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Surface Damages in Texas: A Proposal for Legislative Intervention.

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COMMENTS

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I. INTRODUCTION

As the law exists today in Texas, the owner of a mineral lease, rather than

the surface estate owner, possesses the dominant estate.[1] This dominance allows the mineral lessee to use as much of the surface owner's land as is reasonably necessary for the production of any minerals, including oil and gas.[2] During the course of exploration and production, the surface owner's land, water, crops, or livestock are often damaged.[3] Although the Texas courts have occasionally undertaken an effort to accommodate the rights of both the landowner and the mineral lessee,[4] the surface owner is often without an adequate remedy for damages to his real and personal property.[5]

Other states have recognized this inequity and have provided legislative protection to ensure proper compensation for surface damages.[6] The purpose of this comment is to trace the development of Texas law regarding the rights of the two conflicting interests, expose the inequities the surface owner may face while attempting to recover for damages, and propose the adoption of a surface damage compensation act.

II. THE CREATION OF THE ESTATES

The severance of a fee simple estate creates two distinct estates with competing interests.[7] Severance is accomplished when the grantor conveys or

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1. *See, e.g.,* Humble Oil & Ref. Co. v. Williams, 420 S.W.2d 133, 134 (Tex. 1967) (oil and gas estate dominant over surface estate and allows reasonable use of the surface); Warren Petroleum Corp. v. Martin, 153 Tex. 465, 467, 271 S.W.2d 410, 413 (1954) (owner of mineral estate has legal right to exclude landowner from lease); Gulf Production Co. v. Continental Oil Co., 139 Tex. 183, 206, 132 S.W.2d 553, 562 (1939) (surface estate servient to mineral estate), *opinion withdrawn,* 164 S.W.2d 488 (Tex. 1942).

2. *See* Sun Oil Co. v. Whitaker, 483 S.W.2d 808, 810 (Tex. 1972); *see also* Browder, *The Dominant Oil and Gas Estate — Master or Servant of the Servient Estate,* 17 SW. L.J. 25, 49-52 (1963) (discussing Texas law on reasonable use).

3. *See, e.g.,* Scurlock Oil Co. v. Harrell, 443 S.W.2d 334, 335 (Tex. Civ. App.—Austin 1969, writ ref'd n.r.e.) (sheep killed after consuming oil); Texaco, Inc. v. Joffrion, 363 S.W.2d 827, 830-31 (Tex. Civ. App.—Texarkana 1962, writ ref'd n.r.e.) (damage to water supply); Finder v. Stanford, 351 S.W.2d 289, 291-92 (Tex. Civ. App.—Houston 1961, no writ) (damage to crops).

4. *See* Sun Oil Co. v. Whitaker, 483 S.W.2d 808, 812 (Tex. 1972) (court attempts to apply accommodation); Getty Oil Co. v. Jones, 470 S.W.2d 618, 628 (Tex. 1971) (Steakley, J., on motion for rehearing) (surface owner should not be denied use of his land by oil operator if alternative methods of production exist).

5. *See* Dycus, *Legislative Clarification of the Correlative Rights of Surface and Mineral Owners,* 33 VAND. L. REV. 871, 884-85 (1980).

6. *See* MONT. CODE ANN. §§82-10.501-.511 (1983); N. D. CENT. CODE §§ 38-11.1-.10 (1980 & Supp. 1983); OKLA. STAT. tit. 52, §§ 318.2-.9 (Supp. 1983).

7. *See* Acker v. Guinn, 464 S.W.2d 348, 352-53 (Tex. 1971). The Supreme Court of Texas has described such a severance as, "[a] grant of reservation of minerals by the fee owner effects a horizontal severance and the creation of two separate and distinct estates: an estate in the surface and an estate in the minerals." *See id.* at 353; *see also* Stephens County v. Mid-Kan. Oil & Gas Co., 113 Tex. 160, 172, 254 S.W. 290, 294 (1923) (grant authorizing exploration and production of gas created two distinct estates). *See generally* Browder, *Accommoda-*

leases the mineral rights, or grants the surface estate and reserves the mineral estate.[8] Although there are several legal classifications for the mineral estate,[9] Texas law defines the typical oil and gas lease as granting a determinable fee to the owner of the mineral lease.[10] The lessor's estate is classified as a non-possessory reversionary interest with the possibility of a reverter.[11] Upon severance, each estate is deemed to have "all the incidents and attributes of an estate in land."[12] The mineral estate, however, is viewed as the dominant estate, and the surface estate is declared servient.[13]

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tion of the Conflicting Interests of the Mineral Owner and the Surface Owner, 25 INST. ON OIL & GAS L. & TAX'N 85, 86 (1974) (owner of one estate may sever estate into mineral and surface estates).

8. *See, e.g.,* Harris v. Currie, 142 Tex. 92, 93, 170 S.W.2d 302, 305 (1943) (owner of entire estate may sever estate by conveying and reserving land); Humphreys—Mexia Co. v. Gammon, 113 Tex. 247, 251, 254 S.W. 296, 298 (1923) (grantor conveyed land and reserved minerals); Texas Co. v. Daugherty, 107 Tex. 226, 236, 176 S.W. 717, 720 (1915) (conveyance of minerals creates vested interest in minerals below surface). The modern oil and gas lease granting clause usually provides: "lessor . . . hereby grants, leases, lets and demises exclusively onto the lessee . . . for the purpose by any method now or hereafter known of investigating, exploring, prospecting, drilling, mining, and operating for and producing oil and gas. . . ." *See* 6 W. SUMMERS, THE LAW OF OIL & GAS § 1123 (1967). For an interesting discussion of the history of the oil and gas lease, see Moses, *The Evolution and Development of the Oil and Gas Lease,* 2 INST. ON OIL & GAS L. & TAX'N 1, 1-14 (1951). *See generally* Nevill, *Multiple Uses and Conflicting Rights,* 13 ST. MARY'S L.J. 783, 786 (1982) (possibilities of how severance is effectuated).

9. *See, e.g.,* Hinds v. Phillips Petroleum Co., 591 P.2d 697, 698-99 (Okla. 1979) (oil and gas lease is granted in real property with easement in surface); Reese Enterprizes Inc. v. Lawson, 553 P.2d 885, 895 (Kan. 1976) (conventional oil and gas lease creates no vested interest in land but is license to enter and explore for minerals); Trunkline Gas Co.v. Steen, 187 So. 2d 720, 725 (La. 1966) (oil and gas lease is classified as a servitude on surface estate); *see also* McRae, *Granting Clauses in Oil and Gas Leases: Including Mother Hubbard Clauses,* 2 INST. ON OIL & GAS L. & TAX'N 43, 46-50 (1951) (varying states' interpretations of granting clauses in oil and gas leases).

10. *See, e.g.,* Texas Co. v. Daugherty, 107 Tex. 226, 229, 176 S.W. 717, 719 (1915) ("grant" established determinable fee subject to condition subsequent); Gulf Oil Corp. v. Prevost, 538 S.W.2d 876, 879 (Tex. Civ. App.—San Antonio 1976, no writ) (requirement of time period for commencement of production created defeasible title, not condition precedent); Sapphire Royalty Co. v. Davenport, 306 S.W.2d 202, 205 (Tex. Civ. App.—Houston 1957, writ ref'd n.r.e.) (lease created determinable fee which could terminate if production ceased).

11. *See* Texas Oil & Gas Corp. v. Ostrom, 638 S.W.2d 231, 234 (Tex. App.—Tyler 1982, writ ref'd n.r.e.). *See generally,* McRae, *Granting Clauses in Oil and Gas Leases: Including Mother Hubbard Clauses,* 2 INST. ON OIL & GAS L. & TAX'N 43, 48-50 (1951) (history of interpretation of granting clause in Texas oil and gas leases).

12. *See* Harris v. Currie, 142 Tex. 93, 99, 176 S.W.2d 302, 305 (1943); *see also* Munsey v. Mills & Garitty, 115 Tex. 469, 482, 283 S.W. 754, 759 (1926) (estate in minerals is estate in land itself).

13. *See, e.g.,* Humble Oil & Ref. Co. v. Williams, 420 S.W.2d 133, 134 (Tex. 1967) (oil and gas lease dominant entitling owner to use surface as reasonably necessary); Warren Petroleum Corp. v. Martin, 153 Tex. 465, 467, 271 S.W.2d 410, 413 (1954) (owner of dominant

The dominance of the mineral estate can be attributed to the essential right of ingress and egress over the surface estate to explore and produce the minerals.[14] Incidental to the mineral estate is the right to use as much of the surface as is reasonably necessary to achieve the objectives of the lease.[15] The standard of reasonableness is based on the usage and customs of the oil and gas industry.[16] Without the privilege of access to and reasonable use of the surface, the mineral estate would be rendered useless because the mineral owner would not be able to conduct the operations necessary for the production of minerals.[17]

III. DEVELOPMENT OF THE MINERAL ESTATE'S RIGHT TO USE THE SURFACE

The law in Texas concerning the rights between mineral and surface owners has been characterized as a confusing morass of concepts and theories

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estate has legal right to exclude surface owner from leased premises); Gulf Prod. Co. v. Continental Oil Co., 132 S.W.2d 553, 562 (Tex. 1939) (surface estate is servient but mineral owner should exercise due regard to surface owner's rights), *opinion withdrawn,* 139 Tex. 183, 164 S.W.2d 488 (1942). *See generally* Browder, *The Dominant Oil and Gas Estate — Master or Servant of the Servient Estate,* 17 SW. L.J. 25, 27-30 (1963) (discussion of Texas law on dominant estate).

14. *See, e.g.,* Ball v. Dillard, 602 S.W.2d 521, 523 (Tex. 1980) (mineral lease grants dominant estate with right of ingress and egress); Sun Oil Co. v. Whitaker, 483 S.W.2d 808, 810 (Tex. 1972) (mineral estate as dominant estate has implied grant to use surface); Getty Oil Co. v. Jones, 470 S.W.2d 618, 621 (Tex. 1971) (mineral estate dominant in sense that as much of surface as necessary may be used). *See generally* Browder, *Accommodation of the Conflicting Interests of the Mineral Owner and the Surface Owner,* 25 INST. ON OIL & GAS L. & TAX'N 85, 88-89 (1974) (tracing development of the dominant mineral estate under Texas law).

15. *See, e.g.,* Sun Oil Co. v. Whitaker, 483 S.W.2d 808, 810 (Tex. 1972) (absent provision to the contrary, oil and gas lessee has implied grant to effectuate purpose of lease); Humble Oil & Ref. Co. v. Williams, 420 S.W.2d 133, 134 (Tex. 1967) (burden on surface owner to prove lessee uses surface unreasonably); Warren Petroleum Corp. v. Monzingo, 157 Tex. 479, 481, 304 S.W.2d 362, 363 (1957) (absent surface damage provision, oil and gas lessee has no duty to restore surface damaged during operation of lease). More recently the courts have recognized that the mineral owner must act with due regard for the surface owner's rights. *E.g.* Sun Oil Co. v. Whitaker, 483 S.W.2d 808, 810 (Tex. 1972). *See generally* Browder, *The Dominant Oil and Gas Estate — Master or Servant of the Servient Estate,* 17 SW. L.J. 25, 49-52 (1963) (standards for determining reasonable necessity).

16. *See* Sinclair Prairie Oil Co. v. Perry, 191 S.W.2d 484, 486 (Tex. Civ. App.—Texarkana 1945, no writ). The court defined reasonable operations as those which are conducted in the "usual and customary way, consistent with the purposes for which the land was leased. . . ." *See id.* at 486. The question of reasonableness is determined by the trier of fact. *See* Warren Petroleum Corp. v. Monzingo, 157 Tex. 479, 479, 304 S.W.2d 362, 362 (1957).

17. *See, e.g.,* Yates v. Gulf Oil Corp., 182 F.2d 286, 290 (5th Cir. 1950) (grant would be worthless if mineral owner could not enter land); Ball v. Dillard, 602 S.W.2d 521, 523 (Tex. 1980) (grant worthless to grantee without right to enter land); Harris v. Currie, 142 Tex. 93, 94, 176 S.W.2d 302, 305 (1943) (reservation in minerals wholly worthless if grantee cannot enter land).

which are neither consistent in their application or results.[18] The right of the mineral owner to enter the land and do what is necessary to capture the minerals has been recognized in Texas since 1862.[19] Over the years, Texas courts have struggled to determine what duties, if any, the mineral owner owed to the landowner when the surface was used for the exploration of oil and gas.[20] Viewed as a continuum, the law concerning the mineral owner's rights to the surface emerged unyieldingly in favor of the mineral estate; progressed to a recognition of surface owners' interests; and has presently evolved into varying attempts to balance the rights of the two conflicting estates.[21] The ultimate conflict to be resolved in most surface damage litigation is whether the mineral estate owner's use of the surface is reasonable.[22] The question of reasonable use is answered on a case-by-case basis by employing such concepts as "due regard to the rights of the surface owner," "accommodations of rights," and "alternative methods of production;" however, these concepts are utilized without regularity or clear definition.[23] The following discussion will attempt to clarify the evolution of the mineral estate's right to use the surface and the surface owner's competing interest.

A. *The Early Dominance of the Mineral Estate*

Early Texas law established the dominance of the mineral estate by permitting the mineral estate owner an "exclusive right to locate and drill wells wherever he chose."[24] However, the right to exclude the surface owner from

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18. *See* Browder, *Accommodation of the Conflicting Interests of the Mineral Owner and the Surface Owner,* 25 INST. ON OIL & GAS L. & TAX'N 85, 85-86 (1976) (commenting on various attempts of Supreme Court of Texas to determine rights and duties of conflicting estates).

19. *See* Cowan v. Hardeman, 26 Tex. 217, 222 (1862). The right to use the surface to remove minerals is founded in common law. *See id.* at 222.

20. *Compare* Stephenson v. Glass, 276 S.W. 1110, 1112 (Tex. Civ. App.—San Antonio 1925, writ ref'd) (lease gives mineral owner exclusive right to locate and drill well) *with* Winslow v. Duval County Ranch Co., 519 S.W.2d 217, 222 (Tex. Civ. App.—Beaumont 1975, writ ref'd n.r.e.) (recognition of trend toward accommodation of both estates).

21. *See* Browder, *Accommodation of the Conflicting Interests of the Mineral Owner and the Surface Owner,* 25 INST. ON OIL & GAS L. & TAX'N 85, 119-21 (1974) (summation of development of law of surface rights).

22. *See, e.g.,* Getty Oil Co. v. Jones, 470 S.W.2d 618, 623 (Tex. 1971) (there must be finding of unreasonable use before surface owner can recover); Humble Oil & Ref. Co. v. Williams, 420 S.W.2d 133, 135 (Tex. 1967) (absent unreasonable use defendant is not liable for injury to landowner's property); Brown v. Lundell, 162 Tex. 84, 86, 344 S.W.2d 863, 865 (1961) (landowner may only use the amount of surface that is reasonable).

23. *See* Browder, *The Dominant Oil and Gas Estate — Master or Servant of the Servient Estate,* 17 SW. L.J. 25, 30 (1963) (courts' reasoning not always clear, explained or defined).

24. *See* Stephenson v. Glass, 276 S.W. 1110, 1112 (Tex. Civ. App.—San Antonio 1925, writ ref'd). This exclusive right gave the lessee the freedom to choose the well site without interference from the surface owner. *See id.* at 1112.

the leased premises comes with limitations.[25] The concept of "due regard" was soon introduced in an attempt to alleviate the burden imposed on the servient surface estate, but the application of this concept has done little to diminish the dominance of the mineral estate.[26] Although the due regard concept has not been clearly defined,[27] it may be viewed as a limitation on the mineral lessee's rights to do that which is necessary to produce oil and gas.[28] While the due regard consideration is often mentioned,[29] it does not guarantee the surface owner will receive adequate protection for his interests in his land.[30] The concept, although acknowledged, was of little significance in the determination that a mineral estate owner has no duty to fence the well site to prevent injury to the landowner's livestock.[31] While application of due regard for the surface owner's rights would seemingly imply a right to have his livestock protected, the mineral lessee's exclusive right to possession prevails, allowing it to use the surface to the exclusion of the landowner or his cattle.[32] Furthermore, the mineral lessee does not have a duty to restore

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25. *See* Warren Petroleum Corp. v. Martin, 153 Tex. 466, 469, 271 S.W.2d 410, 413 (1954) (regardless of exclusive right to use surface, mineral owner must exercise due regard for rights of surface owner).

26. *See* Gulf Prod. Co. v. Continental Oil Co., 132 S.W.2d 553, 562 (Tex. 1939), *opinion withdrawn,* 139 Tex. 183, 164 S.W.2d 488 (1942).

27. *See* Browder, *Accommodation of the Conflicting Interests of the Mineral Owner and the Surface Owner,* 25 INST. ON OIL & GAS L. & TAX'N 85, 95 (1974); *see also* Note, *Oil and Gas — Getty v. Jones,* 3 ST. MARY'S L.J. 355, 358 (1971) (due regard frequently mentioned, infrequently observed).

28. *Cf.* Gregg v. Caldwell-Guadalupe Pick-up Stations, 286 S.W. 1083, 1084 (Tex. Comm'n App. 1926, holding approved) (rights of mineral lessee are limited to production of oil on premises). *But see* Browder, *Accommodation of the Conflicting Interests of the Mineral Owner and the Surface Owner,* 25 INST. ON OIL & GAS L. & TAX'N 85, 95 (1974) (due regard concept not often used to limit mineral owner's rights).

29. *See, e.g.,* Miller v. Crown Cent. Petroleum Corp., 309 S.W.2d 876, 877 (Tex. Civ. App.—Eastland 1958, no writ) (mineral owner must exercise due regard for landowner's rights when pumping salt water); Weaver v. Reed, 303 S.W.2d 808, 809 (Tex. Civ. App.—Eastland 1957, no writ) (lessee must exercise due regard for surface owner's right to graze cattle); Humble Oil & Ref. Co. v. L. & G. Oil Co., 259 S.W.2d 933, 938 (Tex. Civ. App.—Austin 1953, writ ref'd n.r.e.) (although surface estate servient, mineral estate owner must act with due regard to surface owner's rights).

30. *See, e.g.,* Sun Oil Co. v. Whitaker, 483 S.W.2d 808, 809-12 (Tex. 1972) (due regard consideration did not prohibit mineral lessee from waterflooding the well); Warren Petroleum v. Martin, 153 Tex. 465, 469, 271 S.W.2d 410, 413 (1954) (due regard does not require duty to fence); Miller v. Crown Cent. Petroleum Corp., 309 S.W.2d 876, 877 (Tex. Civ. App.—Eastland 1958, no writ) (due regard concept not violated when mineral lessee used pipelines).

31. *See* Warren Petroleum v. Martin, 153 Tex. 465, 469, 271 S.W.2d 410, 413 (1954). The court merely acknowledged the concept of due regard and found it did not require a duty of mineral owner to fence well site. *See id.* at 469, 271 S.W.2d at 413.

32. *See id.* at 469, 271 S.W.2d at 412 (court allows mineral owner to use the leased premises to exclusion of servient surface estate).

the surface after production ceases,[33] since the land can be used in any manner reasonably necessary to effectuate the purposes of the lease.[34]

In contrast to the due regard concept, an independent limitation on the dominance of the mineral estate is the duty of the mineral owner or lessee not to use the surface in a negligent manner.[35] While holding that the mineral estate's exclusive right to possess the surface extended only to the portion needed for exploration and production, the Supreme Court of Texas in *Brown v. Lundell*[36] held a mineral lessee liable for negligently allowing salt water to percolate into the landowner's water supply.[37] The court emphasized the claim was for negligence and not for unreasonable use.[38] The *Brown* decision modified earlier holdings which allowed the mineral lessee to exclude the surface owner from the entire premises and did not qualify the lessee's right to possess the surface.[39]

With the right of the surface owner to recover damages for negligent acts secured, a guideline for establishing negligence was then announced.[40] A surface owner could recover for damages by establishing a specific negligent act by the mineral lessee which damaged the surface,[41] or that the mineral

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33. *See* Warren Petroleum v. Monzingo, 157 Tex. 479, 482, 304 S.W.2d 362, 363 (1957). The court found that absent a contractual agreement, the oil and gas lessee had no duty to restore the surface after abandoning the lease. *See id.* at 482, 304 S.W.2d at 362-63.

34. *See id.* at 482, 304 S.W.2d at 363. No mention of the due regard concept was made. *See id.* at 482, 304 S.W.2d at 363.

35. *See, e.g.,* Brown v. Lundell, 162 Tex. 84, 86, 344 S.W.2d 863, 865 (1961) (no right for operator to negligently use surface); Murfee v. Phillips Petroleum Co., 492 S.W.2d 667, 676 (Tex. Civ. App.—El Paso 1973, writ ref'd n.r.e.) (negligent act is ground for recovery); Miller v. Crown Cent. Petroleum Corp., 309 S.W.2d 876, 877 (Tex. Civ. App.—Eastland 1958, no writ) (dominant mineral estate cannot be negligent in use of surface).

36. 162 Tex. 85, 344 S.W.2d 864 (1961). The due regard consideration was briefly mentioned; the surface owner's rights were held to be separate and distinct; and either party extending his rights would be regarded as a trespasser. *See id.* at 87-90, 344 S.W.2d at 866.

37. *See id.* at 87, 344 S.W.2d at 867. The court held the operator "knew or should have known" that salt water would percolate into a fresh water well underlying the property. *See id.* at 93, 344 S.W.2d at 870. The operator's argument of consent by "volenti non fit injuria" was rejected because the surface owner had no knowledge that salt water would pollute underground water. *See id.* at 93, 344 S.W.2d at 869.

38. *See id.* at 86, 344 S.W.2d at 865.

39. *See* Sinclair Prairie Oil Co. v. Perry, 191 S.W.2d 484, 486 (Tex. Civ. App.—Texarkana 1945, no writ) (holder of mineral lease had exclusive right to use as much of surface as reasonable); *see also* Texas Co. v. Daugherty, 107 Tex. 226, 231-32, 176 S.W. 717, 718 (1915) (holding there was no limitation on number of wells which could be drilled, extent of the operations involved in production, or qualifications on the right of possession under lease provisions).

40. *See* Humble Oil & Ref. Co. v. Williams, 420 S.W.2d 133, 134 (Tex. 1967). The suit was for recovery for the wrongful removal of a tree by the mineral lessee during the construction of a road. *See id.* at 134.

41. *See id.* at 134.

lessee used more of the surface than was reasonably necessary to effectuate the objectives of the lease.[42] If the surface owner was not able to satisfy one of these requirements, his only method of protection and compensation would be to place surface damage provisions in the lease.[43]

B. *Recognition of the Surface Owner's Rights*

In 1971, the Supreme Court of Texas recognized the need to protect the surface owner from unbridled use of the surface by a mineral owner.[44] In determining the ownership of unnamed minerals in a mineral deed, the right of the surface owner to retain a beneficial use in the surface was observed.[45] The court protected the surface owner's interests by providing that when the removal of the unnamed mineral would result in destruction of the surface, title to the minerals will remain with surface owner.[46] The court reasoned that a surface owner would not convey minerals which would render his estate useless for agriculture or grazing uses absent clear intent in the deed.[47]

Following this desire to relieve the burden placed on the surface estate, the court began an attempt to protect the surface owner's rights by introducing the accommodation theory to resolve conflicts over surface use.[48] The theory of accommodation represents a balancing of the rights of both the surface and mineral owners to use the surface so as to utilize both estates to their full potential.[49] In applying an accommodation of rights approach, certain elements must be established before the surface estate can interfere

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42. *See id.* at 134-35. The landowner sought recovery on the grounds that the road interfered with his stock raising and was a nuisance. *See id.* at 134.

43. *See id.* at 134-35. There were no allegations of negligence or unnecessary use. *See id.* at 135. The court ignored the due regard concept. *See id.* at 134-35; *see also* Comment, *A New Approach to the Use of the Surface Estate by a Lessee Under an Oil and Gas Lease,* 13 S. TEX. L.J. 269, 278 (1982) (notes lack of due regard application).

44. *See* Acker v. Guinn, 464 S.W.2d 348, 352 (Tex. 1971); *see also* Getty Oil Co. v. Jones, 470 S.W.2d 618, 623 (Tex. 1971) (accommodation of surface owner's rights fashioned).

45. *See* Acker v. Guinn, 464 S.W.2d 348, 352-53 (Tex. 1971). The court recognized the mineral estate as dominant, but stated that it was not ordinarily within the contemplation of the parties that the utility of the surface would be destroyed. *See id.* at 352.

46. *See id.* at 352.

47. *See id.* at 352-53. The court did not apply the due regard limitation on the mineral estate. *See* Browder, *Accommodation of the Conflicting Interests of the Mineral Owner and the Surface Owner,* 25 INST. ON OIL & GAS L. & TAX'N 85, 97 (1974) (failure to mention due regard in *Acker).*

48. *See* Getty Oil Co. v. Jones, 470 S.W.2d 618, 623 (Tex. 1971); *see also* Browder, *Accommodation of the Conflicting Interests of the Mineral Owner and the Surface Owner,* 25 INST. ON OIL & GAS L. & TAX'N 85, 100 (1974) (*Getty* represents first appearance of accommodation).

49. *See* Sun Oil Co. v. Whitaker, 483 S.W.2d 808, 817-18 (Tex. 1972) (Daniel, J., dissenting) (accommodation test preserves both dominance of mineral estate and use of surface estate); *see also* Comment, *A New Approach to the Use of the Surface Estate by a Lessee Under an*

with the dominant mineral estate's use of the surface.[50] The initial inquiry is whether the surface owner can use the surface in any other reasonable fashion.[51] Second, there must be a finding of unreasonable use of the surface by the mineral owner.[52] Unreasonable use may be shown by presenting evidence of alternative methods of production used in the industry which would not interfere with the use and enjoyment of the landowner's property.[53] This accommodation approach also incorporates the due regard concept by recognizing that alternative methods of production can prevent impairment or destruction of the surface thereby protecting the surface owner's interests.[54]

In *Getty Oil Co. v. Jones,*[55] a dispute arose when the oil operator installed pumping units which interfered with the surface owner's automatic sprinkler system.[56] The surface owner sought an injunction to prevent the mineral lessee from using a beam-type pumping unit which, due to its height, prevented the irrigation system from functioning properly.[57] The court rejected the oil company's claim that it had the exclusive right to use the surface without the restriction of reasonable use,[58] thus expanding the mineral lessee's zone of liability from the subsurface to the airspace above the lease.[59] The court concluded that since the mineral lessee could bury his pumps without interfering with the surface owner's sprinkler system, public policy

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Oil and Gas Lease, 13 S. TEX. L.J. 269, 292 (1972) (*Getty* represents attempt to allow surface owner protection while reserving power of dominant estate).

50. *See* Getty Oil Co. v. Jones, 470 S.W.2d 618, 622-23 (Tex. 1971). Due to the shortage of labor, the court found the automatic irrigation system was the most reasonable means of developing the land. *See id.* at 622.

51. *See id.* at 622-23.

52. *See id.* at 623. The court noted that Getty could have installed underground pumping units to alleviate the interference with the sprinklers. *See id.* at 622-23.

53. *See id.* at 622-23. The landowner presented evidenced that another oil company had installed non-interfering underground pumping units on his property and that it would not be an extraordinary burden on Getty to do likewise. *See id.* at 620-22.

54. *See id.* at 622-23. The concept of due regard was said to describe more fully the considerations in determining what is reasonably necessary. *See id.* at 622; *see also* Note, *Oil & Gas — Getty Oil Co. v. Jones,* 3 ST. MARY'S L. J. 355, 358-60 (1971). The due regard concept has been used intermittently by the court without definition. *See id.* at 358-60.

55. 470 S.W.2d 618 (Tex. 1971).

56. *See id.* at 620. The irrigation system consisted of pipes which rotated around the field. *See id.* at 620.

57. *See id.* at 620. The pumps prevented the irrigation of a section of the land resulting in its depreciation. *See id.* at 620.

58. *See id.* at 621. The court rejected this contention stating as a matter of property law the use of surface extends to the air. *See id.* at 621.

59. *See id.* at 621. The rights of the surface owner in the subsurface and the soil itself had already been recognized. *See* Acker v. Guinn, 464 S.W.2d 348, 353 (Tex. 1971) (right to protection of soil); Brown v. Lundell, 162 Tex. 84, 86, 344 S.W.2d 863, 866 (1961) (protection of subsurface water supply).

demanded that he choose this alternative in order to maximize the productivity of both estates.[60]

In denying Getty's motion for rehearing, the court sought to clarify some misconceptions of its opinion and emphasized that possible uses available to the surface owner must be considered in determining if the mineral lessee's use is unreasonable.[61] The court emphasized that the threshold question in applying the accommodation or alternative methods test is whether there are reasonable alternative methods for developing the land available to the surface owner which would not be impaired by the mineral owner's use of the surface.[62] If reasonable alternatives to the landowner existed, he could not successfully contend that the mineral owner's use of the land was unreasonable.[63] However, if no reasonable alternatives are available to the landowner, he must prove the present use of the mineral estate is unreasonable because alternative methods of production available to the mineral owner exist which would not interfere with the landowner's intended use of the surface.[64] The decision in *Getty* has been said to diminish the dominance of the mineral estate by balancing the interests of the landowner and the mineral owner while forwarding the public policy of utilizing land for both agricultural and oil and gas production purposes.[65] At first impression, the accommodation test seems to be a workable solution to resolve the conflicts confronting surface and mineral owners, but in actuality the holding in *Getty* is narrow at best and difficult to apply in most cases.[66]

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60. *See* Getty Oil Co. v. Jones, 470 S.W.2d 618, 622-23 (Tex. 1971).

61. *See id.* at 627-28 (Steakley, J., on motion for rehearing). What would be a reasonable use of the surface by the mineral lessee depends upon the surface owner's use of the land for grazing or for a residential area. *See id.* at 627 (Steakley, J., on motion for rehearing).

62. *See id.* at 628 (Steakley, J., on motion for rehearing). The court found the landowner had no other reasonable means other than the sprinkler system to produce his land. *See id.* at 628 (Steakley, J., on motion for rehearing).

63. *See id.* at 628 (Steakley, J., on motion for rehearing). If no other alternatives are available to either party, the landowner must yield as the servient estate. *See id.* at 628 (Steakley, J., on motion for rehearing); *see also* Browder, *Accommodation of the Conflicting Interests of the Mineral Owner and the Surface Owner,* 25 INST. ON OIL & GAS L. & TAX'N 85, 98-99 (1974) (initial inquiry is finding reasonable alternatives for surface owner).

64. *See* Getty Oil Co. v. Jones, 470 S.W.2d 618, 628 (Tex. 1971) (Steakley, J., on motion for rehearing). Reasonable alternatives can be measured by methods and practices customary in the oil and gas industry which are utilized in similar circumstances. *See id.* at 628 (Steakley, J., on motion for rehearing).

65. *See id.* at 622-23 (Steakley, J., on motion for rehearing); *see also* McCoy, *Oil and Gas Annual Survey of Texas Law,* 26 SW. L.J. 59, 63 (1972) (court was balancing interests of oil and agriculture industries); Comment, *A New Approach to the Use of the Surface Estate by a Lessee Under an Oil and Gas Lease,* 13 S. TEX. L.J. 269, 295 (1972) (holding represents policy considerations of allowing both agriculture and oil industry productive use of land).

66. *See* Sun Oil Co. v. Whitaker, 483 S.W.2d 808, 812 (Tex. 1972) (limiting *Getty* application to alternative uses of surface on lease premises); Getty Oil Co. v. Jones, 470 S.W.2d 618, 629 (Tex. 1972) (Greenhill, J., concurring, on motion for rehearing) (holding is narrow and

C. *The Struggle to Achieve Accommodation*

The introduction of the accommodation theory seemingly indicated an increasing recognition of the surface owner's rights, however, it has been limited or not applied in subsequent cases.[67] As an example, the requirement that the mineral lessee employ alternative methods of production to allow the surface owner to fully use the land was restricted to situations where alternative methods were available on the leased premises.[68] In *Sun Oil Co. v. Whitaker,*[69] the Supreme Court of Texas was called upon to establish the rights of the mineral lessee to use fresh water from the leased surface estate.[70] The court held that the oil company had an implied grant to use the water found on the leasehold,[71] and that the use of water to waterflood the well reservoir was reasonably necessary to effectuate the lease's purposes.[72] The majority distinguished the alternative methods of production rationale utilized in *Getty*, because the oil producer had alternative methods of production existing on the leased premises.[73] The majority reasoned that requiring oil operators to employ the alternative method of production of

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applied only to reflect jury's verdict); TDC Eng'g, Inc. v. Dunlap, 686 S.W.2d 346, 349 (Tex. Civ. App.—Eastland 1985, writ ref'd n.r.e.) (no alternative methods for disposing of salt water on surface owner's property).

67. *See* Sun Oil Co. v. Whitaker, 483 S.W.2d 808, 812 (Tex. 1972). The court made no mention of accommodation of the surface owner's rights. *See* Comment, *A New Approach to the Use of the Surface Estate by a Lessee Under an Oil and Gas Lease,* 13 S. TEX. L.J. 269, 291 (1971) (court ignores question of due regard); *see also* Comment, *Sun's Broadening of Implied Surface Rights: A Reversal of the Trend Toward Accomodation,* 4 TEX. TECH L. REV. 341, 350 (1973) (*Sun Oil* is reversal of accommodation trend).

68. *See* Sun Oil Co. v. Whitaker, 483 S.W.2d 808, 812 (Tex. 1972) (no application of *Getty* accommodation doctrine).

69. 483 S.W.2d 808 (Tex. 1972).

70. *See id.* at 809-10. The court had previously held that Sun's use of the landowner's water was not reasonable because of the availability of water off the leased premises, but withdrew that opinion. *See* Comment, *Sun's Broadening of Implied Surface Rights: A Reversal of the Trend Towards Accommodation,* 4 TEX. TECH L. REV. 341, 345-46 (1973) (indicating court's reliance on *Getty* in its first opinion).

71. *See* Sun Oil Co. v. Whitaker, 483 S.W.2d 808, 810 (Tex. 1972). Water unsevered belongs to the surface, but the lease provided that Sun could use all of the water on the leasehold except the water contained in Whitaker's well. *See id.* at 811.

72. *See id.* at 811. Absent a lease provision, the mineral owner is still entitled, under an implied grant, to use as much of the surface water as necessary to achieve the purpose of the lease. *See* Fleming Found. v. Texaco, Inc., 337 S.W.2d 846, 852 (Tex. Civ. App.—Amarillo 1960, writ ref'd n.r.e.).

73. *See* Sun Oil Co. v. Whitaker, 483 S.W.2d 808, 812 (Tex. 1972). The alternative underground pumping units were already in operation on the leased premises in *Getty,* while Sun would be forced to buy and transport water from adjoining property. *Compare* Getty Oil Co. v. Jones, 470 S.W.2d 618, 620 (Tex. 1971) (alternative means of pumping already utilized on lease) *with* Sun Oil Co. v. Whitaker, 483 S.W.2d 808, 822 (Tex. 1972) (Daniel, J., dissenting) (alternative methods would require purchase of water from other tracts).

requiring them to purchase water off the leased premises would defeat the dominance and value of the mineral estate.[74]

In a well-reasoned dissent, Justice Daniel, observing the majority's disregard of the surface estate, argued that the lease granting the oil company the right to use water for producing oil did not contemplate the waterflood project and the resulting depletion of the water supply.[75] Justice Daniel's position suggested an attempt to free the surface owner from the stranglehold of a lease which was broadly interpreted and led to inequitable results.[76] Furthermore, because Texas public policy promotes conservation of water, an oil operator should not be granted an implied right to deplete a valuable freshwater reservoir.[77] The dissent also reasoned that the accommodation test should be applied to off-premises sources of production, and that forcing the oil company to purchase outside water would not be unreasonable under industry practices.[78] The overall effect of the *Sun Oil* decision was to restrict any accommodation of the surface owner's rights so as to favor the age-old dominance of the mineral estate.[79]

Another limitation placed on the implementation of the accommodation or alternative methods doctrine is the difficulty courts have in applying it for the benefit of the surface owner.[80] Instead of resolving conflicts with an application of accommodation principles, the mineral estate dominance has been lessened only by strict interpretations of rights implied in the mineral lease.[81] The Supreme Court of Texas resolved a dispute over the right of a

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74. *See* Sun Oil Co. v. Whitaker, 483 S.W.2d 808, 812 (Tex. 1972).

75. *See id.* at 814 (Daniel, J., dissenting).

76. *See id.* at 814 (Daniel J., dissenting) (pointing out right to consume surface should be expressed in lease); *cf.* Acker v. Guinn, 464 S.W.2d 348, 352 (Tex. 1971) (intent to allow destruction of the agricultural use of land must be clearly expressed in lease).

77. *See* Sun Oil Co. v. Whitaker, 483 S.W.2d 808, 818 (Tex. 1972) (Daniel, J., dissenting). Accommodation represents an attempt to preserve both the needs of the agriculture and oil industries. *See id.* at 817 (Daniel, J., dissenting).

78. *See id.* at 821 (Daniel, J., dissenting). Other area operators had purchased water for secondary recovery operations. *See id.* at 821-22 (Daniel, J., dissenting).

79. *See id.* at 822 (Daniel, J., dissenting). Justice Daniel feared that the concept of accommodation of surface owner's rights was in jeopardy after the majority's holding. *See id.* at 822 (Daniel, J., dissenting); *see also* Comment, *Sun's Broadening of Implied Surface Rights: A Reversal of the Trend Toward Accommodation,* 4 TEX. TECH L. REV. 341, 350 (1973) (reversal of trend toward accommodation).

80. *See, e.g.,* Ball v. Dillard, 602 S.W.2d 521, 523 (Tex. 1980) (case decided on dominant mineral estate theory without discussion of accommodation); Humble Oil & Ref. Co. v. West, 508 S.W.2d 812, 816 (Tex. 1974) (in determining correlative rights, reasonable accommodations should be observed when proper factual context exists); TDC Eng'g, Inc. v. Dunlap, 686 S.W.2d 346, 349 (Tex. Civ. App.—Eastland 1985, writ ref'd n.r.e.) (court found no alternative means existing on premises for disposing of salt water).

81. *See* Robinson v. Robbins Petroleum Corp., 501 S.W.2d 865, 867-68 (Tex. 1973); *see also* Note, *Oil and Gas — Robinson v. Robbins Petroleum Corp., Inc.,* 52 TEXAS L. REV. 781,

mineral lessee to pump salt water from the surface owner's estate in order to waterflood other tracts of land under the mineral lease.[82] The surface owner's tract was subject to a mineral lease which included his property as well as adjacent tracts.[83] The court held that salt water is not a mineral and therefore belonged to the surface, but recognized the mineral estate had an implied easement to use what was reasonably necessary to produce the oil.[84] This implied right, however, was limited to the use of water on the surface owner's property and did not extend to surrounding tracts.[85] There was no attempt to apply an alternative method of production approach nor was accommodation mentioned.[86]

Further insight into the theory of accommodation was revealed in a dispute between royalty holders and an oil company over the injection of the oil company's gas into a reservoir containing gas owned by the royalty holders.[87] Although this was not a suit over the right to use the surface, the Supreme Court of Texas applied the rationale of accommodation to resolve the conflicting rights of the parties.[88] In summarizing the court's recent accommodation cases, Justice Steakley interpreted the decision in *Acker v. Guinn* as protecting the surface owner from conveyances which would result in destruction of the surface.[89] The accommodation doctrine of *Getty*, however, was limited to the unique facts of that case and the policy reasons of promoting agriculture.[90] The court reversed an injunction which prohibited the oil company lessee from using an underground reservoir on the grounds

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786 (1974) (observing court's reliance on *Acker* in limiting mineral lessee's power under the lease).

82. *See* Robinson v. Robbins Petroleum Corp., 501 S.W.2d 865, 866 (Tex. 1973). The mineral owner brought the action to prevent the surface owner from interfering with his waterflood project, and the surface owner counterclaimed for damages resulting from the use of the salt water. *See id.* at 866.

83. *See id.* at 866.

84. *See id.* at 867. The court treated salt water the same as fresh water and refused to make a distinction based on the mineral content of the solution if salt was not being extracted from the water. *See id.* at 867; *see also* Note, *Oil and Gas — Robinson v. Robbins Petroleum Corp.*, 52 TEXAS L. REV. 781, 783 (1974) (classification of salt water as non-mineral in *Robinson).*

85. *See* Robinson v. Robbins Petroleum Corp., 501 S.W.2d 865, 867-68 (Tex. 1973). The court reasoned that allowing the mineral estate owner to use salt water for other acreage would not be acting with due regard for the rights of the surface estate. *See id.* at 867-68.

86. *Cf. id.* at 867 (court resolved case on due regard for surface owner's rights).

87. *See* Humble Oil & Ref. Co. v. West, 508 S.W.2d 812, 814 (Tex. 1974). The gas was injected into an underground reservoir to prevent its destruction from encroaching water. *See id.* at 813.

88. *See id.* at 815. The court dissolved the injunction based on the principles of accommodation and public policy of providing the public with energy. *See id.* at 815-16.

89. *See id.* at 815; *see also* Acker v. Guinn, 464 S.W.2d 348, 353 (Tex. 1971) (iron ore removal would destroy the usefulness of the surface).

90. *See* Humble Oil & Ref. Co. v. West, 508 S.W.2d 812, 815-16 (Tex. 1974); *see also*

that the injunction would deny the public a ready energy supply.[91] Similarly, the more recent decisions of the Supreme Court of Texas on surface damages and correlative rights have given the accommodation approach little attention.[92] Emphasizing the dominance of the mineral estate, a surface lessee was held liable for interfering with the mineral lessee's right to enter the leasehold to explore for and produce oil and gas.[93] The surface owner's liability included the mineral lessee's additional cost of rehiring its driller at a higher contract price.[94]

The recent *Moser v. U. S. Steel Corp.*[95] decision, concerning a confrontation between the two estates though not involving a claim for surface damages,[96] exhibits a desire to protect the surface owner from the removal of unnamed minerals from his land.[97] The *Moser* rule provided that when the mineral conveyed is not specifically named in the deed, liability for *any* sur-

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Getty Oil Co. v. Jones, 470 S.W.2d 618, 629 (Tex. 1971) (Greenhill, J., concurring, on motion for rehearing) (holding should be limited to facts of the case).

91. *See* Humble Oil & Ref. Co. v. West, 508 S.W.2d 812, 816 (Tex. 1974).

92. *See* Ball v. Dillard, 602 S.W.2d 521, 526 (Tex. 1980) (the accommodation approach not mentioned in determining whether surface lessee could exclude oil operator); *see also* Moser v. United States Steel Corp., 676 S.W.2d 99, 103 (Tex. 1984) (court mentions *Getty* without addressing accommodation).

93. *See* Ball v. Dillard, 602 S.W.2d 521, 524 (Tex. 1980).

94. *See id.* at 523-24. The dissent believed the controlling issue in the case was whether the oil company could enter through a gate and use a road that the surface lessee was obligated to protect. *See id.* at 526 (Spears, J., dissenting). The right of the surface owner to prohibit other individuals from using the road had been granted in his lease. *See id.* at 526 (Spears, J., dissenting). The majority decision placed the surface lessee in the precarious position of choosing between being sued by the mineral lessee for violation of the right of ingress, or being sued by lessor for violating his lease. *See id.* at 527 (Spears, J., dissenting).

95. 676 S.W.2d 99 (Tex. 1984).

96. *See id.* at 100. The suit was to determine if uranium was included in the deed reservation of "oil and gas and other minerals". *See id.* at 100. In determining whether subsurface uranium belonged to the mineral estate, the court modified its earlier decisions on classification of subsurface minerals and held uranium was a mineral within the ordinary meaning of the word. *See id.* at 101-02. The determinations of unnamed mineral conveyances have been done on a substance-by-substance basis. *See, e.g.,* Sun Oil Co.v. Whitaker, 483 S.W.2d 808, 811 (Tex. 1972) (water is not a mineral); Atwood v. Rodman, 355 S.W.2d 206, 212-14 (Tex. Civ. App.—El Paso 1962, writ ref'd n.r.e.) (limestone, caliche, and surface shale not minerals and belong to surface estate); Union Sulphur Co. v. Texas Gulf Sulphur Co., 42 S.W.2d 182, 184 (Tex. Civ. App.—Austin 1931, writ ref'd) (sulphur conveyed by oil and gas lease). *See generally* Note, *Mines and Minerals—Title to Minerals, Moser v. United States Steel Corp.,* 15 ST. MARY'S L.J. 477, 480 (1984) (discussion of various determinations of what constitutes minerals).

97. *See* Moser v. United States Steel Corp., 676 S.W.2d 99, 103 (Tex. 1984). The simple solution to this strict liability burden would be to name the mineral which would result in imposing liability only for negligence or unreasonable use. *See* Note, *Mines and Minerals-Title to Minerals, Moser v. United States Steel Corp.,* 15 ST. MARY'S L.J. 477, 487-88 (1984) (avoidance of strict liability by naming minerals).

face damage arising from removal of the substance is not limited to negligence but will be premised on strict liability.[98] While this decision changed the methods of classifying subsurface substances, the due regard and accommodation doctrines were said to be left undisturbed.[99] By imposing strict liability compensation for damage resulting from the production of unnamed minerals, the surface owner's interests have been strengthened.[100] It has been predicted, however, that further surface damage litigation will arise because of the surface owner's diminished burden in establishing liability.[101]

Summarizing the development of the rights of the mineral owner's use of the surface, the dominance of the mineral owner to use the surface as he sees fit has been compromised by a trend towards accommodation and the narrowing of implied use under the lease.[102] However, although the concepts of due regard and accommodation are often mentioned, when applied, they yield inconsistent results.[103] The surface owner continues to have both his real and personal property damaged without the benefit of predictable rules for recovery.[104]

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98. *See* Moser v. United States Steel Corp., 676 S.W.2d 99, 103 (Tex. 1984). The holding of strict liability for the removal of unnamed minerals is not startling in light of the Texas Uranium Surface and Mining Act. *See* TEX. NAT. RES. CODE ANN. §§ 131.001-132.000 (Vernon 1978 & Supp. 1985) (requiring reclamation, bond posting, and permit for surface mining).

99. *See* Moser v. United States Steel Corp., 676 S.W.2d 99, 101 (Tex. 1984). The methods of determining title to minerals in *Acker* and *Reed v. Wylie* were abandoned for all leases or deeds after June 8, 1983. *See id.* at 101; *see also* Note, *Mines and Minerals-Title to Minerals, Moser v. United States Steel Corp.*, 15 ST. MARY'S L.J. 477, 480-81 (1984) (recognizes the modification of previous methods of title determinations).

100. *Cf.* Moser v. United States Steel Corp., 676 S.W.2d 99, 103 (Tex. 1984) (limitation on dominant estate in cases of unnamed minerals requires reducing liability to strict liability).

101. *See* Note, *Mines and Minerals-Title to Minerals, Moser v. United States Steel Corp.*, 15 ST. MARY'S L.J. 477, 491 (1984) (*Moser* leaves many issues unresolved and litigation over title to other minerals will increase).

102. *See* Moser v. United States Steel Corp., 676 S.W.2d 99, 103 (Tex. 1984). The mineral owner who receives a specific grant "is restricted in his use of the surface estate by the dictates of 'due regard' or 'accommodation doctrine' ". *See id.* at 103.

103. *Compare* Humble Oil & Ref. Co. v. West, 508 S.W.2d 812, 815 (Tex. 1974) (reasonable accommodations should be observed to resolve conflicting interests) *with* Ball v. Dillard, 602 S.W.2d 521, 523 (Tex. 1980) (mineral estate is dominant and surface lessee may not interfere with mineral lessee's right to enter property).

104. *See, e.g.*, Brown v. Lundell, 162 Tex. 85, 86, 344 S.W.2d 863, 866-67 (1961) (damage to surface owner's wells); Warren v. Martin, 153 Tex. 465, 467, 271 S.W.2d 410, 412 (1954) (injury to surface owner's cattle resulting from drinking oil); Klostermann v. Houston Geophysical Co., 315 S.W.2d 664, 664 (Tex. Civ. App.—San Antonio 1958, writ ref'd) (suit for damage to home resulting from seismic explosions).

IV. TYPES OF SURFACE DAMAGES

A. *Injuries to Livestock*

One of the more common damages suffered by surface owners involves injuries to livestock.[105] The typical injury is poisoning of the livestock due to their ingestion of oil and other chemicals.[106] In Texas the mineral lessee is under no obligation to fence the well site area, thus precluding most attempts at recovery by the landowner.[107] The courts have rejected the argument of res ipsa loquitur,[108] and have required a showing of negligence before the mineral lessee will be deemed liable.[109] Because of these strict requirements, landowners have been largely unsuccessful in suits for injuries

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105. *See, e.g.,* Warren Petroleum Corp. v. Martin, 153 Tex. 465, 467, 271 S.W.2d 410, 412 (1954) (cows killed by drinking oil which escaped from pump); Texaco, Inc. v. Spires, 435 S.W.2d 550, 552 (Tex. Civ. App.—Eastland 1968, writ ref'd n.r.e.) (horse killed in defective cattleguard); Curry v. Ingram, 397 S.W.2d 484, 488-89 (Tex. Civ. App.—Eastland 1965, writ ref'd n.r.e.) (sheep killed from drinking escaping salt water).

106. *See, e.g.,* Scurlock Oil Co. v. Harrell, 443 S.W.2d 334, 338 (Tex. Civ. App.—Austin 1969, writ ref'd n.r.e.) (sheep killed from drinking oil escaping from pipeline); Strong v. Caudill, 389 S.W.2d 736, 737 (Tex. Civ. App.—Fort Worth 1965, writ ref'd n.r.e.) (cattle killed from eating "heavy metal poison" left around well); Shelburne v. Christie-Hickman Drilling Co., 295 S.W.2d 476, 477 (Tex. Civ. App.—Amarillo 1956, no writ) (cattle killed by drinking from slush pit); *cf.* Texaco, Inc. v. Spires, 435 S.W.2d 550, 552 (Tex. Civ. App.—Eastland 1968, writ ref'd n.r.e.) (horse killed by defective cattleguard); *cf. also* Trinity Prod. Co. v. Bennet, 258 S.W.2d 160, 160 (Tex. Civ. App.—Amarillo 1953, no writ) (cow crushed in oil well pump). *See generally* Keeton & Jones, *Tort Liability and the Oil and Gas Industry,* 35 TEXAS L. REV. 1, 1-3 (1956) (injuries resulting from escape of substances involved in oil production).

107. *See* Warren Petroleum Corp. v. Martin, 153 Tex. 465, 467, 271 S.W.2d 410, 412 (1954). The only duty owed to surface owner is not to "intentionally, willfully or wantonly injure his cattle." *See id.* at 469, 271 S.W.2d at 413. Cattle have been likened to trespassers when killed upon the area of the well site. *See* Amerada-Hess Corp. v. Iparrea, 495 S.W.2d 60, 62 (Tex. Civ. App.—El Paso 1973, writ ref'd n.r.e.). The lower courts have applied a "no duty to fence" rule to reject cattle owner's claim for damages. *See, e.g.,* Young v. McGill, 473 S.W.2d 672, 673 (Tex. Civ. App.—El Paso 1971, no writ) (oil and gas lessee has no duty to fence pit; therefore, no negligence); McCarty v. White, 314 S.W.2d 155, 157 (Tex. Civ. App.—Eastland 1958, no writ) (fact that operator fenced separator did not create a duty to do so); Shelburne v. Christie-Hickman Drilling Co., 295 S.W.2d 476, 477-78 (Tex. Civ. App.—Amarillo 1956, no writ) (no duty to guard or fence slush pit).

108. *See, e.g.,* Lynn v. Maag, 220 F.2d 703, 705 (5th Cir. 1955) (doctrine of res ipsa loquitur does not apply in these cases involving the servient surface estate); Jones v. Nafco Oil & Gas, Inc., 380 S.W.2d 570, 575 (Tex. 1964) (res ipsa loquitur not allowed because independent contractor operated well); Carter v. Simmons, 178 S.W.2d 743, 746 (Tex. Civ. App.—Waco 1944, no writ) (failure to show breach of legal duty not established, res ipsa loquitur not allowed; therefore, no presumed negligence).

109. *See, e.g.,* Warren Petroleum Corp. v. Martin, 153 Tex. 465, 468, 271 S.W.2d 410, 412 (1954) (mineral lessee not negligent because he had no duty to fence well); Amerada-Hess Corp. v. Iparrea, 495 S.W.2d 60, 65 (Tex. Civ. App.—El Paso 1973, writ ref'd n.r.e.) (absent negligence, no recovery for injured livestock); McCarty v. White, 314 S.W.2d 155, 156 (Tex.

to livestock.[110] These holdings have been criticized as unjust since it is unlikely that the landowner would have contemplated an obligation to protect his livestock from the mineral lessee's operations when the severance occurred.[111]

B. *Damage to Water*

There have been many conflicts between landowners and mineral lessees regarding both the right to use water on the leasehold premises and liability for water polluted during production.[112] Although fresh water belongs to the landowner,[113] it is subject to use by the mineral owner.[114] While the mineral owner has the right to use water to effectuate the purpose of the lease, this right does not extend to uses off the premises.[115] Even though the mineral owner can use available water, he cannot pollute it.[116] Most water pollution is caused by contamination of underground water supplies and creeks from overflowing salt water pits.[117] The surface owner's burden of

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Civ. App.—Eastland 1958, no writ) (no proof of proximate cause established for death of sheep).

110. *See* Amerada-Hess Corp. v. Iparrea, 495 S.W.2d 60, 64 (Tex. Civ. App.—El Paso 1973, writ ref'd n.r.e.) (evidence did not support negligence); Weaver v. Reed, 303 S.W.2d 808, 810 (Tex. Civ. App.—Eastland 1957, no writ) (negligence not established). *But see* Texaco, Inc. v. Spires, 435 S.W.2d 550, 554 (Tex. Civ. App.—Eastland 1968, writ ref'd n.r.e.) (evidence supported negligent construction of cattle guard).

111. *See* Keeton & Jones, *Tort Liability and the Oil and Gas Industry,* 35 TEXAS L. REV. 1,7 (1956) (pointing out that courts could have ruled that surface owner would anticipate oil operator to fence area).

112. *See, e.g.,* Robinson v. Robbins Petroleum Corp., 501 S.W.2d 865, 866 (Tex. 1973) (suit over mineral owner's right to use salt water for waterflooding); Murfee v. Phillips Petroleum Co., 492 S.W.2d 667, 670 (Tex. Civ. App.—El Paso 1973, writ ref'd n.r.e.) (suit for water pollution of underground water supply); Christy v. Hamilton, 384 S.W.2d 795, 795 (Tex. Civ. App.—Amarillo 1964, no writ) (action for pollution of pond). *See generally* Keeton & Jones, *Tort Liability and the Oil and Gas Industry,* 35 TEXAS L. REV. 1, 10 (1956) (discussion of tort liability for water pollution).

113. *See* Robinson v. Robbins Petroleum Corp., 501 S.W.2d 865, 867 (Tex. 1973) (salt water treated same as fresh water and belongs to surface); *see also* Sun Oil Co. v. Whitaker, 483 S.W.2d 808, 811 (Tex. 1972) (water belongs to surface estate).

114. *See* Sun Oil Co. v. Whitaker, 483 S.W.2d 808, 811 (Tex. 1972) (mineral owner has right to use water to develop and produce oil and gas).

115. *See* Robinson v. Robbins Petroleum Corp., 501 S.W.2d 865, 867 (Tex. 1973) (implied right to use the water for the production does not extend to produce wells off the leased premises).

116. *See* Brown v. Lundell, 162 Tex. 84, 88, 344 S.W.2d 863, 866-67 (1961) (oil operator found negligent in disposing salt water into surface owner's water supply).

117. *See, e.g.,* Murfee v. Phillips Petroleum Co., 492 S.W.2d 667, 670 (Tex. Civ. App.—El Paso 1973, writ ref'd n.r.e.) (polluting of underwater well supply); Texaco, Inc. v. Joffrion, 363 S.W.2d 827, 830 (Tex. Civ. App.—Texarkana 1962, writ ref'd n.r.e.) (slush pits containing oil, chemicals, and salt water overflowed into water supply); Geochemical Surveys v. Dietz,

proof consists of showing that the mineral lessee was negligent in his actions and that these negligent acts were the proximate cause of the water pollution or waste.[118] This burden may be satisfied by showing that the mineral owner used more of the surface than necessary or operated the well contrary to the customs of the oil and gas industry.[119] Due to many obvious acts of negligence, surface owners have been more successful in suits for water pollution than in actions for injuries to cattle.[120]

C. *Damage to Crops*

Farmers who hold their land as surface tenants often suffer losses to their crops as a result of the exploration and production of oil and gas.[121] Without a crop damage provision in the lease, agriculture producers can only recover for the damages which are a result of negligence or unreasonable use of the surface.[122] Destruction of crops can result from a variety of activities

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340 S.W.2d 114, 115 (Tex. Civ. App.—Austin 1960, writ ref'd n.r.e.) (damage to water well due to seepage of salt water).

118. *See, e.g.,* Brown v. Lundell, 162 Tex. 84, 86, 344 S.W.2d 863, 867 (1961) (right to use surface does not permit negligent operations); Murfee v. Phillips Petroleum Co., 492 S.W.2d 667, 673 (Tex. Civ. App.—El Paso 1973, writ ref'd n.r.e.) (specific finding of negligent act to impose liability); Texaco, Inc. v. Joffrion, 363 S.W.2d 827, 831-32 (Tex. Civ. App.—Texarkana 1962, writ ref'd n.r.e.) (finding of negligence and proximate cause justifies damages).

119. *See* Brown v. Lundell, 162 Tex. 84, 86, 344 S.W.2d 863, 866-67 (1961) (allowing salt water to contaminate fresh water supply constituted unreasonable use); Texaco, Inc. v. Joffrion 363 S.W.2d 827, 831 (Tex. Civ. App.—Texarkana 1962, writ ref'd n.r.e.) (recognizing that custom in itself may be negligent).

120. *Compare* General Crude Oil Co. v. Aiken, 162 Tex. 104, 110-12, 344 S.W.2d 668, 669 (1961) (rancher recovers for negligent disposal of salt water) *and* Texaco, Inc. v. Joffrion, 363 S.W.2d 827, 830 (Tex. Civ. App.—Texarkana 1962, writ ref'd n.r.e.) (judgment supported by findings of negligent disposal of salt water) *with* Baker v. Davis, 211 S.W.2d 246, 247 (Tex. Civ. App.—Eastland 1948, no writ) (surface lessee unable to recover for steer killed by pumping jack) *and* Carter v. Simmons, 178 S.W.2d 743, 746-47 (Tex. Civ. App.—Waco 1944, no writ) (surface owner unable to establish negligence and proximate cause for cattle's death). Some surface owners have been unsuccessful in actions for damage to water sources. *See* Murfee v. Phillips Petroleum Co., 492 S.W.2d 667, 672 (Tex. Civ. App.—El Paso 1973, writ ref'd n.r.e.) (surface owner failed to prove specific act of negligence); Christy v. Hamilton, 384 S.W.2d 795, 796 (Tex. Civ. App.—Amarillo 1964, no writ) (petition did not allege duty necessary to establish cause of action).

121. *See, e.g.,* Finder v. Stanford, 351 S.W.2d 289, 291-92 (Tex. Civ. App.—Houston 1961, no writ) (absent contractual agreement, surface lessee must show specific negligence or excessive use to recover for crop damage); Phillips Petroleum Co. v. Cargill, 340 S.W.2d 877, 880 (Tex. Civ. App.—Amarillo 1960, no writ) (forbearance of drilling was not consideration to justify crop surface damages); Chapapas v. Delhi-Taylor Oil Corp., 323 S.W.2d 64, 66 (Tex. Civ. App.—San Antonio 1959, writ ref'd n.r.e.) (oral agreement not sufficient to recover for surface damages).

122. *See* Robinson Drilling Co. v. Thomas, 385 S.W.2d 725, 726 (Tex. Civ. App.—East-

related to the production of oil and gas.[123] Often such damage results in permanent injury to the land.[124] In successful suits for damages, surface owners have established negligence against the mineral lessee for allowing oil to escape from the well,[125] permitting pipelines to drain onto the land,[126] and for disposing of salt water over crops.[127]

D. *Damage to the Surface in General*

With any production of oil and gas, it is inevitable that the surface surrounding the well site will be damaged.[128] Roads must be built, slush pits must be excavated, storage tanks constructed, pipelines laid, and water and chemicals disposed.[129] The typical oil and gas lease provides for such uses, but if it does not, the mineral lessee has an implied right to use the surface as is reasonably necessary.[130] After production ceases, and the need to utilize the surface disappears, the mineral lessee is under no duty to restore the

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land 1964, no writ); *see also* Currey v. Ingram, 397 S.W.2d 484, 486 (Tex. Civ. App.—Eastland 1965, writ ref'd n.r.e.) (mineral lessee may not negligently damage surface).

123. *See* Lone Star Gas Co. v. McGuire, 570 S.W.2d 229, 230 (Tex. Civ. App.—Waco 1978, no writ) (salt water pollution to land); Robinson Drilling Co. v. Thomas, 385 S.W.2d 725, 727 (Tex. Civ. App.—Eastland 1964, no writ) (oil tank overflowed); Shell Oil Co. v. Dennison, 132 S.W.2d 609, 609 (Tex. Civ. App.—El Paso 1939, no writ) (oil wells sprayed crop).

124. *See* Currey v. Ingram, 397 S.W.2d 484, 490 (Tex. Civ. App.—Eastland 1965, writ ref'd n.r.e.); *see also* Lone Star Gas Co. v. McGuire, 570 S.W.2d 229, 230-31 (Tex. Civ. App.—Waco 1978, no writ) (salt water contaminated soil, preventing growth of bermuda grass).

125. *See* Robinson Drilling Co. v. Thomas, 385 S.W.2d 725, 730 (Tex. Civ. App.—Eastland 1964, no writ).

126. *See* Lone Star Gas Co. v. McGuire, 570 S.W.2d 229, 230 (Tex. Civ. App.—Waco 1978, no writ).

127. *See* Currey v. Ingram, 397 S.W.2d 484, 486 (Tex. Civ. App.—Eastland 1965, writ ref'd n.r.e.).

128. *Cf.* Keeton & Jones, *Tort Liability and the Oil and Gas Industry,* 35 TEXAS L. REV. 1, 1-2 (1956); *cf. also* KAN. STAT. ANN. § 55-132a (1976) (requiring operator to restore surface after abandoning any well).

129. *See* Texaco, Inc. v. Faris, 413 S.W.2d 147, 149 (Tex. Civ. App.—El Paso 1967, writ ref'd n.r.e.); Browder, *The Dominant Oil and Gas Estate — Master or Servant of the Servient Estate,* 17 SW. L.J. 25, 32 (1963); *see also* Keeton & Jones, *Tort Liability and the Oil and Gas Industry,* 35 TEXAS L. REV. 1, 3 (1956) (typical lease will grant mineral owner use of surface).

130. *See, e.g.,* Gulf Oil Corp. v. Walton, 317 S.W.2d 260, 263 (Tex. Civ. App.—El Paso 1958, no writ) (right to build roads to drill sites); J. M. Miller v. Crown Cent. Petroleum Corp., 309 S.W.2d 876, 878-79 (Tex. Civ. App.—Eastland 1958, no writ) (right to pipeline salt water across surface); Joyner v. R. H. Dearing & Sons, 134 S.W.2d 757, 759 (Tex. Civ. App.—El Paso 1939, writ dism'd judgmt cor.) (mineral lessee could build living quarters for employees). The right to build storage tanks and disposal pits has been upheld. *See* Warren Petroleum Corp. v. Martin, 153 Tex. 465, 467, 271 S.W.2d 410, 413 (1954) (right to have slush pits on premises); *see also* Pitzer & West v. Williamson, 159 S.W.2d 181, 182 (Tex. Civ. App.—Fort Worth 1942, writ dism'd) (lessee could maintain storage tanks and slush pits on premises).

premises to its original condition.[131] Absent a duty to restore, the location of the well site could have disastrous consequences to the use and enjoyment of the surface by the landowner.[132] Surface owners have had wells implanted in their front yards, and production has also disrupted harvesting.[133] As a matter of law, the surface owner has no right to prevent the mineral lessee from drilling the well where he pleases and therefore must protect himself in the form of a lease provision.[134] A modification of these harsh and inequitable exclusive right rules may arise out of the due regard concept, and one lower court decision seemed to protect the interests of the surface owner by preventing a well location which would ruin the landowner's grazing.[135] Under current Texas law, however, the surface owner risks that his land will be left scarred by oil and gas production, and if he does not, or cannot, protect himself contractually, he must absorb the damages.[136]

V. REMEDIES AVAILABLE TO THE SURFACE OWNER

A. *Protection by the Oil and Gas Lease*

The most effective way for a surface owner to protect himself from incurring damages to his land without compensation is to insert a surface damage clause into the oil and gas lease.[137] Ideally, the surface damage provision

131. *See* Warren Petroleum Corp. v. Monzingo, 157 Tex. 479, 481, 304 S.W.2d 362, 363 (1957) (no obligation that surface will be restored absent provision in lease).

132. *See* Grimes v. Goodman Drilling Co., 216 S.W. 202, 203-04 (Tex. Civ. App.—Fort Worth 1919, writ dism'd) (oil well placed in front yard of surface owner and slush pit splattered against house). The noise was so great as to prevent ordinary conversation and interrupt sleep. *See id.* at 203; *see also* Robinson Drilling Co. v. Moses, 256 S.W.2d 650, 651 (Tex. Civ. App.—Eastland 1953, no writ) (cotton crop destroyed before farmer could harvest it).

133. *See* Grimes v. Goodman Drilling Co., 216 S.W. 202, 203 (Tex. Civ. App.—Fort Worth 1919, writ dism'd) (well in front of house); Robinson Drilling Co. v. Moses, 256 S.W.2d 650, 651 (Tex. Civ. App.—Eastland 1953, no writ) (oil well prevented harvest of cotton).

134. *See* Reading & Bates Offshore Drilling Co. v. Jergenson, 453 S.W.2d 853, 854-55 (Tex. Civ. App.—Eastland 1970, writ ref'd n.r.e.) (parties had contracted that well would not be near barn); *see also* Keeton & Jones, *Tort Liability and the Oil and Gas Industry,* 35 TEXAS L. REV. 1, 4 (1956) (selection of drill site absolute right). *See generally* Browder, *Accommodation of the Conflicting Interests of the Mineral Owner and the Surface Owner,* 25 INST. ON OIL & GAS L. & TAX'N 85, 102 (1976) (mineral owner generally not liable for injuries resulting from selection of well site).

135. *See* Reading & Bates Offshore Drilling Co. v. Jergenson, 453 S.W.2d 853, 854-56 (Tex. Civ. App.—Eastland 1970, writ ref'd n.r.e.) (court upheld jury's verdict that well's placement was not reasonable).

136. *See* Warren Petroleum Corp. v. Monzingo, 157 Tex. 479, 481, 301 S.W.2d 362, 363 (1957) (obligation to restore land must be provided for in lease).

137. *See, e.g.,* Mobil Oil Corp. v. Brennan, 385 F.2d 951, 955 (5th Cir. 1967) (express language in lease may impose obligation to restore); Humble Oil & Ref. Co. v. Williams, 420 S.W.2d 133, 135 (Tex. 1967) (surface owner may provide for surface damages in contract); Meyer v. Cox, 252 S.W.2d 207, 208 (Tex. Civ. App.—San Antonio 1952, writ ref'd) (parties

should provide for a method to determine the amount of damages.[138] Although earlier case law suggested that without a lease provision for recovery of damages, liability was limited to negligence or unreasonable use;[139] the Supreme Court of Texas has recognized a right of recovery for damages not contemplated when the lease was executed.[140] The surface owner may avoid the burden of proving unreasonable use in a suit for damages by expressly limiting the use of the surface in the lease.[141]

While the protection afforded by a surface damage clause can be a viable method to ensure compensation, this alternative is not always available to the surface lessee.[142] Typically, the surface owner or lessee takes possession of the land after the mineral estate has already been severed and therefore must rely on the grantor of the mineral lease to have provided for compensation for surface damages in the lease agreement.[143]

Often agricultural tenants have suffered crop damages without compensation because they could not establish negligence or failed to protect them-

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may contract for damages although lessee has right to use surface). *See generally* Comment, *A New Approach to the Use of the Surface Estate by a Lessee Under an Oil and Gas Lease,* 13 S. TEX. L.J. 269, 280-81 (1982) (discussion of strict interpretation of leases).

138. *See* Keeton & Jones, *Tort Liability and the Oil and Gas Industry,* 35 TEXAS L. REV. 1, 4-5 n.12 (1956).

139. *See, e.g.,* Warren Petroleum Corp. v. Monzingo, 157 Tex. 479, 481, 304 S.W.2d 362, 363 (1957) (duty to restore premises will not be implied); Reading & Bates Offshore Drilling Co. v. Jergenson, 453 S.W.2d 853, 854-55 (Tex. Civ. App.—Eastland 1970, writ ref'd n.r.e.) (absent surface damage clause, lessee may use land as reasonably necessary); Premier Petroleum Co. v. Box, 255 S.W.2d 298, 299-300 (Tex. Civ. App.—Eastland 1953, writ dism'd w.o.j.) (recovery for damages provided in lease does not require proof of negligence).

140. *See* Robinson v. Robbins Petroleum Corp., 501 S.W.2d 865, 868 (Tex. 1973). *But see* Getty Oil Co. v. Jones, 470 S.W.2d 618, 625 (Tex. 1971) (McGee, J., dissenting) (court should not broaden lessee's duty under lease).

141. *See* Texaco, Inc. v. Faris, 413 S.W.2d 147, 149-50 (Tex. Civ. App.—El Paso 1967, writ ref'd n.r.e.).

142. *See, e.g.,* Kenny v. Texas Gulf Sulphur Co., 351 S.W.2d 612, 614 (Tex. Civ. App.—Waco 1961, no writ) (surface lessee who purchased burdened estate subject to mineral lease could not recover for subsidence from mineral owner); Finder v. Stanford, 351 S.W.2d 289, 291-92 (Tex. Civ. App.—Houston 1961, no writ) (absent surface damage clause, surface lessee must prove negligence); Placid Oil Co. v. Lee, 243 S.W.2d 860, 861 (Tex. Civ. App.—Eastland 1951, no writ) (surface lessee must allege specific act of negligence when he takes land subject to oil lease).

143. *See, e.g.,* TDC Eng'g, Inc. v. Dunlap, 686 S.W.2d 346, 348 (Tex. Civ. App.—Eastland 1985, writ ref'd n.r.e.) (surface owner purchased land subject to mineral lease and could not sue for diminution of land); Finder v. Stanford, 351 S.W.2d 289, 292 (Tex. Civ. App.—Houston 1961, no writ) (when lessee takes subject to oil and gas lease, absent damage provision he must allege negligence or unreasonable use); Miller v. Crown Cent. Petroleum Corp., 309 S.W.2d 876, 877 (Tex. Civ. App.—Eastland 1958, no writ) (lessee could not receive damages for use of land authorized under lease). *See generally* Cassin, *Land Use Permitted on Oil and Gas Lessee,* 37 TEXAS L. REV. 889, 898-99 (1959) (revealing that surface lessees and subsequent purchasers take land subject to mineral lease).

selves with contractual agreements providing for surface damages.[144] Other problems arise out of contractual agreements because many surface owners are ignorant of the standards of the oil and gas industry and about what damages may occur as a result of mineral exploration.[145] Considering the fact that many surface lessees and other surface owners cannot often afford to litigate contract disputes, the contractual surface damage provisions do not always provide adequate protection to the surface owner or lessee.[146]

B. *Injunctions and Temporary Restraining Orders*

Surface owners have also sought protection from damages to their land by use of temporary injunctions or restraining orders.[147] These remedies have often proven unsuccessful for surface owners because they are seldom granted, and unfortunately are often used by oil companies to prevent interference with their right to use the surface.[148] In rare cases when a surface owner receives injunctive relief, he must establish the following: no adequate remedy at law, suffering irreparable harm, inability of the oil operator to respond in damages, and a probable right to receive a permanent injunction.[149] Successful injunctive relief for the surface owner has been almost nonexistent, as injunctions to prevent mineral owners from continuing operations are routinely denied.[150]

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144. *See, e.g.,* Finder v. Stanford, 351 S.W.2d 289, 292 (Tex. Civ. App.—Houston 1961, no writ) (damage to maize could not be compensated for; lack of contract provision); Phillips Petroleum Co. v. Cargill, 340 S.W.2d 877, 879 (Tex. Civ. App.—Amarillo 1960, no writ) (recovery denied for cotton, no contract provision); Chapapas v. Delhi-Taylor Co., 323 S.W.2d 64, 66 (Tex. Civ. App.—San Antonio 1959, writ ref'd n.r.e.) (oral agreement insufficient to support recovery).

145. *See* Dycus, *Clarification of the Correlative Right of Surface and Mineral Owners,* 33 VAND. L. REV. 871, 884-85 (1980).

146. *See id.* at 885 (claiming inability of many landowners to afford litigation of suits has led to unequal distribution of economic power).

147. *See, e.g.,* Winslow v. Duval County Ranch Co., 519 S.W.2d 217, 220 (Tex. Civ. App.—Beaumont 1975, writ ref'd n.r.e) (injunction to prevent pollution); Gulf Oil Corp. v. Walton, 317 S.W.2d 260, 262 (Tex. Civ. App.—El Paso 1958, no writ) (injunction to stop building of roads); Miller v. Crown Cent. Petroleum Corp., 309 S.W.2d 876, 877 (Tex. Civ. App.—Eastland 1958, no writ) (injunction to prevent water flooding).

148. *See, e.g.,* Craft v. Freeport Oil Co., 563 S.W.2d 866, 867-68 (Tex. Civ. App.—Amarillo 1978, no writ) (oil company granted injunction to prevent interference with right of ingress); Rendon v. Gulf Oil Corp., 414 S.W.2d 510, 511 (Tex. Civ. App.—Corpus Christi 1967, writ ref'd n.r.e.) (injunction in favor of oil company granted for building roads); Atlantic Refining Co. v. Bright & Schiff, 321 S.W.2d 167, 168 (Tex. Civ. App.—San Antonio 1959, writ ref'd n.r.e.) (oil operator received injunction for drilling rights).

149. *See* Winslow v. Duval County Ranch Co., 519 S.W.2d 217, 224 (Tex. Civ. App.—Beaumont 1975, writ ref'd n.r.e.); *see also* Gulf Oil Co. v. Walton, 317 S.W.2d 260, 263-64 (Tex. Civ. App.—El Paso 1958, no writ) (must allege irreparable injury or that damages cannot be measured definitely).

150. *See, e.g.,* Ball v. Dillard, 602 S.W.2d 521, 523 (Tex. 1980) (surface owner cannot

C. *Actions for Negligence and Unreasonable Use*

Although the mineral lessee has the right to use as much of the surface as is reasonably necessary for exploration and production, he is not entitled to do so negligently.[151] The requisites to prove negligence of the mineral lessee are the same as for any other tortfeasor.[152] The landowner must allege and prove a specific negligent act,[153] which was the proximate cause[154] of some measurable damage.[155] Texas courts have declined to apply the res ipsa loquitur doctrine,[156] but one court implied a negligence per se concept by finding an oil company negligent for a violation of a Railroad Commission rule.[157]

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interfere with dominant estate); Winslow v. Duval County Ranch Co., 519 S.W.2d 217, 221 (Tex. Civ. App.—Beaumont 1975, writ ref'd n.r.e.) (injunction must not be so broad to prevent legal exercise of right); Gulf Oil Co. v. Walton, 317 S.W.2d 260, 263 (Tex. Civ. App.—El Paso 1958, no writ) (surface lessee had adequate remedy at law). *But see* Speedman Oil Co. v. Duval County Ranch Co., 504 S.W.2d 923, 928-30 (Tex. Civ. App.—San Antonio 1973, writ ref'd n.r.e.) (surface owner successful in restraining oil company from negligent pollution).

151. *See, e.g.,* Brown v. Lundell, 162 Tex. 84, 86, 344 S.W.2d 863, 865 (1961) (operator may not be negligent in use of surface); McCarty v. White, 314 S.W.2d 155, 157 (Tex. Civ. App.—Eastland 1958, no writ) (oil lessee liable for negligent maintenance of surface); Miller v. Crown Cent. Petroleum Corp., 309 S.W.2d 876, 877 (Tex. Civ. App.—Eastland 1958, no writ) (dominant mineral estate must not be negligent). *See generally* Keeton & Page, *Tort Liability and the Oil and Gas Industry,* 35 TEXAS L. REV. 1, 12 (1956) (discussing recovery for torts in oil industry).

152. *See* Keeton & Jones, *Tort Liability and the Oil and Gas Industry,* 35 TEXAS L. REV. 1, 12 (1956).

153. *See, e.g.,* Humble Oil & Ref. Co. v. Williams, 420 S.W.2d 133, 134-35 (Tex. 1967) (must plead specific act of negligence); Murfee v. Phillips Petroleum Co., 492 S.W.2d 667, 676 (Tex. Civ. App.—El Paso 1973, writ ref'd n.r.e.) (jury must find specific act of negligence); Carroll v. Roger Lacy, Inc., 402 S.W.2d 307, 316 (Tex. Civ. App.—Tyler 1966, writ ref'd n.r.e.) (burden on surface owner to plead and establish negligence).

154. *See, e.g.,* Scurlock Oil Co. v. Harrell, 443 S.W.2d 334, 335 (Tex. Civ. App.—Austin 1969, writ ref'd n.r.e.) (pipeline leak established as proximate cause of injury); Currey v. Ingram, 397 S.W.2d 484, 488 (Tex. Civ. App.—Eastland 1965, writ ref'd n.r.e.) (negligent disposal of salt water proximate cause of injuries); Crawford v. Yeatts, 395 S.W.2d 413, 417 (Tex. Civ. App.—Eastland 1965, writ ref'd n.r.e.) (damage to subsurface proximately caused by operator).

155. *See* Macha v. Crouch, 500 S.W.2d 902, 905 (Tex. Civ. App.—Corpus Christi 1973, no writ). To recover damages for permanent injury to the land, the surface owner must also present evidence of the value of the land after the injury occurs. *See id.* at 905. Temporary damages can be established by showing the cost to restore the land to its original condition. *See id.* at 905. To recover exemplary damages, the surface owner must prove willful, malicious, or wanton conduct. *See id.* at 906. Damages may be limited by contract. *See* Willey v. Vincik, 458 S.W.2d 236, 238 (Tex. Civ. App.—Corpus Christi 1970, no writ).

156. *See* Lynn v. Maag, 220 F.2d 703, 705 (5th Cir. 1955) (doctrine of res ipsa loquitur inapplicable in case of explosion because no proof offered that explosion would not occur without proper care); Jones v. NAFCO Oil and Gas, Inc., 380 S.W.2d 570, 575 (Tex. 1964) (court refused to apply res ipsa loquitur because no proof of exclusive control).

157. *See* Gulf Oil Corp. v. Alexander, 291 S.W.2d 792, 794-95 (Tex. Civ. App.—

The courts have also equated negligence with unreasonable use, and unreasonable use with using more of the surface than is necessary.[158] Reasonableness is a question of fact for the jury and can be measured by the standards of the industry[159] and, more recently, the existence of alternative methods of production available to the oil operator.[160]

Surface owners have utilized these remedies successfully at the district court level, but often judgments are reversed by the appellate court[161] for failure to establish negligence,[162] failure to prove unreasonable use, or failure to demonstrate excessive use of the premises.[163] This indicates a state of

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Amarillo 1956, writ ref'd n.r.e.) (violation of anti-pollution rule of the Railroad Commission gives rise to action). *But see* Murfee v. Phillips Petroleum Co., 492 S.W.2d 667, 673 (Tex. Civ. App.—El Paso 1973, writ ref'd n.r.e.) (specific act of negligence necessary when allege violation of rule of Railroad Commission). The Supreme Court of Texas has declined to render a decision on the effect of a statutory violation. *See* Gulf Oil Corp. v. Alexander, 156 Tex. 455, 455, 295 S.W.2d 901, 901 (1956).

158. *See, e.g.,* Macha v. Crouch, 500 S.W.2d 902, 904 (Tex. Civ. App.—Corpus Christi 1973, no writ) (must show specific act of negligence or unreasonable use); Young v. McGill, 473 S.W.2d 672, 673 (Tex. Civ. App.—El Paso 1971, no writ) (must establish unreasonable use or more surface used than necessary); Reading & Bates Offshore Drilling Co. v. Jergenson, 453 S.W.2d 853, 856 (Tex. Civ. App.—Eastland 1970, writ ref'd n.r.e.) (surface owner can recover if establishes negligence or unreasonable use). *But see* Texaco, Inc. v. Faris, 413 S.W.2d 147, 149 (Tex. Civ. App.—El Paso 1967, writ ref'd n.r.e.) (surface owner can contract to force oil operator to only do what is "necessary").

159. *See* Brown v. Lundell, 164 Tex. 84, 90, 344 S.W.2d 863, 867-68 (1961). Proof of acting within the custom of the trade or industry does not absolve the mineral lessee of liability. *See* Texaco, Inc. v. Joffrion, 363 S.W.2d 827, 831-32 (Tex. Civ. App.—Texarkana 1962, writ ref'd n.r.e.).

160. *See* Getty Oil Co. v. Jones, 470 S.W.2d 618, 628 (Tex. 1971) (alternative methods measured by what customary operations are under similar circumstances). The alternative use test is narrow and not adaptable to many situations. *See id.* at 629 (Greenhill, J., concurring, on motion for rehearing).

161. *See, e.g.,* Warren Petroleum Corp. v. Monzingo, 157 Tex. 479, 480, 304 S.W.2d 362, 363-64 (1957) (reversing lower court and holding mineral lessee has no duty to restore surface); Ball v. Dillard, 570 S.W.2d 465, 466 (Tex. Civ. App.—Eastland 1978) (reversing district court's holding), *aff'd,* 602 S.W.2d 521 (Tex. 1980); Finder v. Stanford, 351 S.W.2d 289, 292 (Tex. Civ. App.—Houston 1961, no writ) (judgment reversed because landowner did not allege negligence and none was established).

162. *See, e.g.,* Warren Petroleum Corp. v. Martin, 153 Tex. 403, 405, 271 S.W.2d 410, 412 (1954) (reversing lower court for failure of surface owner to prove negligence); Weaver v. Reed, 303 S.W.2d 808, 810 (Tex. Civ. App.—Eastland 1957, no writ) (no negligent act to support judgment); Placid v. Lee, 243 S.W.2d 860, 862 (Tex. Civ. App.—Eastland 1951, no writ) (no evidence of negligence).

163. *See, e.g.,* Humble Oil & Ref. Co. v. Williams, 420 S.W.2d 133, 134-35 (Tex. 1967) (reversed appellate court finding of negligence for landowner's failure to prove specific act of negligence or unreasonable use); Warren Petroleum Corp. v. Monzingo, 157 Tex. 479, 482, 304 S.W.2d 362, 362-64 (1957) (reversing lower court's findings of unreasonable use); Young v. McGill, 473 S.W.2d 672, 673 (Tex. Civ. App.—El Paso 1971, no writ) (spilled oil did not constitute unreasonable use).

confusion among the courts trying to protect the needs of surface estate owners while confronted with the judicial concept of the dominant mineral estate.[164] The attempts by the courts to modify the mineral estate's dominance with the creation of due regard, unreasonable use, and accommodation considerations have been viewed by commentators as confusing and with little practical effect.[165]

VI. PROPOSAL FOR LEGISLATIVE INTERVENTION

A. *Existing Surface Damage Acts for Oil and Gas Production*

Recognizing the need to provide surface owners with an adequate remedy for damages to their property, a minority of states have enacted statutory protections to guarantee landowners compensation suffered from oil and gas exploration and production.[166] Citing the need to protect the agricultural industry,[167] ensure just compensation for damages,[168] and unanticipated changes in the oil and gas industry,[169] these compensation acts shift the costs for surface damages from the surface owner to the oil and gas operator.[170] The net result of this legislative protection is to hold oil operators strictly liable for damages inflicted on the surface estate.[171]

A common provision of the various compensation acts is the requirement

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164. *Cf.* Dycus, *Legislative Clarification of Correlative Rights of the Surface and Mineral Owners,* 33 VAND. L. REV. 871, 871 (1980) (recognizes need for more clear cut understanding of surface and mineral owners' rights). The reasonable and necessary standards have led to unjust results when applied under the dominant mineral estate theory. *See id.* at 880.

165. *See* Pearce, *Surface Damages and the Oil and Gas Operator in North Dakota,* 58 N. D. L. REV. 457, 488 (1981) (accommodation doctrine will not substantially change law of dominant mineral estate); *see also* Dycus, *Legislative Clarification of Correlative Rights of the Surface and Mineral Owner,* 33 VAND. L. REV. 871, 896-97 (1980) (modification of dominance doctrine leads to confusion and unjust results).

166. *See* MONT. CODE ANN. §§ 82-10-501 to -511 (1983); N. D. CENT. CODE §§ 38-11.1-01 to -10 (1980 & Supp. 1983); OKLA. STAT. tit. 52, §§ 38-18.2 to 318.9 (Supp. 1983); S. D. CODIFIED LAWS ANN. §§ 45-5A-1 to -11 (1983); W. VA. CODE §§ 22-4C-1 to -9 (Supp. 1984).

167. *See* N. D. CENT. CODE § 38-11.1-01 (1983) (Act is to protect agriculture by providing just compensation for surface damage); S. D. CODIFIED LAW ANN. § 45-5A-1 (1983) (legislative purpose is to protect agriculture); Note, *Oil and Gas: Legislative Damage to Surface Rights,* 36 OKLA. L. REV. 386, 390 n.31 (1983) (Oklahoma act designed to force oil operators to respect landowners' rights). The Montana, North Dakota, and South Dakota compensation acts are virtually identical. See MONT. CODE ANN. §§ 82-10-501 to -511 (1983); N. D. CENT. CODE §§ 38-11.1-01 to -10 (1980 & Supp. 1983); S. D. CODIFIED LAWS ANN. §§ 45-5A-1 to -11 (1983).

168. *See* N. D. CENT. CODE § 45-5A-1(3) (1983).

169. *See* W. VA. CODE § 22-4C-1(2) (Supp. 1984).

170. *See* Comment, *The Constitutionality of the Oklahoma Surface Damages Act,* 20 TULSA L. J. 60, 60 (1984).

171. *See* Murphy v. Amoco Prod. Co., 729 F.2d 552, 555 (8th Cir. 1984) (holding North Dakota statute benefits public by imposing strict liability on oil and gas lessee); *see also* Recent

that the mineral developer give the surface owner notice of his intent to produce the lease prior to entering the property.[172] The draftsmen of the Oklahoma Surface Damage Act, providing for an intent to drill notice, noted a disregard of the surface owner's interests by oil operators who moved onto the premises without notifying the landowner.[173] The North and South Dakotas' Compensation Acts provide for a surface owner's "bill of rights," including a notice of the intent to drill, which would inform the surface owner of his rights and options conferred by the statutes.[174]

Oklahoma's Surface Damage Act is unique in that it requires the oil operator to post a $25,000 bond or letter of credit with the secretary of state prior to commencing drilling.[175] The Oklahoma statute also requires damages to be negotiated before the mineral producer enters the property with heavy equipment.[176] If the mineral developer and surface owner cannot make a contractual agreement concerning the amount of damages, the operator must petition a district court for appraisers to survey the premises and report the extent of existing or future damages.[177] If either party disagrees with the appraisers' assessments of damages they have the right to file exceptions or demand a jury trial.[178] The statute also provides a provision for appeal, which would not delay drilling operations provided an amount equal to the damage award has been deposited with the court.[179]

These legislative acts also provide that the surface owner may receive punitive damages in cases of noncompliance.[180] The Oklahoma Statute pro-

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Developments, *Surface Damages in Oklahoma Procedures for Payments and Penalties,* 18 TULSA L.J. 338, 347 (1982) (Surface Damage Act read to impose strict liability).

172. *See* N. D. CENT. CODE § 38-11.1-05 (Supp. 1983) (requiring 20 days notice to surface owner of record prior to commencing production); OKLA. STAT. tit. 52, § 318.3 (Supp. 1983) (requires notice to surface owner of intent to drill). Notice by publication is allowable when the surface owner cannot be ascertained. See OKLA. STAT. tit. 52, § 318.3 (Supp. 1983).

173. *See* Note, *Oil and Gas: Legislative Damage to Surface Rights,* 36 OKLA. L. REV. 386, 390 n.31 (1983).

174. *See* N. D. CENT. CODE § 38-11.1-05 (Supp. 1983) (state geologist prepares form advising the surface owner of his rights under act); S. D. CODIFIED LAWS ANN. § 45-5A-5 (1983) (notice prepared by department of water and natural resources).

175. *See* OKLA. STAT. tit. 52, § 318.4 (Supp. 1984). If damages exceed the bonded amount, the operator is required to post additional bond or pay immediately for the excess. *See id.* § 318.4(c).

176. *See id.* § 318.5.

177. *See id.* § 318.5(c). The court then notifies each party to select an appraiser, and the two selected appraisers designate a third appraiser for appointment by the court. *See id.* § 318.5(c). The West Virginia statute provides for arbitrators to determine the amount of damages to be awarded after the surface owner notifies the oil operator of damage incurred, and the operator rejects the claim. *See* W. VA. CODE § 22-4C-7(b) (Supp. 1984).

178. *See* OKLA. STAT. tit. 52, § 318.6 (Supp. 1983).

179. *See id.* § 318.6.

180. *See* N. D. CENT. CODE § 38-11.1-05 (Supp. 1983) (failure to notify surface owner of

vides for treble damages if the oil operator, upon a showing of clear and convincing evidence, is found guilty of willfully and knowingly ignoring the requirements of providing notice of drilling intentions, filing a credit bond, or refusing to apply for appraisals in disagreements over damage amounts.[181] The North Dakota statute encourages the oil operators to settle damage claims for a reasonable amount because, if the surface owner rejects the operator's offer and at trial is awarded a greater amount, the mineral lessee is liable for reasonable attorney's fees, court costs, and interest on the amount of the final award.[182]

B. *Constitutionality of Existing Acts*

Obviously, the surface damage acts have not been well received by members of the oil and gas industry, and challenges to the constitutionality of the acts have been raised.[183] The North Dakota statute has withstood constitutional attacks,[184] and although there are no reported cases on the constitutionality of the Oklahoma Surface Damage Act,[185] it has been construed as constitutional by some commentators.[186] The Eighth Circuit has upheld the North Dakota Oil and Gas Production Damage Compensation Act as a proper exercise of the state's police power.[187] The court also found the act was an incentive to oil companies not to drill in instances where resulting surface damages would outweigh the likelihood of the well yielding a sufficient amount of oil and gas to justify the payment of damages.[188] The court concluded that a shifting of the standard of care from negligence to strict

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intent to drill results in punitive damages); OKLA. STAT. tit. 52, § 318.9 (Supp. 1983) (provides for treble damages for violation of statutory requirements).

181. *See* OKLA. STAT. tit. 52, § 318.9 (Supp. 1983).

182. *See* N. D. CENT. CODE § 38-11.1-09 (Supp. 1983).

183. *See* Murphy v. Amoco Prod. Co., 729 F.2d 552, 557-60 (8th Cir. 1984) (court upholds the constitutionality of Oil and Gas Production Damage Compensation Act); *see also* Note, *Oil and Gas: Surface Damages, Operators and the Oil and Gas Attorney,* 36 OKLA. L. REV. 414, 431 (1983) (retroactive application of act would be unconstitutional).

184. *See* Murphy v. Amoco Prod. Co., 729 F.2d 552, 560-61 (8th Cir. 1984).

185. *See* Comment, *The Constitutionality of the Oklahoma Surface Damage Act,* 20 TULSA L.J. 60, 60 (1984) (noting unreported cases which avoid ruling on direct constitutional grounds by holding the Surface Damage Act did not apply to leases entered into before Act's effective date).

186. *See id.* at 75 (indicates the Act is constitutional). *But see* Note, *Oil and Gas: Surface Damages, Operators, and the Oil and Gas Attorney,* 36 OKLA. L. REV. 414, 431 (1983) (questions the constitutionality of the Act); Recent Developments, *Surface Damages in Oklahoma: Procedures for Payments and Penalties,* 18 TULSA L.J. 338, 345 (1982) (Act raises serious constitutional questions).

187. *See* Murphy v. Amoco Prod. Co., 729 F.2d 552, 555 (8th Cir. 1984).

188. *See id.* at 555. The Surface Damage Act was perceived as also encouraging reasonable use of surface, and requiring payment for any actual damage would reduce the suits for negligence. *See id.* at 555.

liability would eliminate the expense of negligence suits and would simplify the law.[189] Arguments that the act violated the Constitution's contract clause[190] were rejected because the additional burden of strict liability imposed on the operator did not substantially increase his existing duties under the lease and therefore did not rise to the level of a constitutional violation.[191] The court also rejected the claim that the statute took property from the oil company without compensation because the requirement of payment for actual damages was a mere elimination of a "bundle of rights" and did not violate the Constitution.[192] The statute was not contrary to the equal protection clause[193] by applying only to oil and gas developers and not lessors and royalty owners, because the goal of the act was to impose liability on those who actually inflicted the damage and not to punish those who only have a pecuniary interest in production.[194] The provision allocating attorney's fees and court costs was upheld as a clear incentive for the developer to bargain reasonably with the surface owner and because it promoted the legislative goal of providing adequate compensation for damages without utilizing the courts.[195]

Commentators have also disagreed on the constitutional implications of the Oklahoma Surface Damage Act.[196] There is agreement that in order for the statute to pass constitutional muster it should not be applied retroactively to lease arrangements made prior to the statute's effective date.[197]

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189. *See id.* at 555-56 & n.3. The court predicted that mineral exploration and production would continue to grow and that equity called for close exmination of the rights of the surface owner. *See id.* at 556 n.3.

190. U. S. CONST. art. I, § 10, cl. 1. The contract clause states: "No state shall . . . pass any . . . Law impairing the Obligations of Contracts." *Id.*

191. *See* Murphy v. Amoco Prod. Co., 729 F.2d 552, 557 (8th Cir. 1984). In balancing the impairment of the contract rights with the necessity and reasonableness of the statute, the court found that since the lease already provided for strict liability for crop damage, the additional burden to compensate for non-negligent damage was not unreasonable. *See id.* at 557.

192. *See id.* at 558. The requirement that the oil company pay for actual damage to the surface did not constitute a taking of private property. *See id.* at 558.

193. *See* U. S. CONST. amend. XIV, § 1 (no person can be denied equal protection of law).

194. *See* Murphy v. Amoco Prod. Co., 729 F.2d 552, 558 (8th Cir. 1984). The court noted that similar legislation applied to coal developers and that oil and gas development constituted a threat to agriculture. *See id.* at 559.

195. *See id.* at 559-60. The court rejected the surface owners' claims for punitive damages because the operator failed to comply with the statute on the advice of his attorney who had a good faith belief that the statute was unconstitutional. *See id.* at 560.

196. *Compare* Comment, *The Constitutionality of the Oklahoma Surface Damage Act,* 20 TULSA L.J. 60, 65 (1984) (implies that Act is constitutional) *with* Note, *Oil and Gas: Surface Damages, Operators, and the Oil and Gas Attorney,* 36 OKLA. L. REV. 414, 422-26 (1983) (questions the constitutionality of act and concludes it could not be applied retroactively).

197. *See* Comment, *The Constitutionality of the Oklahoma Surface Damage Act,* 20 TULSA L.J. 60, 65 (1984) (courts will likely apply Act prospectively); Note, *Oil and Gas: Sur-*

Disagreements have centered around possible violations of the contract clause,[198] the just compensation clause of the fifth amendment,[199] and an unauthorized exercise of state police power.[200] The Oklahoma courts have declined to address such issues, but the upholding of the North Dakota statute on similar challenges indicates that the Oklahoma Surface Damage Act could survive constitutional scrutiny.[201]

C. *Proposal for a Surface Damage Act in Texas*

In 1980, the Texas agribusiness industries accounted for thirty-seven billion dollars of the state's economy, with almost ten billion of this income directly attributable to farm and ranching receipts.[202] Meanwhile, the oil and gas industry provided for over two-thirds of the thirty-three billion dollars generated from Texas energy producers.[203] These figures indicate that the farm and ranching producers are viable contributors to the Texas economy and are worthy of legislative protection, and that the oil and gas industry has reached a level of economic maturity that no longer requires judicial insurance in order to continue functioning.[204] A surface damage compensa-

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face Damages, Operators, and the Oil and Gas Attorney, 36 OKLA L. REV. 414, 422 (1983) (Act should not be retroactive). *But see* Murphy v. Amoco Prod. Co., 729 F.2d 552, 555-56 & n.3 (8th Cir. 1984) (gave similar statute retroactive effect).

198. *Compare* Comment, *The Constitutionality of the Oklahoma Surface Damage Act,* 20 TULSA L.J. 60, 62-66 (1984) (Act does not violate contract clause because state was exercising proper police power) *with* Note, *Oil and Gas: Surface Damages, Operators, and the Oil and Gas Attorney,* 36 OKLA. L. REV. 414, 422 (1983) (violation of implied contract right to use the surface). The statute provides that it does not impair existing contract rights. *See* OKLA. STAT. tit. 52, § 318.7 (Supp. 1983); *see also* U. S. CONST. art. I, § 10, cl. 1 (states may not impair obligations of contracts).

199. *See* Comment, *The Constitutionality of the Oklahoma Surface Damages Act,* 20 TULSA L.J. 60, 65-67 (1984) (interpreting Act only to future leases ensures no violation of just compensation clause); *see also* Murphy v. Amoco Prod. Co., 729 F.2d 552, 558 (8th Cir. 1984) (rejecting taking clause claims); U. S. CONST. amend. V (states cannot take property without just compensation). *But see* Note, *Oil and Gas: Surface Damages, Operators, and the Oil and Gas Attorney,* 36 OKLA L. REV. 414, 422-23 (questions policy behind the taking of right from developer to use surface without paying compensation).

200. *See* Comment, *The Constitutionality of the Oklahoma Surface Damages Act,* 20 TULSA L.J. 60, 67-72 (1984) (public purposes served by efficient use of land, fair dealing by oil operators, and simplification of the law). *But see* Note, *Oil and Gas: Surface Damages, Operators, and the Oil and Gas Attorney,* 36 OKLA. L. REV. 414, 422-24 (1983) (Act does not serve legitimate public purpose).

201. *See* Murphy v. Amoco Prod. Co., 729 F.2d 552, 560 (8th Cir. 1984) (declaring surface damage statute constitutional).

202. *See* Texas Almanac 506 (1982).

203. *See id.* at 376.

204. *Cf.* Getty Oil Co. v. Jones, 470 S.W.2d 618, 622-23 (Tex. 1971) (accommodation recognizes public policy of protecting agriculture); *see also* Texas Almanac 376, 506 (1982) (economic effect of agriculture and oil and gas industries in Texas).

tion act requiring that oil producers be held strictly liable for any surface damages they cause would eliminate the confusing and often unjust results which surface owners have encountered when attempting to recover compensation for their damaged property.[205] Although none of the existing surface damage compensation acts appear completely adequate, they provide good models to which Texas legislators may look when drafting comprehensive statutory protection for surface owners.[206] The following provisions represent some of the more important features of any comprehensive surface damage compensation act.[207]

1. Legislative Findings

The legislative intentions should reveal a desire to protect the public welfare by promoting efficient use of the land, protection of the agriculture industry, and also promote fair dealing between the oil operator and the surface owner.[208] The legislature should recognize the interference and injury that occurs to the landowners from the production of oil and gas,[209] the state of confusion that exists in the application of legal remedies, and the need for a simplification of the law.[210]

2. Purpose of the Act

The legislature should expressly protect the rights of surface owners and provide just compensation for surface damages by imposing a strict liability standard, thereby advancing public concerns of promoting the efficient use of land.[211]

3. Definitions

An adequate definition of surface damages should provide compensation for lost use of land, damages to crops, livestock, water supply, and any other loss to personal property, including any costs required to restore the land to

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205. *See* Dycus, *Legislative Clarification of the Correlative Rights of Surface and Mineral Owners,* 33 VAND. L. REV. 871, 880 (1980).

206. N. D. CENT. CODE §§ 38-11.1-01 to -10 (1980 & Supp. 1983); OKLA. STAT. tit. 52, §§ 318.2 to .9 (Supp. 1983); W. VA. CODE §§ 22-4C-1 to -9 (Supp. 1984) (states' surface damage acts).

207. *See* Dycus, *Legislative Clarification of the Correlative Rights of the Surface and Mineral Owners,* 33 VAND. L. REV. 871, 896-901 (1980) (proposed model act to clarify the rights of surface owners involved in mineral production).

208. *See* N. D. CENT. CODE § 38-11.1-01 (1980).

209. *See id.* § 38-11.1-01.

210. *See* Dycus, *Legislative Clarification of the Correlative Rights of the Surface and Mineral Owners,* 33 VAND. L. REV. 871, 898 (1980).

211. *See id.* at 898-99; *see also* N. D. CENT. CODE § 38-11.1-01 (1980) (legislative findings of statute).

its original condition.[212] Definitions of those who qualify as surface owners and oil and gas operators should also be included.[213]

4. Notice of Intent to Drill

The statute should include a requirement that, prior to entering the landowner's premises to explore for and produce oil and gas, the surface owner of record receive notification of entry by certified mail.[214]

5. Notice of Rights

Accompanying any notice of intention to drill should be a statement of the surface owner's rights under the statute.[215]

6. Requirement of Bond

The oil operator must have on file with the appropriate regulatory agency a bond or letter of credit for a specified amount to guarantee payment of surface damages.[216]

7. Pre-drilling Negotiations for Damages

Prior to entering the land with drilling equipment, a contract must be signed for payment of damages which might result from such operations.[217]

8. Appointment of Appraisers

Either after damages have accrued, or before drilling commences, if the parties cannot agree on the actual or prospective damages, each may select a disinterested appraiser, who in turn would select a third, for the purpose of making findings of the actual or prospective damages.[218]

9. Incentives to Comply

The statute should provide for punitive damages for failure to notify surface owners of intent to drill, post bond, or select an arbitrator.[219] In addition, if the surface owner rejects the offer of the oil and gas developer, and is forced to go to court and recover damages in excess of the offered amount,

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212. *See* W. VA. CODE § 22-4C-3 (Supp. 1984).

213. See OKLA. STAT. tit. 52, § 318.2 (Supp. 1983).

214. *See id.* § 318.3.

215. *See* N. D. CENT. CODE § 38-11.1-05 (1980).

216. *See* OKLA. STAT. tit. 52, § 318.4 (Supp. 1983).

217. *See id.* § 318.5.

218. *See id.* § 318.5; *see also* W. VA. CODE § 22-4C-7 (Supp. 1984). If the parties cannot agree on a third appraiser the court should appoint one. *See* W. VA. CODE § 22-4C-7(b) (Supp. 1984).

219. *See* OKLA. STAT. tit. 52, § 318.9 (Supp. 1983) (providing for treble damages).

the operator should be assessed attorney's fees and court costs.[220]

10. Effective Date

The statute should contain an effectiveness date or an intention of retroactive effect.[221] If the act is declared retroactive, it should be clear whether the statute is to apply to leases entered into prior to the enactment and whether it applies to estates severed before the effectiveness date.[222]

A surface damage compensation act would not be welcomed by the oil and gas industry, but such an act would provide for fair payment of surface damage and would eliminate the necessity for "get along money."[223] The oil operators could eliminate outlandish demands for surface damages by forcing the landowner into arbitration and would not have to resort to injunctive measures to allow them to properly produce their wells.[224]

In *Getty Oil Co. v. Jones,*[225] Justice Steakley took notice that few cases on conflicts between landowners and oil operators have been reported, especially considering the amount of oil and gas production which has occurred in the state.[226] This observation indicated to him that oil and gas operators were respecting the rights and needs of the landowners.[227] Another possible interpretation of this situation is that the surface owner's desires to be compensated for damages have been consistently rejected under the dominant mineral estate doctrine, and that many surface tenants do not possess the economic resources to gamble on a court holding for him under an application of vague concepts such as due regard, unreasonable use, and accommodation of rights.[228]

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220. *See* N. D. CENT. CODE § 38-11.1.-.09 (Supp. 1983).

221. *Cf.* Note, *Oil and Gas: Surface Damages, Operators, and the Oil and Gas Attorney,* 36 OKLA. L. REV. 414, 420 (1983) (indicating confusion on whether the Act applies retroactively).

222. *See* Comment, *The Constitutionality of the Oklahoma Surface Damage Act,* 20 TULSA L.J. 60, 65 (1984) (Act should apply to leases entered into before the effective date).

223. *Cf.* Sellers, *How Dominant is the Dominant Estate? Or Surface Damages Revisited,* 13 INST. ON OIL & GAS L. & TAX'N 377, 397-98 (1963) (discussion of payment for "location damages" and unwarranted demands for surface damages).

224. *See id.* at 398-99; *see also* Ball v. Dillard, 602 S.W.2d 521, 522 (Tex. 1980) (oil operator forced to get injunctive relief to prevent surface lessee's interference).

225. 470 S.W.2d 618 (Tex. 1971).

226. *See id.* at 628 (Steakley, J., on motion for rehearing).

227. *See id.* at 628 (Steakley, J., on motion for rehearing).

228. *See* Comment, *The Constitutionality of the Oklahoma Surface Damage Act,* 20 TULSA L.J. 60, 70-71 (1984) (discusses frustrations surface owners have experienced in receiving compensation through the courts).

VII. CONCLUSION

With any exploration and production for oil and gas, damage to the surface invariably results. Under the doctrine of the dominant mineral estate, the oil operator has not only the right to use the surface, but to damage it as well. Attempts by the courts to modify the dominance of the mineral estate have not been applied with consistency, and the surface owner cannot rely on the concepts of due regard and accommodation for protection of his real and personal property. Other states have recognized the need to protect the agricultural industry and have provided incentives for fair dealing between the oil operator and landowner by enacting surface damage compensation acts. With a significant portion of its economy consisting of farm and ranch income, Texas would do well to adopt similar legislation to balance the rights of the landowner and the oil operator and provide a consistent and equitable method for compensating the landowner for damages incurred from the production of oil and gas.