

## BOOKS

THE NATURAL GAS REVOLUTION OF 1985, Stephen F. Williams.  
American Enterprise Institute Studies in Energy Policy, 48 pages (1985)

Reviewed by *Mary Baluss\**

This short work will be familiar in significant portion to faithful readers of this Journal. It is the "general public" version of the author's very useful "for lawyers" analysis of FERC's 1985 gas regulation initiatives<sup>1</sup> that earlier appeared in these pages.<sup>2</sup> The practitioner will almost certainly find the earlier work more useful; it quite effectively previewed some of the legal questions that will be briefed to exhaustion before the changes that Mr. Williams has outlined, or some version of them, are a settled part of the regulatory landscape.

Although the revolution that Mr. Williams describes is far from over, the industry already is settling into a mixture of set battles, guerilla warfare and peace talks. Matters are moving quickly; the proposed rule that Mr. Williams describes has been bifurcated into a final rule and a further proposal.<sup>3</sup> The final rule, in turn, has spawned, at this writing, almost one hundred FERC orders granting or denying requests for clarification. Pipelines are filing tariffs intended to meet, or to approach Order 436 criteria and the Commission is beginning to come to grips with the practical questions they raise. Descriptive and predictive writing is an inevitable casualty in such a context.

There is, however, more reason to pay attention to this book than merely to bask in the happy glow of hindsight. For example, Mr. Williams gives a great deal of attention to the notion of "block billing" of pipeline purchased gas costs, a proposal that FERC has since deferred for further public comment and agency consideration. FERC proposes to "level the playing field" by segregating all low cost "old gas" into Block 1, to which "old customers" would have preferential access. Block 2 would be composed of all other (higher priced) purchases. Then, rather than follow the present practice of "rolling-in" all gas costs, pipelines would bill customers for their allocated share of Block 1 gas and add the costs by their share of Block 2 purchases. Customers presumably would react intelligently to the marginal cost of each unit of gas consumed.

Mr. Williams concludes that much of FERC's stated rationale for block billing is either misguided or not met by the block billing proposal. Mr. Wil-

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1. *Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol* Notice of Proposed Rule-Making, 50 Fed. Reg. 24,130 (June 7, 1985). Portions of the proposed rule were adopted in FERC Orders 436, 50 Fed. Reg. 42,408 (Oct. 18, 1985) and 436-A, 50 Fed. Reg. 52,217 (Dec. 23, 1985).

2. Williams, *The Proposed Sea Changes in Natural Gas Regulation*, 6 ENERGY L.J. 233 (1985). Mr. Williams has since been nominated by President Reagan to the United States Court of Appeals for the District of Columbia Circuit.

3. FERC Orders 436 and 436-A *supra* note 1.

liams doubts that block billing will, absent cooperative state action affecting local distribution tariffs, serve the FERC-assigned purposes of flowing economic units for old gas to consumers and sending consumers correct price signals. He dismisses the value of "leveling of the playing field" as between competing pipelines, on the ground that the field isn't really all that bumpy; only a few pipelines have average gas costs significantly below market. For most, the competitive impact is painfully offset by the denial of use of the old gas economic units. The cure, in short, is perceived as worse than the disease.

Mr. Williams offers two alternatives. One embodies a significant variation on the Commission theme. Here, Mr. Williams would allow some high cost gas into Block 1, including high-cost gas contracted for before the current market price decline began, and thus before pipelines were, or should have been, on notice that long-term commitments at above-market prices were necessary. He proposes to limit this exception at the point that a pipeline's Block 1 gas reaches the current market price. Mr. Williams fairly notes that this baby-splitting solution would not address all the Commission's concerns. Neither would it stifle the complaints of any group of opponents—either producers who fear loss of production revenue and long-term supply limitation, pipelines who fear that Block 2 gas will be unmarketable, or distributors and customers who want more Block 1 gas sooner. However, he urges that his variation addresses the legitimate purposes of block billing as proposed, and does so with less tension between Natural Gas Act and Natural Gas Policy Act priorities and with less penalty on the pipelines. (Mr. Williams does not address the producer concerns).

Mr. Williams appears to be at least equally content with another alternative: attacking the problem at the wellhead. This could be done either by complete wellhead price deregulation, coupled with access to nondiscriminatory transportation, or by increasing old gas prices along lines that have since been formally proposed by the Department of Energy.<sup>4</sup> Conceding that either step would have a severe financial impact on the pipelines, he views the positive gas supply opportunity inherent in wellhead price change as an important reason to accept either of these variants over block billing. With continued pressure from producer state representatives in Congress and DOE's strong initiative in favor of raising old gas prices at the wellhead, the political climate may be more amenable to Mr. Williams's analysis than anticipated.

Mr. Williams raises a second consideration that requires continuing attention: pushing the benefits of the revolution downstream. As did the FERC, he views pipeline and regulatory barriers to open transportation as having prevented consumers from reacting to higher gas costs by purchasing their own supplies at market prices. His view is that under the old structure, pipelines blocked Congressional intent to appropriate old gas rents—the difference between the old gas regulated prices and its current market value—for the consumer.

With the new regulations, all that should change. Mr. Williams, however, believes it likely that distribution companies may replace pipelines in the causal linkage. Under block billing they will have control of the old gas cushion. And,

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4. Ceiling Prices; Old Gas Pricing Structure, 50 Fed. Reg. 48,540 (Nov. 25, 1985).

even though innovative pricing by distributors could cure some of the block billing's failure to pass correct pricing signals from consumer to producer, Mr. Williams sees no incentives in the FERC proposal—probably out of concern for federalism—that would give distributors an incentive to manage the old gas cushion better than the pipelines have done. Thus, the revolution may now depend upon the intervention of state regulatory authorities.

These are fair comments. If one accepts FERC's diagnosis of industry problems, then one must recognize that the cure is only partly in FERC's hands. Mr. Williams suggests that FERC temper "open access" transportation, making it available to intrastate and distribution company transporters only if they also provide nondiscriminatory access. The Commission, in Order 436, declined to adopt such a condition. Presuming that it could institute such a rule, the question of how FERC would deal with claims that any particular distributor's tariff or actions was discriminatory invites a tangle of jurisdictional disputes. Thus, although Mr. Williams identifies a valid problem, his solution is Pandora's Box.

These and other comments aside, there remain aspects of Mr. Williams' work that do not sit comfortably with those in the revolutionary trenches. For example, there is no substantive mention of a primary stumbling block to pipeline acceptance of open access—the accompanying right of the pipelines' sales customers completely to walk away from contract demand obligations. This right may be necessary to open up firm capacity to would-be transporters. Nonetheless, for pipelines uncertain about how much of the reduced contract demand will simply be lost load, and to captive customers uncertain about how costs now borne by departing rather than converting customers will be allocated, the contract demand reduction is a difficult issue. Pipelines will, as Mr. Williams predicts, accept open access. Most will do so only after some energetic bargaining with their customers to reduce these and other perceived risks.

Mr. Williams apparently disregards one other limitation on the ability of many purchasers to access the currently low well-head prices. Footnoting the fact that reliability of gas supply is "a separate issue," his economic analysis is based on the presumption that all purchasers can take advantage of the present short-term, spot-sales market price if barriers to transportation are lowered. For fuel-switching industrials this is fairly the case. For many customers, however, other contract terms have their own value. Just what the premium will be remains to be seen, but it is real. The spread between spot market prices and pipeline average gas purchase costs is therefore a useful but not necessarily dispositive number for the purposes to which Mr. Williams puts it.

This may be quibbling. A short summary aimed, presumably, at a general audience, cannot fine-tune every detail. The principal difficulty with the book is not that it is already dated—indeed, it remains a fair snapshot of the original proposal and a commentary on the portion that remains to be acted upon—but rather that it is too short and too general to be particularly useful to those even reasonably familiar with the revolution it chronicles. Those without that familiarity will be informed and, in the case of block billing, they will be informed in a well-focused way.



LAW OF FEDERAL OIL AND GAS LEASES By The Rocky Mountain Mineral Law Foundation. Matthew Bender, 1985. originally published: 1964

Reviewed by *Stephen D. Davis\**

“The scope of this treatise is to deal with all questions regarding federal oil and gas leasing. Obviously some areas must be dealt with in far less detail than other . . . .” So writes the Chairman of the Law of Federal Oil and Gas Leases Revision Committee in the preface to this work. *The Law of Federal Oil and Gas Leases*, a two volume loose-leaf set published by the Rocky Mountain Mineral Law Foundation, recently has undergone three major updates, the most recent released in November 1985, that together have completely revised and updated the treatise. While not actually a second edition, it is frequently referred to as such. The Foundation first published the treatise in 1964, and thereafter, it was updated periodically. In 1982, the Foundation decided that a complete revision was in order to reflect substantial changes in various areas of the law and to introduce new issues that did not conveniently fit the existing framework.

While the treatise is edited by staff members of the Foundation, the chapters of the book have been drafted, with the exception of those relating to the Outer Continental Shelf leasing and federal oil and gas leasing in Alaska, by oil and gas practitioners or law professors in the Rocky Mountain States. The experience of the various authors greatly contributes to the value of the treatise.

As a general matter, the value of this work will depend upon the user's background and the specific question to be addressed. Much of the practice in the area of federal oil and gas leases revolves around the Bureau of Land Management and its customary treatment of particular issues. As a result, for a day-to-day practitioner in this field, the treatise is helpful because it provides sufficient information for one to draw reasonable conclusions, although in some instances they may need to be confirmed through conversations with local BLM personnel, or by more in-depth research. For those whose practice involves federal oil and gas leases primarily in transactional situations, the work provides helpful background but is generally not adequate to make unnecessary the retention of local counsel with experience in dealing with the interrelationship between the particular state law and the federal law relating to the leases. Thus, in general, the treatise should be considered supplemental to, and not a replacement of, a general oil and gas treatise such as *Williams & Meyers Oil and Gas Law*,<sup>1</sup> *Kuntz Law of Oil and Gas*<sup>2</sup> or *Summers Oil and Gas*.<sup>3</sup>

The scope of this treatise is very broad and many of the chapters, particularly those relating to the issues that arise in a day to day practice, are quite specific and well footnoted. The titles to the chapters reflect the breadth of the

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1. H. Williams & C. Meyers, *Oil and Gas Law* (1984).
2. E. Kuntz, *Oil and Gas* (1985).
3. W. Summers, *Oil and Gas* (1985).

work.<sup>4</sup> There is, for example, a chapter relating exclusively to royalties, the valuation of the underlying production, the determination of the amount of the royalty and the method of payments. Other chapters, as acknowledged by the Foundation, are very general and provide, first, an introduction to the issues through a historical narrative that helps the reader gain perspective<sup>5</sup> and, second, a means through which to access the appropriate federal statutes and regulations. This is true principally in the areas of Indian leases, Outer Continental Shelf leases and Alaska leases. The treatise is not recommended for those whose practice primarily relates to any one of those three areas, except for the two purposes described above. For example, from a nuts and bolts point of view, the Oil and Gas Leasing Procedures Guidelines prepared by the Minerals Management Service is more helpful with respect to Outer Continental Shelf leasing matters than is the treatise, and parts of the chapter relating to Alaska leases are no more than restatements of the Code of Federal Regulations.

The other parts of the treatise, however, are generally more complete in their treatment of the covered issues, and provide more than a mere summary of the applicable statutes and regulations. In this regard, Chapter 2 in particular provides an informative history lesson in federal oil and gas leasing.

The table of contents, the index and cross references within the text are, as always, crucial elements. For the most part, the chapter names in the table of contents are informative. More often, however, it is necessary to use the index, which this reviewer found to be adequately detailed. Generally speaking, references in the footnotes are helpful. One minor observation in this regard is that there are frustratingly few references to publications other than those associated with the Foundation.

The treatise also seems to be slightly lacking with respect to cross references within the text. Frequently the same issue is treated in more than one chapter or more than one section within a chapter, and not always with the same detail. More cross references within the footnotes or in the text itself would allow the user more easily to determine that he has reviewed all sections of the treatise that relate to a particular problem.

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4. The chapter titles are as follows: Chapter 1-Introduction; Chapter 2-History, the Government Survey, and Basic Oil and Gas Leasing Legislation; Chapter 3-Lands Available for Leasing; Chapter 4-Lessee and Transferee Qualifications; Chapter 5-Noncompetitive Leases—Over-the-Counter Offers; Chapter 6-Noncompetitive Leases—Simultaneous Filings; Chapter 7-Competitive Leases; Chapter 8-Right-of-Way Leasing; Chapter 9-Lease Form and Basic Provisions; Chapter 10-Assignments and Transfers of Interest; Chapter 11-Options and Rights to Acquire; Chapter 12-Fees and Rentals; Chapter 13-Royalties; Chapter 14-Extension, Suspension, Termination and Reinstatement of Leases; Chapter 15-Surface Management Requirements and Special Stipulations; Chapter 16-Exploration, Drilling, Producing, and Operating Regulations and Procedures; Chapter 17-Bonds; Chapter 18-Unitization and Communitization; Chapter 19-Administrative Procedures and Judicial Review; Chapter 20-Federal Land Records and Title Examination; Chapter 21-Post Leasing Changes in Federal Title; Chapter 22-Access to the Leasehold; Chapter 23-Conflicts with Development of Other Minerals; Chapter 24-State and Local Regulation of Activities on Federal Oil and Gas Leases; Chapter 25-Outer Continental Shelf Leases and Operating Regulations; Chapter 26-Indian Leasing; Chapter 27-Federal Oil and Gas Leasing in Alaska.

5. While all of the historical sections are well written and make for interesting reading, they are not likely to be reviewed by those whose practice frequently does not allow the luxury of a thoughtful review of the historical background of a particular question.

This problem was encountered, for example, with regard to the question of assignments in relatively large transactions. It is frequently the practice in such cases to prepare a master form of assignment dealing with many leases, both federal and private, which is to be recorded in the county records, while simultaneously preparing the prescribed forms of assignments of federal leases for filing with the Bureau of Land Management. Chapter 20 of the treatise, dealing with title examination, is quite helpful in analyzing certain of the issues that this practice gives rise to, such as the effect of the county-recorded assignments versus the effect of the federal forms of assignments. Chapter 10, relating to assignments, however, also contains a discussion of the issue, but it does not really contemplate that there will be a separate form of assignment filed for record in the various counties, nor do the provisions in Chapter 10 refer one frequently enough to Chapter 20 for a more complete discussion. Likewise, Chapter 20 does not frequently refer to Chapter 10. In fairness, however, it should be noted that this is not a uniform problem. Other chapters, such as Chapter 9, dealing with lease forms and provisions, contained ample references to other sections in which a more complete treatment of certain issues may be found. On a similar note, one past difficulty caused by frequent changes in the Code of Federal Regulations, and its numbering systems, and the concomitant need to repeatedly use a cross-reference table in the front of the treatise, is resolved by this general revision.

From a substantive perspective, the treatise succeeds as a source of basic information with respect to federal oil and gas leases. While not particularly recommended for OCS, Indian or Alaska leasing, or, unfortunately, environmental matters, it does provide at least general perspective with respect to those issues. The major usefulness of the treatise lies in its provision of answers or reference sources for the more common questions arising with respects to on-shore federal oil and gas leases, particularly leases issued pursuant to the Mineral Leasing Act of 1920. Still, if one has a relatively obscure question, one should not expect to get all the answers from this work. To those who have an in-depth knowledge of the federal regulations, the treatise will be of less use than it will be to those whose practice does not require such an in-depth knowledge. For example, attorneys with the Solicitor's Office of the Department of the Interior have told the reviewer that they only infrequently use the treatise, relying instead on their familiarity with the regulations with respect to federal questions, and on the general oil and gas treatises cited above, with respect to issues arising under the laws of various states.

While *The Law of Federal Oil and Gas Leases* does not "deal with all questions regarding federal oil and gas leasing," it does a good job of trying. The treatise has been in use for twenty-two years and, if the Foundation, as expected, continues its commitment to the effort, it likely will be in use that long into the future. To assure that result, however, the Foundation must continue to annually update the treatise so that users can feel more comfortable that they can rely on it as being relatively current, particularly with respect to case law that embellishes existing statutes and regulations.



MANUAL OF UNITED KINGDOM OIL AND GAS LAW By Terence Daintith and Geoffrey Willoughby . London, Sweet & Maxwell, 1984. 264 pages.

Reviewed by *Donald N. Zillman\**

While the United States can take credit for creating much of oil and gas law, it has not set a pattern for all other producing countries. Evidence of this lies as close as the United Kingdom, whose oil and gas law is profiled in the 1984 updating of Terence Daintith and Geoffrey Willoughby's *Manual of United Kingdom Oil and Gas Law*.

The first version of the text published in 1977 included both narrative text and a collection of pertinent documents. The 1984 version separates the narrative and documentary portions. It also updates the reader on seven years of significant change in United Kingdom oil and gas law and policy. Daintith and Willoughby contribute to most chapters as authors and edit the contributions of five other attorneys and accountants. Their goal is a "comprehensive narrative, examining, often critically, the full range of legal questions" dealing with the law of exploration, production and bulk transport of United Kingdom oil and gas. While the 264 page text may fall short of being "comprehensive" in some areas, the text remains the best in the field and an excellent starting point for either historical study of United Kingdom oil and gas policy or research in present law.

The United Kingdom experience proves that sophisticated oil and gas law begins with major discoveries of oil and gas. Prior to the major North Sea discoveries in the 1960s there was little United Kingdom oil and gas law. The one crucial element of the early law was the declaration of Crown ownership of oil and gas. This government control of the resource was applied to the offshore resources. It set the stage for a United Kingdom oil and gas law consisting of government dealings with private industry lessees.

The authors trace the history of the clarification of international claims over the off-shore reserves and the variable government policy toward leasing and development of the resources. In accord with its free market preferences, the present Conservative Government has reduced government involvement in ownership and regulation of the resource while keeping control over the government's revenue share. The dismantling of the state run British National Oil Corporation, continued even further since the 1984 publication date, is a fascinating study of state policy toward natural resources.

The chapters of the text address leasing, lease operation, land use and governmental revenue. The raw materials are statutes, regulations, model clauses of operating agreements and only rarely case law. The concise paragraphs of the text lay out the legal essentials and highlight the government involvement with the lessees and the importance of joint operating agreements

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(virtually all major offshore developments are joint ventures). The text is a fine resource for any student of the subject.

TRANSPORTATION AND MARKETING OF NATURAL GAS: UPDATE 1986, William A. Mogel. Published By Executive Enterprises Publications, Inc. 1986 (165 pages).

Reviewed by *Steven H. Brose*<sup>1</sup>

The ubiquitous Bill Mogel — known to readers of this publication as its Editor-in-Chief, as well as a frequent observer and commentator on the energy regulatory scene in numerous other forums — has returned “to update and build upon the principles discussed in *Transportation and Marketing of Natural Gas*”<sup>2</sup> That work, which was published only last year,<sup>3</sup> is by no means obsolete; indeed, Mr. Mogel’s principal thesis is that the “fundamental concepts of regulation discussed in [last year’s] book still are relevant,” and that, while “[t]he rules of the game may have changed, certain underlying principles have remained constant.”<sup>4</sup> Nevertheless, the significant movement in the past year has made necessary a revisiting of the scene that Mr. Mogel so recently surveyed.

The nature of the regulatory initiatives of recent months has been well documented, both in these pages and elsewhere. Their impact, moreover, will not reasonably be assessed until some time in the future. What, then, can Mr. Mogel bring to the job that others either have not or, at least for the time being, cannot?

For one thing, the author provides his usual comprehensive treatment of his subject. *Update 1986* is not simply another summary and commentary on FERC Order No. 436. While it does provide a clear and readable synthesis of Order No. 436 and its aftermath (Chapter II), as well as of the aborted move toward block billing (Chapter III), it goes well beyond that into the year’s other critical developments. For example, the book treats in some detail the demise of special marketing programs and blanket certificates (Chapter IV); the Order 380 (minimum bill) series (Chapter V); and the effect of Order No. 436 on the states and their regulatory commissions (Chapter VII). There are also fresh looks at subjects covered in the earlier book, but which have seen developments worthy of note. These include the the general area of pipeline rate design, most recently considered in the FERC’s *Texas Eastern* decision (Chapter VI);<sup>5</sup> and the newly vibrant question of the relationship of the anti-trust laws to the natural gas industry, particularly in light of the Supreme Court’s decision last term in which it attempted to give greater definition to the “essential facilities” doctrine<sup>6</sup> (a decision that Mr. Mogel sees as “especially

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2. W. MOGEL, *TRANSPORTATION AND MARKETING OF NATURAL GAS: UPDATE 1986* (1986) at 3 [hereinafter *UPDATE 1986*].

3. See W. MOGEL, *TRANSPORTATION AND MARKETING OF NATURAL GAS* (book review), 6 *ENERGY L. J.* 77 (1985).

4. *UPDATE 1986* at 3-4.

5. *Texas Eastern Transmission Corp*, 30 FERC ¶ 61,144 (1985).

6. *Aspen Skiing Co. v. Aspen Highlands Skiing*, 105 S.Ct. 2847 (1985).

relevant if the pipeline is the only source of transportation service and aggressively seeks to keep the end-user as a sales customer"<sup>7</sup> (Chapter VIII).

*Update 1986*, also includes two subjects that either were not dealt with at all or that were treated quite differently in *Transportation and Marketing of Natural Gas*. In Chapter IX of *Update 1986*, Mr. Mogel discusses the question of natural gas shortages and curtailments, and does so from the perspective that, as the result of disincentives to production embodied in Order Nos. 436 and 380, those relics of the early 1970's "may not be so remote as many believe."<sup>8</sup> In Chapter X, he delves into the quagmire of the Bankruptcy Code and its possible use by natural gas companies "as either a sword or shield to afford protection for financial consequences resulting from, among other things, take-or-pay obligations, Order No. 380 or financially burdensome contracts."<sup>9</sup>

Apart from comprehensive and rational treatment of these varied topics, Mr. Mogel brings to the task his typically readable — indeed, lively — style. The book is peppered with usually (although not always) apt, but consistently entertaining quotes.<sup>10</sup> Mr. Mogel's chosen topic does not easily lend itself to comment of this sort and he is to be commended for it.

Do not expect *Update 1986* to offer bold analysis of the developments in the last year, or dramatic prediction of what is to follow. Rather, use it as a helpful, and timely summary of the events and currents that have emerged since publication of *Natural Gas Transportation and Marketing*. Mr. Mogel has done well to weave those significant and wide-ranging changes into the framework of his earlier work, without sacrificing recognition of the new directions in which they are leading us.

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7. UPDATE 1986 at 123.

8. UPDATE 1986 at 125.

9. UPDATE 1986 at 135.

10. Who can resist a regulatory treatise that includes words from, among others, E.L. Doctorow, Raquel Welch, Paul Dirac, Mae West, and Oliver Wendell Holmes. This reviewer's personal favorite is the quotation used to introduce the discussion of Order No. 436. To that end, Mr. Mogel cites the immortal words of the inimitable baseball pitcher Joaquin Andujar, "The thing that I am proudest of in my life . . . is that I can come up here . . . and speak to you in a language I do not understand." UPDATE 1986 at 9.