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Testimony to Kansas Senate Judiciary Committee

Senate Bill 55
An Act concerning civil actions and civil procedure; relating to partitions; enacting the uniform partition of heirs property act

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February 5, 2019

I am Joseph Schremmer appearing on behalf of the Kansas Independent Oil and Gas Association (KIOGA). My aim is to inform the Committee, from my perspective as a practicing oil and gas lawyer and an adjunct oil and gas law professor in Kansas, of certain foreseeable consequences for oil and gas development in Kansas of adopting the Uniform Partition of Heirs Property Act (the Act).

The oil, gas, and other minerals under many tracts of land in Kansas are severed from the surface interest. Severed mineral interests are often owned by numerous and far-flung cotenants, often with differing views of how and whether to develop or lease the property for oil and gas exploration and production. As Professor David Pierce of Washburn University School of Law has noted, “Partition has been used in Kansas to consolidate diverse mineral interests for development, protect land from drainage, protect term mineral interest owners, and to facilitate unitization and secondary recovery.”[1] Indeed, sometimes a partition action is the only tool available to develop a property. Importantly, where the mineral interest in property is severed, a partition of the minerals does not necessarily affect the interest in the surface of the property, and vice versa.

Unfortunately, as currently drafted the Act would limit the availability of partition to mineral owners and oil and gas developers for these purposes. The Act applies to “heirs property” which is defined to be “real property held in tenancy in common.” Mineral interests are considered under Kansas law to be interests in real property, just like interests in the surface of property.[2]

Consequently, the Act would apply to severed mineral interests owned in tenancy in common that satisfy the remaining elements of the "heirs property" definition. From my own experience and that of my colleagues, there is reason to believe that many fractured mineral interests in Kansas would meet the definition of "heirs property."

Whether or not the drafters of the Act intended it to apply to partitions of mineral interests, the Act's provisions would significantly complicate existing mineral partition procedure. In many cases, the Act may completely remove partition from the oil, gas, and mineral owners' toolbox. The Committee should not pass SB 55 in its current form, without including an exception for interests in oil, gas, and minerals, for three reasons: (1) the abuses that the Act is intended to prevent do not appear to be prevalent in partitions of oil, gas, and mineral interests; (2) the Act's provisions do not work for partitioning oil, gas, and mineral interests; and (3) the Act's procedural changes would increase the time and expense of pursuing partition. Even if the Committee decides the Act's changes to existing Kansas law are justified, SB 55 should be amended to exclude partitions of oil, gas, and mineral interests from the Act's scope to avoid depriving mineral owners of the tool of partition in many cases.

Reason 1: There Is No Need to Protect Oil, Gas, and Mineral Interest Owners from Partition Abuses. The Uniform Law Commission's purpose in promulgating the Act was to reform partition law to protect heirs of property, particularly in low-income and minority communities, from losing their interests in a forced partition sale for a below-market price. This problem which may be very serious in certain places, does not appear to be a significant concern in partitions of oil, gas, and mineral interests in Kansas.

First of all, oil, gas, and mineral interests generally do not have sentimental value to their owners like other forms of real property that also tend to pass to subsequent family generations through intestate succession. Secondly, oil, gas, and mineral interests are easier to value by buyers without physical inspection and are typically sold in an auction setting. The risk that a mineral cotenant may be divested of her interest in oil, gas, and mineral property through a partition sale without receiving fair value is relatively low. Kansas partition law further protects owners by requiring that the property sell for at least 2/3 of the property's appraised value.

Reason 2: The Provisions of the Act Would Not Work in Partitions of Most Oil, Gas, and Mineral Interests. To see why the Act does not work for oil, gas, and mineral partitions, it will help to understand how a typical partition usually occurs. Partitions of oil, gas, and mineral interests are commonly filed when one cotenant wishes to lease the property for oil and gas development but is unable to identify, locate, or obtain consent from all other cotenants. This occurs both in the context of mineral interests (i.e., the severed oil, gas, and other minerals in and under land) and of interests in oil and gas leases.

When a cotenant commences a partition action, notice is served to all other cotenants and the court determines their ownership. Oil, gas, and mineral interests are almost always partitioned by sale as opposed to in kind. It is impossible to know with certainty where oil and gas are precisely

located within a tract of land, which means it could be unfair to partition in kind. The court will appoint appraisers to determine the value of the property and then order the property sold. All cotenants are given the opportunity to elect to buy the entire property directly; if none elect or more than one elect, the property goes to an auction sale.

The property can be, and often is, sold by a local auction house that specializes in selling oil and gas properties. The auction is attended by buyers in the business of oil and gas investment and development; they are usually sophisticated in valuing oil and gas interests. In this way, partition sales of oil, gas, and mineral interests are not drastically different from sales of such interests in the ordinary course of business.

There are number of provisions in the Act that simply do not work for partitions of oil, gas, and mineral interests. The Act would require the court in each partition case to analyze a series of factors to determine whether partition by sale would be appropriate, even though partition in kind is almost never appropriate for oil, gas, and mineral interests and several of the factors are inapplicable, such as the sentimental value of the property. The Act also requires that, when partition by sale is ordered, the sale be conducted as an open-market sale by a licensed real estate agent, unless cause can be shown to sell it another way, even though oil and gas interests are not usually sold in an open-market setting.

Most importantly, the Act gives the non-petitioning cotenants the right to buy out the petitioning cotenant's interest for the appraised value. The petitioning cotenant is not, however, permitted to buy out the other cotenants. This provision defeats the purpose of most oil, gas, and mineral partitions, which is to consolidate ownership in a single buyer to enable development.

Reason 3: The Act Would Make Many Mineral Partition Actions Needlessly Slow and Expensive. Legislation that complicates existing procedure should offer a benefit to Kansas property owners that clearly offsets the additional expense in time and effort the changes will impose. It is clear to me, for the reasons stated above, that the Act does not offer a benefit of any kind to oil, gas, and mineral owners in Kansas. Yet the Act would clearly complicate existing partition procedure.

Section 3 of the Act would require the court in a partition action to "determine whether the property is heirs property." It does not clarify how the court is to do this, although it would seem to require an evidentiary hearing. A property's qualification as "heirs property" may also be subject to questions of law, such as when a cotenant's legal status as a "relative" is an issue. Determining whether a cotenant is a "relative" could require the court to make parentage or heirship determinations under other statutory schemes and procedures. The Section 3 hearing alone would add a layer of legal complexity, time, and expense to partition actions.

The Act would also introduce new procedures for giving cotenants notice (beyond that which is already required by statute and constitutional provisions) and for selling property when partition by sale is ordered. The special notice and sale provisions would entail more time and legal fees to pursue a partition. These procedural safeguards may make sense in the context of partitioning surface interests in land but they do not in the context of partitioning oil, gas, and mineral interests.

In summary, the Act's purpose does not require that it apply to interests in oil, gas, and other minerals or oil and gas leases. The Act is not designed to apply to partitions of these interests. As a result, its provisions would be cumbersome, time consuming, and expensive, and yet would provide no offsetting benefit to oil, gas, and mineral interest owners in Kansas.

Respectfully, the Committee should not pass SB 55 as it is currently written. Rather, it should consider doing so only if the bill were amended to exclude interests in oil, gas, and other minerals and oil and gas leases from its scope.

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[1] David E. Pierce, *Kansas Oil and Gas Handbook* § 8.13, 8-30 to 8-31 (Kansas Bar Association 1986).

[1] *Rucker v. Delay*, 295 Kan. 826, 830, 289 P.3d 1166 (Kan. 2012).