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SURFACE DAMAGES AND THE OIL AND GAS OPERATOR IN NORTH DAKOTA

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I. INTRODUCTION

The relationship between the surface owner of land and the mineral developer producing oil and gas from the land has always been a troubled and thorny one, particularly when the surface owner does not own the oil and gas beneath his property. Much litigation and many pages of analysis and commentary have been devoted to the inherent conflicts between the mutual obligations and expectations of each party in this controversial area.[1] At the heart of the matter is the question of damage to the surface caused,

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1. *See e.g.*, Browder, *Accommodation of the Conflicting Interests of the Mineral Owner and the Surface Owner,* 25 INST. ON OIL & GAS L. & TAX'N 85 (1974); 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); Lopez, *Upstairs/Downstairs: Conflicts Between Surface and Mineral Owners,* 26 ROCKY MTN. MIN. L. INST. 995 (1980); Manning, *Mineral Rights Versus Surface Rights,* 2 NAT. RESOURCES LAW. 329 (1969); Moses, *Peaceful Coexistence Between Lessor and Lessee Under an Oil and Gas Lease,* 38 TUL. L. REV. 341 (1964); Patton, *Recent Changes in the Correlative Rights of Surface and Mineral Owners,* 18 ROCKY MTN. MIN. L. INST. 19 (1973).

The nature of the different interests involved seems to point inevitably to conflict, as one commentator has observed:

> By virtue of the necessary use of the surface to capture and reduce to possession the underlying minerals, it is plain that at some time or another, if development is had under the lease, the surface use of the land must inevitably bring about a clash between the holders of the two estates in the land — and one must yield.

McMahon, *Rights and Liabilities with Respect to Surface Usage by Mineral Lessees,* 6 INST. ON OIL & GAS L & TAX'N 231 (1955).

or alleged to have been caused, by exploration for and development of the underlying oil and gas resources.[2] Who bears the risk for such damage and upon what legal theories liability may be predicated are questions of particular interest in North Dakota in light of the current high levels of oil and gas activity in the state.[3]

The purpose of this Article is to summarize the law of North Dakota on this question, analyzing the reported cases and discussing the possible ramifications of the enactment of the Oil and Gas Production Damage Compensation Act of 1979.[4] It will be

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2. This Article deals only with matters relating to oil and gas development. The issues arising in the context of development of coal and other solid or "hard" minerals are beyond the scope of the discussion here, although some references will be made to the strip mining of coal. In the case of minerals such as coal, which are produced by surface strip mining techniques, a number of the questions that arise are clearly quite different than in the oil and gas situation, so that the applicable law is not the same. V. KULP, OIL AND GAS RIGHTS § 10.4 (1954).

The North Dakota Industrial Commission has broad jurisdiction over coal exploration under chapter 38-12.1 of the North Dakota Century Code, including the power to require "the plugging, covering, or reburial in an appropriate manner so as to protect environmental quality, general health and safety, and economic values, of all holes, pits, or trenches excavated during the course of coal exploration." N.D. CENT. CODE § 38-12.1-04(2) (Supp. 1981). The state geologist, acting for the Industrial Commission, "shall require that any lands substantially disturbed" by coal exploration be reclaimed in accordance with the standards applicable to coal mining, in order to "protect environmental quality, general health and safety, and economic values." *Id.* § 38-12.1-04(5).

The actual surface mining of coal subsequent to exploration and the restoration and reclamation of the surface is extensively regulated by the North Dakota Public Service Commission, pursuant to chapters 38-14.1 and 38-14.2 of the North Dakota Century Code, for several stated purposes, one of which is "to ensure the restoration of affected lands designated for agricultural purposes to the level of productivity equal to or greater than that which existed in the permit area prior to mining." *Id.* § 38-14.1-01(5) (1980). For a background discussion of the earlier development of North Dakota law on surface mining regulation, see Hagen, *North Dakota's Surface Mining and Reclamation Law Will Our Wealth Make Us Poor?* 50 N.D.L. REV. 437 (1974). In 1975 the North Dakota Legislature enacted the Surface Owner Protection Act, chapter 38-18 of the North Dakota Century Code, providing for payment of monetary damages by a coal developer to the surface owner for loss of agricultural production caused by mining activity and for moving farm buildings if operations come within five hundred feet. N.D. CENT. CODE § 38-18-07(1)-(2) (Supp. 1981). The Act also expressly places the financial obligation for surface reclamation upon the mineral developer. *Id.* § 38-18-08(1) (1980). This statute provided a precedent for the Oil and Gas Production Damage Compensation Act of 1979, chapter 38-11.1 of the North Dakota Century Code, discussed in section V of this Article. *Id.* ch. 38-11.1.

Exploration and development of other "hard" minerals, such as uranium and sulphur, is regulated by the Industrial Commission. *Id.* ch. 38-12. The Commission has the authority to require "[t]he reclamation of all land disturbed by operations regulated by [chapter 38-12] to a condition consistent with prior land use and productive capacity." *Id.* § 38-12-02(1)(e). Although oil and gas would fit within the definition of "subsurface minerals" in § 38-12-01(7) of the North Dakota Century Code ("all naturally occurring elements, and their compounds"), this chapter presumably is not intended to cover oil and gas, which are treated separately at length in chapter 38-08 of the North Dakota Century Code. *Id.* § 38-12-01(7).

Finally, it is of interest to note that the 1981 North Dakota Legislature enacted statutes regulating geothermal resource development. *Id.* ch. 38-19 (Supp. 1981). Here also the Industrial Commission has the authority to require that the operator "restore the surface as nearly as possible to its original condition and productivity" upon termination of any facility or activity. *Id.* § 38-19-03(1)(g). One of the declared policies of the geothermal act is to prevent "waste," which is defined to include activities that would cause "unnecessary or excessive use, or degradation, of land surface." *Id.* §§ 38-19-01, -02(7). In the oil and gas context, "waste" is also prohibited, *id.* § 38-08-03 (1980), but "waste" is defined in terms of physical loss of oil or gas, dissipation of reservoir energy, excessive production and the like, rather than in terms of damage to the surface. *Id.* § 38-08-02 (15).

3. Section 38-08-05 of the North Dakota Century Code requires the issuance of a permit for the drilling of an oil or gas well. N.D. CENT. CODE § 38-08-05 (Supp. 1981). The North Dakota Industrial Commission issued 1072 drilling permits in 1981, an increase of 39% over the 773 permits issued in 1980. NORTH DAKOTA GEOLOGICAL SURVEY, NEWSLETTER 23 (Dec. 1981).

4. N.D. CENT. CODE ch. 38-11.1 (1980).

useful first to review the conceptual nature of the different interests of the surface owner and the owner of severed minerals and the respective rights of each. The rights of the oil and gas developer, as against the interrelated rights of the surface owner, under a typical oil and gas lease will then be examined, first in general and then as established under North Dakota law.

II. NATURE OF THE PARTIES' INTERESTS

The term "correlative rights" is frequently used in oil and gas law, usually in the context of the interrelated rights of a number of mineral owners to the oil and gas in a common source or "pool" underlying their lands.[5] It may be helpful to extend the concept here to the case of a surface owner and an owner of the severed oil and gas interest underlying the surface. Each enjoys certain corresponding and reciprocal rights and duties, which necessarily impose limitations upon each other. Hence, their rights and duties may be said to be "correlative" to each other, though not necessarily in the sense of being entitled to equal protection or recognition.[6] It is possible for the surface owner and mineral owner to be the same person, but the surface damage problem does not usually arise in that case. If the surface owner also owns the mineral interests, then he is the lessor when a developer-lessee is exploring for or producing the oil and gas, and he will have received an initial bonus consideration for having granted the lease, as well as delay rentals, or royalties if there is production from his land. Moreover, by entering into the lease he may be said to have impliedly authorized the lessee to do such damage to the surface as is reasonably necessary in the conduct of its operations.[7]

The surface damage issue usually becomes a serious bone of contention only in the case in which the surface interest has been severed from the underlying oil and gas interest, so that the mineral owner who leases to the developer and reaps the financial reward is

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5. *E.g.*, 1 H. WILLIAMS & C. MEYERS, OIL AND GAS LAW § 204.6, at 60.4 (1981) [hereinafter cited as WILLIAMS & MEYERS]; Kuntz, *Correlative Rights of Parties Owning Interests in a Common Source of Supply of Oil or Gas*, 17 INST. ON OIL & GAS L. & TAX'N 217 (1966). *See generally*, Arnstad v. North Dakota State Indus. Comm'n, 122 N.W.2d 857, 859-61 (N.D. 1963).

6. "Correlative" generally means "[h]aving a mutual or reciprocal relation, in such sense that the existence of one necessarily implies the existence of the other." BLACK'S LAW DICTIONARY 311 (5th ed. 1979). *See* Gray, *supra* note 1, at 232; Patton, *supra* note 1.

See also Hunt Oil Co. v. Kerbaugh, 283 N.W.2d 131, 138 (N.D. 1979). The court in *Hunt Oil* characterized the use of the term "correlative rights" in this sense as "unfortunate" because it might suggest equality of the surface and mineral interests, as opposed to the traditional dominance of the mineral estate. *Id.*

7. Keeton & Jones, *Tort Liability and the Oil and Gas Industry*, 35 TEX. L. REV. 1, 3 (1956). Such authorization would bar any recovery for damages, since the lessor has assumed the risk of damage from operations customary in the industry. *Id. See* notes 74-75 *infra*.

not the same person as the surface owner. The latter normally receives nothing from mineral production and may feel that he has somehow been victimized by the whole process. The owner of the severed surface interest seeking to pursue a damage claim probably does not stop to ponder the theoretical nature of his interest or to inquire whether it is in fact an interest that enjoys legal protection from this kind of damage. Such an analysis, however, is not only instructive, but also crucial to the manner in which a court must approach the issue if the surface owner pursues his damage claim to litigation.

The separation or severance of the surface interest in a tract of land from the mineral interests in or underlying the land creates a situation in which at least two persons share in some manner in the "ownership" of the land, defining the "land" to be the surface and everything underlying it.[8] It is often said that each has a separate and distinct property right or estate in the land.[9] Simply to state that one has a property right in or owns the surface and another the minerals, however, does not shed any light on their mutual rights and duties. That question can be clarified only by looking behind the descriptive words "property" and "ownership."

> In the first place, it is necessary to distinguish between the right of ownership itself and the subject-matter of that right. . . . It is necessary to realize, however, that although "property" is often used in this loose way to refer either to the thing itself or to the rights in that thing, the concept of ownership itself is quite distinct from any tangible things to which it may relate, for it is no more than the expression of a legal relationship resulting from a set of legal norms.
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> For this purpose it may be said that ownership is not a single category of legal "right" but is a complex bundle of rights whose precise character will vary from legal system to legal system.[10]

8. This Article does not attempt to deal with minerals mined by surface strip mining techniques, as noted above, and, therefore, there is no need to be concerned with the subtleties of defining the term "surface." The distinction between "surface" and the shallowest oil and gas producing formations in North Dakota is well defined.

9. *E.g.*, McDonald v. Antelope Land & Cattle Co., 294 N.W.2d 391, 396 (N.D. 1980). In *McDonald* the court observed: "In North Dakota, after a mineral title is severed by reservation, the surface and minerals are held by separate and distinct titles, and each is a freehold estate of inheritance." *Id.* The result is the same whether the severance is accomplished by reservation or by a deed of a mineral interest. *See* Beulah Coal Mining Co. v. Heihn, 46 N.D. 646, 652, 180 N.W. 787, 789 (1920).

10. D. LLOYD, THE IDEA OF LAW 319, 323 (1964).

Thus, "property," as a legal concept, connotes not a thing in itself but rather certain rights. These rights are not between the property owner and some thing or object, but are rights between the owner and other persons with respect to that thing or object.[11] This concept of the enjoyment by one person of a certain bundle of rights in a thing, such as land, enforceable by the sanctions of the law against other persons, is at the heart of the common law theory of private property.[12] As a general principal the nature of private property is the right to exclude others from exercising power or control over, or enjoying the fruits of, some object or thing.[13]

In the context of the surface owner and the owner of severed oil and gas interests, therefore, the question is what rights does each possess; that is, what legally protected privileges does the law grant to each one in the tract of land in question?[14] The idea of separate sets of rights and separate ownership with respect to the surface and minerals is a fairly modern concept. The English common law tradition contemplated that "ownership of land" included ownership of the surface and everything under it and over it.[15] An exception was made for ownership of precious metals such as gold, which belonged to the sovereign, who could be said to have reserved those mineral substances in any grant of rights in land to

11. M. COHEN, LAW AND THE SOCIAL ORDER 45 (1933) ("A right is always against one or more individuals").

12. *See* O. HOLMES, THE COMMON LAW 214, 246 (1881). Oliver Wendall Holmes defined a legal right as follows:

> A legal right is nothing but a permission to exercise certain natural powers, and upon certain conditions to obtain protection, restitution, or compensation by the aid of the public force. Just so far as the aid of the public force is given a man, he has a legal right. . . .
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> But what are the rights of ownership? . . . Within the limits prescribed by policy, the owner is allowed to exercise his natural powers over the subject-matter uninterfered with, and is more or less protected in excluding other people from such interference. The owner is allowed to exclude all, and is accountable to no one.

Id.

13. M. COHEN, *supra* note 11, at 46. Thus, "[a]ny thing, then, is my property if I have the right to exclude you, at my pleasure, from any use of it. All civil societies must, if perpetual conflict is to be avoided, regulate the control which diverse persons may exercise over the same object." M. COHEN, REASON AND LAW 109 (1950).

14. *See* E. BODENHEIMER, JURISPRUDENCE 312 (rev. ed. 1974). These separate interests provide a cogent illustration of the inherent function of law as an instrument of social policy: "It is one of the chief functions of the law to adjust and conciliate these various conflicting interests, individual as well as social. This must be done, in part at least, by the promulgation of general rules assessing the weight of various interests and providing standards for their adjustment." *Id.*

15. *See* 2 W. BLACKSTONE, COMMENTARIES *18. As Blackstone stated: "Land hath also, in its legal signification, an indefinite extent, upwards as well as downwards. . . .Whatever is in a direct line, between the surface of any land and the centre of the earth, belongs to the owner of the surface; as is every day's experience in the mining countries." *Id.* Ownership was not absolute, however, since under the tenure theory all land was deemed to be owned by the sovereign, and landowners held various rights in the land under the king as their ultimate feudal overlord. L. FRIEDMAN, A HISTORY OF AMERICAN LAW 51-52 (1973). For practical purposes, though, tenure in fee simple was functionally equivalent to ownership in the modern sense. *See* W. WALSH, A HISTORY OF ANGLO AMERICAN LAW 100 (2d ed. 1932).

private persons.[16] American law did not recognize inherent ownership of any severed mineral by the government in private land, perhaps due in part to the policy of favoring free alienability of land.[17] Grants of land to individuals or to corporations, such as the railroads, from the vast domain of public lands in this country starting in the nineteenth century did not even attempt to sever and reserve minerals in these public lands. Early in the present century, however, when it had become apparent that coal, oil and gas, and other minerals constituted a potentially enormous source of public wealth, mineral reservations became mandatory in many types of public land grants so that the surface and mineral ownership began to be severed in large tracts of land, particularly in the western United States.[18] As the practices of reserving minerals in private land transfers and of separately transferring minerals gained favor, severed ownership of minerals and surface in land became common. North Dakota is typical of many western states in having widespread ownership of severed mineral interests, both private and governmental.[19]

Investigation of the relationship between the surface owner and the owner of these severed mineral interests in North Dakota

16. *See* Ferguson, *Severed Surface and Mineral Estates — Right to Use, Damage or Destroy the Surface to Recover Minerals,* 19 ROCKY MTN. MIN. L. INST. 411, 412-13 (1974); Lopez, *Upstairs/Downstairs: Conflicts Between Surface and Mineral Owners,* 26 ROCKY MTN. MIN. L. INST. 995, 996-97 (1980).

17. *See* L. FRIEDMAN, *supra* note 15, at 359. "The dominant idea of American land law was that land should be freely bought and sold. For this reason, lawyers, judges and legislatures, in the years after independence, had gone to great pains to untie the Gordian knots of English land law." *Id.*

18. In the pre-Civil War period, so little thought was given to the public mineral wealth that the federal government actually bought gold and silver taken from public lands by private individuals. Davis, *Expanding the Republic,* in THE GREAT REPUBLIC 444 (1977). In modern times the relations between the surface owner and a mineral developer on lands where the minerals are owned by the federal government is intermeshed with provisions in various federal statutes governing the grants of the lands. That is a subject beyond the scope of this Article. *See generally* Note, *Protection for Surface Owners of Federally Reserved Mineral Lands,* 2 U.C.L.A.-ALASKA L. REV. 171 (1973). Questions arising in the context of federally owned coal are discussed in Haughey & Gallinger, *Legislative Protection of the Surface Owner in the Surface Mining of Coal Reserved by the United States,* 22 ROCKY MTN. MIN. L. INST. 145 (1976). Rights to surface use under mineral reservations in federal statutes governing the patenting of public lands are discussed in Fleck, *Severed Mineral Interests,* 51 N.D.L. REV. 369, 370-72 (1974) and Lacy, *Conflicting Surface Interests: Shotgun Diplomacy Revisited,* 22 ROCKY MTN. MIN. L. INST. 731, 748-68 (1976).

19. Not only the federal government, but also the State of North Dakota itself is a large owner of severed mineral interests. Pursuant to § 38-09-01 of the North Dakota Century Code the state must reserve 50% of oil, gas, and other minerals in any transfer of state-owned lands. N.D. CENT. CODE § 38-09-01 (1980). The state reservation was originally 5%, but was increased to 50% in 1941. *See* 1939 N.D. SESS. LAWS 231; 1941 N.D. SESS. LAWS 238. Since June 28, 1960, in any of the state-owned "school lands," lands originally granted to the state by the United States under the enabling legislation creating the state in 1889, all oil and gas and other minerals must be reserved to the state. N.D. CONST. art. IX, § 5. This constitutional requirement for school lands takes precedence over the statutory reservation in § 38-09-01 of the North Dakota Century Code. N.D. CENT. CODE § 38-09-01 (1980). Haag v. State, 219 N.W.2d 121, 131 (N.D. 1974). The power of the State to grant oil and gas leases on its original grant lands was challenged early in the history of oil and gas development in North Dakota, but was definitively established in State v. Amerada Petroleum Corp., 78 N.D. 247, 262, 49 N.W.2d 14, 23 (1951). The State's power to grant oil and gas leases of its reserved mineral interests and the procedural requirements for leasing are set out in sections 38-09-14 through 38-09-20 of the North Dakota Century Code. N.D. CENT. CODE §§ 38-09-14 to -20 (1980). No mineral reservation is required in conveyances by the state to the federal government. *Id.* § 38-09-01.1.

rests, as noted above, upon an analysis of the legally recognized and protected rights of each and the corresponding duties and restrictions placed upon each. It is helpful to begin this analysis by considering the manner in which the North Dakota Supreme Court has characterized these separate property interests. In *Beulah Coal Mining Co. v. Heihn*[20] an early decision involving the effect of a conveyance of land with a reservation of minerals by the grantor, the court made it clear that the mineral interest is a separate interest in real property, which may validly be severed from the ownership of the surface. A reservation of minerals in a deed of real property is conceptually a conveyance of the reserved minerals back to the grantor by the grantor himself.[21] A mineral interest may be conveyed separately from the surface by mineral deed, just as any other interest in real property may be transferred, and the result is the same as if the mineral interest were the result of a reservation or exception.[22]

Once the severance of the mineral interest has occurred, by whichever method, two separate estates in land have been created,

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Considerable litigation was required before the exact nature and extent of the State's statutory mineral reservation was defined. *See* Abbey v. State, 202 N.W.2d 844, 856 (N.D. 1972) (coal included); Salzseider v. Brunsdale, 94 N.W.2d 502, 504 (N.D. 1959) (gravel not included); State v. Amerada Petroleum Corp., 71 N.W.2d 675, 684 (N.D. 1955) (construing § 15-07-15 of the North Dakota Century Code, which eliminates the reservation upon resale by the State to a former private owner, spouse, or lineal descendant in the first degree). The State may reserve no other substances, nor a larger share, than the statute (or constitution) provides. Convis v. State, 104 N.W.2d 1, 4-5 (N.D. 1960). Local governmental entities may also own mineral interests; § 38-09-02 of the North Dakota Century Code grants townships, cities, school districts, and park districts the power to grant oil and gas leases on their lands. N.D. CENT. CODE § 38-09-02 (1980). In theory, a county might also own mineral interests, but most county-owned land has been acquired by delinquent tax proceedings and a county is not empowered to reserve minerals in any conveyance of land so acquired. Kershaw v. Burleigh County, 77 N.D. 932, 940, 47 N.W.2d 132, 136 (1951); Adams County v. Smith, 74 N.D. 621, 630, 23 N.W.2d 873, 878 (1946). In 1951 the statute providing for mineral reservations in conveyances by a county was repealed. 1951 N.D. SESS. LAWS 172.

20. 46 N.D. 646, 180 N.W. 787 (1920).

> Minerals in place are land, and may be conveyed as other lands are conveyed. . . . Contracts excepting ores and minerals from grants of land, with a reservation of the right to enter upon the portion thereof granted, are in accordance with long-established usage, and have been invariably held by the courts to be valid; and not to be contrary to, but in harmony with, public policy.

Beulah Coal Mining Co. v. Heihn, 46 N.D. 646, 651-52, 180 N.W. 787, 789 (1920).

21. *See* Northwestern Improvement Co. v. Norris, 74 N.W.2d 497, 508 (N.D. 1955). In Reiss v. Rummel, 232 N.W.2d 40, 47 (N.D. 1975), the court refers to this "grant back" theory as "employing hypertechnical legal reasoning, if not legal fiction." The grantor's retention of a mineral interest may also be regarded as an "exception" to the quantum of real property conveyed to the grantee, who receives the grantor's interest except for the retained mineral interest. In North Dakota there is no difference in legal significance between a "reservation" of minerals and an "exception" of minerals in a grant. *See* Christman v. Emineth, 212 N.W.2d 543, 552 (N.D. 1973). In some states, however, different consequences may attach to the use of one word or the other in certain situations. *See, e.g.*, Coyne v. Butler, 396 S.W.2d 474, 476 (Tex. Civ. App. 1965).

22. *See* Beulah Coal Mining Co. v. Heihn, 46 N.D. 646, 180 N.W. 787 (1920). There are many subtleties in the conveying of mineral interests that do not arise in transfers of surface interests. For a recent discussion, see Bledsoe, *Conveyancing of Oil and Gas Interests*, 32 INST. ON OIL & GAS L. & TAX'N 83 (1981).

which are "as distinct as if they contained two parcels of land."[23] The grantee in the mineral deed or the grantor of the surface estate who has reserved or excepted the minerals holds a separate fee simple estate in the minerals in place, with all of the legally protected rights that such an estate entails.[24] Thus, the severed mineral estate is subject to and enjoys the benefits of all the legal doctrines applicable to real property. For example, the mineral owner enjoys the benefits of recording statutes and bonafide purchaser doctrines,[25] a mineral estate may be acquired by adverse possession,[26] title to the minerals may be confirmed by a quiet title action,[27] an after-acquired interest in the mineral estate passes

23. Bilby v. Wire, 77 N.W.2d 882, 889 (N.D. 1956). In North Dakota attempts have been made to modify this doctrine legislatively by giving the surface owner, in effect, a portion of the mineral estate by statute. House Bill No. 1626, introduced in the 1981 Legislative Assembly, would have allowed the surface owner who owned less than 12½% of the mineral estate to be entitled to no less than a 1% royalty interest in the production of the minerals subject to lease. N.D.H.B. 1626, 47th Leg., § 1 (1981). It further provided that any transfer of the surface estate by a person also owning an underlying mineral interest must include a transfer to the grantee of enough of the mineral estate so that the surface owner would own no less than a 12½% mineral interest. *Id.* Finally, House Bill 1626 provided that a grantor owning both the surface and mineral estates must retain at least 12½% of the mineral estate, or his entire mineral estate if it was greater than that, in any conveyance. *Id.* After being rewritten in the house to provide simply that all oil and gas leases must contain a provision giving the surface owner not less than 1% of the value of the oil and gas produced, the bill passed but was later defeated in the senate. N.D.H.J. 1187 & N.D.S.J. 1557-58, 47TH. LEG. (1981).

House Bill 1335 would have required any person holding title to the surface and a portion of the mineral estate to have also conveyed the mineral interest in any conveyance of the surface. N.D.H.B. 1335, 47th Leg., § 1 (1981). A 25% limitation, the significance of which was not clear, also appeared in the bill, which was defeated in the house. N.D.H.J. 1137-38, 47th Leg. (1981).

24. Northwestern Improvement Co. v. Norris, 74 N.W.2d 497, 505 (N.D. 1955). Under the typical language used in the granting instrument, this right will be a "fee simple estate in the minerals 'in or under' the land in question." Christman v. Emineth, 212 N.W.2d 543, 550 (N.D. 1973). The purpose of this Article is to consider to what extent these rights will be protected against the claims of the surface owner. *See supra,* notes 10-14 and accompanying text.

The question of what kinds of minerals the grantee acquires is a complex one, depending upon the language used in the conveying instrument and the intent of the parties, as well as the date of the conveyance, and is beyond the scope of this Article. For discussions, see Beck, *"And Other Minerals" as Interpreted by the North Dakota Supreme Court,* 52 N.D.L. REV. 633 (1976), and Reeves, *The Meaning of the Word "Minerals,"* 54 N.D.L. REV. 419 (1978). The mutual intent of the parties regarding the instrument is the primary controlling factor, in the absence of specific statutory provisions. *See, e.g.,* Perschke v. Burlington N., Inc., 311 N.W.2d 564, 567 (N.D. 1981).

25. *See* Nodland v. Plainsmen Petroleum, Inc., 265 N.W.2d 252, 255 (N.D. 1978); Northwestern Improvement Co. v. Norris, 74 N.W.2d 497, 506 (N.D. 1955). In a series of decisions early in the history of oil and gas production in North Dakota the supreme court made it very clear that bona fide purchasers of mineral interests were entitled to full legal protection of their interests. Dockter v. Crawford, 65 N.W.2d 691, 695 (N.D. 1954); Hoffer v. Crawford, 65 N.W.2d 625, 633 (N.D. 1954); Dixon v. Kaufman, 79 N.D. 633, 644, 58 N.W.2d 797, 803 (1953).

26. The applicability of the doctrine of adverse possession usually arises in a negative context. The court frequently has noted that since a severed mineral estate and the surface estate are separate estates in land, title to a mineral interest cannot be acquired by adverse possession of the surface only. *E.g.,* Wisness v. Paniman, 120 N.W.2d 594, 595 (N.D. 1963); Yttredahl v. Federal Farm Mortgage Corp., 104 N.W.2d 705, 708 (N.D. 1960); Northern Pac. Ry. v. Advance Realty Co., 78 N.W.2d 705, 719 (N.D. 1956). Possession of the surface is entirely consistent with separate ownership of a severed mineral interest, so that surface occupancy does not provide constructive notice of any possessory claim to mineral rights. Dixon v. Kaufman, 79 N.D. 633, 644, 58 N.W.2d 797, 803 (1953). It follows, therefore, that adverse possession of severed mineral rights, adverse to the surface owner or adverse to another claimant to the mineral interest, can occur only by engaging in producing them by drilling or mining. Bilby v. Wire, 77 N.W.2d 882, 889 (N.D. 1956). If there has been no severance, adverse possession of the surface under the usual conditions gives title to the surface and the mineral estate. Payne v. A. M. Fruh Co., 98 N.W.2d 27, 32 (N.D. 1959).

27. *See, e.g.,* Reiss v. Rummel, 232 N.W.2d 40, 41 (N.D. 1975); Olson v. Dillerud, 226 N.W.2d 363, 364 (N.D. 1975); Corbett v. La Bere, 68 N.W.2d 211, 212 (N.D. 1955).

under a warranty of title provision,[28] a mineral interest that is not severed from the surface is subject to a mortgage granted in the land,[29] the usual rules applicable to cotenancy in land govern the interrelations between mineral owners holding interests as tenants in common,[30] and statutory restraints limiting suspension of the power of alienation are applicable.[31]

As an interest in real property, a severed mineral interest is, theoretically, subject to separate assessment for real property taxes.[32] If the mineral interest or interests in particular minerals have not been severed from the surface, their value should be included in the general tax assessment of the property.[33] As a practical matter, however, severed minerals have never successfully been assessed separately for taxation purposes in North Dakota, due in part to the difficulty of fixing a proper valuation for the mineral interest.[34] The theoretical basis for property taxes is that they compensate for the protection afforded to property rights by the legal might of the state. It would be thought, therefore, that surface owners in disputes over surface damages might raise the point that they pay taxes while the severed mineral owner does not

28. *E.g.*, Skelly Oil Co. v. A. M. Fruh Co., 137 N.W.2d 664, 666 (N.D. 1965); Aure v. Mackoff, 93 N.W.2d 807, 811 (N.D. 1958).

29. Skelly Oil Co. v. A. M. Fruh Co., 137 N.W.2d 664, 666 (N.D. 1965). Holders of severed mineral interests granted subsequent to the mortgage must be given notice and named as parties in a mortgage foreclosure proceeding in order for their rights to be affected by the foreclosure. Yttredahl v. Federal Farm Mortgage Corp., 104 N.W.2d 705, 709 (N.D. 1960). It follows from the separate nature of the surface estate and a severed mineral estate that a mortgage given by the surface owner after severance is a lien against the surface only and not against the mineral estate. Northern Pac. Ry. v. Advance Realty Co., 78 N.W.2d 705, 715 (N.D. 1956).

30. *See, e.g.*, Schank v. North Am. Royalties, Inc., 201 N.W.2d 419, 429-30 (N.D. 1972); Smith v. Nyreen, 81 N.W.2d 769, 771-72 (N.D. 1957).

31. Carlson v. Tioga Holding Co., 72 N.W.2d 236, 239 (N.D. 1955). Statutes such as § 47-02-27 of the North Dakota Century Code are commonly referred to as the "rule against perpetuities," although the North Dakota Supreme Court has noted that the common law rule against perpetuities is not in force in this state. Anderson v. Blixt, 72 N.W.2d 799, 807 (N.D. 1955); *see* N.D. CENT. CODE § 47-02-27 (1980).

32. Northwestern Improvement Co. v. Oliver County, 38 N.D. 57, 64, 164 N.W. 315, 318 (1917).

33. Northern Pac. Ry. v. Advance Realty Co., 78 N.W.2d 705, 718 (N.D. 1956). If the land is forfeited to the county for delinquent taxes assessed against the surface owner after severance of the mineral estate the county acquires only the surface. Bilby v. Wire, 77 N.W.2d 882, 887 (N.D. 1956). Conversely, if the county tax lien attaches before severance, the county acquires the mineral interest along with the surface. Payne v. A. M. Fruh Co., 98 N.W.2d 27, 32 (N.D. 1959).

34. On two occasions the court has held legislative attempts to place a tax on severed mineral interests to be unconstitutional. In Northwestern Improvement Co. v. State, 57 N.D. 1, 10-11, 220 N.W. 436, 439-40 (1928), a flat 3% tax on severed minerals was held to be an arbitrary and unreasonable classification of property, by form of ownership rather than by type of property, and was also held to violate § 179 of the State Constitution (currently N.D. CONST. art. X, § 4) requiring local assessment where the property is situated. In Northwestern Improvement Co. v. Morton County, 78 N.D. 29, 42, 47 N.W.2d 543, 550-51 (1951), a three cent per acre privilege tax on minerals severed by reservation in deeds, when no development of the minerals had occurred, was held invalid as an arbitrary classification because the manner of severance could not constitutionally be made the basis of classification for taxation. This taxation question has continued to surface regularly in the legislative sessions in this state. During the 1981 session of the North Dakota Legislative Assembly, for example, two bills dealing with taxation of severed mineral interests, Senate Bills 2421 and 2439, were introduced in the senate and defeated without crossing to the house side. N.D.S.J. 847 & 1496, 47th Leg. (1981).

and, thus, they should be entitled to greater protection of the law. This does not seem to be an argument that is normally made, however.

The severed mineral estate may take several different forms, all of which are interests in real property. It may, depending on the form of the instrument creating it, be what is commonly called a "mineral interest" in the technical sense. The holder of such a mineral interest is regarded as the "absolute" owner of the severed minerals in place with the right to produce them or to dispose of them as he chooses.[35] It is in pursuing that right, generally through a lessee, that conflicts with surface owners arise. If the interest is simply a "royalty interest," however, the holder has a right to some specified fraction of the minerals, or to the proceeds thereof, upon production, but no right to produce the minerals himself.[36] A royalty owner, therefore, does not normally become involved in surface damage issues. Like the mineral interest, the royalty interest is an interest in real property with all the resulting attributes of such interests.[37]

A third category of mineral estate, the one of most concern in this Article, is the interest acquired by the lessee under a mineral lease, specifically an oil and gas lease. A thorough discussion of all of the ramifications of a typical oil and gas lease is beyond the scope of this Article and is not necessary for discussion of the surface damage issue. What is important is to recognize that an oil and gas lease is in many ways quite different from an ordinary lease of real

35. *See* Northwestern Improvement Co. v. Morton County, 78 N.D. 29, 47 N.W.2d 543 (1951). The distinctive features of a "mineral interest" were summarized by the court in *Texaro Oil Co. v. Mosser*: "A 'mineral interest' is a real property interest created in oil and gas in place. . . . The prime characteristic of a mineral interest is the right to enter the land to explore, drill, produce and otherwise carry on mining activities." 299 N.W.2d 191, 194 (N.D. 1980) (citation omitted).

36. *Id.* "It is this attribute of operating rights that distinguishes a mineral interest from a royalty interest." *Id.*

37. Payne v. A. M. Fruh Co., 98 N.W. 2d 27, 30 (N.D. 1959); Van Sickle v. Olsen, 92 N.W. 2d 777, 782 (N.D. 1958). An assignment of a royalty interest is, therefore, a grant of real property. Knox v. Krueger, 145 N.W. 2d 904, 909 (N.D. 1966). Once minerals have been produced and separated from the ground they lose their real property character and become personal property, as do any interests in the produced minerals. Thus, in Corbett v. La Bere, 68 N.W. 2d 211, 214 (N.D. 1955), the court noted that "unaccrued royalty . . . is an interest in real estate entitling the royalty owner to share in the production of the minerals." In Federal Land Bank v. State, 274 N. W.2d 580, 583 (N.D. 1979), the court held that " 'produced' or 'severed' minerals are personal property, not real" property. The term "severed," as used in *Federal Land Bank*, refers to separation from the ground, not "severance" of the mineral estate from the surface estate as that term is used herein.

The supreme court may have created some unfortunate confusion in its recent decision of Texaro Oil Co. v. Mosser, 299 N.W.2d 191, 194 (N.D. 1980), when it stated that a royalty interest is personal property. A close reading of the decision, however, reveals that what the court must have been referring to was the royalty owner's interest in produced or severed minerals. After referring to royalty as the landowner's share of production "at severance," the court stated: "A royalty interest is personal property and refers to the owner's right to receive a certain part of the proceeds from oil and gas, leases *if and when there is production.*" *Id.* (emphasis added) (citation omitted). When one reads this to mean the royalty interest in *produced* minerals, then the statement is consistent with the well-established rule set out in *Payne* and *Corbett, supra* note 37, that royalty interests are real property. For another view of this issue see Maxwell, *Some Comments on North Dakota Oil and Gas Law — Three Cases from the Eighties*, 58 N.D.L. REV. 431 (1982).

property. Like any lease of land it does constitute an estate or interest in real property,[38] but it conveys much more than simply the right to undisturbed possession for some defined period of time.

An oil and gas lease bears more resemblance to the common law concept of a *profit a prendre,* a right to extract something from land, than it does to a typical real property lease.[39] This was the characterization noted by the North Dakota Supreme Court for describing oil and gas leases in *Corbett v. La Bere*[40] and *Alfson v. Anderson*,[41] and it suggests quite aptly the nature of the interest conveyed by such a lease. One significant distinction is that a common law *profit a prendre* was not necessarily an exclusive right, as the landowner did not relinquish his right to extract the substances from the land,[42] whereas the oil and gas lessee normally acquires an exclusive right from the mineral owner to drill for and produce oil and gas.[43]

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38. Ulrich v. Amerada Petroleum Corp., 66 N.W.2d 397, 402 (N.D. 1954). This is true of any mineral lease, as first stated by the North Dakota court in Petroleum Exchange, Inc. v. Poynter, 64 N.W.2d 718, 726 (N.D. 1954). It follows that an assignment of such a lease, a very common practice in the industry, is also a conveyance of real property. Mar Win Dev. Co. v. Wilson, 104 N.W.2d 369, 373 (N.D. 1960).

39. A concise definition of a *profit a prendre,* or simply a "profit," was stated in A HISTORY OF ANGLO AMERICAN LAW: "A profit is an incorporeal right to enter upon the land of another and to take and carry away a product or profit of the land, such as grass, fruit, timber or firewood, coal, iron or other mineral, fish or game." W. WALSH, A HISTORY OF ANGLO AMERICAN LAW 262-63 (2d ed. 1932). The right to dig for coal and other minerals was one of the earliest forms of profits and derives from the rights in the common land, which early villagers enjoyed before it came to be considered as belonging to their feudal overlords. *Id.* at 263. Blackstone refers to a profit as a "common, or right of common." 2 W. BLACKSTONE, COMMENTARIES *32.

40. 68 N.W.2d 211, 214 (N.D. 1955) (quoting Callahan v. Martin, 3 Cal. 2d 110, _____, 43 P.2d 788, 792 (1935)).

41. 78 N.W.2d 693, 702 (N.D. 1956) (quoting Gavina v. Smith, 25 Cal. 2d 501, _____, 501 P.2d 681, 683 (1944)). A distinction is sometimes made between states such as North Dakota, which treat the lessee as having acquired rights to oil and gas in place, and those that treat the lessee as having acquired an incorporeal hereditament. 1 E. BROWN, THE LAW OF OIL AND GAS LEASES § 3.02 (2d ed. 1973). Although a *profit a prendre* is classified as an incorporeal hereditament, it is also an interest in real property. In any case, the classification of the lessee's rights as corporeal or incorporeal does not affect the question of his rights to use the surface. 1 WILLIAMS & MEYERS, *supra* note 5, § 210.4.

42. W. WALSH, *supra* note 39, at 263 n.43.

43. An interesting question arises through the analogy to a *profit a prendre* in connection with the question of abandonment of the interest. A *profit a prendre* can be abandoned by a nonuser with intent to abandon; this doctrine has been used to support abandonment of mineral rights. *See* Manning, *Mineral Rights Versus Surface Rights,* 2 NAT. RESOURCES LAW. 329, 344-45 (1969). Some states have enacted statutes that purport to extinguish mineral rights which have been unused for a specified period of years in an effort to promote the clearing and simplifying of "dormant" mineral titles, and presumably to stimulate development of the minerals. Constitutional challenges to such statutes in Indiana and Michigan were brought before the United States Supreme Court. In Texaco, Inc. v. Short, 102 S. Ct. 781, 794-97 (1982), the Supreme Court held that the Indiana Dormant Mineral Interests Act did not violate the due process or equal protection clauses of the fourteenth amendment and did not run afoul of the commerce clause. The case dealing with the Michigan statute was dismissed for want of a substantial federal question. Larsen v. Van Slooten, 102 S. Ct. 1242 (1982). For a general discussion of the abandonment question, see 1 WILLIAMS & MEYERS, *supra* note 5, § 210.1. The general question of undeveloped mineral interests, including statutes on abandoned minerals, is discussed in Kuntz, *Old and New Solutions to the Problem of the Outstanding Undeveloped Mineral Interest,* 22 INST. ON OIL & GAS L. & TAX'N 81 (1971). For a discussion of dormant mineral acts, see Note, *Dormant Mineral Statutes and Abandoned Severed Mineral Interests,* 58 N.D.L. REV. 611 (1982).

The "mineral owner" in this context is generally a lessee under an oil and gas lease, or an assignee of the original lessee, since the actual owners of the oil and gas normally do not develop their interests themselves but rather lease them to developers, retaining a royalty interest for themselves under the lease.[44] In the common situation in which disputes over surface damages may arise there will generally be at least three separate sets of interests: those of the surface fee owner, those of the severed mineral owner who typically leases his interest to a developer, and those of the developer-lessee.[45] The lessor of severed oil and gas interests is generally a bystander in the disputes over surface damages, as the question is whether the surface owner must bear the risk of the particular damages resulting from the lessee's drilling or exploratory operations, or whether the latter must compensate the surface owner in some manner for the damages.[46]

III. DOMINANCE OF THE MINERAL ESTATE

Before analyzing the North Dakota cases that have dealt with disputes between the surface owner and the oil and gas operator over surface damage claims, it will be helpful to review briefly the general law on the question. Certain general principles have emerged from the large body of litigation on this subject, though a number of uncertainties persist so that many issues remain in a state of constant flux. As one commentator has aptly characterized the situation:

> Despite a long history of experience and a fairly extensive body of judicial precedent, the questions of whether, and to what extent, and under what circumstances the oil and gas lessee may occupy and use the surface of the leased premises to find, produce, and

44. *See generally* Corbett v. La Bere, 68 N.W.2d 211, 213-14 (N.D. 1955).

45. These individual interests may be split among many different persons. The surface estate, for example, may be held by a number of persons in cotenancy or there may be a surface tenant leasing from the surface owner. The mineral ownership may be split between the lessor and owners of separate royalty interests, and different minerals may be owned by different persons. Finally, the working interest may be split among a number of lessees and assignees of lessees, and may be burdened with outstanding overriding royalty interests. Also, any of a number of possible arrangements that affect the sharing of the working interest, such as farm out agreements, may have been entered into. It is useful, however, for purposes of discussion to categorize the types of interests into these three broad groups.

46. This is not to say that the lessor may not be interested in the resolution and outcome of the dispute, as his interest is in seeing production of the oil and gas proceed smoothly and expeditiously so that he can reap the reward in the form of his royalty payments. However, the amount of those royalties will not be directly affected by whether the lessee must pay for surface damages. This discussion assumes, of course, that the oil and gas interest was severed from the surface interest prior to leasing.

> remove the oil and gas therefrom, and dispose of waste products, now seem to arise more often than before, and frequently the answers seem more elusive than ever.[47]

The analysis generally starts with the proposition that the mineral estate is the "dominant" estate to which the surface estate is subservient.[48] Simply characterizing the mineral estate as "dominant," however, does not provide a solution to the question of liability for surface damages.[49] The consequence of this dominant status is usually stated to be that the mineral owner or lessee has the legally protected right to use as much of the surface overlying the minerals, and to use it in such manner, as is reasonably necessary for his exploration, development, and production of his mineral interest.[50] This right exists by implication under the grant of mineral rights, whether by lease or otherwise, since if it did not the minerals might be inaccessible and the mineral estate would be worthless.[51] It is possible for the lessee's rights of surface user to be expressly set out in the lease, which may be construed to negate any further or additional rights by implication.[52] Modern leases, however, expressly grant quite broad rights of surface user to the lessee so that it is unlikely that the lease

47. 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, 227 (1975).

48. *E.g.,* Ferguson, *Severed Surface and Mineral Estates — Right to Use, Damage or Destroy the Surface to Recover Minerals,* 19 ROCKY MTN. MIN. L. INST. 411, 414-18 (1974); Sellers, *How Dominant is the Dominant Estate? or, Surface Damages Revisited,* 13 INST. ON OIL & GAS L. & TAX'N 377, 378 (1962); Comment, *Land Uses Permitted an Oil and Gas Lessee,* 37 TEX. L. REV. 889, 890 (1959).

49. *See* Manning, *Mineral Rights versus Surface Rights,* 2 NAT. RESOURCES LAW. 329, 330 (1969). The author noted that "[a]n overly simplified solution to the problem of conflicting surface uses which has been suggested too frequently by the courts has been to describe the mineral estate as the dominant estate." *Id.*

50. *E.g.,* 1 WILLIAMS & MEYERS, *supra* note 5, § 218, at 186.32; Jones, *The Oil Operator and Surface Damages,* 4 NAT. RESOURCES LAW. 339, 341 (1971). For a discussion of what constitutes reasonably necessary use, see Annot., 53 A.L.R.3d 16 (1973).

51. 1 WILLIAMS & MEYERS, *supra* note 5, § 218, at 186.32. As one commentator observes:

> It has been stated time after time, in law review articles, legal briefs, and court decisions, that an ordinary or conventional oil and gas lease carries with it the implied right to possess and use so much of the surface in such manner as is reasonably necessary to enable the lessee to perform all legitimate obligations imposed upon him by the lease, and to effectuate the purposes of the lease.

Browder, *Accommodation of the Conflicting Interests of the Mineral Owner and the Surface Owner,* 25 INST. ON OIL & GAS L. & TAX'N 85, 92 (1974). The dominance of the mineral estate may be said to flow from the necessity of implying rights of reasonable surface user so that the holder of mineral rights, the oil and gas lessee in the context of this discussion, will be able to enjoy the estate he has acquired. Manning, *supra* note 49, at 332. "This is based upon the principle that when a thing is granted all the means to obtain it and all the fruits and effects of it are also granted." Healy, *Rights of Mineral Owners in Surface,* 1 ROCKY MTN. MIN. L. INST. 85, 89 (1955). The oil and gas lessee's implied right to reasonably necessary use of the surface necessarily includes the right of ingress and egress from the drillsite. *Id.* at 91; Lopez, *Upstairs/Downstairs: Conflicts Between Surface and Mineral Owners,* 26 ROCKY MTN. MIN. L. INST. 995, 1003 (1980).

52. 1 WILLIAMS & MEYERS, *supra* note 5, § 218.1; Cage, *The Modern Oil and Gas Lease — A Facelift for Old 88,* 31 INST. ON OIL & GAS L. & TAX'N 177, 194 (1980).

terms themselves will prove unduly restrictive.[53]

To characterize the mineral estate as dominant is not to vest it with an absolute supremacy. If dominance meant that the mineral owner always prevailed, then the question of liability for surface damages would disappear, as the surface owner would always be on the losing side.[54] The doctrine is limited by the rule that the lessee's use of the surface must be reasonably necessary; if this restriction does not answer the question it does, at least, provide a framework for analysis that is often used by the courts.[55] As one commentator points out in discussing the broad language of the typical form lease:

> Nevertheless, such language is not intended to convey to the lessee the use of the entire surface without restraint; his use is limited. He is entitled to enter upon and use only so much of the leased premises, and only in such fashion, as may reasonably be necessary to carry out the terms of the lease and to effectuate its purposes. This rule seems logical and equitable; its practical application rests with the courts, and often the juries.[56]

The dominance of the mineral estate, therefore, does not give the oil and gas lessee the right to totally destroy the surface. He is entitled only to such use as is reasonably necessary, and he may not make unreasonable use of the surface. Total destruction of the surface by an oil and gas lessee during exploration, drilling, or production operations would normally be regarded as "unreasonable."[57] It is fair to say that such a right would not be

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53. *See* Moses, *Peaceful Coexistence Between Lessor and Lessee Under an Oil and Gas Lease*, 38 TUL. L. REV. 341, 342 (1964). For example, the lease form currently in use for oil and gas leases by the State of North Dakota provides that the lessor does as follows:

> [L]ease exclusively to lessee the property described below, for the purpose of exploring for, by geological, geophysical and other methods, and drilling for, and producing oil and/or gas from the leased premises . . . and with the right of ingress and egress and the right to use as much of the leased premises as shall be reasonably necessary to the purpose of this lease including but not limited to the right to build roads, lay and maintain gathering and transmission lines, and erect and maintain communication lines, buildings, tanks, power stations, and other structures, appliances, and equipment.

See generally 2 E. BROWN, THE LAW OF OIL AND GAS LEASES § 18.02 (1973); Anderson, *David v. Goliath: Negotiating the "Lessor's 88" and Representing Lessors and Surface Owners in Oil and Gas Lease Plays*, 27 ROCKY MTN. MIN. L. INST. 1029 (1982).

54. Browder, *supra* note 51, at 89; Ferguson, *supra* note 48, at 414-15.

55. *See* Browder, *supra* note 51, at 89-92.

56. *See* Moses, *supra* note 53, at 354.

57. *See* Patton, *Recent Changes in the Correlative Rights of Surface and Mineral Owners*, 18 ROCKY MTN. MIN. L. INST. 19, 41-42 (1973). A dilemma is presented by the case of a mineral that is recoverable only by a technique which necessarily destroys the surface, such as the strip mining of lignite coal in

implied and that most courts would require a fairly clear express grant of the right to destroy the surface.[58]

The limitation of reasonable necessity placed on the rights of a lessee or other owner of the dominant mineral estate regarding his use of the surface is often characterized as requiring the lessee to act with "due regard" for the rights of the surface owner.[59] This has led to the theory that there should be an "accommodation" between the interrelated rights of the mineral owner and the surface owner, still recognizing, however, the traditional dominance accorded to the mineral estate.[60] The notion that due regard for the interests of the surface owner requires an accommodation between his rights and those of the mineral developer first achieved widespread currency in the decision of the Texas Supreme Court in

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North Dakota. In this case there is no reasonable alternative. The surface mining reclamation statutes have sought to find a solution by requiring restoration of the surface after mining, that is by undoing the destruction of the surface. *See supra* note 2. Consent of the surface owner is required by statute before coal may be strip mined on his land, or if consent cannot be obtained, an action in the district court may be brought and damages awarded to the surface owner to compensate him for lost agricultural production, lost land value, and loss of the value of improvements on the land. N.D. CENT. CODE § 38-18-06 (Supp. 1981). For a discussion of this problem, including legislative attempts at a solution and a proposed model act, see Dycus, *Legislative Clarification of the Correlative Rights of Surface and Mineral Owners,* 33 VAND. L. REV. 871 (1980).

This problem of surface destruction from strip mining of coal and other minerals near the surface has led to litigation over, and statutory provisions governing, the question of what "minerals" are included in a grant, reservation, or lease of minerals. Lopez, *supra* note 51, at 1002-03; Patton, *supra,* at 19-30. In Hovden v. Lind, 301 N.W.2d 374 (N.D. 1981), the North Dakota Supreme Court expressed concern about surface destruction when construing the phrase "all other minerals," reserved in a land sale contract, to exclude clay and scoria:

> A reasonable construction of the word "minerals" as used in a land sale contract excludes clay and scoria, as well as gravel. The rationale for similar holdings in other cases is that these substances, if they are not literally part of the surface itself, cannot be removed without damaging the surface.

Id. at 378. The court also noted that the buyers had objected to any reservation of coal because strip mining could destroy their interest in the surface. *Id.* at 376. In Olson v. Dillerud, 226 N.W.2d 363, 367 (N.D. 1975), the court noted that if it could be shown that strip mining constitutes destruction or permanent damage to the surface, as opposed simply to "use" of the surface, then the doctrine that gives the mineral owner the implied right to reasonably necessary use of the surface might have to be reexamined. For a discussion of the North Dakota law on the question of what is meant by "minerals," see Beck, *"And Other Minerals" as Interpreted by the North Dakota Supreme Court,* 52 N.D. L. REV. 633 (1976).

58. Lopez, *supra* note 51, at 1004. A frequently cited decision of the Texas Supreme Court states the principle concisely: "Unless the contrary intention is affirmatively and fairly expressed . . . a grant or reservation of 'minerals' or 'mineral rights' should not be construed to include a substance that must be removed by methods that will, in effect, consume or deplete the surface estate." Acker v. Guinn, 464 S.W.2d 348, 352 (Tex. 1971). The requirement to provide subjacent support to the surface would also apply to limit recovery of minerals by methods that destroy the surface. Twitty, *Law of Subjacent Support and the Right to Totally Destroy Surface in Mining Operations,* 6 ROCKY MTN. MIN. L. INST. 497, 498 (1961).

59. *E.g.,* Jones, *supra* note 50, at 341-42; Lambert, *Surface Rights of the Oil and Gas Lessee,* 11 OKLA L. REV. 373, 374 (1958); Manning, *supra* note 49, at 331-32. It has been noted that courts have tended to give more weight to the dominance of the mineral estate than to the concern for due regard for the surface owner. Comment, *supra* note 48, at 890. Under the "accommodation doctrine," however, the due regard owed to the surface estate is fully honored. *See infra* note 60 and accompanying text.

60. Browder, *supra* note 51. The North Dakota Supreme Court embraced this concept in Hunt Oil Co. v. Kerbaugh, 283 N.W.2d 131, 136 (N.D. 1979). *See infra* notes 126-43 and accompanying text.

Getty Oil Co. v. Jones.[61] The lessee in that case was using pumping units that extended to heights above the surface which prevented the surface owner from using, in the vicinity of the pumping units, the self-propelled sprinkler units required by his irrigation system. The Texas court upheld an appellate court decision reversing the trial court's decision, which had recognized the mineral lessee's dominant rights to use the pumping units. Witnesses testified that adjoining lessees had been able to use other types of pumping units which were below the height that would interfere with the irrigation system, and that the cost of such equipment was not excessive. Thus, an accommodation could be reached between the conflicting interests by giving due regard to the surface owner's interests through a finding that reasonable alternative means existed by which the oil and gas lessee could realize the value of his interests.[62]

The accommodation doctrine set out in *Getty* stirred up considerable controversy and provoked dire predictions that the traditional rights of the mineral owner had been abrogated.[63] It is important, however, to maintain a proper perspective by keeping in mind what *Getty* did not hold. A review of the language of the decision reveals that it did not constitute a radical departure from traditional law, but in fact fit solidly into the mold of previously established principles. The *Getty* accommodation doctrine focuses on the relative rights of the mineral owner and the surface owner in a particular factual context, instead of upsetting the traditional dominance of the mineral estate. As the court itself pointed out, it was simply applying the usual "reasonable necessity" test to the facts in the case.[64] A number of criteria must be met before a given

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61. 470 S.W.2d 618 (Tex. 1971).

62. Getty Oil Co. v. Jones, 470 S.W.2d 618, 619-23 (Tex. 1971). This doctrine of "alternative means" has been hailed as a useful method for handling surface damage controversies:

> The doctrine of alternative means, as expounded by the supreme court in *Getty*, can be summarized in the following manner: when a conflict occurs between the surface estate and the mineral estate, and the surface owner has no other choice in how he develops the surface while the dominant estate has at least one alternative which will not interfere with the surface development, the dominant estate must follow that alternative. A more expansive use of this doctrine could provide a means of handling disputes over correlative surface rights on a case by case basis.

Note, *The Surface Mineral Producer v. the Oil and Gas Producer: A Need for Peaceful Coexistence*, 29 BAYLOR L. REV. 907, 923 (1977).

63. Jones, *supra* note 50, at 351. Writing after the decision of the appellate court and before the Texas Supreme Court had affirmed it, the author stated categorically: "Furthermore, it is submitted that in the event this holding is affirmed by the Supreme Court, the concept of the mineral lessee as the holder of the dominant surface estate will be virtually overturned." *Id.* Another commentator observed that the protection afforded to the surface owner by the accommodation or due regard doctrine enunciated in *Getty* "suggests that the traditional dominance of the mineral estate may be waning." Lopez, *supra* note 51, at 1007.

64. Getty Oil Co. v. Jones, 470 S.W.2d 618, 621-22 (Tex. 1971). In *Getty Oil,* the court stated:

> [T]he rights implied in favor of the mineral estate are to be exercised with due regard

surface use by the lessee will be found to be unreasonable so as to require yielding to a conflicting claim of right to use by the surface owner. At the outset the surface owner has the burden of establishing that the lessee's surface use is unreasonable. The reasonableness of the lessee's surface use is to be tested by the "usual, customary and reasonable practices in the industry under like circumstances of time, place and servient estate uses."[65] A crucial principle is that if the lessee's use is "the only reasonable, usual and customary method that is available for developing and producing the minerals on this particular land," then the surface owner must yield to the use by the lessee.[66] If the surface owner has a reasonable alternative method for accomplishing his purposes, other than by the method in question, then his use of that method must yield to the lessee's method of surface use.[67] Even if this is not the case, the surface owner must nevertheless show that the lessee's method of surface use is unreasonable because there are alternative methods available in customary use in the industry that could be employed by the lessee on the type of property in question.[68] It is evident that the surface owner bears a substantial burden if he is to prevail against the mineral owner under the due regard or accommodation theory. The surface owner may not prevail merely upon a showing that the lessee's use of the surface causes him inconvenience.[69] The net result would appear to be that while the doctrine may have caused the courts to take a closer look at the surface owner's claim, the lessee should prevail if he can show that his use meets the usual test of being reasonably necessary. The due regard concept is essentially a part of that test.[70]

It is fair to say, therefore, despite some indications of a broadened concern for the rights of the surface owner,[71] that the mineral estate retains the important attributes of its dominant

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> for the rights of the owner of the servient estate. . . . The due regard concept defines more fully what is to be considered in the determination of whether a surface use by the lessee is reasonably necessary.

Id.

65. *Id.* at 627.
66. *Id.* at 628.
67. *Id.*
68. *Id.*
69. *Id.* at 623; Browder, *supra* note 51, at 99; Lopez, *supra* note 51, at 1007 n.46.
70. Browder, *supra* note 51, at 100. Browder analyzed the *Getty* decision and noted that "with proper definition of 'reasonableness' and 'unreasonableness' of the lessee's surface use, the law has probably not been changed to such extent as viewed with loud acclaim by some of the surface owners and with cries of anguish by some of the oil company operators." *Id.* This observation is consistent with the rationale of the decision of the North Dakota court based on the approach set out in *Getty* in Hunt Oil Co. v. Kerbaugh, 283 N.W.2d 131 (N.D. 1979), discussed *infra,* notes 126-43 and accompanying text.
71. *See* Bennett, *Damages to the Landowner Following the Oil and Gas Lease,* 13 S.D. L. REV. 29, 46 (1968); Manning, *supra* note 49, at 337-41.

status. Perhaps the most important of these, and one that is sometimes overlooked when the surface owner confronts the lessee with a surface damage claim, is that there is no right to compensation for damage caused by the lessee's operations if they are reasonably necessary in fact. The fact that the lessee has a legally protected right to such surface use means that his acts will not expose him to liability for damages. He has a "right of ownership" in the sense alluded to by Justice Holmes and, therefore, is "accountable to no one."[72] In effect, the surface owner may suffer a loss, but he is not "damaged" in the legal sense of being able to look to the lessee to be made whole.[73] Reasonably necessary uses by the lessee cannot serve as the basis for a valid compensable damage claim.[74] Since it is well known that some surface damage inevitably results from reasonable oil and gas operations, the parties to the instrument severing the minerals, whether a lease or a mineral deed, must be deemed to have had this in mind when striking their bargain.[75]

It has been properly pointed out that it is undesirable for the lessee simply to settle all surface damage claims as though he were necessarily liable for all damages of any kind.[76] This is not to say

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72. *See supra* note 12.

73. Lambert, *supra* note 59, at 381. The author states:

> Thus, in the absence of lease provisions to the contrary, even though the lessee does damage to the soil, trees, or crops, if his operations are reasonable and incidental to his development of the leased premises, such damage is *damnum absque injuria* and no recovery can be had therefor against the lessee. . . .

Id. This question is analyzed within the context of North Dakota law *infra* notes 140-41 and accompanying text.

74. Keeton & Jones, *Tort Liability and the Oil and Gas Industry,* 35 TEX. L. REV. 1, 3 (1956). This result of the dominance of the mineral estate may be rationalized on the theory that the oil and gas lessor has impliedly authorized such reasonably necessary use by the lessee, thereby assuming the risk of any resulting damage to the surface from operations which are customary in the industry. *Id.* at 3, 10, 12. Of course this is of no consolation to the surface owner who does not own any part of the mineral interest.

75. 1 WILLIAMS & MEYERS, *supra* note 5, § 218.12, at 245-46. If asked later, of course, the surface owner might be surprised to learn that he had in mind the particular damage which did occur. It has been suggested that the lessor should not be regarded as having contemplated or impliedly authorized operations that cause more surface damage than any royalties he might receive from mineral production. *See, supra* note 74, at 13. The surface owner acquired his rights subject to whatever implied rights of surface use passed by mineral conveyances, or were retained by mineral reservations, earlier in his chain of title.

76. Jones, *supra* note 50, at 357-58. The commentator stated:

> Unfortunately, the practice has grown up in the oil industry over the years to settle many damage claims with little investigation as to whether or not grounds for liability exist. This is the case in some instances even where the demand is patently unwarranted. . . . This practice has given rise to some undesirable side effects in that it has invited damage claims that lack substance.

Id. See Manning, *supra* note 49, at 337-38. If the lessee or other mineral owner were to be held strictly liable for all surface damages the public policy basis underlying the dominance of the mineral estate might be thwarted or at least discouraged. Referring to the "public policy which encourages the exploration, development and production of energy-producing natural resources which are vital to

that there are not situations in which the lessee may be liable to the surface owner for damages. Liability does not arise automatically out of the relationship between lessee and surface owner, however, or out of the fact that some kind of surface damage has been caused. If liability does exist it must be premised on tort or contract, or in some cases theories of negligence per se or strict liability based on breach of a statute or administrative rule. Putting aside for the moment the questions of negligence per se and strict liability, the lessee may be held liable for breach of the lease terms on a contract basis, or for negligent or excessive use of the surface or for private nuisance on the basis of traditional tort law.[77] Other related theories of tort liability, such as nuisance, trespass, and the duty not to cause damage intentionally or wantonly, may also provide a basis for recovery of surface damages. There is some blending and overlapping among these theories of tort liability because excessive use of the surface may constitute trespass or nuisance and because negligence is not always separable from trespass and excessive use.[78] At any rate, it is clear that there must be some recognizable contract or tort basis before surface damage liability can be imposed upon the lessee:

> [I]f the lessor cannot prove negligence, he must show unreasonable user or some other ground of tort liability, absent a contractual provision to pay damages. This is to say that the lessee may damage land, crops and improvements without paying damages if no tort or contractual liability can be shown.[79]

Liability based upon breach of the lease will be of little use to the surface owner when his interest has been severed from the oil and gas interests so that he is not a party to the lease, unless the lease provisions can be construed to have the character of third

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the health, safety and defense of our country," one commentator observes that "[m]ost of us will agree that the public policy interest is more than sufficient justification for the dominance accorded the mineral estate." *Id.* at 333.

77. 1 WILLIAMS & MEYERS, *supra* note 5, § 218.10; Davis, *Selected Problems Regarding Lessee's Rights and Obligations to the Surface Owner,* 8 ROCKY MTN. MIN. L. INST. 315, 319-20 (1963). The mineral owner has always been liable for damages to the surface caused by such tortious acts. Lopez, *supra* note 51, at 1007.

78. Scott, *Oil and Gas Lease Clauses Relating to Surface Damage and Use of the Surface,* 13 ROCKY MTN. MIN. L. INST. 317, 319-22 (1967). For example, the author poses the case in which the lessee clears a site but does not drill. It could be claimed that he is guilty of excessive use because he has used more of the land than was reasonably necessary, which is essentially a trespass. It could also be said that he has failed to use reasonable care in not having foreseen that a well should not or could not have been drilled. *Id.* at 321. Use of more of the surface than reasonably necessary may also be regarded as creating a private nuisance. Lopez, *supra* note 51, at 1011.

79. Scott, *supra* note 78, at 322.

party beneficiary contracts. When liability is based on contract, the liability may be a result of a breach of the lease with the resulting obligation to pay damages, or it may be a result of damages payable under an express lease provision for some specified surface consequence resulting from acts of the lessee.[80]

A common lease provision of the latter type found in most modern leases is a clause providing that the lessee shall pay for damages to growing crops on the land caused by its operation. This language will clearly create liability for any damage actually done to the crops, however reasonable the lessee's mode of operation may have been, since the express clause negates the right of reasonably necessary use to the extent it results in damage to growing crops.[81] It has been observed that this crop damage provision may be more for the benefit of the lessee than the surface owner, since it may operate as a limitation, impliedly excluding liability for other forms of surface damage.[82] This exclusion would not apply to claims for other forms of damages based on tort theories since the express lease clause deals with only the contractual promise to pay damages, not with liability imposed by law.[83] If the lease does not contain a clause providing for payment for damage to growing crops, then there is no obligation to pay any such damages that result from reasonably prudent operations on the part of the lessee, assuming he has caused no intentional unnecessary harm or has used no more of the surface than reasonably necessary.[84]

The usual basis for surface damage claims premised on tort is negligence. Although nuisance is a possible theory, it is more often subsumed under the notion of excessive use of the surface or one of the other theories justifying recovery.[85] Trespass is another possible

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80. *See id.* at 323-25.

81. Davis, *supra* note 77, at 340-41. There may be disputes about what is encompassed within the term "growing crops," for example, whether native grasses used for pasture or stubble are included. *Id.* at 341-42; Moses, *supra* note 53, at 346-49. As usual in tort actions, the plaintiff must prove that the crop damage was actually caused by the lessee's operations. The surface damage claimant bears the burden of demonstrating causation. Scott, *supra* note 78, at 324.

82. *See* Cage, *supra* note 52, at 195. The writer refers to the crop damage clause as a "mirage" provision: "The obligations to pay for damages caused to growing crops is a real mirage. It means that lessee has not expressly or by implication agreed to pay for any other kind of surface damage." *Id.*

83. *See* Scott, *supra* note 78, at 328-29; Cage, *supra* note 52, at 195. In some leases the phrase "growing crops" has been crossed out of the damage clause. This indicates that a knowledgeable lessor has bargained for a broader clause, which provides that lessee agrees to pay for damages caused by its operations, implying by failing to specify the kinds of damages that all kinds are covered. One cannot argue with the observation that striking the phrase "growing crops" is advisable from the landowner's point of view. *See* Bennett, *supra* note 71, at 36.

84. Moses, *supra* note 53, at 347.

85. 1 WILLIAMS & MEYERS, *supra* note 5, § 218.10, at 229. This notion is stated as follows:

> Occasionally a surface owner or a claimant through him has sought to recover damages from a mineral owner or lessee on the theory of nuisance. Absent proof of

theory, as mentioned above, although not really an independent one, as it is essentially coextensive with the concept of unreasonable or excessive surface use. The lessee is always given the right of ingress and egress to the premises under an express provision of the lease, and even if there is no express right, this right would be implied in order that he be able to produce and enjoy the fruits of his mineral interest.[86] Since the lessee cannot be a trespasser on land where he has the right to be, the trespass claim would normally arise only when it is alleged that the lessee has used more of the surface than he is entitled to.[87] A claim of surface damage based on alleged excessive use of the surface, however, is fairly difficult to sustain.[88]

Negligence on the lessee's part is, therefore, the most frequently asserted basis of liability for surface damages. Typical situations arise when there has been one of the following: Overflow from salt water disposal pits; failure to warn the surface owner in advance about impending drilling operations so that he can take

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negligence, breach of a duty imposed by statute or valid order of a regulatory agency, or conduct giving rise to the application of the doctrine of liability without fault, recovery has usually been denied in such cases.

Id. The nuisance concept is more common in connection with claims by adjoining landowners. Bennett, *supra* note 71, at 41. The present Article does not purport to deal with the question of damage to the surface of adjacent tracts owned by other landowners, although many of the principles discussed herein are applicable. *See* 1 WILLIAMS & MEYERS, *supra* note 5, § 217.

The question of what constitutes a nuisance is an elusive one, as Professor Prosser points out:

> There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word "nuisance." It has meant all things to all men, and has been applied indiscriminately to everything from an alarming advertisement to a cockroach baked in a pie. There is general agreement that it is incapable of any exact or comprehensive definition. Few terms have afforded so excellent an illustration of the familiar tendency of the courts to seize upon a catchword as a substitute for any analysis of a problem; the defendant's interference with the plaintiff's interests is characterized as a "nuisance," and there is nothing more to be said.

W. PROSSER, THE LAW OF TORTS 571 (4th ed. 1971) (footnotes omitted).

North Dakota defines "nuisance" by statute, although the definition is broad and quite general, providing in relevant part that a nuisance is any act or omission of performance of a duty which "[a]nnoys, injures, or endangers the comfort, repose, health, or safety of others," or renders persons "insecure in life or in the use of property." N.D. CENT. CODE § 42-01-01 (1968). It is not necessary, of course, to prove negligence in order to establish that a nuisance has been created. Thorson v. City of Minot, 153 N.W.2d 764, 770 (N.D. 1967). Negligent acts, on the other hand, may result in the creation of a nuisance, the distinction being that negligence is based on a lack of due care, whereas liability for maintaining a nuisance exists regardless of the degree of care or skill exercised to avoid it. Kinnischtzke v. City of Glen Ullin, 79 N.D. 495, 510, 57 N.W.2d 588, 596 (1953).

86. Davis, *supra* note 77, at 354.

87. Note, *Protection for Surface Owners of Federally Reserved Mineral Lands,* 2 U.C.L.A.-ALASKA L. REV. 171, 183-84 (1973).

88. *See* Jones, *supra* note 50, at 342. As the author notes:

> Courts seem to be reluctant to hold a mineral lessee liable in money damages unless it is obvious that he has cleared much more of the surface than was or could conceivably have been used in connection with his well site, roads and pits and tank battery area, all of which are necessary to his operations.

Id.

steps to keep his livestock away from danger; the presence of open tanks or other impoundments of poisonous materials which might injure livestock; failure to protect against the escape of gas or other substances from the well bore; breaking of salt water disposal lines; or leaking and accumulation of oil in pools in the vicinity of storage tanks.[89] The test to be applied is the usual one in negligence theory, essentially whether a reasonably prudent operator might have avoided reasonably foreseeable surface damage. There is an additional proviso, however, in that it is recognized that some surface damage is normally inevitable, so that it is really a question of whether reasonably foreseeable *excessive* surface damage could have been avoided. The blending between the question of negligence and that of excessive surface use is apparent here because the test of reasonably necessary surface use is what a reasonably prudent operator would do in the circumstances.[90] The traditional dominance of the mineral estate should still prevail to defeat a claim of negligence or excessive surface use even when the lessee is using the surface in a manner that causes substantial damage or interference with the surface owner's desired use, if the lessee is prudently employing the only method that can reasonably be used to produce the minerals. A frequent source of current litigation is damage alleged to have been caused by geophysical exploration, particularly seismic tests. For example, it is often claimed that damage to water wells has resulted from blasting operations on the land. It may be, however, that this is the only feasible method by which the exploration can be carried out. It is not the seismic operations per se, therefore, that give rise to any liability, but rather whether they have been prudently carried out and whether they were reasonably necessary.[91]

The final basis for liability that may arise in surface damage cases is strict liability or negligence per se, based on breach of a statutory duty or violation of an administrative rule or regulation.[92] This occurs most frequently in the case of pollution of the surface

89. 1 WILLIAMS & MEYERS, *supra* note 5, § 218.10, at 232-34. Damages to the surface by leaks and spills of products and damage to livestock, usually as a result of the livestock's drinking wastes or other poisonous substances or being injured by contact with machinery, are the most frequent kinds of negligence claim. Jones, *supra* note 50, at 343. It is generally held that there is no duty on the part of the lessee to fence off his operating area, and livestock which wander into the area and suffer injury are regarded as trespassers. Browder, *supra* note 51, at 106-07; Gray, *supra* note 47, at 267.

90. Gray, *supra* note 47, at 268-69.

91. Leases usually grant the lessee the right to carry on geophysical explorations, but in any case this right, including the right to conduct seismographic operations, is implied. 1 WILLIAMS & MEYERS *supra* note 5, § 218.5. In North Dakota a person engaging in geophysical exploration must file a bond with the Industrial Commission for the purpose of indemnifying property owners against physical damage to property from the exploration. N.D. CENT. CODE § 38-08.1-03.1 (Supp. 1981).

92. Bennett, *supra* note 71, at 42-43; Jones, *supra* note 50, at 344-48; Keeton & Jones, *supra* note 74, at 7-11.

by the escape of deleterious substances, such as overflow from salt water disposal pits.[93] The lessee has the implied, if not express, right to maintain salt water disposal pits as a necessary part of his operation, but by virtue of statute or regulation prohibiting overflow and pollution, he may be deemed to have assumed the risk of any escape of the substance onto the surrounding surface.

IV. NORTH DAKOTA DECISIONS

Having outlined both the general law on the relative rights of the surface owner and the oil and gas developer, and the theories that may provide a basis for liability for surface damages, it is appropriate to review the North Dakota cases that have dealt with these questions. Although the North Dakota Supreme Court has not had frequent occasion to deal with these issues, its most recent decision, *Hunt Oil Co. v. Kerbaugh,*[94] has attracted considerable attention as an example of a court's seeking to reach an "accommodation" between the rights of the mineral owner and surface owner.[95]

Another case, *Klokstad v. Ward,*[96] deals more with procedural matters than with the substantive law of the relationship between mineral owner and surface owner, but it is interesting as an example of the application of several of the theories of liability described above. In *Klokstad* a pumping oil well on the plaintiff's land was producing salt water with the oil, and treatment equipment was installed at the well site in order to separate the salt water. After separation the salt water was diverted to a disposal pit near the well. The court noted that the destructive nature of salt water subjects its disposal to regulatory control.[97] The surface owner brought an action for damages to growing crops, which occurred during preparation of a well site by the lessee, and for permanent damage to the surface, alleging negligence in the failure to construct the salt water pit in accordance with the regulation, thereby allowing salt water to escape and flow on the surface. The

93. *See, e.g.*, Jones, *Escape of Deleterious Substances: Strict Liability vs. Liability Based Upon Fault,* 1 ROCKY MTN. MIN. L. INST. 163 (1955); Sellers, *supra* note 48, at 391-96.

94. 283 N.W.2d 131 (N.D. 1979).

95. *See supra* note 70 and accompanying text.

96. 131 N.W.2d 244 (N.D. 1964).

97. Klokstad v. Ward, 131 N.W.2d 244, 245 (N.D. 1964). "Salt water is destructive to vegetation and poisonous to livestock and may cause land over which it is permitted to flow to become permanently unfit for agricultural purposes. For this reason the disposal of salt water is regulated by the Industrial Commission of the State of North Dakota." *Id.* The present regulation provides that all saltwater produced with oil and natural gas must be disposed of without pollution of freshwater supplies and that saltwater shall not be allowed to flow over the surface or into streams. N.D. ADMIN. CODE § 43-02-03-53 (1982).

trial court had instructed the jury on the various requirements under the Industrial Commission regulation regarding the design of salt water handling facilities,[98] including the requirement for a continuous embankment surrounding the pit so that salt water or brine could not be allowed to overflow. In this case there was no embankment and exceptionally heavy rains and the presence of a nearby slough caused water to flow into and out of the pit, carrying salt water with it. The plaintiff alleged that the resulting salt water saturation permanently damaged some ten or twelve acres and cut off another nine or ten acre tract from the balance of his farm. The jury returned a verdict in the surface owner's favor for a small amount of damage to growing crops and for a reduction in the value of twelve acres.[99]

Klokstad does not expressly delve into the nature of the legally protected rights of the surface and mineral owner as bearing upon the question of the lessee's liability for the damage, which seems to have been taken for granted. Recovery on the claim for crop damage was based on contract, on an express lease provision.[100] As discussed above, liability for this damage, once it occurs, is automatic since the lessee is bound to pay under the provision in question, so long as the necessary causal chain is established.[101] The claim for salt water damage in *Klokstad* was based on negligence, and presumably, the surface owner carried his burden of proving the requisite elements for recovery on that basis.[102] The question of negligence per se or strict liability for breach of the Industrial Commission regulation requiring an embankment for the salt water pit does not appear to have been raised. The lack of mention of these theories in the opinion does not necessarily mean that they were not implicit in the case, however, and one may surmise that the fact of violation of the regulation may have influenced the jury's thinking on the negligence issue.

The first case in which the North Dakota Supreme Court dealt

98. N.D. ADMIN. CODE § 43-02-03-53 (1982).

99. *Klokstad*, 131 N.W.2d at 245-47. Damages were assessed in the amount of $42.75 for crop damage and $600 for damage to the land itself. *Id.* at 246. The court inferred that this meant the jury had accepted the defendants' evidence of $50 per acre damage to twelve acres. *Id.* at 247.

100. *Id.* at 245 ("The plaintiff sued for damage to growing crops that occurred when one of the well sites was prepared under the provisions of the lease.").

101. *See supra* note 81 and accompanying text.

102. 131 N.W.2d at 245 ("He also sued for permanent damage to his land resulting from alleged negligence in permitting salt water to flow upon it, caused by failure to construct the salt water pit in accordance with the regulation."). The doctrine of *res ipsa loquitur* may also be available in a negligence action based on escape of deleterious substances. The question would be whether escape of the salt water or other substance does not ordinarily occur in the absence of negligence. *See* Keeton & Jones, *supra* note 74, at 15-19. One may surmise from the amount of the verdict in *Klokstad* that the jury did not deem the damage to be extensive and permanent. An earlier verdict for $2300 in the first trial of the case was set aside by the trial court as excessive and unsupported by the evidence. 131 N.W.2d at 246.

squarely with the respective legal rights of the surface owner and the mineral owner was *Bell v. Cardinal Drilling Co.*,[103] decided in 1957. The action did not involve any claim of negligence, but was based simply on breach of contract on the part of the lessee. The plaintiff surface owner was also the lessor; therefore, he could rely directly on the lease provisions for protection. The lease contained the usual clause, discussed above, providing for payment by the lessee of damages to growing crops resulting from drilling operations. The plaintiff alleged that the well site and approximately three adjacent acres had been damaged by the passage of heavy machinery, by the discarding of debris and refuse by workers, and by the intermingling of the topsoil with underlying clay strata, impairing agricultural productivity for many years. It was further claimed that growing crops on the well site and adjacent lands had been partially destroyed by the drilling operations. The jury returned a verdict in favor of the plaintiff, both for damage to the growing crops and for damage to the value of the land.[104]

The actual language of the lease does not appear in the opinion, but it may be presumed that it contained a more or less standard granting clause giving the lessee the exclusive right to explore, drill for and produce oil and gas and related products, engage in secondary recovery, install pipe lines, build storage tanks and other structures, and build access roads to produce, process, treat, store, and transport the products extracted.[105] The court implicitly approved the trial court's charge to the jury as to the general rights of the lessee,[106] and held that such a lease gave the lessee the right to make reasonably necessary use of the surface: "The oil and gas lease was the contract between the parties. Under its terms the defendant had the right to use so much of the land as was reasonably necessary in the operation of drilling the test well."[107]

There was no allegation in the complaint that the lessee had

103. 85 N.W.2d 246 (N.D. 1957).

104. Bell v. Cardinal Drilling Co., 85 N.W.2d 246, 247-48 (N.D. 1957).

105. This is the usual kind of language appearing in the fairly standard type of "Producers 88" lease widely used in the Rocky Mountain area, including North Dakota. *See* 2 E. BROWN, THE LAW OF OIL & GAS LEASES § 18.02, at 18-122 (1973); Anderson, *David v. Goliath: Negotiating the "Lessor's 88" and Representing Lessors and Surface Owners in Oil and Gas Lease Plays,* 27 ROCKY MTN. MIN. L. INST. 1029 (1982).

106. 85 N.W.2d at 250. The trial court had instructed the jury that the lessee had the right under the lease to ingress and egress, and to the reasonable use of the surface "as to all matters defined in the granting clause," with the right to use as much of the surface and in such manner as to accomplish the purpose of the lease. *Id.* The limitations on the lessee were to proceed in such manner "that no substantial injury shall be done . . . through any negligence or wilful misconduct on its part." *Id.*

107. *Id.*

used more land than was reasonably necessary for its operations, nor was there any evidence to that effect.[108] Implicit in the court's analysis was the recognition that some surface damage to the land was necessarily contemplated by the lease.[109] It was held improper, therefore, to have instructed the jury to assess separately the damage to growing crops and the damage to the land itself. The only damages allowable were those found to have been caused to growing crops, for which the lessee had expressly agreed to pay under the lease clause:

> The plaintiffs neither pleaded nor proved that defendant used more land than was reasonably necessary, and therefore they are not entitled to damages on that ground. However, we think the evidence is sufficient to sustain the verdict in so far as it allows damages for the destruction of growing crops.[110]

Bell, then, may be understood to stand for the proposition that while damages to growing crops may be recovered under an express lease clause, reasonably necessary modes of surface use are permitted without liability on the part of the lessee for resulting surface damage when he has not used more land than reasonably necessary. The holding is entirely consistent, therefore, with the general law on the subject discussed above.[111]

In *Feland v. Placid Oil Co.*[112] the North Dakota Supreme Court was again faced with a case involving salt water disposal problems, and this time the respective rights of the lessee and the surface owner were necessarily treated in some detail. The principal issue in the case was the effect of a nine-month cessation of production from a well after the primary term of the lease, when continuation

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108. *Id.* at 250-51. The lessee had arranged to have its drilling equipment moved onto the well site, which occupied about three-fourths of an acre, had cut down the side of a steep hill to make a level surface for the equipment and done grading on the hill to construct an access road, and had dug mud pits and a sump hole. Other work necessary for drilling of the well was also performed. *Id.* at 249.

109. *Id.* at 251. Rejecting the plaintiff's claim of reduction in value of the land itself, the court observed that "there is no evidence showing any damage in excess of that contemplated by the lease." *Id.*

110. *Id.* It is interesting to note that the trial court had instructed the jury that native grasses were not "growing crops." *Id.* at 248. *But see supra* note 81. The court mentions in the opinion that the lessee caused the mud pits, sump hole, and other excavations to be properly filled and leveled off to the satisfaction of the plaintiffs after drilling was completed and the equipment removed. *Id.* at 249. One can only speculate, however, whether this fact had any influence on the decision.

111. Bennett, *supra* note 71, at 46. Citing the *Bell* decision, Bennett discerns a "cautious trend" by the courts toward looking more favorably upon surface owners' claims than was traditionally the case. *Id.* The *Bell* holding, however, appears to lie solidly within the mainstream of traditional law on the subject.

112. 171 N.W.2d 829 (N.D. 1969).

of the lease depended, under the standard "thereafter" clause, on the production of oil or gas from the well. The well was shut in because the salt water disposal pit was filled, but after nine months production was resumed when evaporation of water in the pit sufficiently lowered the water level. The lessors, surface owners who had refused permission to dig a second disposal pit, sought to terminate the lease based on the lack of production during this period. They took the somewhat anomalous position, citing *Bell*, that the lessee should have dug a second disposal pit at the site, despite their refusal as surface owners to consent.[113]

The court held that under the grant in the lease, which contained the usual kind of language,[114] the lessee was entitled to construct an additional salt water disposal pit at the site if it was "necessary, incident to or convenient for the economical operation" of production of oil.[115] The court stated that this criterion of being "necessary, incident to or convenient for" operation of the well was established by the request from the lessee for permission to construct the additional disposal pit, given the undisputed fact that it was not economically feasible to connect to the nearest disposal well.[116] The lessee's power to dig a second pit derived from his rights under the lease itself, which necessarily carries with it the right to possession of the surface to the extent reasonably necessary to allow the lessee to perform the obligations and enjoy the rights he has acquired.[117] The lessee's right to reasonably necessary use of the surface, therefore, includes the right to use of the space needed for salt water confinement facilities.[118]

Although the *Feland* court stressed that it was dealing with rights expressly granted by the lease, it cited with approval a Texas case stating the traditional principle discussed above, that the grant of the lease itself vests the lessee with a dominant mineral estate and the implied right to use of the surface to the extent required to fully enjoy the fruits of his interest.[119] Either as an express power or as an implied power, therefore, the lessee in *Feland* had the right to

113. Feland v. Placid Oil Co., 171 N.W.2d 829, 831-32 (N.D. 1969).

114. *See supra* note 105 and accompanying text.

115. 171 N.W.2d at 832. The quoted language is taken from the granting clause of the lease.

116. *Id.* at 833. There was no question in this case of a violation of the Industrial Commission rule on salt water disposal facilities, as the court stated that the existing pit conformed to the rule. *Id.* at 832.

117. *Id.* at 834. The court notes that in this particular case the operator's rights were based not on implied rights, but rather on expressly granted rights "including the broad authorization to 'all other rights and privileges necessary, incident to, or convenient' for economical operation and production of oil." *Id.*

118. *Id.*

119. *Id.* (citing Texaco, Inc. v. Faris, 413 S.W.2d 147, 149 (Tex. Civ. App. 1967)).

construct a second disposal pit on the surface, and the refusal of the lessors to consent was of no legal significance.[120]

The rights of the oil and gas lessee or other operator to all reasonably necessary uses of the surface, whether by express grant or through implication, were thus clearly established in *Bell* and *Feland*. In several subsequent cases involving other minerals the court reaffirmed this right on the part of the mineral owner and touched on the troublesome questions that arise when the method of mineral extraction may require substantial surface destruction.[121] In *Christman v. Emineth*,[122] a decision which confirmed the mineral owner's right to reasonably necessary use of the surface, one of the issues considered was whether coal was included within a 1943 reservation in a deed that reserved to the grantor fifty per cent of its interest in "oil, gas and other minerals." The reservation also retained in the grantor "such easement for ingress, egress and use of the surface as may be incidental or necessary" to enjoyment of his rights.[123] An argument was made that the references to "ingress and egress" and "use of surface" meant that the grantor was to have some rights, but that it could not have been intended to give the right to completely destroy the surface and nullify its agricultural value by the strip mining of coal. Therefore, the argument went, coal must not have been intended to be included within the reservation of "other minerals." The court observed that this problem had been foreseen by the legislature and dealt with through the surface mining reclamation statutes requiring restoration of the surface after strip mining.[124] Therefore, the surface destruction problem was not an impediment, and the court held that coal was to be included within the reservation.[125]

120. 171 N.W.2d at 834. The balance of the opinion in *Feland* is not germane to the subject matter under consideration here. Having held that the lessee had the power to dig the second pit, the court went on to consider whether the lessee had exercised reasonable diligence and good faith in restoring production. The holding was in favor of the lessee, and therefore, the lease did not terminate by reason of this temporary cessation of production. *Id.* at 834-37.

121. *See supra* note 57.

122. 212 N.W.2d 543 (N.D. 1973).

123. Christman v. Emineth, 212 N.W.2d 543, 546 (N.D. 1973).

124. *Id.* at 551. *See* N.D. CENT. CODE ch. 38-14.1 (1979 & Supp. 1981) (entitled "Surface Mining and Reclamation Operations").

125. 212 N.W.2d at 549-51. In MacMaster v. Onstad, 86 N.W.2d 36, 39, 42 (N.D. 1957), the court determined that the term "other minerals" in a lease covering oil, gas, casinghead gas, casinghead gasoline, and all other minerals did not include uranium. By way of dictum the court went on to suggest that "the class of minerals conveyed by a mineral deed is limited to those which are valuable, are not a part of the soil and may be mined without destroying the surface." *Id.* at 42-43. The court in *MacMaster* relied on § 47-10-24 of the North Dakota Century Code, which provides that in a mineral conveyance coal, clay, uranium, and gravel are not included unless the intent to do so is made clear and that in a lease only minerals specifically named are covered. N.D. CENT. CODE § 47-10-24 (1978). In Reiss v. Rummel, 232 N.W.2d 40, 44 (N.D. 1975), the court suggested that the purpose of this statute was to prevent leases or conveyances of mineral interests for oil and gas

The court reaffirmed the *Christman* decision in *Olson v. Dillerud*,[126] although expressing some doubt as to whether strip-mined lands can be restored to productive use. In *Trauger v. Helm Bros.*,[127] which involved an attempt to terminate a lease for the extraction of rock, sand, and gravel, the plaintiffs sought to rely on the fact of surface destruction and the lack of any applicable surface reclamation law as a basis for termination of the lease.[128] There was no question about what substances were covered by the lease, however, and the court gave short shrift to the argument that the surface destruction resulting from extracting these substances should affect the validity of the lease.[129] The difficulty of extraction without surface damage or destruction was recently noted by the court in *Hovden v. Lind*,[130] however, only as a rationale for excluding clay and scoria from the meaning of the term "all other

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exploration from being "transmuted into a license to exploit the surface estate, with the concomitant destruction of same."

This question also arises in cases involving instruments predating sections 47-10-24 and 47-10-25 of the North Dakota Century Code, the latter of which provides that a reservation of minerals includes only those specifically named in the instrument. *See* N.D. CENT. CODE § 47-10-24 (1978) (enacted in 1955); *see also id.* § 47-10-25 (1978) (enacted in 1975).Thus, in Lee v. Frank, 313 N.W.2d 733, 737 (N.D. 1981), the court construed the phrase "all ores and minerals" in a 1945 reservation and held that all metallic minerals and ores, plus all nonmetallic solid, liquid, or gaseous minerals were included "except insofar as it may be interpreted in a manner to defeat the conveyance of the soil itself."

126. 226 N.W.2d 363, 367 (N.D. 1975). The court also urged legislative action if required:

> Recent events have raised doubts in the minds of some as to whether strip-mined lands have been, or can be, restored to productive use. If a case should come before us in the future, based on factual data in evidence, as to whether strip mining constitutes "use" as distinguished from destruction of, or permanent damage to, the surface, it may be necessary to reexamine the language of *Christman*. . . .
>
> Because of possible consequences of inadequate restoration of the surface following strip mining of coal, we urge the Legislature to take whatever steps may be reasonably necessary to insure that the surface is restored for agricultural and ranching purposes.

Olson v. Dillerud, 226 N.W.2d 363, 367 (N.D. 1975).

127. 279 N.W.2d 406 (N.D. 1979).

128. Trauger v. Helm Bros., 279 N.W.2d 406, 407, 411 (N.D. 1979).

129. *Id.* at 411. The *Trauger* court reasoned as follows:

> The fact that surface mining for sand, gravel, and rock is not governed by those Acts [Reclamation of Surface-Mined Lands and Surface Owner Protection Act] does not, however, affect the validity of the lease between the Traugers and Helm Bros. Many leases involving surface mining for various minerals or substances were executed before and after those Acts became effective, and the validity of those leases is not dependent upon provisions for restoration of the premises in the lease or legislation requiring such restoration. The Legislature deemed it necessary to enact certain statutes involving the surface mining of coal, and, in so doing, limited the application of those Acts to coal. Whether it is necessary for the Legislature to enact similar legislation for the surface mining of sand, gravel, and rock is a decision for the Legislature.

Id.

130. 301 N.W.2d 374 (N.D. 1981). The court also based its conclusion on evidence of the parties' intent and the observation that substances like gravel, clay, and scoria are not usually classified as minerals because they are not rare or highly valuable. Hovden v. Lind, 301 N.W.2d 374, 378 (N.D. 1981).

minerals'' used in a reservation in a contract for the sale of land.[131]

The most recent decision of the North Dakota Supreme Court dealing with the conflict between the surface owner and the mineral owner, and one that has attracted considerable notice, is *Hunt Oil Co. v. Kerbaugh*[132] The case is unusual in that it is an action brought by lessees to restrain surface owners from interfering with their rights, rather than an action by surface owners for damages caused by a lessee. The lessees contracted for seismic exploration work to be carried out on the leased premises and sought permission from the surface owner, who owned no interest in the severed minerals, to conduct the exploration, offering compensation on a per hole basis and offering to pay for damages to growing crops. Upon the surface owner's refusal to permit the exploration activities the lessees sought and obtained temporary injunctive relief.[133] In response to the surface owner's argument that the lessees did not have an unlimited right to conduct seismic exploration, the court stated that in *Christman*[134] it had adopted the general rule as to the implied rights of the mineral estate owner, that ''a grant of mines or minerals gives to the owner of the minerals the incidental right of entering, occupying, and making such use of the surface lands as is reasonably necessary in exploring, mining, removing, and marketing the minerals.''[135] The court also noted that it had held this principle applicable to oil and gas leases in *Feland v. Placid Oil Co.*[136] The basis for those holdings was the well-settled rule that the severed mineral estate is dominant:

> The mineral estate is dominant in that the law implies, where it is not granted, a legitimate area within which mineral ownership of necessity carries with it inherent surface rights to find and develop the minerals, which rights must and do involve the surface estate. Without such rights the mineral estate would be meaningless and worthless. Thus, the surface estate is servient in the sense it is charged with the servitude for those essential rights of the mineral estate.[137]

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131. 301 N.W.2d at 378.
132. 283 N.W.2d 131 (N.D. 1979).
133. Hunt Oil Co. v. Kerbaugh, 283 N.W.2d 131, 133-34 (N.D. 1979).
134. Christman v. Emineth, 212 N.W.2d 543 (N.D. 1973).
135. 283 N.W.2d at 134-35 (quoting 58 C.J.S. *Mines and Minerals* § 159b (1948)). The court noted in *Hunt Oil* that this incidental right exists in the case of a reservation as well as a grant. *Id.* at 135.
136. *Id.*
137. *Id.*

The usual limitations on the lessee's rights are applicable; he may use so much of the surface and in such manner as is reasonably necessary to explore, develop, and transport the minerals, and he must exercise due regard for the rights of the surface owner.[138] The requirement of giving due regard to the surface owner's rights is a factor in analyzing whether the mineral owner's surface use is reasonably necessary, as established by the "accommodation doctrine" set out in *Getty Oil Co. v. Jones.*[139] Citing a Utah decision that adopted the *Getty* accommodation doctrine,[140] the court stated that it was adopting the doctrine in North Dakota as well.[141] It is important to bear in mind that the accommodation doctrine adopted in *Hunt* is not a pure balancing test in which the harm and benefits to the severed mineral owner and the surface owner are weighed against each other. On the contrary, the issue is the existence of reasonable alternative methods which the mineral owner may be able to use.[142]

The accomodation doctrine as approved in *Hunt* is perhaps best described as a "modified" balancing test. The court described it as follows:

> We agree a pure balancing test is not involved under the accommodation doctrine where no reasonable alternatives are available. Where alternatives do exist,

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138. *Id.* The court also observed that the mineral owner has no right to act negligently or to wantonly use the surface. *Id.* Whether the mineral owner's surface use is reasonably necessary is a question of fact, for which the surface owner bears the burden of proof. *Id.* at 137.

139. *Id.* at 136. *See supra* notes 61-68 and accompanying text.

140. Flying Diamond Corp. v. Rust, 551 P.2d 509, 511 (Utah 1976) (stating that surface owner and mineral owner should each 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 the other").

141. 283 N.W.2d at 136. The essence of that doctrine, as set out in *Getty* and quoted by the court in *Hunt* is as follows:

> The reasonableness of a surface use by the lessee is to be determined by a consideration of the circumstances of both and, as stated, the surface owner is under the burden of establishing the unreasonableness of the lessee's surface use in this light. The reasonableness of the method and manner of using the dominant mineral estate may be measured by what are usual, customary and reasonable practices in the industry under like circumstances of time, place and servient estate uses. . . . [I]f the manner of use selected by the dominant mineral lessee is the only reasonable, usual and customary method that is available for developing and producing the minerals on the particular land then the owner of the servient estate must yield. However, if there are other usual, customary and reasonable methods practiced in the industry on similar lands put to similar uses which would not interfere with the existing uses being made by the servient surface owner, it could be unreasonable for the lessee to employ an interfering method or manner of use.

Id. at 136-37 (quoting Getty Oil Co. v. Jones, 470 S.W.2d 618, 627-28 (Tex. 1971)).

142. *Id.* at 137. Thus, the effect on the surface owner is not the determining factor unless reasonable alternatives do exist.

> [T]he 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

> however, the concepts of due regard and reasonable necessity do require a weighing of the different alternatives against the inconveniences to the surface owner. Therefore, once alternatives are shown to exist a balancing of the mineral and surface owner's interest does occur.[143]

The acceptance of this doctrine, with its modified balancing test, has been characterized as a "new doctrinal journey" tentatively embarked upon by the courts.[144] While it certainly will provide a point of departure from which a surface owner may seek to launch his case,[145] it is probably premature to suggest that any substantial change has been wrought in the traditional law governing the relative rights of mineral owner and surface owner.

As discussed above, it is unlikely that the *Getty* decision itself constituted a marked departure from traditional principles.[146] This doctrine does give the surface owner the opportunity to demonstrate that a reasonable and feasible alternative exists by which the mineral owner can develop his interest. He has the burden, however, to establish this fact, and it may be questioned whether he is in any different position than before the *Hunt* decision. For example, under traditional theory, as expressed in *Feland v. Placid Oil Co.*, the surface owner bears the burden of proving that the mineral owner's use of the surface is not reasonably necessary. Presumably, the best method for meeting this burden is to demonstrate that there are reasonable alternatives that the mineral owner may use instead, which is the same showing he would be trying to make under the *Hunt* accommodation doctrine. The change is really a matter of emphasis or degree, rather than a matter of a change in the law. Theoretically, after *Hunt* the surface owner's rights may be given more prominence in the analytical framework applied to the surface damage question, but it seems unlikely that *Hunt* will suddenly result in large

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> 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.

Id.

143. *Id.* The stress on alternatives has led some to refer to the accommodation doctrine as the "doctrine of alternative means." *E.g.*, Note, *The Surface Mineral Producer v. the Oil and Gas Producer: A Need for Peaceful Coexistence*, 29 BAYLOR L. REV. 907, 923 (1977).

144. Lopez, *Upstairs/Downstairs: Conflicts Between Surface and Mineral Owners*, 26 ROCKY MTN. MIN. L. INST. 995, 1010 (1980).

145. *Id.* "In the future, counsel for surface owners may be expected to unsheath *Getty, Flying Diamond*, and *Hunt* to undercut precedents favoring the mineral estate." *Id. See* Note, *supra* note 143, at 928.

146. *See supra* note 70 and accompanying text.

numbers of surface owners being able to prevail in cases that would have been unsuccessful prior to the decision.[147]

Potentially much more revolutionary than the adoption of the accommodation doctrine is the language regarding the question of damages that is buried in a footnote in the *Hunt* opinion.[148] The case involved injunctive relief only, so damages were not directly in issue. In dicta, however, the court discussed the matter of compensation for surface damage and expressly left open the question whether the surface owner might be entitled to recovery even when the lessee's use of the surface had been reasonably necessary:

> This case does not present, nor does this opinion decide, the issue of whether or not the owner or lessee of the mineral estate is liable for damages arising from the reasonably necessary use of the surface incident to the exploration, development, and transportation of the minerals. The authorities which have considered the issue appear to be in agreement that such damages are *damnum absque injuria* and no recovery can be had against the mineral estate owner or lessee. . . . This conclusion seems to rest on a principle that injury necessarily inflicted in the exercise of a lawful right does not create liability, but rather, the injury must be the direct result of the commission of a wrong. . . . We question, however, the social desirability of a rule which potentially allows the damage or destruction of a surface estate equal or greater in value than the value of the mineral being extracted.
>
> . . . Equity requires a closer examination of whether or not the cost of surface damage and destruction arising from mineral development should be borne by the owner of a severed surface estate or by the developer and

147. 283 N.W.2d at 135. It is important to keep in mind that the *Hunt* court expressly confirmed that the dominance of the mineral estate is "the well-settled rule." *Id.* The import of the accommodation doctrine is summarized well in 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). Gray states the following:

> The due regard concept means, among other things, that considering the alternatives available on the leased premises, a proposed surface use may have to be "more necessary" under some circumstances than under others. In the final analysis, however, if accomplishment of the lease purposes requires a particular use that cannot be reconciled with the lessor's wishes, the leasehold estate, it is submitted, is still the dominant one and will prevail.

Id. at 269.

148. 283 N.W.2d at 135-36 n.4.

> consumer of the minerals. Although we do not doubt the mineral estate owner's right to use the surface estate to explore, develop and transport the minerals, we specifically do not decide if the right of reasonable use also implies the right to damage and destroy without compensation.[149]

If the court has embarked on a new doctrinal journey in *Hunt* it surely arises from this startling language. To allow the surface owner compensation for reasonably necessary surface damage by the lessee in the absence of negligence or any of the other normal bases of liability would reverse the traditional roles of mineral estate and surface estate and would make the lessee strictly liable as an insurer for all surface damage. It cannot simply be taken for granted that the court intended to suggest such a revolutionary concept. It is submitted that the court would still require some definite basis for liability, such as negligence or fault of some kind. Thus, while a particular use by the lessee may be allowed as a reasonably necessary use so that he could not be enjoined by the surface owner from so using the surface, it is possible that in the course of such use the lessee might be negligent or might create a nuisance. It is apparent that the court was contemplating cases of severe surface damage in its declaration, since its concern was premised on the problem of a rule which could allow the damage or destruction of a surface as valuable or more valuable than the extracted minerals. Such a situation would be unusual in the context of North Dakota oil and gas development.[150] It seems probable, moreover, that such extensive surface damage would normally not occur in the absence of negligence, breach of a statute or regulation, or some other acts that would give rise to liability for damages under the usual theories.

It is premature, therefore, despite this dicta, to suppose that the *Hunt* court approved the concept of liability for surface damages arising from reasonably necessary use of the surface by the oil and gas lessee. Although the surface owner in *Hunt* did testify that he suffered damages from the seismic exploration,[151] *Hunt* was an action for injunctive relief by the lessee, not an action for surface

149. 283 N.W.2d at 135 n.4. (citations omitted).

150. Presumably, cases in which the surface might be more valuable than the underlying minerals would arise more readily in a more urban state where the surface was proposed to be used for a commercial or industrial project of some kind. Oil and gas exploration and production in North Dakota occurs largely in sparsely populated areas.

151. The surface owner claimed damages because a spring, which supplied water to his home and livestock, had stopped producing, and open holes and debris were left on the property. 283 N.W.2d at 133.

damages. The court upheld a temporary injunction against interference with the lessee's activities on the grounds that the surface owner had failed to meet his burden of proof under the accommodation doctrine:

> The oil companies were not required to show their proposed activities were the most reasonable or even that other alternatives were unreasonable in the absence of the Kerbaughs' bringing the reasonableness of other alternatives into issue. The oil companies had the right to use the surface in exploring for their minerals. They also had the right to seek an injunction preventing the Kerbaughs from interfering with the right of exploration. It was the Kerbaughs' burden to show the proposed activities were unreasonable by reason of the existence of other alternatives.
>
> In summary, the Kerbaughs, as the owners of the servient surface, failed to show the proposed exploration activities of the oil companies were not reasonably necessary as to prevent the issuance of a temporary injunction.[152]

V. STATUTORY REMEDY FOR SURFACE DAMAGES

The enactment of the North Dakota Oil and Gas Production Damage Compensation Act (Act)[153] in 1979, which has not yet been construed by the North Dakota Supreme Court, bears directly on the question whether the law of North Dakota has gone so far as to impose liability without fault for surface damage caused by reasonably necessary use of the surface by the lessee. The Act begins quite broadly by stating that surface owners "should be justly compensated for injury to their persons or property and interference with the use of their property occasioned by oil and gas development"[154] and that the purpose is to "provide the maximum amount of constitutionally permissible protection" to surface owners from the results of oil and gas development.[155] The crucial provisions relating to damages provide in relevant part:

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152. *Id.* at 139-40.

153. N.D. CENT. CODE ch. 38-11.1 (1980). Montana enacted a statute based on the North Dakota Act in 1981. MONT. CODE ANN. §§ 82-10-501 to -511 (1981). South Dakota has also enacted a statute, effective July 1, 1982, that is essentially identical to the North Dakota Act, except that it covers other minerals as well as oil and gas. S.D. CODIFIED LAWS ANN. ch. 45-5A (Supp. 1982).

154. N.D. CENT. CODE § 38-11.1-01(3).

155. *Id.* § 38-11.1-02.

> The mineral developer shall pay the surface owner a sum of money equal to the amount of damages sustained by the surface owner for loss of agricultural production and income, lost land value, and lost value of improvements caused by drilling operations.[156]
>
> The mineral developer shall be responsible for all damages to person or property, real or personal, resulting from the lack of ordinary care by the mineral developer. The mineral developer shall also be responsible for all damages to person or property, real or personal, resulting from a nuisance caused by drilling operations.[157]

The question that presents itself at the outset is whether these two provisions are interdependent or whether they provide for separate forms of surface damage liability, one incorporating the element of fault, section 38-11.1-06 of the North Dakota Century Code, and the other being a form of strict liability, section 38-11.1-04 of the North Dakota Century Code. Since all parts of an act must be read together and harmonized with each other,[158] it would appear that Section 38-11.1-06 specifies when liability will arise: when there is lack of ordinary care, or when a nuisance has been created.[159] Section 38-11.1-04 then specifies what the damage compensation shall cover when one of these occasions of liability does arise: loss of agricultural production and income, lost land value, and loss of improvement values.[160] In other words, one of the traditional bases of liability for surface damage must still exist. A surface owner may argue that Section 38-11.1-04 of the North Dakota Century Code provides for absolute liability, with its provision that the lessee "shall pay . . . a sum . . . equal to the amount of damages sustained,"[161] and that Section 38-11.1-06 of the North Dakota Century Code, by its heading, relates to "other responsibilites."[162] This argument, however, ignores the express language of section 38-11.1-06, which specifies when the mineral

156. *Id.* § 38-11.1-04 (section entitled "Surface damage and disruption payments").

157. *Id.* § 38-11.1-06 (section entitled "Other responsibilities of mineral developer"). It is not clear whether the word "other" refers back to § 38-11.1-04 of the North Dakota Century Code, or whether it refers to the fact that some responsibilities of the mineral developer, such as giving notice of drilling operations, are covered in the immediately preceding section, § 38-11.1-05 of the North Dakota Century Code. See N.D. CENT. CODE §§ 38-11.1-04, -05 (1980).

158. *See* Sheets v. Graco, Inc., 292 N.W.2d 63, 67-68 (N.D. 1980).

159. N.D. CENT. CODE § 38-11.1-06 (1980).

160. *Id.* § 38-11.1-04.

161. *Id.*

162. *Id.* § 38-11.1-06.

developer "shall be responsible for damages."[163] This theory would also be inconsistent with the *Hunt* dicta discussed above,[164] since that opinion was rendered on August 2, 1979, after the effective date of the Act, July 1, 1979. If the Act had created absolute liability without fault for surface damages, the court surely would have referred to that fact and discussed it in the *Hunt* opinion, as that precise question was treated in the court's dicta on damages.[165] That it did not do so suggests the court implicitly recognized that the Act was not intended to be read so broadly as to impose an absolute form of liability for surface damages.

An attempt to read the Oil and Gas Production Damage Compensation Act as imposing any form of liability without fault would also run the risk of violating the constitutional rights of the mineral owner. The stated purpose of the Act is to provide the maximum constitutionally permitted protection to the surface owner.[166] It is submitted, however, that liability for surface damages imposed on the operator without proven fault may transgress constitutional limitations and constitute a taking of the mineral owner's property without due process of law.[167] A Kentucky court held that a statute that requires the consent of the surface owner before mineral production can take place is

163. The headnote of a statutory section is not part of the statute. N.D. CENT. CODE § 1-02-12 (1975).

164. *See supra* note 149 and accompanying text.

165. Hunt Oil Co. v. Kerbaugh, 283 N.W.2d 131, 135 n.4 (N.D. 1979).

166. N.D. CENT. CODE § 38-11.1-02 (1980).

167. This would be an entirely different matter than the question of liability without fault for breach of a duty imposed by statute or administrative rule. In that case, while there may have been no "fault" in the negligence sense of a lack of ordinary care, there has been fault in the failure to abide by the statute or rule enacted under the police power of the state. The offending mineral owner would not be paying for the right to extract his minerals but rather would be paying for the damages resulting from his having violated the statute or rule. The fact of the violation serves as the evidence of culpability. The question of this kind of strict liability has not arisen in North Dakota in surface damage cases decided by the supreme court, although a breach of an Industrial Commission rule did occur in *Bell v. Cardinal Drilling Co. See supra* note 104 and accompanying text for a discussion of the *Bell* case.

Industrial Commission rules provide for jurisdiction over a number of areas of surface damage and reclamation. *E.g.*, N.D. ADMIN. CODE § 43-02-03-06 (1982) (prohibiting leak or escape of oil or gas from a natural reservoir or from wells or equipment, although the focus of this rule is on the prevention of waste, in the sense of loss of oil or gas); *id.* § 43-02-03-07 (requiring compliance with federal requlations on United States government lands); *id.* § 43-02-03-15 (requiring a drilling and plugging bond and specifying that approved plugging "shall also include practical restoration of the well site"); *id.* § 43-02-03-19 (requiring the operator to provide a pit for drilling mud and drill cuttings, which must be constructed so as not to allow surface or subsurface contamination or flow from the pit, and providing that the pit shall be leveled and the surface restored within a reasonable time after the well has been completed; also requiring stockpiling and redistribution of topsoil and restoration of the surface after plugging or setting production casing); *id.* § 43-02-03-34 (requiring plugging of abandoned wells and cutting off of casing below plow depth); *id.* § 43-02-03-37 (requiring the filling of all unnecessary pits within a reasonable time after completion of the well); *id.* § 43-02-03-49 (prohibiting storage of oil in earthen reservoirs or open receptacles and requiring dikes or fire walls around oil tanks and tank batteries when deemed necessary by the state geologist); *id.* § 43-02-03-53 (prohibiting saltwater liquids or brines from being allowed to flow over the surface or into streams and setting standards for saltwater handling facilities); *id.* § 43-02-03-55 (requiring plugging and site restoration on a deserted well).

unconstitutional on those grounds.[168] The Oil and Gas Production Damage Compensation Act would not be constitutionally invalid on that precise basis because it does not require surface owner consent for oil and gas development on the land. It does provide, however, for mandatory compensation in any case in which it does impose liability, since the surface owner may bring a court action for compensation if the oil and gas developer's damage compensation offer is rejected.[169] The 1975 North Dakota Surface Owner Protection Act, [170] which applies to the strip mining of coal and upon which this oil and gas statute is modeled, does require surface owner consent, but seeks to avoid the constitutional problem by providing a procedure by which the mineral developer may obviate the consent requirement by bringing an action in the district court.[171] In any case the developer is required to pay the surface owner damages for loss of agricultural production caused by coal mining activity.[172]

A potential constitutional problem, however, appears to persist under either Act. In effect, it is only a matter of degree whether the mineral owner is prevented from producing his minerals by a consent requirement or whether he is required to pay additional compensation to the surface owner for the right to produce them. In the one case he loses the full value of the minerals and in the latter case he loses some part of their value, since his proceeds are reduced by whatever amount is paid out to the surface owner for surface damage caused by reasonably necessary surface use. Conceptually, this amount cannot be regarded as simply an expense of production because, in reality, it amounts to requiring the mineral developer to pay twice for his mineral interest, first

168. Department for Natural Resources & Envtl. Protection v. No. 8 Ltd., 528 S.W.2d 684, 686 (Ky. Ct. App. 1975). The Kentucky statute required consent of each holder of a freehold interest in the surface before strip mining could be performed. *Id.* at 685.

169. N.D. CENT. CODE § 38-11.1-09 (1980). In referring to "the amount of compensation awarded by the court," this section seems to take for granted that the court will necessarily award some compensation. The amount may be less than the mineral developer's offer, or it may be greater. In the latter case the surface owner is also entitled to recover reasonable attorney's fees, as well as costs. *Id.* This provision suggests an analogy to a taking under the eminent domain statutes. *Cf.* N.D. CENT. CODE ch. 32-15 (1976 & Supp. 1981).

170. N.D. CENT. CODE ch. 38-18 (1980 & Supp. 1981).

171. Upon a showing to the court that the surface owner will be adequately compensated for lost production, lost land value, and loss of the value of improvements, the consent of the surface owner will not be required. *Id.* § 38-18-06(5) (Supp. 1981). In North Am. Coal Corp. v. Huber, 268 N.W.2d 593, 597 (N.D. 1978), the court limited the right to resort to a court action to situations in which the developer had leases covering all of the coal. The holding was based on statutory construction and was also supported, in the court's view, by the fact that forced pooling does not exist in the context of coal mining in North Dakota, as it does for oil and gas production. *Id.; see* N.D. CENT. CODE § 38-08-08 (1980). The Surface Owner Protection Act, in the court's opinion, "obviously was not intended to provide a forum for determining the extent that mineral interests may, under all circumstances dominate surface interests. . . ." North Am. Coal Corp. v. Huber, 268 N.W.2d at 598.

172. N.D. CENT. CODE § 38-18-07 (Supp. 1981).

when he acquires the interest under an oil and gas lease, under which he will pay a bonus consideration and royalty payments or delay rentals, and then a second time when he must pay compensation in order to extract the minerals even though he is making only reasonably necessary use of the surface.[173]

If the compensation payments were destined for some general fund for the public benefit there would probably be less chance for successful constitutional challenge, as it would then be easier for a court to find a valid exercise of the police power or some analogy to taxation. The payments, however, are made to private persons, the surface owners, who have no obligation to use the funds for any kind of surface restoration or other environmental or public purpose. Despite the stated purpose "to exercise the police power of the state . . . to protect the public welfare,"[174] therefore, it is really private individuals who benefit from the Act, except in the general sense that agricultural production in the state might be benefited.[175] This kind of private purpose does not provide a sufficient constitutional basis for the exercise of the police power through statutes that require the prior consent of the surface owner before minerals can be extracted.[176] Surely a cogent argument can be made by analogy that the police power of the state does not extend to requiring the mineral developer to compensate the

173. *See* Note, *A Constitutional Analysis of the Surface Owner Consent Provisions in the Tennessee Surface Mining Law and the West Virginia Oil and Gas Conservation Act,* 82 W. VA. L. REV. 1385, 1389 (1980). The constitutionality of the Surface Owner Protection Act, chapter 38-18 of the North Dakota Century Code, was challenged in North American Coal Corp. v. Huber, 268 N.W.2d 593, 595 (N.D. 1978); however, the case was decided on issues of statutory construction and the constitutional issues were not reached.

It is interesting to note that the Oil and Gas Production Damage Compensation Act applies even if the surface and mineral estates are not severed. N.D. CENT. CODE § 38-11.1-02 (1980). The lessor who also owns the surface is generally held to have waived, or assumed the risk of, reasonably foreseeable surface damage. *See supra* notes 74-75 and accompanying text. There may be a question, therefore, whether the protection of the Act may be waived by the granting of a lease when the mineral owner and the surface owner are the same person. The Surface Owner Protection Act, on the other hand, expressly provides that the requirements for surface damage and disruption payments may not be waived. N.D. CENT. CODE § 38-18-07 (3) (Supp. 1981).

174. N.D. CENT. CODE § 38-11.1-01(1) (1972). The same language appears in the Surface Owner Protection Act. *Id.* § 38-18-02(1).

175. The Act is also premised on protecting "the economic well-being of individuals engaged in agricultural production." *Id.* § 38-11.1-01(1). Again, the Surface Owner Protection Act contains the same language. *Id.* § 38-18-02(1).

176. Department for Natural Resources & Envtl. Protection v. No. 8 Ltd., 528 S.W.2d 684, 686 (Ky. Ct. App. 1975). The Kentucky court found there was no rational relationship between such a private veto power and any goal of environmental protection. *Id.* One commentator summarized:

> Though politically expedient, these requirements simply do not fall within the scope of the police power. Consequently, they are arbitrary impositions upon the mineral owner's and operator's rights to the beneficial use and enjoyment of their property, violating the taking clause of the fifth amendment and the due process clause of the fourteenth amendment.

Note, *supra* note 173, at 1394. Constitutional problems raised by surface owner consent statutes are discussed in Dycus, *Legislative Clarification of the Correlative Rights of Surface and Mineral Owners,* 33 VAND. L. REV. 871, 907-17 (1980).

surface owner, a private individual, when surface damages have been caused by the developer's operations carried on without any fault on his part in the traditional legal sense of negligence, nuisance, or excessive use. The relationship between such private right of compensation and the public welfare would seem to be tenuous at best, particularly when the surface owner is under no obligation to undertake any surface restoration or reclamation.[177]

It would be premature to speculate further on how the North Dakota Supreme Court will deal with the Oil and Gas Production Damage Compensation Act, as it surely must in the fairly near future. The potential constitutional problems inherent in construing section 38-11.1-04 of the North Dakota Century Code as creating strict liability for surface damages without fault have been pointed out above.[178] These problems are avoided by construing sections 38-11.1-06 and 38-11.1-04 together, as suggested herein, to require the existence of a lack of ordinary care, that is negligence, or nuisance before liability can arise.[179]

In one trial court decision, *Murphy v. Amoco Production Co.*,[180] in which the surface owner sought damages under section 38-11.1-04 of the North Dakota Century Code and which was consolidated with a separate action by the oil and gas developer seeking a determination that the Act was unconstitutional, the court implicitly took the view that sections 38-11.1-04 and 38-11.1-06 provide separate and distinct liability.[181] Citing the *Hunt* decision the court noted that, apart from section 38-11.1-04, the lessee "would have the right to enter upon and use the surface estate to the extent necessary for development of the mineral estate" without liability for surface damages caused by reasonably necessary use.[182] The court then held that section 38-11.1-04 of the North Dakota

177. *Cf.* Note, *supra* note 173, at 1393. Under the Surface Owner Protection Act the coal developer is in fact obligated to reclaim the surface, although this cost is above and beyond the compensation paid to the surface owner. N.D. CENT. CODE § 38-18-08 (1980). There is no corresponding provision in the Oil and Gas Production Damage Compensation Act, presumably because oil and gas development does not normally affect large surface tracts in the way strip mining of coal does. Under traditional principles and in the absence of express agreement, there is no obligation on the part of an oil and gas developer to restore the surface after reasonable use. 1 WILLIAMS & MEYERS, *supra* note 5, § 218.12; Sellers, *How Dominant is the Dominant Estate? or, Surface Damages Revisited*, 13 INST. ON OIL & GAS L. & TAX'N 377, 383-84 (1962); Comment, *Land Uses Permitted an Oil and Gas Lessee*, 37 TEX. L. REV. 889, 897-98 (1959). The North Dakota Industrial Commission rules require "practical restoration of the well site" when a dry hole or abandoned well is plugged. N.D. ADMIN. CODE § 43-02-03-15 (1982). Restoration of the surface is also required on a producing well site within a reasonable time after setting production casing. *Id.* § 43-02-03-19.

178. *See supra* notes 166-76 and accompanying text.

179. *See* N.D. CENT. CODE §§ 38-11.1-04, -06 (1980).

180. Civ. Nos. 3614 & 3633 (S.W. Dist. N.D. Jan. 8, 1981) (consolidated for trial).

181. Murphy v. Amoco Prod. Co., Civ. Nos. 3614 & 3633, slip op. at 1-2. *See* N.D. CENT. CODE §§ 38-11.1-04, -06 (1980).

182. Civ. Nos. 3614 & 3633, slip op. at 2. "This could cause loss, such as to crops, but the surface owner would not be compensated for any damage unless caused unnecessarily or . . . because of express agreement." *Id.*

Century Code applied prospectively only, so that it had no bearing on leases executed before July 1, 1979, such as the one in issue.[183] The constitutional challenge, therefore, was not reached. The court did express the view that section 38-11.1-06, which it characterized as simply restating existing law, constitutionally could be applied to exploration and development after June 30, 1979.[184] In discussing section 38-11.1-04, however, which it viewed as establishing a kind of statutory contractual liability[185] as opposed to the traditional tort liability under section 38-11.1-06, the court seemed to have doubts of its constitutionality, even when applied prospectively: "*If there is to be any chance at all of saving the legislation,* it can only be by applying it prospectively."[186]

The constitutional problems inherent in imposing strict liability by statute, therefore, appear to have been at least hinted at by one court. It will be of great interest to observe the development of the law in North Dakota as the courts are faced with the difficult questions raised by the Oil and Gas Production Damage Compensation Act. If the Act is to be construed liberally enough to impose strict liability on the developer to compensate for all surface damages, then the North Dakota Legislature has indeed embarked upon uncharted and potentially troubled waters. If the intent on the other hand was to clarify and codify existing law as exemplified by the *Hunt* decision, that sections 38-11.1-04 and 38-11.1-06 of the North Dakota Century Code must be read together, then North Dakota remains within the mainstream in this area of the law.[187] In

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183. *Id.* at 3, 5.

184. *Id.* at 4.

185. *Id.* at 3. The *Murphy* court reasoned as follows:

> Both the federal and state constitutions forbid the passage of laws which impair the obligations of contracts. § 38-11.1-04, if applied retroactively, would clearly violate these constitutional prohibitions by impairing the developer's contractual rights or, to put it differently, by imposing contractual restrictions that did not exist prior to the passage of the legislation. This is not an incidental result of the passage of the legislation, but a direct result; indeed, the legislation was passed specifically for this purpose.

Id.

186. *Id.* at 4 (emphasis added).

187. *See* L. FULLER, ANATOMY OF THE LAW 59 (1968). The question of legislative intent is always an elusive one, which can only rarely be fully ascertained by reference to legislative history. Professor Fuller stated as follows:

> The interpretation of statutes is, then, not simply a process of drawing out of the statute what its maker put into it but is also in part, and in varying degrees, a process of adjusting the statute to the implicit demands and values of the society to which it is to be applied. In this sense it may be said that no enacted law ever comes from its legislator wholly and fully "made."

Id. This does not reflect a failure in statutory draftsmanship, but simply reflects the nature of the legislative process. A legislative body differs fundamentally from a court in that it is not required to decide specific cases in specific situations:

any case, one provision of the Act is laudatory and noncontroversial. Section 38-11.1-05 mandates that the mineral developer give the surface owner written notice of contemplated drilling operations.[188] Surely one of the most effective ways to avoid potential conflict between the mineral developer and the surface owner would be to ensure that the latter is adequately informed in a timely manner of the developer's drilling plans.[189] The goal should always be peaceful coexistence, rather than hostile confrontation, between the oil and gas developer and the surface owner.

VI. CONCLUSION

The nature of the ownership of severed oil and gas interests in land is inherently permeated with the potential for conflict between the oil and gas owner or developer and the surface owner. A necessary concomitant of mineral ownership is that the law affords its protection to the mineral owner to the extent reasonably necessary to allow him to reap the benefits of his property by producing the oil and gas by the usual and customary methods in the industry. To say that he has this legally protected right is to say that he is not required to make compensation to any private person,

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> For a legislature perhaps the pressures are such that a bill has to be passed dealing with a certain subject. But the precise effect of the bill is not something upon which the members have to reach agreement. If the legislature were a court, it would not decide the precise effect until a specific fact situation arose demanding an answer. . . . It will not be required to make the determination in any event, but can wait for the court to do so. . . . The result is that even in a non-controversial atmosphere just exactly what has been decided will not be clear.

E. LEVI, AN INTRODUCTION TO LEGAL REASONING 30-31 (1948) (footnote omitted). For this reason the statutory language may reflect the goals and intent of the framers only incompletely and imperfectly. This provides a basis for the court's duty to use its best judgment in construing the language in the light of actual fact situations. *See* E. BODENHEIMER, JURISPRUDENCE 420 (rev. ed. 1974).

It would be somewhat premature, therefore, to speculate on what the precise legislative intent was as to how the provisions of the Oil and Gas Production Damage Compensation Act should operate in practice. This will be for the North Dakota Supreme Court to establish as it deals with cases arising under the Act.

188. N.D. Cent. Code § 38-11.1-05 (1980). The notice must sufficiently disclose the plan of work to allow the surface owner to evaluate the effect of the drilling on his own use of the surface. *Id.* The language of the section expressly excludes geophysical exploration under chapter 38-08.1 of the North Dakota Century Code, which contains its own requirement to file notice with the county commission. *Id.* § 38-08.1-04 (Supp. 1981).

189. *See* Moses, *Peaceful Coexistence Between Lessor and Lessee Under an Oil and Gas Lease,* 38 TUL. L. REV. 341, 359 (1964). Although there is generally no implied duty to give notice, voluntary notice is beneficial to both parties, as one commentator observed:

> Despite the holdings of the courts, common sense and prudence, as well as good public relations, dictate that a cooperative and smart lessee would give timely notice of his intent to move onto the property and conduct operations. It is quite true that such a notice is not a "burden" placed upon the lessee under the terms of the typical lease. Nevertheless, a wise lessee should not endanger what otherwise might be pleasant relations with his lessor by failing to comply with this simple request.

Id.

in particular the owner of the overlying surface, for reasonably necessary surface damage or disruption caused by the extraction process.[190] In recent years courts have begun to stress, in addition to the doctrine allowing reasonably necessary surface use, a corollary to the effect that due regard must be accorded to the rights of the surface owner. This has led to characterization of the problem as requiring an accommodation between the rights of the mineral developer and the surface owner when reasonable alternative means exist by which the oil and gas can be produced without surface damage, or at least with less damage. This doctrine was elaborated in some detail by the North Dakota Supreme Court in the 1979 *Hunt* case.

With the enactment of the Oil and Gas Production Damage Compensation Act in North Dakota in 1979, a new element has entered the scene. Whether the Act is fundamentally a codification of existing law or whether it is an attempt to forge new safeguards for the surface owner can be ascertained only after the North Dakota Supreme Court has dealt with its ramifications. It is safe to say that thorny constitutional issues will need to be resolved if trial courts interpret the Act as imposing absolute liability without fault upon the oil and gas owner for all damage or disruption caused by exploration or production activities.

190. The mineral owner is required to compensate the state, in a sense, through the 6½% oil extraction tax imposed "upon the activity in this state of extracting oil from the earth." N.D. CENT. CODE § 57-51.1-02 (Supp. 1981). The constitutionality of this tax was upheld in Sunbehm Gas, Inc. v. Conrad, 310 N.W.2d 766, 770-71, 773 (N.D. 1981). The 5% oil and gas gross production tax imposed by § 57-51-02 of the North Dakota Century Code is a tax on produced oil and gas, in lieu of property tax, rather than a tax on the act of extraction. N.D. CENT. CODE § 57-51-02 (1972); *see* Federal Land Bank v. State, 274 N.W.2d 580, 583 (N.D. 1979).