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February 25, 2016

Representative Marvin Kleebe
Chairman House Committee Taxation
State House, Room 582-N
300 S.W. 10th Ave.
Topeka, KS 66612

Re: House Bill No. 2701
House Tax Committee Hearing, March 3, 2016 at 3:30 pm

Dear Chairman Kleebe and Members of the House Taxation Committee:

As an attorney, I have represented oil and gas producers in the State of Kansas since 1985. I represent several oil and gas producers concerning ad valorem taxes assessed on oil and gas producing properties in various counties across the State of Kansas.

I would like for the Committee on Taxation to consider this letter as my testimony in opposition to House Bill No. 2701 (H.B. 2701). My opposition to H.B. 2701 is as follows:

1. House Bill No. 2701 arbitrarily excludes any "production prior to April 1 of the calendar year in which such property is assessed." House Bill No. 2701(d) (2). The result of the proposed change would be to preclude the use of production information after April 1 to validate the claim of either the producer or the Appraiser as to what the proper decline rate should be on the lease. Neither the producer nor the County gains an advantage by the use of additional production evidence after April 1, but consideration of such production data may show that either the producer or the County has not properly determined the decline rate that should be applied to the lease. By precluding consideration of production evidence after April 1, H.B. 2701 would limit the ability of the Board of Tax Appeals (BOTA) from arriving at the fairest valuation possible.

2. H.B. 2701 fails to recognize that the appraisal process with respect to oil and gas leases is not completed until June 15 each year. K.S.A. § 79-1467. This is the date when the completed tax roll must be certified by the appraiser to the county clerk. *Id.* The producer's rendition is due on April 1. K.S.A. § 79-332a (a). The Appraiser is required to mail the valuation notice on or before May 1. The producer then has until May 15 to notify the Appraiser that the producer disagrees with the Appraiser's valuation and request an informal hearing. K.S.A. § 79-1448. The County Appraiser is then required to hold an informal hearing with the producer, which

generally does not occur until 30 days later. *Id.* In recognition of the deadlines that are a part of the appraisal process, the Kansas Supreme Court stated:

Under our ad valorem taxation scheme, the valuations are being reported, altered, tested, appealed from, and determined *during essentially the first half of the tax year. An overview of the entire process and consideration of the numerous statutes makes it clear that all available appraisal information is to be utilized, regardless of whether the data originated before, on, or after January 1 of the tax year.*

Board of Ness County Commr's v. Bankoff Oil Co. 265 Kan. 525, 543, 960 P.2d 1279 (1998) (emphasis added).

3. By precluding evidence concerning production after April 1, H.B. 2701 arbitrarily alters the Uniform Standards of Professional Appraisal Practice adopted by the legislature in K.S.A. § 79-506. In *Bankoff*, the Kansas Supreme Court discussed K.S.A. § 79-506 as follows:

In addition, in K.S.A. § 79-506, the legislature specifically adopted the Uniform Standards of Professional Appraisal Practice issued by the Appraisal Standards Board in effect on March 1, 1992. . . . **Appraisal Standard No. 3, adopted by the Legislature, acknowledges that retrospective appraisals may be appropriate for property tax matters and permits appraisers to consider data subsequent to the effective date of appraisal to confirm trends that would have been considered by a buyer or seller as of the effective date in arriving at a retrospective value.** *Bankoff, supra* 265 Kan. at 542 (emphasis added).

4. H.B. 2701(d) (2) is contrary to the approach followed by the Kansas Department of Revenue, Property Valuation Division, which has consistently recognized that production data after April 1 may be considered in determining the appropriate decline. For example, the testimony of John Cooper, then head of the Property Valuation Division, was discussed in *Bankoff*. See *Bankoff*, 265 Kan. at 534-36. In *Bankoff*, Mr. Cooper testified that production as late as June or July could be properly considered in determining the proper decline. *Id.* at 535-36. The current director of Property Valuation for the Kansas Department of Revenue, Ms. Lynn Kent, gave similar testimony before BOTA on February 25, 2015, a copy of which testimony is attached as Exhibit A.

5. H.B. 2701(d) (2) changes existing law by excluding consideration of production evidence after April 1. As mentioned earlier, the *Bankoff* case recognized that production evidence for six months after the valuation date was permissible. *Bankoff* at 542-43. Consideration of production data after April 1 was also allowed in *Helmerich & Payne, Inc. v. Board of Seward County Com'rs* 34 Kan. App. 2d 53, 115 P.3d 149 (2005). In that case, the valuation date was January 1, 2001. The producer confirmed the decline rate that was occurring as of January 1, 2001, by considering production through April 2001 and also by considering production through April 2002. *Helmerich & Payne*, 34 Kan. App. 2d at 58.

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6. H.B. 2701 is unconstitutional because it attempts to change substantive rights through a retroactive application of the law. H.B.2701 (e) provides that the provisions of this act "shall apply to all years commencing on and after December 31, 2003." H.B. 2701(d) (2) adds a new provisions that excludes production information after April 1. As discussed earlier, this is contrary to existing law. It is well-settled in Kansas that, if a statute's retroactive application will affect vested or substantive rights, its retroactive application cannot be enforced. *See, Owen Lumber Co. v. Chartrand*, 270 Kan. 218, 220, 73 P.3d 753, 755 (2003). Such a retroactive application of the law by a newly enacted statue violates both the United States' and Kansas' due process provisions. *Id.* As recognized in *In re: Garden City Med Clinic P.A.*, 36 Kan. App. 2d 114-115, 137 P.3d 1058, 1059 (2006), A taxpayer's right to a refund of its ad valorem taxes is a vested and substantive right and cannot be retroactively reduced by the enactment of a new statute. H.B. 2701 as presently drafted would have a potential impact on many ad valorem tax assessments from December 31, 2003 through the current date. I urge the House Committee on Taxation to avoid making H.B. 2701 retroactive.

Please do not hesitate to contact me if you have any questions.

Very truly yours,



Steven D. Gough

WITHERS, GOUGH, PIKE, PFAFF & PETERSON, LLC

SDG/mkc

1 A You read it correctly.

2 Q (BY MR GOUGH) Okay. And do you teach that
3 in your classes to appraisers?

4 A Do I teach that under this individual
5 circumstance that this would be a reason? No, it's not
6 a standard. I teach standards what covers the mass of
7 properties, which is what the Oil & Gas Guide does.

8 Now, I also teach that -- when we get into the
9 advanced classes -- that there are always exceptions.
10 And within the format of the Guide, the county may step
11 aside from the scheduled column and they may look at
12 different scenarios. They may look at different
13 annualizing scenarios that would lead to production
14 changes, or using different months of production to try
15 to annualize that, as well as, they could use up to a
16 50-percent decline rate based on the standard tables as
17 they are.

18 Q And that would include looking at production
19 history during the 2013 Calendar Year for the term, the
20 2013 Tax Year, if it's available?

21 A Typically, I would advise the county to look
22 at -- if there's question about -- especially if the,
23 property comes on towards the end of the year, the way
24 the Guide exists as of 2013, we typically would look at
25 production during the first quarter up until the --

1 beyond the appraisal date of January 1. But up until
2 the date that information is turned into the county,
3 any standard appraisal could be within six months of
4 your January date.

5 Q I didn't hear the last part.

6 A You can look at data within six months of
7 your January -- of your appraisal date.

8 Q So you could go clear out to the end of June
9 of 2013?

10 A You could possibly go to the end of June if
11 necessary. However, usually, we would look at that
12 first-quarter data to see if that changes any kind of a
13 shift in what decline is looking at and/or if
14 production rates need to be annualized from that point.

15 Q And under the 2013 Guide, it is permissible,
16 in your opinion, to at least go out to mid-2013 to see
17 if the actual production trend confirms the decline
18 rate that it -- it looks like is occurring in that
19 first three months of the year?

20 A I wouldn't go out until June, usually,
21 because my appraisal date is January 1, and I have to
22 turn in my renditions on January 1. However, I would
23 want to look at that first-quarter data to see if
24 there's a trend on the individual property. I may say:
25 Well, we're still seeing that trend go down and by the