ORIGINAL

In the

Supreme Court of the United States

CALIFORNIA ET AL.; EL PASO NATURAL GAS COMPANY; FEDERAL ENERGY REGULATORY COMMISSION, PETITIONERS,	)	
V.	)	Nos. 76-1114; 76-1133; and 76-1587
SOUTHLAND ROYALTY COMPANY, ET AL, RESPONDENTS.	)	

Washington, D. C.
April 17, 1978

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v.	:	Nos. 76-1114; 76-1133; and 76-1587
SOUTHLAND ROYALTY COMPANY, ET AL, Respondents.	:	

Washington, D. C.

Monday, April 17, 1978

The above-entitled matter came on for argument at 1:32 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN P. STEVENS, Associate Justice

APPEARANCES:

STEPHEN R. BARNETT, ESQ., Office of the Solicitor General, Department of Justice, Washington, D. C. 20530, for Petitioner Federal Energy Regulatory Commission.

RANDOLPH W. DEUTSCH, ESQ., 5066 State Building, San Francisco, California 94102, for Petitioner California et al.

APPEARANCES: (Cont'd)

J. EVANS ATTWELL, ESQ., 2100 First City National Bank Building, Houston, Texas 77002, for the Respondents.

JOHN L. HILL, ESQ., Attorney General of the State of Texas, P. O. Box 12548 Capitol Station, Austin, Texas 78711, for Texas as amicus curiae.

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C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 76-1114, 76-1133 and 76-1587, California et al., El Paso Natural Gas Company and Federal Energy Regulatory Commission against Southland Royalty Company et al.

Mr. Barnett.

ORAL ARGUMENT OF STEPHEN R. BARNETT, ESQ.

ON BEHALF OF THE PETITIONER

FEDERAL ENERGY REGULATORY COMMISSION

MR. BARNETT: Mr. Chief Justice, and may it please the Court:

As the Court will recall, we are dealing here with an oil and gas lease -- actually, two of them, but I think they can be reduced to one for purposes of the argument -- running for a term of fifty years to the mineral estate underlying the Waddell Ranch in West Texas, where the lessee, Gulf, was selling the gas from the reserves under the Waddell Ranch in Interstate commerce pursuant to certificates of public convenience and necessity granted by the Commission.

The question presented is whether, when the 50-year lease expires, Section 7(b) of the Natural Gas Act requires the lessors, Southland Royalty and others, that is the holders of the reversionary interest in the mineral estate, to obtain abandonment authority from the Commission before they may stop that service of supplying gas to interstate commerce and divert

that flow of gas instead to the intrastate market.

Now, first, I would like to explain why we take the position that what is dedicated to interstate commerce here and hence cannot be abandoned without the Commission's approval under Section 7(b), is the service of supplying gas to the interstate market from these reserves underlying the Waddell Ranch, the reserves from which the gas was continuing to flow to the interstate market at the moment that the lease expired.

Now, Respondents speak throughout their brief and my colleague, Mr. Atwell, spoke throughout his argument last time as though what was involved here was two distinct bodies of gas, two physically distinct bodies of gas, Gulf's gas and Southland's gas, as they put it. Thus, in Respondent's brief at page 18 it stated, "The Commission held that Southland Royalty's gas was dedicated to interstate service because Gulf had made an interstate sale of Gulf's leasehold gas. Whether Gulf thus dedicated Southland Royalty's gas is the issue before this Court." That's Respondent's view of it.

In pursuit of this theory, Respondents analogize the case to the situation of vertical or horizontal limitations on interstate sales. The case where a producer limits vertically to a certain distance below the ground the gas that is being sold interstate, or where a producer limited horizontally, say, to 500 acres of a 1,000-acre tract. Or Respondents analogize the case to that of a split stream, where certain producers

owning shares in a producing property make interstate sales of their gas while other producers make intrastate sales of their shares. And Respondents say that this case is, in their terms, simply a case of a severance in time, rather than a severance in space. Quote from their brief at page 12, "The severance between a fixed-term leasehold interest and a mineral fee interest is a severance in time, rather than a horizontal or vertical severance in space." To Respondents, they are both the same, and this case should be analogized to the others. As Mr. Atwell said last time, it's just as if Gulf owned Black Acre and Southland owned White Acre. The parcels are that separate. And so the Court of Appeals held here, applying Texas law.

Well, there are several reasons why we think this analogy is no good, why we think a severance in time, that is the severance created here between the leasehold and the reversionary estate, is quite different for purposes of the Natural Gas Act from the spatial severances to which Respondents would analogize it.

First of all, the argument ignores the certificates that were granted to Gulf here. The certificates granted to Gulf here were not limited in time. Now, in this case, we know that as clearly as we ever could because the very certificates that were granted to Gulf for this particular -- for the reserves under the Waddell Ranch were before this Court in the Sun Oil case and were expressly held there not to be limited in

time. That is the first thing that we find wrong with the argument.

But more important, the attempt to analogize the so-called severance in time here with these limitations of space is quite inconsistent with the language and purposes of the Natural Gas Act. There is, first of all, a physical difference. In the case of the vertical or horizontal limitation on the interstate sale, the stream never flows in interstate commerce, in the first place. There is simply a limitation on the amount of gas that flows in interstate commerce, in the first place. There is no stream flowing in interstate commerce that would be shut off and diverted to intrastate commerce, as would happen here, if Respondents prevail.

That is the heart of this case. Respondents here claim that by virtue of their status as a certain kind of property owner, under Texas law, they may cut off a stream of gas from given reserves that is flowing to interstate commerce at the end of this lease and divert it physically to the intrastate market instead, without having to get the Commission's abandonment authority under Section 7(b).

Now, the distinction here is crucial with respect to the purpose of Section (b) and, indeed, of the entire Act. That purpose, as this Court emphasized in Sunray, among other cases, is to protect the continuity of service to the interstate market, the stability of natural gas prices and supply.

Well, in the case of the vertical or horizontal limitation on the sale, the interstate market never comes to rely on that sale because the gas is never flowing to the interstate market in the first place. The interstate consumers cannot become dependent on the part of the gas that would now be reserved for intrastate use because that part never entered interstate commerce in the first place.

Here, in contrast, the stream of gas from the reserves underlying the Waddell Ranch has supplied El Paso's interstate customers since 1951. El Paso and its customers have come to rely on that supply. And, indeed, the amount of gas involved in this case represents more than 1% of El Paso's total annual firm supply of gas. That's in the record at Appendix, page 375. Further, if El Paso loses this case and if the Commission loses this case, the amount of gas that El Paso would now have to return to Southland and the other reversionary owners, under the protective agreement, now amounts to $37 million MCF. That is --

QUESTION: Is that in the record?

MR. BARNETT: No, that's not in the record. That's a figure as of March 1, 1978, supplied by the Commission.

QUESTION: What difference would it make if it were ten times that much, to the legal issues involved in this case?

MR. BARNETT: Well, the point is that that gas would have to come out of the interstate market. It would have to

come out of supplies that El Paso would otherwise be able to provide to the interstate market. And that illustrates the purpose of the Natural Gas Act which is involved in this case which is to assure supply to the interstate market.

So, as I was saying, the basic purpose of the Act, it seems to us, distinguishes sharply between the flow that has begun and would now be cut off by what Respondents call a severance in time and a horizontal or a vertical limitation or a split stream limitation, where the gas never flows to the interstate market in the first place and thus there is no reliance on it and no continuity to protect.

Further, we submit that the very language of Section 7(b), the very word "abandonment," distinguishes between a severance in time and a spatial severance. A statutory requirement that a service may not be abandoned is precisely a command that a severance in time is not permitted. That's what abandonment means.

Now, if the statute also had a provision that prohibited any spatial segmentation, that prohibited any percentage segmentation of a gas reserve, then it might be appropriate to argue that severances in space can be analogized to severances in time. But there is no such provision. The very purpose and meaning of abandonment is that you cannot stop something that has been started, that a severance in time must be distinguished from a severance in space.

This is supported also by this Court's decisions. For example, California v. Lo-Vaca Gathering, 379, U.S. 366, cited in El Paso's brief, holds, we submit, that once gas flows in interstate commerce, it is subject to the Commission's jurisdiction, that even with a sale for resale in interstate commerce Federal jurisdiction follows the flow, as the Court there said. That, too, distinguishes the spatial severance which would cut off a flow that has begun from the -- I am sorry, the so-called temporal severance that would cut off a flow that has begun from the spatial cases where the flow never starts in the first place.

Now, we submit here that what has been dedicated on the facts of this case by Gulf sale in interstate commerce is a service in interstate commerce and service is a key concept under Section 7, as this Court held in Sunray. Of course, a service of supplying gas from the particular reserves underlying the Waddell Ranch, and that that service, that stream of gas running from these particular reserves has been dedicated by Gulf Oil and may not be abandoned without the Commission's approval.

Southland has, in fact, taken a rather similar position with which we agree. In Southland's brief before the Commission which appears in the record at page A-476, Southland said this, and I am reading from A-476: "Preliminarily, Mineral Interest Owners" -- that's Southland and the other

reversioners -- "agree with El Paso's statement that, once dedicated to interstate commerce, gas reserves may not be removed from interstate commerce without abandonment authorization." Gas reserves may not be removed from interstate commerce without abandonment authorization.

That, of course, is what would happen here. This gas, at the termination of the lease, is flowing from the particular reserves under the Waddell Ranch.

Our position is that that flow may not be terminated until the reserves are exhausted without the Commission's approval. Southland appeared there to have taken the same position.

We would cite other support for this notion that Section 7 applies to the flow until the reserves are exhausted. In the Hunt case in the Fifth Circuit, 306 F2d 334, which the Commission relied on and which we quoted in our brief, the Court said that the obligation to continue serving is like the ancient covenant running with the land -- I am sorry -- like the ancient covenant running with the land. The duty to continue to deliver and sell flows with the gas from the moment of the first delivery down to the exhaustion of the reserve, or until the Commission, on appropriate terms, permits cessation of service under Section 7(b).

I might here, since this case talks about a covenant running with the land, say a word in response to the argument

that our colleagues from Texas have made. They argue that this notion of a covenant running with the land would create all sorts of problems of clouds on title in Texas because one would never know whether some previous lessee of particular acreage had made an interstate sale and then ceased it. And, thus, if one discovers a completely new reserve on that land, one might subsequently find that gas in that reserve had been dedicated.

As we pointed out in our reply brief, which apparently our colleague from Texas did not refer to last time, that is not an accurate representation of the position the Commission has taken here. The Commission's position here is that this gas is dedicated until the reserve is exhausted, that in the words of the Hunt case the duty to continue to deliver and sell flows with the gas from the moment of the first delivery down to the exhaustion of the reserve. That is the covenant the Court was talking about in the Hunt case and that is the covenant we are talking about here.

As further support for this notion of dedication of a particular reserve or a particular field, I would call the Court's attention to the United Gas Pipe Line case, 385, U.S. 83.

QUESTION: What do you suggest? Do you suggest that this is a matter of law, federal law, that says to a lessee that -- and to his lessor that if you are going to get in the interstate market you are in until we let you out?

MR. BARNETT: Once the lessee has made sales in interstate commerce pursuant to a Commission certificate which has no limit on time, that service is dedicated until the reserves run out.

QUESTION: So when the lease expires -- you don't dispute the fact that the lease expires?

MR. BARNETT: No, no, not at all.

QUESTION: And when the lease expires, the lessor is still stuck in the interstate market because that was the rule of law in the first place, is that it?

MR. BARNETT: That's right, because the lessee, acting within the authority granted by the lease, began a service, instituted a service which the lessee had full authority to do under the lease, and this service has come under the Commission's jurisdiction and is dedicated to interstate commerce so long, at least, until the gas flows from the particular reserves. As Southland, itself, said before the Commission, "The reserves have been dedicated." That is our position.

QUESTION: If there was a clause in the lease that says you cannot sell this gas in the interstate market, would a certificate be issued for the interstate market or not?

MR. BARNETT: If the Commission knew about that clause --

QUESTION: Well, the leases are filed, aren't they?

MR. BARNETT: The leases, in fact, as I understand it,

are not filed, are not brought to the attention --

QUESTION: I know, but when they apply for the certificate they must make some representation about --

MR. BARNETT: It is my understanding that the leases, as a matter of course, are not brought to the attention of the Commission, but let's assume that they are. I assume if the Commission knows that the lessee has no authority under the lease to make an interstate sale. The Commission would not grant the certificate.

QUESTION: So, you are saying, legally, it is as though it was a joint application for certificate from the lessor and the lessee.

MR. BARNETT: That is the legal conclusion, but it is not based on any agency that the lessee has from the lessor; it is based on the facts of what the lessee did within the authority granted by the lease. The lessee was authorized to make interstate sales, in fact, may have had a duty to, when it did sell. And under the Natural Gas Act, with its purpose of assuring continuity to the interstate market, that flow, those sales from those reserves may not be abandoned without abandoning authorization. That is our position.

Mr. Justice White, the United Gas Pipe Line case, which was an opinion written by you, as I recall, where the Court rejected the notion that the word "service" under Section 7(b) could include only the sale of natural gas, not the taking

and transportation of gas from any particular field. Rather, the Court said, at page 89, "It could not be more clear that United here abandoned a service, the taking of Johnson Bayou field gas and its transportation in interstate commerce." And we would cite that for the proposition that what is begun is a service of supplying gas from a particular field, a particular reserve, and that is what may not be cut off without the Commission's authorization.

Now, Respondents argue that there is something being done here that is inconsistent with basic principles of property law, that one cannot encumber a property interest that one does not own and, hence, that Gulf cannot encumber Southland's gas, still pursuing their notion that there are two separate packages of gas here, rather than a continuing flow from the same reserve.

QUESTION: Well, there are two separate owners, aren't there?

MR. BARNETT: There are two separate owners.

QUESTION: One the general owner and the other a lessee.

MR. BARNETT: That is true, Mr. Chief Justice. We do not question that.

QUESTION: Your case turns on the power of the lessee, through the Act, to commit the owner in perpetuity?

MR. BARNETT: Until this particular reserve runs out, in any event, yes, or until the Commission grants abandonment

authority, of course.

QUESTION: Is that duty you speak of to sell in the interstate market, is that a Texas law proposition?

MR. BARNETT: There is authority in Texas law, the Cole case, cited in the briefs, for the notion that a lessee has a duty to sell. And at the time these sales were made the interstate market was virtually the only place that this gas could be sold. Now, Respondents, in their brief, have argued that that was not true of Texas as a whole at this time. We submit it was true of the Permian Basin where this gas comes from.

QUESTION: But, in any event, you do insist that the lessee had the authority to sell in the interstate market?

MR. BARNETT: I don't think Respondents even dispute that, Mr. Justice White.

Well, in response to Respondents' argument about how one cannot supposedly encumber a property interest that one does not own, we do not see any such radical innovation here. We point out in our brief the Interstate Commerce Act cases which support the proposition that once a lessee operates railroad property there can be no abandonment unless the Commission grants authority either to the lessee or the lessor.

But, more basically, we would look at the basic purpose of public utility regulation. The purpose of public utility regulation is based on the public interest in the

service or the property being regulated. The purpose is to regulate for the public benefit a business or a property that has become effected with the public interest. And in the Natural Gas Act, Section 1(a), Congress expressly finds that "the business of transporting and selling natural gas for ultimate distribution to the public is effected with the public interest."

Now, that is the business that the lessee here has started under the authority of the lease. The theory of public interest regulation has never been based on the notion of estoppel or consent. Thus, Respondents here do not complain and cannot complain about the fact that when they granted their lease in 1925 they had no way of knowing that the Natural Gas Act would come along later or that the Phi lips decision would come along later. They realized that they are subject -- that the sales Gulf made, at least, were subject to the Commission's jurisdiction, even though they never consented to that when they made the sale.

Thus, since the purpose of public utility regulation is based on the public's interest in what's being regulated and not on any notion of estoppel or waiver or consent by the owners, it shouldn't matter that it's the lessor rather than the lessee who, by virtue of property law, has come with the control of the property being regulated.

Let me try a hypothetical case which may illustrate

this. Suppose an owner of a large tract of land leases it for 25 or 50 years to a developer. This is undeveloped real estate. The land is leased to a developer and the lessee proceeds to build residential housing, say, garden apartments, on the land. Now, at the time of the lease, the land is not zoned at all. It is undeveloped and unzoned. But as a result of the lessee's construction of the residential housing the local government authority steps in and zones the land residential. Suppose, even further, that the lessee appears at the zoning hearing and supports the residential zoning. Now, at the expiration of that lease, 25 or 50 years later, when the lessor comes into the reversion, if the lessor wants to build a factory on that land the lessor may find that he cannot do so because the land was zoned residential, and that zoning has resulted from actions taken by the lessee under the lease.

QUESTION: Couldn't he tear the houses down if he wanted to?

MR. BARNETT: He could tear the houses down if he wanted to but he would still have to get the zoning changed, I suppose.

QUESTION: Why would he have to get the zoning changed to tear the houses down?

MR. BARNETT: No, no, he would have to get the zoning changed to build his factory, I assume --

QUESTION: But at least he has the power to discontinue

the use of the property for the purpose it had been used for during the lease, doesn't he?

MR. BARNETT: Yes, but assuming what he wants to do is build a factory on a portion of the property that would not require tearing the houses down. In any event, the point is this property is now zoned residential and he will have to get that zoning changed somehow. And that is, in Respondent's terms, the Respondent might say the lessee has somehow encumbered the reversionary estate. We see nothing strange in it. All that has happened is that the lessee has done something under the lease and within the authority granted by the lease which is --

QUESTION: In my example, I suppose that your zoning laws probably would provide for notice to the landlord of what was going to happen to the zoning rules, and he would have a chance to appear and oppose. Is there any similar notice here that the landlord -- I mean to the landlord about this lease, what future burden there might be on his property if the gas were sold in interstate commerce?

MR. BARNETT: Well, there certainly was an opportunity on behalf of the land -- of the lessors in this case to intervene in the Commission proceeding and, indeed, the record here states that there was no protest, no intervention in the proceeding.

QUESTION: How would they even know about it? How would they even know about the proceeding? The zoning case

that you give us is a similar example. They are entitled, as a matter of right, to notice, aren't they?

MR. BARNETT: I cannot assay on the record that the lessors here knew of the proceeding. However, they --

QUESTION: There is no Commission procedure whereby they would normally, in the normal routine, be given notice, either, is there?

MR. BARNETT: I don't know whether there is or not, Mr. Justice Stevens. I can say that when the second certificate was granted back in 1962, I think it was, that by that time the lessor certainly must have known that sales were being made in the interstate market. They were receiving royalties. And the record reflects that there was no protest or intervention in that proceeding either. So it seems to me fair to assume that this is not a problem of their not having had notice, and they have not asserted that they did not have notice.

QUESTION: I was just wondering how far you press your hypothetical example, is all. In one case, they are clearly entitled to it. In the other, they may or may not have gotten it, depending on what the record might show.

MR. BARNETT: As I said, they do not appear to contend here that they didn't have notice of the Commission proceedings. And so we would submit that that is simply a similar situation. There is a case cited in El Paso's brief at page 9, a New York case, which supports a similar kind of consequence under the

zoning laws.

I would like to say a few things, finally, about the consequences of this decision. We submit that if this decision below is not reversed it would substantially impair the Commission's regulatory authority over natural gas, it would undercut the Commission's ability to assure an adequate and reliable supply of natural gas to the nation, an ability which this Court since the Phillips case has striven to uphold.

QUESTION: Can the Commission require that the lessor join with the lessee in making an application to the Commission?

MR. BARNETT: For the future, I suppose, the Commission could do that. That would not handle a lot of cases that have already come up. The Commission might find that if it did that it would have less gas dedicated, but I suppose --

QUESTION: But that's the natural consequence of the Phillips decision.

MR. BARNETT: I suppose the Commission could do that for the future.

It should be noted in the first place that there is a lot of gas involved in this case. Respondents have belittled the amount of gas involved here, saying in their brief at page 14, "This case involves a miniscule fraction of the United States marketed natural gas production." They don't cite that miniscule fraction there. They do cite it in their brief in opposition to the petition for certiorari, page 11, Note 7, and

that fraction is .08, that is 8/10's of 1% of all the gas production in the nation is involved in this case, that is on-shore and off-shore, 8/10's of 1%. We submit that that's not a miniscule amount.

QUESTION: Is that .08 over 100 or simply .08 decimal?

MR. BARNETT: It is .08 --

QUESTION: Almost 1%?

MR. BARNETT: I am sorry, it must be almost 1/10 of 1%. I will check that, Mr. Justice Rehnquist. I am sorry.

As I said before, that is more than 1% of El Paso's total annual requirement.

The significance of this case is further illustrated by the interests of the States of Texas, New Mexico and Louisiana in it. To them it is not a minor case. Further, the effect of the case would not be limited to fixed-term leases. It would, in fact, very possibly extend to the kind of lease that is quite common and that was involved in the Pennzoil case in the Fifth Circuit. That was simply a typical life-of-the-reserves lease, cited in our brief at pages 30 to 33, a life-of-the-reserves lease providing for royalties to be paid from the market value of the gas. The lessor insisted that this must be intrastate market value. The state court upheld that and the lessees applied to the Commission for an exception from the Commission's ceiling price, arguing that they would have to pay that higher rate. And they argued that if they could not

pay that higher rate the lease would be terminated for failure to pay the royalties.

The Commission responded that if the lease was terminated, well, the lessors will still have to carry on the service, citing the Commission's decision in the Southland case. The Fifth Circuit, however, in reversing the Commission in Pennzoil, said that is not the case, the Commission was operating on the wrong legal premise in Southland in assuming that that gas was trapped in the interstate market, as the Fifth Circuit put it. Thus, it is quite possible that under such leases if the lessor terminates for failure to pay the higher rate, the lessor is then in control and under Texas property law, as Respondents assert here, there is a separate estate which is not subject to the interstate dedication.

I would like to reserve the rest of my time, please.

MR. CHIEF JUSTICE BURGER: Mr. Deutsch.

ORAL ARGUMENT OF RANDOLPH W. DEUTSCH, ESQ.

ON BEHALF OF THE PETITIONERS CALIFORNIA ET AL.

MR. DEUTSCH: Mr. Chief Justice, and may it please the Court:

We believe that what is presented in the decision in the court below is an attack on one of the fundamental principles of the Natural Gas Act, in that it raises the central issue of whether the Federal Regulatory Commission possesses the jurisdiction, under the Natural Gas Act, to protect the

public's continuity of interstate service at reasonable rates.

Now, my colleague has already referenced the Congressional intent stated in Section 1(a) of the Act, that the business of transporting and selling natural gas for ultimate distribution to the public is effected with the public interest. We believe that Section 7, and specifically Section 7(b), of the Natural Gas Act embodies the heart of that public protection. The essential meaning of the abandonment requirement of Section 7(b) is to protect the public from a loss of gas in interstate service upon which it has come to rely.

California agrees with the statement of the 10th Circuit Court of Appeals in the original Sunray case, at 239 F2d, 101, which states, "No single factor in the Commission's duty to protect the public can be more important to the public than the continuity of service furnished."

The Natural Gas Act does not deal expressly with the Commission's jurisdiction over gas which is the subject of an expired lease. We think that this particular circumstance makes it entirely proper when deciding the Commission's jurisdiction, in this particular instance, to look at the reason why the Act was passed and the impact on the consuming public.

My colleague has already mentioned the immediate impact of the loss of some 25 million cubic feet a day of gas from the interstate market. This is gas that El Paso has partially relied on in building gas facilities. This is gas

that the consumer has partially relied on in putting gas appliances in its homes.

We also agree with the statement that this decision of the court below can foster reliance upon forms of leasehold arrangements which, under the protection of local law, will permit lessors to reenter into possession of gas reserves at their discretion, ignoring the public interest and divert supplies from the interstate service. This is a very real threat today. It is a real threat because of the difference and divergence of gas prices in the intrastate market. Obviously, the interstate market is regulated and the intrastate market isn't. There is also a great shortage of gas in the interstate market and there is not necessarily that shortage in the intrastate market.

It is in the interest of the producers to be able to leave the interstate market, at their discretion, in order to make the best profit possible from this gas. The question here is whether the Commission will be foreclosed from exercising any authority over interstate service of gas supplies covered by the leases which terminate because of clauses in these leases.

QUESTION: You emphasize the reliance of consumers on getting the equipment. How did the consumers know that this particular reserve was going to last even 50 years, let alone beyond? You don't really suggest that consumers go through a

process of reflection and analyze how long a particular area is going to produce gas, do you?

MR. DEUTSCH: Mr. Chief Justice, I do not. And I believe that is the purpose for the Act. They have no way of judging the specific dedication of gas.

QUESTION: Then why did you rely on that? You just made an argument that consumers bought appliances and put in, perhaps, I assume you meant household heating, because they were depending on this supply. I thought you made that argument.

MR. DEUTSCH: Well, perhaps, I failed to say -- I thought I had -- that in partial reliance. I was looking at it in terms of the overall picture, that the consumers were relying on a continuous and reliable stream of gas in interstate service. And I believe that was one of the main purposes the Act was passed and one of the main duties of the Natural Gas Act -- excuse me, the Federal Energy Regulatory Commission, because the consumer cannot, himself, determine what each particular gas contract might say. It is up to the Federal Energy Regulatory Commission to protect the consumer and the consumer's reliance on a reliable and continuous stream of gas. That's one of the most important elements.

QUESTION: What notice did the lessor have here 50 years ago that this would be the consequence?

MR. DEUTSCH: The lessor did not have notice that this would be the consequence, but I would submit that the

obligation to continue the certified service is not one imposed by the agreement between the lessor and the lessee. It is imposed by the Natural Gas Act. I would submit, and I think this Court recognized in the Sunray decision, that the idea of service is something separate and apart, service of natural gas to the public is something separate and apart from the agreement which initiates that service. And I would further submit that this is part of the idea of public convenience and necessity, that a particular agreement, in order to be certified initially, has to be justified by the service to which it relates. If there is no justification in terms of the public interest, then the Federal Energy Regulatory Commission should not certify that agreement in the first place.

So, in answer to your question, I would say that I don't think it is necessary that the lessor have had notice at the beginning of that 50 years. In fact, I don't believe the Natural Gas Act had been passed at that time.

QUESTION: I am guessing also. The lessor has to put up with the prices, I guess, that the interstate market sets, or the Commission sets for the interstate market, and his royalties are figures on that, I suppose.

MR. DEUTSCH: Yes, Justice White. I would add that we must remember at the beginning of the lease term Gulf, the lessee, had the right to sell all of the gas under this reserve, and I think he had a duty to get the best price for that reserve,

not only for himself, but for the reversionary interest holders which were receiving a royalty at that time.

QUESTION: What law would be the source of that duty? State or federal?

MR. DEUTSCH: I think that would be state law. It would be state law, but the point is that at that time it was in the reversionary mineral interest owners' interests for that gas to be sold in interstate commerce. Today, it is in his interest to have that gas sold in intrastate commerce. But the question is, under the Natural Gas Act, is it in the consumer's interest? And under the theory of Southland the consumer's interest, which the Natural Gas Act requires the Federal Energy Regulatory Commission to look at, could not be looked at at all. The continuing stream of gas would simply be terminated because the lease terminated.

What, I think, the theory of the case is, is that now the reversionary mineral interest owners receive not the royalty interests but the entire sales price from this gas that is sold in interstate commerce at a rate set by the Federal Energy Regulatory Commission.

But I think that this Court, from the Phillips Petroleum Company v. Wisconsin case through the CATCO and Sunray and Lo-Vaca cases, has always recognized that there was a Congressional intent to protect the consuming public's continuity of natural gas service at reasonable prices and has

determined, or reached decisions on the Natural Gas Act with that in mind.

QUESTION: Don't you think that Congress recognized the same effect that this Court recognized in Phillips?

MR. DEUTSCH: I think that this Court recognized the basic fundamental intent of Congress to protect the consumer, in passing the Natural Gas Act. I think that is a very important point. I think the Southland would probably tell you that without the Natural Gas Act, without regulation, there might be more gas in the interstate market, and there might very well be. But the point is Congressional intent was to protect the consuming public because, as Justice Brennan said in the Sunray case, that "If the producers and pipelines were left completely free to determine when to enter and when to leave the market and what prices to charge, without the Federal Power Commission looking after their interests, there would be economic chaos at the local level."

Mr. Chief Justice, my time is up. Thank you, very much.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Atwell.

ORAL ARGUMENT OF J. EVANS ATTWELL, ESQ.

ON BEHALF OF THE RESPONDENTS

MR. ATTWELL: Mr. Chief Justice, and may it please the Court:

We have heard a great deal today about many reasons why this Court should hold that Southland's gas has been somehow dedicated to El Paso in interstate commerce, but I've heard precious little about the Natural Gas Act. And I agree with the Chief Justice that the basic decision to be rendered by the Court is the power of a lessee, through the Natural Gas Act, to commit to interestate commerce the gas of Southland Royalty.

As I understand the Commission's position in this case, it is that it concedes, one, that Southland has never dedicated any of its Waddell Ranch gas to El Paso, and two, that under universal common law, Gulf could not have dedicated Southland's gas because Gulf and Southland owned two separate and independent interests.

Instead, the Commission claims that the Waddell Ranch gas was involuntarily dedicated when Gulf made an interstate sale of Gulf leasehold gas. According to the Commission, this dedication occurred as a matter of law under the Natural Gas Act.

So, we see the case as boiling down to the fundamental issue as to whether Congress intended for the Natural Gas Act to abrogate established common law and empower private parties, such as Gulf Oil Corporation, to dedicate gas it never owned, never had any interest in and never intended to dedicate.

We submit that there is nothing in the Natural Gas Act or its legislative history to suggest that Congress intended

such a radical result. To the contrary, the plain language of the Act shows that Gulf could not dedicate Southland's gas.

In considering this question of statutory construction, the Commission would have you focus on 7(b) of the Act, the abandonment section. That section provides that if a natural gas company undertakes dedicated service it cannot abandon that service without Commission authorization. But the Commission is looking at the wrong section. 7(b) merely begs the question, because it applies to dedicated gas. Here the question is whether Southland's gas has ever been dedicated, more particularly, whether Southland's gas was somehow dedicated when Gulf made an interstate sale of Gulf gas.

QUESTION: Was the lessee authorized to sell in the interstate market under the lease?

MR. ATTWELL: Yes, sir, Justice White.

QUESTION: Was it required to, or would there have been some breach of lease -- breach of duty under the lease if it just hadn't sold anything?

MR. ATTWELL: Well, he had a duty to market. But he could have sold on the interstate market or the intrastate market.

QUESTION: But he wasn't breaching the lease by selling in the interstate market?

MR. ATTWELL: No, sir, he was not. The record in this case does show, though, that there was a substantial

intrastate market in the Permian Basin area. It shows that, in fact, Gulf Oil Corporation on these very properties that are at issue here sold all of its gas -- well, gas and some of its casing head gas -- in the intrastate market. So there was an intrastate market connected into these very ---.

QUESTION: Well, were there any rules governing -- any official or unofficial rules governing the interstate market that the lessee wasn't authorized to live up to? I suppose he would have to live up to the prices.

MR. ATTWELL: I don't follow your question.

QUESTION: Well, he was authorized to sell in the interstate market and sooner or later there came to be a regime of law that governed the interstate market, including prices.

MR. ATTWELL: Correct.

QUESTION: And I suppose the lessee was supposed to live up to that, wasn't he? He wasn't breaching his lease by doing that?

MR. ATTWELL: By making a sale of -- By making a sale of Gulf's gas in the interstate market, they were certainly not breaching their lease. In fact, in this particular lease, Justice White, the royalty was payable on 4 cents per mcf for 1,000 feet, regardless of what Southlands itself got for its gas.

QUESTION: Were any of these leases a percentage, or not?

MR. ATTWELL: These leases -- No, the royalty was

based strictly on a rate of 4 cents.

In determining whether Gulf could dedicate Southland's gas, we submit that the proper section of the Act to be looked at is Section 7(e). That section says that a certificate shall be issued to any qualified applicant who is able and willing properly to do the acts and perform the service. 7(e) makes it clear that in order for a producer to dedicate gas to interstate service he must be able to perform the service. Gulf was never able at any time to perform the service selling Southland's gas, because Gulf never owned any interest in or had any right or control over the disposition of Southland's gas.

As the court below noted, in the present case, Gulf at all times lacked the legal ability to deliver any gas from Southland's property after the expiration of its limited 50-year term.

As to Gulf's willingness to dedicate Southland's gas, I want to make sure that the Court realizes that Gulf's assertion that it attempted no dedication of gas beyond the interests it owned is undisputed on the record in this case. Likewise, there has been no challenge to Gulf's assertion that it did not purport to dedicate the gas to El Paso which it would not own after the expiration of its lease.

According to the record, Gulf believed that any such dedication would have been ineffective as a matter of law to bind gas that it had no right to. I make this point because

in the original argument it appeared there might be a misconception that the record showed that Gulf intended or attempted in its contract with El Paso and then its certificate application to dedicate more gas than it owned under its 50-year fixed-term lease. Such was not the case.

The fact that Gulf applied for and was issued a certificate of unlimited duration does not bear on whether Gulf was able or willing to dedicate Southland's gas. That simply meant that Gulf was obligated to sell all the Waddell Ranch gas it owned. It didn't mean that Southland either sought or was authorized to sell gas it didn't own. Gulf sought a certificate unlimited in time because its contract with El Paso covered not only its limited interest in Waddell gas, but also gas from a number of other sources, where the leases were not for a fixed term but for the life of the reserves.

As a result, Gulf delivered and is today delivering very substantial quantities of gas from these other sources to El Paso under this very same contract. In fact, those volumes of gas are substantially in excess of the volume of gas involved in this case.

Nor was Southland's gas dedicated because the certificate issued to Gulf pursuant to Section 7(e) imposed a service obligation separate and apart from the sales obligation imposed by contract with El Paso.

Under 7(e), the service obligation imposed by the

producer's certificate, extends to what the producer is able to do, but does not extend to what he is not able to do.

QUESTION: Do you know if the Commission could give Gulf permission to terminate? Let's forget about Southland.

Would the lessee be required to get permission to terminate at the end of the lease?

MR. ATTWELL: The lessee in this case, Gulf Oil Corporation, has been required to file abandonment application. It filed such an application more than two years ago.

QUESTION: Do you think the Commission was within its powers in doing that?

MR. ATTWELL: Yes, I do. It is in full compliance with --

QUESTION: As you say, it would be just a pro forma rule. The Commission would be obligated to give permission.

MR. ATTWELL: Correct, Justice White, because Gulf's supply of available gas has depleted to the extent that continuance of service is unwarranted. Those are the words of Section 7(b), and that is our position.

In this case, Gulf's service obligation was limited to the Waddell Ranch gas it found and produced during the defined 50-year term of its lease, because that was the only gas Gulf had any right to sell and deliver. Thus, Gulf's service obligation in no way was binding on Southland.

Let me illustrate by saying that in most instances

gas reserves are owned by a number of different producers. If one owner in a gas reserve makes an interstate sale of his interests, his service obligation binds him to deliver all the gas he owns, regardless of any limitations in his contract to the contrary. But this service obligation is in no way binding on any of the other owners. They are free to sell their interests in the gas to the purchaser of their choice. We say that's exactly the situation here.

Gulf made an interstate sale of its interest in the Waddell Ranch gas. The service obligation it incurred under its certificate obligated Gulf to deliver, as it has done, all of the Waddell Ranch gas it owned. Gulf would have had this obligation even if its contract with El Paso had expired before the termination of its fixed-term lease. But Gulf's service obligation is in no way binding on Southland's entirely separate interest in the Waddell Ranch gas, because Gulf was never legally able to undertake any service of Southland's gas.

I would like to now turn to several of the points that Mr. Barnett made during the course of his opening presentation. The first I want to turn to is the question of reliance which he mentioned and I believe also Mr. Deutsch mentioned.

We reject that claim entirely. As the court below noted, this claim of public reliance is supported -- and I quote -- "by neither fact nor authority." None of the Commission's

orders under review here are based upon any such alleged reliance. Moreover, there is absolutely no evidence in the record to support a claim of public reliance.

QUESTION: Congress didn't need a claim of public reliance when it enacted the Federal Power Act in 1934. It could just legislate under commerce power and tell owners of oil royalties and oil pipelines who had previously not been subject to regulation that hereafter they were subject to regulation.

MR. ATTWELL: Well, there is no question whether -- There might be a question, Justice Rehnquist, in my mind, if Congress could do that if it encompasses that Congress could tell A he could dedicate B's gas. But, aside from the fact -- putting that aside, Congress could certainly, in effect, assert jurisdiction over producers and lessors.

QUESTION: And the fact that it happened before would be no defense to that assertion.

MR. ATTWELL: That is correct. And I think that really gets back to where we started from, and that is what Congress did in the Natural Gas Act, and what the plain words of the Act say when read in a common-sense fashion.

QUESTION: Does your response embrace intrastate as well as interstate?

MR. ATTWELL: You mean the fact that Congress could assert --

QUESTION: Your response to Mr. Justice Rehnquist. Could they regulate intrastate production and shipment?

MR. ATTWELL: Could they amend the existing Natural Gas Act? I believe they could. I know there are some that take the position to the contrary, but I believe that a showing could be made by Congress --

QUESTION: Under the General Welfare Clause, not the Commerce Clause.

MR. ATTWELL: I believe that also, probably, the effect that the intrastate market has on the interstate market would be a basis for Congress asserting jurisdiction on that basis.

I want to point out that Southland did not ratify Gulf interstate dedication of Gulf gas to the interstate market by accepting royalties. An opinion of more than six years ago by Judge Levanthal of the D.C. Circuit pointed out that a royalty owner is not a natural gas company subject to Commission jurisdiction. Because he is a landowner, he simply enters into a lease for the exploration and development of his land, and that transaction is clearly not a jurisdictional one and that likewise a royalty owner does not make a sale of gas in interstate commerce because he has no control over the sale, one way or the other.

The Commission also contends that Southland's gas was somehow dedicated to interstate service in this case because

a continuing flow of Gulf gas could not be interrupted without 7(b) abandonment authorization. First, let me say that the record is unequivocal and clear that Southland has never made a sale of its gas in interstate commerce, except under compulsion of the orders that are under review. But we don't have a situation where Southland's gas has been flowing in interstate commerce and because of the flow the Commission can assert jurisdiction. The basic fallacy, though, in the Commission's argument is that the only physical flow that Gulf could and did dedicate to interstate service was Gulf's leasehold gas, a 50-year flow. And as this Court made clear in Sunray, once Gulf's gas commenced to flow, that supply could not be withdrawn from continued interstate movement without permission. Of course, Gulf didn't withdraw that supply. Instead, Gulf has delivered all of its leasehold gas. Therefore, Gulf's supply, the only supply which ever has flowed in interstate commerce, is gone, and in the words of Section 7(b), it's been depleted "to the extent that continuance of service is unwarranted."

As to the basis for asserting jurisdiction because of what are essentially policy witnesses, I believe that Mr. Justice Rehnquist put his finger on the question about this proliferation of short-term leases if Southland prevails in this case when he said that clearly the Commission has the power and can require all the necessary information so as to determine whether or not a proposed sale involves such a lease, and if so

to take appropriate action to protect the public interest.

QUESTION: Do you mean that will be the consequence if Southland prevails or if it does not prevail?

MR. ATTWELL: We say that if Southland prevails there are not going to be any short-term leases because they are not economically feasible, that many, many years ago, back in the late 1920s these leases became extinct because producers are just not going to spend hundreds of thousands of dollars or millions of dollars drilling wells if they won't be able to produce any gas they find for two or three years, or whatever the defined term is. But that even if it should happen that there were short-term leases, the Commission clearly has it within its power to require regulations that a lessee show the term of his lease and then the Commission can take such action as it deems appropriate to protect the public interest.

QUESTION: Would you explain that a little bit more to me. What could they do? Say a lessee came in with a 10-year lease. What could the Commission do to be sure it would have a longer source of supply?

MR. ATWELL: Justice Stevens, the Commission could say, "We are not going to certificate this sale unless you get the lessor to join." The Commission could say that "We are going to just refuse the sale altogether. We don't think it is in the public interest to have that." Or thirdly, it could condition the sale on an unlimited term certificate just as the

Commission did in Sunray.

QUESTION: Isn't this certificate unlimited in duration in this case?

MR. ATTWELL: This certificate is. In this certificate, the service obligation that was imposed by this certificate, as I spoke to a minute ago, Gulf's service obligation, is limited to Gulf's ability to perform. And Gulf's ability to perform here was limited to its leasehold gas. And under its lease, the only gas that Gulf was entitled to was the gas that it actually produced during the specified 50-year term. So that the fact that Gulf got an unlimited term certificate really made no difference. It didn't affect, in other words, Southland, as far as we are concerned.

As a second policy reason, the Commission speculates that dedicated reserves may somehow be released from interstate commerce because of the reasoning or the theory of the Fifth Circuit in this case. They say that such theory may be applied where a lease grants a producer the right to dedicate gas. He dedicates the gas and then his lease is prematurely terminated before all of the dedicated gas has been produced. They particularly refer to the typical life reserve lease which provides that it will remain in effect so long as the reserve maintains production.

We do not believe that the reasoning of the Fifth Circuit applies to such a situation. In his opinion,

Justice Clark was very careful to emphasize that under its lease Gulf at no time was possessed of rights in the Waddell Ranch gas that could extend beyond the 50-year term of its lease. Therefore, it is clear, we believe, that the decision below is based on the fact that Gulf never -- I emphasize the word "never" -- had any interest in or control over Southland's gas. In fact, that's the basis on which the Tenth Circuit subsequently distinguished this case, when it affirmed orders of the Commission, holding that gas of the Phillips Petroleum Company was dedicated to interstate commerce.

The Commission, in fact, in the Pennzoil case mentioned by the Commission counsel, has gone even further and taken the position that the reasoning in this case actually supports the position that when a life of reserve lease prematurely terminates, the interstate dedication of reserves prior to such termination continues in effect.

In any event, when this Court is faced with a case involving the premature determination of a typical life reserves lease, it may well conclude that because the producer, under such a lease, has the power to dedicate 100% of this gas reserves and did so dedicate them before his lease terminated, any such gas remains dedicated despite the lease termination.

Such a holding would be entirely consistent with holding for Southland based on the facts of this case. All the Court need hold here, and all that we believe the Fifth Circuit

held, is that one who has never had any interest in or control over gas cannot dedicate that gas to interstate service. Of course, if there is any question in the Court's mind as to the extent of the decision below, it can and should limit it to the issues presented by the facts of this case, which is whether one who never had an interest in or control over gas can dedicate that gas to interstate service.

QUESTION: Suppose the Natural Gas Act said on its face that when any gas is dedicated by lessee that, as a matter of law, the entire gas supply is dedicated to interstate market, unless there is consent of the Commission. Suppose the Gas Act said that and tomorrow a lease is entered into and a lessee dedicates gas. Do you think you could bind the lessor in a manner like that, or no?

MR. ATTWELL: Well, first, of course, it is our position that the Act doesn't say that.

QUESTION: I understand that.

MR. ATTWELL: But, I believe as long --

QUESTION: I am just responding to your general statement that a lessee could never have authority to dedicate gas that he doesn't own.

MR. ATTWELL: I think that that is probably right, because under the Natural Gas Act, as it now stands, the Commission cannot force someone to sell their own gas in interstate commerce.

QUESTION: The lessee comes in, though, and says, "I want to dedicate," and the law, on its face, says this will be taken as so and so. And the lessor has authorized him to sell in interstate commerce.

MR. ATTWELL: The lessee says that he --

QUESTION: The lease says on its face that he can sell it anywhere he wants to.

MR. ATTWELL: But you are saying the Act is also amended to provide that when the lessee makes the sale -- Well, of course, if the lease was entered into at the time that he had notice, then it might be a different --

QUESTION: Let's just suppose the lessor had notice of the law, of what the law was, and he entered into the lease. So is he bound?

MR. ATTWELL: I would say he had given his implied consent in that instance. Of course, in this instance, we have no notice whatsoever.

QUESTION: The lessee is then dedicating gas in which he has no interest.

MR. ATTWELL: But the lessor, by entering into the lease with knowledge of the law as it is, giving his implied consent to the lessee to sell his gas in interstate commerce, it is kind of an agency argument, in other words.

QUESTION: Yes.

MR. ATTWELL: And we don't have that here. I believe

that this morning, or this afternoon, the Government said that they are not relying on any type of agency concept.

I do want to mention two other points that Mr.Barnett brought up. First, he read from part of the brief we filed with the Commission as to once gas being dedicated it remains dedicated. But he quit there. Because the next sentence says, "But this legal conclusion begs the question of whether gas attributable to the interest of the mineral estate of mineral interest owners has been dedicated to interstate commerce."

And then we went on to answer another question that was asked this morning,and that is the effect of this Court's decision in California v. Lo-Vaca. We said that reliance on that decision is totally misplaced because there has been no physical movement of any gas attributable to our mineral estate.

A question was asked of Mr. Barnett: Could Southland have come in and blocked, in effect, Gulf's certificate application? Of course, Southland had no idea that it would ever be claimed that Gulf was attempting to dedicate Southland's gas.

But, in any event, in this case, the record shows that the Commission told the Fifth Circuit, and I quote, "That Southland Royalty could not prevent Gulf's total dedication of surplus residue gas to El Paso."

As to the Commission's analogy to an ancient covenant running with the land, we find that unusual, that that analogy doesn't benefit them. Under common law, a covenant is not

binding on anyone who is not a successor to the covenantor. And, in this case, the decision of the Texas Supreme Court in 1973, made it crystal clear that Southland had a separate, independent estate that was vested at all times, and that Southland is in no way a successor to Gulf.

In conclusion, let me say that we think that this case is based on two basic principles still, and that is, one, that you can't dedicate what you don't own, and two, that Gulf Oil never owned any interest in Southland's gas, never had any right in that gas and never had any control over it. And that, therefore, Southland's gas was not dedicated to interstate service when Gulf made an interstate service of Gulf's gas.

For these reasons, we ask that you affirm the decision below.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Attorney General.

ORAL ARGUMENT OF JOHN L. HILL, ESQ.

ON BEHALF OF THE STATE OF TEXAS

AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

MR. HILL: Mr. Chief Justice, and may it please the Court:

The State of Texas, for reasons that we have outlined in our amicus brief, joins in most of the basic arguments that have been presented by Southland. I would not want us to be in

agreement here. Not that it is material to the decision in this case. We would not want to be in agreement that Congress could authorize a lessee to contract gas that it did not own, nor would we want to be in agreement concerning any Congressional authority to control intrastate gas.

Since neither one of those matters are, in our opinion, essential to the issue here, let me turn to Section 7(b) which is the heart of this case and state why the State of Texas cares about this case, and what our interest is, as we conceive it, in sustaining the Circuit Court's decision in overturning the Federal Power Commission order in this case.

Section 7(b), as we have been over and over, speaks of "No natural gas company shall abandon all or any portion of its facilities, subject to the jurisdiction of the Commission."

Now, we say, first, that the Congressional intent, as well as a clear reading of Section 7(b), would require you to hold in this case that Southland Royalty is not a natural gas company, within the meaning of 7(b), that Gulf is the only natural gas company that would come within that definition or meaning.

Then, when it says "facilities," we ask that you hold that facilities contemplated in this case are only the lease that Gulf took -- its lease, that that's the facilities, the 50-year term lease -- or that that would be the facilities in any interpretation of 7(b), the lease taken by the lessee. And

that the service intended is the gas covered by that lease and not any other gas, not any reversionary interest of anyone else, and that it is a misreading of the Federal Power Commission Act to say that the mere dedication of a lessee's interest to interstate service, in some way not ever stated by Congress, would then mean that as long as that gas were flowing it would also authorize the bringing in under that service, or that facility, gas which the lessee didn't even own in the first place, or would extend the gas that was found after that particular lease were abandoned.

We say that is a total misreading and a stretching of the Federal Power Commission authority, and that if Congress intends that it should say so. And then, and only then, would we be facing the issue that's being inquired about in some of the questions. And we would certainly want to raise constitutional objection to it. But that is not here, it is not intended. And the reason that we are concerned with any rule that would emanate from this case is as broad as the Federal Power Commission order. And let me refer to it again. It says, "The duty to continue to serve is like an ancient covenant running with the land. Now, that's --

QUESTION: Or a new covenant.

MR. HILL: New, ancient or middle-aged.

It is to us a very, very novel doctrine with no authority to support it and totally unprecedented in universal

law. And that has to bother us because we own 16 million acres of land in our state, the State of Texas does. We are far and away our largest landowner. We have 4,000 expired leases that we have discovered just since 1944, covering over 2 million acres of land in our state. That's just for openers, that's just what we could find going over the general land office for purposes of this case. And when you are faced with the possibility of a rule about a covenant running with the land that could mean that the interstate dedication would extend beyond the lessee's interest, whether or not there had been an abandonment, you can see why our state would be very concerned and the havoc that that could cause, not only -- because most of these abandonments have not been carried out, it would mean that people trying to do business with us would find -- it would mean, certainly, that people that are trying to deal with the State of Texas in taking these leases, if they had no way of knowing -- and they don't. You can't find these contracts that are made and utilized for interstate service. They are not recorded in any courthouse anywhere. You can't find them. You could come up here and dig around in the FCC files, if you wanted to be that diligent, but we haven't found their files to be all that up to date. It would place a tremendous burden to try to run down all those gas contracts. And how are you going to know when some contract -- the lease is down there, but you can't go find every unexpired lease. We found land where there

are nine unexpired leases. How are you going to know whether in some prior lease, 25 or 30 years ago, maybe someone had a dedication of some gas to an interstate market, then the gas trickled out and the lease expired and someone went on to the next deal? Do you mean that when we are going to deal with people now to get new leases to encourage them to go out and drill these deep wells and have this exploration, that they've got to try to determine whether someone years ago might have had some lease under which there was some sale of gas in an interstate market, and by that be bound now to sell their gas regardless of the circumstances in the interstate market?

You can see the tremendous dampening influence that would have on exploration at a time when we are all trying to encourage exploration. And you can see the cloud that it would put over titles and our ability as landowners to do business. That's why the rule should be, plainly and simply, as the Circuit Court has put it. And that is that the lessee can sell only what he owns. That's always been the law. That should remain the law for the purpose of deciding this case before us. There is nothing else that Gulf had except 50 years to sell. That's the gas they had. That's --

QUESTION: Nobody is trying to sell the lessor's gas. It is just a question of whether he must stay in the interstate market.

MR. HILL: Well, you see, there was never any

authorization.

QUESTION: I understand, but nobody is suggesting that Gulf has the right to sell the lessor's gas.

MR. HILL: Well, if you leave it in interstate --

QUESTION: I know, but it will still be the lessor selling it.

MR. HILL: Not if it is an involuntary sale.

QUESTION: I know, but it will still be him selling it. It wouldn't be Gulf selling it.

MR. HILL: Well, Gulf would be, in effect, forcing Southland to sell its gas whether it wanted to or not.

QUESTION: If the law was construed as the Commission says, it would be the law that's making the lessor stay in the interstate market. Gulf is out.

MR. HILL: By what law?

QUESTION: I understand your position on that, but nevertheless it would be -- Gulf would be out and the lessor would be in, and the lessor would be making the sale.

MR. HILL: The lessor wouldn't have one thing in the world to do -- It would just be an involuntary forcing of Southland to sell its gas in the interstate market.

QUESTION: And at those prices.

MR. HILL: Yes, sir. We are not worried -- The price is not the issue here. California talks about its consumers, talks about how many homes it will heat in California, and it

talks about losing gas. They have no gas to lose, because this gas was never dedicated into interstate service beyond the 50-year term. Southland didn't dedicate its gas.

They are begging -- They are bootstraping themselves. They are just begging the question when they say --

QUESTION: The issue in the case is that in what market may the gas be sold, I gather.

MR. HILL: And we say that Southland has the right to sell it to Texas, and we are here to say that it's our gas now and that it was not dedicated under the previous transaction. All Gulf could sell was its 50-year supply. Everyone knew that going in. El Paso knew what it was buying for 50 years. Gulf couldn't sell something they didn't own. They've had it now. Their rights have been exhausted under the only lease that existed.

QUESTION: Nobody is suggesting Gulf's rights are going to go on.

QUESTION: General Hill, is that quite right? If the Commission is correct in holding that it was like a covenant running with the land and the landlord's gas is permanently dedicated, why would not the Commission have the power to deny Gulf's petition for abandonment and keep Gulf in the picture? Because they would still have a source of supply.

MR. HILL: You see, Gulf had filed an abandonment.

QUESTION: If the supply is still available, they may

deny the petition for abandonment, may they not?

MR. HILL: Why don't they act on it? That's a very good question.

QUESTION: Is it perfectly clear that Gulf is out of the picture if the gas is still there?

MR. HILL: Absolutely.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Attorney General.

Do you have anything further, Mr. Barnett?

REBUTTAL ORAL ARGUMENT OF STEPHEN R. BARNETT, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. BARNETT: Just a few points, Mr. Chief Justice.

First, in response to Mr. Justice Rehnquist, with respect to that fraction that I fumbled. It is .08 of 1%. That is nearly 1/10 of 1%. And, as I said, that's more than 1% of El Paso's firm annual requirement.

With respect to Mr. Attwell's argument that the case is really based on Section 7(e), not 7(b), because Gulf was not able and willing to initiate the service, there are several answers to that. One is that it contradicts the certificate. The certificates granted to Gulf said precisely that Gulf is able and willing to perform the service, and these certificates were unlimited in time, not limited to the 50 years of the lease.

QUESTION: Mr. Barnett, do you agree that if the Commission is right, Gulf may remain in the picture permanently,

until the well expires?

MR. BARNETT: Not permanently.

QUESTION: Well, until the well is exhausted then.

MR. BARNETT: No, we do not take the position that the Commission could make Gulf sell Southland's gas permanently. The Commission held that Gulf must seek abandonment.

QUESTION: Yes, I know, but they would have power to deny the petition for abandonment as long as there was still gas available in the well, would they not?

MR. BARNETT: Well, so long as they also had power to deny Southland's petition.

QUESTION: Sure, but if they had the power over Southland, it would follow a fortiori, would it not, that they could keep Gulf in the picture?

MR. BARNETT: Yes, so long as Southland was there.

QUESTION: Why do you say that? Can't the lessor, even though he has to stay in the interstate market, at least get rid of his lessee?

MR. BARNETT: Well, I think that's true, too, but the Commission --

QUESTION: Well, it can't be both ways.

MR. BARNETT: Well, somebody else could be substituted.

QUESTION: Substituted? Like whom?

What if the lessor says, "The lease is expired. I

understand that I have to stay in the interstate market, but I don't want to deal with Gulf any more."

MR. BARNETT: Well, in that case, that's what I had in mind when I said the lessor could bring in someone other than Gulf.

QUESTION: What about itself, Southland?

MR. BARNETT: I think Southland, itself, could --

QUESTION: If it were equipped?

MR. BARNETT: Yes, I think Southland, itself, could be substituted for Gulf, if necessary. But the point is that Southland ultimately is the natural gas company by virtue of having succeeded to this dedicated service in natural gas.

QUESTION: But if Southland is a bunch of doctors sitting in Los Angeles, they are not going to want to start building a pipeline in the south.

MR. BARNETT: Well, you don't have to build a pipeline to be a seller of natural gas, Mr. Justice Rehnquist. There are many owners who have no facilities in the sense of pipes, or anything, but which are natural gas companies under the Act, because they are engaged in sales of natural gas. Indeed, we would say the reserve, itself, is the facility, if you need a facility.

QUESTION: On the last day of the 50th year, Mr. Barnett, why is any petition for abandonment necessary. What does Gulf have to abandon?

MR. BARNETT: Gulf has a continuing service which it is still performing, and as the Commission said --

QUESTION: How can it perform anything under a lease after it has expired?

MR. BARNETT: All the Commission said was that "We are requiring Gulf to seek abandonment, so that we would have all the parties before us if we have to rearrange their legal arrangements."

QUESTION: Could they order Southland to make a new lease with Gulf?

MR. BARNETT: They could order Southland to make a lease with somebody to continue selling.

QUESTION: I am sure it is not intentional, but you have given contradictory answers to Justice White and to Justice Stevens. To say that the Commission can rearrange the legal arrangements of the parties. That's a rather strange notion to emanate from the statute, isn't it?

MR. BARNETT: Well, to make clear that Southland is required to continue this service which Gulf has begun under the lease. The Commission said, "We need all the parties before us if we are going to" -- I think it said, "rearrange -- "resettle their legal arrangements." But the point is that Southland contends that it does not have to sell its gas in interstate commerce. The Commission would be telling it that it does, that is, a rearrangement of the legal arrangement, at least

as Southland views it.

QUESTION: Do you take the position, Mr. Barnett, that by virtue of Gulf's dedication the Commission acquires greater power over Southland than it does over Gulf?

MR. BARNETT: In the sense that after the 50 years it now has power to require Southland to sell the gas --

QUESTION: But does it also have power to require Gulf to stay in the picture, assuming you are right on Southland?

MR. BARNETT: To stay in the picture --

QUESTION: As lessee.

MR. BARNETT: Not if Southland wants another lessee. But if Gulf's being in the picture is necessary to effect --

QUESTION: It doesn't have the power to deny the petition for abandonment, even though the source of supply remains available. That's your position?

MR. BARNETT: No, it has the power to deny the petition for Gulf's abandonment or to require Gulf to file its petition, as it did here.

QUESTION: It has filed it. If it acts on it, can't it deny it? That's my question. Does the Commission have the power to a) hold that Southland's gas must remain available, and b) "We are going to deny Gulf's petition for abandonment." Does it have such power?

MR. BARNETT: Yes.

QUESTION: What if Southland says, "We are not going

to do anything at all. We are tired of this business. We are just going to let the gas stay where it is. We won't make a new lease with anybody." Can the Commission say, "Here are three names. Make a lease with one of them"?

MR. BARNETT: Yes. In the United Gas Pipe Line case, the Commission required a pipeline to keep purchasing. In the Sunray case, it required a seller to keep selling. That would be the same thing here.

QUESTION: You wouldn't think you -- Or do you? I don't know what your answer is now. May the Commission keep -- deny Gulf's petition for abandonment and make it stay in the picture over Southland's objection?

MR. BARNETT: Not if Southland has someone else it wants in the picture instead of Gulf. But if Southland does not have somone else, if Southland's objection was based on not wanting this gas to be sold in interstate commerce --

QUESTION: Well, I suppose at least one reason for requiring a lessee, under an expiring lease, to file is just at least to make sure the lease is expiring and it isn't just a trumped up arrangement.

MR. BARNETT: That may be one reason, yes.

QUESTION: Well, there wouldn't be much difficulty about that. The Commission's records show the lease --

MR. BARNETT: The Commission's records, as I understand, do not show the lease. This case was brought by

declaratory judgment action before the Commission. I think, ordinarily, the Commission would not be aware that a particular lease has expired.

QUESTION: You mean because that's 50 years ago? They certainly must keep records these days, don't they?

MR. BARNETT: It is my understanding that they do not keep records of leases. I could be wrong, but that is my understanding.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 2:59 o'clock, p.m., the case in the above-entitled matter was submitted.)