SWKROA

SOUTHWEST KANSAS ROYALTY OWNERS ASSOCIATION

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Testimony before the House Committee on Energy and Utilities
HB 2164 – an act relating to ownership of pore space

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Chairman Holmes and Members of the Committee:

My name is Erick Nordling. I would like to submit written testimony on behalf of SWKROA in regard to HB 2164. I am from Hugoton and serve as the Executive Secretary of SWKROA. I also am an attorney with the law firm of Kramer, Nordling, and Nordling, LLC. In my law practice, and as Secretary for the Association, I regularly advise mineral and royalty interest owners, as well as surface owners and farm tenants, with regard to issues relating to access on their lands for oil and gas operations and from damages resulting from such access and use of the land for oil and gas operations.

HB 2164 is an interesting bill, which presents somewhat of a dilemma for the membership of our Association. As you know, our organization represents the interests of mineral and royalty owners, but we also have a number of our members who own surface interests too. We understand this bill is designed to target the ownership of pore spaces as it relates the injection and sequestration of carbon dioxide. At first blush, HB 2164 appears to favor mineral owners by declaring that they own the pore spaces under the surface where their mineral interests lie. Although we believe that it would be good policy for the Kansas Legislature to address the ownership of pore spaces, we are concerned that HB 2164 changes the common law of Kansas and may trigger claims of inverse condemnation and constitutional challenges. Also, as HB 2164 paints with a broad brush there may be some unintended consequences as the bill is presently drafted.

The mineral estate in Kansas, like many other states, is dominant over the surface estate such that the owner of the oil, gas and other minerals is allowed to use as much of the surface estate as is necessary to explore for and develop the minerals, subject to reasonable accommodations to the surface owner for the mineral owner's use of the surface. The oil and gas lease is the key document in which the mineral owner can grants an oil and gas company the rights to explore for, drill, and extract oil and gas. In return for the mineral owner (as Lessor) granting the oil and gas company (as Lessee) the exploration and production rights, the Lessee pays the Lessor royalty for gas and oil which is produced and sold from the leased property.

Many oil and gas leases also give the Lessee the right to dispose of salt water produced from the wells located on the leased premises, in to subsurface strata. Also, most leases would

permit an operator to inject water, carbon dioxide, or other fluids into the producing formation as a part of enhanced or secondary recovery operations to maximize production from the gas and oil deposits.

Interestingly, in Kansas, if an oil and gas company has a lot of produced water from several wells, they can enter into a salt water disposal agreement with some surface owner to drill a new well or utilize an old wellbore, for the disposal of salt water in a subsurface zone. The Kansas Corporation Commission has rules and regulations governing the injection and disposal of salt water, and for injection of fluids for enhanced recovery operations. HB 2164 would likely reverse this long standing practice.

Jurisdictions which have reviewed the issue of whose permission must be obtained for the storage of natural gas in underground storage reservoirs in which the 'native' gas and oil have been extracted, have concluded that the injector must obtain permission from the owner of the surface estate. This has also been the case in Kansas. HB 2164 could also affect this long standing practice.

Other states which have addressed this issue have concluded that it is the surface owner who owns the pore spaces. As part of their legislative declaration, Wyoming and North Dakota state that their legislation would not alter the common law of the state. HB 2164, appears to be patterned, almost verbatim, from North Dakota's 2009 legislation (*North Dakota Century Code Annotated, Section 47-31-01 through 47-31-08*), **except** that the North Dakota Legislature declared that the pore spaces were owned by the **"owner of the overlying surface estate."** HB 2164, also glaringly leaves off the North Dakota provision (NDCC 47-31-08) which declared that their legislation **"does not change or alter the common law as of April 9, 2009, as it relates to the rights belonging to, or the dominance of, the mineral estate."**

Wyoming's statute (W.S. 1977 Section 34-1-152) appears to be a more balance approach to the ownership of pore space issue. Wyoming also declares that, **"the ownership of all pore space in all strata below the surface lands and waters of this state is declared to be vested in the several owners of the surface above the strata."**

(Copies of the North Dakota statute are being delivered to the Committee Secretary, as well as an electronic version.)

To our knowledge, we believe that no state has declared the mineral owner to be the owner of the pore spaces. HB 2164 would alter the common law of Kansas.

Professor Owen L. Anderson, in his article, *Geologic CO[2] Sequestration: Who Owns the Pore Space?, 9 WYO. L. Rev. 97 (2009)*, examines the ownership of pore spaces in context of

CO_2 sequestration states, "that under the common-law maxim, *cujus est solum, ejus est usque ad et ad inferos*, a fee-simple owner of land owns the entire tract "from the heavens to the depths." Thus, a fee-simple owner owns the subterranean pore spaces. The question of pore-space ownership arises when the fee-simple interest is severed into a mineral estate and a surface estate. As between the surface owner and mineral owner, most jurisdictions, including Texas, have not specifically determined the ownership of subterranean pore spaces." He further submits that most likely the 'owner' of the pore space is the surface owner.

Professor Anderson states that the mineral owner has the right to *use* the pore space to extract the oil and gas reserves. ("Accordingly, even though the surface owner may own the pore spaces, the mineral owner has broad rights to penetrate or otherwise use them in connection with mineral exploration and exploitation. Indeed, commercial deposits of oil and gas occupy pore spaces within geologic traps. Thus, the mineral owner may be able to enjoin CO_2 sequestration that prevents, greatly hinders, or endangers the capture of oil and gas.")

There is also a good law review article by South Dakota law student, Blayne N. Grave, entitled, *Carbon Capture and Storage in South Dakota: The need for a clear designation of Pore Space Ownership, 55 S.D. L. Rev. 72 (2010),* for your review. Mr. Grave concludes that, "…Pore space ownership is a critical piece of the puzzle. Because of the lack of case law in the jurisdiction regarding pore space is likely the best way to achieve clarity on the issue. Most commentators and the states surrounding South Dakota that have addressed the issue are in favor of the surface estate owning the pore space."

(Copies of the articles by Professor Anderson and Blayne N. Grave are being delivered to the Committee Secretary, as well as an electronic version.)

A couple of other cases are available through the Committee Secretary, including: (a) *Ellis v. Ark. La. Gas Co., 450 F. Supp. 412 (E.D. Okla. 1978)*, at (422) (observing that if "it was the mineral interest owner and not the surface owner who had power to grant storage rights, it would typically mean that hundreds of severed mineral interest owners would have to be contacted if those rights were to be obtained privately." And (b) *Dept. of Transportation v. Goike, 220 Mich. App. 614 (1996)* (A cased dealing with the issue of "once the fluid minerals and gas have been extracted from the property, does the resulting underground storage space that held those fluid minerals and gas belong to the surface owner or to the owner of the mineral rights." The Court concluded in favor of the surface owner.)

Although it may look attractive for the mineral owner to be declared the owner of the pore spaces, it may actually create a bigger burden to obtain permission from all mineral owners, than it would to obtain permission from surface owners since so many mineral interests have been severed from the surface estate and have become very fractionated over time.

As stated above, SWKROA believes it to be a good idea to declare the ownership of the pore spaces, but for the reasons stated above, urges that the surface owner should be declared as the owner of the pore spaces. The Wyoming approach seems to be one which you could consider.

Thank you, for your consideration of our remarks.

Respectfully submitted,

Erick E. Nordling
Executive Secretary, SWKROA