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MEMORANDUM

To: Chairman Hedke and Members of the Committee on Energy and Environment
From: Matt Sterling, Assistant Revisor of Statutes
Date: 02/02/2015
Subject: House Bill 2132

HB 2132 amends K.S.A. 55-1210 concerning the property rights to injected natural gas. As background to ownership of injected natural gas, there are several important legal theories and relevant Kansas Supreme Court cases in addition to K.S.A. 55-1210 and the Underground Storage of Natural Gas Act to consider.

Two important legal theories relevant to the underground storage of natural gas are the ownership in place theory and the rule of capture. Under the ownership in place theory, a “Kansas landowner historically has a present estate in the oil and gas in the ground. But when that oil and gas is produced and severed from the land, it becomes personal property of the producer.” The rule of capture holds that a “landowner with a present estate in natural gas in the ground loses title to any gas that ‘escapes’ or migrates away from the landowner’s property. Instead, that migrating gas becomes the personal property of the first person to produce the gas.”¹

The rule of capture was changed by the Kansas Legislature through the enactment of the Underground Storage of Natural Gas Act, particularly K.S.A. 55-1210. However, the Kansas Supreme Court has held that the rule of capture still applies to injected natural gas if that gas migrates beyond a property adjoining the certificated boundaries of a storage area.

The court has held that the “first two subsections of K.S.A. 55-1210 govern ownership rights to previously injected storage gas that remains within a designated underground storage area. Under K.S.A. 55-1210, [an injector] retains title to its previously injected storage gas that has been injected into the underground storage area and that lies within the Field.”² The court stated that “section (c) preserves the rule of capture except as to gas that has migrated horizontally to adjoining property or vertically to a stratum or portion thereof not leased or

¹ *Northern Natural Gas Co. v. ONEOK Field Services Co.*, 296 Kan. 906, 919 (2013).

² *Id.* at 928.

condemned by the injector... [S]ection (c) makes no exception for gas that has migrated beyond adjoining property.”³

With the court deciding that subsections (a) and (b) concerns injected storage gas that remains within a designated underground storage area and subsection (c) preserves the injector’s ownership of such natural gas that migrates horizontally to adjoining property, the remaining issue is what “adjoining property” means. The court has held that any “section of land which touched a section containing a storage field ‘adjoined’ the storage field... [and] that this definition was consistent with prior caselaw defining the term ‘adjoining’ as ‘being contiguous or touching.’”⁴ Therefore, any section of land that touches another section that contains at least part of the storage field is considered adjoining property.

With that as background, current law provides that an injector retains possession of any injected gas as long as it does not migrate further than property that adjoins the certificated boundaries of the injector’s storage field. Furthermore, K.S.A. 55-1210(c)(2) provides that if such gas migrates to an adjoining property, the injector has the right to conduct tests on any wells on that adjoining property to establish the presence of the injector’s injected gas.

HB 2132 would abolish the rule of capture with respect to all natural gas that has been reduced to possession and injected into underground natural gas storage by an injector that is licensed or certificated by the Federal Energy Regulatory Commission or the Kansas Corporation Commission. Such injected natural gas would remain the property of the injector, regardless of how far from the storage area the gas migrated. Furthermore, an injector would have the right to test any well in any place, regardless of the distance from the certificated boundaries of the injector’s storage field, for the presence of the injector’s natural gas.

³ *Id.* At 929.

⁴ *Id.* At 922.