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Oil and Gas: Legislative Damage to Surface Rights

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pretation may ease this burden by limiting liability through consideration of factors similar to those established in *Lucas v. Hamm*.[87]

The impact of the decision remains to be seen. More than likely, insurance premiums for attorney malpractice in the state will rise because of the permitted expansion of liability. If the increase proves to be substantial, legal fees may also increase to absorb the costs.

Bradford will be important for allowing recovery in tort by third party beneficiaries. It also will allow third persons to rely upon an attorney's opinion as long as the reliance can be reasonably foreseen by the attorney. It is this step that may prove to be too burdensome and an overexpansion of attorney negligence liability in Oklahoma.

Stephen M. Morris

Oil and Gas: Legislative Damage to Surface Rights

In 1859, E. L. Drake drilled the first producing oil well to a depth of 69½ feet. Only fifteen years ago a well drilled to 12,000 feet was considered extremely deep. Today, however, production from strata underlying the surface 20,000 to 25,000 feet is not uncommon. This raises the question of whether the law relating to the recovery of hydrocarbons should be expanded to match the technological growth experienced by the recovery oriented industries. Should judicial interpretation of recently enacted and preexisting legislation continue to encourage exploration, development, and production of hydrocarbons, or rather would a modest dissuasion be appropriate? This question, specifically limited to the substantive legal policies relating to an operator's right to surface usage, will be addressed in this note.

Oklahoma has been an integral part of the most extensive drilling operations in recent times.[1] Because of the substantial increase in activity, the Oklahoma legislature has deemed appropriate the enactment of special legislation in an attempt to redefine and expand the obligations of oil and gas operators with regard to liability for surface damage.

Title 52, Sections 318.2 to 318.9 of the Oklahoma Statutes (Supp. 1982) (hereafter referred to as the Surface Damage Act)[2] represents a radical and

87. 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821 (1961), *cert. denied*, 368 U.S. 987 (1962).

1. Statewide drilling permits increased from 7,335 in 1979 to 17,014 in 1982. Telephone interview with administrative staff member of the Oklahoma Corporation Commission (Oct. 13, 1982).

2. Act of June 2, 1982, ch. 341, 1982 Okla. Sess. Law Serv. 1062 (West). The Act was entitled:

> An act relating to oil and gas; defining terms; providing procedures for payment of surface damages in drilling for oil and gas; requiring bond or guaranteed letter of credit; providing for appointment and procedures of appraisers; specifying procedure to determine damages; providing for appeal; limiting construction of act; providing penalties; directing codification; providing severability; providing an operative date; and declaring an emergency.

unprecedented[3] mutation in the law relating to oil and gas. The controversial provisions of this Act constitute what is, in effect, a total repudiation of prior common law principles concerning an operator's privilege to make use of the surface incident to a drilling program. To ensure the payment of damages for surface use, the Act requires every operator doing business in Oklahoma to file a $25,000 corporate surety bond or letter of credit with the Secretary of State. Extensive notice, negotiation, and potentially burdensome appraisal procedures are also required.

It is contended here that legislative interference with such well-established rights is unwarranted. Modern lease forms, with their comprehensively itemized provisions,[4] minimize a number of surface damage-related difficulties. Moreover, most recurring problems emerge from the slow-moving judicial animal enforcing those rights rather than from the substantive law itself.

The purpose of this note is to afford the practicing Oklahoma attorney a readily ascertainable guide to assist in the comprehension of the newly enacted statutes.[5] There are five general categories: a historical perspective of surface damage, a summarization of the Act, a clarification of its ambiguities, an observation of the Act's practical realities, and a guide to successful operation.[6]

Common Law

The payment of damages for injury to the surface during drilling operations is a unique concept within the law.[7] A surface owner's request for remuneration is predicated not upon the wrongful conduct of the operator, as in tort, but rather upon injuries that are a natural and expected result of activities the operator has an absolute right to perform under a lease—drill for oil and gas.

Every mineral lease, by implication, creates a dominant estate in the minerals

3. Detailed research of existing statutes from all oil- and gas-producing states confirmed House Bill 1460 as being nationally unique. *But cf.* N.D. CENT. CODE §§ 38-11.1-01 to 38-11.1-10 (1980) (necessitating the payment of damages for diminution in land value and lost agricultural production and income); MONT. CODE ANN. §§ 82-10-501 to 82-10-511 (1981) (paralleling the North Dakota Act); S.D. COD. LAWS ANN. §§ 45-5A-1 to 45-5A-11 (1982) (also paralleling the North Dakota Act).

4. For example, the American Ass'n of Petroleum Landmen (AAPL) Form 670 provides:

> For the purpose of carrying on geological, geophysical and other exploratory work including core drilling, the right to enter upon said lands for such purposes without any additional payments, and for the purpose of drilling, mining and operating for, producing, and saving all of the oil, gas, casinghead gas, casinghead gasoline and all other gases and their respective constituent vapors, and constructing roads, laying pipe lines, building tanks, storing oil, building power stations, telephone lines and other structures thereon necessary or convenient for the economical operation of said land, to produce, save, take care of, and manufacture all of such substances, and also for housing and boarding employees. . . .

5. 52 OKLA. STAT. §§ 318.2-318.9 (Supp. 1982).

6. Because of its scope, the constitutionality of the Surface Damage Act will not be discussed. *See also* Note, *Oil and Gas: Surface Damages, Operators and the Oil and Gas Attorney*, 36 OKLA. L. REV. 414 (1983).

7. 4 E. KUNTZ, OIL AND GAS § 49.4 (1972).

and consequently a servient estate in the surface.[8] In addition, all oil- and gas-producing states have uniformly held, "*every oil and gas lease carries with it the right to possession of the surface to the extent reasonably necessary to enable the lessee to perform the obligations imposed upon him by the lease.*"[9] Though this statement appears to be relatively clear, it is difficult to apply. Specifically, what is a reasonable amount of the surface? Is one to infer this applies to what the surface owner considers reasonable or that which the operator deems reasonable? Perhaps this is a veiled attempt to employ the use of Professor William Prosser's "reasonable man" standard.[10]

"Surface damage"[11] has long escaped universal definition[12] or application.[13] Not only does the phrase connote various consequences from state to state,[14] it also differs as between parties to every leasing transaction.[15] Surface owners will always tend to use a more restrictive interpretation of reasonable surface use, while lessees and operators will construe it as generally as possible. Surface owners will construe it narrowly in order to be compensated for any damage beyond the limited scope of their definition. Consequently, however, operators will do just the opposite. They will encourage a definition so broad that any damage, however remote, will come within the boundaries of their interpretation. Fortunately, through years of litigation on this precise issue, the courts have given us a fairly determinative view of what comes within the ambit of surface damage.[16]

8. *See* Sellers, *How Dominant is the Dominant Estate? Or, Surface Damages Revisited*, 13TH OIL & GAS INST. 377 (1962).

9. Emphasis added. *Accord*, Gulf Oil Corp. v. Deese, 275 Ala. 178, 183, 153 So. 2d 614, 619 (1963); Costa Mesa Union School Dist. v. Security First Nat'l Bank, 254 Cal. App. 2d 4, 62 Cal. Rptr. 113, 118 (1967); Phoenix v. Graham, 349 Ill. App. 326, 330, 110 N.E.2d 669, 672 (1953); Kentland-Elkhorn Coal Co. v. Charles, 514 S.W.2d 659, 661 (Ky. 1974); Hawthorne Oil & Gas Corp. v. Continental Oil Co., 368 So. 2d 726, 737 (La. 1979); Central Oil Co. v. Shows, 246 Miss. 300, 308, 149 So. 2d 306, 310 (1963); Hunt Oil Co. v. Kerbaugh, 283 N.W.2d 131, 135 (N.D. 1979); Hinds v. Phillips Pet. Co., 591 P.2d 697, 699 (Okla. 1979); Pulaski Oil Co. v. Conner, 62 Okla. 211, 214, 162 P. 464, 466 (1916); Ottis v. Haas, 569 S.W.2d 508, 513 (Tex. 1978).

10. W. PROSSER, TORTS § 32 (1971).

11. This is often referred to within the industry as "location damage."

12. Ramage v. South Penn Oil Co., 94 W. Va. 81, 102-03, 118 S.E. 162, 171 (1923).

13. Caldwell-Guadalupe Pick-up Stations v. Gregg, 276 S.W. 342 (Tex. Civ. App. 1925) (reasonable surface use doctrine entitled lessee, to the exclusion of the lessor, to construct pick-up stations for the retention of escaping waste oil from his own wells); Gregg v. Caldwell-Guadalupe Pick-up Stations, 286 S.W. 1083 (Tex. Civ. App. 1926) (reversed and remanded previous case); Humphreys Oil Co. v. Liles, 277 S.W. 100 (Tex. Civ. App. 1925) (lessor may use or grant land to maintain pick-up stations, conditioned, however, that such use does not prevent the lessee from retaining the waste oil from his own wells or interfere with operations).

14. Wilcox Oil Co. v. Lawson, 341 P.2d 591 (Okla. 1959) (applying reasonable surface use doctrine to oil and gas production); Stamp v. Windsor Power House Coal Co., 154 W. Va. 578, 177 S.E. 146 (1970) (applying reasonable surface use doctrine to coal production).

15. Crop damage would be an obvious example. Unless crops were contiguous to the drilling operations where damage would be foreseen, the surface owner will most certainly object and request relief. However, absent leasing provisions specifically addressing crop damage, the operator will not be liable.

16. For a more extensive review of the law relating to surface damages, *see* Davis, *Selected*

Inherent in the rights of a dominant estate, lessees have an absolute right of ingress and egress[17] and consequently the right to build and maintain roads to and from each drill site, the right to construct slush pits, tanks, drainage ditches, salt-water ponds,[18] and housing for employees,[19] and are further entitled to remove their property, including casing, within a reasonable time after the expiration of the lease.[20] Therefore, notwithstanding negligent or wanton conduct[21] or special leasing provisions,[22] a lessee is not liable for damage to growing crops[23] or other injuries[24] necessarily incident to the drilling and continued operation of an oil or gas well. Because lessees generally subcontract actual drilling operations, this immunity from liability extends to all independent contractors and agents.[25] Furthermore, an assignment or sale of any part of the surface owner's interest will not serve to extinguish this right. The assignee or subsequent purchaser merely takes the interest subject to the previously acquired right of the lessee.[26]

In Oklahoma, an operator has no affirmative duty to restore the premises to their original condition upon cessation of drilling.[27] Although the mineral owner possesses the dominant estate, he may not blindly or willingly ignore the correlative rights of the surface owner,[28] nor may the surface owner interfere with the activities of the operator in carrying out his duties pursuant to the lease.[29] Even though the rights and liabilities of both estates are fairly

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Problems Regarding Lessee's Rights and Obligations to the Surface Owner, 8 ROCKY MTN. MIN. L. INST. 315 (1963); Lambert, *Surface Rights of the Oil and Gas Lessee*, 11 OKLA. L. REV. 373 (1958); Sellers, *supra* note 8.

17. Davon Drilling Co. v. Ginder, 467 P.2d 470, 472 (Okla. 1970).

18. *See* Indian Territory Illuminating Oil Co. v. Dunivant, 183 Okla. 233, 233, 80 P.2d 225, 226 (1938).

19. Mid-Continent Pet. Corp. v. Donelson, 189 Okla. 273, 274, 116 P.2d 721, 723 (1941).

20. Luttrell v. Parker Drilling Co., 341 P.2d 244, 246 (Okla. 1959).

21. *Id.*

22. In Phillips Pet. Co. v. Sheel, 206 Okla. 330, 331, 243 P.2d 726 (1952), the subject lease provided:

> During operations the lessee shall pay all damages for the use of the surface, other than that included in the location and tanksites, all damages to any growing crops or any improvements on the lands and all other damages as may be occasioned by reason of operations. Such damages shall be apportioned among the parties interested in the surface, whether as owner, lessee, or otherwise, as the parties may mutually agree or as their interest may appear. If the parties are unable to agree concerning damages, the same shall be determined by arbitration, but nothing herein contained shall be construed to deny the surface owner or lessee the right to appeal to the courts without the consent of the Secretary of the Interior, in the event he is dissatisfied with the amount of damages awarded him.

23. Wilcox Oil Co. v. Lawson, 341 P.2d 591, 594 (Okla. 1959).

24. *But cf.* Phillips Pet. Co. v. Sheel, 206 Okla. 330, 331, 243 P.2d 726, 728-29 (1952) (injury sustained by livestock considered not necessarily incident to operations).

25. Tenneco Oil Co. v. Allen, 515 P.2d 1391, 1398 (Okla. 1973).

26. Lone Star Producing Co. v. Jury, 445 P.2d 284, 287 (Okla. 1968).

27. Fox v. Cities Serv. Oil Co., 201 Okla. 17, 21, 200 P.2d 398, 401 (1948).

28. Tenneco Oil Co. v. Allen, 515 P.2d 1391, 1396-97 (Okla. 1973).

29. *Accord*, Luttrell v. Parker Drilling Co., 341 P.2d 244, 246 (Okla. 1959).

well defined, in unsettled areas the almost insurmountable burden of proving what is unreasonable rests squarely upon the shoulders of the surface owner.[30]

Oklahoma's Surface Damage Act

As of July 1, 1982, all Oklahoma common law principles of surface damage liability have undergone a de facto repeal by the Surface Damage Act.[31] In effect, the Act transposes the traditionally superior interest of the lessee/operator[32] with that of the subordinate surface owners, expanding the rights of the latter while restricting those of the former.[33] To aid thorough understanding, the statutes are summarized below. They are comprised of six major provisions: Bonding, notice, negotiations, appraisals, exceptions-jury trials, and damages.

Bonding

Every operator doing business in Oklahoma is required to file a corporate surety bond or letter of credit from a banking institution with the Secretary of State in the sum of $25,000.[34] The bonding company or bank must file a certificate regarding the status[35] of the letter or bond with the court clerk in each county where the operator is or will be drilling.[36] The bond or letter of credit must remain in full force during all drilling operations. Upon deposit of the bond or letter of credit,[37] the operator may enter and commence drilling.[38]

30. Cities Serv. Oil Co. v. Dacus, 325 P.2d 1035, 1036-37 (Okla. 1958).

31. Conversations with State Representative Vernon Dunn (D., House Dist. 51, Loco, Okla.) and State Senator Paul Taliaferro (D., Senate Dist. 31, Lawton, Okla.), the Act's principal authors, revealed the primary impetus for the legislation to be a general lack of respect on the part of operators with regard to the agricultural and ranching interests of their surface owners. Incident to his coauthorship, Representative Dunn stated he had personally experienced "difficulty" with operators moving equipment onto a drill site prior to notifying him of such intentions. Additionally, his constituents had informed him of operators claiming up to thirty-five acres as necessary for carrying out their operations.

When questioned concerning coercion from special interest groups, Senator Taliaferro commented that there had been no direct pressure from any one group, rather, that he had been morally supported by various organizations including but not limited to the Cattleman's Association, the Farm Bureau, and the Farmers' Union.

32. Throughout the remainder of this note, the terms "lessee" and "operator" will be used interchangeably.

33. See *supra* text accompanying notes 7-30.

34. The Act, as originally drafted, provided for a $25,000 bond to be posted in each and every county within which an operator intended to drill. Alternatively, to avoid the tremendous expense incurred while operating in several counties, a statewide bond in the sum of $200,000 could be posted that would exempt the depositor from the necessity of filing any additional bonds.

35. In full force and amount, pending litigation, insufficient or canceled.

36. No filing fee is required.

37. See generally the discussion *infra* regarding deposit in text accompanying notes 65-68.

38. See generally the discussion *infra* regarding entry in text accompanying notes 59-64.

Notice

Before entering the drill site,[39] an operator is required to give written notice, via certified mail, to all ascertainable surface owners of his intent to drill. The notice must specify the proposed location and approximate date of spudding.

In instances where there are non-state-resident surface tenants, non-state-resident surface owners, unknown heirs, imperfect titles, surface owners, or surface tenants whose whereabouts cannot be ascertained with reasonable diligence[40] (hereafter referred to as "unascertainables"), notice may be given by publication in the respective county newspaper qualified to publish legal notices pursuant to Title 25, Section 106 of the Oklahoma Statutes (1981).[41]

Negotiations

Within five days of service of notice, the operator and the surface owner must enter into negotiations to determine prospective surface damages. Upon agreement as to the amount of damage and after a written contract has been signed, the operator will be allowed entry.[42] If the agreed upon damages are in excess of the posted bond, the operator must pay the damages immediately or post an additional bond.[43]

Appraisers

If the operator and surface owner cannot agree to a reasonable amount of damages or if all surface owners cannot be contacted,[44] the operator must petition the district court to appoint appraisers to make recommendations to the parties and the court concerning proper damages.[45] Ten days' notice of the petition must be given to the opposite party.[46] Notice may be accomplished by personal service or by leaving a copy at the residence of the surface owner with any member of his family over fifteen years of age. In the case of unascertainables, notice may be published in the proper newspaper.[47]

39. *Id.*

40. *See* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950); Bomford v. Socony Mobil Oil Co., 440 P.2d 713 (Okla. 1968).

41. 25 OKLA. STAT. § 106 (1981), requires a "newspaper" to be published for a period of 104 consecutive weeks immediately prior to the publication of any legal notice, advertisement, or publication of any kind required or provided by any of the laws of the state of Oklahoma if such notice or advertisement is to be considered valid in a legal newspaper.

42. See generally the discussion *infra* regarding entry in text accompanying notes 59-64.

43. See generally the discussion *infra* regarding excess damages in text accompanying notes 69-70.

44. Presumably, surface owners does not include those who have been deemed "unascertainable." See *supra* text accompanying notes 39-41.

45. Petitions to appoint appraisers are to be filed with the district court clerk of the county within which drilling is to occur. 52 OKLA. STAT. § 318.5(A) (Supp. 1982).

46. See generally the discussion *infra* regarding notice in text accompanying notes 70-72.

47. See *supra* note 44.

Both the operator and the surface owner will be allowed to select one appraiser each. The third appraiser will be chosen by the two previously appointed appraisers. If an agreement cannot be reached concerning any one of the appraisers, the district court will select that appraiser. Prior to entering upon their duties, the court must administer an oath of impartiality to the appraisers. After petitioning for appraisers, the operator may enter the site to drill.[48] After an inspection of the property and within fifteen days of their appointment,[49] the appraisers are required to file a written report with the clerk of the district court. This report will specify quantity, boundaries, and value of the drill-site property. The appraisers will determine and report to the district court the amount and manner[50] of payment for damages.

Within ten days after receipt of the appraisers' report, the district court will forward to each attorney, each party, and any other interested party of record a copy of the report. The district court will determine the salaries of the appraisers and court costs, which will be divided equally between both parties.[51]

Exceptions—Jury Trial

With the copy of the appraisers' report will be a notice of time restrictions concerning the filing of an exception or a demand for a jury trial.

In an attempt to reach the unascertainables, the district court will forward a copy of the appraisers' report, combined with the notice of time restraints, to the last-known mailing address of each party and shall have published a copy of the notice in the proper county newspaper.[52] All exceptions must be made within thirty days of the filing of the appraisers' report. The time for filing an exception to the report or a demand for a jury trial will be calculated as commencing from the date the appraisers' report is filed. If the court clerk fails to give proper notice, a time extension may be requested by any interested party. An extension will not be less than twenty days from the date the application is heard by the court.

The district court has the power to confirm, reject, modify, or order a new appraisal. If a new appraisal is ordered, the operator has the right to enter the property subject to a continuance of a valid bond.[53] Appraisers' fees and court costs may be the subject of an exception. All demands for a jury trial must be made within sixty days of the filing of the appraisers' report. If the

48. See generally the discussion *infra* regarding entry in text accompanying notes 59-64.

49. Because the district court is under no time restraint concerning selection of a third appraiser, the effective date of appointment will be the time at which the final appraiser is chosen.

50. The legislatively appointed capacity of the appraisers to determing the manner of payment exceeds the scope and purpose of their duties and appears to bestow them with quasi-judicial powers.

51. Potential for abuse exists here. Why the Act does not allow for predetermined fees and expenses remains a point of bewilderment.

52. See *supra* note 44.

53. See generally the discussion *infra* regarding entry in text accompanying notes 59-64.

party demanding a jury does not recover a more favorable verdict, he will be assessed all court costs, including a reasonable attorney fee.[54]

Any aggrieved party may appeal the decision of the district court or the jury.[55] However, such an appeal will not be allowed to postpone or delay any work on the property, provided the award of the appraiser has been deposited.

Damages

The operator may be liable for treble damages if the surface owner can show by clear, cogent and convincing evidence that:

(1) The operator willfully and knowingly entered the land for the purpose of drilling before giving proper notice or without the agreement of the surface owner;[56]

(2) The operator willfully and knowingly failed to keep the bond or letter of credit posted; and

(3) The operator failed to agree upon damages and did not petition the district court to appoint appraisers.[57]

Recovery pursuant to this Act does not preclude collecting additional future damages.[58]

Scope and Effect

The Surface Damage Act is ambiguous. Because it has only been in effect since July of 1982, the courts have not had the opportunity to review and pronounce policies concerning its construction.

Of primary importance to both the operator and surface owner is the issue of exactly when an operator may enter a leasehold to commence drilling opera-

54. Representative Dunn distinguished this provision as an effort to discourage subterfuge and dilatory tactics.

55. This provision most likely will extend to working interest owners, but will not include royalty owners because of their nonparticipation in expenses.

56. 52 OKLA. STAT. § 318.9 (Supp. 1982) provides in part:

> Upon presentation of clear, cogent and convincing evidence that the operator willfully and knowingly entered upon the premises for the purpose of commencing the drilling of a well before giving notice of such entry or without the agreement of the surface owner, the court may, in a separate action, award treble damages. The issue of non-compliance shall be a fact question, determinable without a jury, . . .

This section is in conflict with state constitutional and statutory provisions for trial by jury. Article II, section 18 of the Oklahoma constitution states: "The right of trial by jury shall be, and remain inviolate, except in civil cases wherein the amount in controversy does not exceed One Hundred Dollars ($100.00), . . ."

12 OKLA. STAT. § 556 (1981) provides that "issues of fact arising in actions for the recovery of money, . . . shall be tried by a jury. . . ."

57. See generally the discussion *infra* regarding treble damages in text accompanying notes 73-77.

58. Presumably, this refers to damage that penetrates boundaries set by appraisers and does not reflect an intention to require further payment for actual damages which are in excess of estimates.

tions. The Act confusingly permits entry at five distinct times[59]:

1. Entry is permitted subsequent to notice of intent to drill being served;[60]
2. Entry is permitted upon the deposit or letter of credit;[61]
3. Entry is permitted after filing petition for appointment of appraisers;[62]
4. Entry is permitted subsequent to the execution of a written contract concerning the amount of damages;[63] and
5. Entry is permitted upon the district court's determination that the appraisal is both valid and appropriate and that a new appraisal is not warranted.[64]

Obviously, these provisions were not intended to be mutually exclusive but rather to be considered as comprehensive requirements, each addressing different fact situations. When appraisers are not required, entries 1, 2, and 4 should be applied cumulatively. Therefore, before entering, an operator should serve the surface owner with proper notice of an intent to drill, confirm the filing of a certificate regarding the status of the bond or letter of credit with the district court clerk, and execute a written contract referencing the agreed-upon damages.

When arbitration is required, the inference may be made that entry 5 disallows entry until the district court has had an opportunity to scrutinize the appraisers' report. However, because of the more specific wording of entry 3, the better view is to allow entry subsequent to the operator's petition to appoint appraisers.

Regarding entry, section 318.4(C) provides in part, "[u]pon deposit of the bond or letter of credit, the operator then shall be permitted entry. . . ."[65] However, the Act necessitates two separate "deposits": the operator's filing of a $25,000 corporate surety bond or letter of credit with the Secretary of State[66] and the bonding company's or the banking institution's duty to file a certificate regarding the present status of that bond or letter of credit in the office of the district court clerk of the county where drilling is to take place.[67] Neither requirement alludes to a deposit; therefore, to which "filing" does this section refer?

The specific reference to "deposit of bond or letter of credit" made in section 318.4(C),[68] without mention of the certificate, indicates that an operator is entitled to enter after depositing the specified sum with the Secretary of State. Upon more thorough review, however, this interpretation appears

59. Although not specifically defined within the text of the statutes, entry presumably refers to the movement of heavy or surface-damaging types of equipment onto a leasehold, and does not include entering for inspection purposes.

60. 52 OKLA. STAT. § 318.3 (Supp. 1982).

61. *Id.* § 318.4(C).

62. *Id.* § 318.5(A).

63. *Id.*

64. *Id.* § 318.5(F).

65. *Id.* § 318.4(C).

66. *Id.* § 318.4(A).

67. *Id.* § 318.4(B).

68. *Id.* § 318.4(C).

unreasonable. If the Act were to be construed as permitting entry subsequent to filing with the Secretary of State only, then what, if anything, would be the purpose of ever filing a certificate with the district court? It would not ensure a surface owner's damage recoupment and would be of no practical significance.

Therefore, the better view would be to consider both filings joint requirements. This would effectuate the Act's purpose more completely in that surface owners would be assured of compensation prior to the operator's entry.

In contemplation of agreed-upon damages that exceed the $25,000 bond or letter of credit, the Surface Damage Act requires the "operator . . . pay the damages immediately or post an additional bond or letter of credit sufficient to cover the damages."[69] Posting an additional bond is of no great significance; however, the Act is not clear whether the total amount of damage must be paid upon reaching an agreement or whether the excess of the original bond must be recompensed.

To construe this provision as requiring an operator to pay damages in full whenever they exceed $25,000 appears to establish an arbitrary one-cent distinction and reduce available working capital. Suppose the appraisal of prospective damage to Tract A is $25,000. Then suppose the damage appraisal of Tract B is $25,000.01. Should the operator on Tract B have to pay the entire amount of the appraisal while the operator on Tract A is obligated to do nothing? Such an inequitable result is not in keeping with the purpose of the Act. Though all too familiar with the colloquialism "you gotta draw the line somewhere," such wisdom should not be employed where unnecessary. Here, it is unnecessary. The best view is to interpret this provision as compelling only the immediate payment of those surface damages that are in excess of $25,000.

If entry is not permitted because negotiations have failed, the operator[70] who petitions the district court to appoint appraisers is required to give ten days' notice "of the petition" to the opposite party.[71] Unfortunately, this provision can be construed in two ways. Specifically, does the notice requirement place an affirmative duty upon the operator to serve the surface owner with notice of the intention to petition ten days before an appearance,[72] or is a ten-day period to follow filing the petition so that the surface owner may appoint one appraiser? Because no practical purpose would be served by requiring the operator to notify the surface owner ten days prior to petitioning, common sense would dictate that the surface owner has a ten-day period after notice has been served to appoint an appraiser.

Epitomizing the poor draftsmanship of the Surface Damage Act is section

69. *Id.* § 318.4(D).

70. Section 318.5(A) explicitly states: "the operator shall petition the district court." *Id.* § 318.5(A).

71. *Id.* § 318.5(B).

72. Simply filing a petition for the appointment of appraisers with the court clerk has not been allowed by the Oklahoma courts. Rather, the operator or his representative must appear before the district court for a hearing concerning the appointment and to choose their appraiser.

318.9[73]: Violation of Act—Damages. That section provides in part: "Any operator who willfully and knowingly . . . fails to come to an agreement and does not ask the court for appraisers, shall pay . . . treble damages to the surface owner." This provision raises the question of whether an operator's liability for treble damages is predicated upon failure to petition for the appointment of appraisers after negotiations with the surface owner have failed.

Surely this Act was not intended to limit an operator's right to abandon intentions of drilling if so desired. Even the most fertile legal imagination could not possibly justify a requirement that would compel operators to drill when they do not want to. Inevitably, situations will arise when, subsequent to beginning negotiations, economic necessities will force an operator to reevaluate and change a drilling program. Should such an occurrence expose one to treble liability? Certainly not. Moreover, because no actual harm has been done, it is difficult if not impossible to rationalize why a surface owner should be entitled to double recovery—treble damages now and compensation for surface damage by another operator later. Public policy demands that this proviso not be interpreted as to allow such an event. Most likely, the authors of the Surface Damage Act intended this passage to apply to situations where an operator entered after negotiations had failed but before requesting appraisers. In any event, the treble damage provisions of this Act must be used as a shield, not a sword.

Because of the severity of treble damages, the Act requires the surface owner to present "clear, cogent and convincing evidence" of an operator's disregard for its provisions.[74] This is a more exacting burden of persuasion[75] than the usual civil standard of "preponderance" and is used only in specific types of cases.[76] Courts and juries should take notice of this higher burden and not grant treble damages for mere clerical oversight or other inadvertent mistakes.[77]

Of less importance, because of its speculative basis, is whether the words "if any" contained in section 318.5(A)[78] of the Act are an obscure reference to the common law doctrine of "reasonable surface use."[79] Arguably, the inclusion of these two words signifies the authors' intent to leave the "reasonable surface use" principle intact. Theoretically, a reasonable use of

73. 52 OKLA. STAT. § 318.9 (Supp. 1982).

74. *Id.*

75. C. MCCORMICK, EVIDENCE § 340 (1972).

76. Fraud, undue influence, specific performance of oral contracts, oral contracts to make a will, etc.

77. Prior to this enactment, treble damages were not awarded. However, the meting out of exemplary damages for cases of willful or wanton misconduct on the part of the operator or lessee was authorized. Sunray DX Oil Co. v. Brown, 477 P.2d 67 (Okla. 1970).

78. Section 318.5(A) provides in part:

> If agreement is not reached, or if the operator is not able to contact all parties, the operator shall petition the district court in the county in which the drilling site is located for appointment of appraisers to make recommendations to the parties and to the court concerning the amount of damages, if any.

52 OKLA. STAT. § 318.5(A) (Supp. 1982).

79. See *supra* text accompanying notes 7-30.

the surface may still be implied in every lease, thus limiting the Act's applicability to damage occurring above and beyond the scope of reasonable operations.

Practically speaking, reliance on this interpretation could be quite hazardous. Although an encouraging thought, it appears that this clause is merely an erroneous reference to the overriding contractual ability of specifically itemized leasing agreements.[80] Its application should be restricted to situations where leases are absent surface damage provisions. If provided in a lease, a surface damage clause should take precedence over the negotiation and/or appraisal requirements, regardless of whether the Act ostensibly confers such rights upon the owner of a severed surface estate.[81]

When did the surface damage statutes become effective? Section 11 of the original Bill[82] provided for an effective date of July 1, 1982, but section 12 declared an emergency to exist, thus rendering the Act in "full force from and after its passage and approval." Governor George Nigh approved and signed the Act June 2, 1982.

The case of *Cities Service Oil Co. v. Oklahoma Tax Commission*[83] appears to be controlling. In that case, Cities Service sought to recover monies paid as mileage tax pursuant to the Motor Vehicle Mileage Act of 1937. The controversy involved the date upon which a repealing section of the Motor Vehicle License and Registration Act of 1939 was to take effect. The latter act repealed the former. The 1939 Act[84] contained inconsistent provisions for an operative date. An emergency clause would have the Act take effect April 18, 1939, while the operational clause provided for an effective date of January 1, 1940. If the emergency clause controlled, Cities Service would be entitled to a refund. Conversely, if the provision for an operative date took precedence, then no reimbursement was in order.

In deciding the case, the Oklahoma Supreme Court stated: "by adding the emergency, the Act becomes a law on approval in this state, but, by express provision, it may be held in abeyance until a specified time."[85] This holding indicates that the Surface Damage Act became a law on June 2, 1982, with its implementation postponed until July 1, 1982.

Probably the most pressing question involving the Act has yet to be discussed. Is it to affect only those leaseholds acquired subsequent to July 1, 1982,[86] or will it apply to all lands which have yet to be entered and damaged regardless of their leasing dates?[87]

80. See *supra* notes 4, 22 and text accompanying note 25.

81. "Nothing herein contained shall be construed to impair existing contractual rights nor shall it prohibit parties from contracting to establish correlative rights on the subject matter contained in this act." 52 OKLA. STAT. § 381.7 (Supp. 1982).

82. Okla. H.B. 1460 (1982).

83. 191 Okla. 303, 129 P.2d 597 (1942).

84. Motor Vehicle License and Registration Act (1939), *codified at* 47 OKLA. STAT. § 22-40.6 (1981).

85. Cities Serv. Oil Co. v. Oklahoma Tax Comm'n, 191 Okla. 303, 304, 129 P.2d 597, 599 (1942).

86. Okla. H.B. 1460, § 11 (1982).

87. Representative Dunn stated he was of the opinion the Surface Damage Act should apply

Generally, statutes are to be construed as having prospective operations unless the purpose and intention of the legislature to give them a retrospective effect is expressly declared or is necessarily implied from the language used.[88] Furthermore, "in every case of doubt, the doubt must be resolved against the retrospective effect."[89] However, if the provisions of a statute affect merely procedural processes, the statute evades the presumption favoring prospective operation and is said to apply retrospectively.[90]

In the recent case of *Wickham v. Gulf Oil Corp.*,[91] the Oklahoma Supreme Court decided whether the state's statutory Pugh clause[92] was to be applicable to leasehold interests acquired prior to the operative date of the statute. In that case, the court held it unnecessary for a statute to state expressly an intention to operate retrospectively if such an intent can be inferred by reviewing its purpose and method of enactment.[93] However, the court held a statute, absent express legislative intent, will not be applied retroactively if it alters the rights and duties under an existing contract or if the result would be to impair an obligation of a contract.[94] That decision parallels the Oklahoma constitutional provision that, "no . . . law impairing the obligation of contracts . . . shall ever be passed."[95]

The Act itself provides, "nothing herein shall be construed to impair existing contractual rights nor shall it prohibit parties from contracting to establish correlative rights on the subject matter contained in this act."[96] A retrospective application would destroy implied contractual rights regarding reasonable surface use,[97] thus negating any contention favoring such an application irrationally based upon the premise that its effect is merely procedural.[98] Such an impairment of rights would be of questionable validity under the Oklahoma and federal constitutions. Moreover, a close examination of the terminology contained within the Act reveals no wording either so clearly expressed or so imperative that a retrospective application is mandated or that it was written to reflect any implications that deem such operation necessary. Doubt does exist and, as previously stated, all doubts must be resolved against retroactive operation. The Act should be applied prospectively, affecting only those leaseholds acquired on or after July 1, 1982.

Assuming, arguendo, the Act operates retrospectively, the question arises

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to all leaseholds which have yet to be damaged. Senator Taliaferro revealed that when drafting the Act, he had no intentions of it operating retrospectively.

88. Benson v. Blair, 515 P.2d 1363, 1365 (Okla. 1973).

89. Wilbanks v. Wilbanks, 441 P.2d 967, 969 (Okla. 1968).

90. Oklahoma Water Resources Bd. v. Central Okla. Master Conservancy Dist., 464 P.2d 748, 756 (Okla. 1969).

91. 623 P.2d 613 (Okla. 1981).

92. 52 OKLA. STAT. § 87.1(b) (1981).

93. Wickham v. Gulf Oil Corp., 623 P.2d 613, 616 (Okla. 1981).

94. *Id.*

95. OKLA. CONST. art. 2, § 15.

96. 52 OKLA. STAT. § 318.7 (Supp. 1982).

97. See *supra* text accompanying notes 7-30.

98. MFA Ins. Co. v. Hankins, 610 P.2d 785, 787-88 (Okla. 1980).

whether coverage pertains to the actual date of entry or simply the effective date of the Act. The use of hypothetical situations will illustrate the four possible situations. All examples presume no agreement for surface damage exists between the surface owner and the operator.

1. *X* executes a lease in favor of *Y* on March 28, 1982. *Y* completes operations on June 1, 1982.

Obviously, *Y* cannot be held liable for damages pursuant to the Act because both the leasing transaction and the damage occurred prior to the operative date of the Act.

2. *X* executes a lease in favor of *Y* on March 28, 1982. *Y* commences drilling on June 1, 1982, but does not complete operations by July 1, 1982.

This situation presents a much more difficult problem. Using common sense, one deduces it would be impossible to adhere to the notice and negotiation provisions of the Act. However, ample opportunity exists for a damage appraisal and the filing of a bond or letter of credit.

The Act requires every operator doing business within the state to file a bond or letter of credit and imposes liability for treble damages for those who do not.[99] Therefore, the prudent thing to do, irrespective of when entry is made, is to promptly file the bond or letter of credit with the Secretary of State.

It is more difficult to determine whether an appraisal is required. The Surface Damage Act expressly provides for appraisal subsequent to entry,[100] conditioned, however, on a maximum time limitation of fifteen days. Should the hypothetical situation be distinguished from the post-entry appraisal allowance, or should appraisals be required in all instances where drilling overlaps the Act's operative date?[101] Because the intent of this Act is to ascertain the amount of damage prior to or within a limited time after it occurs, requiring appraisals on drill sites where activity is substantially underway would be inconsistent with its purpose.

The best view of this situation would be to compel adherence to appraisal provisions only when entry has been made subsequent to July 1, 1982. This view enunciates the principle that the date of entry should be the controlling factor of the Act's retrospective applicability.

3. *X* executes a lease in favor of *Y* on March 28, 1982. *Y* commences drilling on August 1, 1982.

Applying the principle stated above, an operator entering after the operative date of the Act will be subject to all its provisions. This is so because the opportunity to effectuate its express purpose exists.

4. *X* executes a lease in favor of *Y* on August 1, 1982. *Y* commences operations thereafter.

Because both the leasing date and damage occurred subsequent to the operative date of the Act, an operator must conform to all its provisions.

99. 52 OKLA. STAT. § 318.9 (Supp. 1982).

100. Entry permitted after petitioning for the appointment of appraisers.

101. The effective date of the Act was July 1, 1982.

In instances where the lessor and surface owner are one and the same, a situation arises where as partial consideration for the lease, the lessee increased the royalty or bonus in lieu of providing for the payment of surface damages. If such an occurrence can be proved by comparing bonuses and royalties paid for nearby leases, an operator should be exempt from the requirements of the Act other than posting a bond or letter of credit.

The most immediate result of this legislation has been to strain the already tenuous surface owner-operator relationship. In the past, the best interest of operators has been served by sustaining amicable relationships with surface owners. Operators with poor surface owner relations have occasionally found themselves obstructed from getting to a drill site or carrying on operations upon arrival by an angry landowner.[102] What was best for the surface owner was also best for the operator. This resulted in a mutually agreeable compensation.

Now, however, the table has turned. The Surface Damage Act effectively places operators and surface owners in adversary positions. Although it requires "good faith negotiations,"[103] an operator who does not care to waste time may simply claim that good faith negotiations had occurred, petition for the appointment of appraisers, and move in. Certainly this will frustrate surface owners. Additionally, as a result of being permitted entry after petitioning, operators should be indifferent as to whether the case is ever heard—they already have what they want, again incensing surface owners. Developing this "bad blood" between the two parties cannot be healthy for either. Somewhat drastic retaliation should not be an unexpected result. Surely, situating operators and surface owners in such combative positions was not the intention of this Act. However, it is the result. In the best interest of all concerned, serious consideration should be given to its repeal.

In a final effort to help clarify these statutes,[104] a proposed guideline to be followed prior to entering any leasehold will be offered.

1. If negotiating the original lease:

A. By all means, endeavor to specifically itemize any matter which could be subsequently construed as surface damage, and;

2. If operating pursuant to preexisting lease:

A. Deposit the required bond or letter of credit with the Secretary of State;

B. Confirm the filing of a certificate regarding the present status of your bond or letter of credit with the court clerk in the county of the proposed well;

C. Give proper notice to all surface owners;

D. Within five days of service of notice, negotiate surface damages with the surface owner(s);

102. Surface owners armed with shotguns greeting drilling rigs at the front gate is not an uncommon tale.

103. 52 OKLA. STAT. § 318.3 (Supp. 1982).

104. *Id.* § 318.2-.9.