Take-Or-Pay Oklahoma Style

By J. Michael Medina

This paper discusses the current state of take-or-pay litigation in Oklahoma. Therefore, Oklahoma cases will be featured.[1] Producers have won most of the legal battles against pipelines. However, the law in Oklahoma is yet unsettled. Until further guidance from either the Oklahoma Supreme Court or from the Tenth Circuit is received, the litigants will have to content themselves with a body of largely unpublished authority.

I. Anatomy of the Take-or-Pay Clause

The take-or-pay clause was commonly inserted into long-term natural gas contracts starting in the fifties. The clause provided benefits to both parties. The producer obtained a guaranteed stream of revenue to assist him in further development and in lease maintenance. The take-or-pay clause also assured the producer that the pipeline would not be able to use his contract as an uncompensated storage agreement, as had been the case in the past. The pipeline, on the other hand, received a guaranteed long-term supply, and with the take-or-pay clause, maintained flexibility in terms of the amount of gas it had to take.[2] The take-or-pay clause also featured a make-up provision, enabling the pipeline to, during a specified period of time following a take-or-pay payment, receive gas paid for but not taken.[3]

A typical take-or-pay clause might therefore read:

> Buyer agrees to purchase and receive from Seller or to pay for if available but not taken, a quantity of gas equal to the Sum of the Daily Contract Quantities herein specified. . . . The Daily Contract Quantity shall be the daily rate of production equal to seventy-five percent (75%) of the Delivery capacity of each well.[4]

The take-or-pay clause, thus, allows a producer to receive certain revenues annually, whether or not a profitable market exists for the producer's gas. As a result, the take-or-pay clause assigns the risk of a deteriorating natural gas market to the pipeline. *Reading & Bates Pet. Co. v. Transok, Inc.*, No. CJ-85-1992 (Tulsa Cty. Dist. Ct., Okla. Jan. 27, 1987), **withdrawn as settled** (March 18, 1987); *Challenger Minerals, Inc. v. Southern Natural Gas Co.*, No. 84-C-357-E (N.D. Okla. Sept. 9, 1986), **withdrawn as settled** (Nov. 26, 1986); *Dyco Pet. Corp. v. El Paso Natural Gas Co.*, No. 86-C-897-E (N.D. Okla., Nov. 1, 1988).

II. The Current Gas Surplus

The economy has changed since the days when these take-or-pay contracts were executed. Gas surpluses now exist and pipelines are searching desperately for ways to get out of their contractual obligations. Pipelines have succeeded in many instances in renegotiating the contract terms, eliminating the take-or-pay feature and inserting market-out or other price responsive clauses. See *American Exploration Co. v. Columbia Gas Trans. Co.*, 779 F.2d 310 (6th Cir. 1985) for one such example. Other producers have sued, but have subsequently settled for cash payouts and contract modifications.[5] A relatively small, but hardy, group of producers have sued to case culmination. New cases continue to be filed.

III. Producer Remedies

In seeking to enforce their contractual rights, producers have invoked a wide range of remedies. The chief remedy remains a suit to collect past due take-or-pay payments. However, in certain cases, other remedies may be available.

Take-or-Pay Damages: The operation of the take-or-pay clause is straightforward. If a pipeline fails to take the volume of gas which it is obligated to take under the contract, the pipeline owes the producer damages measured by the value of the pipeline's shortfall. The producer must therefore establish (1) the minimum take volume, (2) the volume taken and (3) the contract price to calculate damages.[6] If the producer prevails, the court will award as damages the deficiency amount the pipeline is obligated to pay. **See,** *Kaiser-Francis Oil Co. v. Producer's Gas Co.*, No. 83-C-400-B (N.D. Okla. July 31, 1986), **affirmed** No. 86-2382 (10th Cir. March 8, 1989); *Southport Exploration Co. v. Producer's Gas Co.*, 83-C-550-B (N.D. Okla. March 13, 1986); *RJB Gas Pipeline Co. v. Colorado Interstate Gas Co.*, No. CJ-84-2601 (Okla. Cty. Dist. Ct., Okla. May 15, 1987). Furthermore, in Oklahoma the successful producer is entitled to attorney's fees under 12 O.S. 1981, §936 as a take-or-pay contract is a contract governed by Article 2 of the Uniform Commercial Code (sales). *International Minerals & Chem. Corp. v. Llano, Inc.*, 770 F.2d 879 (10th Cir. 1985), **cert. denied** 106 S. Ct. 1196 (1986).

Extraordinary Relief: The burden is a heavy one that the producer must overcome. **See,** *Mustang Production Co. v. Delhi Gas Pipeline Co.*, No. 83-1667-BT (W.D. Okla. Nov. 9, 1983), denying a preliminary injunction because the producer failed to establish irreparable injury. In one Oklahoma case, however, the producer established that irreparable drainage was occurring as the result of the pipeline's failure to take the gas. The court granted a preliminary injunction. *Unit Exploration v. Arkla, Inc.*, No. CJ-87-03282 (Tulsa Cty. Dist. Ct., Okla. Oct. 1, 1987), **appeal dismissed** No. 69,789 (Okla. App. April 25, 1988). Other possible bases for injunctive relief might include (a) the delayed payments threaten the producer with the loss of its business (b) the reservoir is being damaged and (c) the pipeline is taking but refusing to pay for the gas and the conduct is a constantly recurring grievance. Medina, 41 Okla. L. Rev., *supra* N.1, at 385. For a concise overview of equity and gas contracts, see Zachos, "Gas Purchase Contracts: Equitable Remedies for Breach," 24 Houst. L. Rev. 991 (1987).

Anticipatory repudiation: In many instances, pipelines have in clear terms repudiated any intention to comply with the contract at issue. Evidence of this repudiation in many instances can be found in pipeline demands for renegotiation, pipeline failure to make take-or-pay payments, or failure to provide adequate assurance of security when requested under 12A O.S. 1981, §2-609.[7] Anticipatory repudiation can generate large potential damage recoveries,[8] which is one reason some courts are reluctant to permit the claim to go to the jury. **See,** *Samson Resources Co. v. Northern Natural Gas Co.*, No. 85-C-74-E (N.D. Okla. Sept. 15, 1987); **but see,** *Kennedy & Mitchell, Inc. v. Internorth, Inc.*, No. 86-C-404-C (Mag. Report & Recomm., N.D. Okla. Sept. 21, 1988)(issue of material fact exists on anticipatory repudiation issue); *Marlin Oil Corp. v. Colorado Interstate Gas Co.*, No. CIV-87-1944-A (W.D. Okla. Aug. 17, 1988)(same).

Declaratory Relief: While a declaration of rights under Oklahoma's Declaratory Judgment Act awards no damages, it can be useful in establishing a future action for take-or-pay damages accruing in succeeding years and should therefore be sought in most take-or-pay cases. Such a declaration might include (a) the applicable contract price (b) the lack of any pipeline defense to its take-or-pay obligation and (c) the amount of gas contractually required to be either taken or paid for during an accounting year.

RICO and antitrust: Since most gas purchase contracts do not contain substantial interest provisions, the incentive for a pipeline to fulfill its obligations in a timely manner is limited. The pipeline, when faced with a straightforward take-or-pay case, can litigate secure in the knowledge that the most it can be held accountable for if found liable is what it should have paid in the first place (plus attorney's fees and minimal prejudgment interest). Producers, recognizing this constraint, have attempted to put the pipelines at greater risk by incorporating into their complaints enhanced recovery causes of action such as RICO (18 U.S.C. §1961 *et seq.*) and federal antitrust law, which provide for treble recovery. The Oklahoma federal courts have not been receptive to such claims. *Samson Resources Co. v. Northern Nat. Gas Co.*, No. 85-C-911-E (N.D. Okla. July 1, 1987)(finding RICO count to be meritless); *Cayman Exploration Co. v. United Gas Pipeline Co.*, No. 86-C-123-B (N.D. Okla. Jan. 5, 1987)(RICO and antitrust counts dismissed). In most instances, insertion of a RICO or antitrust count into the take-or-pay complaint is a mistake. The producer benefits by keeping his action clean and simple and by concentrating on the terms of

the contract. Injecting the complexities inherent in either a RICO or an antitrust case will defeat these basic producer objectives.

Tortious breach: One possible way of raising the stakes to the pipeline is asserting causes of action permitting punitive damages. Oklahoma does not permit punitive damages in most contract actions. *Fox v. Overton*, 534 P.2d 679 (Okla. 1975). Producers have attempted to circumvent this prohibition by alleging that the pipeline committed a tort —— the test of tortious breach of contract. Tortious breach is an appealing concept in the take-or-pay arena, as pipeline breaches are almost always the product of clear economic logic, the pipeline concluding that it is cheaper to breach the contract and run the litigation risk than to comply with the contract's terms. In England, therefore, courts will award punitive damages "where a defendant with a cynical disregard for a plaintiff's rights has calculated that the monetary gain arising out of his wrongdoing will most likely exceed the damages at risk." *Trans. Container Services v. Security Forwarders*, 752 F.2d 483, 487 (9th Cir. 1985); *Rookes v. Barnard*, [1964] A.C. 1129, 1227. The Oklahoma state courts seemed to accept that reasoning, permitting tortious breach claims to survive pipeline summary judgment motions. [9] The federal courts struck such claims.[10] The federal courts, it turns out, appear to have guessed right. In *Rodgers v. Tecumseh Bank* [11] the Oklahoma Supreme Court held that for a tortious breach of contract to exist, the plaintiff must establish the commission by the defendant of an independent tort. For a theoretical application of a tort theory to take-or-pay litigation, see Comment, "Remedial Theories Supporting Tort and Antitrust Recovery in Take-or-Pay Litigation," 39 Bay. L. Rev. 809 (1987). In most cases, the producer will be unable to establish such an independent tort.[12]

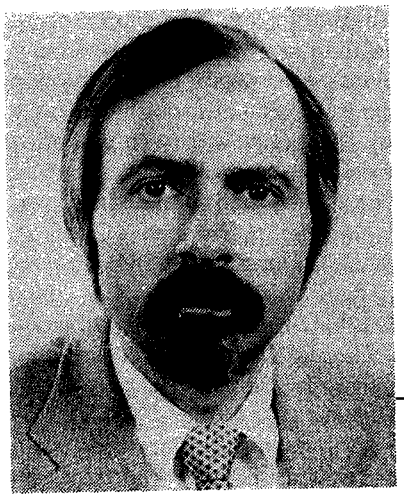
IV. Pipeline Defenses

Take-or-pay litigation is somewhat unusual in that the main action is almost never on the plaintiff's affirmative case. In most instances, the pipeline will readily concede the existence of a contract and that it has failed to take the prescribed quantity of gas. The epicenter of the dispute will be the justifications asserted by the pipeline to excuse its failures. These justifications are affirmative defenses and have, to a large degree become generic — that is, characteristic of the entire pipeline defendant class. **See** *Northwestern Mut. Life Ins. Co. v. ANR Pipeline Co.*, No. H-86-2189 (S.D. Tex. Jan. 16, 1987)(motion to disqualify law firm representing plaintiffs on basis that law firm had previously represented defendant's predecessor in same type of litigation denied, court finding affirmative defenses raised to be so non-distinctive as not to prejudice defendant). Other defenses feature specific contract term issues, such as water quality standards, **see,** *Southport Exploration, Inc. v. Producer's Gas Co.*, No. 83-C-550-B (N.D. Okla. June 6, 1984); *Kaiser-Francis Oil Co. v. Producer's Gas Co.*, No. 83-C-400-B (N.D. Okla. June 19, 1985), **affirmed** No. 86-2382 (10th Circuit, March 8, 1989), pricing determination clauses, see *Samson Resources Co. v. Northern Natural Gas Co.*, No. 85-C-74-E (N.D. Okla. Sept. 15, 1987), purity standards, and pressure requirements. This section will briefly canvass the known Oklahoma authority on the so-called generic defenses. By and large, the generic defenses have not been effective. [13]

Natural Gas Policy Act: Pipelines will almost invariably claim that take-or-pay payments violate the pricing provisions of Title I of the NGPA, 15 U.S.C. §3301.[14] Most post-NGPA gas contracts provide for maximum lawful prices under the appropriate NGPA price category. Pipelines contend that take-or-pay payments must either (a) be added to the prices received by producers for gas already taken or (b) the value of the use of the prepayment must be added to the price of the gas to be taken in the future. In either case, the addition may result in a price that exceeds the applicable NGPA price ceiling.

The pipelines' argument has convinced no one. Take-or-pay clauses were commonly used in the gas industry prior to passage of the NGPA. Congress did not promulgate the NGPA on a blank slate, "but in the context of prevailing practices under the Natural Gas Act." *Indicated Producers*, 22 FERC (CCH) ¶61,013 (January 17, 1983). FERC has in uncompromising language rejected all NGPA pricing attacks on take-or-pay clauses. *ANR Pipeline Co. v. Wagner & Brown, Inc.*, No. GP85-54-000 (FERC 1987). See also, Southern Natural Gas Co., 41 FERC (CCH) ¶63,030 (ALJ 1987)(rejecting both facets of NGPA defense). Oklahoma courts have followed this reasoning and have uniformly rejected the defense. [15]

Referral/Deferral to FERC: Pipelines alternatively argue that the court should not even rule on the NGPA pricing issue, that the issue is one for FERC's



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presumed special expertise in administering the regulatory scheme created by the NGPA. The pipelines recognize that "entering a stay for the FERC to exercise primary jurisdiction would be the equivalent of sending the case to the graveyard." *Southern Natural Gas Co. v. Fritz*, 523 So.2d 12, 17 (Miss. 1987). The pipeline's referral argument should be unavailing, especially in light of FERC's decision in *ANR Pipeline Co. v. Wagner & Brown, supra.* The common law rights embodied in the gas purchase contract do not lose their character simply because a scheme of federal regulation exists. *Pan American Corp. v. Superior Court*, 366 U.S. 656 (1961); *Western Natural Gas Co. v. Cities Service Gas Co.*, 507 P.2d 1236, 1243-44 (Okla. 1972), **appeal dismissed and cert. denied** 409 U.S. 1052 (1972). The take-or-pay clause is one of simple contract construction, an area in which FERC does not have special expertise. *Texas Gas Trans. Corp. v. Shell Oil Co.*, 363 U.S. 263 (1960); *Warren Pet. Co. v. FPC*, 282 F.2d 312 (10th Cir. 1960). Oklahoma courts have therefore refused to either refer to FERC the issue or stay their proceedings pending guidance from FERC.[16]

Mutual Mistake: Pipelines have argued that the parties made mutual mistakes when they entered into the long-term natural gas contract at issue in a particular case. The nature of mutual mistake varies with the pipeline defendant, but commonly includes assumptions of continuing gas shortages, assumptions pertaining to governmental policy, and assumptions concerning the adequacy of the make-up provisions. The defense fails for multiple reasons: (a) the mistake was not mutual, but a unilateral mistake on the part of the pipeline. The producer made no such assumptions; with the take-or-pay clause to protect him, he did not need to; (b) the pipeline's assumption of the risk makes the defense inapplicable; (c) a mutual mistake as to predictions of future conduct or events is not the type of mutual mistake which excuses performance and (d) the defense carries a heightened burden of proof. Medina, 58 O.B.J. at 2554, 2555 (1987). Oklahoma courts have rejected the defense in motions for summary judgment or to strike.[17]

Public policy: Pipelines, particularly public utilities, like to wrap themselves up in the mantle of the public good, and attempt to convey to the court the impression that they are fighting take-or-pay claims on behalf of their down-trodden consumer and business customers. One specific tactic is to try to shift the issue away from whether the pipeline will be required to perform its take-or-pay obligations to who should bear the burden for the pipeline's bad business decisions — the consumers or the producers, the pipeline being only a middleman. Fortunately, the courts have rejected this shell game. The public policy is to enforce contracts, not to permit parties who improvidently enter into contracts to bail out of them. *Arkansas Natural Gas Co. v. Arkansas R.R. Comm'n*, 261 U.S. 379 (1923); *Resources Inv. Corp. v. Enron Corp.*, 669 F. Supp. 1038 (D.Colo. 1987).

The allocation of costs between the pipeline and its customers is not one for the court, but for the government agency regulating the pipeline or public utility. *Chicago R. I. & P. Ry Co. v. Brown*, 105 Okla. 133, 232 P. 43 (1925); *Pioneer Tel. & Tel. Co. v. Bartlesville*, 40 Okla. 583, 139 P. 694 (1914). The public policy defense has been found inadequate by many Oklahoma courts.[18]

Penalty: Pipelines argue that the take-or-pay

clause constitutes a penalty since the crucial feature of the clause is to require the pipeline to pay for gas not taken. However, the take-or-pay clause is not a penalty; [19] the clause does transform the gas contract into a contract providing for alternative means of performance, a far cry from a penalty. 5 Corbin, Contracts, §1070 (1962); *International Minerals & Chem. Corp. v. Llano, Inc.*, 770 F.2d 879 (10th Cir. 1985), cert. denied 106 S. Ct. 1196 (1986); *PGC Pipeline Co. v. Louisiana Interstate Gas Co.*, 791 F.2d 338 (5th Cir. 1986); *Forest Oil Corp. v. El Paso Natural Gas Co.*, No. CIV-86-1948-W (W.D. Okla. May 1987). The pipeline is granted alternative means of performing: it can either take the gas now, or pay for the gas now, and take it later.[20] Unlike a situation involving a penalty or liquidated damage provision, the producer continues to be bound by the contract and must perform. 5 Corbin, Contracts, §1070 (1962). Accepting the alternative performance nature of the take-or-pay clause, courts have rejected the assertion that a particular clause constitutes an impermissible penalty.[21]

Force majeure: Force majeure, signifying superior or irresistible force, Black's Law Dictionary (5th Ed. 1979), p. 581; 36A C.J.S., "Force", at p. 953, has been extensively litigated in Oklahoma. Broad generalizations concerning the force majeure defense are dangerous, as there is no standard force majeure clause in the industry. Kirkham, "Force Majeure — Does it Really Work?" 30 Rocky Mtn. Min. L. Inst. 6-1 (1985). The force majeure defense has proven the most resistant in Oklahoma, with ANR Pipeline Co. in particular having success in defeating summary judgment motions of producers.[22] Other pipelines have seen their force majeure defenses stricken on summary judgment.[23] Courts in Oklahoma seem more sympathetic to governmental action based force majeure claims than to purely economic based claims, although the government-action based force majeure claims are also at bottom economic based. It is not Order 380, eliminating the variable minimum bills, see, Note, *Elimination of Variable Costs From Natural Gas Minimum Bills: Wisconsin Gas Co. v. FERC* (770 F.2d 1144), 7 Energy L.J. 121 (1986), which caused these gas pipeline purchasers to change suppliers. The purchasers switched because gas pipeline prices were much higher than the going spot market price dictated.[24]

The force majeure defense was recently rejected by the Oklahoma Supreme Court in that Court's first encounter with the take-or-pay clause. In *Golsen v. ONG Western, Inc.*, 756 P.2d 1209 (Okla. 1988), the Supreme Court reversed a lower court's non-jury verdict in favor of the pipeline and directed that judgment be entered in favor of the producer. The *Golsen* contract specified as a force majeure event "failure of markets." ONG pled and sought to establish that there was no market in Oklahoma for its high-priced gas. The Supreme Court, in reversing the District Court, unequivocally held that "the fact that no market exists (during a relevant period of time) for gas at or above ONG's contract price does not establish failure of markets." *Id.*, 756 P.2d at 1213. The Court found the take-or-pay clause to be the heart of the gas contract, or in the Court's words, that "the take-or-pay provision permeates the entire contract," and refused to permit a liberal interpretation of the force majeure clause to defeat the controlling purposes of the gas contract.

Force majeure will remain the central battleground for take-or-pay litigation in Oklahoma.[25] Producers will have to conduct extensive discovery in order to challenge pipeline claims of force majeure. Furthermore, producers will have to be willing to fight for discovery material, including prior depositions of pipeline witnesses. [26]

Unconscionability: Many pipelines have ceased urging this defense, recognizing the incredulity the defense invokes in the courts. See, *e.g.*, *Resources Inv. Corp. v. Enron Corp.*, 699 F. Supp. 1038 (D. Colo. 1987). Commercial contracts carry a presumption of conscionability, *Earman Oil, Inc. v. Burroughs Corp.*, 625 F.2d 1291 (5th Cir. 1980), and must be judged from the factual situation existing at the time the contract was executed. *Bradford v. Plains Cotton Co-op*, 539 F.2d 1249 (10th Cir. 1976); *Phillips Mach. Co. v. LeBlond, Inc.*, 494 F. Supp. 318 (N.D. Okla. 1976). Despite pipelines' half-hearted assertion of producer market power,[27] it strains credibility to describe a take-or-pay contract as "one which no person in his senses, not under delusion would make, on the one hand, and which no fair and honest man would accept on the other." *Hume v. United States*, 132 U.S. 406, 415 (1889); *Barnes v. Helfenbein*, 548 P.2d 1014, 1020 (Okla. 1976). It should come as little surprise that no court has accepted the defense of unconscionability in the context of a natural gas contract. See, *Thomas N. Berry & Co. v. Northern Natural Gas Co.*, CIV-85-1430-R (W.D. Okla. May 13,

1986); *Plains Resources v. Producer's Gas Co.*, C-84-397 (Woodward Cty. Dist. Ct., Okla. Sept. 18, 1986). *Brumark Corp. v. Northern Natural Gas Co.*, No. C-87-46 (Roger Mills Cty. Dist. Ct., Okla. Feb. 21, 1989).

Commercial impracticability: Pipelines have sought refuge in the provisions of the Commercial Code governing commercial impracticability, 12A O.S. 1981, §2-615. They have not been successful. The courts consider as one of the crucial factors in evaluating the defense the foreseeability of the contingency that the pipeline is asserting as the motivating factor activating commercial impracticability. Market change and governmental intervention have been deemed foreseeable and thus not genuine events of commercial impracticability. *Forest Oil Corp. v. El Paso Natural Gas Co.*, No. CIV-86-1948-W (W.D. Okla. May 7, 1987); *Challenger Minerals, Inc. v. Southern Natural Gas Co.*, No. 84-C-357-E (N.D. Okla. Sept. 9, 1986), **withdrawn as settled** (Nov. 26, 1986); *Dyco Pet. Corp. v. El Paso Natural Gas Co.*, No. 86-C-897-E (N.D. Okla. Nov. 1, 1988)(frustration of purpose defense stricken on summary judgment); *Reading & Bates Pet. Co. v. Transok, Inc.*, No. CJ-85-1992 (Tulsa Cty. Dist. Ct., Okla. Jan. 27, 1987), **withdrawn as settled** (March 18, 1987).[28] Furthermore, the alternative performance nature of the take-or-pay clause requires that performance of **both** alternatives be rendered impracticable. *Ashland Oil & Ref. Co. v. Cities Service Gas Co.*, 462 F.2d 204 (10th Cir. 1972); *Superior Oil Co. v. Transco Energy Co.*, 616 F. Supp. 98 (W.D. La. 1985); **cf.**, *International Minerals & Chem. Corp. v. Llano, Inc.*, 770 F.2d 879 (10th Cir. 1985), **cert. denied** 106 S. Ct. 1196 (1986)(upholding commercial impracticability defense in the context of pipeline selling to an end-user). As financial insolvency is not considered a viable defense to an obligation to pay, **see** *407 East St. Garage v. Savoy Fifth Ave. Corp.*, 23 N.Y.2d 275, 244 N.E.2d 37 (1968); *Deibel v. Deibel*, 512 F. Supp. 135 (E.D. Mo. 1981), commercial impracticability should seldom be a viable defense to a take-or-pay claim, absent unusual contract provisions.[29]

A concurring opinion in *Golsen*, however, may give pipelines some hope.[30] The opinion suggests that commercial impracticability might be available to a distressed pipeline whose financial health is at stake,[31] and deplored the majority's stringent rejection of commercial impracticability. The concurring opinion did acknowledge that assumption by the pipeline of a greater obligation would defeat the defense.[32] One district court has already rejected application of the concurring opinion. *Forest Oil Corp. v. Oneok, Inc.*, C-84-197 (Caddo Cty. Dist. Ct., Okla. May 20, 1988); **Contra,** *Ricks Exploration Co. v. Oklahoma Natural Gas Co.*, No. CJ-85-11114 (Okla. Cty. Dist. Ct., Nov. 2, 1988)(commercial impracticability defense allowed to go to jury). The concurring opinion, when carefully analyzed, should therefore not be reassuring to the pipelines.

Conservation defenses: There have been two variants of the conservation defense employed by pipelines in Oklahoma litigation.

(1) Application of 52 O.S. 1981, §§86.3 and 239 (which prohibit wasteful production) to prevent production by the producer in excess of the pipeline's market demand. If successful, the defense would neutralize the producer's take-or-pay claims since if production in excess of that taken by the pipeline was unlawful, the gas could not be tendered to the pipeline. The pipeline, by contract, is normally only required to take or pay for gas that the producer can lawfully tender. In *Golsen*, the Oklahoma Supreme Court authoritatively rejected this aspect of the conservation defense. The court found that the market demand must be examined from the producer's viewpoint, as §§86.3 and 239 regulate the producer. The producer has a market for its gas —— indeed, the producer is in court seeking to enforce that market.[33]

(2) Application of the Commission's priority rule (OCC OGR Rule 1-305) to either prevent production or prevent the pipeline from taking the gas. *Golsen* found that the Commission rules did not impact on the producer's ability to produce his gas. Pipelines have in other cases argued that the priority rules acted to prevent taking of the gas. Many Oklahoma courts have rejected application of the rules since the pipeline has the option of paying for the gas, and thus not violating the Commission's rules.[34] In any event, it is not the Commission's rules which prevent the pipeline from taking the gas. It is the market which limits the pipeline's ability to sell its over-priced gas. Marseglia, "Take-or-Pay Litigation -The Producer's Perspective," 6 Oil & Gas L. & Tax'n Rev. 93, 99 (1987). Of course, application of Commission rules or Oklahoma statutes to interstate pipeline buying practices is highly problematical. **See,** *ANR Pipeline Co. v. Corporation Commission*, No. CIV-85-1929-A (W.D. Okla. Sept. 4, 1986), aff'd 860 F.2d 1571 (10th Cir. Nov. 8, 1988) (priority rules cannot apply to interstate

pipelines); *Challenger Minerals, Inc. v. Southern Natural Gas Co., supra.* **See also,** *Transcontinental Gas Pipeline Corp. v. State Oil & Gas Bd.*, _____ *U.S.* _____, 106 S. Ct. 709 (1986).

Conclusion

The take-or-pay clause will be the genesis for many lawsuits in the years to come. The judicial and legislative response to this litigation will serve to redefine the parameters of the producer-pipeline relationship.

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1. For a broader overview of take-or-pay litigation, **see,** Medina, "The Take-or-Pay Wars: A Further Status Report," 41 Okla. L. Rev. 381 (1988); Medina, "A Report From the Battle Zone: The Take-or-Pay Wars," 58 O.B.J. 2554 (1987); Medina, McKenzie & Daniel, "Take or Litigate: Enforcing the Plain Meaning of the Take-or-Pay Clause in Natural Gas Contracts," 40 Ark. L. Rev. 185 (1987); Wood, "The Allocation of Risk in Gas Purchase Contracts After Golsen v. ONG Western, Inc.," 13 Okla. City U.L. Rev. _____ (1989); Kearney, "The Take-or-Pay Controversy From the Pipeline Perspective," 13 Okla. City U.L. Rev. _____ (1989).

2. *Golsen v. ONG Western, Inc.*, 756 P.2d 1209 (Okla. 1988); *Diamond Shamrock Exploration Corp. v. Hodel*, 853 F.2d 1159 (5th Cir. 1988).

3. The pipeline must, however, before exercising its make-up right during any applicable period of time, have already taken the specified minimum amount for that period. The periods for make-up vary. Some contracts, notably interstate contracts, provide for five year make-up periods. Others permit make-up during the life of the contract. Still others require the producer to return the unmade-up payments at either contract termination or reserve depletion. The possibility of a producer obtaining payment twice for the same gas is expressly contemplated by the take-or-pay clause. **See,** *Stack v. Tenneco, Inc.*, No. E83-0143L (S.D. Miss. Oct. 23, 1987); In *Freede v. Commissioner*, 864 F.2d 671 (10th Cir. 1988), the Tenth Circuit concluded that a pipeline's make-up rights were not economic interests in minerals in place. Furthermore, the Court concluded that the pipeline's take-or-pay payments were not production payments for purposes of federal tax law.

4. The Daily Contract Quantity will also vary from contract to contract. The take-or-pay contract must be distinguished from its less well-known cousin, the take-and-pay clause. Unlike the take-or-pay clause, which embodies alternative means of performance, the take-and-pay clause **requires** the pipeline to both take **and** pay for a specified quantity of gas. Medina, McKenzie & Daniel, *supra* note 1, 40 Ark. L. Rev. at 186 fn. 2. **See** *Hartman v. El Paso Natural Gas Co.*, _____ N.M. _____, 763 P.2d 1144 (Sup. Ct. 1988), for recent analysis of a minimum take clause. Although the two clauses share many common analytical features in evaluating affirmative defenses, the alternative performance obligation of the take-or-pay contract must be recognized.

5. A producer who has been coerced into an unfavorable settlement might have a remedy in Oklahoma if the producer can demonstrate duress. **See,** *Centric Corp. v. Morrison-Knudsen Co.*, 731 P.2d 411 (Okla. 1986).

6. In many cases, however, complicated damage computations are required as a result of pipeline challenges to producer calculations. The pipeline, for example, might challenge the btu adjustment calculation, the amount of gas taken, the method used in determining the daily contract quantity, the size of the producer's working interest, or the area of contract acreage dedication.

7. **See** *Kaiser-Francis Oil Co. v. Producer's Gas Co.*, No. 83-C-400-B (N.D. Okla. June 19, 1985), **affirmed on other grounds** No. 86-2382 (10th Cir. March 8, 1989), for an unsuccessful attempt to use §2-609 by a producer.

8. In a gas contract, the remedy will most often be the volume of reserves multiplied by the difference between the contract price and the market price. In prolific wells with high gas prices, this measure of damages can result in large awards. **See** *e.g., El Paso Natural Gas Co. v. G.H.R. Energy Corp.*, No. 85-09329 (Harris Cty. Texas. Dist. Ct.)(jury verdict of $536.2 million); *Kimble v. Tenneco Inc.*, No. 27880-S (Wharton Cty. Texas Dist. Ct., Dec. 14, 1988, later settled) (jury verdict of $250 million). A recent 10th Circuit case explores the calculation of anticipatory repudiation damages in the context of a take-or-pay contract. *Manchester Pipeline Corp. v. Peoples Natural Gas Co.*, 862 F.2d 1439 (10th Cir. 1988).

9. **See,** *Forest Oil Co. v. Oneok, Inc.*, No. C-84-197 (Caddo Cty. Dist. Ct., Okla. Oct. 28, 1987); *Plains Resources Corp. v. ANR Pipeline Co.*, No. C-86-417 (Woodward Cty. Dist. Ct., Okla. July 2, 1987), **petition for certiorari on certified interlocutory order pending** No. 69,159 (Okla. Sup. Ct.).

10. *Sabine Corp. v. ONG Western, Inc.*, CIV-88-99-R (W.D. Okla. April 22, 1988); *Devon Energy Corp. v. Columbia Gas Trans. Corp.*, No. CIV-87-1108-R (W.D. Okla. August 30, 1988); *Dyco Pet. Corp. v. El Paso Natural Gas Co.*, No. 86-C-897-E (N.D. Okla., Sept. 25, 1988); *Earlsboro Energies Corp. v. Arkla, Inc.*, No. CIV-87-1372-W (W.D. Okla. Dec. 23, 1987); *Glass v. Arkansas Louisiana Gas Co.*, No. CIV-86-545-W (W.D. Okla. Jan. 12, 1987); *Hamilton Bros. Oil Co. v. Arkla, Inc.*, CIV-86-1703-R (W.D. Okla. Dec. 19, 1986); *Hold Oil Corp. v. Arkansas Louisiana Gas Co.*, No. 86-C-352-E (N.D. Okla. March 26, 1987). *O.G.&E. v. El Paso Natural Gas Co.*, C-87-1522-P (W.D. Okla. Feb. 8, 1988); *Prospective Inv. & Trading Co., Ltd. v. Producer's Gas Co.*, No. 86-C-986-C (Mag. Report & Recomm., N.D. Okla. Dec. 20, 1988.)

11. 756 P.2d 1223 (Okla. 1988).

12. However, should the producer be able to establish tortious acts independent of performance under the contract, his tort claim might be allowed to go to the jury. **See** *Marlin Oil Corp. v. Colorado Interstate Gas Co.*, No. CIV-87-1944-A (W.D. Okla., August 17, 1988).

13. One pipeline tactic is particularly deserving of condemnation and sanctions. The pipeline will set forth an extensive laundry list of defenses in its answer. After the producer has taken the time (and expended the money) to challenge these defenses through a motion to strike or for summary judgment, only then will the pipeline dismiss

several of its more ridiculous defenses, typically penalty, unconscionability and waste. Indeed, some courts are inviting Rule 11 type motions for certain pipeline defenses. See, *e.g., Koch v. United Gas Pipeline Co.*, 700 F. Supp 865 (M.D. La. 1988)(NGPA and FERC referral defenses).

14. This issue is rapidly diminishing in importance. Sections 102 and 103 gas were mostly price deregulated on January 1, 1985 and most other categories have subsequently been deregulated. See Moody, "The Natural Gas Industry After Partial Deregulation," 36 Inst. on Oil & Gas L. & Tax'n 6-1 (1985).

15. *Challenger Minerals, Inc. v. Southern Natural Gas Co.*, No. 84-C-357-E (N.D. Okla. Sept. 9, 1986), **withdrawn as settled** No. 84-C-357-E (N.D. Okla. Nov. 26, 1986); *Thomas N. Berry & Co. v. Northern Natural Gas Co.*, CIV-85-1430-R (W.D. Okla. May 15, 1986); *Kaiser-Francis Oil Co. v. Producer's Gas Co.*, No. 83-C-400-B (N.D. Okla. June 19, 1985), **affirmed** No. 86-2382 (10th Cir. March 8, 1989); *Southport Exploration, Inc. v. Producer's Gas Co.*, No. 83-C-550-B (N.D. Okla. June 3, 1984); *Prospective Inv. & Trading Co. Ltd. v. Producer's Gas Co.*, No. 86-C-986-C (Mag. Report & Recomm., N.D. Okla. Dec. 20, 1988); *Cayman Exploration Co. v. United Gas Pipeline Co.*, CJ-87-000139 (Tulsa Cty. Dist. Ct., Okla. Nov. 18, 1988); *Forest Oil Corp. v. Oneok, Inc.*, No. C-84-197 (Caddo Cty. Dist. Ct., Okla. Oct. 28, 1987); *Hamilton Bros. Oil Co. v. United Gas Pipeline Co.*, No. CJ-87-8890 (Okla. Cty. Dist. Ct., Okla. Jan. 20, 1988).

16. **See,** *Thomas N. Berry & Co. v. Northern Natural Gas Co.*, No. CIV-85-1430-R (W.D. Okla. May 15, 1986); *Kaiser-Francis Oil Co. v. Producer's Gas Co.*, No. 83-C-400-B (N.D. Okla. March 13, 1984); *Southport Exploration, Inc. v. Producer's Gas Co.*, No. 83-C-550-B (N.D. Okla. March 13, 1984); *Samson Resources Co. v. Internorth, Inc.*, No. 82-C-1214-E (N.D. Okla. Nov. 21, 1983); *Kennedy & Mitchell, Inc. v. Internorth, Inc.*, No. 86-C-404-C (Mag. Report & Recomm., N.D. Okla., Sept. 21, 1988); *Cayman Exploration Co. v. United Gas Pipeline Co.*, CJ-87-000139 (Tulsa Cty. Dist. Ct., Okla. Nov. 18, 1988); *Brumark Corp. v. Northern Natural Gas Co.*, No. C-87-46 (Roger Mills Cty. Dist. Ct., Okla. Feb. 21, 1989); *Hamilton Bros. Oil Co. v. United Gas Pipeline Co.*, No. CJ-87-8890 (Okla. Cty. Dist. Ct., Okla. Jan. 20, 1988); *Kaiser-Francis Oil Co. v. Internorth, Inc.*, No. C-82-3291 (Tulsa Cty. Dist. Ct., Okla. Sept. 20, 1983). PSO, in at least one case, has succeeded in obtaining a stay while the Corporation Commission adjudicates PSO's pending applications for relief. **See,** *Samson Resources Co. v. Public Service Co.*, No. CJ-88-2276 (Tulsa County District Court, Oklahoma, Dec. 2, 1988).

17. *Thomas N. Berry & Co. v. Northern Natural Gas Co.*, No. CIV-85-1430-R (W.D. Okla. May 15, 1986); *Kennedy & Mitchell, Inc. v. Internorth Inc.*, No. 86-C-404-C (Mag. Report & Recomm., N.D. Okla. Sept. 21, 1988); *Forest Oil Corp. v. Oneok, Inc.*, No. C-84-197 (Caddo Cty. Dist. Ct., Okla. Oct. 28, 1987); *Hamilton Bros. Oil Co. v. United Gas Pipeline Co.*, No. CJ-87-8890 (Okla. Cty. Dist. Ct., Okla. Jan. 20, 1988); *Cayman Exploration Co. v. United Gas Pipeline Co.*, CJ-87-000139 (Tulsa Cty. Dist. Ct., Okla. Nov. 18, 1988); *Brumark Corp. v. Northern Natural Gas Co.*, No. C-87-46 (Roger Mills Cty. Dist. Ct., Okla. Feb. 21, 1989; *Simpson Walker Enterprises, Inc. v. Producer's Gas Co.*, No. C-84-397 (Woodward Cty. Dist. Ct., Okla. Sept. 18, 1986); **contra,** *ANR Pipeline Co. v. National Exploration Co.*, No. CIV-85-1692-R (W.D. Okla. Feb. 27, 1987), **withdrawn as settled** (March 13, 1987)(issue of fact found).

18. *Dyco Pet. Corp. v. El Paso Natural Gas Co.*, No. 86-C-897-E (N.D. Okla. Nov. 1, 1988); *Challenger Minerals, Inc. v. Southern Natural Gas Co.*, No. 84-C-357-E (N.D. Okla. Sept. 9, 1986), **withdrawn as settled** (Nov. 26, 1986); *Mustang Prod. Co. v. Delhi Gas Pipeline Co.*, No. CIV-83-1667-BT (W.D. Okla. Nov. 9, 1983); *Thomas N. Berry & Co. v. Northern Natural Gas Co.*, CIV-85-1430-R (W.D. Okla. May 15, 1986); *Forest Oil Corp. v. El Paso Natural Gas Co.*, No. CIV-86-1948-W (W.D. Okla. May 6, 1987); *Kennedy & Mitchell, Inc. v. Internorth*, No. 86-C-404-C (Mag. Report & Recomm., N.D. Okla. Sept. 21, 1988); *Cayman Exploration Co. v. United Gas Pipeline Co.*, CJ-87-00139 (Tulsa Cty. Dist. Ct., Okla. Nov. 18, 1988); *Brumark Corp. v. Northern Natural Gas Co.*, No. C-87-46 (Roger Mills Cty. Dist. Ct., Okla. Feb. 21, 1989); *Forest Oil Corp. v. Oneok, Inc.*, C-84-197 (Caddo Cty. Dist. Ct., Okla. Jan. 20, 1988); *Plains Resources, Inc. v. ANR Pipeline Co.*, No. C-86-417 (Woodward Cty. Dist. Ct. Okla. July 2, 1987), **petition for certiorari on certified interlocutory order pending** No. 69,159 (Okla. Sup. Ct.); **contra,** *Ricks Exploration Co. v. Oklahoma Natural Gas Co.*, No. CJ-85-11114 (Okla. Cty. Dist. Ct., Okla. Nov. 2, 1988)(judge will hear evidence on public policy).

19. Penalties are made unenforceable in Oklahoma by 15 O.S. 1981, §§213, 215.

20. The fact that market conditions make it unlikely that the pipeline will be able to avail itself of its make-up right does not transform the take-or-pay clause into a penalty. **See** *Challenger v. Northern Natural Gas Co., supra; Hamilton Bros. Co. v. United Gas Pipeline Co., supra.*

21. *Challenger Minerals, Inc. v. Southern Natural Gas Co., supra; Thomas N. Berry & Co. v. Northern Natural Gas Co., supra; Forest Oil Corp. v. El Paso Natural Gas Co., supra; Kennedy & Mitchell, Inc. v. Internorth, Inc.*, No. 86-C-404-C (Mag. Report & Recomm., N.D. Okla., Sept. 21, 1988); *Hamilton Bros. Oil Co. v. United Gas Pipeline Co., supra; Forest Oil Corp. v. Oneok, Inc., supra; Plains Resources Inc. v. ANR Pipeline Co. Inc., supra; Brumark Corp. v. Northern Natural Gas Co.*, No. C-87-46 (Roger Mills Cty. Dist. Ct., Okla. Feb. 21, 1989).

22. ANR's success reinforces the caution to generalizations. The specific language of ANR's force majeure clauses is much more favorable to the pipeline than most force majeure clauses. **See** Medina, 41 Okla. L. Rev. at 403 ; *Hamilton Bros. Oil Co. v. ANR Pipeline Co.*, CIV-88-132-A (W.D. Okla., Feb. 21, 1989); *Dyco Pet. Corp. v. ANR Pipeline Co.*, No. 86-C-1097-C (N.D. Okla., Sept. 1, 1988); *Burkhart Pet. Co. v. ANR Pipeline Co.*, No. 87-C-257-C (N.D. Okla. July 5, 1988); *ANR Pipeline Co. v. F.D.I.C.*, No. CIV-87-760 (W.D. Okla. July 1, 1988)(although narrowly construing force majeure clause in the process); *Dyco Pet. Co. v. ANR Pipeline Co.*, No. 86-C-1097 (N.D. Okla. Nov. 2, 1987)(Magistrate's Findings and Recommendations); *Oxley v. ANR Pipeline Co.*, No. CJ-87-02495 (Tulsa Cty. Dist. Ct., Okla. Aug. 3, 1987); **contra,** *Plains Resources*

Inc. v. ANR Pipeline Co., supra; Siegel v. ANR Pipeline Co., CIV-86-2593-P (W.D. Okla. Dec. 4, 1987)(Transcript), **later settled.** In *Little v. Lone Star Gas Co.*, No. 87-427-C (E.D. Okla. Jan. 5, 1989, Transcript at pp 8-9), the author of *Burkhart* specifically rejected its across-the-board application to other force majeure clauses.

23. *Dyco Pet. Corp. v. El Paso Natural Gas Co.*, No. 86-C-897-E (N.D. Okla. Nov. 1, 1988); *Kaiser-Francis Oil Co. v. Producer's Gas Co.*, No. 83-C-400-B (N.D. Okla. June 19, 1985), **affirmed** No. 86-2382 (10th Cir. March 8, 1989); *Thomas N. Berry & Co. v. Northern Nat. Gas Co.*, CIV-85-1430-R (W.D. Okla. May 13, 1986); *Prospective Inv. & Trading Co., Ltd. v. Producer's Gas Co.*, No. 86-C-986-C (Mag. Report & Recomm., N.D. Okla. Dec. 20, 1988); *Kennedy & Mitchell, Inc. v. Internorth, Inc.*, No. 86-C-404-C (Mag. Report & Recomm., N.D. Okla. Sept. 21, 1988); *Simpson Walker Enterprises v. Producer's Gas Co.*, No. C-84-397 (Woodward Cty. Dist. Ct., Okla. Sept. 18, 1986); *Reading & Bates Pet. Co. v. Transok, Inc.*, No. CJ-85-1992 (Tulsa Cty. Dist. Ct., Okla. Jan. 27, 1987); *Forest Oil Corp. v. Oneok, Inc.*, C-84-197 (Caddo Cty. Dist. Ct., Okla. Oct. 28, 1987); *Hamilton Bros. Oil Co. v. United Gas Pipeline Co.*, No. CJ-87-8890 (Okla. Cty. Dist. Ct., Okla. Jan. 20, 1988); *Cayman Exploration Co. v. United Gas Pipeline Co.*, No. CJ-87-00139 (Tulsa Cty. Dist. Ct., Okla. Nov. 18, 1988) (also striking inability to make-up, failure of consideration and failure of cause defenses); *Brumark Corp. v. Northern Natural Gas Co.*, Co. C-87-46 (Roger Mills Cty. Dist. Ct., Okla. Feb. 21, 1989); **contra,** *Ricks Exploration Co. v. Oklahoma Natural Gas Co.*, No. CJ-85-11114 (Okla. Cty. Dist. Ct., Okla. Nov. 2, 1988)(force majeure defense allowed to go to jury).

24. In addition, to establish inability to sell the contracted gas at the contract price, the inquiry is not whether a pipeline can sell the gas at the contract price, but rather, whether the pipeline can sell the gas at its weighted-average cost of gas (WACOG) **after** inclusion into the WACOG calculation of the contracted gas. **See,** *Consolidated Gas Trans. Corp. v. Ashland Exploration, Inc.*, No. 87-C-103-1 (Harrison Cty. Cir. Ct., W.Va., Oct. 13, 1988).

25. **See,** *Manchester Pipeline Corp. v. Peoples Natural Gas Co.*, 862 F.2d 1439 (10th Cir. 1988) (*Golsen* forecloses failure of gas market as force majeure). Indeed, as the case law on the other generic defenses continue to be almost universally negative, pipelines have begun reducing the number of liability defenses asserted, probably hoping to preserve credibility of the force majeure defense by eliminating some of the more unsavory defenses.

26. For authority for such discovery **see,** *Siegel v. ANR Pipeline Co.*, No. CIV-86-2593-P (W.D. Okla. July 7, 1987); *Union Oil Co. v. ENSERCH Corp.*, No. CIV-87-1377-R (Mag. Order, W.D. Okla. May 5, 1988); *Arkla Energy Resources v. Roye Realty Developing, Inc.*, No. C-86-67 (Haskell County District Ct. Okla., Oct. 5, 1988). **See also,** involving analogous issues, *CareyCanada, Inc. v. Cal. Union Ins. Co.*, 118 F.R.D. 242 (D.D.C 1986); *Tobacco and Allied Stocks v. Trans-America Corp.*, 16 F.R.D 545 (D. Del. 1954). The policies behind the liberal pleading and discovery rules support the collaboration of attorneys involved in suits raising similar issues, even to the extent of pooling discovery materials. **See,** *United States v. Hooker Chemicals & Plastics Corp.*, 90 F.R.D. 421 (W.D.N.Y. 1981); *Patterson v. Ford Motor Co.*, 85 F.R.D. 152 (W.D. Tex. 1980); *Kamp Implement Co. Inc. v. J.I. Case Co.*, 630 F. Supp. 218 (D. Montana 1986) (collecting authorities).

27. Take-or-pay clauses were the product of negotiation, not raw producer market power. **See,** Mulherin, "Complexity in Long-Term Contracts: An Analysis of Natural Gas Contractual Provisions," 2 J. Law, Econ. & Organ. 105 (Spring 1986); Cassin, "Gas Purchase Contracts: Enticing a Shy Genie From an Invisible Lamp," 25 Inst. on Oil & Gas L. & Tax'n 27, 30-31 (1974).

28. **See also,** rejecting commercial impracticability, *Simpson Walker Enterprises v. Producer's Gas Co.*, No. C-84-397 (Woodward Cty. Dist. Ct., Okla. Sept. 18, 1986); *Thomas N. Berry & Co. v. Northern Natural Gas Co.*, CIV-85-1430-R (W.D. Okla. May 13, 1986); *Plains Resources, Inc. v. ANR Pipeline Co., supra; Forest Oil Corp. v. Oneok, Inc.*, No. C-84-197 (Caddo Cty. Dist. Ct., Okla. Oct. 28, 1987); *Hamilton Bros. Oil Co. v. United Gas Pipeline Co.*, No. CJ-87-8890 (Okla. Cty. Dist. Ct., Okla. Jan. 20, 1988); *Kennedy & Mitchell, Inc. v. Internorth, Inc.*, No. 86-C-404-C (Mag. Report & Recomm. N.D. Okla. Sept. 21, 1988); *Brumark Corp. v. Northern Natural Gas Co.*, C-87-46 (Roger Mills Cty. Dist. Ct., Okla. Feb. 21, 1989).

29. The related common-law defenses of frustration of purpose and impossibility have also been rejected. The courts approach frustration and impossibility in the same fashion as commercial impracticability. **See** *In re Westinghouse Elec. Corp.*, 517 F. Supp. 440 (E.D. Va. 1981); R. Hillman, J. McDonnel & S. Nickles, "Common Law & Equity Under the Uniform Commercial Code," ¶7.03[2]. For Oklahoma cases rejecting frustration, **see** *Challenger Minerals v. Southern Natural Gas Co., supra; Thomas N. Berry & Co. v. Northern Natural Gas Co., supra; Forest Oil Corp. v. Oneok, Inc., supra; Simpson Walker Enterprises, Inc. v. Producer's Gas Co., supra; Plains Resources Inc. v. ANR Pipeline Co., supra; Hamilton Bros. Oil Co. v. United Gas Pipeline Co., supra; Brumark Corp. v. Northern Natural Gas Co.*, C-87-46 (Roger Mills Cty. Dist. Ct., Okla. Feb. 21, 1989).

30. It is some measure of desperation that the pipelines greet a **concurring** opinion with acclaim. The **majority** gave the defense short shrift, noting that both sets of code comments "give explicit denial to the excuse of performance by failure of presupposed conditions where performance becomes more expensive." *Id.*, 756 P.2d at 1213. Woods, *supra* n. 1, provides an excellent analysis of why the concurring opinion is of little help to most pipelines.

31. Many pipelines might be hard pressed to establish financial distress having made substantial profits over the last few years. Furthermore, at least one administrative law judge has found claims of financial disaster unconvincing. **See,** *ANR Pipeline Co.*, 41 FERC (CCH) ¶63,017 (ALJ 1987).

32. Even the concurring opinion recognized that in the normal instance, the pipeline does assume a greater obligation:" . . . ONG failed to meet its burden of proof that despite what appears to be the assumption of a greater obligation under the contract, it neither assumed nor bore any risk for an increase in prices beyond the

foreseeable limits of deviation under the Natural Gas Policy Act of 1978." *Id.*, 756 P.2d at 1222-1223. Of course, the case law establishes that a pipeline does assume a greater obligation by entering into a take-or-pay contract. *Universal Resources Corp. v. Panhandle E. Pipeline Co.*, 813 F.2d 77, 80 (5th Cir.), **supplemented on rehearing** 821 F.2d 1097 (5th Cir. 1987); *Forest v. El Paso Natural Gas Corp., supra; Challenger Minerals Inc. v. Southern Natural Gas Co., supra; Kennedy & Mitchell, Inc., v. Internorth Inc.* No. 86-C-404-C (Mag. Rep. & Recomm., N.D. Okla., Sept. 21, 1988); Lone Star Gas Co. v. McCarthy, 605 S.W.2d 653 (Tex. Civ. App. 1980); *Amoco Production Co. v. United Gas Pipeline Co.*, No. 86-10766 (Orleans Parish Civ. District, La. Dec. 29, 1987).

33. **See also,** *Prospective Inv. & Trading Co., Ltd. v. Producer's Gas Co.*, No. 86-C-986-C (Mag. Report & Recomm., N.D. Okla. Dec. 20, 1988). Furthermore, of course, the pipeline always has the option of **paying,** and not violating the waste statutes. **See,** *Union Oil Co. v. Enserch Corp.*, CIV-87-1397-R (W.D. Okla. July 13, 1988); *Kaiser-Francis Oil Co. v. Producer's Gas Co., supra; Samson Resources Co. v. Northern Natural Gas Co., supra; Southport Exploration, Inc. v. Producer's Gas Co.*, No. 83-C-550-BT (N.D. Okla. June 16, 1984); *Thomas N. Berry & Co. v. Northern Natural Gas Co.*, CIV-85-1430-R (W.D. Okla. May 13, 1986); *Kennedy & Mitchell, Inc. v. Internorth Inc.*, No. 86-C-404-C (Mag. Report & Recomm., N.D. Okla., Sept. 21, 1988); *Forest Oil Corp. v. Oneok, Inc., supra; Plains Resources, Inc. v. ANR Pipeline, Inc., supra; Simpson Walker Enterprises v. Producer's Gas Co., supra.*

34. *Union Oil Co. v. Enserch Corp.*, No. CIV-87-1377-R (W.D. Okla., July 13, 1988); *Challenger Minerals, Inc. v. Southern Natural Gas Co., supra; Samson Resources Co. v. Northern Natural Gas Co.*, No. 85-C-911-E (N.D. Okla. Sept. 15, 1987); *Hamilton Bros. Oil Co. v. United Gas Pipeline Co.*, No. CJ-87-8890 (Okla. Cty. Dist. Ct., Okla. Jan 20, 1988); *Ricks Exploration Co. v. Oklahoma Natural Gas Co.*, No. CJ-85-11114 (Okla. Cty. Dist. Ct., Okla., Nov. 2, 1988). **See also,** *Resources Inv. Corp. v. Enron Corp.*, 669 F. Supp. 1038 (D. Colo. 1987)(construing Okla. law). *Brumark Corp. v. Northern Natural Gas Co.*, C-87-46 (Roger Mills Cty. Dist. Ct., Okla. Feb. 21, 1989).