



STATE OF KANSAS

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July 17, 1980

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ATTORNEY GENERAL OPINION NO. 80-155

Tom Fiegel
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109 W. Main St.
Ness City, Kansas 67560

Re: Uniform Commercial Code--Secured Transactions--
Security Interest in Oil and Gas when Extracted
and in the Proceeds From the Sale Thereof

Taxation--Mortgage Registration--Registration Fee
Due When Security Interest is Created in Oil and
Gas Leasehold.

Synopsis: The creation of a security interest in oil and gas after such are extracted, as well as in the accounts receivable and proceeds from the sale thereof, is governed by the provisions of the Uniform Commercial Code, K.S.A. 84-9-101, et seq. As no interest in real estate is created, the mortgage registration fee of K.S.A. 1979 Supp. 79-3102 need not be paid. However, if the security interest taken also covers leasehold interests, then a realty interest is created and payment of the fee is required. In either case, the Register of Deeds is the proper filing officer for the security interest created. Cited herein: K.S.A. 58-2221, 58-2222, 79-329, K.S.A. 1979 Supp. 79-1542(6), 79-3102, 84-9-103(5), 84-9-104(j), 84-9-401(b).

* * *

Dear Mr. Fiegel:

As Ness County Attorney, you request our opinion on a matter which was presented to you by the Register of Deeds concerning the filing of certain documents by her. Specifically, you ask

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whether the documents in question (two of which you submitted with your request) should be considered as liens on personal property or mortgages on real property, and hence subject to the registration fee provided for by K.S.A. 1979 Supp. 79-3102. We would conclude that they are in fact both.

The examples which you have supplied us are both entitled "Uniform Commercial Code-Financing Statement," and are on forms approved for use in Kansas by the Secretary of State. The debtor and secured party are identified on each, and the statements are listed as covering the following types of property: "Minerals (including oil and gas) as extracted, and all Accounts resulting from the sale thereof at the wellhead and including all proceeds thereof." (Emphasis added). In addition, an attached document identified as Schedule A is made a part of the statements of collateral, and reads as follows:

"Minerals (including oil and gas) as extracted, and all Accounts resulting from the sale thereof; all of Debtor's (a) interests in Murfin Oil Company, (b) certificates, contracts, documents, instruments and agreements relating to such interests, (c) Murfin leases in which Debtor has share or interest (including, without limitation, 1968 Exploration Program), (d) claims, privileges, options and rights therein and thereunder, (e) increase and profits therefrom, (f) substitutions therefor, (g) Proceeds thereof and (h) as to all above, now owned or hereafter acquired." (Emphasis added.)

Any discussion of a question concerning oil and gas interests must be conducted with a view to the fact that such interests are "hybrids" in the eyes of the law, taking on the characteristics of real property in some situations, personal property in others. For example, oil and gas leases are considered by case law to be intangible personal property [Western National Gas Co. v. McDonald, 202 Kan. 98 (1968)], yet for the purposes of the inheritance tax [K.S.A. 1979 Supp. 79-1542(6)] and ad valorem tax [K.S.A. 79-329] they are termed tangible personal property. On the other hand, such leasehold interests are considered as real property under the statutes pertaining to the recording of instruments conveying

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or affecting real estate. K.S.A. 58-2221. As a result, a mortgage or assignment of this type of interest is considered as affecting realty, and thus subject to the mortgage registration fee of K.S.A. 1979 Supp. 79-3102. Ingram v. Ingram, 214 Kan. 415 (1974). This has also been held true for working interests and royalty interests. Luthi v. Evans, 1 Kan.App.2d 114, rev'd on other grounds, 223 Kan. 622 (1978).

However, such is not the case once the oil and gas is extracted. At that time, at least in the eyes of the law, the nature of the property changes from realty to personalty [Kansas Natural Gas Co. v. Neosho County, 75 Kan. 335 (1907)], and the law pertaining to security interests in personal property becomes applicable. Ingram, supra at 423. As a result, the Uniform Commercial Code, inapplicable when interests in or liens on real estate are involved [K.S.A. 1979 Supp. 84-9-104(j)], controls the way in which a security interest may be created once the oil and gas are severed from the ground. See, e.g. K.S.A. 1979 Supp. 84-9-103(5). In addition, the Code covers any proceeds from the sale of such property at the "wellhead" (i.e., as soon as it issues from the ground and is measured), or any accounts receivable arising in the same way. Clark, "The New UCC Article 9 Amendments," 44 J.B.A.K. 131, 134 (1975). Therefore, insofar as the documents at issue herein concern these kind of security interests, they do not concern realty, and are not liable for the registration fee under K.S.A. 1979 Supp. 79-3102.

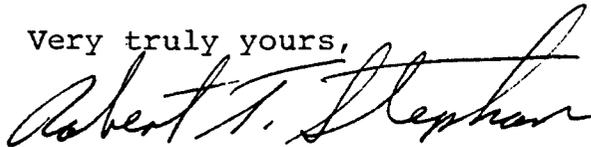
However, the above conclusion does not end the inquiry in this particular case, for on the attached schedules we note that an additional interest is taken in "all of Debtor's (a) interests in Murfin Oil Company, . . . (c) Murfin leases in which Debtor has share or interest." The inclusion of these leasehold interests has the effect of creating an Ingram-type situation which must be treated as a real estate mortgage. Accordingly, the fee set under K.S.A. 1979 Supp. 79-3102 is due and payable at the time of registration.

Does the dual nature of the security interests created here mean that multiple filings will be required? In our opinion, no, for K.S.A. 1979 Supp. 84-9-401(1)(b) requires the UCC financing statement to be filed "in the office where a mortgage on the real estate would be filed or recorded." This has the effect of allowing a single filing with the Register of Deeds to fulfill both purposes, although the documents may well have to be cross-indexed. As it is our conclusion that a mortgage registration fee is required due to the inclusion of the leasehold security interest, this fee would be due at the time of this filing. A failure to pay the fee would justify the Register of Deeds in refusing to file the document. This would have the practical effect of preventing the UCC interests from being perfected, as well as failing to impart notice of the leasehold interest to third-parties. K.S.A. 58-2222. Of course, nothing would prevent the interests from being split, and both a UCC and a realty filing being made.

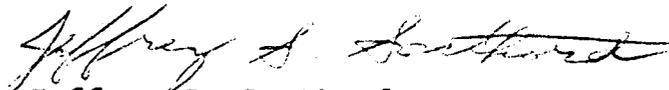
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In conclusion, the creation of a security interest in oil and gas after such are extracted, as well as in the accounts receivable and proceeds from the sale thereof, is governed by the provisions of the Uniform Commercial Code, K.S.A. 84-9-101, et seq. As no interest in real estate is created, the mortgage registration fee of K.S.A. 1979 Supp. 79-3102 need not be paid. However, if the security interest taken also covers leasehold interests, then a realty interest is created and payment of the fee is required. In either case, the Register of Deeds is the proper filing officer for the security interest created.

Very truly yours,



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Assistant Attorney General

RTS:BJS:JSS:phf