SWKROA

SOUTHWEST KANSAS ROYALTY OWNERS ASSOCIATION

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Testimony before the Joint Committee on Energy and Environmental Policy
Ownership of underground pore space

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Chairman Holmes and Members of the Committee:

My name is Erick Nordling. I appear at the request of the Chairman Holmes, to provide a 'royalty owner's perspective' to the ownership of "pore spaces" in Kansas. 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. Our organization represents the interests of mineral and royalty owners, but some our members also own surface interests.

The issue of 'pore spaces' in relationship to the oil and gas industry is not a new concept, although it seems to be receiving a lot of attention lately, mostly as a concern with the sequestration or disposal of carbon dioxide (CO_2) into underground formations and perhaps is linked to concerns by some of the use of hydraulic fracturing techniques in the completion of horizontally drilled wells. Our members generally didn't think in terms of who owns the pore space. Rather, more commonly we discuss who owns the "surface rights" and who owns the "mineral rights" in connection with issues such as: leasing of the mineral interests for the development of natural gas and oil, settlement of damages caused by oil and gas lease operations, granting of salt water disposal agreements, and in pipeline right-of-way requests.

So, the experiences of our members are generally linked to whether the minerals have been leased for oil and gas development. The oil and gas lease is the key document in which the mineral owner (as Lessor) grants an oil and gas company the right to explore for, drill, and extract oil and gas. In return, the oil and gas company (as Lessee) pays a 'royalty' to Lessor for the gas and oil which has been produced and sold from the leased property.

In Kansas, like in many other states, the mineral estate is considered as being 'dominant' over the surface estate to allow the owner of the oil, gas and other minerals to exploit and extract the gas and oil from underneath the land, and 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. 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, many leases 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.

Under the common-law a fee-simple owner of land owns the entire tract "from the heavens to the depths." So, as long as the mineral estate has not been separated from the surface estate, the oil and gas companies can just deal with the owners of the surface, which includes the mineral rights. However, when the mineral estate has been severed from the surface, the issue of who owns what rights becomes more important. To my knowledge, I don't believe any state has declared the mineral owner to be the owner of the pore spaces. SWKROA is concerned if any proposed legislation would change the common law of our state.

Professor Owen L. Anderson, in his article, *Geologic CO[2] Sequestration: Who Owns the Pore Space?, 9 WYO. L. Rev. 97 (2009)*, examined 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 David E. Pierce in his testimony before this committee on September 9th commented that "Ownership of the surface of land includes ownership of all that lies beneath the surface boundaries extended downward, to include minerals, rock structures, and voids." He also noted, that "Although not expressly addressed by the courts to date, where the surface estate has been severed from a mineral estate, the surface owner will most likely 'own' subsurface areas that are not part of the mineral comprising the mineral estate. Surface estate ownership of subsurface areas may be subject to implied rights in the mineral estate owner to access, or drill through, the subsurface area to develop the mineral estate."

We are also concerned that if the legislative goal is to declare pore space ownership to enhance CO2 injection, and disposal, that the bill should not be overly broad and that the Legislature be cautious of unintended consequences in areas such as: underground natural gas storage; disposal of salt water; water law; and the impact on existing oil and gas leases which grant the lessee certain rights to use the pore spaces already.

Thank you, for your consideration of our remarks.

Respectfully submitted,

Erick E. Nordling
Executive Secretary, SWKROA