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# Oil and Gas: Ownership and Use of Abandoned Oil Well Casing When the Surface and Mineral Estates Have Been Severed

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showing of unconscionable or inequitable conduct by the lender toward the party seeking to avoid enforcement.

(5) The exercise of an option to accelerate under an escalation clause is inherently valid as an enforceable contract right; further, such an exercise need meet no test of "reasonableness."[109]

It is hoped that the Oklahoma Supreme Court will recognize the advantages to be gained (and the problems to be avoided) by adopting the above principles. The citizens of this state, and perhaps especially the community of potential borrowers, stand to gain as much as the institutional lender from favorable treatment of due-on-sale clauses.

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## Oil and Gas: Ownership and Use of Abandoned Oil Well Casing When the Surface and Mineral Estates Have Been Severed

Upon termination or abandonment of an oil and gas lease,[1] where the lessee previously has drilled an oil well, the lessee has the right to remove his drilling equipment from the premises. The extent of this right is determined by a removal of equipment clause in the lease[2] or, in the absence of such a clause, by the law relating to trade fixtures, which permits the lessee to remove equipment within a reasonable time after the lease terminates.[3] The oil well casing itself is regarded as part of the lessee's equipment. It is composed of the wide diameter surface casing, which, by law, must extend below the water table, and the narrower production casing, which usually extends the depth of the well bore.[4] The oil and gas lessee is under no obligation to

[109] Lenders will obviously want to protect their interests by using escalation language in conjunction with a due-on-sale clause.

[1] An oil and gas lease may terminate for a number of reasons including failure to make timely payment of delay rentals or shut in royalties, cessation of production, or lack of production when the lease term expires. Perhaps the most common cause of termination occurs when the producing formation has been exhausted and drilling to a deeper oil-bearing formation is at the time unprofitable.

[2] 4 E. KUNTZ, OIL AND GAS § 50.3(d) (1972) [hereinafter cited as KUNTZ]: "The most common form of the removal of equipment clause extends to the lessee the right to remove equipment 'at any time'." However, this phrase "has been construed to mean within a reasonable time after termination or abandonment of the lease." "What constitutes a reasonable time is determined in the light of all of the surrounding circumstances and is not determined by the passage of time alone."

[3] *Id.*

[4] Okla. Corp. Comm'n: Oil & Gas Rules, R. 3-206(b) (1980): "Suitable and sufficient surface casing or a stage collar shall be installed to a depth of at least 50 feet below the surface or a depth of 50 feet below all fresh water strata encountered in the well, whichever is deeper. . . ." *See also* Note, *The Expanding Liability for the Improper Plugging of Oil and Gas Wells in*

pull the casing, and frequently, after the lease is terminated or abandoned, the lessee will either by intent or by omission fail to exercise his right to remove the casing from the premises within a reasonable time. Consequently, the lessee loses his right in the casing.[5]

If this occurs and the mineral and surface estates previously have been severed, the surface owner and the mineral owner may question who has the right to salvage value of the casing. Furthermore, if the casing is never salvaged, they may question who has the right to its use. The surface owner may wish to utilize the surface casing as a water well. (This can be accomplished by plugging the well just below a fresh water formation and perforating the casing in the water-bearing zone.) The mineral owner may have granted a new oil and gas lease and the new lessee may wish to re-enter and rework the old well, using the abandoned casing in drilling to a deeper oil-bearing formation which, at current crude oil prices, now would be profitable to produce. The possibility of using the bore for waterflood operations also exists if the lessee has other oil wells on the same tract or unit.

No jurisdiction has addressed this issue. However, Oklahoma case law states that oil well casing left embedded in the ground is a trade fixture that, after the lessee's reasonable time of removal has elapsed, becomes part of the realty, thus vesting title in the "landowner."[6] The question of who is a "landowner" remains unresolved, at least in determining ownership of casing when the mineral and surface interests are severed.

The first part of this note will examine Oklahoma law and the nature of the two severed interests in an attempt to determine where title to the casing (and consequently the rights to its salvage value) should vest. Of more importance, however, is the situation where the casing has been left in the ground, the surface owner is using it as a water well, and the mineral owner now wishes to use the bore to drill to a deeper formation. Can the mineral owner require the surface owner to provide him the exclusive use of the well? Conversely, does the surface owner have the right to charge a fee for the use of the hole and casing by a new oil and gas lessee?

Although no oil and gas cases address this point, an analogy may be made to mining law, where similar cases have arisen regarding the severed mineral interest's ownership of coal tunnels.[7] It has been held that as long as

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*Oklahoma*, 29 OKLA. L. REV. 763 (1976). Surface casing is set and cemented in place and provides protection for fresh water formations above the producing zone. It also prevents loose shale and sand or gravel from falling into the hole and affords a means for controlling the flow of fluid from the well. Setting depths may vary from 500 feet to 5,000 feet. The production casing is set either near or completely through the potential pay zone. FUNDAMENTALS OF PETROLEUM 134-35 (2d ed. 1981). Depending upon the quality and weight of the casing, the cost of casing today ranges approximately from $15 to $25 per foot of production casing, and from $20 to $45 per foot of surface casing. Although used and reconditioned casing usually sells at new equipment prices, it is worth substantially less in the ground because of high salvage costs.

[5] Garr-Woolley v. Martin, 579 P.2d 206 (Okla. Ct. App. 1978). *See also* 4 KUNTZ, *supra* note 2, § 50.3(c) (1972).

[6] Garr-Woolley v. Martin, 579 P.2d 206 (Okla. Ct. App. 1978).

[7] Moore v. Indian Camp Coal Co., 75 Ohio St. 493, 80 N.E. 6 (1907); Kormuth v. United States Steel Co., 379 Pa. 365, 108 A.2d 907 (1954), *cert. denied*, 349 U.S. 911 (1955);

the coal seam has not been exhausted, the mineral owner owns the passageways that he or his grantees have excavated.[8] This analogy supports the second part of this note, which advocates that the application of a similar policy in oil and gas law is not only appropriate but also consistent with well-established laws regarding the frequent rivalry between surface and mineral interests.[9]

### *Technological Considerations*

Most states have statutes requiring plugging of abandoned oil wells.[10] Lessees, however, are reluctant to plug wells because old wells may be valuable to a new operator or may become valuable for secondary or tertiary recovery projects.[11] Thus, the original lessee may plug his well only to the extent necessary to prevent seepage of oil or gas from the bottom of the well. This is significant because a new lessee easily can drill out a partial plug, but it is impractical in most circumstances to drill out a complete plug. However, if the casing is pulled for its salvage value, this usually cannot be accomplished without exploding the casing in the bottom of the hole away from the cement plug. If the casing is so removed, the well bore will be destroyed.[12]

### *Salvage Rights*

In *Garr-Woolley v. Martin*,[13] the Oklahoma Court of Appeals held that an oil and gas lessee forfeits casing left in the ground beyond a reasonable time for removal. The casing thus becomes part of the realty and title vests in the owner of the fee.[14] This conclusion also was reached by the Court of Appeals for the Tenth Circuit in *Gutierrez v. Davis*.[15] The court reasoned that oil well casings are trade fixtures[16] and, as objects embedded in the land, are by statutory definition real property belonging to the "landowner."[17]

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Webber v. Vogel, 189 Pa. 156, 42 A. 4 (1899); Lillibridge v. Lackawanna Coal Co., 143 Pa. 293, 22 A. 1035 (1891).

[8] See cases cited in note 7 *supra*. *But see* Clayborn v. Camilla Red Ash Coal Co., 128 Va. 383, 105 S.E. 117 (1920).

[9] For a recent comprehensive discussion of the relationship between oil and gas lessees and surface owners, *see* Gray, *A New Appraisal of the Rights of Lessees Under Oil and Gas Leases to Use and Occupy the Surface*, 20 ROCKY MT. MIN. L. INST. 227 (1975). This article also contains an exhaustive list of other articles, comments, and notes addressing the same subject. *Id.* at 228-29 nn.3, 4, & 5.

[10] Douglass, *The Obligations of Lessees and Others to Plug and Abandon Oil and Gas Wells*, 25 OIL & GAS INST. 123, 138 (1974). In Oklahoma, *see* Okla. Corp. Comm'n: Oil & Gas Rules, R. 3-400 through 3-409 (1980).

[11] Douglass, *supra* note 9, at 145.

[12] Eubank v. Twin Mountain Oil Corp. 406 S.W.2d 789, 791 (Tex. Civ. App. 1966).

[13] 579 P.2d 206 (Okla. Ct. App. 1978).

[14] *Id.* at 208.

[15] 618 F.2d 700 (10th Cir. 1980).

[16] *Id.* at 702, *citing* Luttrell v. Parker Drilling Co., 341 P.2d 244, 246 (Okla. 1959).

[17] *Id.* at 702, *citing* Garr-Woolley v. Martin, 579 P.2d 206 (Okla. Ct. App. 1978), and 60 OKLA. STAT. §§ 5, 7 (1971).

In both cases, the "landowner" owned the entire fee. However, where the surface and mineral estates are severed, it is still possible to determine who owns the casing. Oklahoma authority indicates that the mineral owner has only a *profit a prendre* (an incorporeal hereditament) and does not own any of the oil and gas in place.[18] In jurisdictions adopting the theory of "ownership in place," the mineral owner owns only the oil and gas below the surface and does not own the containing strata.[19] Therefore, if the reasoning presented in *Garr-Woolley* and *Gutierrez* is applied along with the principles of Oklahoma property law, the surface owner, who owns all of the soil below the surface, also owns the abandoned casing since by operation of law, it becomes real property.

### *Right To Use the Casing in the Ground*

#### *Oklahoma Law*

While *Gutierrez* aids in determining who owns abandoned casing, the principal question in that case was whether a lessor, who owned both the surface and mineral estates, could maintain a conversion action against lessees who drilled through a concrete plug in the casing of an abandoned oil well and who, after failing to find oil, replugged the hole without either removing or harming any part of the casing.[20] Relying upon Oklahoma case law, which holds that the tort of conversion will lie only for wrongful deprivation of personal property,[21] the court found the rule also would apply to deny an action for conversion of fixtures (oil well casing) not severed from the real estate.[22] Furthermore, the defendant's lease gave him the right to use the land for "the purpose of exploring . . . mining and operating for oil" and other minerals.[23] The court construed this provision to give the lessee "the right to drill through *any part of the real estate including the plug and casing* of the abandoned well" when it was a reasonable use within the stated purpose.[24] In *Gutierrez*, the court awarded no damages because: (1) a conversion action in Oklahoma applies only to personal property, whereas the casing was real property; (2) the lessee left the casing in the same condition as he found it; and, (3) the mineral lease conferred upon the lessee the right to drill through any part of the real estate, including the plug and casing, if it was a

[18] 1 KUNTZ, *supra* note 2, § 2.4 (1962) (Oklahoma adheres to the "exclusive right to take" theory of ownership).

[19] *Id.*

[20] Gutierrez v. Davis, 618 F.2d 700, 701-702 (10th Cir. 1980).

[21] *Id.* at 702, *citing* Davidson v. First State Bank & Trust Co., Yale, 559 P.2d 1228, 1231 (Okla. 1976); Benton v. Ortenberger, 371 P.2d 715, 716 (Okla. 1962).

[22] *Id.*, *citing* Etchen v. Ferguson, 59 Okla. 253, 159 P. 306, 308 (1916).

[23] *Id.*

[24] *See also* 1 WILLIAMS & MEYERS, OIL AND GAS LAW § 222 at 333 (1980): "We urge . . . adoption of the view that the mineral severance should be construed as granting exclusive rights to subterranean strata for all purposes relating to minerals . . . absent contrary language in the instrument severing such minerals."

reasonable use of the surface.[25] A broad interpretation would permit a mineral owner or his lessee to use abandoned casing in place with no financial obligation to the surface owner.

However, *Gutierrez* does not address situations in which the surface owner wishes to exercise his rights of ownership in the casing at the *same time* the mineral owner or his lessee wishes to drill. Then, two questions arise: whether the surface owner can charge the lessee for his use of the casing and whether he can deny the lessee use of the casing in order to pull it for the salvage value, thus destroying the bore.

*Principles of Mining Law Applied To Oil and Gas Law*

A similar situation frequently arises in mining law when the surface owner attempts to prohibit the mineral owner from using previously excavated tunnel passages for transporting coal from adjoining tracts. This situation bears such a strong resemblance to the abandoned casing problem as to be analogous.

In coal mining the severed mineral owner traditionally owns a bed or a seam of coal. Unlike oil and gas, coal is not a fugitive substance. The quantity and location of coal in a seam therefore reasonably can be ascertained for conveyance purposes.[26] The mineral owner has a fee simple in the coal seam, determinable only upon complete exhaustion of the seam.[27] Where there are no restrictions, reservations, or exceptions in the grant creating the mineral interest, the space left by removal of coal and by removal of as much surrounding strata as reasonably may be required for the mining operation remains the mine owner's property until exhaustion of the seam. It may be used by him as he sees fit, provided no unnecessary surface injury results.[28] When the seam is exhausted, the space the coal occupied reverts to the owner of the surface by operation of law.[29] If these principles are applied to oil and gas law, the mineral owner would be able to assert a right to use the space in existing wells, which he or his lessees have created, to recover oil and gas from the land.

While this analogy appears to be consistent with regard to mining law and oil and gas law, it should not be applied without a showing of compatibility and consistency in the property principles underlying each area. That is, the reason courts allow the coal owner's ownership of underground passageways must also serve as the proper reason for allowing the oil and gas owner to use existing wells. Upon such a showing, courts should encounter little difficulty in applying mining principles to oil and gas law.

[25] *Id.* at 701-702. *But see* Biggs v. Tallent, 539 S.W.2d 288 (Ky. 1976).

[26] Coal seams vary in width from several inches to several feet. The width of a seam varies with each formation and is limited by rock walls on each side. Coal seams also vary in length. 58 C.J.S. *Mines and Minerals* § 3(b) (1948).

[27] *Id.* § 162(a).

[28] Moore v. Indian Camp Coal Co., 75 Ohio St. 493, 80 N.E. 6 (1907).

[29] *Id.*

Most mining decisions considering ownership of underground passageways revolve around the mineral owner's right to use the passageways to transport coal from adjacent mines under different lands wherein the mineral owner owns additional mineral rights. The first and leading American case addressing this issue is *Lillibridge v. Lackawanna Coal Co.*,[30] decided by the Pennsylvania Supreme Court in 1891. The mineral owner had carved out a passageway 200 feet below the surface through and completely contained by his vein of coal. He used the tunnel to transport coal from his mines underlying nearby lands and to bring coal to the surface on adjacent lands he also owned. The court rejected the surface owner's contention that the fee in such spaces remained with the surface estate subject merely to an easement for removal of minerals. Instead, it held that the mineral owner, in addition to owning the coal seam, also owns the spaces left by removal of coal and, so long as specific damage to the surface is not caused, he may use such spaces for any purposes he sees fit.[31] Since the coal in the seam is a corporeal substance, the court reasoned, the mineral owner had a fee simple in the seam that was determinable upon exhaustion. Accordingly, since the mineral owner owned the coal in place in fee, he also owned the space left by removal of the coal.[32]

The Pennsylvania court's reasoning in *Lillibridge* was followed in *Moore v. Indian Camp Coal Co.*,[33] wherein the Ohio Supreme Court held that it would be illogical, impracticable, and unjust to rule that the empty space created by removal of coal reverts to the surface owner as soon as the coal is removed.[34] In relation to oil and gas law, the most significant aspect of *Moore* deals with actual excavations made by the mineral owner in mining his coal. The coal seam averaged only four feet in width, and the mineral owner had to remove some of the containing strata to create necessary headway for working the mine.[35] The court found he owned the passageway and could use it in transporting coal from other lands, even though the passage was not, strictly speaking, space remaining after removal of coal.[36] The court reasoned that the grant of a fee simple determinable estate in a mineral "necessarily implies the right to use or remove such portions of the containing strata as may be necessary or proper for the convenient and proper removal of the mineral itself" with, of course, regard for the surface owner's right of subjacent support.[37]

[30] 143 Pa. 293, 22 A. 1035 (1891).

[31] *Id.* at 308, 22 A. at 1037-39. The Court of Appeals for the Eighth Circuit noted its acceptance of this rule in deciding a federal district case from Oklahoma. Sharum v. Whitehead Coal Mining Co., 223 F. 282, 290 (8th Cir. 1915).

[32] *Id.* at 301, 22 A. at 1036-37.

[33] 75 Ohio St. 493, 80 N.E. 6 (1907).

[34] *Id.* at 500, 80 N.E. at 8.

[35] *Id.*, 80 N.E. at 7.

[36] *Id.* at 500-501, 80 N.E. at 8.

[37] *Id.* at 499, 80 N.E. at 7.

In *Kormuth v. United States Steel Co.*,[38] the mineral owner owned a coal seam that undulated so sharply that for a short segment the owner had to deviate from the seam for the purpose of constructing a haulage road of a uniform and safe grade.[39] Rejecting the surface owner's contention that this was not, strictly speaking, a space made by removal of coal, the court held that the deviation was "a proper exercise of right and one that was necessarily contemplated by the very purposes of the grant."[40] The court further declared that the mineral owner did no more than was customary, proper, and necessary for mining and removing coal and constructing a haulage way.[41]

The Pennsylvania court in *Lillibridge*[42] narrowly based its decision on the fact that the mineral owner's interest was a corporeal hereditament, that is, the mineral was actually owned in place. However, *Moore*[43] and *Kormuth*,[44] in following the *Lillibridge* doctrine, relied on the implied rights of mineral owners in determining ownership of tunnel space. The two cases hold that when removal of strata is necessary for convenient and proper removal of the mineral itself, the resulting space will belong to the mineral owner.[45] The removal of strata resulting from drilling for oil is necessary for convenient and proper removal of oil. With respect to jurisdictions in which ownership of oil and gas is recognized as a corporeal hereditament, an application of the foregoing mining principles would indicate that both the space in the well bore created by the drilling process and the casing that holds the bore intact would be available for the mineral owner's use in additional drilling or in secondary recovery operations.[46] The West Virginia Supreme Court addressed the mining law analogy in *Tate v. United Fuel Gas Co.*[47] In that case, the plaintiff surface owner sought an injunction against the defendant mineral owner's use of a limestone stratum for gas storage. The mineral owner attempted to make an analogy, similar to that set out in this note, with regard to his use of the stratum. He was unsuccessful, though, because, according to the pleadings, the stratum had been completely exhausted. The

[38] 379 Pa. 365, 108 A.2d 907 (1954), *cert. denied*, 349 U.S. 911 (1955).

[39] *Id.* at 373, 108 A.2d at 911.

[40] *Id.*

[41] *Id.*

[42] Lillibridge v. Lackawanna Coal Co., 193 Pa. 293, 22 A. 1035 (1891).

[43] Moore v. Indiana Camp Coal Co., 75 Ohio St. 493, 80 N.E. 6 (1907).

[44] Kormuth v. United States Steel Co., 379 Pa. 365, 108 A.2d 907 (1954), *cert. denied*, 349 U.S. 911 (1955).

[45] See text accompanying notes 28-41 *supra*.

[46] The proposed analogy seems to draw partial support, at least in principle, from Professor Kuntz, who believes that it is apparent that exhausted sands and cavities created by the extraction of oil and gas may be utilized by the mineral owner in the process of removing any recoverable minerals. He states: "[o]wners engaged in secondary recovery operations make such assumption." 1 KUNTZ, *supra* note 2, § 2.6 (1962).

[47] 137 W. Va. 272, 71 S.E.2d 65 (1952). *See also* Comment, 55 W. VA. L. REV. 72 (1952-53).

West Virginia court, however, did not reject the analogy nor its theoretical basis, intimating that in a more appropriate factual situation the analogy indeed would be applicable.[48]

*Theories of Ownership*

Conflicting theories of ownership of oil and gas[49] may pose difficulties in analogizing mining law to oil and gas law. The ownership of oil and gas in place is conceptually compatible with the ownership of solid minerals. Both are considered corporeal hereditaments. Jurisdictions treating ownership of oil and gas as a corporeal hereditament thus will be able to apply the analogy on a theoretical basis, if not on a practical one.

In nonownership jurisdictions, such as Oklahoma, where the mineral interest is considered a *profit a prendre*, the analogy also may be supported. In *Clayborn v. Camilla Red Ash Coal Co.*,[50] the court rejected the majority rule which accords the mineral owner the right to use underground passageways opened by removal of granted minerals in transporting other minerals from adjacent tracts. The court held that although the mineral grantee had a corporeal interest in the coal seam, he never had such an estate in the containing walls.[51] However, the conveyance carried the "necessary incidental easement to use the containing walls for support and for the purpose of getting it out, just as it carries the right to sink a shaft or drive an opening when necessary upon and through the surface to reach and remove the coal."[52] So long as the granted coal seam was not exhausted, the mineral

[48] *Id.* at 282, 71 S.E.2d at 71. "The case of *Lillibridge v. Lackawanna Coal Co.* . . . has been substantially limited by subsequent decisions to the effect that so long as there remain recoverable minerals which are mined in good faith, the space may be used by the owner of the minerals. . . . An entirely different factual situation is presented . . . in this case. . . . [T]he allegations of the bill of complaint, being treated as true, are to the effect that there are no recoverable minerals in the Big Lime stratum. Under the rule of the cases cited, we do not think the individual defendants . . . have a right to use the space in the Big Lime stratum, if any such space exists." *Id. But cf.* Emeny v. United States, 412 F.2d 1319 (Ct. Cl. 1969).

[49] According to Professor Kuntz, theories of ownership represent little more than acceptable methods of describing ownership in light of the law of capture. Two theories of ownership of oil and gas exist. They are: "ownership in place" and "exclusive right to take." The two theories may also be referred to as the "ownership" and "nonownership" theories. (However, "nonownership" does not indicate the absence of property rights.)

Professor Kuntz explains the distinction thus: "According to the ownership-in-place theory, the landowner owns all substances, including oil and gas, which underlie his land. Such ownership is qualified, however, in the case of oil and gas, by the operation of the law of capture. If the oil and gas depart from beneath the owned land, ownership in such substances is lost.

"According to the exclusive-right-to-take theory, the landowner does not own the oil and gas which underlie his land. He merely has the exclusive right to capture such substances by operations on his land. Once reduced to dominion and control, such substances become the object of absolute ownership, but, until capture, the property right is described as an exclusive right to capture." 4 KUNTZ, *supra* note 2, § 2.4.

[50] 128 Va. 383, 105 S.E. 117 (1920).

[51] *Id.* at 390, 105 S.E. at 119.

[52] *Id.*

owner possessed an easement of way through and support of the granted coal.

The rule stated in *Clayborn* that the mineral owner has an absolute right to *use* spaces he has created, so long as he mines his own coal, is applied easily to the owner of a *profit a prendre* in oil and gas. He should be able to use and control spaces created by drilling for oil and gas as long as he owns the mineral fee. The ability to exercise this right necessarily implies that the casing must be left in place in the well bore.

### *Practical Applications*

The foregoing discussion can be helpful to the mineral owner and his lessee in three situations.[53] The first situation exists when the surface owner is willing to leave the casing in the bore so that it can be reused in drilling but also wishes to charge the mineral owner for its use. If the mineral owner's rights are such that the space in the well bore must be preserved, he cannot be charged for use of the casing. Furthermore, the Court of Appeals for the Tenth Circuit in *Gutierrez v. Davis*,[54] stated that the lessee's use of abandoned casing is a reasonable use of the surface where such right is implied in the oil and gas lease. If this is so, the lessee's use of the casing can be equated with his implied right to reasonable use of the surface owner's water and to as much of the surface owner's land as is necessary to maintain a drill site. Because the lessee is not required to pay the surface owner for these uses, he should not be required to pay the surface owner for use of the casing.

The second situation occurs when the surface owner decides to pull the casing for its salvage value just as the mineral owner is about to commence drilling operations. In that instance, the mineral owner might want to enjoin the surface owner from pulling the casing. An application of the analogy could support an injunction.

A third situation arises where the mineral owner wants to drill through the casing but the surface owner already has put it to use, for example, as a water well. A solution lies in working out an accommodation which preserves for the severed mineral owner or his lessee a reasonable dominant easement for the production of minerals, while at the same time preserving a viable servient estate.[55] A case in point is *Getty Oil Co. v. Jones*.[56] In 1955 plaintiff Jones bought a large tract of land that was subject to prior mineral interests

[53] Since the rights of the oil and gas lessee derive from those of the mineral owner, the above arguments will apply with equal force in favor of the lessee should he be involved in a dispute with the surface owner.

[54] 618 F.2d 700 (10th Cir. 1980).

[55] Paraphrasing a portion of Justice Daniel's dissent, Sun Oil Co. v. Whitaker, 483 S.W.2d 808, 817 (Tex. 1972).

[56] 470 S.W.2d 618 (Tex. 1971), *aff'd on reh.*, 470 S.W.2d 627. *See also* Note, *Determination Whether A Land Use By A Mineral Lessee Is Reasonably Necessary Requires Consideration Of Alternate Methods Of Development Available to a Lessee And A Surface Owner*, 50 TEX. L. REV. 806 (1972).

in which he acquired no interest. Jones used the land primarily for agricultural purposes and, in later years, installed a large pivotal sprinkler system. In 1967, Getty drilled two wells upon which it had to install two beam-type pumping units to maintain production. The upstroke of these units was so high as to preclude the use of Jones's pivotal irrigation system in the area of the two wells. Jones sought to enjoin Getty from operating the pumps. The court ruled that the oil and gas estate is the dominant estate in the sense that use of as much of the premises as is reasonably necessary to produce and remove the minerals is impliedly authorized by the lease, but these rights are to be exercised with "due regard" for the rights of the owner of the servient estate.[57] The court pointed out, however, that due regard is not to be measured by the degree of harm or inconvenience to the landowner. Rather, there must be a determination of whether, under all the circumstances, the manner of surface use is reasonably necessary. The burden is upon the surface owner to prove unreasonable use.[58] It has been observed that this includes the burden of establishing the availability to the lessee of a feasible alternative use, and possibly also the lack of an available alternative for the surface owner's proposed activity.[59] Because it was economically practicable for Getty to install its pumping units in cement cellars, lowering their height and permitting the sprinklers to move freely, the court required Getty to do so, holding this was a reasonable alternative to Getty's present use of the surface. The court thought that this compromise would serve the public policy in favor of developing mineral resources while simultaneously permitting the utilization of the surface for productive agricultural uses.[60]

*Getty* principally dealt with the relationship between a surface owner and a mineral lessee, and has been viewed as creating an independent duty owed to the surface owner by the lessee, the breach of which could support an action for damages.[61] The court's decision, however, is more correctly characterized as one seeking a *reasonable accommodation* of the mineral and surface estates that acknowledges the dominance of the mineral estate by placing on the surface owner the burden of proving unreasonable use of the surface.[62] In applying this principle, it is logical that a mineral owner should

[57] 470 S.W.2d 618, 621 (Tex. 1971). *See also* Diamond Shamrock Corp. v. Phillips, 511 S.W.2d 160 (Ark. 1974); Sun Oil Co. v. Whitaker, 483 S.W.2d 808, 817 (Tex. 1972); Ottis v. Haas, 569 S.W.2d 508 (Tex. Civ. App. 1978); Winslow v. Duval County Ranch Co., 519 S.W.2d 217 (Tex. Civ. App. 1975).

[58] 470 S.W.2d 618, 623 (Tex. 1971), *aff'd on reh.*, 470 S.W.2d 627.

[59] Gray, *A New Appraisal of the Rights of Lessees Under Oil and Gas Leases to Use and Occupy the Surface*, 20 ROCKY MT. MIN. L. INST. 227, 261 (1975).

[60] 470 S.W.2d 618, 622-23 (Tex. 1971).

[61] Ferguson & Jones, *A New Approach to the Use of the Surface Estate by a Lessee Under an Oil and Gas Lease*, 13 SO. TEX. L.J. 269 (1972); Floyd, *Broadening of Implied Surface Rights: A Reversal of the Trend Toward Accommodation*, 4 TEX. TECH. L. REV. 341 (1973); Note, *Oil and Gas—Reasonable Use—Determination Whether a Land Use by a Mineral Lessee Is Reasonably Necessary Requires Consideration of Alternative Methods of Development Available to a Lessee and a Surface Owner*, 50 TEX. L. REV. 806 (1972).

[62] The North Dakota Supreme Court has applied its view of the "accommodation doctrine" in Hunt Oil Co. v. Kerbaugh, 283 N.W.2d 131 (N.D. 1979), wherein the surface owner

have the right to use the abandoned casing as long as the surface owner's rights are preserved. If the surface owner is currently using the abandoned surface casing as a water well, the mineral owner should be allowed to drain the well for his use in recovering oil if he is willing to drill another water well nearby for the surface owner's use. In such an arrangement, the surface owner suffers no loss and the public policy of developing mineral resources is preserved.

### *Conclusion*

The reasoning in this note can be simply stated. If an oil and gas lessee fails to remove embedded oil well casing from a terminated or abandoned lease, the casing is forfeited and title thereto vests in the owner of the fee. In Oklahoma, this result is reached because casing is regarded as a trade fixture which, when abandoned, becomes part of the real estate. When the surface and mineral estates are severed, the surface owner takes title to the casing because he owns all the strata below the surface subject to the mineral owner's right to extract oil and gas from the fee.

The surface owner thus has the right to pull the casing for its salvage value. However, if the mineral owner or his new lessee wishes to use the abandoned well bore and casing in new oil and gas recovery operations without being charged for the use, two theories can be applied to enjoin the surface owner from removing the casing or from charging the mineral owner or his lessee for the use of the casing.

First, according to *Gutierrez v. Davis*,[63] the mineral lessee, in drilling for oil and gas, has, by the implied terms of the lease, the right to reasonable use of the surface including the abandoned casing, which by operation of law is a part of the realty. *Gutierrez* indicates that the surface owner cannot charge the lessee where he has made a reasonable use of the casing.

Second, an analogy can be drawn between mining law and oil and gas law. By drawing such an analogy, the owner of oil and gas in jurisdictions where such ownership is regarded as a corporeal hereditament also would have a fee simple in the spaces left by the removal of the mineral itself or by the removal of containing strata that is necessary for the proper and convenient extraction of the oil and gas. If the abandoned well bore is preserved by the presence of casing, ownership of the space in the bore necessarily implies the right to keep the casing in the well so that the space may be preserved. It follows, then, that an oil and gas lessee could rightfully refuse to pay the severed surface owner for the use of the casing; and based on the mineral interest's ownership of the space created by previous drilling, the lessee should be able to enjoin the removal of the casing where he can show that doing so might cause the bore to collapse.

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sought to prevent the mineral lessees from conducting seismic exploration activities on his property. Somewhat contrary to *Getty*, the court stated, "Where alternatives do exist, however, the concepts of due regard and reasonable necessity do require a weighing of the different alternatives against the inconvenience to the surface owner." *Id.* at 137.

[63] 618 F.2d 700 (10th Cir. 1980).

Because of conceptual and theoretical restrictions, in jurisdictions where the oil and gas owner is regarded as owning an incorporeal hereditament, or *profit a prendre*, ownership of space in the well bore conceptually cannot be concluded by analogizing to mining law. However, in *Clayborn v. Camilla Red Ash Coal Co.*,[64] the court reasoned that a coal seam owner has an implied grant of easement through containing strata where the removal of strata in recovering the mineral is necessary. The reasoning in *Clayborn* does not contradict the majority rule in mining law insofar as the mineral owner's exclusive right to use his underground passageways in recovering minerals under the surface owner's tract. For this reason, the rule in *Clayborn* can be analogized to oil and gas law, where the mineral owner has a *profit a pendre*. *Clayborn* supports the proposition that the oil and gas owner has an implied grant of easement through the spaces he or his lessees have created as long as he owns the right to produce oil and gas on the tract in question. Thus, the surface owner cannot pull the casing, thereby destroying the bore, when such an easement exists.

Further, where the mineral owner wishes to drill through the casing, but the surface owner has already put the casing to use, courts should seek to attain a reasonable accommodation of both estates. In this regard the oil and gas estate is the dominant estate, but the surface rights implied in favor of the mineral estate are to be exercised with "due regard" for the rights of the owner of the servient estate. This principle can be followed by allowing the mineral owner to use the casing as long as he accommodates the servient estate by providing a reasonable alternative for the surface owner's current use of the casing.

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[64] 128 Va. 383, 105 S.E. 117 (1920).