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Surface Use by the Mineral Owner: How Much Accommodation Is Required under Current Oil and Gas Law

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SURFACE USE BY THE MINERAL OWNER: HOW MUCH ACCOMMODATION IS REQUIRED UNDER CURRENT OIL AND GAS LAW?*

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I. Introduction

Many oil and gas articles have generally addressed the two topics of (1) the rights of mineral owners¹ to use the surface estate to explore for and produce oil and gas² and (2) surface damage statutes.³ This article, however, specifically examines the interplay between these two doctrines.

Part II of this article provides background information on the historical rights of surface and mineral estate owners and the development of the accommodation doctrine. Part III considers how various jurisdictions deal with the inherent conflict between mineral and surface estates through the use of the accommodation doctrine and how surface damage provisions change or modify the rights and responsibilities of the mineral estate owner. Part IV summarizes the findings in Part III. Part V discusses applications of the accommodation doctrine's "reasonableness" requirement, identifying specific actions by mineral owners that courts have deemed reasonable and specific actions courts have deemed unreasonable. Part VI discusses surface damage liability as imposed by clauses in oil and gas leases and by surface damage statutes. This section identifies states that have adopted surface damage statutes and explains various aspects of those statutes. Part VII concludes with an argument that the accommodation doctrine, rather than surface damage statutes,

1. The term "mineral owner" for purposes of this article includes oil and gas lessees and operators.

2. See Richard J. Garcia & Paula K. Manis, *Across the Great Divide: Surface Owners v. Severed Mineral Owners — What Is Reasonable Use?*, 78 MICH. B.J. 140 (1999); Morris G. Gray, *A New Appraisal of the Rights of Lessees Under Oil and Gas Leases to Use and Occupy the Surface*, 20 ROCKY MTN. MIN. L. INST. 227 (1975); Paul F. Hultin, *Recent Developments in Statutory and Judicial Accommodation Between Surface and Mineral Owners*, 28 ROCKY MTN. MIN. L. INST. 1021 (1982); Charles G. King et al., *Surface Rights Issues*, STATE BAR OF TEX., ANNUAL OIL, GAS & MIN. L. INST. § 9 (1992); John C. Lacy, *Conflicting Surface Interests: Shotgun Diplomacy Revisited*, 22 ROCKY MTN. MIN. L. INST. 731 (1976); John S. Lowe, *The Easement of the Mineral Estate for Surface Use: An Analysis of Its Rationale, Status and Prospects*, 39 ROCKY MTN. MIN. L. INST. 4-1 (1993); J. Michael Morgan & Glen Droegemueller, *Accommodation Between Surface Development and Oil and Gas Drilling*, 24 COLO. LAW. 1323 (1995); Guy L. Nevill, *Multiple Uses and Conflicting Rights*, 13 ST. MARY'S L.J. 783 (1982); John J. Patton, *Recent Changes in the Correlative Rights of Surface and Mineral Owners*, 18 ROCKY MTN. MIN. L. INST. 19 (1972); David E. Pierce, *The Impact of Landoner/Lessor Environmental Risk on Oil and Gas Lessee Rights and Obligations*, 31 TULSA L.J. 731 (1996); John Erich Johnson, Note, *Gerrity Oil & Gas Corp. v. Magness: Colorado's Furtive Shift Toward Accommodation in the Surface-Use Debate*, 33 TULSA L.J. 943 (1998); Michelle Andrea Wenzel, Comment, *The Model Surface Use Act and Mineral Development Accommodation Act: Easy Easements for Mining Interests*, 42 AM. U. L. REV. 607 (1993).

3. See Jeanine Feriancek & Cynthia L. McNeill, *Oil Company Surface Use: Do Farmers Need Protection?*, 9 NAT. RESOURCES & ENV'T 28 (Winter 1995); Ronald W. Polston, *Surface Rights of Mineral Owners — What Happens When Judges Make Law and Nobody Listens?*, 63 N.D. L. REV. 41 (1987); Davind H.O. Roth, *Mineral Instruments and Surface Development: The Past Dominance of Mineral Rights and Royalty Interests in an Increasingly Urbanized Texas*, Cox & Smith Library, <http://www.coxsmith.com/Library/272629.htm> (Mar. 10, 2001); Susan Hlywa Topp, *Severed Minerals: Are Surface Owners Entitled to Damages for Diminution of Their Property Value?*, 78 MICH. B.J. 148 (1999); Steven John Berry, Comment, *Surface Damages in Texas: A Proposal for Legislative Intervention*, 17 ST. MARY'S L.J. 121 (1985); Stacey L. Graus, Comment, *Surface Use and Damages Statutes: 'Cloud'ed Constitutionality* 6 J. MIN. L. & POL'Y 87 (1990).

provides the most effective solution to the problem of balancing surface and mineral owners' rights.

II. Rights of the Mineral and Surface Estate Owners and Development of the Accommodation Doctrine

One of the well-established principles of property law is that land may be horizontally severed into surface and subsurface estates so that legal title vests in different owners.⁴ Once horizontal severance occurs, a mineral estate is created.⁵ One of the rights included in the mineral estate is the implied right of the mineral estate owner to use "so much of the surface as may be reasonably necessary for operation."⁶ Conduct is considered reasonable if it is consistent with practices of the industry.⁷ Provided conduct was reasonable, courts historically placed few restrictions on the rights of the mineral estate owner and did not balance the interests of the mineral owner against the interests of the surface owner.⁸

This implied right of the mineral owner to use the surface has been characterized as an easement or as a "right of access."⁹ The use of this easement by the mineral owner may sometimes be in conflict with the desires of the surface owner. However, because he has an easement, the mineral owner has the dominant estate, while the surface owner has the servient estate.¹⁰ Thus, the interests of the mineral owner have prevailed over the interests of the surface owner when the two interests conflicted.¹¹ Recently, however, beginning with the *Getty Oil v. Jones*¹² decision in Texas, courts have placed some limitations on the mineral estate owner's right to

4. *Del Monte Mining & Milling Co. v. Last Chance Mining & Milling Co.*, 171 U.S. 55, 60 (1898) (stating that "[u]nquestionably at common law the owner of the soil might convey his interest in mineral beneath the surface without relinquishing his title to the surface," and thereby separating ownership of the surface from ownership of the subsurface).

5. *Harris v. Currie*, 176 S.W.2d 302, 304 (Tex. 1943) (stating that a horizontal severance brings into existence two separate and distinct estates, one of which is the mineral estate).

6. *Union Producing Co. v. Pittman*, 146 So. 2d 553, 555 (Miss. 1962) (stating that the owner of a mineral interest has the right to enter, occupy, and make such use of the surface as is reasonably necessary to produce the minerals); *see also Harris v. Currie*, 176 S.W.2d 302 (Tex. 1942) (stating that the grant or reservation of minerals carries with it the right to use as much of the surface as necessary to enforce and enjoy the mineral estate conveyed or reserved because a grant or reservation of minerals would be wholly worthless if the grantee or reserver could not enter the land to explore for and extract the minerals); *Placid Oil Co. v. Lee*, 243 S.W.2d 860 (Tex. App. 1951) (stating that the owner of a mineral interest may use as much of the surface as reasonably necessary to produce the minerals).

7. *Hunt Oil v. Kerbaugh*, 283 N.W.2d 131, 136 (N.D. 1976) (stating that the reasonableness of the use of the dominant mineral estate may be measured by the usual, customary, and reasonable practices in the industry under like circumstances of time, place, and surface estate use); *see also Polston, supra* note 3, at 42.

8. *King, supra* note 2, § 9-2; *Polston, supra* note 3, at 42.

9. *See Bergen Ditch & Reservoir Co. v. Barnes*, 683 P.2d 365 (Colo. Ct. App. 1984); *see also King, supra* note 2, § 9-2.

10. *Morgan & Droegemueller, supra* note 2, at 1323.

11. *Polston, supra* note 3, at 42.

12. 470 S.W.2d 618 (Tex. 1971).

use the surface,¹³ and state legislatures have added their own restrictions in the form of surface damage statutes.¹⁴

The *Getty Oil* case was the first to hold that the mineral estate owner's right to use the surface was not absolute and to create the interplay of rights between the mineral owner and surface owner known as the accommodation doctrine.¹⁵ The accommodation doctrine "is a judicial, non-statutory concept [that] requires the mineral owner to act with prudence and to have due regard for the interests of the surface owner in exercising his right to use the surface to produce the minerals."¹⁶ This doctrine is sometimes referred to as "due regard" or the doctrine of "alternative uses."¹⁷ To date, the accommodation doctrine established in Texas has also become law in some form in Utah,¹⁸ North Dakota,¹⁹ Arkansas,²⁰ New Mexico,²¹ West Virginia,²² and possibly Colorado²³ and Wyoming.²⁴

III. Jurisdictions That Have Adopted the Accommodation Doctrine

A. Texas

In *Getty Oil*, the surface owner, Jones, brought an action to enjoin Getty from using vertical space above the surface for pumping units that would prevent Jones from using a center-pivot irrigation system.²⁵ When Jones purchased the property in 1955, it was encumbered by an outstanding oil and gas lease owned by several oil companies, including Getty.²⁶ The lease did not specify the type of oil pumps that could be installed on the land, but it did contain a clause requiring the mineral owner to bury any pipelines below plow depth.²⁷ One commentator has suggested

13. King, *supra* note 2, § 9-2.

14. See 765 ILL. COMP. STAT. 530/1 to 530/7 (1993); IND. CODE § 32-5-7-2 (c) (1995); KY. REV. STAT. ANN. § 353.595 (Michie 2000); MONT. CODE ANN. §§ 82-10-501 to 82-10-511 (1999); N.D. CENT. CODE §§ 38-11.1-01 to 38-11.1-10 (1987); 52 OKLA. STAT. §§ 318.2 to 318.9 (Supp. 2000); S.D. CODIFIED LAWS §§ 45-5A-1 to 45-5A-11 (Michie 1997); TENN. CODE ANN. §§ 60-1-601 to 60-1-608 (1989); W. VA. CODE §§ 22-7-1 to 22-7-8 (1998); see also *infra* Part VI.B.

15. John F. Welborn, *New Rights of Surface Owners: Changes in the Dominant/Servient Relationship Between the Mineral and Surface Estates*, 40 ROCKY MTN. MIN. L. INST. 22-1, 22-21 (1994).

16. *Id.*; see also Alan V. Hager & Kevin L. Shaw, *Idle and Deserted Wells: Who Plugs and Who Pays?*, 45 ROCKY MTN. MIN. L. INST. 12-1, 12-28 (1999) (stating that the accommodation doctrine requires the lessee to consider the rights of the lessor and accommodate the lessor's surface uses if the uses do not unreasonably interfere with the lessee's operations).

17. See King, *supra* note 2, § 9-15.

18. See *Flying Diamond Corp. v. Rust*, 551 P.2d 509 (Utah 1976).

19. See *Hunt Oil Co. v. Kerbaugh*, 283 N.W.2d 131 (N.D. 1979).

20. See *Diamond Shamrock Corp. v. Phillips*, 511 S.W.2d 160 (Ark. 1974).

21. See *Amoco Prod. Co. v. Carter Farms Co.*, 703 P.2d 894 (N.M. 1985).

22. See *Buffalo Mining Co. v. Martin*, 267 S.E.2d 721 (W. Va. 1980).

23. See *Gerrity Oil & Gas Corp. v. Magness*, 946 P.2d 913 (Colo. 1997).

24. See *Mingo Oil Producers v. Kamp Cattle Co.*, 776 P.2d 736 (Wyo. 1989).

25. *Getty Oil Co. v. Jones*, 470 S.W.2d 618, 619 (Tex. 1971).

26. *Id.* at 620.

27. *Id.* at 621.

that this clause could be construed as evidence of intent to allow farming to coexist with mining.²⁸

In 1963, Jones installed a center-pivot irrigation system that could negotiate most obstacles less than seven feet in height.²⁹ In 1967, Getty drilled two wells in the area served by the irrigation system, but the wells could only produce oil if Getty installed pumping units.³⁰ Getty consequently installed two beam-type pumping units; one was seventeen feet high on its upstroke and the other thirty-four feet high on its upstroke.³¹ Due to the height of the pumping units, Jones could not use his irrigation system effectively.³² Significantly, two other oil lessees producing on Jones's property had installed their pumping units in below-ground concrete cellars so that the vertical obstruction was less than seven feet high, thus permitting Jones to use the sprinkler system.³³ At trial, Jones claimed that under all of the facts and circumstances, it was not reasonably necessary for Getty to install pumping units in a manner that denied him the use of his irrigation system. Getty argued that it had an exclusive right to superadjacent airspace above the surface area occupied by its pumps because its mineral estate was the dominant estate.³⁴

The Texas Supreme Court agreed with Jones, noting that Getty had reasonable alternatives for producing the oil, such as using cellars as the other lessees had done.³⁵ The court held that

where there is an existing use by the surface owner which would otherwise be precluded or impaired, and where under the established practices in the industry there are alternatives available to the lessee whereby the minerals can be recovered, the rules of reasonable usage of the surface may require the adoption of an alternative by the lessee.³⁶

In so holding, the court assigned the surface owner a right "to an accommodation between the two estates."³⁷

On rehearing, the court clarified its holding, stressing that the burden of establishing the unreasonableness of the lessee's surface use is on the surface owner and that the reasonableness of the surface use is to be determined by a consideration of the circumstances of both owners.³⁸ The court reasoned that the reasonableness of the method and manner of using the mineral estate should be measured by the usual, customary, and reasonable practices in the industry under like circumstances

28. Wenzel, *supra* note 2, at 632.

29. Getty, 470 S.W.2d at 620.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* at 621.

35. *Id.* at 622.

36. *Id.*

37. *Id.* at 623.

38. *Id.* at 627.

of time, place, and servient estate uses.³⁹ Further, courts must consider the condition of the surface itself and the uses then being made by the servient surface owner in determining reasonableness.⁴⁰

The court also suggested that the surface owner must first establish that his proposed use of the surface is the only reasonable means of developing his land.⁴¹ Once the surface owner meets this first burden, he must then establish that there are reasonable alternative methods available to the lessee that will allow the lessee to produce his wells.⁴² By placing the burden on the surface owner to establish reasonable alternative methods, the *Getty Oil* court preserved the dominant nature of the mineral estate.⁴³

Therefore, under *Getty Oil*, the lessor must meet three requirements to invoke the accommodation doctrine: (1) there must be an existing use of the surface; (2) the mineral lessee's proposed use of the surface must preclude or impair the existing use of the surface; and (3) the mineral lessee must have reasonable alternatives available.⁴⁴ Under this test, if there is only one means of surface use by which to produce the minerals, the mineral owner is not bound by the accommodation doctrine and may pursue that use regardless of potential damage to the surface.⁴⁵

One year later, the Texas Supreme Court limited the accommodation doctrine in *Sun Oil Co. v. Whitaker*.⁴⁶ In *Whitaker*, the owner of severed surface rights farmed his land by irrigation using a closed and isolated aquifer. The surface owner sued Sun Oil, the mineral owner, to prevent it from using potable water from the aquifer in a secondary recovery operation.⁴⁷ While the water used by Sun Oil was from the only available source of water on the land,⁴⁸ Whitaker argued that purchasing water from other sources was a reasonable alternative available to Sun Oil.⁴⁹ Whitaker produced evidence at trial showing that the water taken by Sun Oil would shorten the life of Whitaker's water supply by 15-20% and that Sun Oil could purchase and pipe in water for its purposes at economically feasible prices.⁵⁰ The

39. *Id.*

40. *Id.* at 627-28.

41. *Id.*; see also Hultin, *supra* note 2, at 1069.

42. *Getty*, 470 S.W.2d at 628; see also Welborn, *supra* note 15, at 22-22 (stating that "the burden of proof is on the surface owner to prove that the mineral owner has reasonable alternatives and that any other use of the surface by the surface owner would be impractical and unreasonable").

43. Wenzel, *supra* note 2, at 632 n.109.

44. Laura H. Burney, *Accommodating and Condemning Surface and Mineral Estates — The Implication of Tarrant County Water Control and Improvement District Number One v. Haupt, Inc.*, STATE BAR OF TEX., ADVANCED OIL, GAS & MIN. L. COURSE, at E-1 (1994); see also Garcia & Manis, *supra* note 2, at 140.

45. *Getty*, 470 S.W.2d at 622.

46. 483 S.W.2d 808 (Tex. 1972).

47. *Id.* at 809.

48. *Id.* at 810.

49. *Id.* at 809.

50. *Id.* at 810.

lower court found Sun Oil's use of the water unreasonable, using *Getty Oil* as the basis for its decision.⁵¹

The Texas Supreme Court reversed, holding that *Getty Oil* is "limited to situations in which there are reasonable alternative methods that may be employed by the lessee *on the leased premises* to accomplish the purposes of the lease."⁵² The court reasoned that the oil and gas lessee's estate is the dominant estate and the lessee has an implied grant to freely use as much of the premises as necessary to effectuate the purposes of the lease. Therefore, the court reasoned, requiring Sun Oil to purchase water from other sources would be a derogation of the dominant estate.⁵³

The court noted that waterflood projects have been held to be reasonably necessary operations under oil and gas leases and that it was uncontradicted that the use of water from the aquifer was reasonably necessary to effectuate the purposes of the lease.⁵⁴ Furthermore, efforts by Sun Oil to use available salt water for the secondary recovery effort had failed, and there was no other source of water on the leased tract for Sun Oil to use.⁵⁵ Thus, *Whitaker* modified *Getty Oil* by requiring the surface owner to show that there are reasonable alternatives available *on the leased premises* in order to successfully invoke the accommodation doctrine.

In 1993, in *Tarrant County Water Control & Improvement District No. One v. Haupt, Inc.*,⁵⁶ the Texas Supreme Court extended the accommodation doctrine to apply "when [a] governmental entity is the surface owner."⁵⁷ In *Haupt*, the Tarrant County water district condemned the surface of an eighty-acre tract in order to construct a reservoir.⁵⁸ *Haupt* was one of the lessees of the tract's mineral estate. After the reservoir was created, *Haupt* sued, claiming that the water district had inversely condemned⁵⁹ its interest in the mineral estate.⁶⁰ The Texas Court of

51. *Id.*

52. *Id.* at 812.

53. *Id.* at 810-12.

54. *Id.* at 811.

55. *Id.* at 812.

56. 854 S.W.2d 909 (Tex. 1993), *rev'g* 833 S.W.2d 697 (Tex. App. 1992), *remanded to* 870 S.W.2d 350 (Tex. App. 1994).

57. *Id.* at 912.

58. *Id.* at 911.

59. Inverse condemnation occurs when the actions of a governmental entity result in the taking of property rights without initiating condemnation proceedings and without paying just compensation as required by the federal and state constitutions. ROGER A. CUNNINGHAM ET AL., *THE LAW OF PROPERTY*, § 9.1, at 519 (2d ed. 1993). The Texas Supreme Court held in 1970 that condemnation of the surface is not an inverse condemnation of the underlying mineral estate so long as the mineral estate owners "possess their common law right to the reasonable use of the surface estate." *Chambers-Liberty Counties Navigation Dist. v. Banta*, 453 S.W.2d 134, 137 (Tex. 1970). The plaintiffs in *Haupt* argued that, as a result of the creation of the reservoir, they no longer possessed the ability to make a reasonable use of the surface estate because in order to produce oil and gas, directional drilling would be required. *Haupt*, 854 S.W.2d at 913. The plaintiffs relied on expert testimony that if the court limited the method of extraction to directional drilling, the value of their mineral interests would be nearly zero. *Id.*

60. *Haupt*, 854 S.W.2d at 910.

Appeals held, without considering the accommodation doctrine, that the lessees' interests had been inversely condemned.⁶¹

The water district appealed, making the novel argument that the accommodation doctrine should determine if the interests in the mineral estate had been inversely condemned.⁶² The Texas Supreme Court delineated the *Getty Oil* criteria but then continued by stating:

The accommodation doctrine preserves — absolute and unfettered — the right of the dominant mineral estate to use the surface under certain limited circumstances: *Getty recognizes that if there is but one means of surface use by which to produce the minerals, then the mineral owner has the right to pursue that use, regardless of surface damage.* On the other hand, if the mineral owner has reasonable alternative uses of the surface, one of which permits the surface owner to continue to use the surface in the manner intended (especially when there is only one reasonable manner in which the surface may be used) and one of which would preclude that use by the surface owner, the mineral owner *must* use the alternative that allows continued use of the surface by the surface owner.⁶³

Upon remand, the Texas Court of Appeals noted that *Getty Oil* requires the surface owner to show that the particular manner of surface use being challenged is not reasonably necessary to the mineral owner.⁶⁴ The surface owner may show this by proving the mineral owner has available other reasonable means of production that would not interfere with the surface owner's existing use.⁶⁵ However, in addition, the court of appeals stated that the surface owner must also show that any alternative uses of the surface, other than the existing use, are impracticable and unreasonable under all of the circumstances.⁶⁶

The court further stated that

if a mineral owner has available several means of accessing the minerals, one of which will maximize the value of the mineral estate and other alternatives that, if used, will either totally destroy or significantly reduce its value, the mineral owner cannot rationally argue that the alternative methods provide *reasonable* access to the minerals.⁶⁷

61. *Haupt, Inc. v. Tarrant County Water Control & Improvement Dist. No. One*, 833 S.W.2d 697, 698 (Tex. App. 1992).

62. *Haupt*, 854 S.W.2d at 912.

63. *Haupt, Inc. v. Tarrant County Water Control & Improvement Dist. No. One*, 870 S.W.2d 350, 353 (Tex. App. 1994).

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* at 354.

Several witnesses for both the water district and the mineral owners testified that creation of the water reservoir made vertical drilling impossible and that only directional drilling could access the minerals.⁶⁸ However, directional drilling would decrease the value of the minerals by at least 75%.⁶⁹

Although the court noted that directional drilling is a generally accepted method of producing oil and gas, the court held that the diminution in value resulting from directional drilling made it an unreasonable alternative.⁷⁰ Thus, *Haupt* stands for the proposition that economic reasonableness is one factor to consider in determining whether an alternative is reasonable. In addition, if there is only one way to produce the minerals, such as vertical drilling, the mineral owner may pursue that use regardless of damage to the surface estate.⁷¹

B. Utah

Utah also follows the accommodation doctrine.⁷² In *Flying Diamond Corp. v. Rust*,⁷³ the Utah Supreme Court adopted the accommodation doctrine when it required a mineral owner to use an alternative means of access to a mineral site.⁷⁴ The mineral owner and lessee, Flying Diamond, wanted to build a road to access its oil and gas wells.⁷⁵ Rust, the surface owner, requested that the lessee build its access road from the north to minimize damage to his alfalfa and clover fields. However, the mineral owner built the road from the east, rendering twenty-one acres of land unusable for agricultural purposes and causing significant damage to the surface.⁷⁶ Rust sued, and the court found that Flying Diamond's construction of the road from the east was not necessary because it could have built the road from the north as requested by Rust.⁷⁷

In so finding, the court relied upon *Getty Oil* and explicitly accepted Texas's views regarding the accommodation doctrine. The court held "that wherever there exists separate ownerships of interests in the same land, each should have the right to the use and enjoyment of his interest in the property to the highest degree possible, not inconsistent with the rights of others."⁷⁸ In defining the phrase "not inconsistent with the rights of others," the court explained that a lessee should use alternative methods to minimize damage to the surface estate. The court also noted that its holding does not mean that the lessee must use any possible alternative, only

68. *Id.*

69. *Id.*

70. *Id.* at 355.

71. *Id.* at 353.

72. See Welborn, *supra* note 15, at 22-22; Wenzel, *supra* note 2, at 631.

73. 551 P.2d 509 (Utah 1976).

74. *Id.* at 511.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

that the lessee is required to pursue an alternative that is "reasonable and practical under the circumstances."⁷⁹

This language strongly suggests Utah's acceptance of the accommodation doctrine, yet the court failed to explicitly define the type of parameters that Texas courts have created to confine the doctrine.⁸⁰ For example, the Utah court did not state which party must introduce evidence of available alternate uses.⁸¹ Despite the court's failure to expressly state the requirements needed in order to invoke the accommodation doctrine, Utah has adopted some form the accommodation doctrine.⁸²

C. North Dakota

In *Hunt Oil Co. v. Kerbaugh*,⁸³ the North Dakota Supreme Court joined both Utah and Texas in accepting the accommodation doctrine.⁸⁴ *Kerbaugh* involved surface owners who sought to prevent the mineral lessees from conducting seismic operations on the land.⁸⁵

In adopting the accommodation concept, the court quoted extensively from both *Getty Oil* and *Flying Diamond*, noting that whether the use of the surface estate by the mineral estate owner is reasonably necessary is a question of fact and that the burden of proof in such a determination is upon the servient estate owner.⁸⁶ The *Kerbaugh* court cited *Getty Oil*, stating:

It is important to note . . . the accommodation doctrine is not a balancing type test weighing the harm or inconvenience to the owner of one type of interest against the benefit to the other. Rather . . . the test is the availability of alternative non-conflicting uses of the two types of owners. Inconvenience to the surface owner is not the controlling element where no reasonable alternatives are available to the mineral owner or lessee. The surface owner must show that under the circumstances, the use of the surface under attack is not reasonably necessary.⁸⁷

At trial, the surface owners could only prove that Hunt Oil's seismic testing disrupted the flow of a spring and that Hunt Oil left open holes on the property.⁸⁸ The surface owners failed to offer any evidence that the mineral lessees had other reasonable alternatives to seismic testing in exploring the property. Nor did they

79. *Id.*

80. See Wenzel, *supra* note 2, at 634-35.

81. *Id.* at 635.

82. *Id.*

83. 283 N.W.2d 131 (N.D. 1979).

84. *Id.* at 136.

85. *Id.* at 133.

86. *Id.* at 137.

87. *Id.*

88. *Id.* at 133.

show that seismic testing was unreasonable.⁸⁹ As a result, the court found for the mineral estate owners.⁹⁰

In so finding, North Dakota more clearly adopted a Texas-style accommodation doctrine than did Utah.⁹¹ Whereas the Utah court in *Flying Diamond* implied which factors should be considered, the *Kerbaugh* court expressly stated that "a pure balancing test is not involved under the accommodation doctrine where no reasonable alternatives are available."⁹² Thus, because there were no reasonable alternatives to seismic testing, the *Kerbaugh* court refused to consider or to balance the harm done to the surface owners.⁹³ However, the *Kerbaugh* court did note that "once alternatives are shown to exist[,] a balancing of the mineral and surface owner's interest [occurs]."⁹⁴ This balancing process takes into account the different alternatives available to the mineral owner and weighs them against the inconveniences to the surface owner.⁹⁵

D. Arkansas

When the accommodation doctrine was initially announced, it protected only a surface owner's existing use.⁹⁶ Arkansas's adoption of the accommodation doctrine extended protection to a surface owner's proposed surface use.⁹⁷ In *Diamond Shamrock Corp. v. Phillips*,⁹⁸ the surface owners, the Phillips, bought eighty acres of land upon which they planned to build their retirement home.⁹⁹ An order of the Arkansas Oil and Gas Commission designated the Phillips' land as part of a unit for the purpose of exploring for gas.¹⁰⁰ The order provided for one drilling site for each section within the unit and stated that the site should be located at the discretion of those who proposed to drill.¹⁰¹ Before the Phillips had formally commenced building their home, Diamond Shamrock selected three possible drilling sites, all of them on the Phillips' eighty-acre tract.¹⁰²

During the initial process of selecting the eventual drill site, Diamond Shamrock gave assurances that it would drill a well 160 feet to the north of the intended homesite¹⁰³ and filed public notices to that effect. But for unspecified reasons,

89. *Id.* at 137.

90. *Id.* at 139-40.

91. Wenzel, *supra* note 2, at 635.

92. *Hunt*, 283 N.W.2d at 137.

93. *Id.*; see also Wenzel, *supra* note 2, at 636.

94. *Hunt*, 283 N.W.2d at 137.

95. *Id.*

96. See *Getty Oil v. Jones*, 470 S.W.2d 618 (Tex. 1971).

97. See Wenzel, *supra* note 2, at 636.

98. 511 S.W.2d 160 (Ark. 1974).

99. *Id.* at 161.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* After the surveying crew placed a stake in the ground and said they "might drill there," the surface owner protested, saying he did not want an encroachment on the homesite. The head surveyor "acceded" to the surface owner's request and assured him that the well could be drilled behind the

Diamond Shamrock ultimately drilled exactly where it promised it would not, on the precise location where the Phillips intended to build their home.¹⁰⁴ As a result, the Phillips could not build their home on the planned location.¹⁰⁵

Although the Arkansas Supreme Court noted that the mineral owner has the right to occupy the surface beyond the limits of his well to operate the mineral owner's estate, the court held that the behavior and use of the surface by Diamond Shamrock in this instance was unreasonable.¹⁰⁶ The court based its finding of unreasonableness on Diamond Shamrock's original promise that it would use an alternative drill site, which remained an available alternative.¹⁰⁷ In fact, the alternative drill site was the site suggested by the mineral owner's own geologist.¹⁰⁸

In reaching its decision, the court relied on *Getty Oil*, describing the case as "very persuasive" and quoting from it the following:

Where there is an existing use [of the surface] by the surface owner which would otherwise be precluded or impaired, and where under the established practices in the industry there are alternatives available to the lessee whereby the minerals can be recovered, the rules of reasonable usage of the surface may require the adoption of the alternative by the lessee.¹⁰⁹

Although the court in *Diamond Shamrock* never explicitly adopted the accommodation doctrine, the court's quoting of the phrase "reasonable use of the surface" from the *Getty Oil* case effectuated an adoption of the doctrine.¹¹⁰ Unlike the facts in *Getty Oil*, however, there was no existing use of the surface by the surface owner in *Diamond Shamrock*. There was merely a proposed use, an intent to build a house. The court failed to consider this distinction and instead focused on Diamond Shamrock's previous promises to the Phillips as a basis for its decision. Yet it is accepted that the accommodation doctrine is law in Arkansas.¹¹¹ Thus, Arkansas somewhat extended the *Getty Oil* doctrine and found that even proposed surface uses are protected by the accommodation doctrine.

E. New Mexico

New Mexico, in the case of *Amoco Production Co. v. Carter Farms Co.*,¹¹² also explicitly adopted the accommodation doctrine. In *Carter Farms*, the surface owner sued Amoco to recover damages for negligent construction of the drilling site and

homesite, several hundred feet away.

104. *Id.* at 164.

105. *Id.* at 161.

106. *Id.* at 163.

107. *Id.* at 164.

108. *Id.*

109. *Id.* at 163 (quoting *Getty Oil v. Jones*, 470 S.W.2d 618 (Tex. 1971)).

110. *Id.*

111. See Wenzel, *supra* note 2, at 636-37.

112. 703 P.2d 894 (N.M. 1985).

for the alleged willful and wanton refusal by Amoco to restore the surface.¹¹³ The surface owner objected to, among other things, the creation of a pit that held drill cuttings, mud, salt water, and other solids.¹¹⁴ The New Mexico Supreme Court found for Amoco,¹¹⁵ holding that mineral lessees are entitled to use as much of the surface area as is reasonably necessary, provided they exercise due regard for the rights of surface owners.¹¹⁶ However, the court noted that regulations set forth by the New Mexico Oil Conservation Division required Amoco to construct a reserve pit and that the creation and use of such a pit was necessary to the drilling operations. Therefore, the court held that Amoco's actions were not unreasonable.¹¹⁷

Unfortunately, the *Carter Farms* decision, like Utah's *Flying Diamond* decision, provides few parameters to confine the accommodation doctrine. The court's decision fails to state which party must introduce evidence of available alternate surface uses and fails to state whether the mineral owner must only accommodate the surface owner as possible on the leased premises. Regardless of these shortcomings in the court's opinion, some form of the accommodation doctrine exists in New Mexico.¹¹⁸

F. West Virginia

West Virginia first adopted and applied the accommodation doctrine in the hard-rock mining context. Significantly, West Virginia's accommodation doctrine does not make a distinction between the extent of the right to use the surface under coal severance deeds and the right under oil and gas severances.¹¹⁹

In *Buffalo Mining Co. v. Martin*,¹²⁰ the West Virginia Supreme Court held that an 1890 mineral severance impliedly gave the mineral owner the right to construct a power line on the surface.¹²¹ In so holding, the court referred to previous West Virginia cases holding that any use of the surface by virtue of rights granted in a mineral deed must be exercised reasonably so as not to unduly burden the surface owner's use.¹²² However, the court continued by stating:

A right to surface use will not be implied where it is totally incompatible with the rights of the surface owner . . . [W]here implied as opposed to express rights [to use the surface] are sought, the test of what is reasonable and necessary becomes more exacting, since the mineral owner is seeking a right that he claims not by virtue of any

113. *Id.* at 895.

114. *Id.*

115. *Id.*

116. *Id.* at 896 (citing *Getty Oil v. Jones*, 470 S.W.2d 618 (Tex. 1971)).

117. *Id.* at 896-97.

118. See *Wenzel*, *supra* note 2, at 629 n.89.

119. See *Buffalo Mining Co. v. Martin*, 267 S.E.2d 721, 726 n.4 (W. Va. 1980).

120. *Id.*

121. *Id.* at 725-26.

122. *Id.* at 725 (citing *Adkins v. United Fuel Gas Co.*, 61 S.E.2d 633 (W. Va. 1950); *Porter v. Mack Mfg. Co.*, 64 S.E. 853 (W. Va. 1909)).

express language in the mineral severance deed, but by necessary implication as a correlative to those rights expressed in the deed. In order for such a claim to be successful, it must be demonstrated not only that the right is reasonably necessary for the extraction of the mineral, but also that the right can be exercised without any substantial burden to the surface owner.¹²³

This language suggests that West Virginia places the burden upon the mineral owner to demonstrate reasonable surface use, as opposed to placing the burden on the surface owner to demonstrate unreasonable surface use or alternative mining methods.¹²⁴ By placing the burden on mineral owners, the court provided surface owners with greater protection than the accommodation doctrine may have originally intended to provide.¹²⁵

With the burden of proving reasonableness on the mineral owner, the surface estate owner becomes, in effect, the dominant estate.¹²⁶ The court cited both *Flying Diamond* and *Getty Oil* as bases for its holding and reasoning;¹²⁷ thus, it is unclear whether the court actually intended to create surface estate dominance or if the court merely misunderstood the law it cited.¹²⁸ For example, in Texas, if a mining easement conflicts with a surface use, the mineral owner may still be allowed to proceed with its surface use,¹²⁹ yet the *Buffalo Mining* court appears to have overlooked this principle in formulating its rule.¹³⁰ Regardless, an accommodation doctrine of some form exists in West Virginia, a state in which total destruction of the surface (an activity which could be considered to be a substantial burden to the surface owner) is commonplace in the mining of coal.

G. Colorado

In *Gerrity Oil & Gas Corp. v. Magness*,¹³¹ the Colorado Supreme Court may have adopted the accommodation doctrine.¹³² However, in so doing, the court

123. *Id.* at 725-26.

124. See Wenzel, *supra* note 2, at 638.

125. *Id.*

126. See Clinton W. Smith, Note, *Disturbing Surface Rights: What Does 'Reasonably Necessary' Mean in West Virginia?*, 85 W. VA. L. REV. 817 (1983) (suggesting that the West Virginia Supreme Court is equating the due regard theory with an undue burden concept and thus the surface estate is transformed into the dominant estate).

127. *Buffalo Mining*, 267 S.E.2d at 726 (stating that the concept it was defining had been clearly articulated in oil and gas cases).

128. See Wenzel, *supra* note 2, at 639 n.147.

129. *Getty Oil Co. v. Jones*, 470 S.W.2d 618 (Tex. 1971); *Sun Oil Co. v. Whitaker*, 483 S.W.2d 808 (Tex. 1972); *supra* notes 25-55.

130. *Id.*

131. 946 P.2d 913 (Colo. 1997).

132. See Johnson, *supra* note 2, at 951 (stating that the *Gerrity* court "allowed some room for adoption of the accommodation doctrine"); cf. COLO. DEPT OF NATURAL RESOURCES, OVERVIEW OF OIL AND GAS LEGISLATIVE PACKAGE (2000), at http://www.dnr.state.co.us/cdnr_news/edo/2000105181447.html (last visited Feb. 28, 2002) [hereinafter COLORADO LEGISLATIVE PACKAGE] (stating that the judicial accommodation doctrine exists in Colorado).

modified the accommodation doctrine by placing the burden on the mineral owner to prove the reasonableness of his use of the surface, instead of requiring the surface owner to establish the unreasonableness of the mineral owner's surface use.¹³³

In *Gerrity*, the surface owner, Magness, purchased 1270 acres of land in 1983 to raise crops and animals. The land was subject to a reservation of the underlying mineral estate.¹³⁴ The owners of the mineral estate, who were not parties to the litigation, executed an oil and gas lease in 1973, of which Gerrity Oil eventually became the lessee.¹³⁵ In 1992, Gerrity Oil notified Magness of its intent to drill four oil wells on the land, and the parties commenced negotiations to determine the locations of the wells so as to minimize crop damage and disruption to the livestock operation.¹³⁶ The parties agreed on the location of one well and began drilling on that well. However, negotiations eventually broke down over the locations for the remaining wells, and an agent of Magness informed Gerrity Oil that it did not have the authority to commence operations on the additional wells.¹³⁷ With Magness refusing to allow Gerrity Oil entrance to the property, Gerrity Oil filed suit, requesting that Magness be enjoined from preventing access to the well sites.¹³⁸ In response, Magness asserted several counterclaims, one of which was trespass.¹³⁹

The Colorado Supreme Court, noting that each estate owner must have due regard for the rights of the other in making use of his estate, held that mineral owners "must accommodate surface owners to the fullest extent possible consistent with their right to develop the mineral estate."¹⁴⁰ The court continued, stating that "when the operations of a lessee . . . would preclude or impair uses by the surface owner, and when reasonable alternatives are available to the lessee, the doctrine of reasonable surface use requires the lessee to adopt an alternative means."¹⁴¹ In addition, the court held that when claiming the mineral owner's use of the surface is unreasonable, the surface owner must initially present evidence that the mineral owner materially interfered with the surface owner's uses.¹⁴²

While these comments by the court appear to be an adoption of the accommodation doctrine, the court modified the doctrine by shifting the evidentiary burden.

[T]he operator [or mineral owner] must [then] present evidence, by means of expert testimony or otherwise, that explains why its surface conduct was reasonable and necessary from the perspective of the operator. This burden properly lies with the operator because the

133. *Gerrity*, 946 P.2d at 933. See generally Johnson, *supra* note 2, at 951.

134. *Gerrity*, 946 P.2d at 920.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.* at 921.

140. *Id.* at 927 (citing *Getty Oil v. Jones*, 470 S.W.2d 618, 622 (Tex. 1971)).

141. *Id.*

142. *Id.* at 933.

operator is in a much better position, from an evidentiary standpoint, to explain the necessity of its conduct and to present evidence that its operations conformed to standard customs and practices in the industry. Assuming the [mineral owner] presents such evidence, the surface owner would then be permitted to present its own rebuttal evidence that reasonable alternatives were available to the operator at the time of the alleged trespass. Ultimately, it is the province of the trier of fact to balance the competing interests of the operator and surface owner and objectively determine whether, under the circumstances, the operator's surface use was both reasonable and necessary.¹⁴³

Thus, the *Gerrity* court shifted the evidentiary burden from the surface owner, the party required to prove the unreasonableness of a mineral owner's surface use in the majority of jurisdictions that have adopted the accommodation doctrine, to the mineral owner.

In addition, once the mineral owner provides evidence that its use of the surface was reasonable, the trial court performs a balancing-type analysis that weighs the parties' competing interests. However, this balancing may not be the same type of balancing first announced by the *Kerbaugh* court in North Dakota. While the court in *Kerbaugh* balanced the different alternatives available to the mineral owner against the inconveniences to the surface owner,¹⁴⁴ the court in *Gerrity* balanced the competing interests of the mineral and surface owners to determine if the mineral owner's use of the surface was reasonable.¹⁴⁵ It appears that under *Gerrity*, the trial court is under no obligation to consider whether an alternative available to the mineral owner, such as directional drilling, which may cost drastically more to implement in terms of cost and risk, counteracts the surface owner's desire to keep his land free from vertical drilling so that he may use the land for growing crops. Thus, a trial court, after balancing the parties' competing interests, could find that the value in using the surface estate to grow crops outweighs the cost of directional drilling, thereby requiring the mineral owner to use that method to produce its minerals. Regardless, Colorado probably has some form of the accommodation doctrine, although it is drastically modified when compared to the doctrine as adopted by other jurisdictions.

H. Wyoming

It is unclear if Wyoming has explicitly adopted the accommodation doctrine.¹⁴⁶ However, in *Mingo Oil Producers v. Kamp Cattle Corp.*,¹⁴⁷ the Wyoming Supreme Court dealt with a mineral owner's right to use the surface.¹⁴⁸ The mineral and surface owners had entered into an "access agreement," which required the mineral

143. *Id.* at 933-34.

144. *Hunt Oil Co. v. Kerbaugh*, 283 N.W.2d 131, 137 (N.D. 1979).

145. *Gerrity*, 946 P.2d at 934.

146. *See Wenzel*, *supra* note 2, at 639 n.147.

147. 776 P.2d 736 (Wyo. 1989).

148. *Id.* at 736-37.

owner to (1) pay rentals in order to use the surface and (2) pay for surface damages.¹⁴⁹ After the mineral owner failed to comply with some of the terms of the "access agreement," the surface owner prevented the mineral owner from conducting operations on the surface.¹⁵⁰ The mineral owner sued, claiming it had a right to use the surface independent of its "access agreement" with the surface owner.¹⁵¹

The court refused to decide if such an "access agreement" was valid; instead, the court focused on the terms of the original lease agreement entered into by the parties. The original agreement contained a clause stating that the "[l]essee shall pay for damages caused by operations on said land."¹⁵² The court concluded that, under the terms of the lease, the surface owner clearly had the right to be paid for surface damages.¹⁵³

More important for purposes of this article, the court, in dicta, reiterated that the mineral estate was dominant and that under the rule of reasonable necessity, the mineral lessee is entitled to possess that portion of the surface estate "reasonably necessary" to the production and storage of the minerals.¹⁵⁴ The court implied that under an "ordinary" oil and gas lease, payments by the mineral owner for surface damages are probably not required. To support this position, the court cited *Getty Oil* and noted that Texas jurisprudence is not "essentially different" from developed Wyoming law.¹⁵⁵

One commentator has opined that this statement by the Wyoming Supreme Court may "represent Wyoming's adoption of the accommodation doctrine, although if so, the state is using it to provide the surface owner continuing damages from the mineral owner so long as mineral development persists, rather than requiring the mineral owner to use alternative mining methods."¹⁵⁶ If this is true, Wyoming's accommodation doctrine functions more like a surface damage statute than a true accommodation doctrine.¹⁵⁷

IV. Summary of Existing Case Law on the Accommodation Doctrine

Applying all of the foregoing case law, it is apparent that in the majority of jurisdictions, the burden of proof is completely on the surface estate owner when invoking the accommodation doctrine. To summarize, the surface owner must show: (1) There is an existing use of the surface that the mineral owner is interfering with; (2) The mineral owner's usage of the surface is unreasonable, as measured by the usual, customary, and reasonable practices in the industry at the time and under like

149. *Id.* at 737.

150. *Id.* at 738.

151. *Id.*

152. *Id.*

153. *Id.* at 742.

154. *Id.* at 741.

155. *Id.* at 741-42.

156. See Wenzel, *supra* note 2, at 639 n.141.

157. *Id.*

circumstances; and (3) There are reasonable and practical alternatives available to the mineral owner in developing the minerals.

Texas, and possibly other jurisdictions, require that the alternatives be on the leased premises as announced in *Sun Oil Co. v. Whitaker*.¹⁵⁸ While New Mexico has not explicitly adopted Utah's position on the accommodation principle, it is possible that New Mexico would subscribe to Utah's position that the lessee does not have to use any possible alternative, only that it pursue one that is reasonable and practical "under the circumstances."¹⁵⁹

The accommodation doctrine *will not* apply where an oil and gas lease expressly reserves to the lessee the right to use "all usual, necessary and convenient means" to explore for and produce oil and gas.¹⁶⁰ Thus, pursuant to such a reservation, the mineral owners are under no obligation to accommodate the surface owners in an existing surface use provided that the mineral owners are using usual means in conducting their operations.¹⁶¹

V. Application of the Reasonableness Requirement

It should not be difficult for courts to determine whether a mineral owner is interfering with a surface owner's already existing use of the surface. The surface estate either is or is not being used when the mineral owner attempts to produce its minerals. However, the issue of whether the mineral owner's usage of the surface is unreasonable is less clear and is therefore the subject of much litigation. The following two sections provide insight into what courts have held to be reasonable and unreasonable uses of the surface estate.

A. What Has Been Deemed a Reasonable Use of the Surface?

In invoking the accommodation doctrine, surface owners must allege that the use proposed by the mineral owner is "unreasonable." This requirement may prove difficult for the surface owner to meet, given what courts have previously deemed to be a reasonable use. The following section, while not comprehensive, provides a general overview of what is considered "reasonable" use by mineral owners in exploring for and producing their minerals.

Although seismographic operations aggravate the surface owner and cause occasional damage to the surface, they are considered to be a reasonable exercise of the mineral owner's easement.¹⁶² The construction of roads is also considered

158. 483 S.W.2d 808 (Tex. 1972).

159. See *Flying Diamond Corp. v. Rust*, 551 P.2d 509, 511 (Utah 1976).

160. *Landreth v. Melendez*, 948 S.W.2d 76, 81 (Tex. App. 1997).

161. *Id.*

162. See *Musser Davis Land Co. v. Union Pac. Res.*, 201 F.3d 561, 568 (5th Cir. 2000) (holding that the mineral lease granted the lessee the right to prudently conduct reasonable seismic operations as part of the exclusive and unqualified right to explore for oil and gas); *Yates v. Gulf Oil Corp.*, 182 F.2d 286, 291 (5th Cir. 1950) (holding that an oil and gas lessee under a 1924 lease that made no mention of geophysical explorations had the implied right to go upon the premises for the purpose of geophysical explorations); *Hunt Oil Co. v. Kerbaugh*, 283 N.W.2d 131, 136 (N.D. 1979) (stating that the right to conduct seismic exploration activities may be limited by the accommodation doctrine but allowing

reasonable even when doing so destroys portions of the surface¹⁶³ through the use of caliche excavated from the leased premises¹⁶⁴ or from the removal of trees.¹⁶⁵ In addition, the surface may be used in the building of structures, such as a house for one of the lessee's employees,¹⁶⁶ and facilities, such as pipelines, storage, or treatment facilities needed for the production and transportation of minerals.¹⁶⁷

Texas courts have given wide discretion to operators in their selection of drillsites. In fact, one early case held that "the lessee [has] the primary and exclusive right to locate and drill wells wherever he [chooses] in the development of the premises."¹⁶⁸ Surface owners cannot compel the lessee to use abandoned well bores instead of drilling new wells,¹⁶⁹ nor can they require an operator to drill in the back yard, instead of the front yard, of a homesite.¹⁷⁰ Likewise, mineral estate owners are generally unrestricted in determining when to drill a well¹⁷¹ and do not have to give advance notice to the surface owner advising when drilling operations will begin.¹⁷²

Mineral lessees may use both fresh water for mineral exploitation¹⁷³ and salt water for secondary recovery efforts,¹⁷⁴ without compensation to the surface owner.¹⁷⁵ In addition, disposal of the salt water that has been produced with oil

seismic exploration in the instant case because the surface owner failed to satisfy the burden of proof placed upon him by the doctrine). *But see* Oklahoma Seismic Exploration Regulation Act, 52 OKLA. STAT. §§ 318.21 to 318.23 (Supp. 2000) (requiring a permit to be obtained before conducting seismic operations and notification of all surface owners where such operations will occur fifteen days prior to the commencement of operations).

163. *See* Gulf Oil Corp. v. Walton, 317 S.W.2d 260, 264 (Tex. App. 1958) (holding that a mineral owner may build roads where necessary for the transportation of heavy machinery and the servicing of well sites).

164. *See* B.L. McFarland Drilling Contractor v. Connell, 344 S.W.2d 493 (Tex. App. 1961).

165. *See* Gulf Ref. Co. v. Davis, 80 So. 2d 467 (Miss. 1955).

166. *See* Livingston v. Indian Terr. Illuminating Oil Co., 91 F.2d 833 (10th Cir. 1937); Joyner v. R.H. Dearing & Sons, 134 S.W.2d 757 (Tex. App. 1939); Holbrook v. Cont'l Oil Co., 278 P.2d 798 (Wyo. 1955).

167. *See* Atl. Ref. Co. v. Bright & Schiff, 321 S.W.2d 167 (Tex. App. 1959) (reasonable use of the surface includes use of pits, pumps, tanks, and equipment incident to drilling); Grubstake Inv. Ass'n v. Coyle, 269 S.W. 854 (Tex. App. 1925) (placement of boiler, toolhouse, tanks, and a tent in connection with drilling operations on the surface was not unreasonable); *see also* King, *supra* note 2, § 9-5.

168. *Stephenson v. Glass*, 276 S.W. 1110, 1112 (Tex. App. 1925).

169. *Gulf Oil Corp. v. Walton*, 317 S.W.2d 260 (Tex. App. 1958).

170. *Grimes v. Goodman Drilling Co.*, 216 S.W. 202 (Tex. App. 1919).

171. *See generally* King, *supra* note 2, § 9-6.

172. *Parker v. Tex. Co.*, 326 S.W.2d 579 (Tex. App. 1959).

173. *Russell v. Tex. Co.*, 238 F.2d 636 (9th Cir. 1956); *Tweedy v. Tex. Co.*, 286 F. Supp. 383 (D. Mont. 1968); *Ark. La. Gas Co. v. Wood*, 403 S.W.2d 54 (Ark. 1966); *Sun Oil v. Whitaker*, 483 S.W.2d 808 (Tex. 1972); *Stradley v. Magnolia Petroleum Co.*, 15 S.W.2d 649 (Tex. App. 1941).

174. *See Holt v. Southwest Antioch Sand Unit*, 1955 OK 368, 292 P.2d 998; *Robinson v. Robbins Petroleum Corp.*, 501 S.W.2d 865 (Tex. 1973).

175. *See generally* Robert W. Dace, *Oil and Gas: Water and Watercourses: The Right to Use Fresh Groundwater in Waterflood Operations*, 35 OKLA. L. REV. 159 (1982); A. Dan Tarlock, *Acquisition of Water Rights for Oil and Gas Development*, 34 S.W. LEGAL FDN. OIL & GAS INST. 143 (1983); Cynthia Kay Vaughan, *Oklahoma Groundwater Law: When Can Oil Companies Use Fresh Groundwater in Secondary Oil Recovery?*, 24 TULSA L.J. 675 (1989).

or gas through various means has also been held to be a reasonably necessary use of the surface.¹⁷⁶ For example, disposal of salt water through the use of reinjection wells¹⁷⁷ and slush pits¹⁷⁸ was once common and allowed, although this may now be restricted due to state environmental regulations.¹⁷⁹

B. What Has Been Deemed an Unreasonable Use of the Surface?

While the previous section demonstrates that courts have given significant deference to the mineral owner in deciding what is a reasonable exercise of the surface, courts have occasionally found that the mineral owner has used the surface in an unreasonable manner. Examples of uses found to be unreasonable include constructing roads in excess of the reasonable needs of the mineral lessee,¹⁸⁰ using deteriorated and unusable equipment that leaked oil,¹⁸¹ and using portions of the surface for operations on other premises without authority to do so.¹⁸² Despite the reluctance of courts to overturn a mineral owner's initial well-site choice, courts in two instances have held that choosing a location without any regard to the surface owner's property rights is unreasonable.¹⁸³

176. See generally King, *supra* note 2, § 9-9.

177. See *Colburn v. Parker & Parsley Dev. Co.*, 842 P.2d 321, 327 (Kan. 1985) (holding that the granting clause in an oil and gas lease includes the implied covenant to dispose of the salt water produced during operations by utilizing a salt-water disposal well); *TDC Eng'g, Inc. v. Dunlap*, 686 S.W.2d 346 (Tex. App. 1985).

178. See *Phoenix v. Graham*, 110 N.E.2d 669 (Ill. 1944); *Gulf Ref. Co. v. Davis*, 80 So. 2d 467 (Miss. 1955); *Norum v. Queen City Oil Co.*, 264 P. 122 (Mont. 1926); *Feland v. Placid Oil Co.*, 171 N.W.2d 829 (N.D. 1969); *Powell Briscoe, Inc. v. Peters*, 1954 OK 107, 269 P.2d 787; *Acidoil Co. v. Mitchell*, 1942 OK 283, 130 P.2d 993; *Brown v. Lundell*, 344 S.W.2d 863 (Tex. 1961); see also William B. Browder, *Accommodation of the Conflicting Interests of the Mineral Owner and the Surface Owner*, 25 INST. ON OIL & GAS L. & TAX'N 85, 102 (1974); Gray, *supra* note 2, at 253. But see *Thurner v. Kaufman*, 699 P.2d 435 (Kan. 1985) (granting forfeiture of an oil and gas lease when the lessee, in violation of the express provisions of the lease, used salt-water pits).

179. See KAN. STAT. ANN. § 55-901 (1991) (providing procedures and penalties for unlawful disposal of salt water); TEX. ADMIN. CODE § 3.8 (West 2000) (severely restricting the use of slush pits and requiring prior approval from the Texas Railroad Commission before using salt-water reinjection wells).

180. See *Denver Producing & Ref. Co. v. Meeker*, 1948 OK 18, ¶ 3, 188 P.2d 858, 859-60 (holding an oil and gas lessee liable for building unnecessary roads, causing unnecessary injury to fences, improperly using the property for pipelines, and failing to bury pipe lines); see also *supra* notes 75-77.

181. See *Speedman Oil Co. v. Duval County Ranch Co.*, 504 S.W.2d 923 (Tex. App. 1973) (issuing a temporary injunction restraining the pumping, flowing, or production of oil and gas under such circumstances).

182. See *Russell v. Tex. Co.*, 238 F.2d 636 (9th Cir. 1956) (finding the lessee of the mineral owner who used a portion of the surface in connection with operations on adjacent land liable for damages).

183. See *Reading & Bates Offshore Drilling Co. v. Jergenson*, 453 S.W.2d 853 (Tex. App. 1970) (finding that the lessee's location of its well was an unreasonable use of the premises and that the location was made willfully, deliberately, and in utter disregard of the surface owner's property rights); see also *supra* notes 103-08 and accompanying text.

VI. Surface Damage Liability

Clearly, the accommodation doctrine provides little protection for the surface owner against alleged unreasonable uses of the surface by the mineral owner. Only after the occurrence of a claimed unreasonable surface use and years of prolonged litigation does the surface owner have the opportunity to receive compensation for the alleged injury. As noted previously, successfully proving that a mineral owner's particular surface use is unreasonable and establishing that available alternatives exist is difficult for the surface owner. Thus, from the perspective of the surface owner, the accommodation doctrine creates a very uneven playing field.¹⁸⁴ Surface damage provisions attempt to equalize the respective positions of the mineral and surface estate owners. Such provisions may impose liability upon the mineral owner for damage done to the surface under two possible regimes: surface damage clauses within the oil and gas lease itself and surface damage statutes enacted by state legislatures.

A. Surface Damage Clauses in Oil and Gas Leases

Many modern oil and gas leases contain express provisions obligating the mineral lessee to compensate the lessor for "all damages caused by [the lessee's] operation to the surface."¹⁸⁵ Obviously, however, these clauses are binding only between the mineral lessor and his lessee. Thus, if the surface owner is not also the owner of the mineral estate, such a provision is of little help. Nevertheless, surface damage clauses can be helpful if the mineral lessor is also the surface owner and, as a result, may seek compensation from the mineral lessee for surface damages under this theory of liability.

Although surface damage clauses vary considerably in their provisions, a typical clause found in a modern oil and gas lease will contain the following language: "Lessee shall pay for actual damages to growing crops, trees and fences caused by its operations on said lands."¹⁸⁶ Some leases may also require the lessee to pay for damages caused to existing houses and barns.¹⁸⁷ Other leases may simply contain a broad surface damage clause specifying that the surface owner shall be compensated for "all damages to the surface."¹⁸⁸

If surface damage covered by the clause occurs, the surface owner, provided he is also the lessor, may recover damages in a cause of action based upon the contract.¹⁸⁹

184. See COLORADO LEGISLATIVE PACKAGE, *supra* note 132.

185. See EUGENE KUNTZ ET AL., FORMS MANUAL TO ACCOMPANY CASES AND MATERIALS ON OIL AND GAS LAW — OKLAHOMA LANDOWNER'S OIL AND GAS LEASE 17 (3d ed. West Group 1998).

186. *Id.*; see also Topp, *supra* note 3.

187. See KUNTZ ET AL., *supra* note 185.

188. See Topp, *supra* note 3, at 148. The following clause is included in some Michigan oil and gas leases:

Lessee shall pay or agree upon payment to the surface owner, or any person holding under the owner, for all damages or losses (including the loss of all or part of the surface) caused directly or indirectly by operations hereunder, whether to growing crops or buildings, to any person or property, or to other operations.

Id. at 148 n.1.

189. See *Meyer v. Cox*, 252 S.W.2d 207 (Tex. App. 1952) (holding that a surface damage clause

One of the more common problems with surface damage clauses, however, is ascertaining the nature of the injuries for which the clause provides compensation.¹⁹⁰ Typically, the scope of the words "growing crops" within the clause is the subject of most litigation.¹⁹¹ Damages under a surface damage clause involve "application of normal rules of damages."¹⁹² Thus, the measure of damages to a growing crop is the difference between the damaged crop and the reasonable market value of an undamaged crop when matured less the cost of cultivating, harvesting, and marketing.¹⁹³

B. Surface Damage Statutes

As noted previously, surface damage clauses within the oil and gas lease itself are of little assistance in affixing liability upon the mineral lessee and providing a method of compensation to surface owners who are not also the mineral owner.¹⁹⁴ Thus, in instances of severed mineral and surface estates, because the surface owner is not a party to the oil and gas lease, the accommodation doctrine originally provided the sole means of compensation from mineral owners in cases of damage done to the surface.

However, a growing number of states have enacted a surface damage statute as an alternative mechanism to the accommodation doctrine to compensate surface owners for damages caused by the mineral owner.¹⁹⁵ In general, surface damage statutes have a threefold purpose: (1) to minimize the harm suffered by the surface estate owners; (2) to prevent potential loss of the surface that may harm the general public by depleting available land for agricultural or other beneficial use; and (3) to prevent unsettled disputes between surface and mineral estate owners from unduly affecting the mineral development itself.¹⁹⁶ North Dakota was the first state to adopt a surface

creates contractual liability whereby the lessees agree to pay the lessors for injuries to their property independent of breach of contract or tort liability); see also *Bell v. Cardinal Drilling Co.*, 85 N.W.2d 246 (N.D. 1957) (holding that under such a clause, a plaintiff need not allege or prove injury by defendant).

190. See 1 HOWARD R. WILLIAMS ET AL., OIL AND GAS LAW § 218.11, at 246.9 (2000).

191. See *Wohlford v. Am. Gas Prod. Co.*, 218 F.2d 213, 215 (5th Cir. 1955) (holding that native grasses used for cattle grazing do not come within the meaning of the expression "growing crops" as used in the surface damage clause of the lease); *Trotter v. Wells Petroleum Corp.*, 732 P.2d 797, 801 (Kan. Ct. App. 1987) (holding that "completely uncultivated and never utilized native grass is not, absent some contrary indication of the parties' intent, a growing crop"); *Holbrook v. Cont'l Oil Co.*, 278 P.2d 798 (Wyo. 1955) (holding that a surface owner may not recover for injury to native grasses under a surface damage clause). But see *Superior Oil Co. v. Griffen*, 1960 OK 249, ¶ 16, 357 P.2d 987, 990-91 (holding that lespedeza, bluestem grass, and pecan trees were "growing crops" within the meaning of a surface damage clause of a lease); *Union Producing Co. v. Allen*, 297 S.W.2d 867, 871-72 (Tex. App. 1957) (stating that grasses and clover may be viewed as a "growing crop" within the meaning of a surface damage clause); *Flying Diamond Corp. v. Rust*, 551 P.2d 509, 512 (Utah 1976) (holding that "growing crops" include alfalfa and natural grasses used for grazing).

192. See 1 WILLIAMS ET AL., *supra* note 190, § 218.11.

193. See *Wilcox Oil Co. v. Lawson*, 1956 OK 248, 301 P.2d 686; *Union Producing Co. v. Allen*, 297 S.W.2d 867 (Tex. App. 1957); see also *Texaco Inc. v. Melton*, 463 S.W.2d 301, 308 (Ky. 1970) (providing a set of instructions for use in charging a jury in a surface damage case).

194. See *supra* text accompanying notes 185-86.

195. See 1 WILLIAMS ET AL., *supra* note 190, § 218.14, at 254.

196. See *Graus*, *supra* note 3, at 87-88; see also *Laura H. Burney, A Pragmatic Approach to*

damage statute.¹⁹⁷ To date, eight other states have also adopted such statutes, including Oklahoma,¹⁹⁸ Montana,¹⁹⁹ South Dakota,²⁰⁰ West Virginia,²⁰¹ Tennessee,²⁰² Illinois,²⁰³ Indiana,²⁰⁴ and Kentucky.²⁰⁵ Because the various jurisdictions have almost identical statutes²⁰⁶ and because there are very few reported cases involving the statutes,²⁰⁷ the following discussion focuses on general topics relating to the statutes with differing states' provisions noted.

1. Legislative Purpose and Interpretation

Surface damage statutes are intended to serve various purposes related to state goals.²⁰⁸ These goals include using the police power of the state to protect the public welfare;²⁰⁹ protecting the economic well being of individuals engaged in agricultural production;²¹⁰ providing just compensation to surface owners for interference with and injury to their property caused by mineral development;²¹¹ and allowing oil and gas development to coexist with an equal right to use the surface.²¹²

Surface damage statutes in Indiana, Kentucky, Illinois, and Oklahoma do not include a legislative purpose within the statute itself. However, one Oklahoma case announced that the purpose of Oklahoma's surface damage statute²¹³ is to provide a mechanism to balance conflicting interests of mineral interest holders and landowners while recognizing that mineral resources support an important industry of the state.²¹⁴

Decision Making in the Next Era of Oil and Gas Jurisprudence, 16 J. ENERGY NAT. RESOURCES & ENVTL. L. 1 (1996) (stating that the goal of surface damage statutes is to protect the "economic well-being" of surface estates, particularly for agricultural uses).

197. See N.D. CENT. CODE §§ 38-11.1-01 to 38-11.1-10 (1987).

198. See 52 OKLA. STAT. §§ 318.2 to 318.9 (Supp. 2000).

199. See MONT. CODE ANN. §§ 82-10-501 to 82-10-511 (1999).

200. See S.D. CODIFIED LAWS §§ 45-5A-1 to 45-5A-11 (Michie 1997).

201. See W. VA. CODE §§ 22-7-1 to 22-7-8 (1998).

202. See TENN. CODE ANN. §§ 60-1-601 to 60-1-608 (1989).

203. See 765 ILL. COMP. STAT. 530/1 to 530/7 (2001).

204. See IND. CODE § 32-5-7-2(c) (1995).

205. See KY. REV. STAT. ANN. §§ 353.595, 353.597 (Michie 2000).

206. In fact, South Dakota's and Montana's surface damage statutes are virtually identical to North Dakota's surface damage statute. Tennessee's statute is closely related to West Virginia's, while Kentucky's and Illinois's statutes are exceptionally similar.

207. No reported cases have been found relating to the Kentucky, Illinois, Montana, South Dakota, or Tennessee surface damage statutes.

208. See Graus, *supra* note 3, at 87-89.

209. See N.D. CENT. CODE § 38-11.1-01(1) (1987); S.D. CODIFIED LAWS § 45-5A-1(1) (Michie 1997).

210. See MONT. CODE ANN. § 82-10-501(2)(a) (1999); N.D. CENT. CODE § 38-11.1-01(1) (1987); S.D. CODIFIED LAWS § 45-5A-1(1) (Michie 1997).

211. See MONT. CODE ANN. § 82-10-501(2)(c) (1999); N.D. CENT. CODE § 38-11.1-01(3) (1987); S.D. CODIFIED LAWS § 45-5A-1(3) (Michie 1997); TENN. CODE ANN. § 60-1-602(b) (1989); W. VA. CODE § 22-7-1(a)(2) (1998).

212. See TENN. CODE ANN. § 60-1-602(b) (1989); W. VA. CODE § 22-7-1(a)(1) (1998).

213. See 52 OKLA. STAT. §§ 318.2 to 318.9 (Supp. 2000).

214. See *Houck v. Hold Oil Corp.*, 1993 OK 166, ¶ 17, 867 P.2d 451, 457; see also *Schneberger v. Apache Corp.*, 1994 OK 117, ¶ 22, 890 P.2d 847, 853; *Davis Oil Co. v. Cloud*, 1986 OK 73, ¶ 18,

Not surprisingly, surface damage statutes are interpreted to benefit surface owners, regardless of when or if the mineral estate was separated from the surface estate.²¹⁵ North Dakota's statute, in particular, provides additional instructions on how the statute should be construed, stating that the provisions relating to damage payments²¹⁶ and notice of drilling operations²¹⁷ must be interpreted to benefit surface owners.²¹⁸

2. Constitutionality

Surface damage statutes have been held to be a constitutional exercise of a state's police power.²¹⁹ North Dakota's statute was declared constitutional in *Murphy v. Amoco Production Co.*,²²⁰ a case decided by the Eighth Circuit. Addressing a due process challenge, the court in *Murphy* noted that the state legislature declared that it was using its police power to protect public welfare when it enacted the statute. The court stated that an exercise of a state's police power is constitutional unless it is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare" of that state.²²¹ Reasoning that the statute was intended to protect the state's agricultural and economic status, the court held that the statute was substantially related to the state's legitimate interests and was thus constitutional.²²²

The *Murphy* court also pointed out that the surface damage statute did not destroy property rights, such as an easement or "right of access" of the mineral owner; instead, the statute merely imposed an economic burden on the mineral developer.²²³ This economic burden, the cost of paying surface damages, effectively protects and promotes agriculture in that it deters mineral owners from disrupting the surface of agricultural land.²²⁴ However, by imposing an economic burden on the mineral owner, the court recharacterized the parties' relationship from one of property to one of tort.²²⁵ Reasoning that no individual has a vested interest in the standards by which tort liability may be measured,²²⁶ the court concluded that the statute could even be applied retroactively.²²⁷

766 P.2d 1347, 1351-52 (stating that the policy behind the passage of the Surface Damage Act reflected conservation of the state's natural resources while balancing the interests of oil and gas operators with those of surface estate owners).

215. See N.D. CENT. CODE § 38-11.1-02 (1987); S.D. CODIFIED LAWS § 45-5A-1(3) (Michie 1997); TENN. CODE ANN. § 60-1-602(b) (1989); W. VA. CODE § 22-7-1(b)(4) (1998).

216. See N.D. CENT. CODE § 38-11.1-04 (1987).

217. See *id.* § 38-11.1-05.

218. See *id.* § 38-11.1-02.

219. See Feriancek & McNeill, *supra* note 3, at 29-30.

220. 729 F.2d 552 (8th Cir. 1984).

221. *Id.* at 555 (quoting *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926)).

222. *Murphy*, 729 F.2d at 555; see also Graus, *supra* note 3, at 30.

223. *Murphy*, 729 F.2d at 555.

224. *Id.*; see also Polston, *supra* note 3, at 61.

225. *Murphy*, 729 F.2d at 557-58; see also Polston, *supra* note 3, at 59.

226. *Murphy*, 729 F.2d at 558.

227. *Id.* at 560.

The Oklahoma surface damage statute has also been declared constitutional.²²⁸ In *Davis Oil Co. v. Cloud*,²²⁹ the Oklahoma Supreme Court held the statute to be constitutional and awarded actual damages to the surface estate.²³⁰ The court reasoned that the state legislature acted to balance conflicting rights between owners of different resources and stated that the surface of the land is not a less vital resource to the State of Oklahoma than the mineral wealth that underlies it. The court concluded by declaring the act was not an arbitrary or capricious exercise of the State's regulation of the public welfare.²³¹ The *Cloud* court also held that because the statute sets forth a mechanism for determining the amount of actual damages to the surface estate and that the means selected bears "a real and substantial relation to the object of balancing the interests of the various estates," it was not unreasonable in its application.²³²

Other jurisdictions' statutes have not been constitutionally tested. However, because the majority of the state legislatures, in enacting the statutes, asserted that the purpose of the statute was to protect the public welfare and to allow the coexistence of mineral and surface development,²³³ much like the North Dakota statute does,²³⁴ it is likely that they will be found constitutional.

3. Requirements of Mineral and Surface Owners Before Drilling

The majority of surface damage statutes require the mineral owner to provide notice of the proposed drilling operations to the surface owner.²³⁵ Typically, the mineral owner must provide written notice at least ten days prior to commencing any activity on the surface,²³⁶ however, some statutes do not provide a timeline for when notice must be given.²³⁷ Failure to give the surface owner notice of proposed operations under North Dakota's statute allows the surface owner to seek punitive and actual damages.²³⁸ In Oklahoma, provided the surface owner can prove that the mineral owner willfully failed to give notice, treble damages may be assessed for damage done to the surface.²³⁹

228. See *Davis Oil Co. v. Cloud*, 1986 OK 73, ¶ 18, 766 P.2d 1347, 1351-52.

229. 1986 OK 73, 766 P.2d 1347.

230. *Id.* ¶ 18, 766 P.2d at 1352.

231. *Id.* ¶ 16, 766 P.2d at 1351.

232. *Id.* ¶ 18, 766 P.2d at 1352.

233. See S.D. CODIFIED LAWS § 45-5A-1(1) (Michie 1997); TENN. CODE ANN. § 60-1-602(b) (1989); W. VA. CODE § 22-7-1(a)(1) (1998).

234. See N.D. CENT. CODE § 38-11.1-01(1) (1987)

235. See 765 ILL. COMP. STAT. 530/4 (1993); KY. REV. STAT. ANN. § 353.595(3) (Michie 2000); MONT. CODE ANN. § 82-10-503 (1999); N.D. CENT. CODE § 38-11.1-05 (1987); 52 OKLA. STAT. § 318.3 (Supp. 2000); S.D. CODIFIED LAWS § 45-5A-5 (Michie 1997).

236. See MONT. CODE ANN. § 82-10-503 (1999) (requiring notice to be given no more than ninety days and no fewer than ten days before the commencement of activity); N.D. CENT. CODE § 38-11.1-05 (1987) (requiring at least twenty days); S.D. CODIFIED LAWS § 45-5A-5 (Michie 1997) (requiring at least thirty days).

237. See 765 ILL. COMP. STAT. 530/4(a) (2001); KY. REV. STAT. ANN. § 353.595(3)(a) (Michie 2000); 52 OKLA. STAT. § 318.3 (Supp. 2000).

238. See N.D. CENT. CODE § 38-11.1-05 (1987).

239. See 52 OKLA. STAT. § 318.9 (Supp. 2000). See generally *Houck v. Hold Oil Corp.*, 1993 OK

When providing notice of anticipated surface activity, the notice must identify (1) the location of the proposed entry and the date when drilling operations will commence;²⁴⁰ (2) a copy of the drilling application for the proposed well;²⁴¹ (3) the name, address, and telephone number of the operator;²⁴² and (4) an offer to discuss the amount of surface damages owed to the surface owner.²⁴³ In Kentucky, failure to include an "offer to discuss" clause in the notice renders the notice deficient.²⁴⁴ Some jurisdictions require that a form advising the surface owner of his rights and options under the surface damage statutes must be provided with the notice as well.²⁴⁵

Within five days after providing notice to the surface owner, Oklahoma requires the surface owner and operator of the proposed well to begin negotiations to determine the amount of surface damages owed.²⁴⁶ Kentucky and Illinois require negotiations to occur at least five days before the proposed drilling operations commence,²⁴⁷ while other states allow negotiations and calculations over surface damages to occur after drilling operations have transpired.²⁴⁸

During negotiations between the surface owner and operator, Kentucky and Illinois require the parties to discuss the placement of roads, the points of entry for drilling operations, the construction and placement of pits, the use of surface water, and the removal of trees.²⁴⁹ Oklahoma does not delineate the topics the parties must discuss, but in the event the parties cannot reach an agreement regarding the amount of damages owed, the statute provides a method of arbitration. Under this method, each party selects an appraiser, who in turn selects a third appraiser, and the appraisers

166, 867 P.2d 451.

240. See 765 ILL. COMP. STAT. 530/4(c)(1) (2001); KY. REV. STAT. ANN. § 353.595(3)(c)(1) (Michie 2000); MONT. CODE ANN. § 82-10-503 (1999); N.D. CENT. CODE § 38-11.1-05 (1987); S.D. CODIFIED LAWS 45-5A-5 (Michie 1997).

241. See 765 ILL. COMP. STAT. 530/4(c)(2) (2001); KY. REV. STAT. ANN. § 353.595(3)(c)(2) (Michie 2000).

242. See 765 ILL. COMP. STAT. 530/4(c)(3) (2001); KY. REV. STAT. ANN. § 353.595(3)(c)(3) (Michie 2000).

243. See 765 ILL. COMP. STAT. 530/4(c)(4) (2001); KY. REV. STAT. ANN. § 353.595(3)(c)(4) (Michie 2000).

244. See KY. REV. STAT. ANN. § 353.595 note (Michie 2000) (stating that "care should be taken to satisfy the 'offer to discuss' requirement of KY. REV. STAT. ANN. 353.595 (3)(c)(4); if not included in the required notice, the Department of Mines and Minerals will consider such notice deficient").

245. See N.D. CENT. CODE § 38-11.1-05 (1987); S.D. CODIFIED LAWS ANN. § 45-5A-5 (Michie 1997).

246. See 52 OKLA. STAT. § 318.3 (Supp. 2000).

247. See 765 ILL. COMP. STAT. 530/4(c)(5) (2001); KY. REV. STAT. ANN. § 353.595(4)(d) (Michie 2000).

248. See IND. CODE § 38-5-7-2(c) (1995); N.D. CENT. CODE § 38-11.1-04 (1987); MONT. CODE ANN. § 82-10-503 (1999); S.D. CODIFIED LAWS § 45-5A-4 (Michie 1997); TENN. CODE ANN. § 60-1-604 (1989); W. VA. CODE § 22-7-3 (1998).

249. See 765 ILL. COMP. STAT. 530/5 (2001); KY. REV. STAT. § 353.595(4) (Michie 2000).

determine the amount of compensation due to the surface owner.²⁵⁰ If the appraisers determine that no compensation is owed, the surface owner may appeal.²⁵¹

However, and perhaps most importantly, absent willful misconduct and violation of the surface damage statutes on the part of the operator,²⁵² Oklahoma does not *specifically require* that surface damages be paid. Oklahoma only requires that the parties enter into negotiations.²⁵³ Regardless, mineral owners often construe Oklahoma's statute as creating an obligation to pay for all damages sustained by the surface owner.²⁵⁴ If, however, the mineral owner willfully fails to enter into negotiations with the surface owner, the surface owner may collect treble damages for the damage done to the surface.²⁵⁵

4. Compensation and Determining Damages

Perhaps the most important provisions of surface damage statutes are those that discuss the compensation due to the surface owner resulting from mineral exploration and development operations. The surface owner wants to know how much restitution he can receive, the mineral owner wants to know how much he is obligated to offer the surface owner, and both parties want to know the types of surface damages the statutes cover and for which they provide compensation.

It should be noted that the mineral owner must pay for damages to the surface regardless of whether or not the mineral owner's use of the surface is reasonable.²⁵⁶ Thus, surface damage statutes, unlike the accommodation doctrine, do not consider whether a mineral owner's use of the surface is reasonable in determining the liability of the mineral owner. Under the accommodation doctrine, provided his conduct is reasonable, the mineral owner can pursue a particular surface use in order to produce his minerals without regard for liability for surface damage.²⁵⁷ Under surface damage

250. See 52 OKLA. STAT. § 318.5 (Supp. 2000).

251. See *id.* § 318.

252. See *id.* § 318.6.

253. See *id.* §§ 318.2 to 318.9; see also Polston, *supra* note 3, at 66.

254. See Polston, *supra* note 3, at 63-64, 66. In a random survey performed by Professor Polston, out of forty-seven wells drilled in Oklahoma, the well operators paid or acknowledged liability for surface damages in all but one of the wells. *Id.* In addition, when asked for reasons why the operators acknowledged liability or paid for such damages, one operator simply sent a copy of the Oklahoma surface damage statutes.

255. See 52 OKLA. STAT. § 318.9 (Supp. 2000). See generally *Houck v. Hold Oil Corp.*, 1993 OK 166, 867 P.2d 451; *Samson Res. Co. v. Cloud*, 1991 OK CIV APP 55, 812 P.2d 1378.

256. See 765 ILL. COMP. STAT. 530/6 (2001); IND. CODE § 38-5-7-2(c) (1995); KY. REV. STAT. § 353.595(5) (Michie 2000); MONT. CODE ANN. § 82-10-503 (1999); N.D. CENT. CODE § 38-11.1-04 (1987); 52 OKLA. STAT. § 318.5 (Supp. 2000); S.D. CODIFIED LAWS §§ 45-5A-4, 45-5A-6 (Michie 1997); TENN. CODE ANN. § 60-1-604 (1989); W. VA. CODE § 22-7-3 (1998); see also Feriancek & McNeill, *supra* note 3, at 29. But see *Houck*, 1993 OK 166, ¶¶ 14-18, 867 P.2d at 456. The court in *Houck* held that in order for surface owners to recover for damage to property caused by the drilling of a well prior to the effective date of the Surface Damage Act, they must show (1) that the injury to the surface was caused by some unreasonable conduct on the part of the lessee in conducting oil and gas operations, or (2) that more of the surface was used than necessary to prudently carry out drilling and related activities. *Id.*

257. See *Haupt, Inc. v. Tarrant County Water Control & Improvement Dist. No. One*, 870 S.W.2d

statutes, the mineral owner must consider potential surface damage liability when exploring for and producing the minerals.

At the very least, the mineral owner must compensate the surface owner for loss of agricultural production and income, lost land value, and lost value to improvements caused by the drilling operations.²⁵⁸ North Dakota adds compensation for the lost use of and access to the surface owner's land.²⁵⁹ Indiana obligates the mineral owner to pay for damages to growing crops,²⁶⁰ and Illinois and Kentucky require compensation for damage to trees, shrubs, fences, roads, structures, and livestock.²⁶¹ Tennessee and West Virginia also require the oil and gas developer to compensate the surface owner for (1) income lost as a result of being unable to dedicate land occupied by the drilling operations; (2) the market value of crops destroyed, damaged, or prevented from reaching market; (3) damage to a water supply in use before drilling commenced; (4) repair of personal property; and (5) the diminished value of the surface after completion of the well.²⁶²

The Oklahoma statute, however, unlike the others, does not specify the types of damages caused by drilling operations for which the surface owner is to be compensated and does not provide guidelines for imposing liability.²⁶³ Thus, the statute does not indicate when, why, or in what amount the developer is liable for surface damages.²⁶⁴ Nevertheless, Oklahoma courts have held that interference with a center-pivot irrigation system even on land not actually used in oil and gas drilling operations is a compensable injury,²⁶⁵ while personal injuries²⁶⁶ and inconvenience to landowners resulting from oil and gas drilling on their property are not.²⁶⁷

When calculating damages in Oklahoma, the diminution in fair market value of the surface resulting from drilling operations is the proper measure of damages under the statute.²⁶⁸ Courts should consider the following factors when determining the diminution in value: (1) the location of the drilling operations; (2) the quality and value of the land used or disturbed by the operations; (3) inconvenience suffered in actual use of the land by the operator; (4) whether the damages are temporary or permanent in nature; (5) the reduction or denial of access; and (6) the destruction or loss of native grasses or growing crops caused by drilling operations.²⁶⁹ Courts should not consider these factors as separate items of damage, but should consider the

350, 353 (Tex. App. 1994).

258. See MONT. CODE ANN. § 82-10-504 (1999); S.D. CODIFIED LAWS § 45-5A-4 (Michie 1997).

259. See N.D. CENT. CODE § 38-11.1-04 (1987).

260. See IND. CODE § 32-5-7-2(c) (1995).

261. See 765 ILL. COMP. STAT. 530/6 (2001); KY. REV. STAT. ANN. § 353.595(5) (2000).

262. See TENN. CODE ANN. § 60-1-604 (1989); W. VA. CODE § 22-7-3(a) (1998).

263. See 52 OKLA. STAT. §§ 318.2 to 318.9 (Supp. 2000); see also Feriancek & McNeill, *supra* note 3, at 29; Polston, *supra* note 3, at 55.

264. See 52 OKLA. STAT. §§ 318.2 to 318.9 (Supp. 2000); see also Feriancek & McNeill, *supra* note 3, at 55.

265. See *Dyco Petroleum Corp. v. Smith*, 1989 OK 51, ¶ 10, 771 P.2d 1006, 1008.

266. See *Union Oil Co. of Cal. v. Heinsohn*, 43 F.3d 500, 503 (10th Cir. 1994).

267. See *Dyco Petroleum Corp.*, 1989 OK 51, ¶ 10, 771 P.2d at 1008.

268. See *Houck v. Hold Oil Co.*, 1993 OK 166, ¶ 41, 867 P.2d 451, 462.

269. See *Davis Oil Co. v. Cloud*, 1986 OK 73, ¶ 22, 766 P.2d 1347, 1352.

total effect they have upon the diminution in value of the surface estate before and after the drilling operations.²⁷⁰

In other jurisdictions, when calculating damages, the surface owner and mineral owner may devise their own formula for damages to the surface.²⁷¹ However, the Montana, North Dakota, and South Dakota statutes specifically state that when determining damages, consideration "shall be given to the period of time during which the loss occurs."²⁷² Tennessee fails to provide a method of calculating damages,²⁷³ however, because its statute is similar to West Virginia's, mineral owners can likely create a formula with the surface owner to compute damages. While stating that no punitive damages shall be assessed against the mineral owner, Indiana's statute also fails to state how surface damages should be measured,²⁷⁴ and there have been no reported cases dealing with this topic.

If the surface owner finds the operator's measurement and offer of compensation unacceptable, the surface owner may reject such an offer.²⁷⁵ In addition, the surface owner may bring an action for compensation in a court of proper jurisdiction for a determination of the measurement of damages.²⁷⁶ Oklahoma,²⁷⁷ Tennessee,²⁷⁸ and West Virginia²⁷⁹ provide for arbitration to decide damages calculations.²⁸⁰ In North

270. See *Houck*, 1993 OK 166, ¶ 41, 867 P.2d at 462.

271. See 765 ILL. COMP. STAT. 530/6 (2001) (providing that compensation may be paid in any manner mutually agreed upon by the operator and surface owner); KY. REV. STAT. ANN. § 353.595(6) (Michie 2000) (compensation may be paid in any manner mutually agreed upon by the operator and surface owner); MONT. CODE ANN. § 82-10-504(b) (1999) (amount of damages may be determined by any formula mutually agreeable between the surface owner and the oil and gas developer or operator); N.D. CENT. CODE § 38-11.1-04 (1987) (amount of damages may be determined by any formula mutually agreeable between the surface owner and the oil and gas developer or operator); S.D. CODIFIED LAWS § 45-5A-4 (Michie 1997) (amount of damages may be determined by any formula mutually agreeable between the surface owner and the oil and gas developer); W. VA. CODE § 22-7-3(a)(1) (1998) (amount of damages may be determined by any formula mutually agreeable between the surface owner and the oil and gas developer).

272. MONT. CODE ANN. § 82-10-504(b) (1999); N.D. CENT. CODE § 38-11.1-04 (1987); S.D. CODIFIED LAWS. § 45-5A-4 (Michie 1997).

273. See TENN. CODE ANN. §§ 60-1-601 to 60-1-608 (1989).

274. See IND. CODE § 32-5-7-2(c) (1995).

275. See 765 ILL. COMP. STAT. 530/6 (2001); KY. REV. STAT. ANN. § 353.595(6) (Michie 2000); MONT. CODE ANN. § 82-10-507 (1999); N.D. CENT. CODE § 38-11.1-08 (1987); 52 OKLA. STAT. § 318.5 (Supp. 2000); S.D. CODIFIED LAWS § 45-5A-4 (Michie 1997); TENN. CODE ANN. §§ 60-1-607(a) (1989); S.D. CODIFIED LAWS 45-5A-8 (Michie 1997) (requiring the surface owner to accept or reject any offer made within sixty days); W. VA. CODE § 22-7-6 (1998).

276. See 765 ILL. COMP. STAT. 530/6 (2001) (stating that the action shall be in the circuit court in which the lands or the greater part thereof are located on which drilling operations were conducted); KY. REV. STAT. ANN. § 353.595(6) (Michie 2000) (action shall be in the circuit court in which the lands or the greater part thereof are located on which drilling operations were conducted); MONT. CODE ANN. § 82-10-508 (1999) (district court of the county in which the damage was sustained is the proper court); N.D. CENT. CODE § 38-11.1-04 (1987); S.D. CODIFIED LAWS § 45-5A-4 (Michie 1997).

277. See 52 OKLA. STAT. § 318.5 (Supp. 2000).

278. See TENN. CODE ANN. § 60-1-607 (1989).

279. See W. VA. CODE § 22-7-7 (1998).

280. For a brief discussion of Oklahoma's arbitration procedure, see *supra* notes 250-51 and accompanying text.

Dakota and Tennessee, if the amount of compensation awarded by the court or arbitration panel is greater than that offered by the oil and gas developer, the surface owner is also awarded attorney's fees, expert witness costs, other legally assessable costs, and interest from the day drilling was commenced.²⁸¹ Thus, in these two jurisdictions, it could be to the surface owner's advantage to reject any offer made by the mineral owner in hopes of obtaining more compensation through arbitration or the courts.

Payment for surface damages resulting only from exploration is generally given in one lump sum,²⁸² while payment for damages from other operations may be given in annual installments over time if the surface owner desires.²⁸³ Under Montana's statute, failure to pay the annual damage installments within sixty days of receiving a notice of failure to pay from the surface owner results in the mineral owner paying twice the amount of the unpaid installment.²⁸⁴

5. Statute of Limitations

Typically, in order to receive compensation from the mineral owner for surface damages caused by oil and gas operations, the surface owner must give written notice of the damages sustained to the oil and gas developer within two years after the injury occurs or after the injury would become apparent to a reasonable person.²⁸⁵ However, Tennessee's statute provides for a three-year statute of limitations.²⁸⁶

VII. Conclusion

Both the accommodation doctrine and surface damage statutes attempt to balance the inherent friction between surface and mineral estates, yet they differ in their approach on how best to resolve the conflict. While the accommodation doctrine places the judiciary in the position of "second guessing" the reasonableness of the mineral owner's judgment,²⁸⁷ surface damage statutes impart the legislature's paternalistic, and perhaps patronizing, wisdom upon the agricultural and oil and gas industries. Such statutes imply that the energy industry is wealthy while those engaged in agriculture are poor, so that a transfer of wealth is necessary for one party to enjoy its estate and exercise its rights.

281. See N.D. CENT. CODE § 38-11.1-09 (1987); TENN. CODE ANN. § 60-1-607(a) (1989).

282. See MONT. CODE ANN. § 82-10-504(c) (1999); N.D. CENT. CODE § 38-11.1-04 (1987); S.D. CODIFIED LAWS § 45-5A-4 (Michie 1997).

283. See MONT. CODE ANN. § 82-10-504(c) (1999); N.D. CENT. CODE § 38-11.1-04 (1987); S.D. CODIFIED LAWS § 45-5A-4 (Michie 1997).

284. See MONT. CODE ANN. § 82-10-504 (1999).

285. See *id.* § 82-10-506; N.D. CENT. CODE § 38-11.1-07 (1987); S.D. CODIFIED LAWS § 45-5A-7 (Michie 1997); W. VA. CODE § 22-7-5 (1998).

286. See TENN. CODE ANN. § 60-1-605 (1989).

287. See Feriancek & McNeill, *supra* note 3, at 31 (stating that "allowing a third-party to decide issues retroactively, based on comparative economics (such as whether relocation of production facilities to minimize disturbance to crops would have been a reasonable accommodation), renders exploration companies' economic projections futile, or at least uncertain").

Under the accommodation doctrine, when calculating the potential economic benefits of a prospect, mineral owners need only consider the costs of exploration, drilling, and possibly the transportation of the minerals. In contrast, under surface damage statutes, mineral owners must also consider the costs of compensating the surface owner for potential surface damages, which directly affect oil companies' profit margins.²⁸⁸ During a period when there is a low domestic supply of oil and gas, it is unwise to burden the oil and gas industry with additional costs and thus discourage the exploration of mineral prospects and the drilling of additional wells.

Furthermore, the accommodation doctrine preserves the dominant nature of the mineral estate, as the burden is on the surface owner to establish that reasonable alternative methods exist. Yet surface damage statutes invert this relationship, in essence granting the surface owner the dominant estate. Under such statutes, the reasonableness of the mineral owner's surface use is no longer considered a relevant inquiry, and the mineral owner, in compensating the surface owner for damages, is essentially paying the surface owner for the right to develop his own estate.

Although neither approach is perfect, the accommodation doctrine, even with its inherent uncertainty over what will be considered a reasonable use, is far superior to the legislative fiat imposed by surface damage statutes. If a surface owner honestly believes the mineral owner is making an excessive or unreasonable use of the surface, then he has access to the courts to air his grievance. But surface damage statutes are simply a poor economic and legal solution to a conflict that can be better resolved through the use of the accommodation doctrine.

288. *See id.*

