

Comments Regarding Senate Bill No. 271 and Answers to Questions

by
David E. Pierce

14 February 2012

I am responding to specific questions regarding SB271 provided by Senator Ostmeyer. I do not represent anyone concerning SB271, nor do I seek to support or oppose SB271.

Comments

Before addressing specific questions, I offer a few general observations regarding SB271. **What is “pore space”?** The bill assumes there is an accepted definition of the term “pore space.” I am not aware of an accepted definition. Although the Wyoming Statute defines “pore space” as “subsurface space which can be used as storage space for carbon dioxide or other substances,” this seems broad enough to include an underground storage tank. If a definition is attempted, it should be limited to a geologic structure so as to exclude man-made structures.

§1(a). Surface owner owns pore space. The bill vests ownership of pore space in the surface owner. This is consistent with present ownership principles in Kansas.

§1(b). Separate conveyance of pore space must be explicit. This too is consistent with present conveyancing concepts. In line 12 it states: “provided by law for the transfer of *mineral* interests in real property.” Consider altering this sentence to read: “The ownership of pore space in strata may be conveyed in the manner provided by law for the transfer of ~~mineral~~ interests in real property.” Although there is a body of statutory law dealing with the transfer of interests in real property, I am not aware of laws specifically addressing conveyances of “mineral” interests.

§1(c). Limits on notice to pore space owners. Consider deleting this section. Although the focus may be on limiting the scope of parties entitled to notice, the language appears too broad and could suggest that a pore space owner is not entitled to notice of proceedings such as a mortgage foreclosure. If there are specific laws requiring notice that you wish to address, it would be better to expressly amend those laws instead of using the broad language of §1(c).

§1(d). Impact on mineral development. It is not clear whether the first sentence in this subsection places a temporal limitation on the second sentence. It appears the first sentence could be deleted. The prospective effect aspects of this first sentence appear to be adequately stated in §1(g). I would suggest deleting the first sentence in §1(d) and altering the remaining sentence to read: “~~For the purpose of~~ *To determining* the priority of subsurface uses between a severed mineral estate and pore space, the severed mineral estate is dominant regardless of whether ownership of the pore space is vested in the several owners of the surface or is owned separately from the surface, *and*

regardless of whether a severed pore space interest is created prior to a severed mineral estate. For purposes of this subsection, a severed mineral estate will include the granting of an oil and gas lease or any other right to explore for, develop, and produce oil and gas or any other mineral.” This section should be clear that it applies to an oil and gas lease and similar development agreements in addition to a severed mineral interest.

§1(e). Surface rights associated with severed pore space. The first and second sentence restate the same basic concept. It could be stated once with the following: “The owner of any pore space right shall have no right to use the surface estate beyond that set out in ~~a~~ *the* properly recorded instrument *conveying the pore space.*” With this modification, the first sentence could be deleted.

§1(f). Voiding rights under certain circumstances. Consider deleting §1(f). This merely invites unnecessary litigation as to what is a “specific description.” As written, it suggests that a governmental survey description of, for example, the Northwest Quarter of Section 30, *etc.* may not be adequate because it is not a “metes and bounds” description. By voiding the right, it creates an incentive for the parties to argue over issues that otherwise may be of no consequence. We already have a body of law governing real estate descriptions which would be incorporated under §1(b) (“The ownership of pore space in strata may be conveyed in the manner provided for the transfer of mineral interests in real property.”).

Questions

Question #1: “*Compare and contrast surface rights, mineral rights and pore rights.*”
Question #2: “*Define surface rights, mineral rights and pore space rights.*” I will address these two questions together. We begin with the owner of land, “**O**,” who has never conveyed away a mineral interest in the land. **O** owns the surface, the minerals, and space within rock structures beneath the surface. **O** has the power to create, and convey away, any right in the land she owns.¹ For example, if **O** conveys to **A** the “oil and gas” in the land, **A** would own oil and gas located anywhere within **O**’s land, but would not own the rock structure in which the oil and gas reside. Oil and gas are found in rock that is porous (tiny spaces) and permeable (the spaces are connected). The rock may be sandstone, for example. **O** has not conveyed “sandstone” to **A**, but rather the oil and gas. Therefore, **O** owns the surface and all minerals, including sandstone, that are not encompassed by the grant of “oil and gas.” However, if the deed conveying the oil and gas from **O** to **A** does not say anything about how **A** can go about extracting the oil and gas, **A** would own the oil and gas plus the right to make reasonable use of the surface and subsurface areas necessary to access, develop, and produce the granted oil and gas. This would include the right to dispose of produced water into rock structures beneath the land. Although **O** would retain the so-called “pore rights” in the land, **A** would have the right to use the pore rights to the extent necessary to develop the granted oil and gas. This would include drilling through rock pores, fracing rock containing pores to enhance recovery of the oil and gas, and injecting material into the rock pores to effectively develop the oil and gas.

¹One exception to this is under K.S.A. § 58-2272, where the Kansas Legislature took away from the Kansas landowner the freedom to convey the “right to use such land for the production of wind or solar generated energy”

Question #3: “Give examples of how each of these rights commonly work for or against an owner, including the landowner. Use an example of someone purchasing new land.” If we assume **O** has not conveyed any rights to **A** or others, **O** has it within her sole power whether she will sell any rights in her land. If she elects to sell, she has it within her power to include restrictions on the use of the minerals or pore space to protect the balance of her rights in the land. If **O** elects to sell the oil and gas to **A**, and the pore space rights to **B**, any subsequent purchaser from **O** will take the property burdened by the rights of **A** and **B**. The sales price will reflect the rights held by **A** and **B**.

Question #4: “Can all three rights be sold separately.” Yes. Among the most fundamental principles of American law are freedom-of-contract and freedom-of-conveyance.

Question #5: “Can permeability be increased.” I will leave this question for the Kansas Geological Survey.

Question #6: “What happens if a substance is in the pore space and goes into someone else’s property? Does the person have any liability?” Perhaps. Unlike surface lands, which can be fenced-off and access controlled, it is not possible to isolate one person’s ownership within a connected rock structure. Material injected into the rock structure may migrate within the structure. If the migration benefits all the owners of the rock structure, the activity may be a protected correlative right of the various owners. If it injures the rock structure, or the rights of the other rock structure owners, it could then become actionable. The injured person’s remedy (injunction vs. damages) can also be impacted by whether the activity is being conducted pursuant to a government-issued permit.

Question #7: “What happens if it messes up someone’s well?” If the injury is proven to have been caused by the activity, and the party undertaking the activity is found to have been negligent, then the party can be held liable for damages caused by their negligent conduct. Just like driving a car. If you drive in a negligent manner (*e.g.* you are being inattentive while talking on the phone), and it results in injury to another person, the negligent driver can be held liable for damages arising out of their negligent conduct.

Question #8: “Is pore space leased the same way mineral rights are leased?” The only pore space I am aware of having been leased in Kansas is for natural gas storage. The documents used to address the use and transfer of pore space rights will evolve to address the unique issues associated with long-term carbon dioxide storage and permanent disposal.

Question #9: “What is the bearing on any CO₂? Is it sequestered into pore space? If so, what is the formation?” I will leave this question for the Kansas Geological Survey.

Question #10: “What, if any, impact could pore space have on water rights?” I am not aware of any impact on water rights. Water used in conjunction with a pore space operations would require a permit and consideration of the impact on other water users.