Tulsa Law Review

Volume 20 | Issue 1

Fall 1984

The Constitutionality of the Oklahoma Surface Damages Act

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COMMENTS

THE CONSTITUTIONALITY OF THE OKLAHOMA SURFACE DAMAGES ACT

I. INTRODUCTION

The recent enactment of the Oklahoma Surface Damages Act[1] alters the common law approach to liability for damages to the surface estate caused by an oil and gas operator.[2] Heretofore, the owner of the surface estate had to bear the expense of damages reasonably caused by the operator's efforts to gain control of the oil or gas.[3] The Oklahoma Act transfers liability for these damages from the surface owner to the operator.[4]

This shift is in keeping with similar legislative enactments undertaken by a small group of states[5] and the constitutional issues raised by these acts could equally apply to the Oklahoma Act. The Oklahoma Court of Appeals recently had the opportunity to address the constitutional issues surrounding the Act in its decision in *Bowles v. Kretchmar*.[6] The court, however, avoided a direct confrontation by finding that the leases in question were not affected by the Act since they were entered into prior to the effective date of the Act.[7] The court based its decision on language in the Act that they interpreted as preventing retroactive application to old leases, thus leaving the constitutionality of the Oklahoma Act in question.[8] This Comment will fo-

1. OKLA. STAT. tit. 52, §§ 318.2-318.9 (Supp. 1983).
2. An operator is defined as "a mineral owner or lessee who is engaged in drilling or preparing to drill for oil or gas." *Id.* § 318.2.
3. *See infra* note 13 and accompanying text.
4. *See infra* notes 17-19 and accompanying text.
5. Four other states, Montana, North Dakota, South Dakota, and West Virginia, have passed similar statutes. *See* MONT. CODE ANN. §§ 82-10-501 to -511 (1983); N.D. CENT. CODE §§ 38-11.1-01 to -.10 (1980); S.D. CODIFIED LAWS ANN. §§ 45-5A-1 to -11 (1983); W. VA. CODE §§ 22-4C-1 to -9 (Supp. 1984).
6. *See* 55 OKLA. B.J. 967 (May 12, 1984).
7. *Id.* at 968. This was the same approach taken in an earlier unreported decision in an Oklahoma federal district court. *See* Hughes Group, Inc. v. Morgan, No. 82-C-995 (N.D. Okla. filed Nov. 19, 1982).
8. *See infra* text accompanying notes 27-32.

cus on the various constitutional issues raised by the Act and predict that the judicial response will be to find the Act constitutional.

II. EFFECT OF THE ACT ON OKLAHOMA COMMON LAW

A piece of real property has at least two distinct estates: the surface estate and the mineral estate that lies underneath.[9] When the estates are sold to two different parties it becomes particularly important to define the rights and obligations of the two parties since their interests may conflict with one another.[10]

In Oklahoma, the general proposition has been that the mineral estate is dominant and the surface estate subservient.[11] This does not mean that the rights of the mineral owner absolutely preempt the rights of the surface owner, but it does mean that the operator of the mineral estate has an implied surface easement that allows him to do whatever is reasonably necessary to explore, develop and produce the minerals.[12] Consequently, the Oklahoma surface owner has not been entitled to any compensation for damages sustained from the operator's reasonable exploration, development and production of the mineral estate,[13] unless the parties expressly agreed otherwise.[14] The reasoning behind this approach appears to be based on a recognition that it would be illogical to grant a mineral estate without providing some means for the mineral owner to remove the minerals[15] and upon the principle that one should not be liable for reasonable damages caused through the

9. *See* 6 G. THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY § 3096 (4th ed. 1962).

10. *See id.*

11. *See, e.g.*, Wellsville Oil Co. v. Carver, 206 Okla. 181, 183, 242 P.2d 151, 154 (1952); Mid-Continent Petroleum Co. v. Rhodes, 205 Okla. 651, 651, 240 P.2d 95, 96 (1951). *See* Note, *Oil and Gas: Surface Damages, Operators, and the Oil and Gas Attorney*, 36 OKLA. L. REV. 414, 416 (1983).

12. *See, e.g.*, Tenneco Oil Co. v. Allen, 515 P.2d 1391, 1396 (Okla. 1973); Melton v. Sneed, 188 Okla. 388, 390, 109 P.2d 509, 512 (1940); Sanders v. Davis, 79 Okla. 253, 256, 192 P. 694, 697 (1920). *See* Note, *supra* note 11, at 414; Recent Development, *Surface Damages in Oklahoma: Procedures for Payments and Penalties*, 18 TULSA L.J. 338, 340 (1982).

13. *See* Cities Serv. Oil Co. v. Dacus, 325 P.2d 1035, 1036 (Okla. 1958); Wilcox Oil Co. v. Lawson, 301 P.2d 686, 688 (Okla. 1956). *See* Note, *supra* note 11, at 416. Any unreasonable damage sustained is compensable to the surface owner under several different legal theories. *See* Sunray DX Oil Co. v. Brown, 477 P.2d 67, 71 (Okla. 1970) (nuisance); Superior Oil Co. v. King, 324 P.2d 847, 848 (Okla. 1958) (strict liability for abnormally dangerous activity); Hamon v. Gardner, 315 P.2d 669, 675 (Okla. 1957) (negligence). *See also* Recent Development, *supra* note 12, at 340.

14. In fact, oil and gas leases and deeds often include provisions that require the operator of the mineral estate to compensate the surface owner for all damage to the surface. *See* Recent Development, *supra* note 12, at 340-41.

15. *See* Note, *supra* note 11, at 415.

exercise of a legal right.[16]

The Oklahoma Act, in the absence of express provisions to the contrary, shifts liability from the surface owner to the operator of the mineral estate by requiring him to enter negotiations for the payment of surface damages.[17] If agreement is not reached, independent appraisers are appointed to recommend a settlement figure to the parties and the court.[18] Accordingly, the Act does not appear to deprive the operator of the the right to use the surface, but it effectively makes him strictly liable for any damage to the surface.[19]

III. CONSTITUTIONALITY OF THE OKLAHOMA ACT

The Oklahoma Act was modeled after similar statutes passed by four other states.[20] Questions regarding the constitutionality of these statutes have been raised, but there has been no conclusive judicial determination[21] and commentators on the subject have reached different conclusions.[22] The most obvious constitutional problems are raised by the contract[23] and takings[24] clauses of the United States Constitution.

A. *Contract Clause*

The contract clause declares that "No State shall . . . pass any . . . Law impairing the Obligation of Contracts."[25] This provision is expressed in absolute terms that appear to completely forbid states from altering contracts. If this interpretation is correct, the Oklahoma

16. *See* Recent Development, *supra* note 12, at 345.
17. OKLA. STAT. tit. 52, § 318.5 (Supp. 1983).
18. *Id.*
19. *See* Hultin, *Recent Developments in Statutory and Judicial Accommodation Between Surface and Mineral Owners*, 28 ROCKY MTN. MIN. L. INST. 1021, 1038 (1983); Recent Development, *supra* note 12, at 347.
20. *See supra* note 5 and accompanying text.
21. *See infra* note 78 and accompanying text.
22. *See*, Dycus, *Legislative Clarification of the Correlative Rights of Surface and Mineral Owners*, 33 VAND. L. REV. 871, 907-17 (1980) (concludes that various legislative responses to the conflict between the two estates are constitutional); Lowe, *Eastern Oil and Gas Operations: Do Recent Developments Suggest New Answers to Old Problems?*, E. MIN. INST. 20-1, 20-18 to 20-20 (1983) (Professor Lowe sees arguments for and against constitutionality); Pearce, *Surface Damages and the Oil and Gas Operator in North Dakota*, 58 N.D.L. REV. 457, 491-99 (1982) (concludes that the North Dakota Act is unconstitutional); Note, *supra* note 11, at 419-26 (determines that the Oklahoma Act is unconstitutional); Recent Development, *supra* note 12, at 345-48 (questions constitutionality of the Oklahoma Act); 35th OIL & GAS INST. 1, 21-39 (Matthew Bender 1984) (Professor Lowe now concludes that surface damages acts are constitutional).
23. U.S. CONST. art. I, § 10, cl. 1.
24. U.S. CONST. amend. V.
25. U.S. CONST. art. I, § 10, cl. 1.

Act would be unconstitutional if any contracts existing on the effective date of the Act were altered by the Act.[26]

The Oklahoma Act appears to avoid conflict with the contract clause by stating that, "Nothing herein contained shall be construed to impair existing contractual rights. . . ."[27] This language was interpreted by the Oklahoma Court of Appeals, in its recent decision in *Bowles v. Kretchmar*,[28] to make the Act only applicable to lease contracts entered into after the effective date of the Act.[29] In that case, a lessor entered into a lease agreement that made the lessee responsible for damage to *growing crops* caused by the lessee's drilling operations. The lessor attempted to make the lessee liable for *all* damage to the surface because of Oklahoma's new Surface Damages Act.[30] The court of appeals held that the Act was not applicable to the lease in question since it was entered into prior to the effective date of the Act.[31] The decision was based upon the view that the legislature intended the Act to only be applied to future leases so that existing rights would not be disturbed.[32] This interpretation avoids conflict with the contract clause since no contractual relationships in existence on the effective date of the Act were disturbed.

While this interpretation may be logical, it is not the only possible construction of the statute. The United States Supreme Court recognized early in the 19th century that all contracts incorporate the law of the state at the time of contracting,[33] thus preventing parties from making a contract contrary to state law and relying upon the contract clause to make that law invalid.[34] Later in the 19th century, the Supreme

26. Any constitutional challenge based on the contract clause assumes that the surface easement the common law grants to the mineral owner is implied as a part of the understanding between the parties when they enter the agreement. If it is a right only applied by courts in order to reach an equitable result, the right was never a part of the contract and the contract clause would never prevent a state from prohibiting a court's use of this equitable remedy. *See* Note, *supra* note 11, at 420-22. This author argues that the right must be implied as forming a part of the agreement since the parties must have anticipated that the mineral estate owner would need to use the surface in order to gain control of the subsurface. *Id.* at 421. If this is the case, the contract clause would present a possible limitation.

27. OKLA. STAT. tit. 52, § 318.7 (Supp. 1983).

28. 55 OKLA. B.J. 967 (May 12, 1984).

29. *Id.* at 968.

30. *Id.* at 967.

31. *Id.* at 968.

32. *See id.*

33. *See, e.g.*, Ogden v. Saunders, 25 U.S. (12 Wheat.) 132, 213 (1827).

34. Justice Holmes succinctly stated it this way: "One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them." Hudson Water Co. v. McCarter, 209 U.S. 349, 357 (1908).

Court recognized that a state's police power is a part of that state's sovereign authority and must be incorporated by implication into contracts as a part of existing state law.[35] In other words, every contract incorporates a recognition that a state may invoke its police power to protect the "health, safety, morals, or general welfare"[36] of the public, even if it means altering terms in the contract. In earlier years, the police power was only applied in limited circumstances, but it has been expanded to encompass more concerns, including economic ones.[37] Accordingly, every contract recognizes that a state may invoke its police power, even for economic concerns, to alter contracts without running afoul of the contract clause. The most recent decisions recognize a certain vitality in the clause by insisting that any contract modifications by the state further some public purpose,[38] but the clause is still not a significant bar to contract modification of agreements between private parties.[39]

By stating that "[n]othing herein contained shall be construed to impair existing contractual rights . . ."[40] the Oklahoma legislature may have recognized that these "existing contractual rights" include the legislature's implied authority to modify contracts through exercise of the police power. Accordingly, the legislature may have been stating its determination that nothing contained in the Act could be construed to impair existing contractual rights since the Act was promulgated as a part of its police power and, thus, became a part of all existing contracts. The result of this interpretation is that the legislature's inclusion

35. *See, e.g.*, Manigault v. Springs, 199 U.S. 473, 481-83 (1905); Stone v. Mississippi, 101 U.S. 814, 819 (1880); Fertilizing Co. v. Hyde Park, 97 U.S. 659, 670 (1878); West River Bridge Co. v. Dix, 47 U.S. (6 How.) 507, 532-36 (1848); *see also* Note, *Legislative Impairment of Natural Gas Contracts*: Energy Reserves Group, Inc. v. Kansas Power & Light Co., 19 TULSA L.J. 384, 386 & n.20 (traces progression of this concept).

36. *See, e.g.*, Penn Central Transp. Co. v. New York, 438 U.S. 104, 125 (1978); Nectow v. Cambridge, 277 U.S. 183, 188 (1928); Stone v. Mississippi, 101 U.S. 814, 818 (1880).

37. *See* Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 437 (1934) (first explicit recognition that states could invoke their police power based on economic concerns); *see also* Note, *Revival of the Contract Clause*: Allied Structural Steel Co. v. Spannaus *and* United States Trust Co. v. New Jersey, 65 VA. L. REV. 377, 382-83 (1979) (emphasizes the importance of *Blaisdell* in adding economic concerns to the state's police power).

38. *See* Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400 (1983). According to this decision, there must be a substantial contract impairment that operates to achieve a "significant and legitimate public purpose." *Id.* at 411. This purpose may only be achieved through the contractual impairment if the impairment "is based upon reasonable conditions and is of a character appropriate to the public purpose . . ." *Id.* at 412 (quoting United States Trust Co. v. New Jersey, 431 U.S. 1, 22 (1977)).

39. *See, e.g.*, Exxon Corp. v. Eagerton, 462 U.S. 176 (1983); Energy Reserves Group, Inc., v. Kansas Power & Light Co., 459 U.S. 400 (1983).

40. OKLA. STAT. tit. 52, § 318.7 (Supp. 1983).

of the above language had nothing to do with whether the Act could be applied prospectively or retroactively. Instead, it was a mere declaration of the State's power to modify contracts without running afoul of the contract clause. If it is correct to interpret this language in this manner, there is no reason to think the Act could not apply to leases entered into prior to the effective date of the Act.

While the Act could be interpreted to apply to leases entered into prior to the Act, it is unlikely that Oklahoma courts will adopt an interpretation that requires such strained logic. It is more likely that the courts will apply the Act prospectively since its logic is much more apparent. Additionally, Oklahoma courts presume prospective application unless there is a clear expression of a contrary intent.[41] Consequently, Oklahoma courts will likely continue to find the Act applicable only to leases entered into after the Act's effective date.

B. *Takings Clause*

Although it may not be immediately apparent, the greatest threat to the constitutionality of the Oklahoma Act is the takings clause of the fifth amendment.[42] The takings clause recognizes the natural law concept of eminent domain which allows the government to take or destroy property.[43] The power of eminent domain, however, is limited by the requirements that it be exercised for public use and be accompanied by just compensation to the injured property owner.[44] The takings concept of the fifth amendment has been incorporated through the fourteenth amendment so that it also applies to state governments.[45] As a result, it is arguable that passage by the Oklahoma legislature of the Act involved an exercise of the State's power of eminent domain since requiring the operator of the mineral estate to compensate for surface damages is a partial taking of the operator's surface easement. Clearly, the Oklahoma legislature has the right to exercise the power of eminent domain,[46] but any attendant taking of private property must

41. *See, e.g.*, Benson v. Blair, 515 P.2d 1363, 1365 (Okla. 1973); Board of Trustees v. Kern, 366 P.2d 415, 419 (Okla. 1961); State v. Ward, 189 Okla. 532, 538-39, 118 P.2d 216, 223 (1941).

42. *See* U.S. CONST. amend. V.

43. J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 480-81 (2d ed. 1983). The recognition is not explicit; rather, it is tacit since the fifth amendment is expressed in terms of a limitation on the government's right to take property. Any such taking must be for a public purpose and accompanied by just compensation. *Id.*

44. U.S. CONST. amend. V.

45. *See, e.g.*, Penn Central Transp. Co. v. New York, 438 U.S. 104, 122 (1978); Chicago, B. & Q. R. v. Chicago, 166 U.S. 226, 239 (1897).

46. *See* Eichman v. Oklahoma City, 84 Okla. 20, 21, 202 P. 184, 185 (1921).

be for public use and accompanied by just compensation.[47]

Interpreting the Oklahoma Act to apply only to future leases, as the *Bowles* court did, appears to circumvent the takings clause because the future operator can not claim a right to cause reasonable damage to the surface as his predecessor could under the common law. Accordingly, the future operator can not complain that his right to inflict reasonable damage to the surface has been taken from him since he never had that right in the beginning. Additionally, leases that were in effect before the passage of the Act will not be affected since the Act has been interpreted as not being retroactive.

The *Bowles* decision does not, however, dispose of the issue as neatly as it might appear. The decision focused on the date of the lease,[48] but if the surface and mineral estates have been severed, the date of the severance is also relevant. If the estates were severed before the enactment of the Oklahoma Act, the owner of the mineral estate would have an implied surface easement, including the right to inflict reasonable damage to the surface. It is possible that the right could be lost if the land is subsequently leased after the passage of the Act. For example, suppose that A purchased a mineral estate in Blackacre, Oklahoma in 1981 and negotiated a lease with B in 1983 after the Oklahoma Act went into effect. The compensation for A's lease[49] will likely be diminished because B will be aware that he must compensate the surface owner for surface damages. Quite clearly A has lost a portion of the value of his mineral estate even though he purchased the estate before the Act went into effect.

The response of Oklahoma courts may be to follow the same approach the *Bowles* court used regarding leases and hold that the Act only applies to severed mineral estates that were severed after the effective date of the Act. This approach, however, creates a pragmatic problem since many existing leases are held on mineral estates severed before the effective date of the Act. If the *Bowles* interpretation is applied to severances, all leases on mineral estates severed prior to the Act would not be covered by the Act. This would virtually render the Act nugatory.

The better approach would be to hold that the Act applies to prior

47. *Id. See* U.S. CONST. amend. V.

48. *Bowles*, 55 OKLA. B.J. at 968.

49. Compensation for an oil or gas lease typically includes a cash payment for executing the lease, delay rentals, and royalties. *See* R. HEMINGWAY, THE LAW OF OIL AND GAS §§ 2.3-2.5, at 48-61 (2d ed. 1983).

severed mineral estates. This approach is more practical because it avoids the problem mentioned above. It also appears to be the legally correct view because the Act only prohibits impairment of *existing* contractual relations.[50] A contract that conveyed the mineral estate prior to the Act would not impair an existing contractual relation because the contract would be fully performed by both parties before the Act went into effect.

This approach has the effect of furthering the intent of the legislature by making the Act applicable to future leases, regardless of the severance date. It also avoids conflict with the contract clause since no existing contractual relationships are impaired. It does not, however, circumvent the takings issue since the owner of the severed mineral estate is still deprived of a portion of his rights that accompany the implied surface easement. Situations like this make it necessary to more closely examine the Act to determine its constitutionality. To be constitutional, the taking must be for the benefit of the public and the operator of the mineral estate must be properly compensated.

1. Public Use Requirement

An initial inspection of the Oklahoma Act leaves the impression that the Act achieves no public purpose since it appears to directly benefit only the owners of severed surface estates.[51] Even if this were true,[52] the mere fact that a small group of private individuals is enriched by the taking of property from other individuals does not, of itself, render an act unconstitutional. If such a taking also achieves a public purpose, the state may justifiably exercise its power of eminent domain and take the property.[53] Accordingly, one critical determination is whether the Oklahoma Act achieves any public purpose.

The Act does not specifically enumerate the public purposes the

50. *See* OKLA. STAT. tit. 52, § 318.7 (Supp. 1983).

51. *See* Note, *supra* note 11, at 424.

52. Even landowners that retain mineral interests directly benefit from the Act. *See infra* notes 67-71 and accompanying text.

53. Berman v. Parker, 348 U.S. 26, 33-34 (1954). Some state courts construe the public use requirement of takings clauses in their own constitutions more narrowly by strictly scrutinizing transfers to private parties. *See, e.g.*, Owensboro v. McCormick, 581 S.W.2d 3, 7-8 (Ky. 1979); Karesh v. City Council, 271 S.C. 339, 344-45, 247 S.E.2d 342, 345 (1978); Hogue v. Port of Seattle, 54 Wash. 2d 799, 838, 341 P.2d 171, 193 (1959). Oklahoma does not follow this strict approach since it allows transfers to private parties so long as the public welfare is enhanced. *See* Delfield v. Tulsa, 191 Okla. 541, 545, 131 P.2d 754, 758 (1942); *see also* Ross, *Transferring Land to Private Entities by the Power of Eminent Domain*, 51 GEO. WASH. L. REV. 355 (1983) (argues that there are no valid reasons for looking at private transfers more strictly).

legislature intended to further by its enactment, but other states that have passed surface damages acts specifically cite the need for protecting individuals engaged in agricultural production since the economies of those states depend upon agriculture.[54] These states have recognized a need to protect the surface of land in order to protect agricultural production.[55] The protection of agriculture might also be a compelling public policy consideration in Oklahoma since much of the State's economy is agriculturally based[56] and the possibility for surface damage is great due to the large amount of oil and gas activity within Oklahoma.[57]

In the absence of specific legislative findings and purposes, however, one can only speculate as to the public purposes the legislature intended to achieve through passage of the Oklahoma Act. It has been suggested that statutes that differ from surface damages acts, but which are still aimed at resolving disputes between surface and mineral owners, promote a number of broad public purposes including encouraging efficient land use, assuring fairness in dealings between surface and mineral owners, and eliminating uncertainty in the law.[58] Although it appears to be a safe assumption that the public is at least marginally benefitted by all these goals, such goals should not be accepted as legitimate public purposes furthered by the Oklahoma Act without further inquiry.

In determining whether the Oklahoma Act encourages efficient use of land and consequently furthers a public purpose, it is necessary to compare the probable efficacy of the Act with the common law approach. On the one hand, under the common law, the mineral owner was encouraged to promote efficient use of the surface since he was precluded from doing anything unreasonable in his quest for the minerals.[59] The mineral owner could not, for example, act in a cavalier fashion and unnecessarily destroy the surface owner's wheat crop, or ruin his groundwater or kill his livestock by failing to properly dispose of salt water used in the drilling operation, or act in any other negligent manner without being subject to liability for any unreasonable and un-

54. *See* MONT. CODE ANN. § 82-10-501 (1983); N.D. CENT. CODE §§ 38-11.1-01 to -02 (1980); S.D. CODIFIED LAWS ANN. §§ 45-5A-1 to -2 (1983); W. VA. CODE § 22-4C-1 (Supp. 1983).

55. *See id.*

56. *See* THE WORLD ALMANAC & BOOK OF FACTS 1979, at 694 (G. Delury ed. 1979).

57. *See id.*

58. *See* Dycus, *supra* note 22, at 916-17.

59. *See supra* text accompanying note 12.

necessary damages.[60] Given the conflicting nature of the two estates, the common law tried to promote efficient use of both.[61] On the other hand, the mineral owner may still not act with the prudence necessary to assure efficient land use since he recognizes that the landowner can only recover damages for the mineral owner's unreasonable use by resorting to the judicial process. The mineral owner may be willing to cause excessive damage in his belief that the landowner will not attempt to assert his rights.[62] Additionally, if the landowner decides to go to court he will be confronted with the fact that "reasonableness" and "necessity" are abstract legal concepts that make it difficult to assure that he will recover anything from the mineral owner.[63] The Oklahoma Act helps change this situation by providing that the surface will be protected by imposing virtual strict liability on the mineral owner.[64] The mineral owner could hardly be expected to act in an unreasonable manner in selecting and employing methods to produce the minerals if he has to bear the burden for any attendant losses. Under these circumstances, efficient use of both the surface and subsurface is maximized to the natural limit allowable by these two conflicting estates.

The state may also have an interest in assuring fairness in dealings between the owners of the mineral and surface estates. This is particularly appropriate since the typical scenario involves an individual landowner on one side and a large mining company, drilling company, or public utility on the other side. Considering the lack of knowledge many landowners might have of modern mining and drilling operations, an agreement regarding liability for surface damages might not be reached at arm's length.[65] The Oklahoma Act helps protect these surface owners from overreaching by requiring the negotiation of surface damages and calling for the appointment of appraisers by a district

60. *See supra* note 13 and accompanying text.

61. Some courts have slightly altered the common law by applying the "due regard" doctrine. This doctrine requires the mineral owner to exercise due regard for the rights of the surface owner by requiring the mineral owner to select an alternative means for gaining control of the mineral estate that is less destructive of the surface. If an alternative means is not available, the mineral owner may proceed regardless of the ensuing surface damages. *See, e.g.*, Getty Oil Co. v. Jones, 470 S.W.2d 618, 621-22 (Tex. 1971).

62. This scenario seems the more likely when one considers that the typical situation involves an individual landowner on one side and a large drilling or mining company as mineral owner or lessee on the other. The landowner could be intimidated into not taking the appropriate steps to protect his rights. *See infra* note 65 and accompanying text.

63. *See* Dycus, *supra* note 22, at 879-81.

64. *See supra* text accompanying notes 17-19.

65. *See* Dycus, *supra* note 22, at 884-85.

court if an agreement is not reached.[66] This assures the landowner of fair compensation for damages to his land without having to negotiate his own agreement.

In achieving fairness between contracting parties, the landowner that has retained the mineral estate is also benefitted. If he decides to try to produce the minerals from his subsurface estate he will, in all likelihood, lease the mineral estate to a mining company, drilling company, or a public utility.[67] This lessee is then subrogated to the rights of the mineral owner and thus obtains a present and vested interest in the surface.[68] Under the common law approach, the lessee was not liable to the landowner for reasonable damages to the surface.[69] Under the Oklahoma Act, since the operator of the mineral estate, which is usually a lessee, is required to enter negotiations for payment of surface damages[70] the lessee is liable to the landowner for all surface damages. This is so notwithstanding the fact that the landowner also owns the mineral estate. This result seems unfair since the lessee must compensate the landowner for surface damages despite the fact the landowner also owns the mineral estate. The result, however, makes sense when it is realized that the unsuspecting landowner will not think he is liable for such damages at the time he contracts with the lessee. Consequently, the landowner will often do a poor job of representing his interests.[71] The Oklahoma Act attempts to eliminate this problem.

Viewing the elimination of uncertainty in the law as a public purpose is improper; instead, it should be regarded as a vehicle for effectuating other public purposes such as reducing societal "demoralization costs."[72] To help define this concept, imagine the landowner that pursues his right to be free from unreasonable and unnecessary damage to his land by suing the mineral owner for his alleged excessive use of the surface easement. If the courts hand down consistent and fair decisions

66. *See* OKLA. STAT. tit. 52, § 318.5 (Supp. 1983).

67. *See* Note, *Oil and Gas: Legislative Damage to Surface Rights*, 36 OKLA. L. REV. 386, 387-89 (1983). Actually, the lessee will probably sublease to an independent contractor to do the actual drilling or mining. *Id.* at 389.

68. Rich v. Doneghey, 71 Okla. 204, 207, 177 P. 86, 89-90 (1918).

69. *See supra* note 13 and accompanying text.

70. OKLA. STAT. tit. 52, § 318.5 (Supp. 1983).

71. *See* Lowe, *Representing the Landowner in Oil and Gas Leasing Transactions*, 31 OKLA. L. REV. 257, 268-71 (1978); Note, *Oil and Gas: Does the Oil and Gas Lessee Have a Duty to Restore the Surface?*, 25 OKLA. L. REV. 572, 573 (1972).

72. *See* Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1214-18 (1967) (discusses the demoralizing effect that failure to pay just compensation has on other property owners).

it is less likely that the landowner or mineral owner will feel victimized. If, however, the courts view each set of circumstances independently and render decisions that are sometimes fair and sometimes not because of the vague concepts of reasonableness and necessity,[73] the unjustly injured party and his supporters will become disenchanted with the government and judicial process. Society will pay a price for this demoralization if the injured parties choose to flaunt other laws due to their belief that society has done them an injustice which entitles them to their "pound of flesh."[74] Arguably, the Oklahoma Act eliminates much of this uncertainty by imposing strict liability on the mineral owner. Initially, this might seem unfair to the mineral owner or lessee, but the relative bargaining power and expertise of these two parties[75] normally places them in a better position to know and protect their rights.

Elimination of uncertainty in the law also helps facilitate planning that ultimately leads to more efficient use of the surface.[76] The landowner need not fear that he will be left uncompensated when he begins the process of putting his land to use only to have his work destroyed by a drilling or mining operation.[77] This enables the landowner to engage in long-range planning without fearing that his plans will be for naught.

With these potential public purposes in mind, it appears less likely that a court will strike down the Oklahoma Act on the basis of the takings clause. This is particularly so because of the deference the United States Supreme Court has granted to the judgment of legislatures in selecting public purposes that justify the exercise of eminent domain.[78] In fact, this deferential attitude formed the basis for uphold-

73. *See supra* text accompanying note 63.

74. One need look no further for proof of this concept than the many taxpayers that do not file completely honest returns because of their belief that the government "short changed" them at some other time.

75. *See supra* text accompanying note 65.

76. *See* Dycus, *supra* note 22, at 883.

77. *See id.* A portion of the surface damages problem have been eliminated or reduced by modern mining and drilling methods. *See id.* at 881-82. Even so, the development of some minerals, such as coal, still requires the complete destruction of the surface. *See id.* at 882.

78. Berman v. Parker, 348 U.S. 26, 32 (1954). *Berman* recognizes that "the legislature, not the judiciary, is the main guardian of the public needs. . . ." *Id.* The Court also declared that "when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive." *Id.* This philosophy is in keeping with the trend toward judicial deference to legislatures in areas of economic concern. *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-7 (1978) (discusses the downfall of the socioeconomic philosophy of Lochner v. New York, 198 U.S. 45 (1905) and the ensuing trend toward judicial abdication in favor of legislative judgment). *Cf.* Palmer Oil Corp. v. Phillips Petroleum Co., 204 Okla. 543, 547, 231 P.2d 997, 1002 (1951) (the

ing the North Dakota Surface Damages Act, which is the only reported decision that addresses the constitutionality of a surface damages act.[79]

2. Just Compensation and the Police Power

Assuming the Oklahoma legislature identified a legitimate public purpose, the exercise of the power of eminent domain still requires compensation to the deprived property owner. The Oklahoma Act contains no such provision and the mineral estate owner does not receive any corresponding benefit that could be regarded as compensation. Without further investigation, the Act would seem to be unconstitutional for its failure to pay the mineral owner compensation. However, not every shifting of property rights is classified as an exercise of eminent domain that requires compensation. If the Act is merely an exercise of the State's police power no compensation is required.[80] It is, therefore, essential to properly characterize the State's action as either involving an exercise of the police power or eminent domain; unfortunately, it frequently is not easy to distinguish between the two.

The focus of both powers is on public concerns, though a state's police power is couched in more specific terms than the power of eminent domain.[81] It is, however, a vain effort to try to determine if compensation is required by drawing subtle distinctions between the public purposes required by eminent domain and the police power. Since the goal of both powers is to achieve some public purpose, characterization of an action is really a decision whether costs should be shouldered by the individual whose property rights are affected or by the public at large.[82] Policy makers appear to have two alternatives. One is to make

court upheld a unitization statute and rejected constitutional challenges based on the contract and equal protection clauses by deferring selection of the purposes and means to the legislature).

79. *See* Murphy v. Amoco Prod. Co., 558 F. Supp. 591 (D.N.D. 1983). This court upheld an alleged retroactive application of the North Dakota Surface Damages Act after finding the Act bore a rational relationship to the State's desire to protect agricultural production. *Id.* at 595-96. Nevertheless, the precedential value of this case is suspect, even in North Dakota, because it involved a federal court's attempt to apply state law in an area where none existed. The federal court relied upon dictum in a North Dakota Supreme Court decision that indicated the court disapproved of the common law imposition of liability on the surface owner. *Id.* (citing Hunt Oil Co. v. Kerbaugh, 283 N.W.2d 131, 135 (N.D. 1979)).

80. *See* J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 42, at 480; Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149, 149 (1971); Michelman, *supra* note 72, at 1167.

81. *See supra* notes 36-37 and accompanying text.

82. *See* Kaiser Aetna v. United States, 444 U.S. 164, 174-75 (1979); Penn Central Transp. Co. v. New York, 438 U.S. 104, 123 (1978); Armstrong v. United States, 364 U.S. 40, 49 (1960). *See also* Michelman, *supra* note 72, at 1168-69 (argues that this determination is really a social method for deciding who shall bear the cost of meeting the needs of the public).

the mineral owner bear the loss recognizing that the state's police power periodically exacts a burden on every individual as part of the cost of living in an ordered society. The second alternative is to have the taxpayers compensate the mineral owner recognizing that the power of eminent domain exacts a heavy burden that is too much for one individual to bear.[83]

In determining the necessity for compensation, courts attempt to categorize by focusing on the property taken and any attendant activity on the property. It has long been established that compensation is required when the government physically invades and ousts the owner of property.[84] Under the early common law this was the only type of taking that required compensation.[85] The Supreme Court has, however, recognized that a deprivation of property can occur without a physical takeover.[86] This often occurs when the government restricts or prohibits certain uses of private property in order to avoid disputes between the individual property owners.[87] The conflict between the surface and mineral estates is a good example of this situation since the mineral estate cannot be put to effective use without interfering with the surface estate. It is under these types of circumstances, where there is no physical invasion and ouster, that it becomes most difficult to determine if compensation is required.

The Supreme Court dealt with the mineral estate versus the surface estate issue in *Pennsylvania Coal Co. v. Mahon*.[88] In *Mahon*, the court recognized that property rights are subject to regulation through the state's police power,[89] but if the state's action "reaches a certain magnitude . . . there must be an exercise of the power of eminent domain and compensation to sustain the act."[90] Further, "the general rule . . . is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[91]

83. *See* Michelman, *supra* note 72, at 1168-69.

84. *See, e.g.*, Northern Transp. Co. v. Chicago, 99 U.S. 635, 642 (1878). A typical example is when the government condemns and razes a house so that a new highway may be constructed.

85. *See id.*

86. *See* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

87. *See* Sax, *supra* note 80, at 151-55.

88. 260 U.S. 393 (1922).

89. *Id.* at 413.

90. *Id.*

91. *Id.* at 415. This approach has been criticized by Professor Michelman as diverging from any real reliance on considerations of fairness by pinning down an arbitrary point lying somewhere between fifty and one hundred percent as being the proportion of diminution that would require compensation. His notion of the proper test is to see if the claimant has been practically deprived of "some distinctly perceived, sharply crystallized, investment-backed expectation." *See*

Determination of the point where regulation goes too far and compensation is required is a difficult task.[92] There is no specific formula for making this assessment,[93] but the Supreme Court has stated that the economic impact of a regulation, particularly the extent that the regulation interferes with the "distinct investment-backed expectations" of a claimant, helps to determine the necessity for compensation.[94] This appears to mean that if property can still be put to use for profit, though not in the particular fashion the owner had in mind, no compensation is required.[95] Even so, much depends upon the facts of each case.[96]

By focusing on the facts presented in *Mahon*, it initially appears that Oklahoma must compensate the operator of the mineral estate for the value of the surface easement taken from him. This is so because the *Mahon* Court found compensation necessary[97] under facts strikingly similar to those presented by the Oklahoma Act.[98] In *Mahon*, a coal company executed a deed that conveyed the surface but retained the right to remove all coal under the surface.[99] The deed expressly stated that the grantee assumed the risk that the surface might be damaged by coal extraction.[100] Years later, the Pennsylvania legislature enacted a statute forbidding coal extraction that caused any structure to subside.[101] When the company's extraction threatened to sink Mahon's residence, he sought an injunction in accordance with the statute.[102]

Michelman, *supra* note 72, at 1233. Recent Supreme Court decisions interpret *Mahon* in accordance with Professor Michelman's view. *See infra* notes 92-96 and accompanying text.

92. Penn Central Transp. Co. v. New York, 438 U.S. 104, 123 (1922). Justice Holmes, the author of the *Mahon* opinion, applied a balancing test that compares the relative benefits to the public with the diminution in value of the property. The less important the public purpose or the greater the diminution in value, the more likely a taking will be found. *Mahon*, 260 U.S. at 414-16. This test has not been widely followed in subsequent decisions. *See* Dycus, *supra* note 22, at 914.

93. *Penn Central*, 438 U.S. at 124.

94. *Id.*

95. *See* Andrus v. Allard, 444 U.S. 51 (1979). The Supreme Court expressed it by saying, "At least where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety." *Id.* at 65-66. The Court pointed out that the mere decrease in value was not enough because the claimant in this case could use the property in an alternative fashion for profit. *Id. See also* Dycus, *supra* note 22, at 915-16 & n.216 (Professor Dycus is of the opinion that "distinct investment-backed expectations" referred to in *Penn Central* refers to the right to make a profit); Sax, *supra* note 80, at 156 n.18 (interprets *Mahon* as also requiring the right to make a profit).

96. *Penn Central*, 438 U.S. 104, 123 (1922).

97. *Mahon*, 260 U.S. at 413-14.

98. *See* Note, *supra* note 11, at 424-26 (argues that *Mahon* compels a finding that the Oklahoma Act is unconstitutional because no compensation is awarded to the mineral owner).

99. *Mahon*, 260 U.S. at 412.

100. *Id.*

101. *Id.* at 412-13.

102. *Id.* at 412.

The Supreme Court held that enactment of the Pennsylvania statute was not a legitimate exercise of the State's police power.[103]

Mahon, however, varies from the situation created by the Oklahoma Act in one essential respect, thus making it more probable that the Act would be regarded as a legitimate exercise of the State's police power. The statute in *Mahon* called for the absolute prohibition of mining activity that caused subsidence, effectively destroying the mineral owner's right to mine coal and his investment-backed expectations.[104] The Oklahoma Act, on the other hand, merely shifts liability for damages from the surface owner to the mineral owner without affecting the mineral owner's right to produce the fruits of the estate.[105] The Act does not foreclose the rights of the operator to subjugate the minerals; it merely adds another item to the cost of production that, in many instances, is required by contract anyway.[106] This leads to the conclusion that the Oklahoma Act is a mere exercise of the State's police power requiring no compensation.

IV. CONCLUSION

Although the Oklahoma Act could possibly be applied retroactively without violating the contract clause, judicial response to the Act is likely to call for prospective application for at least two reasons. First, the interpretation that the Act applies only prospectively is logical and more facially apparent. Second, Oklahoma courts presume prospective application unless there is a clear expression of contrary intent.[107]

Interpreting the Act to apply prospectively, however, will not avoid the takings issue. Even so, the takings clause does not pose a serious threat to the Act since the Act appears to further a number of public purposes. Additionally, compensation is not necessary since the Act appears merely to be regulatory in nature rather than a taking in the constitutional sense.[108]

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103. *Id.* at 414.
104. *Id.* at 413-14. Justice Holmes stated, "What makes the right to mine coal valuable is that it can be exercised with profit. To make it commercially impracticable to mine certain coal has very nearly the same effect . . . as appropriating or destroying it." *Id.* at 414.
105. *See* OKLA. STAT. tit. 52, § 318.5 (Supp. 1983).
106. *See supra* note 14 and accompanying text.
107. *See supra* notes 25-41 and accompanying text.
108. *See supra* notes 42-106 and accompanying text.

Author's Note: Immediately prior to publication of this Comment, the Oklahoma Supreme Court ordered the *Bowles* opinion withdrawn from publication and denied certiorari.[109] Withdrawal from publication means that the *Bowles* decision will not be published in the Pacific Reporter and will thus, have no precedential or persuasive value.[110] These developments call the *Bowles* interpretation that the Act only applies prospectively into question. On the other hand, withdrawal of the opinion will have no effect on the current constitutional status of the Act since the *Bowles* court did not address the constitutional issues.[111]

109. Order, 55 OKLA. B.J. 1991 (October 6, 1984).
110. Despite the fact that *Bowles* carries no precedential or persuasive value, the decision is still the law of the case. Mandate, 55 OKLA. B.J. 2076 (October 13, 1984).
111. *See supra* notes 6-8 and accompanying text.