Approved 4-8-86
Date

MINUTES OF THE HOUSE COMMITTEE ON FEDERAL & STATE AFFAIRS

The meeting was called to order by REPRESENTATIVE ROBERT H. MILLER
Chairperson at

1:30 a.m./p.m. on April 7, 1986 in room 526S of the Capitol.

All members were present except:
Representative Jayne Aylward

Committee staff present:
Lynda Hutfles, Secretary
Mary Torrance, Revisor's Office
Russ Mills, Research

Conferees appearing before the committee:
Representative Steve Cloud
Marjorie VanBuren, Judicial Administration
Randy Hearrell, Judicial Council
Representative Shore
Larry Kepley, Southwest Kansas Irrigators Association
Paul Fleener, Kansas Farm Bureau
Randy Shore, Southwest Kansas Irrigation Association
Dick Brewster, Amoco Production Company
Bill Bryan, Cities Service Oil & Gas
Jack Glaves, Anadarko
Dick Randall, Petroleum, Inc.
Kirby Vernon, Kansas Corporation Commission

The meeting was called to order by Chairman Miller at 1:00.

Representative Ramirez made a motion, seconded by Representative Sughrue, to approve the minutes of the April 2 meeting. The motion carried.

Representative Grotewiel made a motion, seconded by Representative Gjerstad, to introduce as a committee bill a proposal by Representative Fox concerning utilities which prohibits the inclusion of a surcharge for research & development in the rate base. The motion carried.

HB3140 - Judicial Council, relating to membership

Representative Steve Cloud gave testimony in support of the bill which creates a judicial council which shall be composed of one justice of the Supreme Court, one judge of the court of appeals, two district judges of different judicial districts, four resident lawyers, the chairperson of the judiciary committee of the senate and one nonattorney. The nonattorney member shall be appointed by the Governor.

Marjorie VanBuren, Judicial Administrator, suggested an amendment which would make the nonattorney serve the same term as the governor who appoints the member.

Randy Hearrell, Judicial Council, gave testimony in support of the bill and gave some background on the Judicial Council and its function. The judicial council has worked on large bill drafting problems and undertaken studies that the legislature could not because of the time or the indepth study required. Mr. Hearrell was also in support of the bill.

Hearings were concluded on HB3140.

HB3141 - Natural gas; infill drilling
HB3143 - Infill drilling; maximum price of gas for agricultural users

Representative Shore explained HB3141 which relates to the ongoing damage to growing crops and due to the normal and prudent operation of the gas well drilled under KCC allowing infill drilling of the Hugoten gas field. The legislation only pertains to nine counties in Southwest Kansas. The bill calls for a 1/32 of production to be paid to the surface owner prior to

any other deductions. This bill is fair, local and necessary for not only compensation for damages, but will help with public relations as infill drilling becomes a reality. See attachment A.

Larry Kepley, Chairman, Southwest Kansas Irrigators Association, gave testimony in support of the bills. HB3141 gives the landowner a 1/32 of the total production from the producers for ongoing payment for damage to soil and growing crops for normal operation of the gas well as more wells are drilled and as field preserves go down there is a need for more gas producer operation traffic, roads, valves, tanks, etc. to be installed on the land surface. HB3143 addresses the need for reasonable price protection to agricultural natural gas users. See attachment B.

Paul Fleener, Kansas Farm Bureau, gave testimony in support of HB3143.

A statement supporting HB3141 by Sam Forrer of Ulysses (who was unable to attend the meeting) was distributed. See attachment C.

Randy Shore, Board member of the Southwest Kansas Irrigation Association, gave testimony in support of HB3143 which if passed in its present form would help make the infill drilling ruling a fair and equitable decision. See attachment D.

Dick Brewster, Amoco Production Company, gave testimony in opposition to HB3141 and HB3143. He discussed a mineral lease - its terms and conditions and the difference between a mineral owner and a surface owner. HB3141 attempts to give the present surface owner something he or she did not buy when the land was bought and takes from the produce and the royalty owner somtthing they bargained for. This bill is unfair and probably unconstitutional. Mr. Brewster spoke in opposition to HB3143. This bill specifically states that the irrigator, or grain dryer, may purchase gas at the contract price of the original well on the lease. In the case of a stripper lease, this bill would force a higher price than otherwise might be available. See attachment E & F.

Bill Bryan, Cities Service Oil & Gas, gave testimony in opposition to HB3141 and HB3143, saying they are both unconstitutional. A better solution is to allow a continued cooperative relationship between the producers and the irrigators. Cities Service is in the business of producing and selling natural gas, and as long as such sales are both practical and legal, wer are happy to have the agricultural market. See attachment G.

Jack Glaves, Anadarko, gave testimony in opposition to the bills and distributed a brief filed by the Southwest Kansas Royalty Owners Association, with the KCC. The royalty owners told the commission there was no way the Commission could violate contracts and the legislature cannot do this either See attachment H.

Dick Randall, General Counsel for Petroleum, Inc., gave testimony in opposition to the bills. He told the committee he felt the bills were unconstitutional and interfere with the economics of producing Kansas natural gas by increasing fixed costs to the lessee risk-taker. Petroleum, Inc. operates oil and gas leases in 13 midwestern states from Louisiana and Texas in the South, to North Dakota and Montana in the North. None of these states interfere with oil and gas lease contracts by giving the surface owner a share of oil and gas production as compensation for surface damages. See attachment I.

Kirby Vernon, Kansas Corporate Commission, distributed a handout of exerpts from a brief filed with the Commission by the Southwest Kansas Irrigators Association. See attachment J.

The meeting was adjourned. The remaining conferees in opposition would be heard on Tuesday.

STATE OF KANSAS

EUGENE L. SHORE
REPRESENTATIVE, 124TH DISTRICT
GRANT, W. HASKELL, MORTON,
STANTON AND STEVENS COUNTIES
ROUTE 2
JOHNSON, KANSAS 67855
(316) 492-2449

TOPEKA

HOUSE OF
REPRESENTATIVES

COMMITTEE ASSIGNMENTS
MEMBER COMMUNICATIONS, COMPUTERS AND TECHNOLOGY
PENSIONS, INVESTMENTS AND BENEFITS
TRANSPORTATION
KANSAS WATER AUTHORITY

HB 3141

HB 3141 is a bill which relates to the ongoing damage to growing crops, and soil due to the normal and prudent operation of the gas well drilled under the KCC order allowing infill drilling of the Hugoton gas field. It would not be payment for the extraordinary damage associated with the drilling activities, or the trenching to pipe the gas away from the well, or the large areas of damage associated with fracing or other major damage causing activities.

The legislation as proposed in this bill would pertain to only nine counties in Southwest Kansas, five of which are in the 124th. Legislative District, making it a local bill. The effects of this legislation would not affect the rest of the state in any way, shape or form.

The bill calls for a 1/32 of production to be paid to the surface owner prior to any other deductions. The reason for this is it would thus be considered a cost of production to the producer just as gas which is blown into the atmosphere when salt water is collected to be disposed of. The producer does not pay royalty or taxes, etc. for other production costs, so he shouldn't for necessary compensation for damage caused in normal operations. The figure 1/32 is arbitrary, ~~in some instances,~~ in some instances it may be high, in others it will be low, depending on the purposes, and use of the surface of the land covered by the lease. If we were only talking pasture land, we could settle for less. However, for an irrigated farm, the damage can be tremendous, many times requiring redesigning of the farm plan. Almost any change with irrigation involves extensive use of labor, equipment, and pipelines to get the water where it can be applied in an efficient manner. The same is true whether you use a pivot system and have to build ramps for the system to cross over the gas production equipment,

H. F&SA
4/7/82

ATTACHMENT A

or flood irrigation where you must use pipe to go around the production equipment. I have seen studies which show it costs about $200 per year to farm around one electric pole under normal farming practices. It is much more if you have to arrange your irrigation to allow for roads and equipment of an additional gas well.

The major producers will undoubtedly argue that this legislation would be an abrogation of their contract or lease, and that they should have contract sanctity. This legislation in no way affects their lease or contract, it simply sets out an amount and method whereby damage will be paid. Currently damage many times must be ignored by the surface owner or he must sue to collect for it. The last damage I collected for cost $3500 in attorney fees, so if the damage isn't substantial, the farmer usually absorbs the damage which certainly isn't the way it should be. Probably the closest analogy to allowing infill drilling without this legislation would be the stripping of helium gas from the natural gas and claiming no royalty was owed on that value. That suit took 20 years, and made wealthy people of many attorneys. We can hopefully avoid a repeat of this lengthy and costly process with this legislation.

I urge you to recommend HB 3141 to the full house favorably. It is fair, local, and necessary for not only compensation for damages, but will certainly help with public relations as infill drilling becomes a reality.

A

Session of 1986

HOUSE BILL No. 3140

By Committee on Federal and State Affairs

4-2

AN ACT concerning the judicial council; relating to membership and duties; amending K.S.A. 20-2201 and 20-2203 and repealing the existing sections.

Be it enacted by the Legislature of the State of Kansas:

Section 1. K.S.A. 20-2201 is hereby amended to read as follows: 20-2201. A judicial council is hereby established and created which shall be composed of one justice of the supreme court, one judge of the court of appeals, two district judges of different judicial districts, four resident lawyers, the chairperson of the judiciary committee of the house of representatives, ~~and~~ the chairperson of the judiciary committee of the senate *and one nonattorney*. All members except the chairpersons of the senate and house judiciary committees *and the nonattorney* shall be appointed by the chief justice of the supreme court ~~for a term~~. *The nonattorney member shall be appointed by the governor and shall serve the same term as the governor who appoints the member.* *All appointed members shall serve for terms* of four years and until a successor ~~shall have been~~ *is* appointed and qualified.

The terms of the chairpersons of the senate and house judiciary committees, and all other members, shall terminate upon such member ceasing to belong to the class from which such member was appointed. ~~All vacancies except those of chairpersons of the senate and house judiciary committees shall be filled by appointment by the chief justice~~ *Any vacancy in an appointed member's position shall be filled* for the unexpired term *in the same manner as the original appointment*. Upon vacancy, the places of the chairpersons of the senate and house judiciary committees shall be filled by their successors as such chairpersons.

Sec. 2. K.S.A. 20-2203 is hereby amended to read as follows:

HOUSE FEDERAL & STATE AFFAIRS
COMMITTEE

Representative Bob Miller, Chairman
April 7, 1986

Presented by:

Larry R. Kepley, Chairman
Southwest Kansas Irrigation Association
Legislative Committee
Route 2, Box 127, Ulysses, Kansas

ATTACHMENT B
H. FLSA
4/7/86

Mr. Chairman and Members of the Committee:

I am Larry Kepley, an irrigation and dryland farmer from Ulysses, Kansas. I am appearing on behalf of the Southwest Kansas Irrigation Association and farmers in the Hugoton Natural Gas Field. It represents farmers, landowners, and allied agriculture business members who use about 9800 irrigation wells in the 22 Southwest Kansas counties.

The majority of these irrigation wells use natural gas from the vast Hugoton Field to pump water. Irrigation and the development of the Hugoton Natural Gas Field have a common history that will be severely threatened by the infill drilling that has been allowed by the Kansas Corporation Commission unless House Bills No. 3141, 3142 and 3143 are passed.

I appear as a Proponent on behalf of passage for all of these House bills. The Southwest Kansas Irrigation Association has watched very closely the efforts of those producing gas companies who have asked and have received permission to infill drill. We asked for the provisions outlined in House Bill No. 3141, 3142 and 3143 to be a part of the producing companies request order, and/or a part of the Corporation Commissions grant order. Since neither of our requests were honored and in both cases the parties being requested by us, felt that legislation would be necessary to approve these measures, we appear before you today.

Southwest Kansas is a "multa-faceted economic diamond". It has irrigation farming that depends in large part on natural gas as an energy source that is assessable at reasonable rates and terms. The multiple beef feedlots depend upon the irrigated feed supply.

The large volume beef packing plants are there because of the fat cattle supply. Almost all citizens individually and collectively in the 22 counties share in the interrelated benefits of the marriage of natural gas and irrigation in Southwest Kansas. I need not remind you of the positive tax revenue that flows from this area to many of the other 83 counties of the state of Kansas that helps pay for state school support and other public benefit.

House Bill No. 3141 gives the landowner a 1/32 of the total production from the producer for ongoing payment for damage to soil and growing crops for normal operation of the gas well as more wells are drilled and as field pressures go down there is a need for more gas producer operational traffic, roads, valves, tanks, drips, markers, etc. to be installed on the land surface. Because of the space this equipment occupies (and no crops can grow), the dangers, and extra cost of farming around them we believe at least the 1/32 of the production should be paid the landowner. A 1/32 to 1/16 payment is not uncommon in other states (Colorado, North Dakota, Montana, Oklahoma, and Nebraska) and current Kansas leases.

House Bill No. 3143 addresses the need for reasonable price protection to agricultural natural gas users. It is commonly assumed that the infill drilled wells will command "New Gas" price which may exceed by twice "Old Gas" price. No one knows for sure what the infill gas wells price will be, but it is safe to assume that a major impetuous of the producing companies is the belief that the infill wells will be able to be produced at a higher price per MCF than older Hugoton Field wells.

We feel that those farmers like myself who are paying as much as nine times the price per million BTU now as they did 12 years ago can not stand any additional natural gas price increase due to a "legislated" decree that a BTU from a new gas well drilled in 1987 should be worth more than a BTU from an old gas well drilled in 1948. Our members fear that the producing companies may either by order or by allowing old wells to become stripper wells will make it necessary for farmers to use from the infill wells producing higher priced gas. House Bill No. 3143 would protect farmers in the Hugoton Field to the extent that their present contract would be transferable to the infill gas.

House Bill No. 3142 is favored by the Southwest Kansas Irrigation Association because it clearly defines a practice that we feel is reasonable and in fact is approved by some producing companies, but not all. It would allow farmers to use natural gas across producer boundry lines for contract purposes. This makes good economic sense where hookups and extra gas lines by the farmers can be reduced and a cost savings realized.

I or any of the other Southwest Kansas Irrigation Association members present will be happy to respond to any questions you may have dealing with our support of House Bills No. 3141, 3142, & 3143.

Thank you for allowing us to appear before you and we appeal to you for an early and favorable vote on behalf of Southwest Kansas farmers.

TESTIMONY GIVEN BEFORE

HOUSE COMMITTEE ON FEDERAL & STATE AFFAIRS

ON HB 3141

BY H. SAMUEL FORRER, PRESIDENT

THE GRANT COUNTY STATE BANK

ULYSSES, KANSAS

Chairman Miller, Vice Chairman Vancrum, and members of the committee, I thank you for this time to express my opinion of HB3141. I am Sam Forrer, President of The Grant County State Bank in Ulysses, Kansas.

The term "extraordinary damage" is defined in the above bill. That damage is obvious to any onlooker while a well is being drilled or the activities for completing that well are in progress. Those are real and are extraordinary. Not so obvious, but just as real, is the damage caused by normal operations of gas wells as it relates to farm production. This Bill deals with compensation to the farm producer for those on-going costs and damages.

At the present time, there is a high degree of cooperation between the farm operator and the gas producers in performing their respective tasks. However, the mere presence of a gas well does cause additional operating expense and damage on a continuing basis in the care and handling of both the soil and the crop. The well forces a farmer to alter his farming operaions. This causes increased crop losses, increased insect damage, diminished efficiency and diminished production. The mere presence of a well causes reduced crop production. Those damages should be compensated.

You are all aware of the severe economic stress in the agricultural sector. Our Bank is encouraging tenant farmers to renegotiate their farmland leases to a lower rent as one means of surviving. Compensation for these damages would also be of assistance in surviving to the owner-operator

H. F.J.S.A
4/7/86

ATTACHMENT C

and as a pass-through to the tenant. An infill well is an operating expense to the farm operator. It cannot be ignored. It cannot be added to the present economic burden of the farmer operator. This Bill will help address the economic loss that is suffered by the presence of a well.

The damages are real. I respectfully request your favorable action on this bill without amendment.

D

TESTIMONY - RANDY SHORE
FEDERAL AND STATE AFFAIRS COMM.
APRIL 7, 1986

I am Randy Shore, I am a farmer, board member of the Southwest Kansas Irrigation Association, and a land owner from which there is production from the Hugoton gas field. I have spent my entire life in the midst of an economic system of irrigated agriculture and gas production balanced by lease contracts protecting the interest of all Southwest Kansas. I am here today to support a bill which will help keep that economic system balanced upon the beginning of infill drilling.

In the years that followed the original proration order, property owners, mainly farmers leased their mineral interest to production companys. In the negotiation of these leases the interest of gas production and of agriculture were compromised and finally protected by signature of a lease.

Both industries have proposed, as has the economics of the entire state, as a result of fair negotiated protection to both parties of Hugoton gas leases.

Since the original order was given forty years have passed and many factors have changed. Production companys have applied for and been granted infill drilling to compensate for changes in their industry.

It is obvious that agriculture is equally dynamic as the gas industry. However, the approval of infill drilling by the KCC without stipulation for renegotiation of leases leaves agriculture of Southwest Kansas locked into an obsolete and very bleak committment on the other side of an updated contract.

When the original production order was given the leasing process assurred all parties a fair shake in relation to the times. With infill drilling it does not appear the land owner will be given the opportunity to protect his interest directly through negotiation with the production company. For that reason it is absolutely necessary for the Kansas legislature to take action to protect land owners interest prior to the onset of infill drilling.

Since infill drilling was first proposed, I have feared it's affect on the cost of irrigation gas. If I would have been allowed to re-negotiate a lease for drilling of an infill well, price of agricultural gas would have been protected if I were to sign the lease.

H. FJSA
4/7/86

ATTACHMENT D

Using only the arguments of petitions for infill drilling,the opportunity of manufa cturing stripper wells out of old Hugoton wells is obvious.

"The infill wells will produce at far greater pressure". They will be plumbed together with the lower pressure old wells. The increased pressure from the infill wells will raise the pressure of the entire gathering system, thus lowering the production capability of the old wells.With this lowered capibility many more old wells will be manipulated into stripper classification.

The new gas from infill wells at an estimated cost of $2.50/mcf will not be feasible for irrigation nor will $4.50 stripper gas.

One irrigator in our area using $4.50 gas spent $33 per acre to water nis wheat one time. I personally operate a farm that it's irrigation fuel cost $2.50. This year it cost $19 per acre to water my wheat one time. Both my neighbor and myself use the most efficient techniques and equipment available so these figures may be lower than average. However, compare these figures with the $6 per acre it cost to water with .50 cent gas and you should see the reason for our concern.

Most years wheat will be irrigated 3 times. I raise 700 acres of wheat that is watered with Hugoton well head gas. Under the terms of a lease signed, protecting my interests I can presently irrigate that 700 acres for approximately $12,500 fuel expense per year.

If legislation is not taken to protect agriculture interests. evolving from infill drilling, production companys would not only be allowed to excell in their endeavors but would also have the right to put me and many others out of business. I could ultimately have the decision of spending $40,000 for irrigation fuel on my wheat crop using $2.50 new gas; or spending $69,000 to do so on $4.50 gas. My right to a $12,500 fuel bill would be lost in the technicalities of infill drilling.

Using a 50 bu. average wheat yield and $3.00 per bushel wheat, 700 acres of wheat will gross $105,000. Using these figures and those previously mentioned, irrigation fuel cost would consume 38% to 66% of the entire gross revenue from the crop. Any agricultural banker will attest to the fact the 12% of the gross income from a wheat crop watered with .50 cent gas does not leave most farmers with much profit.

I was very dismayed when a production company representative referred to irrigators as "just another special interest group". However, when he made that statement it opened my eyes to the idea that legislators and others could perceive us as just that. I want to strongly stress the fact that land owners are the very foundation of the production phase of natural gas. Even in today's world of severed minerals, in most cases, the land owner owns the mineral and has merely leased their interest for valuable consideration. It is imperative for House Bill 3143 to be passed. Not only will it preserve the value of land owners contractural consideration but it will also reaffirm the ownership of mineral interest.

The bill proposed, allowing an irrigator to use a blended supply at the old price, if passed in it's present form would help make the infill drilling ruling a fair and equitable decision.

Statement to:

Kansas House Committee on Federal and State Affairs

Re:

House Bill No. 3141

April 7, 1986

By:

E. Richard Brewster
Government Affairs Representative
Amoco Corporation
800 Jackson Suite 1416
Topeka, Kansas 66612
(913) 233-5532

H. FISA
4/7/86

ATTACHMENT E

Mr. Chairman, Members of the Committee, my name is Dick Brewster, and I am a Government Affairs Representative for Amoco Corporation. I appear today on behalf of Amoco Production Company, the exploration and production subsidiary of Amoco. We oppose House Bill 3141, and I appreciate the chance to take a few minutes to tell you why.

I want to talk about a mineral lease, its terms and conditions, and then about the difference between a mineral owner and a surface owner, so that we can better understand what this bill attempts to to.

A mineral lease is a written agreement which allows the lessee the right to enter upon the property owned by the lessor and, in a reasonable manner, extract minerals which might be found under the surface of the land. In exchange for the right of ingress and egress, and the right to use whatever portion of the surface is reasonably necessary, the mineral owner, or lessor, is granted a portion of the recovered minerals.

Years ago, when title to land was first granted, that title included both the surface and mineral rights. But, through the years, that has changed. Now, we find many cases in which the mineral rights and surface rights have been severed. The mineral owner, who has leased the mineral production rights to Amoco, or some other producer, may have sold the surface rights to someone else. So, the surface owner may be someone entirely different from the mineral owner who is the party to the mineral lease. The deed which conveys surface ownership of land, but which reserves to the seller of the land the mineral rights, contains some provisions which you should know about. Essentially, those provisions advise the buyer that he or she is not getting the mineral rights, and the conveyance of the surface of the land is subject to the provisions of the mineral lease.

My point is simply this: when I buy property, and the mineral rights are specifically reserved to the seller and the property is subject to an existing mineral lease, I know what I am getting. Presumably, I am getting the surface at a price below what I would have to pay if I bought the mineral rights too. I am indeed getting the benefit of the bargain. And, I have notice that my surface is subject to the terms and conditions of the existing mineral lease, or any subsequent lease granted by the mineral owner. The situation is not unlike buying property subject to certain restrictive covenants. Such restrictions run with the land, and the buyer of the property has full knowledge of what he or she is and is not getting.

What **House Bill 3141** attemps to do is give the present surface owner something he or she did not buy when the land was bought. And, it takes from the producer and the royalty owner something they bargained for. It is not unlike buying a new Ford without a radio at a lower price, and then demanding the installation of a radio at no additional cost.

I know it has been said that this 1/32nd overriding royalty should accrue to the surface owner because there will be an additional well on the land... one which was not there when the surface was bought. This argument really won't work. When the surface was bought, in many cases, there was only one Hugoton well on the property. And maybe that was the only well on the section. But, later there were Council Grove wells drilled, and no one was asking an override then.

However, the real point is that the reservation of mineral rights by the seller of land did not specify how many wells there would be. The reservation of mineral rights in a deed for land puts the buyer on notice that the minerals may be extracted, regardless of how many wells that might take, and every purchaser of surface interests subject to existing mineral leases knew full well what the potential was.

Mineral leases do provide that when damage is done to growing crops by drilling or production operations, these damages will be paid for by the producer. But such damages are determined by negotiation between the parties or by the court, and the amount paid relates to the real damages incurred. The 1/32nd override in this bill amounts to the taking of property without due process of law. There is no relationship between the amount to be paid and the actual damages which might exist, if indeed any real damages accrue as the result of infill drilling. Nor is there any relationship between the person who might be damaged and the one to receive payment under this bill.

For example, if the 1/32nd override is to compensate for interferring with the farming operation caused by the infill well, which surface owner is to receive it. On the drawing I gave you, the full section of land is one lease. The surface owner of the northwest quarter is the one who is being bothered by the infill well. Yet, all four surface owners are "surface landowners whose property is subject to the lease," as the bill states in line 22. So, all four get paid for damage done, theoretically, only to one.

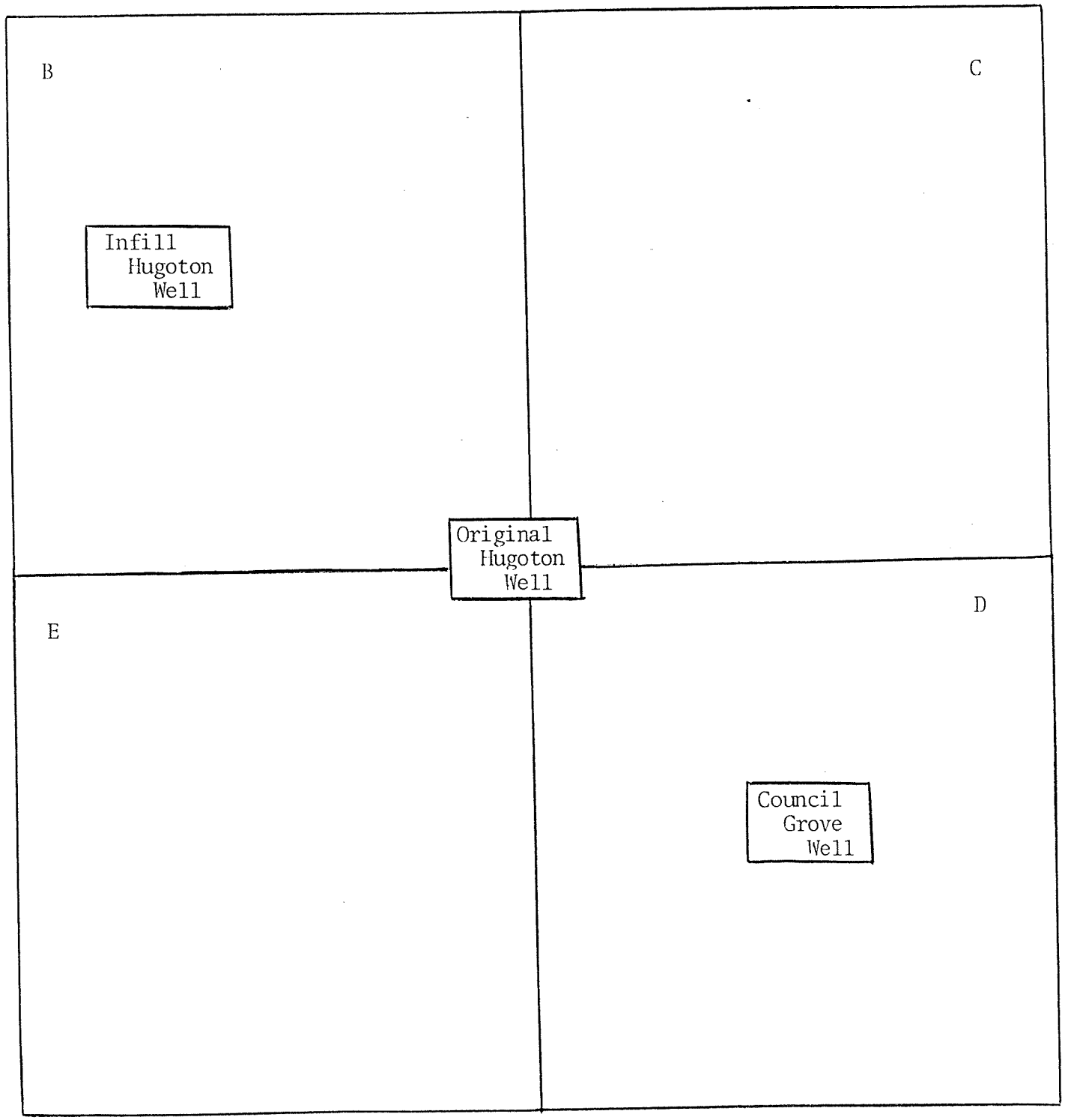
An unanswered question is where is the money to come from. Can we create a 33rd 32nd? Of course not. So, the money comes from the producer and the royalty owner. Keep in mind that the royalty, or mineral, owner is the person who thought he retained the mineral rights when he sold the surface. A flat 1/32nd

override has no relationship to actual damages. And, to take this money from the producer will shorten the economic life of the field, because it will increase costs of production.

This bill is unfair and, I would argue, unconstitutional. It has been said that some other states have similar legislation. I know of no other state which grants a surface owner an overriding royalty. I do know that some nearby states have looked at similar legislation, but it has been rejected by those legislatures for many of the reasons I have mentioned. We urge you to reject this proposal.

Thank you for your attention. I will be glad to try to answer any questions you might have.

MAP



TABLE

A: Mineral Owner

B: NW Quarter Surface Owner

C: NE Quarter Surface Owner

D: SE Quarter Surface Owner

E: SW Quarter Surface Owner

N

S

Statement to:

Kansas House Committee on Federal and State Affairs

Re: **House Bill No. 3143**

April 7, 1986

By:

E. Richard Brewster
Government Affairs Representative
Amoco Corporation
800 Jackson Suite 1416
Topeka, Kansas 66612
(913) 233-5532

ATTACHMENT F
H. FLSA
4/7/86

Mr. Chairman, Members of the Committee, my name is Dick Brewster. I am a Government Affairs Representative for Amoco Corporation, and appear today on behalf of Amoco Production Company, the exploration and production subsidiary of Amoco.

I appear in opposition to **House Bill No. 3143.** Let me try to explain the situation which has given rise to this proposal. Natural gas wells in Southwest Kansas, producing from the Hugoton formation, are deemed "section 104" wells, under the Natural Gas Policy Act (NGPA) of 1978. The maximum lawful price of gas produced from these wells will never be decontrolled under current Federal Law. The maximum lawful price is now about 47 cents per Mcf (thousand cubic feet).

At the sufferance of the producer, many irrigation farmers in Southwest Kansas buy gas from these wells, at this low price, to power the engines used to pump irrigation water. (There are about 8 gallons of gasoline in a Mcf of gas, in terms of energy equivalent, so gas at 47 cents is about the same as gasoline at six cents per gallon.) Three things can theoretically happen to cause the price of gas to increase for the irrigator.

The first is that the producer could refuse to sell gas for irrigation. This would force the irrigator to buy gas from pipelines in the area. Many of them will not allow irrigation hook-ups at all, and when they do, they charge their average price, which is usually over $2.60 per Mcf.

Second, the section 104 well from which the irrigator is taking gas could become a stripper well. This means that the average production and deliverability of the well has fallen below 60 Mcf per day. A stripper well, under NGPA, is a "section 108" well, and the maximum lawful price is now about $4.60 per Mcf. This high price is the contract price of gas from a stripper well in the Hugoton field.

Finally, the irrigator could be forced to take his or her gas from a new infill well. Now, since we have no K.C.C. order in hand as of yet, no one is sure what the price of gas from an infill well will be. But the common assumption is that the Federal Energy Regulatory Commission (FERC) will allow these wells to be classified as "section 103" wells. If so, gas from these wells will have a maximum lawful price of close to $3.00 per Mcf. This will not necessarily be the contract price, however. The market will determine the price of that infill gas, so the contract price may well be below that figure.

Let me tell you what is happening at the present time. Amoco has told the Irrigators Association in Southwest Kansas that, to the extent permitted under by regulation, law, and existing contracts, we will allow the irrigator to remain hooked up to the existing section 104 well, even after infill wells are drilled

and into production. This means that the irrigators supplied by Amoco will suffer no additional cost by virtue of infill drilling. We have made this commitment in writing to that association, and we so said to the K.C.C. during the infill drilling hearings. Again, infill drilling, in and of itself, will not cause any increase in the price of irrigation gas. So, the third possibility I mentioned is not a problem for those irrigators hooked to Amoco section 104 wells.

The first possibility I mentioned, that producers would simply refuse to sell irrigation gas, seems unlikely to me. Amoco has sold this gas voluntarily for many years, and management is committed to our continued support of the Southwest Kansas economy. I think the other producers feel the same way, however, it should not be made too difficult for us to sell this irrigation gas. The more impediments placed in the way of these sales, the more manpower and money it costs producers to accomodate the irrigators. At some point, producers may have to reexamine their posture on this issue.

Now we get to the real problem regarding the price of irrigation gas... the stripper well. (And, by the way, this problem is not really related in any way to the infill drilling project.) As I said, when the well's production falls below 60 Mcf per day, the well may be reclassified as a stripper, and the price increases from about 47 cents to over $4.50 per Mcf. We recognize that such a price is unrealistically high. A farmer just cannot afford to irrigate at this price. Amoco has taken several steps to help the irrigator when this happens.

We have asked those irrigators whose gas wells have become strippers to attend a meeting at our production office in Liberal, on April 22, 1986, to review what is happening. We are prepared, under the proper circumstances and after negotiation, to allow an irrigator to move his or her irrigation gas supply from the stripper well to the Council Grove well, where one is available, on the same lease. (Understand that a Council Grove well produces gas from a deeper strata than a Hugoton well. Many sections have Council Grove wells on them.) The price from most Council Grove wells is about $1.50 per Mcf. I know this is higher than the section 104 price, but it is a whole lot better than the 108, or stripper, price.

I should say a little about the relative price of gas at this point. I said earlier that 47 cent natural gas is about the same as gasoline at six cents per gallon. Gas at $1.50 equals about 18 cents per gallon for gasoline. Even at $4.62, you are buying the equivalent of gasoline at 58 cents per gallon.

We have also told the irrigators that if the old section 104 well becomes a stripper, and Council Grove gas is not available, or is more costly, he or she can hook up to the infill well and receive his or her gas at the contract price for gas from that well. In short, we have told the irrigator that we will sell him or her gas at the lowest price for which we sell gas to the pipeline purchaser. We are doing everything possible to keep the cost of irrigation gas down.

Understand, that we cannot sell gas to a pipeline at one price and the same gas to an irrigator at a lower price. We would be in breach of our contractual duty to the pipeline and the royalty or mineral owner, and would be subject to civil liability to them both.

This bill specifically states that the irrigator, or grain dryer, may purchase gas at the contract price of the original well on the lease. Keep in mind, as I mentioned earlier, that if that section 104 well becomes a stripper, the contract price becomes $4.65 per Mcf. So, in the case of a stripper lease, this bill would force a higher price than otherwise might be available.

Mr, Chairman, Members of the Committee, a natural gas producer has a duty to the mineral owner to obtain the highest lawful and available price for the minerals extracted. We cannot charge the irrigator a price lower than the law and the market will allow, without subjecting ourselves to litigation. We cannot charge an irrigator a price lower than the pipeline price. To try and force us to do so is an unlawful taking of property, and it clearly abbrogates existing contract rights.

We urge you to defeat this bill. I will be glad to answer any questions you may have.

CITIES SERVICE OIL & GAS CORPORATION
TESTIMONY OF BILL F. BRYAN
BEFORE THE KANSAS HOUSE COMMITTEE ON
FEDERAL AND STATE AFFAIRS
ON H.B. 3141 and H.B.3143

APRIL 7, 1986

Good day. My name is Bill Bryan and I am a petroleum engineer with Cities Service Oil and Gas Corporation in our Regulatory Affairs Department. Our department deals with all regulatory bodies, both state and federal, that control oil and gas activity. In addition to being trained as a petroleum engineer, I am also a member in good standing of the Oklahoma Bar Association.

Everyone is aware and concerned with the plight of the American farmer, and the issues addressed in H.B. 3141 and H.B. 3143 are an attempt to help alleviate the situation which many in Southwest Kansas face. However, a better solution would appear to lie in a cooperative relationship between the farmer and the other major economic force in Southwest Kansas, the oil and gas industry.

H.B. 3143 defines the price that shall be paid for natural gas for agricultural use. The issue of pricing of natural gas has been addressed by the United States Supreme Court many times. All of these decisions clearly show the state's lack of jurisdiction over interstate gas prices. I quote from the U.S. Supreme

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Court decision in Northern Natural Gas Co. v. State Corporation Commission, 188 Kan. 255, 361 P.2d 599, rehearing denied 188 Kan. 624, 364 P.2d 688 (1961), reversed 372 U.S. 84,9 L Ed 2d 601, 607, rehearing denied 372 U.S. 960 (1963), a case originating in Kansas.

> "The federal regulatory scheme leaves no room either for direct regulation of interstate wholesales of natural gas... or for state regulations which would indirectly achieve the same result."

The case goes on to say that the Federal Power Commission, now the Federal Energy Regulatory Commission, has been given "paramount and exclusive authority" over the pricing issues and the states have no authority in this area.

The same issues of price were discussed in the Transcontinental Gas Pipeline Corporation v. State Oil and Gas Board of Mississippi, _____ U.S. _____ (Decided January 22, 1986), a case decided January of this year by the U.S. Supreme Court. This case clearly shows the state's lack of jurisdiction over interstate gas prices.

Oklahoma passed similar legislation in the 1950's which made irrigation a "preferred use" for gas and granted the Corporation Commission the authority to fix the price and terms and conditions under which the gas would be made available.

The law was tested in Phillips Petroleum Co. v. Corporation Commission, (S. Ct. Okla., 1957) 312 P.2d 916. The court saw the issue as whether a producer of gas could be required to comply under the "police power" of the State and held that it was not a regulation under the police power but a taking of property without due process. The point of the case is that it was a statutory authority that was held invalid as a violation of constitutional guarantees.

Further, all the surface owners that own the minerals have given leases to develop the oil and gas under their property with the rights and obligations defined in the leases, or the surface owners purchased the surface with full notice of an existing oil and gas lease. To try to redefine the contractual and property rights as they now exist would be interference which is prohibited by the Constitution.

Cities Service has already addressed many of the concerns of the irrigator in H.B. 3143 by making public its position on irrigation gas after infill drilling in the Hugoton field is implemented. This policy was made public before a meeting of the Southwest Kansas Irrigation Association and in testimony under oath before the Kansas Corporation Commission. Cities Service has agreed that irrigation sales will continue from the original wells at the original contract price, subject to existing contractual obligations.

H. B. 3141 calls for a payment of 1/32 overriding royalty to be paid to the surface owner when an infill well is drilled for damages. Cities Service now pays to the surface owner where a well is drilled damages to crops and land to fully compensate the surface owner. This bill calls for these payments to continue, but requires the oil and gas companies to pay an open-ended, overriding royalty payment in addition to the normal damages to surface owners. Exactly who is paid, the surface owner on whose property a well is drilled or all surface owners in the existing 640 acre unit, is unclear.

This bill is constitutionally unsound. It is a taking of private property for private use in violation of constitutional guarantees. The U. S. Constitution allows a taking of private property through the use of eminent domain powers if, 1) there is just compensation and, 2) it is for a recognized public use. Neither of these conditions are met here. Again the Phillips Petroleum Co. v. Corporation Commission, supra, addressed many of these same issues and found the legislation invalid.

These two bills, H.B. 3141 and 3143, along with their companion bill H.B. 3142, are clearly unconstitutional.

A better solution is to allow a continued cooperative relationship between the producers and the irrigators. Cities Service is in the business of producing and selling natural gas, and as long as such sales are both practical and legal, we are happy to have the agricultural market. Cities Service is committed to continuing to work with the irrigators on lands where Cities operates wells.

BEFORE THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

In the Matter of the Application of CITIES SERVICE OIL AND GAS CORPORATION for an Order Amending the Basic Proration Order for the Hugoton Gas Field to Allow an Optional Well to be Drilled and Completed in Each Basic Acreage Unit in the Chase Group in Kearny, Finney, Grant, Haskell, Morton, Stevens, Seward, Stanton, Gray and Hamilton Counties, Kansas.	Docket No. C-164 License No. 5447 CONSERVATION DIVISION

STATEMENT OF THE SOUTHWEST KANSAS ROYALTY OWNERS ASSOCIATION RELATIVE TO ISSUES RAISED BY THE SOUTHWEST KANSAS IRRIGATION ASSOCIATION

The issues raised by the Southwest Kansas Irrigation Association fall within two general categories. The first category relates to physical interference of an infill well to irrigation systems and their operation and the corresponding question of whether it is appropriate for this Commission to accommodate the irrigators with respect to the location of the infill well. The second general category relates to actions suggested to be taken by this Commission relative to the establishment of a maximum price for irrigation gas and related service obligations sought to be placed on lessee-producers.

THE COMMISSION SHOULD TAKE APPROPRIATE STEPS TO ACCOMMODATE LEGITIMATE CONCERNS OF IRRIGATORS WITH RESPECT TO THE LOCATION OF THE INFILL WELL

The Commission has always considered existing structures appurtenant to irrigation systems as a justifiable reason for granting well location exceptions. In fact, paragraph (g) of the Basic Proration Order for the Hugoton Field expressly permits an exception to the well location provision for "(1) [A] surface obstruction, either natural or man-made." Paragraph (g) does not expressly permit an exception in the event of a contemplated irrigation system not presently in place at the time of the drilling of the infill well. That exception provision should be expanded to read "(1) [A] surface obstruction presently existing or reasonably contemplated, either natural or man-made."

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The conventional lease forms existing in the Hugoton field generally contain one special specific provision relating to well location. While the language of that provision varies with the printed lease form used, the following language is typical: "No well shall be drilled nearer than 200 feet to the house or barn now on said premises, without the written consent of the lessor." (Kansas Blue Print Co. Form 88 (Revised) (KANSAS). Other leases occasionally contain special provisions with respect to irrigation systems. Because they are usually found in specially negotiated language added by lease "rider" to the printed form, the language of those "riders" varies considerably.

Without contractual terms such as those above, the surface owner usually is not in a position to dictate the location of a well. On the other hand, where reasonable alternatives for the well location exist, neither can the lessee arbitrarily dictate the well location, since the lessee must exercise his right of access in a manner least injurious to the surface owner. Diamond Shamrock Corp. v. Phillips, 511 S.W.2d 160 (Ark. 1984).

It is the position of the Southwest Kansas Royalty Owners Association that this Commission should establish rules and regulations to accommodate the interests of the irrigators. To achieve this objective, this Association suggests that the Commission adopt the following proposal:

> The Commission should require the lessee to contact the surface owner to advise him of the proposed infill well location for the purpose of securing the surface owner's consent to such location. The Commission could ensure that such contact is made by requiring that the duly verified allowable application prescribed by Rule 82-3-300 include additional information. (See Rule 82-3-300[7] for such authority.) The additional information would be: (a) the names and addresses of the surface owners of record of the land upon which the well is or will be located (b) a statement by the applicant that such surface owners have been advised and consulted with respect

> to the location or proposed location of the infill well, and (c) a statement by the applicant whether or not the location has been agreed to by such surface owner.
>
> The order herein should also require that such surface owner receive notice of the hearing of the application for an allowable on the well, which notice shall set out the exact well location and shall set forth the provisions of the application stating whether or not such well location has been agreed to by the surface owner.

Through that required contact, the irrigator and lessee may be able to reach a mutually satisfactory agreement with respect to the infill well location. By virtue of the proposed rule, that agreement could be proper evidence to be considered by the Commission in granting an exception to the well-location provision of the amended Basic Proration Order, if the agreed-upon location requires an exception.

This Commission does not have jurisdiction to adjudicate or decide disputes regarding reasonable usage of the surface. Its jurisdiction only extends to natural gas matters for the purpose of preventing waste and protection of correlative rights. K.S.A. 55-703. As a creature of statute, the Commission cannot expand its own jurisdiction so as to prevent a lessee from drilling at an otherwise legally permitted location because of protests from the irrigator, regardless of how legitimate those protests may be.

The irrigator is not left unprotected. The surface owner could have a common law action for damages against his lessee in those instances where reasonable alternatives for the well location exist, and the lessee, in disregard of the surface owner's wishes and concern with respect to interference with the irrigation system and its operation, causes its well to be placed in a location which interferes with that system. Diamond Shamrock v. Phillips, supra.

The Commission cannot alter the existing contractual relationships by requiring that the lessee-producers assign an overriding royalty interest to the surface owner in compensation for ongoing crop damages. Apart from a question as to the lawfulness of this state agency to effectuate this proposal under the Contract Clause of the U.S. Constitution (see, e.g. Farmers Coop. G. & S. Co. v. Chicago, R. I. & P. Rly. Co., 139 Kan. 677, 33 P.2d 170 (1934), this Commission does not have the jurisdictional power to change the lease contract, even though that proposed change appears to have some equitable appeal. The Oklahoma legislature has addressed the issues of surface damages raised by the irrigators. Recognizing the inadequacy of the present procedures relating to surface damage, that legislature has altered those procedures. 52 Okl. St. Ann. §318.1 et seq. That statute is attached hereto as Exhibit "A." The Kansas legislature may also wish to adopt a similar procedure.

ISSUES RELATED TO GAS PRICES AND SERVICE OBLIGATIONS TO IRRIGATORS SHOULD BE DEFERRED FOR LATER CONSIDERATION

The Southwest Kansas Irrigation Association requested that a maximum price for irrigation gas be established by the Commission which would be equivalent to the "old" flowing gas rate. That association also wishes to have this Commission impose certain service obligations upon the lessee-producer, including the requirement that irrigation gas be supplied for the use of the surface owner and that such use should be given priority over supplies to the pipelines.

The instant proceedings have dealt with the narrow question of whether or not a second well is necessary for the effective and efficient drainage of the basic proration unit in the Hugoton field. Because of the limited nature of the inquiry, scant evidence has been proffered to this Commission that touch upon such issues raised by the Southwest Kansas Irrigation Association.

The legal issues raised by these proposals of the Irrigation Association are just as murky as the facts surrounding the present circumstances relating to the irrigation sales. The Natural Gas Act of 1938 and the Natural Gas Policy Act of 1978 have pre-

empted state regulations with respect to some of the activities relating to the production of natural gas. At least with respect to natural gas flowing into interstate commerce, the Commission would have to resolve mixed issues of fact and law before it could address the set of issues raised by the irrigators. Among those issues are the following:

1) Has the Federal Energy Regulatory Commission relinquished control of its jurisdiction over the irrigation sale?

Once natural gas has been introduced into interstate commerce, a company subject to the Natural Gas Act cannot abandon its service to interstate commerce without first obtaining approval from the Federal Energy Regulatory Commission. Section 7(b) of the Natural Gas Act, 15 U.S. §717(b). This Commission could not even attempt to assert jurisdiction over such sales until abandonment authorization has been granted by the Federal Energy Regulatory Commission. Nothing in this record touches upon this fundamental jurisdictional issue.

2) Can this Commission, in the exercise of its conservation authority, prescribe prices and service obligations for irrigation gas?

Once the gas has been abandoned from interstate commerce, the State of Kansas may be able to exercise its authority over the sales and service to irrigators in Kansas. Section 602(a) of the Natural Gas Policy Act of 1978 provides that a state may establish a price for a producer's sale of gas in intrastate commerce at a level lower than the federal ceiling set by that act. 15 U.S.C. §3432(a). The Kansas legislature has already invoked this section of the Natural Gas Policy Act of 1978 to set lower prices for certain intrastate natural gas. Energy Reserves Group, Inc. v. Kansas Power and Light Co., 456 U.S. 400, 74 L.Ed.2d 569 (1983).

The fact that the State of Kansas may have power to establish a maximum price for irrigation sales does not mean that this Commission, in a proper exercise of its conservation jurisdiction, would have the power to establish

that maximum price. The Commission may have authority to establish prices and service obligations in the exercise of its authority over public utilities. A producer under an oil and gas lease, however, does not fall within the ambit of "public utility" as defined by statute. K.S.A. 66-104. Lessee-producers would not then be subject to the jurisdiction of the Kansas Corporation Commission in this regard. Legislation would have to be enacted to confer upon the Kansas Corporation Commission such jurisdiction. The state of Oklahoma has recently passed legislation which addresses those issues presented by the Southwest Kansas Irrigation Association. 52 Okl. St. Ann. §524 et seq. That statute is attached hereto as Exhibit "B."

In light of the complex legal issues and facts regarding irrigation sales in a proceeding at least not initially intended to address the issues raised by the Southwest Kansas Irrigation Association, the Commission should completely defer consideration of these proposals insofar as they concern price and service until a more appropriate occasion arises. To place those issues properly before this Commission, the Commission may itself wish to institute separate proceedings or to wait for an interested party to attempt to invoke the Commission's jurisdiction in this regard. In no event should the Commission defer its decision on the merits of this docket pending disposition of those issues.

Respectfully submitted,

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-and-

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By _____
Attorneys for Southwest Kansas Royalty Owners Association

b. R. D. Randall, KIOGA
RE: Opposition to H.B. #3141

April 7, 1986

STATEMENT

Mr. Chairman and members of the Committee, I am Dick Randall, General Counsel for Petroleum, Inc., and Chairman of the KIOGA Legislative Committee. We are opposed to passage of H.B. #3141.

My company is a Kansas based, independent oil and gas producer, owning and operating oil and gas wells in Kansas and 12 other Mid-Continent states. We currently operate about 60 gas wells in Kansas, with 17 of those wells being located in the Hugoton field.

Unconstitutional - This bill is bad legislation and probably unconstitutional because it interfers with Kansas oil and gas lease contracts entered into by private citizens. If passed, the impact would be to transfer a fractional part of gross income from the gas leasehold estate owners, to owners of the land surface. In Kansas, the surface owner usually owns the minerals also.

Economic Interference - This bill is bad legislation because it interfers with the economics of producing Kansas natural gas by increasing fixed costs to the lessee risk-taker. How can the legislative role of protecting the citizens of Kansas be served by increasing the cost of producing Kansas natural gas. There could be justification for this bill if the benefit were for a public purpose; however, this legislation serves only one private citizen over another, at the expense of all Kansas citizens. At this time, many Hugoton wells are unprofitable because of the low volumes of gas being taken by pipeline purchasers.

Not Equitable - This bill is bad legislation because it is a windfall to the surface owner and violates principles of equity. A fractional payment of gross income from a producing gas well has no relationship whatsoever to alleged damage or inconvenience suffered by the surface owner. Such a payment would be open ended and would vary with the quality of the well, gas volumes sold from the well, and the price of the gas. The lessee would continue to pay lump sum damages under terms of the lease for drilling of wells, installation of equipment, laying of pipelines, etc.

Other States - This bill is bad legislation because such a damage concept has not been adopted by other states. Petroleum, Inc. operates oil and gas leases in 13 Midwestern states from Louisiana and Texas in the South, to North Dakota and Montana in the North. None of these states interfer with oil and gas lease contracts by giving the surface owner a share of oil or gas production as compensation for surface damages.

Legislative Excess - This bill is bad legislation because it goes beyond ligitimate areas of state legislative concern and jurisdiction. The Kansas legislature has the power to tax and the severance tax and other taxes on Kansas natural gas production are evidence of that fact. However, the impact of this bill would be to place another gross production tax on the lessee risk-takers, for the sole benefit of a private surface owner. In many cases, that surface owner would not even be a Kansas citizen.

The natural gas industry continues to suffer from unwise government interference. We urge you to vote against H.B. #3141. Thank you.

* * * * * *

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are neither producers nor the owners of minerals within the boundaries of the field. Since they own no minerals, they have no correlative rights which would be subject to any Commission's order regarding the application.

The Kansas Supreme Court in Colorado Interstate, supra, at page 24 of the opinion, states:

> "The right of the pipeline companies to challenge matters which do not affect them but affect only the producers and royalty owners is somewhat questionable."

The application seeks only the permission of this Commission to drill additional wells to effectively and efficiently drain the Hugoton Reservoir. The basis of this request is the prevention of waste and the opportunity of protecting the correlative rights of producers and royalty owners.

Although pipeline purchasers will have an effect on achieving these objectives, only the Commission's action can lead to their realization. The Commission's decision should not rest on the purchasing policies of the pipelines, past and present, but only on the evidence relating to the issues involved.

IV.

The State Corporation Commission has no Authority To Effectuate the Proposals of The Southwest Kansas Irrigators Association

On September 26, 1985, a public hearing in this docket was held in Ulysses, Kansas. At the hearing, representatives of the Southwest Kansas Irrigators Association (SWKIA or Association) appeared and presented certain proposals to the Commission which they wish to have included in any order issued with respect to the instant application of Cities Service Oil and Gas Corporation. The Commission requested that the parties address these proposals made by SWKIA in briefs.

The proposals of the SWKIA are as follows:

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(1) Maintain the old gas price for agricultural use of wellhead and farmstead gas, regardless of which well the gas comes from.

(2) Grant permission to use gas on adjoining land for irrigation, i.e., to allow irrigation gas to cross section lines.

(3) Allow a 1/64 overriding royalty to go to the surface owner for ongoing crop damages.

(4) Allow the surface owner to have some input as to the location of the new well.

(5) Require that agricultural gas be available to the surface owner regardless of whether they are a mineral owner or not.

(6) Regarding the infill wells, provide that agricultural use should have priority over pipelines.

Disregarding the propriety of the Association's proposals, the principal question raised is whether or not this Commission, under its legislative mandate, has the jurisdiction or power to effectuate the proposals.

As previously stated, the Commission's jurisdiction under Article 7, Chapter 55 of K.S.A. is related solely to the prevention of waste and the protection of correlative rights with regard to the production of natural gas.

> "The Commission has three responsibilities under the Gas Conservation Statute. It must first of all prevent waste of the natural resource. It must allow sufficient production to meet the market demand if such can be done without waste. It must protect correlative rights.
>
> "In a gas field such as the Kansas-Hugoton where five major companies are taking gas through separate pipelines not connected to the same wells, the responsibilities placed upon the Commission will clash. If the market demand cannot be supplied without waste, or if correlative rights cannot be protected without waste, or if correlative rights cannot be protected without unduly restricting production needed for the market demand, one of the three, waste, market demand, or correlative rights, must suffer. The dominate purpose of the Gas Conservation Statute is to prevent waste." Colorado Interstate Gas Co. v. State Corporation Commission, 192 Kan. 1 at p. 25.

Unless the SWKIA proposals can be intertwined with these stated responsibilities, then this Commission is not authorized to issue an order mandating their enactment. Furthermore, if implementing any the proposal would interfere with federal regulations, then such actions would be void.

considering the first proposal, the request to maintain the Section 104 or old gas price, it appears the Association is requesting the Commission to set or limit the price of gas produced or the portion thereof which is used for irrigation purposes. Neither waste nor correlative rights constitute the basis of this request, but, rather, the proposal is based upon the economic considerations of the irrigator. Such a request is beyond the authority of this Commission and invades the province of the Federal Energy Regulatory Commission, which is the agency with authority to affect the price paid for natural gas.

When this Commission first placed a minimum price upon gas to be produced from the Hugoton Gas Field, it was done with conservation and prevention of waste in mind. The Kansas Supreme Court upheld the minimum price on the basis that the Commission had the power to regulate the physical production and gathering of natural gas in the interest of conservation, including the protection of correlative rights and the prevention of waste. Cities Service Gas Co. v. State Corporation Commission, 180 Kan. 454, 304 P.2d 528 (1956). This case was later reversed by the United States Supreme Court (2 L.Ed.2d 355 (1958)) in a per curiam decision based on the Phillips v. Wisconsin decision in 347 U.S. 672, 98 L.Ed 1035, 74 S.Ct. 794 (1954). As a result, the law is clear that this Commission has no authority to issue an order which affects the price paid for natural gas.

Items 2, 3, 5, and 6 of the irrigators' proposal in effect request the Commission to redistribute the property of others without regard to existing contractual rights or obligations or federal laws and regulations. The Commission is not empowered to issue any order which proposes to do so. In Republic Natural Gas Co. v. Baker, 197 F.2d 647, 10th Cir., (1952), the Court stated as page 650 as follows:

> "The law does not imply a power in the regulatory bodies or the courts to take the property of one party and give it to another in order to effectuate a just result."

Any order mandating such a result would be void.

Since the basis of the Association's request rests solely on economic considerations of the irrigators and not on any valid conservation issue, there is no jurisdictional basis for the Commission to adopt the request of SWKIA as a part of its order.

With regard to proposal No. 4, Mobil has no objection to consulting with the surface owners in regard to well locations with the understanding that such well locations must be in conformance with the Basic Order adopted by the Commission. Mobil does however assert that the proposal is outside the scope of the Commission's authority and the Commission has no power to require such consultation.

In conclusion, Mobil's position with respect to the six proposals offered by the Southwest Kansas Irrigators Association is that while it is recognized that the stated proposals are of obvious concern to the Association, this Commission is without the requisite authority to issue any order which mandates the adoption of any of them. The jurisdiction of this Commission extends to the prevention of waste and the protection of correlative rights with respect to the production of natural gas. The proposals of the Association would require the Commission to exceed its stated authority and any order which seeks to carry out the proposals would be null and void.

Conclusion

The evidence presented to this Commission clearly and convincingly demonstrates that:

(1) Existing wells in the Hugoton Gas Field will not effectively and efficiently drain the reservoir.

(2) An optional or additional well for each 640-acre unit is necessary to produce gas presently connected to existing wells within an economic time frame.

(3) Optional or additional wells are necessary to produce substantial quantities of gas from

V. THE IRRIGATION ISSUES

Many members of SWKIA spoke in opposition to CSOG's infill drilling application at the public hearing held in Ulysses, Kansas on September 26, 1985. The primary concerns expressed by the SWKIA members was the probability of greatly increased costs for irrigation gas. First, the possibility that irrigators would be stuck with the new NGPA §103 gas price rather than NGPA §104 price. Second, that the infill wells would draw down pressures on existing wells, resulting in stripper well classification and the corresponding higher price of gas for existing wells, also. (See, for example, September 26, 1985, Tr. 14-17, 21, 41).

Unless certain major conditions are placed on any infill drilling program adopted, most of the SWKIA members and other interested individuals who spoke at the September 1985 public hearing would not favor infill drilling. (See, for example, September 26, 1985, Tr. 25-27, 29-33, 36-37, 38-39, 52, 58, 61-62, 64-65, 65-66).

The conditions urged by SWKIA to have made a part of any infill drilling order issued by the KCC were summarized by State Representative Gene Shore, as follows: (1) A non-severable 1/64th continuing crop damages payable provision for surface owners; (2) Irrigation gas to be made available at the old gas price even if supplied from stripper wells or new infill wells; (3) Irrigation gas to be allowed to cross section lines; and (4) Surface owner input as to well location. In the words of Rep. Shore, ". . . . if you allow infill drilling without these small considerations to protect the people who live and work in Southwest Kansas, this is an injustice that will last a long time also." (September 26, 1985, Tr. 27)

Although the issues raised by the SWKIA are, of course, important issues, the conditions which SWKIA would like to have imposed upon infill drilling are not within the authority or jurisdiction of the KCC to grant. The conditions noted above are basically contractual matters (i.e., price of irrigation gas) that must necessarily be worked out between the parties. In other words, they call for contractual agreements between the individual irrigators or farmers and producers in the field. Generally, administrative agencies have no authority to consider or adjudicate individual rights or obligations between private parties, absent statutory grants. 1 AmJur 2d Administrative Law §185,

ing Williams Electrical Cooperative v. Montana-Dakota Utility Co., 79 N.W. 2d 508 (N.D. 1956). Thus, in Regents of University System of Ga. v. Carroll, 70 S.Ct. 370 (1950), the U.S. Supreme Court held that the FCC could not make the granting of a license contingent upon repudiation by the applicant of one of its existing contracts. Cf. Peter Fox Brewing Co. v. Sohio Petroleum Co., 1989 F. Supp. 743 (N.D. I. 1958).

This same rule, limiting jurisdiction of administrative agencies, has been applied in Kansas, specifically with respect to the KCC. In Cities Service Gas Co. v. State Corp. Commission of Ks., 197 Kan. 338, 342, 416 P.2d 736 (1966), the Kansas Supreme Court ruled that the KCC is an administrative agency with its jurisdiction being that conferred by Statute. See also Renner v. Monsanto Chemical Co., 187 Kan. 158, 354 P.2d 326. Thus, the KCC does not provide a forum for litigation of purely private rights and liabilities. Simply stated, the power of the corporation commission is regulatory in nature, representative of the public interest, and it is not intended to settle private controversy apart from the public interest. Cities Service Gas Co. v. State Corp. Commission, 197 Kan. 338 at Syl.3. Moreover as the record indicates the irrigators have the same problem with infill drilling that consumers in eastern Kansas have - infill drilling will increase their costs of gas fivefold at a time when agriculture is already suffering economic hardship.

VI. CONCLUSION

CSOG and the proponents have not presented evidence to support their allegation that infill drilling will develop additional and new natural gas reserves hitherto unknown; nor evidence to support their allegation that a market exists currently for increased deliverability; and have not presented evidence to support their allegation of a demand by the market for high priced NGPA §103 gas. There is no evidence that infill drilling is required to prevent waste and uncompensated drainage nor to protect correlative rights. Denial of this application will not prevent CSOG or any other proponent from filing an application at a later date if it has sufficient evidence to sustain the burden of proof required with respect to conservation nor will it prevent CSOG or proponents from filing an application for a well classification determination under K.A.R. 82-3-500 on a well-by-well basis.

ssion. However, the Commission lacks statutory or constitutional rity to make such a delegation to an industry group whose bers comprise a part of the business regulated by legislative cate.

The Commission's authority, delegated by the legislature, is nited by statute. Cities Service Gas Co. v. State Corporation ommission, 197 Kan. 338, 416 P.2d 736 (1966). Nowhere in the Gas conservation Act is the Commission authorized to delegate its investigative powers to a "Committee" or any other person or entity. As such, the delegation of authority to the "Committee" is unlawful. If such a delegation were made, it would be an unconstitutional exercise of legislative power.

IX. THE COMMISSION IS WITHOUT JURISDICTION TO DECIDE ROYALTY AND IRRIGATION ISSUES

The Commission has requested that certain issues presented to it by representatives of royalty owners and irrigators be addressed in briefs submitted in this docket. The issues are as follows:

A. Old gas price for agricultural use of wellhead and farmstead gas, regardless of which well the gas comes from;

B. Permission to use gas on adjoining land for irrigation, (i.e., allow irrigation gas to cross section lines);

C. Allow a 1/64 overriding royalty to go to the surface owner for on-going crop damages;

D. Surface owners have some input as to the location of the new well;

E. Agricultural gas be available to the surface owner regardless of whether they are a mineral owner or not; and

F. Regarding the infill wells, agricultural use should have priority over pipelines.

These issues were not set forth in the notice of hearing. There was no advance notice of the issues. In addition, there was no evidence presented at the hearing which would bear on these issues.

The failure of notice leaves the Commission without jurisdiction to decide the royalty and irrigation issues. The Kansas Supreme Court has stated on numerous occasions:

> . . . the essential elements of due process of law are notice and an opportunity to be heard and to defend in an orderly proceeding adopted to the nature of the case.

E.g., Crane v. Mitchell County U.S.D. 273, 232 Kan. 51, 652 P.2d 205 (1982).

The Commission limited the hearing to pre-filed testimony that was to be submitted within certain time periods. No one presented testimony on these issues. There was no practical way that anyone could have envisioned that these issues would have been the subject of the infill proceeding. To decide these issues without evidence would be a fundamental denial of due process. Due process requires that one be given the opportunity to be heard at a meaningful time and in a meaningful manner. Armstrong v. Manzo, 380 U.S. 545, 552 (1965). This opportunity must be appropriate to the case. Mullane v. Central Hanover Trust Co., 330 U.S. 306 (1950). In this instance, no opportunity was made to be heard on the royalty and irrigation issues.

Additionally, because the royalty and irrigation issues were not

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BEFORE THE CORPORATION COMMISSION
OF THE STATE OF KANSAS

IN THE MATTER OF THE APPLICATION OF CITIES SERVICE OIL AND GAS CORPORATION FOR AN ORDER AMENDING THE BASIC PRORATION ORDER FOR THE HUGOTON GAS FIELD TO ALLOW AN OPTIONAL WELL TO BE DRILLED AND COMPLETED IN EACH BASIC ACREAGE UNIT IN THE CHASE GROUP IN KEARNY, FINNEY, GRANT, HASKELL, MORTON, STEVENS, SEWARD, STANTON, GRAY, HAMILTON, AND WICHITA COUNTIES, KANSAS.	DOCKET NO. C-164 LICENSE NO. 5447 CONSERVATION DIVISION

RESPONSE OF INTERVENOR SANTA FE MINERALS
TO ISSUES RAISED BY THE SOUTHWEST KANSAS IRRIGATION ASSOCIATION
AND
BRIEF IN SUPPORT THEREOF

Pursuant to the Memorandum issued on December 17, 1985, by Kirby A. Vernon, acting on behalf of the Corporation Commission of the State of Kansas, the Intervenor, Santa Fe Minerals, does hereby respond to the issues raised by the Southwest Kansas Irrigation Association.

The proposals submitted by the Southwest Kansas Irrigation Association and the Intervenor's position upon the six (6) proposals submitted are as follows:

1. Old gas price for agricultural use of wellhead and farmstead gas, regardless of which well the gas comes from.

   It is Intervenor's position that the Corporation Commission of the State of Kansas has no jurisdiction in this regard for the following reasons:

   (a) The question of the availability of natural gas for irrigation purposes is a matter of contract law and property law and it is necessary to look at all of the provisions, terms and conditions of applicable oil and gas leases and gas purchase contracts in order to determine the question of

whether natural gas is available for irrigation purposes and also to ascertain the price of the same, if so available.

(b) If the natural gas in question has been dedicated into Interstate Commerce, the pricing of such gas for all purposes is subject to the exclusive jurisdiction of the Federal Energy Regulatory Commission and the Corporation Commission of the State of Kansas has no jurisdiction over such pricing.

(c) The price of such gas, if available for irrigation, shall be determined by the oil and gas lease upon the property or by such other contractual arrangements which may have heretofore been entered into.

2. Permission to use gas on adjoining land for irrigation, i.e., allow irrigation gas to cross section lines.

It is Intervenor's position that the Corporation Commission of the State of Kansas has no jurisdiction in this regard for the following reasons:

(a) The question of the availability of natural gas for irrigation purposes is a matter of contract law and property law and it is necessary to look at all of the provisions, terms and conditions of applicable oil and gas leases and gas purchase contracts in order to determine the question of whether natural gas is available for irrigation purposes and, if so, to whom and where such gas is available for irrigation purposes. Any such questions of contract law and property law are property to be decided in the Kansas Courts and not before the Corporation Commission of the State of Kansas.

3. Allow a 1/64 overriding royalty to go to the surface owner for ongoing crop damages.

It is Intervenor's position that the question of crop damages owing to a surface owner is a question to be decided by Kansas Courts in the application of Kansas law.

(a) The question of damages is connected directly to the terms of the applicable oil and gas lease. The rights of the lessor and the lessee are determined by the application of Kansas law to the provisions, terms and conditions of the applicable oil and gas lease and the appropriate facts. If a surface owner alleges ongoing crop damages, his remedy is to be sought in the Courts. To attempt to grant the surface owner an overriding royalty interest is to confiscate the oil and gas lessee's property without just compensation. The Corporation Commission of the State of Kansas has no jurisdiction over damages as this is a matter of contract law and property law. If the surface owner is a person other than the lessor on the underlying oil and gas lease, it is likely that said surface owner acquired his rights either subject to the rights of the mineral owner who has granted the lease as a lessor or the surface owner has acquired his rights subsequent to the oil and gas lease and the surface owner's rights were taken subject to all of the provisions, terms and conditions of the oil and gas lease. This is not a question to be decided by the Corporation Commission of the State of Kansas. If there are ongoing crop damages for which a surface owner is entitled to receive compensation, the judicial

system is already in place to resolve such disputes and to make appropriate awards and there is no need for the Corporation Commission of the State of Kansas to attempt to enter this arena.

4. Surface owner have some input as to the location of the new well.

It is Intervenor's position that the input of the surface owner as to the location of the new well should be recognized to the extent allowed by present law.

(a) The question of the location of a new well is connected directly to the terms of the applicable oil and gas lease and the applicable field rules. The rights of the lessor and the lessee are determined by the application of Kansas law to the provisions, terms and conditions of the applicable oil and gas lease and the appropriate facts. The Kansas Hugoton Field Basic Proration Order as presently in place, or, if amended by the Commission as a result of the final order to be entered in the Infill Drilling proceedings, will establish appropriate rules for locating new wells in the Kansas Hugoton Field. The field rules, as applicable, whether hereafter amended or not, set forth procedures for establishing allowables for gas wells; the appropriate formula takes into consideration the locations of wells; the field rules, whether or not hereafter amended, take into consideration, under the jurisdiction of the Corporation Commission of the State of Kansas, the prevention of waste and the protection of correlative rights. The surface owner has certain rights which are recognized by state law. The producer and the surface owner, or his tenant, can

co-exist if they will develop mutual respect for each other's rights. To allow the surface owner to mandate locations of new wells in the Kansas Hugoton Field would result in a horrendous burden upon the Corporation Commission and its staff, as well as the Kansas Hugoton Field producers. There is no need to create an entirely new regulatory scheme for locating infill wells. If the oil and gas lease provides by its own terms where wells are to be located, this provides a contract which binds the parties. The operator knows how a well location affects his gas allowable and whether he will be penalized by a non-standard location. The surface owner should not be allowed to penalize the operator by picking the operator's location for a second or new well.

5. Agricultural gas be available to the surface owner regardless of whether they are a mineral owner or not.

It is Intervenor's position that the Corporation Commission of the State of Kansas has no jurisdiction in this regard for the following reasons:

(a) The question of the availability of natural gas for agricultural purposes is a matter of contract law and property law and it is necessary to look at all of the provisions, terms and conditions of applicable oil and gas leases and gas purchase contracts in order to determine the question of whether natural gas is available for agricultural purposes and also to ascertain the price of the same, if so available. The rights of mineral owners to use gas for agricultural purposes are negotiated when the oil and gas leases are entered into. The surface owner who has no mineral rights

generally is subject to the rights granted under the oil and gas lease. This Intervenor is of the opinion that the pipelines in the Kansas Hugoton Field which purchase natural gas under existing contracts will likely join with the producers in resisting the granting of any such priority to the surface owner for agricultural use over pipeline use.

6. Regarding the infill wells, agricultural use should have priority over pipelines.

It is Intervenor's position that the Corporation Commission of the State of Kansas has no jurisdiction in this regard for the following reasons:

(a) The question of natural gas being made available for agricultural use is a matter of contract law and property law and it is necessary to look at all of the provisions, terms and conditions of applicable oil and gas leases and gas purchase contracts in order to determine the question of whether natural gas is available for agricultural use and also to ascertain the price of the same, if so available. This Intervenor is of the opinion that the pipelines in the Kansas Hugoton Field which purchase natural gas under existing contracts will likely join with the producers in resisting the granting of any such priority for agricultural use over pipeline use.

This Intervenor also feels that the Federal Energy Regulatory Commission would like an opportunity to be heard upon such an attempt to usurp its jurisdiction over the acreage and gas purchase contracts which have been dedicated into Interstate Commerce.

WHEREFORE this Intervenor, Santa Fe Minerals, respectfully requests that the Corporation Commission of the State of Kansas reject in total all six (6) proposals submitted by the Southwest Kansas Irrigation Association upon the bases hereinabove set forth.

Respectfully submitted,

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By Spencer L. Depew
Spencer L. Depew
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he caused a copy of the above and foregoing Response of Intervenor Santa Fe Minerals to Issues Raised by the Southwest Kansas Irrigation Association and Brief in Support Thereof, to be served upon each addressee on the current official service list for this Docket by placing the same in the United States Mail, postage prepaid, on the 30th day of January, 1986.

Spencer L. Depew
SPENCER L. DEPEW

BEFORE THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

In the Matter of the Application of CITIES SERVICE OIL AND GAS CORPORATION for an Order Amending the Basic Proration Order for the Hugoton Gas Field to Allow an Optional Well to be Drilled and Completed in Each Basic Acreage Unit in the Chase Group in Kearny, Finney, Grant, Haskell, Morton, Stevens, Seward, Stanton, Gray and Hamilton Counties, Kansas.	Docket No. C-164 License No. 5447 CONSERVATION DIVISION

STATEMENT OF THE SOUTHWEST KANSAS ROYALTY OWNERS ASSOCIATION RELATIVE TO ISSUES RAISED BY THE SOUTHWEST KANSAS IRRIGATION ASSOCIATION

The issues raised by the Southwest Kansas Irrigation Association fall within two general categories. The first category relates to physical interference of an infill well to irrigation systems and their operation and the corresponding question of whether it is appropriate for this Commission to accommodate the irrigators with respect to the location of the infill well. The second general category relates to actions suggested to be taken by this Commission relative to the establishment of a maximum price for irrigation gas and related service obligations sought to be placed on lessee-producers.

THE COMMISSION SHOULD TAKE APPROPRIATE STEPS TO ACCOMMODATE LEGITIMATE CONCERNS OF IRRIGATORS WITH RESPECT TO THE LOCATION OF THE INFILL WELL

The Commission has always considered existing structures appurtenant to irrigation systems as a justifiable reason for granting well location exceptions. In fact, paragraph (g) of the Basic Proration Order for the Hugoton Field expressly permits an exception to the well location provision for "(1) [A] surface obstruction, either natural or man-made." Paragraph (g) does not expressly permit an exception in the event of a contemplated irrigation system not presently in place at the time of the drilling of the infill well. That exception provision should be expanded to read "(1) [A] surface obstruction presently existing or reasonably contemplated, either natural or man-made."

The conventional lease forms existing in the Hugoton field generally contain one special specific provision relating to well location. While the language of that provision varies with the printed lease form used, the following language is typical: "No well shall be drilled nearer than 200 feet to the house or barn now on said premises, without the written consent of the lessor." (Kansas Blue Print Co. Form 88 (Revised) (KANSAS). Other leases occasionally contain special provisions with respect to irrigation systems. Because they are usually found in specially negotiated language added by lease "rider" to the printed form, the language of those "riders" varies considerably.

Without contractual terms such as those above, the surface owner usually is not in a position to dictate the location of a well. On the other hand, where reasonable alternatives for the well location exist, neither can the lessee arbitrarily dictate the well location, since the lessee must exercise his right of access in a manner least injurious to the surface owner. Diamond Shamrock Corp. v. Phillips, 511 S.W.2d 160 (Ark. 1984).

It is the position of the Southwest Kansas Royalty Owners Association that this Commission should establish rules and regulations to accommodate the interests of the irrigators. To achieve this objective, this Association suggests that the Commission adopt the following proposal:

> The Commission should require the lessee to contact the surface owner to advise him of the proposed infill well location for the purpose of securing the surface owner's consent to such location. The Commission could ensure that such contact is made by requiring that the duly verified allowable application prescribed by Rule 82-3-300 include additional information. (See Rule 82-3-300[7] for such authority.) The additional information would be: (a) the names and addresses of the surface owners of record of the land upon which the well is or will be located (b) a statement by the applicant that such surface owners have been advised and consulted with respect

to the location or proposed location of the infill well, and (c) a statement by the applicant whether or not the location has been agreed to by such surface owner.

The order herein should also require that such surface owner receive notice of the hearing of the application for an allowable on the well, which notice shall set out the exact well location and shall set forth the provisions of the application stating whether or not such well location has been agreed to by the surface owner.

Through that required contact, the irrigator and lessee may be able to reach a mutually satisfactory agreement with respect to the infill well location. By virtue of the proposed rule, that agreement could be proper evidence to be considered by the Commission in granting an exception to the well-location provision of the amended Basic Proration Order, if the agreed-upon location requires an exception.

This Commission does not have jurisdiction to adjudicate or decide disputes regarding reasonable usage of the surface. Its jurisdiction only extends to natural gas matters for the purpose of preventing waste and protection of correlative rights. K.S.A. 55-703. As a creature of statute, the Commission cannot expand its own jurisdiction so as to prevent a lessee from drilling at an otherwise legally permitted location because of protests from the irrigator, regardless of how legitimate those protests may be.

The irrigator is not left unprotected. The surface owner could have a common law action for damages against his lessee in those instances where reasonable alternatives for the well location exist, and the lessee, in disregard of the surface owner's wishes and concern with respect to interference with the irrigation system and its operation, causes its well to be placed in a location which interferes with that system. Diamond Shamrock v. Phillips, supra.

The Commission cannot alter the existing contractual relationships by requiring that the lessee-producers assign an overriding royalty interest to the surface owner in compensation for ongoing crop damages. Apart from a question as to the lawfulness of this state agency to effectuate this proposal under the Contract Clause of the U.S. Constitution (see, e.g. Farmers Coop. G. & S. Co. v. Chicago, R. I. & P. Rly. Co., 139 Kan. 677, 33 P.2d 170 (1934), this Commission does not have the jurisdictional power to change the lease contract, even though that proposed change appears to have some equitable appeal. The Oklahoma legislature has addressed the issues of surface damages raised by the irrigators. Recognizing the inadequacy of the present procedures relating to surface damage, that legislature has altered those procedures. 52 Okl. St. Ann. §318.1 et seq. That statute is attached hereto as Exhibit "A." The Kansas legislature may also wish to adopt a similar procedure.

ISSUES RELATED TO GAS PRICES AND SERVICE OBLIGATIONS TO IRRIGATORS SHOULD BE DEFERRED FOR LATER CONSIDERATION

The Southwest Kansas Irrigation Association requested that a maximum price for irrigation gas be established by the Commission which would be equivalent to the "old" flowing gas rate. That association also wishes to have this Commission impose certain service obligations upon the lessee-producer, including the requirement that irrigation gas be supplied for the use of the surface owner and that such use should be given priority over supplies to the pipelines.

The instant proceedings have dealt with the narrow question of whether or not a second well is necessary for the effective and efficient drainage of the basic proration unit in the Hugoton field. Because of the limited nature of the inquiry, scant evidence has been proffered to this Commission that touch upon such issues raised by the Southwest Kansas Irrigation Association.

The legal issues raised by these proposals of the Irrigation Association are just as murky as the facts surrounding the present circumstances relating to the irrigation sales. The Natural Gas Act of 1938 and the Natural Gas Policy Act of 1978 have pre-

empted state regulations with respect to some of the activities relating to the production of natural gas. At least with respect to natural gas flowing into interstate commerce, the Commission would have to resolve mixed issues of fact and law before it could address the set of issues raised by the irrigators. Among those issues are the following:

1) Has the Federal Energy Regulatory Commission relinquished control of its jurisdiction over the irrigation sale?

Once natural gas has been introduced into interstate commerce, a company subject to the Natural Gas Act cannot abandon its service to interstate commerce without first obtaining approval from the Federal Energy Regulatory Commission. Section 7(b) of the Natural Gas Act, 15 U.S. §717(b). This Commission could not even attempt to assert jurisdiction over such sales until abandonment authorization has been granted by the Federal Energy Regulatory Commission. Nothing in this record touches upon this fundamental jurisdictional issue.

2) Can this Commission, in the exercise of its conservation authority, prescribe prices and service obligations for irrigation gas?

Once the gas has been abandoned from interstate commerce, the State of Kansas may be able to exercise its authority over the sales and service to irrigators in Kansas. Section 602(a) of the Natural Gas Policy Act of 1978 provides that a state may establish a price for a producer's sale of gas in intrastate commerce at a level lower than the federal ceiling set by that act. 15 U.S.C. §3432(a). The Kansas legislature has already invoked this section of the Natural Gas Policy Act of 1978 to set lower prices for certain intrastate natural gas. Energy Reserves Group, Inc. v. Kansas Power and Light Co., 456 U.S. 400, 74 L.Ed.2d 569 (1983).

The fact that the State of Kansas may have power to establish a maximum price for irrigation sales does not mean that this Commission, in a proper exercise of its conservation jurisdiction, would have the power to establish

that maximum price. The Commission may have authority to establish prices and service obligations in the exercise of its authority over public utilities. A producer under an oil and gas lease, however, does not fall within the ambit of "public utility" as defined by statute. K.S.A. 66-104. Lessee-producers would not then be subject to the jurisdiction of the Kansas Corporation Commission in this regard. Legislation would have to be enacted to confer upon the Kansas Corporation Commission such jurisdiction. The state of Oklahoma has recently passed legislation which addresses those issues presented by the Southwest Kansas Irrigation Association. 52 Okl. St. Ann. §524 et seq. That statute is attached hereto as Exhibit "B."

In light of the complex legal issues and facts regarding irrigation sales in a proceeding at least not initially intended to address the issues raised by the Southwest Kansas Irrigation Association, the Commission should completely defer consideration of these proposals insofar as they concern price and service until a more appropriate occasion arises. To place those issues properly before this Commission, the Commission may itself wish to institute separate proceedings or to wait for an interested party to attempt to invoke the Commission's jurisdiction in this regard. In no event should the Commission defer its decision on the merits of this docket pending disposition of those issues.

Respectfully submitted,

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-and-

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By _____
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§ 318.1. Agreement as to compliance with drilling and plugging regulations—Evidence of financial responsibility—Bond—Cost of plugging—Notice—Remedial operations

A. Any person who drills or operates any well for the exploration, development or production of oil or gas, or as an injection or disposal well, within this state, shall furnish in writing, on forms approved by the Corporation Commission, his agreement to drill, operate and plug wells in compliance with the rules and regulations of the Commission and the laws of this state, together with evidence of financial ability to comply with the plugging requirements established by the rules and regulations of the Commission and by law. To establish evidence of financial ability, the Commission shall require

1. A financial statement showing the net worth of not less than Fifty Thousand Dollars ($50,000.00), or

2. An irrevocable commercial letter of credit in an amount of Twenty-five Thousand Dollars ($25,000.00), or

3. A blanket surety bond in an amount of Twenty-five Thousand Dollars ($25,000.00). For good cause shown concerning pollution or improper plugging of wells by the operator posting the bond, the Commission, upon application of the Director of the Oil and Gas Division, after notice and hearing, may require the filing of a bond in an amount higher than Twenty-five Thousand Dollars ($25,000.00) but not to exceed One Hundred Thousand Dollars ($100,000.00).

If the Commission determines that a blanket surety bond is required, the bond shall be conditioned on the fact that the operator shall cause the wells to be plugged and abandoned in accordance with the laws of this state and the rules and regulations of the Commission. Each bond shall be executed by a corporate surety authorized to do business in this state and shall be renewed and continued in effect until the conditions have been met or release of the bond is authorized by the Commission.

B. The agreement provided for in subsection A of this section shall provide that if the Commission determines that the person furnishing the agreement has neglected, failed, or refused to plug and abandon, or cause to be plugged and abandoned, or replug any well in compliance with the rules and regulations of the Commission, then the person shall forfeit from his bond or letter of credit or shall pay to this state, through the Commission, for deposit in the State Treasury, a sum equal to the cost of plugging the well. The Commission may cause the remedial work to be done, issuing a warrant in payment of the cost thereof drawn against the monies accruing in the State Treasury from the forfeiture or payment. Any monies accruing in the State Treasury by reason of a determination that there has been a noncompliance with the provisions of the agreement or the rules and regulations of the Commission, in excess of the cost of remedial action ordered by the Commission, shall be credited to the Conservation Fund. The Commission shall also recover any costs arising from litigation to enforce this provision. Provided, before a person is required to forfeit or pay any monies to the state pursuant to this section, the Commission shall notify the person at his last-known address of the determination of neglect, failure or refusal to plug or replug any well, and said person shall have ten (10) days from the date of notification within which to commence remedial operations. Failure to commence remedial operations shall result in forfeiture or payment as provided in this subsection.

C. If title to property or a well is transferred, the transferee shall furnish the evidence of financial ability to plug the well, required by the provisions of this section, prior to the transfer.

Added by Laws 1971, c. 25, § 1, emerg. eff. March 22, 1971. Amended by Laws 1983, c. 91, § 1, eff. Nov. 1, 1983; Laws 1984, c. 117, § 1, eff. Nov. 1, 1984.

Section 2 of Laws 1984, c. 117 provides for an effective date.

Section 2 of Laws 1983, c. 91 provides for an effective date.

Section 3 of Laws 1971, c. 25 directed codification.

Title of Act:

An Act relating to oil and gas; providing for plugging of abandoned oil and gas wells; imposing certain duties upon the Corporation Commission; prescribing conditions for lawfully drilling or operating certain types of wells; authorizing the Commission to recover costs; providing for codification; repealing Section 4, Chapter 217, O.S.L.1970 (52 O.S.Supp.1970, § 319), and declaring an emergency. Laws 1971, c. 25.

Law Review Commentaries

Act providing for plugging of abandoned oil and gas wells. 8 Tulsa L.J. 146 (1972).

Expanding liability for the improper plugging of oil and gas wells. Gary B. Conine. 47 Okl.Bar.J. Quarterly 9–16 (Fall 1976).

Mineral Law Section annual survey of significant developments. John S. Lowe. 55 Okl.B.J. 717 (1984). John S. Lowe and Michael F. Miller. 56 Okl.B.J. 744 (1985).

Oil and gas: Expanding liability for improper plugging of oil and gas wells in Oklahoma. 29 Okl.L.Rev. 763 (1976).

Library References

Mines and Minerals ⇐92.56.
C.J.S. Mines and Minerals § 240.

Notes of Decisions

1. In general

Regulation of "economic waste" by general monitoring of natural gas supply through manipulations of rate structure and determination of gas use priorities is within jurisdiction of Federal Power Commission. Federal Power Commission v. Corporation Commission of State of Okl., D.C.Okl. 362 F.Supp. 522 (1973), affirmed 94 S.Ct. 1548, 415 U.S. 961, 39 L.Ed.2d 863.

In proceeding by Federal Power Commission to enjoin enforcement of orders of Oklahoma Corporation Commission relating to wellhead price of natural gas, evidence established that the purpose of orders was to establish a minimum price at which gas might be sold in interstate commerce that orders were not conservation or waste prevention measures but were intended to increase [illegible] from interstate pipelines before natural gas would be permitted to move in interstate commerce. Id.

State has authority to regulate physically wasteful practices with respect to natural gas such as improper well spacing and flaring of unused gas, so long as regulation does not interfere with federal jurisdiction. Id.

Orders of Oklahoma Corporation Commission requiring operator of well producing gas under contract below $.21 per MCF to demonstrate that continued production at contract price would not [illegible] gas produced in Oklahoma might move from there to other states, thus constituting a regulation violative of federal interstate commerce clause. Id.

§ 318.2. Definitions

For purposes of Sections 1 through 8 of this act [1]

1. "Operator" means a mineral owner or lessee who is engaged in drilling or preparing to drill for oil or gas. and

2. "Surface owner" means the owner or owners of record of the surface of the property on which the drilling operation is to occur

Added by Laws 1982, c. 341, § 1, operative July 1, 1982

[1] Sections 318.2 to 318.9 of this title

Approved June 2, 1982. Emergency.

Section 9 of Laws 1982, c. 341 directs codification. § 10 provides for severability and § 11 provides for an operative date.

Title of Act:

An Act relating to oil and gas; defining terms; providing procedures for payment of surface damages in drilling for oil and gas; requiring bond or guaranteed letter of credit; providing for appointment and procedures of appraisers; specifying procedures to determine damages; providing for appeal; limiting construction of act; providing penalties; directing codification; providing severability; providing an operative date; and declaring an emergency. Laws 1982, c. 341.

Law Review Commentaries

Constitutionality of Oklahoma's Surface Damages Act. 20 Tulsa L.J. 60 (1984).

Mineral Law Section annual survey of significant developments. John S. Lowe. 54 Okl.B.J. 859 (1983).

1983 decisions of interest pertaining to real property. Martha L. Marshall. 55 Okl.B.J. 699 (1984).

1984 Supreme Court and Court of Appeals cases pertaining to oil and gas and real property. R. Clark Musser. 56 Okl.B.J. 753 (1985).

Oil and gas.
Legislative damage to surface rights. 36 Okl. L.Rev. 386 (1983).
Surface damages, operators, and the oil and gas attorney. 36 Okl.L.Rev. 414 (1983).

Water and watercourses. Effect of Oklahoma Groundwater Law on common law right to use water. 37 Okl.L.Rev. 157 (1984).

Surface damages in Oklahoma. Procedures for payments and penalties. 18 Tulsa L.J. 338 (1982).

Texas Reexaminers meaning of 'minerals' Moser v. United States Steel Corp. 19 Tulsa L.J. 448 (1984).

Notes of Decisions

1. Construction and application

Oil and gas lease grants by implication right to use the surface. Cormack v. Wil-Mc Corp., Okl., 661 P.2d 525 (1983).

Absent contrary provision in lease, lessee has no liability to lessor for surface use necessary and incidental to extraction of minerals, but this rule has no application to a forced pooled lessor. Id.

Fee owner of unleased mineral interest who was forced by Corporation Commission to participate in unit operation pursuant to pooling action and forced to accept intrusion on his land occasioned by order directing that the well be drilled there was entitled under Const. Art. 2, § 23 to just compensation for this "undue burden." Id.

§ 318.3. Notice of intent to drill—Negotiating surface damages

Before entering upon a site for oil or gas drilling, except in instances where there are non-state resident surface owners, non-state resident surface tenants, unknown heirs, imperfect titles, surface owners, or surface tenants whose whereabouts cannot be ascertained with reasonable diligence, the operator shall give to the surface owner a written notice of his intent to drill containing a designation of the proposed location and the approximate date that the operator proposes to commence drilling.

Such notice shall be given in writing by certified mail to the surface owner. If the operator makes an affidavit that he has conducted a search with reasonable diligence and the whereabouts of the surface owner cannot be ascertained or such notice cannot be delivered then constructive notice of the intent to drill may be given in the same manner as provided for the notice of proceedings to appoint appraisers.

Within five (5) days of the date of delivery or service of the notice of intent to drill, it shall be the duty of the operator and the surface owner to enter into good faith negotiations to determine the surface damages.

Added by Laws 1982, c. 341, § 2, operative July 1, 1982

Law Review Commentaries

Oil and gas.
Legislative damage to surface rights. 36 Okl. L.Rev. 386 (1983).
Surface damages, operators, and the oil and gas attorney. 36 Okl.L.Rev. 414 (1983).

Library References

Mines and Minerals ⇐92.12.
C.J.S. Mines and Minerals § 229 et seq.

§ 318.4. Bond or letter of credit

A. Every operator doing business in this state shall file a corporate surety bond or letter of credit from a banking institution with the Secretary of State in the sum of Twenty-five Thousand Dollars ($25,000.00) conditioned upon compliance with Sections 318.2 through 318.9 of this title for payment of any location damages due which the operator cannot otherwise pay. Each corporate surety bond and letter of credit filed with the Secretary of State shall be accompanied by a filing fee of Ten Dollars ($10.00).

B. The bonding company or banking institution shall file, for such fee as is provided for by law, a certificate that said bond or letter of credit is in effect or has been canceled or that a claim has been made against it in the office of the court clerk in each county in which the operator is drilling or planning to drill. Said bond or letter of credit must remain in full force and effect as long as the operator continues drilling operations in this state. Each such filing shall be accompanied by a filing fee of Ten Dollars ($10.00).

C. Upon deposit of the bond or letter of credit the operator shall be permitted entry upon the property and shall be permitted to commence drilling of a well in accordance with the terms and conditions of any lease or other existing contractual or lawful right.

D. If the damages agreed to by the parties or awarded by the court are greater than the bond or letter of credit posted the operator shall pay the damages immediately or post an additional bond or letter of credit sufficient to cover the damages. Failure to make payment or post a bond or letter of credit shall constitute a violation of the requirements of this section.

Added by Laws 1982, c. 341, § 3, operative July 1, 1982. Amended by Laws 1983, c. 273, § 13, operative July 1, 1983.

Approved June 24, 1983. Emergency.

Law Review Commentaries

Oil and gas

Legislative damage to surface rights. 36 Okl. L. Rev. 386 (1983).

Surface damages, operators, and the oil and gas attorney. 36 Okl. L. Rev. 414 (1983).

Notes of Decisions

1. Construction and application

An operator under § 318.2 et seq. of this title may not post cash, negotiable government securities, certificates of deposit, or other negotiable instruments in lieu of the statutorily mandated undertakings. Op. Atty. Gen. No. 82-232 (Sept. 22, 1982).

§ 318.5. Negotiating surface damages—Appraisers—Report and exceptions thereto—Jury trial

A. Prior to entering the site with heavy equipment, the operator shall negotiate with the surface owner for the payment of any damages which may be caused by the drilling operation. If the parties agree, and a written contract is signed, the operator may enter the site to drill. If agreement is not reached, or if the operator is not able to contact all parties, the operator shall petition the district court in the county in which the drilling site is located for appointment of appraisers to make recommendations to the parties and to the court concerning the amount of damages, if any. Once the operator has petitioned for appointment of appraisers, he may enter the site to drill.

B. Ten (10) days' notice of the petition to appoint appraisers shall be given to the opposite party, either by personal service or by leaving a copy thereof at his usual place of residence with some member of his family over fifteen (15) years of age, or, in the case of nonresidents, unknown heirs or other persons whose whereabouts cannot be ascertained, by publication in one issue of a newspaper qualified to publish legal notices in said county, as provided in Section 106 of Title 25 of the Oklahoma Statutes; said ten-day period to begin with the first publication.

C. The operator shall select one appraiser, the surface owner shall select one appraiser, and the two selected appraisers shall select a third appraiser for appointment by the court. If either of the parties fails to appoint an appraiser or if the two appraisers cannot agree on the selection of the third appraiser, the remaining required appraisers shall be selected by the district court. Before entering upon their duties, the court shall administer to such appraisers an oath that they will perform their duties faithfully and impartially to the best of their ability. They shall inspect the real property and consider the surface damages which the owner has sustained or will sustain by reason of entry upon the subject land and by reason of drilling or maintenance of oil or gas production on the subject tract of land. The appraisers shall then file a written report within fifteen (15) days of the date of their appointment with the clerk of the court. The report shall set forth the quantity, boundaries and value of the property entered on or to be utilized in said oil or gas drilling, and the amount of surface damages done or to be done to the property. The appraisers shall make a valuation and determine the amount of compensation to be paid by the operator to the surface owner and the manner in which the amount shall be paid. Said appraisers shall then make a report of their proceedings to the court. The compensation of the appraisers shall be fixed and determined by the court. The operator and the surface owner shall share equally in the payment of the appraisers' fees and court costs.

D. Within ten (10) days after the report of the appraisers is filed, the clerk of the court shall forward to each attorney of record, each party, and interested party of record, a copy of the report of the appraisers and a notice stating the time limits for filing an exception or a demand for jury trial as provided for in this section.

1. This notice shall be on a form prepared by the Administrative Director of the Courts, approved by the Oklahoma Supreme Court, and supplied to all district court clerks.

2. If a party has been served by publication, the clerk shall forward a copy of the report of the appraisers and the notice of time limits for filing either an exception or a demand for jury trial to the last-known mailing address of each party, if any, and shall cause a copy of the notice of time limits to be published in one issue of a newspaper qualified to publish legal notices as provided in Section 106 of Title 25 of the Oklahoma Statutes.

3. After issuing the notice provided herein, the clerk shall endorse on the notice form filed in the case the date that a copy of the report and the notice form was forwarded to each attorney of record, each party, and each interested party of record, or the date the notice was published.

E. The time for filing an exception to the report or a demand for jury trial shall be calculated as commencing from the date the report of the appraisers is filed with the court. Upon failure of the clerk to give notice within the time prescribed, the court, upon application by any interested party, may extend the time for filing an exception to the report or filing a demand for trial by jury for a reasonable period of time not less than twenty (20) days from the date the application is heard by the court. Appraisers' fees and court costs may be the subject of an exception, may be included in an action by the petitioner, and may be set and allowed by the court.

F. The report of the appraisers may be reviewed by the court upon written exceptions filed with the court by either party within thirty (30) days after the filing of the report. After the hearing the court shall enter the appropriate order either by confirmation, rejection, modification, or order of a new appraisal for good cause shown. Provided that in the event a new appraisal is ordered, the operator shall have continuing right of entry subject to the continuance of the bond required herein. Either party may, within six (6) days after the filing of such report, file with the clerk a written demand for a trial by jury, in which case the amount of damages shall be assessed by a jury. The trial shall be conducted and judgment entered in the same manner as railroad condemnation actions tried in the court. If the party demanding the jury trial does not recover a verdict more favorable to him than the assessment award of the appraisers, all court costs including reasonable attorney fees shall be assessed against him.

Law Review Commentaries

Constitutionality of Oklahoma Surface Damages Act. 20 Tulsa L.J. 60 (1984).

Oil and gas

Legislative damage to surface rights. 36 Okl. L. Rev. 386 (1983).

Surface damages, operators and the oil and gas attorney. 36 Okl. L. Rev. 414 (1983).

Surface damages in Oklahoma: Procedures for payments and penalties. 18 Tulsa L.J. 335 (1982).

§ 318.6. Appeal of decision on exceptions to report of appraiser or verdict upon jury trial—Execution of instruments of conveyance

Any aggrieved party may appeal from the decision of the court on exceptions to the report of the appraisers or the verdict rendered upon jury trial. Such appeal shall not serve to delay the prosecution of the work on the premises in question if the award of the appraisers or jury has been deposited with the clerk for the use and benefit of the surface owner. In case of review or appeal, a certified copy of the final order or judgment shall be transmitted by the clerk to the appropriate county clerk to be filed and recorded.

When an estate is being probated, or when a minor or incompetent person has a legal guardian or conservator, the administrator or executor of the estate, or guardian of the minor or of the incompetent person or the conservator, shall have the authority to execute all instruments of conveyance provided for in this act on behalf of the estate, or minor or incompetent person with no other proceedings than approval by the judge of the court of jurisdiction being endorsed on the instrument of conveyance.

Added by Laws 1982, c. 341, § 5, operative July 1, 1982.

§ 318.7. Effect of act on existing contractual rights and contracts to establish correlative rights—Indian lands

Nothing herein contained shall be construed to impair existing contractual rights nor shall it prohibit parties from contracting to establish correlative rights on the subject matter contained in this act.

This act shall not be applicable to nor affect in any way property held by an Indian whose interest is restricted against voluntary or involuntary alienation under the laws of the United States or property held by an Indian Tribe or by the United States for any Indian Tribe.

Added by Laws 1982, c. 341, § 6, operative July 1, 1982.

Law Review Commentaries

Constitutionality of Oklahoma Surface Damages Act. 20 Tulsa L.J. 60 (1984).

§ 318.8. Effect of act on jurisdiction, authority and power of Corporation Commission

Nothing in this act shall be construed as repealing or limiting the jurisdiction, authority and power of the Oklahoma Corporation Commission.

Added by Laws 1982, c. 341, § 7, operative July 1, 1982.

§ 318.9. Violation of act—Damages

Upon presentation of clear, cogent and convincing evidence that the operator willfully and knowingly entered upon the premises for the purpose of commencing the drilling of a well before giving notice of such entry or without the agreement of the surface owner, the court may, in a separate action, award treble damages. The issue of noncompliance shall be a fact question, determinable without jury, and a de novo issue in the event of appeal.

Any operator who willfully and knowingly fails to keep posted the required bond or who fails to notify the surface owner, prior to entering, or fails to come to an agreement and does not ask the court for appraisers, shall pay, at the direction of the court, treble damages to the surface owner.

Damages collected pursuant to this act shall not preclude the surface owner from collecting any additional damages caused by the operator at a subsequent date.

Added by Laws 1982, c. 341, § 8, operative July 1, 1982.

Law Review Commentaries

Oil and gas

Legislative damage to surface rights. 36 Okl. L. Rev. 386 (1983).

Surface damages, operators and the oil and gas attorney. 36 Okl. L. Rev. 414 (1983).

EXHIBIT "B"

§ 524. Natural gas—Preferred use

The use of natural gas on the premises in which it is produced or in gathering pipelines located or lands in a proven gas field to pump water to the surface for irrigation on such premises, is a preferred use prior in order to all other uses to which such gas may be devoted

Added by Laws 1977, c 38 § 1

Sections 7 and 8 of Laws 1977, c 38 provide for codification and severability

Title of Act:

An Act relating to oil and gas creating a preferred usage for certain natural gas granting rights to certain persons engaged in agricultural activities where natural gas is produced or gathered setting maximum prices for certain natural gas providing for payment of equipment and installation costs conferring certain powers and duties on the corporation commission imposing liabilities, directing codification and making provisions of act severable Laws 1977, c 38

Law Review Commentaries

Oil and gas "Preferred use" of natural gas for agricultural purposes 34 Okl L Rev 172 (1981)

Library References

Gas ⇐1
C J S Gas § 3 et seq

§ 525. Agricultural use of natural gas—Price—Installation of lines—Cessation of delivery

Subject to prior contractual rights, every person, firm or corporation owning or operating any gas well from which natural gas is produced sold or used off the premises on which such well is located shall make available, upon request, to any person engaged in agricultural activities upon such premises, sufficient gas from the production of such well for the operation of pumps necessary for the pumping of such amount of water, produced from wells on such premises, as may be necessary and proper for the irrigation of such portion of said premises as may be devoted to the growth of agricultural products or to pasture or orchard uses The person at whose request the gas is furnished shall receive the gas at the wellhead and pay therefor the price not to exceed that at which the gas is sold at the wellhead All cost of installation, including the gas meter, shall be borne by the person at whose request the gas is furnished Provided, however, that the owner or operator of the well may cease deliveries of gas upon fifteen (15) days' written notice if the person requesting delivery fails to make payments for delivered gas within forty-five (45) days after billing is made by the owner or operator The owner or operator shall be permitted a reasonable surcharge for the cost of meter maintenance, determination of volumes accounting and other operational costs incurred by the owner and operator in connection with the furnishing of the gas

Added by Laws 1977, c 38 § 2

Law Review Commentaries

Oil and gas "Preferred use" of natural gas for agricultural purposes 34 Okl L Rev 172 (1981)

Library References

Gas ⇐1, 14 to 14 6
C J S Gas §§ 3 et seq, 28 et seq

§ 526. Irrigation pumps—Providing natural gas—Price—Installation of lines—Cessation of delivery

Subject to prior contractual rights, every person, firm or corporation owning or operating a natural gas gathering pipeline located on lands in a proven natural gas field, shall furnish to owners or operators of natural gas engines used for pumping irrigation water on such lands and to these same owners or operators of irrigation wells, if requested to do so, natural gas for the operation of engines used for pumping irrigation water. The price charged to the owner or operator of such irrigation wells shall not be more than twenty-five percent (25%) above the prevailing wellhead price The owners or operators of such gathering line shall make connection and furnish the gas meter, but all costs of installation, including this cost of the gas meter, shall be borne by the owner or operator of such irrigation well Provided, however, that the owner or operator of the pipeline may cease deliveries of gas upon fifteen (15) days' written notice if the person requesting delivery fails to make payments for delivered gas within forty-five (45) days after billing is made by the owner or operator The owner or operator shall be permitted a reasonable surcharge for the cost of meter maintenance, determination of volumes, accounting and other operational costs incurred by the owner and operator in connection with the furnishing of the gas

Added by Laws 1977, c 38, § 3

Library References

Gas ⇐1, 14 to 14 e
C J S Gas §§ 3 et seq, 28 et seq

§ 527. Method of measuring amount of gas

It shall be permissible, when agreeable to all parties mentioned in Sections 2 and 3 of this act, to substitute an hour meter or such engine in lieu of a natural gas meter as a method of measuring the amount of the gas so used

Added by Laws [illegible] 38 § 4

Gas ⇐
C J S Gas § 3 et seq

§ 528. State Corporation Commission—Powers and duties—Duty of operators

The State Corporation Commission is hereby vested with jurisdiction over the sales of natural gas pursuant to this section, and may adopt such rules and regulations as may be necessary with respect thereto, but nothing in this act shall create in any manner an obligation or duty on the part of the operator of any well or gathering pipeline, who furnishes gas under the provisions of this act, to assume in any way public utility duties to the public at large, except as such duties may arise from such operator's acts separate and apart from any performance of obligations imposed under this act.

Added by Laws 1977, c. 38, § 5.

Library References

Gas ⇐1.
C.J.S. Gas § 3 et seq.

§ 529. Liability of operator—Jurisdiction—Venue

Any owner or operator of a well who fails to comply with any duty imposed by this act shall be liable to the person or persons aggrieved for all damages suffered as a result thereof, including any diminution in yield from said land which may arise from inability to irrigate the same because of or arising out of the failure to perform such duty. Any person entitled to rights under the provisions of this act may bring an action or proceeding in the district court of the county wherein the natural gas well or natural gas-gathering pipeline is situated to protect and enforce any or all such rights.

Added by Laws 1977, c. 38, § 6.

Library References

Gas ⇐1, 22.
C.J.S. Gas §§ 3 et seq., 27.

Clearly, 18 C.F.R. §271.305 is not written to allow such flexibility and creativity. This regulation was written to be applied when there is a present need to drain a portion of the reservoir which is being inefficiently drained, not to address a projected need some three years in the future. Either a reservoir is being presently inefficiently and ineffectively drained, or it is not. The same reason why the Commission staff's suggestion is improper is applicable to the suggestion by Mobil. The Commission simply does not have the authority to presently grant an application for infill drilling when the alleged necessity is a future one.

III. The Commission Does Not Have the Authority to Condition Its Order As Requested by the Southwest Irrigation Association.

The parties to this proceeding were directed to brief whether the Commission could fashion its order so as to accommodate the following requests of the Southwest Kansas Irrigation Association (SWKIA):

1. Keep gas from either well at the old gas price for agricultural use of wellhead and farmstead gas;

2. Allow irrigation gas to cross section lines;

3. Allow a 1/64 overriding royalty to go to the surface owner for ongoing crop damages;

4. Allow the surface owner to have some input regarding the location of the new well;

5. Make agricultural gas available to the surface owner regardless of his status as mineral owner or not; and

6. Give agricultural use a priority over pipelines regarding the infill wells.

CIG respectfully submits that the Commission is not authorized to mold its order by granting any of the above requests. Rather, the Commission is authorized only to prevent waste and protect correlative rights through the order it renders herein.

A recent decision by the Kansas Supreme Court describes the scope of authority afforded an administrative agency:

> Administrative agencies are creatures of statute and their power is dependent upon authorizing statutes, therefore any exercise of authority claimed by the agency must come from within the statutes. There is no general or common law power that can be exercised by an administrative agency.
>
> Rules or regulations of an administrative agency, to be valid, must be within the statutory authority conferred upon the agency. Those rules or regulations that go beyond the authority authorized, which violate the statute, or are inconsistent with the statutory power of the agency have been found void. Administrative rules and regulations to be valid must be appropriate, reasonable and not inconsistent with the law.

Pork Motel, Corp. v. Kansas Department of Health & Environment, 234 Kan. 374, 673 P.2d 1126, 1132 (1983); see also Olathe Community Hospital v. Kansas Corporation Commission, 232 Kan. 161, 652 P.2d 726 (1982); Woods v. Midwest Conveyor Co., 231 Kan. 763, 648 P.2d 234 (1982); Kelly v. Kansas City, Kansas Community College, 231 Kan. 751, 648P.2d 225 (1982). Therefore we must look to the statutes which grant the Commission authority to ascertain whether SWKIA's requests fall within its scope.

The bulk of the Commission's authority to regulate the production of natural gas is found in K.S.A. §§55-701 to -713 (1983 & Cum. Supp. 1984). Therein, the Commission is empowered to regulate production, K.S.A. §55-703, govern well spacing, K.S.A. §55-7032, promulgate rules to prevent waste, K.S.A. §55-704, preside over hearings, K.S.A. §55-706, impose penalties for violating its orders, K.S.A. §55-708, maintain actions in a court of competent jurisdiction to enforce its rules, K.S.A. §55-709, and to assess costs of hearings to the parties, K.S.A. §55-711. Nowhere in these sections is the Commission given the power to regulate the transactions between buyers, sellers and agricultural users insofar as they concern price, location of lease use, overriding royalties, well location, availability of agricultural gas to surface owners, or priority of agricultural use over pipeline sales. Therefore, if the Commission should attempt to so regulate these relationships, that action will be void. Woods, supra, at 648 P.2d 242.

A brief discussion of Woods may be illustrative of the narrowness of this rule. Woods had filed a complaint with the Kansas Commission on Civil Rights, alleging racial discrimination by his employer. The hearing examiner found in favor of Woods and ordered the employer to pay him an amount for back wages, which was found by the Kansas Supreme Court to be proper. However, the examiner also awarded an amount representing pain, suffering and humiliation. This portion of the award was

stricken on the basis that it exceeded the statutory authority given the agency. The agency's rule allowing compensation and punitive damages was stricken. Id.

The requests made by SWKIA herein are not even remotely related to the authority given under the sections set forth hereinabove. Therefore, their requests cannot be given consideration.

CONCLUSION

The applicant and the proponents deserve a certain amount credit for the ingenuity of their plan in this case. Actually, their plan is the same process that goes on in the oil and gas industry any time when an exploration effort is pursued. In the traditional exploration program by a producing company, it has secured a lease and possesses a geologic idea and thus seeks to finance the program by the selling of various working interests in the lease to investors so as to spread the financial risk of drilling a dry hole. In this case, the applicant Cities, Amoco and Mobil have all admitted that the infill program is not a 100 percent, surefire cinch of securing new reserves -- they admit there is an element of risk, although there is virtually no risk of a dry hole because the infill well will certainly encounter the "connected reserves." The difference between the traditional exploration program and the "infill exploration" program is that in the latter case the risk is not spread by selling working

to four years, it is doubtful that it would have the same positive impact on the gas surplus and on the purchasers in the Hugoton Field.

The fact that the average price of gas from the Hugoton Field, even after infill, will still be less than the weighted average cost of gas of the pipelines, and given the fact that the pipelines agree that they will need additional reserves and deliverability to meet system-wide demand within the next three to four years, the consumer will be better off if those additional reserves came from the Hugoton Field rather than from those gas fields which produce gas priced higher than the weighted average cost of gas for pipelines.

Given these two factors, there is considerable question as to the validity of the opponents contention that infill drilling will result in increased rates to consumers.

The one question that none of the opponents of infill drilling could answer was why, with Hugoton gas presently priced at 51¢ per Mcf, they have permitted the wells to which they are connected to become underproduced. They complain about the cost of gas increasing as a result of infill drilling, yet refuse to purchase the cheapest gas available to their system. Only witness Dunn on behalf of the Royalty Owners had an answer to this dilemma. Mr. Dunn testified that the purchasers run just enough low cost gas to keep their weighted average cost below competing fuel costs. Since the price of Kansas Hugoton gas is so low, very little has to be run to bring the purchasers' costs down. Mr. Dunn testified that infill drilling would result in greater production from the field because the purchasers would have to run larger volumes to keep their weighted average cost of gas down. (Dunn, Vol. XXXXVIII, Tr. 11075).

Even if the Commission were to consider evidence of economic impact of infill drilling, which it should not do, the record clearly shows that the economic benefits for Kansas are tremendous, and far outweigh any increase in gas prices that might occur.

V. THE COMMISSION'S AUTHORITY TO IMPLEMENT PROPOSALS SUBMITTED BY SOUTHWEST KANSAS IRRIGATION ASSOCIATION

The Commission has requested all parties to address whether the Commission has jurisdiction to implement the following proposals submitted by the Southwest Kansas Irrigation Association (SWKIA):

1. Old gas price for agricultural use of wellhead and farmstead gas, regardless of which well the gas comes from;

2. Permission to use gas on adjoining land for irrigation, i.e., allow irrigation gas to cross section line;

3. Allow a 1/64 overriding royalty to go to the surface owner for ongoing crop damages;

4. Surface owner have some input as to the location of the new well;

5. Agricultural gas be available to the surface owner regardless of whether they are a mineral owner or not;

6. Regarding the infill wells, agricultural use should have priority over pipelines.

In the regulation of the production of natural gas the Commission's authority is limited to three areas: prevention of waste, protection of correlative rights, and determination of market demand. Bennett v. Corporation Commission, 157 Kan. 589, 596, 142 P.2d 810 (1943) (Commission possesses no powers not given it by statute); Colorado Interstate Gas Co. v. State Corporation Commission, 192 Kan. 1, 24, 386 P.2d 266 (1963), cert. denied 379 U.S. 131 (1964), (statute gives Commission three areas of responsibility: prevention of waste, production of correlative rights and determination of market demand).

In order for the Commission to have authority to decide an issue or implement a proposal, that issue or proposal must be directly related to one of the above areas. If such issue or proposal is not directly related to the prevention of waste, protection of correlative rights or determination of market demand, then the Commission has no jurisdiction over the matter. Kansas-Nebraska Natural Gas Co. v. State Corporation Commission, 169 Kan. 722, 732, 222 P.2d 704 (1950); Cities Service Gas Co. v. State Corporation Commission, 180 Kan. 454, 461, 466, 304 P.2d 528 (1956); Columbian Fuel Corp. v. Panhandle Eastern Pipe Line Co., 176 Kan. 433, 443, 271 P.2d 773 (1954) (Commission has authority to set Hugoton Field minimum wellhead price based upon power to prevent waste); Northern Natural Gas Co. v. Republic Natural Gas Co., 172 Kan. 450, 471, 241 P.2d 708 (1952); Northwest Central Pipeline Corp. v. Kansas Corporation Commission, 237 Kan. 248, 258, (1985) (Commission has authority to set Hugoton Field allowables based upon power to protect correlative rights); Hartman v. State Corporation Commission, 215 Kan. 758, 770, 529 P.2d 134 (1974) (Commission has authority to require producers to submit exploratory information based upon power to prevent waste); Mobil Oil Corp. v. Kansas Corporation Commission, 227 Kan. 594, 608, 608 P.2d 1325 (1980) (Commission has no authority to regulate bargaining rights of parties or act upon equitable considerations).

The Commission's authority is further limited by the Natural Gas Act, 15 U.S.C. §717, et seq., which provides for exclusive federal regulation over the transportation and sale of natural gas in interstate markets. Under the Natural Gas Act, the Kansas Commission's authority over the transportation and sale of natural gas is limited to the local distribution of natural gas, the facilities used for such distribution and

the production or gathering of natural gas. The latter, has been further limited by the U. S. Supreme Court decision in Northern Natural Gas Co. v. State Corporation Commission, 312 U.S. 84 (1963) that ratable take orders implemented by the Commission to protect correlative rights were invalid because they were concerned with the purchase of natural gas, rather than production and gathering, and thus, interferred with the exclusive federal jurisdiction.

It is in this light that the Commission must decide whether it has jurisdiction to implement the proposals submitted by SWKIA.

Mesa and Tenneco contend that, with the exception of the location of the new well, the Commission lacks jurisdiction to implement the proposals submitted by SWKIA.

The proposals that deal with making gas available to adjoining landowners for irrigation or making gas available to the surface owner regardless of whether they are a mineral owner or not, or providing the surface owner with a 1/64th overriding royalty interest for crop damage, have absolutely no relation to the prevention of waste, protection of correlative rights or determination of market demand. As stated above, the Commission's jurisdiction is limited to matters that relate to those three areas and if the issue is not directly related to the prevention of waste, protection of correlative rights or determination of market demand, the Commission has no jurisdiction over the matter. While it may be appropriate to consider the equitable nature of such requests, which Mesa and Tenneco intend to do, it is quite clear under Mobil Oil Corp., supra, that the Commission has no authority to regulate the bargaining rights of parties or act upon equitable considerations.

As to SWKIA's proposals that the old gas price be charged for agricultural use regardless of which well the gas comes from and that such use be given priority, Mesa and Tenneco contend that such proposals have no relation to the prevention of waste, protection of correlative rights or determination of market demand. Further, adoption of these proposals would likely infringe upon the exclusive jurisdiction of FERC, in that, such are outside the realm of the physical production and gathering of natural gas in the interest of conservation and are more fully involved in the purchase of natural gas that has been dedicated to interstate markets.

As to the proposal that the surface owner has some input as to the location of the new well, Mesa and Tenneco agree that the Commission has authority over the issue of the location of the new well but only as it pertains to the prevention of waste and protection of correlative rights.

Mesa and Tenneco further contend that the majority of the proposals submitted by SWKIA would modify or extend the terms of the contract between the producer and the landowner, and therefore such terms can be changed only through negotiations between those parties. Such changes cannot legally be made by the Commission under its general police power.

There have been a few cases decided by the Supreme Court of Kansas that have dealt with the Commission's ability to abrogate contracts or a portion thereof and a review of those holdings at this juncture would prove fruitful.

In Railroad & Light Co. v. Court of Industrial Relations, 113 Kan. 218 (1923), three traction companies were supplied electric service under contracts with a public utility. The public utility applied to the Commission for an increase in rates which initially did not include the contracts with the traction companies. The Commission ordered the utility to present information supporting any changes it desired in its contractual rates. After several hearings the Commission abrogated the contract rates under which the traction companies were supplied with power and substantially increased them.

On appeal, the District Court and the Supreme Court in affirming the District Court's refusal to abrogate the contract rates, emphasized that "contracts cannot be waived aside by mere lip service invocation of the police power, 'by simply invoking the convenient apologetics of the police power' to use the language of Mr. Justice Holmes in Kansas Southern Railway v. Kaw Valley District, 233 U.S. 75, 79; 58 L.Ed. 857." The Supreme Court further stated that "before a contract can be interferred with through the police power, it must appear that the contract does in some measure affect adversely the welfare of the public." Railroad & Light Company, supra at 229.

In explaining what would be considered an unreasonable contract that could be abrogated by the Commission, the Court stated that:

> If, for instance, continued performance of the contracts in question should bear so heavily on the power company that its general revenues would be depleted to the extent that recoupment would have to be made at the expense of the other customers, or would otherwise be reflected adversely in its rates or service to that portion of the public served by the power company, the contracts could and should be abrogated under the police power; but if continued performance of the contracts would only affect the net profits or dividends on that portion of the power company's property devoted to performance of the contracts, then the public interest would not be affected, and there would be no occasion or excuse for the intrusion of the state's police power. Citations omitted. Railroad & Light Co., supra at 229.

In Central Kansas Power Company v. State Corporation Commission, 181 Kan. 817 (1957) the Supreme Court of Kansas in its syllabus states:

> The necessity for an express finding of the unreasonableness of existing contract rates as a prerequisite to their abrogation is in recognition of the state's police power to regulate public utilities, the exercise of which is conditioned on the public interest. Absent this public interest, abrogation of contract rates may not be effected merely to relieve one or the other parties from unprofitable or injudicious undertakings. Central Kansas, supra, syl. 3 at page 817.

In support of the above legal proposition the Supreme Court of Kansas found the Commission Orders unlawful because the Commission abrogated contract rates without making an express finding concerning the reasonableness of the existing contract rates.

The Supreme Court reasoned as follows:

> In order for the contract rates to be abrogated upon the initiative of the Commission or upon complaint of the customer, the Commission is required by G.S. 1949, 66-110 to conduct an investigation and make an express finding of the unreasonableness of the existing rates. The statute (G.S. 1949, 66-117) cannot be read as requiring less when the public utility vendor wishes to change the contract rates. A finding that a contract rate is unreasonable must precede the abrogation of the contract. Central Kansas Power Company, supra at 827.

The Court went on to state that the requirement of an express finding of unreasonableness of the existing contract rates has strong support in policy, as effecting a workable compromise between contract stability on the one hand, and the public interest in changing contracts when their rates become unreasonable on the other. The Court, in making the above finding, adopted the following language from United Gas Co. v. Mobile Gas Corp., 350 U.S. 332, 100 L.Ed. 373, 765 S.Ct. 373:

> ...By preserving the integrity of contracts, (this construction of the Natural Gas Act), permits the stability of supply arrangements which all agree is essential to the health of the natural gas industry. Conversion by consumers particularly industrial users, to the use of natural gas may frequently require substantial investments which the consumer would be unwilling to make without long-term commitments from the distributor, and the distributor can hardly make such commitments if its supply contracts are subject to unilateral change by the natural gas company whenever its interest so dictate... On the other hand, denying to natural gas companies the power unilaterally to change their contracts in no way impairs the regulatory powers of the Commission, for the contracts remain fully subject to the paramount power of the Commission to modify them when necessary in the public interest.

In Kansas Power & Light Company v. Mobil Oil Company, 198 Kan. 556 (1967), the Supreme Court of Kansas, citing Central Kansas Power Company, supra, held that a rate for gathering and transporting excess gas, having been fixed by contract by the parties, was not subject to change except upon a finding made by the Commission that the same was unreasonable. The Court reiterated that "contracts freely and fairly made are favorites of the law" and should not be abrogated unless there is an express finding that the contracts are "damaging to the public."

In a very recent case, the Supreme Court of Kansas had the opportunity to

expound on the Commission's jurisdiction over private contractual terms that do not deal with utility rates, the same type of contractual terms involved in the present case. Kansas Electric Power Cooperative, Inc. v. State Corporation Commission, 235 Kan. 661 (1984).

KEPCO was formed in 1975 and one condition of membership therein was that its cooperatives had to participate in Wolf Creek. Kaw Valley and Nemaha-Marshall, were two cooperatives that either failed to join KEPCO or withdrew from it because of the above condition.

KEPCO, on April 19, 1979, entered into a contract with the United States for the purchase of 90 Mw of Hydro Power and decided to condition access to that power on Wolf Creek participation, thus excluding Kaw Valley and Nemaha-Marshall. The two latter cooperatives argued that they had made a substantial contribution to help finance the acquisition of the hydro power, and thus were entitled to an allocable share of that power notwithstanding their determination not to participate in Wolf Creek.

The Commission, in granting KEPCO a certificate of convenience and necessity, decided that all Kansas distribution cooperatives who were members of Kansas Electric Cooperatives, Inc. (KEC) at that point and paid assessments to KEC without regard to Wolf Creek participation would be entitled to the hydro capacity and that KEPCO's certificate should be conditioned upon KEPCO allowing Kaw Valley and Nemaha-Marshall access to the hydro power. KEPCO appealed the Commission's decision and the district court concluded that:

> The question of the distribution of SPA hydro peaking power involved matters which should have been excluded from consideration by the KCC in granting a certificate of convenience, because the entire SPA hydro peaking power matter is purely a contractual dispute between private corporations affected by the public interest and, thus, were outside the jurisdiction of the KCC...(emphasis added) KEPCO, supra at 666.

The District Court reasoned that when the KCC ordered a reallocation of SPA power in exchange for the grant of a certificate of convenience and necessity it in effect demanded the right to decide a contract dispute between KEPCO and two or more non-member rural electric cooperatives. The District Court further concluded that in so doing the KCC exceeded its authority and therefore the condition which required a wider distribution of SPA hydro peaking power was unlawful.

The Supreme Court of Kansas adopted both the reasoning and conclusions of the District Court. KEPCO, supra at 666.

In the present case, the Southwest Kansas Irrigation Association have contended

that the Commission's approval of the proponents' applications for infill drilling in the Hugoton Field should be subject to the condition that the producers agree to implement the above-mentioned proposals submitted by the SWKIA. In order for the majority of those proposals to be implemented, changes in the contracts between the landowners and producers would have to be made. Both Mesa and Tenneco, as well as other producers, stated on the record a willingness to continue furnishing gas from the existing well on the unit for irrigation use as long as legally permissible. Other requests made by SWKIA will be given consideration by Mesa and Tenneco through negotiations between the parties even though the Commission has no authority to either directly abrogate or modify the contract terms between the landowner and producer or indirectly abrogate or modify those terms by conditioning approval of infill drilling upon the producers' agreement to implement the proposals of the SWKIA.

Despite a thorough search of Kansas case law, Mesa and Tenneco could find no case where the Commission ever abrogated or modified non-pricing terms of a contract between a landowner and producer. Indeed, all of the cases cited above, with the exception of the KEPCO case, have dealt only with abrogation or modification of contractual rates. In the KEPCO case, the Supreme Court's decision suggests that with respect to the Commission's authority to abrogate or modify contractual terms other than rates or price, between parties affected with the public interest, which terms dictate the allocation of an owner's resource, the Commission has no authority to modify such contractual terms. Such terms which explicate the relationship between the parties have not been disturbed by the Commission in the past, and there appears to be no authority or precedent for the Commission to do so now.

Even if the Commission had such authority, then pursuant to the above-mentioned case law, the Commission must give proper notice to all parties involved, conduct an investigation and make an express finding that the existing contracts between each landowner and producer are unreasonable. As indicated by the Central Kansas Power Company, and Kansas Power & Light, decisions, the Commission, cannot simply abrogate or modify existing terms of contracts by finding that certain new terms are reasonable. It must examine those existing terms and find that they are unreasonable. As stated by the Supreme Court of Kansas in Central Kansas Power Company:

> There is a significant difference between a finding of the unreasonableness of existing contract rates and a finding of the reasonableness of the public utility's proposed rates. In order for the

> contract rates to be abrogated...the Commission is required to conduct an investigation and make an express finding of the unreasonableness of the existing rates. Central Kansas Power Company, supra at 827.

No such examination has been made in the present case, and thus, any change in the terms of existing contracts by implementation of the SWKIA proposals would be unlawful.

Further, even if the Commission made such investigation, Mesa and Tenneco contend that based upon the above mentioned case law, that existing contract terms are reasonable and that such terms in no way damage or adversely affect the public to the extent that the Commission could lawfully abrogate or modify the terms of those contracts.

Finally, Mesa and Tenneco contend that SWKIA's contention that the Commission should only improve the proponents' application for infill drilling in the Hugoton Field if such approval is subject to the condition that the producers agree to implement the above-mentioned proposals submitted by the SWKIA, would be the same as the Commission's decision to grant KEPCO a certificate subject to KEPCO allowing Kaw Valley and Nemaha-Marshall access to the hydro power. As mentioned above, the Supreme Court of Kansas found that such a condition interferred with a traditional contractual matter and made the Commission's decision in the KEPCO case unlawful.

As in the KEPCO case, the irrigators' proposals for such things as payment of crop damage or use of gas for irrigation are matters that have always been purely contractual in nature and thus, outside the jurisdiction of the Commission.

With the exception of the location of the new well, the Commission lacks jurisdiction to implement the proposals submitted by SWKIA. Such proposals have absolutely no relation to the prevention of waste, protection of correlative rights or determination of market demand, and as stated above, the Commission's jurisdiction is limited to matters that relate to those three areas.

In addition, the proposals submitted by the SWKIA modify or extend the terms of the contract between the producer and the landowner and therefore, such terms can be changed only through negotiations between those parites. Such changes cannot legally be made by the Commission pursuant to its general police power. Mesa and Tenneco, as well as the other purchasers participating in this proceeding have indicated a willingness to continue to sell gas for irrigation purposes from the existing well as long as it is legally permissible. We urge the Commission not to risk the validity of its order by illegally conditioning the approval of the application.

There has been some discussion during the hearings suggesting the Commission direct the operators to drill the infill well in a specific quarter section. For the most part, the producers did not have a problem with this proposal. However, it is foreseeable that exceptions would have to be granted, after notice and hearings. Even though it may lead to a more orderly development of the field, such an order, could result in an administrative burden on the Commission. Furthermore, given the 1,250 foot tolerance provision, it seems the best course of action would be to allow the operators to drill the additional well in the section they believe would maximize their recovery.

In conclusion, staff recommends the location of the infill well be pursuant to the proposal set forth by Cities Service in its application.

7. WITH THE EXCEPTION OF WELL LOCATION, THE COMMISSION DOES NOT HAVE THE AUTHORITY TO IMPLEMENT THE PROPOSALS SUBMITTED BY THE SOUTHWEST KANSAS IRRIGATION ASSOCIATION.

The Commission has requested all parties to brief the issue of whether the Commission has the authority to implement the following proposals submitted by the Southwest Kansas Irrigation Association (SWKIA):

1. Old gas price for agricultural use of wellhead and farmstead gas, regardless of which well the gas comes from;

2. Permission to use gas on adjoining land for irrigation, i.e., allow irrigation gas to cross section line;

3. Allow a 1/64 overriding royalty to go to the surface owner for ongoing crop damages;

4. Surface owner have some input as to the location of the new well;

5. Agricultural gas be available to the surface owner regardless of whether they are a mineral owner or not;

6. With respect to the infill wells, agricultural use should have priority over pipelines.

The Commission is a creature of statute and its jurisdiction and powers are limited to those granted by statute. Bennett v. State Corporation Commission, 157 Kan. 589, 596, 142 P.2d 810

(1943). In the regulation of the production of natural gas the authority of the Commission is restricted to the areas of preventing waste, protecting correlative rights and establishing market demand. Colorado Interstate Gas Co. v. State Corporation Commission, 192 Kan. 1, 24, 386 P.2d 266 (1963). Before the Commission has the authority to make a determination on an issue or execute a proposal, such issue or proposal must be directly related to prevention of waste, protection of correlative rights or market demand. Kansas-Nebraska Natural Gas Co. v. State Corporation Commission, 169 Kan. 722, 732, 222 P.2d 704 (1950); Hartman v. State Corporation Commission, 215 Kan. 758, 770, 529 P.2d 134 (1974). Additionally, the Kansas Supreme Court has found in Mobil Oil Corp. v. Kansas Corporation Commission, 227 Kan. 594, 608, 608 P.2d 1325 (1980), that nowhere in the statutes, regulations or case law are "bargaining rights" a matter the Commission is intended to regulate, supervise or protect. The Commission's authority is further restricted by the Natural Gas Act, 15 U.S.C. §717, et seq., which provides for exclusive federal regulation over the transportation and sale of natural gas in interstate markets.

Within these confines, the Commission must determine whether it has the authority to invoke the proposals submitted by SWKIA.

Concerning the proposal that the old gas price be charged for farmstead gas regardless of the well it comes from, it is firmly established that the price of gas is within the purview of FERC's jurisdiction. Adoption of this proposal would infringe upon the exclusive jurisdiction of FERC.

The proposal pertaining to the irrigators being granted permission to use gas on adjoining land for irrigation purposes appears to be a "bargaining right," which the Commission is powerless to regulate. The increased demand for an economical supply of gas for farming and related purposes has led many lessors to seek an agreement from lessees to supply gas from production obtained from the leased premises. It has become common for leases to contain "irrigation gas clauses" through which the

surface owner is entitled to receive under the stated conditions and at the agreed price, gas from the wells on the premises to operate the irrigation systems. However, these contracts have generally been restricted to those premises where the gas well is located. SWKIA is proposing that it be granted permission to use the gas off the premises. If the Commission were to encroach into what has traditionally been a contractual matter, the Commission would first have to find the means to validly exercise its police power to abrogate the existing contracts.

The SWKIA is seeking a 1/64 overriding royalty to compensate the surface owner for ongoing crop damage. Historically, absent any language in the lease to the contrary, the lessee of mineral rights was said to have an implied right to reasonable use of the surface in order to explore and develop oil and gas. See Generally 38 Am. Jur. 2d Gas and Oil §115. This right has most often been characterized as an easement. Compensation for damage to land, crops or other facets of the surface was restricted to the limits contemplated in the damage clause of the lease. If the lease was without a damage clause the surface owner was practically helpless, as the law tended to give great leeway to the lessee's "reasonable" use of the surface. Wms. and Meyers, §218 Oil and Gas Law (1985). In sum, surface owners or users have had little leverage under the law to complain about mineral operations which though reasonable, interfered with their existing use of surface or created situations which would otherwise be termed nuisances if not for the traditional dominance of the mineral estate.

As a result of the 1970's boom in oil and gas exploration, the awareness of this problem heightened. At least three states, Montana, North Dakota and Oklahoma have enacted legislation providing greater procedural and substantive rights to surface owners impacted by oil and gas operations. These acts represent a major departure from traditional law in that they provide for compensation to the surface owner without regard to the reasonableness of

the use. The constitutionality of such legislation has been questioned, but to date, the statutes have been upheld.

It must be remembered that an overriding royalty comes out of the producers pocket. It is generally paid to persons whom actively contribute to the production of oil or gas. It is a contractual matter and beyond the scope of the Commission's jurisdiction to require an overriding royalty interest to surface owners for ongoing crop damage. This matter would be better left for the legislature to address, much like the legislatures of other states have done.

The SWKIA request that the irrigators have some input as to the location of the second well. While the Commission should encourage voluntary consultation as to the location of the second well, it cannot mandate anything outside of the scope of its statutes and rules and regulations. It is staff's position that the Commission's authority concerning well location is restricted to its relationship to the prevention of waste and protection of correlative rights.

The proposals that gas be available for agricultural purposes to the surface owner regardless of whether they are a mineral owner or not and that they be given a priority over pipelines constitute "preferred use" requests.

The Commission has long recognized the importance of the availability of gas for irrigation purposes. In 1956, the Commission issued an administrative bulletin setting forth parameters for contracts related to irrigation gas. Such guidelines were as follows:

> Subject to the following prescribed conditions and limitations governing use of natural gas for irrigation purposes, gas may be made available to any farmer desiring it for that use who will take delivery at the wellhead, make his own connection to the wellhead and transport his own gas to his irrigation pumps:
>
> (1) Contracts entered into between the farmer-user and the producing company must be ratified by the contract purchaser of gas produced from the well.
>
> (2) Each such contract shall be submitted to the Director of Conservation for approval and a copy as approved filed in his office before any gas is delivered thereunder.

(3) All gas so furnished shall be metered and proper records of same shall be kept in a manner approved by the Director of Conservation.

(4) The amount of gas taken from a well and furnished to a farmer-user for irrigation purposes shall be charged against the monthly current allowable for such well.

(5) It is understood that producing companies will charge a nominal price for gas furnished for irrigation purposes, and the price shall be uniform to all such users.

The cooperation of all parties interested in this matter is invited.

Presumably these guidelines are still the official policy of the Commission.

The granting of a preferred use status or a system of priority can only be done through preferred use legislation. For example, the Oklahoma legislature has enacted preferred use legislation to insure that there is a dependable source of energy for use in the operation of irrigation pumps. The statutes declare the preferred use of gas produced from the premises would be to provide a source of power to pump water for irrigation of such premises. 52 Okla. Stat. §§ 524-529. There has been numerous constitutional objections to the preferred use doctrine, but to date, such legislation has been justified by the state's interest in the health and welfare of its citizens. 34 Okla. Law Rev. 172 (1981).

In conclusion, with reference to the preferred use status the irrigators seek, the Commission is limited to do anything beyond setting forth the policy of encouragement and cooperation.

Regarding all the proposals of the SWKIA, with the exception of the limited authority it has concerning well locations, the Commission is without jurisdiction to execute the proposals. The Commission can encourage the producers to address the irrigators concerns when negotiating contracts. These matters should be left in the hands of the contracting parties until the legislature enacts statutes addressing the proposals raised by the SWKIA.

VI. CONCLUSION

Commission staff recommends the Commission find that the latest geological and engineering evidence demonstrates one well

SUPPLEMENTAL BRIEF

ISSUES RAISED BY SOUTHWEST KANSAS IRRIGATION ASSOCIATION (SWKIA)

The following responds to Mr. Vernon's December 17, 1985, memorandum in regard to the briefing schedule wherein he states that the Commission requests that parties to the infill proceedings address issues raised by the proposals submitted by SWKIA.

The six proposals of SWKIA are basically six propositions by which SWKIA seeks to have the Commission by rules or conditional order to expropriate contract rights or ownership rights of producers or pipeline companies and vest them in the surface landowners. The proposals would normally be expected to be vigorously opposed by the producers; however, in view of the substantial rewards to the producers if infill drilling is approved, it may be that some producers would conclude that the rewards from infill wells would far outweigh the cost arising from the six propositions. In a different environment than these infill proceedings, it is clear that each of the SWKIA propositions would be vigorously opposed by the producers.

Clearly, each and all of the six proposals of SWKIA are contrary to the federal and state constitutional provisions which protect property rights, including contractual rights.

It is well established that the Commission's powers cannot exceed those lawfully delegated to it by the legislature.

The applicable law is summarized at 1 Am. Jur. 2d Administrative Law § 70 as follows:

> "Administrative agencies are creatures of statute and their power is dependent upon statutes, so that they must find within the statute warrant for the exercise of any authority which they claim. They have no general or common-law powers but only such as have been conferred upon them by law expressly or by implication."

Section 72 states:

> "The powers of administrative agencies are measured and limited by the statutes or acts

creating them or granting their powers, to those conferred expressly or by necessary or fair implication. . . ."

> "Limitations upon the power of an administrative agency are not confined to limitations in the statute conferring its power. There are limitations upon the power of the legislature to confer power on administrative agencies. Thus, it is said that the legislature cannot confer a power which it cannot itself exercise and that whatever powers a state may deny to its commissions, it cannot give them power to do what the laws of the United States forbid, whether they call their action administrative or judicial. The rulemaking power of an administrative agency is restricted by law apart from the statute conferring power, and an agency having authority to effectuate the policies of a particular statute may not effectuate such policies so single-mindedly that it wholly ignores other and equally important legislative objectives."

The principles were enounced by the Kansas Supreme Court in Continental Investment Corp. v. State Corporation Commission, 156 Kan. 858, 868, 137 P.2d 166, 172 (1943) when it stated "Moreover the powers and duties of our state corporation commission are exclusively those which are conferred and circumscribed by our own statutes." (Our emphasis) Also see Cray v. Kennedy, 230 Kan. 663, 640 P.2d 1219 (1982) where the syllabus of the Kansas Supreme Court states: "In the absence of valid statutory authority an administrative agency may not, under the guise of a regulation, substitute its judgment for that of the legislature."

The syllabus of the Kansas Supreme Court in Hartman v. State Corporation Commission, 215 Kan. 758, 529 P.2d 134, states: "In order to be valid, administrative regulations must be within the authority conferred by the legislature. An administrative regulation which goes beyond or conflicts with legislative authorization is void."

Here, clearly, the legislature has not made any delegation to the Kansas Corporation Commission to do any of the things proposed by SWKIA, with the possible exception to allow the surface owner to have some input as to the well locations. As to well locations the Commission's present rules

provide for well location inputs (not decision) by interested parties during the well licensing process.

But, assuming, arguendo, that the legislature has in fact delegated authority to the Commission to issue regulations implementing the proposals submitted by SWKIA, such regulations, nonetheless, would be unlawful because the legislature lacks the power to make a delegation of authority when the matter delegated would be contrary to fundamental law of the land. Neither the legislature nor the Commission can make contracts for parties, alter contracts for parties, or take property of one party and give it to the other party.

SWKIA's Proposition 1 would mandate the price to be charged the irrigator for gas regardless of contractual arrangements or the source of the gas to be taken. Clearly, the proposition would contradict an express term of gas contracts which is impermissible under the law. (Allied Structural Steel Company v. Spannaus, 438 U.S. 234, 57 L.Ed.2d 727, 98 S. Ct. 2716 (1978) Article I, §10, clause stating "no State shall . . . pass any law impairing the obligation of contracts). Even if it did not, the proposition prejudicially affects and thereby impairs the contract. The taking of gas having a value of $3.00 for compensation of 60¢ per Mcf, would deprive the producer or the downstream pipeline of property without due process of law in violation of the Fourteenth Amendment of the United States Constitution.

SWKIA's Propositions 2, 5, and 6 will have the effect of unlawfully impairing the rights of persons to contract or not to contract.

In Thompson v. Consolidated Gas Utilities Corporation, 300 U.S. 55, 81 L.Ed. 510, 57 S. Ct. 364 (1937), the Supreme Court examined the constitutionality of a gas proration order issued by the Railroad Commission of Texas. The challengers asserted that the purpose and effect of the order was to compel them to purchase gas from well owners who did not otherwise have markets for their gas. The Court approved the finding of

lower court stating that the effect of the order was to take from complainant . . . substantial and valuable interests in their private marketing contracts and commitments and in the use of their pipelines and other facilities for transmitting their gas to their markets without compensation." 81 L.Ed. at 523. This creation of a contractual obligation for the sole benefit of well owners who did not have markets was a "taking of property." The Court noted that it was done without compensation and with no "public purpose" in mind. The Court held that there was no taking for the public benefit, but a taking for the benefit of private individuals. "[T]he court has many times warned that one person's property may not be taken for the benefit of another private person without a justifying public reason, even though compensation be paid." 81 L.Ed at 524. The lack of a public purpose or the giving of just compensation proved fatal to the validity of the Railroad Commission's order. Thus, the creation of a contractual obligation by the state's police power was found to be a violation of the due process guarantees of the Constitution. Thompson clearly applies to Propositions 2, 5, and 6.

If Propositions 2, 5, and 6 are to be extended to an interstate pipeline company, it will be in violation of the Commerce Clause of the Federal Constitution since only the Congress can regulate commerce between the states. The Congress has delegated to the FERC under the Natural Gas Act and the Natural Gas Policy Act of 1978 the regulation of sales and transportation in interstate commerce. An order by the Kansas Corporation Commission which would undertake to impose on an interstate pipeline company an obligation to serve irrigation gas sold into interstate commerce would be in contradiction of the two Acts referred to and the FERC's regulations which preempt the matters. (Transcontinental Pipe Line v. State Oil & Gas Board, United States Supreme Court Decision January 20, 1985, 54 Law Week 4114)

SWKIA's Proposition 3 which would carve out of the producers' leasehold a 1/16th override is simply the taking of property without compensation. There is no justification for the exercise of the police power of the state to enact a proposition where property is taken from one party and given to another.

A regulation can affect the value of property to such an extent that a "taking" does occur. In Goldblatt v. Town of Hempstead, 369 U.S. 590, 8 L.Ed.2d 130, 82 S. Ct. 987 (1962) the Supreme Court sets forth the standard to be applied as follows:

> "To justify the state in . . . interposing its authority in behalf of the public, it must appear, first that the interests of the public . . . requires such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals." 8 L.Ed.2d at 134.

The proposals of SWIKA, if adopted, would not inure to the public but to private parties which is even more reason for the Commission to reject them.

None of the six proposals of SWKIA can be justified as an exercise of the police power of the state to protect public interests. First, the police power is vested in the State Legislature--not in the Corporation Commission. Secondly, the public interest would appear to favor the producers and pipeline companies in that any sum that they must pay or bear in the way of additional expense in way of payments or valuable benefits to surface owners must be passed on to the public in higher costs. Finally, where interstate commerce is involved and would be affected by the Commission's rules if it adopted SWKIA's proposal, the rules cannot stand, either under the Commerce Clause or the Fourteenth Amendment to the Federal Constitution. (Great Northern Ry. v. Washington, 300 U.S. 154, 57 S. Ct. 397, 81 L.Ed. 573) (Panhandle Eastern Pipe Line Company v. Fadely, 183 Kan. 803, 332 P.2d 568 (1958))

to ultimately produce, without waste, the amount of gas underlying the proration unit as mandated by K.S.A. 55-703.

In short, the above engineering evidence establishes that an infill well is necessary on each proration unit to effectively and efficiently drain portions of the reservoir within each proration unit which cannot be effectively and efficiently drained by the existing well on the proration unit. Substantial reserves will not be recovered unless an infill well is drilled on each proration unit. An infill well on each proration unit is also necessary to prevent hydrocarbon waste and to protect correlative rights.

III. THIS COMMISSION LACKS JURISDICTION TO ACT ON THE VARIOUS DEMANDS OF THE SOUTHWEST KANSAS IRRIGATORS ASSOCIATION.

Representatives of the Southwest Kansas Irrigators Association have requested this Commission, as a condition to authorization of infill drilling of the Hugoton Field, to do the following: (1) require producers and pipelines to forever sell gas at the Section 104 price even if irrigation connections are made to new infill wells; (2) allow irrigation gas to cross section lines; (3) impose a 1/64th override royalty to compensate for crop damage related to the drilling and maintenance of wells on the surface; (4) require surface owner designation of well locations; (5) require producers and/or pipelines to make agricultural gas available to surface owners who have no mineral rights; and (6) provide that agricultural use shall have priority or preferred usage over other uses. The Commission simply does not have jurisdiction to consider these claims for the reasons set forth below:

A. The Commission has not given proper notice to the many producers and other interested parties who did not participate in the infill hearings that the various demands of the SWKIA would be considered.

The various notices published in connection with this application simply do not furnish notice that any of the SWKIA's demands as set forth above would be considered. Many small producers, as well as mineral owners not represented by the Southwest Kansas Royalty Association, did not participate in this hearing and

thus have not received any notice, let alone the notice required by K.S.A. 55-706 and K.A.R. 82-3-135. Many of the demands of the SWKIA would require fundamental changes in the existing Basic Proration Order. If this Commission acts on these demands without proper notice, its order is simply invalid. Stevens v. State Corporation Commission, 185 Kan. 190, 341 P.2d 1021 (1959).

B. This Commission's jurisdiction is limited by statute. The Commission does not possess equity jurisdiction or jurisdiction over purely private rights and liabilities.

The jurisdiction of this Commission is limited to those conferred by K.S.A. 55-701 et. seq., commonly referred to as the Gas Conservation Statute. Bennett v. Corporation Commission, 157 Kan. 589, 596, 142 P.2d 810, (1943). The Commission's primary responsibilities under the Gas Conservation Statute are: (1) to prevent waste of gas as a natural resource; (2) to allow sufficient production to meet demand if such can be done without waste; and (3) to protect correlative rights. Colorado Interstate Gas Co. v. State Corporation Commission, 192 Kan. 1, 24, 386 P.2d 266 (1963). The dominant purpose of the Gas Conservation Statute is to prevent waste. Id. at 25. The Commission lacks equity jurisdiction. In Mobil Oil Corp. v. Kansas Corporation Commission, 227 Kan. 594, 608, 608 P.2d 1325 (1980), the Commission was reversed for "acting upon what might be referred to as equitable considerations when it is cloaked with no equitable jurisdiction." Id. at 608. The Court further noted that "[n]owhere in statutes, regulations, or case law are 'bargaining rights' a matter that the Commission is intended to regulate, supervise, or protect." Id. Furthermore, the Commission cannot serve as a forum for litigation of purely private rights and liabilities. Cities Service Gas Co. v. State Corporation Commission, 197 Kan. 338, 342, 416 P.2d 813 (1964). Many of the irrigators' demands appear to involve the modification of existing contract rights (items 1, 2, 3 and 4), the creation of new contract and property rights (items 1 through 6), and modification of existing oil and gas law (items 4, 5 and 6). The Commission simply does not have jurisdiction over these private demands. Mobil Oil Corp. v. Kansas

Corporation Commission, supra; Cities Service Gas Co. v. State Corporation, supra.

C. A surface owner's estate is subservient to the mineral estate. A surface owner cannot dictate the location of wells.

Amoco has entered into many contracts with its mineral owners that contain provisions concerning the extent of the lessee's use of the surface in connection with oil and gas exploration. As mentioned earlier, this Commission lacks jurisdiction over such private contract rights. Cities Service Gas Co. v. State Corporation Commission, 197 Kan. 338, 342, 416 P.2d 813 (1964). To the extent that such rights are not set forth by way of private contract, the general law is summarized as follows:

> In the absence of some special provision in the lease, there is ordinarily no restriction imposed on the lessee in the manner of selecting a site for his operations. In the exercise of his reasonable right of access, the lessee may select the site of drilling operations on the basis of excellence of the site for mineral development without regard to the convenience of the lessor or owner of the surface estate, providing it does not require the removal of any structure on the land at the time the lease was granted. 4 Kuntz, Oil & Gas, § 49.2, p. 235 (1972).

Notwithstanding the above, a lessee cannot act arbitrarily in locating wells or using the surface where reasonable alternatives exist that would minimize surface damage. See, e.g., Flying Diamond Corp. v. Rust, 551 P.2d 509, 55 O.&G.R. 512 (Utah 1976); Diamond Shamrock Corp. v Phillips, 511 S.W.2d 160 (Ark. 1984). The surface owner's remedy is to pursue relief through the courts. Id.

D. Several demands of the SWKIA are unconstitutional because they involve the taking of property without due process of law.

Several demands of the SWKIA amount to a request that this Commission take the property rights of others without due process of law and without just compensation (see, e.g., demands 2, 3, 5 and 6). In Phillips Petroleum Co. v. Corporation Commission, 312 P.2d 916 (Okla. 1956), the Oklahoma Supreme Court held that similar

demands were unconstitutional since they amounted to the taking of private property without due process of law. Id. at 922. In that case, the Oklahoma Corporation Commission sought to require Phillips Petroleum to furnish gas to local irrigators for agricultural use. Id. at 919. The court found that no authority existed for the taking of private property under the police power for another industry, i.e., agricultural irrigation, even assuming such an industry was clothed with a public purpose. Id. Such a taking of property could only occur by condemnation under the power of eminent domain. Id.

E. This Commission does not have the authority to set the price of natural gas except a minimum price for intrastate natural gas if a minimum price is required to prevent the waste of natural gas.

In years past, this Commission established a minimum price for gas in the Hugoton Field as a conservation measure to prevent waste of natural gas as a natural resource. See, e.g., Cities Service Gas Co. v. State Corporation Commission, 180 Kan. 454, 304 P.2d 528, rev'd, 355 U.S. 391, L.Ed. 2d 355, 78 S.Ct. 381. Even though the Kansas Supreme Court recognized that the Commission had authority to establish a minimum price in order to prevent waste, the U.S. Supreme Court reversed on the basis that the Commission had no authority to set the price of interstate gas. Id. The only authority that this Commission retains would apply to the establishment of a minimum price of intrastate gas provided that a minimum price was required in order to prevent waste. Id. There is no evidence in this record that establishes what minimum price would be required in order to prevent waste with respect to intrastate gas.

The Commission does not have any legislative authority to otherwise establish the price of intrastate gas. Legislation concerning the price of intrastate natural gas was rescinded effective December 31, 1984. See, K.S.A. 55-1401 through 55-1423.

IV. THIS COMMISSION CANNOT IMPOSE ANY RATABLE TAKE ORDER WITH RESPECT TO PRODUCTION FROM THE INFILL WELL AND THE EXISTING WELL WITHOUT VIOLATING THE SUPREMACY CLAUSE OF THE U.S. CONSTITUTION.

on a single unit, (Tr. 2438) will coerce pipelines into connecting wells. If allowables are assigned upon completion and production is required to be pro-rata, producers will be able to force shut-ins of existing wells pending connection of infill wells. If Bryan's recommended changes are accepted, the Basic Order would assure producers that not only will their infill wells be connected almost immediately, but also that a market will exist for the gas produced from those wells. The Hugoton Basic Order should not be used to create demand for Hugoton gas.

VIII. THE PROPOSAL OF REPRESENTATIVE SHORE IS BEYOND THE COMMISSION'S JURISDICTION.

Representative Shore, apparently representing both irrigators and royalty owners at the public hearing in Ulysses, proposed a plan which one proponent thereof characterized as "having our cake and eating it too." This plan would allow infill drilling but insulate area landowners and irrigators from its negative effects on gas price and land use. It is interesting to note, in fact, that speakers at the public hearings at both ends of the state were interested in the same thing -- economics of infill drilling. The same can obviously be said for the parties on both sides of this case. It is basically a dispute over economics: cost of gas to consumers versus profit to producers and royalty owners.

This de facto dispute aside, this remains a proceeding brought under the conservation statute for the purpose of determining whether certain changes should be made in the Hugoton Proration order. It is a long established axiom that the Commission may not act unless its action is authorized by the Legislature. Such authorization must be specifically expressed or necessarily implied in order to carry out the Commission's statutory responsibilities. Any other act is outside its jurisdiction and unlawful.

The Commission has, in the past, been authorized to set minimum prices to promote conservation of gas. Here the issue is whether a maximum price lower than that fixed by the NGPA may be established for selected customer classification. Nothing in the statutes permits such action. Likewise, the Commission is not authorized, expressly or by necessary implication, to affect the

contractual relationships between producers and third parties in the manner requested. Therefore, the Commission cannot condition an order on Representative Shore's proposal.

However, the strong sentiments of those Kansans in the area of the Hugoton Field should not go unnoticed. Absent the protections requested, the overriding concern was the economic burden of increased gas costs on the consuming public: residential, farm and business. This is direct evidence supporting the contention that infill generated price increases will further depress market demand, increasing the degree of wastefulness inherent in the Cities application.

CONCLUSION

It has been amply demonstrated that the evidence presented in support of Cities' application fails to establish a present need to amend the basic proration order. The technical evidence is too sparse and too unreliable to establish the occurrence of waste in the Hugoton Field under existing rules. Rather, the evidence shows that the present order, including the 640 acre spacing provision, is generally resulting in adequate drainage of gas reserves across the field. In the absence of an urgent need to increase the rate of production, permitting infill drilling as requested would be wasteful and would cause considerable harm without conferring any public benefit.

For the reasons stated herein, the application of Cities Service should be denied and the proceeding dismissed.

Respectfully submitted,
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Irrigation Association voiced concern in several areas and asked the Commission to incorporate into its Order the following:

1. Gas used for agricultural or farmstead gas be at the old price, regardless of which well it is produced from.
2. Allow agricultural wellhead gas to cross section lines.
3. A 1/64th overriding royalty, payable out of the producer's share, as payment for ongoing crop damages.
4. Surface owner to have some input as to the location of the new well.
5. Gas be available for irrigation use to the surface owner whether or not he is a mineral owner.
6. Agricultural use should have priority over pipelines.

Basic to the authority of the commission to include any provision in its Order in this proceeding is its statutory authority.

> "Administrative agencies are tribunals of limited jurisdiction." 2 Am. Jur.2d §328, citing Bennett v. State Corporation Commission, Supra.

In the Kansas case of Woods v. Midwest Conveyor Co. Inc., 231 Kan. 763, 648 P.2d 234, 241 (1982) contains a clear statement of administrative authorization when it stated:

> "Administrative agencies are creatures of statute and their power is dependent upon the authorizing statutes, so that we must find within the statute warrant for the exercise of the authority which they claim. They have no general or common law powers." (emphasis added)

See also, Pork Motel v. Kan. Dept. of Health and Environment, 234 Kan. 374, 673 P.2d 1126 (1983).

In Mobil Oil v. State Corporation Commission, (Supra at 1337):

> "The Commission is acting upon what might be referred to as equitable considerations when it is cloaked with no equity jurisdiction." (emphasis added)

Also in the dissenting opinion, page 1339:

> ". . . the Gas Conservation Act, 55-701 et seq., does not specifically authorize the

Commission to modify property or contract rights. (emphasis added)

In addition, in the Woods case, Supra, 648 P.2d 234, 241:

> "Absent an express grant of power, an administrative agency has no power and may not determine damages . . ."

As previously shown in the cases relative to Federal pre-emption, i.e. Northern Natural, Supra, the states have been pre-empted from regulating the sale and transportation of gas dedicated to interstate commerce, but not the production and gathering functions.

Phillips Petroleum Co. v. Corporation Commission, (S. Ct. Okla., 1957) 312 P.2d 916, involved a situation where the State of Oklahoma had enacted a statute which made irrigation a "preferred use" for gas and granted the Corporation Commission the authority to fix the price, terms and conditions under which the gas would be made available. The Court saw the issue as whether a producer of gas could be required to comply under the "police power" of the State and held that it was not a regulation under the police power but a taking of property without due process.

The point to be noted from the Oklahoma case is that it was a statutory authority that was held invalid, and in the case at hand an administrative body is being asked to do something that even a legislative enactment raised severe constitutional questions.

In summation, while the issues raised by the Southwest Kansas Irrigation Association are issues that are of concern to everyone affected by the plight of the American farmer, they are issues which appear to involve contract or property rights which cannot be addressed by this Commission in view of the lack of statutory authority to do so. A better solution would appear to lie in a cooperative relationship.

XI.

CONCLUSION

The preponderance of the evidence in this case shows, based on the extensive geologic and engineering data and studies presented by the Applicant and the proponents, that the existing

Paragraph "t", it could not have been adequate notice, because it did not briefly and adequately disclose the matter to be considered or the relief sought. The Commission is therefore essentially without jurisdiction of the proceedings. Compare Day v. State Corporation Commission, 185 Kan. 165, 341 P.2d 1028.

3. This Commission does not have jurisdiction of the "Irrigator" issues in this proceeding, since they are contractual in nature

Many members of the Southwest Kansas Irrigators Association (SWKIA) spoke in opposition to infill drilling at the public hearing held in Ulysses, Kansas on September 26, 1985. Among the primary concerns expressed by the SWKIA members was the possibility of greatly increased costs for irrigation gas. Two bases for this concern were explained. The first of these bases was the possibility that irrigators would be stuck with the new NGPA §103 gas price rather than NGPA §104 or 105 price. The second of these bases was that the infill wells would draw down pressures on existing wells, resulting in stripper well classification and the corresponding higher price for gas from existing wells, also. (See, for example, September 26, 1985, Tr. at pp. 14-17, 17-19, 21, 41).

Unless certain major conditions are placed on any infill drilling program adopted, most of the SWKIA members and other interested individuals who spoke at the September 1985 public hearing would not favor infill drilling. (See, for example, September 26, 1985, Tr. at pp. 25-27, 29-33, 36-37, 38-39, 52, 58, 61-62, 64-65, 65-66).

The conditions which the SWKIA would like to have made a part of any infill drilling order issued by the Commission were summarized by State Representative Gene Shore, as follows: (1) A non-severable 1/64th continuing crop damages payable provision for surface owners; (2) Irrigation gas to be made available at the old gas price even if supplied from stripper wells or new infill wells; (3) Irrigation gas to be allowed to cross section lines; and (4) Surface owner input as to well location. In the words of Rep. Shore, ". . . if you allow infill drilling without these small considerations to protect the people who live and work in Southwest Kansas, this is an injustice that will last a long time also." September 26, 1985, Tr. at p. 27.

Although the issues raised by the SWKIA are, of course, important issues, the conditions which SWKIA would like to have imposed upon infill drilling are not within the authority or jurisdiction of the Commission to grant. The conditions noted above are basically contractual matters (i.e., price of irrigation gas) that must necessarily be worked out between the parties to the respective contracts. In other words, they call for contractual agreements between the individual irrigators or farmers and the producers in the field. Generally, administrative agencies have no authority to consider or adjudicate individual rights or obligations between private parties, absent statutory grants. AmJur 2d Administrative Law §185, citing Williams Electrical Cooperative v. Montana-Dakota Utility Co., 79 N.W. 2d 508 (N.D. 1956). Thus, in Regents of University System of Ga. v. Carroll,

70 S.Ct. 370 (1950), the U.S. Supreme Court held that the FCC could not make the granting of a license contingent upon repudiation by the applicant of one of its existing contracts. Cf. Peter Fox Brewing Co. v. Sohio Petroleum Co., 189 F.Supp. 743 (N.D. Ill. 1958).

This same rule, limiting jurisdiction of administrative agencies, has been applied in Kansas, specifically with respect to the Corporation Commission. In Cities Service Gas Co. v. State Corp. Commission of Ks., 197 Kan. 338, 342, 416 P.2d 736 (1966), the Kansas Supreme Court ruled that the Kansas Corporation Commission is an administrative agency with its jurisdiction being that conferred by Statute. See also Renner v. Monsanto Chemical Co., 187 Kan. 158, 354 P.2d 326. "The power of the corporation commission is regulatory in nature, representative of the public interest, and it is not intended to settle private controversy apart from the public interest. The corporation commission provides no forum for the litigation of purely private rights and liabilities." Cities Service Gas Co. v. State Corp. Commission, 197 Kan. 338 at Syl.3, 416 P.2d 736.

CONCLUSION

Cities' technical case has not been proved. After 50 days of hearing the appropriate technical testimony evidencing a need for an additional well in each and every proration unit in the Hugoton Field is non-existent. There has been a sheer failure on Cities' part to sustain the burden of proof, and its application