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Recent Developments in Natural Resources Law - Circa 2000-01

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RECENT DEVELOPMENTS

Thomas A. Daily
Arkansas Supreme Court Affirms *Hales v. SEECO* as Contortionists' Dream Comes True

This author's vocabulary was recently expanded to include "contort," a noun. He first heard the term from Ed Norwood, a sage South Texas trial lawyer and co-presenter to this institute. Contort should never be confused with the verb, also spelled "contort," which, according to Webster, means "to twist into or as if into a strained shape or expression."\(^2\) Webster also advises that the verb "contort" comes to us from the same root as the word "torture" and that it is a synonym of "deform." The noun "contort," on the other hand, means a claim for breach of contract which a clever plaintiff's lawyer (the "contortionist") and a gullible court have morphed into a tort case.

Whenever one learns a new word it is advisable to try it out in a couple of sentences. How about: "*Hales* court allows contortionists to contort a simple 'implied covenant to market' case into a nightmare contort?" That's once. We will try again a little later.

Once upon a time there was a natural gas utility in Northwest Arkansas called "Arkansas Western Gas Company." Arkansas Western, like other gas utilities of its time, not only sold gas to end user, but also produced the gas and transported it to the retail distribution system. In 1978, responding to an order of the Arkansas Public Service Commission, Arkansas Western reorganized into a holding company and changed its name to Southwestern Energy Company. The gas production business and leasehold interests were transferred to a new subsidiary, SEECO, Inc., and the public utility business was transferred to the re-named Arkansas Western Gas Company. As a part of this Public Service Commission mandated reorganization, SEECO and AWG entered into a 20-year contract for the sale of gas produced from leases held by

1\(^{\text{Member, Daily & Woods, P.L.L.C., Attorneys, Fort Smith, Arkansas.}}\)

2\(^{\text{Merriam-Webster's Collegiate Dictionary, online edition.}}\)
SEECO, known as Contract 59. Pursuant to Contract 59, SEECO dedicated substantial gas reserves in Franklin, Johnson, Washington, Logan and Crawford Counties to AWG. In return, AWG promised to pay the "market-value" price for gas throughout the contract's 20-year term. However "market-value" was determined not by the external market but by a constantly escalating formula. The contract also contained a take-or-pay obligation, which provided that AWG would buy a certain volume of gas at the contract price or pay a specified price without taking the gas.

Meanwhile, the external market price for natural gas did not rise as the parties had expected. According to its testimony, SEECO was concerned that if it forced Contract 59 to be strictly enforced the Public Service Commission would disallow the inclusion of the full price in Arkansas Western’s rate base. If that had happened, Arkansas Western had the right to terminate Contract 59 altogether under the contract’s "regulatory out" clause. So, on December 10, 1984, Arkansas Western froze the price of gas purchased from SEECO at $3.85 per MCF.3

On January 16, 1990, AWG filed an application with the Public Service Commission for approval of a general change in its rates and tariffs. On December 21, 1990, the Public Service Commission approved the overall revenue requirement and associated tariffs. However, it expressed concern over AWG's gas purchasing practices, its affiliate transactions with SEECO, its allocation of gas costs, and its transportation practices. The Public Service Commission initiated proceedings to address these issues, and following those proceedings, it issued its Order No. 41 on November 29, 1993, in which it addressed the propriety of Arkansas Western's contracting practices with SEECO. The Agency specifically noted that it must decide whether the market prices set in Contract 59 were reasonable so to allow them to be passed on to AWG's ratepayers. Order No. 41 found that the relationship between SEECO and AWG was "fraught with conflicts of interest." It further found that AWG was not in compliance with Ark. Code Ann. § 23-15-103 (1987), the least cost purchasing statute. The Public Service Commission ordered that for purposes of the cost of gas charged to its Arkansas ratepayers, Arkansas Western's purchases from SEECO under Contract 59 must henceforth be indexed to an appropriate market price based

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3A price that just about every other gas producer in the Arkoma Basin would have traded the farm for.
upon published prices. On October 31, 1994, AWG, SEECO, the Public Service Commission, the Arkansas Attorney General, and a group of Northwest Arkansas Gas Consumers entered into a Stipulation and Agreement whereby Contract 59 was amended to reflect the APSC's findings in Order No. 41. The APSC published this stipulation in its Order No. 52 on January 5, 1995. As part of the Stipulation and Agreement, SEECO agreed to waive all take-or-pay pricing, buy-down demands, and other contractual claims arising under Contract 59 prior to July 1, 1994.

It sounds like Arkansas Western and SEECO were right to have concluded in 1984 that the Public Service Commission would never have allowed strict enforcement of Contract 59. If the agency would not permit these affiliated companies to buy/sell gas at $3.83 per MCF, why on earth would it have permitted the much higher price prescribed by Contract 59? Indeed, the "conflict of interest" criticized by the Public Service Commission resulted in a gas price which that agency found was too high. One contort later, the Supreme Court would believe that the companies' conflict of interest led them to conspire to lower the price to the detriment of SEECO's royalty owners.

On May 24, 1996, Allen Hales and the other named appellees filed suit on behalf of themselves and other similarly situated royalty owners under SEECO gas leases. In their complaint, the class alleged that throughout the term of Contract 59, SEECO never requested nor required Arkansas Western to pay the market price or take the volumes of gas set out under the express terms of the contract. The complaint also referred to the fact that in 1984, Arkansas Western froze the price of gas to be paid SEECO for gas produced and sold under Contract 59. The class asserted that this freeze violated the pricing provisions of Contract 59, and contended that SEECO did nothing to contest the price freeze implemented by Arkansas Western. Because the price freeze was not to SEECO's advantage, the class asserted that the freeze was only implemented to benefit Arkansas Western and significantly reduced the amount of royalty payments the class would receive under Contract 59.

Now for the contort. The class further alleged fraud and constructive fraud. Their complaint contended that in a 1983 letter, SEECO advised certain royalty owners that it had entered into a gas-sales contract with Natural Gas Pipeline (NGP) which would result in reduced royalties. The royalty owners claimed that SEECO failed to disclose that the same gas dedicated
under the NGP contract was already dedicated under Contract 59, with its take-or-pay provision, at a significantly higher purchase price. The complaint further asserted that in 1987, SEECO solicited the purchase of mineral interests from certain royalty owners and misrepresented the market price for natural gas. In the solicitation letter, SEECO noted that gas prices had been declining in recent years, but, according to the complaint, SEECO failed to disclose that under Contract 59, Arkansas Western was obligated to make minimum volume purchases of gas and to pay for that gas at a certain price as part of the arrangement for having the gas reserves dedicated for its use for twenty years. The class further claimed that SEECO fraudulently concealed its failures under Contract 59 by intentionally refusing to document the pricing and other deficiencies under the contract and by failing to reveal Contract 59 pricing on check stubs and in the monthly royalty statements.4

The Hales litigation was as mean spirited as Arkansas has ever seen. SEECO took three unsuccessful interlocutory appeals. The jury bought the contort hook, line and sinker, awarding $62,136,827 to which the trial court added interest raising the total to $93,222,157. Ultimately, post judgment interest took the judgment over $100,000,000, clearly a state record. That’s where we were when we reported Hales to the 2000 Natural Resources Law Institute. This author boldly predicted a reversal. Sadly, he was wrong.

In SEECO, Inc. v. Hales5 the Arkansas Supreme Court affirmed. In its lengthy opinion the court rejected each of the defendants’ many arguments. That opinion makes much of the court’s deference to the jury’s determination of matters of fact. Much of it is devoted to discussions of matters of general law and of trial and appellate procedure. However, the court

4Like many companies, SEECO’s software’s limitations left it with no place to categorize these NGP sales for check stub purposes, but contained a category for oil sales. Since the Arkoma Basin produces absolutely no oil, SEECO used this category to tabulate the sales to NGP, so they appeared on the check stub as oil sales. In a particularly glaring display of ignorance of royalty accounting practices (aided, no doubt by SEECO’s failure to refute the accusation) the Supreme Court allowed this completely innocent practice to be contorted into fraud.

appears to have spoken to at least four mineral law issues and you won’t like what it said.

First, the court approved a jury instruction that, for purposes of the class’ lease royalty clauses, “market price” was the formula-driven Contract 59 price. Thus, apparently, SEECO was required to either compel enforcement of the contract price or, if not, to strictly adhere to the contract’s price renegotiation provisions. The court based this holding upon *Hillard v. Stephens* which held that a producer that had, in good faith, signed a long term fixed-price contract was not required to pay royalty based upon the external market price prevailing many years later. The *Hales* court applied *Hillard* in reverse. It held, in effect, that once a producer secures a price or pricing formula it may not renegotiate the price downward, notwithstanding that it might be prudent to do so. That is simply wrong. There are valid reasons for a prudent operator to agree, in good faith, to a price reduction. Indeed, that might well be in the best long range interest of royalty owners. The implied covenant to market gas on favorable terms imposes a standard of prudence and good faith upon any such price change and thus protects royalty owners from collusion between a producer and purchaser. There is no valid reason to hold that such a price reduction is an express breach of the royalty clause or, worse still, a contort.

Second, the court held that whether an oil and gas lessee occupies a confidential or fiduciary relationship with its lessor is a question of fact which the jury is free to decide on a case by case basis. This is important. If a lessee is a fiduciary, it has an affirmative duty to disclose matters which might constitute causes of action against it or else be judged guilty of fraud and/or fraudulent concealment, which tolls the running of limitations. Here is exactly what the *Hales* court said:

> We have held that whether a confidential relationship exists is a question of fact for the trier of fact to decide. *Donaldson v. Johnson*, 235 Ark. 348, 359 S.W.2d 810 (1962); see also *Marsh v. Nat'l Bank of Commerce*, 37 Ark. App. 41, 822 S.W.2d 404 (1992). Because the jury returned verdicts for fraud, constructive fraud, and fraudulent concealment, we presume that it found that a confidential or special relationship did exist giving rise to a duty on the part of SEECO to speak and clarify misinformation upon which others might rely. *Berkeley Pump Co. v. Reed-Joseph Land Co.*, 279 Ark. 384, 653 S.W.2d 128 (1983). Other jurisdictions

have affirmed that a producer occupies a fiduciary relationship with respect to its royalty owners. See, e.g., Roberts Ranch Co. v. Exxon Corp., 43 F. Supp.2d 1252 (W.D. Okla. 1997). Charles Scharlau testified that he agreed in 1991 that SEECO owed a fiduciary duty to its royalty owners and added that SEECO had always tried to act as a fiduciary towards them. That supports the jury's verdict. We affirm on this issue.\(^7\)

You read it right. The court **presumed** that the jury had found that there was a confidential relationship. Why must such an important finding be **presumed**? Were there no express jury instructions on this critical issue?

Neither *Donaldson v. Johnson* nor *Marsh v. Nat'l Bank of Commerce*, cited by the court begin to suggest that a confidential relationship can be presumed or even that such a relationship is easily proven. Both affirmed appeals from decisions of chancellors, not juries, which refused to find confidential relationships. Indeed, both of those cases suggest that the burden of proving a confidential relationship is upon the party alleging the relationship and that it is a heavy burden indeed. It is hard to believe that even a contortionist can meet that burden with one answer of one witness given in one discovery deposition.

In *Klein v. Arkoma Production Co.*\(^8\) the Eighth Circuit Court of Appeals held that under Arkansas law a lessee is not a fiduciary, citing *Amoco Production Co. v. Ware*.\(^9\) While the *Amoco* decision does not expressly reject the fiduciary theory, its tenor is certainly to that effect. We have not heard the end of this issue. Unless the Arkansas Court limits this ruling to the *Hales* facts,\(^10\) it will have removed the defense of limitations from royalty owner litigation in Arkansas.

In another highly questionable holding the court upheld the trial court's exclusion of evidence that other producers, not affiliated with Arkansas Western, made similar price concessions to the utility during the same time-frame:

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\(^7\)SEECO, Inc. v. Hales, Supra, 341 Ark. at 698 (emphasis added)

\(^8\)73 F.3d 799 (8th Cir. 1996).

\(^9\)269 Ark. 331, 602 S.W.2d 620 (1980).

\(^10\)Sometimes the Arkansas Court "limits" a ruling by simply ignoring it in subsequent opinions.
The appellants claim that evidence showing that AWG received concessions from unaffiliated producers with regard to "market-outs," well releases, price freezes, and reduced take-or-pay obligations from the 1980's through 1992 was relevant and essential to SEECO's defense that it acted prudently in agreeing to the same or similar concessions in the instant case. The appellants maintain that the trial judge abused his discretion by disallowing this evidence as irrelevant. We disagree.

On August 24, 1998, the royalty owners filed a motion in limine asking the trial judge to preclude the appellants from referring to or offering at trial evidence showing that unaffiliated gas producers accepted a price freeze or made other contract concessions that were comparable to or more onerous than those SEECO accepted. The trial judge granted the motion based on Charles Scharlau's deposition testimony that AWG had no contract for gas "comparable" to Contract 59. This court has held that the relevance of evidence is within the trial court's sound discretion, subject to reversal only if an abuse of discretion is demonstrated. Arthur v. Zearley, 337 Ark. 125, 992 S.W.2d 67 (1999); Potlatch Corp. v. Missouri Pac. R.R. Co., 321 Ark. 314, 902 S.W.2d 217 (1995). The appellants cite us to Parker v. TXO Prod. Corp., 716 S.W.2d 644 (Tex. 1986), and emphasize that in Parker, the trial court affirmed the prudency of a gas producer's contract with an affiliated buyer based in part on the fact that other unaffiliated sellers were accepting terms similar to those that the affiliated buyer offered. But the Parker decision does not address a challenge to the comparability of the evidence of other concessions. Thus, it is not instructive on this point.11

SEECO and Arkansas Western were accused of abusing their affiliate relationship to reach a pricing scheme which violated the royalty owners. What more probative evidence could there be than the fact that other producers gave Arkansas Western similar concessions. Again, the contortionists managed to carry the day with a single line from a single deposition. That deposition testimony certainly is admissible to impeach evidence of other producers' price concessions, but it should never foreclose that evidence altogether. Hales is a decision where, for the most part, the court deferentially refuses to invade the province of the jury to weigh the evidence and determine the facts. However, on this most critical issue it employed a double standard allowing the trial judge to deny the jury the opportunity to hear the most important exonerating evidence in the whole case.

Finally, the court held that under Arkansas law royalty owners have a right to a portion of

11SEECO, Inc. v. Hales, Supra, 341 Ark. at 709.
a lessee's take-or-pay claims. The court thus adopted the ruling to the Eighth Circuit Court of Appeals in *Klein v. Arkoma Production Co.*\(^{12}\) and *Klein v. Jones*\(^{13}\) that a lessor is entitled to share in all benefits received by the lessee. The court in *Hales* acknowledged that Arkansas is among a minority of two states on this issue, but held that such result is compelled by an Arkansas statute.\(^{14}\)

How could this have happened? Have the contortionists poisoned the water in Little Rock with hallucinogens? Unlikely. A number of factors probably contributed. Here are some, in no particular order of importance.

- By the time *Hales* reached the Supreme Court on its merits SEECO had already lost three interlocutory appeals. The Court had clearly lost its patience with SEECO. The court's opinion begins:

  This is the fourth appeal to come before us in this case. In *SEECO, Inc. v. Hales*, 330 Ark. 402, 954 S.W.2d 234 (1997) (*SEECO I*), we affirmed the certification of a class of royalty owners in litigation brought against appellants SEECO, AWG, and SWN. In *SEECO, Inc. v. Hales*, 334 Ark. 134, 969 S.W.2d 193 (1998) (*SEECO, II*), we affirmed the trial judge's disqualification of co-counsel for SEECO, AWG, and SWN from participating in this case because he had announced his candidacy for the same judicial position held by the trial judge. In *SEECO, Inc. v. Hales*, 334 Ark. 307, 973 S.W.2d 818 (1998) (*SEECO III*), we affirmed the trial judge's notice order to a subclass of royalty owners, which had the effect of permitting the trial to proceed as scheduled.\(^{15}\)

- This was ugly litigation for which the court blamed SEECO alone. Sports officials are often accused of punishing the reaction rather than the action which caused it. That certainly happened in *Hales*. SEECO's counsel was caught making what the court considered to be a deliberate misstatement of fact in his closing argument.

\(^{12}\)Supra.

\(^{13}\)980 F.2d 521 (8th Cir. 1992).


\(^{15}\)SEECO, Inc. v. Hales, Supra, 341 Ark. at 679.
• SEECO put too many of its eggs into one unsuccessful defense. SEECO's most fervent argument in its brief and at oral argument was that it was immune from this suit altogether because the Public Service Commission's holding that Contract 59's modified price was too high was res judicata as to the class' claims. The problem, of course, was that the royalty owners were not parties to the Public Service Commission's proceedings.

• SEECO caused its Public Service Commission testimony to be placed under seal thus giving the impression that it had something to hide.

• A SEECO employee destroyed files during discovery which contained discovered documents. SEECO argued that all these documents were mere copies and that it had produced the same documents in other files but damage was clearly done.

• Complicated oil and gas cases are, in many cases, beyond the ability of a busy court to comprehend.

• These contortionists were really good at contorting and they suckered the court into standing back while a really bad contort took place.

That's the second sentence, I have learned the word. It is time to move on.

**Oklahoma Decisions Clarify JOA Issues**

The last few years have seen several large transactions, each involving sales of hundreds of producing properties from one producer to another. These transactions have spawned some interesting questions about the interpretation of various JOA provisions. Two recent cases arising out of Oklahoma may provide some guidance. In *Brown v. Samson Resources Company*16 the issue was whether Samson, which held preferential rights to purchase under an operating agreement, had the right to purchase some unit wells without purchasing all unit wells. The United States District Court for the Western District of Oklahoma agreed with Samson that it could exercise its rights piecemeal. The Tenth Circuit Court of Appeals reversed. This opinion, which was not designated for publication, may be downloaded by selecting the Supreme Court Network (Online Search) at http://www.state.ok.us/osfdocs/judhp.html.

The court noted that the identical issue is the subject of a pending appeal within the

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16 No. 99-6344 (10th Cir. 09/01/2000) (table - opinion not for publication)
Oklahoma state court system. In that case\(^\text{17}\) the lower court has ruled in favor of Samson that it may select which properties to purchase without purchasing them all.

In *Duncan Oil Properties, Inc. v. Vastar Resources, Inc.*\(^\text{18}\) Vastar purchased all of the interest of Union Oil Company of California in a drilling unit. Since Unocal was the former unit operator, an operator's election was triggered by Vastar's purchase. The issue was whether Vastar, as Unocal's successor, was entitled to vote in that election. If Vastar could vote it would become successor operator. If not, Duncan would become operator. The trial court held for Duncan but the Oklahoma Court of Appeals reversed holding that when Vastar purchased Unocal's interest it became a party to the Operating Agreement and was entitled to vote to elect itself operator.

**Oklahoma Court of AppealsLimits Application of Duhig Rule to Warranty Deeds.**

The *Duhig* Rule was first expressed by the Texas Supreme Court in the case of *Duhig v. Peavey-Moore Lumber Co.*\(^\text{19}\) It is a rule that resolves the dilemma caused by a grantor's apparent attempted mineral reservation made in the face of prior mineral reservations. It may be summarized as follows:

Absent express language to the contrary, any prior mineral severance will be subtracted from an attempted mineral reservation in the current deed so as to give full effect, if possible, to the interest granted rather than to the interest reserved. In other words, where full effect cannot be given both to the granted interest and to a reserved interest, the court will give priority to the granted interest (rather than to the reserved interest) until the granted interest is fully satisfied.

The *Duhig* Rule was adopted in Arkansas by *Peterson v. Simpson*\(^\text{20}\) and by Oklahoma in


\(^{18}\)2000 OK CIV APP 146 (Okla.App. 08/21/2000)

\(^{19}\)135 Tex. 503, 144 S.W.2d 878 (1940).

\(^{20}\)286 Ark. 177, 690 S.W.2d 720 (1985).
Early on, though, it was apparently unclear whether the DuHig Rule was based upon the principle of estoppel by deed (in which case it would only apply to warranty deeds) or some other principle or principles of interpretation. In Hill v. Gilliam the Arkansas Supreme Court held that the Arkansas DuHig Rule applied only to warranty deeds. Recently, the Oklahoma Court of Appeals reached the same result in Young v. Vermillion.

**ARKANSAS OIL AND GAS COMMISSION INCREASES PRODUCTION ALLOWABLES, RAISES FEES**

On July 25, 2000 the Arkansas Oil and Gas Commission unanimously approved a change to its Rule D-16. That change increases the production allowable for a gas well from 50% to 75% of the well’s calculated absolute open flow and increases the minimum production allowable from 274 to 500 mcf per day, regardless of the well’s absolute open flow. This rule change also deletes the requirement that periodic open flow tests of minimum allowable wells be witnessed by Commission staff members. As under the former rule, a well’s production allowable is penalized arithmetically if the well’s location encroaches upon its drilling unit’s boundary (a location closer than 1,300 feet to a boundary is generally considered encroaching). Likewise, a well’s production allowable is adjusted arithmetically if its drilling unit size is different from the standard unit size for the gas field within which the unit is located.

The Arkansas Commission also raised the fees which it charges to process various applications which it processes for producers. These fees were generally doubled, with the price for filing an application to be heard on the Commission’s docket increasing from $250 to $500.

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23 284 Ark. 383, 682 S.W.2d 737 (1985).

ARKANSAS LEGISLATURE CONVENES; THE MISCHIEF BEGINS

Each biennium, in odd numbered years, a vague feeling of uneasiness spreads throughout the land. The cause is apparent. The Arkansas General Assembly has ridden into Little Rock to kick some butt. Often that butt belongs to some industry which has gored the poor ox of some legislative crony. In the old days, before term limits, you at least knew who your friends and enemies in the legislature were. Those folks are mostly gone now and the new bunch is pretty scary.

This is a story in progress; it will be updated. As of the publication date of this paper the following bills of interest to the natural resources industries have been filed:

Senate Bill 15 would have terrorized all regulated industries in Arkansas by creating a de novo appeal from all final orders of administrative agencies. It was opposed by virtually everyone in state government and was withdrawn by its sponsor, Senator Cliff Hoofman. It read:

State of Arkansas

83rd General Assembly
Regular Session, 2001

By: Senator Hoofman

A Bill

SENATE BILL 15

For An Act To Be Entitled
AN ACT TO AMEND ARKANSAS CODE 25-15-212 TO PROVIDE FOR JUDICIAL HEARINGS DE NOVO FROM ALL FINAL AGENCY ADJUDICATIONS; AND FOR OTHER PURPOSES.

Subtitle
AN ACT TO AMEND ARKANSAS CODE 25-15-212
TO PROVIDE FOR JUDICIAL HEARINGS DE NOVO
FROM ALL FINAL AGENCY ADJUDICATIONS.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:

SECTION 1. Arkansas Code 25-15-212 is amended to read as follows:
(a) In cases of final agency adjudications, any person, except an inmate under sentence to the custody of the Department of Correction, who considers himself injured in his person, business, or property by final agency action shall be entitled to a judicial review of the action under this subchapter hearing de novo. Nothing in this section shall be construed to limit other means of review provided by law.
(b)(1) Proceedings for review a judicial hearing shall be instituted by filing a petition within thirty (30) days after service upon petitioner of the agency's final decision in:

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(A) The circuit court of any county in which the petitioner resides or does business; or
(B) The Circuit Court of Pulaski County.

(2) Copies of the petition shall be served upon the agency and all other parties of record in accordance with the Arkansas Rules of Civil Procedure.

(3) In its discretion, the court may permit other interested persons to intervene.

(c) The filing of the petition does not automatically stay enforcement of the agency decision, but the agency or reviewing court may do so upon such terms as may be just. However, on review of prior to hearings regarding disciplinary orders issued by professional licensing boards governing professions of the healing arts, the reviewing court, only after notice and hearing, may issue all necessary and appropriate process to postpone the effective date of an orders enforcing the agency action or to preserve status or rights pending conclusion of review the judicial proceedings.

(d)(1) Within thirty (30) days after service of the petition or within such further time as the court may allow but not exceeding an aggregate of ninety (90) days, the agency shall transmit to the reviewing court the original or a certified copy of the entire record of the proceeding under review.

(2) The cost of the preparation of the record shall be borne by the agency. However, the cost of the record shall be recovered from the appealing party if the agency is the prevailing party.

(3) By stipulation of all parties to the review proceeding, the record may be shortened. Any party unreasonably refusing to stipulate to limit the record may be taxed by the court for the additional costs.

(4) The court may require or permit subsequent corrections or additions to the record.

(e) If review proceedings have been instituted in two (2) or more circuit courts with respect to the same order, the agency concerned shall file the record in the court in which a proceeding was first instituted. The other courts in which the proceedings are pending shall thereupon transfer them to the court in which the record has been filed.

(f) If before the date set for hearing, application is made to the court for leave to present additional evidence and the court finds that the evidence is material and that there were good reasons for failure to present it in the proceeding before the agency, the court may order that the additional evidence be taken before the agency upon any conditions which may be just. The agency may modify its findings and decision by reason of the additional evidence and shall file that evidence and any modifications, new findings, or decisions with the reviewing court.

(g)(d) The review hearing shall be conducted by the court without a jury and shall be confined to the record, except that in cases of alleged irregularities in procedure before the agency not shown in the record, testimony may be taken before the court. The court shall, upon request, hear oral argument and receive written briefs.

(h)(e) The court may affirm the decision of the agency or remand the case for further proceedings. It may reverse or modify the decision if the substantial rights of the petitioner have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

(1) In violation of constitutional or statutory provisions;
(2) In excess of the agency's statutory authority;
(3) Made upon unlawful procedure;
(4) Affected by other error or law;
(5) Not supported by substantial evidence of record; or
(6) Arbitrary, capricious, or characterized by abuse of discretion. The court is authorized to enter findings and orders consistent with the evidence presented and within the statutory authority of the agency from which the appeal was taken.
House Bill 1051, by Representative Milum, seeks to eliminate the creation of prescriptive easements. The bill, as filed, was a lot worse than it now is, as amended. Nevertheless, it will still pose problems if enacted. It reads:

State of Arkansas

83rd General Assembly

Regular Session, 2001

By: Representative Milum

For An Act To Be Entitled

AN ACT TO AMEND ARKANSAS CODE ANNOTATED 18-61-101 TO PROVIDE THAT EASEMENTS MAY ONLY BE ACQUIRED THROUGH AN EXPRESS WRITTEN GRANT OF EASEMENT; AND FOR OTHER PURPOSES.

Subtitle

AN ACT TO AMEND ARKANSAS CODE ANNOTATED 18-61-101 TO PROVIDE THAT EASEMENTS MAY ONLY BE ACQUIRED THROUGH AN EXPRESS WRITTEN GRANT OF EASEMENT.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:

SECTION 1. Arkansas Code 18-61-101 is amended to read as follows:

18-61-101. Actions to recover land, tenements, or hereditaments.

(a) No person or his heirs shall have, sue, or maintain any action or suit, either in law or equity, for any lands, tenements, or hereditaments after seven (7) years once his right to commence, have, or maintain the suit shall have come, fallen, or accrued. All suits, either in law or equity, for the recovery of any lands, tenements, or hereditaments shall be had and sued within seven (7) years next after the title or cause of action accrued and no time after the seven (7) years shall have passed.

(b) If any person who is, or shall be, entitled to commence and prosecute a suit or action in law or equity is, or shall be, at the time the right or title first accrued come or fallen within the age of twenty-one (21) years or non compos mentis, the person or his heirs, shall and may, notwithstanding the seven (7) years may have expired, bring his suit or action if the infant or non compos mentis, or his heirs, shall bring it within three (3) years next after full age or coming of sound mind.

(c) No cumulative disability shall prevent the bar formed and constituted by the saving of this section.

(d) Subsections (a), (b), and (c) of this section shall not apply to lands which have been sold to any improvement district of any kind or character for taxes due the districts, nor to any taxes due any improvement districts, but the lien of these taxes shall continue until paid.

(e) An easement shall not be acquired, created, nor granted by any court, based on prescription, or adverse use, with or without the knowledge of the person against whom the easement is claimed, but shall only be acquired and created through an express written grant of easement executed by the owners of the real property or the owners' attorney in fact.

(f) The provisions of subsection (e) shall not apply to public utilities, telecommunication companies.
pipeline companies, companies engaged in oil, gas or brine exploration or production operations, natural gas storage companies, counties, municipalities, or the State of Arkansas, and shall not prohibit the exercise of the right of eminent domain by any entity possessing that right.

(g) A public utility, telecommunication company, pipeline company, company engaged in oil, gas or brine exploration or production operations, natural gas storage company, county, municipality, or the State of Arkansas, shall have the right of access, ingress and egress to rebuild, upgrade, modernize, reconstruct, protect, repair, bury or maintain its facilities located on property subject to a prescriptive easement in its favor.

(h) The provisions of subsection (e) are intended to be prospective only and shall not apply to any prescriptive easements which may have been previously created or granted by an order or judgement of a court of competent jurisdiction.

/s/ Milum

Senate Bill 251, sponsored by Senator Everett, would increase the severance tax on natural gas from the current de minimus .3¢ per mcf to 5% of well-head price. At $4.50 per mcf gas, that is about a 7,000% increase. No one likes to be taxed. Certainly the gas industry does not relish the state’s budget being balanced across its back. However, what more attractive target could there be? This is an industry which survived gas prices of less than $2 per mcf. Why then, with gas prices over $5, should it not be able to pay more taxes? There are good arguments to the contrary, but they may not be persuasive. It may be necessary to compromise. Here is the bill:

State of Arkansas
83rd General Assembly
Regular Session, 2001

A Bill

For An Act To Be Entitled
AN ACT TO INCREASE THE SEVERANCE TAX ON NATURAL GAS;
AND FOR OTHER PURPOSES.

Subtitle
TO INCREASE THE SEVERANCE TAX ON NATURAL GAS.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:

SECTION 1. Arkansas Code 26-58-111(5), concerning the severance tax on natural gas, is amended to read as follows:

(5) On natural gas, three-tenths of one cent (3/10 of 1¢) per one thousand cubic feet (1,000 cu. ft.) five
percent (5%) of the wellhead price;

House Bill 1534 is a sweeping effort to reduce the terms of members of state administrative agencies and, in many instances, to term-limit them as well. It proposes to reduce the length of terms for Oil and Gas Commissioners from six years to four years and to limit the Commissioners to two such four-year terms. There seems to be a general consensus among intelligent life in Arkansas that term limits are a miserable failure. Indeed, the legislative hopper is filled with proposed Constitutional Amendments designed to repeal this failed experiment. Why, then, do we have this proposal to term-limit members of administrative agencies?

We are told that this is the Governor’s idea. If so, it ranks among his worst. The Governor appoints Commissioners. If the Governor wants to limit a Commissioner’s term, the Governor may simply not reappoint that Commissioner. He doesn’t need a law to do that.

On the other hand, many administrative agencies, including the Oil and Gas Commission, benefit from continuity of policy which is largely the result of the fact that a few very able Commissioners have been on the job for a long time. If this bill passes, that will no longer be an option. Here’s what it says:

State of Arkansas
83rd General Assembly
Regular Session, 2001

A Bill

By: Representatives M. Smith, Shoffner, Glover, King By: Senator Hill

For An Act To Be Entitled
AN ACT CONCERNING THE TERMS OF OFFICE OF PERSONS APPOINTED TO VARIOUS BOARDS, COMMISSIONS, COMMITTEES, COUNCILS, AND PANELS; TO LIMIT LENGTH OF SERVICE TO SERVE ON SUCH BOARDS, COMMISSIONS, COMMITTEES, COUNCILS, AND PANELS; AND FOR OTHER PURPOSES.

Subtitle
AN ACT CONCERNING THE TERMS OF OFFICE OF PERSONS APPOINTED TO VARIOUS BOARDS, COMMISSIONS, COMMITTEES, COUNCILS, AND PANELS; AND TO LIMIT LENGTH OF SERVICE TO SERVE ON SUCH BOARDS, COMMISSIONS, COMMITTEES, COUNCILS, AND PANELS.
BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:

SECTION 1. Construction.
(a) This act shall not be construed to change the term of office of a person appointed to a board, commission, committee, council, or panel before July 1, 2001.
(b) The limitation imposed by this act on the number of terms for which a person may be appointed to a board, commission, committee, council, or panel shall not apply to any term for which the person was appointed before July 1, 2001.

SECTION 150. Arkansas Code 15-71-102(a), concerning the Oil and Gas Commission, is amended to read as follows:
(a)(1) The commission shall consist of nine (9) members, each to be appointed for a term of six (6) four (4) years, and, in event of a vacancy, the Governor shall by appointment fill the unexpired term.
(2) No member of the commission shall be appointed to serve more than two (2) consecutive full terms.
(3) The appointing authority shall, at the time of appointment or reappointment, adjust the length of terms to insure that the terms of commission members are staggered so that, insofar as is possible, an equal number of members shall rotate each year.

Senator Jody Mahony has long been a champion of administrative reform in Arkansas. Senate Bill 429 is his latest effort in that regard. It appears to be pretty benign:

State of Arkansas
83rd General Assembly
Regular Session, 2001

By: Senator Mahony

A Bill

For An Act To Be Entitled
AN ACT TO AMEND VARIOUS PROVISIONS OF THE ADMINISTRATIVE PROCEDURE ACT; AND FOR OTHER PURPOSES.

Subtitle
TO AMEND VARIOUS PROVISIONS OF THE ADMINISTRATIVE PROCEDURE ACT.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:

SECTION 1. Arkansas Code 25-15-202(4), regarding definitions in the Administrative Procedure Act, is amended to read as follows:
(4)(A) "Rule" means any agency statement of general applicability and future effect that implements, interprets, or prescribes law or policy, or describes the organization, procedure, or practice of any agency and includes, but is not limited to the amendment or repeal of a prior rule.
(B) "Rule" does not mean:

(i) Statements concerning the internal management of an agency and which do not affect the private rights or procedures available to the public;

(ii) Declaratory rulings issued pursuant to § 25-15-206; or

(iii) Intra-agency memoranda;

SECTION 2. Arkansas Code 25-15-203(b) is amended to read as follows:

(b) No agency rule, order, or decision shall be valid or effective against any person or party, nor may it be invoked by the agency for any purpose, until it has been filed and made available for public inspection as required in this subchapter. This provision shall not apply in favor of any person or party with actual knowledge of an agency rule, order, or decision.

SECTION 3. Arkansas Code 25-15-204 is amended to read as follows:


(a) Prior to the adoption, amendment, or repeal of any rule, the agency shall:

(1) Give at least thirty (30) days' notice of its intended action. The thirty-day period shall begin on the first day of the publication of notice.

(A) The notice shall include a statement of the terms or substance of the intended action, or a description of the subjects and issues involved, and the time, the place where, and the manner in which interested persons may present their views thereon.

(B) The notice shall be mailed to any person specified by law and to all persons who shall have requested advance notice of rulemaking proceedings.

(C) The Notice shall be published in a newspaper of general daily circulation for seven (7) consecutive days and, where appropriate, in those trade, industry, or professional publications which the agency may select;

(2) (A) Afford all interested persons reasonable opportunity to submit written data, views, or arguments, orally or in writing.

(B) Opportunity for oral hearing must be granted if requested by twenty-five (25) persons, by a governmental subdivision or agency, or by an association having no fewer than twenty-five (25) members.

(C) The agency shall fully consider all written and oral submissions respecting the proposed rule before finalizing the language of the proposed rule and filing the proposed rule as required by subsection (d) of this section.

(D) Upon adoption of a rule, the agency, if requested to do so by an interested person either prior to adoption or within thirty (30) days thereafter, shall issue a concise statement of the principal reasons for and against its adoption, incorporating therein its reasons for overruling the considerations urged against its adoption.

(E) Where rules are required by law to be made on the record after opportunity for an agency hearing, the provisions of that law shall apply in place of this subdivision.

(b) If an agency finds that imminent peril to the public health, safety, or welfare requires adoption of a rule upon fewer than twenty (20) days notice and states in writing its reasons for that finding, it may proceed without prior notice or hearing, or upon any abbreviated notice and hearing that it may choose, to adopt an emergency rule. The rule may be effective for no longer than one hundred twenty (120) days.

(c) Every agency shall accord any person the right to petition for the issuance, amendment, or repeal of any rule. Within thirty (30) days after submission of a petition, the agency shall either deny the petition, stating in writing its reasons for the denial, or shall initiate rule-making proceedings.

(d) (1) Every agency, including those exempted under § 25-15-202, shall file with the Secretary of State, the Arkansas State Library, and the Bureau of Legislative Research a copy of each rule and regulation adopted by it and a statement of financial impact for the rule or regulation.
The Secretary of State shall keep a register of the rules open to public inspection, and it shall be a permanent register.

Each agency shall provide its regulations to the Bureau of Legislative Research in an electronic format acceptable to the bureau. The bureau shall place the agency regulations in the General Assembly's internet web site.

The scope of the financial impact statement shall be determined by the agency, but shall include, at a minimum, the estimated cost of complying with the rule and the estimated cost for the agency to implement the rule.

If the agency has reason to believe that the development of a financial impact statement will be so speculative as to be cost prohibitive, the agency shall submit a statement and explanation to that effect.

If the purpose of a state agency rule or regulation is to implement a federal rule or regulation, the financial impact statement shall be limited to any incremental additional cost of the state rule or regulation as opposed to the federal rule or regulation.

Each rule adopted by an agency shall be effective ten (10) days after filing unless a later date is specified by law or in the rule itself. However, an emergency rule may become effective immediately upon filing, or at a stated time less than ten (10) days thereafter, if the agency finds that this effective date is necessary because of imminent peril to the public health, safety, or welfare. The agency's finding and a brief statement of the reasons thereof shall be filed with the rule. The agency shall take appropriate measures to make emergency rules known to the persons who may be affected by them.

No rule adopted after June 30, 1967, shall be valid unless adopted and filed in substantial compliance with this section.

An action to contest the validity of a rule on the grounds of noncompliance with any provision of this subchapter shall be commenced within two (2) years after the effective date of the rule.

The Secretary of State shall publish the rules contained in "The Arkansas Register" on its internet web site.

The Secretary of State may omit from publication on its internet web site any rules:

(A) That are published on an agency, board, or commission internet web site and are accessible at no cost to the public; or

(B) In which publication would be unduly cumbersome, expensive, or otherwise, so long as its internet web site indicates where and how a copy of the omitted materials may be obtained.

Any agency order which is affirmed or affirmed in part by the court shall be a final judgment subject to writ of garnishment or execution to the extent it is affirmed.


In every case of adjudication, and in cases of rule making in which rules are required by law to be made on the record after opportunity for an agency hearing, and in cases of rule making in which, pursuant to § 25-15-204(a)(2), the agency shall direct that oral testimony be taken or a hearing held:

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(1) Any person compelled to appear before any agency or representative thereof shall have the right to be accompanied and advised by counsel. Every party shall have the right to appear in person or by counsel.

(2)(A) There shall preside at the hearing:
   (i) The agency;
   (ii) One (1) or more members of the agency; or
   (iii) One (1) or more examiners or referees designated by the agency.

   (B) All presiding officers and all officers participating in decisions shall conduct themselves in an impartial manner and may at any time withdraw if they deem themselves disqualified.

   (C) Any party may file an affidavit of personal bias or disqualification, which affidavit shall be ruled on by the agency and granted if timely, sufficient, and filed in good faith.

(3)(A) Presiding officers shall have power, pursuant to published procedural rules of the agency:
   (i) To issue subpoenas if the agency is authorized by law to issue them;
   (ii) To administer oaths and affirmations;
   (iii) To maintain order;
   (iv) To rule upon all questions arising during the course of a hearing or proceeding;
   (v) To permit discovery by deposition or otherwise;
   (vi) To hold conferences for the settlement or simplification of issues;
   (vii) To make or recommend decisions; and
   (viii) Generally to regulate and guide the course of the pending proceeding.

   (B) In any proceeding before any agency, if any person refuses to respond to a subpoena, or refuses to take the oath or affirmation as a witness or thereafter refuses to be examined, or refuses to obey any lawful order of an agency contained in its decision rendered after hearing, the agency or the presiding officer of the agency hearing may apply to the circuit court of the county where the proceedings were held or are being held or to the circuit court of the county where a petition for judicial review was filed for an order directing that person to take the requisite action or to otherwise comply with the order of the agency. The court shall issue the order in its discretion. Should any person willfully fail to comply with an order so issued, the court shall punish him as for contempt.

(4) Except as otherwise provided by law, the proponent of a rule or order shall have the burden of proof. Irrelevant, immaterial, and unduly repetitious evidence shall be excluded. Any other oral or documentary evidence, not privileged, may be received if it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs. Objections to evidentiary offers may be made and shall be noted of record. When a hearing will be expedited and the interests of the parties will not be substantially prejudiced, any part of the evidence may be received in written form.

(5) Parties shall have the right to conduct such cross examination as may be required for a full and true disclosure of the facts.

(6) Official notice may be taken of judicially cognizable facts and of generally recognized technical or scientific facts within the agency's specialized knowledge. Parties shall be notified of material so noticed, including any staff memoranda or data, and shall be afforded a reasonable opportunity to show the contrary.

(7)(A) Every agency that has the authority to conduct a hearing which is subject to this section may issue subpoenas and bring before the agency as a witness any person in this state.

   (B) The subpoena may require the witness to bring any book, writing, or other thing under the person's control which the person is required by law to produce in evidence.

   (C) Service of the subpoena shall be in accordance with law or rule for the service of subpoenas in civil cases.

   (D)(i) Arkansas Code 25-15-213(7) is intended to be supplemental and add the power to issue subpoenas to the various agencies which do not have the power to do so; and

   (ii) This provision shall not repeal any law or part of laws now in existence.

SECTION 7. Arkansas Code 25-15-214 is amended to read as follows:
In any case of rule making or adjudication, if an agency shall unlawfully, unreasonably, or capriciously
fail, refuse, or delay to act, any person who considers himself injured in his person, business, or property by the failure, refusal, or delay may bring suit in the chancery circuit court of any county in which he resides or does business, or in the Chancery Circuit Court of Pulaski County, for an order commanding the agency to act.

SECTION 8. Arkansas Code Title 25, Chapter 15, Subchapter 2 is amended by adding additional sections to read as follows:

   (a)(1) The Attorney General shall publish model rules of procedure for use by agencies.
   (2) The model rules shall include general functions and duties commonly performed by agencies.
   (b)(1) Each agency created after the effective date of this act shall adopt, in accordance with the provisions of this subchapter, those model rules that are practicable.
   (2) Any agency that adopts a rule of procedure that differs from the model rule shall, in conjunction with adopting the rule of procedure, state the reason why the relevant portions of the model rules are impracticable.

   (a) As soon as is practicable after each regular session of the General Assembly, each agency shall review any newly enacted laws to determine whether:
      (1) Any existing rule should be repealed or amended; or
      (2) Any new rule should be adopted.
   (b) At the conclusion of each review, the agency shall adopt a written report of the result of the review.
   (c) A copy of each report shall be maintained as a public record by the agency.

   (a)(1) Each agency which may suspend, revoke, or deny a license for acts or omissions, or other conduct as provided by law may impose alternative sanctions set forth in subsection (b) of this section.
   (2) The penalties set forth in subsection (b) of this section shall be supplemental to any agency’s authority to impose penalties upon any person or entity under the board or commission’s jurisdiction.
   (b) Each agency may impose on any person or entity under the agency’s jurisdiction:
      (1) A monetary penalty not to exceed five hundred dollars ($500) for each violation;
      (2) A requirement that the person complete appropriate education programs, courses, or both;
      (3) A requirement that the person or entity successfully complete:
         (A) A licensing examination;
         (B) A credentialing examination; or
         (C) Any other examination required in order to obtain a permit, license, registration, or credential;
      (4) Conditions or restrictions upon regulated activities of the holder of a license, permit, certificate, credential, registration, or other authority; and
      (5) Other requirements or penalties as may be appropriate under the circumstances of the case and which would achieve the agency’s desired disciplinary purposes, but which would not impair the public health and welfare.
   (c) The agency may file suit to collect any monetary penalty assessed pursuant to this subchapter if the penalty is not paid within the time prescribed by the agency, in either the Circuit Court of Pulaski County or the circuit court of any county in which the person or entity under the agency’s jurisdiction:
      (1) Resides; or
      (2) Does business.
   (d) Upon imposition of a sanction against a person or entity under the agency’s jurisdiction, the agency may order that the license, permit, certification, credential, or registration be suspended until the person or entity has complied in full with all applicable sanction imposed pursuant to this section.
   (e)(1) Each violation shall constitute a separate violation.
The power and authority of the agency to impose a sanction authorized in this section shall not be affected by any other civil or criminal proceeding concerning the same violation.

House Bill 1496 allows owners of forfeited severed mineral interests to redeem those interests without paying $25.00 to the Commissioner of State Lands as is required by current law. It would be better to raise the $25.00 fee, make it apply to all redemptions, and leave the severance tax alone. Here is the text of House Bill 1496:

State of Arkansas
83rd General Assembly
Regular Session, 2001

A Bill

For An Act To Be Entitled
AN ACT TO AMEND ARKANSAS CODE 21-6-203 TO CLARIFY THE TWENTY-FIVE DOLLAR FEE COLLECTED BY THE COMMISSIONER OF STATE LANDS, AND TO EXEMPT FROM SAID FEE THE REDEMPTION COSTS OF SEVERED MINERAL INTERESTS; AND FOR OTHER PURPOSES.

Subtitle
TO AMEND ARKANSAS CODE 21-6-203 TO CLARIFY THE TWENTY-FIVE DOLLAR FEE COLLECTED BY THE COMMISSIONER OF STATE LANDS, AND TO EXEMPT FROM SAID FEE THE REDEMPTION COSTS OF SEVERED MINERAL INTERESTS.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:

SECTION 1. Arkansas Code 21-6-203 is amended to read as follows:

21-6-203. Commissioner of State Lands.

(a) The following fees shall be charged and collected by the Commissioner of State Lands:

(1) Emerged Land Deeds issued pursuant to §§ 22-5-404, 22-5-405 ................. $ 5.00
(2) Deeds to 16th section school lands under § 22-5-407 .......................... 5.00
(3) Quitclaim deed of mineral interest under § 22-6-502 .......................... 5.00
(4) Issuance of duplicate deeds and patents under § 22-6-104 ......................... 5.00
(5) Issuance of original patents under § 22-6-105 ........................................ 5.00
(6) Redemption deeds issued under § 26-37-310 ....................................... 5.00
(7) Issuance of sale deeds ............................................................... 5.00
(8) Double entry statements .............................................................. 3.00
(9) Disclaimers ................................................................................. 3.00
(10) For each page of field notes issued by the Office of the State Land Commissioner . . 50

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(11) A fee of five dollars ($5.00) plus actual cost for each Government Land Office plat copied and distributed.

(b) The Commissioner shall charge a twenty-five dollar ($25.00) collection fee against all tax delinquent land which has been transferred to the Commissioner of State Lands redeemed or sold by the Commissioner of State Lands except the fees charged for the redemption of severed mineral interests shall not include the twenty-five dollar ($25.00) collection fee.

(c) For each certificate of donation to forfeited lands issued by the Commissioner of State Lands, there shall be paid into the State Treasury the sum a fee of ten dollars ($10.00).

(d) For each donation deed issued by the Commissioner of State Lands, there shall be paid into the State Treasury the sum a fee of one dollar ($1.00).

(e) All fees and charges collected by the Commissioner of State Lands shall be deposited in the State Treasury to the credit of the Constitutional Officers Fund a financial institution in the state.

SECTION 2. EMERGENCY CLAUSE. It is hereby found and determined by the Eighty-third General Assembly that the effective date of this act shall be July 1, 2001, in that the fiscal year for all state agencies begins on July 1; that for purposes of accounting and record keeping it is necessary that the changes made by this act to the collection of fees by the Commissioner of State Lands be implemented on a date corresponding with the start of the fiscal year. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on July 1, 2001.

Arkansas Royalty Membership (“ARM”) and a few prominent oil and gas producers have authored proposed legislation to modernize the Arkansas Statutes dealing with payment of royalties. This proposed bill has not yet been introduced, since much of the natural gas industry is reluctant to expend any energy doing anything other than opposing the severance tax increase. However, it is still possible that the bill will be introduced in the current legislative session and, if not, look for it in 2003.

The text of the current draft is as follows:

15-74-703. Entitlement of royalty interests to premiums and bonuses.

All purchasers of oil and/or other liquid hydrocarbons and gas shall pay to the royalty interest the same premium or bonus above the posted market price for oil and/or other liquid hydrocarbons or gas they pay to the leaseholder or working interest under any oil, gas, or mineral lease on lands from which oil and/or other liquid hydrocarbons or gas may be purchased under contract with the lease owner or operator.

15-74-704. Paying part of production cost or giving bonus or premium without paying share to royalty interest.

It shall be unlawful for any purchaser of oil and/or other liquid hydrocarbons or gas to enter into any contract with any lessee or operator under any oil, gas, or mineral lease, whereby the purchaser undertakes to pay any of the cost or expense of operation or production, steaming, treating, or running oil and/or other liquid hydrocarbons or gas or any other bonus or premium under any name or subterfuge whatsoever, without providing for paying to the royalty interest its proportionate share according to interest therein.
15-74-705. Purchaser’s price for royalty gas paid on oil that is produced and sold.

It shall be the duty of both the lessee, or his assignee, and any pipeline company, corporation, or individual contracting for the purchase of oil and/or other liquid hydrocarbons or gas that is produced and sold under any oil, gas, or mineral lease to protect the royalty of the lessor’s interest by paying to the lessor or his assignees the same price, including premiums, steaming charges, and bonuses of whatsoever name for royalty oil and other liquid hydrocarbons or gas that is produced and sold, that is paid the operator or lessee under the lease for the working interest thereunder.

15-74-706. Contracting to buy royalty gas-oil for less than price paid operator or lessee.

It shall be unlawful for any pipeline company, corporation, or individual purchasing oil and/or other liquid hydrocarbons or gas from the operator or lessee of any oil, gas or mineral lease to enter into any contract with the operator or lessee whereby the purchaser acquires the royalty oil and/or other liquid hydrocarbons or gas reserved in the oil, gas or mineral lease for any price less than the price paid the operator or lessee of the lease.

14-73-707. Time of royalty payment – Monthly statements to royalty owners.

(a) It shall be the duty of any purchaser of oil and/or other liquid hydrocarbons or gas to pay the royalty interest at the same time it pays the lessee or producer. However, the parties may expressly waive the time and manner of payment in writing.

(b) The purchaser shall at some time not later than the twelfth last day of each month furnish each royalty owner with a statement showing the correct amount of oil or gas and/or other liquid hydrocarbons purchased during the previous month together with the correct amount paid each in interest therefore.

15-74-708. Forfeiture Payment of lease: treble damages upon lessee receiving more than share from sale – Purchaser to pay treble value.

(a) Notwithstanding any terms or conditions contained in any oil, gas and mineral lease, a lesseeholder or operator who contracts for the sale of oil or gas and/or other liquid hydrocarbons to any pipeline company or other purchaser, under and by virtue of the terms of which the lessee receives a greater amount than the royalty owners in proportion to interest therein, or receives a bonus, or by any other means conspires with a purchaser to receive from the sale of such oil and/or other liquid hydrocarbons and/or gas more than his just proportionate share therefrom shall forfeit his rights and to the leasehold premises pay to the royalty owners treble the value of the amount of oil wrongfully withheld from the royalty interest.

(b) Any pipeline company or other purchaser of oil and/or other liquid hydrocarbons who makes royalty payments directly to the royalty owners and who contracts with any lessee as set out in subsection (a) of this section to the injury of the royalty owners shall forfeit be jointly and severally liable with such lessee to the royalty owners. owners treble value of the amount of oil or gas runs thus wrongfully taken withheld from the royalty interest.

SUBCHAPTER 8
NATURAL GAS ROYALTY ACT

15-74-800. Definitions.

(a) “Gas” as used in this section shall mean natural gas that is not produced and sold with any liquid hydrocarbons.

(b) “Wellhead” as used in this section shall mean the location of the well from which gas is produced.

(c) “Minimum Quality Gas” as used in this section shall mean gas for which a market exists at the wellhead, or if no such market exists at the wellhead, gas which satisfies each of the following criteria:
Pressure of 50 pounds per square inch at sixty degrees Fahrenheit;
Presence of not more than 1/4 grain of hydrogen sulphide nor more than 10 grains of total sulphur per 100 cubic feet;
Presence of not more than seven pounds of water per million cubic feet; and
Average BTU content of not less than 950 BTU per cubic feet.

"Market Value" as used in this section shall mean the actual value proceeds of sales of gas, untreated and uncompressed, at the wellhead from which it is produced, unless such gas is sold untreated and uncompressed at the wellhead; or if such gas is not marketable at the wellhead because it, in any respect, fails to satisfy the criteria of Minimum Quality Gas, in which case "market value" shall mean the value of such gas at the wellhead, after treatment or compression sufficient to cause it to satisfy such criteria.

"Reasonable and prudent operator" as used in this section shall mean an oil and gas operator engaged to obtain profits for the lessor and the lessee who bases its development of the leasehold upon the following considerations:

1. The quantity of oil and/or gas capable of being produced from the premises as indicated by prior exploration and development;
2. The local market or demand;
3. Means of transporting to market;
4. Extent and result of operations, if any, on adjacent lands;
5. Character of the reservoir; and
6. Custom and usage within the natural gas industry.

Payment of royalties on gas production.

(a) Whenever an oil and gas lease requires the lessee to pay royalties on gas production based upon the market value of such gas produced, such market value shall have the meaning set out in this section and royalties shall be payable based upon the lease terms, and upon the proportionate share of all payments received for all gas sold, and delivered by the lessee that was produced on the lease premises or lands pooled therewith.

(b) Whenever an oil and gas lease requires the lessee to pay royalties on gas production based upon the proceeds from the sale of gas from the lease, and such sale occurs at the wellhead before any treatment, separation, gathering, transportation, or compression other than that required to cause the gas to become Minimum Quality Gas, such proceeds shall mean the actual proceeds received by the lessee for such gas sold and delivered, whether or not the lessee is required to cause the gas to become Minimum Quality Gas.

(c) Whenever an oil and gas lease requires the lessee to pay royalties on gas production based upon the proceeds from the sale of gas from the lease, and:

(i) such sale occurs at a point away from the wellhead; and/or
(ii) the lessee, acting as a reasonable and prudent operator, enhances the value of such gas by supplying treatment, dehydration, separation, gathering, transportation, and/or compression in excess of that required to cause the gas to become Minimum Quality Gas, then such proceeds shall mean the actual proceeds received by the lessee for such gas sold and delivered reduced by the lessee's actual direct expenses, if reasonably incurred, to supply such treatment, dehydration, separation, gathering, transportation, and/or compression in excess of that required to cause the gas to become Minimum Quality Gas and/or the lessee's actual direct expenses, if reasonably incurred, to gather, compress, and/or transport such gas to a point of sale away from the wellhead.

(c) In no event shall a lessee be required to pay royalties on any payments made to lessee other than payments made for gas produced and sold.
(d) The terms of this section shall not be applicable to any producing unit or well that produces liquid hydrocarbons only, or gas containing hydrogen sulfide in excess of 30 parts per million.

14-73-801.1. Time of royalty payment.

Payment of gas royalties shall be paid as set forth in Section 15-72-305.

15-74-803. Payment of treble damages upon lessee receiving more than share from sale - Purchaser to pay treble value.

(a) Notwithstanding any terms or conditions contained in any oil, gas and mineral lease, any leaseholder or operator who contracts for the sale of gas to any pipeline company or other purchaser, under and by virtue of the terms of which the lessee receives a greater amount than the royalty owners in proportion to interest therein, or receives a bonus, or by any other means conspires with a purchaser to receive from the sale of such gas more than his just proportionate share therefrom shall pay to the royalty owners treble the value of the amount of gas wrongfully withheld from the royalty interest.

(b- ) Any pipeline company or other purchaser of gas who contracts with any lessee as set out in subsection (a) of this section to the injury of the royalty owners shall forfeit to the royalty owners treble value of the amount of gas thus wrongfully withheld from the royalty interest.

In recent litigation, parties challenging the validity of an Arkansas Oil and Gas Commission integration order attempted to disqualify Commission Counsel William Wynne based upon the language of current Arkansas Code Annotated § 15-71-104, which appears to state that only the Attorney General (or, in emergencies, the prosecuting attorney) has a right to represent the Commission. In response, the Commission intends to introduce a bill re-writing A.C.A. §15-71-104. The current text of that bill, which has not yet been introduced, is as follows:

15-71-104. Counsel for the Commission.

(a) The Commission may employ an attorney to provide specialized professional services in matters requiring legal representation; provided that any contract therefor shall be subject to approval by the Attorney General who shall otherwise be attorney for the Commission. However, in cases of emergencies the Commission may call upon the prosecuting attorney of the district where the action is to be brought or defended to represent the Commission until such time as contract counsel or the Attorney General may take charge of the litigation.

(b) Any member of the Commission or the secretary thereof shall have power to administer oaths to any witness to any hearing, investigation, or proceeding contemplated by this act or by any other law of this state relating to the conservation of oil or gas.

In addition to the above-statutory revision, the Oil and Gas Commission is trying to figure a way to increase the conservation assessments which are the Commission’s primary sources of income. Specific legislation has not yet been drafted. Moreover, the severance tax bill presents a
major obstacle because if it passes in anything resembling its current form, the industry will be tapped out and thus unwilling to support an increase in the conservation assessment.

As noted above, the legislative session is a piece of work in progress. The deadline for submitting this paper for publication is February 13, 2001. This paper will be delivered February 24. Much can (and probably will) change in those eleven days. Stay tuned.