

<sup>2</sup> *In re Oquest Cherokee, LLC*, 07-CONS-115-CSHO, Order on Show Cause (July 16, 2008).

“physical operation and control of a well” and “lease upon which such well is located,” so that an operator would know the circumstances under which it may become responsible for an abandoned well. Importantly, the Commission’s interpretation of KSA 55-179(b) in *New Donna Lee* and *Quest* comported with (1) the plain language of the statute, as the Kansas Court of Appeals tacitly found in *Denman*,<sup>3</sup> and (2) the obvious legislative intent behind the statute—to hold the party who abandoned the well accountable for its plugging. The course of action recommended by Commission Staff exceeds the boundaries established by legislature in KSA 55-179(b), and would create greater uncertainty concerning abandoned well responsibility—rather than the certainty desired by all parties. The outcome of this course of action would be to deter oil and gas development in Kansas, in contradiction of the Commission’s own mandate to prevent the waste of the State’s oil and gas resources. If anything is to be done in this matter, it should be to formally and finally adopt, through regulation, the Commission’s orders in *New Donna Lee* and *Quest*.

***Denman did not upset New Donna Lee and Quest***

The Kansas Court of Appeals opinion in *Denman* did not overrule, undermine or even attempt to address the legality of the Commission’s *New Donna Lee* and *Quest* orders. The only issue on appeal in *Denman* was whether more than one party could be held responsible for plugging an abandoned well under KSA 55-179(b).<sup>4</sup> The issue the Commission is investigating in this docket is who is responsible for an abandoned well under KSA 55-179(b), not how many people can be found liable under KSA 55-179(b). Intervenor contend KSA 55-179(b) plainly prescribes

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<sup>3</sup> *John M. Denman Oil Co., Inc. v. State Corp. Comm’n*, 51 Kan.Ap.2d 98, 105 (2015).

<sup>4</sup> *Id.*, at 98-99, 100. (“Denman Oil contends that only one party may be held legally responsible for the wells under K.S.A. 55-179 and that since another party took over the mineral lease from Denman Oil, it is no longer responsible.”); *Id.* at 100. (“On appeal, then, the only matter before us is Denman Oil’s appeal of the KCC’s order that Denman plug 41 well.”)

who is responsible for an abandoned well, and that the Commission properly interpreted and enforced the statute as the legislature intended in *New Donna Lee* and *Quest*.

The present state of uncertainty concerning abandoned well responsibility is rooted in a pretext conjured by Staff—that the *Denman* opinion “explicitly disallow[s] the Commission’s ruling and rationales from *New Donna Lee* and *Quest*.”<sup>5</sup> Staff’s interpretation of *Denman* is wrong. Indeed, both the District Court and Court of Appeals upheld the Commission’s interpretation of KSA 55-179(b) as applied through the lens of *New Donna Lee* and *Quest* in *Denman*.<sup>6</sup> There is no need to revisit the wisdom of *New Donna Lee* and *Quest* as those orders remain legally sound. Staff’s misreading of *Denman* creates a problem that does not need to be solved.

The pretext that *Denman* overruled *New Donna Lee* and *Quest* provides the faulty foundation upon which Staff’s proposed regulations are crafted. The proposed regulations are not authorized by KSA 55-179, and would inequitably shift tremendous well plugging liability from the culpable party to the people who seek to develop the State’s oil and gas resources. As such, the proposed regulations threaten to cause waste. It is dubious to assert such an outcome was the legislature’s intent when it crafted and codified KSA 55-179(b).

### ***The Proposed Regulations are Not Authorized by KSA 55-179***

The regulations proposed by Staff cannot be adopted by the Commission because the proposed regulations do not comport with KSA 55-179. The proposed regulations attempt to (1) impermissibly expand the universe of parties who may be found responsible for an abandoned well

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<sup>5</sup> *In re Potential Commission Rulemaking Responsibility for Abandoned Wells*, 17-CONS-3362-CINV, Report and Recommendation of Commission Staff, p.2, (May 30, 2017).

<sup>6</sup> *Denman*, 51 Kan.App.2d at 105 (“*Denman* Oil has not shown any reason to set aside the KCC’s order, which was affirmed by the district court. No issues are before us regarding the orders the KCC issued to the Bridwells and TSCH. We affirm the district court’s judgment.”).

under KSA 55-179, and (2) improperly expand the circumstances upon which such parties may be found responsible for an abandoned well under KSA 55-179.

As explained in detail in Intervenor's previously submitted written comments<sup>7</sup>, Staff's proposed regulations delete the definition of "operator" prescribed by KSA 55-150(e) and adopted by the Commission in KAR 82-3-101(a)(48) so as to functionally re-write KSA 55-179(b). KSA 55-150(e) and KAR 82-3-101(a)(48) define "operator" as "a person who is responsible for the **physical operation and control of a well. . .**"<sup>8</sup> The proposed regulations abandon the legislatively prescribed definition of "operator" and replace it with three new subcategory operator definitions: "current operator", "last operator", and "original operator."<sup>9</sup> The result is to re-write KSA 55-179(b) from:

"A person who is legally responsible for the proper care and control of an abandoned well shall include . . . the **current or last operator of the lease** upon which such well is located . . . ; **the original operator who . . . abandoned such well. . .**"

to:

"A person who is legally responsible for the proper care and control of an abandoned well shall include . . . the [**person responsible for the care and control of an abandoned well located upon acreage it has under lease or was last to lease**]. . . ; [**the person responsible for the care and control of an abandoned well located on acreage it had leased at the time the well was most recently abandoned**]. . ."

By watering-down what it means to be an "operator" under KSA 55-179, the proposed regulations would impermissibly expand upon who may be held responsible for an abandoned well in Kansas.

Simply put, the Commission cannot adopt regulations that operate to change the statute. By changing the legislatively prescribed definition of "operator," persons who are, in fact, not

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<sup>7</sup> *In re Potential Commission Rulemaking Responsibility for Abandoned Wells*, 17-CONS-3362-CINV, Intervenor's Comments, pp. 2-5, (Dec. 14, 2016).

<sup>8</sup> KSA 55-150(e).

<sup>9</sup> *In re Potential Commission Rulemaking Responsibility for Abandoned Wells*, 17-CONS-3362-CINV, Mot. to Open Investigatory Docket, attached Preliminary Regulations K.A.R. 82-3-1500(c), (d), and (f) (Nov. 13, 2016).

operators could seemingly be held responsible for abandoned wells. KSA 55-179(b) assigns abandoned well responsibility under four scenarios:

- 1) any **operator** of a waterflood,
- 2) the current or last **operator** of a lease upon which such well is located,
- 3) the original **operator** who plugged or abandoned the well, and
- 4) any **person** who is responsible for the physical operation and control of a well.<sup>10</sup>

The first three scenarios limit abandoned well responsibility to “operators,” whereas the fourth scenario assigns responsibility to a person who impermissibly tampers with an abandoned well. The legislature obviously used the term “person” rather than “operator” in the fourth circumstance, because the legislature never intended for a person who is not an operator to become obligated for an abandoned well under the other three scenarios. As addressed below, this is why a landman cannot be responsible for an abandoned well under KSA 55-179(b) by simply taking an oil and gas lease.

Further, the definition of “lease” advanced by Staff in its proposed regulations is legally untenable, and would operate to improperly expand upon the circumstances in which an operator may become responsible for an abandoned well under KSA 55-179. An oil and gas lease is not “acreage subject to a contract or other document that provides a person with the authority to use a well” as the proposed regulations suggest. The Supreme Court has held time and time again that an oil and gas lease is a license to explore for and produce oil and gas.<sup>11</sup> It is an intangible right in the land, an oil and gas lease does not convey a possessory interest in the real estate, as the regulations suggest.<sup>12</sup> An oil and gas lease gives the lessee the right to come onto the land to

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<sup>10</sup> KSA 55-179(b) (“[A] person who is legally responsible for . . . an abandoned well shall include . . . one or more of the following: [1] any **operator** of a waterflood. . . , [2] the current or last **operator** of the . . . well . . . , [3] the original **operator** who plugged or abandoned the well, and [4] any **person** who . . . tampers with . . . an abandoned well.”) (emphasis added).

<sup>11</sup> *Ingram v. Ingram*, 214 Kan 415, 418 (1974); *State ex rel. Fatzer v. Board of Regents*, 176 Kan. 179, 190 (1954); *Connell v. Kanwa Oil, Inc.*, 161 Kan. 649 (1946) (citing many cases to that effect).

<sup>12</sup> See n. 7, *supra*.

explore for oil, it does not obligate the lessee to come onto the land, and it certainly does not obligate him to use wells previously abandoned—wells that at least one operator previously determined to be worthless. The obvious effect of Staff’s unfitting definition of “lease” is to improperly expand the circumstances in which an operator may become responsible for an abandoned well. Why not just cut to the chase and call a “lease” an “assumption of liability” for all wells located on the leased? After all, that is what the legally unfounded definition of “lease” advanced by Staff operates to do.

As demonstrated above, the proposed regulations cannot be adopted as drafted because they improperly expand upon who may be responsible for an abandoned well and the circumstances in which a person may be found responsible, in contravention of KSA 55-179. The proposed regulations would turn every abandoned well in Kansas into a snare trap set to capture unsuspecting operators—allegedly even non-operator landmen—so that they may be held to account for, and abdicate the malfeasance and inaction of another party. That outcome is grossly inequitable, and far afield of what the legislature contemplated when enacted KSA 55-179. Contrary to Staff’s contentions, the Commission orders in *New Donna Lee* and *Quest* do, in fact, comport to the statute, and may remain the rule of the State.

### ***Landmen are not Operators***

Frankly, it is outrageous to assert that a landman<sup>13</sup> could be responsible for an abandoned well under KSA 55-179(b) by simply taking an oil and gas lease. A landman is not an operator. An operator is a “person who is responsible for the **physical operation and control of a well.**” KSA 55-150(e) (emphasis added). At law, a landman cannot physically operate and control a

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<sup>13</sup> Independent geologists are likewise chilled by the notion that simply taking an oil and gas lease could impart abandoned well responsibility under the proposed regulations, because they too obtain oil and gas leases in their own name but cannot physically operate and control a well at law.

well.<sup>14</sup> The fact that Staff believes its proposed regulations make it plausible for a landman to be held responsible for an abandoned well as an “operator,” highlights the impropriety of Staff’s attempt to re-write KSA 55-179. As noted above, the legislature deliberately created a separate and distinct scenario under which a person who is not an operator (e.g., a landman) may be assigned abandoned well responsibility under KSA 55-179(b). As if using the term “operator”—rather than “lessee” or “person”—was not enough to signal the legislature’s intent behind KSA 55-179(b), the fourth circumstance makes clear that persons other than operators are only to be held responsible if they tamper with an abandoned well. To imply that a landman may be responsible for an abandoned well is counterproductive, as it casts greater uncertainty upon abandoned well responsibility, contrary to everybody’s desire for certainty. Such an implication is not supported at law, and the proposed regulations cannot be adopted if such an outcome is plausible.

Finally, to set the record straight, copied below is a proper definition of “landman,” and the definition adopted by the American Association of Petroleum Landman (“AAPL”) and its local chapter the Wichita Association of Petroleum Landman (“WAPL”):

Landmen are the public facing (business) side of the oil, gas and mineral exploration and production team. They interact and negotiate directly with landowners, mineral owners and/or other oil and gas companies to acquire oil and gas drilling leases and permits on the behalf of oil and gas companies. Landmen are responsible for researching and interpreting title records necessary to determine the rightful owners to oil and gas rights. They must be knowledgeable about matters affecting title and about oil and gas exploration and production operations. They must also be knowledgeable about the contracts and agreements necessary to responsibly provide for and govern exploration and production operations. Being the public facing side of the business, landmen must present themselves in a professional manner and conduct their business with utmost integrity; consequently, our association requires its members adhere to a high ethical standard. There are three different types of landmen:

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<sup>14</sup> KSA 55-155(a); K.A.R. 82-3-120(a).

Company Landmen: Negotiate deals and trades with other companies and individuals, draft contracts (and administer their compliance), acquire leases, clear title, prepare land for drilling and ensure compliance with governmental regulation.

Independent Field Landmen: Serve clients on a contract basis and are generally the industry's contact with the public as they research courthouse records to determine ownership and prepare necessary reports and locate mineral and land owners. They negotiate oil and gas leases and various other agreements, obtain necessary curative documents and conduct surface inspections before drilling.

Independent Land Consultants: Serve clients on a contract basis to perform the functions listed above. Much effort is directed to due diligence examinations required in the purchase and sale of companies and properties.

Notably absent from this definition is the responsibility for the “physical operation and control of a well” as would be required to be an operator under 55-150(e).

### **Conclusion**

Certainty concerning abandoned well responsibility should be the result of this docket. *New Donna Lee* and *Quest* provide a framework for Commission rulemaking that comports with KSA 55-179 and provides all parties with the desired certainty. *Denman* is not at issue in this matter, and certainly did not upset *New Donna Lee* or *Quest*. If a legislative remedy is preferred, Intervenor recommend revised statutes that adhere to the guidance adopted by the Commission in *New Donna Lee* and *Quest*, rather than laws or regulations that seek to inequitably shift tremendous well plugging responsibility from bad actors to an industry that is currently suffering. Such an outcome would be grossly unfair.



Respectfully submitted,

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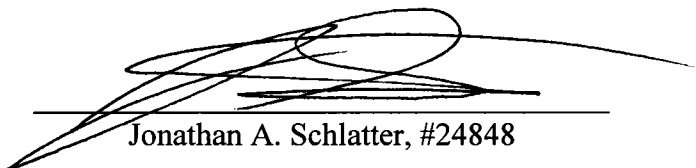
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### CERTIFICATE OF SERVICE

I, Jonathan A. Schlatter, hereby certify that on this 12<sup>th</sup> day of June, 2017, I caused the original of the foregoing **Response to the Report and Recommendation of Commission Staff** to be electronically filed with the Conservation Division of the State Corporation Commission of the State of Kansas, and caused true and correct copies of the same to be deposited in the United States Mail, first class, postage prepaid, and properly addressed to:

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