In the

Supreme Court of the United States

CALIFORNIA, ET AL.,	
	No. 76-1114
EL PASO NATURAL GAS COMPANY	
	No. 76-1133
FEDERAL ENERGY REGULATORY COMMISSION,	
	No. 76-1587
PETITIONERS,	
V.	
SOUTHLAND ROYALTY COMPANY, ET AL.,	
RESPONDENTS.	

Washington, D. C.
December 7, 1977

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IN THE SUPREME COURT OF THE UNITED STATES

CALIFORNIA, et al., Petitioners, v. SOUTHLAND ROYALTY COMPANY, et al., Respondents.	No. 76-1114
EL PASO NATURAL GAS COMPANY, Petitioner, v. SOUTHLAND ROYALTY COMPANY, et al., Respondents.	No. 76-1133
-- and -- FEDERAL ENERGY REGULATORY COMMISSION, Petitioner, v. SOUTHLAND ROYALTY COMPANY, et al., Respondents.	No. 76-1587

Washington, D. C.,

Wednesday, December 7, 1977.

The above-entitled consolidated matters came on for argument at 11:11 o'clock, a.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
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

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

RANDOLPH W. DEUTSCH, ESQ., 5066 State Building, San Francisco, California 94102; on behalf of the State of California, et al.

J. EVANS ATTWELL, ESQ., Vinson & Elkins, 2500 First City National Bank Building, Houston, Texas 77002; on behalf of the Respondents, Southland Royalty Company, et al.

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

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 76-1114 and the consolidated cases, California against Southland Royalty Company.

Mr. Barnett.

ORAL ARGUMENT OF STEPHEN R. BARNETT, ESQ.,

ON BEHALF OF THE FEDERAL ENERGY REGULATORY

COMMISSION

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

These cases involve oil and gas leases and the extent of the authority of the Federal Energy Regulatory Commission, formerly the Federal Power Commission, under Section 7(b) of the Natural Gas Act. Section 7(b), as set out in the Appendix to our brief, provides, and I'd like to read it in full since I think it's crucial to this case:

"No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment."

In these cases a gas producer had leased gas producing property under a 50-year lease and had sold gas from that property in interstate commerce, pursuant to a certificate of public convenience and necessity, issued by the Commission without limit of time.

The question presented in the case is whether, when the 50-year term of the lease expires, the process of supplying gas from that property to interstate commerce may be terminated, and the gas produced from those reserves sold in intrastate commerce instead, without a requirement that either the lessee or the lessor obtain abandonment authorization from the Commission pursuant to Section 7(b) of the Act.

The facts may be briefly stated.

In 1925 Gulf Oil Corporation obtained an oil and gas lease from the owners of the Waddell ranch in Crane County in West Texas, part of the Permian Basin. The lease gave Gulf the exclusive right to explore for oil and gas on the Waddell ranch, and to produce and market all the oil and gas it might find there for the fixed term of 50 years. The lease provided that the owners of the Waddell ranch, the lessors, would receive a royalty from Gulf based on the quantity of natural gas produced and the number of producing wells.

A year later, in 1926, the owners of the Waddell ranch conveyed one-half of their mineral fee interest to Southland Royalty Company, one of the respondents here. Other

shares in the mineral interest under the Waddell ranch were subsequently conveyed to a number of other owners.

At present the record discloses that Southland owns 47 percent, trustees under the will of Warren Wright own 26 percent, the Exxon Corporation owns 14 percent, and there are more than 100 other owners. I will refer at times to all those owners collectively as Southland.

In 1951, Gulf entered into a contract with El Paso Natural Gas Company, an interstate pipeline, whereby Gulf agreed to sell to El Paso surplus residue gas; that is, a portion of the casinghead gas which comes from oil wells, as distinguished from gas-well gas. Gulf agreed to sell to El Paso surplus residue gas from the Waddell lease and from other sources.

In 1954, after this Court's decision in the Phillips case, Gulf applied to the Federal Power Commission, as it then was, for a certificate of public convenience and necessity under Section 7(e) of the Natural Gas Act, authorizing it to make this sale to El Paso, and this certificate was granted by the Commission in 1956. Neither the application for the certificate nor the certificate itself provided for any limit of time on the sales or service being authorized.

In 1972, Gulf entered into a second similar contract with El Paso for the sale of gas coming from the Waddell lease and other sources, Gulf again applied for a certificate to the

Federal Power Commission, and again got it in 1973.

On July 14, 1975, the 50-year term of the Waddell lease came to an end, and the lease expired. And title to the mineral estate in the Waddell ranch thus reverted to the reversionary mineral interest owners, Southland, et al.

Meanwhile there is also in this case the Goldsmith leade. Also in 1925, Gulf entered into a similar 50-year fixed term oil and gas lease with Goldsmith and others on the Goldsmith ranch in Ector County, Texas, also West Texas. The owners of the Goldsmith ranch subsequently conveyed this mineral interest to others, including the same Southland Royalty Company, and including Texaco, Inc., which now owns one-fourth of the interest.

Gulf sold gas from the Goldsmith lease to Phillips Petroleum Company, which processed that gas and sold it to El Paso for resale in interstate commerce pursuant to certificates that the Commission granted to El Paso.

In 1975, of course, the Goldsmith lease also expired, and title to the mineral estate reverted to the reversionary mineral interest owners.

For the purposes of this case, the parties are agreed that the Waddell lease and the Goldsmith lease, the Waddell ranch and the Goldsmith ranch, and all the legal ramifications of each have no legal differences, and thus I will adopt the practice followed by Southland in its brief and

refer at least sometimes to both leases in terms of the Waddell lease. I will always refer to the lessee as Gulf, although in fact there are some other minor lessees, and I will sometimes refer to the owners of the reversionary mineral interests simply as Southland.

Now, the proceedings before the Commission --

QUESTION: Mr. Barnett, right at that point, where you're clarifying the parties, is it Gulf or the Southland and Waddell people that, within your view of Section 7(b), is the natural gas company within the meaning of the statute?

MR. BARNETT: I plan to get to that, Mr. Justice Stevens, but, in short, I think they both are. But I will expound on that a little more fully in a moment, if you like.

The proceedings before the Commission were as follows: Shortly before the end of the Waddell lease period in 1975, Southland entered into a contract with Intratex Gas Company, and intrastate gas pipeline in Texas, whereby Southland agreed to sell to Intratex, on the unregulated intrastate market, gas from the Waddell lease after the lease expired.

Needless to say, the intrastate price -- and that's what this case is all about, of course -- the intrastate price is significantly higher than the interstate price regulated by the Commission, at which the gas was being sold to El Paso.

In January 1975, having heard that Southland was

soliciting proposals for intrastate sales of its gas, El Paso petitioned the Commission for a declaratory judgment as to whether, when the Waddell lease expired, Southland and the other reversionary mineral interest owners would be entitled to terminate the deliveries of Waddell ranch gas to El Paso, and sell the gas instead on the intrastate market without getting the Commission's approval under Section 7(b).

Texaco, as one-fourth owner of the reversionary estate in the Goldsmith ranch, filed a similar petition for declaratory judgment before the Commission.

Since the cases were so similar, the Commission consolidated the two proceedings, since there were no issues of fact, no evidentiary hearings were sought or held, various parties intervened before the Commission.

The Commission issued its decision in July 1975. It held that the various mineral interest reversioners may not sell gas from the reserves underlying the Waddell and Goldsmith ranches in intrastate commerce without first obtaining abandonment authorization from the Commission, because, the Commission held, that gas had been dedicated to interstate commerce by the certificated sales that the lessees had made to El Paso.

The Commission reasoned that under the decisions of this Court the dedication involved is not the dedication of an individual party or producer, but the dedication of gas. And

that once the service of supplying gas in interstate commerce from specific acreage has commenced, quoting this Court's decisions in CATCO and Sunray, "there can be no withdrawal of that supply from continued interstate movement without Commission approval."

The Commission said: This does not mean we are modifying the law of Texas as to the leasehold rights, we are, however, recognizing rights and duties that have been created by the Congress under the Natural Gas Act.

The Commission therefore held, and this relates to your question, Mr. Justice Stevens, that the reversionary mineral interest owners and also Gulf were required to obtain abandonment authority under Section 7 before ceasing the interstate sales.

I don't mean to say that answers your question; I propose to try to do so in a minute.

QUESTION: It wasn't on any agency theory, then, it was just the idea that if the lessee had dedicated it, it was automatically dedicated when the lease reverted?

MR. BARNETT: That's correct. The Commission's theory was that it is a dedication of gas not a dedication of any particular person. As it has otherwise been put, it's an in rem rather than in personam concept. The gas is dedicated.

I will return to some of the ramifications of that.

On petition for rehearing, the Commission essentially

adhered -- the Commission did adhere to its findings and conclusions, although adding some supplementary reasoning that I think I need not recite.

Southland and the other reversionary interest owners appealed to the Fifth Circuit Court of Appeals, which reversed the Commission's orders.

The Court viewed the issue of interstate dedication as controlled by local Texas law, noting that "under applicable Texas law, Gulf's rights were those of a tenant for a term of years; its interest was a limited one which terminated completely when title reverted to Southland at the expiration of a 50-year term." Thus, "under well-established concepts of property law, Gulf could not legally deal in or dedicate that portion of the gas which Southland might own upon termination of Gulf's estate."

The Court reiterated that under Texas law Gulf's 50-year lease interest did not authorize it to impose any limitation on the reversionary estate, and that under Texas property law Gulf could not bind the reversionary estate by its actions. Unquote.

The Court thus concluded that by virtue of local law the reversioners were free to cease the service to El Paso and its interstate customers, and to sell the gas from these reserves in intrastate commerce after expiration of the lease.

Petitions for certiorari were filed in this Court

by the Commission and also by El Paso in the State of California. The Court granted the petitions and consolidated the cases.

Well, in the first place, we submit that the case is controlled by the plain language of Section 7(b). That language provides, "No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without" first obtaining abandonment authorization from the Commission.

QUESTION: I suppose the key words are "subject to the jurisdiction of the Commission", is that not so?

MR. BARNETT: Well, I don't think so, Mr. Chief Justice. I would say the key words are "service" -- the key word is "service". It is clear here that what El Paso was doing was subject to the jurisdiction of the Commission. That was a service; indeed, I don't take it to be denied by our opponents that El Paso was performing a service subject to the jurisdiction of the Commission, within the language of Section 7(b). They do, I assume, raise a question --

QUESTION: You don't mean to suggest that El Paso was one of the natural gas companies referred to --

MR. BARNETT: Did I say El Paso? I should have said Gulf, I'm sorry. Thank you.

QUESTION: Okay.

MR. BARNETT: I don't take it -- I think it could not

be denied, and is not denied, that Gulf was performing a service subject to the jurisdiction of the Commission by the sales it was making to El Paso under the lease. Given that service, and the Court has emphasized in the Sunray case the importance of the service concept under Section 7(b).

The Court there said that it is a service not just a sale that the Commission authorizes when it grants a certificate under Section 7(e).

In the language quoted in our brief at page 11, it is evident that all the matters for which a certificate is required must be justified in terms of a service to which they relate.

Thus, --

QUESTION: Mr. Barnett, just because you focus on the statutory language, which interests me too, the word "service" is followed by "rendered by means of such facilities".

MR. BARNETT: Yes.

QUESTION: and the "such facilities" in turn refer back to "its facilities". If you talk about Gulf, the service would have to be service rendered through facilities of Gulf, wouldn't they?

By just reading the plain language of the statute.

MR. BARNETT: "No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any" -- well, I think Gulf's facilities

clearly were. Gulf had a processing plant, it had pipeline connections with El Paso, and with these gas wells.

QUESTION: Well, is it your position Gulf was obligated to continue providing the service?

MR. BARNETT: Yes. Well, let me now -- this brings me now to your question, Mr. Justice Stevens. I have just argued that it would seem clear here, and I would think not denied, that Gulf was performing a service subject to the jurisdiction of the Commission.

However, it might be argued, and our opponents apparently do argue, that you also have to have a natural gas company on the premises. That 7(b) says "no natural-gas company shall abandon", and Southland at least argues that it is not a natural gas company for the purposes of this case. And thus I come to the question you raised earlier, and I think there are several answers. One is that Gulf is a natural gas company, clearly, for the purposes of this case.

The Commission, in its certificate granted to Gulf for these sales, specifically held that the applicant is a natural gas company.

Moreover, I take the --

QUESTION: Stop right there for just a moment.

MR. BARNETT: Yes.

QUESTION: What does that mean? Does that mean Gulf must continue to provide the gas?

MR. BARNETT: Well, the Commission held in its order here that neither Gulf nor Southland may abandon this service without Commission authority. To that extent it means Gulf must continue to provide the gas, yes.

QUESTION: But Gulf doesn't have the lease, Gulf's lease has expired.

MR. BARNETT: That's true. Gulf and Southland might have a cause of action between each other; but for purposes of the -- regulatory purposes of the Natural Gas Act, Gulf having been performing this service subject to the jurisdiction of the Act was held not to be able to abandon it without --

QUESTION: What if Gulf simply -- it wasn't a question of reversion of the lease, but Gulf had some oil fields and they simply ran out? Would it still be obligated to continue furnishing that service?

MR. BARNETT: Well, it might be obligated to go to the Commission and seek abandonment, and I assume the Commission would grant it, if the oil wells ran out. But, in any event, that's a different case, because here you have a continually flowing stream, which did not run out. Which is being stopped and diverted to intrastate commerce.

And the Commission held -- this is at page 608 of the Appendix -- with respect to holding that Gulf must seek abandonment as well as the reversioners. In our opinion, this

is not a mere technical requirement, but would allow us to pass upon the merits of the lessee's abandonments upon the termination of the 50-year leases, as well as the proposed abandonment of the reversioners.

But I don't take the position, Mr. Justice Stevens, that that's the only answer to the question. While we do submit that Gulf is a natural gas company for the purpose of having to go to the Commission before abandoning this particular service, we also submit that Southland is a natural gas company for this purpose.

Now, Southland says, "We're not a natural gas company, because we were not engaged in selling gas subject to the Commission's jurisdiction, we were just receiving royalties."

QUESTION: And Southland didn't process either, did it?

MR. BARNETT: Southland didn't process either, that is true. But --

QUESTION: If it didn't process -- wouldn't it be pretty hard to have a gas company that didn't process?

MR. BARNETT: Excuse me, Mr. Justice?

QUESTION: Isn't it difficult to have a gas company if the company doesn't process?

MR. BARNETT: Well, I would not assert that they are a gas company here because they didn't process, I would assert they are a natural gas company here because they are the

party who now controls a service in natural gas which is subject to the Commission's jurisdiction, and which Section 7(b) says may not be abandoned without the Commission's approval.

It would be an anomalous and wholly self-destructive interpretation of Section 7(b), I submit, to -- really to say, either now you have a service which Section 7(b) says may not be abandoned without the Commission's approval, still the party who controls that service happens not to be a natural gas company and therefore there is no way that the Commission can effectuate the result that Section 7(b) commands.

QUESTION: Well now, the Commission could have required the consent of Southland at the time that it issued the original certificate, couldn't it?

MR. BARNETT: At the time it issued the certificate to Gulf, it could have required the consent of Southland?

QUESTION: Yes. If it said, "We see you've just got a 50-year lease, and we think we may want service furnished beyond that", they can require the application by Southland to accompany that of Gulf, couldn't it?

MR. BARNETT: The certificate provided for no limited time. The application provides for no limited time. By the same token, Southland could have written into its contract with Gulf, its lease with Gulf, that "if you go apply for a certificate, you make clear that you are only applying

for a 50-year certificate."

QUESTION: Well, can't the Commission in its proceedings on the application ask the necessary questions and develop the necessary information to find out how long the lease is of the natural gas company, and if there are reversionary interests, require that the owners of the reversionary interest join in the application?

MR. BARNETT: Well, it perhaps could do that in the future. In this case the application was for an unlimited certificate. The Commission may well have assumed, on the basis of cases like Sunray, that the certificate is unlimited when it says it's unlimited, and that just as a contract of twenty years was held in Sunray not to limit the term of the dedication, so a lease here doesn't.

QUESTION: Mr. Barnett, it often happens that gas companies get in a fight over who really owns the land, who really has a valid lease. Suppose Gulf went to the Commission and got the certificate, but litigation started as to who really had a valid lease, and it's determined in court that Gulf had no lease at all? I suppose you would say that Gulf would have to ask to terminate the service, but you wouldn't say that the Commission would deny a termination, would you?

MR. BARNETT: No, I would think, on those facts, the Commission would grant the termination and substitute whoever the court has found -- whomever the court has found to be the

actual lessee.

QUESTION: Well, I know, but that person, suppose that person who owns it hasn't any interest in continuing the service?

MR. BARNETT: Well, --

QUESTION: Wants to sell in intrastate commerce, hasn't any interest in doing what Gulf had been doing.

MR. BARNETT: Well, if it --

QUESTION: And it's the owner of the lease.

MR. BARNETT: Well, if you're suggesting that Gulf's application to the Commission on your facts was wholly unauthorized, Gulf was a sort of squatter on the land and had no authority from --

QUESTION: To show good faith, just like a lot of people do, they just get in a title question.

MR. BARNETT: Oh, well, I think in that case the Commission might find that the original dedication was not authorized by the landowner, and in that case might set aside the original dedication.

QUESTION: Well, you said a moment ago that the theory of the Commission wasn't agency, but now, I mean, that's Justice White's question, it sounds like you're saying it was the agency.

MR. BARNETT: Where there has once been a dedication of a stream of gas, the Commission -- an authorized dedication,

anyway, of a stream of gas --

QUESTION: Yes, but there isn't anybody, nobody -- you can't say Gulf, in my example, is authorized by anybody; the landowner is -- it's determined that Gulf doesn't hold the lease, but some other company holds the lease, and has the right to dedicate the gas.

MR. BARNETT: Well, that's why I said an authorized dedication. In that case there would not have been an authorized dedication in the first place, and the --

QUESTION: So the service could be discontinued?

MR. BARNETT: Well, you might well have to go to the Commission to do so, but I should think that on those facts the Commission would find that since there had been no authorized sale or service in the first place, the application was fraudulent in a sense.

QUESTION: So you must say, then, that Southland here implicitly authorized the dedication?

MR. BARNETT: Yes, I would say implicitly, by virtue of what its authorized lessee did.

QUESTION: Now, is that the theory that the Commission used?

MR. BARNETT: Well, in a sense, yes, I think the Commission's theory is that this gas was dedicated to interstate commerce by the sales and service which Gulf performed pursuant to the Commission's certificate. Everything Gulf did

was not only normal but proper and required of it under its lease, and --

QUESTION: Well, it certainly didn't use the theory that Southland was a gas company, did it?

MR. BARNETT: Well, the Commission didn't specifically address the question of who is a natural gas company and why; it held that Southland and Gulf both are, for purposes of having to come to the Commission to get abandonment authority.

And I would submit, as I already have, that Gulf clearly is. I think Southland also is, by virtue of controlling the service.

In the United Gas Pipeline case of a few years ago, this Court was faced with a question whether -- in that case a producer didn't want to buy any more gas from a particular field, and the Commission -- and the Court held that its refusal to keep purchasing was an abandonment, ordered him to keep purchasing, and the objection was made: where does this Court get the authority to order a purchase? And the Court answered: Where it is necessary to regulate the purchase of gas in some respects to carry out the expressly granted authority over transportation and sales, the Commission must have the power to do so.

Undoubtedly the continued purchase of gas has been ordered, but only as an incident to regulating transportation and sales. Similarly here --

QUESTION: What are you reading from there?

MR. BARNETT: United Gas Pipe Line Co. vs. FPC, 385 U.S. at 90, cited in El Paso's brief at page 29.

Similarly here, in order to effectuate its jurisdiction over the service that does exist, the Commission, if necessary, would have to be able to assert personal jurisdiction over Southland to hold the abandonment proceeding.

But, as I've said, Gulf also is a natural gas company, as yet a third point on this, it should be noted how carefully Southland qualified its statement in its brief at page 16, that it, "has not at any time been a natural gas company with respect to its Waddell ranch gas".

Well, now, some of the reversioners here clearly are natural gas companies with respect to other gas. Texaco is, it concedes so in the record at Appendix page 218. Exxon, which owns 14 percent of the Waddell interest, is; it concedes so in the record at page 443. And, although it is not in the record, it is implied by Southland's statement, which I just read, and I am informed that Southland is also a natural gas company. That is, does sell gas in interstate commerce pursuant to Commission certificate with respect to other gas.

That would make more than 50 percent of the -- more than 60 percent of the owners of the Waddell ranch who are natural gas companies.

Now, if the argument is that the natural gas company

requirement under Section 7(b) is a separate requirement from the requirement of having a service subject to the Commission's jurisdiction, then there's no reason why the natural gas company has to be one with respect to this gas. And, on that basis, too, you have the --

QUESTION: Mr. Barnett, the statutory language is that the facilities, particular facilities must be subject to the jurisdiction. Is it your view that the lessor's interest is a facility subject to the jurisdiction of the Commission?

The fact that the lessor operates a natural gas plant up in Maine or some place wouldn't have anything to do with the case, would it?

MR. BARNETT: No, the --

QUESTION: I mean, you know, the fact that they are technically a natural gas company is not dispositive and it must be an operating facility subject to the jurisdiction of the Commission, and the service involved must be performed pursuant to those facilities.

MR. BARNETT: "No natural-gas company shall abandon all or any of its facilities" --

QUESTION: Of its facilities. Now, you say Exxon is a lessee, but that doesn't -- or is one of the lessors; that doesn't make any difference unless the leasehold interest is a facility within the meaning of the statute, does it?

MR. BARNETT: No, but it is a service, the lessee

here --

QUESTION: Only those facilities.

MR. BARNETT: What?

QUESTION: Service is rendered by means of such facilities.

MR. BARNETT: Well, "such facilities" could mean facilities subject to the Commission's jurisdiction, that is Gulf's facilities --

QUESTION: No, the meaning of "such facilities" is "its facilities" in the preceding language.

MR. BARNETT: Well, I don't think it has to be read that way. I think it's Gulf's facilities here were rendering the service and a natural gas company -- the natural gas company could be one separately.

But I think the start of --

QUESTION: Well, let me just cut through that. Do you think it makes any difference, for this case, whether the lessor is some individual who never had anything to do with gas other than owning the lease interest, or if it's Exxon Corporation's?

MR. BARNETT: I don't think it makes any difference.

QUESTION: All right.

MR. BARNETT: I think the shortest and easiest answer is that once you come into control of jurisdictional service, and you are the only party who has the power then to continue

that service, you are, by virtue of that control, a natural gas company within the meaning of the Act. Otherwise, you --

QUESTION: You really don't make any point out of the careful language in the Southland brief that they may have been a natural gas company for some other purpose. That's irrelevant.

MR. BARNETT: Well, it's not the essential argument, by any means.

QUESTION: Well, it's a totally meritless argument, isn't it?

MR. BARNETT: I wouldn't say that. I think it has some weight, especially with respect to the claim of the reversioners that they are just landowners, they have nothing to do with the natural gas business, and why should they be subjected to any duties under the Natural Gas Act.

Well, to get --

QUESTION: Mr. Barnett, I'm interested as to whether, if you can put your finger on where you think the Commission indicated that Southland should be held to have dedicated the gas?

MR. BARNETT: I don't say that the Commission indicated that Southland should be held to have dedicated the gas. The Commission found that the gas was dedicated by what Gulf did within the terms of its lease.

QUESTION: And you don't say, then, that Gulf had any

-- do you say that the Commission said that Gulf had the authority on behalf of Southland to dedicate all of the gas?

MR. BARNETT: Well, Gulf had that authority by virtue of its lease from Southland. That lease authorized it to take all the gas it could out of the land, pursuant to that lease it applied for and got a certificate without limit of time.

QUESTION: But I thought your argument really was, and I thought the Commission's argument was that it was a matter of service. And even if Gulf was breaching its contract, breaching its lease with Southland, in asking for an unlimited certificate, you would be making the same argument?

MR. BARNETT: Well, that would be a different case. There is nothing here to indicate that Gulf has in any way breached its lease with Southland.

I see that my time is up for the present.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Barnett.

Mr. Deutsch.

ORAL ARGUMENT OF RANDOLPH W. DEUTSCH, ESQ.,

ON BEHALF OF STATE OF CALIFORNIA, ET AL.

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

California is here today as a consumer State of interstate natural gas service. The facts of this case directly affect California.

However, we believe that the decision of the court below so undermines one of the fundamental protections for the gas consumers of the United States that we are basically here to plead the cause of those consumers on policy grounds.

Factually, California receives --

QUESTION: What do you mean when you say you're here to plead it on policy grounds?

MR. DEUTSCH: I'm sorry, sir, what I mean is that we certainly agree with the statements that the Solicitor has made as to the law of the case. What I wanted to bring to the Court's attention was the various situations in the interstate gas market today.

QUESTION: It will have some relation, I take it, to the statute or administrative law in question, then?

MR. DEUTSCH: Yes, Justice Rehnquist.

Factually, the State of California receives approximately 90 percent of its gas from the interstate market. Our major supplier of that gas is El Paso Natural Gas Company.

Under the facts of this case, if the decision of the lower court is upheld, some 35 million cubic feet a day of gas will be lost to the El Paso system, without the abandonment authorization. This is sufficient to heat approximately 120,000 homes.

California would receive approximately 75 percent of that gas under normal circumstances.

But we believe that the theory of this --

QUESTION: Actually, what will happen to that gas if you lose?

MR. DEUTSCH: It's my understanding that that gas has already been contracted in intrastate commerce within the State of Texas, and I have no idea what the use of that gas will be.

QUESTION: Do you think we should have an interest in being sure it goes to California instead of to Texas?

MR. DEUTSCH: No, sir; not at all.

QUESTION: Then what's your argument?

MR. DEUTSCH: My argument is that, first of all, this gas goes to all the States on the El Paso system; but, more importantly, the theory of the case to be applied, not only to these two fixed-term leases but to all types of leases, including life-of-production leases. Therefore, that the facts of -- or the theory of the case could be applied to cause the loss of a great deal more gas from the interstate system, and this is inopposite to one of the basic protections of the consumer in the United States under the Natural Gas Act, which is to have an assurance of an adequate and reliable supply of gas in interstate service.

And in deciding this case, California believes that the Court should consider the purpose for which the Natural Gas Act was enacted, and the impact the decision of this Court will

have on the consumers of the United States.

In deciding that, we would like to bring to your attention two facts, or two factors in the gas market today that will be -- that have an effect on this case and have an effect on the Commission's ability to insure a continuing, reliable and adequate supply of gas in the interstate market. That's the shortages of natural gas in the interstate market and the disparity of price in the interstate -- between the interstate and intrastate markets.

California, receiving over 90 percent of its gas from the interstate market, has found that there has been a significant decline in gas, some 9 percent a year, dedicated to that market, and subsequently declining supplies to California.

This is true for the United States. And this is shown by the amici briefs of New York and the Associated Gas Producers.

The shortages, I think the effect of the shortages, were dramatically shown in the winter freeze of 1976, where natural gas did not get to the northern tier States. It has an immediate effect on the health, well-being and economic viability of the gas consumers.

Now, a major reason for these shortages is the disparity in price between the interstate and intrastate markets. The intrastate market, of course, is unregulated,

and the price has been as high as over two dollars a thousand cubic feet. The ceiling price in interstate market is $1.44.

California is not here to disparage the fundamental economic motivation of someone to sell their gas at the highest price possible. What we're bringing to the Court's attention is that the chronic shortages in the interstate market, combined with the disparity of price, and added to this motivation to sell gas at the highest price possible, puts untenable pressures on the Commission to uphold the fundamental protection, which is to insure a continuing, adequate and reliable supply of gas in interstate service.

QUESTION: Untenable pressures on the Public Utilities Commission of California or the Federal Power -- what used to be the Federal Power Commission?

MR. DEUTSCH: The Federal Power Commission, Justice Rehnquist.

In the 1950's, it was in the interest of producers to sell their gas in the interstate market. In 1977, it is in their interest to sell the gas in the intrastate market.

And we believe that the decision of the court below applied to leases gives producers just the vehicle that they need to carry out their economic interest to determine, to be able to take gas from interstate commerce either now or sometime during the life of production and move that to intrastate commerce without worrying about the public interest, and with-

out having the Commission being able to determine the public convenience and necessity of whether this gas can be removed from interstate commerce. And we think this violates --

QUESTION: Well, I understood the government to say that they were trying to do just what you're talking about. That the Energy Commission was trying to do just what you say they're not doing.

MR. DEUTSCH: I'm sorry, Justice Marshall?

QUESTION: Are you saying the Energy Commission is having pressure put on them to stop them from doing what you want them to do?

MR. DEUTSCH: But we think that --

QUESTION: Is that what you're saying?

MR. DEUTSCH: Well, what I'm saying is that the Commission has a duty to insure an adequate supply of gas in the interstate market. I'm saying that the chronic shortages which make it a seller's market, combined with this case, allow producers -- give producers an opportunity to move their gas from the interstate market to the intrastate market; or, in the future, to make leases that give them that opportunity. And this is the pressure put on the Commission, and the Commission has the duty to insure that there's an adequate supply in the interstate market, and not to allow this abandonment unless the gas well has been depleted or --

QUESTION: Well, are you criticizing what the

Commission did in this case or not?

MR. DEUTSCH: No.

QUESTION: Well, what's your argument?

MR. DEUTSCH: My argument is that the decision of the court below applied -- can be applied to all forms of leases, and that theory concerning leases, which allows leases to be drawn up, which would avoid Section 7(b) abandonment provisions, --

QUESTION: All I'm trying to say is, I'm trying to find out what legal arguments you have, other than policy.

MR. DEUTSCH: Well, my legal argument is, as the Solicitor has stated, that gas cannot be removed -- Section 7(b) says gas cannot be removed from interstate commerce once it has been dedicated, without a Section 7(b) abandonment authorization.

The gas in this case was dedicated to interstate commerce, an unlimited certificate was given, Gulf had the right to dedicate all that gas; in fact, Gulf -- if the production circumstances had been different, Gulf could have sold all of that gas before the termination of the fifty years. And the reversionary mineral interest owners had only a future expectation. Until that vested at the end of the fifty years, they did not know what gas would be left. All of that gas was in fact dedicated to the interstate market and could have been produced and sold in the interstate market,

and under the clear language of Section 7(b), that gas, once dedicated, for whatever reason, no matter how justified the reason, cannot be removed from interstate commerce in the first instance until the Commission, within its jurisdiction, has determined that abandonment can be made.

QUESTION: So it all turns on the interpretation of this one section?

MR. DEUTSCH: Yes, it does. I believe so.

I would like to turn to two points raised by respondents in this case. The first is that leases could not be made that would terminate prematurely natural gas service in interstate commerce because it would be against the economic interest of the producer to do so, because of the initial cost of production.

I would like to make several comments on that.

First of all, we have the possibility of lease situations that affect adversely the consumer, even though they don't necessarily affect the producer. And we see this in cases now in the court below, one in the Fifth Circuit concerning the area of royalty gas, where the issue is whether the royalty payment to a lessor should be based on the intrastate or interstate price of gas. And a secondary issue there is whether the gas -- the lessor can terminate the lease, thereby causing the gas to revert back to the lessor if the lessor does not receive the value that he thinks he should.

Under the ehroy of this case, that would avoid the abandonment provision.

Another factual situation concerns a lessor's ability to retain a royalty interest with the right to convert that into a working interest, a situation that arose in the Tenth Circuit in the Phillips Petroleum case. In that case the lessor did convert the gas into a working interest, and attempted to sell it as new gas in interstate commerce without seeking abandonment authorization.

Now, the Tenth Circuit held that that gas was dedicated. But I think there's no guarantee that other courts of appeals would also hold that, especially if, in this case, the Fifth Circuit is upheld.

There are other situations involving termination for lack of production. A producer with a marginal well could find it in his best interest to simply abandon that well, allowing the gas lease to terminate, and he could move on to more productive areas. But that avoids Section 7(b) abandonment, and perhaps the Commission would find that it's in the public interest to produce that marginal gas, that that producer is still getting a fair rate of return.

And one over-all comment in this area, and one I'd like to emphasize to the Court, it's a seller's market. There is a tremendous chronic shortage of natural gas. Whether producers like it or not, whether the Commission likes it or

not, if the theory of this case, that leases can avoid Section 7(b) abandonment authorization, is upheld, I think we will find a great many leases that include provisions that allow for termination if certain circumstances occurred during the production and the life of the lease, and neither the Commission nor producers will be able to do anything about it. Because those are the types of leases they are faced with.

One last point concerning the issue raised about cloud on real property in the State of Texas.

First, what we perceive here is a congressional regulatory requirement placed on interstate gas service. We do not see the cloud on real estate title. That gas has reverted to the reversionary mineral interest owners, they have full title to it, they will receive the proceeds for the sale of that gas.

I see my time is up, sir. Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Attwell.

ORAL ARGUMENT OF J. EVANS ATTWELL, ESQ.,

ON BEHALF OF SOUTHLAND ROYALTY COMPANY, ET AL.

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

My name is Evans Attwell, and I appear here on behalf of the respondents Southland Royalty Company, et al.

I would like to start out by briefly summarizing our position in what we're asking this Court to hold; then I want

to turn to the reasons why Southland's gas was not involuntarily dedicated to interstate service, because Gulf made an interstate sale of Gulf's share of the Waddell ranch gas; and then finally I want to conclude with a discussion of the practical consequences of this Court holding for Southland.

Our position is very simple, but it's very fundamental. It is that you can't sell what you never owned, nor can you dedicate what you never owned. This is true as a matter of property law; and it is also true under the National Gas Act.

Therefore, this case does not present a conflict between State property law on the one hand and the Natural Gas Act on the other. Nor does it involve the withdrawal or diversion of dedicated gas from the interstate market.

We recognize that if our gas has been dedicated, then, in the words of Justice Brennan, in Sunray, there can be no withdrawal of that supply from continued interstate movement without Commission approval.

But none of Southland's gas has ever flowed in interstate commerce, except under compulsion of the Commission's orders in this case, and those orders expressly provide that such forced sales by Southland are without prejudice to its rights in this case.

Therefore, the question before the Court is whether Southland's share of the Waddell ranch gas was somehow dedicated to interstate service because Gulf made an interstate

sale of its share of the Waddell ranch gas.

We recognize and agree that this dedication question is to be decided under the Natural Gas Act. We say that because Gulf was never -- and I emphasize the word "never" -- possessed of any rights in or control over Southland's interest in the Waddell ranch gas, it could not and did not encumber that gas with an interstate service obligation.

QUESTION: Well, do you think the Commission, as a matter of law or of fact, said that it did?

MR. ATTWELL: It did say that in its opinion, yes, sir.

QUESTION: As a matter of fact or of law that --

MR. ATTWELL: I think it --

QUESTION: -- that anybody who takes a lease or anybody who gives a lease must understand, under the Natural Gas Act, that the lessee has the power under the Natural Gas Act to dedicate permanently?

MR. ATTWELL: I think they said --

QUESTION: Is that what the Commission said?

MR. ATTWELL: I think that the Commission said that it was holding that Gulf had the power and did exercise the power to dedicate Southland's gas. Now, the Commission equivocates as to where it got that power.

QUESTION: Now, what if the Natural Gas Act said on its face what I just indicated, then you wouldn't be here, I

take it?

MR. ATTWELL: You mean just what you said? I think if Congress wanted to preempt the whole field --

QUESTION: Not preempt. The Gas Act just says -- let's suppose it just said on its face that when lessors give leases, lessees have the power to dedicate permanently all of the gas?

MR. ATTWELL: I think --

QUESTION: That's just like a provision of law.

MR. ATTWELL: That's right, that's just like saying that A -- the Natual Gas Act said A could dedicate B's gas.

MR. CHIEF JUSTICE BURGER: You may address that further at one o'clock.

MR. ATTWELL: Thank you, Your Honor.

[Whereupon, at 12:00 noon, the Court was recessed, to reconvene at 1:00 p.m., the same day.]

AFTERNOON SESSION

[1:02 p.m.]

MR. CHIEF JUSTICE BURGER: You may continue, Mr. Attwell.

ORAL ARGUMENT OF J. EVANS ATTWELL, ESQ.,

ON BEHALF OF THE RESPONDENTS -- Resumed

MR. ATTWELL: Thank you, Mr. Chief Justice.

Mr. Justice White, I'd like to take up, if I may, where we left off before the luncheon recess. If I understood you correctly, you had asked what if Congress had said that A could dedicate B's gas, that Gulf could dedicate Southland's gas.

We think it's very clear, from the Natural Gas Act, that Congress didn't say that. Now, the Commission has made references to Section 7(b) of the Natural Gas Act, the abandonment section. We think that really kind of begs the question in this case, which is whether our gas is dedicated.

QUESTION: But, in effect, the Commission is construing the Natural Gas Act to say that when a lessee dedicates, he can dedicate the entire thing.

MR. ATTWELL: That's right. That's exactly the point I'm trying to make. I think they're looking at the wrong section. 7(b) applies to dedicated gas, it doesn't apply to undedicated gas. What section applies here? How do you determine what gas a lessee could dedicate?

QUESTION: You also said, I think, before lunch that

he can dedicate only what he has.

MR. ATTWELL: Absolutely. That's our position.

QUESTION: Well, what about his potential? Beyond the fifty years.

MR. ATTWELL: He didn't have any potential. He had none whatsoever.

QUESTION: What if there were a potential, let's say an option of some kind, that clearly would be part of the dedication, would it not?

MR. ATTWELL: Any interest or property right he had, yes. No question about that, sir, Mr. Chief Justice.

QUESTION: Well, he has the potential of using it all in fifty years.

MR. ATTWELL: No. The Texas Supreme Court in 1973, in its decision, made it very clear that all that Gulf Oil Corporation got under its lease was the gas that was found, produced within a specified 50-year term, ending July 14, 1975. And that when that day went bang, that was the end of any interest whatsoever.

QUESTION: Well, was it physically possible that by the end of fifty years there wouldn't be any more oil and gas? In that lease?

MR. ATTWELL: I don't think it's physically possible, but there's certainly no evidence in this record one way or another.

QUESTION: Well, in any event, if that were a remote possibility, Gulf might use it all up.

MR. ATTWELL: Well, yes. Maybe I misunderstood your question. Obviously it was physically possible --

QUESTION: Whatever it was free to take out within fifty years, at least that it dedicated?

MR. ATTWELL: That's right. And that's all it could dedicate under its lease.

QUESTION: But, could --

MR. ATTWELL: Let me get back to my question as to the proper section of the Natural Gas Act, that I think we need to look to, to see the extent of dedication. It's Section 7(e), not Section 7(b), because --

QUESTION: 7(e)?

MR. ATTWELL: (e), yes, Mr. Chief Justice.

That says"a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension", et cetera, "if it is found that the applicant is able and willing properly to do the acts and to perform the service."

Gulf was never able to perform the service of selling Southland Royalty's gas. Gulf never owned any interest in or had any right to control the disposition of Southland Royalty's gas.

QUESTION: Could Gulf, by producing more rapidly

out of the leased properties, have taken a larger amount of gas out of the properties than it in fact did? Or is the record silent on that point?

MR. ATTWELL: I would say the record is silent on that point, Justice Rehnquist.

QUESTION: Now, there was some conversation earlier today about selling this, about Gulf selling this in intrastate commerce.

QUESTION: Not Gulf.

MR. ATTWELL: I don't think so, Mr. Chief Justice. I think Southland Royalty has --

QUESTION: Well, Southland then.

MR. ATTWELL: -- made a contract to sell its gas in intrastate commerce, yes, sir; but not Gulf. Gulf sold all the gas it was entitled to under the 50-year lease to El Paso, all the gas in question here.

QUESTION: Well, where did Southland get its title, interest, or whatever, to sell it in intrastate commerce?

MR. ATTWELL: Because we have a separate, independent property interest. It's never been dedicated. It's just like we had White acre over here and Black acre over here; White acre was dedicated by Gulf, and we owned Black acre. And we claim that we're entitled to sell our gas in intrastate commerce. We're entitled to sell it to the purchaser of our choice.

QUESTION: What you are saying is that Congress hasn't authorized the FPC to regulate that sort of sale?

MR. ATTWELL: That is correct, Justice Rehnquist. At least as of the present moment.

[Laughter.]

QUESTION: Mr. Attwell, while you're interrupted, assume for the moment that Gulf was under an obligation to apply for an abandonment, because they had a certificate and in effect their interest in the leasehold was going to run out. They had an obligation to do so and they failed to do so. What would the consequences be?

MR. ATTWELL: Well, they would have violated the rules and regulations of the Commission and of course the Natural Gas Act gives the Commission the remedial power. But the truth of the matter is --

QUESTION: Remedial power to do what?

MR. ATTWELL: Remedial power to either punish Gulf or to make them, force them to file. And the proof of the matter in this case, Justice Stevens, is that Gulf filed an application to abandon over two years ago, and it's been sitting up at the Federal Power Commission, and nothing has happened.

QUESTION: Is that -- does the record show that?

MR. ATTWELL: I believe it does, yes, sir. In fact, I believe it was filed pursuant to the very orders that are

under review in this case.

QUESTION: But you're saying that the remedy -- if they were under a duty to -- if they acted properly by filing the request to abandon and if the Commission didn't act on it, and they went ahead and abandoned anyway, without action, they may be subject to some penalty; that's what you're saying?

MR. ATTWELL: Well, I'm saying they are not subject to any penalty for abandonment, because all the gas that Gulf had was sold and delivered to El Paso. It completely performed the service.

It was just like, I believe Justice Rehnquist asked the question: what would happen if you just ran out of gas? If Gulf had just run out? Well, that's what happened.

QUESTION: Well, under the statute, even if you run out, you have to file a petition to abandon, don't you?

MR. ATTWELL: That is correct, and they had filed one. And it's been pending there for two years.

But that's a -- I'll admit that's a pro forma, because the statute says if your reserves are depleted to the extent that further service is unwarranted, and presumably Gulf meets that standard. But an application to abandon has been filed, it is pending. So I don't think that that's -- it's more or less a technical point.

QUESTION: Gulf is not before us here now, are they?

MR. ATTWELL: That is correct.

QUESTION: They are a party to the proceeding before the Commission, but not -- well, didn't they intervene before the Commission?

MR. ATTWELL: Yes, sir, they did.

QUESTION: But they're not here now?

MR. ATTWELL: No, sir.

I think that the decision of the Texas Supreme Court, that I referred to, a 1973 decision, which conclusively established the limitations on Gulf's power under its lease, conclusively established that El Paso -- I mean that Gulf had absolutely no power under that lease to dedicate Southland's gas also is a full and complete answer to any suggestion that Southland is a successory interest to Gulf and therefore bound by Gulf's dedication of Gulf's gas.

A successor, of course, is one who acquires his predecessor's estate and takes that estate subject to any benefits or infirmities.

But in this case when Gulf's lease expired, it ceased to exist. There was nothing left. There was nothing to be transferred. Southland didn't acquire Gulf's lease voluntarily or otherwise. Southland had a continuing presently vested property interest.

I think that the Texas Supreme Court decision is also an answer as to whether or not there was some type of agency under which Gulf acted in this case. I think it's clear from

this record and from the law that Gulf had absolutely no agency whatsoever to act on behalf of Southland Royalty.

Now, in the past, the Commission has consistently recognized that a producer can't dedicate what it doesn't own. In fact, just 45 days ago, the new Commission reversed a decision by the old Commission and held that when Producer A dedicated his reserves, interest in a gas reserve, it didn't dedicate Producer B's, because Producer A had no authority to dedicate Producer B's gas, and it had no ownership right in it.

But, in this case, the Commission has, for the first time, to our knowledge, ignored the fundamental principle and held that when Gulf made an interstate sale of its gas it could and did dedicate our gas, even though Gulf never had any ownership or other interest of any kind.

In so holding, we submit the Commission clearly exceeded its authority under the Natural Gas Act.

First, we believe it's clear our gas was not --

QUESTION: You mean even prospectively, as well as otherwise?

MR. ATTWELL: I don't follow that.

QUESTION: Well, suppose the same transaction happened tomorrow. Every lessor then knows what the Commission's rule is.

MR. ATTWELL: That's a good point.

QUESTION: And so, are you saying that if -- suppose

the Commission had gone through a rule-making proceeding and made this supplemental piece of legislation and had said -- and put out a regulation, put out a regulation that this is the way leases will be construed or applied, or this is what the Natural Gas Act means? Or at least that this is the regulation?

I suppose you would be arguing here, from what you just said, that that would be contrary to the Natural Gas Act?

MR. ATTWELL: Absolutely. And let me make one thing clear, Justice White. And the record in this case shows it.

One, fixed-term leases, of the kind we're dealing with here, are unique animals. They went into disuse in the late 1920's, and the reason they went into disuse is because producers are just not going to undertake investing hundreds of thousands or millions of dollars in a well and not be entitled to produce all of the gas that comes out of the well. They went into disuse; the modern-day lease provides that the producer's lease rights continue so long as production continues in paying quantities.

So you're not faced with the spectar of this happening, of these things coming up from the past. More or less like when you issued your Sunray decision, you were contemporaneously faced with the spectar of the Sun Oil decision, with those old certificates coming up, and if you didn't hold as you did in Sunray then those older certificates

would have terminated.

QUESTION: What I don't understand is why the original agreement with Gulf, the original dedication didn't say specifically that "We are dedicating only the gas that we have control over".

MR. ATTWELL: Justice Marshall, I --

QUESTION: Could that have been done?

MR. ATTWELL: I think that Gulf's application to the Federal Power Commission --

QUESTION: Yes.

MR. ATTWELL: -- clearly shows that all that was dedicated was -- as far as the Waddell ranch gas is concerned, was its interest under its lease.

Now, Gulf's application does not --

QUESTION: With Waddell --

MR. ATTWELL: -- say it's limited to fifty years, it just identifies the lease.

QUESTION: And the lease did say to fifty?

MR. ATTWELL: Yes, it identifies a great number of leases. I want you to understand --

QUESTION: That's what I --

MR. ATTWELL: -- that Gulf's application -- Gulf took -- Gulf had a processing plant here, and under its certificate it took gas from a great number of sources, including, one of those was the Waddell ranch.

QUESTION: And as those leases ran out, their dedication ran out.

MR. ATTWELL: As the gas ran out, that's right. That was the end of it.

QUESTION: That's your position.

QUESTION: You're saying this situation is analogous to a person who has a 50 or a 30-year lease on a building, or a piece of land, for traditional purposes, not gas and oil, and he has no power to do anything with it except to sell that lease term?

MR. ATTWELL: I couldn't have said it better myself. That's exactly what we're saying.

QUESTION: But you did concede that if there were an option for a renewal or extension, that that would be part of the original estate?

MR. ATTWELL: I did. Whatever Gulf owned. It is our position that it's what Gulf owned at the time of dedication that determined the scope and extent of the dedication. And all Gulf owned was the right to produce gas from the Waddell ranch for a defined 50-year term.

QUESTION: Could I ask you -- in asking this question, I'm not assuming that the Commission was correct, or that it's legally correct, but let me ask you this: Was it foreseeable that the Commission was going to rule this way? Is this the first time it ever ruled this way?

MR. ATTWELL: Yes. I think there's some statements that we quote, Justice White, about what a -- from the Commission's orders, about what a difficult question this is.

QUESTION: It never -- it didn't overrule any prior decisions, for example?

MR. ATTWELL: I think that this situation is so rare and unique that this is the first time it was confronted with such a situation.

QUESTION: Well, of course there is a -- there's interesting language in Sunray.

MR. ATTWELL: There's a lot of different language in Sunray, and I've read it a lot of times, but --

QUESTION: Yes, but on -- with any -- I suppose that even if the Commission were right, it might not have been -- legally, it might not have been foreseeable.

MR. ATTWELL: We're not -- I don't think we're basing -- I mean, we're not basing our argument in this instance on the fact that our expectations of any kind -- we're not saying that because our expectations were one way in 1925, they are different obviously now after the Natural Gas Act.

QUESTION: Well, I suppose you wouldn't -- if we disagreed with you legally and said the Commission had the power to do this, I'm sure you would say: Well, we think you're wrong, but even if we have to live with your rule, Mr. Court,

you shouldn't apply it retroactively.

MR. ATTWELL: We would certainly say that, yes.

QUESTION: In other words, you would say that we were engaging in a rule-making process.

MR. ATTWELL: I would say that.

QUESTION: De facto rule-making.

MR. ATTWELL: Correct.

The Commission's reliance on Justice Brennan's Sunray opinion to support its flow theory we believe is equally misplaced in this case, because the record clearly shows that Southland has never sold any of its gas voluntarily at least in interstate commerce.

The only physical flow that Gulf could and did dedicate to interstate service was Gulf's leasehold gas, a 50-year flow. And once Gulf commenced that flow, the service had to continue. Sunray made it very clear that it couldn't withdraw that supply, and Gulf has delivered all of its leasehold gas. But now Gulf's supply is gone, it flowed and has gone, and they've applied for abandonment.

But that in no way supports the Commission's position that Gulf's flow of Gulf gas somehow bound Southland.

Now, we also recognize that under Sunray, the certificate issued to Gulf imposed a service obligation that was obviously separate and apart from the sales obligation imposed by its contract. But Gulf's service obligation applied

only to Gulf's share of the Waddell ranch.

The capacity of a producer to dedicate natural gas reserves, we say, is limited to the producer's ownership rights in such reserves, and doesn't extend to gas which the producer never had any ownership or other interest in.

Let me illustrate that by saying that throughout the industry it's very commonplace for there to be a number of different interest owners in gas reserves, in fact that's a lot more common than the contrary. And it has been well established that if one producer in that gas reserve makes a sale of his interest, it in no way binds or covers the other producers. And we say that's exactly the same thing here. Here it's the Waddell gas, the Waddall ranch, Gulf makes a sale of its interest; that's in no way binding on us. We say that's exactly analogous.

Nor is it significant, we submit, that Gulf was issued a certificate of unlimited duration in this case. That simply meant that Gulf was obligated to sell all of its Waddell ranch gas that it owned. It didn't mean that Gulf was somehow authorized to sell gas it didn't own.

We would note that what is involved in this case is far different from what faced you in Sunray. In that case this Court required the producer to continue selling his own gas, after the term of his contract, because of the service obligation imposed by his certificate. In Sunray, the producer

clearly had the right and the power to continue to sell his gas after the contract expired.

By contrast, in the present case, Gulf never had any power or right to sell Waddell ranch gas after its lease expired. Therefore, Gulf's service obligation could not have extended to Southland's gas.

Gulf was not able, in fact, to sell Southland's gas.

In my remaining time, I'd like to turn to the practical consequences of holding for Southland in this case.

First, I think, as far as this narrow case is concerned, the consequences are de minimis. There's this case, and there are only three other fixed-term lease cases, and the relative volumes of gas, compared to the over-all, are de minimis.

Second, holding for Southland in this case will not mean that gas dedicated under the typical life-of-reserves lease could escape from interstate service if such a lease is prematurely terminated. All that the Court need hold -- and we say should hold in this case -- is that one who has never had any interest in or control over gas cannot dedicate that gas to interstate service. The typical life-of-reserves lease is of unlimited duration, and, unlike Gulf in this case, the producer has the power at the time of dedication to dedicate whatever gas he finds.

I don't think the petitioners really take the firm

position that holding in this case would reach that result; they say the theory of this case might be expanded to bind these ordinary lease situations, where the producer has the power which, unlike Gulf in this case to dedicate gas, does dedicate the gas and then the lease is prematurely terminated.

We don't believe the Fifth Circuit's decision goes that far. We think it's clear that the Fifth Circuit's decision is based on the fact that Gulf had no interest in or control over our gas reserves. In fact, that's the basis on which the Tenth Circuit distinguished it. Mr. Deutsch, on behalf of California, referred you to a recent Tenth Circuit decision, in which the Commission had held that gas was dedicated, and Phillips Petroleum Company appealed to the Tenth Circuit and the Commission was affirmed. And the Tenth Circuit said Southland is not applicable, because in that case the lessee, Gulf Oil, never at any time had any interest in or control over Southland's gas.

QUESTION: What about the lease? Couldn't Gulf say, "I will dedicate all of the oil that I will get under my 50-year lease with the Waddell ranch"?

MR. ATTWELL: Justice Marshall, that's exactly what they did say.

QUESTION: Yes, well, I thought you said that they didn't have any gas; that Gulf didn't have any.

MR. ATTWELL: I'm saying that after fifty years, they

had absolutely no interest in any gas produced in the Waddell ranch.

QUESTION: Oh, I see.

MR. ATTWELL: If I misspoke myself, I apologize.

In any event, if there's any question obviously in this Court's mind as to the extent of the opinion below, it can obviously limit it to the issues presented in this case, which is whether one who has no interest in or control over gas can dedicate that gas to interstate service.

Such a holding, we submit, would be entirely consistent with the contrary holding, if this Court were of that opinion, in these other cases.

Third, it's our position that holding for Southland in this case is not going to in any way result in this parade of horrors that the briefs have given you, this proliferation of short-term leases, terminable at will, under which producers can limit their service obligation in some manner; and thereby switch back and forth between interstate and intrastate markets.

The suggestion is really so devoid of economic reality as to be a makeweight.

In response to earlier questions, I pointed out that producers quit entering into these leases many, many years ago, for economic reasons, and they are not going to do it again, because they're spending hundred of thousands and millions of dollars on these wells now, and they're not going to subject

themselves to a situation where their right to producing gas can be cut off in five years or, even worse, cut off at the will of the lessor.

But even if the future producers should try to do that, and should approach the Commission with an application to make such a sale of gas, if the Commission determines that that quantity of gas, that limited quanity in some way jeopardizes the public interest, we submit that it has, and can and will protect the public interest, just as it has done by refusing to issue certificates limited to the term of a producer's contract. The Commission can refuse to issue the certificate, or it can condition it on the producer obtaining a longer and more stable supply of gas.

On the other side of the coin, if this Court's going to hold against Southland, it's going to have to adopt, in effect, a new rule of law, in our opinion, and that is that one who never owned or had any interest in or control over gas can dedicate that gas to interstate service. As we previously discussed, the authority for such a holding will have to be found in the Natural Gas Act, and we don't believe there's anything whatsoever in the Natural Gas Act to indicate that Congress, in any way, intended such a radical alteration of established ownership rights.

In conclusion, I'd like to briefly summarize the two points that we think are controlling in this case.

First, a producer cannot dedicate gas which he has never owned. This is true under property law and, as I have discussed, is true under the Natural Gas Act.

Second, Gulf never owned or had any interest in or control over Southland's gas, and therefore could not dedicate such gas.

From these two simple but indisputable points, we believe it is clear that Southland's gas is not now and never has been dedicated to interstate commerce.

Consequently, Southland is under no obligation to obtain abandonment authorization under Section 7(b) of the Natural Gas Act before Southland can sell its gas to the purchaser of its choice.

For these reasons, we respectfully urge that this Court affirm the decision below, on the ground that under the Natural Gas Act Gulf could not and did not dedicate Southland's gas to interstate service.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Attwell.

Mr. Attorney General.

ORAL ARGUMENT OF JOHN L. HILL, ESQ.,

ON BEHALF OF THE STATE OF TEXAS, AS AMICUS CURIAE

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

I'm grateful for the ten minutes that's been allotted

to me to express some concern which we have for the broader legal implications that we think are inherent in this FPC order, which petitioners are seeking to uphold.

And, if I might address first what I conceive this order to do, so that I can demonstrate why our concerns are real, both as to the effect of this order on the stability of our domestic drilling program which affects this entire nation, it's effect on our State lands, which we own, and, of course, its effect on our consumers whose own gas supply is in jeopardy in many instances by this order.

Let me try to say why I believe this order conjures up the potentiatility of many, many adverse effects on established legal rights, what we thought were established legal rights prior to this FPC order.

The order states on its face, and I'm quoting from 443 of the Appendix: "Thus it makes no difference whether a lease is transferred or terminates, the obligation of service imposed upon the dedicated gas continues. ...the duty to continue to serve is like an ancient covenant running with the land."

So, in this order, the FPC has held that as a matter of law, Gulf here created a federal covenant running with the land forever, by making an interstate sale of Gulf's 50-year gas commitment under this lease. And so the order holds that although the landowner was not a party to the granting of that

certificate, although it's suggested by Justice Rehnquist the landowner could have been brought in as a condition to the granting of that certificate, condition to Gulf, that wasn't done. And although the landowner clearly is not a natural gas company within the meaning of 7(b), and although Southland here is clearly not the owner of any facilities being used in service within the meaning of 7(b), and although the landowner here is clearly the owner of different gas, gas that was never subjected or never could have been subjected to the jurisdiction of the Commission, to use the words of the Act, you can't subject to the jurisdiction of the Commission by an application gas you don't own, whether you say in that application, Justice Marshall, that I'm just applying for a 50-year supply or whether you just attached your lease. You simply don't have the power to commit in that application any gas beyond that which you own.

And in spite of all that --

QUESTION: Well, the Gas Act could so provide, I suppose, couldn't it?

MR. HILL: Well, that's possibly so, and whether or not that would be a proper --

QUESTION: Well, the Commission says it so provides right now.

MR. HILL: Well, I don't agree with that, and I think it would also pretend some other constitutional questions

that are not before us.

But, suffice it to say that it is not --

QUESTION: Well, no more so than what the Commission says. The Commission says that when you dedicate under a lease, you've dedicated all the gas.

MR. HILL: Well, that's why --

QUESTION: That's the way they construe the Act. So if there are constitutional issues, if the Act expressly said it, there are constitutional issues now.

MR. HILL: Well, I'm not addressing constitutional issues. I was responding to you, to say that I think an effort to do that, whether by the Commission or by the Congress, would certainly open up such questions.

But it's enough to say here that the gas from the acreage -- they're holding that the gas from this acreage must be forever sold into the interstate market. That's the nubbin of our complaint, that even though it's a 50-year supply and a 50-year lease, that by this so-called covenant running with the land theory of the FPC in their order, that even after that lease expires, that the gas has to still be sold into interstate commerce.

Now, that legal result of that order bothers Texas, because if gas is discovered in the future in our State, and we think a great deal will be discovered in the future -- I hope for the good of this country that it will be -- if that

gas is discovered from a lease that's previously been under an expired lease, and I assure this Court, and we've set it out in our brief by checking with our Land Office, that we know in the instance of State-owned land, that there are many unexpired leases, some as many as eight and nine unexpired leases, and I mean expired for legitimate purposes. If under any of those expired leases, it could be discovered later, if this FPC order here holds up, that that -- that there was some interstate gas sold back up the road, even though it petered out and is no longer in the game, that that would create a covenant running with that land so as to commit any new gas produced from that acreage into interstate commerce forever.

It takes little imagination to see what effect that has on the stability of title searches, the stability of drilling programs, to know where you stand when you go in to make these deep tests, which we're increasingly having to make, to find gas in this country.

And, as Justice White observed, this order here is broad enough to cover a situation where A obtained the certificate from the FPC and then gets in litigation with B, who claims that he really owns the lease, even though A in good faith thought he owned it, and B wins. B, in spite of the fact he had nothing to do with the certification process, wasn't involved, topside or bottom, could be held under this

"ancient covenant running with the land" theory in this order to be subject to the FPC jurisdiction to interstate commerce sales and to abandonment procedures for actions that he totally was -- were unauthorized for him and in which he had no participation and presumably no knowledge.

Now then, when a producer in Texas is leasing today for new exploratory purposes, under this order and the breadth of this order that producer would have no assurance at all that there hasn't been a previous lease applicable to that acreage that would automatically subject his acreage to the FPC jurisdiction in the interstate market. And of course --

QUESTION: Do you think the lessor and the lessee prior to the fifty years could just together terminate the lease, agree to terminate it?

MR. HILL: No, but you can --

QUESTION: And without getting the Commission's consent?

MR. HILL: What we have today under our -- so long as gas is produced, and that's the way most of our leases read, when there's no gas produced and it's past the primary term, the lease lapses. That's the typical thing that happens in the oil industry today.

And that happened six times, seven times, eight times. Sometimes they go through an abandonment procedure and sometimes they don't. Possibly, if you --

QUESTION: Well, suppose the gas had run out in the forty years, technically, I suppose, the Commission could require an abandonment proceeding --

MR. HILL: No doubt about it.

QUESTION: Yes. And why wouldn't it satisfy your concerns, Mr. Attorney General, if a lessee, at the end of his lease, had to file his petition for an abandonment, but if the facts are as he alleged, the Commission would have to grant it -- would have to grant it.

MR. HILL: Well, in the first place, Mr. Justice White, the theory of the covenant running with the land --

QUESTION: I don't -- I'm not talking about that.

MR. HILL: I know you're not, but --

QUESTION: Would it satisfy your concerns if the rule was that he had to file but that the Commission would have to grant the abandonment.

MR. HILL: That would not, because that doesn't change this order that says that we're establishing a covenant running with the land.

QUESTION: But I thought Mr. Justice White's question was not necessarily supporting the reasoning of the Commission, but simply independent of the reasoning of the Commission.

MR. HILL: Well, I would answer it then, that if that supplants the language and we don't have a convenent running

with the land, and the abandonment proceeding would have the legal effect of eliminating entirely the notion that the new lessee wouldn't have a free hand to come in and produce, if he found gas, and sell it wherever he wanted to; that would eliminate our concern.

But there are two problems to it.

First, this Court has got to deal with this covenant running with the land. I hope you will in your decision.

QUESTION: But your colleague -- Mr. Barnett said that in that example that you reviewed, the one I gave, he thought the Commission would have to grant the abandonment under the Commission's rule. In the A and B case.

MR. HILL: No, the case you asked him about, the litigation --

QUESTION: And the one you just reviewed.

He thought the Commission would have to grant the abandonment, although they would --

MR. HILL: Well, it's by no means certain that they would. And he inferred, from his answer to you, that the theory of this decision was that the FPC was finding as a matter of law that they had implicit rights, that Southland had implicitly authorized the dedication of their gas.

And so there would --

QUESTION: Well, I understand. I understand that the Commission isn't agreeing with my suggestion -- wouldn't

be agreeing with my suggestion, but I'm wondering if it would satisfy your concern?

MR. HILL: No, sir, it would not.

QUESTION: If the lessee had to file for abandonment at the end of his lease term, and that the Commission had to grant it if -- unless there were some hanky-panky or some strange circumstances.

MR. HILL: Well, in the first place, it doesn't satisfy us because there are a number of our -- a lot of our acreage in Texas today, where we have reason to believe there was some prior interstate sale, but it petered out, there's no more production and no abandonment was sought. Now, what do we do about that kind of a situation?

Are we to go back now? Is this Court going to write some rule about abandonment? Or will -- I think what the Court should do, may it please the Court, is to hold now in this case, squarely and clearly, that a producer's interstate service obligation cannot be broader or longer than his property right to sell gas.

QUESTION: Did you interpret Mr. Justice White's question to mean that until the lessee had filed an abandonment and it had been pro forma approved by the Commission, the lessor's sales of gas would be subject to regulation by the FPC?

MR. HILL: I understood him to ask me would it

satisfy our concern about the problems associated with newly discovered gas if there was some requirement that the lessee, once the lease has been extinguished by production, was required as a matter of absolute requirement to go and obtain an abandonment under 7(b).

QUESTION: And the Commission was required to grant the abandonment.

MR. HILL: Yes, that would eliminate -- in other words, the abandonment --

QUESTION: Because once they had consented to the abandonment, future gas is free, I take it.

MR. HILL: With one provision. If you will write out this -- of any attempt of the FPC to write into our law this ancient covenant running with the land theory, because that is a broader concept than abandonment.

QUESTION: That would be wholly inconsistant with my suggestion.

MR. HILL: Yes, sir.

So if we don't have an ancient covenant running with the land coming out of this case, and if the Court holds that no producer can obligate gas that he doesn't own, and that abandonment procedures would be mandatory, then we would have something that we could work with.

But there are so many potentialities of harm when you're faced here with an order like this, stating that: we're

finding first that there is a covenant running with the land; we're finding second that a person can deal in gas beyond its lease term; we're finding third that if the lease has already expired and there is no longer any production, if there hasn't been an abandonment proceeding, that this -- and even though you don't know about it, haven't picked it up in a title search, and you go out and spend a vast amount of money and find new gas, we can come back and put it into interstate commerce.

Those are the vices in this order.

QUESTION: Well, do you think the issue here is whether there has to be a filing for an abandonment?

MR. HILL: No, sir, I do not. I think the issue here is whether or not the gas was subject to the jurisdiction of the FPC in the first place.

As Justice Burger pointed out, 7(b) applies only to that gas over which the Commission has jurisdiction.

It's my belief that the application, when it's filed, gives the Commission only jurisdiction over the gas which the applicant owns. You can't confer jurisdiction on someone over something you don't own or possess.

Gulf possessed a 50-year lease. That's all they possessed. They had no ability to place within the jurisdiction of the FPC something that they didn't have.

The reversionary interest to Southland, which came

in after the 50-year period, was totally outside of the jurisdiction of the court.

So it's clearly not within the contemplation of Congress or that Act that gas which you don't own you can place within the jurisdiction of that court.

It's not like Sunray, written by Justice Brennan, because in Sunray the only thing we were dealing with was a contract to purchase, a contract to purchase. Here we're dealing with property interest. What was the extent of the property interest?

I think that issue has to be met squarely in this case.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 1:43 o'clock, p.m., the case in the above-entitled matter was submitted.]

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