

## **KIOGA PRODUCER ALERT**

### **IMPACT of BP WIND ENERGY FLAT RIDGE II WIND FARM PROJECT on OIL AND GAS OPERATIONS in SPIVEY-GRABS OIL and GAS FIELD, HARPER and KINGMAN COUNTIES, KANSAS, and IMPLICATIONS to OPERATORS of EXISTING OIL and GAS LEASES.**

**July 17, 2011**

#### **Executive Summary**

BP Wind Energy and Westar have initiated implementation of the second phase of their Flat Ridge II Wind Farm Project (“the Project”) located in Harper and Kingman Counties, Kansas. The Project covers 66,000 contiguous acres and is in large part situated directly over the Spivey-Grabs Oil and Gas Field (“the Field”) (See Exhibit 1. “Flat Ridge II Boundary and Oil and Gas Production”). The Field was initially discovered in the early 1950s and now consists of hundreds of oil and gas wells operated by dozens of Kansas-based independent oil and gas companies. Many of the leases in the area have been in continuous production since that time. The area continues to see ongoing development and drilling operations that provide local jobs and significant tax revenues at both the state and local level.

Oil and gas operators in the Field are just now becoming aware and informed as to details of the Project due to the fact that there appears to be negligible or non-existent governmental requirements to properly notify affected parties of the potential impact of this type of activity. As a matter of Kansas law, the owners of an oil and gas lease have, although not exclusive, certain and distinct rights to the surface that are superior to any subsequent easements, leases or encumbrances. It appears that the Project is nearing the implementation stage, and that the implementation of the Project as planned will interfere with the oil and gas producers’ superior rights, will have a substantial negative effect on the ability of the oil and gas producers to operate, maintain, produce and develop their mineral rights, and, in fact, will result in substantial monetary damages to the affected operators, working interest owners and royalty interest owners, as well as the loss of substantial tax revenues by state and local governments.

The oil and gas industry through the Kansas Independent Oil and Gas Association (“KIOGA”) has had general conversations with the Wind Industry Coalition, but the focus of these conversations has been on addressing concerns related to wind lease forms conflictive with Kansas law and communication in regard to the impact of subsequent oil and gas lease activity where wind leases may already be in place. The Project appears to be the first significant incident where wind activity may be in conflict with pre-existing oil and gas operations.

It should be noted that KIOGA and the oil and gas industry do not take a negative or positive position as to wind energy in Kansas. Industry efforts are simply to protect the superior rights of the oil and gas operator and should not be construed as an industry moratorium against the wind energy industry.

This document will outline and focus on details of the oil and gas industry's issues and concerns with the implementation of wind energy projects in areas where pre-existing oil and gas leases are present. It is the result of a collective effort by multiple operators to consolidate relevant information to relay to the wind energy industry, state and local government, and the oil and gas industry, in the hope that through further discussion, adequate solutions will be found that will address these concerns and issues.

### **Recent Oklahoma Legislation in regard to Wind Farms and Pre-existing Oil and Gas Leases.**

Recent legislation in Oklahoma was passed earlier this year to address oil and gas operator concerns related to wind energy development on pre-existing oil and gas leases and producing properties. The summary is provided by the Oklahoma Independent Producers Association. (See Exhibit 2. "HB1821")

*HB1821, by Rep. John Trebilcock, R-Broken Arrow and Sen. Bryce Marlatt, R-Woodward, creates the Exploration Rights Act of 2011. It states legislative findings and modifies existing legislative findings, citing the need to address the relationship between wind energy developers and mineral estate owners who have a historical right to make reasonable use of the surface estate, including the right of ingress and egress. It states that unless otherwise provided by instrument, a mineral owner has had and shall thereafter continue to have, the right to make reasonable use of the surface estate, including the right of ingress and egress for the purpose of exploring, severing, capturing and producing the mineral underlying the tract of real property of lands spaced or pooled therewith. It prohibits the lessee of a wind or solar energy agreement of the wind energy developer from unreasonably interfering with the mineral owner's right to make reasonable use of the surface estate. It requires a wind energy developer to provide, to the oil and gas operator or lessee, at least 30 days notice of intent to construct a wind energy facility. It also requires the wind energy developer to publish the notice in the legal section of a qualified newspaper in the applicable county. It also allows a person affected by violations to seek declaratory or injunctive relief in district court. It prohibits a mineral estate from being subject to eminent domain unless the owner of the mineral estate expressly consents to inclusion.*

### **Kansas law in regard to pre-existing mineral rights use of the surface and protection of lessees of mineral rights.<sup>1</sup>**

Under Kansas Law, an oil and gas lessee enjoys such rights to the surface as are expressly stated in the pertinent oil and gas lease. These rights are generally set forth in the granting clause of the oil and gas lease, which typically grants such rights as to lay pipelines, store oil, and build tanks and other structures upon, over and under the lands covered by the oil and gas lease. However, oil and gas leases very seldom contain provisions which expressly set forth the relative rights of the surface owner to the rights of the lessee under the pertinent oil and gas lease.

In the absence of express provisions so stating, and perhaps even in addition to express surface rights being stated, in an oil and gas lease, the lessee has the implied right to make reasonable use of the surface under an oil and gas lease, in order to develop the land for oil and gas. The Kansas Supreme

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<sup>1</sup> The following legal summary was provided by David Nickel of Depew, Gillen, Rathbun & McInteer, LC.

Court has held that, “If in the grant or reservation of a separate interest in oil and gas the grantor does not expressly grant or retain such legal relations as are necessary for the production and operation of the land for oil and gas purposes, these relations are held to be created by implication.” Mai v. Youtsey, 231 Kan. 419, 646 P.2d 479 (1982).

Importantly, the lessee, under an oil and gas lease, does not own a dominant estate relative to a surface owner’s subservient estate in the lands covered by the oil and gas lease. Rather, the licensed privileges of the lessee are to run hand in hand with those reserved by the lessor with neither interfering more than need be with the continuing uses of the other -- the one for the exploration, production and transportation of minerals and the other for the pursuit of agriculture or other interests.

There is very little Kansas law determining the relative rights and priority of an oil and gas lessee over an easement holder in cases in which an easement was granted by the surface estate owner to the easement holder subsequent to the granting of an oil and gas lease to the lessee over the lands covered by the easement. However, courts of various jurisdictions (excluding Kansas) have held that the surface owner may not make such use of the surface as will prevent the mineral owner or oil and gas lessee from enjoying surface use reasonably necessary for exploration and development of the minerals underlying the pertinent lands. It has also been held by courts (outside of Kansas) that, if the interest of the surface lease is junior in time to the interest of a mineral grantee, including an oil and gas lessee, the mineral grantee is not required to obtain permission from the surface lessee to enter upon the pertinent land and make such use of it as is reasonably necessary in the exploration and development of minerals. Moreover, it has been held that it is unreasonable to require a lessee to accommodate future speculative surface uses which may be sought by the surface owner of the lands covered by an oil and gas lease.

Applying these principles of law to the issues involved in the wind farm proposed for the lands located in the Field, there are a few observations which appear to be safely stated.

- First, in most cases, the oil and gas leases have been recorded in the pertinent county offices and have been operated long before the wind farm easements and leases. Thus, the rights of the wind farm leases would likely be junior and inferior to the rights of the pertinent oil and gas lessees to make reasonable use of the surface under an oil and gas lease, in order to develop the land for the oil and gas.
- Secondly, the rights to the surface of the lands covered by the pertinent oil and gas leases enjoyed by the pertinent oil and gas lessees is not exclusive and is not a dominant estate. Thus, Kansas courts may impose upon the oil and gas lessees the obligation to accommodate the desires of the pertinent surface owners or claimants (their assignees) to develop the surface rights of lands covered by the oil and gas leases, provided that such development of such lands does not unreasonably interfere with the right of the oil and gas lessees to enter upon the pertinent lands and make such use of it as is reasonably necessary in the exploration and development of minerals. However, based on the information presented in this document, it

certainly appears that the wind farm activity will unreasonably interfere with the superior rights of the oil and gas lessees.

- Third, when development by an oil and gas lessee is occurring or imminent and a surface owner's (his/her assignee) activities are unreasonably interfering with the surface rights of lands covered by an oil and gas lease, the more likely it is that a declaratory order, injunctive relief and/or damages may be obtained through a court of competent jurisdiction. In this case, oil and gas development in the Field is necessary and imminent. This should help to obtain adequate relief from a court with respect to any plan of the wind farm owners which would unduly interfere with such oil and gas operations and development.

### **Producer Concerns**

- Lack of regulatory oversight to give proper notice and protect correlative rights of owners of the oil and gas mineral estate.

Activity has apparently been occurring on the project since 2008 at the county level. It appears that local government is the primary oversight for the wind farm portion of the Project; the KCC only gets involved as to utility-related aspects of the Project. No public disclosure of specifics of the Project plan is required nor notice made to affected parties such as the owners of the oil and gas mineral estate.

- Surface Interference of oil and gas operations by turbines and power lines.

Information provided by BP Wind Energy indicates that 5 to 8 turbines per square mile might typically be expected. The turbines would be lined up approximately 1,000 feet apart in an East to West orientation; each turbine would create at least a 200-foot diameter (about 10 acres per turbine) of highly restricted surface operations. In effect, each turbine would eliminate or highly restrict access for a legal drilling location.

In addition to the surface use affected by the turbines themselves, BP Wind Energy is seeking approval to install overhead electrical gathering from the turbines. This would require a continuous line running more or less the entire width of an individual section connecting the array of East-West turbines, or in the alternative each turbine would run a line every 1,000 feet North or South back to the respective boundary of the governmental section (see figure B). In either case, these 35,000 volt lines will create safety setbacks for drilling and service rigs 200 to 300 feet wide along the electric line corridors highly restricting or eliminating access for service and drilling operations covering a significant percentage of the surface area. Lines on the perimeter of a lease boundary or governmental section would also create additional setback interference with service and drilling operations.

- Oil and gas well and pipeline corrosion issues created by electrical fields as a result of the turbines and infra-structure.

The presence of electrical fields as a result of the turbines, and gathering and transmission of electricity will require that cathodic protection be installed on all pipeline and well installations in order to help slow down the effects of accelerated corrosion due to their presence. This represents a substantial expense to oil and gas operators at approximately \$3,000 per well bore. These measures will only slow down the effects of corrosion, not eliminate them. Potential for substantial economic loss to working interest owners and royalty interest owners will occur when casing fails and replacement wells must be drilled. Additionally, the potential for environmental and safety issues related to pipeline failures due to accelerated corrosion caused by the vast electrical fields will remain a concern.

- Loss of oil and gas reserves to the working interest owners, royalty interest owners and state and local governments.

Significant increased density drilling and development remain in the Field. It is widely recognized that substantial oil and gas reserves remain within the field boundaries. Current recoveries of the oil and gas are just a fraction of the oil and gas calculated in place. Further vertical well down-spacing, new fracture technology and horizontal drilling, and other advancements will be utilized to improve the ultimate recovery of reserves from the Field, providing a domestic energy source not dependent on tax payer subsidies, jobs, significant revenue to working interest owners and royalty interest owners flowing into the local economy and substantial revenue for the state and local tax base.

- Safety concerns to field personnel and equipment from icing, arcing and high voltage.

The setbacks for oil and gas activity presented with this document are minimum; most wind farm agreements require larger recommended setbacks for a higher margin of safety to personnel and equipment. While the oil and gas industry prides itself on a strong safety record, the introduction of high voltage and a voluminous amount of overhead hazards in an area where there is a substantial amount of daily activity by a large number of oil and gas operators and service company employees seems highly questionable, when virtually all other wind projects are conducted in sparsely populated, primarily agrarian settings.

## **Conclusions**

The goal of the oil and gas industry is not to prevent the development of wind energy, and given assurances that all of the above issues can be adequately resolved in a way that will not interfere with producers pre-existing rights, there may be a way for the Project, and projects like it, to proceed where

there are pre-existing oil and gas operations. However, the concerns and issues are substantial, and it should be clear to all parties involved and/or affected that the Project should not proceed further until the aforementioned issues are satisfactorily addressed.

KIOGA supports the oil and gas operators who are respectfully requesting that BP Wind Energy and Westar agree to hold still with the Project and related transmission projects until meeting with affected oil and gas operators to address their concerns and issues.

KIOGA also supports operator efforts to inform state and local governments about oil and gas operator concerns and issues and the need for better regulation, legislation and oversight to address the negative impact the Project will have on the oil and gas industry.