Environmental Law: Comparing the Effectiveness of Oil and Gas with Coal Surface Damage Statutes in Oklahoma: Bonding Producers and Operators to Land Reclamation

Todd S. Hageman

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Environmental Law: Comparing the Effectiveness of Oil and Gas with Coal Surface Damage Statutes in Oklahoma: Bonding Producers and Operators to Land Reclamation

I. Introduction

Federal and state environmental statutes have multiplied since the passage of the seminal National Environmental Policy Act of 1969.1 The goal of environmental law is to protect human health and discourage environmental abuse. Involved in this equation are ethics, public interest issues, and economics.2 Thus, when environmental statutes affect a state or a region's primary economic industry, choices between environmental concerns and economics are particularly difficult. Moreover, the introduction of environmental regulation to a previously unregulated industry is often met with predictions of the industry's demise due to unprofitability. Such was the scenario concerning Oklahoma's surface damage statutes.

Oklahoma, whose economy depends upon a profitable oil industry, enacted the Oklahoma Surface Damages Act3 on July 1, 1982, in response to the oil boom of the 1970s and early 1980s. Commentators greeted the Surface Damages Act with a chorus of outcries that the new environmental regulation on the state's oil and gas industry would be overly burdensome. Criticisms included questioning the Act's constitutionality4 and calling the Act an unwarranted, "radical and unprecedented mutation" of common law oil and gas principles.5 Conversely, surface damage provisions contained in The Coal Reclamation Act of 19796 were largely ignored by commentators. This may be due to the low profile of Oklahoma coal mining, as well as coal mining being overshadowed by the oil and gas industry.7

However, generations of coal surface mining, or "strip" mining, left thousands of acres of Oklahoma land useless and environmentally hazardous.8 The Oklahoma

7. See generally Theodore M. Vestal, The Pits: Federal Administration of the Surface Mining Control and Reclamation Act of 1977 in Oklahoma (1986) (unpublished paper, on file with author) [hereinafter Vestal, Federal Administration]. This paper is also available through the Faculty of Political Science, Kendall College of Arts & Sciences, University of Tulsa, Tulsa, Okla.
8. See C.C. Dietrich, Mined Land Reclamation in the Western United States, 16 ROCKY MTN. MIN. L. INST. 143, 144 (1971).
legislature first reacted to the problem by enacting two unsuccessful reclamation acts: the Open Cut Land Reclamation Act of 1967, and a second version in 1971 which is currently succeeded by the Coal Reclamation Act.

The Surface Damages Act (for oil and gas production) and the Coal Reclamation Act (for coal mining) employ two vastly different methods to achieve the mutual goal of providing surface owners with adequate funds to restore the surface estate to its condition prior to drilling or mining activities. However, the Surface Damages Act contains various features which undermine this policy. The Surface Damages Act relies on private negotiations between the surface owner and the oil and gas producer to agree to an amount to remedy surface damage. This results in an inherent inequality in bargaining power. This inequality can only be remedied through expensive litigation which places an economic hardship on the surface owner. The Coal Reclamation Act rejects this method in favor of a more traditional, permit-based regulatory approach. Thus, a comparison of the acts' effectiveness is warranted to analyze whether one approach is superior to the other relative to remedying surface damages after the minerals are extracted.

The different approaches appear divergent at first blush. However, different approaches are necessary to remedy surface damages resulting from different types of mineral extraction operations. Strip mining disturbs vast tracts of surface land to extract coal. Moreover, strip mining, by its nature, is unpredictable regarding surface damages after mining operations cease. Thus, expertise in predicting surface damages and continual monitoring is required.

Conversely, oil and gas drilling operations disturb comparatively little surface land. Accordingly, oil and gas operations result in more predictable surface damages requiring less oversight and expertise to determine surface damages prior to operations. Therefore, although the different methods are necessary to monitor and remedy surface damages, the Surface Damages Act places an unreasonable burden on the surface owner which leads to compromising economic efficiency and accuracy to remedy surface damages resulting from oil and gas production. The purpose of this comment is to examine the Oklahoma Surface Damages Act and the Coal Reclamation Act to analyze the effectiveness of each statute concerning land reclamation following mining or drilling operations.

Specifically, this comment analyzes the adequacy of land reclamation awards following mining and drilling operations, as well as the procedural and economic efficiency with which the awards are granted. First, this comment discusses the background, implementation, and effectiveness of the Coal Reclamation Act. Second, this comment analyzes the Surface Damages Act and its effectiveness. Third, the two acts are compared to determine which method is superior concerning land reclamation following mining or drilling activities. Finally, this comment concludes that the Coal Reclamation Act employs a superior method in awarding

11. 'Id. §§ 742.1-793.
II. Oklahoma's Reclamation of Abandoned Coal Surface Mining Land

A. Background

Prior to Oklahoma's surface damage statutes, surface damages were analyzed by employing purely economic analyses. For this reason, land reclamation costs were a major factor courts considered in determining whether surface damage awards were justified. If reclamation costs were significantly higher than the land's diminution in value, reclamation costs were denied in favor of diminution damages. *Peevyhouse v. Garland Coal & Mining Company* is illustrative of Oklahoma's policy toward land reclamation following surface mining prior to the coal surface damage acts. 15

In *Peevyhouse*, the plaintiffs, a farm couple, entered into negotiations with the defendant coal mining company to lease their farm, which contained coal deposits. The defendant coal company leased the farm, beginning in November 1954, for five years. During the lease negotiations, the defendant stated that strip-mining operations would be used in order to extract the coal. 13 Consequently, the Peevyhouses specifically required that the defendants perform certain remedial work at the conclusion of mining operations to preserve the land for future use. Although the defendant agreed to this condition, it refused to perform the promised remedial work following mining operations.

Evidence introduced at trial indicated that the remedial work would cost approximately $29,000. Without the remedial work, the farm's diminution in value would be only $300. For this reason, the *Peevyhouse* court held that the breached remedial land-work provision was merely incidental to the purpose of the contract. 14 Thus, the Peevyhouses would have gained an economic windfall by measuring damages by the cost of performance, which was grossly disproportionate to the received benefit. 15 Therefore, the damages were limited to the farm's diminution in value resulting from the nonperformance. 16

The *Peevyhouse* decision is significant. The diminution-in-value rule for damages to real property, as opposed to the cost-of-performance rule, became entrenched as the common law measure of damages in Oklahoma. However, no environmental concerns, either health, safety, or aesthetic, were mentioned in the *Peevyhouse* decision. Moreover, other Oklahoma case law, when read in combination with

12. 382 P.2d 109 (Okla. 1962), cert. denied, 375 U.S. 906 (1963). *Peevyhouse* was the first time the Oklahoma Supreme Court decided the measure of damages for failure to reclaim land pursuant to express conditions contained in a coal mining lease. *Id.* at 114.
13. In Oklahoma, and most other western states, surface mining is usually the only economically feasible method which can be used to extract coal.
15. *Id.*
16. *Id.*
Peevyhouse, suggested that adjoining landowners' rights under nuisance law received greater protection than surface owners' interests concerning land surface destroyed by strip mining.¹⁷

For example, the court in Garland Coal & Mining Co. v. Few¹⁸ considered whether an adjoining landowner could bring a nuisance and trespass action against a coal strip-mining operator for damages resulting from the strip-mining operations. The plaintiff alleged the defendant's mining operations created actual damages to the plaintiff's property, as well as damages for inconvenience, annoyance, and discomfort. The plaintiff asked for punitive and exemplary damages.¹⁹

Garland held that, under Oklahoma law, the strip-mining operator was liable for both actual and punitive damages.²⁰ Furthermore, a strip-mining operator could be held liable even if the conduct at issue was not fraudulent, malicious, or grossly negligent.²¹ The court reasoned that evidence suggesting a reckless and wanton disregard of another's rights may allow the court to infer malice and evil intent.²² Thus, a strip-mining operator could be held liable to an adjoining landowner when the conduct at issue amounted to a "flagrant disregard of plaintiff's right to the enjoyment of his property."²³ Additionally, the defendant was enjoined from conducting activities which diverted natural watercourses and created surface damage by flooding the adjoining land.²⁴

Both Garland and Peevyhouse are illustrative of how Oklahoma law analyzed strip-mining damages from solely an economic viewpoint. Environmental and aesthetic factors were ignored by the courts. Economic efficiency was the sole criterion the courts utilized in awarding surface damages. Additionally, actions were based upon nuisance or breach of contract theories. Accordingly, interference with the surface owner's right to enjoyment of surface property was balanced against the economic efficiency of awarding damages pursuant to the cost-of-performance versus diminution-of-value rules. Consequently, surface owners received damages from strip-mining operators for damage to dwellings or for adversely affecting their

¹⁷. See Garland Coal & Mining Co. v. Few, 267 F.2d 785 (10th Cir. 1959) (applying Oklahoma law); Canadian Mining Co. v. Cleveland, 312 P.2d 913 (Okla. 1957). The Peevyhouse decision was particularly troublesome because the destroyed surface land at issue was half of the Peevyhouse family farm. See generally Judith L. Maute, Peevyhouse v. Garland Coal Co. Revisited: The Ballad of Willie and Lucille (1993) (unpublished manuscript, on file with author).

¹⁸. 267 F.2d 785 (10th Cir. 1959).

¹⁹. Additionally, the plaintiff originally alleged injuries for losses incurred due to the mining activities necessitating an otherwise unplanned sale of livestock, and for loss of consortium and medical expenses relating to his wife. These claims could not be sustained by evidence and were not submitted to the jury.

²⁰. Garland, 267 F.2d at 790. The jury awarded the plaintiff $5000 in actual damages and $3635 in punitive damages. Id. The damages were reduced by a remittitur and the plaintiff was awarded a total of $6544.51. Id. This amount was upheld on appeal. Id.

²¹. Id.
²². Id.
²³. Id.
²⁴. Id. at 792.
livelhood based upon purely economic analyses. Thus, the courts disregarded surface damages based on either environmental or aesthetic concerns.\textsuperscript{25}

This pre-surface damages statute policy resulted in decades of allowing coal mining companies to regulate themselves regarding remediing surface damages. Predictably, strip mining created unsightly landscape, water discoloration, and other permanent environmental problems on more than 29,000 acres, concentrated mainly in eastern Oklahoma.\textsuperscript{26} Coal reclamation acts were passed in Oklahoma in 1967 and 1971 in response to the problem.\textsuperscript{27}

However, both acts were largely ineffectual concerning land reclamation. They allowed ongoing, destructive mining operations to continue while failing to restructure mining practices to meet established environmental standards.\textsuperscript{28} The attempts to provide for coal mining land reclamation failed primarily because the Oklahoma Department of Mines (ODM), the regulating agency, was not given the power to effectively combat environmental problems resulting from abandoned surface coal mining operations.\textsuperscript{29}

\textbf{B. Federal Legislation: The Surface Mining Control and Reclamation Act of 1977}

Oklahoma's problems concerning reclaiming land following coal strip-mining operations were mirrored nationwide.\textsuperscript{30} Accordingly, Congress passed the Surface Mining Control and Reclamation Act of 1977 (SMCRA)\textsuperscript{31} to regulate surface mining.\textsuperscript{32} This was the first federal attempt to regulate the environmental effects of coal mining operations.\textsuperscript{33}

In SMCRA, Congress established a regulatory scheme to ensure that future surface coal mining operations would be conducted within federally-established environmental performance standards.\textsuperscript{34} SMCRA provides, \textit{inter alia}, that lands affected by surface mining should be restored to a condition equal to, or greater

\textsuperscript{25} See Canadian Mining Co. v. Cleveland, 312 P.2d 913, 915 (Okla. 1957) (holding a strip mining operator liable to lessor due to dynamite charges damaging lessor's dwelling and mining lease's compensation provision for damaging lessor's crops).


\textsuperscript{27} See supra notes 9-10 and accompanying text.

\textsuperscript{28} See Vestal, \textit{First Decade, supra} note 26, at 596.

\textsuperscript{29} Id.


\textsuperscript{34} 30 U.S.C. § 1265(b) (1988).
than, its condition prior to mining operations.\textsuperscript{35} The regulations are enforced by the Office of Surface Mining (OSM), a division created by SMCRA within the Department of Interior.\textsuperscript{36} Moreover, SMCRA employs a "cooperative federalism" approach which encourages the states to regulate their own coal industry in accordance with SMCRA's federal guidelines.\textsuperscript{37} However, if any state does not meet the SMCRA environmental standards, the federal government will take over the state program.\textsuperscript{38} This section provided the impetus needed for Oklahoma's enforcement of SMCRA's environmental standards.

C. SMCRA's Effect in Oklahoma

The Oklahoma coal industry tried various measures to thwart SMCRA's implementation.\textsuperscript{39} This action paralleled a national coal industry movement to challenge SMCRA, primarily concerning its constitutionality.\textsuperscript{40} However, by 1978, the Oklahoma coal mining industry recognized it had to conform to SMCRA's regulations.\textsuperscript{41} Nonetheless, this was a job for which ODM, the state agency in charge of enforcing the SMCRA, was completely ill-equipped.\textsuperscript{42}

ODM adopted regulations to ensure compliance with SMCRA's standards. These regulations were later endorsed by OSM, the federal agency in charge of SMCRA oversight. However, OSM's 1983 Annual Report of the Oklahoma Program was a litany of ODM's enforcement shortcomings.\textsuperscript{43} Specifically, OSM cited ODM for inadequate and infrequent inspection procedures, deficient permitting regulations, and inadequate bonding and reclamation practices.\textsuperscript{44} The report concluded that Oklahoma's attempt to implement SMCRA standards was a failure.\textsuperscript{45} Consequently, OSM informed Oklahoma that procedures for federal SMCRA enforcement had begun.\textsuperscript{46}

Furthermore, ODM's responses to OSM's inquiries were inadequate, prompting OSM to announce that it would partially take over the inspection and enforcement aspects of the state-approved surface coal mining regulatory program.\textsuperscript{47} However,

\begin{itemize}
  \item \textsuperscript{35} Id. § 1265(b)(2).
  \item \textsuperscript{36} Id. § 1211(a).
  \item \textsuperscript{39} \textit{See} Vestal, Federal Administration, \textit{supra} note 7, at 600.
  \item \textsuperscript{40} \textit{See} McGinley & Barrett, \textit{supra} note 32, at 418 n.3. SMCRA's constitutionality was eventually upheld in \textit{Hodel v. Virginia Surface Mining & Reclamation Ass'n}, 452 U.S. 264 (1981) and \textit{Hodel v. Indiana}, 452 U.S. 314 (1981). The Court's rationale for upholding SMCRA's constitutionality is beyond this comment's scope.
  \item \textsuperscript{41} \textit{See} Vestal, \textit{First Decade}, \textit{supra} note 26, at 601.
  \item \textsuperscript{42} Id. at 602.
  \item \textsuperscript{43} Id. (citing \textit{OKLAHOMA OFFICE OF SURFACE MINING, 1983 ANNUAL REPORT} (1984) (Okla. Permanent Program)).
  \item \textsuperscript{44} Id.
  \item \textsuperscript{45} Id.
  \item \textsuperscript{46} Id. The notice was given in a letter to Governor George Nigh which stated that OSM had initiated procedures to take over the state's program pursuant to 30 C.F.R. § 733.13.
  \item \textsuperscript{47} Id. (citing 49 Fed. Reg. 14,674-89 (1984)). Oklahoma was the first state in which OSM forcibly
\end{itemize}
ODM was allowed to continue its permitting, bonding, and processing systems under OSM's increased monitoring and assistance.\textsuperscript{44} The OSM takeover lasted from 1984 until 1987 when ODM emerged with more technically oriented personnel who demonstrated that ODM could regulate Oklahoma's surface mining without the federal agency's continued presence.\textsuperscript{49}

Oklahoma's coal operators, unaccustomed to vigorous mining regulation enforcement, were issued citations during OSM's assistance of ODM.\textsuperscript{50} SMCRA conveyed to OSM a virtual free hand to regulate Oklahoma surface mining, as evidenced in \textit{Oklahoma Wildlife Federation v. Hodel}.\textsuperscript{51} In \textit{Hodel}, the plaintiff citizens' group filed a SMCRA action seeking to compel Donald Hodel, Acting Secretary of the United States Department of Interior, to enjoin the McNabb Coal Company from conducting surface mining activity without a permit. The district court held that it had no jurisdiction over OSM's actions other than forcing Hodel to take action.\textsuperscript{52} The Secretary's issuance of a Cessation Order to McNabb fulfilled OSM's duties and precluded the district court's jurisdiction from ruling on the plaintiffs' action.\textsuperscript{53} Thus, OSM was granted summary judgment.\textsuperscript{54}

State officials made a priority of regaining ODM's primacy over its surface mining regulatory program despite OSM's initial successes.\textsuperscript{55} The Oklahoma legislature cooperated with OSM's offer to return Oklahoma's surface mining regulation to ODM, after ODM proved it could competently enforce the SMCRA standards.\textsuperscript{56} By October 2, 1987, ODM demonstrated to OSM that it had personnel with the technical expertise necessary to enforce SMCRA within the state. Accordingly, ODM regained primacy to enforce Oklahoma's surface mining regulatory program.\textsuperscript{57}

\textbf{D. The Emergence of ODM and The Coal Reclamation Act of 1979}

Oklahoma's Coal Reclamation Act of 1979\textsuperscript{58} is the state legislation through which the federal SMCRA environmental standards are enforced. The purpose of the Coal Reclamation Act is to protect surface owners' rights, as well as the environment, by requiring reclamation of lands affected by coal mining.\textsuperscript{59}

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overroced surface mining reclamation regulation. Shortly thereafter, however, OSM overroced Tennessee's surface mine regulatory program. Unlike Oklahoma, which resisted federal takeover, Tennessee invited OSM to takeover all aspects of surface mining regulation. OSM currently continues sole SMCRA enforcement in Tennessee, whose coal industry is virtually nonexistent. \textit{Id.}

48. \textit{Id.} at 603.
49. \textit{Id.} at 594.
50. \textit{Id.} at 604.
52. \textit{Id.} at 570.
53. \textit{Id.}
54. \textit{Id.} at 571. In a supplemental order, the court relieved McNabb of any liability, concluding that it had not violated any legally enforceable rule, regulation, order or permit. \textit{Id.}
55. See Vestal, \textit{First Decade}, \textit{supra} note 26, at 605.
56. \textit{Id.}
57. \textit{Id.} at 609.
59. 45 OKLA. STAT. § 742.1 (Supp. 1993). The section provides:

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Consequently, coal mining operations cannot be conducted if reclamation is not feasible.60

The Coal Reclamation Act authorizes ODM to promulgate regulations ensuring Oklahoma's compliance with OSM's regulations to enforce SMCRA.61 Strip mining disturbs vast tracts of land leading to expensive reclamation procedures. Accordingly, strip-mining sites require ongoing monitoring to ensure a mining operator has adequate funds to reclaim the affected surface. Absent ongoing monitoring, an operator may fail to set aside adequate land reclamation funds and become insolvent prior to completing reclamation.62 Thus, ODM employs a permit-based regulatory and inspection scheme to enforce the Coal Reclamation Act's land reclamation provisions. This regulatory scheme consists of a four-pronged administrative procedure.

First, coal mining operators are required to obtain a permit to engage in coal mining.63 This permit includes a detailed mining and reclamation plan under which the operator will mine the coal and reclaim the affected land.64 The permitting

[T]o protect the rights of surface owners and the environment, and to require reclamation of lands affected by surface and underground coal mining in a manner compatible with the social, environmental and aesthetic needs of the state. If reclamation is not feasible, surface mining operations should not be conducted. It is the intent of the Legislature to ensure . . . that there be public participation in the development of rules and regulations appropriate to the State of Oklahoma and that the Department of Mines exercises the full reach of its powers to ensure the protection of the public interest through the effective control of surface mining operations.

Id. 60. Id.
61. Id. Section 789 states in pertinent part:

The Department [ODM] shall adopt and promulgate all necessary rules and regulations including rules and regulations for hearings and appeals, subject to the provisions of this act and the Administrative Procedures Act for the implementation of this act. Provided, the Department shall coordinate its regulations with the Office of Surface Mining to ensure consistency in regulatory actions and that state interpretations of the law and regulations are not more restrictive than those of the Office of Surface Mining.

Id.

62. Notwithstanding the best precautions of any environmental legislation, one practical question remains: whether insolvent entities may discharge their environmental debts in bankruptcy. Neither the Coal Reclamation Act nor the Surface Damages Act deals directly with this issue. However, one Oklahoma bankruptcy case has indicated that an insolvent entity may not abandon a site if it poses an imminent harm or danger to the public. See In re Oklahoma Ref. Co., 63 B.R. 562 (Bankr. W.D. Okla. 1986) (allowing the abandonment of a refinery since no imminent harm or danger existed; see also Midlantic Nat'l Bank v. New Jersey Dept of Envtl Protection, 474 U.S. 494 (1986).

The issue of whether a coal mining operator or an oil and gas producer may discharge a surface damage debt is a practical problem for enforcement of reclamation obligations. However, this issue is beyond the scope of this comment. For further information, see generally Robin E. Phelan et al., Dancing The Toxic Two-Step: Environmental Problems in Bankruptcy Cases, 601 PRAC. L. INST. 445 (1992) (PLI Order No. A4-4359); Robert J. Rosenberg & Andrew M. Applebaum, Oil on Water: Environmental Law and Bankruptcy, 618 PRAC. L. INST. 135 (1992) (PLI Order No. A4-4377); Arlene E. Minsky et al., The Interface Between Bankruptcy and Environmental Laws, 46 BUS. LAW. 623 (1991).

63. See OKLAHOMA DEPT OF MINES, OKLAHOMA PERMANENT REGULATORY PROGRAM REGULATIONS §§ 773.1-773.21 (1990) [hereinafter REGULATION OPRPR].

64. 45 OKLA. STAT § 745.1(A), (D) (Supp. 1993). The subsections specifically provide:

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system forces the operator to provide a realistic reclamation plan before mining operations begin.

Second, before mining operations begin, coal mine operators are required to post a bond which is adequate to ensure land reclamation costs.\footnote{Id. The bond is made payable to the State of Oklahoma. Id.} Posting a security adequate to cover reclamation costs is vital to Coal Reclamation Act enforcement. By forcing coal mine operators to have adequate reclamation funds in reserve, forfeiting bonds and refusing to do the required reclamation work do not provide an economic windfall to operators because forfeiting the bond is just as expensive as performing the required land reclamation. Although the requirement to post a reclamation bond before mining operations begin may preclude smaller operators from engaging in coal mining in Oklahoma, those operators engaged in mining operations are economically able to reclaim the land affected by their operations.\footnote{66. However, ODM has a Small Operator Assistance Program in accordance with 30 C.F.R. § 795.10 (1990). See Regulation OPRPR, supra note 63, § 795.}

Third, ODM must inspect active coal mining sites on a monthly basis to ensure that the mining is being conducted pursuant to the mining and reclamation plan.\footnote{67. See Regulation OPRPR, supra note 63, § 842.11(a). The regulation provides:}

However, strip mining requires ongoing regulation. Failure to do so could allow coal mining operators to circumvent the Coal Reclamation Act's intent. For example, a coal mining operator could provide ODM with an artificially low reclamation plan and surety in the permit stage. Accordingly, ODM monitors and

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  \item \textbf{(A)} It shall be unlawful for any operator to engage in any mining operations in this state without first obtaining from the Department a permit. . . .
  \item \textbf{(D)} Each application for a permit . . . shall be accompanied by a plan for the reclamation of the affected land that meet the requirements of the Coal Reclamation Act.
\end{itemize}

\begin{itemize}
  \item Id. 65. \textit{Id.} The bond is made payable to the State of Oklahoma. \textit{Id.}
  \item Id. 66. However, ODM has a Small Operator Assistance Program in accordance with 30 C.F.R. § 795.10 (1990). See Regulation OPRPR, supra note 63, § 795.
  \item Id. 67. See Regulation OPRPR, supra note 63, § 842.11(a). The regulation provides:
    \begin{itemize}
      \item \textbf{(a)} The Department shall conduct an average of at least one partial inspection per month of each active surface coal mining and reclamation operation under its jurisdiction, and shall conduct such partial inspections of each inactive surface coal mining and reclamation operation under its jurisdiction as are necessary to ensure effective enforcement of the State program. A partial inspection is an on-site or aerial review of an operator's compliance with some of the permit conditions and requirements imposed under the State program.
      \item \textbf{(b)} The Department shall conduct an average of at least one complete inspection per calendar quarter of each active or inactive surface coal mining and reclamation operation under its jurisdiction. A complete inspection is an on-site review of an operator's compliance with all permit conditions and requirements imposed under the State program within the entire area disturbed or affected by the surface coal mining and reclamation operations.
    \end{itemize}
\end{itemize}
re-calculates reclamation costs by monthly inspections. Therefore, it is difficult to continue mining operations without being forced to post a bond adequate to ensure reclamation costs.

Finally, if the mining operator fails to reclaim the mining site fully, the reclamation bond is forfeited for this purpose. Thus, ongoing monitoring and calculating the surety, combined with the possibility of forfeiting bonds, ensures that adequate reclamation funds are readily available. The alternative to this method is ODM's risking that the original surety will cover reclamation costs without monitoring the surety's accuracy throughout mining operations. This could result in an operator's failure to post an adequate surety and force the state to pay for expensive remedial land reclamation.

The Coal Reclamation Act requires ODM to monitor mining operations to ensure adequate reclamation funds are posted by the private operator responsible for the surface damage. Moreover, ongoing monitoring reduces the need for tax dollars to pay for expensive reclamation procedures. Therefore, ODM's preventative inspections save the state money by ensuring adequate private funds are available to pay for reclamation costs.

ODM has various statutory methods to enforce reclamation efforts before bond forfeiture. ODM may issue a Notice of Violation (NOV) or a Cessation Order (CO) to coerce compliance with the reclamation plan. An NOV, which is less severe than a CO, is a formal sanction which requires the coal mine operator to abate the problem or apply for a public hearing within ninety days. The most severe sanction ODM can issue a mine operator is a CO. A CO requires that, following a reasonable period to remedy a violation, mining operations must cease until the reclamation violation has been abated. Furthermore, the coal mining

69. Id.
70. See id. § 800.50(d)(1). The regulation provides in pertinent part:

In the event the estimated amount forfeited is insufficient to pay for the full cost of reclamation, the operator shall be liable for remaining costs. The Department may complete, or authorize completion of, reclamation of the bonded area and may recover from the operator all costs of reclamation in excess of the amount forfeited. (emphasis added). Therefore, the state may initially pay for the reclamation work. However, the operator remains ultimately liable for the costs should the operator ever be in a position to repay the state.

Id.
71. Id. § 843.12(a).
72. Id. § 843.11(e)(1).
74. See id. The regulation provides:

If the Department determines that any permittee is in violation of any requirement of this act or any permit condition required by this act, . . . the Department shall issue a notice to the permittee or his agent fixing a reasonable time not to exceed ninety (90) days for the abatement of the violation and providing opportunity for public hearing.

Id.
75. See id. The regulation provides:

If, upon expiration of the period of time, as originally fixed or subsequently extended, for good cause shown and upon the written finding of the Department, the Department
operator will be assessed a $750 per day fine, for a maximum of thirty days, until the violation is abated.\footnote{76}

All facets of the four-pronged enforcement procedure are administered directly by ODM. Accordingly, ODM employs engineers capable of accurately estimating reclamation costs for proposed mining operations. The Act's flexibility in allowing ODM to modify the reclamation bond amount after mining operations begin allows for continual accuracy in ensuring the mining operator will post adequate reclamation funds. It is in these areas that the federal takeover forced state government to provide ODM with adequate personnel, technical facilities, and authority to enforce badly needed land reclamation regulations.

\subsection*{E. ODM's Enforcement of The Coal Reclamation Act of 1979}

The Act's\footnote{77} administrative enforcement is at the expense of traditionally reported case law. Thus, ODM's enforcement procedures and philosophy are largely unobtainable from traditional legal reporters. Accordingly, it is necessary to search ODM's administrative record to analyze the effectiveness of Oklahoma's coal mining land reclamation enforcement.\footnote{78}

The lead case in Oklahoma coal surface mining land reclamation enforcement is \textit{P&K Co. v. Oklahoma Department of Mines}.

\footnote{79} P&K is illustrative of various enforcement techniques which ODM utilizes to enforce land reclamation. Moreover, P&K, due to its extensive briefing, reveals ODM's philosophy regarding the Coal Reclamation Act, its enforcement, and its coextensive nature with federal legislation and case law.

P&K received a permit to conduct surface coal mining operations in Oklahoma\footnote{80} and was subsequently served with an NOV.\footnote{81} The NOV charged P&K with

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\item finding that the violation has not been abated, it shall immediately order a cessation of surface coal mining and reclamation operations or the portion thereof relevant to the violation. Such cessation order shall remain in effect until the Department determines that the violation has been abated, or until modified, vacated or terminated by the Department.
\end{itemize}

\footnote{Id. \textit{Id.} § 722. Prior dealings within the coal mining industry indicate that companies which routinely receive Cessation Orders are those which imminently become insolvent. Thus, the prior posting of a reclamation bond remedies the problem of coal mining operators which become insolvent before reclamation operations begin. \textit{Id.} \textit{Id.} §§ 742.1-793.}

\footnote{76} The rules and procedures for hearings, appeals, filing documents, and the composition of ODM's administrative record are found in the Rules of Practice and Procedure for the Coal Reclamation Act of 1979, §§ 460.2-1-1 to :2-41-B (Okla. Dept of Mines 1991). The regulations for enforcing the Coal Reclamation Act are found at REGULATION OPRFR, \textit{supra} note 63, §§ 700.1-850.15.


\footnote{78} P&K's permit allowed the company to mine coal in Section 36, Township 5N, Range 17E in Latimer County, Oklahoma. Pursuant to 45 \textit{Okla. Stat.} § 745.1(A), (D) (Supp. 1993), the permit, which was issued on January 27, 1984, included a detailed mining and reclamation plan. \textit{See supra} notes 63-64 and accompanying text.

\footnote{80} Notice of Violation (NOV) No. 87-27-01 (Oklahoma Dept. of Mines Nov. 16, 1987). The NOV
violating Oklahoma Permanent Regulatory Program Regulations (OPRPR) by failing to meet pH effluent runoff limitations.\textsuperscript{82} A second inspector visited the mining site and found an additional violation for low pH runoff from a sedimentation pond. Consequently, an amended NOV was issued which included the additional violation, as well as a federal regulation violation.\textsuperscript{83} P&K failed to abate the violation, thus the ODM inspector issued a CO ordering P&K to construct a water treatment facility, if necessary, to abate the violations. P&K responded by applying for, and receiving, a formal administrative review of both the NOV and CO.\textsuperscript{84}

In the hearing, P&K, while admitting it failed to comply with the water quality standards, asserted that the entire drainage area was affected by acid mine drainage from previous underground coal mines.\textsuperscript{85} Moreover, P&K had taken extensive and expensive reclamation measures in attempting to comply with ODM's effluent standards.\textsuperscript{86}

ODM countered that P&K was ignoring the regulations requiring pH levels to remain at 6.0 at all times. Moreover, ODM pointed out that P&K previously made similar arguments which were rejected as a matter of law.\textsuperscript{87} In the previous matter, it was held, notwithstanding evidence proving that the water quality violation was not a direct result of current mining operations, that ODM regulations clearly require all discharge from the disturbed area to comply with state and federal water quality laws and regulations.\textsuperscript{88}

\textsuperscript{82} See REGULATION OPRPR, supra note 63, § 816.42. The regulation states:

\emph{Discharges of water from areas disturbed by surface mining activities shall be made in compliance with all applicable State and Federal water-quality laws and regulations and with the effluent limitations for coal mining promulgated by the U.S. Environmental Protection Agency set forth in 40 C.F.R. Part 434.}

\textsuperscript{83} Id.

\textsuperscript{84} See id. § 843.16(c). The regulation provides: "A person issued a notice of violation or cessation order . . . or a person having an interest which is or may be adversely affected by the issuance . . . may request review of that action by filing an application for review." Id.


\textsuperscript{86} Id.

\textsuperscript{87} NOV No. 86-3-257-1 was issued to P&K in May 1987 for failure to meet effluent limitations pursuant to 30 C.F.R. § 434.52 and REGULATION OPRPR, supra note 63, § 816.42(b), (c). The NOV No. 86-3-257-1 proceedings, like the instant proceedings, concerned water with a pH of less than 6.0 draining from P&K's mining site. In the hearing, an administrative law judge from the United States Department of Interior rendered a decision against P&K on the same grounds upon which it asserted in the instant matter. See Applicant's Brief at 3, P&K Co. (No. AR-87-66).

\textsuperscript{88} See Respondent's Brief, Okla. Dept of Mines at 3, P&K Co. (No. AR-87-66) (on file with author).
Furthermore, ODM pointed out that other administrative proceedings precluded P&K from asserting prior mining activity on their mining site as a defense to reclamation violations. Specifically, \textit{Cravat Coal Co.} involved a virtually indistinguishable fact pattern. In \textit{Cravat}, federal regulations were held to require all surface water drainage from surface mining and reclamation areas to comply with the regulation's effluent limitations, regardless of whether the acidic runoff's source is from previously mined areas. Moreover, distinguishing between sources of water discharged from areas disturbed by surface mining activities is irrelevant. Thus, acid water runoff caused by seepage from previous mining operations does not constitute a valid defense to reclamation violations. Therefore, the NOV and CO were sustained.

However, the district court reversed ODM's decision concerning \textit{P&K} on appeal. The district court decision vacated ODM's order that P&K must treat all effluent to attain a pH discharge effluent level in compliance with the reclamation regulations before resuming surface mining operations. Consequently, ODM appealed the district court decision to the Oklahoma Court of Appeals. ODM asserted that P&K should be strictly held to the permit reclamation plan regulations.

\begin{footnotesize}
\begin{enumerate}
\item The fact that the acid was likely caused by surface water mixing with underground mine seepage was no defense to the violation.
\item That the Appellee knew that the area had previously been mined and there was a water problem before he engaged in mining. Therefore, the fact finder [the ODM Hearing Examiner] disagreed with the Appellee [P&K] that he should not be accountable for the low pH in his discharge.
\item That Appellee's reliance on \textit{Appalachian Power Company v. Train}, 545 F.2d 1351 (1976) was unfounded since the subject of the court order was specifically limited to steam electric power generating plants.
\item That NOV 87-27-01 and CO 88-14-01 were properly written and should be sustained.
\end{enumerate}
\end{footnotesize}
Furthermore, ODM argued that the district court erred in improperly applying federal case law upon which P&K relied. P&K relied heavily upon the Fourth Circuit decision in Appalachian Power Company v. Train, which held that the Environmental Protection Agency could not require industry to treat and reduce pollutants other than those added by the plant process. Therefore, P&K argued it could not be required to reclaim the area by treating and reducing naturally occurring pollutants or pollutants resulting from other industrial discharges not affiliated with P&K's activities. ODM countered that Appalachian Power was limited to thermal discharge and that thermal discharge was distinguishable from pH discharge. ODM argued that P&K did not fall within the same class or category of polluter as the Appalachian Power petitioner because pH discharge differs significantly from the thermal discharge at issue in Appalachian Power. Moreover, subsequent case law indicated that Appalachian Power was a specific exception to regular enforcement of pollution discharge standards, thus, it should not apply to a coal company.

The court of appeals agreed with ODM, holding that Appalachian Power should not be applied to Oklahoma surface coal mining operations for two reasons. First, Appalachian Power was restricted to steam electric generating plants and it should not be applied to surface coal mining operations. Second, pH pollutants are distinguishable from the thermal pollution at issue in Appalachian Power. Moreover, the trial court failed to give proper deference to ODM's decision.

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Reclamation & Enforcement, 92 IBLA 381 (July 14, 1981). OSM entitled to rely on permit package as evidence of conditions under which mining and reclamation were approved. This case had significant precedential value because it interpreted SMCRA regulations, upon which ODM's regulations are based. Moreover, Turner Brothers was a case initiated in Rogers County, Oklahoma.

99. 545 F.2d 1351 (4th Cir. 1976).
100. Id. at 1377.
102. Id. at 12.
103. Train, 545 F.2d at 1355.
104. Appellants Brief at 12, P&K Co. (No. 75,778).
105. Id.
106. Id. Furthermore, Appalachian Power was decided pursuant to Environmental Protection Agency regulations promulgated regarding the Federal Water Pollution Control Act Amendments of 1972. See 33 U.S.C. §§ 1311, 1314, 1316, 1326(a) (1988). However, the court in Consolidation Coal Co. v. Costle, 604 F.2d 239 (4th Cir. 1979), held that these provisions no longer apply to coal mining operations. Id. at 251. Congress enacted SMCRA because the Federal Water Pollution Control Act was inadequate to eliminate inactive mine pollution. Moreover, SMCRA requires strip-mine operators to reclaim land disturbed by mining operations by restoring vegetation, preventing erosion, and curtailing water pollution after active mining has ceased. Therefore, Appalachian Power is inapplicable to surface coal-mining operators who fail to reclaim land, including remediating effluent discharge violations, pursuant to ODM's state regulations and SMCRA standards.
108. Id.
109. Id.
110. Id.
Therefore, the court of appeals reversed the district court and reinstated ODM's administrative determinations.111

As noted above, P&K is more extensive than most actions before ODM. Thus, P&K represents a departure from ODM's normal land reclamation enforcement. Bond forfeitures are ODM's most common method of enforcing the Coal Reclamation Act. Typically, during a monthly inspection by an ODM inspector, a decision is made whether to issue NOVs or COs if reclamation violations are found. Only completely abating the violation will preclude forfeiting the reclamation bond in instances where a coal mining operator violates the reclamation plan. This was true even during the period of joint ODM-OSM reclamation enforcement when overlaps in some instances led to confusion concerning reclamation enforcement.112

If ODM determines land is not being reclaimed as required by law, a Notice of Bond Forfeiture is issued to the violator.113 This notice provides for the right to show cause why the bond should not be forfeited and to dispute the amount to be forfeited.114 ODM's forfeiting procedures are automatically stayed upon the operator's filing of a request for review concerning the bond's forfeiture.115 If an operator fails to request a hearing, the reclamation bond will be automatically forfeited.116

Moreover, an operator cannot assert that ODM should be estopped from forfeiting a bond due to ODM's failure to enforce reclamation regulations.117 This position has been upheld in Oklahoma's Supreme Court and Court of Appeals.118 Further-

111. Id. (citing Tulsa Area Hosp. Council v. Oral Roberts Univ., 626 P.2d 316, 320 (Okla. 1981)) (holding that an agency's opinion requires affirmance pursuant to 75 OKLA. STAT. § 322(1)(e), if facts determined by administrative agency are supported by substantial evidence, and the order is otherwise error free).

P&K has applied to the Supreme Court of the State of Oklahoma for a writ of certiorari in an attempt to overturn the Court of Appeals decision reinstating ODM's administrative determination, and to reinstate the district court decision, overturning ODM's administrative determination. See P&K Co. v. Oklahoma Dept of Mines, No. 75,778 (Okla. filed June 26, 1992).


113. See REGULATION OPRPR, supra note 63, § 800.50.


115. Id. § 460:2-29-4.


118. Id. (citing State ex rel. Cartwright v. Tidmore, 674 P.2d 14 (Okla. 1983); State ex rel. Comm'r v. Shull, 279 P.2d 339 (Okla. 1955); Oklahoma Tax Comm'r v. Emery, 645 P.2d 1048 (Okla. Ct. App. 1982) (holding that laches and estoppel do not apply against State acting in its sovereign capacity due to its employees' mistakes or errors)).
more, an action can be brought to compel compliance with Oklahoma's reclamation standards regardless of ODM's prior vigilance concerning reclamation violations. 119

F. Policy Ramifications of Oklahoma's Coal Reclamation Act

The Coal Reclamation Act's policy of strictly requiring land reclamation results in an arduous regulatory scheme. Moreover, requiring coal mining operators to reclaim affected land is reflected in the price of a ton of coal. This results in higher prices to consumers and reduced profits for mining operators. However, the result is that prices accurately reflect all costs of extraction, including the operators' costs and the public costs.

Furthermore, the cost of failing to reclaim Oklahoma's land would undoubtedly be reflected in other aspects of the state's economy. Forcing the state to pay for costly remedial land reclamation would require either reallocating state resources from other areas or increased revenue measures. Coal mining operators would stand to profit while escaping responsibility to reclaim land disturbed by its mining operations. Therefore, strict adherence to reclamation costs ensures that private mining operators factor reclamation costs into potential profit calculations while allocating adequate funds for reclamation.

The policy of strictly requiring land reclamation has been felt outside of ODM's administrative proceedings in enforcing the Act in various mining activities. For instance, it is unnecessary for surface owners to rely on equitable remedies for land reclamation costs due to the obligations the Coal Reclamation Act imposes on mining operators. 120 Moreover, operators and surface owners cannot contractually agree to forego reclamation after mining operations cease. 121 Instead, mandatory reclamation procedures are imposed upon the mining operator. 122

The most significant impact that coal surface damage acts have supplied concerns the measure of damages for failing to reclaim land. The diminution-in-value rule, espoused in Peevyhouse, 123 has most likely been superseded in favor of the cost to complete land reclamation. 124 In Rock Island Improvement Co. v. Helmerich &

119. Westhoff Brothers, Inc. v. Oklahoma Dep't of Mines, No. ARSC 88-13, slip op. at 5 (Okla. Dep't of Mines Aug. 16, 1988) (report and order of the hearing officer) (citing Ohio Farmers Ins. Co. v. Department of Envl. Resources, 457 A.2d 1004 (Pa. 1983) (holding that adversely affected private citizens have the right to bring civil action to compel compliance with Pennsylvania reclamation act due to Department's alleged failure to enforce compliance with act)).
120. See Alpine Const. Corp. v. Fenton, 764 P.2d 1340, 1344 (Okla. 1988).
122. Id.
124. See Rock Island Improvement Co. v. Helmerich & Payne, Inc., 698 F.2d 1075 (10th Cir.), cert. denied, 461 U.S. 944 (1983). However, the federal court could not expressly overturn the Peevyhouse decision. Recently, the District Court for the Western District of Oklahoma has stated that the Tenth Circuit likely rejects Peevyhouse in Blackburn v. Delaware Primeenergy Corp., No. CIV-91-664-W (July 8, 1992) (on file with author). Accordingly, the Oklahoma Supreme Court will soon expressly rule on
Payne, Inc.,\textsuperscript{125} a lessor contracted with the lessee coal mining company to reclaim all disturbed land following mining operations. However, the coal mining operator abandoned the mining site without reclaiming the land after the mining operations ceased.

The lessors were awarded $375,000, the amount necessary to reclaim the land, although the land's diminution in value was only $6797.\textsuperscript{126} Significantly, the current Coal Reclamation Act was not in force at the time the parties entered into their mining agreement; thus, the lessors could not pursue their action pursuant to the current act.\textsuperscript{127} The lessors were required to pursue their action under the Open Cut Land Reclamation Act of 1967.\textsuperscript{128}

Under that statute, the coal mining operator was only required to post a reclamation bond at a rate of $50 per acre of land mined,\textsuperscript{129} as opposed to the current act which requires a bond adequate to ensure full reclamation costs. Consequently, the reclamation bond at issue was only $50,000, a fraction of the $375,000 which was actually required to reclaim the land.\textsuperscript{130} Thus, the lessors sued to uphold the reclamation clause in the lease instead of suing under the available statutory provisions.\textsuperscript{131}

The lessors argued that Oklahoma's enactment of the surface damage acts signaled a change in the state's policy toward reclamation.\textsuperscript{132} Therefore, the surface damage acts changed the measure of damages for land disturbed by mining operations to the cost of performance for reclamation.\textsuperscript{133} The Tenth Circuit, in predicting how the Oklahoma Supreme Court would rule in the same situation, stated that Peevyhouse is probably no longer the prevailing law in Oklahoma due to the policy changes favoring land reclamation reflected in the surface damage acts.\textsuperscript{134} Accordingly, Oklahoma's policy change requiring reclamation of land disturbed by coal mining operations was endorsed and the lessors were awarded the $375,000 reclamation cost.\textsuperscript{135}

Thus, the Coal Reclamation Act's policy of requiring surface damages in the amount necessary to reclaim the land is felt outside of the Act's purview. This

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\item \textsuperscript{125} Rock Island Improvement Co. v. Helmerich & Payne, Inc., 698 F.2d 1075 (10th Cir.), cert. denied, 461 U.S. 944 (1983).
\item \textsuperscript{126} Id. at 1077-78.
\item \textsuperscript{127} Id. at 1078.
\item \textsuperscript{128} 45 OKLA. STAT. §§ 701-713 (Supp. 1967) (repealed 1971). See supra note 9 and accompanying text.
\item \textsuperscript{129} 45 OKLA. STAT. § 728(B) (1971) (amending 45 OKLA. STAT. §§ 701-723 (Supp. 1967)).
\item \textsuperscript{130} Rock Island, 698 F.2d at 1078 n.5.
\item \textsuperscript{131} Id. at 1078.
\item \textsuperscript{132} Id.
\item \textsuperscript{133} Id.
\item \textsuperscript{134} Id. The Western District of Oklahoma has also expressly rejected Peevyhouse. See Davis v. Shell Oil Co., 795 F. Supp. 381 (W.D. Okla. 1992) (denying defendant oil company's summary judgment motion, which relied on Peevyhouse for proposition that nuisance damages resulting from oil and gas leases cannot exceed market value of damaged land). See supra note 124 and accompanying text.
\item \textsuperscript{135} Rock Island, 698 F.2d at 1082.
\end{itemize}
\end{footnotes}
results in more realistic awards to reclaim surface lands. Moreover, surface owners cannot pocket surface damage awards. The funds must be used for land reclamation, resulting in no private windfall to the surface owner which may defeat the public interest.

The Act’s policy introduces predictability to the industry concerning the measure of surface damages. Mining operators are on notice that surface damage awards will be measured relative to the cost to reclaim affected land. Consequently, reclamation costs can be calculated prior to mining operations without the uncertainty of fair market value calculations before and after mining operations.

III. Oklahoma’s Reclamation of Abandoned Oil and Gas Wells

A. Background

Oil and gas lessees are granted broad rights to conduct exploring, drilling, and producing operations on the leased premises. Although these operations cause certain surface damage, the lessee generally incurred no liability for surface damage. Common law provided lessees with the affirmative defense of the right of reasonable access doctrine. Lessees were only liable for surface damages in instances of an abuse of the right of reasonable access, negligence, or an alternative basis for liability accruing independent from the oil and gas lease provisions. Additionally, some oil and gas leases contained surface damage clauses. The surface damage clauses require the lessee to compensate the surface owner for specified loss or injury suffered resulting from the lessee’s lawful exercise of rights under the lease.

Moreover, in Oklahoma, lessees are entitled to possess such surface land as is reasonably necessary for the exploration and development of the leased premises. The right to enter, prospect for, and take oil and gas is a proper subject of mineral rights ownership. The rationale for this policy is that the mineral lease’s purpose is the recovery of oil or gas, necessitating an implied right to enter the premises. Surface damages resulting from reasonable surface use were characterized as *damnum absque injuria*, or harm without liability. Thus, the surface

136. 4 EUGENE KUNTZ, LAW OF OIL AND GAS § 49.4 (1990).
137.  Id.
138.  Id.
139.  Id.
140.  Id.
141.  Id.
142.  See Sanders v. Davis, 192 P. 694 (Okla. 1920).
144.  See Marland Oil Co. v. Hubbard, 34 P.2d 278 (Okla. 1934), rev’d on other grounds, 75 P.2d 464 (Okla. 1936), superseded by statute as stated in Collins v. Oxley, 897 P.2d 456 (10th Cir. 1990).
145.  Id. The court defined *damnum absque injuria* as "[l]oss, hurt, or harm without injury in the legal sense; that is, without such breach of duty as is redressible by an action. A loss which does not give rise to an action for damages against the person causing it."  Id. (citing BLACK’S LAW DICTIONARY 354 (5th ed. 1979)).
estate was servient to the mineral estate\textsuperscript{146} and the burden of proving the operator's unreasonable surface use was placed on the surface owner.\textsuperscript{147}

The lessee is required to proceed with due regard to the lessor's interest while acting as an experienced operator of ordinary care and prudence during drilling operations.\textsuperscript{148} Thus, the corresponding rights between the lessor and lessee have been stated as the lessor having the right to enter upon the surface to use what is reasonably necessary for development while the lessor is entitled to the possession of the land for all other purposes.\textsuperscript{149}

Generally, Oklahoma lessees had no common law duty to reclaim land disturbed by oil and gas production after the wells were abandoned.\textsuperscript{150} However, Oklahoma lessees could be liable for damages specified in a surface damage clause, as well as damages resulting from nuisance or negligence. Other types of liability include strict liability, resulting from breaching a statute or regulatory order,\textsuperscript{151} or willful destruction of the surface.\textsuperscript{152} Moreover, a surface owner may recover both temporary and permanent damages in a nuisance action for damaging one parcel of land.\textsuperscript{153} Specifically, a duty may be imposed on a lessee to reclaim land during the lease period because failing to do so allowed the lessee to use more of the surface than was reasonably necessary for production operations, resulting in a nuisance.\textsuperscript{154}

An operator's failure to comply with a surface damage clause allowed the surface owner to bring an action for specific performance or an action based on any other remedy available for breach of contract.\textsuperscript{155} However, within the last thirty years it became a custom in the industry to at least partially compensate the surface owner for surface damages and restore the leased premises to as good a condition as

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  \item \textsuperscript{146} See, e.g., Indian Territory Illuminating Oil Co. v. Dunivant, 80 P.2d 225 (Okla. 1938) (holding that mineral lessee has right to build necessary structures, including roads, slush pits, tanks, 'drainage ditches and salt-water ponds on surface); Mid-Continent Petroleum Corp. v. Donelson, 116 P.2d 721 (Okla. 1941) (stating that mineral lessee has right to build employee housing on surface); Wellsville Oil Co. v. Carver, 242 P.2d 151 (Okla. 1952) (deciding that mineral lessee's right to surface is dominant over subsequent agricultural lessee); Davon Drilling Co. v. Ginder, 467 P.2d 470 (Okla. 1970) (concluding that mineral lessees have absolute right of ingress and egress).
  \item \textsuperscript{147} See Cities Serv. Oil Co. v. Dauces, 325 P.2d 1035, 1037 (Okla. 1958), \textit{superseded by statute as stated in} Collins v. Oxley, 897 F.2d 456 (10th Cir. 1990).
  \item \textsuperscript{148} See Brimmer v. Union Oil Co., 81 F.2d 437 (10th Cir.), \textit{cert denied}, 298 U.S. 668 (1936).
  \item \textsuperscript{149} In Tenneco Oil Co. v. Allen, 515 P.2d 1391 (Okla. 1973), the supreme court stated: 'The right of possession of the leased premises under an oil and gas mining lease is 'concurrent in the lessor and lessee; the lessee being entitled to enter upon the premises and to use so much thereof as is reasonably necessary for the development thereof for oil and gas under the terms of the lease and for the successful operation thereof, and the lessor being entitled to the possession of the land for all other purposes.'\textit{Id.} at 1396 (quoting Schlegel v. Kinzie, 12 P.2d 223, 233 (Okla. 1932)).
  \item \textsuperscript{150} See 1 HOWARD R. WILLIAMS & CHARLES J. MEYERS, OIL AND GAS LAW § 218.12 (1981); \textit{see also} Fox v. Cities Serv. Oil Co., 200 P.2d 398 (Okla. 1948).
  \item \textsuperscript{151} See Pyron, supra note 4, at 340 (citing Gulf Oil Corp. v. Lemmons, 181 P.2d 568, 570 (Okla. 1947) (holding that a violation of the oil refuse statute is negligence per se)).
  \item \textsuperscript{152} See Wilcox Oil Co. v. Lawson, 301 P.2d 686, 688 (Okla. 1956).
  \item \textsuperscript{153} See Briscoe v. Harper Oil Co., 702 P.2d 33, 36 (Okla. 1985).
  \item \textsuperscript{154} See Tenneco Oil Co. v. Allen, 515 P.2d 1391 (Okla. 1973).
  \item \textsuperscript{155} See Schlegel v. Kinzie, 12 P.2d 223 (Okla. 1932).
\end{itemize}
possible under the circumstances, thus resulting in little land reclamation litigation.\textsuperscript{156} The most frequent litigation involved negligent operations and breach of the statutory duty requiring safe disposal of salt water and other refuse.\textsuperscript{157}

B. The Oklahoma Surface Damages Act

Commentators greeted the enactment of Oklahoma's Surface Damages Act with hyperbolic outcries.\textsuperscript{158} Critics asserted that Oklahoma's common law principles of surface damage liability underwent a de facto repeal,\textsuperscript{159} imposing strict liability on operators for surface damages that deprived operators of their rights to the mineral estate.\textsuperscript{160} They also argued that the Surface Damages Act was an invasion of private commercial transactions under the guise of protecting the public interest.\textsuperscript{161} Challenges to the Surface Damages Act's constitutionality were also raised.\textsuperscript{162}

The Act requires an oil and gas operator\textsuperscript{163} to give the surface owner\textsuperscript{164} written notice of the intent to drill before entering the drilling site.\textsuperscript{165} The surface owner is at least partially protected from the outset because every operator doing business in Oklahoma is required to post a $25,000 security.\textsuperscript{166} This provides a readily available pool of funds for surface owners bringing suit pursuant to the Surface Damages Act.\textsuperscript{167}

\textsuperscript{156} "The factors which influenced industry to regulate itself included promoting a good-neighbor policy with the lessor to work together in the lease's best interest, to encourage future lessors to sign leases, and the attempt to discourage legislatures from enacting further regulatory measures." Interview with Owen L. Anderson, Eugene O. Kuntz Professor of Oil, Gas and Natural Resources Law, Univ. of Okla. College of Law, Norman, Okla. (Nov. 6, 1992).


\textsuperscript{158} Oklahoma was the fifth state to pass a surface damage act statute. The statutes preceding the Oklahoma Surface Damages Act are: MONT. CODE ANN. § 82-10-501,-511 (1981); N.D. CENT. CODE §§ 38-11.1-01,-10 (1987); S.D. CODIFIED LAWS ANN. §§ 45-5A-1,-11 (1983); W. VA. CODE § 22A-4-1,-28 (1985).

\textsuperscript{159} See Pierson, supra note 5 at 390.

\textsuperscript{160} See Pyron, supra note 4, at 347.

\textsuperscript{161} See Walker, supra note 4 at 431.

\textsuperscript{162} Id. at 419-26; see also Hogue, supra note 4, at 60.

\textsuperscript{163} The Act defines an operator, for the purposes of the Surface Damages Act, as "a mineral owner or lessee who is engaged in drilling or preparing to drill for oil or gas." 52 OKLA. STAT. § 318.2(1) (1991).

\textsuperscript{164} The Act defines a surface owner, for the purposes of the Act, as "the owner or owners of record of the surface of the property on which the drilling operation is to occur." Id. § 318.2(2).

\textsuperscript{165} Id. § 318.3.


\textsuperscript{167} 52 OKLA. STAT. § 318.4(A) (1991). The security is in the form of a corporate surety bond, letter of credit from a banking institution, cash or a certificate of deposit with Oklahoma's Secretary of State. This security is for "payment of any location damages due which the operator cannot otherwise
The written notice of intent to drill must be given by certified mail. The notice must inform the surface owner of the proposed location and approximate date the operator plans to commence drilling. Alternatively, if the operator is unable to ascertain the surface owner's identity or whereabouts through reasonable diligence, constructive notice will be allowed. Within five days of the date of delivery or service of the notice of intent to drill, both the operator and the surface owner have the duty to enter into good faith negotiations to determine the amount of surface damages to be reflected in the surety.

The initial negotiations concerning surface damages are done privately between the surface owner and the operator. It is only in the event that these negotiations are unsuccessful that outside parties assist in arriving at an amount concerning surface damages. If the surface owner and the operator agree to an amount for surface damages, the operator may enter the drilling site and commence drilling operations. Conversely, if no agreement can be reached between the parties, the operator must give notice to the surface owner of its petitioning the district court in the drilling site's county for appointment of appraisers to make recommendations concerning reclamation costs. This provision is unique among oil and gas surface damage statutes.

The provision to appoint appraisers to assess surface damages was likely included to balance the inherent inequality in bargaining power which usually exists between an experienced oil and gas producer and a surface owner. Surface owners usually do not have experience or expertise in negotiating oil and gas leases. However, the appraiser appointment process requires the surface owner to share the costs equally with the producer, who is in a better economic position to absorb this cost. Therefore, the added cost of the appraiser appointment process is more prohibitive on the surface owner and may deter the surface owner from initiating the process.

Private negotiations between an experienced operator and unexperienced surface owner could pose further problems. For instance, a surface owner may reach an agreement which could eventually prove to be substantially lower than actual surface reclamation costs. However, at the time the agreement was reached, the

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168. Id. § 318.3.
169. Id.
170. Id. The operator is not required to serve notice in the event of non-state resident surface owners, non-state resident surface tenants, unknown heirs or imperfect titles. Id. However, the Act applies to both resident and nonresident surface owners. Nonresidents, while not being excluded from the Act, are treated differently only insofar as operators are not required to give notice of the intent to commence drilling operations. See Darling v. Quail Creek Petroleum Management Group, 778 P.2d 943, 944 (Okla. Ct. App. 1989).
172. Id. § 318.5.
173. Id. § 318.5(A).
174. Id. § 318.5(A), (B).
175. While all other surface damage acts provide for compensation to the surface owner, no other act expressly provides for the opportunity for independent appraisers to make recommendations to the court concerning likely surface damage amounts.
surface owner believed the reclamation bond amount was accurate, so no attempt was made to initiate the appraiser appointment process. This could present two problems for the surface owner. First, the ensuing litigation costs would reduce the surface damage award, thereby effectively barring the recovery of adequate reclamation costs. Second, the operator could assert that the private negotiations were entered into in good faith and the surface owner should be estopped from further recovery. This argument is especially persuasive if the surface owner did not initiate the appraiser appointment provision.

If the surface owner elects to initiate appraiser appointment, the operator may commence drilling operations immediately upon petitioning the district court for appointment of appraisers.176 The appraisers must be selected within twenty days of service of the notice to petition for appointment of appraisers.177 Generally, the surface owner selects one appraiser, the operator selects another, and a third appraiser is selected by an agreement between the original two appraisers.178 Alternatively, the court may select the appraisers if the parties cannot agree upon the appraisers' selection.179 After the appraisers are selected, they inspect the drilling site and calculate the surface damages which the owner will sustain due to drilling and maintenance of oil and gas production.180

The appraisers make their recommendations in a report that is filed with the district court.181 The parties have two options to pursue if a party objects to the appraisers' findings. First, the objecting party may request a bench hearing within thirty days of the day the report is filed.182 After hearing the evidence presented by both sides, the court will enter an order to confirm, reject, or modify the report.183 Alternatively, a new report may be ordered for good cause.184 Second, the objecting party may demand a jury trial to assess the surface damage amount within sixty days of the report's filing date.185 If a jury trial is demanded, the

177. Id. § 318.5(C).
178. Id. The appraisers' compensation is determined by the court. The costs are then equally divided between the surface owner and the operator. See Collins v. Oxley, 897 F.2d 456, 460 (10th Cir. 1990) (holding that one party's prepayment to appraiser gave appearance of tainting appraisal process but did not justify departing from Surface Damages Act's plain language).
179. 52 OKLA. STAT. § 318.5(C) (1991).
180. Id.
181. Id.
182. Id. § 318.5(F). The objection is made by filing a "written exception" with the court. Id.
183. Id.
184. Id. If a new appraisal is ordered, the operator continues to have the right of entry to commence or continue drilling operations, subject to the continuance of the required bond. Id.
185. Id. The jury trial is conducted in the same manner as railroad condemnation actions tried before the court. Thus, a practitioner utilizing the Surface Damages Act must be familiar with railroad condemnation actions. However, a discussion analyzing railroad condemnation actions' effects upon the Surface Damages Act is beyond this comment's scope.
appraisers' report is not a final order subject to immediate appeal pending the trial's outcome.\textsuperscript{186} All court costs and attorney fees are assessed against the party demanding the jury trial if that party fails to recover a larger verdict than originally assessed by the appraisers' report.\textsuperscript{187} Once again, due to the producer's superior economic position, the producer is in a better position to gamble on litigation costs to force a surface owner into an agreement the surface owner may not otherwise accept.

The operator may continue drilling operations provided that the operator deposits the appraisers' assessment, or the jury verdict amount, pending the outcome of the appeal.\textsuperscript{188} It is important to note, however, that the Surface Damages Act's fee-shifting provisions are only triggered after commencing the appraiser appointment process. Thus, no provision is made for an agreement which is reached between the parties, but later proves inadequate to reclaim the surface. Therefore, to reduce this uncertainty, surface owners may elect for an appraisers' report, for which they must bear half the cost.

At first glance, the Surface Damages Act appears to be adequately enforced by the threat of treble damages being awarded against noncomplying operators.\textsuperscript{189} However, the statute imposes an extremely high burden upon a surface owner to obtain treble damages against an operator who fails to reclaim the surface after oil and gas production has ceased. The surface owner must show, by clear, cogent, and convincing evidence, that the operator knowingly and willfully entered the surface to commence drilling operations without the surface owner's agreement.\textsuperscript{190} Moreover, although the issue of noncompliance is a question of fact, it is to be determined without a jury and receives no deference on appeal.\textsuperscript{191}

Treble damages may also be awarded at the direction of the court if an operator knowingly and willfully fails to post or maintain the required bond, or fails to petition the court for appraisers if a reclamation agreement with the surface owner cannot be reached.\textsuperscript{192} Thus, treble damages, as well as attorney fees, will not be awarded against an operator who attempted to comply with the spirit of the Surface Damages Act without willful disregard of the statute's requirements.

\textsuperscript{186} Jerry Scott Drilling Co. v. Scott, 781 P.2d 826, 828 (Okla. 1989).
\textsuperscript{187} Id. Fees will be assessed even if a party originally demands a jury trial, withdraws that request, but the opposing party receives a verdict in excess of the appraisers' award. Id. Expert witness fees, however, are not awarded to a party demanding a jury trial who wins a more favorable verdict. See Andress v. Bowlby, 773 P.2d 1265, 1268 (Okla. 1989) (citing Oklahoma City Urban Renewal Auth. v. Lindauer, 534 P.2d 682 (Okla. 1975) (interpreting statutes concerning railroad condemnation actions, upon which Surface Damages Act actions are to be based)). See supra note 185 and accompanying text. Both the bench order and the jury verdict are appealable. See also 52 OKLA. STAT. § 318.6 (1991).
\textsuperscript{188} Jerry Scott Drilling, 781 P.2d at 828.
\textsuperscript{190} Id.
\textsuperscript{191} Id. Generally, the trial judge is accorded deference by the appellate court on issues of fact. Accordingly, questions of fact are reviewed on the clearly erroneous standard. However, pursuant to section 318.9, the trial judge's findings of fact are reviewed pursuant to a de novo standard. Id.
\textsuperscript{192} Id.
Damages Act, but commits purely procedural errors. Additionally, treble damages will not be awarded for failure to negotiate in good faith.

Moreover, a separate hearing is required before treble damages may be assessed. The requirement of a separate action before treble damages may be assessed has been described as vital for two reasons. First, a separate action ensures the parties are given notice of the issues and penalties involved. Second, evidence supporting treble damages must be developed in a separate hearing, thus avoiding a court's imposition of penal liability in a proceeding where treble damages were not the issue to be determined.

Negotiated damages, appraisers' report damages, and the opportunity to collect treble damages are the only remedies a surface owner has pursuant to the Surface Damages Act. However, a surface owner's recovery of damages pursuant to the Surface Damages Act does not preclude the surface owner from collecting additional damages caused by the operator at a subsequent date.

A surface owner may recover either under the Surface Damages Act or in a separate nuisance action. These actions have been described as incompatible when brought together, but both actions exist harmoniously for different purposes. Although a surface owner may pursue various remedies, those remedies can be obtained only through expensive litigation with no guidance from the Corporation Commission or other agencies which possess knowledge and expertise concerning surface damages and the oil and gas industry. Thus, a heavy economic burden is placed on the surface owner when challenging experienced oil and gas operators. Therefore, oil and gas producers may exploit their superior bargaining position to extract a surface damage agreement from the surface owner which is inadequate to compensate the surface owner for the cost to reclaim the surface land.

193. See Samson Resources Co. v. Cloud, 812 P.2d 1378, 1381 (Okla. Ct. App. 1991) (holding that operator's filing petition for appraisal in wrong county was procedural error lacking knowing or willful wrongdoing intent necessary to impose treble damages or attorney fees).
196. Tower, 782 P.2d at 1357.
197. Id.
198. Id.
200. See id. at 1009. For a discussion concerning the elements a surface owner must prove to recover in a nuisance action, see Marshall v. El Paso Natural Gas Co., 874 F.2d 1373 (10th Cir. 1989); Thompson v. Andover Oil Co., 691 P.2d 77 (Okla. Ct. App. 1984). Comparing nuisance actions with actions pursuant to the Surface Damages Act is beyond this comment's scope.
201. Compare Dyco, 771 P.2d at 1009 (holding that harmonious construction of Surface Damages Act with law of nuisance does not preclude surface owner's nuisance action, although Surface Damages Act does not afford nuisance remedy) with Darling v. Quail Creek Petroleum Management Corp., 778 P.2d 943, 945 (Okla. Ct. App. 1989) (stating that Surface Damages Act remedies, which afford only diminution of surface market value damages, and nuisance remedies, which include personal inconvenience and annoyance in surface enjoyment, are incompatible in same action).
C. Court Enforcement of Oklahoma's Surface Damages Act

The Surface Damages Act initiated litigation which explained the new relationship between the surface estate and the mineral estate. Courts balanced the competing policies of the traditional concept of the dominant mineral estate against the new policy requiring the surface to be reclaimed. The Surface Damages Act allows the surface owner to recover surface damage awards quickly to restore the surface to its condition prior to drilling operations. Thus, the Act's effectiveness hinges on the courts' accuracy in calculating surface damages.

The first reported case decided pursuant to the Surface Damages Act shed little light on its enforcement. The Surface Damages Act was characterized as a guideline for causes of action recognized by the Oklahoma Constitution. However, a mineral lessee's right to use the necessary surface to obtain minerals under the surface was affirmed. Predictably, most early cases brought pursuant to the Surface Damages Act challenged the Act's constitutionality. This issue was laid to rest by a 5-4 decision in Davis Oil Co. v. Cloud.

In Davis, the operator argued that oil and gas drilling operations necessitate entering the surface estate as an incident of exploiting the mineral estate. Accordingly, the right of entry and reasonable use of the surface constituted a property right vested by the mineral lease. The Davis court rejected these arguments by reasoning that the reasonable use doctrine was simply a common law defense which was subject to modification by appropriate exercise of the state's police power. Moreover, the Surface Damages Act's mechanism for determining actual damages to the surface estate is not unreasonable, arbitrary, or capricious. Because the surface damage awards bear a substantial relation to the goal of balancing the competing interests of the surface owner and the mineral rights owner, the Surface Damages Act is constitutional. Furthermore, the Surface Damages Act was held to apply to all leases existing at the time of the Act's enactment. This resulted in at least one

203. Id. at 527.
204. Id. at 526.
205. Another early case challenging the Act's constitutionality was Bowles v. Kretchmar, 55 Okla. B.J. 967 (May 12, 1984), opinion withdrawn from publication, 55 Okla. B.J. 1991 (Oct. 6, 1984). However, the Oklahoma Court of Appeals declined to address the issue, holding that the leases at issue were entered into prior to the Act's enactment thus excluding them from the Act's provisions. See Hogue, supra note 4, at 60. Subsequently, the Oklahoma Supreme Court withdrew the Bowles opinion from publication.
207. Davis, 766 P.2d at 1350-51.
208. Id. at 1352.
209. Id.
210. Id. at 1351. However, this is the point with which the four dissenting justices disagreed. Justice Summers stated that applying the Surface Damages Act retroactively impairs contractual rights insofar as operators are required to bargain with surface owners for what was previously a contractual right to reasonable surface use without damages payments. Id. at 1356 (Summers, J., dissenting, with which Opala, VCJ, Hodges, Simms, J., joined).
operator being liable for failing to comply with the Surface Damages Act by
attempting to drill an additional well on the surface included in a lease existing prior
to the Act's enactment.\textsuperscript{211}

\textit{Davis} also contained important dicta concerning the new relationship between
the surface estate and the mineral estate. The surface, which supports business, industrial,
agricultural, and residential purposes, is an equally vital resource as the mineral
estate.\textsuperscript{212} The Surface Damages Act guarantees that one industry's development may
not be undertaken at the expense of another when both industries are important to
Oklahoma's economy.\textsuperscript{213}

This new policy toward protecting the surface is limited. The Surface Damages Act
has been narrowly interpreted as limited only to oil and gas preparation and
drilling.\textsuperscript{214} Moreover, the Surface Damages Act does not derogate an operator's right
of access to the surface for exploration activities. In \textit{Anschutz Corp. v. Sanders},\textsuperscript{215}
the surface owner petitioned for injunctive relief to prohibit an operator from
conducting seismic testing on the property. The surface owner argued that other states'
surface damage acts applied to exploration activities; thus, Oklahoma's act must have
likewise intended this aspect.

The Oklahoma Supreme Court rejected this expanded view of the Surface Damages Act
by reasoning that any legislation which diminished recognized surface access
rights must be strictly construed against abrogating those rights.\textsuperscript{216} Geophysical
exploration, which may result in a decision not to drill, is not included in commencing
drilling operations.\textsuperscript{217} Accordingly, since the Oklahoma legislature did not include
language indicating that activities other than production or drilling were to trigger the
Surface Damages Act, exploratory activities cannot be inferred by the court.\textsuperscript{218}

Therefore, a potential operator may conduct exploratory activities, including seismic
testing, without negotiating with the surface owner prior to entering a potential drilling
site.\textsuperscript{219} Somewhat ambiguously, however, the court noted that a surface owner may
pursue remedies for unreasonable or excessive surface use resulting from exploratory
activities.\textsuperscript{220} Presumably, the court is referring to the surface owner's common law
rights to bring a nuisance or other proper action.\textsuperscript{221}

The Surface Damages Act also does not place the entire compliance burden upon
an operator. In \textit{Beasley Oil Co. v. Nance},\textsuperscript{222} surface owners asserted that the operator
engaged in dilatory practices by failing to pursue the appraisal process. The appraisal

\textsuperscript{211} See \textit{Darling}, 776 P.2d at 944.

\textsuperscript{212} \textit{Davis}, 766 P.2d at 1351.

\textsuperscript{213} Id.

\textsuperscript{214} See \textit{Alpine Const. Corp. v. Fenton}, 764 P.2d 1340 (Okla. 1988).

\textsuperscript{215} 734 P.2d 1290 (Okla. 1987).

\textsuperscript{216} Id. at 1291 (citing \textit{In re Adoption of Graves}, 481 P.2d 136, 138 (Okla. 1971)).

\textsuperscript{217} Id.

\textsuperscript{218} Id. at 1291-92.

\textsuperscript{219} Id. at 1292.

\textsuperscript{220} Id.

\textsuperscript{221} See supra notes 138-41 and accompanying text.

was not completed until the surface owner obtained a court order directing the appraisal's completion, nearly three years after the petition to appoint appraisers had been filed. The operators were engaged in drilling operations during the three years. However, the delay in arriving at surface damages while the operator pursued drilling operations did not render the operator liable.\textsuperscript{223} Specifically, the burden of initiating the appraisal process does not fall solely on the operator.\textsuperscript{224}

Although the operator delayed for over two years to complete the appraisal after entering the surface and completed the appraisal only under direction of a court order, the operator's conduct was not oppressive or malicious.\textsuperscript{225} Thus, the surface owners were not entitled to recover attorney fees.\textsuperscript{226} Moreover, in \textit{Tower Oil & Gas Co. v. Keeler},\textsuperscript{227} the court noted that an operator indicated it would delay the appraisers' award payment as long as possible if the surface owners did not agree to a lesser amount.\textsuperscript{228} This conduct also did not descend to vexatious, oppressive, or bad faith conduct, and the surface owners were denied litigation costs.\textsuperscript{229}

The Surface Damages Act is also restricted to actual damages to the surface resulting in diminished market value as a consequence of drilling and production activities.\textsuperscript{230} The appraisers may calculate surface damages prior to completion of oil and gas drilling operations.\textsuperscript{231} In certain instances, damage to land not actually used in oil and gas drilling operations may be considered in calculating damages.\textsuperscript{232} Specifically, the Surface Damages Act requires the operator to compensate surface owners for the diminution in value of the entire surface estate resulting from drilling operations.\textsuperscript{233}

By using the difference in fair market value as the measure of damages, operators may not be liable to pay for all surface damages resulting from their drilling operations. This is particularly troublesome, given the surface owner's inequality in bargaining position. Thus, operators are not required to pay the entire cost of reclaiming the surface following drilling operations.

This is added leverage for an operator who inherently commands a superior bargaining position relative to the surface owner. Accordingly, operators can use their superior bargaining position to extract a surface damage bond agreement from the surface owner that is not adequate to remedy actual surface damages. Moreover, the bond amount will be upheld by the court if the negotiations were entered in good faith, even if the bond is not adequate to cover reclamation costs. For this reason, the

\textsuperscript{223} \textit{Id.} at 746.
\textsuperscript{224} \textit{Id.}
\textsuperscript{225} \textit{Id.} at 747.
\textsuperscript{226} \textit{Id.}
\textsuperscript{227} 776 P.2d 1277, 1279 (Okla. 1989).
\textsuperscript{228} \textit{Id.}
\textsuperscript{229} \textit{Id.} The surface owners were awarded court costs and attorney fees, however, for recovering a larger jury verdict than the appraisers' award. See \textit{supra} notes 185-87 and accompanying text.
\textsuperscript{230} See \textit{Andress v. Bowlby}, 773 P.2d 1265, 1267 (Okla. 1989).
\textsuperscript{231} See \textit{Dyco}, 771 P.2d at 1008.
\textsuperscript{232} \textit{Id.}
\textsuperscript{233} \textit{Id.}
diminution in value measure of damages undermines the policy of restoring the surface to its condition prior to drilling operations.

However, several factors are considered in determining loss in market value. For instance, in *Dyco Petroleum Corp. v. Smith*, the operator's drilling activities interfered with the surface owner's center pivot irrigation system. This interference caused a diminution in value of the surface owner's entire 160-acre surface estate. However, only a fraction of the 160-acre surface estate was directly used for drilling operations. Notwithstanding the operator's limited surface use, the entire 160 acres was held to be taken and subjected to the operator's interference. Accordingly, the surface owner's entire 160 acres was considered in calculating the surface damages resulting from oil and gas drilling activities.

The Surface Damages Act does not create a property interest allowing the surface owner to dispute an operator's right to use the surface. Thus, the surface owner has no interest in well-spacing proceedings or other matters solely related to oil and gas production. Moreover, granting a surface owner the rights to dispute access to the surface, drilling preparation and drilling operations could abrogate a mineral lessee's drilling rights. Therefore, the Surface Damages Act creates a right only to monetary compensation for damages resulting from oil and gas drilling operations.

Compensation for damages and expenditures other than those directly related to the operator's drilling and operating activities are difficult to recover because the Act does not expressly include consequential damages. Although the court will consider interference with the surface owner's entire tract, inconvenience resulting from drilling operations is usually not compensable. Inconvenience is compensable only if it affects the land's value. Thus, a surface owner's personal inconvenience does not qualify as an additional or separate element of damages.

Moreover, if the damage award is based on the appraisers' report, the report must base any inconvenience damages on a factual valuation. A surface owner is precluded from recovering prejudgment interest on damages authorized by appraisers' reports or from the date of taking. However, if the surface owner wins a larger judgment for surface damages in a jury trial against the operator, interest is recoverable from the judgment date until the award is collected.

234. Id.
235. Id.
236. Id.
239. Id. at 1055.
240. Id.
241. Id.
242. See Davis, 766 P.2d at 1352.
243. Id.
244. See Dyco, 771 P.2d at 1008.
245. Id. at 1009.
246. See Tower, 776 P.2d at 1282.
Surface owners are entitled to immediate collection of awarded damages, even pending an operator's appeal, without posting security.\(^\text{247}\) An operator's appeal cannot delay a surface owner's collection of damages for the use and benefit of reclaiming land following oil and gas drilling operations, provided that the confirmed appraisers' award was deposited with the court.\(^\text{248}\) An operator's argument that it should not have to depend on the surface owner's ability to repay the funds if the award is overturned on appeal has been rejected.\(^\text{249}\)

Conversely, the surface owner is immediately entitled to the use and benefit of the funds.\(^\text{250}\) Either delaying the surface owner's award pending an appeal's outcome, or forcing the surface owner to post a security before the award may be withdrawn, frustrates the Surface Damages Act's policy of requiring the surface owner to be quickly compensated for the surface taken.\(^\text{251}\) Additionally, a surface owner may convey the surface estate to a subsequent surface owner while reserving the right to collect surface damages from an operator.\(^\text{252}\)

D. Policy Ramifications of Oklahoma's Surface Damages Act

Contrary to popular opinion among commentators upon the Surface Damages Act's passage, oil and gas operators have not suffered a repeal of their common law rights.\(^\text{253}\) In fact, even after the enactment of the Surface Damages Act, courts continue to characterize the surface estate as servient to the mineral estate.\(^\text{254}\) Thus, a mineral lessee has the right to enter and reasonably use the surface in exploring and extracting mineral deposits.\(^\text{255}\) Prior to the Surface Damages Act's enactment, operators had an absolute defense to surface damages by invoking the reasonable and necessary doctrine.

The Surface Damages Act does not include reasonableness or necessity as considerations for determining damages.\(^\text{256}\) This may be out of recognition that while a well's positioning, access roads and other necessary procedures are detrimental to the surface, they are nonetheless necessary. Thus, these necessary damages would not automatically result in compensation to the surface owner under the reasonable and necessary doctrine.\(^\text{257}\) Critics of the Surface Damages Act argue that surface damage necessarily results from oil and gas drilling procedures. This is undoubtedly true.

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247. See Dyco, 771 P.2d at 1009.
248. Id.
249. Id.
250. Id.
251. Id. (interpreting the Surface Damages Act consistently with established policy relating to railroad condemnation actions); see also Samson Resources Co. v. Cloud, 812 P.2d 1378, 1381 (Okla. Ct. App. 1991); Tower, 776 P.2d at 1281. See supra note 185 and accompanying text.
252. See Collins, 897 P.2d at 459-60 (applying railroad condemnation principles to the Surface Damages Act). See supra note 185 and accompanying text.
253. See supra notes 158-62 and accompanying text.
254. See Flug-Redfearn, 782 P.2d at 135.
257. Id.
However, the critics fail to understand the changing policy trend toward conservation and land reclamation as evidenced by the Surface Damages Act. This policy change reflects the belief that land must be reclaimed to ensure the continued viability of the surface and the environment. The surface is a valuable resource which supports economic and agricultural endeavors separate from, but equally important as minerals. Therefore, in reconciling these positions, oil and gas operators must be liable for surface damages, as they are the parties better able to recover these transaction costs through pricing of oil.

Moreover, surface owners were not the recipient of radically expanded rights as a result of the Surface Damages Act. Surface owners may not bar exploration and drilling activities. Surface owners gained only a monetary interest in requiring the operators to restore the surface after drilling operations cease. In fact, because the measure of damages is the diminution in value, as opposed to cost of completion, the operators may receive the windfall if the land's diminution in value is less than the cost of reclamation. Thus, the Surface Damages Act only partly reconciles the need for land reclamation with the need for efficient exploitation of mineral resources.

IV. Comparing the Effectiveness of the Coal Reclamation Act with the Surface Damages Act

The Coal Reclamation Act and the Surface Damages Act employ different enforcement procedures in arriving at a mutual goal of quickly reclaiming land following mining or drilling operations. Both acts require operators to acquire a bond, or other type of security, to provide a pool of funds for reclamation procedures. However, the Coal Reclamation Act has statutory safeguards to ensure the bond is adequate to cover reclamation costs, while the Surface Damages Act requires that operators pay only the land's diminution in market value. Thus, the Surface Damages Act does not strictly require land reclamation, and likewise undercompensates surface owners if the reclamation cost is greater than the land's diminution in market value. Consequently, the surface owner must use personal funds to reclaim the land which was exploited for the operator's profit.

Moreover, the Acts' enforcement procedures are vastly different. The method of initially arriving at reclamation costs offers a dramatic policy difference. The Coal Reclamation Act employs a permit-based regulatory approach which includes ODM involvement throughout the entire process. ODM is equipped with technical instruments to aid in predicting reclamation costs. Moreover, ODM is staffed with individuals that accurately calculate potential damages from the outset.

Coal mining operators are required to submit a mining and reclamation plan before mining begins. The plan is submitted to ODM for approval. Thus, an inexperienced surface owner, who has no knowledge or expertise concerning coal mining or land reclamation, is not required to negotiate with coal mining operators who possess such experience and expertise. The result is an equality in bargaining power which leads to accurate land reclamation bonds.

Conversely, the Surface Damages Act places reliance upon the surface owner to negotiate personally with the oil and gas operator. The Oklahoma Corporation Commission, which regulates the oil and gas industry, may not participate in these
private negotiations. For this reason, an inequality in bargaining power exists. The Surface Damages Act's remedy for this problem is through the district court with the aid of appraisers for which the surface owner must bear half the cost. Furthermore, if the surface owner does not agree with the appraisers' award, an additional cost to hire an attorney and demand a jury trial is involved. Consequently, a far greater economic burden is placed on the individual surface owner.

This economic burden frustrates the Surface Damages Act's purpose by allowing an oil and gas operator to exploit its superior economic position. The Act attempts to correct the inequality in bargaining power problems through a punitive approach. The Act raises the specter of treble damages against an oil and gas operator who attempts to take advantage of a surface owner and force a costly jury trial on the issue of surface damages. However, the knowing and willful standard which the surface owner must prove seriously undermines the effectiveness of the treble damages provision. Thus, a surface owner is taking a risk that the reclamation bond will be adequate.

For this reason, a surface owner may request that an appraisal be done. However, the surface owner must pay half of the appraisal cost. Once again, the producer is in a better position to absorb this cost than the surface owner. Therefore, despite the attempts to put the surface owner in an equal bargaining position with the operator, an inherent inequality in bargaining power exists under the Surface Damages Act. The Coal Reclamation Act bypasses the surface owner in favor of governmental regulation to remedy the inequality in bargaining power problem.

Before the Coal Reclamation Act was effectively enforced, operators were given the luxury of choosing the lesser dollar value between diminution in the land's value and cost of reclamation. Coal mining operators are no longer given this choice. On the other hand, before the Surface Damages Act was enacted, producers had no duty to restore the surface if the disturbed surface was necessary for oil and gas production. The Surface Damages Act recognizes that surface owners need to be compensated for the taking of their land; however, the Act undercompensates the surface owner because the producer is not under a duty to restore the surface. Rather, oil and gas producers must pay only the diminution of the land's market value.

The Surface Damages Act's flaws can be easily remedied. First, the measure of damages should be changed from diminution in value to cost of reclamation to ensure the surface owner is not undercompensated. Second, the inequality in bargaining power problem could be solved by having the Corporation Commission assess the bond amount before drilling operations begin. While it is unnecessary for oil and gas producing operations to be monitored to the extent strip-mining operations require, certain knowledge and expertise must be utilized to accurately calculate surface damages. The Corporation Commission can supply this knowledge and expertise.

Third, the Surface Damages Act must adopt a more flexible approach to modifying reclamation bond amounts. Although oil and gas surface damages are more predictable than strip-mining damages, the Act must recognize that a margin of error exists. Thus,

258. 52 OKLA. STAT. § 318.5(A) (1991). The statute expressly states that the original negotiations shall take place between the operator and the surface owner. If these negotiations break down, the only remedy the Act provides for is through the district court. Id.
an alternative to the Surface Damages Act's present approach to adjusting the reclamation bond amount must be implemented. Instead of forcing the parties to sue in the district court to modify the bond amount following production activities, the Corporation Commission should be available to modify the bond amount if good cause is shown. This would result in less litigation and more realistic surface damage awards.

Other comparisons with the Coal Reclamation Act point to further weaknesses of the Surface Damages Act. For example, the Surface Damages Act provides no remedy for a surface owner whose reclamation costs exceed the bond amount. In this scenario, the surface owner's remedy lies outside the Surface Damages Act in a nuisance, pollution, or other action through the district court. This involves even more expensive litigation. Thus, while oil and gas operations may not need the regulation involved with coal strip-mining operations, oil and gas operators clearly have more room to exert their superior positions over surface owners.259

Utilizing the Corporation Commission would allow for an independent appraisal while reducing the cost to the surface owner. This would alleviate the economic imbalance that currently favors operators. Thus, an existing agency with knowledge and expertise concerning the oil and gas industry could be utilized to cut costs to the surface owner while expediting the appraisal process and relieving the district court of oversight responsibilities.

V. Conclusion

Oklahoma's policy toward surface land has evolved from nonregulation and indifference. Prior to surface damage statutes, operators and producers could ignore reclamation costs if the costs were greater than the land's diminution in value. Thus, diminution in value costs were usually absorbed as a cost of doing business, to the detriment of adequate land reclamation. Currently, Oklahoma courts recognize that the surface land is an equally valuable resource as the minerals which lie underneath. Accordingly, when the surface is disturbed by mining or drilling operations to exploit mineral wealth, the surface damage statutes' policy is to restore the surface, as closely as possible, to its condition prior to mining or drilling operations. However, certain provisions within the Surface Damages Act frustrate this purpose.

The Coal Reclamation Act's continuous monitoring is a more accurate method to assess reclamation costs. However, this additional monitoring is required for coal strip-mining operations which disturb large amounts of the surface in a single mining operation. Conversely, continuous regulation is not required to monitor oil and gas drilling operations which use comparatively little of the surface and are considerably cheaper to reclaim. Moreover, surface damages resulting from oil and gas drilling procedures are more limited and predictable than damages resulting from large coal strip-mining operations. Accordingly, the degree of regulation to which coal strip-mining operations must be held is not applicable to oil and gas drilling operations.

259. See supra notes 222-29 and accompanying text.
However, in the case of the Surface Damages Act, if the original reclamation bond is insufficient to remedy surface damages, and the surface owner did not initiate the appraiser appointment provisions, the surface owner must pursue costly litigation to recover the necessary funds. Moreover, the surface owner's recovery is limited only to the diminution in the market value of the land. Consequently, oil and gas producers are in a superior economic position to extract favorable bargains and absorb litigation costs at the expense of adequate land reclamation.

The Surface Damages Act attempts to remedy this problem by threatening treble damages to operators who do not pursue the reclamation bond negotiations in good faith. However, the surface owner's burden in proving bad faith is so high that a surface owner's likelihood of prevailing on treble damages is remote. Thus, the Surface Damages Act should be modified to allow for flexibility in determining the amount of the reclamation bond and require that an operator's measure of damages be the cost of completing land reclamation. Employing the Corporation Commission to remedy the Surface Damages Act's flaws would level the bargaining position between surface owners and oil and gas producers, resulting in less litigation and more realistic surface damage awards.

Todd S. Hageman