

# SWKROA

**SOUTHWEST KANSAS ROYALTY OWNERS ASSOCIATION**

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Testimony before the Senate Committee on Natural Resources  
**SB 271 – an act relating to ownership of pore space**

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Chairman Ostmeyer and Members of the Committee:

My name is Erick Nordling. I would like to submit written testimony on behalf of SWKROA in support of SB 271. I am from Hugoton and serve as the Executive Secretary of SWKROA. In addition, I am an attorney with the law firm of Kramer, Nordling, and Nordling, LLC. In my law practice, and as Secretary for the Association, I regularly advise mineral and royalty interest owners, as well as surface owners and farm tenants, with regard to issues relating to access on their lands for oil and gas operations and from damages resulting from such access and use of the land for oil and gas operations. Our organization represents the interests of mineral and royalty owners, but some of our members also own surface interests.

SB 271 recognizes and is consistent with the common law practices in our state on the ownership of pore spaces. SB 271 is also consistent with how other states have dealt with this issue, and it closely follows the legislative approach chosen by Wyoming in its 2008 enactment. SB 271 declares that the ownership of all pore spaces below the surface lands and waters of this state are vested in the surface owners. Further, SB 271 includes provisions that the ownership of pore space can be severed or transferred, as long as such transfer is very specific.

The use of 'pore spaces' is not a new concept to the oil and gas industry, although it has received a lot of attention lately, most likely in anticipation of increased use of pore spaces for the sequestration or disposal of carbon dioxide (CO<sub>2</sub>). For the desire for certainty on who should be approached to lease subsurface zones for the injection of CO<sub>2</sub>, legal scholars have reviewed statutory and case laws in states with oil and gas production to determine who would be considered as owners of the subterranean pore spaces. These scholars believe it would be sound public policy to declare the ownership of pore spaces.

Washburn Law Professor, David E. Pierce, testified before the Joint Committee on Energy and Environmental Policy last Fall that "Ownership of the surface of land includes ownership of all that lies beneath the surface boundaries extended downward, to include minerals, rock structures, and voids." He also noted that "although not expressly addressed by the courts to date, where the surface estate has been severed from a mineral estate, the surface estate owner will most likely 'own' subsurface areas that are not part of the minerals comprising the mineral estate. Surface estate ownership of subsurface areas may be subject to implied rights in the mineral estate owner to access, or drill through, the subsurface area to develop the mineral estate." SB 271 would give certainty to his remarks.

Professor Owen L. Anderson, of the University of Oklahoma, College of Law, in his article, *Geologic CO<sub>2</sub> Sequestration: Who Owns the Pore Space?*, 9 *WYO. L. Rev.* 97 (2009), examined the ownership of pore spaces in context of CO<sub>2</sub> sequestration states, “that under the common-law maxim, *cujus est solum, ejus est usque ad et ad inferos*, a fee-simple owner of land owns the entire tract “from the heavens to the depths.” Thus, a fee-simple owner at common law is the owner of the subterranean pore spaces.

In Kansas, like in many other states, the mineral estate is considered as being ‘dominant’ over the surface estate to allow the owner of the oil, gas and other minerals to exploit and extract the gas and oil from underneath the land, and to use as much of the surface estate as is necessary to explore for and develop the minerals, subject to reasonable accommodations to the surface owner for the mineral owner’s use of the surface. An oil and gas lease is the key document in which the mineral owner (as Lessor) grants an oil and gas company rights to explore for, drill, and extract oil and gas. In much of Kansas, the mineral estate has not been severed from the surface estate.

A Lessor of an oil and gas lease, if he also owns the surface estate, can grant the Lessee the right to dispose of salt water produced from oil and gas lease operations into subsurface strata. Plus, such Lessor could permit an operator to inject water, carbon dioxide, or other fluids into the producing formation as a part of enhanced or secondary recovery operations to maximize production from the gas and oil deposits.

The surface owner can likewise grant rights to dispose of salt water produced from neighboring wells, and the right to inject natural gas into underground storage reservoirs (subject to the mineral owner being compensated for the native natural gas or oil remaining within such storage reservoir), and for the right to inject carbon dioxide into subsurface strata for storage or sequestration purposes. SB 271 would help to clarify such authority.

We support the ability of the surface owner to freely sell, transfer, or lease the sub-surface pore spaces, in the manner provided by law for the transfer of mineral interests in real property. We support SB 271’s codification of the dominance of the mineral estate.

Thank you, for your consideration of our remarks.

Respectfully submitted,

Erick E. Nordling  
Executive Secretary, SWKROA