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CONSERVATION DIVISION
WICHITA, KS

KANSAS CORPORATION COMMISSION
OIL & GAS CONSERVATION DIVISION

REQUEST FOR CHANGE OF OPERATOR
TRANSFER OF INJECTION OR SURFACE PIT PERMIT

Form T-1
April 2004
Form must be Typed
Form must be Signed
All blanks must be Filled

Check Applicable Boxes:

- ☐ Oil Lease: No. of Oil Wells _____ **
- ☑ Gas Lease: No. of Gas Wells 3 **
- ☐ Gas Gathering System: _____
- ☐ Saltwater Disposal Well - Permit No.: _____
  - Spot Location: _____ feet from ☐ N / ☐ S Line
  - _____ feet from ☐ E / ☐ W Line
- ☐ Enhanced Recovery Project Permit No.: _____
  - Entire Project: ☐ Yes ☐ No
  - Number of Injection Wells _____ **

Field Name: Louisburg

**** Side Two Must Be Completed.***

Effective Date of Transfer: January 2, 2008

KS Dept of Revenue Lease No.: N/A NW

Lease Name: Mazza

__ - __ - S/2 - NW Sec. 16 Twp. 16 R. 25 ☑ E ☐ W

Legal Description of Lease: S/2 of the NW/4 of Sec. 16- T16-R25E

County: Miami

Production Zone(s): South Mound, Lexington, Summit, Mulky

Injection Zone(s): _____

Surface Pit Permit No.: N/A-No pit
(API No. if Drill Pit, WO or Haul)

_____ feet from ☐ N / ☐ S Line of Section

_____ feet from ☐ E / ☐ W Line of Section

Type of Pit: ☐ Emergency ☐ Burn ☐ Settling ☐ Haul-Off ☐ Workover ☐ Drilling OR

Past Operator's License No. 33872

Past Operator's Name & Address: PR. Operating, LP

3000 Internet Blvd. Suit 400 Frisco, TX 75034

Title: N/A

Contact Person: N/A--Legal Documents Attached

Phone: N/A

Date: N/A

Signature: See Attached Documents

New Operator's License No. 32294

New Operator's Name & Address: Osborn Energy, L.L.C.

24850 Farley Bucyrus, KS 66013

Title: Operations Manager

Contact Person: Jeff Taylor

Phone: 913-533-9900

Oil / Gas Purchaser: Riverdale Pipeline, LTD

Date: May 2/08

Signature: Jeff Taylor

Acknowledgment of Transfer: The above request for transfer of injection authorization, surface pit permit # N/A-No pit has been noted, approved and duly recorded in the records of the Kansas Corporation Commission. This acknowledgment of transfer pertains to Kansas Corporation Commission records only and does not convey any ownership interest in the above injection well(s) or pit permit.

_____ is acknowleged as the new operator and may continue to inject fluids as authorized by Permit No.: _____. Recommended action: _____

Date: _____ _____
Authorized Signature

_____ is acknowleged as the new operator of the above named lease containing the surface pit permitted by No.: _____.

Date: _____ _____
Authorized Signature

DISTRICT _____ EPR 5-15-08 PRODUCTION MAY 15 2008 UIC 5-15-08

Mail to: Past Operator _____ New Operator _____ District _____

Mail to: KCC - Conservation Division, 130 S. Market - Room 2078, Wichita, Kansas 67202

Side Two

Must Be Filed For All Wells

KDOR Lease No.: N/A

* Lease Name: Mazza * Location: S/2 of NW/4 of Sec. 16- T16S- R25E

Well No.	API No. (YR DRLD/PRE '67)	Footage from Section Line (i.e. FSL = Feet from South Line)		Type of Well (Oil/Gas/INJ/WSW)	Well Status (PROD/TA'D/Abandoned)
2	15-121-28186-0000	2310 Circle FSL/(FNL)	990 Circle FEL/(FWL)	Gas	Producing
3	15-121-28178-0000	1650 FSL/(FNL)	1650 FEL/(FWL)	Gas	Producing
4	15-121-28188-0000	2310 FSL/(FNL)	2310 FEL/(FWL)	Gas	Producing
		FSL/FNL	FEL/FWL		
		FSL/FNL	FEL/FWL		
		FSL/FNL	FEL/FWL		
		FSL/FNL	FEL/FWL		
		FSL/FNL	FEL/FWL		
		FSL/FNL	FEL/FWL		
		FSL/FNL	FEL/FWL		
		FSL/FNL	FEL/FWL		
		FSL/FNL	FEL/FWL		
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		FSL/FNL	FEL/FWL		

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A separate sheet may be attached if necessary

* When transferring a unit which consists of more than one lease please file a separate side two for each lease. If a lease covers more than one section please indicate which section each well is located.

Osborn Energy, LLC
24850 Farley, Bucyrus, KS 66013 • Ph: 913-533-9900 • Fax: 913-533-9955

May 6, 2008

Kansas Gas Exploration, L.L.C.
1055 Broadway 12th Floor
Kansas City, MO 64105

By signing below, Kansas Gas Exploration, L.L.C (from here on know as KGE), agrees that Osborn Energy, L.L.C. is the Operator of the wells on the following leases that belong to KGE:

Lease:	Brief Legal Description;
Mazza	S/2 of NW/4 of S16-T16-R25E
Bell	N/2 of NE/4 of S21-T16-R25E
Eidemiller	W/2 of NE/4 and S/2 of SE/4 of NE/4 of S17-T16-R25E
Silver Star	W/2 of SE/4 of S17-T16-R25E
Levin	N/2 and E/2 of SW/4 of S10-T16-R25E
Shirk	N/2 of SW/4 of NE/4 of S16-T16-R25E

Agent for KGE

5/6/08
Date

Manager, Investment Accts.
Title

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2008 JAN -2 PM 2:21

IN THE DISTRICT COURT OF MIAMI COUNTY, KANSAS

Robert R. Mazza, II,
Carol M. Mazza, and
Kansas Gas Exploration, LLC,

Plaintiffs,

vs.

Maw Oil & Gas, LLC and
Clary Energy, LLC,

Defendants.

Case No. 07 CV 175

JOURNAL ENTRY OF JUDGMENT

NOW on this 2 day of Jan, 2008 the above-captioned case comes before this Court on plaintiffs' *Motion for Summary Judgment*.

Plaintiffs appear personally and through Smithyman & Zakoura, Chartered. Defendants also appear personally and through counsel of record Jeff Kennedy of Martin Pringle Oliver Wallace & Bauer, L.L.P.

The parties also advise the Court that defendants have agreed to withdraw their counterclaim and plaintiffs agree it may be dismissed without prejudice.

Having heard the arguments, been advised in the premises, and considered the Memoranda of the parties,

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the counterclaim against KGE is dismissed without prejudice; and that

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For the reasons stated in the Court's *Decision on Plaintiffs' Motion for Summary Judgment* (attached), the Court finds Summary Judgment for the Plaintiffs.

IT IS SO ORDERED.

Judge of the District Court

Submitted by:

SMITHYMAN & ZAKOURA, CHARTERED

By_____
Lee M. Smithyman, KS Bar #9391
Constance L. Shidler, KS Bar #18402
750 Commerce Plaza II
7400 West 110th Street
Overland Park, KS 66210-2346
913-661-9800 / fax: 913-661-9863
Attorneys for Plaintiffs

MARTIN PRINGLE OLIVER WALLACE & BAUER, L.L.P.

By_____
Jeff Kennedy, KS Bar #12099
100 N. Broadway St., Suite 500
Wichita, KS 67202-2205
316-265-9311 / fax 316-265-2955
Attorneys for Defendants

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IN THE DISTRICT COURT OF MIAMI COUNTY, KANSAS

MICHAEL L. LEVIN, DIANE L. LEVIN
and KANSAS GAS EXPLORATION, LLC,
Plaintiffs,

vs.

Case No. 07 CV 166

MAW OIL & GAS, LLC. and
CLARY ENERGY, LLC,
Defendants,

JAMES L. BELL, SHEILA R. BELL
and KANSAS GAS EXPLORATION, LLC,
Plaintiffs,

vs.

Case No. 07 CV 167

MAW OIL & GAS, LLC. and
CLARY ENERGY, LLC,
Defendants,

JEFFREY EIDEMILLER, DIANE EIDEMILLER,
and KANSAS GAS EXPLORATION, LLC,
Plaintiffs,

vs.

Case No. 07 CV 168

MAW OIL & GAS, LLC. and
CLARY ENERGY, LLC,
Defendants,

DONALD R. EIDEMILLER, SANDRA K. EIDEMILLER,
and KANSAS GAS EXPLORATION, LLC,
Plaintiffs,

vs.

Case No. 07 CV 169

MAW OIL & GAS, LLC. and
CLARY ENERGY, LLC,
Defendants,

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SILVER STAR RANCH, LLC. and
KANSAS GAS EXPLORATION, LLC,
Plaintiffs,

vs.

Case No. 07 CV 170

MAW OIL & GAS, LLC. and
CLARY ENERGY, LLC,
Defendants,

ROBERT R. MAZZA, II, CAROL M. MAZZA
and KANSAS GAS EXPLORATION, LLC,
Plaintiffs,

vs.

Case No. 07 CV 175

MAW OIL & GAS, LLC. and
CLARY ENERGY, LLC,
Defendants.

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DECISION ON PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs in all of the above captioned cases have filed essentially identical Motions for Summary Judgment. The matters are consolidated for the purpose of the Court entering one decision regarding the dispositive issue in each.

INTRODUCTION

These are quiet title actions filed by landowners to cancel natural gas production leases on six separate tracts of real estate in Miami County, Kansas. Kansas Gas Exploration, L.L.C. (KGE) has taken what is commonly known as a "top lease" on each tract and joins with the landowners. The original lessee, MAW Oil and Gas Company, (MAW) assigned its leases to Clary Energy, L.L.C. (Clary) retaining an overriding royalty interest. Plaintiffs seek a declaratory judgment determining the leases MAW/Clary forfeited. This result would give KGE the exclusive rights as the natural gas lessee. The parties agree as to the lease history with respect to each of the individual

tracts. Although important to establish the legal relationships of the parties, the history of lease ownership does not effect the outcome of the issue at hand. The Court, therefore adopts the Statements of Uncontroverted Fact (without the necessity of repetition herein) as follows: In Case No. 07 CV 166 ¶¶s 1-6 and in Case Nos. 07 CV 167, 07 CV 168, 07 CV 169, 07 CV 170 and 07 CV 175 ¶¶s 1-4.

DRILLING HISTORY

Clary has drilled wells during the "primary" term of the pertinent leases. Gas wells were drilled on the Levin property (07 CV 166) in February 2007. One gas well was drilled on the Jeffrey Eidemiller property (07 CV 168) between February 20, 2006 and March 28, 2006. Three wells were drilled on the Donald Eidemiller property (07 CV 169) from January 26, 2006 to March 3, 2006. Defendants drilled four gas wells on the Bell property (07 CV 167) from March 28, 2006 to May 15, 2006. Two wells were started on the Silver Star Ranch (07 CV 170) but on only one was drilling concluded. That was on March 3, 2006. Finally, on the Mazza property (07 CV 175) three wells were drilled. Drilling began on April 14, 2006 and concluded on July 21, 2006. Each well was drilled at an approximate cost of $25,000.00.

THE LEASE

Identical lease language was used on all six properties. The pertinent provisions of said lease are as follows:

> 2. This is a PAID-UP LEASE and shall remain in force and effect for a term of [*Primary term set forth here*][1] ("Primary Term") from this date and as long thereafter as gas or its constituent products or other hydrocarbons

[1] The leases had varying primary terms. In the case of the Levin Lease there was an original lease which expired and a subsequent lease entered into. All of this is only important so as to understand that the parties agree that all leases are beyond their primary term and are only subject to extension by the habendum clause, ¶ 2, and the shut-in well provision set forth in ¶ 4 of the lease(s).

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are produced from said land, or lands with which said land is unitized, or as long as LESSEE is conducting operations on said land or lands with which said lands are unitized therewith. If, at the expiration of the Primary Term, gas is not being produced from the premises or lands unitized therewith, but LESSEE is engaged in drilling, reworking or dewatering operations thereon, then this Lease shall continue in full force and effect as long as operations are being continuously prosecuted. Operations shall be considered to be continuously prosecuted if not more than ninety (90) days shall elapse between the completion or abandonment of one well and the beginning of operations for the drilling of a subsequent well. If, after the discovery of gas on the subject lands or on lands unitized therewith, the production therefrom ceases for any cause after the expiration of the Primary Term, this Lease shall not terminate if LESSEE commences additional drilling, reworking or dewatering operations within ninety (90) days from the date of the cessation of said production or from the date of the completion of the drilling of a dry hole. Notwithstanding anything in this lease contained to the contrary, it is expressly agreed that if LESSEE shall commence operations for drilling at any time while this lease is in force, this lease shall remain in force and its term shall continue so long as such operations are prosecuted and, if production results therefrom, then as long as production continues.

4. If, at any time while there is a gas well or wells on the above land or lands with which said land is unitized, and such well or wells are shut in, and if this lease is not continued in force by some other provisions hereof or if a well has been completed and dewatering operations have commenced, then it shall, nevertheless, continue in force as long as said well or wells are shut in and it shall be considered that gas is being produced from the leased premises in paying quantities within the meaning of this lease by the LESSEE paying or tendering to LESSOR annually, in advance of substitute or shut-in gas royalty, in an amount equal to $1.00 per mineral acre owned by LESSOR. Said advance royalty shall be payable ninety (90) days after the date such well or wells are shut in and annually thereafter. The period covered by said advance or shut in royalty payments shall be measured from the date such well or wells are shut in.

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Shut in royalty payments have been tendered by the Lessee to the Lessors. Some early checks were negotiated. Later checks were not. This is not dispositive of the primary issue therefore the Statements of Uncontroverted Fact regarding the tendering of shut in royalty payments are incorporated herein by reference.[2] (07 CV 166 ¶ 12, 07 CV 167, 07 CV 168, 07 CV 169, 07 CV 170 and 07 CV 175, ¶ 10.)

It is uncontroverted that the landowners, allegedly having observed no gas production activity on the real estate during the relevant time period, entered into a gas leases with KGE. It is also undisputed that each of the landowners filed an affidavit of non production with the Register of Deeds of Miami County, Kansas, with respect to the MAW/Clary leases. On or about June 25, 2007 each landowner filed their verified petition to quiet title and for this Court's declaration at KGE had to sole right to develop and produce gas on the real estate. It is further uncontroverted that counsel for the defendants, by agreement, accepted service of the verified petitions, that twenty (20) days elapsed after said service and that the case is procedurally ripe for the consideration of the Motion for Summary Judgment.

ESSENTIAL FACTS

The factual basis of the controlling issue is set forth in plaintiffs' Statements of Uncontroverted Fact ¶ 6, 7, 8, 9 and 11 of 07 CV 167, 168, 169, 170 and 175. They are also set forth in ¶ 8, 9, and 10 in 07 CV 166. By way of summary each of the plaintiffs allege:

(1) Required completion activity has never been undertaken to allow the drilled gas wells to produce and deliver natural gas to a commercial

[2] Defendants are not asserting an equitable theory of extension based upon the acceptance of early shut-in payments. The dispositive issue is whether the wells were shut-in and subject to ¶¶s 2 & 4 of the lease(s).

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market. They contend the defendants have not (a) dewatered the natural gas wells (b) constructed a pipeline to allow natural gas access to a gathering system or (c) constructed a pipeline gathering system to allow transport to a natural gas [sic.].

(2) All of these activities or improvements are necessary to obtain production.

(3) Outside of some activities to level well pit sites, operations were not being continuously prosecuted during the pertinent time frame to extend the respective leases beyond the primary term.

It is undisputed that the wells have had no production and no gas has been marketed. Of particular significance is the lack of dewatering facilities. Theses were described in oral argument as pipelines, a water disposal well, etc. It is certain that absent these improvements the wells cannot produce gas from the pertinent structure. No gas has been produced, gathered or transmitted to a market. Plaintiffs suggests these factual contentions with the support of their verified petitions.[3]

Essentially, defendants controvert these factual allegations as "conclusory" and offer in controvention the affidavit of John Land. Each separately numbered contention of plaintiffs' Uncontroverted Statements of Fact is replied to by defendants with a general reference to the Land affidavit as a whole. Land's pertinent testimony can be summarized as follows:

(1) The payments tendered to the landowners should be characterized as shut in payments or advanced royalties.

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[3] The Court has received and accepted ample authority suggesting that verified petitions can be considered under appropriate circumstances in the context of a Motion for Summary Judgment.

(2) Clary expended approximately $25,000.00 to drill each of the wells. They have expended additional sums to remedy surface damages. Everything that has been done has been consistent with industry standards to prepare these wells for production, once a pipeline connection can be established.

(3) Land has been trying to develop the market for the gas. Clary has be diligently attempting to develop an alternative market ones plans to connect to the Riverdale Pipeline did not come to fruition.

(4) In Land's opinion drilling commenced in the primary term and the shut in payments have been timely tendered to extend the terms of the leases.

The affidavit does not controvert the plaintiffs' primary factual contention. That is that additional improvements must be made to the wells (a dewatering system, pipelines to a gathering system, and a gathering system) before these wells are capable of producing any natural gas.

Mr. Land opines that the wells are "certainly capable of producing gas in paying quantities." He does not dispute the allegation that these mechanical or engineering improvements are necessary before any gas can be produced whatsoever.

ISSUE

Thus the issue is framed for the Court. Does the word "capable" within the phrase "capable of producing in paying quantities" require that a well be capable of production without any additional equipment. Plaintiffs would argue that "capable" within that phrase means can you turn the well on and gas will flow. Defendants would argue that capable within this context means the well has that capacity or potential. They argue that these improvements for additional equipment would not be prudent until

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a market is established. The definition of capable determines whether the wells can be considered "shut-in" and is dispositive of Plaintiffs' Motion for Summary Judgment.

"SHUT-IN" WELLS

"Shut-in" provisions in Oil and Gas leases are a relatively recent phenomenon. They first appeared in the 1930s and gained popularity and became common practices in the 1940s - 50s.[4] The first question to be analyzed is "what does the contract (lease) say?" The pertinent lease language is set forth above. The language will be analyzed later in this opinion. The term "shut-in" is not defined in the lease.

"Shut-in wells" is a term of art and though often used by legal authorities is rarely defined. A federal court construing Texas law defined shut-in as follows:

> ... "shut-in" is a generic term used to refer to the closing of the values through which oil and gas flow through a well, its legal meaning refers to the closing of values when production at a well capable of producing in paying quantities is temporarily halted to repair or clean the well, to allow reservoir pressure to build, or for a lack of market."

Norman v Apache Corp., 19 F. 3d 1017 (5th Cir. 1994) p. 1027.

Williams and Meyers Manual of Oil and Gas Terms, Annotated, Volume 8 at pg. 973 defines "shut-in well" as "a producing well that has been closed down temporarily for repairs, cleaning out, building up pressure, lack of a market, etc."

The shut-in clause of the pertinent leases is found in ¶ 4. Not only does the lease not define shut-in well it makes no mention of the well's capacity for paying production (except to provide that if said shut-in payment if tendered will make the well considered as producing in paying quantities.) "Even though the shut-in clause makes no mention of capacity for a paying production, it is generally said that payment of a shut-in royalty

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[4] *Williams and Meyers, Oil and Gas Law* § 632 p. 400.3.

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will not suffice to hold a lease unless the shut-in well is capable of paying production." See Williams and Meyers, *Oil and Gas Law*, § 632.3, p. 407. This general statement of law contained in the *Williams and Meyers* treatise is consistent with Kansas law.

> What if the well is capable of producing in paying quantities but unable to produce because no market exists in the area, or transportation to get the product to market is unavailable? In Kansas, under the habendum clause, "production" means actual production and sale of the product. Although you have a very valuable and productive well at the end the primary term, if you are not marketing it that time, the lease terminates. *Elliot v Oil Co.*, 106 Kan. 248, 187 p.692. (1920) (Failure to find a market for gas); *Collins v Oil and Gas Co.*, 85 Kan. 483 118 p. 54 (1911) (Failure to Market Oil); *Home Royalty Ass-n v Stone*, 199 F. 2d 650 (10th Cir. 1952) (Failure to Market Gas by end of primary term). See § 9.23.

Pierce, Kansas Oil and Gas Handbook Supp. (1991) § 11 - 17. Professor Pierce goes on to state in his treatise "**Before the lessee can avail himself of the shut-in royalty clause, the well must be capable of producing in "paying quantities."** Although the shut-in clause seldom specifies the "paying quantities" requirement, it is implied. Citing *Pray v Premier Petroleum, Inc.*, 233 Kan. 351, 353 (1983). (Emphasis supplied)

Both plaintiffs and defendants suggest that *Pray* is the controlling Kansas authority. No Kansas case has ever defined "capable" as used in the phrase "capable of producing in paying quantities." The Supreme Court in *Pray* held that the presence of a shut-in royalty clause effects the expenses to be charged against the lease in calculating whether the well is capable of producing in paying quantities. The Supreme Court concluded that the lessee in *Pray* had shut-in a gas well for lack of market or transportation facilities and that if the cost of building a pipeline to nearest market were charged against the lessee the well would not be capable of producing in paying quantities and the lease would terminate. The Supreme Court held that such "capital

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expenditures for building a pipeline are improper considerations for determining whether a gas well produce in paying quantities under a shut-in royalty clause." The Court went on to hold that pipeline costs fall in the same category as costs of drilling and equipping the well and....should not be taken into account in making...[the paying quantities] determination." p. 357. The issue of whether or not a gas well without the requisite dewatering facilities, pipeline to a gathering system, or a gathering system can be "shut-in" under the provisions of the lease was not before the Court in *Pray*. The issue in *Pray* was whether the cost of a pipeline from the gathering system to the nearest available market could be imputed in making a "paying quantities" determination. Presumably the well in *Pray* was capable of actual production and this is not the circumstance the Court is confronted with the instant actions.

This reading of *Pray* is supported by the Supreme Court's own introspection in *Tucker v Hugoton Energy Corp.* 253 Kan. 373 (1993) At p. 381 that Court stated regarding *Pray*: "On appeal, the sole issue was whether the cost of connection could be used in determining the well's capability of producing in paying quantities." Further distinguishing *Pray* from the instant matter is the observation by the *Tucker* Court that in *Pray* "a well capable of producing in paying quantities was completed." p. 381.

In *Tucker* plaintiffs claimed that the shut-in royalty clause could not be invoked because of the existence of a limited market and that the wells were incapable of producing due to their mechanical problems. The Supreme Court held that the existence of a limited market precluded invocation of the shut-in royalty provisions and therefore did not reach plaintiffs assertion that the wells were incapable of producing in paying quantities due to their mechanical problems. p. 382.

In a case arising the year before *Pray* out of Kingman County, *Martin v Costner*,

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231 Kan. 315 (1982) now Chief Justice McFarland analyzed when a shut-in royalty period began. At p. 317 she wrote "the trial court reasoned ...this one year period of remittance of shut-in payment does not commence until a well capable of producing gas is completed. (Citations omitted) ... We agree with the Trial Court. Its conclusion comports with the interpretation of this type of shut-in royalty clause[5] in *Carlisle v United Producing Co.*, 278 F. 2d 893 (10th Cir. 1960) and *Robinson v Continental Oil Co.*, 255 F. Supp. 61 (D.Kan. 1966)... The clear language of the clause here did not require payment until one year after the well was shut-in."

It is an ancient principle of Kansas law that discovery of hydrocarbon products without production will not suffice to extend a lease into its secondary term. See *Elliot v Crystal Springs Oil Co.*, 106 Kan. 248 (1920). See also *Williams and Meyers Oil and Gas Law*, § 631 p. 396.2 - 397. As this is the legal issue which the shut-in royalty provision is specifically designed to alleviate both parties agree for the shut-in royalty clause of an oil and gas lease to be operative the shut-in well must be capable of producing in paying quantities. *Pray* Syl ¶ 4. As discussed above *Pray* sheds some light on elements that can be considered in determining "paying quantities." There is no specific Kansas decision on the term "capable."

OTHER JURISDICTIONS

The concept of capable of producing in paying quantities was addressed by the Supreme Court of Texas in *Anadarko Petroleum Corp. v Thompson*, 94 S.W. 3d 550 (2002).

---

[5] The shut-in clause provided in pertinent part: "A[t] any time, either before or after the expiration of the primary term of this lease, if there is a gas well or wells on the above land... and such well or wells are shut in before or after production therefrom, the lessee ...may pay ... as substitute gas royalty... and if such payments or tenders are made it shall be considered under all provisions of this lease that gas is being produced from the leased premises in paying quantities."

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> We believe that the phrase "capable of production in paying quantities" means a well that will produce in paying quantities if the well is turned "on" and it begins flowing, **without additional equipment or repair.** Conversely, a well would not be capable of producing in paying quantities if the wells which were turned "on" and the well did not flow, because of technical problems or because the well needs rods, tubing or pumping equipment. p. 558 - 9. (Emphasis supplied)

The *Anadarko* Court approved language and a ruling in a previous case held before a Texas Appellate Court. *Hydrocarbon Mgt., Inc. v Track Exploration, Inc.*, 861 S.W. 2d 427. The *Anadarko* Court stated succinctly "accordingly, we hold that a well is capable of production if is capable of producing in paying quantities without additional equipment or repairs." p. 558.

The Court of Appeals of Oklahoma in *Fisher v Grace Petroleum Corp.* 830 P. 2d 1380 (1991) held:

> In Oklahoma, a shut-in gas well must be capable of production in paying quantities. A well which is incapable of production in paying quantities cannot be considered "shut-in" as that term is used in a shut-in royalty clause and is insufficient to hold the lease under the habendum clause. p. 1388.

The rule is clearly set forth in *Kuntz, Oil and Gas,* Volume 4 § 46.4(b):

> It is not difficult to reach the conclusion that the shut-in royalty clause in common use does not become operative unless the gas well has actually been shut-in. It also readily apparent that the requirement that the well be shut-in does not refer to any particular type of engineering operation but refers to the absence of current production. p. 15

Also in that same treatise at § 464.4(e) at p. 25 is the following statement:

> In those cases where the question has been raised, it has been held that the shut-in gas well must be capable of producing in paying quantities in order for the payment of shut-in gas royalties to preserve the lease after the expiration of the primary term. **The fact that the well is**

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completed in an area of known gas reserves will not preserve the lease unless the well is capable of actual production. (Emphasis supplied.)

Other jurisdictions have adopted this same analysis and the prerequisite of an operational well before the invocation of a shut-in provision of a lease. See *Griffin v Crutcher-Tufts Corp.*, 500 So. 2d 1008, 1011-12 (Ala. 1986), *Taylor v Kimbell*, 219 La. 731, 54 So. 2d 1, 3 (1951), *Bixler v Lamar Exploration Co.*, 733 P. 2d 410, 412 (Okla. 1987).

It should be noted that the defendants did provide nor could the Court find authority that defines capable in this context as merely having the potential or possible capacity to produce in paying quantities.

APPLICATION TO KANSAS LAW

Defining "capable" as actually capable without additional equipment is consistent with Kansas law. Defendants argue that this would represent a massive shift in Kansas Oil and Gas law. To the contrary, it is consistent with the ruling in *Tucker*. According to Eugene Kuntz in his treatise every jurisdiction that has considered the issue has so held. (ibid.)

Nor is it inconsistent with the holding in *Pray*. The pipeline in *Pray*, of which the cost of was not allocated to operating expenses, was a 3 mile line from the point the gas was gathered to a mainline market pipeline. That line had nothing to do with the ability of the well to produce natural gas. The line in *Pray* was necessary to market the gas.

The purpose of the shut-in royalty clause was discussed in *Pray* and reiterated in *Tucker*. The shut-in royalty clause was developed to protect against automatic termination of a gas lease where a well was drilled and no market exists for the gas.

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This all relates to the inherent physical nature of natural gas. Unlike oil it cannot be produced and stored or transported in railroad cars or tank trucks. Nothing in this recitation of the philosophy and public policy is inconsistent with the general requirement recognized in other jurisdictions that before a well can be considered "shut-in" the well must be actually capable of production.

It is uncontroverted that these wells are currently incapable of production. They will not be capable of production until the necessary dewatering systems are in place and the lessor has constructed both pipelines to a gathering system and gathering system. As a matter of law these wells do not fit the definition of "shut-in" due to their inability to actually produce gas.

CONSTRUCTION OF THE LEASE

A review of the actual lease provisions suggest that the wells do not fit the contractual provisions of the shut-in clause. In reviewing the shut-in provisions contained in ¶ 4 and excising the unnecessary wording one is left with the following language "...while there is a gas well..on the land... and such well...[is] shut-in, and if a well has been completed and dewatering operations have commenced...then [the lease] shall...continue in full force."

The wording of ¶ 4 is at best confusing and ambiguous and at worst nonsensical.[6] The lease requires as conditions precedent that a well be both "shut-in" and completed with a dewatering operation to have commenced. This may appear somewhat redundant, but under the contract for shut-in royalty payments to extend the lease under the

[6] There appears to be no dispute that ambiguity in an oil and gas lease is generally construed in favor of the lessor.

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habendum clause the well must be shut-in, completed and dewatering operations have commenced. It is uncontroverted that dewatering operations have not commenced.

CONCLUSION

Based upon the above and foregoing the plaintiffs' Motions for Summary Judgment are hereby granted. The gas production leases in favor of MAW and assigned to Clary are deemed forfeited. Title to the pertinent real estate is deemed quieted as to the interest of MAW and Clary. Counsel for plaintiffs is hereby directed to prepare a Journal Entry of Judgment in each individual case and submit the same to the Court for filing.

RICHARD M. SMITH
Chief District Judge

cc: Lee Smithyman
Constance Shidler
Jeffrey Kennedy

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