No. _____

In The
Supreme Court of the United States

NORTHERN NATURAL GAS COMPANY,

Petitioner,

v.

ONEOK FIELD SERVICES COMPANY, L.L.C.;
ONEOK MIDSTREAM GAS SUPPLY, L.L.C.;
LUMEN ENERGY CORPORATION;
LUMEN MIDSTREAM PARTNERSHIP, LLC;
NASH OIL & GAS, INC. and L.D. DRILLING, INC.,

Respondents.

On Petition For Writ Of Certiorari
To The Supreme Court Of Kansas

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a state court decision allowing private parties to take interstate natural gas from federally-regulated underground storage fields is pre-empted by the Natural Gas Act, 15 U.S.C. § 717 *et seq*.

PARTIES TO THE PROCEEDING

Petitioner, Northern Natural Gas Company ("Northern"), was the appellant in the underlying matter before the Supreme Court of the State of Kansas. Respondents, ONEOK Field Services Company, L.L.C.; ONEOK Midstream Gas Supply, L.L.C.; Lumen Energy Corporation; Lumen Midstream Partnership, LLC; Nash Oil & Gas, Inc.; and L.D. Drilling, Inc., were appellees.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Northern states that it is a wholly-owned subsidiary of NNGC Acquisition LLC, which is directly and wholly-owned by MidAmerican Energy Holdings Company. MidAmerican Energy Holdings Company is owned 89.8% by Berkshire Hathaway and 10.2% by two individual shareholders and the family members and related entities of one of such individual shareholders.

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PETITION FOR WRIT OF CERTIORARI

Northern Natural Gas Company respectfully petitions this Court for a writ of certiorari to review the March 15, 2013 decision ("Decision") of the Supreme Court of the State of Kansas in this case.

OPINIONS BELOW

The March 15, 2013 Decision from the Supreme Court of the State of Kansas is reported at *Northern Natural Gas Co. v. ONEOK Field Services Co.*, 296 P.3d 1106 (Kan. 2013), and reproduced at pp. 1-59 of the Appendix ("App."). The unreported April 15, 2010 decision from the District Court for the County of Pratt, State of Kansas is reproduced at App. pp. 60-103.

STATEMENT OF JURISDICTION

The Supreme Court of the State of Kansas entered its Decision on March 15, 2013 and this Petition is timely because Northern has filed it within 90 days of the Kansas Supreme Court's Decision. App. pp. 1-59. This Court's jurisdiction rests on 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

The Natural Gas Act, 15 U.S.C. §§ 717 *et seq*., provides, in relevant part:

Section 717(b): Transactions to which provisions of chapter applicable

> The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, and to the importation or exportation of natural gas in foreign commerce and to persons engaged in such importation or exportation, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

Section 717f(b): Abandonment of facilities or services; approval of Commission

> No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of

service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

STATEMENT OF THE CASE

Northern is a natural gas company that operates several underground natural gas storage fields under the authority of the Federal Energy Regulatory Commission ("FERC" or the "Commission") pursuant to the Natural Gas Act, 15 U.S.C. §§ 717 *et seq*. As a general matter, the Natural Gas Act is intended to provide the public with a reliable and economic supply of natural gas by, *inter alia*, allowing gas to enter the stream of interstate commerce during the summer months when prices are relatively low so the gas can be stored underground for later recovery during the winter when demand increases and gas prices generally rise. *See, e.g., California v. Southland Royalty Co*., 436 U.S. 519, 523 (1978). To achieve this goal, Congress created a comprehensive statutory framework for regulating natural gas in interstate commerce, and it vested FERC with exclusive jurisdiction over all matters related to the transportation, storage, and sale of such gas. *See Schneidewind v. ANR Pipeline Co*., 485 U.S. 293, 300-01 (1988).

This Petition arises from Northern's efforts to seek legal redress for the harm caused by private parties who siphoned interstate gas out of Northern's federally-certificated Cunningham Storage Field (the "Field"). Certain natural gas producers discovered

that they could draw interstate storage gas away from the Field and then reap millions of dollars in profits by producing the storage gas as their own. In complement to its efforts to obtain forward-looking relief from FERC, Northern asserted conversion claims against companies who had purchased Northern's previously-injected storage gas.

Despite the fact that both Kansas and federal law recognize the right of natural gas companies to store gas underground free from interference, the Kansas Supreme Court has issued a Decision that disregards these lines of authority and creates imminent conflict between state law and federal law. As a result of the Decision, Northern is now subject to FERC's express requirement to prevent gas migration from the Field while, at the same time, Northern is subject to state law which authorizes third party activities designed to achieve that very result – *i.e.*, gas migration from the Field. The Decision cannot be allowed to stand because it will impair storage operators' ability to carry out the express orders of FERC and discourage investment in, and operation of, such storage fields. This will, in turn, disrupt the nationwide natural gas transportation and storage system that Congress and FERC have sought to establish and preserve. This case thus epitomizes the danger that led Congress to create a uniform, federal framework for transporting and storing the nation's supply of natural gas.

A. The National Market For Natural Gas And The Natural Gas Act

Northern's Cunningham Storage Field is an integral part of the national network of transmission and storage facilities that provide millions of consumers with an economical and reliable supply of natural gas. Recognizing the importance of securing the nation's supply of energy, Congress enacted the Natural Gas Act, 15 U.S.C. §§ 717 *et seq*., to bring most aspects of the industry under federal regulation by FERC. *See Cascade Natural Gas Corp. v. FERC*, 955 F.2d 1412, 1416 (10th Cir. 1992). Congress vested FERC with exclusive jurisdiction over three areas: (1) the transportation and storage of natural gas in interstate commerce; (2) the sale in interstate commerce of natural gas for resale; and (3) natural gas companies engaged in such transportation or sale. 15 U.S.C. § 717(b); *Schneidewind,* 485 U.S. at 295, n. 1. Congress carved out a narrow exception for state regulation of "production and gathering" activities but otherwise precluded state laws seeking to regulate matters encompassed by the comprehensive regulatory framework administered by FERC. *See* 15 U.S.C. § 717(b); *Interstate Natural Gas Co. v. FPC*, 331 U.S. 682, 690 (1947); *Northwest Central Pipeline Corp. v. State Corp. Comm'n of Kansas*, 489 U.S. 493, 510 (1989).

Natural gas companies seeking to engage in the transportation and sale of interstate natural gas must obtain a certificate of public convenience and necessity from FERC. 15 U.S.C. § 717f(c). By means

of the application process, FERC exercises plenary authority over the construction, extension, and acquisition of natural gas facilities. 15 U.S.C. § 717f(c)(1)(A). FERC's authority is comprehensive, extending to the design, installation, inspection, operation, and safety of natural gas facilities, and no natural gas company may abandon any portion of its facilities, or any service rendered by means of such facilities, without FERC's permission. 15 U.S.C. § 717f(b); 18 C.F.R. § 157.14(a)(9)(vi). Natural gas companies are required to operate their facilities in compliance with the specific requirements set forth in FERC's certificates, and states may not impose regulatory requirements that conflict with FERC's exclusive control over such matters. *See* 15 U.S.C. § 717f; *Schneidewind*, 485 U.S. at 299-300.

B. The Cunningham Storage Field

Northern owns and operates an underground natural gas storage facility in Pratt, Kingman, and Reno Counties, Kansas, known as the Cunningham Storage Field, pursuant to a series of certificates of public convenience and necessity from FERC. The Field was originally discovered in 1932 and production of native natural gas began shortly thereafter. During original production, the Field produced approximately 79 billion cubic feet of natural gas but, by 1977, the Field had been depleted and production of the original gas reserves ceased. After this initial depletion of native natural gas in the Field, Northern obtained federal certification for natural gas storage

operations. Following certification, Northern injected storage gas and re-pressurized the Field to facilitate natural gas storage operations, and Northern has since operated the Field for approximately thirty (30) years.

Gas is maintained within the boundaries of the Field by a means of a hydrostatic seal created by the proper balance of pressures between a bordering underground saltwater aquifer and conditions inside the Field. Although the Field enjoyed years of stable storage operations, in the mid-1990's the Field began to suffer losses of gas associated with an increased number of private party wells drilled near the boundaries of the Field. As the number of wells increased, Northern obtained evidence of a causal connection between the loss of storage gas from the Field and the production of extraordinary amounts of water by these third-party wells.

In September 2009, Northern filed an application with FERC, wherein Northern sought to extend the boundaries of the Field to address the problem of third-party activities pulling gas away from the Field. On June 2, 2010, FERC issued an Order which expanded the boundaries of the Field by 12,320 acres and provided Northern with the authority to condemn the wells causing storage gas to migrate away from the Field. *See In re Northern Natural Gas Company*, CP09-465-000, 131 FERC ¶ 61,209. In addition to authorizing an expansion of the Field, FERC directed Northern to take specific actions inside the Field designed to prevent the migration of storage gas

beyond the newly-authorized boundaries. *See id*. at ¶ 79, ¶ 91.

C. Northern's Efforts To Enforce Its Rights Through Litigation

While Northern's request for forward-looking relief from FERC was still pending, Northern filed a petition in Pratt County District Court, Pratt County, Kansas asserting conversion claims against ONEOK Field Services Company, L.L.C.; ONEOK Midstream Gas Supply, L.L.C.; Lumen Energy Corporation; and Lumen Midstream Partnership, LLC (collectively, "Purchasers"). Northern's conversion claims against Purchasers were derivative of conversion claims Northern asserted against Nash Oil & Gas, Inc. and L.D. Drilling, Inc. (collectively, the "Producers") in the United States District Court for the District of Kansas. Northern alleged that Producers converted Northern's storage gas in two ways: (1) by interfering with Northern's ability to control and maintain its property interest – *i.e*., its injected interstate storage gas – when such gas was located *within* Northern's Cunningham Storage Field, and (2) by producing Northern's migrated injected storage gas, which Northern owns and/or holds title to, pursuant to the Storage Statute and/or Kansas common law.

The gist of Northern's conversion claims against Purchasers is that if Producers' exercise of ownership rights over Northern's injected storage gas is unauthorized, then Purchasers' exercise of ownership rights over such gas is unauthorized as well. The

Purchasers asserted third-party claims against Producers, alleging that Producers are contractually obligated to indemnify Purchasers against any conversion damages that can be recovered by Northern. The Producers filed motions for summary judgment focusing on the parties' dispute as to who holds lawful title to gas that has "migrated" away from the Field.

Northern provided the District Court with uncontroverted evidence that: (1) Producers were pumping atypical amounts of water at their wells to create artificial pressure sinks; (2) such pressure sinks caused Northern's injected storage gas to be pulled away from the Cunningham Storage Field to Producers' wells; and (3) Producers' wells are located in an area where no economically recoverable native gas exists and where only dry holes existed prior to Northern's re-pressurization of the Cunningham Storage Field. Northern offered this evidence in support of its claim that Producers' actions constitute an unauthorized exercise of ownership or control over Northern's injected storage gas within the certificated boundaries of the Field. On April 15, 2010, the District Court granted summary judgment in favor of Producers. *See* App. at pp. 102-03. The District Court held that, as a matter of law, Northern lost title to its storage gas when it migrated more than one mile from the boundaries of the Field, regardless of whether the evidence demonstrated that such gas was taken away from the Field by third-party activities. *See* App. at pp. 101-03.

Northern filed a *Notice of Appeal* on April 15, 2010. Pursuant to Kansas law, however, the District

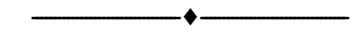
Court retained jurisdiction until it made a formal journal entry memorializing its ruling. Before the District Court did so, Northern asked the court to modify its ruling in light of two events that occurred in the interim: (1) the issuance of a *Memorandum and Order* by the United States District Court for the District of Kansas in the matter styled *Colorado Interstate Gas Company v. Thomas E. Wright, et al.*, 707 F.Supp.2d 1169 (D. Kan. 2010) (the "*CIG Opinion*"), and (2) FERC's issuance of the June 2, 2010 Order expanding the certificated boundaries of the Field. *See* App. pp. 9, 52-53. The District Court held a hearing on June 30, 2010, to address these matters. During the hearing, the District Court declined to modify its Order in light of the *CIG Opinion* or the FERC Order and the court certified its prior decision as a final appealable decision pursuant to K.S.A. 60-254(b).

D. The Kansas Supreme Court Decision

The Kansas Supreme Court rejected Northern's argument that the District Court's entry of summary judgment was void and without effect because it conflicts with, and is thus pre-empted by, the Natural Gas Act. *See* App. pp. 56-58. In an abrupt departure from Kansas and federal law recognizing that storage gas belongs to the injector when it is located inside an authorized storage field, the Kansas Supreme Court held that interstate storage gas is subject to the "Rule of Capture," even when it is located within the boundaries of a federally-certificated storage field. *See* App. at pp. 4, 39, 45-48.

By declaring that interstate storage gas is subject to "capture" while such gas is located inside federally-regulated storage fields, the Decision stands in direct conflict with this Court's decisions pre-empting state activity that interferes with the national framework designed by Congress to ensure a stable and economical supply of natural gas for the country. *See Schneidewind*, 485 U.S. at 299-300; *Northern Natural Gas Co. v. State Corporation Comm'n of Kansas*, 372 U.S. 84, 91-93 (1963) (state regulations requiring gas purchasers to take gas ratably from producers were pre-empted); *Transcontinental Pipe Line Corp. v. State Oil & Gas Bd. of Mississippi*, 474 U.S. 409, 422-24 (1986) (same).

The direct nature of the conflict between state and federal law is driven home by considering the fact that: (1) Kansas has authorized third parties to cause gas migration from the Field; and (2) FERC has directed Northern to stop gas migration from the Field. *See In re Northern Natural Gas Company,* CP09-465-000, 131 FERC ¶ 61,209. It is difficult to imagine a more direct conflict between state and federal law. The Kansas Supreme Court Decision is directed toward interstate storage gas while such gas is located inside federally-regulated fields, and its central effect is to authorize private parties to take interstate gas away from such fields. Consequently, the Decision stands in direct opposition to FERC's administration of the Natural Gas Act. *See Schneidewind*, 485 U.S. at 306-09.



REASONS WHY THIS COURT SHOULD GRANT CERTIORARI

The Kansas Supreme Court Decision Threatens To Destabilize The Federal Regulatory Regime And It Conflicts With Well-Settled Precedent From This Court Recognizing The Broad Pre-emptive Scope Of The Natural Gas Act.

The Kansas Supreme Court's Decision sets the stage for untenable consequences of national significance because it is not limited to resolution of, or application to, the discrete circumstances that led to its issuance. The Kansas Supreme Court's Decision was not predicated upon a failure of proof or any circumstances peculiar to the parties. By declaring, as a matter of law, that natural gas companies may not seek redress from private parties who actively draw interstate gas away from federally-regulated storage fields, the Kansas Supreme Court has created Kansas law affirmatively authorizing private parties to take interstate gas by any means necessary, without limit and without consequence. As a result, the Kansas Supreme Court has effectively declared open season on interstate, jurisdictional gas stored within federally-regulated underground storage fields.

A. The Natural Gas Act Pre-empts State Laws That Interfere With FERC's Exclusive Authority To Regulate The Transportation And Storage Of Interstate Gas.

The Kansas Supreme Court Decision stands in direct conflict with this Court's prior decisions holding

that state laws regulating matters within FERC's exclusive jurisdiction are pre-empted, at least where their "central purpose" is to address matters that Congress intended FERC to regulate. *Schneidewind*, 485 U.S. 293; s*ee also Northwest Central Pipeline Corp.,* 489 U.S. 493; *Transcontinental Pipeline Corp., 474 U.S. 409*; *Northern Natural Gas Co.*, 372 U.S. 84. As a collective, these decisions recognize the NGA as a comprehensive scheme of federal regulation governing all wholesales of natural gas in interstate commerce and vesting FERC with exclusive jurisdiction over the transportation, storage, and sale of natural gas in interstate commerce. *See, e.g., Schneidewind*, 485 U.S. at 295, n. 1 and 300-01. Conflict warranting pre-emption will be found when it is impossible to comply with both federal and state law, or "where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." *Id.* at 300. The Kansas Supreme Court Decision must be pre-empted because it stands as an obstacle to achieving the purposes and objectives Congress intended to realize by means of the Natural Gas Act.

In complement to this recognition of the broad types of activities falling within FERC's jurisdiction, this Court has likewise recognized the comprehensive temporal scope of FERC's authority by declaring that FERC's exclusive jurisdiction encompasses regulation of "market entry" through FERC's authority to issue certificates of public convenience and necessity authorizing natural gas companies to transport, store, and sell gas in interstate commerce, and of "market

exit" through FERC's control over the "abandonment of certificated interstate service." *Northwest Central Pipeline Corp*., 489 U.S. at 506. State law will be pre-empted where it is directed toward matters that Congress intended FERC to regulate, or when its application would impede realization of Congress' intent for the NGA to provide an efficient, economical, and stable supply of energy for the public benefit. *Schneidewind*, 485 U.S. at 308. Pre-emption of state laws is warranted when they present the "prospect of interference with the regulatory power." *Northern Natural Gas Co.*, 372 U.S. at 91-92.

It is of no moment that the Kansas Supreme Court characterized the question before it as one involving natural gas "production." App. at p. 38. Although the Natural Gas Act does not apply to "the production or gathering of natural gas," this exception does not give states power to control the allocation of interstate storage gas. *See Pub. Serv. Comm'n of Ky. v. FERC*, 610 F.2d 439, 444 (6th Cir. 1979). Once gas is "initially dedicated to interstate use . . . there can be no withdrawal of that supply from continued interstate movement without Commission approval." *Sunray Mid-Continent Oil Co. v. Fed. Power Comm'n*, 364 U.S. 137, 156 (1960). States may not, without federal authorization, divert from the interstate market supplies of natural gas for intrastate use. *See Pub. Serv. Comm'n of Ky.*, 610 F.2d at 443; *accord Backus v. Panhandle E. Pipe Line Co*., 558 F.2d 1373, 1375-76 (10th Cir. 1977) (Oklahoma statute granting owners of land crossed by gas

pipeline right to gas violates Supremacy Clause because it would frustrate the full effectiveness of the Natural Gas Act by permitting "private interests to subvert public welfare").

Moreover, actions designed to pull previously-produced, interstate storage gas away from federally-regulated storage fields cannot fall within the exception for "production and gathering" because they are not "physical acts of drawing gas from the earth and preparing it for the *first* stages of distribution." *See Northwest Central Pipeline Corp.*, 489 U.S. at 510; 15 U.S.C. § 717(b) (emphasis added). The interstate storage gas inside the Cunningham Storage Field has already been produced and then distributed within the transportation and storage framework created by Congress and administered by FERC.

B. The Kansas Supreme Court's Decision Undermines Congress' Regulatory Framework For Securing A Stable Supply Of Natural Gas For The Nation.

The Kansas Supreme Court's Decision creates a legal framework from which private interests may withdraw and reallocate interstate gas dedicated to public benefit. Such a framework is impermissible because it would frustrate, if not impede, Congress' goal of securing a stable supply of natural gas for the country. *See Northwest Central Pipeline Corp.,* 489 U.S. at 510; *Backus*, 558 F.2d at 1375-76. Therefore, because the Kansas Supreme Court's Decision creates

an impermissible, state-sanctioned re-allocation of interstate, jurisdictional gas, the Decision conflicts with the Natural Gas Act and is pre-empted by federal law. *See, e.g.*, *Pub. Serv. Comm'n of Ky.,* 610 F.2d at 44; *accord Schneidewind*, 485 U.S. at 310; *Iroquois Gas Transmission System, L.P.*, 59 FERC ¶ 61,094, at 61,360 (1992) (the Natural Gas Act pre-empted state and local law to the extent the enforcement of such laws or regulations would conflict with the Commission's exercise of its jurisdiction under the federal scheme).

When a state law presents the "prospect of interference with the federal regulatory power," then the state law may be pre-empted under a conflict analysis even though "collision between the state and federal regulation may not be an inevitable consequence." *Schneidewind*, 485 U.S. at 310, *quoting Northern Natural Gas Co.*, 372 U.S. at 91-92. Like the state laws at issue in *Public Service Commission of Kentucky* and *Backus,* the Kansas Supreme Court's Decision creates Kansas state law that impermissibly allows the withdrawal of interstate gas from interstate commerce for private profit. Further, the Decision subjects Northern to state law that is diametrically opposed to FERC's authority to direct Northern's operation of the Cunningham Storage Field. The Decision is pre-empted because it is in direct conflict with FERC's directive for Northern to stop gas migration from the Field and because it provides private parties with the incentive to take interstate gas from federally-regulated storage fields.

If the Kansas Supreme Court Decision is allowed to stand, the problems at the Cunningham Storage Field are likely to be replicated at other federal storage fields throughout Kansas as private parties recognize the lucrative prospect of drilling next to such fields to tap into a virtually unlimited supply of interstate gas. This scenario would, most assuredly, impede or prohibit accomplishment of Congress' desire to provide an adequate supply of natural gas for the entire nation and it would permit "private interests to subvert public welfare." *See Pub. Serv. Comm'n of Ky.*, 610 F.2d at 443; *Backus*, 558 F.2d at 1375-76.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 11, 2013

IN THE SUPREME COURT
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No. 104,279

NORTHERN NATURAL GAS COMPANY,
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ONEOK FIELD SERVICES COMPANY, L.L.C.;
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Appellees,

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NASH OIL & GAS, INC. AND L.D. DRILLING, INC.,
Appellees.

SYLLABUS BY THE COURT

(Filed Mar. 15, 2013)

1.

In Kansas, standing is jurisdictional. An appellate court has a duty to question jurisdiction on its own initiative and, when the record discloses a lack of jurisdiction, the appellate court has a duty to dismiss the appeal. Whether jurisdiction exists is a question of law subject to unlimited review.

2.

As a general rule, a party seeking to appeal must be aggrieved by the judgment or order from which the appeal is taken. However, a party ordinarily has no

standing to appeal from a judgment or order that dismisses a claim to which it was not a party.

3.

The most fundamental rule of statutory construction is that the intent of the legislature governs if that intent can be ascertained. We first attempt to ascertain legislative intent by reading the plain language of the statutes and giving common words their ordinary meanings.

4.

When a statute is plain and unambiguous, an appellate court does not speculate as to the legislative intent behind it and will not read into the statute something not readily found in it. But when the statute's language or text is unclear or ambiguous, an appellate court may employ canons of construction, legislative history, or other background considerations to divine the legislature's intent and construe the statute accordingly.

5.

Even if the language of the statute is clear, an appellate court must still consider various provisions of an act in pari materia with a view of reconciling and bringing those provisions into workable harmony if possible. Additionally, an appellate court must construe statutes to avoid unreasonable or

absurd results and must presume the legislature does not intend to enact useless or meaningless legislation.

6.

K.S.A. 55-1210(a) gives an injector title to gas injected into its legally recognized storage area. By its plain terms, however, section (a) does not apply to gas that has migrated outside the injector's certificated storage area.

7.

K.S.A. 55-1210(a) and (b) govern ownership rights to previously injected storage gas that remains within a designated underground storage area.

8.

The phrase "*such gas*" in K.S.A. 55-1210(b) refers to the gas described in K.S.A. 55-1210(a), and the gas described in section (a) does not include gas which has migrated beyond the certificated boundaries of the storage site.

9.

K.S.A. 55-1210(c) specifically addresses ownership of storage gas that has migrated outside the designated underground storage area.

10.

K.S.A. 55-1210(c) preserves the rule of capture except as to gas that has migrated horizontally within a stratum to adjoining property or vertically to a stratum or portion thereof not leased or condemned by the injector.

11.

K.S.A. 55-1210(c)'s preservation of the rule of capture makes no exception for gas that has migrated beyond adjoining property based on some nonnatural means or as a result of some affirmative action by the ultimate producer of such gas.

12.

The body of caselaw that has applied the rule of capture to extinguish ownership rights in previously injected storage gas that has migrated to adjoining property developed without regard to whether the injector intended to "abandon" migrating gas.

13.

An issue of fact is not genuine unless it has legal controlling force as to the controlling issue. A disputed question of fact which is immaterial to the issue does not preclude summary judgment. Stated another way, if the disputed fact, however resolved, could not affect the judgment, it does not present a genuine issue of material fact.

14.

Ordinarily, summary judgment should not be granted until discovery is complete. However, if the facts pertinent to the material issues are not controverted, summary judgment may be appropriate even when discovery is unfinished.

15.

An appellate court reviews a district court's refusal to permit additional discovery under K.S.A. 2012 Supp. 60-256(f) for an abuse of discretion.

16.

A judicial action constitutes an abuse of discretion if the action (1) is arbitrary, fanciful, or unreasonable; (2) is based on an error of law; or (3) is based on an error of fact. The party asserting an abuse of discretion bears the burden of showing such an abuse of discretion.

17.

An appellate court reviews the denial of a motion seeking relief from judgment under an abuse of discretion standard.

18.

An appellate court exercises de novo review over questions of federal preemption.

19.

Absent an express statement by Congress that state law is preempted, federal preemption occurs when (1) there is an actual conflict between federal and state law; (2) compliance with both federal and state law is, in effect, physically impossible; (3) Congress has occupied the entire field of regulation and leaves no room for states to supplement federal law; or (4) state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress.

Appeal from Pratt District Court; ROBERT J. SCHMISSEUR, judge. Opinion filed March 15, 2013. Affirmed in part and remanded with directions.

Mark D. Coldiron, of Ryan Whaley Coldiron Shandy PLLC, of Oklahoma City, Oklahoma, argued the cause, and *Corey A. Neller* and *Paula M. Jantzen*, of the same firm, and *Richard A. Olmstead*, of Kutak Rock LLP, of Wichita, were on the briefs for appellant Northern Natural Gas Company.

Dennis C. Cameron, of Gable & Gotwals, of Tulsa, Oklahoma, argued the cause, and *Tyson D. Schwerdtfeger* and *Bradley W. Welsh*, of the same firm, and *Robert R. Eisenhauer*, of Johnston and Eisenhauer, of Pratt, were on the brief for appellees ONEOK Field Services Company, L.L.C., and ONEOK Midstream Gas Supply, L.L.C.

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Jim H. Goering, of Foulston Siefkin LLP, of Wichita, argued the cause, and *Timothy B. Mustaine*, of the same firm, and *Larry E. Keenan* and *Timothy R. Keenan*, of Keenan Law Firm, P.A., of Great Bend, were on the brief for appellee L.D. Drilling, Inc., and *Mark Banner*, of Hall, Estill, Hardwick, Gable, Golden & Nelson, P.C., of Tulsa, Oklahoma, were on the brief for appellees Lumen Energy Corporation and Lumen Midstream Partnership, LLC.

Michael Irvin, of Manhattan, was on the brief for amicus curiae Kansas Farm Bureau, *Gordon B. Stull*, of Stull Law Office, P.A., of Pratt, was on the brief for amicus curiae Haynesville Surface and Minerals Association, Inc., *Gregory J. Stucky*, of Fleeson, Gooing, Coulson & Kitch, L.L.C., of Wichita, was on the brief for amicus curiae Southwest Kansas Royalty Owners Association, and *David G. Seely,* of the same firm, was on the brief for amicus curiae Eastern Kansas Royalty Owners Association.

Teresa J. James, of Martin, Pringle, Oliver, Wallace & Bauer, L.L.P., of Overland Park, was on the brief for amicus curiae Southern Star Central Gas Pipeline, Inc.

Will B. Wohlford, of Morris, Laing, Evans, Brock & Kennedy, Chartered, of Wichita, and *Jeffery L.*

Carmichael, of the same firm, were on the brief for amicus curiae Val Energy, Inc.

The opinion of the court was delivered by

MORITZ, J.: In this conversion action, Northern Natural Gas Company (Northern) claims ONEOK Field Services Company, L.L.C., ONEOK Midstream Gas Supply, L.L.C. (collectively ONEOK), Lumen Energy Corporation, and Lumen Midstream Partnership, LLC (collectively Lumen) wrongfully converted natural gas by purchasing gas from two producers, Nash Oil & Gas, Inc. (Nash) and L.D. Drilling, Inc. (L.D.), which operated wells on land near Northern's underground natural gas storage field. Northern claims that Nash and L.D. were producing and selling Northern's previously injected storage gas and that ONEOK and Lumen unlawfully converted such gas when they purchased it from Nash and L.D. ONEOK and Lumen filed third-party indemnification claims against Nash and L.D. In turn, Nash and L.D. asserted various claims against Northern, ONEOK, and Lumen.

In granting summary judgment in favor of Nash and L.D. on the third-party indemnification claims, the district court determined that K.S.A. 55-1210(c) preserved the common-law rule of capture as to injected storage gas that migrates horizontally beyond property adjoining the certificated boundaries of a gas storage field. Because the wells at issue here were located beyond property adjoining the certificated boundaries of Northern's gas storage field, the

district court concluded Northern lost title to its migrating storage gas. Thus, the court concluded Nash and L.D. had title to the gas produced by those wells and purchased by ONEOK and Lumen.

After the district court issued its memorandum decision and order granting summary judgment in favor of Nash and L.D., but before the court journalized its order, Northern received authorization to expand the certificated boundaries of its storage field, thus bringing the wells at issue within the expansion area or onto property adjoining the expansion area. Northern moved the district court to modify its summary judgment ruling in light of the boundary change. In denying that motion, the district court acknowledged the change in circumstances and effectively limited its summary judgment ruling to matters prior to June 2, 2010. The court certified its Order as a final judgment and ordered ONEOK and Lumen to "hold all runs" pending further order of the court.

In this appeal of that summary judgment ruling, Northern primarily challenges the district court's interpretation of K.S.A. 55-1210. Focusing on subsections (a) and (b) of the statute, Northern contends the legislature intended to abolish the common-law rule of capture as to all previously injected storage gas, regardless of how far that gas migrates beyond the certificated boundaries of an injector's gas storage field. But we conclude, as did the district court, that Northern's reading of K.S.A. 55-1210 renders meaningless subsection (c) of the statute, which preserves

title in the injector to "natural gas that has migrated to adjoining property or to a stratum, or portion thereof. . . ." Further, Northern's interpretation of the statute ignores the caselaw precipitating enactment of the statute as well as subsequent caselaw interpreting the statute.

We conclude K.S.A. 55-1210 abolished the rule of capture as to natural gas which migrates horizontally within a stratum to adjoining property or vertically to a different stratum, but preserved that rule as to natural gas which migrates beyond those boundaries. Because the natural gas at issue here allegedly migrated horizontally beyond property adjoining Northern's certified storage field, Northern lost title to that gas and it became subject to the rule of capture. By application of the rule of capture, Nash and L.D. possessed title to the gas produced from their wells before June 2, 2010. Therefore, we hold the district court properly dismissed ONEOK's and Lumen's indemnification claims against Nash and L.D. and granted summary judgment in favor of Nash and L.D. regarding any alleged acts of conversion occurring before June 2, 2010. As more fully explained below, we remand this case to the district court for any further proceedings necessary to finally resolve this litigation.

Factual and Procedural Background

Northern owns and operates an underground natural gas storage facility in Pratt and Kingman

counties known as the Cunningham Storage Field (the Field). In the late 1970's, Northern obtained certification from the Kansas Corporation Commission (KCC) and the Federal Energy Regulatory Commission (FERC) to inject and store natural gas in the Viola formation, a geological stratum underlying the Field. In 1996, Northern obtained certification from the KCC and FERC to inject and store natural gas in a second stratum underlying the Field, the Simpson formation.

As of March 2007, the certificated boundaries of the Field encompassed 26,240 acres. In October 2008, FERC authorized Northern to expand the Field by approximately 1,760 acres. FERC specifically indicated its authorization did not permit Northern to inject storage gas in the expansion area; rather, the expansion permitted Northern to address "gas migration problems."

Nash and L.D., Kansas corporations engaged in mineral exploration and production, both operate several oil and gas wells in Pratt County. All of the wells at issue are located approximately 2 to 6 miles and more than a full section beyond the Field's northern certificated boundary as that boundary existed prior to June 2, 2010.

Pursuant to purchase agreements executed in 2005 and 2009, ONEOK purchased natural gas produced by Nash from these wells. Similarly, in 2008, Lumen entered into a gas purchase contract with

L.D. and began purchasing natural gas produced from L.D.'s wells in this area.

In December 2008, Northern filed suit in federal court against L.D., Nash, and Val Energy, Inc., alleging all three companies had caused Northern's storage gas to migrate beyond the certificated boundaries of the Field by creating "pressure sinks." Specifically, Northern argued the companies pumped atypical quantities of groundwater at their wells, thereby creating artificial pressure sinks which caused Northern's storage gas to migrate away from the Field and toward the wells.

Northern further alleged all three defendant companies were producing and selling Northern's previously injected storage gas as their own. Northern sought a declaratory judgment as to title and ownership of the migrated storage gas and/or injunctive relief pursuant to K.S.A. 55-1210 and stated claims for conversion, unjust enrichment, nuisance, tortious interference with a business relationship, and civil conspiracy. *See Northern Natural Gas Co. v. L.D. Drilling, Inc.,* No. 08-1405-WEB, 2009 WL 3739735, at *5 (D. Kan. 2009) (parallel federal litigation).

In September 2009, Northern requested authorization from FERC to expand the Field by an additional 14,420 acres based on Northern's concern that third-party operators, including Nash and L.D., were producing Northern's previously injected storage gas from wells in the proposed expansion area.

While the parallel federal litigation against Nash, L.D., and Val Energy remained pending, Northern filed this action in Pratt County District Court in December 2009 against ONEOK and Lumen alleging they indirectly converted Northern's gas. Specifically, Northern contended Nash and L.D. caused or contributed to the migration of Northern's previously injected storage gas; that Nash and L.D. produced and sold Northern's storage gas to the exclusion of Northern's ownership interests; and that ONEOK and Lumen bought, transported, and/or re-sold Northern's storage gas without authorization. In response, defendants ONEOK and Lumen admitted they purchased gas from Nash and L.D., denied Northern's allegations of conversion, claimed various defenses, and asserted third-party indemnification claims against Nash and L.D.

In response to the defendants' third-party indemnification claims, L.D. admitted that if either ONEOK or Lumen purchased gas owned by Northern from L.D., L.D. would be obligated to indemnify the defendants. However, L.D. denied Northern possessed or had any right to the gas L.D. sold to ONEOK or Lumen. L.D. also asserted various affirmative defenses to the third-party claims and asserted its own third-party claims against Northern for tortious interference with a business relationship, trespass, nuisance, slander of title, inverse condemnation, abuse of process, unjust enrichment, and lost production.

Similarly, Nash denied ONEOK's third-party indemnification allegations, asserted two affirmative

defenses and third-party crossclaims against ONEOK and Lumen, and sought a declaratory judgment pursuant to K.S.A. 60-1701 *et seq*. to determine the parties' rights to natural gas which had migrated outside Northern's storage field and beyond property adjacent to that field. Nash also asserted a third-party counterclaim against Northern for tortious interference with a business relationship.

Nash and L.D. jointly moved for summary judgment on ONEOK and Lumen's third-party indemnification claims, citing the Underground Storage of Natural Gas Act, K.S.A. 55-1201 *et seq*. In particular, Nash and L.D. relied upon K.S.A. 55-1210(c), which provides that injectors of natural gas do not lose title to gas that has "migrated to adjoining property or to a stratum, or portion thereof, which has not been condemned as allowed by law or otherwise purchased." Nash and L.D. reasoned that because their wells were located beyond property "adjoining" Northern's certificated storage area, Northern lost title to any gas that migrated to Nash's and L.D.'s wells and the common-law "rule of capture" applied to give Nash and L.D. title to any such gas produced from their wells. Further, Nash and L.D. contended that because Northern did not own the gas Nash and L.D. produced and sold to ONEOK and Lumen, Northern's conversion claim against ONEOK and Lumen failed. Consequently, ONEOK and Lumen's third-party indemnification claims against Nash and L.D. failed, and Nash and L.D. were entitled to summary judgment.

In response, Northern argued it had title to or ownership rights in any migrating storage gas under K.S.A. 55-1210. Northern reasoned that under K.S.A. 55-1210(a) and (b), Northern maintained title to its previously injected storage gas regardless of how far the gas migrated. Alternatively, Northern argued even if the district court determined Northern lacked title to the gas, genuine issues of material fact precluded summary judgment.

The district court issued a comprehensive opinion and order (Order) on April 15, 2010, granting summary judgment in favor of Nash and L.D. "as to all the gas purchased by ONEOK and/or Lumen from any of the Nash or L.D. wells identified by Northern." The court agreed with the interpretation of K.S.A. 55-1210(c) suggested by Nash and L.D. and found that Northern lost title to any storage gas which migrated beyond property adjoining Northern's certified boundaries. Further, the district court held that the rule of capture gave Nash and L.D. title to any such migrating gas.

In so holding, the district court rejected Northern's argument that Nash and L.D. had "interfered" with Northern's ownership rights to the storage gas within the boundaries of the Field in violation of K.S.A. 55-1210(b) by allegedly causing a breach in the storage field's containment features. Further, the district court pointed out that Northern's interpretation of the statute would render section (c) of the statute superfluous. The district court certified the Order as a final judgment under K.S.A. 2010 Supp. 60-254(b),

and Northern immediately appealed to the Court of Appeals.

After filing its notice of appeal, Northern filed a motion in district court to clarify or amend the Order, suggesting the district court's rejection of Northern's allegation that Nash and L.D. "interfered" with storage gas within the Field rendered the Order void as contrary to and preempted by the Natural Gas Act, 15 U.S.C. § 717 *et seq*. (2006). On May 6, 2010, Northern docketed the appeal in the Court of Appeals and moved to transfer the appeal to this court pursuant to K.S.A. 20-3017.

On June 2, 2010, FERC issued an order (the FERC Order) authorizing Northern to expand the Field by 12,320 acres. As a result, since June 2, 2010, all but two of the wells operated by Nash and L.D. are located either in the expansion area or within 1 mile of that area. Citing the FERC Order, Northern moved for relief from judgment in this case, challenging the district court's factual findings regarding the location of the wells. Northern also subsequently filed a "Complaint in Condemnation" in the United States District Court for the District of Kansas seeking to confirm its legal right to condemn the expansion area authorized in the FERC Order. *Northern Natural Gas v. 9117.53 Acres in Pratt,* 781 F. Supp. 2d 1155, 1158-59 (D. Kan. 2011).

In this case, the district court conducted a hearing on June 30, 2010, to settle the journal entry related to the Order and to address Northern's post-ruling

motions. At the hearing, Northern argued the summary judgment ruling should be certified only as a final judgment regarding the conversion claim as it existed prior to June 2, 2010, *i.e.,* before the FERC Order changed the certificated boundaries.

The district court declined to modify the Order regarding "matters prior to June 2nd." In its journal entry, the court (1) indicated the April 15, 2010 order, including the K.S.A. 60-254(b) certification, would serve as the journal entry, (2) ordered ONEOK and Lumen "to hold all runs," *i.e.,* to suspend payments to Nash and L.D. for gas produced from Nash and L.D.'s wells, pending further order of the court, and (3) indicated that all pleadings, documents, and evidence filed in the case were considered as part of the summary judgment record.

We granted Northern's motion to transfer the appeal to this court, and Northern amended its notice of appeal to include "rulings, orders, and judgments made by the District Court up to, and including, June 30, 2010."

On appeal Northern claims the district court erred in granting summary judgment to Nash and L.D. because it: (1) erroneously interpreted K.S.A. 55-1210 to find that Northern lost title to gas that migrated beyond adjoining property, (2) abused its discretion by refusing to allow Northern further time for discovery, and (3) abused its discretion by denying Northern's motion to modify the summary judgment ruling. Northern further argues the district court's

ruling resulted in an unconstitutional taking of Northern's property without just compensation and that the order granting summary judgment is void because it conflicts with and is preempted by the Natural Gas Act, 15 U.S.C. § 717 *et seq*.

NORTHERN HAS STANDING TO INVOKE APPELLATE JURISDICTION

Before turning to the merits of Northern's claims, we initially address the parties' responses to the show cause order issued by this court requesting the parties address whether Northern has standing to invoke appellate jurisdiction.

In Kansas, standing is jurisdictional. *Mid-Continent Specialists, Inc. v. Capital Homes,* 279 Kan. 178, 185, 106 P.3d 483 (2005). We have a duty to question jurisdiction on our own initiative and, when the record discloses a lack of jurisdiction, we have a duty to dismiss the appeal. *State v. Gill,* 287 Kan. 289, 294, 196 P.3d 369 (2008). Whether jurisdiction exists is a question of law subject to unlimited review. *Harsch v. Miller,* 288 Kan. 280, 286, 200 P.3d 467 (2009).

As a general rule, a party seeking to appeal must be aggrieved by the judgment or order from which the appeal is taken. *See*, *e.g., Thomas v. Metropolitan Life Ins. Co.,* 631 F.3d 1153, 1159 (10th Cir. 2011); *City of Cleveland v. Ohio,* 508 F.3d 827, 836-37 (6th Cir. 2007); *St. Paul Fire Ins. v. Univ. Builders Supply,* 409 F.3d 73, 83 (2nd Cir. 2005). However, a party

ordinarily has no standing to appeal from a judgment or order that dismisses a claim to which it was not a party. *City of Cleveland,* 508 F.3d at 836; *St. Paul Fire,* 409 F.3d at 83.

Here, Northern appeals from the district court's grant of summary judgment in favor of third-party defendants Nash and L.D. on ONEOK's and Lumen's third-party indemnification claims against them. After oral arguments, we issued a show cause order requesting the parties address whether Northern, as plaintiff, has standing to appeal from the Order dismissing ONEOK's and Lumen's third-party indemnification claims even though the Order did not explicitly dismiss Northern's conversion claim against ONEOK and Lumen.

After reviewing the record and considering the parties' responses to the show cause order and oral argument as to this issue, we are persuaded that Northern is sufficiently "aggrieved by" the district court's summary judgment ruling to appeal that ruling. Specifically, we are persuaded that the district court's ruling primarily was based on its determination that Northern had no ownership rights in the gas produced by Nash and L.D. As the parties suggest, although the district court failed to explicitly dismiss Northern's conversion claim against ONEOK and Lumen when it granted summary judgment in favor of Nash and L.D. on ONEOK and Lumen's third-party indemnification claims, that was the practical effect of the court's ruling. Accordingly, we conclude Northern has standing to appeal.

THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF NASH AND L.D.

In this appeal, Northern primarily challenges the district court's interpretation of K.S.A. 55-1210, maintaining its argument that the statute abolished the rule of capture as to all previously injected storage gas regardless of how far that gas migrates beyond the boundaries of a certificated underground storage field.

In contrast, Nash, L.D., and Lumen contend K.S.A. 55-1210 abolished the rule of capture regarding storage gas that remains within the certificated boundaries of an underground storage field or migrates to an adjoining property or to a stratum or portion thereof, but retained the rule of capture as to storage gas that migrates outside of those limitations.

Northern's primary argument requires interpretation of K.S.A. 55-1210.

Thus, the primary issue we must resolve is whether K.S.A. 55-1210 abolished the common-law rule of capture as to previously injected storage gas that migrates beyond property adjoining an underground storage field or to a stratum or portion thereof. Resolution of this question requires statutory interpretation and, to some extent, consideration and application of prior caselaw. Accordingly, our review is unlimited. *Johnson v. Brooks Plumbing,* 281 Kan. 1212, 1213-14, 135 P.3d 1203 (2006). Nonetheless, our

review is guided by several well-established principles of statutory construction.

Rules of statutory construction.

The most fundamental rule of statutory construction is that the intent of the legislature governs if that intent can be ascertained. *Bergstrom v. Spears Manufacturing Co.,* 289 Kan. 605, 607, 214 P.3d 676 (2009). We first attempt to ascertain legislative intent by reading the plain language of the statutes and giving common words their ordinary meanings. *Padron v. Lopez,* 289 Kan. 1089, 1097, 220 P.3d 345 (2009). When a statute is plain and unambiguous, we do not speculate as to the legislative intent behind it and will not read into the statute something not readily found in it. But when the statute's language or text is unclear or ambiguous, we "employ canons of construction, legislative history, or other background considerations to divine the legislature's intent and construe the statute accordingly." *Stewart Title of the Midwest v. Reece & Nichols Realtors,* 294 Kan. 553, 564-65, 276 P.3d 188 (2012).

However, even if the language of the statute is clear, we must still consider various provisions of an act in pari materia with a view of reconciling and bringing those provisions into workable harmony if possible. *Southwestern Bell Tel. Co. v. Beachner Constr. Co.,* 289 Kan. 1262, 1270, 221 P.3d 588 (2009). Additionally, we must construe statutes to avoid unreasonable or absurd results, and we presume the

legislature does not intend to enact useless or meaningless legislation. 289 Kan. at 1269; *State v. Le,* 260 Kan. 845, 850, 926 P.2d 638 (1996).

Historical context of K.S.A. 55-1210.

While it is helpful to place the statute at issue, K.S.A. 55-1210, in historical context, we need not extensively undertake that task here, as we did in *Northern Natural Gas Co. v. Martin, Pringle, et al.,* 289 Kan. 777, 788, 217 P.3d 966 (2009). Nevertheless, for ease of reference, we will undertake an abbreviated discussion of the statute's historical context.

In *Martin, Pringle,* we described the evolution of the "ownership in place theory" and the "rule of capture" in Kansas. As we explained, under the ownership in place theory, a Kansas landowner historically has a present estate in the oil and gas in the ground. But when that oil and gas is produced and severed from the land, it becomes personal property of the producer. 289 Kan. at 788. Further, traditionally, under the rule of capture, a landowner with a present estate in natural gas in the ground loses title to any gas that "escapes" or migrates away from the landowner's property. Instead, that migrating gas becomes the personal property of the first person to produce the gas. 289 Kan. at 788 (discussing the rule of capture and citing *Anderson v. Beech Aircraft Corp.,* 237 Kan. 336, 342, 699 P.2d 1023 [1985]); *see also* 1 Kuntz Law of Oil and Gas §§ 4.1 and 4.2 (1987) (discussing the rule of capture).

In 1951, the Kansas Legislature passed the Underground Storage of Natural Gas Act, K.S.A. 55-1201 *et seq.* (the Storage Act) to promote the underground storage of natural gas. The Storage Act defined, *inter alia,* the terms "underground storage" and "natural gas public utility" and established procedures for natural gas public utilities to appropriate property for underground storage facilities. *See* K.S.A. 55-1201; K.S.A. 55-1205.

As passed in 1951, the Storage Act was silent regarding its impact, if any, on the rule of capture as to injected storage gas. But nearly 30 years ago, this court extended the rule of capture to determine ownership of previously injected storage gas. *See Anderson,* 237 Kan. 336, *superseded by statute as stated in Martin, Pringle,* 289 Kan. 777. In *Anderson,* we held that the owners of land and of an oil and gas lease could produce and hold title to nonnative gas from their land, even though that gas previously had been purchased, injected, and stored in a common reservoir by another landowner having no license, permit, or lease covering the land from which the nonnative gas was produced. 237 Kan. at 348.

Although the entity that stored the gas in *Anderson,* Beech Aircraft, was not a natural gas public utility, this court extended *Anderson*'s holding to public utilities in *Union Gas System, Inc. v. Carnahan,* 245 Kan. 80, 774 P.2d 962 (1989), *superseded by statute as stated in Martin, Pringle,* 289 Kan. 777. There,

Union, a natural gas public utility, acquired abandoned wells and obtained gas storage leases from area landowners before it began injecting and storing natural gas in the Squirrel formation in Montgomery County. Eventually, Union's storage gas migrated horizontally within that formation to adjoining farmland where Union had not secured any ownership rights. There, individuals who had obtained oil and gas leases from the adjoining landowners drilled wells and tapped into the Squirrel formation. They produced significant quantities of gas consisting largely of Union's storage gas and then ultimately sold some of that gas back to Union.

Union eventually secured a certificate from the KCC, pursued condemnation proceedings, and secured the wells on the adjoining property. However, this court in *Union* did not permit Union to fully recover for the gas which had been produced from those wells. Instead, the court held that the rule of capture as discussed in *Anderson* applied to give the producers ownership of the gas until January 13, 1986, the date Union obtained KCC certification. *Union Gas,* 245 Kan. at 86-87.

Enactment of K.S.A. 55-1210.

In response to the common law as it had developed in *Union Gas* and *Anderson,* the legislature enacted in 1993 the statute at issue in this case, K.S.A. 55-1210. In *Martin, Pringle,* we succinctly described

the state of the law preceding the effective date of the statute:

> "[P]rior to July 1, 1993, the landowners adjoining Northern's underground gas storage area possessed the legal right to produce and keep the injected gas which had migrated onto their property, unless and until Northern obtained a certificate to expand its storage area onto their land and paid them for that privilege through a condemnation action. K.S.A. 55-1210 abolished that right, as well as permitting migrating gas to trespass upon adjoining land." 289 Kan. at 791.

K.S.A. 55-1210 provides:

> "(a) All natural gas which has previously been reduced to possession, and which is subsequently injected into underground storage fields, sands, reservoirs and facilities, whether such storage rights were acquired by eminent domain or otherwise, shall at all times be the property of the injector, such injector's heirs, successors or assigns, whether owned by the injector or stored under contract.
>
> "(b) In no event shall such gas be subject to the right of the owner of the surface of such lands or of any mineral interest therein, under which such gas storage fields, sands, reservoirs and facilities lie, or of any person, other than the injector, such injector's heirs, successors and assigns, to produce, take, reduce to possession, either by

means of the law of capture or otherwise, waste, or otherwise interfere with or exercise any control over such gas. Nothing in this subsection shall be deemed to affect the right of the owner of the surface of such lands or of any mineral interest therein to drill or bore through the underground storage fields, sands, reservoirs and facilities in such a manner as will protect such fields, sand, reservoirs and facilities against pollution and the escape of the natural gas being stored.

"(c) With regard to natural gas that has migrated to adjoining property or to a stratum, or portion thereof, which has not been condemned as allowed by law or otherwise purchased:

(1) The injector, such injector's heirs, successors and assigns shall not lose title to or possession of such gas if such injector, such injector's heirs, successors or assigns can prove by a preponderance of the evidence that such gas was originally injected into the underground storage.

(2) The injector, such injector's heirs, successors and assigns, shall have the right to conduct such tests on any existing wells on adjoining property, at such injector's sole risk and expense including, but not limited to, the value of any lost production of other than the injector's gas, as may be reasonable to determine ownership of such gas.

(3) The owner of the stratum and the owner of the surface shall be entitled to such

> compensation, including compensation for use of or damage to the surface or substratum, as is provided by law, and shall be entitled to recovery of all costs and expenses, including reasonable attorney fees, if litigation is necessary to enforce any rights under this subsection (c) and the injector does not prevail.
>
> "(d) The injector, such injector's heirs, successors and assigns shall have the right to compel compliance with this section by injunction or other appropriate relief by application to a court of competent jurisdiction."

Interpretation of K.S.A. 55-1210.

A few years after the enactment of K.S.A. 55-1210, this court considered the meaning of the term "adjoining property" in section (c) as well as the constitutionality of the testing provisions of K.S.A. 55-1210(c)(2), (c)(3), and (d). *Williams Natural Gas Co. v. Supra Energy, Inc.,* 261 Kan. 624 (1997). In that case, Williams operated a natural gas storage field in Elk, Montgomery, and Chautauqua counties and stored natural gas in the Burgess Sand formation. At some point, Williams became concerned that Supra Energy, which leased property in Elk County, was producing gas that had migrated horizontally from Williams' storage field. When the parties could not agree on testing, Williams sought and obtained an injunction pursuant to K.S.A. 55-1210(d) and K.S.A. 60-901.

On appeal, Supra argued the testing provisions of K.S.A. 55-1210(c)(2) and (3) were unconstitutional, in part, because the term "adjoining" was vague. This court disagreed, finding the term "adjoining" referred to "any section adjacent to a storage field." 261 Kan. at 630. Specifically, we held that any section of land which touched a section containing a storage field "adjoined" the storage field. We pointed out that this definition was consistent with prior caselaw defining the term "adjoining" as "'being contiguous or touching,'" and we noted that "a person exercising common sense would understand the term 'adjoining' in" K.S.A. 55-1210(c)(2). 261 Kan. at 630 (citing *State, ex rel. Boynton v. Bunton,* 141 Kan. 103, Syl. ¶ 1, 40 P.2d 326 [1935]). Ultimately, the court upheld the constitutionality of K.S.A. 55-1210(c)(2), (3), and (d). 261 Kan. at 631.

Next, in *Hayes Sight & Sound, Inc. v. ONEOK, Inc.,* 281 Kan. 1287, 136 P.3d 428 (2006), we considered the statute's provision for recovery of attorney fees, K.S.A. 55-1210(c)(3). There, natural gas migrated from underground storage caverns and caused explosions, resulting in two fatalities and extensive property damage to plaintiffs' businesses. The plaintiffs eventually were successful in their negligence action against ONEOK, the owner of the migrating storage gas, and were awarded damages. They then sought attorney fees under K.S.A. 55-1210(c).

In reversing the trial court's denial of plaintiffs' request for attorney fees, the *Hayes* court concluded that subsection (c)(1)

> "does not create title in the natural gas. Instead, it provides *some* protection to the titleholder when gas migrates. Likewise, subsection (c)(3) does not create a cause of action but rather declares that damages will be available to substratum or surface owners as provided by law and provides for the recovery of attorney fees, expenses, and costs. The negligence action prosecuted by [plaintiffs] in the present action, although not a statutorily created cause of action, is 'provided by law' for compensation for damage to the surface, as expressly secured by subsection (c)(3)." (Emphasis added.) 281 Kan. at 1329.

Curiously, the court in *Hayes* was not swayed by ONEOK's argument that the last clause of K.S.A. 55-1210(c)(3), which expressly states that compensation is recoverable under that section only "if litigation is necessary to enforce any rights under this subsection (c) and the injector does not prevail," rendered the statute inapplicable under the circumstances of that case.

More recently, in *Martin, Pringle,* this court accepted a certified question from the United States District Court for the District of Nebraska, where Northern was pursuing a malpractice claim against its former law firm, Martin, Pringle, Oliver, Wallace & Bauer, L.L.P. We were asked to decide whether an

injector of natural gas into underground storage loses title to such gas when it migrates prior to the effective date of K.S.A. 55-1210 to "adjoining property or to a stratum, or portion thereof, which has not been condemned as allowed by law or otherwise purchased." K.S.A. 55-1210(c).

According to the stipulated facts in *Martin, Pringle,* gas injected by Northern into its underground storage in the Cunningham Field had migrated beyond Northern's certificated northern boundaries, and Trans Pacific, which owned two wells on property adjacent to Northern's storage field, produced that gas. We answered the certified question affirmatively, concluding the statute applied only prospectively. 289 Kan. at 791. Thus, as in *Union Gas,* Northern's failure to pursue condemnation of the adjoining property prior to the effective date of the statute, July 1, 1993, meant that Trans Pacific had "a right, title, and interest in and to the gas which had migrated to the adjoining property as of that date." *Martin, Pringle,* 289 Kan. at 791.

To summarize, before the enactment of K.S.A. 55-1210, the rule of capture gave landowners adjoining an underground storage area the right to produce and keep injected gas which migrated onto their property "unless and until [the injector] obtained a certificate to expand its storage area onto their land." *Martin, Pringle,* 289 Kan. at 791; *see also Union Gas,* 245 Kan. at 88 (noting that injector's gas was no longer subject to rule of capture as of date injector received KCC certification). But effective July 1, 1993, K.S.A.

55-1210 abolished the right of capture as to storage gas that migrates to adjoining property. *Martin, Pringle,* 289 Kan. at 791-92. This brings us to the present action.

The plain language of K.S.A. 55-1210 supports the district court's ruling.

Here, applying K.S.A. 55-1210(c) and the definition of "adjoining property" from *Williams,* the district court determined that Nash's and L.D.'s wells, located 2 to 6 miles from the certificated boundary of the Field, were not on adjoining property. Consequently, the court concluded any migrating storage gas produced from those wells did not fall within K.S.A. 55-1210(c)'s provision for "gas that has migrated to adjoining property or to a stratum, or portion thereof, which has not been condemned as allowed by law or otherwise purchased." Instead the district court concluded that the migrating gas remained subject to the rule of capture.

Relying on K.S.A. 55-1210(a) and (b), Northern maintains that the statute grants injectors of natural gas, like Northern, an unqualified, unlimited right to maintain title to all injected gas regardless of where that gas migrates or ultimately is found. Northern argues the statute expressly abolished the rule of capture as to migrating storage gas. Or, as L.D. characterizes Northern's argument: "In Northern's view, it is entitled to follow and recover for every molecule of gas it can prove it injected into underground storage

against any producer of that gas (or any purchaser from such producer), even if the gas has migrated to wells at the ends of the earth."

While the simplicity of such an "ends of the earth" premise is seductive, it is fatally flawed in several respects. As discussed below, Northern's interpretation of K.S.A. 55-1210 ignores several significant phrases in sections (a) and (b) of the statute and would render section (c) superfluous if given effect.

K.S.A. 55-1210(a)

Section (a) of the statute provides:

> "All natural gas which has previously been reduced to possession, and which is subsequently injected into underground storage fields, sands, reservoirs and facilities, whether such storage rights were acquired by eminent domain or otherwise, shall at all times be the property of the injector, such injector's heirs, successors or assigns, whether owned by the injector or stored under contract." K.S.A. 55-1210(a).

Northern's argument regarding the "plain and unambiguous" language of section (a) bears repeating in full, as much for what it omits as for what it includes:

> "Subsection (a) clearly conveys the Legislature's intention that *all* natural gas that has previously been reduced to possession and then injected into the ground for storage

> shall *at all times* be the property of the injector. [Citation omitted.] The District Court erred by holding that subsection (a) applies only to gas located within the certificated boundaries of a storage field because the plain language of subsection (a) does not support the District Court's holding. Nothing in subsection (a) requires that the gas be injected into a *certificated* storage field. [Citation omitted.] Instead, subsection (a) expressly states that *all* natural gas which has previously been reduced to possession and injected into underground storage field, sands, reservoirs, and facilities is owned by and remains the possession of the injector *at all times*. The District Court's interpretation is error because it requires the Court to add language to subsection (a) not found in the statute."

As Northern points out, the first clause of K.S.A. 55-1210(a) refers to "[a]ll natural gas which has previously been reduced to possession, and which is subsequently injected into underground storage fields, sands, reservoirs and facilities." Perhaps recognizing that this clause, standing alone, could be construed to refer simply to gas which has been reduced to possession, is injected into a storage field, and remains in that storage field, Northern proceeds directly to the phrase "shall *at all times* be the property of the injector, such injector's heirs, successors or assigns." (Emphasis added.) K.S.A. 55-1210(a). Northern reasons that this italicized phrase reflects the legislature's intention that once storage gas is injected, it

remains the property of the injector regardless of when or how far the gas migrates.

Northern's analysis is flawed in several respects. First, Northern omits and ignores the phrase "whether *such storage rights* were acquired by eminent domain or otherwise." (Emphasis added.) K.S.A. 55-1210(a). Second, Northern essentially interprets the phrase "at all times" to mean "at all places." Finally, Northern omits and ignores the last clause of the section: "whether owned by the injector or stored under contract." K.S.A. 55-1210(a).

The phrase "whether *such storage rights* were acquired by eminent domain or otherwise" clearly modifies the phrase preceding it, "[a]ll natural gas which has previously been reduced to possession, and which is subsequently injected into underground storage fields, sands, reservoirs and facilities. . . ." (Emphasis added.) K.S.A. 55-1210(a). Thus, as Nash and L.D. suggest, section (a) simply clarifies that natural gas which is reduced to possession and injected into an underground area in which the injector has *storage rights* is not subject to the rights of owners of the surface or mineral interests in the land above those storage areas.

Further, Northern inexplicably suggests that the phrase "shall *at all times* be the property of the injector" means that once gas is reduced to possession and injected into an underground storage area, the injector's ownership has no limits – temporal, geographic, or otherwise – regardless of when or where

that gas strays. But that interpretation requires that we ignore much of the remainder of section (a) and its application to gas that is stored pursuant to previously acquired "storage rights." Moreover, we are unwilling to substitute the geographic qualifier "at all places" for the temporal qualifier "at all times" in order to achieve the meaning asserted by Northern.

Finally, Northern's expansive interpretation of section (a) omits the last phrase of section (a), "whether owned by the injector or stored under contract." Again, this phrase clearly pertains to the gas which is "the property of the injector" and clarifies that section (a) applies to stored gas, whether owned by the injector or stored under contract.

In short, section (a) gives an injector title to gas injected into its legally recognized storage area. By its plain terms, however, section (a) does not apply to gas that has migrated outside the injector's certificated storage area.

K.S.A. 55-1210(b)

Northern also suggests that the language of section (b) supports its expansive interpretation of section (a). Section (b) provides:

> "In no event shall *such gas* be subject to the right of the owner of the surface of such lands or of any mineral interest therein, under which such gas storage fields, sands, reservoirs and facilities lie, *or of any person,* other than the injector, such injector's heirs,

> successors and assigns, to produce, take, reduce to possession, either by means of the law of capture or otherwise, waste, *or otherwise interfere* with or exercise any control over such gas." (Emphasis added.) K.S.A. 55-1210(b).

Northern concedes that section (b) primarily restricts the rights of interest owners of the surface lands under which injected gas lies. Nevertheless, Northern ascribes broader meaning to the statute based on the two disjunctive phrases italicized above. Specifically, Northern contends Nash and L.D. created "pressure sinks" which caused storage gas to migrate outside Northern's certificated area and toward Nash's and L.D.'s wells. Based on these alleged activities, Northern concludes Nash and L.D. are "persons" who have "otherwise interfere[d]" with Northern's possession of the gas.

Northern's "interference" argument, while initially appealing, is unpersuasive for two reasons. First, the italicized portion of section (b) upon which Northern relies, like the remainder of section (b), applies only to "such gas." Unquestionably, the phrase "*such gas*" in section (b) references the gas described in section (a) above. Second, as we have determined, the gas described in section (a) does *not* include gas which has migrated beyond the certificated boundaries of the storage site.

Additionally, we perceive a disconnect between Northern's allegations of conversion against ONEOK

and Lumen and Northern's allegations of "interference" against Nash and L.D. based on the language of section (b). We note that in the parallel federal litigation described above, the United States District Court for the District of Kansas eventually granted Northern's motion for a preliminary injunction, ordering Nash and L.D. to shut in certain wells and cease production by February 2011. The district court in that case relied, in part, on the likelihood that Northern might succeed on its nuisance claim against Nash and L.D., a claim which arises from the same "pressure sink/interference" argument Northern presses here. *Northern Natural Gas Co. v. L.D. Drilling, Inc.,* 759 F. Supp. 2d 1282 (D. Kan. 2010), *aff'd* 697 F.3d 1259 (10th Cir. 2012).

Although the United States Court of Appeals for the Tenth Circuit affirmed the district court's order granting Northern's motion for a preliminary injunction, the panel recognized a distinction that Northern attempts to erase in this case. Specifically, the Tenth Circuit reasoned that the district court in this case (the state case) applied K.S.A. 55-1210 to reject Northern's conversion claim and noted:

> "The state case addressed whether Northern had still had title to the natural gas that migrated several miles away from the Field. Here, on the other hand, the issue is whether Defendants' production from their wells in the expansion area unreasonably interfered with Northern's storing its natural gas in the Field. Therefore, the state court's decision in

> the state-court proceeding cannot make Defendants' interference with Northern's storage field reasonable." *Northern Natural Gas Co. v. L.D. Drilling, Inc.,* 697 F.3d 1259, 1272 (10th Cir. 2012).

The Tenth Circuit further noted that the district court's ruling in the state case regarding Northern's claims of "interference" did not have preclusive effect in the parallel federal litigation because the district court's "interference determination" in the state case "was not made in the context of a nuisance claim, but was instead premised on Kan. Stat. § 55-1210(b), which the state court ruled was limited to gas migrating to 'adjoining property.' [Citation omitted.] That limitation does not apply to this nuisance claim." 697 F.3d at 1272 n.7.

To summarize, we agree with the district court's ruling in this case that the first two subsections of K.S.A. 55-1210 govern ownership rights to previously injected storage gas that remains within a designated underground storage area. Under K.S.A. 55-1210(a) and (b), Northern retains title to its previously injected storage gas that has been injected into the underground storage area and that lies within the Field. But the question here is whether Northern retained title to previously injected storage gas that migrated at least 2 to 6 miles beyond the certificated boundaries of the Field to Nash's and L.D.'s production wells.

To answer that question, we must look to K.S.A. 55-1210(c). As we discuss more fully below, section (c) preserves the rule of capture except as to gas that has

migrated horizontally to adjoining property or vertically to a stratum or portion thereof not leased or condemned by the injector. Simply stated, section (c) makes no exception for gas that has migrated beyond adjoining property based on some nonnatural means or as a result of some affirmative action by the ultimate producer of such gas. While such an exception may well be an appropriate additional basis for permitting an injector to retain title to migrating gas, that is an exception for the legislature to make, not this court. *See* Note, *Underground Fences and Storage Gas Migration: K.S.A. Section 55-1210 and Legislating Property Rights to Injected Natural Gas,* 50 Washburn L.J. 177, 197 (Fall 2010) (suggesting changes to K.S.A. 55-1210 which "encourage delineation of storage field boundaries rather than further litigation").

K.S.A. 55-1210(c)

Unlike sections (a) and (b), section (c) specifically addresses ownership of storage gas that has migrated outside the designated underground storage area. *See Hayes,* 281 Kan. at 1329 (explaining that section [c] "does not create title in the natural gas," but instead "provides some protection to the titleholder when gas migrates").

Section (c) contains three subsections. The introductory language of section (c) limits application of those three subsections to "natural gas that has migrated to adjoining property or to a stratum, or portion thereof, which has not been condemned as

allowed by law or otherwise purchased." Subsection (c)(1) provides that an injector "shall not lose title to or possession of *such gas* if such injector . . . can prove by a preponderance of the evidence that *such gas* was originally injected into the underground storage." (Emphasis added.) K.S.A. 55-1210(c)(1). Subsection (c)(2) reinforces the limited application of subsection (c)(1) by providing an injector with a statutory right to test wells on "*adjoining property*" for the presence of the injector's storage gas. (Emphasis added.) K.S.A. 55-1210(c)(2). Subsection (c)(3), which is not at issue here, provides for compensation to the surface owner for damage to the surface or substratum and for costs and expenses associated with litigation if the injector does not prevail.

Northern contends that section (c)'s introductory clause limiting its application to natural gas "*that has migrated to adjoining property or to a stratum, or portion thereof,* which has not been condemned as allowed by law or otherwise purchased" does not identify a "geographic limit to an injector's right to show title to migrated storage gas." Instead, Northern reasons that section (c) applies to gas which has migrated (1) to adjoining property, (2) horizontally or vertically to a stratum in which the injector does not have storage rights, or (3) horizontally or vertically to a portion of a stratum in which the injector does not have storage rights. Northern concedes that applying its interpretation, gas which migrates beyond the certificated boundaries of a storage field – whether the gas migrates 1 mile or 1 million miles – remains

the property of the injector. Northern points out that this interpretation is consistent with its expansive interpretation of sections (a) and (b).

But Northern's argument as to the reach of section (c) relies heavily upon Northern's flawed interpretation of sections (a) and (b). As the district court noted, Northern's argument regarding sections (a) and (b) renders superfluous the introductory language limiting section (c)'s application to gas "that has migrated to adjoining property or to a stratum, or portion thereof, which has not been condemned." K.S.A. 55-1210(c). Simply stated, if the legislature intended to protect *all* gas that migrates outside certificated boundaries, there would be no need to specify that section (c) applies to "to natural gas that has migrated *to adjoining property or to a stratum, or portion thereof,* which has not been condemned as allowed by law or otherwise purchased." (Emphasis added.) K.S.A. 55-1210(c). *See Southwestern Bell Tel. Co. v. Beachner Constr. Co.,* 289 Kan. 1262, 1269, 221 P.3d 588 (2009) (providing appellate courts presume the legislature does not intend to enact meaningless legislation).

Additionally, Northern's interpretation of section (c) ignores this court's definition of the term "adjoining property" in *Williams.* By defining the phrase "adjoining property" to mean "any section of land which touch[es] a section containing a storage field," the *Williams* court implicitly rejected any suggestion that the phrase is meaningless or superfluous. *Williams Natural Gas Co. v. Supra Energy, Inc.,* 261 Kan. 624,

630, 931 P.2d 7 (1997). And, it does not escape our attention that despite several opportunities since *Williams* to modify or define the term "adjoining property," the legislature has not chosen to do so. *See Hayes,* 281 Kan. at 1329 (finding that subsection [c][1] provides "some protection" to the injector when gas migrates).

Further, if Northern is correct that an injector retains title to migrating gas regardless of where or how far that gas migrates away from its certificated boundaries, the legislature would have had no reason to include the language in subsection (c)(1) specifically indicating that an injector "*shall not lose title to or possession of* such gas if such injector . . . can prove by a preponderance of the evidence that such gas was originally injected into the underground storage." (Emphasis added.) K.S.A. 55-1210(c)(1). Clearly, this provision anticipates that if the reverse occurs, *i.e.,* the injector cannot prove that gas which migrated to adjoining property or to a stratum or portion thereof originally was injected into the underground storage, the injector *loses* title to the migrating gas.

Moreover, Northern's interpretation of section (c) to apply to all gas which migrates horizontally *within* a stratum, regardless of how far it migrates, is inconsistent with the language of the statute itself. The statute applies to natural gas that has "migrated to . . . a stratum or a portion thereof." K.S.A. 55-1210(c). As the producers point out, gas migrates horizontally within a stratum but migrates vertically "to" another stratum. *See* Webster's Third New International

Dictionary 2257 (2002) (geological definition of the term "stratum" is "a tabular mass or thin sheet of sedimentary rock or earth of one kind formed by natural causes and made up [usually] of a series of layers lying between beds of other kinds"). Thus, Northern's argument alters the plain meaning of the statute by essentially requiring that we substitute the word "within" for the word "to" in the statute. *See Stewart Title of the Midwest v. Reece & Nichols Realtors,* 294 Kan. 553, 564-65, 276 P.3d 188 (2012) (recognizing that when a statute is plain and unambiguous, we do not speculate as to the legislative intent behind it and will not read into the statute something not readily found in it).

Northern's argument also is inconsistent when considered in the context of other provisions of the Storage Act and overlooks the maxim that various provisions of an act must be read together and harmonized if possible. *See Southwestern Bell Tel. Co.,* 289 Kan. at 1270-71.

The Storage Act contemplates that an injector will store gas within a specific stratum after obtaining storage rights in that stratum. A review of the Storage Act's provisions reveals that the legislature did not intend for an injector to claim ownership to gas which travels outside certificated boundaries, whether horizontally within the stratum or vertically to another stratum. *See*, *e.g.,* K.S.A. 55-1203 (permitting a natural gas public utility to "appropriate for its use for the underground storage of natural gas any subsurface stratum or formation in any land which

the [KCC] shall have found to be suitable and in the public interest for the underground storage of natural gas"); K.S.A. 55-1204(a)(1) (providing a natural gas public utility desiring to exercise the right of eminent domain must obtain a certificate from the KCC setting out, *inter alia,* "[t]hat the underground stratum or formation sought to be acquired is suitable for the underground storage of natural gas"); K.S.A. 55-1209 (requiring the owner of an underground natural gas storage facility to provide the KCC with "a plat map identifying the location of such facility and a description of the geological formation or formations to be used for storage").

It is clear from the record that Northern is authorized to store gas within two particular strata – the Simpson formation and the Viola formation. Further, Northern's authorization to store gas within those formations does not extend to all portions of the formations wherever they may lie. Instead, as demonstrated by Northern's repeated requests for FERC authorization to expand the certificated boundaries of the Field, Northern is authorized to store its gas only in those portions of the formations that lie underneath the certificated boundaries of the Field.

Finally, Northern's interpretation of K.S.A. 55-1210(c) ignores the caselaw which precipitated the statute as a whole. As discussed, prior to K.S.A. 55-1210's enactment, this court applied the rule of capture to determine ownership rights in previously injected storage gas in two cases, both of which involved disputes between landowners on *adjoining properties*

and both of which resulted in the injector losing title to the storage gas. *See Union Gas System, Inc. v. Carnahan,* 245 Kan. 80, 86-88, 774 P.2d 962 (1989); *Anderson v. Beech Aircraft Corp.,* 237 Kan. 336, 347-48, 699 P.2d 1023 (1985). We generally presume that the legislature acts with full knowledge of existing law. *State v. Henning,* 289 Kan. 136, 144-45, 209 P.3d 711 (2009).

In response to this caselaw, the legislature enacted K.S.A. 55-1210 to establish that an injector can retain title to storage gas injected into underground storage facilities if gas migrates to "adjoining property or to a stratum, or portion thereof, which has not been condemned" and the injector can prove the gas migrated from its storage facility. K.S.A. 55-1210(c). The legislature further provided injectors with the means to test production wells on adjoining property, through injunction if necessary, in order to develop the proof necessary to retain title to gas that migrated outside the certified boundary but within the limitations of the introductory language of K.S.A. 55-1210(c)(1) and (2).

Thus, in light of the narrow circumstances which precipitated the statute's enactment and the language crafted by the legislature to address those circumstances, we simply cannot accept Northern's expansive interpretation of K.S.A. 55-1210(c). Instead, we agree with the district court that section (c) preserved the rule of capture as to injected gas which migrates horizontally within a stratum and beyond adjoining

property or vertically to another stratum in which the injector has not obtained storage rights.

Northern had no ownership rights in the migrating storage gas under general principles of personal property law.

Although not addressed by the district court, Northern argued below and reasserts on appeal that even if this court agrees with the district court's interpretation of K.S.A. 55-1210, the district court nevertheless erred in granting summary judgment. Northern claims it has common-law ownership rights in the storage gas that migrated beyond adjoining property and that those rights are independent of K.S.A. 55-1210.

Specifically, Northern contends the district court failed to recognize that Northern never "abandoned" its rights to the migrating storage gas and, consequently, Northern retained those rights. Northern cites *Botkin v. Kickapoo, Inc.,* 211 Kan. 107, 108-10, 505 P.2d 749 (1973), in support of this argument. But the issue in that case – whether the plaintiffs abandoned their ownership in feed mill equipment – has no bearing on the facts in this case which require us to determine the effect of K.S.A. 55-1210 on the application of the rule of capture to migrating gas.

While we have held that once natural gas is severed from real estate it becomes personal property, *see Northern Natural Gas Co. v. Martin, Pringle, et al.,* 289 Kan. 777, 788, 217 P.3d 966 (2009), Northern's

argument ignores the entire body of caselaw that has applied the rule of capture to extinguish ownership rights in previously injected storage gas that has migrated to adjoining property. This body of caselaw developed without regard to whether the injector intended to "abandon" migrating gas. *See Martin, Pringle,* 289 Kan. at 791-92; *Union Gas,* 245 Kan. at 86-87; *Anderson,* 237 Kan. at 347-48.

Therefore, we conclude the district court did not err in failing to consider Northern's argument regarding whether it intended to abandon its migrating gas before granting summary judgment.

No genuine issues of material fact precluded summary judgment.

Finally, Northern contends the district court erred in granting summary judgment because genuine issues of material fact precluded summary judgment. Specifically, Northern cites factual disputes regarding whether Nash and L.D. caused Northern's storage gas to migrate away from the Field.

We have held that an issue of fact is not genuine unless it has legal controlling force as to the controlling issue. A disputed question of fact which is immaterial to the issue does not preclude summary judgment. Stated another way, if the disputed fact, however resolved, could not affect the judgment, it does not present a genuine issue of material fact. *Mitchell v. City of Wichita,* 270 Kan. 56, 59, 12 P.3d 402 (2000).

Here, as discussed above, the facts pertaining to Northern's allegation that Nash and L.D. caused Northern's storage gas to migrate beyond its certificated boundaries lacked any legal controlling force over the controlling issue, *i.e.,* whether Northern retained title under K.S.A. 55-1210(c) to gas which migrated beyond its certificated boundaries. Thus, the district court did not err in finding there were no genuine issues of material facts precluding summary judgment.

The district court did not abuse its discretion by refusing to permit additional discovery.

Northern also asserts the district court abused its discretion in refusing to permit Northern to conduct further discovery. Northern contends it lacked the "opportunity to engage in *any* discovery or develop the factual record necessary to fully support its allegation that Producers are creating pressure sinks which draw Northern's storage gas away from the Cunningham Storage Field and to Producers' wells."

Ordinarily, summary judgment should not be granted until discovery is complete. However, if the facts pertinent to the material issues are not controverted, summary judgment may be appropriate even when discovery is unfinished. *Hauptman v. WMC, Inc.,* 43 Kan. App. 2d 276, 297, 224 P.3d 1175 (2010).

A district court's refusal to permit additional discovery under K.S.A. 60-256(f) is reviewed for an abuse of discretion. *Troutman v. Curtis,* 286 Kan. 452,

458-59, 185 P.3d 930 (2008). A judicial action constitutes an abuse of discretion if the action (1) is arbitrary, fanciful, or unreasonable; (2) is based on an error of law; or (3) is based on an error of fact. *State v. Ward,* 292 Kan. 541, 550, 256 P.3d 801 (2011), *cert. denied* 132 S. Ct. 1594 (2012). The party asserting an abuse of discretion bears the burden of showing such an abuse of discretion. *Harsch v. Miller,* 288 Kan. 280, 293, 200 P.3d 467 (2009).

As discussed, the facts material to the district court's ruling were undisputed. In denying Northern's request for additional discovery, the district court pointed out that Northern sought further discovery on allegedly disputed facts that were immaterial to the "key issue" before the court, *i.e.,* who held title to migrating storage gas. Additionally, the court noted it was "concerned" that Northern had asserted in parallel federal litigation "that the 'adjoining property' issue presented 'a purely legal issue as to which no discovery was required.'" *See Northern Natural Gas Co. v. L.D. Drilling, Inc.,* No. 08-1405-WEB, Memorandum and Order (Doc. No. 288), at 24-25 (D. Kan. Mar. 26, 2010) (noting that "[b]oth parties have previously advised the Court . . . that this issue of statutory interpretation is a purely legal issue as to which no discovery is necessary"). Under these circumstances, we conclude the district court did not abuse its discretion in denying Northern's request for additional discovery.

Conclusion

To summarize, we interpret K.S.A. 55-1210(a) and (b) to govern ownership rights to previously injected storage gas that remains within a designated underground storage area, while K.S.A. 55-1210(c) governs ownership of migrating gas. Section (c) permits an injector to maintain title to gas which migrates horizontally to adjoining property or vertically to another stratum if the injector can prove by a preponderance of the evidence under subsections (c)(1) and (2) that the migrating gas originally was injected into the injector's underground storage area. However, section (c) preserves the rule of capture as to injected gas which migrates horizontally beyond property adjoining the certificated boundaries of a storage field.

Therefore, the district court properly concluded that to the extent Northern's injected storage gas migrated beyond property adjoining the certificated boundaries of its storage field, as those boundaries existed before June 2, 2010, Northern lost title to such gas. Consequently, Nash and L.D. had title to any such migrating gas produced by their wells until June 2, 2010, when FERC extended the certificated boundaries of the Field to include Nash's and L.D.'s wells, or brought those wells onto property adjoining the expansion area.

In conclusion, the district court properly granted summary judgment to Nash and L.D. and dismissed ONEOK's and Lumen's indemnification claims against

Nash and L.D. as to any alleged acts of conversion occurring before June 2, 2010.

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY DENYING NORTHERN'S MOTION TO MODIFY THE SUMMARY JUDGMENT RULING

Although its argument is not entirely clear, Northern appears to also contend the district court erred by failing to recognize that FERC's June 2, 2010, order fundamentally altered the district court's factual findings regarding the location of the wells in question. Northern raised these same arguments below in a K.S.A. 2010 Supp. 60-260(b) motion which sought relief based upon the FERC Order. To the extent Northern challenges the district court's denial of the K.S.A. 2010 Supp. 60-260(b) motion, we reject that challenge.

We review the denial of a motion seeking relief from judgment under an abuse of discretion standard. *Subway Restaurants, Inc. v. Kessler,* 273 Kan. 969, 977, 46 P.3d 1113 (2002). *See Ward,* 292 Kan. at 550 (explaining abuse of discretion standard). As noted above, the party asserting an abuse of discretion bears the burden of showing such an abuse of discretion. *See Harsch,* 288 Kan. at 293.

In its summary judgment ruling of April 15, 2010, the district court concluded Nash's and L.D.'s wells were not on property adjoining the Field. Thus, under K.S.A. 55-1210(c), Northern lost ownership to gas migrating to those wells and the gas was subject

to the rule of capture. On June 2, 2010, after Northern had already docketed its appeal from the summary judgment ruling, FERC authorized Northern to expand the Field. The parties appear to agree that as a result of the FERC Order, all but two of the wells at issue in this case are now located either within the expansion area or within 1 mile of the expansion area. Northern then filed a motion for relief from judgment, citing the FERC Order and challenging the district court's factual findings regarding the location of the wells.

For several reasons, the district court did not abuse its discretion in denying Northern's K.S.A. 2010 Supp. 60-260(b) motion. First, because Northern had already docketed its appeal, the district court lacked jurisdiction to modify the Order. *See Harsch,* 288 Kan. at 286-87 (noting that trial court lacks jurisdiction to modify a judgment after it has been appealed and the appeal is docketed at the appellate level).

Second, despite its lack of jurisdiction to modify the Order, the court conducted a hearing to address, *inter alia,* Northern's K.S.A. 2010 Supp. 60-260(b) motion. At that hearing, Northern asked the district court to certify its summary judgment ruling as a final judgment only as to its conversion claims as they existed before the FERC Order modified the Field's certificated boundaries. At the hearing, counsel for Northern specifically stated, "we can stick a stake in the ground on June 2nd and everything that we discussed in the prior Summary Judgment order

can go up to the Court of Appeals. Nothing will change those facts looking backwards." Although the court declined to modify the Order with respect to "matters prior to June 2nd," it acknowledged that "[t]he issue from June 2nd forward . . . is a much different animal."

But as L.D. and Nash point out, the undisputed material facts as they existed at the time of the district court's summary judgment ruling were not altered by the FERC Order. Further, the district court's acknowledgement regarding the changed circumstances after June 2, 2010, signals the district court's intent to limit its summary judgment ruling to matters before June 2, 2010. As previously discussed, we are affirming that temporally limited summary judgment ruling but remanding the case to the district court to resolve any remaining claims that might be based on matters "from June 2nd forward."

Under these circumstances, we conclude the district court did not abuse its discretion in denying Northern's K.S.A. 2010 Supp. 60-260(b) motion.

THE SUMMARY JUDGMENT RULING DID NOT RESULT IN AN UNCONSTITUTIONAL TAKING OF NORTHERN'S PROPERTY WITHOUT JUST COMPENSATION

Next, Northern argues the district court's summary judgment ruling "constitute[d] an unconstitutional judicial taking of Northern's property because the District Court's decision judicially eliminate[d] Northern's established property interest in its injected

storage gas within the Cunningham Storage Field under (1) Kansas common law; (2) the express terms of [K.S.A. 55-1210]; and (3) this Court's decision in [*Union Gas*]."

Preliminarily, Nash, L.D., and ONEOK contend Northern failed to preserve this issue for appeal. Alternatively, they argue this issue lacks merit.

Northern argued below that it had vested rights in the migrating storage gas under general principles of personal property law and that there was no evidence Northern intended to abandon its storage gas. Specifically, Northern asserted, "Northern has a vested property interest in its injected storage gas and this Court cannot now interpret the Storage Statute the way advocated by Producers without unconstitutionally depriving Northern of its property without just compensation." Even if we deem this assertion sufficient to preserve Northern's "judicial taking" argument, Northern's argument fails.

First, in support of its argument that the district court's summary judgment ruling violated the Takings Clause of the Fifth Amendment to the United States Constitution, Northern relies upon a plurality opinion with no precedential value. *See Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection,* 560 U.S. ___, 130 S. Ct. 2592, 2602, 177 L. Ed. 2d 184 (2010) (plurality) (four justices agreed that a state court order could constitute a "judicial taking" if the "court declares that what was once an established right of private property no

longer exists"); *see also Gibson v. American Cyanamid Co.,* No. 07-C-864, 2010 WL 3062145, at *3 (E.D. Wis. 2010) (recognizing "[t]he plurality in *Stop the Beach* held that the Takings Clause applies to the judiciary"); *Sagarin v. City of Bloomington,* 932 N.E.2d 739, 744 (Ind. App. 2010) (acknowledging that plurality portions of *Stop the Beach* cited by parties in the case lacked precedential authority).

Second, even if we were persuaded by the plurality opinion in *Stop the Beach,* the Takings Clause has no application here because the district court's ruling did not result in the taking of private property for public use. *See Young Partners v. U.S.D. No. 214,* 284 Kan. 397, 406, 160 P.3d 830 (2007) ("The Fifth Amendment, made applicable to the States through the Fourteenth Amendment, provides that 'private property [shall not] be taken for public use, without just compensation.' "). Instead, the court's ruling resolved a dispute between private individuals regarding ownership rights in previously injected storage gas through application of K.S.A. 55-1210 and the common-law rule of capture. For these reasons, we conclude the district court's summary judgment ruling did not result in an unconstitutional taking of Northern's property without just compensation.

THE SUMMARY JUDGMENT RULING NEITHER CONFLICTS WITH NOR IS PREEMPTED BY THE NATURAL GAS ACT, 15 U.S.C. § 717 *et seq*.

Finally, Northern argues the district court's summary judgment ruling conflicts with, and therefore is preempted by, the Natural Gas Act, 15 U.S.C. § 717 *et seq.* (2006) (the NGA) because FERC has exclusive jurisdiction over the abandonment of natural gas and the withdrawal of natural gas from interstate commerce. We exercise de novo review over questions of federal preemption. *Zimmerman v. Board of Wabaunsee County Comm'rs,* 289 Kan. 926, 974-75, 218 P.3d 400 (2009).

In *Zimmerman,* we discussed the circumstances in which the federal law preempts state law:

> "'Absent an express statement by Congress that state law is preempted[, federal] preemption occurs where [1] there is an actual conflict between federal and state law; [2] where compliance with both federal and state law is, in effect, physically impossible; [3] where Congress has occupied the entire field of regulation and leaves no room for states to supplement federal law; or [4] when the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress.'" 289 Kan. at 974-75 (quoting *Doty v. Frontier Communications, Inc.,* 272 Kan. 880, Syl. ¶ 4, 36 P.3d 250 [2001]).

Northern fails to fully explain how the district court's summary judgment ruling meets any of the above-described circumstances. Instead, Northern argues the NGA preempts the district court's ruling because: (1) the district court impliedly held that Northern abandoned its storage gas, and FERC has exclusive jurisdiction over the abandonment of natural gas under 15 U.S.C. § 717f(b) (2006); and (2) the district court's rejection of Northern's "Interference Conversion Claim" effectively allows the withdrawal of natural gas from interstate commerce, an issue over which FERC has exclusive jurisdiction as stated in *Sunray Oil Co. v. F.P.C.,* 364 U.S. 137, 156, 80 S. Ct. 1392, 4 L. Ed. 2d 1623 (1960). These arguments fail for several reasons.

First, the district court made no finding regarding abandonment, implied or otherwise, in its comprehensive summary judgment ruling. Second, even if the district court had made such a finding, Northern's reliance on 15 U.S.C. § 717f(b) is misplaced because that section governs abandonment of facilities and services, not the abandonment of title to or ownership rights in migrating storage gas. *See* 15 U.S.C. § 717f(b) (requiring natural gas companies to obtain FERC's permission and approval before abandoning "all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities").

Finally, none of the cases cited by Northern support its suggestion that the district court's summary judgment ruling resulted in the withdrawal of

Northern's storage gas from interstate commerce in violation of the NGA. *See Sunray Oil Co.,* 364 U.S. at 156 (explaining that an independent natural gas producer who obtains a certificate of public convenience and necessity under the NGA and agrees to place its gas in interstate commerce must obtain FERC's approval in order to withdraw that gas supply from interstate commerce); *Public Service Com'n v. Federal Energy Reg.,* 610 F.2d 439, 443 (6th Cir. 1979) (concluding state law seeking to regulate transportation of natural gas through interstate pipelines and to reserve a supply of that natural gas to certain state residents was preempted by NGA); *Backus v. Panhandle Eastern Pipe Line Co.,* 558 F.2d 1373, 1376 (10th Cir. 1977) (invalidating state law requiring interstate gas pipeline owner to provide service upon request to rural landowners if the pipeline crosses the landowners' property and to provide gas to the landowners at same rate as charged in nearest city or town). *See also Atlantic Rfg. Co. v. Pub. Serv. Comm'n,* 360 U.S. 378, 389, 79 S. Ct. 1246, 3 L. Ed. 2d 1312 (1959) (discussing FERC's authority under 15 U.S.C. § 717f(e) to grant a certificate of public convenience and necessity "authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition" of natural gas facilities). Accordingly, we reject Northern's federal preemption arguments.

CONCLUSION

In sum, we affirm the district court's summary judgment ruling as well as its decision denying

Northern's K.S.A. 2010 Supp. 60-260(b) motion. Because the district court effectively limited the scope of its summary judgment ruling to matters before June 2, 2010, we remand the case for any further proceedings necessary to resolve any remaining claims that may exist regarding matters after June 2, 2010, and for resolution of the district court's standing order requiring ONEOK and Lumen to suspend payments to Nash and L.D.

Affirmed in part and remanded with directions.

BEIER, J., not participating.

THOMAS E. FOSTER, District Judge, assigned.[1]

[1] **REPORTER'S NOTE:** District Judge Foster was appointed to hear case No. 104,279 vice Justice Beier pursuant to the authority vested in the Supreme Court by Art. 3, § 6(f) of the Kansas Constitution.

IN THE THIRTIETH JUDICIAL DISTRICT
DISTRICT COURT, PRATT COUNTY, KANSAS
DIVISION ONE

NORTHERN NATURAL GAS COMPANY, *Plaintiff*, *vs.* ONEOK FIELD SERVICES COMPANY, LLC; ONEOK MIDSTREAM GAS SUPPLY, LLC; LUMEN ENERGY CORPORATION; and LUMEN MIDSTREAM PARTNERSHIP, LLC, *Defendants and Third-Party Plaintiffs,* *vs.* NASH OIL & GAS, INC; and L.D. DRILLING, INC., *Third-Party Defendants*.	No. 2009-CV-111

OPINION AND ORDER GRANTING THIRD-PARTY DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

(Filed Apr. 15, 2010)

Introduction and Summary of Ruling

This case involves natural gas produced from wells operated by third-party defendants Nash Oil and Gas, Inc., ("Nash") and L.D. Drilling, Inc. ("L.D.")

and purchased by defendants ONEOK Field Services Company and ONEOK Midstream Partnership (collectively, "ONEOK") and/or defendants Lumen Energy Corp. and Lumen Midstream Partnership, L.L.C. (collectively "Lumen"). The wells in question are located several miles to the north of the Cunningham Field, an underground natural gas storage field that is owned and operated by plaintiff Northern Natural Gas Co. ("Northern") and is located in Pratt and Kingman Counties, Kansas.

Plaintiff Northern contends that the gas produced from these wells is storage gas that has migrated from the Cunningham Field, and contends that Northern has title to that gas. Northern's claims against ONEOK and Lumen are that, in purchasing and taking possession of the gas produced from Nash's and L.D.'s wells, ONEOK and Lumen are converting storage gas that is Northern's personal property. ONEOK and Lumen have filed third-party claims against Nash and L.D.; in those third-party claims ONEOK and Lumen contend that, to the extent they are liable to Northern, Nash and L.D. are liable to indemnify them against such liability.

Nash and L.D. have moved for summary judgment. They contend that their wells are located on property that is too far from the Cunningham Field to qualify as property "adjoining" that field, as that term is used in K.S.A. 55-1210(c) and was defined in *Williams Natural Gas Co. v. Supra Energy, Inc.,* 261 Kan. 624 (1997). Nash and L.D. argue that, under Kansas common law, as modified by K.S.A. 55-1210(c)(1),

Northern has lost title to any Cunningham Field storage gas that has migrated beyond property that is "adjoining" the Cunningham Field, and that Nash and L.D. accordingly have the right under the common law "rule of capture" to produce any gas, including any storage gas that may have migrated from the Cunningham Field, that underlies the property on which their wells are located and on which they have valid oil and gas leases.

The premise of Nash and L.D.'s summary judgment motion is that, as a matter of law, Northern does not have title to any gas produced from the wells on distant, non-adjoining property, that ONEOK and Lumen accordingly cannot be liable to Northern for purchasing and taking possession of gas from those wells, and that Nash and L.D. cannot be liable to indemnify ONEOK and Lumen against any liability to Northern because ONEOK and Lumen have no liability to Northern.

Nash's and L.D. Drilling's summary judgment motions have been fully briefed, and the court held a hearing on those motions, and on Northern's motion to stay, on March 12, 2010. The court also requested and received from Northern and from Nash and L.D. proposed opinions ruling on these summary judgment motions, and is now prepared to rule. As explained in this Opinion and Order, the court concludes that Nash's and L.D.'s summary judgment motions are well-taken, and grants those motions in their entirety. The court also believes that the legal issues presented by these summary judgment motions has never been

ruled upon by the Kansas Supreme Court or the Kansas Court of Appeals, and cannot be definitively resolved until they are presented to those Kansas appellate courts. Accordingly, the court will certify this summary judgment ruling as a final order under K.S.A. 60-254(b), in order that a definitive appellate resolution of these legal issues may be had as soon as possible. And the court adheres to its prior oral ruling denying Northern's motion to stay all proceedings in this case until the issue of whether Northern has title to the gas produced from Nash's and L.D.'s wells is resolved in the parallel federal litigation that Northern has also initiated.

The Parties' Factual Statements and Responses

Nash and L.D. on February 5, 2010, filed a joint motion for summary judgment, together with a supporting memorandum. The memorandum includes a 34-paragraph Statement of Uncontroverted Facts ("Joint SOF") and supporting Exhibits "A" though "Y" ("Nash and L.D.'s Exhibits"), including affidavits, and pleadings and decisions in various related court and administrative proceedings. Nash and L.D. also submitted a supplemental Exhibit "AA" to the court after the hearing held March 12, 2010.

Northern on March 1, 2010, filed its response to Nash and L.D.'s summary judgment motion. That Northern document includes paragraph-by-paragraph responses to the Joint SOF ("Response to Joint SOF"), and also includes an additional 30-paragraph

Statement of Relevant Facts ("Northern's Additional Facts").

L.D. on February 17, 2010, filed its own motion for summary judgment as to gas sold to Lumen (the previous joint summary judgment motion had involved gas sold to ONEOK). That document includes a nine-paragraph Statement of Uncontroverted Facts ("L.D.'s SOF"). The first of those nine paragraphs incorporates by reference the Joint SOF and supporting exhibits, and the remaining eight paragraphs set out additional facts related to defendant Lumen's purchases of gas from L.D. and Lumen's suspension of payments for such gas, supported by an affidavit from L.D.'s revenue clerk.

Finally, Northern on March 10, 2010, filed a brief opposing L.D.'s motion for summary judgment. That brief includes a paragraph-by-paragraph response to L.D.'s SOF ("Response to L.D.'s SOF").

The Court's Determination of the Uncontroverted Facts

Northern's Response to the Joint SOF admits that Northern does not dispute Paragraphs 1, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 18, 20, 21, 22, 23, 24, 26, 27, 28, 29, 30, 31, 32 and 34 of the Joint SOF. The court accordingly determines for purposes of K.S.A. 60-256 and Supreme Court Rule 141 that the facts stated in those paragraphs of the Joint SOF are uncontroverted.

Northern's Response to the Joint SOF also states that Northern controverts, at least in part, the allegations of Paragraphs 15, 16, 17, 19, 20, 26, and 33 of the Joint SOF. The court determines, however, that Northern's responses to these allegations do not fulfill the requirements of Rule 141(b) in that they do not include a "concise summary of conflicting testimony or evidence," nor meet the requirements of K.S.A. 60-256(e) that Northern must "by affidavits or as otherwise provided in this section . . . set forth specific facts showing that there is a genuine issue for trial." The court therefore determines pursuant to Supreme Court Rule 141 that the allegations of Paragraphs 15, 16, 17, 19, 20, 26, and 33 of the Joint SOF are deemed admitted, and that those facts are uncontroverted.

Specifically, with regard to Paragraph 15 of the Joint SOF, the Court determines that there is nothing in Judge Brown's Order of May 12, 2009, to suggest that the Map (Exhibit "G") referred to in Paragraph 15 is *factually* inaccurate in its depiction of the locations of the operator's wells, of the certificated boundaries of the Cunningham Field and of Northern's leased areas. With regard to Paragraph 16 of the Joint SOF, Northern asserts that Nash and L.D. "mischaracterize" the *Trans Pacific* jury verdict and judgment described therein, but does not specify *how* Nash and L.D. are erroneously describing that federal case, much less provide supporting evidence. In its response to Paragraph 17 of the Joint SOF, Northern again criticizes the "mischaracterization" of the *Trans Pacific* jury verdict, but Paragraph 17 merely states that the jury verdict was upheld on appeal, as it was.

See Northern Natural Gas Co. v. Trans Pacific Oil Corp., 248 Fed. Appx. 882 (10th Cir. 2007). With respect to Paragraphs 19 and 20 of the Joint SOF, Northern again purports to dispute Nash and L.D.'s characterization of the district court and Tenth Circuit decisions in the prior *Nash* litigation, but again without specificity or supporting evidence. Nash and L.D.'s descriptions of the *Nash* decisions appear to be accurate. *See Northern Natural Gas Co. v. Nash Oil & Gas, Inc.,* 2005 WL 1153482 (D. Kan., May 16, 2005); *Northern Natural Gas Co. v. Nash Oil & Gas, Inc.,* 526 F.3d 626 (10th Cir. 2008). In purporting to controvert Paragraph 26 of the Joint SOF, Northern asserts that FERC and the KCC have exclusive jurisdiction to determine certain administrative issues, as indeed they do. But that does not mean that there was no coincidence between the *factual* issues disputed in the *Nash* and *Trans Pacific* cases and those disputed in the FERC and KCC proceedings; clearly there were *factual* disputes in common (whether the Nash and Trans Pacific wells north of the Cunningham Field were producing Northern storage gas that had migrated to those wells), even if the ultimate *legal* issues in FERC and the KCC (whether Northern was entitled to expand its storage field) was different than the ultimate legal issues in the federal court cases (whether Northern was entitled to money damages for the alleged conversion of gas to which it had title). Finally, in response to Paragraph 33 of the Joint SOF, Northern says that Nash and L.D. are mischaracterizing Northern's communications with ONEOK as "threats of suit," but does not explain what is wrong with that characterization,

much less provide any evidence that it did not in fact threaten suit against ONEOK or that its threats did not motivate ONEOK to suspend payment for the gas it purchased.

In its response to Paragraph 1 of L.D.'s SOF, which incorporates by reference all 34 Paragraphs of the Joint SOF, Northern incorporates by reference its response to those 34 Paragraphs, discussed above. Northern does not specifically dispute Paragraphs 2 through 9 of L.D.'s SOF, and indeed admits that Paragraph 2 is undisputed, but as to Paragraphs 3 through 9 of L.D.'s SOF, Northern avers that it has taken no discovery in this case, cannot now determine whether the factual allegations of those Paragraphs are true, and thus cannot present affidavits in opposition to these Paragraphs. Northern contends that under K.S.A. 60-256(f), the court should either refuse summary judgment, or should grant a continuance so that Northern can take discovery into these facts before the court rules. Northern makes similar arguments, albeit without explicitly referring to K.S.A. 60-256(f), in its responses to Paragraphs 2 and 33 of the Joint SOF.

For several reasons the court rejects Northern's requests that the Court now refuse summary judgment or postpone a ruling so that Northern may have discovery in this case as to the facts alleged in Paragraphs 3 through 9 of L.D.'s SOF and Paragraphs 2 and 33 of Nash and L.D.'s Joint SOF. To begin with, whether to refuse summary judgment or order a continuance for discovery is a matter within this

court's *discretion,* not a matter of a litigant's inviolable right. *See, e.g., Troutman v. Curtis,* 286 Kan. 452, 458-59 (2008) (trial court did not abuse its discretion in granting summary judgment to defendant without allowing plaintiff discovery, where the key fact plaintiff hoped to establish through discovery was a matter of mere allegation). Second, Northern has asserted that it is entitled to discovery under K.S.A. 60-256(f), but it has not filed an explanatory affidavit "as that subsection contemplates." *Id.* Case law developed under the identical provisions of Fed. R. Civ. P. 56(f) permits a party opposing summary judgment to obtain discovery under Rule 56(f) *only* if that party files an affidavit that, at a minimum, articulates a plausible basis for belief that previously undisclosed facts exist, that those facts can be secured by further discovery, that there is some credible prospect that the new evidence will create a trial-worthy issue, and that the party had good cause for not having conducted the discovery. *See, e.g., Hackworth v. Progressive Cas. Ins. Co.,* 468 F.3d 722, 732 (10th Cir. 2006); *Mass. Sch. of Law at Andover, Inc. v. Am. Bar Ass'n,* 142 F.3d 26, 44-45 (1st Cir. 1998).

The case law under K.S.A. 60-256(f) is not as well developed as the case law under the counterpart federal rule. But under Kansas law it is nonetheless the case that "a party cannot avoid summary judgment on the mere hope that something may develop later during discovery. . . ." *Trautman v. Curtis,* 36 Kan. App. 2d 633, 652 (2006), *aff'd* 286 Kan. 452 (2008). So while Northern says, for example, that only through discovery can it verify whether Nash has

only three employees, is wholly owned by Jerry Nash and his wife, and has no permanent offices, as stated in Paragraph 2 of Nash and L.D.'s Joint SOF, it does not say that it has some plausible basis for suspecting that Jerry Nash's affidavit swearing to those facts might be false, much less explain how it could possibly make a difference to the key issue now before the Court: whether under K.S.A. 55-1210(c)(1) a storage field operator retains title to storage gas that migrates beyond "adjoining" property. The Court does not see, for example, how it could make a difference if it turned out that Nash actually had many employees or owned a fancy headquarters, or if L.D.'s Revenue Clerk was mistaken as to the date Lumen suspended payment for L.D.'s gas, or the cumulative amount Lumen holds in suspense.

Finally, the court suspects that Northern's call for discovery under K.S.A. 60-256(f) may be intended to delay these proceedings so that the key "adjoining property" issue will not soon be decided by the Kansas Supreme Court. The court takes judicial notice of the recent decision of Magistrate Judge Donald W. Bostwick in the parallel federal case to defer a ruling on a Northern motion to compel certain discovery (well-testing) until this court decides the pending summary judgment motions. *See Northern Natural Gas Co. v. L.D. Drilling, Inc.,* No. 08-1405, Memorandum and Order (Doc. No. 288), (D. Kan. Mar. 26, 2010). The court is concerned that, according to Judge Bostwick, in that federal case Northern has told the federal court that the "adjoining property" issue

presented "a purely legal issue as to which no discovery was required." *See id.* at 24-25. But now that the same legal issue is pending before this court, Northern asserts that additional discovery is necessary before this court may rule.

As to Northern's Additional Facts, set out in 30 Paragraphs, the Court concludes that these asserted facts are not material to the particular legal issue framed by third-party defendants' summary judgment motions. In 25 of these 30 Paragraphs (Paragraphs 2, 3, 4,10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29 and 30) Northern presents evidence, opinion, and legal conclusions to the effect that Northern is not to blame for the alleged migration of its storage gas to Nash's and L.D.'s wells. The Court is mindful of the response of the KCC submitted in the current FERC proceeding, which is found at Nash and L.D.'s Exhibit "AA". It is apparent these matters would be hotly contested by the parties if a trial is ultimately necessary. But the issue framed by third-party defendants' summary judgment motions do not depend on whether Nash and L.D.'s wells are producing storage gas, as opposed to native gas, or on whether Northern has caused or contributed to any migration of its gas. The issue before the court is primarily a legal one, to which Northern's evidence, opinion, and conclusions are not material. As to the remaining five Paragraphs of Northern's Additional Facts (Paragraphs 1, 5, 7, 8, and 9), these Paragraphs provide background information about the Cunningham Storage Field and

Northern's other litigation. But these Paragraphs do not contradict or undercut any of the information set out in the Joint SOF or L.D.'s SOF, and likewise do not appear to be material to the pending summary judgment motions.

So in summation, the court determines pursuant to K.S.A. 60-256 and Supreme Court Rule 141 that for purposes of deciding the pending summary judgment motions all 34 Paragraphs of the Joint SOF and all nine Paragraphs of L.D's SOF are uncontroverted, and the court declines to exercise its discretion alder K.S.A. 60-256(f) to refuse summary judgment or to continue these proceedings so that Northern may take discovery. The court also determines that the 30 Paragraphs of Northern's Additional Facts do not set forth any facts that are material to the pending summary judgment motions or that contradict or undercut the uncontroverted facts established by Nash and L.D.

The Court's Ruling on Northern's Motion to Stay

Although Northern initiated this lawsuit, after Nash and L.D. moved for summary judgment Northern filed a motion to stay all proceedings in this case. "A stay in a civil case is an extraordinary remedy." *State ex rel Stovall v. Meneley,* 271 Kan. 335, 367 (2001). "The party seeking the stay bears the burden of proof to establish that the stay is necessary." *Id.* at 368 (citing *Midlands Utility Inc. v S.C.D.H.E.C.,* 339 S.E.2d 862 (S.C. 1986)); *see also Nat'l Bank of Andover,*

N.A. v. Aero Standard Tooling, Inc., 30 Kan. App. 2d 784, 792 (2002). "The staying of proceedings in a state court pending determination of an action in a federal court is not a matter of right but rests on the rule of comity and involves the exercise of discretion, which will not be interfered with unless clearly abused." *Henry v. Stewart,* 203 Kan. 289, 293 (1969).

"Federal and state courts that have concurrent jurisdiction over civil actions are considered as courts of separate jurisdictional sovereignties, and the pendency of a personal action in either a state or federal court involving the same parties and the same controversy does not entitle a litigant to abatement of the action in the other court." *Id.* at 293. Generally, in guiding a state court's discretion with regard to granting or denying a stay pending determination of a federal court action, courts consider the following:

> whether the federal court was commenced prior to the state court proceeding; whether the federal adjudication affects the outcome of the state court action; whether the parties, causes of action, and issues in the two actions are the same; whether it is more convenient for the parties to conduct the litigation in one forum rather than in the other; whether the question was one of federal law, as to which the federal courts have special knowledge and expertise; whether the federal court was likely to entertain the action and whether the federal action was brought in good faith.

Id. (citation omitted).

The court notes the decision of whether to grant a motion to stay this proceeding is one which is vested in the sound discretion of this court. In exercising its discretion, the court concludes that there are three factors that predominate and counsel against a stay. First, Northern is the party that initiated this action and sought out this forum. As the *Henry* court noted:

> [m]ost of the cases upholding an order staying a state court proceeding pending determination of the federal court action have been in situations where one party has initiated an action in federal court and the other party thereafter filed an action involving substantially the same issues in the state court. The significance of the federal court action being commenced first is somewhat lessened in a situation where, as here, the same party institutes identical actions in both the federal and state courts.

Henry, 203 Kan. at 294. Because Northern itself pursued this action in state court, under *Henry* the fact that Northern had filed a previous similar case against different parties in federal court is less significant in determining whether to order a stay of this case.

Second, the issues in dispute here are issues of Kansas state statutory law. Principles of comity command that the critical legal premise of the summary judgment motions pending before this Court – that Northern loses title to any storage gas that migrates beyond "adjoining" property under K.S.A.

55-1210(c)(1) – should be resolved by Kansas courts, rather than federal courts. The Kansas Supreme Court has over the last 25 years repeatedly decided cases involving a storage field operator's right to claim title to storage gas that has migrated outside the storage field, and the Kansas legislature has weighed in as well by enacting K.S.A. 55-1210 in 1993. *See Anderson v. Beech Aircraft Corp.,* 237 Kan. 336 (1985); *Carnahan v. Union Gas Systems,* 245 Kan. 80 (1989); *Williams Natural Gas. Co. v. Supra Energy, Inc.,* 261 Kan. 624 (1997); *Northern Natural Gas Co. v. Martin, Pringle, Oliver, Wallace & Bauer, L.L.P.,* 289 Kan. 777 2009). As to such an uncertain and hotly-contested issue of state law, "no matter how seasoned the judgment of the [federal court] may be, it cannot escape being a forecast rather than a determination." *Louisiana Power & Light Co. v. City of Thibodaux,* 360 U.S. 25, 27 (1959) (reversing federal appellate court's refusal to stay federal case involving uncertain question of state eminent domain law to await outcome of state court action and subsequent decision by state supreme court). So in cases such as this one, whose outcome turns solely on an uncertain and disputed issue of state law, the U.S. Supreme Court has "increasingly recognized the wisdom of staying actions in the federal courts pending determination by a state court of decisive issues of state law." *Id.* This approach reflects no mere "technical rule of equity," but rather "a deeper policy derived from our federalism." *Id.* at 28. *See also, e.g., Bacardi, U.S.A. v. Premier Beverage, Inc.,* 352 F. Supp. 2d 1188 (D. Kan. 2005) (staying federal court lawsuit to await decision

of governing Kansas statutory question in parallel Kansas state court litigation).

The importance of a quick and definitive decision is heightened because ONEOK and Lumen have suspended payment for Nash's and L.D.'s gas and the suspended proceeds likely will not be released until there is a final and authoritative decision regarding Kansas state law and the scope of K.S.A. 55-1210. Getting these state law issues to the Kansas Court of Appeals and/or the Kansas Supreme Court as soon as possible will minimize the financial hardship to Nash, L.D., and their working and royalty interest owners. By the same token, a definitive and early resolution of the key statutory issue could well forestall expensive litigation, requiring extensive testimony from petroleum engineers and other experts as to the mechanisms of gas migration from underground storage fields, and the distinction between storage gas and native gas. And a definitive resolution would bring certainty, not just to the parties to this case, but to others similarly situated, now and in the future. Indeed, unless Northern has ulterior motives it, too, would benefit from a swift, definitive resolution of the legal issues at the heart of this case.

The court intends to further hasten prompt appellate review by certifying its grant of summary judgment as a final judgment under K.S.A. 60-254(b), so that its ruling will be immediately appealable as a matter of right under K.S.A. 60-2102(a). By contrast, had the court decided to deny Nash's and L.D's summary judgment motions, that decision would not be a

final judgment under K.S.A. 60-254(b) and would not be immediately appealable as a matter of right, but only to the extent that the appellate court chose in its discretion to accept an interlocutory appeal under K.S.A. 60-2102(c). Not merely is granting summary judgment an appropriate decision on the merits, in the Court's opinion; doing so now without a stay or delays for discovery will allow for the swiftest and most efficient possible determination of the issues in this case in a definitive appellate ruling.

The court also concludes that by deciding this case and placing it before the Kansas appellate courts as soon as possible the central statutory issue will likely be definitively resolved years earlier than if the court stayed this case to allow the same determination to unwind in the federal courts. And although federal court delays might be reduced through certification to the Kansas Supreme Court, that prospect is by no means certain. Uncertain and hotly-contested issues of Kansas law were *not* certified to the Kansas Supreme Court in the federal *Nash* and *Trans Pacific* lawsuits, and the Kansas Supreme Court just announced in *Northern Natural Gas Co. v. Martin, Pringle, Olive, Wallace & Bauer, L.L.P.,* 289 Kan. 777, 786-87 (2009), that it would henceforth abandon its former practice of automatically accepting all certified questions without prior review So it is by no means certain that the federal courts will certify the present statutory construction issue to the Kansas Supreme Court or that, if they do, that the Kansas Supreme Court will accept certification. This court's

course is the surest route to definitive review in the Kansas appellate courts.

So the court concludes in its discretion that, for the reasons stated above, the extraordinary remedy of a stay is not warranted, and that Nash and L.D.'s motions for summary judgment should proceed to an immediate decision in this court.

The Court's Ruling on Third-Party Defendants' Motions for Summary Judgment

1. Summary Judgment Standards

Summary judgment is appropriate in any case when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." K.S.A. 60-256(c)). "The trial court is required to resolve all facts and inferences which may reasonably be drawn from the evidence in favor of the party against whom the ruling is sought. When opposing a motion for summary judgment, an adverse party must come forward with evidence to establish a dispute as to a material fact. In order to preclude summary judgment, the facts subject to the dispute must be material to the conclusive issues in the case." *Bergstrom v. Noah,* 266 Kan. 847, 871 (1999). "An issue of fact is not genuine unless it has legal controlling force as to the controlling issue. The disputed question of fact which is immaterial to the issue does not preclude summary

judgment. If the disputed fact, however resolved, could not affect the judgment, it does not present a genuine issue of material fact." *Id.* at 872 (citing *Saliba v. Union Pacific R. R. Co.,* 264 Kan. 128, 131-32 (1998).

With respect to the key issues of how K.S.A. 55-1210 is to be interpreted the most material facts are the location of Nash's and L.D.'s wells and the location of Northern's Cunningham storage facility. These facts are undisputed.

2. K.S.A. 55-1210

The statute at issue, K.S.A. 55-1210, provides as follows:

> (a) All natural gas which has previously been reduced to possession, and which is subsequently injected into underground storage fields, sands, reservoirs and facilities, whether such storage rights were acquired by eminent domain or otherwise, shall at all times be the property of the injector, such injectors heirs, successors or assigns, whether owned by the injector or stored under contract.
>
> (b) In no event hall such gas be subject to the right of the owner of the surface of such lands or of any mineral interest therein, under which such gas storage fields, sands, reservoirs and facilities lie, or of any person, other than the injector, such injector's heirs, successors and assigns, to produce take, reduce

to possession, either by means of the law of capture or otherwise, waste, or otherwise interfere with or exercise any control over such gas. Nothing in this subsection shall be deemed to affect the right of the owner of the surface of such lands to drill or bore through the underground storage fields, sands, reservoirs and facilities in such a manner as well protect such fields, sand, reservoirs and facilities against pollution and the escape of the natural gas being stored.

(c) With regard to natural gas that has migrated to adjoining property or to a stratum, or portion thereof, which has not been condemned as allowed by law or otherwise purchased:

(1) The injector, such injector's heirs, successors and assigns shall not lose title to or possession of such gas if such injector, such injector's heirs, successors or assigns can prove by a preponderance of the evidence that such gas was originally injected into the underground storage.

(2) The injector, such injector's hairs, successors and assigns, shall have the right to conduct such tests on any existing wells on adjoining property, at such injector's sole risk and expense including, but not limited to, the value of any lost production of other than the injector's gas, as may be reasonable to determine the ownership of such gas.

> (3) The owner of the stratum and the owner of the surface shall be entitled to such compensation, including compensation for use of or damage to the surface or substratum, as is provided by law, and shall be entitled to recovery of all costs and expenses, including reasonable attorney fees, if litigation is necessary to enforce any rights under this subsection (c) and the injector does not prevail.
>
> (d) The injector, such injector's heirs, successors and assigns shall have the right to compel compliance with this section by injunction or other appropriate relief by application to a court of competent jurisdiction.

3. Nash's and L.D.'s wells are not situated on property "adjoining" Northern's storage field, as that statutory term was defined in *Williams Natural Gas. Co. v. Supra Energy, Inc*.

Nash and L.D.'s summary judgment motions are based on K.S.A. 55-1210. As they interpret the statute, a storage field operator does not lose title to storage gas that migrates vertically among different strata within the horizontal boundaries of a storage field, and does not lose title to gas that migrates outside the horizontal boundaries of a storage field to nearby property "adjoining" the storage field, as that term is utilized in K.S.A. 55-1210(c), but does lose title to gas that migrates horizontally even further, to land too far from the storage field to qualify as "adjoining." Since no one contends that any of Nash's or

L.D.'s wells are located inside the horizontal boundaries of Northern's Cunningham Storage field, the first question to answer is whether those wells are all located on property too distant from the Cunningham Field to qualify as "adjoining" that field. The facts material to that determination are those regarding the location of the wells in relation to the boundaries of the Cunningham Field

The meaning of the statutory term "adjoining property" as that term appears in K.S.A. 55-1210(c) is not statutorily defined. But the meaning of the statutory term was given an authoritative, binding interpretation in *Williams Natural Gas. Co. v. Supra Energy, Inc.,* 261 Kan. 624, 630 (1997). In that case the Kansas Supreme Court stated that "any section of land which touch[es] a section containing a storage field [is] adjoining." The location of the wells in question relative to the boundary of the Cunningham storage field is accurately depicted on Nash and L.D's Exhibit "G." None of the wells identified by Northern in this case are in a section of land touching a section containing the Cunningham storage field, as determined by its FERC-certified boundaries. The closest wells to the Cunningham field are more than 2 miles from the northern-most storage field boundary. Other than those two wells, the remaining 32 wells identified by Northern in this case are located further from the nearest storage field boundary, with many between 4 and 6 miles from the nearest storage field boundary. None of these wells can be considered to be located on property "adjoining" the Cunningham

Field as certificated by FERC for purposes of K.S.A. 55-1210.

In the parallel federal case, Judge Brown has ruled that four of the wells operated by Nash – the CRC #1, CRC #2, Trinkle #1 and Staub #1 wells – are located on property "adjoining" the Cunningham storage field under the *Williams* definition for purposes of well-testing under K.S.A. 55-1210(c)(2).[1] *See Northern Natural Gas Co. v. L.D. Drilling, Inc.,* 618 F. Supp.2d 1280 (D. Kan. 2009). This ruling is based on Judge Brown's determination that the "storage field" referred to in the *Williams* definition encompasses not only the certificated boundaries of the Cunningham Field as determined by FERC or the KCC, but land on which Northern has acquired storage leases. *See id.* at 1292.

If this court were to follow Judge Brown's determination that Northern's Cunningham Field encompasses not merely the certificated area in which FERC has permitted Northern to store gas, but also to the uncertificated areas on which Northern has acquired storage leases, the court would necessarily have to deny summary judgment as to gas produced from those four Nash wells (the others are not on

[1] Both *Williams* and *Northern Natural* involved interpretations of the well-testing provisions of K.S.A. 55-1210(c)(2), rather than the gas title provisions of K.S.A. 55-1210(c)(1). But the court believes that the Legislature intended to give the statutory term "adjoining property" two different meanings, depending on whether well-testing or gas title was involved.

adjoining property even under Judge Brown's ruling). But "[f]ederal court decisions on issues of state law are not binding on and have limited precedential effect in state courts." *KPERS v. Reimer & Koger Assocs., Inc.,* 262 Kan. 635, 669-70 (1997). Given that FERC has explicitly denied Northern's application to expand the Cunningham Storage Field to include the storage lease areas, *see Northern Natural Gas Co.*, 127 FERC ¶ 61,038 (2009), the court believes that Judge Brown was wrong to include the storage lease areas as part of Northern's storage field for purposes of K.S.A. 55-1210(c), and declines to follow his lead in this case. Under a more straightforward reading of *Williams,* the court concludes that all the Nash and L.D. wells at issue in this case are located on land that is too far from the certificated boundary of the Cunningham Storage field to qualify as "adjoining property."

4. Nash and L.D.'s interpretation of K.S.A. 55-1210 follows well-recognized principles of statutory interpretation, but Northern's interpretation does not.

Issues of statutory interpretation raise pure questions of law for the court. *Moser v. State Dept. of Revenue,* 289 Kan. 513, 516 (2009). And statutory interpretation is governed by well-recognized principles that apply to the present case. "When courts are called upon to interpret statutes, they begin with the fundamental rule that they must give effect to the intent that the legislature expressed through the plain

language of the statute, when that language is plain and unambiguous." *In re Mental Health Ass'n of Heartland,* 221 P.3d 580, 583 (2009). In addition, "[t]he several provisions of an act, *in pari materia,* must be construed together with a view of reconciling and bringing them into workable harmony and giving effect to the entire statute if it is reasonably possible to do so." *Guardian Title Co. v. Bell,* 248 Kan. 146, 151 (1991). "Courts should avoid interpreting a statute in such a way that part of it becomes meaningless, useless, or surplusage," *State v. Lackey,* 42 Kan. App. 2d 89, 96 (2009) (citing *State v. Sedillos,* 279 Kan. 777, 783 (2005) and *State v. Van Hoet,* 277 Kan. 815, 826-27 (2004)), and courts must not "'construe a statute in a way that renders words or phrases meaningless, redundant, or superfluous.'" *New Mexico Cattle Growers Ass'n v. United States Fish and Wildlife Serv.,* 248 F.3d 1277, 1285 (10th Cir. 2001) (quoting *Bridger Coal Co./Pac. Minerals, Inc. v. Director, Office of Workers' Compensation Programs,* 927 F.2d 1150, 1153 (10th Cir. 1991)). Additionally, it is well accepted that "[i]t is the court's duty to uphold [a] statute under attack, if possible, rather than defeat it, and, if there is any reasonable way to construe [a] statute as constitutionally valid, that should be done." *Hainline v. Bond,* 250 Kan. 217, 226 (1992).

Nash and L.D. contend that K.S.A. 55-1210 only protects an injector's title to storage gas that migrates horizontally to property "adjoining" the storage facility, but that beyond "adjoining" property, the

injector loses title to any allegedly migrating storage gas and it becomes subject to the rule of capture.

Northern contends in contrast, that K.S.A. 55-1210(a) protects a storage field operator's title to gas it injects into its field no matter how far that gas may have migrated away from the storage field, and that its right to claim title to migrating storage gas is not limited to gas produced from wells on "adjoining" property. Northern also contends under K.S.A. 55-1210(b) that by drilling and producing their distant wells Nash and L.D. have interfered with Northern's operation of the Cunningham storage facility and with Northern's ownership of the storage gas.

But if as Northern contends an injector's title to storage gas is insured under K.S.A. 55-1210(a) and (b), no matter how far away from the storage field that gas may migrate, then subsection (c)(1) is wholly superfluous, and adds nothing to the statute, because it accomplishes nothing that is not already achieved by subsections (a) and (b). To accept Northern's argument that under K.S.A. 55-12 10(a) and (b) Northern can claim title to all migrating gas that escapes the boundaries of Northern's Cunningham Storage field, no matter how far that gas migrates, would in effect read K.S.A. 55-1210(c)(l) language about the injector's "retention of title" to gas that migrates to "adjoining property" right out of the statute. And Northern's interpretation "harmonizes" the various provisions of K.S.A. 55-1210 only by denying subsection (c)(1) any voice at all.

In contrast, Nash and L.D.'s interpretation of the statute properly reconciles and harmonizes its provisions, and affords all of them meaning and operative effect. Under that straightforward interpretation, K.S.A. 55-1210(a) applies to gas that is injected into an underground storage field; K.S.A. 55-1210(b) applies to storage gas that migrates vertically within the boundaries of the storage field, and subsection (c) applies when gas migrates horizontally outside the storage field boundaries to nearby property that qualifies as "adjoining." When gas migrates further, to more distant property that does not qualify as "adjoining," the injector loses title to the gas and the common law rule of capture comes into play.

In addition, Northern's interpretation would likely render the statute unconstitutional under circumstances such as those presented in this case. Under Northern's interpretation, it can allow gas to migrate to very distant property (6 miles or more in this case) and in effect occupy these areas and use them for storage, despite the fact that it does not have any rights to store gas in such property and has not paid to do so. Worse, it can effectively pass on the costs of retrieving the gas that escapes from its field to distant gas producers and thereby avoid the costs of measures to maintain the integrity of its field (such as reducing the field pressure, drilling monitoring and recycling wells, and such) without incurring any eminent domain expenses. So under Northern's interpretation of the statute, the gas producers surrounding the Cunningham field, even miles away,

would be dragooned into service as involuntary, unpaid insurers against gas escaping from Northern's storage field.

Moreover, as a practical matter, under Northern's interpretation of the statute it could arrest oil and gas leasing and exploration activities over huge areas of land – in this case the area involved includes some 20 square miles of property owned and leased to parties other than Northern. Under color of state law, Northern could effectively occupy areas in which it does not have a storage field or contractual rights, and without paying any compensation could eliminate landowners' ability to lease property and lease holders' ability to explore for minerals even miles away from the Cunningham Field.

The United States Constitution prohibits the taking of private property for public use without just compensation. *See, e.g.* U.S. Const. Amend. V. "The constitutional requirement of just compensation for the taking of private property for public use is addressed to every sort of interest which the citizen may possess in the physical thing taken." *City of Topeka v. Estate of Mays,* 245 Kan. 546, 550 (1989) (citing *United States v. General Motors Corp.,* 323 U.S. 373, 378 (1945)). Under Northern's interpretation, injectors would be permitted to take areas of private property to be used for storage and to prevent rightful leasing and exploration activities in areas outside their storage fields under color of state law without compensation to the owner of the property. This would run afoul of the United States Constitution.

The court is not inclined to risk an interpretation that would render K.S.A. 55-1210 unconstitutional.

5. Nash and L.D's interpretation of the statute is consistent with the development of Kansas law in this area and with the statute's legislative history

Nash and L.D.'s interpretation of K.S.A. 55-1210 is also consistent with the development of Kansas law with respect to migrating gas and with legislative history of the statute. K.S.A. 55-1210 was enacted in the context of profound differences of opinion among state courts as to whether an injector continued to possess rights in gas injected into underground formations for storage. Some courts held that simply by re-injecting the gas for underground storage, the injector automatically relinquishes possession of the gas, making it subject to the rule of capture and subject to the rightful claim of title by any party who produces it from lawfully-drilled wells. Other courts held that the injector retains some title to the injected gas under certain circumstances. In the leading case, *Hammonds v. Central Kentucky Natural Gas Co.,* 75 S.W.2d 204 (Ky. 1934), the Kentucky Supreme Court held that by injecting gas which was previously produced and reduced to possession, the injector "ceas[es] to be the exclusive owner of the whole of the gas," and instead the gas "again became mineral *ferae naturae*" subject to the rule of capture. *Id.* at 206. Other courts took the opposite view, and held that title to gas which has been previously produced and

reduced to possession is not automatically lost by the reinjection of that gas into underground storage facilities. *See White v. New York State Natural Gas Corp.,* 190 F. Supp. 342 (W.D. Pa. 1960) ("the Supreme Court of Pennsylvania would hold that title to natural gas once having been reduced to possession is not lost by the injection of such gas into a natural underground reservoir for storage purposes.").

In *Anderson v. Beech Aircraft Corp.,* 237 Kan. 336 (1985), the Kansas Supreme Court adopted the *Hammonds* approach. In *Anderson,* an injector's gas had migrated to and was being stored in formations under land belonging to and leased to the plaintiffs, which was adjacent to or adjoining land used by the defendant as a storage field. *Id.* at 337-38. On interlocutory appeal, the Kansas Supreme Court reviewed the issue of whether gas produced from the adjoining property belonged to the plaintiffs or the defendant. As mentioned briefly above, the *Anderson* Court awarded title to the plaintiffs, owners of the adjoining property, stating that:

> [w]here no certificate authorizing an underground natural gas storage facility had been issued by the Kansas Corporation Commission, and where a landowner had used the property of an adjoining landowner for gas storage without authorization or consent, the landowner, as the owner of non-native natural gas, lost title thereto when it injected the non-native gas into the underground area and the gas was then produced from the

> common reservoir located under the adjacent property.

Id. at 336 Syl. ¶ 3.

The *Anderson* rule was extended in *Union Gas Sys. Inc. v. Carnahan,* 245 Kan. 80 (1989). Like *Anderson*, the *Union Gas* case concerned storage gas that migrated to and was produced from wells located on adjoining property. The difference in *Union Gas* was that the injector in that case was a natural gas utility under Kansas law. The Court held that the injector as a natural gas public utility did not lose title to gas simply by injecting it back into underground formations for storage, and therefore the *Anderson* rule that gas previously reduced to possession automatically is subject to the rule of capture upon injection into underground formations for storage does not apply when the injector is a natural gas public utility. *Id.* at 86. But the *Union Gas* Court also ruled that if such injected gas migrated to adjoining property not owned by the injector and as to which the injector had not obtained a certificate from the KCC for condemnation and use for storage, the injector loses title to such gas produced on adjoining property. *Id.*; *see also Martin Pringle, supra,* 289 Kan. at 790-91 (explaining *Union* Gas). So under *Anderson* and *Union Gas,* even a natural gas public utility such as Northern lost title to gas it injected into storage formations if the storage gas migrated beyond the lateral boundaries of the storage facility and is produced from wells on adjoining property as to which

injector has no storage rights and has not obtained certification from the KCC.

K.S.A. 55-1210, adopted in 1993 by the Kansas legislature, was in part modeled after, and took much of its language from, 52 Okla. Stat. Ann. § 36.6.[2] One

[2] 52 Okla. Stat. Ann. 36.6 provides:

All natural gas which has previously been reduced to possession, and which is subsequently injected into underground storage fields, sands, reservoirs and facilities, shall at all times be deemed the property of the injector, his heirs, successors or assigns. In no event shall such gas be subject to the right of the owner of the surface of said lands or of any mineral interest therein, under which said gas storage fields, sands, reservoirs, and facilities lie, or of any person other than the injector, his heirs, successors and assigns, to produce, take reduce to possession, waste, or otherwise interfere with or exercise any control thereover. With regard to natural gas in a stratum, or portion thereof, which has not been condemned or otherwise purchased under the provisions of this act:

1. The injector, his heirs successors and assigns shall not lose title to such gas if such injector, his heirs, successors or assigns can prove by a preponderance of the evidence that such gas was originally injected into the underground storage;

2. The injector, his heirs, successors and assigns, shall have the right to conduct such tests, at his sole risk and expense including, but not limited to, the value of any lost production of other than the injector's gas, as may be reasonable to determine ownership of such gas; and

3. The owner of the stratum shall be entitled to such compensation as provided by law.

key difference between K.S.A. 55-1210 and Okla. Stat. Ann. 36.6 is that in the preamble of subsection (c), 55-1210 contains language referencing gas "that has migrated to adjoining property." There is no such reference to "adjoining property" (or to lateral migration) in the Oklahoma statute.

The scope of the Oklahoma statute has never been delineated by the Oklahoma courts. Nevertheless, when the Kansas legislature enacted K.S.A. 55-1210, it added to the Oklahoma statutory language by including K.S.A. 55-1210(c)(1), an express provision dealing with gas that migrates horizontally to "adjoining property." The legislature added subsection (c)(1) to the statute for an obvious reason: to limit the storage field operator's possible retention of title to gas that migrates to "adjoining property" and not beyond.

Consistent with the plain language of the statute, the legislative history demonstrates that the proponents of the bill were concerned with injected gas migrating only to "adjoining property" and did not explicitly mention migration further afield. The statute was introduced as a bill in March of 1993 at the request of Williams Natural Gas Company. As a result of the holdings in *Anderson* and *Union Gas*, the proponents of the bill were concerned about gas "migrat[ing] laterally beyond the original certificated limits of the storage field." The bill which eventually became K.S.A. 55-1210 was intended to provide that "the injector does not lose title to, or the right of possession of, gas previously injected if it can be proved by a preponderance of the evidence that the gas was originally injected by the operator." *Id.* But it

is clear from the eventual statutory language, and from the legislative history's references to *Anderson* and *Union Gas,* both of which involved migration to nearby property, that the problem that the legislature intended to correct involved horizontal migration to nearby land. As the Committee notes state, "[w]ithout this bill, an *adjoining landowner* can drill a well, produce and sell gas which has been already purchased and injected into the ground by the injector. Under *existing law* [i.e. *Anderson* and *Union Gas*], the storage operator is at the mercy of the landowner for resolution of the problem or must seek redress in condensation proceedings." Nash and L.D. Exhibit "U", at 3 (emphasis added). As Paul Karns, the Senior Attorney of Williams Natural Gas Company testified before a Kansas Senate Committee, he explained that the proposed statute would protect Kansas landowners, and Mr. Karns made it clear that Williams (the main proponent of the statute) was focused on adjoining property:

> The bill provides for the protection of the adjoining surface and mineral owners by requiring any testing to be at the sole expense of the injectors. In addition, adjoining property owners are entitled to compensation as provided by law.

Id.

The statute arose as the result of interplay between the courts and the legislature regarding the interpretation of a statutory scheme, K.S.A.

55-1201 *et seq*. As the Kansas Supreme Court stated in *Anderson*:

> We are also convinced that by applying the law of capture, as traditionally followed in this state, the court would be carrying out the Kansas statutory scheme as set forth above in K.S.A. 55-1201 *et seq*. The court in *Strain v. Cities Service Gas Co.*, 148 Kan. 393, 83 P.3d 124, recognized that the regulation of the underground storage of natural gas is a matter for the consideration of the legislature. In the event the legislature should determine that it would be in the best interest of the people of Kansas to adopt different legal principles to regulate the storage of gas, this is a matter for future legislative action.

Anderson, 237 Kan. at 348. By the discussion of the status of the "existing law" in the legislative history, it is clear the legislature took the Kansas Supreme Court's invitation to amend the law. The legislature, therefore, overturned *Anderson* and *Union Gas* as to gas migrating horizontally to "adjoining property." There is nothing in the legislative history of the statute to suggest that the legislature consciously intended to address problems of gas migration even farther afield.

6. Northern's case authorities do not require this court to accept Northern's interpretation of the statute

Northern also relies on authorities that are either entirely inapposite or, at best, contain dicta to

support its interpretation of K.S.A. 55-1210. First, Northern points to *Northern Natural Gas Co. v. Nash Oil & Gas, Inc.,* 04-CV-1295 (D. Kan. 2004), a case in which the federal district court dismissed Northern's claims for testing under K.S.A. 55-1210, because the Nash Wells were not located on property "adjoining" the Cunningham Storage Field, and then, in a later final decision, granted summary judgment to Nash and against Northern on all Northern's claims. In the final decision, Judge J. Thomas Marten held that Northern's claims were completely barred by the statute of limitations, and also completely barred under the doctrine of collateral estoppel, by virtue of the *Trans Pacific* jury's determination that Cunningham Field gas had not migrated to the Trans Pacific wells, which were located between the storage field and the Nash wells. *Northern Natural Gas Co. v. Nash Oil & Gas, Inc.,* 506 F. Supp. 2d 520 (D. Kan. 2007)). On appeal, the Tenth Circuit affirmed Judge Marten's summary judgment against Northern on limitations grounds, without reaching the alternative collateral estoppel grounds. *Northern Natural Gas Co. v. Nash Oil & Gas, Inc.,* 526 F.3d 626 (10th Cir. 2008)).

In that *Nash* litigation, final judgments in the federal district court, and then in the Tenth Circuit, were not based on any determination that Northern did or did not retain title to storage gas that reached Nash's wells, which were at least four miles from Northern's storage field and thus not on "adjoining property." Rather, Judge Marten granted summary

judgment to Nash and against Northern on the grounds that the *Trans Pacific* jury verdict and judgment collaterally estopped Northern from claiming that the gas at Nash's wells was storage gas, and on the alternative grounds that Northern's claims were completely barred by the applicable statute of limitations. The subsequent final judgment on Northern's unsuccessful Tenth Circuit appeal affirmed Judge Marten's limitations ruling, and did not reach his alternative collateral estoppel ruling. The affirmance of Judge Marten's summary judgment against Northern and in favor of Nash was based solely on the Tenth Circuit's determination that Northern's claim against Nash was limitations-barred. So any mention of K.S.A. 55-1210 and its meaning in these cases made no difference to the ultimate decision in the district court or on appeal. A discussion about a rule of law that is not necessary to the decision at hand is a quintessential example of dicta. *See, e.g., Lee Builders, Inc. v. Farm Bureau Mut. Ins. Co.,* 281 Kan. 844, 862 (2006) (quoting Black's Law Dictionary 1102 (8th ed. 2004) (defining dictum as "judicial comment that is unnecessary to the decision in the case"); *Rohrbaugh v. Celotex Corp.,* 53 F.3d 1181, 1184 (10th Cir. 1995) (quoting Black's Law Dictionary 454 (6th ed. 1990)). And mere dicta are never binding precedent. *State v. Rosas,* 28 Kan. App. 2d 382, 385 (2000); *see, e.g., U.S. v. Rith,* 164 F.3d 1323, 1330 n.2 (10th Cir. 1999); *Dedham Water v. Cumberland Farms Dairy,* 972 F.2d 453, 459 (1st Cir. 1992) ("Dictum constitutes neither the law of the case nor the stuff of binding precedent.").

Northern also asserts that *Hayes Sight & Sound, Inc. v. ONEOK, Inc.,* 281 Kan. 1287, 1325-30 (2006), means that K.S.A. 55-1210 gives an injector title to storage gas no matter how far that gas might migrate from the storage field. Northern relies on the *Hayes* decision's brief synopsis of K.S.A. 55-1210, in this passage:

> *Subsection* (a) of 55-1210 establishes that natural gas injected into underground storage units is at all times the property of the injector. Subsection (b) states the corollary of (a), that the owner of the surface or any mineral interests has no ownership right in the injected gas, but (b) preserves the right of the owner of the surface or any mineral interests to drill through storage units in a manner that will protect against pollution and escape of the stored gas. Subsection (c) applies when stored gas has migrated to property not controlled by the gas injector. Subsection (c)(1) provides that migration does not necessarily cause the injector to lose title to stored gas, and subsection (c)(2) authorizes the injector, at the injector's risk and expense, to conduct tests on adjoining property to determine ownership of migrated gas. Subsection (c)(3) provides compensation to the owners of the surface and stratum and entitles them to attorney fees if litigation is necessary to enforce rights or obtain compensation and the injector does not prevail. The compensation to which surface and

> stratum owners are entitled is "such compensation . . . as is provided by law." K.S.A. 55-1210(c)(3).

Hayes, 281 Kan. at 1327. The issue under discussion was whether the *Hayes* plaintiffs were entitled to recover attorneys' fees for their successful negligence claims against the defendants.

In its attorneys' fees ruling the *Hayes* court determined the fees were available under K.S.A. 55-1210(c)(3) even though the plaintiffs' claim was a common-law negligence claim, rather than a statutory claim, and it rejected the defendants' argument that subsection (c)(3) attorneys' fees could be awarded only in cases involving disputes over the title to migrating storage gas. *See Hayes,* 281 Kan. at 1329-30. None of the parties argued that the attorneys' fees issue turned on how far the gas traveled before exploding, and nothing in the *Hayes* decision even hinted that the distance the defendant's gas traveled before blowing up the plaintiffs' businesses was in any way relevant to the question. In short, the *Hayes* attorneys' fees decision is completely inapposite to the gas title issue in this case, and nothing in that decision undercuts defendants' argument, or supports Northern's argument, over the proper interpretation of K.S.A 55-1210 in the present controversy.

Contrary to Northern's arguments the most recent decision from the Kansas Supreme Court signals that the Court would adopt Third-Party Defendants' interpretation of the scope of K.S.A. 55-1210. In

Northern Natural Gas Co. v. Martin, Pringle, Oliver, Wallace & Bauer, L.L.P., 289 Kan. 777 (2009), the Kansas Supreme Court stated the following with regard to the changes to the law brought about by K.S.A. 55-1210:

> As discussed above, prior to July 1, 1993, the landowner *adjoining* Northern's underground gas storage area possessed the legal right to produce and keep the injected gas which had migrated onto their property, unless and until Northern obtained a certificate to expand its storage area onto their land and paid them for that privilege through a condemnation action. K.S.A. 55-1210 abolished that right, as well as permitting migrating gas to trespass upon *adjoining* land.

289 Kan. at 791 (emphasis added). Therefore, consistent with Third-Party Defendants' arguments, the Kansas Supreme Court observed that prior to 1993, under *Anderson* and *Union Gas,* an adjoining landowner had the right by the rule of capture to produce gas migrating out of a storage field under the adjoining land. After 1993, gas migrating to adjoining land was no longer subject to the rule of capture. The Supreme Court, however, recognized the limitation in K.S.A. 55-1210(c)(1) on the injector's substantive right to claim gas only as to wells on adjoining property.

Finally, the court is not persuaded by Northern's argument that K.S.A. 55-1210(b) provides Northern a claim against Third-Party defendants for alleged

interference with storage field operations regardless of the fact that Third-Party Defendants' wells are more distant than "adjoining property." The statutory language contains an express limitation such that it applies to gas that allegedly migrates only to "adjoining property" and not beyond. Again, this limitation would become a virtual nullity if an injector can simply allege that it has a claim that the operations of producers of distant wells is interfering with the injector's operation of the storage facility or ownership of the injected gas. Northern's arguments in this respect are contrary to the scope of the statute as required by its plain language containing the limitation to "adjoining property."

In addition, by statutory mandate, the KCC has been given the power to regulate the production of natural gas in the state to prevent waste and respect correlative rights of lessees surrounding natural gas wells and drilling operations. *See* K.S.A. §§ 55-701 to -713. In particular, K.S.A. 55-703 directs the KCC to engage in such regulatory activities "as will permit each developed lease to ultimately produce approximately the amount of gas underlying the developed lease and currently produce proportionately with other developed leases in the common source of supply without uncompensated cognizable drainage between separately owned, developed leases or parts thereof." K.S.A. § 55-703(a).

Pursuant to these statutes, the KCC has jurisdiction to regulate drilling and production in Kansas to prevent waste and uncompensated drainage, and it

has promulgated regulations to do so under its statutory authority. For instance, the KCC has promulgated regulations under which it dictates the standard daily allowable production for each gas well in order to regulate waste and uncompensated drainage. K.A.R. 82-3-312. Third-party defendants had rightful and legally binding leases to explore on the property on which their wells are located, their wells were duly permitted under the KCC procedures, and there is no suggestion that Northern (or anyone else) has challenged third-party defendants' drilling and production activities in the KCC. Whether Nash's and L.D.'s drilling and production activities impact the rights of other mineral rights holders, including Northern, is a matter for the KCC under its regulatory jurisdiction.

7. The Court rejects Northern's Interference Claim.

At oral argument and in various pleadings, counsel for Northern contends that the drilling and production activities of the operators miles away from the certificated boundaries of the storage field constitutes "interference" with Northern's legitimate storage activities as prohibited in K.S.A. 55-1210(b). Specifically, Northern complains that the operators miles away from the storage field use large pumping units to move fluid on their leases causing a breach in the containment features of the storage field.

This claim fails to address the simple question of how the gas migrated several miles before the wells

in question were drilled so the gas would be present to be detected in testing during the original drilling activities. Obviously, if the gas discovered by the Nash and LD is former storage gas, it migrated more than a mile from the storage field before the production activities complained of. The production activities did not cause the initial breach of the storage field if in fact the storage field was ever secure in the first place.

Under a standard oil and gas lease, the lessee has a responsibility to operate the lease in a commercially reasonable fashion and to develop and produce hydrocarbons discovered during exploration activities. Said activities miles away from a gas storage field are not "interference".

8. The court grants summary judgment to Nash and L.D.

For the reasons stated above, the court concludes that none of the Nash and L.D. wells are located on property "adjoining" Northern's Cunningham Storage Field The court also concludes that Nash and L.D.'s interpretation of K.S.A. 55-1210 is correct, and that K.S.A. 55-1210(c)(1) protects a storage field operator's title to previously injected storage gas that migrates horizontally, beyond the boundaries of the storage field, only if that gas migrates to "adjoining property," and not if it migrates further, to property that is too far from the storage field to qualify as "adjoining property." The Court accordingly rules that

the summary judgment motions of Nash and L.D. are ***granted*** in full as to all the gas purchased by ONEOK and/or Lumen from any of the Nash or L.D. wells identified by Northern in this case.

Certification Under K.S.A 60-254(b)

This case presents multiple claims and multiple parties, but the court's summary judgment decision set out above does not adjudicate all the claims nor adjudicate the rights and liabilities of all the parties. However, pursuant to K.S.A. 60-254(b), the court expressly determines that there is no just reason for delay and expressly directs that summary judgment granted herein be entered as a final judgment in favor of Nash and L.D. Counsel for Nash will prepare an appropriate journal entry.

/s/ Robert J. Schmisseur
Robert J. Schmisseur
District Judge