No. 10-104279-AS

IN THE SUPREME COURT OF THE STATE OF KANSAS

NORTHERN NATURAL GAS COMPANY,

Plaintiff/Appellant,

vs.

ONEOK FIELD SERVICES COMPANY, L.L.C.; ONEOK MIDSTREAM GAS SUPPLY, L.L.C.; LUMEN ENERGY CORPORATION; and LUMEN MIDSTREAM PARTNERSHIP, LLC,

Defendants/Third-Party Plaintiffs/Appellees,

vs.

NASH OIL & GAS, INC.; and L.D. DRILLING, INC.,

Third-Party Defendants/Appellees.

JOINT BRIEF OF AMICI CURIAE
Haynesville Surface and Minerals Assoc., Inc.
Kansas Farm Bureau
The Southwest Kansas Royalty Owners Association
The Eastern Kansas Royalty Owners Association

Appeal from the District Court of Pratt County
Hon. Robert J. Schmisseur, Judge
District Court Case No. 2009-CV-111

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THE INTERESTS OF AMICI CURIAE

The Haynesville Surface and Minerals Association, Inc. ("Haynesville") is a non-profit corporation organized under the laws of Kansas for the purpose of defending, protecting and promoting the rights and interests of owners of surface and

mineral rights in property located in Pratt County. Haynesville's members are individuals and family trusts who own property in the vicinity of the Cunningham Storage Field maintained by appellant Northern Natural Gas Company ("Northern"). They benefit substantially from—and, in some instances, depend upon—the royalty payments and other benefits that accrue to them from the production and development of their mineral interests. However, as a result of Northern's inability to manage the Cunningham Field and its overreaching attempts to claim ownership of allegedly migrating gas under K.S.A. 55-1210, regardless of how far the gas ventures, development and production of minerals under the property of Haynesville's members has come to a virtual standstill.

The Kansas Farm Bureau ("KFB") is a general farm organization, incorporated under the Kansas Cooperative Marketing Act, K.S.A. 17-1601, *et seq.* KFB represents approximately 40,000 Kansas families directly engaged in agricultural pursuits—approximately 80% of all Kansas families engaged in agriculture. Its members include farmers and ranchers in every Kansas county. The interests of KFB members are implicated in this proceeding. Many of its members own land and have agricultural operations in the vicinity of the Cunningham Field. Many more of its members have agricultural operations in the vicinity of other gas storage fields located throughout Kansas. If Northern prevails in this appeal, the farming and ranching operations of members of KFB would be detrimentally affected.

The Southwest Kansas Royalty Owners Association ("SWKROA") is a Kansas non-profit membership corporation organized "to foster, protect and further in all respects the rights and interests of the mineral owners" in southwestern Kansas. Its approximately 2,100 members not only reside in southwestern Kansas, but are also found throughout Kansas and elsewhere. Of the 19 regulated Kansas gas storage fields, two fields—the Borchers North and the Boehm gas storage fields—are located in southwestern Kansas. SWKROA is vitally interested in the rights of its members whose mineral and surface interests are in the vicinity of Kansas gas storage fields.

The Eastern Kansas Royalty Owners Association ("EKROA") is a Kansas non-profit membership corporation dedicated to promoting the interests of persons and concerns who own land, minerals and/or royalty interests under oil and gas leases in eastern Kansas. EKROA's mission statement includes as one of its principal objectives "to provide, encourage and promote exploration and production in Kansas while preserving, protecting, advancing, and representing the interest and rights of Kansas land, mineral and/or royalty owners through education, advocacy, and assistance to the corporation members, governmental bodies and the public." Although its members reside primarily in eastern Kansas, they are also found throughout Kansas and elsewhere. Twelve of the 19 regulated Kansas gas storage fields are located in eastern Kansas. EKROA is vitally interested in the rights of its members whose mineral and surface interests are in the vicinity of those gas storage fields and could be impacted by the outcome of this case.

ARGUMENT AND AUTHORITIES

Kansas has always adhered to the common law Rule of Capture, which recognizes that the subsurface geology neither reflects nor respects property lines and boundaries.

> Petroleum and gas, as long as they remain in the ground, are a part of the realty. They belong to the owner of the land, and are a part of it as long as they are on it, or in it, or subject to his control. ***When they escape and go into other lands, or come under another's control, the title of the former owner is gone.***

Lanyon Zinc Co. v. Freeman, 68 Kan. 691, 696, 75 Pac. 995 (1904) (emphasis added); *see also Mobil Exploration & Producing U.S. v. State Corp. Comm'n*, 258 Kan. 796, 800, 908 P.2d 1276 (1995) ("At common law, the owner of a tract of land acquired title to the oil and gas which the owner produced from wells drilled thereon even though . . . part of such oil or gas migrated from adjoining lands.").

As a corollary to this Rule, the implied covenant to protect against drainage protects an oil and gas lessor from his lessee's failure to prevent drainage of the leased oil and gas by activities occurring off the leased premises. *Renner v. Monsanto Chemical Co.*, 187 Kan. 158, 168, 354 P.2d 326 (1960). The lessee whose lease is being drained is not absolved of this obligation by blaming the producer on the neighboring lease whose well is causing the drainage. The drained lessee cannot respond by claiming that it need not take any action because the offending producer is intentionally draining. *See id.* ("[A] rigid duty is imposed upon the lessee to protect the premises from drainage by drilling a sufficient number of wells . . . ."). Nor can

the lessee successfully stop even the most notorious activities of the draining producer. *See, e.g., Union Gas System, Inc. v. Carnahan*, 245 Kan. 80, 774 P.2d 962 (1989) ("Cross-appellants, relying on the rule of capture, legitimately . . . recovered . . . Union's injected gas which had migrated onto [their] property. They then sold the gas to [buyers], who then sold it to Williams, who then sold it to Union for reinjection . . . . This created a clever circle of purloined production, and a successful one under the rule of capture" ending only when cross-appellants' property was condemned). Instead, consistent with its implied covenant to protect against drainage and the Rule of Capture, the drained lessee must take action solely on its leased premises to stop the drainage.

Northern specifically alleges that the appellee-producers, by allegedly withdrawing enormous amounts of water from wells outside the storage area, intentionally caused lower pressures to develop at those wells, causing the storage gas to migrate toward the producers' well bores. (Appellant's Brief at 3).[1] The producers

[1] Northern's present explanation of the alleged migration of its storage gas is quite different from the one it gave only a couple of years ago when, in *Northern Natural Gas Company*, 125 FERC ¶ 61,127, 61,632, 2008 FERC LEXIS 2923, at **19-**20 (October 30, 2008), the FERC summarized Northern's explanation as follows:

> Northern has presented evidence demonstrating that when storage injections began into Cunningham around 1978 and storage reservoir pressures increased, the result was gas movement out of the Cunningham storage reservoir via the non-sealing fault. Northern states that the migrating storage gas created highly permeable gas-saturated pathways until the field stabilized around 1984 and remained stabilized until around 1996. Northern estimates that approximately 17-18 Bcf of natural gas migrated prior to stabilization.

have a different explanation for the alleged drainage. They claim that the drainage, if it is occurring, is as a result of the Northern's over-pressurization of the Cunningham Field, thus pushing gas beyond the confines of that Field.[2] The KCC agrees with the producers,[3] as did the trial court, which found that the "[appellees's] production activities did not cause the initial breach of the storage field if in fact the storage field was ever secure in the first place." (R. Vol. 1 at 148).

Assuming, however, that injected gas is in fact migrating beyond the confines of Northern's storage field, under the Rule of Capture it simply does not matter what caused the migration. Under the Rule of Capture it is Northern's responsibility to address the drainage by taking appropriate action within the confines of its storage field, which apparently it has not done.[4] The law simply does not recognize a claim by Northern against the alleged draining producer.

Northern's misunderstanding of the Rule of Capture may be best illustrated by its incendiary analogy, in which it claims that "the facts of this case are akin to those

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[2] *Northern Natural Gas Company*, Docket No. CP09-465-000 (FERC) (Protest and Initial Comments of Nash Oil & Gas, Inc., Val Energy, Inc., and L.D. Drilling, Inc. on Northern Natural Gas Company's Renewed Application to Expand the Boundary of the Cunningham Storage Field, Oct. 13, 2009, p. 18), *available at* http://elibrary.ferc.gov/IDMWS/nvcommon/NVViewer.asp?Doc=12172685:0

[3] *Northern Natural Gas Company*, *supra* (Kansas Corporation Commission's Comments on the Environmental Assessment, Feb. 25, 2010, p. 7), *available at* http://elibrary.ferc.gov/IDMWS/nvcommon/NVViewer.asp?Doc=12277823:0 ("The KCC believes this excessive operating pressure may be the cause of, or at least a contributing factor to, the containment issues at the Cunningham Storage Field.").

[4] The KCC has noted that "Northern has taken no operational steps to stop or limit continuing migration of storage gas from its Cunningham Storage Field." *Id*.

in which cattle rustlers cut a rancher's fences to facilitate their theft of the rancher's cattle." (Appellant's Brief at 7). This, of course, is a faulty analogy. As a matter of fact, the producers have not trespassed upon Northern's property, as did the cattle rustlers when they cut the rancher's fences. Unlike cattle, which the rancher owns and physically controls, under the Rule of Capture natural gas is, as a matter of law, *ferae naturae*, and is not owned until it is ultimately reduced to possession and placed under control by the act of production. A more accurate analogy is a careless and ruthless rancher who feeds his cattle by cutting his own fences and driving them to his neighbors' pastures and then claims ownership of his neighbors' pastures by the presence of his cattle on them.

Northern appears to acknowledge that Kansas adheres to the Rule of Capture, but claims that K.S.A. 55-1210 completely abolished that Rule insofar as injected storage gas is concerned. Northern contends that K.S.A. 55-1210 grants injectors, such as Northern, an "unqualified, unlimited right to all of their injected gas without regard to where that gas migrates or is ultimately found, and expressly abolished the Rule of Capture with respect to migrating storage gas." (Appellant's Brief at 19).

Separate provisions of statutes are to be read in harmony with each other and *in pari materia*, and no statutory provision should be so emphasized as to reduce any other to surplusage. *Moser v. State Dept. Of Revenue*, 289 Kan. 513, 213 P.3d 1061 (2009); *State v. Van Hoet*, 277 Kan. 815, 826-27, 89 P.3d 606 (2004). Northern attempts to evade that bedrock principle of statutory construction.

In arguing that subsection (a) of K.S.A. 55-1210 gives it an absolute right to its injected gas, regardless of how far the gas roams, Northern conveniently ignores the geographic limitations established by subsections (b) and (c) of the statute. K.S.A. 55-1210(b) specifically addresses the rights of the owner of lands "under which . . . gas storage fields, sands, reservoirs, and facilities lie," limiting their ability to take control of the stored gas, but preserving rights to drill through storage fields to reach other minerals. Similarly, subsection (c) specifically concerns only the rights of landowners adjoining a storage field. Northern's attempts to reconcile its construction of subsection (a) with the remainder of the statute by focusing on the phrase "any other person" in subsection (b) (Appellant's Brief at 20-21) would make the vast majority of the statute's contents utterly superfluous. If "any other person" is proscribed from claiming title to storage gas anywhere, what purpose could K.S.A. 55-1210(b) and (c)'s discussion of the rights of landowners at particular locations possibly serve?

In the wake of *Anderson v. Beech Aircraft Corp.*, 237 Kan. 336, 699 P.2d. 1023 (1985), the Kansas Legislature relaxed the Rule of Capture in favor of the injector to provide that under subsection (c) if the gas migrates to "adjoining property," the injector can claim that gas if it can show by a preponderance of evidence that it actually injected the gas. The Legislature went no further. It simply did not address the circumstance in which injected gas migrates beyond "adjoining" property. Therefore, the common law Rule of Capture continues to apply to such gas.

Northern acknowledges the value of legislative history as an aid to statutory interpretation. (Appellant's Reply Brief at 6) ("Defendants cite no . . . legislative history . . . ."). Yet, the interpretation of K.S.A. 55-1210 that it advocates is at odds with that statute's legislative history. Williams, which requested the statute's introduction as S.B. 168,[5] testified before the legislature that K.S.A. 55-1210 would affect only "adjoining" landowners.[6] Helpfully, diagrams accompanying that written testimony illustrate precisely what definition of "adjoining" was being proposed to the legislature: "adjoining" means adjacent property just beyond the certificated boundaries of the storage field.[7] Neither Williams nor the Kansas legislature intended by the adoption of K.S.A. 55-1210 to abolish the Rule of Capture with respect to storage gas that migrated further.

The court below correctly construed K.S.A. 55-1210 as creating a limited exception to the Rule of Capture. If all of the subsections of K.S.A. 55-1210 are read as a statutory whole, the only conclusion that can be drawn is that the Kansas Legislature intended to grant injectors unconditional rights to their injected gas only insofar as that gas remains in the storage area.

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[5] *Abandonment of Natural Gas Storage Facility and Rights of an Injector of Natural Gas into an Underground Storage Facility: Hearing on SB 167 and SB 168 Before the S. Comm. on Energy and Natural Resources*, 1993 Leg., at Attachment 2, p. 2 (Feb. 23, 1993) (statement of Paul Karns, Senior Attorney for Williams Natural Gas Co.) ("WNG requested the introduction of SB 168 . . . .") (Attachment A hereto).

[6] *Id.* at Attachment 2, p. 3.

[7] *Id*. at Attachments 3 and 4.

Relying on its incorrect construction of K.S.A. 55-1210, Northern has relentlessly claimed ownership of gas located beyond the boundaries of "adjoining" properties. For example, Northern has already attempted, albeit unsuccessfully, to claim rights to gas produced several miles from its storage area. *See Northern Natural Gas Co. v. Nash Oil & Gas, Inc.*, 506 F. Supp. 2d 520 (D. Kan. 2007), *aff'd* 526 F.3d 626 (10th Cir. 2008).

The application of Northern's interpretation of K.S.A. 55-1210 would have drastic consequences to property rights beyond the boundaries of "adjoining" properties. If Northern actually owns its migrated gas beyond "adjoining" properties, it could claim that it has the right to retrieve that gas. Under Kansas law, that would necessarily include the rights to "explore, develop, and produce oil and gas and, generally, to use as much of the surface of the land as is reasonably necessary for carrying out such activities."*Dick Properties, LLC v. Paul H. Bowman Trust*, 43 Kan. App. 2d 139, 144, 221 P.3d 618 (2010). Northern could disrupt farming and ranching operations by drilling on any lands under which its gas has migrated. Do the farmers and ranchers receive any compensation for such disruption? Would there need to be an adjudication every time Northern retrieves gas beyond the "adjoining" properties to determine whether that gas is migrated gas owned by Northern, or native gas, owned by the landowner?

Ironically, if the lands were within the "adjoining" properties, landowners would receive protection under K.S.A. 55-1210(c) but, under Northern's

interpretation of that statute, the lands beyond the "adjoining" properties receive no such statutory protection. The novel property regime created under Northern's interpretation of K.S.A. 55-1210 presents a host of unanswered questions that could only result in the diminished value of estates, both surface and mineral, of lands beyond the "adjoining" properties. Can an owner of real estate not "adjoining" a gas storage field but in its vicinity ever again warrant title on a sale of the property or in giving a mortgage? Can an attorney give a title opinion as to fee ownership, both as to surface and minerals, without reference to this potential claim Northern's theory creates? Northern's ownership scheme would severely disrupt real estate titles.

Since Northern began publicly asserting ownership of gas beyond the boundaries of "adjoining" properties, gas development activities on those distant properties have come to a virtual standstill. What oil and gas producer would want to "buy a lawsuit" against Northern by drilling a well outside the boundaries of "adjoining" properties, knowing that Northern will respond by claiming that some or all of the produced gas is Northern's injected gas?[8]

Through the present lawsuit, and by its aggressive posturing, Northern has unilaterally imposed a moratorium on the production payments to royalty owners and

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[8] *Northern Natural Gas Company, supra* (Protest of Sabco Oil and Gas Corporation and Motion for Leave to File Protest out of Time, Nov. 24, 2009, p. 7), *available at* http://elibrary.ferc.gov/IDMWS/nvcommon/NVViewer.asp?Doc=12205488:0 ("[A]s wells are drilled on land north and northwest of the expansion area. . . [Northern] will come calling, either through filing claims for restitution in Kansas courts or applications for yet larger expansion of the Cunningham Storage Field boundary.").

the drilling of any oil and gas wells in the area outside the boundaries of "adjoining" property.[9] Northern's conduct impairs and clouds title to the surface and minerals and thwarts the ability to develop and produce those resources, for the economic benefit of royalty owners and landowners and for the good of the Kansas economy.

Only when the Court definitively rejects Northern's construction of K.S.A. 55-1210 will mineral exploration and development resume on these non-adjoining properties and the surface freed from Northern's threats. Until then, the members of amici curiae and others in the vicinity of Northern's Cunningham Storage Field will continue to suffer the effects of Northern's overreaching.

Respectfully submitted,

KANSAS FARM BUREAU

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[9] *See, e.g.*, J.W. Keene, *Landowners thank County Commission for support in battle with utility*, PRATT TRIBUNE, Nov. 30, 2010:

> Because Northern Natural Gas is withholding gas production payments to the landowners several of them have lost their properties and other assets.
>
> * * *
>
> Another problem being created for members of the group is tax liabilities. All the wells in question had production and all owners in Haynesville are going to get tax bills although they have not received any money from production, according to the Pratt County Assessor.

(Attachment B hereto).

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Attachment A

Abandonment of Natural Gas Storage Facility and Rights of an Injector of Natural Gas into an Underground Storage Facility: Hearing on SB 167 and SB 168 Before the S. Comm. on Energy and Natural Resources, 1993 Leg. (Feb. 23, 1993)

Attachment B

J.W. Keene, *Landowners thank County Commission for support in battle with utility*, PRATT TRIBUNE, Nov. 30, 2010