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Local Governments and State Agencies: When the Governments is the Lessor - County Ordinances and Use Fees

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Citation

Honea, R. M. (2008). Local Governments and State Agencies: When the Governments is the Lessor - County Ordinances and Use Fees. *Annual of the Arkansas Natural Resources Law Institute*. Retrieved from <https://scholarworks.uark.edu/anrlaw/120>

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**LOCAL GOVERNMENTS AND STATE AGENCIES:
WHEN THE GOVERNMENT IS THE LESSOR – COUNTY
ORDINANCES AND USE FEES; ARKANSAS HIGHWAY &
TRANSPORTATION DEPARTMENT RESTRICTIONS, ETC.**

- OR -

**WHY THE SCARIEST WORDS IN THE ENGLISH LANGUAGE ARE:
“WE’RE FROM THE GOVERNMENT, AND WE’RE HERE TO HELP.”**

In fairness, although I think all of us can find some degree of humor and some degree of accuracy in the foregoing, at the same time I must say that as I was working on this paper, the government representatives I dealt with were very reasonable and very helpful. Nevertheless, as a practical matter dealing with the government is never simple. Hopefully, this paper will be of some benefit to those of you who have to navigate the sometimes turbulent waters of state and local government.

I. The fourth and fifth branches of government.

All of us are well aware of the fact that our founding fathers were firm believers in the Separation of Powers Doctrine, and therefore provided in the Constitution that government would be divided into three branches – legislative, judicial, and executive. The Arkansas Constitution, as originally enacted, recognized the wisdom of the Doctrine, and therefore adopted the same governmental structure – three branches of government, legislative, judicial, and executive. Although this system has worked very well for the United States for more than two hundred years, and although it worked very well for the State of Arkansas for the first approximately one hundred years of its existence, the State of Arkansas was apparently not satisfied with having just three branches, and therefore created two more. In 1944, the citizens of the State of Arkansas at a general election

adopted Amendment 35 to the Arkansas Constitution, and in 1951, again at a general election, adopted Amendment 42 to the Arkansas Constitution. The former created the Arkansas Game and Fish Commission, and gave it plenary authority over the “control, management, restoration, conservation, and regulation of birds, fish, game and wildlife resources of the State, including hatcheries, sanctuaries, refuges, reservations and all property now owned, or used for said purposes in the acquisition and establishment of same” The latter Amendment created the State Highway Commission, and vested the Highway Commission “. . . with all the powers and duties now or hereafter imposed by law for the administration of the State Highway Department, together with all powers necessary or proper to enable the Commission or any of its officers or employees to carry out fully and effectively the regulations and laws relating to the State Highway Department.”

A discussion of constitutional law as it concerns the Separation of Powers Doctrine is beyond the scope of this paper. It is sufficient to say, however, that within their respective spheres of authority, the Game and Fish Commission and the Highway Commission are, for all practical purposes, autonomous branches of government. For this reason, the Game and Fish Commission and the Highway Commission will be discussed as separate and distinct topics.

II. The government as mineral owner.

The obvious starting point for the discussion of this topic is a question: Why are we even having this discussion in the first place? The Arkansas Oil and Gas Commission was created by an act of the legislature. The Oil and Gas Commission was granted authority to integrate (force pool) mineral owners. Why isn't this topic as simple as

telling the government that if they don't want to be reasonable, they'll be integrated? The answer, interestingly, is that although the Oil and Gas Commission almost certainly does not have authority to integrate the interests of the State of Arkansas and its agencies, in my opinion the Commission does have authority to integrate the interests of cities, towns, school districts, and other political subdivisions of the State. I will therefore begin this discussion by addressing the question of the Commission's authority to integrate the government. I will then discuss how you go about dealing with the government, assuming you can't integrate them.

A. Who says the Arkansas Oil and Gas Commission does not have authority to integrate the government?

The Arkansas Oil and Gas Commission was created by Act No. 105 of 1939. The legislation delegated to the Oil and Gas Commission “. . . jurisdiction and authority of and over all persons and property necessary to administer and enforce effectively the provisions of this Act and all other acts relating to the conservation of oil and gas.”

A.C.A. § 15-71-110(a). The Act also included a declaration of the public policy which led to the creation of the Oil and Gas Commission, in these terms:

“In recognition of past, present, and imminent evils occurring in the production and use of oil and gas, as a result of waste in the production and use thereof in the absence of co-equal or correlative rights of owners of crude oil or natural gas in a common source of supply to produce and use the crude oil or natural gas, this law is enacted for the protection of public and private interests against such evils by prohibiting waste and compelling ratable production.” A.C.A. § 15-72-101.

The Commission is given authority to create drilling and spacing units in A.C.A. § 15-72-302. The Commission is then given authority to integrate the owners of interests in drilling and spacing units in A.C.A. § 15-72-303. The portion of the Act delegating integration authority to the Commission reads in its entirety as follows:

“(a) When two or more separately owned tracts are embraced within an established drilling unit, when there are separately owned interests in all or part of the drilling unit, or when there are separately owned tracts and separately owned interests in all or part of such drilling unit, the owners thereof may voluntarily pool, combine, and integrate their tracts or interests for the development or operation of that drilling unit.

(b) Where the owners fail or refuse voluntarily to integrate their interests, the Commission, upon the application of any such owner, shall, for the prevention of waste or to avoid the drilling of unnecessary wells, enter its order integrating all tracts and interests in the drilling unit for the development or operation thereof and the sharing of production therefrom.”

The Act also includes a section setting forth definitions, A.C.A. § 15-72-102. The preamble to the definitions section of the Act reads: “As used in this Act, unless the context otherwise requires:” The Act then defines the words “owner” and “person” in these terms:

“(2) “Person” means any natural person, a corporation, association, partnership, receiver, trustee, guardian, executor, administrator, fiduciary, federal agency, or representative of any kind.”

“(7) “Owner” means the person who has the right to drill into and to produce from any pool, and to appropriate the production either for himself, or for himself and another, or others.”

(1) Can the foregoing provisions be construed as giving the Commission authority to integrate the State and its political subdivisions?

In my opinion, the answer to this question is an emphatic “yes.” If you read only the legislature’s expressly stated declaration of policy and the statute granting the Commission authority to integrate, you would be compelled to reach the conclusion that the legislature has delegated to the Commission the authority to integrate all owners of interests in pooling and spacing units. Frankly, it is impossible to read the foregoing provisions and reach any other conclusion.

The only aspect of all of this that troubles me are the definitions of “owner” and “person.” On the one hand, the definition of “person” does not expressly include the State or any of its political subdivisions, unless the phrase “. . . or representative of any kind . . .” is construed to include the State and its political subdivisions. I honestly have no idea what this phrase means. It would not on its face seem to be susceptible of interpretation as including the State and its political subdivisions, but on the other hand the list that precedes it is so exhaustive that the only thing left is the State and its political subdivisions. Nevertheless, I am of the opinion that a legitimate argument could be asserted that the definition of the word “person” as stated in the Act does not include the State and its political subdivisions. Assuming such an interpretation, then the State and its political subdivisions would not be included in the definition of the word “owner” (remember, “owner” means “the person” . . .) and therefore the State and its political subdivisions would not be considered “owners” as that term is used in the section which gives the Commission authority to integrate.

The alternative argument is found in the preamble to the definitions section of the Act, and specifically the proviso that the definitions apply “. . . unless the context otherwise requires.” I don’t see how you can read the statement of public policy and the integration statute together, and then come to a conclusion which is directly contrary to the stated public policy and common sense. The legislature would not have inserted the phrase “. . . unless the context otherwise requires . . .” in the preamble to the definitions section of the Act unless there were instances in which the definitions as stated were not appropriate and did not apply. My personal opinion is that the word “owner” as used in the section of the Act giving the Commission authority to integrate is precisely the kind

of situation the legislature had in mind when it added the proviso “. . . unless the context otherwise requires . . .” I therefore conclude that notwithstanding the definitions of “owner” and “person,” the section of the Act giving the Commission authority to integrate “owners” does in fact delegate to the Arkansas Oil and Gas Commission the authority to integrate all owners, to include the State of Arkansas and its political subdivisions, if they happen to be owners.

(2) That’s all well and good, but what about Section 20 of Article V of the Arkansas Constitution?

Article V of the Arkansas Constitution is the Article which creates the legislative department of state government and spells out its functions and duties. Section 20 of Article V reads as follows:

“The State of Arkansas shall never be made defendant in any of her courts.”

I am not sure why this language is inserted as a part of Article V, since it would appear to be a constitutional provision that has general application as opposed to being a constitutional provision that pertains only to the legislature. The most logical explanation is that if the State cannot be sued in any of its courts, then the only way to seek redress for wrongs committed by the State is by asking the legislature to enact legislation that reaches the same end result. As a practical matter, this is exactly what happens. If a state employee driving a state-owned car on state business runs a red light and hits you, you can’t sue the State, but you can ask the legislature to pass an act appropriating funds from the state coffers for the purpose of paying you for your damages. In any event, the Arkansas Constitution very clearly states that the State of Arkansas shall never be made defendant in any of her courts. Since the Constitution necessarily trumps legislation, the

integration statute loses in the event of a conflict between the integration statute and the foregoing provision. The questions presented, therefore, are what is included within the definition of the word “courts” and what is included within the definition of the “State of Arkansas”?

(3) Is the Oil and Gas Commission a “court”?

I have been unable to find any case law addressing the question of whether or not a hearing on an application for integration filed with the Arkansas Oil and Gas Commission would be considered a court proceeding within the scope of Section 20 of Article V of the Arkansas Constitution. I suppose that’s not surprising, as I cannot think of another context in which the State of Arkansas would be a respondent in a proceeding before a state agency or commission. In any event, there isn’t an answer to the question, so we are sailing in uncharted waters. My instinctive reaction, however, is that if the question is ever presented, the Arkansas Supreme Court would hold that a hearing on an application for integration is in fact a “court” proceeding falling within the scope of Section 20.

As a practical matter, however, although the issue may be a good one for theoretical discussion, in the real world it accomplishes nothing, for this reason. Assuming *arguendo* that a hearing on an application for integration was not a “court” proceeding within the scope of Section 20, and that the Commission has authority to integrate the State, how in the world would you ever enforce the resulting order? The only way to enforce the order would be by filing a lawsuit against the State of Arkansas in circuit court, and Section 20 would very clearly prohibit such a lawsuit. In other words, although you might win the battle by successfully asserting that Section 20 does

not prohibit the Oil and Gas Commission from integrating the State of Arkansas, you would undoubtedly lose the war in the sense that the order would be completely unenforceable. I therefore conclude that Section 20, directly or indirectly, precludes the Oil and Gas Commission from integrating the “State of Arkansas.”

(4) Political subdivisions are not the State of Arkansas.

Although I could find no cases which addressed the question of what constitutes “courts” under Section 20, there are all kinds of cases addressing the question of what falls within the scope of the phrase the “State of Arkansas.” It turns out that although the phrase includes the State itself and all of its agencies, it does not include political subdivisions. *See, e.g., Dermott Special School District v. Johnson*, 343 Ark. 90, 32 S.W.3d 477 (2000); *Parrish v. Pitts*, 244 Ark. 1239, 429 S.W.2d 45 (1968). Cities, counties, school districts, and housing authorities are all political subdivisions which are not considered the “State of Arkansas” for purposes of Section 20. It therefore follows that although Section 20 in all likelihood precludes the Oil and Gas Commission from integrating the State and its agencies, Section 20 does not prohibit the Oil and Gas Commission from integrating the interests of cities, counties, school districts, housing authorities, and other political subdivisions.

(5) Conclusion.

It is my opinion that the Arkansas Oil and Gas Commission, if it wanted to do so, would have the authority to integrate the interests of cities, counties, school districts, housing authorities, and other political subdivisions, but does not have the authority to integrate the interests of the State of Arkansas or its agencies. I emphasize, however, that my conclusion is only that the Oil and Gas Commission has authority to integrate

political subdivisions if it wants to. The Oil and Gas Commission has historically expressed a reluctance to integrate governmental entities, and it is anyone's guess how the Commission would react if and when someone actually tries to integrate a political subdivision. Of course, if an application to integrate a political subdivision was filed, and the Commission rejected it simply because the Commission didn't want to integrate political subdivisions for purely political reasons, the Commission's decision could be appealed to circuit court, and assuming the court agreed with the proposition that the Commission had legal authority to integrate political subdivisions, I feel confident that the court would ultimately order the Commission to grant the application. In the meantime, however, the applicant may very well have incurred the wrath of any number of politically connected persons. As a practical matter, I therefore suggest the exercise of discretion in deciding whether or not to pursue an application to integrate a political subdivision. Specifically, I suggest that the benefit to be gained by an integration proceeding should be carefully weighed against the potential down side in terms of the political fallout.

B. The State and its agencies as mineral owner.

Act 509 of 1993 (A.C.A. §22-5-801 at seq.) gives the commissioner of states lands exclusive authority and jurisdiction to negotiate and execute oil and gas leases covering mineral interests owned by the State of Arkansas or its agencies. There are a couple of exceptions, however. As I mentioned in the beginning of this paper, the Arkansas Game and Fish Commission and the Arkansas Highway Commission are both separate and distinct constitutional entities. Act 509 expressly excludes the Arkansas Game and Fish Commission from the scope of the legislation, but makes no mention of

the Highway Commission. When I began working on this paper, I was of the opinion that the Highway Commission would likewise be exempt from Act 509, since the Highway Commission is a separate constitutional entity. Initially, the staff attorney at the Land Commissioner's office confirmed that the Land Commissioner sees it the same way – the Highway Commission is a separate constitutional entity, and the highway commission does its own thing with Highway Commission minerals. I got the same response when I posed the question to the Highway Commission staff attorney. Interestingly, however, in a letter I received on February 7, 2008, the staff attorney at the Land Commissioner's office advised me that the Highway Commission has now begun forwarding requests for leases of Highway Commission lands to the Land Commissioner's office.

I must confess I'm not sure what to make of the foregoing. Act 509 gives the commissioner of state lands blanket authority to negotiate and enter into oil and gas leases for all state owned lands, with the sole exception of the Game and Fish Commission, so I suppose Highway Commission lands would be included within the scope of authority delegated by Act 509. On the other hand, the Highway Commission is a separate constitutional entity, so I don't see how the legislature would technically have authority to tell the Highway Commission what it can or cannot do with the Highway Commission's minerals. Although it stands to reason that the Highway Commission could, if it wanted to, designate the Land Commissioner as its representative to negotiate leases, I don't see how the Highway Commission could delegate authority to the Land Commissioner to execute the leases on behalf of the Highway Commission. In my opinion, if minerals are held of record in the name of the Highway Commission, then the Highway Commission is the party that must be identified as lessor and the party who has

to sign the lease, even if the Land Commissioner's office is the one that negotiates the terms. I therefore suggest caution in taking leases of Highway Commission owned lands. Specifically, it is my advice that you make an effort to persuade the people involved that the lease needs to identify the Highway Commission as the lessor and the lease needs to be executed by the Highway Commission, not the commissioner of state lands.

With the exception of the Game and Fish Commission and the Highway Commission, Act 509 clearly vests the commissioner of state lands with exclusive authority to negotiate and execute oil and gas leases for any minerals that are held of record in the name of the State of Arkansas or any of its agencies, and also specifies the procedures the commissioner is required to follow in the course of negotiating and executing leases. In effect, these procedures are in many ways very similar to the procedures followed by the United States Bureau of Land Management. If a person is interested in leasing state owned lands, they submit an application to the Land Commissioner's office on forms prepared and approved by the Land Commissioner, setting forth the details of the proposed lease. A.C.A. §22-5-805(b). The application must propose at least the "minimums" prescribed by the Land Commissioner's office. A.C.A. §22-5-806(a). Upon receipt of the application, the commissioner makes an initial determination of whether or not it would be in the best interest of the State of Arkansas to enter into the lease. If the commissioner makes a favorable initial determination, then notice is published and anyone else who has an interest has an opportunity to submit their own bid. A.C.A. §22-5-806(b). The Land Commissioner is also required to give notice to various other state agencies, and is required to consider any comments those agencies may have. A.C.A. §22-5-807. After the bidding process is complete, the Land

Commissioner can award the lease to the high bidder, can make a judgment call as between two reasonably equivalent bids, or can change his mind and conclude that it really isn't in the best interest of the State of Arkansas to enter into the proposed lease. A.C.A. §22-5-806(c). Once a lease has been issued, it may not be transferred without the approval of the commissioner of state lands. A.C.A. §22-5-810(b).

The foregoing procedures are simple and straightforward. The statutes and the commissioner's regulations are posted on the Land Commissioner's website. Everyone I have visited with in the industry has indicated that they have had no problems with the Land Commissioner's office and have had no difficulty securing leases of state owned lands when the need arose. Frankly, there isn't a whole lot I can add to what you can find for yourself simply by getting on the Land Commissioner's website.

I do have a couple of "heads up" comments, however. First, the Land Commissioner is required to follow a very specific and detailed procedure. Although the procedure is simple and straight forward, as I have already said, at the same time a statute is a statute, a procedure is a procedure, and there isn't any wiggle room. If the procedures are not followed exactly, then the lease is potentially subject to being set aside. For example, a situation arose recently where a state agency owned both surface and minerals. The lease terms proposed in the application did not include any surface restrictions. When the commissioner published notice of the application, however, the commissioner published the lease as a "no surface use" lease. After the commissioner executed the lease, a party who would have been interested in bidding on a lease with no surface use restrictions found out that the notice to bidders incorrectly described the proposed lease as a no surface use lease. The Land Commissioner ended up setting aside

the lease, and starting over. It is my sense that all of this happened in a very short period of time, and that the original lessee did not suffer any irreparable harm as a result of proceeding forward on the basis of the assumption that it had a good lease. I can see a situation arising, however, where the lease was challenged long after the fact, and a person who had proceeded forward thinking they had a good lease ended up in a bind because of it. I therefore caution anyone seeking a lease from the Land Commissioner's office to make sure that all the I's are dotted and the T's are crossed, and to not rely on the Land Commissioner's office to make sure that everything is done according to Hoyle.

My second "heads up" concerns the standard lease form used by the commissioner of state lands. I have attached a copy of the standard lease form to this paper. It is more or less unremarkable, except for Paragraphs 7 and 8 concerning surface use limitations, and specifically the incorporation by reference of something called the "best management practices." The latter document is a result of a process that was initiated by the U.S. Fish and Wildlife Service. Although the document itself does not have the force of law (or at least is a purely federal document from a legal standpoint), both the Land Commissioner's lease and the Game and Fish Commission's lease forms incorporate the document by reference, so it is in effect a part of any lease you may enter into with the State of Arkansas, its agencies, or the Arkansas Game and Fish Commission. I will not take the time to review the document in detail, but I suggest that it is fraught with peril and that there is absolutely no way you can protect yourself against the dangers the document creates. To illustrate my point, I will give you an example of why the scariest words in the English language are "we're from the government and we're here to help." You will note that the document states that "these guidelines" were

developed in cooperation and partnership with a long list of agencies and industry representatives. My sense is that what really happened is that all of the people listed as cooperators and partners were invited to a meeting, so they could be listed as cooperators and partners on the document, but that it really came down to the U.S. Fish and Wildlife Service telling everyone how it was going to be. For example, I have it on good authority that at one point in the discussion, a federal government employee who was some kind of an authority on some kind of threatened and endangered animal made some statements to the effect that his office had identified certain areas in the Fayetteville Shale play where this threatened and endangered species was either known to exist or was likely to exist. One of the people present at the meeting suggested something that sounds perfectly logical – tell us where those areas are, and we’ll stay away from them. The federal employee declined to divulge this information, asserting that the information was “secret.” When it was pointed out that this almost guaranteed that the habitat would be destroyed inadvertently for lack of knowledge, the only response was that this was the industry’s problem, not the federal government’s, but that if such an awful thing happened, the perpetrators would be in a lot of trouble.

I’m not sure what else I can say on this topic, other than buyer beware.

C. Counties as mineral owners.

Counties are political subdivisions of the State of Arkansas. A.C.A. §14-14-102. A county government is a body politic and corporate. A.C.A. §14-14-501. The organizational structure of county government is set forth in Amendment 55 to the Arkansas Constitution. In essence, county government consists of a county judge and a quorum court, the county judge being roughly equivalent to both the executive and

judicial branches of government and the quorum court being the equivalent to the legislative branch of government. The powers of the county judge are stated in Section 3 of Amendment 55. Section 3 provides, in pertinent part, that “the county judge, in addition to other powers and duties provided for by the constitution, and by law, shall...have custody of county property....”

A.C.A. §14-16-105 sets forth the procedures for selling county property. The preamble to the statute reads as follows:

“The county court of each county shall have power and jurisdiction to sell and cause to be conveyed any real estate or personal property belonging to the county...by proceeding in the manner set forth in this section.” A.C.A. §14-16-105(a).

The statute goes on to set forth a competitive bid process, initiated by the county judge and approved by the county court. The statute further provides that any sale or conveyance of real or personal property which is not made pursuant to the competitive bid procedures specified in the statute “. . . shall be null and void.” A.C.A. §14-16-105(f)(1)(A).

The statute then provides, however, that the procedures for selling and conveying county property (i.e., the competitive bid process) shall not apply in those instances “. . . when the county is leasing county property” A.C.A. §14-16-105(f)(2)(D). As a practical matter, since leasing is not included in the competitive bid procedures specified in A.C.A. §14-16-105, everyone believes that the county judge has inherent authority, pursuant to his constitutional status as custodian of county property, to negotiate and enter into leases of county property on his own initiative, including oil and gas leases. I can find no statute which specifically says this, nor can I find any statute that specifically says the contrary. Although no one seems to be at all concerned about the lack of a

statute which specifically recognizes that the county judge has inherent authority, in his sole and independent discretion, to negotiate and enter into leases of county property, at the same time I can't find anything that says the county judge can't do it.

I am troubled, however, by the question of whether or not an oil and gas lease is truly a lease of county property or is instead a sale of county property. There is an Arkansas Supreme Court decision which says, in so many words, that an oil and gas lease “. . . constitutes a present sale of all of the gas in place at the time such lease is executed.” *Hillard v. Stephens*, 276 Ark. 545, 637 S.W.2d 581 (1982). If the Arkansas Supreme Court decision says what it means and means what it says, then an oil and gas lease is a “sale” of county property, and the competitive bid procedure specified in A.C.A. §14-16-105 apply. Although I have never been asked to approve title to a lease taken from a county, now that I have researched this issue I think that if I'm ever asked to approve a lease from a county, I will require proof that the county complied with the competitive bid procedures specified in A.C.A. §14-16-105.

D. Cities, towns, and municipalities as mineral owners.

Cities, towns, and municipalities are bodies politic and corporate, capable of acquiring, holding, and possessing real property. A.C.A. § 14-54-101. They have inherent authority to sell, convey, lease, and rent any real estate they may own or control. A.C.A. § 14-54-302. Section 3 of Article XII of the Arkansas Constitution gives the legislature authority to provide for the organization of cities and incorporated towns. The legislature has approved several different forms of municipal government, including the aldermanic, city manager, and city administrator forms of government. They all have in common the proposition that the governing body is a board or council of elected officials,

who make decisions by majority rule, and a mayor or city manager/administrator who carries out and puts their decisions into effect. The statutes do not require competitive bidding for oil and gas leases. They do, however, require that the city council or city board approve any proposed lease at a public hearing, by majority vote. There is a proviso that unless the proposed action is approved by a two-thirds majority, three consecutive readings are required (i.e., if you have a majority but not a supermajority, you have to discuss it and vote on it at three consecutive public hearings, and approve it each time).

Although I could find no statutory requirement for competitive bidding, it is my understanding that as a practical matter a number of cities have decided to go with a public auction/competitive bidding process anyway. For example, the City of Searcy recently entered into a lease with Chesapeake, following a competitive bidding process.

From visiting with a number of industry representatives who have worked with cities, towns, and municipalities to negotiate leases, I get the sense that to the extent there are problems, the problems are practical ones as opposed to substantive ones. City fathers often have no idea what they actually own, and no experience or expertise in oil and gas leasing. The end result is a situation where negotiating a voluntary lease agreement involves a great deal of hand-holding and educating. If I am right that the Oil and Gas Commission has authority to integrate cities, however, all of a sudden it gets a lot easier to find a way to make a deal on city-owned minerals.

III. The government as surface owner.

There really isn't much to discuss under this heading. If the government owns surface only, and you have acquired surface rights from a severed mineral owner, then the government has no more rights than any other severed surface owner has. The Arkansas Constitution, like the United States Constitution, has a takings provision, to the effect that "private property shall not be taken, appropriated or damaged for public use, without just compensation therefor." If an oil and gas lessee has acquired surface rights from a severed mineral owner, then the government cannot impair those surface rights without violating the takings clause of the Constitution.

Similarly, if the government owns the surface and 8/8 of the minerals, then again the government stands in the same position as any other landowner. The Arkansas Oil and Gas Commission does not have authority to integrate surface rights, so if you need to use the surface of the government's land in these circumstances, the government gets to tell you the terms and conditions pursuant to which you will have surface rights.

In short, there isn't any difference between Farmer Brown as surface owner and the government as surface owner, at least from a technical legal standpoint. The foregoing discussion, of course, ignores the fact that the government has significant regulatory powers, and the government can certainly use those regulatory powers to make your life easier or harder. I therefore recommend that before exercising your legal rights to use the surface in the face of opposition from the government body who owns the surface, you may want to consider whether risking the wrath of the government regulators is worth the benefit you gain by forcing the issue.

IV. The government as regulator.

There are any number of ways in which the oil and gas industry may encounter the government in its regulatory capacity. For example, John Peiserich and Alan Perkins are presenting a paper at this Institute concerning the impact of ADEQ and U.S. Army Corps of Engineers regulations on the oil and gas industry. I am going to limit the discussion in this paper to two topics, governmental regulation of the use of the public highways and county and city ordinances which attempt to impose various restrictions and regulations on the oil and gas industry. Obviously, there are any number of other instances in which the government will have regulatory authority which impacts the oil and gas industry, but those topics will be left for another day.

A. The Arkansas Highway Commission.

As I noted in the beginning of this paper, the Arkansas Highway Commission is a separate and distinct constitutional entity, created by Amendment 42 to the Arkansas Constitution. As such the Highway Commission has essentially autonomous control over the regulation of the state highway system. In addition to their constitutional authority, the legislature has also passed legislation giving the Commission broad authority over the public highways, A.C.A. § 27-65-107. When it comes to the state highway system, I think it is fair to say that the Commission can do whatever it darn well pleases, subject only to the broad limitations of the Bill of Rights to the Constitution.

As a practical matter, the place where the Highway Commission and the industry butt heads is in the area of weight limits. Every road in the State of Arkansas has a weight limit, with the weight limits for the state highways established by the Arkansas Highway Commission. The Arkansas Highway Commission has also adopted

regulations pursuant to which permits can be issued allowing the holder of the permit to exceed the weight limits. So far, it all makes sense. Roads are designed and built to specifications consistent with the traffic which can reasonably be expected. It stands to reason that if someone is going to be using the roads for a purpose for which they were not designed or built, the person who is exceeding the limits ought to have to pay for the resulting acceleration of the deterioration of the roads. In theory, the permit process accomplishes this objective, by assessing a permit fee which has some correlation to the amount of damage which the overweight activity is anticipated to cause.

The problem is that what you see on paper and what you encounter in the real world are two different things. When the Fayetteville Shale play started, operators and the trucking companies who were hired to move the equipment and rigs did the same thing they had always done. They went to the Highway Commission, filled out the appropriate forms, paid the appropriate fees, and got the appropriate permits. It wasn't long, however, before local residents started calling their elected representatives, who started calling the Highway Commission, complaining about the traffic. Arkansas is not a rich state, and like all state agencies, the Highway Commission is underfunded. As time went on and everyone read the articles about how much money was being spent on the Fayetteville Shale play, it made it easy for government representatives to consider the possibility of finding a way to get a piece of the pie.

And then some odd things started to happen. Permits were requested, but they never seemed to be acted on. On Monday a permit would be issued. On Tuesday the same applicant would file the same paperwork to move identical equipment on a similar, if not identical, road, and the application would be denied. On Wednesday the same

application would be granted. A trucking company has a valid permit to haul an overweight load on a stretch of highway. On Monday the trucker has no problem hauling the load. On Tuesday he gets a ticket, because the district engineer has, overnight, changed the weight limit on that particular stretch of highway. A truck pulls out of a location, and gets a ticket for not securing the load because mud comes flying off the tires as the truck gets up to speed. A drilling rig has a ladder that makes the unit overwidth when it is collapsed for transport. The ladder is removed and secured to the rig. The trucker gets a ticket for hauling two loads on a one-load permit. The list goes on and on. Frankly, I was amazed to hear some of the stories I heard.

Not surprisingly, while all of this was going on, representatives of the industry were trying to broker a deal which would solve these problems. When all the dust settled, the industry was able to negotiate an agreement with the Highway Commission, effective through December 31, 2008, pursuant to which the oil and gas industry pays \$18,000.00 per well, in addition to the otherwise applicable heavy haul permit fees, and in essence the Commission agrees to leave the industry alone.

Although I never could get anyone to admit it, I think that what is really going on here is a political issue. The Highway Commission is underfunded. The governor has to find a way to get the Highway Commission more money. An increase in the severance tax is coming, whether as a referendum voted on at the general election in November or in the 2009 legislature. One way or another, part of the severance tax is going to go to the Highway Commission. In summary, it sure sounds like a stopgap arrangement to help finance the Highway Commission until the severance tax issues can be worked out. In any event, until December 31, 2008, the rules for the oil and gas industry are different

than the rules for everybody else – pay \$18,000.00, over and above all of the otherwise applicable heavy haul permit fees, and everyone's happy.

The problem I have with all of the foregoing is that it completely ignores a number of constitutional requirements, not the least of which are the equal protection clause and the due process clause. Although the Commission certainly has authority to regulate the highways, the equal protection clause requires that the regulations be applied uniformly, across the board, to everyone who is similarly situated. Although the Highway Commission has authority to regulate the highways, it also has an obligation to comply with the due process requirements when it adopts those regulations, specifically notice and hearing. Although the Commission has authority to regulate the highways, it has an absolute obligation to enforce the regulations uniformly. I'm not so sure that the members of the Commission have not exposed themselves to personal liability under 42 U.S.C. § 1983, which provides that any person acting under color of law who shall deprive a citizen of the United States of his property without due process of law shall be personally liable in damages. Frankly, I get a sense that in many ways the Commission has had its own way for so long it has forgotten that there are still some constitutional limits to its power, and has also forgotten that the consequences for exceeding those constitutional limits can be severe.

That having been said, I'm not sure what it would gain the industry to successfully litigate the constitutional issues. In the two or three or four years it would take to litigate the matter, the Commission would have the ability to effectively prevent oil and gas exploration and production activities. Again, it appears to be a situation in which it would be very easy to win the battle and lose the war, in the sense that the

Commission gets its hand slapped but in the meantime the oil and gas industry goes out of business.

B. County and city government regulation of roads.

Believe it or not, there is actually a statute which absolutely requires that oil and gas companies (no one else – just oil and gas companies) must post a bond before traveling on county roads and municipal streets. A.C.A. § 27-66-507. The statute is specifically applicable only to the oil and gas industry. There isn't any doubt that the statute is unconstitutional, but there it is. A copy is attached for your reference. There are also numerous statutes, and in the case of counties a constitutional provision, which make it clear that counties and cities have regulatory authority over their streets and roads.

I know that a number of counties have adopted ordinances which implement the bond requirement. For example, Faulkner County has a very simple one-page ordinance that simply states that before oil and gas companies shall drive heavy equipment on Faulkner County roads, they shall notify the county judge, and the county judge will tell them what kind of a bond they have to post. A copy of the ordinance and a copy of a notice from the judge setting a bond amount are attached as exhibits to this paper. I don't think there is any doubt that the Faulkner County way of doing things is unconstitutional.

Crawford County has adopted a more detailed ordinance concerning heavy haul operations. A copy of the Crawford County ordinance is also attached. I think the Crawford County ordinance is relatively well-drafted and is probably a constitutional ordinance, at least on its face. It provides a procedure for specifying what the load limits will be on the various roads and bridges in the county. It then sets forth a procedure for

securing a permit, posting a bond, and paying for damage when the work is done. The ordinance is not (at least on its face) directed at the oil and gas industry, but is instead simply a heavy haul ordinance – anyone that exceeds the weight limits has to get a permit, post a bond, and pay for any damages. I believe the Faulkner County ordinance and the statute on which it is based and the Crawford County ordinance and the statute on which it is based provide a nice illustration of an unconstitutional statute and ordinance and a constitutional statute and ordinance.

Cities also have inherent and statutory authority to regulate traffic on city streets. As with counties, however, there is a right way to do it and a wrong way to do it. As an example, a copy of Fort Smith's ordinance is attached. The ordinance requires a permit, and gives the City Administrator authority to set weight limits and designate routes. If the ordinance was applied in a way which effectively prevented all oil and gas drilling, it would probably be unconstitutional, but as written it is probably enforceable.

I suggest, however, that although some ordinances may be unconstitutional and some may not, as a practical matter they all accomplish exactly the same thing – they make heavy haul operators pay for damage caused by the heavy haul operations. My point here is that counties and cities have the authority to make heavy haul operators pay for the damage they cause to the public highways. Although it would certainly be possible to contest ordinances on constitutional grounds, I don't see how it advances the ball, as all that will be accomplished is to make everyone in the county or city even more angry, and you're still ultimately going to have to pay for whatever damage you cause to the public highways.

I have conducted something of an informal poll of the industry and county and city representatives in the Fayetteville Shale Play area, to get a sense of how all of this is working in the real world. Without exception, I have been advised by both the industry and the government representatives I visited with that everyone is basically operating under the same set of ground rules, regardless of what the ordinances and statutes may or may not say. Specifically, the industry is working together with the county judges and the representatives of city governments where applicable, and everyone is working in good faith to come up with a reasonable means of making sure that any damage to the public highways which is caused by the oil and gas industry's operations is fixed. Sometimes the agreement involves a payment of a sum of money to the governing body, which in theory the governing body then uses to fix the damage, sometimes industry uses its own contractors to fix the damage, sometimes it's a little of both. The end result, however, has so far been the same – everybody has found a way to get along with each other.

I am hopeful that this trend will continue and that it won't be necessary to go to war. If it does become necessary, however, I suggest to county and city government that an ordinance along the lines of the Crawford County ordinance is the way to go, and I suggest to industry that unless the government's demands are outrageous, you might as well go ahead and pay for whatever damage your operations cause to the public highways, because cities and counties clearly have the ability to make the industry pay for the damage it causes to public highways.

C. County and city regulation of the oil and gas industry – what authority do counties and cities really have?

Counties and cities have some regulatory authority, but in the context of the oil and gas industry, the regulatory authority is quite limited, by both statutes and the Constitution. Section 3 of Article XII of the Arkansas Constitution gives the legislature authority to “. . . provide, by general laws, for the organization of cities . . . and incorporated towns . . .” Section 4 of Article XII of the Arkansas Constitution prohibits municipal corporations from passing any laws that are “. . . contrary to the general laws of the state . . .” The legislature has passed legislation authorizing cities and towns to adopt bylaws and ordinances, but expressly provides that any such bylaws or ordinances cannot be “. . . inconsistent with the laws of the state . . .” A.C.A. § 14-55-101, 102.

Section 1 of Amendment 55 to the Constitution gives limited legislative authority to the county quorum court, in these terms: “A county acting through its quorum court may exercise local legislative authority not denied by the Constitution or by law.” There is a mirror image statute adopted by the legislature setting forth the legislative powers of county quorum courts, A.C.A. § 14-14-801. That section is followed, however, by a series of acts which place express limits on the legislative powers of counties, A.C.A. § 14-14-805, 806, 807, 808, and 809. I specifically draw your attention to A.C.A. § 14-14-808, which expressly prohibits county government from exercising local legislative authority which is “. . . in any manner inconsistent with state law or administrative regulation in any area affirmatively subjected by law to state regulation or control.”

The constitutional limits on the legislative authority of counties and cities are particularly pertinent in connection with any discussion of regulation of the oil and gas industry. Counties and cities are subject to the due process and equal protection

requirements of the Fourteenth Amendment to the United States Constitution and Sections 3, 8, 18, and 21 of the Arkansas Constitution. Although counties and cities may be delegated eminent domain powers, Section 23 of Article II of the Arkansas Constitution, counties and cities, like all governmental entities, are prohibited from taking private property without just compensation. Section 22, Article II, Arkansas Constitution. The last mentioned point is particularly significant, given the fact that the United States Supreme Court has recognized the proposition that regulation can rise to the level of an inverse condemnation. *See, e.g., Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S. Ct. 2886 (1992). And representatives of city and county governments are also well-advised to bear in mind 42 U.S.C. § 1983, which allows persons who have been deprived of their constitutional rights to recover a judgment for money damages against the governmental officials involved in the situation:

“Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured . . .” (To the extent there may have been any doubt, there are any number of cases holding that corporations are “persons” entitled to assert the protection provided by Section 1983. *See, e.g., California Diversified Promotions, Inc. v. Musick*, 505 F.2d 278 (1974); *Auburn Medical Centers, Inc. v. Peters*, 953 F.Supp. 1518 (M.D. Ala. 1996).)

In summary, when it comes to regulating the oil and gas industry, counties and cities have very little regulatory authority, and the potential consequences for exceeding that authority are severe. So far, although there has been a great deal of discussion and rhetoric on this topic, and although counties and cities have considered some rather

extensive regulation of the oil and gas industry, cooler heads have always prevailed and the legislation which has been adopted by counties and cities is appropriate.

To give you a sense of how this has worked in the real world (so far), the City of Clinton ordinance is a good example. About a year ago the City of Clinton decided to consider legislation aimed at regulating the oil and gas industry. The initial draft of the ordinance ran 50 pages, and contained an example of a violation of essentially every one of the limitations I just described. Several representatives of the oil and gas industry learned of the proposed ordinance, and contacted the appropriate representatives of the City of Clinton and initiated a dialogue. Ultimately, the City of Clinton adopted an ordinance which I think is reasonable. The ordinance requires that a permit be obtained before commencing drilling operations, but the permit process is a reasonable one. In essence, it simply requires filling out a few forms and paying a fee. Much like the Oil and Gas Commission has no authority to refuse to issue a drilling permit if the requirements are met, the City of Clinton has no authority to refuse to issue a permit if the requirements are met. The ordinance does have some health and safety limitations, such as distances from structures, but there is nothing unreasonable about these provisions of the ordinance. The ordinance requires that the permittee pay for any damage the permittee may cause to the city streets. Again, although if challenged there would probably be some equal protection issues with this aspect of the ordinance, unless the City of Clinton makes outrageous demands for street repairs, I seriously doubt this aspect of the ordinance would ever be challenged. As I have already said, the industry recognizes that it has an obligation to fix what it breaks, and so far everything I am

hearing leads me to the conclusion that the industry is doing a good job of repairing whatever damages the industry causes to the public streets and highways.

A copy of the ordinance as it was ultimately adopted by the City of Clinton is attached as an exhibit to this paper. For comparison purposes, I also attach a copy of the pertinent portions of the ordinances adopted by the City of Fort Smith.

In summary, counties and cities have very little regulatory authority over the oil and gas industry. At the same time, however, I think it is fair to say that there is a learning curve involved, and that most cities and counties are not aware of the limitations on their authority in this area. So far, the industry has done a good job of being proactive in terms of educating city and county governments and at the same time working with county and city governments to come up with an ordinance that addresses the public's concerns in a way that does not infringe upon the industry's constitutional rights or exceed the constitutional and statutory limits on the legislative authority of counties and cities. I predict that this trend will continue, and notwithstanding some of the rhetoric we hear from time to time, I anticipate that when all the dust settles we will not see a pitched battle between industry and a county or city government over an unreasonable ordinance.

V. The Arkansas Game and Fish Commission

The Arkansas Game and Fish Commission was created by the 35th Amendment to the Constitution of the State of Arkansas. Because it is a constitutionally created body, it is an autonomous arm of government. Indeed, within its sphere of designated authority, the only limits on its power are those found in the Bill of Rights. In short, the Game and Fish Commission can do whatever it wants, and that's just the way it is.

In cases where the Game and Fish Commission owns both surface and minerals, about all you can do is go to the Commission and try and persuade them to voluntarily enter into a lease agreement. The Oil and Gas Commission clearly has no authority to integrate the interest of the Game and Fish Commission. In fact, because the Game and Fish Commission is a separate constitutional entity, I suppose you could argue that the Oil and Gas Commission does not have authority of any kind, including regulatory authority, over the Game and Fish Commission.

The Game and Fish Commission has put together its version of a standard form lease. The document is really quite remarkable. It incorporates by reference the best management practices document, regulations for mineral exploration and production adopted by the Game and Fish Commission, and a surface use agreement created by the Game and Fish Commission. After reading all of it, I'm not so sure it wouldn't have been easier to simply insist that the only lease they will sign is a no surface use lease, and call it good. That's not to say the Commission cannot be persuaded to allow surface operations. Rather, the net effect of the documents is that the only way industry will ever get on the surface of Game and Fish Commission lands is if they first lay out exactly what they are proposing to do, agree to (for all practical purposes) guarantee that there will never, ever, under any circumstances be any environmental contamination of any kind resulting from the surface operations, and also agree to the absolute minimum impact on the Game and Fish lands, both in terms of seasons of operation and the area of surface used.

There really isn't much more I can say on this topic. If the Game and Fish owns the surface and minerals, and you want to lease their interest or drill on the Game and Fish, you will just have to do whatever they tell you to do, and that's all there is to it.

It is my understanding that there are a number of instances in which the Game and Fish Commission owns minerals, but does not own the surface. I have been told that the Game and Fish Commission has nevertheless insisted on significant surface restrictions as a condition of their lease, which doesn't make any sense. My guess is that the Game and Fish Commission will ultimately acknowledge that if it doesn't own any surface rights, it doesn't make any sense for the Game and Fish Commission to insist that surface use restrictions be incorporated in its lease. Again, however, although the position may be unreasonable and not make any sense, there isn't anything you can do about it – if that's the way the Game and Fish Commission wants it done, then that's the way it is.

Finally, you will undoubtedly encounter situations where the Game and Fish Commission owns the surface but has no interest in the minerals. In this situation, the Game and Fish Commission does not have any higher or better powers, rights, or authorities than any other surface owner. The takings clause, the impairment of contracts clause, and the prohibition on *ex post facto* legislation contained in the Constitution preclude the Game and Fish Commission from using its regulatory power to deprive the mineral owner of his vested surface rights. The Commission could, of course, exercise eminent domain powers and thereby acquire the mineral rights, or at least the mineral owner's surface rights. The Game and Fish Commission could also adopt regulations that do not impose unreasonable restrictions on the mineral owner's ability to get the minerals out of the ground. Obviously, it is impossible to know exactly where this line is

drawn. I think it is fair to say, however, that if the Game and Fish Commission, as surface owner, attempted to prohibit surface activity during the entirety of the hunting seasons, I think the mineral owner would have an excellent argument that the regulation amounts to inverse condemnation, and could therefore sue the Game and Fish Commission for the taking of the mineral owner's property without compensation.

So far, I have not heard of any instance in which the Game and Fish Commission, as a surface owner only, has ended up in a knock-down, drag-out fight with a mineral owner over surface use regulations. Hopefully that trend will continue, but the broad regulatory powers of the Game and Fish Commission and its status as a separate constitutional body certainly create the potential for such a fight.

STANDARD FORM LEASE

COMMISSIONER OF STATE LANDS

AR COSL Lease No. 00-000-000

STATE OF ARKANSAS
COMMISSIONER OF STATE LANDS
NATURAL RESOURCES MINERALS LEASING DIVISION
ROOM 109, STATE CAPITOL BUILDING
LITTLE ROCK, AR 72201

OIL AND GAS LEASE

This lease, made and entered into in duplicate, on the (Date), by and between the state of Arkansas, acting through its authorized agent, the Commissioner of State Lands, State of Arkansas, hereinafter designated as Lessor, and (Company), designated as Lessee whose address is (Address), under and in pursuance to the provisions of the Constitution of the State of Arkansas and Arkansas Codes Annotated §§ 22-5-801 – 22-5-813 (as amended), and to Regulations of the Natural Resources Committee which are made a part hereof, WITNESSETH:

1. The Lessor, for and in consideration of \$00.00 dollars, the receipt of which is hereby acknowledged, and the rents and royalties to be paid, and the covenants, stipulations and conditions to be observed and performed as set forth, does hereby grant, demise, lease and let to the lessee the exclusive right and privilege to explore by geophysical and other methods and drill for, mine and extract all of the oil and natural gas deposits in or under said land, the following described tract(s) of land situated in (County) County, in the state of Arkansas, to-wit:

Section Township Range
County, Arkansas

(Legal Description)

Lessor hereby grants to the Lessee the exclusive right and privilege to prospect and drill for, mine and extract all of the oil and natural gas deposits in or under said land, together with the right to pipe, store and remove oil and natural gas and to occupy and use so much only of the surface of said land as may reasonably be necessary to carry on the work of prospecting for, extracting, piping, storing and removing such oil, distillate, and natural gas. Also, the right to obtain from wells or other sources on said land by means of pipelines or otherwise a sufficient supply of water to carry on said operation, except the private wells or ponds of the surface owner of Lessor, and also the right to use, free of cost, oil and gas, casing head gas for fuel so far as necessary to the development and operation of said property.

2. Subject to the other provisions herein contained, this lease shall remain in force for a term of five (5) years from this date herein called "primary term" and as long thereafter as oil and gas, or either of them, is produced from said leased premises or drilling operations are continuously prosecuted as hereinafter provided. "Drilling operations" includes operations for the drilling of a new well, the reworking, deepening or plugging back of a well or hole or other operations conducted in an effort to obtain or reestablish production

of oil or gas; and drilling operations shall be considered to be "continuously prosecuted" if not more than 60 days shall elapse between the completion or abandonment of one well or hole and the commencement of drilling operations on another well or hole. If at the expiration of the primary term of this lease, oil or gas is not being produced from the leased premises but Lessee is then engaged in drilling operations, the lease shall continue in force as long as drilling operations are continuously prosecuted; and if production of oil or gas results from any such drilling operations, this lease shall continue in force so long as oil or gas shall be produced from the leased premises. If, after the expiration of the primary term of this lease, production on the leased premises should cease, this lease shall not terminate if Lessee is then prosecuting drilling operations, or within 60 days after each such cessation of production commences drilling operations, and this lease shall remain in force as long as such operations are continuously prosecuted, and if production results, from then as long thereafter as oil and gas is produced from the leased premises, provided however, that in the event additional drilling operations are not commenced within 60 days from the date the last drilling operations were completed this lease shall forfeit as to all acreage not included in a drilling unit as established by an order of the governmental authority charged in the event no drilling unit has been established, then the lease shall forfeit as to all acreage except such of the acreage containing 40 acres surrounding a producing well located thereon. (Said 40 acres to be within the confines of a governmental quarter, quarter section, unless said acreage is within a riverbed. Forty acres of river bed acreage to be surveyed and assigned).

3. The royalties to be paid by Lessee are:

(a) The value at the well of **(Royalty)** of all oil, distillate, condensate, natural gasoline or other liquid hydrocarbon produced and sold from the leased land, at a price equivalent to the current market price in the field at the time of production. The value at the well of **(Royalty)** of all natural gas produced and sold from the land, it being specifically provided that the Lessee shall have the power and authority to enter into contracts for the sale of all natural gas produced, and royalty upon all natural gas sold under such contracts shall be based upon the price provided in such contract.

(b) If gas, of whatsoever nature or kind, is used on or off the lease premises by the Lessee for purposes other than solely in the development and operations of the premises as provided in the lease, Lessee shall pay Lessor **(Royalty)** of the proceeds received by Lessee for the sale of the products manufactured or extracted there from after deducting the value of reasonable costs for extracting or manufacturing said gas or other substances. On all residue gas sold by Lessee after manufacture or extraction of production, royalty shall be paid under sub-paragraph (a) above.

Any permit granted pursuant to this application shall be subject to all Federal and State Laws, executive orders, rules and regulations pertaining to operations in and on navigable waterways.

(c) If a well capable of producing gas or gas and gas-condensate in paying quantities located on the leased premises (or on acreage pooled or consolidated with all or a portion of the leased premises into a unit for the drilling or operation of such well) is at any time shut in and no gas or gas-condensate there from is sold or used off the premises or for the manufacture of gasoline or other products, nevertheless such shut-in well shall be deemed to be a well on the leased premises producing gas in paying quantities and this lease will continue in force during all of the time or times while such well is so shut-in, whether before or after the expiration of the primary term hereof. Lessee shall use reasonable diligence to market gas or gas-condensate capable of being produced from such shut-in well but shall be under no obligation to market such products under terms, conditions or circumstances which, in Lessee's judgment exercised in good faith, are unsatisfactory. Lessee shall be obligated to pay or tender to Lessor within 45 days after the expiration of each period of one year in length (annual period) during which such well is so shut-in as royalty, an amount equal to the annual delay rental herein provided applicable to the interest of Lessor in acreage embraced in this lease as of the end of such annual period and included within the confines of

a pooled unit declared under the terms hereof or created by order, rule or regulation of any governmental authority; provided that, if gas or gas-condensate from such well is sold or used as aforesaid before the end of any such annual period, or if, at the end of any such annual period, said sum of money. Such payment shall be deemed a royalty under all provisions of this lease. Such payment may be made or tendered to Lessor or to Lessor's credit in the designated depository bank in the manner prescribed for the payment of delay rentals. Royalty ownership as of the last day each such annual period as shown by Lessee's records shall govern the determination of the party or parties entitled to receive such payment.

4. If drilling operations are not commenced on the lease premises or on lands pooled therewith on or before one year from this date, this lease shall terminate as to both parties unless Lessee on or before the expiration of said period, shall pay or tender to Mark Wilcox, Commissioner of State Lands, Natural Resources Minerals Leasing Division, Room 109, State Capitol, Building, Little Rock, AR 72201, the sum of \$00.00 per acre hereinafter called "rental," which shall extend for one year the time within which drilling operations may be commenced. Thereafter, annually, in like manner and upon like payments or tenders, the commencement of drilling operations may be further deferred for periods of twelve (12) months each during the primary term. Payment or tender of rental may be made by currency, check or draft of lessee delivered or mailed to Mark Wilcox, Commissioner of State Lands, Room 109 State Capitol Building, Little Rock, AR 72201 on or before the date of payment, and the payment or tender will be deemed made when the currency, check or draft is so delivered or mailed. The cash down payment under paragraph (1) is consideration for this lease according to its terms and shall not be allocated a mere rental for a period.

5. If, during the primary term and before production is obtained, a well is drilled and completed as a dry hole, or if production is obtained but ceased during the primary term, Lessee shall:

(a) Commence operations, as herein defined, for drilling a new well or for reworking an existing well before the next ensuing rental paying date and continue such operations with due diligence to completion; or

(b) Pay rentals on the next ensuing rental paying date in conformity with paragraph (4) of this lease.

Unless Lessee complies with one of the options, this lease shall terminate upon said next ensuing rental date. Upon the completion of diligent but unsuccessful drilling or reworking operations under (a), or after resumption of rental payments under (b), Lessee shall have the same options as the next rental paying date.

6. Lessee may surrender this lease as to any part or parts of the leased premises by delivering or mailing a release thereof to Lessor, and by recording a release thereof in the proper county; except that Lessee shall not be relieved from liability accruing prior to such surrender, or from liability for damages for injuries, accruing before or after surrender, resulting from breach of its obligations under this lease.

7. Lessee agrees to take reasonable steps to prevent its operations from (a) causing or contributing to soil erosion or to the injury of terraces or other soil-conserving structures on said premises; (b) polluting the waters of reservoirs, springs, streams, wells or rivers upon the leased premises; (c) damaging crops, timber, or pasture, consistent with the purpose of this lease. Damage to or loss of timber removed from the sale area shall be borne by the Lessee.

8. Lessee agrees to comply with any Best Management Practices (BMPs) established by State or Federal government agencies in effect during the term of the lease. Lessee will utilize the applicable BMPs to

conserve important public resources such as wildlife habitats, wetlands, streams and aesthetic values.

9. Lessee shall within a reasonable time after abandonment of any well remove all machinery, material and structures used in connection with said well and in other operations on the leased premises, and shall fill in and level off all excavations, pits or other alterations on the surface of the land caused in connection with said well, and generally shall restore the surrounding land and the means of ingress and egress to their original condition so far as reasonably possible. Within six (6) months after expiration of this lease, Lessee shall perform specifically all of the above obligations which have not been performed. A bond may be required by the Lessor.

10. Lessee agrees to bury all pipelines below deep plow depth, and no well shall be drilled within two hundred (200) feet of any residence, barn, or irrigation well on said land without Lessor's consent.

11. Lessee shall have the right within six (6) months after the expiration or termination of this lease to remove all property and fixtures and to draw and remove all casing it has placed on said land.

12. Lessee shall only have the right to assign or transfer this lease upon having received written approval from the Commissioner of State Lands. In the event the lease should be transferred in violation of this Section, said lease shall be subject to cancellation by the Commissioner of State Lands.

13. All provisions hereof, express or implied, shall be subject to all federal and state laws and the orders, rules and regulations of all governmental agencies administering the same, and this Lease shall not in any way be terminated wholly or partially, nor shall the Lessee be liable in damages for failure to comply with any of the express or implied provisions hereof if such failure accords with any such laws, orders, rules or regulations. Should the Lessee be prevented during the last year of the primary term hereof from drilling a well hereunder by the order of any constituted authority having jurisdiction, or if Lessee shall be unable during said period to drill a well hereunder due to the equipment necessary in the drilling thereof not being available for any cause, the primary term of this Lease shall continue until one (1) year after said order is suspended or said equipment is available, but the Lessee shall continue to make delay rental payments as herein above provided for during such extended time.

14. If oil or gas is discovered but production is prevented by any of the causes in paragraph (13), this Lease shall be considered producing and shall continue in full force and effect until Lessee is permitted to produce the oil or gas, and as long thereafter as oil or gas actually is produced in paying quantities; provided, however, that Lessee, as an express condition for the extension of the lease with production, shall pay to Lessor the sum of ~~\$00.00~~ per annum for each acre of the leased premises, payment to be made within ninety (90) days from the date that production is prevented and annually upon such payment date until production is resumed.

15. No express obligation imposed upon Lessee shall relieve it of any otherwise existing duty of exploration, development, operation, marketing or protection, except to the extent of direct conflict with such express obligation, and all such express obligations shall be construed as providing minimal standards only.

16. This lease is granted without warranty of title, either express or implied, but it does cover all interests owned or hereafter acquired by Lessor. It is agreed that if Lessor owns an interest in said land less than the entire fee simple estate, the royalties, shut-in gas well royalties, and rentals to be paid Lessor shall be reduced proportionately.

17. The words "gas" or "gaseous substance" as used herein do include helium or carbon dioxide, and any other non-hydrocarbonic compound or substance subject to the payment to the Lessor on the same terms and conditions as stated in paragraph three (3).

18. Lessee is hereby given the right at its option, at any time and whether before or after production, to pool for development and operation purposes all or any part or parts of leased premises or rights therein with any other land in the vicinity thereof, or with any leasehold, operating or other rights or interest in such other land so as to create units of such size and surface acreage as Lessee may desire but containing not more than forty-five (45) acres; provided, however, a unit may be established hereunder containing not more than 640 acres plus 10% acreage tolerance if unitized only as to gas rights or only as to gas and gas-condensate, except that units pooled for oil or oil and gas for or in conjunction with repressuring, pressure maintenance, cycling and secondary recovery operations or any one or more of same, may be formed to include not more than 320 acres. If, at any time, larger units are required under any then applicable law, rule, regulation or lawful order of any governmental authority for the drilling, completion or operation of a well, or for obtaining maximum allowable from any contemplated, drilling or completed well, any such unit may be established or enlarged to conform to the size specified by such law, rule, regulation or order. Each unit shall be created by Lessee's recording a declaration of pooling containing a description of the unit so created with the Circuit Clerk's office in the county or counties where the property is located and a copy of said declaration shall be filed with Lessor within a reasonable time, not to exceed thirty (30) days. The commencement of a well, the conduct of other drilling operations, the completion of a well or a dry hole, or the operation of a producing well on the pooled area, shall be considered for all purposes (except for royalty purposes) the same as if said well were located upon, or such drilling operations were conducted upon, the lands covered by this lease whether or not such well is located upon, or such drilling operations are conducted upon, said lands.

Operations on any part of any lands so pooled shall, except for the payment of royalties, be considered operations on leased premises under this lease, and notwithstanding the status of a well at the time of pooling, such operations shall be deemed to be in connection with a well which was commenced on leased premises under this lease. The term "operations" as used in this lease shall include but not be limited to the following: commencing construction on roadways, preparation of drill site, drilling, testing, completing, reworking, recompleting, deepening, plugging back, repressuring, pressuring maintenance, cycling, secondary recovery operations, or the production of oil; or gas or the existence of a shut-in well capable of producing gas.

There shall be allocated to the portion of leased premises included in any such pooling such proportion of the actual production from all lands so pooled as such portion of leased premises, computed on an acreage basis, bears to the entire acreage of the lands so pooled. The production so allocated shall be considered for the purpose of payment or delivery of royalty to be the entire production for the portion of leased premises included in such pooling in the same manner as though produced from such portion of leased premises under the terms of this lease.

19. All of the provisions of this lease shall inure to the benefit of and be binding upon the parties hereto, their heirs, administrators, successors and assigns.

20. Disclaimer Clause – The state of Arkansas does not warrant title, either expressed or implied, nor will action be mandatory by grantor to defend the rights herein of the grantee. Lessor specifically does not warrant that the subject real property is free and clear of any existing lease, contract or legal document. It shall be the duty of the Lessee to determine whether such documents exist and whether such documents limit the intended use of the real property.

IN TESTIMONY of the agreement entered into in this lease, witness the hand and seal of Mark Wilcox as Commissioner of State Lands for the state of Arkansas, and the hand and seal of _____

this _____ day of _____, _____.

Commissioner of State Lands

Lessee

STATE OF ARKANSAS)

)
)

COUNTY OF PULASKI)

BE IT REMEMBERED, that on this day came in person before me, the undersigned, a Notary Public, within and for the county and state aforesaid, duly commissioned and acting as Commissioner of State Lands of the state of Arkansas, Mark Wilcox, to me well known as the lessor or grantor in the foregoing instrument of writing, and stated that he, as Commissioner of State Lands for the state of Arkansas, had executed same for the consideration and purpose there in mentioned and set forth.

WITNESS my hand and seal as such Notary Public on this the _____ day of _____, _____

NOTARY PUBLIC

MY COMMISSION EXPIRES:

THIS INSTRUMENT WAS PREPARED
BY THE COMMISSIONER OF STATE
LANDS OFFICE -- LITTLE ROCK, AR

MW/ah

CORPORATE ACKNOWLEDGMENT

STATE OF _____)

COUNTY OF _____)

On this _____ day of _____, _____, before me, a Notary Public within and for the

county and state aforesaid, the undersigned officer, personally appeared _____
_____ who acknowledged himself to be the _____
_____ of _____, a corpora-
tion, and that he, as such _____ being authorized so to do, executed the foregoing instrument for the
purpose therein contained, by signing the name of the corporation by himself as _____

IN WITNESS WHEREOF I hereunto set my hand and official seal.

Notary Public

My Commission Expires:

INDIVIDUAL ACKNOWLEDGMENT

STATE OF _____)

COUNTY OF _____)

On this _____ day of _____, _____, before me a Notary Public within and for the county and
state aforesaid, personally appeared _____ and _____, known
to me to be the person whose name _____ subscribed to the foregoing instrument and acknowledged
that _____ executed the same as _____ free and voluntary act and deed for the purposes
and consideration therein mentioned and set forth.

IN WITNESS WHEREOF I hereunto set my hand and official seal.

Notary Public

My Commission Expires:

CITY/COUNTY ROAD

BOND STATUTE

meanor. Upon conviction, he shall be fined in any sum not less than twenty-five dollars (\$25.00) nor more than two hundred dollars (\$200).

History. Acts 1949, No. 172, §§ 1-3;
A.S.A. 1947, §§ 76-126 — 76-128.

27-66-506. Protection of bridges and culverts — Penalty for violation.

(a) It is unlawful for any person or persons owning or controlling any traction engine or engines or other unusual heavy machine or machinery in moving it from place to place over any of the public roads or highways to cross any of the bridges or culverts on the roads or highways without first laying plank at least three inches (3") thick and not less than twelve inches (12") wide and not less than twelve feet (12') long over bridges and culverts in such manner as to prevent any damage being done to the bridges or culverts.

(b) Should any person or persons owning or controlling any engine or machinery mentioned in subsection (a) of this section do any damage to any bridge or culvert in crossing either on any of the public roads or highways by reason of any neglect, refusal, or failure to first provide and place the plank across and over the bridges and culverts before attempting to cross with the engines or machinery, they shall be deemed guilty of a misdemeanor and upon conviction shall be fined in any sum not more than two hundred dollars (\$200). However, if provisions are made before attempting to cross bridges or culverts with such engines or machinery and damage then occurs to any crossings and it appears that the damage occurred through no neglect or carelessness on the part of the party so crossing, then the party shall not be liable.

History. Acts 1909, No. 178, §§ 1, 2, p. 549; C. & M. Dig., §§ 5506, 5507; Pope's Dig., §§ 7148, 7149; A.S.A. 1947, §§ 76-118, 76-119.

Cross References. Liability for damage to highway or structure, § 27-35-109.

27-66-507. Bond for driving heavy oil and gas equipment.

(a) If, prior to exploration and drilling for oil and gas, it appears that an oil and gas company or an individual who is to explore and drill will be driving heavy equipment on county roads or municipal streets, then the company or individual shall file a reasonable bond with the county or with the municipality, as the case may be, to cover anticipated damages to the county roads or municipal streets.

(b) The bond shall be in an amount determined by the county road foreman and supervisor or by the municipal street department or appropriate municipal street official to be sufficient to repair damage caused to the roads or streets by operating the equipment on them.

FAULKNER COUNTY

ROAD BOND ORDINANCE

PRESTON SCROGGIN
FAULKNER COUNTY JUDGE
(501) 450-4900
Conway, Arkansas 72034

ORDINANCE 07-10

**Be it enacted by the Quorum Court of the County of Faulkner, State of Arkansas.
An Ordinance to be entitled: an Ordinance to establish the bonding for driving
Heavy oil and gas Equipment on County Roads**

Section 1: It shall be required by Faulkner County that all Oil and Gas companies who will be driving heavy equipment on the Roads of Faulkner County shall notify the County Judge of their intent to use such roads.

Section 2: If, prior to exploration and drilling for oil and gas, it appears that an oil and gas company or an individual who is to explore and drill will be driving heavy equipment on county roads then the company or individual shall file a reasonable bond with the county, as the case may be, to cover anticipated damages to the county roads.

Section 3: The bond shall be in an amount determined by the county road foreman and supervisor to be sufficient to repair damage caused to the roads by operating the equipment on them.

Section 4: This is to be in accordance with Arkansas code 27-66-507

Dated: March 20, 2007

Dated: March 20, 2007

Attest: _____
Jeff Johnston
Quorum Court Secretariat
Faulkner County, AR

Approved: 
Preston Scroggin
Faulkner County Judge
Faulkner County, AR

**PRESTON SCROGGIN
FAULKNER COUNTY JUDGE**

(501) 450-4900
Conway, Arkansas 72034

Notice Bond or Vacate County Road

Date: August 21, 2007

To: Chesapeake Inc.

From: Preston Scroggin, County Judge

**Reason for Notice: The use of your heavy equipment may cause damage to
Cash Springs Road**

**Action Required: A \$105,000.00 bond is required for the repair of the Cash Springs
Road should your heavy equipment traffic cause damage to the road**

Effective Date: Immediately

The Reason: Cash Springs Road is necessary portion of the County Road System.

1. Faulkner County Ordinance 07-10 States:

- It shall be required by Faulkner County that all Oil and Gas companies who will be driving heavy equipment on the Roads of Faulkner County shall notify the County Judge of their intent to use such roads.
- If, prior to exploration and drilling for oil and gas, it appears that an oil and gas company or an individual who is to explore and drill will be driving heavy equipment on county roads then the company or individual shall file a reasonable bond with the county, as the case may be, to cover anticipated damages to the county roads
- The bond shall be in an amount determined by the county road foreman and supervisor to be sufficient to repair damage caused to the roads by operating the equipment on them.

**2. Arkansas Code 27-66-107 states the County Judge is responsible for Operation of
System of County Roads, Bridges, and Ferries**



**Preston Scroggin
County Judge
August 21, 2007**

CRAWFORD COUNTY

HEAVY HAUL ORDINANCE

County Roads

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§ 92.39 DENIAL OF FUTURE WORK.

If any person, corporation or other entity consistently does faulty backfill or final repair work, the Superintendent of the County Road Department shall refuse to issue any further excavation permits to such person, corporation, or entity.

(Ord. 80-6, passed 5-11-80)

PROCEDURES FOR HEAVY HAUL OPERATIONS**§ 92.50 PURPOSE.**

The purpose of this subchapter is to provide a legal means of protecting the county's investment in county roads as well as protecting the county residents from unsafe roads. Further, it is the purpose of this subchapter to provide a financial system to repair roads damaged by heavy hauls, and to protect the taxpayers' investment in the system of county roads.

(Ord. 84-26, passed 8-13-84)

§ 92.51 AUTHORITY.

In accordance with A.C. §§ 27-35-101 through 27-35-213; Arkansas Act 300 of 1937; Act 742 of 1977, as amended, and the Arkansas State Constitution, the county permit and bond procedures for heavy haul operations occurring over county roads are established as set forth in this subchapter.

(Ord. 84-26, passed 8-13-84)

§ 92.52 JURISDICTION.

This subchapter shall be established for all county roads, highways, structures and streets within the county, providing these roads, highways, structures and streets do not fall under the jurisdiction of any city within the county or are state and/or federal highways.

(Ord. 84-26, passed 8-13-84)

§ 92.53 MAP DESIGNATING BRIDGE LOAD LIMITS.

(A) The County Judge shall cause to be attached to the county permit a map designating the specific load limits for county bridges.

(B) The technical information referenced in this subchapter concerning road survey criteria and cost criteria shall be filed in the County Road Department and the County Judge's office.

(Ord. 84-26, passed 8-13-84)

§ 92.54 CIVIL LIABILITY FOR DAMAGING ROAD.

In addition to the penalty prescribed for this subchapter, the person convicted of violation of this subchapter or of the administrative rules and regulations thereof, shall be liable in a civil action for all damage occasioned or caused by such violation; such person shall be civilly liable to the county for all damages which he may occasion to the public highway over which such movement is made.

(Ord. 84-26, passed 8-13-84)

§ 92.55 EXTREME CLIMATIC CONDITION.

In cases of extreme climatic conditions concerning water and/or ice, the County Judge may declare an emergency to exist, and may restrict and/or prohibit heavy haul operations on county roads, as specified, and accordingly may restrict weight limitations thereof.

(Ord. 84-26, passed 8-13-84)

§ 92.56 PERMITS AND BONDING REQUIREMENTS.

Any individual or firm desiring to use any county road in any manner that might result in unnecessary damages to the roadway or its drainage facilities or that might result in undue safety hazards to the public, must obtain a special use permit. Activities subject to special use permits includes, but is not limited to, any transporting of construction materials, equipment, or commodity in any equipment, whose gross tonage would be in excess of the load carrying capacity of the roads over which they travel. County roads are not constructed to sustain heavy loads. Any user of a county road who causes unnecessary damage to it shall be liable for damages equal to repair cost necessary to restore them to their original, preexisting condition. The County Judge shall determine, during negotiations with special use permit applicants, adequate bonding arrangements and amounts which will guarantee that roads will be restored to preexisting conditions at the conclusion of special use permit activities.

(Ord. 84-26, passed 8-13-84) Penalty, see § 92.99

§ 92.57 LIABILITY FOR DAMAGE TO COUNTY ROAD OR STRUCTURE.

(A) Any person driving any vehicle, object, or contrivance upon any road or road structure shall be liable for all damage which the road or structure may sustain as a result of any careless, negligent, or illegal operation, driving, or moving of such vehicle, object, or contrivance, or as a result of operation, driving, or moving any vehicle, object or contrivance of excessive weight in excess of the maximum weight established by the county, even though authorized by a special permit issued as provided herein.

(B) Whenever such driver is not the owner of such vehicle, object or contrivance, but is so operating, driving, or moving the same with the express or implied permission of the owner, then the owner and driver shall be jointly and severably liable for any such damage.

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(C) Such damage may be recovered in a civil action by the authorities in control of such road or road structure.

(Ord. 84-26, passed 8-13-84) Penalty, see § 92.99

§ 92.58 PERMIT APPLICATION.

(A) The application for any such permit shall specifically describe the vehicle and load to be operated or moved, the origination and destination of such vehicle and load, the approximate dates in which the operation or movement is to be completed and the particular roads for which permit to operate is requested.

(B) The County Judge's office shall issue permits to authorized individuals or shall withhold such permit at its sole discretion, but its action in withholding a permit must be based upon the condition and state of repair of the road involved, and ability of the road to carry the vehicle or upon danger to the traveling public from the standpoint of safety; to establish seasonal or other time limitations with which the vehicles described may be operated on the highway or roads indicated; to otherwise limit or prescribe conditions of operations of such vehicles when necessary to assure against damage to the road foundation, surfaces or structures; and to require such bond or other security as may be deemed necessary by the agency to compensate for any injury to any roadway or road structure arising out of the operation under such permit.

(C) Each such permit shall be carried in the vehicle to which it refers and shall be open to inspection by any police officer or authorized agent of any authority granting such permit and no person shall violate any of the terms or conditions of such permit.

(Ord. 84-26, passed 8-13-84) Penalty, see § 92.99

§ 92.59 BASIS FOR ESTABLISHING BOND AMOUNT.

(A) A representative of the company and the County Road Department shall visit the roads to be used and survey them for condition and status. The survey shall note any existing failures and problem areas, taking photographs of such.

(B) An estimate will be computed concerning the cost of repairing the entire length, fixing the maximum ceiling.

(C) A bond will be set based on the cost of repair up to the maximum.

(D) A permit fee shall be collected to cover the administrative cost of divisions (A) through (C).

(E) The county shall hold the bond until completion of the permitted time period.

(F) Upon completion of permitted heavy haul activities, the county and a representative of the company shall conduct another on-site visit to determine damages.

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(G) Payment for any damages shall be determined as follows:

(1) The heavy haul operation shall pay for repairs and labor.

(2) The payment option shall be at the discretion of the County Judge considering the scope of existing road activity and accordingly the availability of county road equipment and labor to administer repair.

(Ord. 84-26, passed 8-13-84) Penalty, see § 92.99

§ 92.60 ROAD SURVEY CRITERIA.

In road survey procedures, the county shall follow guidelines in conformance with the Arkansas Highway and Transportation Department Pavement Management Program, Manual for Coding Pavement Conditions, as updated, as shall be prescribed by the County Judge. Accordingly, the county shall utilize field inspection criteria consistent with the Arkansas Highway Department field inspection criteria.

(Ord. 84-26, passed 8-13-84)

§ 92.61 COST CRITERIA TO ESTABLISH ROAD DAMAGE.

The estimate of road damage cost shall be based on the Arkansas Highway Department cost criteria. This criteria primarily sets forth two sets of cost data:

(A) Unit cost for specific work to be performed to be used in small repair work, such potholes, culverts and shoulder repair. Cost criteria to estimate road damage shall be based upon weighted average unit price as established by the Arkansas Highway and Transportation Department, as updated.

(B) Per mile cost used by the State Aid Engineer for reconstruction in major damage repair, as updated.

(Ord. 84-26, passed 8-13-84)

BRIDGES**§ 92.70 GENERALLY.**

After thorough study, it has been determined by the Quorum Court that the upgrading of existing bridges and the construction and erection of replacement and new bridges on county roads shall meet certain minimum bridge design standards as set forth in § 92.71.

(Ord. 92-06, passed 2-11-92)

CLINTON

CITY ORDINANCE

ORDINANCE NO. 2007-16

AN ORDINANCE REGULATING OIL, NATURAL GAS AND MINERAL DRILLING AND EXPLORATION WITHIN THE CITY LIMITS OF THE CITY OF CLINTON, ARKANSAS, PROVIDING FOR THE PERMITTING AND LICENSING THEREOF, PROVIDING FOR PENALTIES FOR THE VIOLATION OF PROVISIONS HEREIN, DECLARING AN EMERGENCY AND FOR OTHER PURPOSES

WHEREAS, The discovery of large oil and natural gas deposits throughout north central Arkansas have prompted the area, including the City of Clinton, to realize the scale of the exploration and drilling that such finds will bring in terms of new business and potential economic growth as well as the scale and problems associated with the infrastructure necessary to conduct such exploration and drilling; and

WHEREAS, The City Council of the City of Clinton desires to promote the economic growth anticipated with such industry but at the same time to protect and enhance the property values of all property within the city through the continued enforcement of the Clinton Zoning ordinances as well as to protect the infrastructure of the City of Clinton from any unnecessary wear and tear; and

WHEREAS, the current zoning ordinances do not effectively deal with potential problems associated with the exploration and drilling of oil, natural gas or mineral rights within the city limits and therefore, additional regulations and requirements are necessary to protect the property uses within the city as well as to promote the growth of such an industry.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF CLINTON, ARKANSAS:

Section 1. TITLE

This ordinance may be cited as the Clinton Oil and Natural Gas Drilling Ordinance.

Section 2. DEFINITIONS

(a). For the purposes of this Ordinance the following definitions shall apply unless the context clearly indicates or requires a different meaning.

ABANDONMENT – The discontinued use of any permitted site under this Ordinance including the plugging of the well and the restoration of the well site.

BUILDING – Any structure used or intended for supporting or sheltering any activity, use or occupancy. The term "Building" includes any portion of the structure.

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CITY – The City of Clinton, Arkansas.

CITY OFFICIAL – The Clinton Zoning Official or other person as designated by the Mayor.

DRILLING – Digging or boring a new well for the purpose of exploring for, developing or producing petroleum, gas or other hydrocarbons, or for the purpose of injecting gas, water or other fluid or substance into the earth.

DRILL SITE – All of the land area used in the drilling or other related operations and/or natural gas or mineral exploration, specifically including, but not limited to, rig locations, portable or permanent structures, steel slush pits, storage areas for pipe or other material, and areas for parking and maneuvering of vehicles, except roadways used for ingress or egress to the drill site.

OPERATION SITE – The area used for development, production, and all operational activities associated with oil or gas after drilling activities are complete.

PERMITTEE – The person or entity to whom is issued a permit or certificate for oil, gas or mineral exploration or drilling, operating and producing of a well under this Ordinance, and his or her or its heirs, legal representatives, successors and assigns.

PERSON – Any natural person, corporation, association, partnership, receiver, trustee, guardian, executor, administrator and a fiduciary or representative of any kind.

PROPERTY OWNER – The named owner of real property as reflected by the most recent Deed recorded in the Circuit Clerk's office.

PROTECTED USE – A residence, commercial building, religious institution, public building, hospital building, school, public park or an approved preliminary or final platted residential subdivision.

RIGHT-OF-WAY – All public rights of way or streets or other public property within the city limits.

STREET – Any street, highway, sidewalk, alley, avenue, recessed parking area, or other public right of way, including the entire right of way.

WELL – Any hole or holes, bore or bores, including multiple horizontal bores, to any sand, horizon, formation, strata or depth for the purpose of producing any oil, gas, liquid hydrocarbon, brine water, sulphur water, mineral or for the use as an inspection well for secondary recovery, or any of them.

(b) All technical or oil and natural gas industry words or phrases used herein and not specifically defined shall have that meaning customarily attributable there by prudent operators in the oil and gas industry.

Section 3. PERMITS REQUIRED

(a) A person wishing to engage in and operate in oil, mineral or natural gas production activities shall apply for and obtain a permit under this Ordinance. It shall be unlawful and an offense for any person acting either for himself or herself or acting as agent, employee, independent contractor, or servant for any person to knowingly drill any well or to

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conduct any mineral exploration or to install any water and/or gas repressurizing or injection facility within the city limits of Clinton without a permit having first been issued by the authority of the City official. A permit shall not be required for seismic surveys unless such surveys will be conducted on city owned property.

- (b) A permit shall not constitute authority for the re-entering and drilling of an abandoned well. A Permittee shall obtain a new permit if he is re-entering and drilling an abandoned well.
- (c) When a permit has been issued for the drilling, re-drilling, deepening, re-entering, activating or converting of a well, such permit shall constitute sufficient authority for drilling, operation, production, gathering of production, maintenance, repair, reworking, testing, plugging and abandonment of the well, and any other activity associated with the mineral exploration at the site of such well. Unless prohibited by this Ordinance such permit shall constitute sufficient authority for the construction and use of all facilities reasonably necessary or convenient in connection therewith, agent and contractors and any provision of any Zoning Ordinance of the City of Clinton to the contrary notwithstanding.
- (d) Any person who intends to re-work a permitted well using a drilling rig, to fracture stimulate, a permitted well after initial completion or to conduct seismic surveys or other exploration activities shall give written notice to the Zoning Official no less than ten (10) days prior to the start of such activities. The notice shall identify where the activities will be conducted and must describe the activities in detail, including whether explosive charges will be used, the duration of the activities and the time the activities will be conducted. If requested by the Zoning Official the person conducting the activities shall post a sign on the property giving the public notice of the activities, including the name, address and twenty four hour phone number of the person conducting activities.
- (e) No additional permit or filing fees shall be required for:
 - (1) Any wells, existing, previously permitted or approved by the City of Clinton on the date this Ordinance is adopted.
 - (2) Any wells on which drilling has commenced on the date this Ordinance is adopted.
- (f) By acceptance of any permit issued pursuant to this Ordinance, the Permittee expressly stipulates and agrees to be bound by and comply with the provisions of this Ordinance. The terms of this Ordinance shall be deemed to be incorporated in any permit issued pursuant to this Ordinance with the same force and effect as if this Ordinance was set forth in the permit.

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Section 4. PERMIT APPLICATION AND FILING FEE; NOTICE OF APPLICATION

- (a) A Special Use Permit shall be required for every site on which there will be an application for a permit to drill a well, reenter and drill to a deeper formation, install a water and/or gas repressurizing or injection facility, or to conduct any mineral exploration shall be in writing on a form prescribed by the City Official, signed by the applicant or some person authorized to act on his behalf, and filed with the City Official together with the onetime fee required for inspections of commercial or industrial site preparations
- (b) Oil and natural gas drilling operations are designated to require a Special Use permit due to the potential harmful effects such use can cause to nearby streets and property and because the requirements needed to eliminate those harmful effects vary from site to site. Thus the Clinton Zoning Official, or other official designated by the Mayor, will review the overall compatibility of the planned use with surrounding property as well as such specific items such as street standards, traffic patterns, compliance with any adopted fire prevention code of the City of Clinton, amount of dust or spillage created by the operation, traffic control and any other specific issue to make sure no harmful effects occur to nearby property or existing public property. However, nothing in this Ordinance shall be interpreted and/or applied so as to effectively prevent or eliminate oil and/ natural gas drilling within the city.
- (c) A separate application for a Special use Permit shall be required for each well and water and/or gas repressurizing or injection facility. The application shall include full information, including the following:
 - (1) The date of the application.
 - (2) A map showing the proposed transportation route and road for equipment, chemicals or waste products used or produced by the oil or gas operation.
 - (3) The proposed well name and the certified 911 address.
 - (4) The name and address of the Permittee and if the Permittee is a corporation or other business entity, the state of incorporation and the agent for service of process and if the Permittee is a partnership, the names and addresses of the general partners.
 - (5) The names and addresses of all property owners within four hundred (400) feet of the property that will contain the proposed drill site and evidence that said property owners have been given written notice by certified mail, return receipt requested of the intent to seek a Special Use Permit for the proposed property.
 - (6) A site plan and survey of the proposed operation showing the

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location of all improvements and all equipment, including the location of the proposed well(s) and other facilities, including, but not limited to, tanks, pipelines, compressors, separators, storage sheds, fencing and any access roads.

- (7) The name and address of the person designated to receive any notices and the name and address of any person with supervisory and/or emergency authority over all oil and gas operations on site and a twenty four (24) hour phone number.
- (8) A description of the public utilities and water source required during drilling and operation.
- (9) A copy of all permits necessary for the drilling of the well that are issued by the State of Arkansas or any of its agencies and the federal government or any of its agencies.
- (10) Evidence of insurance and security requirements under this Ordinance.
- (11) A statement under oath by the applicant that the information submitted with the application is, to the best of his knowledge and belief, true and correct.
- (12) The location of all security fencing around the site (if applicable) and a description of the proposed special use, including the description of any construction of temporary structures to be used on the property.

Section 5. PERMITS; ISSUANCE OR REFUSAL TO ISSUE

- (a) The City Official within ten (10) business days after the application for a permit to drill a well or a permit to install water and/or gas repressurizing or injection facilities or conduct any mineral exploration shall determine whether or not the application complies in all respects with the provisions of this Ordinance, then the City Official shall issue a permit for the drilling of the well or the installation of the facilities applied for.
- (b) If the Zoning Official determines that a Permit should be denied for reasons other than lack of a required distance setback as set forth in this Ordinance, the Zoning Official shall notify the Applicant in writing of such denial stating the reasons for the denial. Within thirty (30) days of the date of the written decision of the Zoning Official to deny the permit, the Applicant may: 1) cure those conditions that caused the denial and resubmit the application to the Zoning Official for approval and issuance of the permit without any additional fees; or 2) file an appeal to the City Council for inclusion on the next regularly scheduled City Council meeting.
- (c) If, however, the City Official determines that all of the provisions of this Ordinance have been complied with by the applicant but that the proposed

drill site is not the required distance from occupied residences, commercial structures or public buildings as required above, or that the drill site is crossed by a public street or road, then the City Official shall issue the permit if the applicant provides written approval from all property owners with structures that will be nearer than the required set back distance described in this Ordinance.

- (d) If any issue is appealed to the City Council the Council shall review the application, the issue in question and any other related material and information. The City Council shall consider the following in deciding whether or not to issue a permit or grant a waiver of a condition required in this Ordinance:
 - (1) Whether the requested waiver or permit is reasonable under the circumstances and conditions prevailing in the area considering the particular location and the character of the improvements located there.
 - (2) Whether the drilling of such wells will interfere with the orderly growth and development of the City.
 - (3) Whether the operations proposed are consistent with the health, safety and welfare of the public when and if conducted in accordance with the permit conditions to be imposed.
 - (4) Whether there is access for City fire personnel and firefighting equipment and or police personnel as may be needed.
- (e) If, following the public hearing, the City Council finds that exceptional circumstances exist, it may grant a requested waiver or permit application upon such terms and conditions as it determines to be necessary to protect the public health and safety.
- (f) The decision of the Council shall be final and in making its decision, it shall, in addition to other considerations, have the power and authority to refuse any permit to drill any well at any particular location within the city, when by reason of such particular location and the character and nature of the improvements already erected on or adjacent to the particular location in question for residences, commercial activities, schools, hospitals, parks, civic purposes, public health or safety reasons or any of them where the drilling of such wells at such particular location would be injurious to the health or safety of the inhabitants in the immediate area of the city or to a substantial number of such inhabitants or would not promote orderly growth and development of the city.
- (g) Each permit shall:
 - (1) By reference have incorporated therein all of the provisions of this Ordinance with the same force and effect as if they were copied

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verbatim in the permit.

- (2) Specify the surface location of the proposed drill site.
- (3) Contain and specify such other terms and provisions as may be necessary to accomplish the purposes of this Ordinance.
- (4) Contain and specify that no actual operations shall be commenced until the Permittee has complied with the bond and insurance provisions of this Ordinance.
- (5) Require that the Permittee promptly restore to its former condition any public property damaged by the oil or gas operation.

Section 6. WELL SETBACKS

- (a) It shall be unlawful to drill any well, the center of which, at the surface of the ground, is located:
 - (1) Within two hundred (200) feet of any Protected Use whether currently existing or for which a building permit has been issued prior to the date of the application for a permit under this Ordinance.
- (b) The distances referred to in Section (a) above shall be calculated from the well bore, in a straight line, without regard to intervening structures or objects to the closest exterior point of any object or boundary listed in Section (a).

Section 7. BOND AND INSURANCE

- (a) A bond or irrevocable letter of credit shall be filed with the City Official in the amount of one hundred thousand dollars (\$100,000.00) along with the permit application for the initial well or facility applied for by an operator. An additional bond or letter of credit shall be required for every application for a tenth operating additional well or facility. To be clear the bond or irrevocable letter of credit shall apply to up to nine operating wells or facilities of each and every kind. The bond shall be executed by the operator as principal and a corporate surety authorized by the Arkansas Insurance Department to conduct business within the State of Arkansas, as surety and with the bond in favor of the City of Clinton conditioned that the Permittee will comply with all of the terms, conditions, and requirements of this Ordinance and any permit issued hereunder, and further conditioned that the Permittee will repair any damages to city streets, as determined by the Street Department, caused by the equipment and vehicles used by the Permittee in going to and from the drill site with such repairs to be in compliance with specifications therefore prepared and provided to the Permittee by the Street Department.

Section 8. PERMIT TERMINATION

- (a) In the event of a failure of a Permittee to comply with any provision of

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this chapter, the City Official shall issue in writing to the Permittee a notice of the nature of the noncompliance and providing a reasonable time, not to exceed seven (7) days in which to regain compliance. After the lapse of such time, if compliance has not been made, the City Official may suspend the permit for a period of time or cancel the permit as he deems proper.

Section 9. AMENDED PERMITS

- (a) A Permittee may submit an application to the Zoning Official to amend an existing permit to commence drilling from a new drill site that is not shown on the permit, to relocate a drill site or operation site that is shown on the existing permit, or to otherwise amend the existing permit.
- (b) Applications for Amended Permits shall be in writing, signed by the Permittee, and shall include the following:
 - a. A description of the proposed amendments;
 - b. Changes to the information in the original application;
 - c. Such additional information as may be reasonably required by the Zoning Official to demonstrate compliance with the existing permit or to prevent imminent destruction of property or injury to persons.
- (c) If the activities proposed by the amendment are not materially different from the activities covered by the existing permit and if the proposed activities are in conformance with the applicable permit then the Zoning Official shall approve the amendment within ten (10) business days of it being filed.
- (d) If the activities proposed by the amendment are materially different from the activities covered by the existing permit and if the proposed activities are in conformance with the applicable permit then the Zoning Official shall approve the amendment within ten (10) days of it being filed. If, however, the activities proposed by the amendment are materially different from the activities covered by the existing permit and, in the opinion of the Zoning Official, might create a risk of imminent destruction of property or injury to persons that was not associated with the activities covered by the existing permit or that was otherwise not taken into consideration by the existing permit, the Zoning Official may require the amendment be processed as a new application but without payment of any additional fees that may have been required.
- (e) The failure of the Zoning Official to review and issue an amended permit within the time limits specified herein shall not cause the application for an amended permit to be deemed approved.
- (f) The decision of the Zoning Official to deny an amendment to a permit shall be forwarded to the Permittee in writing within ten (10) days after

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the decision, including an explanation of the basis for denial. The Permittee may appeal such decision to the City Council.

Section 10. USE OF STREETS AND ALLEYS

- (a) No Permittee shall make any excavations for any purpose or construct any lines or pipes on, under or through the streets or alleys or other lands of the City of Clinton without an express easement agreement or right of way license from the City, at a price to be agreed upon, and then only in strict compliance with this Ordinance or any other Ordinance of the City and the repairs to any such excavation to be made according to specifications set by the Clinton Street Department.
- (b) The Permittee shall, at Permittee's expense, repair any damages to roads, streets, highways or other city property caused by the use of heavy vehicles and equipment for any activity associated with the preparation, drilling, production and operation of any well permitted under this Ordinance.

Section 11. STREETS AND ALLEYS; OBSTRUCTIONS

No well shall be drilled and no permit shall be issued for any well to be drilled at any location which is within any of the streets or alleys of the City and/or streets or alleys shown on the master plan of the City, and no street or alley shall be blocked or encumbered or closed in any drilling or production operation or for any mineral or natural gas exploration except by written permission of the Police Chief, and then only temporarily.

Section 12. PRIVATE ROADS AND DRILL SITES

- (a) Prior to the commencement of any drilling operations, all private roads used for access to the drill site and the operation site must be at least ten (10) feet wide, have an overhead clearance of fourteen (14) feet and be surfaced and maintained so as to prevent dust and mud and to allow access for firefighting equipment or other emergency vehicles.
- (b) The requirements of Section (a) above may be altered at the discretion of the Zoning Official in consultation with the Fire Chief after consideration of all circumstances including, but not limited to, the following: 1) distances from streets and highways; 2) distances from nearby property owners whose surface rights are not leased by this operation; 3) the purposes for which the property of such owners is or may be used; 4) topographical features; 5) soil conditions; 6) exposure to wind.

Section 13. OPERATIONS, PRACTICES AND STANDARDS

- (a) Drilling operations must be conducted in such a manner that percolating or ground water will not be adversely affected.
- (b) All oil drilling and production operations shall be conducted in such a manner as to minimize, so far as practicable, dust, noise, vibration or

noxious odors, and shall be in accordance with the best accepted practices incident to drilling for the production of oil, gas and other hydrocarbon substances.

- (c) There shall not be a Central Point Compressor Station (from multiple wells) located in the City of Clinton without the approval of such a station by the City Council.
- (d) Except in cases of emergency, no materials, equipment, tools or pipe used for drilling or production operations shall be delivered to or removed from the site except between the hours of 7:00 a.m. to 8:00 p.m. on any day. On drillstem tests, only one trip will be allowed at night between 8:00 p.m. and 7:00 a.m. unless an emergency exists.
- (e) Firefighting apparatus and supplies as approved by the Fire Chief shall be maintained on the drilling site at all times during drilling and production operations.
- (f) All production equipment used shall be so constructed and operated so that noise, vibration, dust, odor or other harmful or annoying substances or effect will be minimized by the operations carried on at any drill site or from anything incident thereto, to the injury or annoyance of persons living in the vicinity; nor shall the site or structures thereon be permitted to become dilapidated, unsightly or unsafe. Proven technological improvements in methods of production shall be adopted as they, from time to time, become available if capable of reducing factors of nuisance or annoyance.
- (g) The well site, drill site, tank site, tank battery site, pump station site or compressor site shall not be used for the storage of pipe, equipment or material except during the drilling or servicing of the well and the production facilities allowed on the site.
- (h) No refinery, dehydrating or absorption plant of any kind shall be constructed, established or maintained on the premises at any time. This shall not be deemed to exclude a simple gas separation process.
- (i) All electric lines to production facilities shall be located in a manner compatible to those already installed in the surrounding area or subdivision.
- (j) No lights located on any drill or operation site shall be directed in such a manner that they shine directly on public roads, adjacent property or property in the general vicinity of the drill or operation site. To the extent practicable, and taking into account safety considerations, site lighting shall be directed downward and internally so as to avoid glare on public roads and adjacent dwellings and buildings within four hundred (400) feet.

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- (k) Exhaust from any internal combustion engine, stationary or mounted on wheels, used in connection with the drilling of any well or for use on any production equipment shall not be discharged into the open air unless it is equipped with an exhaust muffler, or mufflers or an exhaust muffler box constructed of non combustible materials sufficient to suppress noise and prevent the escape of noxious gases, fumes or ignited carbon or soot.
- (l) Signs
 - (1) A sign shall be immediately and prominently displayed at the gate of the temporary and permanent fencing erected pursuant to this Ordinance. Such sign shall be of a durable material, maintained in a good condition and have a surface area of not less than two (2) square feet nor more than five (5) square feet and shall be lettered with the following:
 - (A) Well name and number
 - (B) Name of Permittee and the telephone numbers of the person responsible for the well who may be contacted in case of an emergency and 911 address of the well
 - (2) Permanent weatherproof signs reading "DANGER NO SMOKING ALLOWED" shall be posted immediately upon completion of the well site fencing at the entrance of each well site.
- (m) Each well must have a shutoff valve to terminate the well's production. The Fire Department shall have access to the well site to provide fire protection in an emergency.
- (n) The Permittee shall provide the Zoning official with forty-eight (48) hours advance notice of the start of drilling and/or fracturing operations.

Section 14. CLEANLINESS AND SANITATION

- (a) The premises shall be kept in a clean and sanitary condition. The Permittee shall prevent any mud, waste water, oil, slush or other waste matter from flowing into the alleys, streets, lots or other property within the city limits.
- (b) All permittee premises shall be kept clear of high grass, weeds and combustible trash within a radius of one hundred (100) feet around any oil tank, tanks, or producing wells. All waste shall be disposed of in such a manner as to comply with the air and water pollution control regulations of Arkansas, the United States and the City of Clinton.

Section 15. FENCES REQUIRED; LOCKING GATES; WAIVER

- (a) Fences shall not be required on drill sites during initial drilling, completion or re-working operations as long as 24 hour on-site

supervision is provided. A secured entrance gate shall be required. All gates are to be kept locked when the Permittee or its employees are not within the enclosure.

- (b) Within thirty (30) days after production has been established, all operation sites shall be completely enclosed by a permanent chain link fence, masonry wall or other fencing material.
- (c) All chain link fences or masonry walls shall be equipped with at least one (1) gate wide enough to allow access for fire or emergency vehicles. The gate shall meet the following specifications:
 - (1) The gates shall be of chain link construction that meets the applicable specifications, or of other approved material that, for safety reasons, shall be at least as secure as a chain link fence;
 - (2) The gates shall be provided with a combination catch and locking device for a padlock, or an electric lock, and shall be kept locked except when being used for access to the site;
 - (3) The Permittee shall provide the Fire Chief with a means of access the well site in the event of an emergency.
- (d) The Permittee shall maintain all walls, fencing and gates in good condition at all times. Gates must be kept securely locked when the Permittee or its employees are not within the enclosure.
- (e) The requirements for a fence or wall may be modified or waived by the City Council after consideration of all of the circumstances including, but not limited to, the nature of the surrounding land uses and the potential impact of the well site on such surrounding land uses if the fence or wall is not required.

Section 16. FIRE PREVENTION

- (a) Any Permittee engaged in the drilling or operation of an oil and/or natural gas well or the operation of any facility used in conjunction with the production of oil and/or natural gas within the city limits shall take reasonable precautions to prevent any gas from escaping into the air, and shall not burn or flare any gas from a torch or any similar means within the city limits provided, however, that gas may be burned for a limited time when necessary to complete any oil and/or natural gas, so long as same does not constitute a fire hazard to the property of others within the vicinity of such oil and/or natural gas well.
- (b) Water must be available at the site (within one thousand five hundred (1500) feet) by either fire hydrant or hoses that connect to fire department connections. This requirement may be waived by the City Council upon application and a showing that such requirement is not essential for fire suppression or extinguishment at the site.

- (c) If blasting is required then all such blasting shall be done by federally licensed technicians during daylight hours and in the presence of the fire department.

Section 17. FLOW LINES AND GATHERING LINES

- (a) Each Permittee shall place an identifying sign at each point where a flow line or gas gathering line or line carrying H₂S gas crosses any public street, road or alley and it shall be unlawful and an offense for any person to remove, destroy or deface any such sign.
- (b) The location of any such lines, if not specified in the permit, must be specifically approved by the Director of the Street Department.
- (c) All pipelines within the city limits other than those belonging to the city for its utility services and other than those belonging to natural gas, electric telephone and other utility providers that are designed or utilized to transport oil, natural gas or water in conjunction with the production and transportation of oil and/or gas or for repressurizing operations shall be installed with a minimum of twenty-four (24) inches of cover or backfill unless a lesser cover or specify a greater cover or backfill is authorized by the Director of the Street Department
- (d) The requirements for construction in public right of ways must conform to any and all applicable Ordinances of the City of Clinton.
- (e) The digging up, breaking, excavating, tunnelling, undermining, breaking up or damaging of any street as herein defined, or leaving upon any street any earth or other material or obstruction, shall not be permitted unless such persons shall first have obtained written permission from the Director of the Street Department, provided however, emergency repairs may be made without such permission when in the good faith opinion of the Permittee the delay required to obtain the written permission would involve a hazard to persons or property.

Section 18 REPORTS

- (a) The Permittee shall notify the Zoning Official of any changes to the name, address and phone number of the Permittee or the person designated to receive notices from the City within five (5) business days after the change occurs:
- (b) The Permittee shall notify the Zoning Official of any change to the name, address, and twenty-four hour phone number of the person(s) with supervisory authority over drilling or operations activities within one (1) business day.

Section 19. VIOLATIONS

- (a) It shall be unlawful and an offense for any person to violate or fail to comply with any provision herein.

Section 20. PENALTY

Any person who violates any provision of this Ordinance or any provision of a permit issued hereunder shall be guilty of a violation and shall, upon conviction thereof, be fined in any sum not less than two hundred dollars (\$200.00) and not more than five hundred dollars (\$500.00). The violation of each separate provision of this Ordinance and of any permit issued hereunder shall be considered a separate offense, and each day's violation of each separate provision thereof shall be considered a separate offense.

Section 21. MISCELLANEOUS PROVISIONS

- (a) This Ordinance and all of its provisions and requirements shall be cumulative to the provisions and requirements of all other ordinances of the City of Clinton and shall not repeal any other Ordinance or provision.
- (b) It is hereby declared by the City Council of the City of Clinton that the phrases, clauses, sentences, paragraphs, sub-sections and sections of this Ordinance are severable, and if any phrase, clause, sentence, paragraph, sub-section or section of this Ordinance should be declared unconstitutional by the valid judgment or decree of any court of competent jurisdiction, such unconstitutionality shall not affect the remaining phrases, clauses, sentences, paragraphs, sub-sections and sections of this Ordinance.

Section 22. EMERGENCY CLAUSE

- (a) The immediate potential of the expanding oil, gas and mineral drilling and exploration within the city limits conflicts with the promotion of the orderly growth of the City of Clinton and may interfere with the health and safety of its citizens. Therefore, an emergency is hereby declared to exist and this Ordinance shall be in full force and effect from and after its passage and publication as required by law.

PASSED: October 11, 2007


Roger Rorie, Mayor

ATTEST:


Merl Eoff, Recorder/Treasurer/Clerk, CMC

APPROVED AS TO LEGAL FORM:

Brad A. Cazort, City Attorney

FORT SMITH

CITY ORDINANCE

ARTICLE I. IN GENERAL**Sec. 17-1. Odorization of natural gas being transported by pipeline; required.**

(a) The following terms, when used in this section, shall have the definitions set forth herein:

(1) *Odorized* shall mean that status of natural gas wherein there has been mixed with the natural gas such chemical substances so as to cause the gas to be readily detectable by a person of normal sense of smell when the odorized gas is at a concentration in air of one-fifth of the lower explosive limit.

(2) *Operator* shall mean that person or entity, normally having an ownership interest in a gas production unit or gas transmission pipeline, who is charged with the duties of producing natural gas or transporting natural gas in a pipeline subject to the provisions of this section.

(b) It is hereby determined to be unlawful for any public service utility, natural gas pipeline operator, person or other entity to cause or permit natural gas to be transported in any pipeline for the purpose of gathering, transmitting or distributing such natural gas within the city, unless the gas so being gathered, transmitted or distributed has been odorized. It is further determined to be unlawful to submit a false certification pursuant to subsection (c) of this section. A violation of this subsection shall be deemed to be a misdemeanor and shall be punishable as provided in section 1-9 of this Code.

(c) As a condition to continuation of franchise and permit rights to operate within the city, the city administrator shall, at such periodic intervals as determined reasonable by the city administrator, require certification to be supplied by every public service utility, operator of a gas production unit located within the city, operator of every natural gas pipeline used for the purpose of gathering, transmitting or distributing natural gas located within the city, and every holder of a permit of any nature granted by the city for the use of public rights-of-way for pipelines for the gathering, transmitting or distributing of natural gas to submit a certification that all gas which any such entity causes to be placed in a pipeline, or which such entity actually gathers, transmits or distributes by pipeline in the city has been odorized to the level required by this section. The certification shall be made:

(1) By the operator of a natural gas pipeline determined to be subject to the jurisdiction of the state public service commission or the state transportation commission;

(2) By a governmental agency having jurisdictional control over the pipeline in question;
or

(3) By a testing laboratory which is a person or entity not in the full-time employ of the entity owning or operating the pipeline in which is located the gas being tested.

(Code 1976, § 23-11)

Franchise fee on gas company, §§ 13-147, 13-148; franchise requirement, § 22-1.

Secs. 17-2--17-25. Reserved.

ARTICLE II. SPECIAL USE PERMIT FOR WELLS**Sec. 17-26. Purpose; required.**

(a) This article is hereby adopted for the purpose of prescribing regulations governing conditions for the drilling of oil and gas wells.

(b) A special use permit is established to set standards used in approving oil and gas well operations and to establish procedures for processing the special use permits. Certain uses are defined as special uses because of the potential harmful effects the use can cause to nearby property and public streets, and because the requirements needed to eliminate those harmful effects vary from site to site. Thus, the city administrator, or his designated agent, in considering each special use request, will review the overall compatibility of the planned use with surrounding property as well as such specific items as streets standards, traffic patterns, compliance with the adopted fire prevention code of the city, amount of dust or spillage created by the operation, traffic control, etc., to make sure no harmful effects occur to nearby property or existing public property. However, nothing herein shall be interpreted and/or applied so as to effectively prevent or eliminate oil and/or gas drilling within the city.

(Code 1976, § 19.5-1)

Sec. 17-27. Application for permit--Submission; fee; contents of required survey and site plan.

(a) The application for a special use permit shall be made to the office of the city administrator, or his designated agent, by the owner or agent of the oil and gas well operations. The application shall include four (4) copies of the required site plan. The fee for processing a special use application is as established by the board of directors.

(b) The required survey and site plan shall be submitted on paper no larger than twenty-four (24) inches by thirty-six (36) inches and no smaller than twelve (12) inches by twenty-four (24) inches. The site plan shall be drawn to a scale of no less than one (1) inch equals twenty (20) feet, unless the city administrator, or his designated agent, approves a different scale.

(c) The survey and site plan shall, at a minimum, contain the following information:

- (1) The land to be included in the proposed use, along with a written legal description of the land.
- (2) The location and dimensions of all public rights-of-way on or abutting the planned area.
- (3) Existing and proposed finished grade on the site, with particular attention to drainage.
- (4) The location of all points of vehicular entrance and exit to the site. The location and dimensions of all existing easements and public improvements within the site.
- (5) The location of permanent or temporary structures or proposed structures to be located on the site.
- (6) The location of any reserve pit.
- (7) The location of closest available water to the site.

- (8) The exact location of the proposed drilling rig.
- (9) The location of an all-weather roadway (shale, SB-2 et seq.) capable of supporting fire apparatus on the site.
- (10) The location of all security fencing around the site (if applicable).

(Code 1976, § 19.5-2)

Sec. 17-28. Same--Contents; due date.

- (a) The complete application, including all supportive information, must be received by the city administrator, or his designated agent, at least seven (7) working days before the date that work is to commence.
- (b) The special use application shall contain the following information:
 - (1) A survey and site plan of the property prepared by a certified land surveyor or registered civil engineer.
 - (2) The street address or addresses of the entire property.
 - (3) The present zoning classification of the property, using such words as "residential," "industrial," and "commercial," along with the numeral and letters in lieu of letters such as "R-2-MF."
 - (4) A description of the proposed special use, including the description of any construction of temporary structures to be erected on the property.
 - (5) The projected route of truck traffic to and from the operation site, including the projected number of trips. The number of trips and route may be regulated by the city administrator, or his designated agent.
 - (6) The name of subcontractor responsible for site preparation (a separate special use permit is required).
 - (7) Evidence that the applicant has given written notice by certified mail, return receipt requested, to the owners of all property situated within four hundred (400) feet of the well bore and all contiguous land owners to the drill site, setting forth the location of the well site and the anticipated date of commencement of operations on the well site.

(Code 1976, § 19.5-3)

Sec. 17-29. Conditions and restrictions upon permit.

The public works department may impose reasonable conditions and restrictions upon the application under consideration, with the intent of minimizing the impact of the special use permit operation upon nearby property or public property. The limitations placed upon a special use permit may include, but are not limited to:

- (1) The method for cleaning materials used in the operations that are dropped, shifted, leaked or otherwise escape onto a roadway from the vehicle transporting such materials, and such material shall be removed as necessary each day.
- (2) The method of controlling traffic (flagman or traffic-control devices may be required at the contractor's expense).
- (3) Weight limits may be placed on all haulers to minimize damage to public facilities (reasonable weight limits to be determined by the city administrator, or designated

agent).

(4) The number of hours that site preparation work may be conducted on the premises may be regulated by the public works department to minimize harmful effects on nearby property owners.

However, nothing herein shall prevent the owner, its agent or any independent contractor from drilling, completing and operating the proposed well.

(Code 1976, § 19.5-4)

Sec. 17-30. Compliance with fire code, related safety precautions.

The applicant must be in compliance with the fire prevention code of the city and must also meet the following conditions:

- (1) The reserve pit shall be located a minimum of one hundred (100) feet from any structure.
- (2) All standing brush or trees shall be cleared for a radius of fifty (50) feet from a reserve pit. Such steps shall be taken as are necessary to preserve vegetation and natural areas on the remainder of the well site.
- (3) The reserve pit shall be diked or otherwise constructed to protect public property and the environment.
- (4) Water must be available at the site (within one thousand five hundred (1,500) feet), by either fire hydrant or hoses which will fit fire department connections.
- (5) The drilling platform shall be a minimum twenty-five (25) feet from any roadway.
- (6) An all-weather roadway capable of supporting fire apparatus shall be available at the site.
- (7) When surface blasting is required, the following precautions shall be taken:
 - a. Blasting shall be conducted by federally licensed technicians.
 - b. Authorities having jurisdiction shall monitor blasting (fire department).
 - c. Blasting shall be limited to the daylight hours, between the hours of 8:00 a.m. to 5:00 p.m.
- (8) The drilling site shall have security fencing around the entire site or personnel on the site twenty-four (24) hours during the operations, to prohibit unauthorized access.
- (9) A list of trained personnel to be called in case of a blow-out shall be furnished to the fire department.
- (10) Temporary repairs to the city streets may be required by the city administrator, or his designated agent.
- (11) The drilling operations on the well site shall not create any unreasonably loud, disturbing or unnecessary noise in accordance with prudent drilling operations.
- (12) All necessary steps shall be taken in the operation of the well site to protect the health, safety and welfare of all persons and property.

(Code 1976, § 19.5-5)

Sec. 17-31. Damages to public property; binding agreement of responsibility; bond.

All reasonable conditions required for a special use must be met before any operations may begin. The owner or applicant filing for a special use permit shall sign a binding agreement with the city that all damages to public property directly related to this operation, for which the owner or applicant is legally responsible, shall be repaired at the expense of the applicant. The city administrator or his designated agent shall determine the condition of public facilities (including photos and documentation) prior to the initiation of the operation. A bond, for a reasonable amount, shall be required for the amount determined by the city administrator, or his designated agent. Immediately after completion of the drilling of the well site, repairs will commence on the damage that has been done to the public property. Failure of the applicant to correctly repair all damaged public facilities, for which it has been determined responsible, may result in the revocation of all existing or future permits for such company, and the qualified and licensed attorneys at law contracted to provide legal services pursuant to sections 2-111--2-113 of this Code is authorized to take what means are necessary to ensure that the public facilities are repaired.

(Code 1976, § 19.5-6; Ord. No. 3-02, § 5, 1-22-02)

Sec. 17-32. Time limit on commencement of drilling operations.

The drilling operation must begin within six (6) months of the authorization, unless a special time limit less than six (6) months has been imposed by the city administrator, or his designated agent.

(Code 1976, § 19.5-7)

Sec. 17-33. Appeal of city administrator's decision to board of directors; time limit; fee.

The decision of the city administrator, or his designated agent, concerning a special use, may be appealed to the board of directors. Any interested party may file an appeal, provided that the appeal is filed with the city clerk by 5:00 p.m. on the tenth (10) calendar day following the date of the decision by the city administrator, or his designated agent. A fee in the amount established by the board of directors is required for filing an appeal.

(Code 1976, § 19.5-8)