Southwest Kansas Royalty Owners Association
209 East Sixth Street, Hugoton, Kansas 67951

Testimony before the Senate Utilities Committee Senate Bill 331
February 9, 2004

Chairman Clark and Members of the Committee:

My name is Bernard E. Nordling, formerly of Hugoton, Kansas, and now a permanent resident of Lawrence, Kansas. I am a lawyer and a member of the Hugoton law firm of Kramer, Nordling, & Nordling, LLC. I have practiced law since 1949 and have spent my entire legal career representing landowners. I am currently serving as Assistant Executive Secretary of the Southwest Kansas Royalty Owners Association.

I am appearing on behalf of the Association and on behalf of Kansas landowners to testify in support of Senate Bill 331. During the past legislative session, I filed a statement in opposition to House Bill 2280, as amended. A copy of that statement is attached and incorporated herein by reference. In addition, I was asked to render an opinion on the question of the necessity of filing oil and gas leases of record with the register of deeds office under the recording statutes. I answered the question in the affirmative with the caveat that an oil and gas lease was not valid, except between the parties to the lease, until it is recorded. A copy of my opinion is also attached and incorporated herein by reference.

In my opinion, I made reference to an article I had written in 1955 for the Kansas Law Review stating that the 1953 Kansas Legislature had amended the recording statute, G.S. 67-221 (now cited as K.S.A. 58-2221), to specifically include "any estate or interest created by an oil and gas lease." The action by the legislature was the result of a court decision dealing with the question as to whether an assignment of production payments under certain oil and leases for mortgage purposes was such an instrument as to come within the meaning of the recording statute.

Later in my opinion, I suggested that the legislature might consider including wind energy leases and easements as a part of K.S.A. 58-2221, the same as the 1953 Kansas Legislature did to include any estate or interest created by an oil and gas lease. Senate Bill 331 does that by amending the provisions of K.S.A. 58-2221 to simply include any estate or interest created by a wind energy lease or easement and is good public policy.

The obvious intent of the recording statute is that the full document be placed of record. If a memorandum of lease could be filed of record in place of the full lease, the statute would have so provided. A perfect example is the amendment by the House Utilities Committee of House Bill 2280 to replace the words "Any lease" by the words "A memorandum of any lease or easement." For years, in compliance with the recording statute, oil and gas companies, pipeline companies, and electric utilities have been filing with the appropriate register of deeds office complete instruments of conveyance affecting real estate, including oil and gas leases, lease modification agreements, unitization agreements, affidavits of production, pipeline easements, road easements, water line easements, electric utility line easements, mortgages, any other document of record affecting title to real estate or creating an encumbrance on the land. The full instrument is of record and any interested person has easy access to determine the rights and obligations of the respective parties in a particular tract of land.

Under K.S.A. 58-2221, as amended by Senate Bill 331, a wind energy company is not obligated to file a wind energy lease or easement of record but if anything is filed of record, it must be the whole document and not just a memorandum of lease.

Wind energy has great potential in Kansas as a fuel source and its development should be encouraged. What is happening though, contrary to the intent of the recording statute, as wind development progresses in Kansas, the wind energy companies operating in Kansas are filing of record only memorandums of lease and not the full document. This creates serious problems for obvious reasons.

If a title examiner makes the requirement that the full document be furnished to determine the rights and obligations of the parties under the lease or easement, it will be impossible to obtain that information

from the courthouse records and it creates the undue burden of having to contact either the lessee or the lessor for a copy of the document.
The problem of having to contact either the lessee or the lessor to examine the full document is amplified as time passes. Perfect examples are the many old oil and gas leases of record executed fifty, sixty, and seventy years ago in the Hugoton Gas Field. There have been many changes of ownership, both as to the lessor and the lessee, during that time, and it would be practically impossible to obtain a full copy of the lease after all these years had not the lease been filed of record in the first instance.

The wind energy leases I have examined have varied in length of time anywhere from 20 years with options to renew, to 30 years, to practically perpetual with no right on the part of the landowner to terminate except to go to court. The length of time wind leases and easements will be in effect and an encumbrance on the land should be sufficient reason for the full document to be placed of record and not just a memorandum of lease.

Knowing the amount of consideration being paid under a wind energy lease or easement is not that important to me. It is easy enough to go on internet and research the question as I did for my wind energy speech to members of the Southwest Kansas Royalty Owners Association at its annual meeting last spring. I learned the compensation ranged anywhere from $2,000 per tower to as high as $7,000 per tower, depending on wind velocity and other factors.

As I was told recently by a wind energy representative in lease negotiations with his company, it is difficult to keep lease terms quiet and within 30 minutes of disclosing the compensation to one farmer, the whole county will know what is being offered for compensation. What is important is that if the wind energy company decides to place anything of record, the whole document needs to be recorded to carry out the intent of the recording statute.
In conclusion, I urge the passage of Senate Bill 331. Thank you for this opportunity to be heard.

Respectfully submitted,

Bernard E. Nordling

Attachments

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March 13, 2003

Senator Stan Clark
Chairman, Senate Committee on Utilities
Room 449-N
State Capitol Building
300 SW Tenth Avenue
Topeka, KS 66612

Re: HB 2280

Dear Senator Clark and Honorable Members of the Senate Committee on Utilities:

This letter is in response to your request for an opinion on the question of the necessity to file oil and gas leases of record with the register of deeds office. It is my understanding this question and other questions were raised by members of the committee during the hearing held yesterday on HB 2280. This bill, as originally drafted, required the filing of record any lease involving wind resources to produce electricity given on land situated in this state.

The answer to the question is "Yes," an oil and gas lease must be recorded in the office of register of deeds in which the land covered by the lease is recorded in order to impart notice to all persons and all subsequent purchasers and mortgagees and to protect innocent purchasers, lessees and mortgagees acting in good faith. **No oil and gas lease shall be valid, except between the parties to the lease, until it is recorded.**

RECORDING STATUTES

The pertinent Kansas statutes dealing with recording of instruments conveying or affecting real estate are K.S.A. 58-2221, K.S.A. 58-2222, and K.S.A. 58-2223. The pertinent part of K.S.A. 58-2221 reads as follows:

"Every instrument in writing that conveys real estate, any estate or interest created by an oil and gas lease, or whereby any real estate may be affected, proved or acknowledged, and certified in the manner hereinbefore prescribed, may be recorded in the office of register of deeds of the county in which such real estate is situated.....(emphasis ours)

"The grantor, lessor, grantee or lessee or any other person conveying or receiving real property upon recording the instrument in the office of register of deeds shall furnish the register of deeds the full name and last known post-office address of the person to whom the property is conveyed or his or her designee. **The register of deeds shall forward such information to the county clerk of the county who shall make any necessary changes in address records for mailing tax statements."** (Emphasis ours)

K.S.A. 58-2222 reads as follows:

"Every such instrument in writing, certified and recorded in the manner hereinbefore prescribed, shall, from the time of filing the same with the register of deeds for record, **impart notice to all persons of the contents thereof; and all subsequent purchasers and mortgagees shall be deemed to purchase with notice.**" (Emphasis ours)

K.S.A.58-2223 provides:

"No such instrument in writing shall be valid, except between the parties thereto, and such as have actual notice thereof, until the same shall be deposited with the register of deeds for record." (Emphasis ours)

RESULTS OF FAILURE TO FILE OIL AND GAS LEASE OF RECORD

While it may be argued that K.S.A. 58-2221 provides only that oil and gas leases **may** be filed of record, the failure to file a lease of record proved to be fatal to a lessee which failed to place its prior lease of record in the early Kansas case of *Derby Oil Co. vs. Bell,* 134 Kan. 489, 7 P. 2d 39 (1932).

Briefly stated, the Eastborough Estates Company (Eastborough) owned a tract of land immediately east of Wichita with intent to develop the tract into a high-class residential district. The Company, on April 16, 1930, executed an oil and gas lease to the Derby Oil Company (Derby) on all the land in the original tract which it owned at the time of the lease. This was

termed a community lease and contained a provision that it was contemplated that other lands located in the tract under development might be included in the lease by the owners joining in it.

One of the lots was sold under contract to J. M. Bell. While the facts are not quite clear, Bell executed a consent that his lot come under the community lease. Subsequently, on July 1, 1930, Bell entered into an agreement with Jones to give him a lease on his lot in consideration of Jones paying Eastborough the amount necessary to complete payment on the full purchase price for the lot. **On July 2, 1930, Dr.Bell executed and delivered to Jones an oil and gas lease on the lot in question and the lease was recorded the same day. The Derby lease, although properly executed on April 16, 1930, was not filed of record until July 7, 1930, five days after the Jones lease had been placed of record**.

The facts in the case further disclose that when Jones was about to enter into the contract for a lease with Bell, he examined the records in the office of register of deeds. This examination did not disclose that any person held any lease upon the real estate in question. Jones later assigned the lease to Hedges, and they (Hedges and Jones) commenced the drilling of a well. An action by Derby followed to cancel the lease from Bell to Jones. The Kansas Supreme Court ruled in favor of Bell, Jones, and others.

The Court held that **an ordinary oil and gas lease is a conveyance of such an interest in real property as to be within the recording statutes, as respects the rights of an innocent purchaser for value (Rev. St. 1923, 67-221 and 67-223)** Author's note: These two statutes are currently cited as K.S.A. 58-2221 and K.S.A. 58-2223.
The Court further held that the Bell-Jones lease was recorded prior to the recording of the community lease. **Jones had no actual or constructive notice of facts which would lead a reasonably prudent man to inquire as to adverse claims.** (Emphasis ours)

I agree with Senator Emler's comments in the question and answer period following the testimony on HB 2280 that it is incumbent upon an attorney, in the course of doing "good business," to make sure an oil and gas lease is filed of record. Failing to do so would certainly open of the possibility of a malpractice suit. **Any oil and gas company representative, as well, is going to see that the lease is filed of record for obvious reasons.**

As pointed out above, while K.S.A. 58-2221 does use the words may be

filed and it could be claimed the filing of record of an oil and gas lease is not mandatory, the Kansas courts have held that the recording statutes should be construed together. In *Luthi v. Evans,* 223 Kan. 622, 576 P.2d 1064, the Court stated:

> **"We have concluded that the statutes contained in K.S.A. Chapter 58 pertaining to conveyances of land and the statutes contained in Chapter 19 pertaining to recordation of instruments of conveyance constitute an overall legislative scheme or plan and should be construed together as statutes in *pari materia.*** (*City of Overland Park v. Nikias,* 209 Kan. 642, 498 P.2d 56.) It also seems obvious to us that the purpose of the statutes authorizing the recording of instruments of conveyance is to impart to a subsequent purchaser notice of instruments which might affect the title to a specific tract of land in which the subsequent purchaser is interested at the time."

The bottom line is that while a person may not have to place an oil and gas lease of record, the legislative intent is that oil and gas leases, along with other instruments of conveyance affecting the title to land need to be placed of record, and the penalty for failure to do so is severe in the event of the transfer of property rights by the record owner to a subsequent purchaser or lessee not having knowledge of a prior conveyance.

HISTORY OF RECORDING STATUTES

In recognizing the need to impart notice to innocent purchasers in good faith on transactions involving real estate, Kansas Legislature years ago took care of the problem by passing what we term "the recording statutes." **The Kansas recording statutes have been on the books since 1868.** In *National Bank v. Warren,* 177 Kan. 281, 279 P.2d 262 (1955), a case involving assignments of payments from oil and gas leases, the Court briefly discussed the history of G.S. 1949, 67-221, as follows:

> ".....This definition sends us to an examination of G.S. 1949, 67-221, as it was in 1925 when Chapter 172 was enacted. It provided: 'Every instrument in writing that conveys real estate or whereby any real estate may be affected, proved or acknowledged, and certified in the manner hereinbefore prescribed, may be recorded in the office of register of deeds of the county in which such real estate is situated.....'
>
> **"This section was originally Section 19, G.S. 1868. As much of it as is quoted above contained the same provisions as when it was**

enacted in 1868. The purpose of the statute was and is to impart notice to those interested in any tract of real estate."

By unusual coincidence, in researching the subject of the necessity to record an oil and gas lease, I discovered in the foot notes under K.S.A. 58-2221 an article I had written for the Kansas Law Review in 1955 in which I made specific reference to G.S. 67-221 (now cited as K.S.A. 58-2221). My assignment had been to cover Kansas and federal court cases, Kansasstatutes, and Kansas Corporation decisions from 1953 to 1955, inclusive. In the article, I discussed the *National Bank of Tulsa* case cited above, which dealt with the question as to whether an assignment of production payments under certain oil and gas leases for mortgage purposes was such an instrument as to come within the meaning of Kan. G.S.1949, 67-221, and was subject to the mortgage registration tax required under the provisions of Kan. G.S. 1949, 793102. Quoting from the article, I stated:

> "The court correctly held that the assignment was such an instrument as to come within the terms of Kan. G.S. 1949m 67-221 and the mortgage registration tax was properly assessed,
> **As a result of the decision, the 1953 legislature clarified the point by amending 67-221 to specifically include "any estate or interest created by an oil and gas lease."** (Emphasis ours) 4 K.L.R. 162, 170 (1955).

Thus, the Kansas legislature confirmed the earlier Kansas court decisions that oil and gas leases and interests created by the oil and gas lease were within the purview of the recording statutes.

Other statutes dealing with the recording of oil and gas leases may be found at K.S.A. 55-201 which defines the duty of a lessee to have a forfeited lease released of record, affidavit to be recorded, notice to landowner, and remedies; K.S.A 55-202 gives the right to sue for failure to release oil and gas lease; K.S.A. 55-205 provides for the recording of an oil and gas lease for a definite term and provides for the filing of an affidavit of production to extend the terms of the lease. Other statutes within Chapter 55 for expunging leases and assignments of record for a given period of time. So obviously, the Kansas legislature has long recognized the importance and necessity of placing oil and gas leases of record.

WIND ENERGY LEASES AND EASEMENTS NO DIFFERENT THAN OIL AND GAS LEASES, PIPELINE AND OTHER UTILITY EASEMENTS

Commenting on the testimony at the Tuesday hearing before your honorable Committee by Scott Schneider, who represents Renewable Energy Systems North America, Mr. Schneider testified that HB 2280 treated one industry engaged in similar activities different than another, and that he had not been able to find any other industry that is required to file a private land contract with the county. I respectfully wish to take exception to Mr. Schneider's statement in that respect. Obviously, oil and gas companies, pipeline companies, and electric utilities are in the same type of energy business.

All these companies, acting responsibly, have all these years and will continue to file in the appropriate register of deeds office instruments of conveyance affecting real estate, including oil and gas leases, lease modification agreements, unitization agreements, affidavits of production, pipeline easement, road easements, water line easements, electric utility line easements, mortgages, and any other document affecting title to real estate or creating an encumbrance on the land.

I do not anticipate the Kansas Legislature making an exception for wind energy companies for the sole and only reason they are fairly new to our state. In fact, it raises a good question as to the need of the legislature to consider including wind energy leases and easements as a part of K.S.A. 58-2221 in the instruments of writing conveying real estate, the same as the 1953 Kansas Legislature did in adding the words, "any estate or interest created by an oil and gas lease," to conform with the existing Kansas law quoted above.

IMPORTANCE OF RECORDING FULL DOCUMENT OF RECORD

I have already stressed in my statement to your honorable Committee the importance of including the full wind energy lease or easement of record. To do so is no different than the thousands upon thousands of oil and gas leases recorded in full throughout the state nor the literally hundreds upon hundreds of pipeline easements and utility easements recorded in full in the register of deeds offices in our state.

I would venture to guess I could go to the courthouse in any of the 11 counties in the Hugoton Gas Field and examine from the courthouse

records the full terms of any oil and gas lease, lease modification agreement, unitization agreement, affidavit of production, pipeline easement, or utility line easement. We are literally talking about thousands of full documents that have been recorded to ensure to an innocent purchaser in good faith the right to determine what encumbrances there may be on the land. These will, of course, be reflected as summaries in any abstract of title or title insurance policy. Any abstracter or title insurance company which fails to show these types of instruments as encumbrances on the land is subject to a malpractice suit.

To give you an example of the thousands of oil and gas leases of record, I have only to refer to the Hugoton Gas Field located in 11 Southwest Kansas counties. The Kansas portion of the field contains some 2,600,000 acres. This computes out to 16,250 quarter sections (160 acres). Even conservatively speaking, there probably are more than 10,000 oil and gas leases of record in the Hugoton Field, and I would venture to guess that I could go to the courthouse and examine the full terms of any of those leases without having to contact the gas company to get a copy of the lease. I see no reason why any wind energy company, acting in good faith, would be reluctant to file the full wind energy lease or easement of record unless they have something to hide.

REMAINING RESPONSES TO QUESTIONS ON HB 2280

In response to Senator Barone's comments about my testimony, I agree wholeheartedly with his statement that if a landowner is not comfortable with the lease, "they should not sign it." That has been my advice to my clients on numerous occasions over the years. However, that is not the issue here. The issue is that a wind energy company needs to make full disclosure of the contents of any wind energy lease or easement as do oil and gas companies in the filing of oil and gas leases of record.

Senator Barone also raised the question whether the Southwest Kansas Royalty Owners Association thought all leases should be recorded with the register of deeds. For example, " if a hunting club from Johnson County that leases several hundred acres of land for hunting rights, should that lease be recorded?" Obviously, it is a matter of common sense as to whether a lease should be placed of record. The Kansas courts

have held that a contract to execute or assign an oil and gas lease is within the contemplation of the statute of frauds and therefore to be valid, such a contract must be in writing. (*Robinson v. Smalley, 102 K*an. 842, 171 P. 1156; *White*
v. Green, 103 Kan. 405, 173 P. 974). For the reasons stated above, the lease should be placed of record. As a matter of clarification, the statute of frauds requires that any lease or interest in land exceeding one year in duration must be in writing

It may surprise Senator Barone to know that my advice to that Johnson County hunting lodge would be to place its hunting lease of record if the lease extends for more than one year and if the lodge might be concerned about the farmer, or a purchaser of the property, subsequently giving similar hunting rights to a group of hunters from Texas or New York, and that group places its lease of record before the Johnson County group records its lease or fails to record it! As mentioned above, it is a matter of common sense as to whether leases affecting real estate should or should not be placed of record under a particular given set of circumstances.

I apologize for the length of this opinion but felt the issue of requiring a wind energy company to file its full lease of record important enough to thoroughly research the subject to assist your honorable Committee to make an informed decision with respect of HB 2280. I also apologize for not having attended the hearing Tuesday. To those who know me realize the difficulty of my being able to get around very well.

Respectfully submitted,
Bernard E. Nordling

ATTACHMENT

STATEMENT OF BERNARD E. NORDLING, ASSISTANT EXECUTIVE SECRETARY SOUTHWEST KANSAS ROYALTY OWNERS ASSOCIATION HUGOTON, KANSAS 67951

March 11, 2003

TO THE HONORABLE MEMBERS OF THE SENATE COMMITTEE ON UTILITIES:

Re. House Bill No. 2280, as amended.

Mr. Chairman and Members of the Committee:

INTRODUCTION AND BACKGROUND

My name is Bernard E. Nordling, formerly of Hugoton, Kansas, and now a permanent resident of Lawrence, Kansas. I am a lawyer and a member of the Hugoton law firm of Kramer, Nordling, & Nordling LLC. I began practicing law in Hugoton in 1949 with A. E. (Gus) Kramer, the founder of the Southwest Kansas Royalty Owners Association. Mr. Kramer served as its first Executive Secretary from 1948 to 1968. I served in that capacity from 1968 until 1994 when my son, Erick, who is my law partner, assumed responsibility of the Secretaryship. My entire career as a lawyer has been representing landowners in the Hugoton Gas Field area.

While the Southwest Kansas Royalty Owners Association is mainly concerned with the protection of rights of royalty owners in the Hugoton Field, nevertheless, many of our members own the surface interest as well and would be affected by any wind energy leases or easements on lands in the southwest Kansas area so suitable for wind energy development.

CONCERNS OVER FAILURE TO RECORD FULL LEASE OR EASEMENT

It is my understanding your honorable Committee has before it today for present consideration and possible action House Bill No. 2280. I wish to make this statement on behalf of Kansas landowners, both as a landowner attorney and as Assistant Executive Secretary of the Southwest Kansas Royalty Owners Association, to express my concern about the passage of HB 2280, as currently amended.

The bill, as originally drafted, addresses the issue of requiring the filing of record any lease involving wind resources and technologies to produce and generate electricity. Because of the newness in Kansas of wind energy as an energy source, this legislation is appropriate to be consistent with the requirement of the filing of oil and gas leases, as well as water rights, of record for the proper notification to prospective purchasers and mortgage of lands of any documents affecting property rights. However, by action of the House Committee on Utilities,
the bill was amended to permit the filing only of a memorandum of lease

or easement and not the full lease agreement or easement and therein lies the problem.
It is absolutely essential that any prospective purchaser or mortgagee of the lands covered by a wind energy lease or easement be fully apprized of the rights and obligations of the parties with respect to the agreement. If the full document is not placed of record, the difficulties faced by that prospective purchaser or mortgagee of knowing what the lease or easement provides and having to determine who might have a copy of the full document available for examination are obvious.

I must confess that because of my partial retirement from the practice of law and from the newness of wind energy leases in Kansas, I have only had the opportunity to examine a couple of wind energy leases and one wind energy easement to determine the rights and obligations of the respective parties to the agreement. I was absolutely shocked at the one-sidedness and over reaching of the wind energy lease agreements I examined. At the time, I told my clients the documents examined were the most one-sided I had ever seen in my fifty some years of practice!

For example, one lease in particular I examined was, among other things, 31 pages long, was very complicated and it was almost impossible to determine the compensation to be paid for use of the land. There was no factor to adjust for inflation in the payment of rent, and while for a specified term of thirty years, it could be renewed every 10 years at the option only of the lessee. Basically, the rights of the owner of the property were subservient to the rights of the wind energy lessee and notice had to be given to use the property other than for "hunting, ranching and agricultural purposes." It would seem a document such as I have described should be fully disclosed of record for full examination by an interested party without having to go to the trouble of chasing it down from the current owner or the wind energy lessee.

The argument may be made that filing a memorandum of lease of record rather than the full document is the same as having only to file a memorandum of a shopping center document but that is comparing apples to oranges. A wind energy lease is no different than an oil and gas lease and the full terms of an oil and gas lease must be placed of record, not just a memorandum of lease.

COMMENTS ON FISCAL NOTE FOR HB 2280

In the fiscal note section about HB 2280, it is recited that the bill would have no effect on any state fund. Also, the Kansas Association of Counties determined that the bill could bring some additional revenue to some counties but no estimation of the amount of revenue could be determined.

As a possible aid on that point, it is submitted that if the full lease is filed of record it must necessarily follow there will be additional revenues to the county in which the lease is filed of record. It is my understanding that currently the charge for filing documents of record in the Register of Deeds office is $8.00 for the first page and $4.00 for each additional page. Taking an average of the two wind energy leases I have examined, there would be 25 pages to be recorded. This computes to revenue to the county of that one document of $104.00. The shorter the leases, of course, the less revenue but obviously the recording of a two or three page memorandum of lease would raise only between $12.00 or $16.00 for the county.

At such a critical time as our current budge crisis, the additional revenue to the county in which the leased property is located will be important to that county. However, the need for recording the full wind energy lease or easement for the reasons stated above should be of primary importance.

RECOMMENDATION ON ACTION TO BE TAKEN WITH REFERENCE TO HB 2280

It is respectfully submitted the appropriate action by your honorable Committee to take with reference to HB 2280, as amended, is to **delete from Section 1, Line 1, the following words: "A memorandum of lease or" so that Section 1 of HB 2280 will read as follows:** "**Any lease or easement** involving wind resources and technologies to produce and generate electricity given on land situated in this state shall be recorded **by the lessee or the grantee of the easement** in the office of the register of deeds of the county in which the land is located **within five business days after the lease or easement is executed."**

Respectfully submitted,

Bernard E. Nordling,
Assistant Executive Secretary
Southwest Kansas Royalty Owners Association