Testimony before the House Energy & Environment Committee

House Bill 2132

Presented by Will Wohlford

Monday, February 2, 2015

Mr. Chairman and members of the committee, my name is Will Wohlford. I am a partner with the law firm Morris, Laing, Evans, Brock & Kennedy, Chartered. Thank you for allowing us to submit testimony in opposition of House Bill 2132, a bill dealing with the ownership of injected natural gas. I am appearing here today in opposition of HB 2132 for the following reasons.

Over the past decade, my firm has had substantial experience litigating issues related to K.S.A. 55-1210 and the ownership of injected natural gas adverse to Northern Natural Gas Company, a large national public utility company. Specifically, we have represented multiple local Kansas-based independent oil and gas producers and currently represent VAL Energy, Inc. in multi-front litigation against Northern in which Northern claims gas that had been previously injected in the certificated boundaries of their storage field migrated miles outside the storage field and was being produced by VAL Energy, and others. Our experience in that litigation demonstrates that HB 2132 would negatively impact rights, not only of Kansas-based independent oil and gas producers, but also Kansas landowners and farmers. Therefore, HB 2132 is contrary to the interests of Kansans, and should not pass the committee.

Under the current state of the law, an injector of natural gas may only claim title to gas that migrates up to one mile outside the certificated boundaries of the injector's storage facility. If the injected gas travels any further outside the boundaries of the field, it then becomes subject to the traditional rule of capture, and may be produced by anyone with the legal right to produce minerals from such acreage. The policy behind the current law strikes a sensible balance between providing measured protections for injectors of natural gas, but with necessary limitations. Those limitations draw a bright line and provide security and certainty to landowners and producers more than a mile away from a storage field that they will not be drawn into lengthy and expensive litigation with a large and powerful gas storage company over the ownership of gas produced from their acreage and wells.

In the case of the Northern litigation, Northern claimed that it had the right to claim title to gas produced up to 10 miles away from the certificated boundaries of its storage field. Northern's ambitious claims to title as to gas produced far away from its storage field, and its aggressive and extremely expensive tactics in litigation effectively froze-up leasing and production in an area that

¹ The current standing law regarding ownership of migrated storage gas, and the proper interpretation of K.S.A. § 55-1210 is set forth in *Northern Natural Gas Co. v. ONEOK Field Serv. Co., LLC*, 296 Kan. 906 (2013)(attached hereto as Exhibit "A").

encompassed dozens of square miles, to the detriment of landowners and the local producers owning acreage in that area.

HB 2132 proposes to expand the right of the injector to go unlimited distances from its storage field and claim title to natural gas produced miles away from its field. Although the injector would have to prove its case, independent oil and gas producers and local Kansas landowners, by and large, cannot bear the time, expense and resources it takes to litigate these battles with large storage companies like Northern. HB 2132 will further embolden storage companies like Northern to take even more aggressive positions and employ more aggressive tactics in litigation. Kansas farmers and businesses do not have the resources to fight these fights with storage companies.

The practical result is that this bill would create large "buffer zones" likely hundreds of square miles in area around storage facilities in Kansas in which oil and gas production and exploration would be chilled if not completely curtailed. This would impede essential oil and gas exploration and production, costing Kansas important jobs and impacting the Kansas economy. Moreover, because HB 2132 would halt oil and gas exploration in these "buffer zones," the effect would be to substantially reduce the value of such acreage, again to the direct detriment of Kansas farmers and landowners. Viewed as a whole, HB 2132 upsets the delicate balance of competing rights and interests reflected in the current law. In its place, HB 2132 would establish a regime that favors largely out-of-state injectors and storage companies to the direct detriment of local Kansas landowners, farmers and businesses. The bill is not good for Kansas, and therefore should not pass committee.

Even more problematic is the fact that HB 2132 would likely be unconstitutional. The practical effect of HB 2132 would be to allow gas storage companies to coopt and use formations underlying thousands of acres of Kansas property—property in which such gas storage companies have no interest by way of lease, purchase or eminent domain—as essentially spill-over storage acreage if gas migrates away from the storage facility. This would almost certainly constitute an unconstitutional taking of the rights of hundreds if not thousands of landowners in Kansas,² and would once again only serve to foster more expensive and protracted litigation between Kansas landowners and gas storage companies.

In addition, and most importantly, injected and stored natural gas that escapes miles from a storage facility is a serious safety hazard. Kansans are all too familiar with this hazard, having witnessed the explosions in Hutchinson in 2001. By limiting the injector's ability to reach more than one mile beyond the boundaries of its storage field, this provides additional economic incentive for injectors to assure that their storage fields are fortified and safe and that stored gas does not migrate miles from the storage field to populous areas. The decision *Colorado Interstate Gas Co. v.*

² Similar issues have already been addressed in one of the recent Northern cases, in which the Honorable Monti L. Belot held that allowing Northern to condemn property outside its certificated storage field but not pay for gas that had allegedly migrated outside of the field would constitute an unconstitutional taking. See Northern Natural Gas Co. v. Approx. 9117 Acres in Pratt, Kingman and Reno Counties, Kansas, 2 F. Supp. 3d 1174, 1184–1187 (D. Kan. 2014)(attached hereto as Exhibit "B").

Wright, 797 F. Supp. 2d 1169 (2010) only exacerbates these safety concerns. In that case, the Court held that the Kansas Corporation Commission, the Kansas agency that had previously regulated storage facilities in Kansas, was precluded from doing so under the United States Constitution. As a result, local regulation and oversight of the safety and security of storage facilities has been almost completely eliminated. It is clear, therefore, that the law should be crafted to reinforce safety concerns wherever possible. Unfortunately, the safety interests of Kansans living in the area of the many storage facilities situated throughout Kansas are not served by HB 2132.

In summary, HB 2132 would hurt Kansas farmers, landowners, and oil and gas producers, and would hurt the Kansas economy. We therefore urge this committee not to pass HB 2132. I thank you for the chance to address this honorable committee regarding these important issues.

296 Kan. 906 Supreme Court of Kansas.

NORTHERN NATURAL GAS COMPANY, Appellant,

ONEOK FIELD SERVICES COMPANY, L.L.C.; Oneok Midstream Gas Supply, L.L.C.; Lumen Energy Corporation; and Lumen Midstream Partnership, LLC, Appellees,

> Nash Oil & Gas, Inc. and L.D. Drilling, Inc., Appellees.

No. 104,279. | March 15, 2013.

Synopsis

Background: Natural-gas company sued four gas buyers, alleging that they wrongfully converted gas by purchasing gas from two well operators that were producing and selling gas from company's underground injected-gas storage field. Buyers filed third-party indemnification claims against operators, which in turn filed numerous claims against company and buyers. The Pratt District Court, 2010 WL 2243637, Robert J. Schmisseur, J., granted summary judgment to operators on the third-party indemnification claims. After company received authorization to expand the certificated boundaries of its storage field, thus bringing operators' wells within the expansion area or onto property adjoining the expansion area, the trial court effectively limited its summary-judgment ruling to matters before the boundaries were changed. Company appealed the ruling. The Supreme Court granted company's motion to transfer the appeal to the Supreme Court.

Holdings: The Supreme Court, Moritz, J., held that:

- [1] company had standing to appeal, as a sufficiently aggrieved party, from the summary-judgment ruling;
- [2] company lost title to any injected gas that migrated horizontally beyond property adjoining the certificated boundaries of its storage field, and under the rule of capture, operators, which first produced the migrated gas, took title to it;

- [3] trial court could refuse to allow company to conduct further discovery before trial court granted summary judgment;
- [4] trial court could deny company's motion for relief from the summary-judgment ruling; and
- [5] summary-judgment ruling was not a taking of company's property without just compensation in violation of the Takings Clause.

Affirmed in part and remanded with directions.

West Headnotes (30)

[1] Appeal and Error

Parties or persons aggrieved by judgments against others

Natural-gas company had standing to appeal, as a sufficiently aggrieved party, from a summary judgment in favor of well operators on thirdparty indemnification claims that were asserted against operators by gas buyers after company sued buyers for wrongful conversion based on an assertion that operators were producing and selling gas from company's underground injected-gas storage field, even though trial court failed to explicitly dismiss company's conversion claim against buyers; the summary-judgment ruling primarily was based on trial court's determination that company had no ownership rights in the gas produced by operators, and the ruling had the practical effect of dismissing company's conversion claim.

Cases that cite this headnote

[2] Action

Persons entitled to sue Standing is jurisdictional.

2 Cases that cite this headnote

[3] Appeal and Error



 Determination of questions of jurisdiction in general

Appeal and Error

Want of jurisdiction

Supreme Court has a duty to question jurisdiction on its own initiative, and when the record discloses a lack of jurisdiction, the Supreme Court has a duty to dismiss the appeal.

Cases that cite this headnote

[4] Appeal and Error

Review Dependent on Whether Questions Are of Law or of Fact

Whether jurisdiction exists is a question of law subject to unlimited review.

3 Cases that cite this headnote

[5] Appeal and Error

Parties or Persons Injured or Aggrieved

As a general rule, a party seeking to appeal must be aggrieved by the judgment or order from which the appeal is taken.

Cases that cite this headnote

[6] Appeal and Error

Parties or Persons Injured or Aggrieved

A party ordinarily has no standing to appeal from a judgment or order that dismisses a claim to which it was not a party.

Cases that cite this headnote

[7] Statutes

Intent

Most fundamental rule of statutory construction is that the intent of the legislature governs if that intent can be ascertained.

16 Cases that cite this headnote

[8] Statutes

Plain Language; Plain, Ordinary, or Common Meaning When construing statutes, a court first attempts to ascertain legislative intent by reading the plain language of the statutes and giving common words their ordinary meanings.

18 Cases that cite this headnote

[9] Statutes

Plain language; plain, ordinary, common, or literal meaning

Statutes

Absent terms; silence; omissions

When a statute is plain and unambiguous, a court does not speculate as to the legislative intent behind it and will not read into the statute something not readily found in it.

11 Cases that cite this headnote

[10] Statutes

Purpose and intent; determination thereof

Statutes

Plain, literal, or clear meaning; ambiguity
When a statute's language or text is unclear

or ambiguous, a court employs canons of construction, legislative history, or other background considerations to divine the legislature's intent and construe the statute accordingly.

8 Cases that cite this headnote

[11] Statutes

- Construing together; harmony

Statutes

Conflict

When construing a statute, even if the language of the statute is clear, a court must still consider various provisions of an act in pari materia with a view of reconciling and bringing those provisions into workable harmony if possible.

3 Cases that cite this headnote

[12] Statutes

Unintended or unreasonable results;
 absurdity

A court must construe statutes to avoid unreasonable or absurd results.

6 Cases that cite this headnote

[13] Statutes

Giving effect to entire statute and its parts; harmony and superfluousness

When construing a statute, a court presumes that the legislature does not intend to enact useless or meaningless legislation.

4 Cases that cite this headnote

[14] Mines and Minerals

Title in general

Natural-gas company lost title to any injected gas that migrated horizontally beyond property adjoining the certificated boundaries of company's underground storage field, and under the rule of capture, well operators that first produced the migrated gas took title to it, regardless of whether company intended to abandon the gas. West's K.S.A. 55–1210(c).

2 Cases that cite this headnote

[15] Mines and Minerals

Title in general

Natural gas that is reduced to possession and injected into an underground area in which the injector has storage rights is not subject to the rights of owners of the surface or mineral interests in the land above those storage areas. West's K.S.A. 55–1210(a).

Cases that cite this headnote

[16] Mines and Minerals

Title in general

Statutory provision that an injector has title to natural gas injected into its legally recognized underground storage area does not apply to gas that has migrated outside the injector's certificated storage area. West's K.S.A. 55–1210(a).

2 Cases that cite this headnote

[17] Mines and Minerals

Title in general

Statute establishing property rights in natural gas that has been reduced to possession and injected into an underground area in which the injector has storage rights preserves the rule of capture as to injected gas that migrates horizontally within a stratum and beyond adjoining property or vertically to another stratum in which the injector has not obtained storage rights; the preservation of the rule of capture makes no exception for gas that has migrated beyond adjoining property based on some nonnatural means or as a result of some affirmative action by the ultimate producer of such gas. West's K.S.A. 55–1210(c).

2 Cases that cite this headnote

[18] Statutes

Prior or existing law in general

When construing a statute, a court generally presumes that the legislature acts with full knowledge of existing law.

Cases that cite this headnote

[19] Judgment

Absence of issue of fact

For purposes of summary judgment, an issue of fact is not genuine unless it has legal controlling force as to the controlling issue.

5 Cases that cite this headnote

[20] Judgment

Absence of issue of fact

A disputed question of fact that is immaterial to the issue does not preclude summary judgment; stated another way, if the disputed fact, however resolved, could not affect the judgment, it does not present a genuine issue of material fact.

5 Cases that cite this headnote

[21] Judgment

Hearing and determination

Trial court could refuse to allow naturalgas company to conduct further discovery before trial court ruled on well operators' motion for summary judgment on third-party indemnification claims that were asserted against operators by gas buyers after company sued buyers for wrongful conversion based on an assertion that operators were producing and selling gas from company's underground injected-gas storage field; trial court pointed out that company sought further discovery on allegedly disputed facts that were immaterial to the key issue before the court, which was who held title to migrated storage gas, and trial court noted that it was concerned the company had asserted, in parallel federal litigation, that an "adjoining property" issue presented a purely legal issue as to which no discovery was required. West's K.S.A. 55-1210(c); K.S.A. 60-256(f).

Cases that cite this headnote

[22] Judgment

Hearing and determination

Ordinarily, summary judgment should not be granted until discovery is complete; if the facts pertinent to the material issues are not controverted, however, summary judgment may be appropriate even when discovery is unfinished.

Cases that cite this headnote

[23] Appeal and Error

Depositions, affidavits, or discovery

An appellate court reviews for an abuse of discretion a trial court's refusal to permit additional discovery under the rule governing summary judgment. K.S.A. 60–256(f).

Cases that cite this headnote

[24] Courts

Abuse of discretion in general

A judicial action constitutes an "abuse of discretion" if the action (1) is arbitrary, fanciful, or unreasonable, (2) is based on an error of law, or (3) is based on an error of fact.

20 Cases that cite this headnote

[25] Appeal and Error

Burden of showing grounds for review A party asserting an abuse of discretion bears the burden of showing such an abuse of discretion.

6 Cases that cite this headnote

[26] Appeal and Error

Amendment of proceedings

Judgment

Right to relief in general

Judgment

Jurisdiction of application

Trial court could deny natural-gas company's motion for relief from a summary judgment in favor of well operators on third-party indemnification claims that were asserted against operators by gas buyers after company sued buyers for wrongful conversion based on an assertion that operators were producing and selling gas from company's underground injected-gas storage field, even though the certificated boundaries of the storage field changed after summary judgment was granted; trial court lacked jurisdiction to modify its summary-judgment ruling because company had already docketed an appeal from the ruling, and trial court signaled its intent to limit the ruling to matters before the boundaries were changed. West's K.S.A. 55–1210(c); K.S.A. 60–260(b).

Cases that cite this headnote

[27] Appeal and Error

Refusal to vacate

An appellate court review a denial of a motion seeking relief from judgment under an abuse-ofdiscretion standard.

2 Cases that cite this headnote

[28] Eminent Domain

Mining

Summary-judgment ruling by which trial court concluded that well operators, not naturalgas company, had title to gas that had migrated horizontally beyond property adjoining the certificated boundaries of company's underground storage field was not a taking of company's property without just compensation in violation of the Takings Clause; the ruling did not result in a taking of private property for public use but, instead, resolved a dispute between private individuals regarding ownership rights in previously injected storage gas through application of the rule governing rights to injected gas and the common-law rule of capture. U.S.C.A. Const.Amend. 5; West's K.S.A. 55-1210(c).

1 Cases that cite this headnote

[29] Appeal and Error

Cases Triable in Appellate Court

Supreme Court exercises de novo review over questions of federal preemption.

2 Cases that cite this headnote

[30] States

Preemption in general

Absent an express statement by Congress that state law is preempted, federal preemption occurs where (1) there is an actual conflict between federal and state law, (2) where compliance with both federal and state law is, in effect, physically impossible, (3) where Congress has occupied the entire field of regulation and leaves no room for states to supplement federal law, or (4) when the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress.

1 Cases that cite this headnote

**1109 *906 Syllabus by the Court

- 1. In Kansas, standing is jurisdictional. An appellate court has a duty to question jurisdiction on its own initiative and, when the record discloses a lack of jurisdiction, the appellate court has a duty to dismiss the appeal. Whether jurisdiction exists is a question of law subject to unlimited review.
- 2. As a general rule, a party seeking to appeal must be aggrieved by the judgment or order from which the appeal is taken. However, a party ordinarily has no standing to appeal from a judgment or order that dismisses a claim to which it was not a party.
- 3. The most fundamental rule of statutory construction is that the intent of the legislature governs if that intent can be ascertained. We first attempt to ascertain legislative intent by reading the plain language of the statutes and giving common words their ordinary meanings.
- 4. When a statute is plain and unambiguous, an appellate court does not speculate as to the legislative intent behind it and will not read into the statute something not readily found in it. But when the statute's language or text is unclear or ambiguous, an appellate court may employ canons of construction, legislative history, or other background considerations to divine the legislature's intent and construe the statute accordingly.
- 5. Even if the language of the statute is clear, an appellate court must still consider various provisions of an act in pari materia with a view of reconciling and bringing those provisions into workable harmony if possible. Additionally, an appellate court must construe statutes to avoid unreasonable or absurd results and must presume the legislature does not intend to enact useless or meaningless legislation.
- *907 6. K.S.A. 55-1210(a) gives an injector title to gas injected into its legally recognized storage area. By its plain terms, however, section (a) does not apply to gas that has migrated outside the injector's certificated storage area.
- 7. K.S.A. 55–1210(a) and (b) govern ownership rights to previously injected storage gas that remains within a designated underground storage area.

- 8. The phrase "such gas" in K.S.A. 55–1210(b) refers to the gas described in K.S.A. 55–1210(a), and the gas described in section (a) does not include gas which has migrated beyond the certificated boundaries of the storage site.
- 9. K.S.A. 55-1210(c) specifically addresses ownership of storage gas that has migrated outside the designated underground storage area.
- 10. K.S.A. 55-1210(c) preserves the rule of capture except as to gas that has migrated horizontally within a stratum to adjoining property or vertically to a stratum or portion thereof not leased or condemned by the injector.
- 11. K.S.A. 55–1210(c)'s preservation of the rule of capture makes no exception for gas that has migrated beyond adjoining property based on some nonnatural means or as a result of some affirmative action by the ultimate producer of such gas.
- 12. The body of caselaw that has applied the rule of capture to extinguish ownership rights in previously injected storage gas that has migrated to adjoining property developed without regard to whether the injector intended to "abandon" migrating gas.
- 13. An issue of fact is not genuine unless it has legal controlling force as to the controlling issue. A disputed question of fact which is immaterial to the issue does not preclude summary judgment. Stated another *908 way, if the disputed fact, however resolved, could not affect the judgment, it does not present a genuine issue of material fact.
- **1110 14. Ordinarily, summary judgment should not be granted until discovery is complete. However, if the facts pertinent to the material issues are not controverted, summary judgment may be appropriate even when discovery is unfinished.
- 15. An appellate court reviews a district court's refusal to permit additional discovery under K.S.A. 2012 Supp. 60–256(f) for an abuse of discretion.
- 16. A judicial action constitutes an abuse of discretion if the action (1) is arbitrary, fanciful, or unreasonable; (2) is based on an error of law; or (3) is based on an error of fact. The party asserting an abuse of discretion bears the burden of showing such an abuse of discretion.

- 17. An appellate court reviews the denial of a motion seeking relief from judgment under an abuse of discretion standard.
- 18. An appellate court exercises de novo review over questions of federal preemption.
- 19. Absent an express statement by Congress that state law is preempted, federal preemption occurs when (1) there is an actual conflict between federal and state law; (2) compliance with both federal and state law is, in effect, physically impossible; (3) Congress has occupied the entire field of regulation and leaves no room for states to supplement federal law; or (4) state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress.

Attorneys and Law Firms

Mark D. Coldiron, of Ryan Whaley Coldiron Shandy PLLC, of Oklahoma City, Oklahoma, argued the cause, and Corey A. Neller and Paula M. Jantzen, of the same firm, and Richard A. Olmstead, of Kutak Rock LLP, of Wichita, were on the briefs for appellant Northern Natural Gas Company.

Dennis C. Cameron, of Gable & Gotwals, of Tulsa, Oklahoma, argued the cause, and Tyson D. Schwerdtfeger and Bradley W. Welsh, of the same firm, and Robert R. Eisenhauer, of Johnston and Eisenhauer, of Pratt, were on the brief for appellees ONEOK Field Services Company, L.L.C., and ONEOK Midstream Gas Supply, L.L.C.

David L. Heinemann, of Shank & Hamilton, P.C., of Kansas City, Missouri, argued the cause, and S.J. Moore, of the same firm, and Brian J. Madden and Adam S. Davis, of Wagstaff & Cartmell, L.L.P., of Kansas City, Missouri, were on the briefs for appellee Nash Oil & Gas, Inc.

Jim H. Goering, of Foulston Siefkin LLP, of Wichita, argued the cause, and Timothy B. Mustaine, of the same firm, and Larry E. Keenan and Timothy R. Keenan, of Keenan Law Firm, P.A., of Great Bend, were on the brief for appellee L.D. Drilling, Inc., and Mark Banner, of Hall, Estill, Hardwick, Gable, Golden & Nelson, P.C., of Tulsa, Oklahoma, were on the brief for appellees Lumen Energy Corporation and Lumen Midstream Partnership, LLC.

Michael Irvin, of Manhattan, was on the brief for amicus curiae Kansas Farm Bureau, Gordon B. Stull, of Stull Law Office, P.A., of Pratt, was on the brief for amicus curiae Haynesville Surface and Minerals Association, Inc., Gregory

J. Stucky, of Fleeson, Gooing, Coulson & Kitch, L.L.C., of Wichita, was on the brief for amicus curiae Southwest Kansas Royalty Owners Association, and David G. Seely, of the same firm, was on the brief for amicus curiae Eastern Kansas Royalty Owners Association.

Teresa J. James, of Martin, Pringle, Oliver, Wallace & Bauer, L.L.P., of Overland Park, was on the brief for amicus curiae Southern Star Central Gas Pipeline, Inc.

Will B. Wohlford, of Morris, Laing, Evans, Brock & Kennedy, Chartered, of Wichita, and Jeffery L. Carmichael, of the same firm, were on the brief for amicus curiae Val Energy, Inc.

Opinion

The opinion of the court was delivered by MORITZ, J.:

*909 In this conversion action, Northern Natural Gas Company (Northern) claims ONEOK Field Services Company, L.L.C., ONEOK Midstream Gas Supply, L.L.C. (collectively ONEOK), Lumen Energy Corporation, and Lumen Midstream Partnership, LLC (collectively Lumen) wrongfully converted natural gas by purchasing gas from two producers, Nash Oil & Gas, Inc. (Nash) and L.D. Drilling, **1111 Inc. (L.D.), which operated wells on land near Northern's underground natural gas storage field. Northern claims that Nash and L.D. were producing and selling Northern's previously injected storage gas and that ONEOK and Lumen unlawfully converted such gas when they purchased it from Nash and L.D. ONEOK and Lumen filed third-party indemnification claims against Nash and L.D. In turn, Nash and L.D. asserted various claims against Northern, ONEOK, and Lumen.

*910 In granting summary judgment in favor of Nash and L.D. on the third-party indemnification claims, the district court determined that K.S.A. 55–1210(c) preserved the common-law rule of capture as to injected storage gas that migrates horizontally beyond property adjoining the certificated boundaries of a gas storage field. Because the wells at issue here were located beyond property adjoining the certificated boundaries of Northern's gas storage field, the district court concluded Northern lost title to its migrating storage gas. Thus, the court concluded Nash and L.D. had title to the gas produced by those wells and purchased by ONEOK and Lumen.

After the district court issued its memorandum decision and order granting summary judgment in favor of Nash and

L.D., but before the court journalized its order, Northern received authorization to expand the certificated boundaries of its storage field, thus bringing the wells at issue within the expansion area or onto property adjoining the expansion area. Northern moved the district court to modify its summary judgment ruling in light of the boundary change. In denying that motion, the district court acknowledged the change in circumstances and effectively limited its summary judgment ruling to matters prior to June 2, 2010. The court certified its Order as a final judgment and ordered ONEOK and Lumen to "hold all runs" pending further order of the court.

In this appeal of that summary judgment ruling, Northern primarily challenges the district court's interpretation of K.S.A. 55–1210. Focusing on subsections (a) and (b) of the statute, Northern contends the legislature intended to abolish the common-law rule of capture as to all previously injected storage gas, regardless of how far that gas migrates beyond the certificated boundaries of an injector's gas storage field. But we conclude, as did the district court, that Northern's reading of K.S.A. 55–1210 renders meaningless subsection (c) of the statute, which preserves title in the injector to "natural gas that has migrated to adjoining property or to a stratum, or portion thereof...." Further, Northern's interpretation of the statute ignores the caselaw precipitating enactment of the statute as well as subsequent caselaw interpreting the statute.

*911 We conclude K.S.A. 55-1210 abolished the rule of capture as to natural gas which migrates horizontally within a stratum to adjoining property or vertically to a different stratum, but preserved that rule as to natural gas which migrates beyond those boundaries. Because the natural gas at issue here allegedly migrated horizontally beyond property adjoining Northern's certified storage field, Northern lost title to that gas and it became subject to the rule of capture. By application of the rule of capture, Nash and L.D. possessed title to the gas produced from their wells before June 2, 2010. Therefore, we hold the district court properly dismissed ONEOK's and Lumen's indemnification claims against Nash and L.D. and granted summary judgment in favor of Nash and L.D. regarding any alleged acts of conversion occurring before June 2, 2010. As more fully explained below, we remand this case to the district court for any further proceedings necessary to finally resolve this litigation.

FACTUAL AND PROCEDURAL BACKGROUND

Northern owns and operates an underground natural gas storage facility in Pratt and Kingman counties known as the Cunningham Storage Field (the Field). In the late 1970's, Northern obtained certification from the Kansas Corporation Commission (KCC) and the Federal Energy Regulatory Commission (FERC) to inject and store natural gas in the Viola formation, a geological stratum underlying the Field. In 1996, Northern obtained certification from the KCC and FERC to inject and store natural **1112 gas in a second stratum underlying the Field, the Simpson formation.

As of March 2007, the certificated boundaries of the Field encompassed 26,240 acres. In October 2008, FERC authorized Northern to expand the Field by approximately 1,760 acres. FERC specifically indicated its authorization did not permit Northern to inject storage gas in the expansion area; rather, the expansion permitted Northern to address "gas migration problems."

Nash and L.D., Kansas corporations engaged in mineral exploration and production, both operate several oil and gas wells in Pratt County. All of the wells at issue are located approximately 2 to 6 miles and more than a full section beyond the Field's northern *912 certificated boundary as that boundary existed prior to June 2, 2010.

Pursuant to purchase agreements executed in 2005 and 2009, ONEOK purchased natural gas produced by Nash from these wells. Similarly, in 2008, Lumen entered into a gas purchase contract with L.D. and began purchasing natural gas produced from L.D.'s wells in this area.

In December 2008, Northern filed suit in federal court against L.D., Nash, and Val Energy, Inc., alleging all three companies had caused Northern's storage gas to migrate beyond the certificated boundaries of the Field by creating "pressure sinks." Specifically, Northern argued the companies pumped atypical quantities of groundwater at their wells, thereby creating artificial pressure sinks which caused Northern's storage gas to migrate away from the Field and toward the wells.

Northern further alleged all three defendant companies were producing and selling Northern's previously injected storage gas as their own. Northern sought a declaratory judgment as to title and ownership of the migrated storage gas and/or injunctive relief pursuant to K.S.A. 55–1210 and stated claims for conversion, unjust enrichment, nuisance, tortious interference with a business relationship, and

civil conspiracy. See *Northern Natural Gas Co. v. L.D. Drilling, Inc.*, No. 08–1405–WEB, 2009 WL 3739735, at *5 (D.Kan.2009) (parallel federal litigation).

In September 2009, Northern requested authorization from FERC to expand the Field by an additional 14,420 acres based on Northern's concern that third-party operators, including Nash and L.D., were producing Northern's previously injected storage gas from wells in the proposed expansion area.

While the parallel federal litigation against Nash, L.D., and Val Energy remained pending, Northern filed this action in Pratt County District Court in December 2009 against ONEOK and Lumen alleging they indirectly converted Northern's gas. Specifically, Northern contended Nash and L.D. caused or contributed to the migration of Northern's previously injected storage gas; that Nash and L.D. produced and sold Northern's storage gas to the exclusion of Northern's ownership interests; and that ONEOK and *913 Lumen bought, transported, and/or resold Northern's storage gas without authorization. In response, defendants ONEOK and Lumen admitted they purchased gas from Nash and L.D., denied Northern's allegations of conversion, claimed various defenses, and asserted third-party indemnification claims against Nash and L.D.

In response to the defendants' third-party indemnification claims, L.D. admitted that if either ONEOK or Lumen purchased gas owned by Northern from L.D., L.D. would be obligated to indemnify the defendants. However, L.D. denied Northern possessed or had any right to the gas L.D. sold to ONEOK or Lumen. L.D. also asserted various affirmative defenses to the third-party claims and asserted its own third-party claims against Northern for tortious interference with a business relationship, trespass, nuisance, slander of title, inverse condemnation, abuse of process, unjust enrichment, and lost production.

Similarly, Nash denied ONEOK's third-party indemnification allegations, asserted two affirmative defenses and third-party crossclaims against ONEOK and Lumen, and sought a declaratory judgment pursuant to K.S.A. 60–1701 *et seq.* to determine the parties' rights to natural gas which had migrated outside Northern's storage field and beyond property adjacent to that field. Nash **1113 also asserted a third-party counterclaim against Northern for tortious interference with a business relationship.

Nash and L.D. jointly moved for summary judgment on ONEOK and Lumen's third-party indemnification claims, citing the Underground Storage of Natural Gas Act, K.S.A. 55-1201 et seq. In particular, Nash and L.D. relied upon K.S.A. 55-1210(c), which provides that injectors of natural gas do not lose title to gas that has "migrated to adjoining property or to a stratum, or portion thereof, which has not been condemned as allowed by law or otherwise purchased." Nash and L.D. reasoned that because their wells were located beyond property "adjoining" Northern's certificated storage area, Northern lost title to any gas that migrated to Nash's and L.D.'s wells and the common-law "rule of capture" applied to give Nash and L.D. title to any such gas produced from their wells. Further, Nash and L.D. contended that because Northern did not own the gas Nash and L.D. produced and sold *914 to ONEOK and Lumen, Northern's conversion claim against ONEOK and Lumen failed. Consequently, ONEOK and Lumen's third-party indemnification claims against Nash and L.D. failed, and Nash and L.D. were entitled to summary judgment.

In response, Northern argued it had title to or ownership rights in any migrating storage gas under K.S.A. 55–1210. Northern reasoned that under K.S.A. 55–1210(a) and (b), Northern maintained title to its previously injected storage gas regardless of how far the gas migrated. Alternatively, Northern argued even if the district court determined Northern lacked title to the gas, genuine issues of material fact precluded summary judgment.

The district court issued a comprehensive opinion and order (Order) on April 15, 2010, granting summary judgment in favor of Nash and L.D. "as to all the gas purchased by ONEOK and/or Lumen from any of the Nash or L.D. wells identified by Northern." The court agreed with the interpretation of K.S.A. 55–1210(c) suggested by Nash and L.D. and found that Northern lost title to any storage gas which migrated beyond property adjoining Northern's certified boundaries. Further, the district court held that the rule of capture gave Nash and L.D. title to any such migrating gas.

In so holding, the district court rejected Northern's argument that Nash and L.D. had "interfered" with Northern's ownership rights to the storage gas within the boundaries of the Field in violation of K.S.A. 55–1210(b) by allegedly causing a breach in the storage field's containment features. Further, the district court pointed out that Northern's interpretation of the statute would render section (c) of the

statute superfluous. The district court certified the Order as a final judgment under K.S.A. 2010 Supp. 60–254(b), and Northern immediately appealed to the Court of Appeals.

After filing its notice of appeal, Northern filed a motion in district court to clarify or amend the Order, suggesting the district court's rejection of Northern's allegation that Nash and L.D. "interfered" with storage gas within the Field rendered the Order void as contrary to and preempted by the Natural Gas Act, 15 U.S.C. § 717 et seq. (2006). On May 6, 2010, Northern docketed the appeal *915 in the Court of Appeals and moved to transfer the appeal to this court pursuant to K.S.A. 20–3017.

On June 2, 2010, FERC issued an order (the FERC Order) authorizing Northern to expand the Field by 12,320 acres. As a result, since June 2, 2010, all but two of the wells operated by Nash and L.D. are located either in the expansion area or within 1 mile of that area. Citing the FERC Order, Northern moved for relief from judgment in this case, challenging the district court's factual findings regarding the location of the wells. Northern also subsequently filed a "Complaint in Condemnation" in the United States District Court for the District of Kansas seeking to confirm its legal right to condemn the expansion area authorized in the FERC Order. Northern Natural Gas v. 9117.53 Acres in Pratt, 781 F.Supp.2d 1155, 1158–59 (D.Kan.2011).

In this case, the district court conducted a hearing on June 30, 2010, to settle the journal entry related to the Order and to address Northern's post-ruling motions. At the hearing, **1114 Northern argued the summary judgment ruling should be certified only as a final judgment regarding the conversion claim as it existed prior to June 2, 2010, *i.e.*, before the FERC Order changed the certificated boundaries.

The district court declined to modify the Order regarding "matters prior to June 2nd." In its journal entry, the court (1) indicated the April 15, 2010 order, including the K.S.A. 60–254(b) certification, would serve as the journal entry, (2) ordered ONEOK and Lumen "to hold all runs," *i.e.*, to suspend payments to Nash and L.D. for gas produced from Nash and L.D.'s wells, pending further order of the court, and (3) indicated that all pleadings, documents, and evidence filed in the case were considered as part of the summary judgment record.

We granted Northern's motion to transfer the appeal to this court, and Northern amended its notice of appeal to include

"rulings, orders, and judgments made by the District Court up to, and including, June 30, 2010."

On appeal Northern claims the district court erred in granting summary judgment to Nash and L.D. because it: (1) erroneously interpreted K.S.A. 55–1210 to find that Northern lost title to gas *916 that migrated beyond adjoining property, (2) abused its discretion by refusing to allow Northern further time for discovery, and (3) abused its discretion by denying Northern's motion to modify the summary judgment ruling. Northern further argues the district court's ruling resulted in an unconstitutional taking of Northern's property without just compensation and that the order granting summary judgment is void because it conflicts with and is preempted by the Natural Gas Act, 15 U.S.C. § 717 et seq.

NORTHERN HAS STANDING TO INVOKE APPELLATE JURISDICTION

- [1] Before turning to the merits of Northern's claims, we initially address the parties' responses to the show cause order issued by this court requesting the parties address whether Northern has standing to invoke appellate jurisdiction.
- [2] [3] [4] In Kansas, standing is jurisdictional. *Mid-Continent Specialists, Inc. v. Capital Homes*, 279 Kan. 178, 185, 106 P.3d 483 (2005). We have a duty to question jurisdiction on our own initiative and, when the record discloses a lack of jurisdiction, we have a duty to dismiss the appeal. *State v. Gill*, 287 Kan. 289, 294, 196 P.3d 369 (2008). Whether jurisdiction exists is a question of law subject to unlimited review. *Harsch v. Miller*, 288 Kan. 280, 286, 200 P.3d 467 (2009).
- [5] [6] As a general rule, a party seeking to appeal must be aggrieved by the judgment or order from which the appeal is taken. See, *e.g., Thomas v. Metropolitan Life Ins. Co.*, 631 F.3d 1153, 1159 (10th Cir.2011); *City of Cleveland v. Ohio*, 508 F.3d 827, 836–37 (6th Cir.2007); *St. Paul Fire Ins. v. Univ. Builders Supply*, 409 F.3d 73, 83 (2nd Cir.2005). However, a party ordinarily has no standing to appeal from a judgment or order that dismisses a claim to which it was not a party. *City of Cleveland*, 508 F.3d at 836; *St. Paul Fire*, 409 F.3d at 83.

Here, Northern appeals from the district court's grant of summary judgment in favor of third-party defendants

Nash and L.D. on ONEOK's and Lumen's third-party indemnification claims against them. After oral arguments, we issued a show cause order requesting the parties address whether Northern, as plaintiff, has *917 standing to appeal from the Order dismissing ONEOK's and Lumen's third-party indemnification claims even though the Order did not explicitly dismiss Northern's conversion claim against ONEOK and Lumen.

After reviewing the record and considering the parties' responses to the show cause order and oral argument as to this issue, we are persuaded that Northern is sufficiently "aggrieved by" the district court's summary judgment ruling to appeal that ruling. Specifically, we are persuaded that the district court's ruling primarily was based on its determination that Northern had no ownership rights in the gas produced by Nash and L.D. As the parties suggest, although the district court failed to explicitly dismiss Northern's conversion claim against ONEOK and Lumen when it granted summary judgment **1115 in favor of Nash and L.D. on ONEOK and Lumen's third-party indemnification claims, that was the practical effect of the court's ruling. Accordingly, we conclude Northern has standing to appeal.

THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF NASH AND L.D.

In this appeal, Northern primarily challenges the district court's interpretation of K.S.A. 55–1210, maintaining its argument that the statute abolished the rule of capture as to all previously injected storage gas regardless of how far that gas migrates beyond the boundaries of a certificated underground storage field.

In contrast, Nash, L.D., and Lumen contend K.S.A. 55–1210 abolished the rule of capture regarding storage gas that remains within the certificated boundaries of an underground storage field or migrates to an adjoining property or to a stratum or portion thereof, but retained the rule of capture as to storage gas that migrates outside of those limitations.

Northern's primary argument requires interpretation of K.S.A. 55–1210.

Thus, the primary issue we must resolve is whether K.S.A. 55–1210 abolished the common-law rule of capture as to previously injected storage gas that migrates beyond property

adjoining an *918 underground storage field or to a stratum or portion thereof. Resolution of this question requires statutory interpretation and, to some extent, consideration and application of prior caselaw. Accordingly, our review is unlimited. Johnson v. Brooks Plumbing, 281 Kan. 1212, 1213-14, 135 P.3d 1203 (2006). Nonetheless, our review is guided by several well-established principles of statutory construction.

Rules of statutory construction.

[7] construction is that the intent of the legislature governs if that intent can be ascertained. Bergstrom v. Spears Manufacturing Co., 289 Kan. 605, 607, 214 P.3d 676 (2009). We first attempt to ascertain legislative intent by reading the plain language of the statutes and giving common words their ordinary meanings. Padron v. Lopez, 289 Kan. 1089, 1097, 220 P.3d 345 (2009). When a statute is plain and unambiguous, we do not speculate as to the legislative intent behind it and will not read into the statute something not readily found in it. But when the statute's language or text is unclear or ambiguous, we "employ canons of construction, legislative history, or other background considerations to divine the legislature's intent and construe the statute accordingly." Stewart Title of the Midwest v. Reece & Nichols Realtors, 294 Kan. 553, 564-65, 276 P.3d 188 (2012).

[11] [13] However, even if the language of the [12] statute is clear, we must still consider various provisions of an act in pari materia with a view of reconciling and bringing those provisions into workable harmony if possible. Southwestern Bell Tel. Co. v. Beachner Constr. Co., 289 Kan. 1262, 1270, 221 P.3d 588 (2009). Additionally, we must construe statutes to avoid unreasonable or absurd results, and we presume the legislature does not intend to enact useless or meaningless legislation. 289 Kan. at 1269, 221 P.3d 588; State v. Le, 260 Kan. 845, 850, 926 P.2d 638 (1996).

Historical context of K.S.A. 55-1210.

While it is helpful to place the statute at issue, K.S.A. 55– 1210, in historical context, we need not extensively undertake that task here, as we did in Northern Natural Gas Co. v. Martin, Pringle, et al., 289 Kan. 777, 788, 217 P.3d 966 (2009). Nevertheless, for ease *919 of reference, we will undertake an abbreviated discussion of the statute's historical context.

In Martin, Pringle, we described the evolution of the "ownership in place theory" and the "rule of capture" in Kansas. As we explained, under the ownership in place theory, a Kansas landowner historically has a present estate in the oil and gas in the ground. But when that oil and gas is produced and severed from the land, it becomes personal property of the producer, 289 Kan, at 788, 217 P.3d 966. Further, traditionally, under the rule of capture, a landowner with a **1116 present estate in natural gas in the ground loses title to any gas that "escapes" or migrates away from the landowner's property. Instead, that migrating gas becomes the [10] The most fundamental rule of statutory personal property of the first person to produce the gas. 289 Kan. at 788, 217 P.3d 966 (discussing the rule of capture and citing Anderson v. Beech Aircraft Corp., 237 Kan. 336, 342, 699 P.2d 1023 [1985]); see also 1 Kuntz Law of Oil and Gas §§ 4.1 and 4.2 (1987) (discussing the rule of capture).

> In 1951, the Kansas Legislature passed the Underground Storage of Natural Gas Act, K.S.A. 55-1201 et seg. (the Storage Act) to promote the underground storage of natural gas. The Storage Act defined, inter alia, the terms "underground storage" and "natural gas public utility" and established procedures for natural gas public utilities to appropriate property for underground storage facilities. See K.S.A. 55-1201; K.S.A. 55-1205.

> As passed in 1951, the Storage Act was silent regarding its impact, if any, on the rule of capture as to injected storage gas. But nearly 30 years ago, this court extended the rule of capture to determine ownership of previously injected storage gas. See Anderson, 237 Kan. 336, 699 P.2d 1023, superseded by statute as stated in Martin, Pringle, 289 Kan. 777, 217 P.3d 966. In Anderson, we held that the owners of land and of an oil and gas lease could produce and hold title to non-native gas from their land, even though that gas previously had been purchased, injected, and stored in a common reservoir by another landowner having no license. permit, or lease covering the land from which the nonnative gas was produced. 237 Kan. at 348, 699 P.2d 1023.

> Although the entity that stored the gas in Anderson, Beech Aircraft, was not a natural gas public utility, this court extended Anderson's holding to public utilities in Union Gas System, Inc. v. *920 Carnahan, 245 Kan. 80, 774 P.2d 962 (1989), superseded by statute as stated in Martin. Pringle, 289 Kan. 777, 217 P.3d 966. There, Union, a natural gas public utility, acquired abandoned wells and obtained gas storage leases from area landowners before it began injecting and storing natural gas in the Squirrel formation

in Montgomery County. Eventually, Union's storage gas migrated horizontally within that formation to adjoining farmland where Union had not secured any ownership rights. There, individuals who had obtained oil and gas leases from the adjoining landowners drilled wells and tapped into the Squirrel formation. They produced significant quantities of gas consisting largely of Union's storage gas and then ultimately sold some of that gas back to Union.

Union eventually secured a certificate from the KCC, pursued condemnation proceedings, and secured the wells on the adjoining property. However, this court in *Union* did not permit Union to fully recover for the gas which had been produced from those wells. Instead, the court held that the rule of capture as discussed in *Anderson* applied to give the producers ownership of the gas until January 13, 1986, the date Union obtained KCC certification. *Union Gas*, 245 Kan. at 86–87, 774 P.2d 962.

Enactment of K.S.A. 55-1210.

In response to the common law as it had developed in *Union Gas* and *Anderson*, the legislature enacted in 1993 the statute at issue in this case, K.S.A. 55–1210. In *Martin, Pringle*, we succinctly described the state of the law preceding the effective date of the statute:

"[P]rior to July 1, 1993, the landowners adjoining Northern's underground gas storage area possessed the legal right to produce and keep the injected gas which had migrated onto their property, unless and until Northern obtained a certificate to expand its storage area onto their land and paid them for that privilege through a condemnation action. K.S.A. 55–1210 abolished that right, as well as permitting migrating gas to trespass upon adjoining land." 289 Kan. at 791, 217 P.3d 966.

K.S.A. 55-1210 provides:

"(a) All natural gas which has previously been reduced to possession, and which is subsequently injected into underground storage fields, sands, reservoirs and facilities, whether such storage rights were acquired by eminent domain or otherwise, *921 shall at all times be the property of the **1117 injector, such injector's heirs, successors or assigns, whether owned by the injector or stored under contract.

"(b) In no event shall such gas be subject to the right of the owner of the surface of such lands or of any mineral interest therein, under which such gas storage fields, sands, reservoirs and facilities lie, or of any person, other than the injector, such injector's heirs, successors and assigns, to produce, take, reduce to possession, either by means of the law of capture or otherwise, waste, or otherwise interfere with or exercise any control over such gas. Nothing in this subsection shall be deemed to affect the right of the owner of the surface of such lands or of any mineral interest therein to drill or bore through the underground storage fields, sands, reservoirs and facilities in such a manner as will protect such fields, sand, reservoirs and facilities against pollution and the escape of the natural gas being stored.

- "(c) With regard to natural gas that has migrated to adjoining property or to a stratum, or portion thereof, which has not been condemned as allowed by law or otherwise purchased:
- (1) The injector, such injector's heirs, successors and assigns shall not lose title to or possession of such gas if such injector, such injector's heirs, successors or assigns can prove by a preponderance of the evidence that such gas was originally injected into the underground storage.
- (2) The injector, such injector's heirs, successors and assigns, shall have the right to conduct such tests on any existing wells on adjoining property, at such injector's sole risk and expense including, but not limited to, the value of any lost production of other than the injector's gas, as may be reasonable to determine ownership of such gas.
- (3) The owner of the stratum and the owner of the surface shall be entitled to such compensation, including compensation for use of or damage to the surface or substratum, as is provided by law, and shall be entitled to recovery of all costs and expenses, including reasonable attorney fees, if litigation is necessary to enforce any rights under this subsection (c) and the injector does not prevail.
- "(d) The injector, such injector's heirs, successors and assigns shall have the right to compel compliance with this section by injunction or other appropriate relief by application to a court of competent jurisdiction."

Interpretation of K.S.A. 55-1210.

A few years after the enactment of K.S.A. 55–1210, this court considered the meaning of the term "adjoining property" in section (c) as well as the constitutionality of the testing provisions of K.S.A. 55–1210(c)(2), (c)(3), and (d). Williams

Natural Gas Co. v. Supra Energy, Inc., 261 Kan. 624, 931 P.2d 7 (1997). In that case, Williams operated a natural gas storage field in Elk, Montgomery, and Chautauqua counties and stored natural gas in the Burgess Sand *922 formation. At some point, Williams became concerned that Supra Energy, which leased property in Elk County, was producing gas that had migrated horizontally from Williams' storage field. When the parties could not agree on testing, Williams sought and obtained an injunction pursuant to K.S.A. 55–1210(d) and K.S.A. 60–901.

On appeal, Supra argued the testing provisions of K.S.A. 55–1210(c)(2) and (3) were unconstitutional, in part, because the term "adjoining" was vague. This court disagreed, finding the term "adjoining" referred to "any section adjacent to a storage field." 261 Kan. at 630, 931 P.2d 7. Specifically, we held that any section of land which touched a section containing a storage field "adjoined" the storage field. We pointed out that this definition was consistent with prior caselaw defining the term "adjoining" as "'being contiguous or touching,'" and we noted that "a person exercising common sense would understand the term 'adjoining' in" K.S.A. 55–1210(c)(2). 261 Kan. at 630, 931 P.2d 7 (citing *State, ex rel. Boynton v. Bunton,* 141 Kan. 103, Syl. ¶ 1, 40 P.2d 326 [1935]). Ultimately, the court upheld the constitutionality of K.S.A. 55–1210(c)(2), (3), and (d). 261 Kan. at 631, 931 P.2d 7.

Next, in *Hayes Sight & Sound, Inc. v. ONEOK, Inc.*, 281 Kan. 1287, 136 P.3d 428 (2006), we considered the statute's provision **1118 for recovery of attorney fees, K.S.A. 55–1210(c)(3). There, natural gas migrated from underground storage caverns and caused explosions, resulting in two fatalities and extensive property damage to plaintiffs' businesses. The plaintiffs eventually were successful in their negligence action against ONEOK, the owner of the migrating storage gas, and were awarded damages. They then sought attorney fees under K.S.A. 55–1210(c).

In reversing the trial court's denial of plaintiffs' request for attorney fees, the *Hayes* court concluded that subsection (c) (1)

"does not create title in the natural gas. Instead, it provides *some* protection to the titleholder when gas migrates. Likewise, subsection (c)(3) does not create a cause of action but rather declares that damages will be available to substratum or surface owners as provided by law and provides for the recovery of attorney fees, expenses, and costs. The nègligence action prosecuted by [plaintiffs] in the present action, although not a statutorily created

cause of action, is 'provided by law' for compensation for damage to the surface, as expressly secured by subsection (c)(3)." (Emphasis added.) 281 Kan. at 1329, 136 P.3d 428.

*923 Curiously, the court in *Hayes* was not swayed by ONEOK's argument that the last clause of K.S.A. 55–1210(c) (3), which expressly states that compensation is recoverable under that section only "if litigation is necessary to enforce any rights under this subsection (c) and the injector does not prevail," rendered the statute inapplicable under the circumstances of that case.

More recently, in *Martin, Pringle,* this court accepted a certified question from the United States District Court for the District of Nebraska, where Northern was pursuing a malpractice claim against its former law firm, Martin, Pringle, Oliver, Wallace & Bauer, L.L.P. We were asked to decide whether an injector of natural gas into underground storage loses title to such gas when it migrates prior to the effective date of K.S.A. 55–1210 to "adjoining property or to a stratum, or portion thereof, which has not been condemned as allowed by law or otherwise purchased." K.S.A. 55–1210(c).

According to the stipulated facts in *Martin, Pringle*, gas injected by Northern into its underground storage in the Cunningham Field had migrated beyond Northern's certificated northern boundaries, and Trans Pacific, which owned two wells on property adjacent to Northern's storage field, produced that gas. We answered the certified question affirmatively, concluding the statute applied only prospectively. 289 Kan. at 791, 217 P.3d 966. Thus, as in *Union Gas*, Northern's failure to pursue condemnation of the adjoining property prior to the effective date of the statute, July 1, 1993, meant that Trans Pacific had "a right, title, and interest in and to the gas which had migrated to the adjoining property as of that date." *Martin, Pringle*, 289 Kan. at 791, 217 P.3d 966.

To summarize, before the enactment of K.S.A. 55–1210, the rule of capture gave landowners adjoining an underground storage area the right to produce and keep injected gas which migrated onto their property "unless and until [the injector] obtained a certificate to expand its storage area onto their land." *Martin, Pringle,* 289 Kan. at 791, 217 P.3d 966; see also *Union Gas,* 245 Kan. at 88, 774 P.2d 962 (noting that injector's gas was no longer subject to rule of capture as of date injector received KCC certification). But effective July 1, 1993, K.S.A. 55–1210 abolished the right of capture as to storage gas that migrates *924 to adjoining property.

Martin, Pringle, 289 Kan. at 791–92, 217 P.3d 966. This brings us to the present action.

The plain language of K.S.A. 55–1210 supports the district court's ruling.

[14] Here, applying K.S.A. 55–1210(c) and the definition of "adjoining property" from *Williams*, the district court determined that Nash's and L.D.'s wells, located 2 to 6 miles from the certificated boundary of the Field, were not on adjoining property. Consequently, the court concluded any migrating storage gas produced from those wells did not fall within K.S.A. 55–1210(c)'s provision for "gas that has migrated to adjoining property or to a stratum, or portion thereof, which has not been condemned as allowed by law or otherwise purchased." Instead the **1119 district court concluded that the migrating gas remained subject to the rule of capture.

Relying on K.S.A. 55–1210(a) and (b), Northern maintains that the statute grants injectors of natural gas, like Northern, an unqualified, unlimited right to maintain title to all injected gas regardless of where that gas migrates or ultimately is found. Northern argues the statute expressly abolished the rule of capture as to migrating storage gas. Or, as L.D. characterizes Northern's argument: "In Northern's view, it is entitled to follow and recover for every molecule of gas it can prove it injected into underground storage against any producer of that gas (or any purchaser from such producer), even if the gas has migrated to wells at the ends of the earth."

While the simplicity of such an "ends of the earth" premise is seductive, it is fatally flawed in several respects. As discussed below, Northern's interpretation of K.S.A. 55–1210 ignores several significant phrases in sections (a) and (b) of the statute and would render section (c) superfluous if given effect.

K.S.A. 55-1210(a)

Section (a) of the statute provides:

"All natural gas which has previously been reduced to possession, and which is subsequently injected into underground storage fields, sands, reservoirs and facilities, whether such storage rights were acquired by eminent domain or otherwise, shall at all times be the property of the injector, such injector's heirs, successors *925 or assigns, whether owned by the injector or stored under contract." K.S.A. 55–1210(a).

Northern's argument regarding the "plain and unambiguous" language of section (a) bears repeating in full, as much for what it omits as for what it includes:

"Subsection (a) clearly conveys the Legislature's intention that all natural gas that has previously been reduced to possession and then injected into the ground for storage shall at all times be the property of the injector. [Citation omitted.] The District Court erred by holding that subsection (a) applies only to gas located within the certificated boundaries of a storage field because the plain language of subsection (a) does not support the District Court's holding. Nothing in subsection (a) requires that the gas be injected into a certificated storage field. [Citation omitted.] Instead, subsection (a) expressly states that all natural gas which has previously been reduced to possession and injected into underground storage field, sands, reservoirs, and facilities is owned by and remains the possession of the injector at all times. The District Court's interpretation is error because it requires the Court to add language to subsection (a) not found in the statute."

As Northern points out, the first clause of K.S.A. 55–1210(a) refers to "[a]ll natural gas which has previously been reduced to possession, and which is subsequently injected into underground storage fields, sands, reservoirs and facilities." Perhaps recognizing that this clause, standing alone, could be construed to refer simply to gas which has been reduced to possession, is injected into a storage field, and remains in that storage field, Northern proceeds directly to the phrase "shall at all times be the property of the injector, such injector's heirs, successors or assigns." (Emphasis added.) K.S.A. 55–1210(a). Northern reasons that this italicized phrase reflects the legislature's intention that once storage gas is injected, it remains the property of the injector regardless of when or how far the gas migrates.

Northern's analysis is flawed in several respects. First, Northern omits and ignores the phrase "whether *such storage rights* were acquired by eminent domain or

otherwise." (Emphasis added.) K.S.A. 55–1210(a). Second, Northern essentially interprets the phrase "at all times" to mean "at all places." Finally, Northern omits and ignores the last clause of the section: "whether owned by the injector or stored under contract." K.S.A. 55–1210(a).

[15] *926 The phrase "whether such storage rights were acquired by eminent domain or otherwise" clearly modifies the phrase preceding it, "[a]ll natural gas which has previously been reduced to possession, and which is subsequently injected into underground **1120 storage fields, sands, reservoirs and facilities...." (Emphasis added.) K.S.A. 55–1210(a). Thus, as Nash and L.D. suggest, section (a) simply clarifies that natural gas which is reduced to possession and injected into an underground area in which the injector has storage rights is not subject to the rights of owners of the surface or mineral interests in the land above those storage areas.

Further, Northern inexplicably suggests that the phrase "shall at all times be the property of the injector" means that once gas is reduced to possession and injected into an underground storage area, the injector's ownership has no limits—temporal, geographic, or otherwise—regardless of when or where that gas strays. But that interpretation requires that we ignore much of the remainder of section (a) and its application to gas that is stored pursuant to previously acquired "storage rights." Moreover, we are unwilling to substitute the geographic qualifier "at all places" for the temporal qualifier "at all times" in order to achieve the meaning asserted by Northern.

Finally, Northern's expansive interpretation of section (a) omits the last phrase of section (a), "whether owned by the injector or stored under contract." Again, this phrase clearly pertains to the gas which is "the property of the injector" and clarifies that section (a) applies to stored gas, whether owned by the injector or stored under contract.

[16] In short, section (a) gives an injector title to gas injected into its legally recognized storage area. By its plain terms, however, section (a) does not apply to gas that has migrated outside the injector's certificated storage area.

K.S.A. 55-1210(b)

Northern also suggests that the language of section (b) supports its expansive interpretation of section (a). Section (b) provides:

"In no event shall *such gas* be subject to the right of the owner of the surface of such lands or of any mineral interest therein, under which such gas storage *927 fields, sands, reservoirs and facilities lie, *or of any person*, other than the injector, such injector's heirs, successors and assigns, to produce, take, reduce to possession, either by means of the law of capture or otherwise, waste, *or otherwise interfere* with or exercise any control over such gas." (Emphasis added.) K.S.A. 55–1210(b).

Northern concedes that section (b) primarily restricts the rights of interest owners of the surface lands under which injected gas lies. Nevertheless, Northern ascribes broader meaning to the statute based on the two disjunctive phrases italicized above. Specifically, Northern contends Nash and L.D. created "pressure sinks" which caused storage gas to migrate outside Northern's certificated area and toward Nash's and L.D.'s wells. Based on these alleged activities, Northern concludes Nash and L.D. are "persons" who have "otherwise interfere[d]" with Northern's possession of the gas.

Northern's "interference" argument, while initially appealing, is unpersuasive for two reasons. First, the italicized portion of section (b) upon which Northern relies, like the remainder of section (b), applies only to "such gas." Unquestionably, the phrase "such gas" in section (b) references the gas described in section (a) above. Second, as we have determined, the gas described in section (a) does not include gas which has migrated beyond the certificated boundaries of the storage site.

Additionally, we perceive a disconnect between Northern's allegations of conversion against ONEOK and Lumen and Northern's allegations of "interference" against Nash and L.D. based on the language of section (b). We note that in the parallel federal litigation described above, the United States District Court for the District of Kansas eventually granted Northern's motion for a preliminary injunction, ordering Nash and L.D. to shut in certain wells and cease production by February 2011. The district court in that case relied, in part, on the likelihood that Northern might succeed on its nuisance claim against Nash and L.D., a claim which arises from the same "pressure sink/interference" argument Northern presses here. *Northern Natural Gas Co. v. L.D.* **121 *Drilling, Inc.*, 759 F.Supp.2d 1282 (D.Kan.2010), *aff'd* 697 F.3d 1259 (10th Cir.2012).

*928 Although the United States Court of Appeals for the Tenth Circuit affirmed the district court's order granting

Northern's motion for a preliminary injunction, the panel recognized a distinction that Northern attempts to erase in this case. Specifically, the Tenth Circuit reasoned that the district court in this case (the state case) applied K.S.A. 55–1210 to reject Northern's conversion claim and noted:

"The state case addressed whether Northern had still had title to the natural gas that migrated several miles away from the Field. Here, on the other hand, the issue is whether Defendants' production from their wells in the expansion area unreasonably interfered with Northern's storing its natural gas in the Field. Therefore, the state court's decision in the state-court proceeding cannot make Defendants' interference with Northern's storage field reasonable." *Northern Natural Gas Co. v. L.D. Drilling, Inc.*, 697 F.3d 1259, 1272 (10th Cir.2012).

The Tenth Circuit further noted that the district court's ruling in the state case regarding Northern's claims of "interference" did not have preclusive effect in the parallel federal litigation because the district court's "interference determination" in the state case "was not made in the context of a nuisance claim, but was instead premised on Kan. Stat. § 55–1210(b), which the state court ruled was limited to gas migrating to 'adjoining property.' [Citation omitted.] That limitation does not apply to this nuisance claim." 697 F.3d at 1272 n. 7.

To summarize, we agree with the district court's ruling in this case that the first two subsections of K.S.A. 55–1210 govern ownership rights to previously injected storage gas that remains within a designated underground storage area. Under K.S.A. 55–1210(a) and (b), Northern retains title to its previously injected storage gas that has been injected into the underground storage area and that lies within the Field. But the question here is whether Northern retained title to previously injected storage gas that migrated at least 2 to 6 miles beyond the certificated boundaries of the Field to Nash's and L.D.'s production wells.

[17] To answer that question, we must look to K.S.A. 55–1210(c). As we discuss more fully below, section (c) preserves the rule of capture except as to gas that has migrated horizontally to adjoining property or vertically to a stratum or portion thereof not leased or *929 condemned by the injector. Simply stated, section (c) makes no exception for gas that has migrated beyond adjoining property based on some nonnatural means or as a result of some affirmative action by the ultimate producer of such gas. While such an exception may well be an appropriate additional basis for permitting an injector to retain title to migrating gas, that is an exception for

the legislature to make, not this court. See 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, 197 (Fall 2010) (suggesting changes to K.S.A. 55–1210 which "encourage delineation of storage field boundaries rather than further litigation").

K.S.A. 55-1210(c)

Unlike sections (a) and (b), section (c) specifically addresses ownership of storage gas that has migrated outside the designated underground storage area. See *Hayes*, 281 Kan. at 1329, 136 P.3d 428 (explaining that section [c] "does not create title in the natural gas," but instead "provides some protection to the titleholder when gas migrates").

Section (c) contains three subsections. The introductory language of section (c) limits application of those three subsections to "natural gas that has migrated to adjoining property or to a stratum, or portion thereof, which has not been condemned as allowed by law or otherwise purchased." Subsection (c)(1) provides that an injector "shall not lose title to or possession of such gas if such injector ... can prove by a preponderance of the evidence that such gas was originally injected into the underground storage." (Emphasis added.) K.S.A. 55-1210(c)(1). Subsection (c)(2) reinforces the limited application of subsection (c)(1) by providing an **1122 injector with a statutory right to test wells on "adjoining property" for the presence of the injector's storage gas. (Emphasis added.) K.S.A. 55–1210(c)(2). Subsection (c) (3), which is not at issue here, provides for compensation to the surface owner for damage to the surface or substratum and for costs and expenses associated with litigation if the injector does not prevail.

Northern contends that section (c)'s introductory clause limiting its application to natural gas "that has migrated to adjoining property *930 or to a stratum, or portion thereof, which has not been condemned as allowed by law or otherwise purchased" does not identify a "geographic limit to an injector's right to show title to migrated storage gas." Instead, Northern reasons that section (c) applies to gas which has migrated (1) to adjoining property, (2) horizontally or vertically to a stratum in which the injector does not have storage rights, or (3) horizontally or vertically to a portion of a stratum in which the injector does not have storage rights. Northern concedes that applying its interpretation, gas which migrates beyond the certificated boundaries of a storage field—whether the gas migrates 1 mile or 1 million miles—remains the property of the injector. Northern points

out that this interpretation is consistent with its expansive interpretation of sections (a) and (b).

But Northern's argument as to the reach of section (c) relies heavily upon Northern's flawed interpretation of sections (a) and (b). As the district court noted, Northern's argument regarding sections (a) and (b) renders superfluous the introductory language limiting section (c)'s application to gas "that has migrated to adjoining property or to a stratum, or portion thereof, which has not been condemned." K.S.A. 55-1210(c). Simply stated, if the legislature intended to protect all gas that migrates outside certificated boundaries, there would be no need to specify that section (c) applies to "to natural gas that has migrated to adjoining property or to a stratum, or portion thereof, which has not been condemned as allowed by law or otherwise purchased." (Emphasis added.) K.S.A. 55-1210(c). See Southwestern Bell Tel. Co. v. Beachner Constr. Co., 289 Kan. 1262, 1269, 221 P.3d 588 (2009) (providing appellate courts presume the legislature does not intend to enact meaningless legislation).

Additionally, Northern's interpretation of section (c) ignores this court's definition of the term "adjoining property" in *Williams*. By defining the phrase "adjoining property" to mean "any section of land which touch[es] a section containing a storage field," the *Williams* court implicitly rejected any suggestion that the phrase is meaningless or superfluous. *Williams Natural Gas Co. v. Supra Energy, Inc.*, 261 Kan. 624, 630, 931 P.2d 7 (1997). And, it does *931 not escape our attention that despite several opportunities since *Williams* to modify or define the term "adjoining property," the legislature has not chosen to do so. See *Hayes*, 281 Kan. at 1329, 136 P.3d 428 (finding that subsection [c][1] provides "some protection" to the injector when gas migrates).

Further, if Northern is correct that an injector retains title to migrating gas regardless of where or how far that gas migrates away from its certificated boundaries, the legislature would have had no reason to include the language in subsection (c) (1) specifically indicating that an injector "shall not lose title to or possession of such gas if such injector ... can prove by a preponderance of the evidence that such gas was originally injected into the underground storage." (Emphasis added.) K.S.A. 55–1210(c)(1). Clearly, this provision anticipates that if the reverse occurs, i.e., the injector cannot prove that gas which migrated to adjoining property or to a stratum or portion thereof originally was injected into the underground storage, the injector loses title to the migrating gas.

Moreover, Northern's interpretation of section (c) to apply to all gas which migrates horizontally within a stratum, regardless of how far it migrates, is inconsistent with the language of the statute itself. The statute applies to natural gas that has "migrated to ... a stratum or a portion thereof." K.S.A. 55-1210(c). As the producers point out, gas migrates horizontally within a stratum but migrates vertically "to" another stratum. See Webster's Third New International Dictionary 2257 (2002) (geological definition of the term "stratum" is "a tabular mass or thin **1123 sheet of sedimentary rock or earth of one kind formed by natural causes and made up [usually] of a series of layers lying between beds of other kinds"). Thus, Northern's argument alters the plain meaning of the statute by essentially requiring that we substitute the word "within" for the word "to" in the statute. See Stewart Title of the Midwest v. Reece & Nichols Realtors, 294 Kan. 553, 564–65, 276 P.3d 188 (2012) (recognizing that when a statute is plain and unambiguous, we do not speculate as to the legislative intent behind it and will not read into the statute something not readily found in it).

Northern's argument also is inconsistent when considered in the context of other provisions of the Storage Act and overlooks the *932 maxim that various provisions of an act must be read together and harmonized if possible. See *Southwestern Bell Tel. Co.*, 289 Kan. at 1270–71, 221 P.3d 588.

The Storage Act contemplates that an injector will store gas within a specific stratum after obtaining storage rights in that stratum. A review of the Storage Act's provisions reveals that the legislature did not intend for an injector to claim ownership to gas which travels outside certificated boundaries, whether horizontally within the stratum or vertically to another stratum. See, e.g., K.S.A. 55-1203 (permitting a natural gas public utility to "appropriate for its use for the underground storage of natural gas any subsurface stratum or formation in any land which the [KCC] shall have found to be suitable and in the public interest for the underground storage of natural gas"); K.S.A. 55–1204(a)(1) (providing a natural gas public utility desiring to exercise the right of eminent domain must obtain a certificate from the KCC setting out, inter alia, "[t]hat the underground stratum or formation sought to be acquired is suitable for the underground storage of natural gas"); K.S.A. 55-1209 (requiring the owner of an underground natural gas storage facility to provide the KCC with "a plat map identifying the location of such facility and a description of the geological formation or formations to be used for storage").

It is clear from the record that Northern is authorized to store gas within two particular strata—the Simpson formation and the Viola formation. Further, Northern's authorization to store gas within those formations does not extend to all portions of the formations wherever they may lie. Instead, as demonstrated by Northern's repeated requests for FERC authorization to expand the certificated boundaries of the Field, Northern is authorized to store its gas only in those portions of the formations that lie underneath the certificated boundaries of the Field.

[18] Finally, Northern's interpretation of K.S.A. 55–1210(c) ignores the caselaw which precipitated the statute as a whole. As discussed, prior to K.S.A. 55–1210's enactment, this court applied the rule of capture to determine ownership rights in previously injected storage gas in two cases, both of which involved disputes between landowners on *adjoining properties* and both of which resulted in *933 the injector losing title to the storage gas. See *Union Gas System, Inc. v. Carnahan*, 245 Kan. 80, 86–88, 774 P.2d 962 (1989); *Anderson v. Beech Aircraft Corp.*, 237 Kan. 336, 347–48, 699 P.2d 1023 (1985). We generally presume that the legislature acts with full knowledge of existing law. *State v. Henning*, 289 Kan. 136, 144–45, 209 P.3d 711 (2009).

In response to this caselaw, the legislature enacted K.S.A. 55–1210 to establish that an injector can retain title to storage gas injected into underground storage facilities if gas migrates to "adjoining property or to a stratum, or portion thereof, which has not been condemned" and the injector can prove the gas migrated from its storage facility. K.S.A. 55–1210(c). The legislature further provided injectors with the means to test production wells on adjoining property, through injunction if necessary, in order to develop the proof necessary to retain title to gas that migrated outside the certified boundary but within the limitations of the introductory language of K.S.A. 55–1210(c)(1) and (2).

Thus, in light of the narrow circumstances which precipitated the statute's enactment and the language crafted by the legislature to address those circumstances, we simply cannot accept Northern's expansive interpretation of K.S.A. 55–1210(c). Instead, we **1124 agree with the district court that section (c) preserved the rule of capture as to injected gas which migrates horizontally within a stratum and beyond adjoining property or vertically to another stratum in which the injector has not obtained storage rights.

Northern had no ownership rights in the migrating storage gas under general principles of personal property law.

Although not addressed by the district court, Northern argued below and reasserts on appeal that even if this court agrees with the district court's interpretation of K.S.A. 55–1210, the district court nevertheless erred in granting summary judgment. Northern claims it has common-law ownership rights in the storage gas that migrated beyond adjoining property and that those rights are independent of K.S.A. 55–1210.

Specifically, Northern contends the district court failed to recognize that Northern never "abandoned" its rights to the migrating *934 storage gas and, consequently, Northern retained those rights. Northern cites *Botkin v. Kickapoo, Inc.*, 211 Kan. 107, 108–10, 505 P.2d 749 (1973), in support of this argument. But the issue in that case—whether the plaintiffs abandoned their ownership in feed mill equipment—has no bearing on the facts in this case which require us to determine the effect of K.S.A. 55–1210 on the application of the rule of capture to migrating gas.

While we have held that once natural gas is severed from real estate it becomes personal property, see *Northern Natural Gas Co. v. Martin, Pringle, et al.*, 289 Kan. 777, 788, 217 P.3d 966 (2009), Northern's argument ignores the entire body of caselaw that has applied the rule of capture to extinguish ownership rights in previously injected storage gas that has migrated to adjoining property. This body of caselaw developed without regard to whether the injector intended to "abandon" migrating gas. See *Martin, Pringle*, 289 Kan. at 791–92, 217 P.3d 966; *Union Gas*, 245 Kan. at 86–87, 774 P.2d 962; *Anderson*, 237 Kan. at 347–48, 699 P.2d 1023.

Therefore, we conclude the district court did not err in failing to consider Northern's argument regarding whether it intended to abandon its migrating gas before granting summary judgment.

No genuine issues of material fact precluded summary judgment.

Finally, Northern contends the district court erred in granting summary judgment because genuine issues of material fact precluded summary judgment. Specifically, Northern cites factual disputes regarding whether Nash and L.D. caused Northern's storage gas to migrate away from the Field.

[19] [20] We have held that an issue of fact is not genuine unless it has legal controlling force as to the controlling issue. A disputed question of fact which is immaterial to the issue does not preclude summary judgment. Stated another way, if the disputed fact, however resolved, could not affect the judgment, it does not present a genuine issue of material fact. *Mitchell v. City of Wichita*, 270 Kan. 56, 59, 12 P.3d 402 (2000).

Here, as discussed above, the facts pertaining to Northern's allegation that Nash and L.D. caused Northern's storage gas to migrate beyond its certificated boundaries lacked any legal controlling *935 force over the controlling issue, *i.e.*, whether Northern retained title under K.S.A. 55–1210(c) to gas which migrated beyond its certificated boundaries. Thus, the district court did not err in finding there were no genuine issues of material facts precluding summary judgment.

The district court did not abuse its discretion by refusing to permit additional discovery.

[21] Northern also asserts the district court abused its discretion in refusing to permit Northern to conduct further discovery. Northern contends it lacked the "opportunity to engage in any discovery or develop the factual record necessary to fully support its allegation that Producers are creating pressure sinks which draw Northern's storage gas away from the Cunningham Storage Field and to Producers' wells."

[22] Ordinarily, summary judgment should not be granted until discovery is complete. However, if the facts pertinent to the **1125 material issues are not controverted, summary judgment may be appropriate even when discovery is unfinished. *Hauptman v. WMC, Inc.*, 43 Kan.App.2d 276, 297, 224 P.3d 1175 (2010).

[23] [24] [25] A district court's refusal to pera additional discovery under K.S.A. 60–256(t) is reviewed for an abuse of discretion. *Troutman v. Curtis,* 286 Kan. 452, 458–59, 185 P.3d 930 (2008). A judicial action constitutes an abuse of discretion if the action (1) is arbitrary, fanciful, or unreasonable; (2) is based on an error of law; or (3) is based on an error of fact. *State v. Ward,* 292 Kan. 541, 550, 256 P.3d 801 (2011), *cert. denied* — U.S. ——, 132 S.Ct. 1594, 182 L.Ed.2d 205 (2012). The party asserting an abuse of discretion bears the burden of showing such an abuse of discretion. *Harsch v. Miller,* 288 Kan. 280, 293, 200 P.3d 467 (2009).

As discussed, the facts material to the district court's ruling were undisputed. In denying Northern's request for additional discovery, the district court pointed out that Northern sought further discovery on allegedly disputed facts that were immaterial to the "key issue" before the court, i.e., who held title to migrating storage gas. Additionally, the court noted it was "concerned" that Northern had asserted in parallel federal litigation "that the 'adjoining property' *936 issue presented 'a purely legal issue as to which no discovery was required.'" See Northern Natural Gas Co. v. L.D. Drilling, Inc., No. 08-1405-WEB, Memorandum and Order (Doc. No. 288), at 24-25 (D.Kan. Mar. 26, 2010) (noting that "[b]oth parties have previously advised the Court ... that this issue of statutory interpretation is a purely legal issue as to which no discovery is necessary"). Under these circumstances, we conclude the district court did not abuse its discretion in denving Northern's request for additional discovery.

Conclusion

To summarize, we interpret K.S.A. 55–1210(a) and (b) to govern ownership rights to previously injected storage gas that remains within a designated underground storage area, while K.S.A. 55–1210(c) governs ownership of migrating gas. Section (c) permits an injector to maintain title to gas which migrates horizontally to adjoining property or vertically to another stratum if the injector can prove by a preponderance of the evidence under subsections (c) (1) and (2) that the migrating gas originally was injected into the injector's underground storage area. However, section (c) preserves the rule of capture as to injected gas which migrates horizontally beyond property adjoining the certificated boundaries of a storage field.

Therefore, the district court properly concluded that to the extent Northern's injected storage gas migrated beyond [25] A district court's refusal to permit property adjoining the certificated boundaries of its storage field, as those boundaries existed before June 2, 2010, Northern lost title to such gas. Consequently, Nash and L.D. had title to any such migrating gas produced by their wells until June 2, 2010, when FERC extended the certificated boundaries of the Field to include Nash's and L.D.'s wells, or brought those wells onto property adjoining the expansion area.

In conclusion, the district court properly granted summary judgment to Nash and L.D. and dismissed ONEOK's and Lumen's indemnification claims against Nash and L.D. as to any alleged acts of conversion occurring before June 2, 2010.

*937 THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY DENYING NORTHERN'S MOTION TO MODIFY THE SUMMARY JUDGMENT RULING

[26] Although its argument is not entirely clear, Northern appears to also contend the district court erred by failing to recognize that FERC's June 2, 2010, order fundamentally altered the district court's factual findings regarding the location of the wells in question. Northern raised these same arguments below in a K.S.A. 2010 Supp. 60–260(b) motion which sought relief based upon the FERC Order. To the extent Northern challenges the district court's denial of the K.S.A. 2010 Supp. 60–260(b) motion, we reject that challenge.

[27] We review the denial of a motion seeking relief from judgment under an abuse of discretion standard. Subway Restaurants, **1126 Inc. v. Kessler, 273 Kan. 969, 977, 46 P.3d 1113 (2002). See Ward, 292 Kan. at 550, 256 P.3d 801 (explaining abuse of discretion standard). As noted above, the party asserting an abuse of discretion bears the burden of showing such an abuse of discretion. See Harsch, 288 Kan. at 293, 200 P.3d 467.

In its summary judgment ruling of April 15, 2010, the district court concluded Nash's and L.D.'s wells were not on property adjoining the Field. Thus, under K.S.A. 55–1210(c), Northern lost ownership to gas migrating to those wells and the gas was subject to the rule of capture. On June 2, 2010, after Northern had already docketed its appeal from the summary judgment ruling, FERC authorized Northern to expand the Field. The parties appear to agree that as a result of the FERC Order, all but two of the wells at issue in this case are now located either within the expansion area or within 1 mile of the expansion area. Northern then filed a motion for relief from judgment, citing the FERC Order and challenging the district court's factual findings regarding the location of the wells.

For several reasons, the district court did not abuse its discretion in denying Northern's K.S.A. 2010 Supp. 60–260(b) motion. First, because Northern had already docketed its appeal, the district court lacked jurisdiction to modify the Order. See *938 Harsch, 288 Kan. at 286–87, 200 P.3d 467 (noting that trial court lacks jurisdiction to modify a judgment after it has been appealed and the appeal is docketed at the appellate level).

Second, despite its lack of jurisdiction to modify the Order, the court conducted a hearing to address, *inter alia*, Northern's K.S.A. 2010 Supp. 60–260(b) motion. At that hearing, Northern asked the district court to certify its summary judgment ruling as a final judgment only as to its conversion claims as they existed before the FERC Order modified the Field's certificated boundaries. At the hearing, counsel for Northern specifically stated, "we can stick a stake in the ground on June 2nd and everything that we discussed in the prior Summary Judgment order can go up to the Court of Appeals. Nothing will change those facts looking backwards." Although the court declined to modify the Order with respect to "matters prior to June 2nd," it acknowledged that "[t]he issue from June 2nd forward ... is a much different animal."

But as L.D. and Nash point out, the undisputed material facts as they existed at the time of the district court's summary judgment ruling were not altered by the FERC Order. Further, the district court's acknowledgement regarding the changed circumstances after June 2, 2010, signals the district court's intent to limit its summary judgment ruling to matters before June 2, 2010. As previously discussed, we are affirming that temporally limited summary judgment ruling but remanding the case to the district court to resolve any remaining claims that might be based on matters "from June 2nd forward."

Under these circumstances, we conclude the district court did not abuse its discretion in denying Northern's K.S.A. 2010 Supp. 60–260(b) motion.

THE SUMMARY JUDGMENT RULING DID NOT RESULT IN AN UNCONSTITUTIONAL TAKING OF NORTHERN'S PROPERTY WITHOUT JUST COMPENSATION

[28] Next, Northern argues the district court's summary judgment ruling "constitute[d] an unconstitutional judicial taking of Northern's property because the District Court's decision judicially eliminate[d] Northern's established property interest in its injected *939 storage gas within the Cunningham Storage Field under (1) Kansas common law; (2) the express terms of [K.S.A. 55–1210]; and (3) this Court's decision in [Union Gas]."

Preliminarily, Nash, L.D., and ONEOK contend Northern failed to preserve this issue for appeal. Alternatively, they argue this issue lacks merit.

Northern argued below that it had vested rights in the migrating storage gas under general principles of personal property law and that there was no evidence Northern intended to abandon its storage gas. Specifically, Northern asserted, "Northern has a vested property interest in its injected storage **1127 gas and this Court cannot now interpret the Storage Statute the way advocated by Producers without unconstitutionally depriving Northern of its property without just compensation." Even if we deem this assertion sufficient to preserve Northern's "judicial taking" argument, Northern's argument fails.

First, in support of its argument that the district court's summary judgment ruling violated the Takings Clause of the Fifth Amendment to the United States Constitution, Northern relies upon a plurality opinion with no precedential value. See Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection, 560 U.S. —, 130 S.Ct. 2592, 2602, 177 L.Ed.2d 184 (2010) (plurality) (four justices agreed that a state court order could constitute a "judicial taking" if the "court declares that what was once an established right of private property no longer exists"); see also Gibson v. American Cyanamid Co., No. 07-C-864, 2010 WL 3062145, at *3 (E.D.Wis.2010) (recognizing "[t]he plurality in Stop the Beach held that the Takings Clause applies to the judiciary"); Sagarin v. City of Bloomington, 932 N.E.2d 739, 744 (Ind.App.2010) (acknowledging that plurality portions of Stop the Beach cited by parties in the case lacked precedential authority).

Second, even if we were persuaded by the plurality opinion in *Stop the Beach*, the Takings Clause has no application here because the district court's ruling did not result in the taking of private property for public use. See *Young Partners* v. U.S.D. No. 214, 284 Kan. 397, 406, 160 P.3d 830 (2007) ("The Fifth Amendment, made applicable to the States through the Fourteenth Amendment, provides *940 that 'private property [shall not] be taken for public use, without just compensation.'"). Instead, the court's ruling resolved a dispute between private individuals regarding ownership rights in previously injected storage gas through application of K.S.A. 55–1210 and the common-law rule of capture. For these reasons, we conclude the district court's summary judgment ruling did not result in an unconstitutional taking of Northern's property without just compensation.

THE SUMMARY JUDGMENT RULING NEITHER CONFLICTS WITH NOR IS PREEMPTED BY THE NATURAL GAS ACT, 15 U.S.C. § 717 et seq.

[29] Finally, Northern argues the district court's summary judgment ruling conflicts with, and therefore is preempted by, the Natural Gas Act, 15 U.S.C. § 717 et seq. (2006) (the NGA) because FERC has exclusive jurisdiction over the abandonment of natural gas and the withdrawal of natural gas from interstate commerce. We exercise de novo review over questions of federal preemption. Zimmerman v. Board of Wabaunsee County Comm'rs, 289 Kan. 926, 974–75, 218 P.3d 400 (2009).

[30] In Zimmerman, we discussed the circumstances in which the federal law preempts state law:

"'Absent an express statement by Congress that state law is preempted [, federal] preemption occurs where [1] there is an actual conflict between federal and state law; [2] where compliance with both federal and state law is, in effect, physically impossible; [3] where Congress has occupied the entire field of regulation and leaves no room for states to supplement federal law; or [4] when the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress.' "289 Kan. at 974–75, 218 P.3d 400 (quoting *Doty v. Frontier Communications, Inc.*, 272 Kan. 880, Syl. ¶ 4, 36 P.3d 250 [2001]).

Northern fails to fully explain how the district court's summary judgment ruling meets any of the above-described circumstances. Instead, Northern argues the NGA preempts the district court's ruling because: (1) the district court impliedly held that Northern abandoned its storage gas, and FERC has exclusive jurisdiction over the abandonment of natural gas under 15 U.S.C. § 717f(b) (2006); and (2) the district court's rejection of Northern's "Interference *941 Conversion Claim" effectively allows the withdrawal of natural gas from interstate commerce, an issue over which FERC has exclusive jurisdiction as stated in **1128 Sunray Mid-Continent Oil Co. v. F.P.C., 364 U.S. 137, 156, 80 S.Ct. 1392, 4 L.Ed.2d 1623 (1960). These arguments fail for several reasons.

First, the district court made no finding regarding abandonment, implied or otherwise, in its comprehensive summary judgment ruling. Second, even if the district court had made such a finding, Northern's reliance on 15

U.S.C. § 717f(b) is misplaced because that section governs abandonment of facilities and services, not the abandonment of title to or ownership rights in migrating storage gas. See 15 U.S.C. § 717f(b) (requiring natural gas companies to obtain FERC's permission and approval before abandoning "all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities").

Finally, none of the cases cited by Northern support its suggestion that the district court's summary judgment ruling resulted in the withdrawal of Northern's storage gas from interstate commerce in violation of the NGA. See Sunray Oil Co., 364 U.S. at 156 (explaining that an independent natural gas producer who obtains a certificate of public convenience and necessity under the NGA and agrees to place its gas in interstate commerce must obtain FERC's approval in order to withdraw that gas supply from interstate commerce); Public Service Com'n v. Federal Energy Reg., 610 F.2d 439, 443 (6th Cir.1979) (concluding state law seeking to regulate transportation of natural gas through interstate pipelines and to reserve a supply of that natural gas to certain state residents was preempted by NGA); Backus v. Panhandle Eastern Pipe Line Co., 558 F.2d 1373, 1376 (10th Cir.1977) (invalidating state law requiring interstate gas pipeline owner to provide service upon request to rural landowners if the pipeline crosses the landowners' property and to provide gas to the landowners at same rate as charged in nearest city or town). See also Atlantic Rfg. Co. v. Pub. Serv. Comm'n, 360 U.S. 378, 389, 79 S.Ct. 1246, 3 L.Ed.2d 1312 (1959) (discussing FERC's authority under 15 U.S.C. § 717f(e) to grant a certificate of public convenience and necessity "authorizing the whole or any part of the operation, sale, service, construction, *942 extension, or acquisition" of natural gas facilities). Accordingly, we reject Northern's federal preemption arguments.

CONCLUSION

In sum, we affirm the district court's summary judgment ruling as well as its decision denying Northern's K.S.A. 2010 Supp. 60–260(b) motion. Because the district court effectively limited the scope of its summary judgment ruling to matters before June 2, 2010, we remand the case for any further proceedings necessary to resolve any remaining claims that may exist regarding matters after June 2, 2010, and for resolution of the district court's standing order requiring ONEOK and Lumen to suspend payments to Nash and L.D.

Affirmed in part and remanded with directions.

BEIER, J., not participating.

THOMAS E. FOSTER, District Judge, assigned. 1

Parallel Citations

296 P.3d 1106

Footnotes

REPORTER'S NOTE: District Judge Foster was appointed to hear case No. 104,279 vice Justice Beier pursuant to the authority vested in the Supreme Court by Art. 3, § 6(f) of the Kansas Constitution.

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2 F.Supp.3d 1174 United States District Court, D. Kansas.

NORTHERN NATURAL GAS COMPANY, Plaintiff,

v.

APPROXIMATELY 9117 ACRES IN PRATT, KINGMAN, and Reno Counties, Kansas, and as Further Described Herein; Tract No. 1062710 Containing 80.00 Acres More or Less, Located in Kingman County, Kansas, and as Further Described Herein; et al., Defendants.

Civil Action No. 10–1232–MLB–DWB. | Signed March 5, 2014.

Synopsis

Background: Natural gas company which owned and operated underground natural gas storage field brought condemnation action under the Natural Gas Act, seeking to acquire additional lands to expand its storage field into areas to which its stored natural gas had migrated. Parties crossmoved for partial summary judgment on issue of whether company was required to pay just compensation for the taking of migrated storage gas in the extension area.

[Holding:] The District Court, Monti L. Belot, J., held that under Kansas law, natural gas company was required to pay just compensation for gas which had migrated out of the underground storage area prior to date of taking.

Company's motion denied and defendants' motion granted.

West Headnotes (11)

[1] Federal Civil Procedure

An issue is "genuine" for purposes of a summary judgment motion if sufficient evidence exists that a rational trier of fact could resolve the issue either way, and an issue is "material" if under substantive law it is essential to

the proper disposition of the claim. Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.App.(2006 Ed.).

Cases that cite this headnote

[2] Federal Civil Procedure

Absence of genuine issue of fact in general When confronted with a fully briefed motion for summary judgment, court must ultimately determine whether there is the need for a trial-whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party; if so, the court cannot grant summary judgment. Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.App. (2006 Ed.)

Cases that cite this headnote

[3] Eminent Domain

Oil and gas

Eminent Domain

Real property in general

Mines and Minerals

Title in general

Under Kansas law, natural gas company, after obtaining a regulatory certificate from the Federal Energy Regulatory Commission (FERC) to support the condemnation of lands for purpose of extending its underground gas storage area, was required to pay just compensation to owners of such lands for gas which had migrated out of the underground storage area prior to date of taking, to extent those lands did not adjoin the storage area; FERC's issuance of regulatory certificate did not serve to transfer title to such migrated gas, and under the Kansas Underground Gas Storage Act, the company's right to retain title to the storage gas was limited to the certified area where it had already obtained the necessary storage rights, and to the adjoining property. Natural Gas Act, § 7(h), 15 U.S.C.A. § 717f(h); Fed.Rules Civ.Proc.Rule 71.1, 28 U.S.C.A. West's K.S.A. 55-1210.

Cases that cite this headnote

EXHIBIT

[4] Eminent Domain

Value of land

Federal Courts

Takings and eminent domain

Substantive law of Kansas determines extent, in action, under the Natural Gas Act, seeking to condemn land in Kansas, of the parties' property rights and the standards for determining just compensation. Natural Gas Act, § 7(h), 15 U.S.C.A. § 717f(h).

Cases that cite this headnote

[5] Eminent Domain

Nature and form of proceeding

Provision of Natural Gas Act (NGA) stating that the procedure for eminent domain shall conform as nearly as possible to the State procedure where the property is located is effectively nullified by the Rules Enabling Act's supersession clause. Natural Gas Act, § 7(h), 15 U.S.C.A. § 717f(h); 28 U.S.C.A. § 2072(b); Fed.Rules Civ.Proc.Rule 71.1, 28 U.S.C.A.

Cases that cite this headnote

[6] Mines and Minerals

Title in general

Under Kansas law, native oil and gas in the ground belong to the owner of the land as long as those minerals remain on or in the land or subject to the landowner's control.

Cases that cite this headnote

[7] Mines and Minerals

Title in general

Under the "ownership in place" theory of Kansas law, landowners own a present estate in oil and gas in the ground, but when oil and gas escape and go into other lands, or come under another's control, the title of the former owner is lost.

Cases that cite this headnote

[8] Mines and Minerals

Title in general

Under Kansas law, the interest of a landowner in native gas in the ground is a defeasible interest, and under the rule of capture, migrating gas becomes the personal property of the first person to produce it.

Cases that cite this headnote

[9] Eminent Domain

Real property in general

Mines and Minerals

Title in general

Under Kansas law, a landowner's right to migrated storage natural gas in the ground is a vested property right which the government can not take for a public purpose without paying just compensation.

Cases that cite this headnote

[10] Mines and Minerals

- Title in general

Issuance of a regulatory certificate by the Federal Energy Regulatory Commission (FERC) works no instantaneous change of ownership in storage gas under Kansas law; rather, ownership rights are determined by the Kansas Underground Gas Storage Act, under which an injector's right to retain title to its injected storage gas is limited to the certified area where it has already obtained the necessary storage rights and to the adjoining property. West's K.S.A. 55–1210.

Cases that cite this headnote

[11] Eminent Domain

Real property in general

Mines and Minerals

Title in general

Under Kansas law, natural gas company, after obtaining regulatory certificate from the Federal Energy Regulatory Commission (FERC) to support the condemnation of lands for purpose of extending company's underground gas storage area, was not entitled to an offset against condemnation award for value of any and all

migrated storage gas produced on or after date on which it obtained the regulatory certificate; FERC's issuance of regulatory certificate did not, standing alone, serve to transfer title to such migrated gas.

Cases that cite this headnote

Attorneys and Law Firms

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MEMORANDUM AND ORDER

MONTI L. BELOT, District Judge.

This matter is before the court on:

Northern's Second Motion for Partial Summary Judgment (Docs. 677, 678);

Producer–Defendants ¹ Response and Cross–Motion for Partial Summary Judgment (Docs. 699, 700) and joinder by other defendants (Docs. 701, 702);

Northern's combined Response and Reply (Doc. 715); and Defendants' Reply (Docs. 731, 732).

I. Background.

Northern brought this condemnation action pursuant to the Natural Gas Act, 15 U.S.C. § 717f(h), to acquire additional acreage for use in its underground natural gas storage field near Cunningham, Kansas.

Since the late 1970's, Northern has operated an underground natural gas storage facility in south-central Kansas known as the Cunningham Storage Field. The facility uses a large natural underground reservoir that was substantially depleted following decades of native gas production from the reservoir. Pursuant to authority granted by the Federal Energy Regulatory Commission (FERC), Northern's operation involves transporting natural gas produced elsewhere to the field and injecting it into the reservoir. The gas can then be withdrawn in periods of high demand and transported to out-of-state markets. Such injected "storage gas" may have a different chemical composition than the "native" gas naturally found in the area. See K.S.A. § 55-1201(c) ("'native gas' shall mean gas which has not been previously withdrawn from the earth"; "storage gas" is not defined by Kansas statute).

Northern's original certificate from FERC allowed it to acquire and store gas in an underground area covering more than 26,000 acres. Northern began to suspect at least by the 1990's that its storage gas was migrating out of the field and was being produced by nearby gas well operators. After litigating (and losing) several lawsuits, Northern returned to FERC and sought authority to acquire additional acreage for use as a buffer zone for the storage field. In 2008 it was granted a certificate to condemn an additional 1,760 acres. In 2010 it was granted a certificate to condemn an additional 12,320 acres. This latter "2010 Extension Area" is the subject of the instant condemnation. Northern obtained voluntary storage lease rights in about 30% of the 2010 Extension Area; it is proceeding with condemnation of rights in the remainder of the Extension Area.

The motions before the court deal with storage gas that migrated into the 2010 Extension Area as of March 30, 2012, the "date of taking" of that area by Northern. *1177 Specifically, the motions seek a determination of whether Northern must pay just compensation for the taking of migrated storage gas in the 2010 Extension Area. There is no dispute that the defendant landowners (or their assignees) are entitled to just compensation for any economically

recoverable native gas that was under their property on the date of taking.

Northern argues the Kansas Underground Gas Storage Act, K.S.A. § 55–1201 et seq. (hereinafter the "Storage Act"), requires it to pay only for native gas in the 2010 Extension Area. It further contends that under *Union Gas System, Inc. v. Carnahan,* 245 Kan. 80, 774 P.2d 962 (1989), title to any storage gas in the Extension Area reverted to Northern (or "revested") once Northern obtained the 2010 FERC certificate. Northern contends defendants held a fee simple determinable interest in any migrated storage gas, and that their interest terminated under Kansas law once Northern obtained the FERC certificate. Northern thus argues it does not have to pay just compensation for storage gas in the Extension Area.

Defendants respond that under Kansas law, including the Supreme Court's ruling in *Northern Natural Gas Co. v. ONEOK Field Svcs. Co.*, 296 Kan. 906, 296 P.3d 1106 (2013), Northern lost title to any storage gas that migrated to the Extension Area. By virtue of the "ownership in place" theory of Kansas oil and gas law, defendants contend any migrated storage gas became their property once it entered

the Extension Area. They assert that the FERC certificate had no effect on their title and that Northern must pay just compensation for the taking of their rights in storage gas as of the date of taking.

II. Uncontroverted Facts.

Northern is a natural gas company as defined by the Natural Gas Act (NGA), 15 U.S.C. § 717. Northern owns and operates the underground natural gas storage field known as the Cunningham Storage Field in Reno, Kingman and Pratt counties, Kansas, pursuant to a series of certificates of public convenience and necessity from FERC.

On October 30, 2008, FERC issued a Certificate of Public Convenience and Necessity authorizing Northern's expansion of the certificated boundaries of the Cunningham Storage Field by approximately 1,760 acres. Through the October 30, 2008, Certificate, FERC authorized "the expansion of Northern's certificated boundary to include, and Northern's acquisition of all property interests in, the Viola and Simpson formations" in the following acreage:

Section	Township	Range	County
N ½ of 13	278	11W	Pratt
W ½ of 14	278	11W	Pratt
NE 1/4 of 14	278	11W	Pratt
E ½ of 15	278	11W	Pratt
NE 1/4 of 22	27S	11W	Pratt
NW 1/4 of 18	278	10W	Kingman
S ½ of 7	278	10W	Kingman

This acreage is referred to as the 2008 *1178 Extension Area.

On June 2, 2010, FERC issued another Certificate of Public Convenience and Necessity "authorizing expansion of Northern's certificated buffer zone to include the Viola and Simpson Formations" in Pratt, Reno, and Kingman Counties, Kansas by 12,320 acres.

Through the June 2, 2010 Certificate, FERC approved the following acreage:

Section(s)	Township	Range	County
23–27	26 S	11 W	Pratt
34–36	26 S	11 W	Pratt

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S 1/2 of 22	26 S	11 W	Pratt
SE 1/4 of 33	26 S	11 W	Pratt
1–3	27 S	11 W	Pratt
10–12	27 S	11 W	Pratt
E ½ of 4	27 S	11 W	Pratt
E ½ of 9	27 S	11 W	Pratt
30–31	26 S	10 W	Reno
6	27 S	10 W	Kingman
N ½ of 7	27 S	10 W	Kingman

This acreage is referred to as the 2010 Extension Area. (Unless indicated otherwise, any reference in this order to the "Extension Area" refers to the 2010 Extension Area.)

Some of the natural gas at issue in these cross-motions for summary judgment is storage gas that migrated more than one section beyond any section containing the precondemnation boundaries of the Cunningham Storage Field. The Producer-Defendants (L.D. Drilling, Nash, Val and Five Star 4) operate wells in the 2010 Extension Area that are more than a section beyond any section containing the boundaries of the Cunningham Storage Field as those boundaries stood immediately prior to the June 2, 2010 FERC order.

Nothing in the June 2, 2010 FERC Order states that it confers title to any natural gas, or to any other property, upon Northern before Northern pays for the property being condemned, or before the condemnation process has been completed.

The parties agree there may be a significant amount of storage gas located in the 2010 Extension Area.

III. Summary Judgment Standards.

[1] [2] The rules pertaining to summary judgment are well-established. Federal Rule of Civil Procedure 56(c) directs the entry of summary judgment in favor of a party who "show[s] that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). An issue is "genuine" if sufficient evidence exists so that a rational trier of fact could resolve the issue either way and an issue is "material" if under the

substantive law it is essential to the proper disposition of the claim. Adamson v. Multi Community Diversified Svcs., Inc., 514 F.3d 1136, 1145 (10th Cir.2008). When confronted with a fully briefed motion for summary judgment, the court must ultimately determine "whether there is the need for a trial-*1179 whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). If so, the court cannot grant summary judgment. Celotex Corp. v. Catrett, 477 U.S. 317, 322–23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

IV. Discussion.

[3] [4] [5] The applicable procedures for condemnation under the Natural Gas Act are supplied by Rule 71.1 of the Federal Rules of Civil Procedure. See e.g., East Tennessee Natural Gas Co. v. Sage, 361 F.3d 808, 822 (4th Cir.2004); Southern Star Central Gas Pipeline, Inc. v. 842 Mineral and Leasehold Acres of Land, No. 08–1313, slip op. at 3 (D.Kan., Mar. 16, 2010) (Rule 71.1 supersedes the NGA's provision endorsing state condemnation procedures). But the substantive law of Kansas determines the extent of the parties' property rights and the standards for determining just compensation. Southern Star, supra; Columbia Gas v. Exclusive Natural Gas, 962 F.2d 1192, 1199 (6th Cir.1992) (amount of compensation due under § 717f(h) is determined using law of the state in which the condemned property is located).

The Kansas law pertaining to ownership of stored natural gas has followed a somewhat tortuous path. Unfortunately, the

court must once again review that history in order to resolve the title questions that are at the heart of the instant summary judgment motions.

A. Background of Kansas Oil and Gas Law.

[8] As explained by the Kansas Supreme Court, the law of Kansas has long been that native oil and gas in the ground belong to the owner of the land as long as those minerals remain on or in the land or subject to the landowner's control. ⁶ See Northern Natural Gas Co. v. Martin, Pringle, Oliver, Wallace & Bauer, LLP, 289 Kan. 777, 217 P.3d 966 (2009) and Northern Natural Gas Co. v. ONEOK Field Services Co., 296 Kan. 906, 296 P.3d 1106 (2013), cert. denied, — U.S. —, 134 S.Ct. 162, 187 L.Ed.2d 40 (U.S.2013). Under this "ownership in place" theory, Kansas landowners own a present estate in oil and gas in the ground. Martin, Pringle, 289 Kan. at 788, 217 P.3d 966. But when oil and gas escape and go into other lands, or come under another's control, the title of the former owner is-in the Tenth Circuit's words—"lost." Bezzi v. Hocker, 370 F.2d 533, 536 (10th Cir.1966) (applying Oklahoma law). In this respect, the interest of a landowner in native gas in the ground is a defeasible interest. Under the rule of capture, such migrating gas becomes the personal property of the first person to produce it.

These ownership principles initially evolved with respect to native gas. Kansas law dealing specifically with previouslycaptured and re-injected storage gas developed more recently. In 1951, the Kansas legislature enacted the Storage *1180 Act to promote the underground storage of natural gas, finding it was in the public interest to build natural gas reserves that allow orderly distribution in periods of peak demand. Among other things, the Storage Act allows natural gas public utilities to condemn subsurface property for use as underground storage facilities if they first obtain a certificate from the Kansas Corporation Commission (KCC). The KCC may issue a certificate after public hearings if it finds the property is suitable and that its use for storage is in the public interest, and after it determines the amount of recoverable oil and native gas, if any, remaining in the formation to be acquired. K.S.A. § 55-1204. In awarding damages for condemnation of such subsurface formations, the Act directs appraisers to take into consideration the amounts of recoverable oil and native gas remaining in the property and to accept the findings of the KCC as prima facie evidence of those amounts. K.S.A. § 55-1205.

Federal law similarly allows for condemnation of underground formations for natural gas storage. Pursuant to the Natural Gas Act, 15 U.S.C. § 717f, FERC may issue a Certificate of Public Convenience and Necessity allowing an applicant to establish or extend facilities for transportation or sale of natural gas in interstate commerce, including underground gas storage areas, through exercise of the United States' right of eminent domain. Northern's condemnation authority in this case is based on a FERC certificate.

In Anderson v. Beech Aircraft Corp., 237 Kan. 336, 699 P.2d 1023 (1985), Beech Aircraft injected captured natural gas into a common natural reservoir underlying its own property and the neighboring property. It had no permission to use the neighboring property. A lawsuit ensued when a producer on that property began producing storage gas. The Supreme Court held that the rule of capture applied in these circumstances, meaning Beech lost title to the gas when it was injected into the reservoir and produced on the adjoining property. The court emphasized that the Storage Act provided a mechanism for condemning underground storage formations, but Beech was not a natural gas public utility and had not obtained a certificate from the KCC authorizing the storage facility. Apart from an historical perspective, Beech has no application here because Northern has obtained the requisite condemnation authority from FERC.

B. Union Gas.

In Union Gas System, Inc. v. Carnahan, 245 Kan. 80, 774 P.2d 962 (1989), a natural gas public utility (Union Gas) had begun in 1952 to inject captured natural gas in the depleted Squirrel formation underlying Montgomery County. It continued to use the formation for storage for more than 30 years without ever obtaining authorization from the KCC. In 1985, shortly after the Anderson v. Beech decision, producer Carnahan drilled two gas wells in the Squirrel formation on the neighboring DeTar property. Union Gas filed a damage suit and asked the court to halt the production, but its request was denied. Union Gas then applied for a KCC certificate to condemn the formation under the DeTar property. On January 13, 1986, the KCC granted the application, and Union Gas initiated a condemnation suit. Meanwhile, Carnahan continued his production of gas until August of 1986. The KCC had been unable to determine the ratio of native to storage gas on the evidence before it, but the parties stipulated that Carnahan's production was about 17% native gas and the rest was storage gas. Union Gas, 245 Kan. at 93, 774 P.2d 962.

*1181 In a consolidated appeal of the condemnation and damage suits, the Kansas Supreme Court made a number of rulings. The first issue was whether Union Gas was entitled to recover for any of its storage gas *produced* by Carnahan. The Supreme Court said Union Gas's choice to forego KCC certification and condemnation when it began storage operations in 1952 placed it under the rule of *Anderson*, i.e., the rule of capture. As such, Union Gas was not entitled to recover for any storage gas produced by Carnahan before the KCC certificate was issued. *Union Gas*, 245 Kan. at 87, 774 P.2d 962. But the court held Union Gas was entitled to a set-off for storage gas produced by Carnahan after the KCC certificate was issued. The court reasoned as follows:

Union acquired no rights to the DeTars' property until April 9, 1987 [the date of taking]. However, the question remains as to its rights to its own gas from January 13, 1986, to April 9, 1987. Since Union established itself as a public utility and was authorized to store its gas underground by the Commission certificate issued on January 13, 1986, it thereafter acquired a changed status. Its operation was given official sanction and its gas was identified. Thereafter it became an exception to the rule of capture expressed in *Anderson*.

Cross-appellants, relying on the rule of capture, legitimately took advantage of Union's pressurizing the Squirrel horizon under the DeTar land without authority and recovered both previously unrecoverable native gas and Union's injected gas which had migrated onto the DeTars' property. They then sold the gas to Salem and Scissortail, who in turn sold it to Williams, who then sold it to Union for reinjection into the North field. This created a clever circle of purloined production, and a successful one under the rule of capture as stated in Anderson. But all good things must eventually come to an end. This scheme ended when Union received its certificate of authority from the Commission on January 13, 1986. The law abhors a forfeiture. So, as soon as Union's storage operation became authorized and its gas identifiable, the gas was no longer ferae naturae and subject to the rule of capture. The title to Union's captured gas remained in Union. Thus, Union did not forfeit its natural gas produced after January 13, 1986, even though it acquired no title to the DeTars' property until the date of taking, April 9, 1987. Consequently, we hold Union is entitled to a setoff for the value of its injected gas produced by cross-appellants after January 13, 1986. The value of its gas is the selling price less its share of the cost of production, including a reasonable rental for the use of the DeTars' land.

Union Gas, 245 Kan. at 88–89, 774 P.2d 962. The court went on to reject Carnahan's argument that he was entitled to just compensation for the value of the storage gas remaining under the DeTar property. The court said the Storage Act specified that only native gas was to be considered. (Citing inter alia K.S.A. § 55–1204(a)(2) and § 55–1205).

*1182 C. Adoption of K.S.A. § 55-1210.

Effective July 1, 1993, the Kansas legislature amended the Storage Act by adding § 55–1210. Subsection (a) of that statute provides in part that all natural gas previously reduced to possession and injected into underground storage fields or reservoirs shall at all times be the property of the injector. Subsection (c) provides in part that with regard to gas that has migrated to adjoining property which has not been condemned or purchased, the injector shall not lose title to such gas if it can prove by a preponderance of evidence that such gas was originally injected into the underground storage.

D. Northern v. Martin, Pringle.

In 2009, the Kansas Supreme Court addressed a certified question in a suit by Northern against its former attorneys. *Martin, Pringle,* 289 Kan. 777, 217 P.3d 966. The certified question addressed whether Northern lost title to injected storage gas that migrated to adjoining property before the effective date of § 55–1210, given that the gas had not been captured or produced by anyone by that date. Northern argued that § 55–1210 "re-vested" it with title to the gas. Pointing to the set-off granted to the injector in *Union Gas,* Northern argued that "title to migrated storage gas previously subject to the Rule of Capture revests in the injector immediately when the Rule of Capture ceases to apply."

The Supreme Court brushed aside this argument. ("Of course, Union Gas said no such thing."). It said Union Gas "clarified that [a natural gas public] utility has the statutory ability to obtain a certificate for an underground gas storage area and that the failure to use that remedy places the utility squarely under the rule of Anderson." Martin, Pringle, 289 Kan. at 790–91, 217 P.3d 966. The court said because "Northern did not obtain a certificate to condemn the adjacent landowner's property prior to July 1, 1993, the adjoining landowners possessed a right, title, and interest in and to the gas which migrated to the adjoining property as of that date." Martin, Pringle, 289 Kan. at 791, 217 P.3d 966. The

landowners thus "possessed the legal right to produce and keep the injected gas which had migrated onto their property, unless and until Northern obtained a certificate to expand its storage area onto their land and paid them for that privilege through a condemnation action." Although K.S.A. § 55–1210 "abolished that right," according to the court, such a substantive change to vested rights could not be applied retroactively and must be prospective only. *Martin, Pringle*, 289 Kan. at 791, 217 P.3d 966.

E. Northern v. ONEOK.

The Supreme Court again addressed § 55–1210 in *Northern v*. ONEOK. That case dealt with claims of conversion of storage gas that migrated beyond the post-October 2008 boundaries of the Cunningham Storage Field, where it was produced and sold by several of the Defendant-Producers. The court said subsections (a) and (b) of § 55-1210 give an injector title to storage gas that remains within its certified storage area. Subsection (c) permits the injector to retain title to storage gas "which migrates horizontally within a stratum to adjoining *1183 property or vertically to a different stratum." The term "adjoining property" was construed by the court to mean "any section of land which touches a section containing a storage field." ONEOK, 296 Kan. at 922, 296 P.3d 1106 (citing Williams Nat. Gas Co. v. Supra Energy, Inc., 261 Kan. 624, 931 P.2d 7 (1997)). The court concluded that "adjoining property" was intended as a geographical limitation on the injector's title to migrating storage gas, meaning that if storage gas migrates beyond the "adjoining property," the injector loses its title and the rule of capture once again applies. The court found that all of the wells at issue in that case were beyond the confines of "adjoining property." Accordingly, the Producer-Defendants rather than Northern had title to any such storage gas and there was no conversion of it.

F. Viability of Union Gas.

Union Gas made two rulings of significance here. First, it found that issuance of a KCC certificate meant that storage gas which had migrated into the property to be condemned was no longer subject to the rule of capture. Title to such gas "remained in" the injector as of the date of the certificate. Second, it found that K.S.A. § 55–1205 only requires a condemnor in such circumstances to pay compensation for the native gas in the property being condemned and not for migrated storage gas.

If *Union Gas* still represents Kansas law, and if it can be applied constitutionally (see discussion *infra* at pages 1185-

86), then it would dictate that Northern's motion be granted because under the rule of *Union Gas*, the FERC certificate of June 2, 2010, would mean title to storage gas in the Extension Area "remained in" Northern as of that date. ⁹ Northern would only have to compensate defendants based on the recoverable native gas in that area. Not surprisingly, the parties disagree whether *Union Gas* remains good law. ¹⁰

Defendants claim, among other things, that K.S.A. § 55–1205 does not preclude compensation for storage gas in this case, as it did in *Union Gas*, because it is a procedural statute and does not apply in this federal action. (Doc. 700 at 9). Section 55–1205 is entitled "Eminent Domain Procedure," and it sets out various procedural requirements. But insofar as it declares that native gas is compensable in *1184 condemnation but storage gas is not—which is how *Union Gas* interpreted it—it is a substantive rule, not a matter of procedure. To say that one item of property is compensable but another is not is a prime example of a substantive law in condemnation. It cannot be considered merely procedural. ¹¹

Defendants also contend *Union Gas* "has been superseded by both statute and by far more recent case law." (Doc. 700 at 4). Section 55–1210 clearly does supersede *Union Gas* insofar as that case said an adjoining landowner could rely on the rule of capture to produce storage gas. Section 55–1210(c)(1) precludes the rule of capture for storage gas on adjoining property. *See Unified School Dist. No. 501, Shawnee County, Kan. v. Baker, 269 Kan. 239, 243, 6 P.3d 848 (2000) ("If the legislature has spoken, the statement supersedes common law"). But <i>Union Gas* also decided the two questions noted above relating to condemnation, neither of which were specifically addressed by § 55–1210.

Defendants contend *Union Gas* was effectively overruled by *Martin, Pringle* and *ONEOK* because these subsequent cases reaffirmed the "ownership in place" doctrine and recognized that landowners have a present estate in the oil and gas under their property. By contrast, they say, *Union Gas* did not treat the migrated gas as belonging to any party before it was produced. But neither of these more recent cases expressly overruled *Union Gas*. In fact, *Martin, Pringle* seemed to rely on its holding about the significance of a regulatory certificate, and *ONEOK* was specifically limited to events before issuance of the 2010 FERC certificate, meaning *ONEOK* did not decide whether that portion of *Union Gas* remains viable. ¹² *See ONEOK*, 296 Kan. at 937, 296 P.3d 1106 ("Nash and L.D. had title to any such migrating gas

produced by their wells until June 2, 2010, when FERC extended the certificated boundaries of the Field to include Nash's and L.D.'s wells, or brought those wells onto property adjoining the expansion area.").

Northern responds that Union Gas remains good law and that it "recognized a special type of fee simple determinable property interest in favor of the landowners." (Doc. 715 at 11). This "fee simple determinable" argument finds no mention or support in any Kansas case law. And while this novel theory at least makes an attempt to explain Union Gas's holding that the landowner's property interest in migrated storage gas terminated when a KCC regulatory certificate was issued, it raises other problems. Most importantly, it ignores the cause-and-effect relationship between authorization to condemn and the termination and transfer of the landowner's property interests. If defendants' vested interests in storage gas terminated *1185 because a governmental certificate to condemn their property was issued, with the result that ownership of those interests "remained in" or "re-vested" or in any other fashion went to Northern because it operated a government-certified storage facility, as a practical matter this change of ownership would have to be viewed as a governmental taking of the landowners' property rights. 13 See e.g., Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 128, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978) ("government actions that may be characterized as acquisitions of resources to permit or facilitate uniquely public functions have often been held to constitute 'takings.' "); cf. Palazzolo v. Rhode Island, 533 U.S. 606, 630, 121 S.Ct. 2448, 150 L.Ed.2d 592 (2001) (a regulation that otherwise would be unconstitutional absent compensation is not transformed into a background principle of the state's law by mere virtue of the passage of title). A special type of defeasible interest that terminates when the government decides the property is suitable for public use is but another way of describing a taking of private property for a public purpose. And as such it would constitutionally require the payment of just compensation.

Faced with the alternatives, the court must agree with defendants that *Union Gas* cannot be applied as Northern contends—i.e., it cannot relieve Northern of the obligation to pay compensation for migrated storage gas in which defendants held a property interest. *ONEOK* made clear that in any section not "adjoining" the post–2008 storage field, defendants possessed a vested ownership interest in all of the gas—both native and storage—under their property. Additionally, *Martin, Pringle* held that any storage gas which migrated out of the storage field before July 1, 1993 was

subject to the rule of capture. As a result of *Martin, Pringle,* then, defendants held title to any storage gas that migrated out of the storage field before July 1, 1993, regardless of whether or not their property "adjoined" the storage field.

ONEOK and Martin, Pringle each relied on the "ownership in place" theory of gas ownership. They characterized the landowner's interest as a "present estate in the oil and gas in the ground" and possession of "a right, title, and interest in and to the gas" in the ground. The landowner's interest included a right to capture the storage gas under their property. Union Gas effectively held that this interest terminated upon issuance of a KCC certificate. Insofar as Union Gas reached that conclusion merely because a certificate authorizing condemnation had been issued—while also finding the landowners were entitled to no compensation for any storage gas under their property—such a rule as applied here would violate the Fifth Amendment. ¹⁴ Because Kansas law now clearly holds that a landowner's right to such migrated storage gas in the ground is a vested property right, the government cannot take it for a public purpose without paying just compensation. 15 So, for the *1186 foregoing reasons, this aspect of Union Gas cannot be lawfully applied and will be treated as having been effectively modified by Martin, Pringle and ONEOK.

An argument can be made that the Union Gas rule poses no constitutional hurdle if it is only applied prospectively. In other words, a rule providing that an injector retains title to any storage gas that migrates into a proposed extension area after the issuance of a regulatory certificate to condemn the area arguably does not deprive the landowner of any vested right. Cf. Martin, Pringle, 289 Kan. at 791, 217 P.3d 966; Northern Nat. Gas Co. v. L.D. Drilling, Inc., 2011 WL 691621, *2, n. 2 (D.Kan., Feb. 15, 2011) (discussing prospective operation of Union Gas rule). In fact, this court previously stated that under Kansas law Northern retained title to any storage gas migrating to the Extension Area after the June 2, 2010 FERC certificate. (See e.g., Doc. 187 at 8). Notwithstanding this prior dicta, the court now concludes from its review of Kansas law that even a prospective application of *Union Gas* has been effectively superseded by K.S.A. § 55–1210 and impliedly modified by Martin, Pringle and ONEOK.

As defendants point out, *Union Gas* seemingly assumed that the landowners did not have any vested property interest in migrated storage gas under their property because that gas was subject to the rule of capture. *See Union Gas*,

245 Kan. at 92, 774 P.2d 962 ("Cross-appellants' qualified interest in the gas beneath the DeTar property is perfected only by capture."). That premise is untenable after *Martin*, *Pringle* and *ONEOK*, which make clear that under § 55–1210, Kansas landowners beyond "adjoining property" hold a present vested interest in any storage gas under their land. *ONEOK* observed that § 55–1210 was adopted "in response to the common law as it had developed in *Union Gas* and *Anderson*," suggesting that the statute was designed to supplant those cases to the extent they were inconsistent with the new statutory rules of ownership.

It is true that § 55-1210 did not expressly address the impact of a regulatory certificate on ownership of migrating storage gas. But ONEOK's conclusion that § 55-1210 grants the injector an ownership interest in storage gas only within the confines of a certified storage field, plus the adjoining property, was itself conditioned upon an understanding that the injector's storage rights in that certified area "were acquired" by eminent domain or otherwise. ONEOK, 296 Kan. at 926, 296 P.3d 1106. In other words, the injector's ownership rights to storage gas are limited to the certified area where the injector has already obtained the necessary storage rights, augmented only to the extent of the "adjoining property." Cf. § 55-1210(c) (governing ownership of storage gas that has migrated to adjoining property "which has not been condemned ... or otherwise purchased"). Insofar as Union Gas would allow an injector to claim ownership of storage gas migrating beyond that limited area, into a more distant area where the injector does not yet have storage rights but has only obtained a certificate to condemn the necessary rights, the court concludes that such a rule implicitly conflicts with and is superseded by K.S.A. § 55-1210's scheme for ownership of migrated storage gas, as construed by the Kansas Supreme Court. Cf. City of Haven v. *1187 Gregg, 244 Kan. 117, 122-23, 766 P.2d 143 (1988) (when a statute conflicts with the common law, the statute controls). See also Martin, Pringle, 289 Kan. at 791, 217 P.3d 966 (the landowners "possessed the legal right to produce and keep the injected gas which had migrated onto their property, unless and until Northern obtained a certificate to expand its storage area onto their land and paid them for that privilege through a condemnation action.") (emphasis added).

[10] In sum, the court concludes that the issuance of a regulatory certificate from FERC works no instantaneous change of ownership in storage gas under Kansas law. Rather, ownership rights are determined by K.S.A. § 55–1210. And under that statute, an injector's right to retain title to its

injected storage gas is limited to the certified area where it has already obtained the necessary storage rights and to the adjoining property.

Northern's reliance on the balance of the Kansas Storage Act, including §§ 55-1204 and 55-1205, does not alter this conclusion. For reasons previously alluded to, § 55-1205 cannot relieve Northern of its obligation to pay just compensation for the taking of defendants' property rights to storage gas. Although § 55-1205 only directs appraisers to consider "the amounts of recoverable oil and native gas" in the property to be acquired, that limited inquiry is due to the fact that this provision "was intended to operate prior to the injection and storage of gas by a natural gas public utility." Union Gas, 245 Kan. at 89, 774 P.2d 962. Prior to establishment of a storage field there obviously would be no storage gas to consider. But when a condemnation instead involves the taking of a landowner's rights to capture both native and storage gas, as it does here, the constitution requires the condemnor to pay just compensation for the taking of both.

The court notes that all of the foregoing pertains only to the question of who had *title* to storage gas in the Extension Area on the date of taking. Insofar as the ultimate question of just compensation is concerned, the Commission will have to factor in a number of variables, including whether or not such gas was economically recoverable. *See e.g., Union Gas,* 245 Kan. at 92–94, 774 P.2d 962. The relevant considerations will be covered in the court's ultimate instructions to the Commission.

G. Northern claim for offset.

[11] Northern also seeks a ruling that it is entitled to an offset against the condemnation award for: (1) the value of any and all storage gas produced on or after October 30, 2008 from the 2008 Extension Area; and (2) the value of any and all storage gas produced on or after June 2, 2010, from the 2010 Extension Area. (Doc. 678 at 16).

With respect to the 2008 Extension Area, the court has no idea what production Northern is referring to, because no such facts are set forth in the parties' statements of fact, nor is any such production mentioned in the briefs. (As noted previously, the only portion of the 2008 Extension Area involved in this condemnation is a 7.87 acre tract, Tract No. 3152711, in Pratt County). The court will deny the request for summary judgment on this issue as factually unsupported. On this record the court is not even certain that there is a live

controversy concerning production from the 2008 Extension Area.

With respect to the 2010 Extension Area, the court will deny Northern's motion for the reasons discussed previously. The court concludes that *Union Gas* has been superseded or modified insofar as it *1188 held that a regulatory certificate gives an injector title to migrating storage gas. The issuance of the 2010 FERC certificate, standing alone, affected no change in ownership of migrating storage gas to the 2010 Extension Area. Northern has shown no entitlement to an offset for production from the 2010 Extension Area after June 2, 2010.

V. Conclusion.

Northern's Second Motion for Partial Summary Judgment (Doc. 677) is DENIED. Defendants' Cross-Motions for Partial Summary Judgment (Docs. 699, 700, 701, 702) are GRANTED.

With respect to any storage gas that migrated from the Cunningham Storage Field to the 2010 Extension Area prior to the date of taking, the court will instruct the Commission according to the ownership principles set forth in this order.

A motion for reconsideration of this order is not encouraged. Any such motion shall not exceed 5 double-spaced pages and shall strictly comply with the standards enunciated by this court in *Comeau v. Rupp*, 810 F.Supp. 1172, 1174 (1992). The response to any motion for reconsideration shall not exceed 5 double-spaced pages. No reply shall be filed.

IT IS SO ORDERED.

Parallel Citations

Util. L. Rep. P 14,887

Footnotes

- L.D. Drilling, Inc., Nash Oil & Gas Co., Val Energy, Inc., and Five-Star Energy, Inc. Doc. 699 at 1.
- The lone exception appears to be Tract 3152711, a 7.87 acre tract in the 2008 Extension Area that is included in Northern's condemnation complaint.
- 3 See Memorandum and Order of July 2, 2013, 2013 WL 3328773 (Doc. 691) determining the date of taking was March 30, 2012, when the court granted Northern an injunction allowing it to take possession of the entire 2010 Extension Area.
- At a status conference on February 26, 2014, counsel for Five Star and Northern stated that the claims involving Five Star will likely soon be resolved and it will be dismissed from the case.
- Although the NGA (15 U.S.C. § 717f(h)) states that the procedure for eminent domain shall conform as nearly as possible to the State procedure where the property is located, that provision is effectively nullified by the Rules Enabling Act's "supersession clause" [28 U.S.C. § 2072(b)] and Rule 71.1. See Guardian Pipeline, L.L.C. v. 295.49 Acres of Land, 2008 WL 1751358, *12 (E.D.Wis. Apr. 11, 2008).
- For purposes of the instant motion it is immaterial whether the oil and gas ownership rights were held by landowners or by someone else (such as a lessee) claiming an interest derived from a landowner.
- The court observed that the Kansas Storage Act "was intended to operate *prior* to the injection and storage of gas by a natural gas public utility." *Union Gas*, 245 Kan. at 89, 774 P.2d 962. This would explain why the statute only requires a determination of how much native gas in is the property and why appraisers are only directed to consider the amount of native gas. Essentially, K.S.A. § 55–1205 contemplates condemnation of an underground area before storage operations begin, meaning there would be no storage gas to be taken into account.
- In dismissing Northern's "re-vesting" argument out of hand, the *Martin, Pringle* opinion did not explain how the landowner's vested property interest in *Union Gas* could be transferred to the injector without any requirement for compensation, nor did it explain what *Union Gas* meant when it said "the title to Union's captured gas remained in Union" after it obtained a KCC certificate.
- Although the Cunningham Storage Field was initially certificated both by FERC's predecessor and the KCC, the later expansions were certificated only by FERC. The reason for this is not clear in the record, but no party has raised it as an issue and the court assumes for purposes of this motion that a FERC certificate would have the same effect on property rights under Kansas law as a KCC certificate.
- Defendants additionally attempt to distinguish *Union Gas* on its facts. They note that the KCC certificate in *Union Gas* authorized the injector to store gas under the adjoining property, while Northern's FERC certificate only permits it to use the Extension Area as a buffer zone. That is a factual difference, but nothing in *Union Gas* suggests that it is a material one. Both certificates allow the condemnor to obtain exclusive use of the specified area as part of its storage field and both preclude any inconsistent use of the area by the landowner.

- Defendants also point out that the FERC certificate did not estimate the amount of recoverable native gas in the property, while the KCC certificate *Union Gas* had such a finding. But that is true because K.S.A. § 55–1204 requires the KCC to make a finding of the amount of native gas in the property in a condemnation under the Kansas Storage Act. That procedural requirement does not apply in this condemnation under the Natural Gas Act, which is governed by the Federal Rules of Civil Procedure. Northern's failure to follow the state procedure does not affect the property rights at issue or the standard for determining just compensation.
- Any construction of Kansas law that would allow a condemnor acting under state law to pay only for native gas but would require a federal condemnor in the same circumstances to pay for both native and storage gas would likely be an impermissible burden on interstate commerce. See e.g., Granholm v. Heald, 544 U.S. 460, 472, 125 S.Ct. 1885, 161 L.Ed.2d 796 (2005) ("Time and again this Court has held that, in all but the narrowest circumstances, state laws violate the Commerce Clause if they mandate 'differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.'").
- The ONEOK opinion characterized Union Gas as "superseded by statute as stated in Martin, Pringle." ONEOK, 296 Kan. at 920–21, 296 P.3d 1106. Westlaw's Keycite system characterizes Union Gas as superseded by statute as stated in Martin, Pringle and ONEOK. Lexis' Shepards' system, on the other hand, characterizes Union Gas as superseded by statute as stated in ONEOK but followed by Martin, Pringle.
- Under ONEOK's construction of K.S.A. § 55–1210, an injector's right to retain title to injected storage gas apparently belongs only to the operator of a storage facility certified by the government to be in the public interest. Cf. Williams, 261 Kan. at 630, 931 P.2d 7 ("There is nothing unconstitutional about permitting anyone to be considered an injector for purposes of K.S.A. § 55–1210.").
- Defendants also accurately point out that such a taking of their property would be inconsistent with the court's determination that the date of taking was March 30, 2012.
- By contrast, *Union Gas* referred to a landowners' "qualified interest in the gas beneath the ... property" and said the landowners' interest "is perfected only by capture." *Union Gas*, 774 P.2d at 971. The court notes that even if the landowners' interest was limited to the right to seek to produce the gas, as opposed to a present vested title to it on the date of taking, it still was a valuable property interest deriving its worth from the amount of gas in the ground. The taking of such a right for a public purpose requires the payment of just compensation. *Cf. Williams v. City of Wichita*, 190 Kan. 317, 374 P.2d 578 (1962) (discussing ownership of water rights).

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