Approved April 20, 1983
Date

MINUTES OF THE House COMMITTEE ON Energy and Natural Resources.

The meeting was called to order by Representative David J. Heinemann at
Chairperson

3:30 ~~x~~a.m./p.m. on February 14, 1983 in room 519-S of the Capitol.

All members were present except:

Representative Ginger Barr (excused)

Committee staff present:

Ramon Powers, Research Department
Theresa Kiernan, Revisor of Statutes' Office
La Nelle Frey, Secretary to the Committee

Conferees appearing before the committee:

Representative Keith Farrar.
Leland Nordling, Southwest Kansas Royalty Owners Association.
George Burrows, Stevens County Commissioner.
Douglas Bendell, Douglas Energy Company, Inc.

Proponents of:
HB 2208 - An act relating to oil and gas leases; concerning covenants of reasonable exploration and development of lands covered by such leases; prescribing certain circumstances under which a presumption of a breach and violation of such covenants will arise.

Representative Keith Farrar testified in support of HB 2208. He provided background information on the bill by saying that most of the acreage in the large Hugoton Natural Gas Field is held by oil and gas leases that were executed many years ago. He stated there were indications that deeper zones of gas and oil are located within this presently leased area; however, most of the companies holding the leases are reluctant to drill to the deeper zones. This bill would shift the burden of proof to the producing company to show that they had made an effort to develop the lease instead as under the present law, where the royalty owner has to prove the company hasn't prudently developed the lease (see attachment 1).

Leland Nordling, assistant secretary of the Southwest Kansas Royalty Owners Association, testified in support of HB 2208. He said that HB 2208 merely changes the burden of proof from the landowner to the lessee, if such shallow acreage has been producing for over 15 years and the lessee has failed to develop the deeper zones (see attachment 2).

George Burrows, Stevens County commissioner, spoke to the committee in support of HB 2208. He said he would like to see further exploration and development of deep gas in Southwest Kansas because he thought it would provide more revenue for that area of the state.

Douglas Bendell, president of Douglas Energy Company, testified in support of HB 2208. He noted that his company is the owner of leases covering approximately 200,000 acres of deep rights in Southwest Kansas. He stated that passage of HB 2208 would not affect contractual rights or oil and gas leases in force, but would effect only a procedural change in any litigation initiated by a Kansas landowner against an oil company when the oil company has failed reasonably to explore under the lease. He said this procedural change is simply shifting the burden of proof from the lessor, as is the present case under the Kansas law, to the lessee, and then only after 15 years have elapsed since the shallow production commenced (see attachment 3). Mr. Bendell also distributed a copy of a memorandum of authorities regarding the constitutionality of HB 2208 which was prepared by John Lungren, associate professor of law, Washburn University School of Law (see attachment 4).

A discussion period followed the presentations of testimony on HB 2208.

MINUTES OF THE House COMMITTEE ON Energy and Natural Resources,

room 519-S, Statehouse, at 3:30 ~~a.m./~~p.m. on February 14, 1983.

There being no further business to come before the committee, the meeting adjourned at 5:00 p.m.

The next meeting of the committee will be held February 15, 1983.

Rep. David J. Heinemann, Chairman

Date February 14, 1983

GUESTS

HOUSE ENERGY AND NATURAL RESOURCES COMMITTEE

NAME	ADDRESS	ORGANIZATION
Ed Reinert	Topeka	KS League Women Voters KS Sierra Club
[illegible] Lungren	Topeka	attorney
Leland E Nordling	Hugoton	SWKPDA
D. Bendell	Oklahoma City	Douglas Energy
Phil Dirk	Topeka	KCC
Patti Gorham	Topeka	KCC
Jan Johnson	Topeka	Pondget Division
[redacted]	[redacted]	[redacted]
George Brannon	Hugoton	Co Comm.

28 in attendance

Attachment 1
2-14-83
House Energy and Natural Resources

KEITH FARRAR
REPRESENTATIVE, 124TH DISTRICT
STEVENS, GRANT, STANTON,
MORTON, HASKELL COUNTIES
STAR ROUTE
HUGOTON, KANSAS 67951

STATE OF KANSAS

TOPEKA

HOUSE OF
REPRESENTATIVES

COMMITTEE ASSIGNMENTS
MEMBER WAYS AND MEANS
JOINT COMMITTEE ON STATE BUILDING CONSTRUCTION
INSURANCE

Presentation to the
House Energy and Natural Resources Committee
Feb. 14, 1983 on HB 2208 by Rep. Keith Farrar

Mr. Chairman and members of the committee, first a few points about HB 2208.

#1. HB 2208 provides the means to make available more natural gas to the people of Kansas.

#2. Most of the acreage in the large Hugoton Natural Gas Field is held by oil and gas leases executed many years ago.

#3. There are indications that deeper zones of gas and oil are located within the presently leased area. However, most of the companies holding these old leases are reluctant to drill to the deeper zones.

I introduced HB 3038 of the 1976 Legislature which was the basis of study by the Interim Judiciary Committee of the 1976 Legislature. That committee voted to introduce HB 2002 to the 1977 Legislature. That bill was the basis for HB 2761 and SB 586, identical bills introduced into the last legislative session.

I introduced those bills because of my concern over dwindling natural gas supplies and the apparent disinterest that some natural gas companies have in developing the deeper horizons in the Hugoton Field. Apparently the gas producer assumes the lease he holds gives

him the right to produce only the shallowest and, therefore, usually the cheapest zone. Surely 15 years is enough time to allow development of a lease.

I feel the understanding most people have of the purpose for a gas lease between a royalty owner and a gas producing company, is that the gas company wants to explore and develop all the oil or natural gas underlying the surface of the land. In many instances, where the producing company has failed to fulfill their obligations under the lease to fully develop all zones, they have borrowed thousands of dollars on the lower zones without further development. However, the royalty owner receives no benefit and the county in which the leased property is located receives no taxes from this valuable resource. Apparently many companies have a reluctance to release these lower zones to the royalty owner for further development because of a belief of more potential value there than previously thought, or the deeper horizons are being used as collateral for loans to explore in other more potentially rewarding areas of the world.

I would remind you that the bill does not change contracts, it changes the burden of proof to the producing company, to show that they have made an effort to develop the lease instead as under the present law the royalty owner has to prove the company hasn't prudently developed the lease. The company still has its day in court.

The lower zones are like money in the bank for some companies and unless the State shifts the burden of proof to the companies, we may not develop those zones for another thirty to forty years.

I would point out to the committee that last session some of the news media had suggested that the leadership of the Senate was in the hip pocket of the big oil and gas interests. I think it is interesting to note that last session a similar bill to this one, SB 586, passed the Senate 36 to 4.

If there is nothing to produce, this bill will not hurt anyone. If there is oil and gas to be produced then the companies who have the leases should not object to producing the minerals 15 years after the primary term of this lease, anymore than the farmer cannot expect his lease to be continued without using all of the land.

A landowner who leases his land for agricultural purpose is entitled to production on <u>all</u> of the leased land, not just one quarter of his land.

I believe the royalty owner has the right to expect the oil companies to produce all of the minerals, not just those that are cheap to produce.

The FPC (now the Federal Energy Regulatory Commission) beginning in 1975 took steps to require lessee-producers to observe the standard of the "prudent operator" in maintaining and developing reserves of natural gas. During the court case that came about because of the FPC order which was challenged by the producing companies, the point was made by the FPC staff that they intended to use their authority over prudent lease hold operations "to insure full and timely development of reserves". The case referred to was heard by the United States Court of Appeals for the Fifth Circuit in Shell Oil Co. v Federal Energy Regulatory Commission. The court

observed that the prudent operator standards sought by the FPC order was contained in lease agreements with mineral owners and that such attempted enforcement would encroach on the jurisdictional areas "reserved to the states."

It is abundantly clear that the enforcement of the prudent operator standard for lessee-producers is of the utmost importance to gas consumers. This was recognized by the FPC, and since it cannot be achieved at the national level after three years of trying to do so, it is clear that if the consumer interest in enforcing a prudent operator standard is to be furthered, it must be done through state effort.

Passage of HB 2208 would provide increased drilling activity, which should result in more natural gas and oil being discovered in Kansas.

STATEMENT OF
LELAND E. NORDLING, ASSISTANT SECRETARY
SOUTHWEST KANSAS ROYALTY OWNERS ASSOCIATION
HUGOTON, KANSAS 67951

February 14, 1983

To the Honorable Members of the
Kansas House Energy and Natural
Resources Committee.

Ladies and Gentlemen:

My name is Leland E. Nordling of Hugoton. I am Assistant Secretary of the Southwest Kansas Royalty owners Association, an attorney, and an owner of land and mineral interests in Stanton County, Kansas. I am appearing on behalf of our Association and as a mineral interest owner in support of House Bill 2208. I am addressing your honorable Committee on the merits of such legislation.

By way of background information, our Association is a non-profit Kansas corporation, organized in 1948. We have a paid-up membership of over 2,000 members. Our membership is limited to landowners owning mineral interests in the Kansas portion of the Hugoton Field - lessors under oil and gas leases as distinguished from oil and gas lessees, producers, operators, or working interest owners. While membership in our organization is voluntary, our members own mineral interests in approximately

1,200,000 acres, or almost half of the producing acreage in the Hugoton Field.

GAS FIELDS IN SOUTHWEST KANSAS

There are five major gas fields located in Southwest Kansas. They are the Hugoton, Panoma Council Grove, Greenwood, Arkalon and Bradshaw fields.

HUGOTON FIELD

In the Kansas portion of the Hugoton Field, there are slightly over 2,600,000 producing acres. The field covers parts of nine Southwest Kansas counties, including Seward, Stevens, Morton, Stanton, Grant, Haskell, Finney, Kearny and Hamilton counties, and extends through the Oklahoma Panhandle into Texas. The Guymon-Hugoton Field has approximately 1,357 gas wells and encompasses 1,110,720 acres. The Texas portion of the Hugoton Field has approximately 972 wells and covers 622,080 acres, making the total acres in the Hugoton Field of 4,232,800 acres and approximately 6,293 gas wells. The field extends about 150 miles north and south and forty to fifty miles east and west.

Production of Hugoton pay gas in Kansas is from a depth of between 2,700 and 2,800 feet.

PANOMA FIELD

Within the confines of the Kansas portion of the Hugoton Field lies the Panoma Council Grove Field, which has defined limits now of over 2,000,000 acres, producing gas from formations lying immediately below the Hugoton pay at depths of between 2,900 and 3,100 feet.

Most of these wells are drilled on 640-acre spacing. There are at least 700,000 acres still undeveloped in the Panoma Field and potentially productive.

OLD LEASES

The discovery well in the Hugoton Field was drilled in 1927, starting a flurry of leasing and drilling activity. Most of the oil and gas leases in the Field were taken in the 1930's and 1940's, with some leasing and development in the 1950's.

In the development of the Hugoton Field, in the early 1940's, the Kansas Corporation Commission, at the request of the lessees, established spacing rules and regulations to permit the drilling of one gas well to every 640 acres. Thus, with the drilling of one well on a single one-acre tract, the oil and gas leases covering the entire 640 acres were cured by the production from this one well at nominal expense to the lessee.

By comparison, in other parts of the state, there are few, if any, 640 acre gas units. Many of the fields are not prorated and require the drilling of offset wells on as little as 10-acre spacing to hold the leases. In the prorated gas fields in other areas, the spacing for gas wells is 160 or 320 acres, requiring additional offsetting wells to hold the acreage outside the smaller units. This requires additional investment on the part of the oil and gas lessees.

On the other hand, with the drilling of one well years ago on 640 acre spacing with the initial investment for the well long since returned many times over, with no delay rentals to pay on thousands of acres in the Hugoton Field, the gas companies operating in the Field can "have their cake and eat it too" by going elsewhere to spend their development and exploration money, holding on to the potential deeper reserves in the Field without doing anything until they are found or willing to test the deeper formations.

As indicated above, much of the acreage in the Hugoton Field is held by oil and gas leases executed in the 1930's and 1940's, with the primary terms of the leases long since expired.

Over the years, engineers and geologists have indicated that the deeper horizons underlying the Hugoton Field contain

large uncapped oil and gas reserves, as evidenced by scattered deep test wells and geological and engineering data. Yet most of the deeper horizons below 3,100 feet underlying the 2,500,000 acres in the Kansas portion of the Hugoton Field are unexplored and undeveloped.

Members of our Association have for many years urged and demanded their lessees to explore the deeper horizons below the shallow Hugoton pay. However, the oil and gas companies operating in the Hugoton Field, most of which are major gas companies, have generally refused to do so, preferring to spend their exploratory funds in searching for oil and gas in other states, new public lands made available by the United States, offshore, or in foreign countries.

OTHER FIELDS WITHIN THE CONFINES OF THE HUGOTON FIELD

Exploration and development of the deeper horizons in the Hugoton Field over the 50-year life of the Field has been extremely slow, but surprisingly enough, there are over 100 oil fields and 70 small gas fields within its confines. These are in the main isolated fields and comprise only a small portion of the acreage in the Field.

One sure way to determine if there are additional oil or gas reserves underlying the field is to cause exploration and development through House Bill 2208, which simply shifts the burden of proving a breach of the covenants of the lease for failure to develop from the lessor to the lessee!

DEVELOPMENT BY INDEPENDENT PRODUCERS

In recent months, independent oil and gas producers in our area have been active in leasing lands not covered by oil and gas leases. Thousands of acres have been leased, and bonuses are being offered ranging from $25.00 to $155.00 per acre plus 3/16ths royalty. There is no doubt in my mind that if the major gas companies operating in the Hugoton Field do not want to develop the deeper horizons after all these years of inactivity, the independents are very eager to step in and take their chances. House Bill 2208 will help afford that opportunity.

EXISTING POLICY OF MAJOR COMPANIES

I lived in Stanton County over 15 years before moving to Stevens County in 1966. During my law practice in Stanton County I saw active oil and gas leasing from time to time on open acreage in the Western part of such county. I still own land in the

Eastern part of Stanton County. All of it is under oil and gas lease to Amoco Production Company and under gas production. The leases were taken by Amoco over 40 years ago and the land has been under gas production for over 35 years. I have watched the exploration activity of Amoco in the Hugoton Field for over 30 years.

On my acreage in Stanton County Amoco owns all the oil and gas leases almost six miles in any direction you would want to go. A copy of part of a township map of Stanton County is attached. How do I prove drainage - How do I prove "Amoco is not a prudent operator" under our present laws?

Amoco, Mobil and many of the other major companies in the Hugoton Field have had a policy not to farm out any Hugoton acreage to independents. In many instances, a very small producing gas well on one 160 acre tract, paying minimal royalty to the landowner, cures all of the oil and gas lease primary terms on all the leases on a 640 acre gas unit. It appears the major oil and gas companies want to keep a hidden gold mine in the Hugoton Field forever.

EXPLANATION OF DEEP HORIZONS LEGISLATION

House Bill No. 2208 does not in any way interfere with contractual rights or oil and gas leases in force. The proposed

bill does not compel any lessee to drill where that lessee believes there is insufficient geological or economic merit. Rather, the bill redresses what is now a severely unfair imbalance in the respective rights of the lessee and lessor when controversies arise with respect to whether the lessee oil and gas company has fulfilled its obligation under the oil and gas lease to the mineral owner to prudently explore and develop.

The legislation does this simply by shifting the burden of proof from the lessor, as is the present case under the Kansas law, to the lessee, and then only after 15 years have elapsed since the shallow production commenced.

ILLUSTRATION OF NEED FOR LEGISLATION

The Kansas mineral owner, whose oil and gas rights are being held by the oil and gas companies from the surface to the center of the earth by virtue of shallow production (established in many cases decades ago) and who is receiving very minimum royalty income, must sue to compel deeper exploration or to free the deeper horizons for exploration by others.

The mineral owners must bear the burden of proving in court that the present lessee has failed to explore the deeper horizons prudently. How does he do this? He must do it through

expert geologic and engineering testimony. He must offer into evidence exhibits such as subsurface structure maps, subsurface isopach (thickness) maps, porosity maps, geophysical interpretation, reservoir pressure studies, remaining reserves reports, pressure decline curves, production decline curves, and similar types of information.

Most Kansas royalty owners are small farmers. Even if they are willing to incur the expert witness fees and legal expense and they are able to find legal counsel sufficiently sophisticated to handle this very complex and technical case, it is virtually impossible for them to develop and secure that sort of evidence. How many Kansas farmers have geologists, petroleum engineers and economists on their payroll? Probably none. But the oil companies do, especially the major oil companies who concede in the press and before the Kansas Corporation Commission that they maintain these data and these studies on an on going basis through the life of producing fields.

Therefore, the small individual Kansas farmer-royalty owner, in order to make his case, must seek out independent consultants, geologists, engineers, and other oil and gas experts who are willing to testify on his behalf and who are experts in Kansas oil and gas.

The farmer must convince these consultants to help support his case with expert evidence and testimony. The problem, of course, is not only the cost of securing this expert testimony but also the fact that these same independent experts depend almost totally upon the oil and gas companies for their own professional livelihood. Consequently, the small Kansas farmer-royalty owner finds himself barred, de facto, from judicial relief.

The deep horizons proposed bill does nothing more than shift the burden of proof from the small Kansas farmer-royalty owner where it does not belong to the oil and gas companies where it does belong and where the resources and the expertise to sustain that burden of proof are in place.

As you can see, no contractual rights are affected by this legislation. The oil company still can drill if it chooses. It can release the deep rights to others if it chooses. It can release the deep rights if it believes further exploration can be unwarranted. It can even choose to defend in court its failure to drill by presenting expert evidence. This expert evidence is easily available to the oil company to prove it has complied with its obligation to explore and develop fully the lands covered by

the oil and gas lease as provided by the terms of the lease and by law.

RECOMMENDATION

House Bill 2208 is needed to give me and thousands of other landowners the chance to make demand on the oil and gas lessee to further test our acreage or to release it if they do not want to test it. With House Bill 2208, our Kansas law will still give the lessee its day in court to prove it is and has reasonably developed such acreage.

The cry of a shortage of energy sources in America during the past years points out rather dramatically, in the public interest, the need to take positive action to relieve our energy shortages.

Under the prudent operator test, the lessee must continue the reasonable development of the leased premises to secure oil or gas for the common advantage of both landowner and lessee. It may be expected and required to do that which an operator of ordinary prudence would do to develop and protect the parties. The burden of proof is now upon the landowner to establish by substantial evidence that covenant has been breached by lessee.

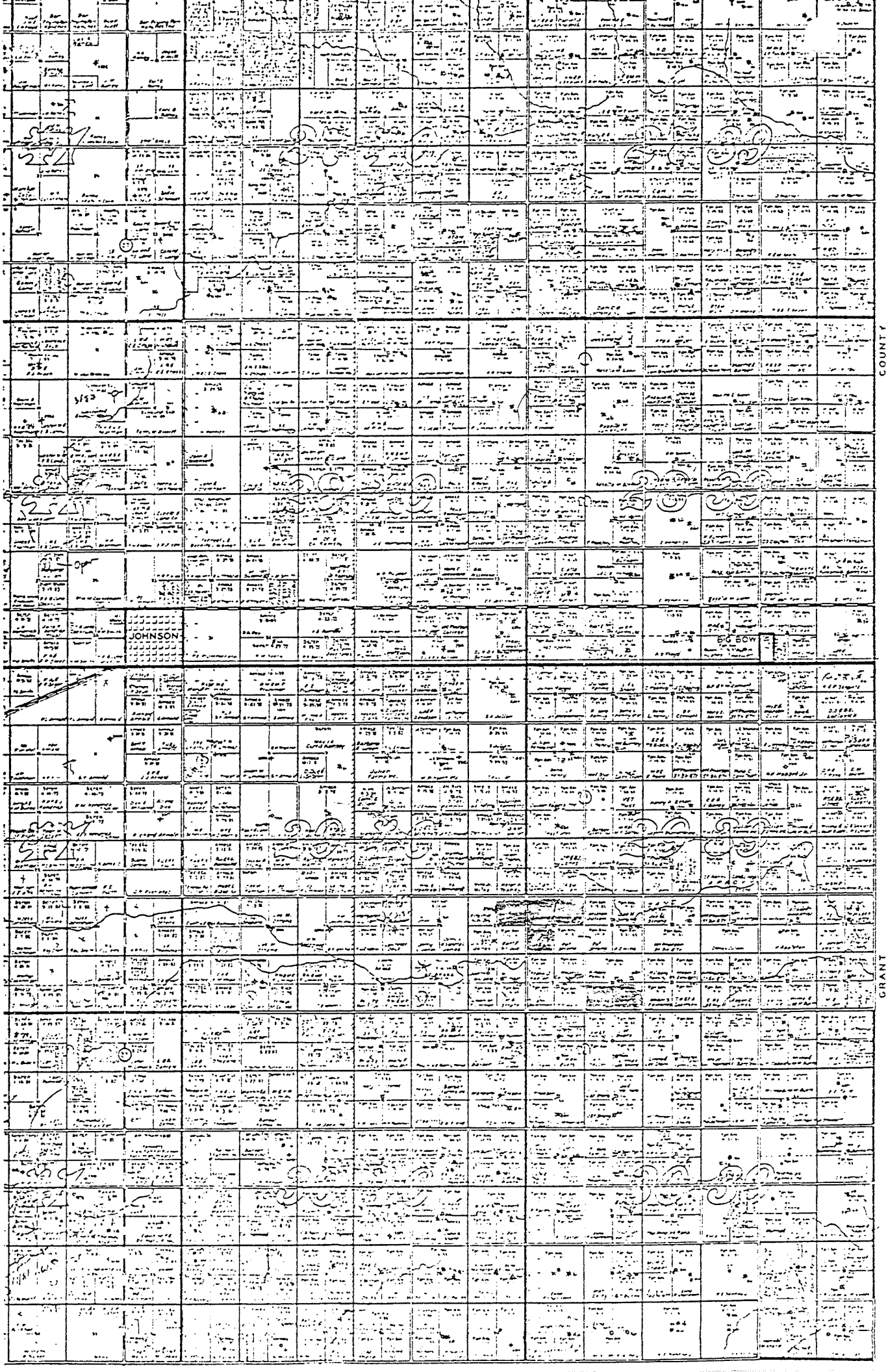
Because of the shortage of energy sources, the 640 acre gas units, proration of the natural gas in the Hugoton Field, and in many cases the payment of minimal royalty to the landowner, we are now asking IN THE PUBLIC INTEREST, by House Bill 2208, to merely change the burden of proof from the landowner to the lessee, if such shallow acreage has been producing for over 15 years and the lessee has failed to develop the deeper zones.

Fifteen years does not mean anything to Mobil, Amoco, Texaco, Cities Service and the other major oil companies - they last forever - we do not!

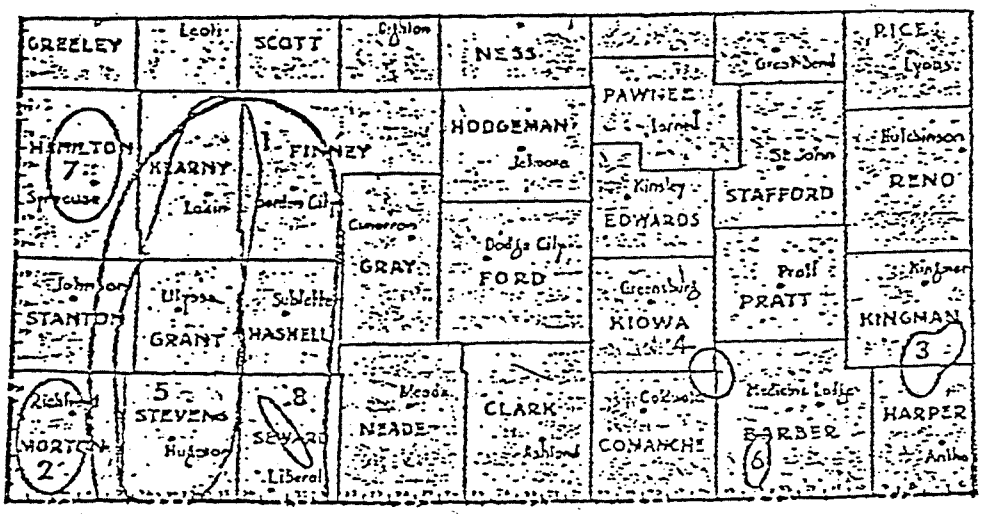
Respectfully submitted,

Leland E. Nordling,
Assistant Secretary
SOUTHWEST KANSAS ROYALTY
OWNERS ASSOCIATION

LEN:s


JOHNSON
BIG BOW
COUNTY
GRANT

APPROXIMATE LOCATION OF
GAS FIELDS IN SOUTHWESTERN KANSAS
AS OF 1-1-1982



1. Hugoton field
2. Greenwood field
3. Spivey-Grabs field
4. Glick field
5. Panoma field
6. Aetna field
7. Bradshaw field
8. Arkalon and Evalyn fields

3 New Fields in Overthrust

Amoco Will Test ERG Well

By Gary Haden
Staff Writer

Energy Reserves Group and Amoco Production have completed an agreement that will allow Amoco to undertake further testing on an apparent dry hole that cost ERG and its partners $16 million to drill.

Reg Orr, ERG's vice president for production, said Thursday that Amoco is expected to begin testing of the #1 C-F Federal in the near future.

If Amoco discovers natural gas or oil, ERG will regain a 33 percent interest in the well after Amoco recovers its testing expenses.

Completion of the agreement came as Amoco announced that it has discovered three new natural gas fields in the northeastern Utah-southwestern Wyoming section of the Overthrust Belt.

One of the new discoveries, the Amoco-Champlin 505 B-1 in the newly named West Carter Creek Field, is within three miles of ERG's abandoned well, where testing was halted early in 1982.

AMOCO'S 505B yielded more than 9 million cubic feet of gas and 120 barrels of gas condensate from 15,150 to 15,224 feet and more than 6 million cubic feet of gas and 165 barrels of condensate from 13,613-13,698 feet.

Orr said he did not believe Amoco's plans to wash down the ERG well are solely related to its success at the 505B, but are because of a different interpretation of seismic and geologic information. "We don't know exactly what they based their decision on," he said.

He said Amoco will test different zones than those where it found gas in the new well. ERG tested the same zones as are productive in the Amoco well in its earlier completion efforts without success.

Another well drilled by Chevron and located about a mile southeast of ERG's well yielded 9 million cubic feet of gas on test and was a primary stimulus to the joint attempt by ERG, American Quasar Petroleum and El Paso Natural Gas. Both Quasar and El Paso would share in any finds by Amoco, after the exploration giant got its money back.

AMOCO IS a leader in wells drilled each year in the United States has interests in 24 of 26 gas discoveries on the Overthrust Belt.

Attachment 3
2-14-83
House Energy and
Natural Resources

TESTIMONY OF DOUGLAS L. BENDELL
IN SUPPORT OF HOUSE BILL NO. 2208
February 14, 1983

Good day, ladies and gentlemen of the Committee. I very much appreciate Representative Farrar's invitation to testify on the "Deep Horizons" Bill.

My name is "Dug" Bendell, and I am the president of Douglas Energy Company, Inc., a Kansas corporation, with offices in Hugoton, Kansas and Oklahoma City. I am a former resident of Kansas but I now reside in Oklahoma. Of course, I continue to pay Kansas income tax, ad valorem property tax, and so forth in connection with oil and gas production in Kansas.

By way of background, I have been actively employed in the oil and gas exploration business since 1969. I am a Certified Professional Landman, a member of the American Association of Petroleum Landmen and an associate member of the American Association of Petroleum Geologists. I have been qualified as an expert witness before the Kansas Corporation Commission.

It should be noted at this point that Douglas Energy Company is the owner of leases covering approximately 200,000 acres of deep rights in southwest Kansas, and that a portion of those leases representing roughly 56,000 acres are the subject of a lawsuit brought by Amoco (Standard Oil of Indiana) against Douglas Energy in the Federal Court, District of Kansas. Obviously, I am unable to testify as to any issues bearing directly on that pending litigation. Fortunately, that will not be necessary, since House Bill 2208, the "Deep Horizons" Bill, would effect only a procedural change in future legal actions brought by Kansas mineral owners, which procedural change is simply the shift of the "burden of proof" from the Kansas mineral owner/lessor to the oil company/lessee. Since in the Amoco v. Douglas Energy case, Amoco is the plaintiff, they have already assumed the burden of proof in that case. Therefore, this particular legislation will have zero effect on the present litigation.

ATTACHMENT 3

House Bill 2208, commonly referred to as "Deep Horizons" legislation, is primarily intended to remove the legal disability which Kansas mineral owners presently suffer when they try to protect their right to reasonable exploration by the oil company owning a lease on their minerals.

The legislation does not affect contractual rights in any way, but simply represents a procedural change in any litigation which may be initiated by the Kansas landowner against the oil company when the oil company has failed reasonably to explore under the lease. This is accomplished by shifting the "burden of proof" from the landowner, where it doesn't belong, to the oil company, where it does.

Explanation of Deep Horizons Legislation.

Section 6 of H.B. 2208 states:

> "This act shall not alter or affect substantive rights or remedies under any such mineral leases under the common law or statutes of the state of Kansas."

Therefore, the "Deep Horizons" Bill does not in any way interfere with contractual rights or oil and gas leases in force. Further, the legislation is so benign that it does not compel any lessee to explore where that lessee believes there is insufficient geological or economic merit. Rather, the legislation simply redresses what is now a severely unfair disadvantage suffered by the Kansas farmer-royalty owner when controversies arise with respect to whether the lessee oil and gas company has fulfilled its present legal obligations under the oil and gas lease to the mineral owner to prudently explore and develop.

The legislation does this simply by shifting the burden of proof from the lessor, as is the present case under the Kansas law, to the lessee, and then only after 15 years have elapsed since the shallow production commenced.

The legislation specifically excludes producing horizons and further excludes non-producing horizons above the deepest producing horizon. No present production or leasehold rights associated therewith are affected.

Why Is This Legislation Needed?

The Kansas mineral owner, whose oil and gas rights are being held by the oil and gas companies from the surface to the center of the earth by virtue of shallow production (established in many cases decades ago) and who is receiving very minimum royalty income, must sue to compel deeper exploration or to free the deeper horizons for exploration by others.

Under present law the mineral owners must bear the burden of proving in court that the present lessee has failed to explore the deeper horizons prudently. How does he do this?
He must do it through expert geologic and engineering testimony. He must offer into evidence exhibits such as subsurface structure maps, subsurface isopach (thickness) maps, porosity maps, geophysical interpretation, reservoir pressure studies, remaining reserves reports, pressure decline curves, production decline curves, and similar types of information.

Most Kansas royalty owners are small farmers. Even if they are willing to incur the expert witness fees and legal expense and they are able to find legal counsel sufficiently sophisticated to handle this very complex and technical case, it is virtually impossible for them to develop and secure that sort of evidence. How many Kansas farmers have geologists, petroleum engineers and economists on their payroll? Probably none. But the oil companies do, especially the major oil companies who concede in the press and before the Kansas Corporation Commission that they maintain these data and these studies on an on-going basis through the life of producing fields.

Therefore, the small individual Kansas farmer-royalty owner, in order to sustain the "burden of proof," must seek out independent consultants, geologists, engineers, and other oil and gas experts who are willing to testify on his behalf and who are experts in Kansas oil and gas.

The farmer must convince these consultants to help support his case with expert evidence and testimony. The problem, of course, is not only the cost of securing this

expert testimony but also the fact that these same independent experts depend upon the oil and gas companies for their own professional livelihood. Consequently, the small Kansas farmer-royalty owner often finds himself barred, de facto, from judicial relief.

The "Deep Horizons" legislation does nothing more than to shift the burden of proof from the small Kansas farmer-royalty owner where it doesn't belong to the oil and gas companies where it does belong and where the resources and the expertise to sustain that burden of proof are in place.

As you can see, no contractual rights are affected by this legislation. The present shallow production is excluded from the bill. The oil company, in our example, still can explore deeper if it chooses. It can "farmout" (sub-lease) the deep rights to others, if it chooses. It can release the deep horizons if it believes further exploration to be unwarranted. It can even choose to defend in court its failure to explore and produce by presenting expert evidence. This expert evidence is easily available to the oil company to prove it has complied with its obligation to explore and develop fully the lands covered by the oil and gas lease as provided by the terms of the lease and by the law.

It is also clear that the present state of the law aids oligopolistic practices, particularly of the international major oil companies which are sitting on hundreds of thousands of relatively unexplored acres in Kansas, and, therefore eliminating leasing or exploration competition as to those lands. This absence of free market competition results in lessened drilling and production activity in Kansas, since it effectively removes from potential exploration millions of acres, in the aggregate, of Kansas land representing the best potential for future discoveries of Kansas oil and gas.

Since the legislation will effect only a procedural, legal change and will have no substantive effect on present ownership rights of oil and gas leases, absent further legal action initiated by individual landowners and absent subsequent findings by a

court that the present lessee has in fact failed reasonably to explore under a lease, theoretically no increase in Kansas drilling activity would result. As a practical matter, however, it is very likely that many Kansas landowners, benefiting from the procedural restoration of their legal rights, will succeed in inducing substantial increased Kansas energy exploration.

While recognizing that the marked reduction in Kansas drilling activity in 1982 is the result of many factors, including the general economy, etc., one must also recognize that oil and gas exploration activity across the U.S. is still vigorous (Oklahoma had 351 rotary rigs operating as of 11/22/82; Kansas had 140 rigs operating as of the same date). Therefore, each state "competes" with each other state for the available exploration dollars. Consequently, as Kansas lands become more available for exploration, given the favorable economics of Kansas exploration, Kansas would attract an increasing share of available exploration dollars. Some general idea of what stimulative effect on Kansas drilling might result from landowners asserting their rights can be inferred by assuming that the legislation results in a return to 1981 exploration activity levels. Before reviewing this economic analysis, we must first examine the merit of the assertion by some that the lack of market demand is solely responsible for the absence of Kansas exploration activity.

Trusting that I have sufficiently demonstrated to you that the subject legislation is irrelevant to the Amoco litigation to which I referred, I would ask your indulgence to allow me to address the market demand issue by referring to the statistics which we have already gathered relative to exploration activity in southwest Kansas by Amoco over the last 35 year period. It is probably fair and reasonable to use the Amoco record for example purposes since their leasehold position in Kansas is so massive and since time does not allow a similar analysis, company by company.

While one could argue that present gas market demand is lower due to a temporary oversupply, it is general knowledge that the period 1973 (Arab oil embargo) through

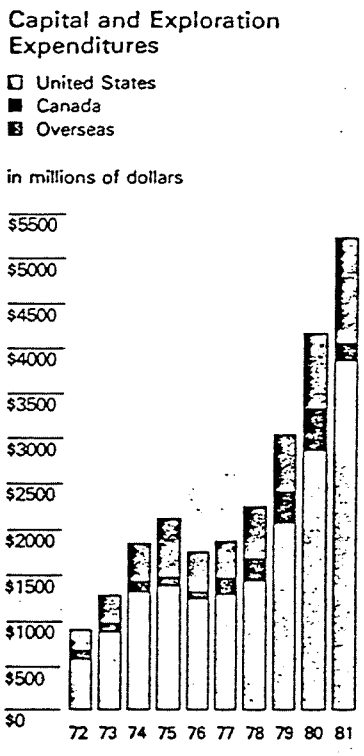
1980 constituted a period of high market demand, in excess of supply, unprecedented in U.S. history. All Kansas gas wells were producing at or near 100% of allowable. Curtailments were rampant. Governor Rhoades of Ohio travelled to other states, imploring producers to sell gas to Ohio users. Oil imports from OPEC reached a historical high and the price of energy escalated dramatically. The following table depicts Amoco's deep drilling activity in the nine (9) southwest Kansas counties during this period of unprecedented market demand:

*	Wildcats	Wildcat Discoveries	Development	All Wells
1973	0	0	0	0
1974	0	0	0	0
1975	0	0	0	0
1976	0	0	0	0
1977	1	0	0	1
1978	0	0	0	0
1979	0	0	1	1
1980	0	0	0	0
Total	1	0	1	2

* From Kansas Corporation Commission records.

This record speaks for itself. When viewed from the perspective of Amoco's holding by production from the very shallow gas zones over 500,000 acres of Kansas lands, with almost no drilling even of the lower risk development category, the relationship of strong or weak markets to deep drilling in Kansas by Amoco simply doesn't exist.

In fact, the inability of the market to stimulate exploration by Amoco and therefore the unquestionable need for the subject legislation is dramatically demonstrated by the Capital and Exploration Expenditures table printed in the 1981 Annual Report of Amoco (page 27). It is reproduced below for your convenience.



So, while Amoco was spending billions elsewhere in the United States, and in Egypt, Tunisia, Gabon, Oman, the United Arab Emirates, Argentina, Trinidad, Indonesia and the Phillipines; and while U.S. gas consumers, including Kansas individuals and industries, were clamoring for new domestic gas and oil, Amoco's response was to drill 2 wells below the shallow gas in southwest Kansas in 8 years.

If there exists overwhelming evidence that the present legal disability incurred by lessors in litigation brought by individual landowners to compel reasonable deeper exploration on their lands, it is contained in Amoco's own (published) record.

The recent record is little better. The same 1981 Annual Report discloses that Amoco's 1982 capital and exploration budget worldwide was $5.2 Billion, of which 72% (or $3.744 Billion) was allocated to the "search for and development" of new supplies of oil and gas; 60% (or $3.59 Billion) targeted for the U.S. Only five deep tests, for a total expenditure of less than $2 Million dollars was expended by Amoco drilling deeper in the nine (9) southwest Kansas counties. At this rate, one

can imagine how many more years and how many more generations of mineral owners will come and pass away before the balance of Amoco's 500,000 acres will be tested below the shallow gas zones.

Therefore, the public record irrefutably demonstrates that the decision to allocate available exploration funds is affected by variables which either ignore or diminish in importance the effect of present or immediate market demand. At this point, I would like to provide you with an economic analysis of what the possible impact of this beneficial legislation might be on the Kansas economy in general, and on landowners, farmers and Kansas consumers in particular.

(PASS OUT ECONOMIC IMPACT ANALYSIS)

With your cooperation, I would like to take you quickly through this analysis so that you can see the assumptions upon which the conclusions are based.

"DEEP HORIZONS" LEGISLATION
ECONOMIC IMPACT

I. Jobs.

Rotary Rigs Operating in Kansas *

11/22/82	11/23/81	Net Reduction
140	221	81

* (Source Hughes Tool-IADC)

81 rigs times 20 jobs per rig = 1,620 rig jobs.

A modest assumption is that at least one additional job in the support industries, such as supply companies, motels, trucking, etc., is created for each job on an operating rig. Therefore, legislation which would re-invigorate the Kansas drilling industry only to its 1981 level would create 3,240 new jobs in Kansas, both for skilled and unskilled workers.

II. Kansas Investment Stimulus.

Each rig operating in Kansas represents on average approximately $5,000 per day investment for payroll, supplies, equipment, etc.

$5,000 times 81 rigs = $405,000 per day

$405,000 per day times 360 days per year = $145,800,000 per year

If we assume that, on average, 1,280 acres (2 sections) is leased for each well drilled (generally, land surrounding a drillsite is also leased), and we further assume an average bonus to the landowners of $10 per acre and that the average Kansas rig will drill 20 wells per year, then:

81 rigs times 20 wells/year = 1,620 wells

1,620 wells times 1,280 acres/well = 2,073,600 acres

2,073,600 acres times $10/acre = $20,736,000 bonus income to Kansas landowners.

This 20 million dollars represents potential income direct to Kansas farmers, ranchers, and other Kansas mineral owners at the very time that virtually all farm commodities are selling at depressed prices, and farm foreclosures are increasing at an alarming rate.

Therefore, without taking into account any revenue from the oil and gas produced from these wells, a total of $167 million dollars each year could conceivably be returned to the Kansas economy from the stimulative effects of this legislation.

III. Tax Revenue.

Since oil and gas reserves which are undiscovered (or unproduced) generate little or no tax revenue, increased exploration activity promises to raise both county and state tax revenues dramatically.

If we assume that of the 1,620 wells, only 500 are successful and, assuming an ultimate recovery of 80,000 bbls of oil per well (converting dollar value of gas to dollar value of oil for this example), then

80,000 bbls/well x 500 successful wells/year will equal 40,000,000 bbls of new reserves (oil and gas equivalent)

40,000,000 bbls of new reserves x $32/bbl = $1,280,000,000 gross revenue value of reserves.

If we assume that county ad valorem tax represents the equivalent of a 3.5% tax on gross revenues, then Kansas county tax collections stand to be increased by $44,800,000.

$1,280,000,000 x .035 = $44,800,000

If Kansas enacts a 5% severance tax, then Kansas general tax revenues stand to gain $64 million dollars.

$1,280,000,000 x .05 = $64,000,000

For a total tax revenue increase of $108,800,000.

Please note that these figures represent only the pro forma increase in tax revenues, in addition to the tax revenues raised from existing producing wells. Further, these figures do not take into account the substantial increase in state income tax revenue.

IV. Impact on Kansas Gas Consumers.

The highest price at the wellhead for new Kansas gas is presently in the $3.25/MCF range. However, Kansas gas consumers will be paying an increasing share of a much higher price reflecting the pipeline companies "rolling in" to the Kansas rates a proportionate share of $5.00/MCF Canadian gas, $5 to $9/MCF Oklahoma gas and other higher priced gas from Wyoming and elsewhere outside of Kansas.

Therefore, while it is impossible to quantify, it seems very clear that Kansas gas consumers could realize a much slower rate of price increases for gas as a consequence of large new reserves of the less expensive new Kansas gas which would inevitably be discovered by the anticipated increase in drilling activity.

For oil as well as gas, the surest method of achieving price stability is to increase supplies. Recent experience with crude oil (and gasoline) prices demonstrates that prices fall with increased supply. New Kansas gas and oil supplies will affect Kansas consumers beneficially. This includes all categories of gas consumers, public utilities (and the resultant impact on their rate increases), irrigation gas consumers, large industrial and institutional users, such as schools, hospitals, factories, and each individual home owner.

I would like to comment very briefly on the issue of constitutionality of House Bill 2208, since I am advised that an innuendo is abroad in the land which suggests that the Kansas Legislature cannot be relied upon to draft legislation which does not violate the Kansas Constitution or U. S. Constitution.

I herewith provide the Committee with a memorandum of law prepared by Professor John Lungren of Washburn University School of Law, who coincidentally, among his other credentials, was formerly an attorney for Clark Oil and Refining Corp. and Standard Oil of Indiana (Amoco). I will not burden the Committee with reading Professor Lungren's memorandum of law, but I believe you will agree with his well researched conclusions that there is no constitutional impediment to this legislation.

Furthermore, all legislation may be tested for constitutionality in the courts. No one seriously suggests that all commercial business cease until every piece of local, state and federal law and regulation is finally tested for constitutionality in the courts. That would be tantamount to suggesting that the Kansas legislature pass no laws affecting business since there may someday, somewhere be some legislation on constitutional grounds. The Kansas legislature is very well capable of drafting constitutionally sound legislation which House Bill 2208 clearly is.

It is a long established practice in the oil and gas industry for different companies to explore and produce oil and gas from different wells into separate reservoirs at different depths which operations are conducted on the surface of a single landowner or lease. Every major oil company when it farms out (sub-leases) to another oil company for a test well restricts the depths to be earned by the company drilling the well either to those depths actually drilled or sometimes to those depths actually produced. This vertical separation of leasehold rights is the rule rather than the exception when oil companies deal with each other.

In conclusion, ladies and gentlemen, let me convey to you that my presence here as a witness in behalf of the legislation is the fulfillment of an obligation which I accepted publicly in a series of meetings with over 4,000 Kansas mineral owners in 1982, when I promised that irrespective of the impact specifically on me or my company I would do my best to bring to the attention of the Kansas legislature the need for this legislation.

I hope I have satisfactorily fulfilled that commitment.

In conclusion, the Kansas legislature has an opportunity by passing this legislation to right a wrong. Given that no expenditures by the state government would be required as a result of the "Deep Horizons" legislation and the very real beneficial economic impact potential to the Kansas economy, and to tax revenues, it is difficult to imagine any legislation which would be as economically beneficial and as cost efficient to Kansas as House Bill 2208, and I strongly urge its passage.

Thank you very much for your courtesy.

Attachment 4
2-14-83
House Energy and Natural Resources

WASHBURN UNIVERSITY OF TOPEKA
School of Law
Topeka, Kansas 66621
Phone 913-295-6660

February 14, 1983

Douglas Bendell, President
Douglas Energy Company
300 Lake Pointe Towers
4013 N.W. Expressway
Oklahoma City, Oklahoma 73116

Dear Mr. Bendell:

At your request I have prepared a memorandum of authorities regarding the constitutionality of H.B. #2208 (Deep Horizons). Please find attached my opinion regarding state of the law on this subject. Naturally, I have undertaken the assignment as a private attorney and specialist in the field of oil and gas law. The opinions expressed are my own and not as a representative of the Law School.

Respectfully submitted,

John H. Lungren
Associate Professor of Law

JHL:sh

Encl.

ATTACHMENT 4

MEMORANDUM OF LAW

This memorandum is in response to your request for an opinion regarding the constitutionality of proposed legislation known as "Deep Horizons" (House Bill #2208).

It will address three major issues:

(1) Theory and application of an implied covenant.
(2) Constitutional implications of House Bill #2208.
(3) Power of the legislature to change evidentiary presumptions.

The proposed statute establishes (in addition to express covenants contained in the mineral lease) an implied covenant to reasonably explore and develop. This obligation is imposed on the lessee. If passed, the Bill would create a set of criteria which would have to be met in order for an action at law to be commenced. Relief may be sought only when (1) no mineral production is present at the time of the action; (2) and initial oil, gas or other mineral production on the lease commenced at least fifteen years prior to the action.

If these criteria are satisfied then a rebuttable presumption will arise that the lessee has violated the implied covenant and breached the lease obligation. The proposed legislation allows the lessee to overcome the presumption by presenting clear and convincing evidence that oil and gas cannot be produced in paying quantities.

The purpose of this memorandum is not to delve into theoretical and public policy aspects surrounding the legislation but to present a clear understanding of the legal issues that may surface when the Bill is introduced.

I. Implied Covenants

Implied covenants have been defined as obligations imposed upon lessees which are derived from the intent of the parties and implied in fact. Generally, five separate covenants are recognized. They require the lessee (1) to protect the leasehold from drainage; (2) to reasonably develop the premises; (3) to produce and market the product; (4) to conduct surface and drilling operations with due care; and (5) to explore and develop further. This latter covenant is recognized by many states, which refuse to allow a lease in its secondary term remain in effect indefinitely without further exploration and development. [See generally Meyers, "The Covenant of Further Exploration, 34 Tex. L. Rev. 553 (1956)].

The application of the implied covenant for exploration and development was sustained in Stamper v. Jones, 188 Kan. 626, (1961) at 631 where the court held:

> A lessee, under the implied covenant to develop an oil and gas lease is required to use reasonable diligence in doing what would be expected of an operator of ordinary prudence, in the furtherance of the interests of both the lessor and lessee.

Current case law places the burden of proof required to enforce the covenant upon the lessor. Determination of breach depends upon a number of factors which include: (1) length of time elapsed since last drilling operations were conducted; (2) size of the tract; (3) number of wells drilled; (4) location of wells; (5) depth of horizons tested; (6) cost of exploration in addition to expenditures already made by the lessee; (7) degree of probability of success; (8) activities by the operator in the area relating to exploration; and (9) willingness of another operator to drill. Barry v. Wondra, 173 Kan. 273 (1952).

In Kansas the doctrine is well established that a lessee is required to meet a standard of reasonable diligence (i.e., doing what would be expected of an operator of ordinary prudence), in furthering the interests of both lessor and lessee. The covenant is not negotiable by the parties but is imposed by law upon every oil and gas lease agreement. Consequently there is no lease agreement in existence that is not governed by implied covenants. Renner v. Monsanto Chemical Co., 187 Kan. 158 (1960); Skinner v. Ajax Portland Cement Company, 109 Kan. 72 (1921); Fischer v. Magnolia Petroleum Company, 156 Kan. 367 (1943).

The tradition of implied covenants sustained by judicial interpretation may change because of the action of the legislature in developing new criteria for the establishment of the implied covenant for exploration and development.

II. Constitutional Implications

The legislative presumption that an implied covenant is part of any lease undertaking (combined with the shift of the burden of proof from lessor to lessee) produces a concern regarding impairment of contract obligations in contravention of the federal constitution. Article I § 10 of the U.S. Constitution provides in part "no state shall . . . pass any law impairing the obligations of contracts." It therefore must be determined if proposed House Bill # 2208 would "impair" the contractual agreement of the lessor and lessee under a mineral lease.

The Courts have experienced difficulty in determining what is meant by "impairment" of contract. One interpretation that has been given credence is found in Northern P. R. Co. v. Miss., 208 U.S. 583 (1908) and Bernheim v. Converse, 206 U.S. 516 (1907) where it was said an impairment of the obligation of a contract is present if legislation alters the terms of the contract by the mandating of new conditions, or substantially changing conditions currently expressed in the contract. Contracts, however, are not immune from legislative modification, limitation, or alteration as long as the substantive rights of contracting parties are not violated. Honeyman v. Jones, 306 U.S. 539 (1939); Henley v. Jones, 215 U.S. 273 (1910); Watkins v. Glenn, 55 Kan. 417 (1895).

Older decisions of the United States Supreme Court seem to suggest any impairment of contract obligations is within the protection of the contract clause without due regard to the quantum of interference with the substantive provisions of the contract. Walker v. Whitehead, 83 U.S. 314 (1872); Von Huffman v. Quincey, 71 U.S. 535 (1866). Current cases however modify this stern stance - suggesting that the law (enacted under the police power of the state) must impose a substantial impairment of a contractual relationship to constitute an impermissible breach of contractual obligations. See Allied Structural Steel v. Spannaus, supra. See also El Paso v. Simmons, 379 U.S. 497 (1965).

The constitutional prohibition against state legislation "impairing the obligation of contracts" has not been given unlimited application which might make it destructive of the public interest. Modern Supreme Court decisions hold that the test of state legislation (alleged to have altered contractual obligations of private parties) is whether such

character appropriate to the public purpose which prompted its adoption. If the legislation is necessary and reasonable and the public purpose is served the contract impairment does not occur. It appears that the court determines reasonability by equating factors of severity of restrictions, impact on contractual provisions, scope and applicability of the legislation, and the urgency of the public need. Allied Structural Steel v. Spannaus, supra; Home Building and Loan Assn. v. Blaisdell, 290 U.S. 398 (1933) - see generally 88 A.L.R. 1-81; Veix v. Sixthward Building and Loan Assn., 310 U.S. 32.

A recent case involving the contract clause was United States Trust Company v. New Jersey, 431 U.S. 1 (1976), wherein the court indorsed the view that language of the contract clause must allow room for the essential attributes of sovereign power necessarily reserved by the States to safeguard the welfare of their citizens. The court established boundaries of interference stating at page 22:

> The states must possess broad power to adopt general regulatory measures without being concerned that private contracts will be impaired, or even destroyed as a result. Otherwise, one would be able to obtain immunity from state regulation by making private contractual agreements.

The court also defined the limitations of legislative influence stating:

> Although the states must possess broad power to adopt general regulatory measures without being concerned that private contract will be impaired or even destroyed as a result, private contracts are not subject to unlimited modification under the states' police power for purposes of the contract clause of the United States Constitution (Art I, § 10, cl 1), (prohibiting state impairment of contract obligations); legislation adjusting the rights and responsibilities of contracting parties must be upon reasonable conditions and of a character appropriate to the public purpose justifying its adoption, but, as is customary in reviewing economic and social regulation, courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure.

See head note 13, 52 L.Ed.2d at page 95.

In order to determine if proposed House Bill #2208 is violative of the contract clause we must inquire as to whether this legislative act impairs the substantive agreements between the parties.

The most recent case in Kansas dealing with the right of the state to adjust responsibilities of the contracting parties in Energy Reserve Group, Inc. v. Kansas Power and Light Company, 230 Kan. 176 (1981). The Kansas Supreme Court based an interpretation of constitutionality on a liberal determination of whether the state legislature should be deprived of representing the public interest by a narrow construction of its police power. Using Allied Structural Steel Company v. Spannaus, supra, the Kansas court stated on page 186:

> The constitutional bar against state legislation 'impairing the obligation of contracts' has not been given literal, unconditional application, making it destructive of the public interest by depriving the states of appropriate powers such as the right to impose price controls.

The court decided that the validity of state legislation that alters contractual terms entered in between private parties must be solely dependent upon whether the legislation is based on reasonable conditions appropriate to the public purpose and is of a nature so related to the public interest that its adoption is justified.

In reviewing economic and social legislation against challenges of the contract clause the Kansas court deferred to the legislature's judgment of the necessity and reasonableness of a particular measure.

Even without a presumption of reasonableness and necessity, House Bill #2208 represents legislation adjusting the rights and responsibilities of contracting parties using reasonable conditions which are of a character appropriate to public policy - Allied Structural Steel, supra; United States Trust Co. v. New Jersey, supra; and Home Building and Loan Assn. v. Blaisdell, supra.

The Kansas court has discharged its function by prescribing a standard of legitimate public purpose thus confirming the obligation of the legislature to the public.

As an example of its extreme reluctance to declare acts of the legislature unconstitutional the Kansas Court

in Manhattan Buildings, Inc. v. Hurley, 643 P.2d 87 (1982) at page 97, stated:

> Statutes are, of course, presumed to be constitutional, all doubts must be resolved in favor of validity, and before a statute may be stricken down, it must clearly appear that the statute violates the constitution.

Again, in State ex rel Stephan v. Martin, 641 P.2d 1020 (1982) at page 1022, the court stated:

> It is court's duty to uphold a statute under constitutional attack if possible, rather than defeat it and if there is any reasonable way that statute may be construed as constitutionally permissible, that should be done.

It therefore becomes evident that the court, while respecting the right to contract, will not unduly restrict the legislature in its endeavor to serve the public interest.

III. Evidentiary Presumptions

The second major concern surrounding House Bill # 2208 is then placement of an evidentiary presumption upon the lessee. Current cases arising from allegations of implied covenant breach, have unanimously held that when an action is initiated, the burden is on the lessor (asserting breach) to prove it in court. If the purposed statute is passed it would have the effect of overriding a substantive amount of case precedent. Hence the power of the legislature to act in this manner may be questioned.

29 Am. Jur. 12 says:

> It is within the power of a legislative body to shift the burden of proof in civil cases . . . . There is no valid objection to converting the burden of proof from a procedural presumption to a statutory rule of substantive law.

The Kansas Supreme Court as well as the U.S. Supreme Court has freely acknowledged the legislature's power to create evidentiary presumptions when the need arises. A Kansas legislative presumption, substantially identical in nature to the one created in the proposed bill was approved by the U.S. Supreme Court in Reitler v. Harris, 223 U.S. 437, 56 L.Ed. 497, 32 S.Ct. 248 (1912). The court stated:

> [T]he plaintiff . . . brought the case here upon the contention . . . that the statute of 1907 impaired the obligation of his contract, and therefore was violative of the contract clause of the Constitution of the United States.
>
> In our opinion, the contention cannot be sustained. The plaintiff's rights arising out of his contract were in no wise impaired by the statute of 1907. It did not interpose any obstacle to their assertion by him and neither did it leave him without a suitable remedy for their ascertainment and enforcement. If the attempted forfeiture was invalid before, it continued to be so thereafter. The statute dealt only with a rule of evidence, not with any substantive right. By making the entry of forfeiture upon the official record prima facie, but not conclusive, evidence that all preliminary steps essential to a valid forfeiture were properly taken and that the forfeiture was duly declared, it but established a rebuttable presumption, which he was at liberty to overcome by other evidence. That such a statute does not offend against either the contract clause or the due process of law clause of the Constitution, even where the change is made applicable to pending causes, is now well settled . . . . [citing cases].
>
> It was because the plaintiff failed to assume and carry the burden of overcoming the rebuttable presumption established by the statute that he failed in his action.

223 U.S. at 441-42; 56 L.Ed. at 500.

Another Kansas case recognizing this principle is In re Estate of Ward, 176 Kan. 614, at 616, where the court said "it is well settled that the legislature has some power over the rules of evidence and it has power to prescribe new and alter existing rules, or to prescribe methods of proof." In criminal and civil actions, the Kansas court has altered the burden of proof. See State ex rel v. Public Service Comm., 135 Kan. 491 (1932); Richardson v. Soldiers Compensation Board, 150 Kan. 343 (1939); and Marx v. Hanthorn, 148 U.S. 172, 181-182, 13 S.Ct. 508, 37 L.Ed. 410, 413 (1893).

It should be noted that the change in evidence prescribed by the proposed bill only affects the contracting parties after a law suit has been initiated. The legislative intent of House Bill #2208 is clearly expressed in § 5 wherein it is stated that "the act shall not alter or affect substantive rights or remedies under such mineral leases."

Therefore neither party is released from any duty or obligation expressed or implied.

It might be contended that the legislature (by changing an evidentiary presumption) has violated the doctrine of separation of powers. This doctrine provides that one branch of government shall not interfere with the powers of another. It is well settled that the courts have fully recognized the rights of the legislature to alter burdens of proof. As a result the legislature has gained the power to change evidentiary presumptions which "but for" the courts approval, would remain within the judicial branch. As was stated earlier, the courts have realized the efficacy of allowing legislatures the freedom to make laws which are in the best public interest. This is clearly not a violation of the doctrine of separation of powers, but is simply a recognition by one branch of government that another branch is more expeditious in providing remedies to public concerns. See generally State ex rel. v. Bennett, 219 Kan. 285 (1976); Leek v. Theis, 217 Kan. 784 (1975), and Van Sickle v. Shanahan, 212 Kan. 426 (1973).

It would appear that legislative recognition of an implied covenant to explore and develop as a condition of a mineral lease does not destroy the obligations of contracting parties. Close scrutiny of available legal precedents demonstrate the likelihood that that proposed action would not impair rights of contracting parties (Article I Section 10 U.S. Constitution).

It would further appear that the legislature by establishing an evidentiary presumption would not be acting in derogation of its designated authority. The legislature has been endowed with the power to change evidentiary presumptions. This concept has been adopted by numerous judicial decisions.

As discussed in this memorandum it is improbable that the legislation would suffer a constitutional disability.

Respectfully submitted,

John H. Lungren

JHL:sh