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well's likely production. This measure of damages would appear to be readily applicable to a case with the facts of *Burger v. Wood*.⁷⁷

Conclusion

It is very likely that the decision in *Burger v. Wood* is the result of a misunderstanding, or at least a misapplication, of the doctrine of obstruction. The facts of the case do not include the essential ingredient of the lessor's interference with the lessee's operations. Without this factor, the case lacks any theoretical support.

While the lessee's predicament was a lamentable one, a better course of action would have been to institute suit against the surface owner. If the court had affirmed the trial court's decision, but explained this alternative in its opinion, the plaintiff would have had enough time to bring suit against the proper party before the statute of limitations expired.⁷⁸ In this way, the court would have assisted the lessee with his problem and, at the same time, would have avoided the dangerous precedent of segregating a doctrine from its underlying philosophy and applying it at will to reach a desired, though unjustifiable, result.

Cindy Keely

Oil and Gas: "Preferred Use" of Natural Gas for Agricultural Purposes†

The Oklahoma legislature has undertaken efforts to insure that there is a dependable source of energy for use in the operation of irrigation pumps. This has been done through preferred use legislation requiring the sale of natural gas by the owner or operator of a natural gas well or pipeline company to the agricultural occupant for use in irrigation operations. There are numerous constitutional objections to the preferred use doctrine, but such legislation is justified by the state's interest in the health and welfare of the citizens of Oklahoma.

Oklahomans can be justifiably proud of the progress that has been made since the "dust bowl" days, but steps must be taken to protect against recurrence. The climate of Oklahoma is considered to be "continental" in type, as is true of all the central Great Plains. Summers are long and hot, and the state has at times been subjected to droughts of varying intensity and

⁷⁷ 575 F.2d 977 (Okla. Ct. App. 1978).

⁷⁸ The landowner's interference occurred Nov. 18-20, 1976, while the court of appeals reached its decision on Jan. 24, 1978. This is well within the two-year statute of limitations for torts.

†This paper is one of two papers awarded the Eugene O. Kuntz Scholarship for 1981, presented by H.B. Watson, Jr., Partner, Watson, McKenzie & Moricoli, Oklahoma City.—*Ed.*

duration. The average annual precipitation ranges from 56 inches in the southeastern quadrant of the state to approximately only 15 inches in the westernmost section of the panhandle.¹

Because of the often inadequate supply of rainfall and accompanying droughts there exists a great need in the state for adequate supplies of energy for the operation of irrigation pumps. The use of pumps for irrigation purposes is prevalent because of the availability of ample supplies of water in groundwater reservoirs.² These groundwater reserves supply approximately 80 percent of the water used for irrigation.³ As of 1978, there were 645,091 acres of land under irrigation in the state, with the majority in the western portion of Oklahoma.⁴ Coincidentally, this is also the same geographic area of major production of natural gas within the state.⁵

The agricultural and the oil and gas industries are among the largest industries in the state.⁶ The agricultural industry, however, is dependent on an adequate and reliable source of energy⁷ for irrigation operations in order to maintain its status in the state's economy. Agriculture is basic to the state's economy, and the low levels of precipitation require that irrigation operations be undertaken both to preserve the economy of the state and to prevent another "dust bowl" from occurring. Natural gas is not only readily available but is also one of the most efficient energy sources available for the operation of irrigation pumps.⁸

The Oklahoma legislature has determined that the extent of the public interest in ensuring an adequate and dependable energy source for the operation of irrigation pumps justifies requiring the natural gas industry to sell gas for such purposes above all other uses that could be made of such gas.⁹ This has been done by exercising the police power of the state to regulate the use of natural resources and to prevent waste. Despite judicial setbacks, this legislative determination remains in effect in the state of Oklahoma. The pur-

¹ Phase 1, *Oklahoma Comprehensive Water Plan, Resources*, at 1 (1975).

² Oklahoma Geological Survey, *Educational Publication 1*, at 8 (updated 1979).

³ *Id.*

⁴ Oklahoma Water Resources Board, *Reported Water Use in Oklahoma 1978*, Pub. 102, at 78 (1980). Approximately 1,905,667 acre-feet of water is used annually in Oklahoma for irrigation.

⁵ Oklahoma Geological Survey, *Educational Publication 1*, at 7 (updated 1979).

⁶ In January of 1978 cumulative production of natural gas within the state was 40.6 billion cubic feet and had a total value of more than \$36 billion. Oklahoma Geological Survey, *Educational Publication 1*, at 7 (updated 1979).

⁷ Statistics showing estimated proved natural gas reserves in Oklahoma indicate adequate reserves for many years. American Gas Assoc., Annual Report, at 170 (1979).

⁸ *Buster v. Phillips Pet. Co.*, 133 F. Supp. 594 (W.D. Okla. 1955), in which evidence was introduced showing irrigation farming would not be profitable if natural gas could not be used for operation of the pumps. Testimony showed that the cost of gasoline would be "enormous"; butane would cost more than ten times as much as natural gas; and electric facilities were not available. Note that this case did not involve statutory construction but was based on promissory estoppel in a private contract dispute.

⁹ 52 OKLA. STAT. § 248-56 (1971) [declared unconstitutional in *Phillips Pet. Co. v. Corporation Comm'n*, 312 P.2d 916 (Okla. 1956)]; and 52 OKLA. STAT. § 524-28 (Supp. 1977).

pose of this note is to identify constitutional objections to the preferred use legislation and to determine whether these defects have been remedied by subsequent legislation.

Constitutional Objections to 52 Oklahoma Statutes § 248-56

In 1955 the Oklahoma legislature enacted a statute¹⁰ with the basic objective of requiring an owner or operator of a natural gas well to sell a portion of the natural gas produced from the well to the lessor for the operation of irrigation water wells. The legislature expressly recognized the need for irrigation to preserve the agricultural industry because irrigation increases production and because the industry is of great importance to the state's economy.¹¹ The areas most in need of irrigation operations are often the same areas from under which large volumes of natural gas are produced. This readily available natural gas could supply an adequate and reliable source of power for the irrigation pumps.¹² Thus the statute provides that "the use of natural gas on the premises from which it is produced to pump to the surface water to be used for irrigation on such premises is a preferred use, prior in order to all other uses [to] which such gas may be devoted."¹³

The statute further provided:

[E]very person owning or operating any well from which natural gas is produced . . . shall make available from the production of such well, to the person or persons engaged in agricultural activities upon such premises, if requested to do so, sufficient gas for the operation of pumps necessary for the pumping of such amount of water, produced from wells on such premises, as may be necessary and proper for the irrigation of such portion of said premises as may be devoted to the growth of agricultural products or to pasture or orchard uses¹⁴. . . [S]uch gas shall be made available for such use in preference to any other use.¹⁵

The statute required the price to be "reasonable" but not less than the price of the gas sold at the wellhead, with terms and conditions to protect the operator of the well.¹⁶

The parties were to determine the prices, terms, and conditions of their agreement by negotiations. If the negotiations fail, however, an application

¹⁰ 52 OKLA. STAT. §§ 248-56 (1971).

¹¹ *Id.* § 248.

¹² Note that the use of gas for irrigation purposes does not fall within the common provisions of the "free gas" clause in the oil and gas lease. There is a growing practice, therefore, in those areas of the country where gas is produced and irrigation is required for agriculture, to negotiate for some provision in the lease whereby the lessee is required to sell natural gas to the lessor for use in operating irrigation pumps. 4 E. KUNTZ, OIL AND GAS § 53.7 (1972).

¹³ 52 OKLA. STAT. § 248 (1971).

¹⁴ *Id.* § 250.

¹⁵ *Id.*

¹⁶ *Id.*

to the Corporation Commission could be made requesting the Commission to fix the terms of the natural gas purchase contract. The Corporation Commission must consider all factors relevant to the purpose of the 1955 act and render justice to all concerned, but it must specifically consider the "necessity of the applicant for the gas . . . ," the "efficient operation of the wells . . . ," and the "obligations assumed by the producer in the sale or other disposition of such gas."¹⁷

The 1955 statute specifically provided that no obligation was to be imposed on the well operator to furnish gas for use off the premises or to assume the duties of a public utility to the public at large.¹⁸ Penalties were provided for failure to make the gas available, including "all damages suffered as a result"¹⁹ of the inability to irrigate because of the "failure to perform such duty."²⁰

The constitutionality of the statute was quickly challenged. In the 1955 federal district court case, *Phillips Petroleum Co. v. Jones*,²¹ Phillips sought injunctive relief against enforcement of the statute on several grounds. Phillips alleged it would suffer immediate and irreparable harm if the statute were enforced, that the statute constituted a taking of private property without due process of law, and that its enforcement would result in impairment of private contractual obligations by placing an undue burden on commerce.²²

The basic issue of the case was whether federal jurisdiction ought to be exercised. The court responded by stating that federal jurisdiction should not be exercised to strike down a state statute unless that statute were clearly unconstitutional.²³ This statute was determined not to be unconstitutional on its face as it was susceptible of a construction protecting the well owner's interests. The purpose of a statute is determined by its effect and as the Oklahoma court had not yet construed the act, the federal court deferred until such time as the state court addressed the issues.²⁴

The basic objective of the statute (the use of natural gas for the operation of irrigation wells) was recognized as one lying within the local police power authority. There is a universally recognized right of the state to conserve and protect valuable natural resources and individual rights may be curtailed or even denied in the furtherance of such objectives.²⁵ Turning to the impairment of contracts issue, the federal district court determined that if the statute were construed as an unconditional obligation to furnish the gas

¹⁷ *Id.* § 251.

¹⁸ *Id.* § 254.

¹⁹ *Id.* § 256.

²⁰ *Id.*

²¹ 147 F. Supp. 122 (D. Okla. 1955).

²² *Id.* at 124.

²³ *Id.* at 125.

²⁴ *Id.* at 126.

²⁵ *Id.*

without regard to prior contracts it would be unconstitutional.²⁶ There is however, no presumption that the Oklahoma legislature intended to impair basic constitutional rights.²⁷ In making this determination the federal court considered the fact that the Corporation Commission was required to consider relevant factors and that the language of the 1955 statute is susceptible of a construction that would permit the Corporation Commission to deny the gas if the circumstances were appropriate.²⁸

Although the federal court had recognized that the Oklahoma legislature's attempt to use one subterranean resource to assist in the capture of another critically needed subsurface mineral to benefit the state's economy was within the police power of the state,²⁹ Phillips again challenged the statute, this time in state court. In the case of *Phillips Petroleum Co. v. Corporation Commission*,³⁰ Phillips again sought to prohibit the Corporation Commission from proceeding under the statute on the grounds that the act was an unconstitutional taking of private property without due process of law.

Phillips argued that the act violated both the state and federal constitutions in that it attempted to convert Phillips into a public utility, although it was recognized by the agricultural occupants that Phillips was not a public utility and had not dedicated its service to the supplying of natural gas for irrigation.³¹ The Corporation Commission contended that the statute constituted a valid exercise of the police power and did not deprive Phillips of property without due process. Further, it contended that the statute is not a "taking" of gas but a regulation under the police power of the use that may be made of a small portion of the gas.³² The Oklahoma Supreme Court held that it was immaterial that the service was limited to a small area and a few people, stating, "If the producer of gas can be required to serve a small area and a few people, we see no reason why he could not be required to serve a larger area and more people."³³ The issue, as seen by the court, was not whether gas produced from the wells may be taken by eminent domain to pump for irrigation, but whether a producer of gas may be required to make

²⁶ *Id.* at 125. Notwithstanding the constitutional prohibition against impairment of the obligations of contract, all contracts are subject to the police power of the state and where the subject matter of the contract is one which affects the safety and welfare of the public it is within the supervising power and control of the legislature. 16A AM. JUR. 2d, *Constitutional Law* § 396 (1979).

²⁷ *Phillips Pet. Co. v. Jones*, 147 F. Supp. 122, 125 (D. Okla. 1955).

²⁸ *Id.* at 126.

²⁹ *Id.*

³⁰ 312 P.2d 916 (Okla. 1956).

³¹ *Id.* at 918. Compelling a public utility to service a market it has not professed to undertake has been held to be an appropriation of private property without just compensation. *Oklahoma Nat. Gas Co. v. Corporation Comm'n*, 88 Okla. 51, 211 P. 401 (1922).

³² *Phillips Pet. Co. v. Corporation Comm'n*, 312 P.2d 916, 918 (Okla. 1956).

³³ *Id.* at 919.

a portion available for these purposes upon prices, terms, and conditions to be imposed by the Commission as a regulation under the police power.³⁴

The court found no cases authorizing a taking of private property from a business or industry under the police power, for use in another business or industry clothed with a public purpose. There are cases where a taking was authorized under the police power but the taking was accomplished by condemnation under the power of eminent domain.³⁵ Thus, the court held that the statute was not a regulation under the police power but would, if enforced, constitute a taking of private property without due process of law and was therefore unconstitutional.³⁶

Although the act under consideration purported to make the use of natural gas for irrigation purposes a preferred use, the court made no reference to the preferred use doctrine.³⁷ A noted scholar in the areas of constitutional law and oil and gas has referred to the decision in the *Phillips* case as a "judicial setback" for the doctrine of preferred use.³⁸ This doctrine falls under the general subject of the power of the state to regulate the use of natural resources in the interest of the public welfare.

"Preferred Use" Legislation: History and Development

It is generally accepted that the states, under the police power, may allocate and conserve the scarce natural resources found upon and beneath their lands. The regulation of various phases of oil and gas operations in order to prevent waste of the oil and gas and to protect correlative rights of the landowners has been held constitutional.³⁹ The theory under which these various regulations have been constitutionally sustained is that such regulations are a valid exercise of the police power to prevent waste and protect correlative rights.⁴⁰ Individual contract and property rights must yield to a proper exercise of the police power.

Whether specific legislation is a proper exercise of the police power depends upon whether it can withstand the constitutional test required for such action. The Oklahoma court has set out this test in a recent case in which it stated, "The police power is a necessary and inherent attribute of sovereignty and where legislation based thereon bears a real, substantial and legitimate relation to the general welfare of the public it is valid."⁴¹

³⁴ *Id.*

³⁵ *Id.* An extensive discussion was given by the court on the distinctions between eminent domain and the police power. Eminent domain "takes" property because it is useful to the public, while the police power regulates the use of property or impairs rights in property because the free exercise of these rights is detrimental to the public interest.

³⁶ *Id.* at 922.

³⁷ Kuntz, *Discussion Note*, 7 O.G.&R. 1040 (1956).

³⁸ M. MERRILL, *THE PUBLIC'S CONCERN WITH FUEL MINERALS* 97 (1960).

³⁹ 5 E. KUNTZ, *OIL AND GAS* § 70.2 (1978).

⁴⁰ *Id.* See also Note, *Oil and Gas: State Regulation of Natural Gas to Prevent Waste and Protect Correlative Rights—What Power Remains Today?*, 25 OKLA. L. REV. 427 (1972).

⁴¹ *Public Serv. Co. v. Caddo*, 479 P.2d 527 (Okla. 1971).

The doctrine establishing preferred use developed from the concept of the prevention of waste of natural resources.⁴² The law of waste is based on public policy regarding resource use, that is, conserving the resource and promoting efficient production.⁴³ The basic argument in favor of the prevention of waste of oil and gas is that such waste would deprive the nation of much needed and valuable resources.⁴⁴ A need for an appreciation of the advantages of conservation for its own sake has been recognized. Society has become concerned about the preservation of valuable resources and has expressed a desire that resources be devoted to uses that will best promote the public welfare.⁴⁵

To carry out this desire, public control has been exerted over private actions that might cause waste. The regulation of wasteful practices may be in the form of direct regulations that prohibit certain practices or that prohibit production so long as certain practices resulting in waste continue.⁴⁶ No matter how the control to prevent waste is exerted, it has been recognized that no one has an inalienable right to waste his own gas and oil to the injury of either his neighbor or the public.⁴⁷

The concept of waste of a natural resource has been expanded to include a use that is less valuable and necessary than higher uses.⁴⁸ This is justified on the basis of prevention of waste caused by low or inferior use of the resource. Early decisions have upheld statutes that prohibited the useless waste of natural gas, water, and other valuable natural resources.⁴⁹ As early as 1920, the United States Supreme Court, in the case of *Walls v. Midland Carbon Co.*,⁵⁰ recognized the validity of a state regulation prohibiting an inferior use of natural gas.

In the *Walls* case, a Wyoming statute prohibiting the burning of natural gas for the manufacture of carbon black was challenged on the grounds that the act transcended the police power of the state and violated the equal pro-

⁴² M. MERRILL, *THE PUBLIC'S CONCERN WITH FUEL MINERALS* 96 (1960). Regulation for the prevention of waste has been recognized as within the police power of the state. See *Minshall v. Corporation Comm'n*, 485 P.2d 1058 (Okla. 1971) (statute governing regulation and inspection of all abandoned wells leaking salt water, oil, gas, or other deleterious substances not in violation of constitution); *Champlin Refining Co. v. Corporation Comm'n*, 51 F.2d 823, *mod.* 286 U.S. 210 (1932) (act authorizing Corporation Commission to make rules and regulations to prevent waste held constitutional).

⁴³ M. HARRIS, *LEGAL-ECONOMIC ASPECTS OF WASTE LAW AS IT RELATES TO FARMING* 96 (1974).

⁴⁴ *Id.* at 95.

⁴⁵ M. MERRILL, *THE PUBLIC'S CONCERN WITH FUEL MINERALS* 95 (1960).

⁴⁶ 5 E. KUNTZ, *OIL AND GAS* § 75.1 (1978).

⁴⁷ M. HARRIS, *LEGAL-ECONOMIC ASPECTS OF WASTE LAW AS IT RELATES TO FARMING* 97 (1974).

⁴⁸ *Id.*

⁴⁹ Merrill, *Stabilization of the Oil Industry and Due Process of Law*, 3 So. CAL. L. REV. 396 (1930). Cf. *Gas Products Co. v. Rankin*, 63 Mont. 372, 207 P. 993 (1922) (statute prohibiting the use of natural gas for the manufacture of carbon black held unconstitutional).

⁵⁰ 254 U.S. 300 (1920).

tection and due process provisions of the Constitution.⁵¹ The question addressed by the Court was whether the legislation was a legal conservation of the natural resources of the state, or an arbitrary interference with private rights. The wisdom of the statute was not in issue; rather it was the power of the state to make the regulation that was challenged.⁵² The Supreme Court recognized that the decision regarding the relative values of carbon black and raw gas was for the state legislature to determine.⁵³

The state has the power to regulate property in which others may have rights and in which the state has an interest. Because natural gas is one of the resources of the state, the legislature has the power to prohibit any extravagant, wasteful, or disproportionate use of the natural gas. A comparison of the value of the industries and a judgment upon them as affecting the state was for the state to make.⁵⁴

The Oklahoma court followed the *Walls* case in *Quinton Relief Oil & Gas Co. v. Corporation Commission*.⁵⁵ An order by the Corporation Commission prohibiting Quinton Relief Oil and Gas Company from selling any portion of the natural gas produced by it for the purpose of using the gas or allowing the use of the gas for the manufacture of carbon black was challenged. The court held that the Corporation Commission had jurisdiction to enter the order in question. The "wasteful utilization of such gas" is a definition of waste and is a general term that vests the Commission with the power to determine under a particular set of facts whether the same constitutes a wasteful utilization of gas.⁵⁶ The court held it was within the constitutional power of the legislature to vest the Corporation Commission with this jurisdiction. Therefore, it is obvious that the state, in the proper exercise of its police power and the preservation of so valuable a natural resource as natural gas, may prohibit the wasteful utilization of the gas in the interest of the public welfare.⁵⁷

It has been stated that "we may regard as definitely established the constitutionality of selective use legislation, provided there is a reasonable basis for the selection."⁵⁸ Some of the uses that have been selected as inferior uses include the use of natural gas service for swimming pool heating,⁵⁹ the use of natural gas for operating unmantled gas lamps,⁶⁰ the consumption of gas for

⁵¹ *Id.* at 310.

⁵² *Id.* at 317.

⁵³ *Id.*

⁵⁴ *Id.* at 322.

⁵⁵ 101 Okla. 164, 224 P. 156 (1924).

⁵⁶ *Id.* at 157.

⁵⁷ *Id.* at 159.

⁵⁸ Merrill, *Stabilization of the Oil Industry and Due Process of Law*, 3 So. CAL. L. REV. 396 (1930).

⁵⁹ National Swimming Pool Institute v. Kahn, 80 Misc. 2d 655, 364 N.Y.S.2d 747 (1975), *aff'd*, 48 App. Div. 2d 736, 367 N.Y.S.2d 869 (1976).

⁶⁰ Leroy Fantasies, Inc. v. Swidler, 44 App. Div. 2d 266, 354 N.Y.S.2d 182 (1974).

boiler use,⁶¹ and the practice permitting the flow of gas to escape into the air.⁶²

Although there is a clear line of authority holding that a state, in the exercise of its police power, can prohibit the use of resources for certain activities or operations, it is not as clear in regard to the establishment of "preferred uses." Preferred use generally refers to requiring the use of a natural resource for a particular purpose rather than prohibiting its use for a particular purpose. It has been stated that "protection of respective interests of production from a common pool, preservation of irreplaceable natural resources against waste and devotion of such resources to socially preferred uses, at least within reasonable limits, all have been recognized as legitimate ends."⁶³ Although someone must determine whether gas should be used to heat homes or to produce carbon black, the determination of which end uses of gas are "superior" and which are "inferior" is a very difficult task.

In *Houston Lighting & Power Co. v. Railroad Commission*,⁶⁴ the Texas court recognized the validity of preferred use legislation. The Texas Railroad Commission had set priority uses for natural gas. The court held that if additional gas is not available and the public interest requires it, the Commission may set priorities and may do this in accordance to the end use to be made of the gas.⁶⁵ Moreover, in *Interstate Natural Gas v. Federal Power Commission*,⁶⁶ the result reached by the Court indicates a recognition of the state's power to enact local conservation laws including the authority to pass preferred use legislation. The regulation of natural gas use priorities within a state are expressly made matters subject to state regulation by the provisions of the Natural Gas Act.⁶⁷

Preferred use regulation is a relatively new doctrine in the field of energy conservation. Despite some constitutional objections, the doctrine is receiving recognition as a valid regulation under the police power, as the foregoing discussion illustrates. A properly drafted piece of legislation setting out a preferred use of an energy resource would not be unconstitutional on its face.

Constitutional Objections to 52 Oklahoma Statutes § 10

In 1910 the Oklahoma legislature adopted a statute that gave authority to every gas pipeline corporation or individual owner to construct pipelines

⁶¹ *Houston Lighting & Power Co. v. Railroad Comm'n*, 529 S.W.2d 763 (Tex. 1975).

⁶² *Ohio Oil Co. v. Indiana*, 177 U.S. 190 (1930).

⁶³ Merrill, *Stabilization of the Oil Industry and Due Process of Law*, 3 So. CAL. L. REV. 396 (1930).

⁶⁴ 529 S.W.2d 763 (Tex. 1975).

⁶⁵ *Id.*

⁶⁶ *Interstate Nat. Gas Co. v. FPC*, 311 U.S. 682 (1947).

⁶⁷ 15 U.S.C.S. § 717(c). See also Note, *Constitutional Law: Interstate Commerce: Authority of FPC to Control the Use of Natural Gas*, 14 OKLA. L. REV. 199 (1961). Note that the Natural Gas Act is only controlling in areas of interstate transportation. The Act specifically exempts the local distribution of natural gas.

over or under highways, bridges, streets, and so forth.⁶⁸ The statute further provided that whenever any gas pipeline crossed the land of anyone outside of a municipality, the corporation, upon request, was required to connect the premises with the pipeline and furnish gas to the consumer at the same rate as charged in the nearest city or town.⁶⁹ This statute was challenged in *Burmah Oil & Gas Co. v. Corporation Commission*.⁷⁰ Burmah sought a writ of prohibition against the Corporation Commission to prevent it from proceeding with the claim of a landowner requesting an order requiring Burmah to furnish natural gas service to his premises under the statute on the ground that the statute was unconstitutional. The court refused to consider the constitutionality of the statute because it found the Corporation Commission was without jurisdiction to enforce the act. The court specifically held that the Corporation Commission was without statutory or constitutional authority to hear and determine disputes between private citizens or entities in which the public interest was not involved.⁷¹

Section 10 of Title 52 was again challenged in *Backus v. Panhandle Eastern*⁷² in which an Oklahoma farmer brought suit to compel Panhandle Eastern to furnish him gas for the operation of irrigation pumps and to recover damages for failure to deliver the gas. The federal district court entered a temporary mandatory injunction requiring Panhandle to furnish the gas. The court then held that the Oklahoma statute required Panhandle to furnish gas to the plaintiff. Panhandle appealed to the Court of Appeals for the Tenth Circuit on the grounds that the statute violated the commerce clause and the supremacy clause of the United States Constitution. The Tenth Circuit held that the transmission of gas from one state to another is interstate commerce and the fact that the gas the plaintiff received had not crossed a state line before reaching plaintiff's pump did not exclude it from the commerce clause.⁷³

The quantity of natural gas used to operate one irrigation pump does not have a substantial effect on interstate commerce, but cumulative withdrawals for landowners under the Oklahoma statute might interfere with interstate commerce.⁷⁴ The court determined, however, that a specific finding of interference with interstate commerce was unnecessary. The court then proceeded to determine that the Natural Gas Act gives the Federal Power Commission (FPC) the power to regulate the transportation of gas in interstate commerce, the sale of gas in interstate commerce, and the natural gas companies engaged in the transportation or sale of gas in interstate commerce.⁷⁵ The FPC had the power to regulate in this instance because Pan-

⁶⁸ 52 OKLA. STAT. § 10 (1971).

⁶⁹ *Id.*

⁷⁰ 541 P.2d 834 (Okla. 1975).

⁷¹ *Id.* at 836.

⁷² 558 F.2d 1373 (10th Cir. 1977).

⁷³ *Id.* at 1375.

⁷⁴ *Id.*

⁷⁵ *Id.*

handle was a company engaged in the transportation or sale of gas in interstate commerce. This state legislation frustrated the full effectiveness of a federal law and was therefore rendered invalid by the supremacy clause.⁷⁶

The Oklahoma Supreme Court addressed the constitutionality of section 10 in *Transok Pipeline Co. v. Richardson*.⁷⁷ There was no supremacy clause argument involved because all transactions in the fact situation were intrastate in nature. The plaintiff in this case was relying on the statute in requesting that gas be connected to his premises for residential purposes and for the operation of a hog farm. The court found constitutional limits on the practice of compelling a public or a nonpublic utility to service a market not professed to be undertaken.⁷⁸ The gas company was required to connect, at its own expense, gas to landowners over whose property the pipeline company had been granted a right of way. The rate was the same as that charged by a utility company in the nearest city, which was less than the cost of the gas to be furnished.⁷⁹ This violated the state constitution's prohibition against the taking of private property for private use.⁸⁰

The New "Preferred Use" Statute: Have the Constitutional Defects Been Remedied?

Although the Oklahoma court has held that a statute setting out a preferred use of natural gas for irrigation purposes and a statute requiring a pipeline company to furnish gas to the landowner both violate the state constitution, the Oklahoma legislature remains undaunted. Recognizing the need for such regulation of a natural resource, the legislature in 1977 passed another statute dealing with both of these areas.⁸¹

The 1977 statute states that the use of natural gas, on the premises from which it is produced or in pipelines located on the premises, to pump water for irrigation "is a preferred use, prior in order to all other uses to which such gas may be devoted."⁸² The owner or operator of a gas well is required to furnish, upon request, sufficient gas from production to operate irrigation

⁷⁶ *Id.* at 1376. Note that only the second part of section 10 was declared unconstitutional. The remainder of the statute, the authority to construct over highways, etc., was not at issue and remains unaffected. Woodruff, *Discussion Notes*, 57 O.&G.R. 574 (1977).

⁷⁷ 593 P.2d 1079 (Okla. 1978).

⁷⁸ *Id.* at 1080. See also note 31 *supra*.

⁷⁹ *Transok Pipeline Co. v. Richardson*, 593 P.2d 1079 (Okla. 1978).

⁸⁰ *Id.* Although the dissenting opinion in *Transok* stated that the Oklahoma court had previously recognized the validity of section 10 in three decisions, citing *Adkins v. Mustang Fuel Corp.*, 527 P.2d 842 (Okla. 1974); *Anchor Stone & Materials Co. v. Carlin*, 436 P.2d 650 (Okla. 1968), and *In re Vance*, 115 Okla. 8, 241 P. 164 (1925), it is to be noted that only the *Vance* case addressed the portion of the statute requiring the furnishing of gas to the landowner. The *Adkins* case and the *Anchor* case both addressed the portion of the statute granting the right to construct pipelines over or under highways, bridges, etc. *Transok Pipeline Co. v. Richardson*, 593 P.2d 1079 (Okla. 1978) (dissenting opinion).

⁸¹ 52 OKLA. STAT. § 524-29 (Supp. 1977).

⁸² *Id.* § 524.

pumps. This requirement is subject to prior contractual rights. The person receiving the gas is to pay a price not to exceed that at which the gas is sold at the wellhead and is to bear all costs. The owner or operator is also permitted to receive a surcharge for costs incurred in connection with the furnishing of the gas.⁸³

In addition, every operator of a natural gas gathering pipeline is required by this new statute to make gas available for the operation of irrigation pumps. The price charged for such gas is not to exceed 25 percent above the prevailing wellhead costs. Although the owners of the pipeline are required to make the connection, the agricultural occupant bears all the costs. This section also allows the pipeline owner to be compensated for all reasonable expenses.⁸⁴

The Corporation Commission is given jurisdiction over the sales of natural gas pursuant to the act and may adopt rules and regulations necessary to insure compliance with the provisions of the act. Nothing in the act is to be construed as creating the obligations of a public utility.⁸⁵ If the act is not complied with, the owner or operator of the pipeline may be liable for all damages suffered by the agricultural occupant, including decreased yield from the land because of the inability to irrigate.⁸⁶

Whether the Oklahoma court will recognize the validity of this new statute remains to be seen as it is yet unchallenged. Many of the constitutional defects of the previous statutes have been remedied in the 1977 statute. In the *Transok* case the major objection to the requirement that the pipeline company furnish gas to the landowner was that the pipeline company was not being fully compensated for the cost of furnishing the gas and had to bear the full cost of connection.⁸⁷ This objection is remedied in the 1977 statute as the agricultural occupant pays a reasonable price for the gas and is required to bear all the expenses in connection with the furnishing of the gas.⁸⁸

In the *Phillips* case, the Oklahoma court objected to the statute requiring the owner or operator of a gas well to furnish gas for irrigation purposes, stating that such legislation was not within the police power of the state and constituted a taking of private property without due process.⁸⁹ The *Phillips* decision was not well reasoned as it has been recognized that such regulation is within the police power.⁹⁰ The statute at issue in that case made no provision for price other than that it be "reasonable," and it allowed the Corporation Commission to set the price in the event of failure of negotiations be-

⁸³ *Id.* § 525.

⁸⁴ *Id.* § 526.

⁸⁵ *Id.* § 528.

⁸⁶ *Id.* § 529.

⁸⁷ See notes 77-80 and accompanying text *supra*.

⁸⁸ See text accompanying notes 83-84 *supra*.

⁸⁹ See notes 30-36 and accompanying text *supra*.

⁹⁰ See note 58 and accompanying text *supra*.