


2015

Windustry and the Accommodation Doctrine: Should Oklahoma Follow in the Steps of the Lone Star State?

Chantel P. James

University of Oklahoma College of Law, chantel.pjames-1@ou.edu

Follow this and additional works at: <http://digitalcommons.law.ou.edu/olr>

 Part of the [Energy and Utilities Law Commons](#), [Natural Resources Law Commons](#), and the [Oil, Gas, and Mineral Law Commons](#)

Recommended Citation

Chantel P. James, *Windustry and the Accommodation Doctrine: Should Oklahoma Follow in the Steps of the Lone Star State?*, 67 OKLA. L. REV. 901 (2015),
<http://digitalcommons.law.ou.edu/olr/vol67/iss4/5>

This Comment is brought to you for free and open access by University of Oklahoma College of Law Digital Commons. It has been accepted for inclusion in Oklahoma Law Review by an authorized administrator of University of Oklahoma College of Law Digital Commons. For more information, please contact darinfox@ou.edu.

Windustry and the Accommodation Doctrine: Should Oklahoma Follow in the Steps of the Lone Star State?

Introduction

The phenomenon of “green energy” is growing rapidly throughout the world, and the United States is no exception.¹ While oil and gas development has been essential to the United States economy since the mid-1800s,² wind energy has only recently begun to creep into the picture, creating new, exciting opportunities for the energy industry. But these opportunities are not without challenges. During the growth of the oil and gas industry over several decades, conflicts arose between oil and gas mineral owners and surface owners.³ These conflicts caused the states to create two different legal remedies. The first, the Accommodation Doctrine, seeks to balance the interests of mineral interest owners and surface interest owners.⁴ Whereas the second, the Surface Damages Act,⁵ is merely a liability rule requiring payment of damages when an oil and gas owner interferes with a surface owner’s interests.⁶ Today, states must further adapt their approach to legal conflicts between interest owners in order to accommodate ever-changing technologies in energy production. The development of wind energy will likely bring conflicts between wind energy and oil and gas developers, and Oklahoma, which currently uses the Surface Damage Act, should adopt an Accommodation Doctrine in addition to its current act to resolve these conflicts in their infancy.

This Comment proposes that Oklahoma implement a modified version of the Texas Accommodation Doctrine to permit growth of wind energy alongside this state’s historical development of oil and gas. Part I of this Comment studies the history of the Accommodation Doctrine in Texas and the Surface Damages Act in Oklahoma (Surface Damages Act). Part II explains the differences between the Texas Accommodation Doctrine and the Surface Damages Act. Part III goes on to explore the possibility of an

1. Robert H. Freilich & Neil M. Popowitz, *The Umbrella of Sustainability: Smart Growth, New Urbanism, Renewable Energy and Green Development in the 21st Century*, 42 URB. LAW. 1 (2010).

2. Chiawen C. Kiew, Comment, *Contracts, Combinations, Conspiracies, and Conservation: Antitrust in Oil Unitization and the Intertemporal Problem*, 99 NW. U. L. REV. 931, 931-32 (2005).

3. See, e.g., *Shell Oil Co. v. Manley Oil Corp.*, 50 F. Supp. 21 (E.D. Ill. 1942); *Adkins v. United Fuel Gas Co.*, 61 S.E.2d 633 (W. Va. 1950).

4. *Getty Oil Co. v. Jones*, 470 S.W.2d 618, 622 (Tex. 1971).

5. 1982 Okla. Sess. Laws 1062 (codified at 52 OKLA. STAT. §§ 318.2-318.9 (2011)).

6. 52 OKLA. STAT. § 318.9.

Oklahoma Accommodation Doctrine similar to the one employed in Texas. Part IV then examines the pressing need for an Oklahoma Accommodation Doctrine through the comparison of Oklahoma and Texas energy industry economics. Finally, Part V offers a suggestion for an Oklahoma Accommodation Doctrine that is derived from the Texas Accommodation Doctrine in light of the potential conflicts that could arise between wind energy companies and oil and gas companies.

I. The Creation of the Accommodation Doctrine and Surface Damage Act and the Implications of Wind Energy

Oil was first discovered in the United States in 1859 in northern Pennsylvania.⁷ This discovery created a feverish rush to find more of these in-demand minerals.⁸ As landowners seeking to make a profit severed mineral interests from surface rights, legal conflicts arose regarding whose rights were superior.⁹ This caused rifts between mineral interest owners and surface interest owners when one party would preclude the other from enjoying full use of their rights.¹⁰ These conflicts prompted implementation of new laws on a piecemeal, state-by-state basis, with each state choosing the remedy best suited for its needs at that time.¹¹ Common among these laws were the Accommodation Doctrine¹² and the Surface Damage Act.¹³

A. The Accommodation Doctrine

Some states have implemented the Accommodation Doctrine to attempt a balance between the rights of a surface interest owner and a mineral interest owner.¹⁴ The Texas Supreme Court established the Accommodation Doctrine in the 1971 *Getty Oil Co. v. Jones* case, making Texas the first

7. Kiew, *supra* note 2, at 935.

8. *Id.* at 936.

9. *Adkins v. United Fuel Gas Co.*, 61 S.E.2d 633, 634 (W. Va. 1950).

10. *Id.* at 635.

11. See Hannah Wittmeyer, *Property Rights & Surface Protection*, FRACKWIRE (June 18, 2013), <http://frackwire.com/property-rights-surface-protection/>.

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

13. See, e.g., 1982 Okla. Sess. Laws 1062.

14. See *Diamond Shamrock Corp. v. Phillips*, 511 S.W.2d 160 (Ark. 1974); *Amoco Prod. Co. v. Carter Farms Co.*, 703 P.2d 894 (N.M. 1985), *abrogated by* *McNeill v. Burlington Res. Oil & Gas Co.*, 182 P.3d 121 (N.M. 2008); *Flying Diamond Corp. v. Rust*, 551 P.2d 509 (Utah 1976); *Buffalo Mining Co. v. Martin*, 267 S.E.2d 721 (W.Va. 1980).

state to adopt the doctrine.¹⁵ In this case, surface owner John Jones brought an action to enjoin mineral interest owner Getty Oil Co. from engaging in activities that adversely affected Jones' surface uses.¹⁶ In particular, Jones sought to preclude Getty Oil Co. from using vertical space for oil pumping units that prevented the use of an automatic irrigation sprinkler system that hung over his property.¹⁷ Getty Oil Co. argued that so long as it "acted in a reasonable manner in accomplishing the purposes of the oil and gas lease, its right to so use the surface and the air above [was] absolute, and that the consequences to the owner of the surface estate [were] of no legal effect."¹⁸ It was already well settled in Texas law that mineral estates took precedence over surface interests, but the court also acknowledged that the rights to access the land as reasonably necessary in order to produce and remove the minerals should "be exercised with due regard for the rights of the owner of the servient estate."¹⁹

Finding it unfair to permit a person with mineral rights to completely disregard and disrupt rights of the surface owner, the court implemented a new judicial order with respect to oil and gas lessees.²⁰ This rule, now known as the Accommodation Doctrine, states that:

where there is an existing use by the surface owner which would otherwise be precluded or impaired, and where under the established practices in the industry there are alternatives available to the lessee whereby the minerals can be recovered, the rules of reasonable usage of the surface may require the adoption of an alternative by the lessee.²¹

Before this landmark decision, Texas oil and gas lessees could use as much of a tract of land as reasonably necessary to produce minerals, regardless of surface and subsurface damage.²² A surface owner's estate was servient to the mineral owner's interests, and the surface owner could

15. Douglas R. Hafer et al., *A Practical Guide to Operator/Surface-Owner Disputes and the Current State of the Accommodation Doctrine*, 17 TEX. WESLEYAN L. REV. 47, 58, 60 n.46 (2010).

16. *Getty Oil Co.*, 470 S.W.2d at 619-20.

17. *Id.* at 618.

18. *Id.* at 621.

19. *Id.*

20. *Id.* at 622.

21. *Id.*

22. *Kenny v. Tex. Gulf Sulphur Co.*, 351 S.W.2d 612, 614 (Tex. Ct. App. 1961) (acknowledging that Texas law had established that when damage is naturally caused by the production of minerals by a lessee, a surface owner cannot complain).

not recover for any damage to the land unless that damage resulted from acts of negligence.²³

Getty Oil Co. recognized that mineral owners are able to pursue the use of the surface, regardless of surface damage.²⁴ However, the Texas Supreme Court also acknowledged the burden this standard placed on surface owners.²⁵ Thus, the court crafted the Accommodation Doctrine, requiring that “if the mineral owner has reasonable alternative uses of the surface, one of which permits the surface owner to continue to use the surface in the manner intended and one of which would preclude that use by the surface owner the mineral owner *must* use the alternative that allows continued use of the surface by the surface owner.”²⁶

The Accommodation Doctrine only protects those surface use interests if the surface owner can first show an existing use, which serves as a threshold before other issues are considered.²⁷ After establishing that the surface use was existent prior to mineral development, the surface owner must show that there are no reasonable alternative methods of the existing surface use.²⁸ The Texas Supreme Court clarified this element in a 2013 decision, holding that the surface owner need only produce the low standard of “legally sufficient evidence that he did not have any reasonable alternatives for conducting [surface] operations on the tract, not whether he produced evidence that he had no reasonable alternatives for general . . . uses.”²⁹ The surface owner must first show the two elements of an existing surface use, coupled with no alternative method of that use.³⁰ If he does this, he then bears the additional burden of proving that the oil and gas operator’s proposed operations will preclude his surface use.³¹ Finally, in order to succeed on an Accommodation Doctrine claim, the surface owner must show that the operator has a reasonable alternative method of production, established by industry practices, to continue operations.³²

23. *Id.*

24. 470 S.W.2d at 622.

25. *Id.*

26. *Valence Operating Co. v. Tex. Genco, L.P.*, 255 S.W.3d 210, 216 (Tex. Ct. App. 2008).

27. *Getty Oil Co.*, 470 S.W.2d at 622.

28. *Id.*

29. *Merriman v. XTO Energy, Inc.*, 407 S.W.3d 244, 250-51 (Tex. 2013).

30. *Getty Oil Co.*, 470 S.W.2d at 623.

31. *Id.*

32. *Id.*

The Accommodation Doctrine helps maintain the balance between mineral and surface owners.³³ Wind energy companies have been increasing their research and productivity, resulting in the purchase of surface interests on tracts of land used by oil and gas companies. This will likely add a new litigant to the scope of the Accommodation Doctrine as the two industries seek to use their rights to the full extent.³⁴ Fortunately for the windustry, the *Getty Oil* court established “that ownership of real property includes not only the surface but also that which lies beneath and above the surface. The use of land extends to the use of the adjacent air.”³⁵ This language will help wind energy companies by allowing the Accommodation Doctrine to apply to large structures over the land, such as windmills.³⁶ Although the Accommodation Doctrine historically has been used to resolve disputes “between the owner of the surface and the oil and gas lessee, ‘there is no apparent doctrinal barrier to applying it in favor of a surface lessee that has expended significant funds in erecting and maintaining the expensive installations and associated infrastructure required for wind-generated electricity.’”³⁷ The Accommodation Doctrine provides comfort for surface owners, offering protection over whatever use they may make of their land, even when a drilling operator gains the mineral interests and wishes to enter the land for drilling purposes.³⁸

B. The Surface Damage Act

Many jurisdictions have followed Texas’ lead, adopting a version of the Accommodation Doctrine similar to the one created in *Getty Oil*.³⁹ Those

33. See generally *Gerrity Oil & Gas Corp. v. Magness*, 946 P.2d 913 (Colo. 1997); *Mingo Oil Producers v. Kamp Cattle Co.*, 776 P.2d 736 (Wyo. 1989).

34. SHANNON L. FERRELL, WIND ENERGY LEASING ISSUES FOR OKLAHOMA LANDOWNERS 6 (n.d.), available at <http://s3.amazonaws.com/content.newsok.com/documents/Wind%20Energy%20Leasing%20Presentation.pdf>.

35. 470 S.W.2d at 621.

36. Becky H. Diffen, Comment, *Energy from Above and Below: Who Wins When a Wind Farm and Oil & Gas Operations Conflict?*, 3 TEX. J. OIL GAS & ENERGY L. 240, 250 (2008).

37. *Id.* (quoting Ernest E. Smith, *Wind Energy Leases: Prospects and Issues*, in ADVANCED REAL ESTATE LAW COURSE 11-12 (State Bar of Tex. 2006)).

38. *Id.* at 246.

39. See, e.g., *United States v. Minard Run Oil Co.*, No. 80-129, 1980 U.S. Dist. Lexis 9570, at *16 (W.D. Pa. Dec. 16, 1980) (“[W]here two alternative methods of proceeding are available to the mineral operator, neither of which is of detriment to the mineral operation and one of which is detrimental to the surface owner, the mineral operator must select the method which does not act to the detriment of the surface owner.”); *Diamond Shamrock*

states that have not followed Texas's lead have legislatively adopted some variation of an alternative legal regime.⁴⁰ Oklahoma is one such state.⁴¹ The Surface Damage Act requires mineral interest lessees and owners to negotiate in good faith with surface rights lessees and owners to compensate for the damage likely to ensue from planned drilling operations.⁴² Additionally, the operator must have a bond on file with the county.⁴³ If parties fail to reach agreement in this initial negotiation, appraisers are then appointed to inform the parties and the court about their own estimated amount of damages.⁴⁴ After the appointment of appraisers, the operator may enter the property and begin drilling.⁴⁵ Any operator who fails to comply with the Surface Damages Act by ignoring the prescribed steps, departing from the agreed upon amount of damages, or disregarding the appraisers' estimations must pay treble damages.⁴⁶ The Oklahoma Supreme Court expanded on the language of the statute, stating that "the damage standard intended by the Legislature . . . [is] the diminution in fair market value of the surface property resulting from the drilling operations."⁴⁷ Therefore, an individual could not recover for pure personal inconvenience under the Surface Damages Act.⁴⁸

The 1982 implementation of the Surface Damage Act properly reflects "Oklahoma policy concerning conservation of the state's natural resources and balancing the interests of oil and gas operators with those of surface estate owners."⁴⁹ The purpose of the Surface Damage Act is to provide adequate compensation to surface owners for damages resulting from the

Corp. v. Phillips, 511 S.W.2d 160, 163 (Ark. 1974) ("An injury to the surface may be said to be the result of the commission of a wrong when the use of the surface is unreasonable.").

40. See, e.g., 52 OKLA. STAT. §§ 318.2 to .9 (2011); see also IND. CODE § 32-23-7-0.3 to 23-7-8 (2011); KY. REV. STAT. ANN. § 353.595 (Lexis Nexis 2011); MONT. CODE ANN. § 82-10-501 to 511 (West 2009); W. VA. CODE ANN. § 22-7-1 to 8 (West 2002).

41. Oklahoma Surface Damages Act, 1982 Okla. Sess. Laws 1062.

42. 52 OKLA. STAT. § 318.3.

43. *Id.* § 318.4(A).

44. *Id.* § 318.5(A) ("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.").

45. *Id.*

46. *Id.* § 318.9.

47. Dycó Petroleum Corp. v. Smith, 1989 OK 51, ¶ 10, 771 P.2d 1006, 1008.

48. *Id.* ¶ 9, 771 P.2d at 1008.

49. Schneberger v. Apache Corp., 1994 OK 117, ¶ 14, 890 P.2d 847, 853-54.

activities conducted by oil and gas operators.⁵⁰ This groundbreaking rule passed by the Oklahoma legislature changed the legal stance between mineral and surface owners.⁵¹ Prior to the passage of the Surface Damage Act, a surface interest holder could only recover damages from an oil and gas operator upon a showing that such damage “resulted from wanton or negligent operations or if the operations affected a more than reasonable area of the surface.”⁵²

The Oklahoma Supreme Court established this rule based on the notion that mineral lessees have the implied right to enter land in order to exercise the right to drill for oil and gas as granted or reserved to them.⁵³ However, shortly after Oklahoma recognized the need for and implemented the Surface Damage Act,⁵⁴ the court expressed its support for the Oklahoma Legislature’s attempt at balancing the conflicting rights between surface and mineral owners:

It cannot be said that the surface of the land constitutes a less vital resource to the State of Oklahoma than does the mineral wealth which underlies it. The surface supports development for business, industrial and residential purposes. It also supports our vital agricultural industry. The passage of the surface damages act guarantees that the development of one industry is not undertaken at the expense of another when the vitality of both is of great consequence to the well-being of our economy.⁵⁵

The Oklahoma Supreme Court’s support, coupled with the legislative approval of the Surface Damage Act, has led to many monetary resolutions between surface owners, namely those using the land for agricultural use, and oil and gas companies.⁵⁶

The Surface Damage Act provides equitable relief to surface owners when drilling operations begin on their land, dealing with the issue of damages up front to prevent an excess of cases within the Oklahoma

50. L. Mark Walker, Note, *Oil and Gas: Surface Damages, Operators, and the Oil and Gas Attorney*, 36 OKLA. L. REV. 414, 414 (1983).

51. *Id.*

52. *Davis Oil Co. v. Cloud*, 1986 OK 73, ¶ 9, 766 P.2d 1347, 1349.

53. *Marland Oil Co. v. Hubbard*, 1934 OK 384, ¶ 10, 34 P.2d 278, 279, *overruled in part on other grounds by Pure Oil Co. v. Chisholm*, 1936 OK 252, 75 P.2d 464.

54. *See supra* notes 41-46 and accompanying text.

55. *Davis Oil Co.*, ¶ 16, 766 P.2d at 1351.

56. *See generally* *Schneberger v. Apache Corp.*, 1994 OK 117, 890 P.2d 847; *Tower Oil & Gas Co. v. Harmon*, 1989 OK 127, 782 P.2d 1355; *Darling v. Quail Creek Petroleum Mgmt. Corp.*, 1989 OK CIV APP 54, 778 P.2d 943.

courts.⁵⁷ However, with the growing wind industry in the historically oil and gas dominant state, there will be more cases arising in Oklahoma courts to remedy the probable disagreements that will occur between the two industries.⁵⁸

C. Wind Energy in Oklahoma

In November 1905, Robert Galbreath and Frank Chesley first discovered oil and gas in Oklahoma.⁵⁹ This discovery has shaped the Oklahoma economy, dominating Oklahoma commerce.⁶⁰ Wind energy, on the other hand, only emerged commercially in Oklahoma in the twenty-first century.⁶¹ In fact, the Oklahoma Wind Energy Center, located in Harper and Woodward counties, was recently completed in 2003, marking the official entry of wind energy into Oklahoma.⁶² However, Oklahoma has grown into the sixth largest wind source in the country in just ten years, producing just more than 3000 megawatts of renewable energy per year.⁶³ That is enough energy to power one million average American homes for one year.⁶⁴

Continuing the progression of wind industry, the Oklahoma Legislature passed three bills in 2010.⁶⁵ The first, known as the Oklahoma Energy Security Act (Security Act),⁶⁶ set a goal that fifteen percent of all installed

57. See 52 OKLA. STAT. § 318.3 (2011).

58. Joe Wertz, *Map: Where Oklahoma Oil Is Produced*, STATEIMPACT (Dec. 7, 2012, 3:27 PM), <http://stateimpact.npr.org/Oklahoma/maps/map-where-oklahoma-oil-is-produced/>; see also AM. WIND ENERGY ASS'N, OKLAHOMA WIND ENERGY *passim* (n.d.) [hereinafter AWEA, OKLAHOMA WIND ENERGY], available at <http://www.awea.org/Resources/state.aspxItemNumber=5190>.

59. *History of the Oil Boom: The Ida E. Glenn Discovery*, GLENN POOL OIL FIELD EDUC. CTR., <http://www.glennpooloilfield.org/history/> (last visited Oct. 26, 2013).

60. See Joseph R. Dancy & Victoria A. Dancy, *Regulation of the Oil and Gas Industry by the Oklahoma Corporation Commission*, 21 TULSA L.J. 613, 613-14 (1986).

61. AM. WIND ENERGY ASS'N, AWEA U.S. WIND INDUSTRY SECOND QUARTER 2013 MARKET REPORT 4 (2013) [hereinafter AWEA WIND INDUSTRY REPORT], available at http://awea.files.cms-plus.com/FileDownloads/pdfs/AWEA2Q2012WindEnergyIndustryMarketReport_Executive%20summary.pdf.

62. OKLA. MUN. POWER AUTH., OKLAHOMA WIND ENERGY CENTER QUICK FACTS (n.d.), available at <http://ompa.app7.net/wp-content/uploads/2010/04/windenergyfactsheet.pdf>.

63. AWEA WIND INDUSTRY REPORT, *supra* note 61, at 3.

64. AWEA, OKLAHOMA WIND ENERGY, *supra* note 58, at 2.

65. Susan Huntsman, *Three New Laws Address Wind Power Issues*, TULSA WORLD (Oct. 3, 2013, 1:13 AM), http://www.tulsaworld.com/business/three-new-laws-address-wind-power-issues/article_956e0ec2-2d23-5ef1-afce-ba815558409f.html.

66. 17 OKLA. STAT. § 801.1 (2011).

electric generation capacity within Oklahoma be generated from renewable energy sources by 2015.⁶⁷ The second act, called the Oklahoma Wind Energy Development Act (Development Act)⁶⁸ addresses the decommissioning requirements for any wind energy facility entering into or renewing a power purchase agreement.⁶⁹ The Development Act discusses restoration, cost estimate of financial security, access to records, and insurance.⁷⁰ The third act is the Airspace Severance Restriction Act (Severance Act), which restricts the permanent severing of rights to the airspace above the surface estate for the purpose of developing and operating commercial wind and solar energy conversion systems.⁷¹ The Severance Act is in direct conflict with the generally accepted practice of severing the mineral interests from the surface rights.⁷² This likely is an attempt to preclude wind facilities from interfering with oil and gas development by further severing a tract of land. This law is supplemented by the Exploration Rights Act of 2011 (Exploration Act).⁷³ This act ensures that wind energy facilities will not interfere with the mineral interest holders' right to make reasonable use of the surface "for the purpose of exploring, severing, capturing and producing the minerals."⁷⁴

The first two acts passed by the Oklahoma legislature indicate receptivity toward renewable energy resources. In contrast, the third act appears to lean toward oil and gas interests, with the fourth act complementing it. The fourth act, the Exploration Act, places restrictions on the wind industry, disallowing interference with mineral operators.⁷⁵ This is not surprising as Oklahoma has always supported the oil and gas industry.⁷⁶ As more wind turbines appear across Oklahoma land, there will likely be conflicts between the two industries.⁷⁷ Oklahoma lawmakers will struggle to satisfy both wind energy and the oil and gas companies if they are only able to use the Surface Damages Act. Therefore, the Oklahoma Legislature should implement its own form of the Accommodation Doctrine, because states

67. *Id.* § 801.2.

68. *Id.* § 160.11.

69. *Id.* § 160.12.

70. *Id.* § 160.15 to .19.

71. 60 OKLA. STAT. § 820.1 (2011).

72. Huntsman, *supra* note 65.

73. 52 OKLA. STAT. § 801 (2011).

74. *Id.* § 803(A).

75. 52 OKLA. STAT. § 801 (Supp. 2014).

76. Dancy & Dancy, *supra* note 60, at 639.

77. *See* Wertz, *supra* note 58.

that have both wind and oil and gas energy industries could face greater conflicts without the adoption of an Accommodation Doctrine.⁷⁸

II. Applying the Texas Accommodation Doctrine in Oklahoma

A. *The Accommodation Doctrine v. The Surface Damages Act*

The Accommodation Doctrine has historically been used to balance the existing use of land by farmers and mineral development by oil and gas operators.⁷⁹ However, just as Oklahoma has experienced a surge in oil and gas development similar to that of Texas,⁸⁰ both states have started to recognize the rapid development of wind energy across the region.⁸¹ Therefore, Oklahoma should endeavor to stay ahead of impending issues and adopt legislation that will provide courts with ready solutions when these companies seek resolutions to conflicts.

The Accommodation Doctrine differs from the Surface Damage Act in many ways. The Surface Damage Act allows an oil and gas operator to enter a surface owner's property so long as it has obtained the mineral rights and uses of that land for extracting minerals.⁸² This right exists regardless of surface use, so long as good-faith negotiations take place to compensate the surface owner for damages.⁸³ Seemingly, a surface owner's only option to protect his existing land use would be to draft an agreement

78. Diffen, *supra* note 36, at 254.

79. *See, e.g.*, Merriman v. XTO Energy, Inc., 407 S.W.3d 244, 249-52 (Tex. 2013) (requiring surface owner to establish that he had no reasonable alternative means of conducting cattle operations); Sun Oil Co. v. Whitaker, 483 S.W.2d 808, 817-19, 822-23 (Tex. 1972) (denying surface owner damages for destroyed crops); Landreth v. Melendez, 948 S.W.2d 76, 81-82 (Tex. Ct. App. 1997) (placing burden on surface owner to show operator had not used usual, necessary, and conventional means to product minerals).

80. Megan James, Comment, *Checking the Box Is Not Enough: The Impact of Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC and Texas's Eminent Domain Reforms on the Common Carrier Application Process*, 45 TEX. TECH L. REV. 959, 963-64 (2013) (discussing how oil was first discovered in Texas in 1859, with substantial developments occurring in 1901 with the discovery of the Lucas Gusher at Spindletop).

81. *See* Logan Layden, *Oklahoma Moves Up, Now No. 6 in Wind Power Generation*, STATEIMPACT (Aug. 6, 2013, 12:40 PM), <http://stateimpact.npr.org/oklahoma/2013/08/06/oklahoma-moves-up-now-no-6-in-wind-power-generation/> ("Oklahoma remains one of the top states for wind power generation . . ."); Michael Marks, *Five Things You Should Know About Energy in Texas*, STATEIMPACT (Aug. 28, 2013, 7:00 AM), <http://stateimpact.npr.org/texas/2013/08/28/five-takeaways-from-the-texas-energy-maps/> ("Texas is the nation's leader in oil, natural gas, and wind production.").

82. 52 OKLA. STAT. § 318.3 (2011).

83. *Id.*

prior to any prospective operations outlining conditions and rules to be followed after an oil and gas company begins drilling operations.⁸⁴ However, the chances of convincing an oil and gas company to agree to such limitations of its drilling privileges may be slim under the Surface Damages Act. The likely outcome is simply that the surface owner's existing use is still sacrificed for an amount agreed upon by himself and the operator or decided by an appraiser.⁸⁵ The Surface Damages Act is meant to protect surface owners, but it only meets this goal in a very limited way.⁸⁶ It penalizes oil and gas companies who do not exercise good-faith discussions with the surface owner regarding damages.⁸⁷ If an oil and gas operator chooses instead to drill and create surface damage without reaching an agreement with the surface owner, the Surface Damages Act allows treble damages against that operator.⁸⁸

On the other hand, the Accommodation Doctrine provides recovery beyond just monetary compensation for surface owners. Instead, it allows for accommodation between surface and mineral interest owners.⁸⁹ The outcome for the mineral and surface owners is tipped in favor of one or the other, depending on the evidence and the findings of the court.⁹⁰ This is important to surface owners who might have permanent structures, complicated agricultural equipment positioned on the land, or who use the surface in any other way such that drilling operations would cause an unreasonable burden to remove or cease that use. This doctrine is capable of protecting the convenience and livelihood of surface owners, whereas the Surface Damage Act only provides a remedy of monetary compensation for the damage or even destruction of land used for crops or wind energy production.

Implementing both the Surface Damages Act and Accommodation Doctrine within the same jurisdiction would best serve the competing interests involved. In fact, some states have elected to implement both an

84. Christopher M. Alspach, *Surface Use by the Mineral Owner: How Much Accommodation Is Required Under Current Oil and Gas Law?*, 55 OKLA. L. REV. 89, 109 (2002).

85. See 52 OKLA. STAT. § 318.5.

86. See, e.g., *Davis Oil Co. v. Cloud*, 1986 OK 73, ¶¶ 4, 20-23, 766 P.2d 1347, 1349, 1352-53 (allowing companies to continue drilling).

87. 52 OKLA. STAT. § 318.9.

88. *Id.*

89. Hafer et al., *supra* note 15, at 58.

90. *Id.* at 58-59.

Accommodation Doctrine and a Surface Damages Act.⁹¹ Some situations would be ideal for use of the Surface Damages Act, allowing the oil and gas operator to compensate the surface owner so that the driller could use the land as reasonably necessary. These situations are likely where monetary compensation would be enough to satisfy the surface owner and allow him to feel whole even after losing the use of land. The Accommodation Doctrine would be preferred in other situations to prevent a mineral interest owner from causing damage or destruction to a surface owner's use of the land. These situations would likely be when a surface owner makes use of land, or as will be discussed later in this Comment, shows interest in making use of land, and would not be satisfied with mere monetary compensation for the loss of that use or potential use.

In still other circumstances, the Accommodation Doctrine could be coupled with the Surface Damages Act to better accommodate the surface owners. In these cases, surface owners could preclude oil and gas operators from interfering with an existing land use by limiting them to using reasonable alternatives through the Accommodation Doctrine.⁹² In addition to this remedy, the surface owner could recover damages to the land through the Surface Damages Act caused by the oil and gas operator that has been made to exercise reasonable alternative methods.⁹³ To illustrate the positive impact of the Accommodation Doctrine, the following sections present real Oklahoma cases decided under the Surface Damages Act. Following the discussion of the court's decision, these sections hypothesize how the result might have differed had the court applied the Accommodation Doctrine.

B. Oklahoma Case Study Using Texas' Accommodation Doctrine

1. Davis Oil Co. v. Cloud

Davis Oil Co. v. Cloud, an Oklahoma Supreme Court case, is analogous to the disputes in Texas between farmers and oil and gas operators that have been resolved by application of the Accommodation Doctrine.⁹⁴ Davis Oil Company (Davis Oil), the appellant, sought to drill a well in the center of a tract of land to extract oil and gas.⁹⁵ Stanley Wilson and Anna Lee Cloud

91. *Mingo Oil Producers v. Kamp Cattle Co.*, 776 P.2d 736 (Wyo. 1989); *see also* WYO. STAT. ANN. § 30-5-402 to -410 (West 2007).

92. *See, e.g., Getty Oil Co. v. Jones*, 470 S.W.2d 618, 621 (Tex. 1971).

93. *See* 52 OKLA. STAT. § 318.5.

94. 1986 OK 73, 766 P.2d 1347.

95. *Id.* ¶ 1, 766 P.2d at 1348.

contractually shared the surface ownership of the estate.⁹⁶ Though Davis Oil reached an agreement with Wilson regarding the expected surface damages, it was unable to reach an agreed compensation amount with Cloud.⁹⁷ As directed under the Surface Damage Act, Davis Oil petitioned the court for an appraiser to determine the amount of surface damages.⁹⁸ The appraisers made their estimates and awarded \$2,500 to Cloud for damages to the surface.⁹⁹ Cloud filed a demand for a jury trial, but prior to the commencement of the trial, Davis Oil entered Cloud's land and drilled a dry hole, failing to discover oil and gas.¹⁰⁰ Davis Oil filled and abandoned the dry hole upon discovering the absence of minerals.¹⁰¹ It then removed the access road and drilling pad that was used during the drilling expedition and placed them on Wilson's side of the land.¹⁰²

Ultimately, Cloud got her day in court. She presented evidence of surface damages including broken water lines, blocked access to the highway, and decreased value of land as a result from the laking effect caused by the pad and road materials placed on Wilson's property, which interfered with the drainage of Cloud's land.¹⁰³ Because the land could not be drained properly, Cloud's land, a high quality hayfield, could no longer produce hay.¹⁰⁴ The District Court of Haskell County issued a judgment rendered on jury verdict of \$15,000 to Cloud pursuant to the Surface Damages Act and Davis Oil appealed that ruling.¹⁰⁵

The Supreme Court of Oklahoma applied the Surface Damages Act to determine the amount of damages owed to Cloud by Davis Oil.¹⁰⁶ Ultimately, the court affirmed the lower court's judgment.¹⁰⁷ This judgment included a calculation of personal inconvenience suffered by Cloud that Davis Oil argued was erroneous because the Surface Damages Act does not traditionally account for speculative damages.¹⁰⁸ The court upheld this decision because the appellant did not object to such a calculation,

96. *Id.*

97. *Id.* ¶ 2, 766 P.2d at 1348.

98. *Id.* ¶¶ 3-4, 766 P.2d at 1348.

99. *Id.*

100. *Id.* ¶¶ 4-5, 766 P.2d at 1348.

101. *Id.* ¶ 5, 766 P.2d at 1348.

102. *Id.*

103. *Id.* ¶ 6, 766 P.2d at 1348.

104. *Id.*

105. *Id.* ¶¶ 0, 8, 766 P.2d 1347-49.

106. *Id.* ¶ 13, 766 P.2d at 1350-51.

107. *Id.* ¶ 26, 766 P.2d at 1353.

108. *See id.* ¶¶ 19-24, 766 P.2d at 1352-53.

effectively waiving its right to object to the admission of such evidence.¹⁰⁹ Ultimately, the court determined that the Surface Damages Act allows for consideration of inconvenience if it is caused by an effect on the value of land for the purposes of properly assessing damages.¹¹⁰ Therefore, the court affirmed the lower court's \$15,000 judgment in favor of Cloud.¹¹¹

Under the Surface Damages Act, Cloud was able to recover monetary damages for the loss of the existing use of hay production on her surface estate.¹¹² The court determined damages should be "measured by the diminution of the fair market value of the property."¹¹³ This recovery might be satisfactory to some surface owners, but for others, compensation for the loss of a business and livelihood would not be acceptable. With the implementation of the Accommodation Doctrine, however, this entire dispute could have been resolved even before Davis Oil destroyed Cloud's hay field.

To invoke the Accommodation Doctrine, the surface owner must show the trier of fact four elements in order to succeed under the Accommodation Doctrine.¹¹⁴ In *Davis Oil Co.*, the surface owner used the surface as a high quality hayfield prior to the oil and gas company's decision to enter the land and drill for minerals.¹¹⁵ This meets the first element of the Accommodation Doctrine, requiring the surface owner to have an existing use of the land.¹¹⁶ The facts of *Davis Oil Co.* satisfy the second element requiring proof that an alternative method of the existing surface use is impossible or unreasonable.¹¹⁷ Cloud argued she used her land as a hayfield and to continue that use, she would have been required to develop a new drainage system throughout the land to prevent water from gathering as a result of the drilling operations.¹¹⁸ This inconvenience would have been significant, as it would have required a substantial amount of money and labor by the surface owner and any contractor hired to assist.¹¹⁹ Digging up

109. *Id.*

110. *Id.* ¶¶ 24-26, 766 P.2d at 1353.

111. *Id.* ¶¶ 8, 26, 766 P.2d at 1349, 1352-53.

112. *Id.* ¶ 23, 766 P.2d at 1353.

113. *Id.* ¶ 23, 766 P.2d at 1352-53.

114. *Getty Oil Co. v. Jones*, 470 S.W.2d 618, 622 (Tex. 1971).

115. *Davis Oil Co.*, ¶ 6, 766 P.2d at 1348.

116. *Getty Oil Co.*, 470 S.W.2d at 622.

117. *Id.*

118. *See Davis Oil Co.*, ¶ 6, 766 P.2d at 1348.

119. *Drainage*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/oecaagct/ag101/cropdrainage.html> (last updated June 27, 2012) ("Designing and installing a drainage system is a complex process. Every field is unique and usually requires an individual design.").

tracts of land to direct water away from the hayfield would cause damage and likely destroy the grasses growing on those areas of the surface. Aside from the inconvenience of labor and time that would not be necessary but for the oil and gas company's intentions to drill for minerals, the financial burden of creating a new, and otherwise unnecessary, drainage system on a twenty-acre tract of land would be exceptional.

The facts of *Davis Oil Co.* would likely satisfy the third element of the Accommodation Doctrine¹²⁰ because the oil and gas operator precluded Cloud's existing use of the land as a hay farm through its surface usage.¹²¹ Davis Oil caused flooding on Cloud's surface estate due to drilling equipment moved to Wilson's portion of the land.¹²² More facts may be required to determine whether it could be reasonable to expect drilling operations to inhibit the use of the surface owner through flood damage, which occurred here.¹²³ However, the flooding in the present case only occurred after Davis Oil abandoned drilling equipment on Wilson's portion of the surface.¹²⁴ This indicates that it is likely unreasonable to expect drilling equipment to cause flooding through normal use, as the materials could have been moved off the property after the completion of operations.

The fourth and final element of the Accommodation Doctrine requires testimony by an expert witness or extensive information and evidence presented to show that there are reasonable alternate methods established by industry practices.¹²⁵ This would include the investigation of the methods of oil and gas development in an area that is similar to the conditions of Cloud's tract of land.¹²⁶ However, it is likely reasonable that an alternative method, including relocation of the drilling site, was available to Davis Oil because they chose to drill in the center of the land, only to hit a dry hole.¹²⁷ Cloud's land consisted of 240 acres, giving the drilling company plenty of room to drill in particular sections of the land, rather than right in the middle of the property.¹²⁸ Absent research indicating that the very center of the land would be the best spot to drill, it could have chosen to drill

120. *Getty Oil Co.*, 470 S.W.2d at 622.

121. *Davis Oil Co.*, ¶ 6, 766 P.2d at 1348.

122. *Id.* ¶¶ 5-6, 766 P.2d at 1348.

123. *Id.* ¶ 6, 766 P.2d at 1348.

124. *Id.* ¶¶ 5-6, 766 P.2d at 1348.

125. *Getty Oil Co.*, 470 S.W.2d at 622.

126. See, e.g., Paige Anderson, Note, *Reasonable Accommodation: Split Estates, Conservation Easements, and Drilling in the Marcellus Shale*, 31 VA. ENVTL. L.J. 136, 164-65 (2013).

127. See *Davis Oil Co.*, ¶¶ 1, 5, 766 P.2d at 1348.

128. *Id.* ¶ 1, 766 P.2d at 1348.

primarily on Wilson's area of the property, because he was willing to negotiate a reasonable amount of expected damages with Davis Oil in accordance with the Surface Damages Act.¹²⁹

Because Cloud, the surface owner, would have met the burdens of proof with respect to all elements in this case, the courts in Oklahoma could have applied the Accommodation Doctrine and precluded Davis Oil from entering the land and drilling without consideration of Cloud's surface uses. The operator would have been forced to adopt a different method of drilling in order to accommodate the interests of the surface owner rather than defer to a district court when the two interest owners are unable to agree on the amount of expected damages, only to have a third party choose the fate of the surface owner's existing use of the land through monetary compensation. This outcome would be much more favorable to surface owners who wish to continue their existing operations rather than merely receive compensation for the destruction of their land.

2. Vastar Resources, Inc. v. Howard

The next case study and application of the Accommodation Doctrine reaches a similarly successful conclusion for the surface owner while allowing the operator to use its mineral interests concurrently. The conflicts in *Vastar Resources, Inc. v. Howard* reached the Oklahoma Civil Court of Appeals when Vastar Resources, Inc. (Vastar) appealed the trial court's judgment on a jury verdict favoring Howard for damages granted under the Surface Damage Act.¹³⁰ The dispute in this case arose when Vastar sought to drill pursuant to its mineral rights on a 170-acre tract of land owned by Howard.¹³¹ Vastar unsuccessfully attempted to discuss compensation with Howard for the projected surface damages in accordance with the Surface Damage Act.¹³² Vastar drilled two wells on the property, and then requested court-appointed appraisers to estimate the damages to the surface.¹³³ The appraisers estimated surface damages at \$28,000 and Howard requested a jury trial under the Surface Damage Act.¹³⁴ Prior to trial, Howard filed a pretrial motion outlining the extent of evidence he planned to introduce at

129. *Id.*

130. *Vastar Res., Inc. v. Howard*, 2002 OK CIV APP 13, ¶ 1, 38 P.3d 236, 237, *abrogated in part by Ward Petroleum Corp. v. Stewart*, 2003 OK 11, 64 P.3d 1113.

131. *Id.* ¶ 2, 38 P.3d at 237.

132. *Id.*

133. *Id.* ¶¶ 2-3, 38 P.3d at 237.

134. *Id.* ¶ 3, 38 P.3d at 237.

trial.¹³⁵ This evidence included expert testimony demonstrating that Vastar caused groundwater and subsurface pollution by burying deleterious substances in reserve pits.¹³⁶ Additionally, Howard alleged that Vastar bulldozed these contents into even deeper holes, potentially causing the plastic liner within the reserve pits to tear, resulting in the contents leaking and subsequently polluting groundwater.¹³⁷ Finally, Howard claimed that Vastar further contaminated the land by pouring hydrochloric acid, among other chemicals, onto the surface.¹³⁸ At trial, Howard presented all of the above-stated evidence and the jury granted Howard \$50,000 in damages.¹³⁹

On appeal, the Court of Civil Appeals of Oklahoma reversed and remanded the lower court's decision.¹⁴⁰ It agreed that Howard should be compensated for Vastar's drilling operations, but the Surface Damage Act did not provide a legal remedy for Howard.¹⁴¹ This is because any claim brought under the Surface Damage Act is limited to "the surface damages which the owner has sustained or will sustain by reason of entry upon the subject land and *by reason of drilling or maintenance* of oil or gas production on the subject tract of land."¹⁴² The damage to Howard's land was caused by Vastar's tortious conduct, not standard drilling operations.¹⁴³ Therefore, evidence of pollution that resulted from Vastar's alleged willful or negligent conduct must be heard under a separate cause of action and not under the Surface Damages Act.¹⁴⁴

In *Vastar Resources, Inc.*, Howard was precluded from recovering damages for the decrease in fair market value of his surface under the Surface Damages Act.¹⁴⁵ This means Howard could have brought a separate negligence action against Vastar and recovered damages. This case shows a

135. *Id.* ¶ 4, 38 P.3d at 237-38.

136. *Id.* ¶ 4, 38 P.3d at 238.

137. *Id.*

138. *Id.*

139. *Id.* ¶ 8, 38 P.3d at 238. Not at issue in this paper is Vastar's motion in limine in order to prevent Howard's expert testimony. *Id.* ¶¶ 4-5, 38 P.3d at 238. Vastar Resources, Inc. claimed that the Surface Damage Act did not contain any provisions allowing remedies for damages to the subsurface estate. *Id.* ¶ 5, 38 P.3d at 238. The trial court denied this motion, claiming that legislative intent of the Surface Damages Act was to provide a remedy for surface damages, regardless of how that damage occurred. *Id.* ¶ 6, 38 P.3d at 238.

140. *Id.* ¶ 19, 38 P.3d at 240.

141. *Id.* ¶ 11, 38 P.3d at 239.

142. 52 OKLA. STAT. § 318.5(C) (2011) (emphasis added).

143. *Vastar Res. Inc.*, ¶ 13, 38 P.3d at 239.

144. *Id.* ¶ 17, 38 P.3d at 240.

145. *Id.* ¶ 17, 38 P.3d at 239.

harmful gap in the Surface Damage Act that has been and could continue to be harmful to surface owners seeking recovery for damages caused by drilling operators. Had Vastar conducted normal drilling operations, Howard could have sought a remedy through the Surface Damages Act.¹⁴⁶ However, because Vastar acted either willfully or negligently in tort, Howard could not bring suit under the act.¹⁴⁷ The vast amount of damage to his land could have been prevented through the Accommodation Doctrine, as this doctrine would apply to all cases in which there are separate surface and mineral interest owners, regardless of whether the mineral interest owners wish to practice drilling operations as reasonably necessary or willfully unnecessary.¹⁴⁸

If Oklahoma implemented the Accommodation Doctrine, the surface and subsurface damage caused by Vastar would have been minimized to only that reasonably necessary for drilling purposes. The Accommodation Doctrine would have allowed Howard to hold Vastar accountable prior to the commencement of any operation. This would have resulted in a far better outcome not only for the surface owner, but also for Vastar itself, as the damages it was likely going to have to pay upon losing a potential negligence claim ranged from \$12,800 to \$170,000.¹⁴⁹

The facts given in the case make it unclear whether the first “existing surface use” element of the Accommodation Doctrine has been met. However, the proposed Oklahoma Accommodation Doctrine in Section V addresses this issue. The second element requiring proof that an alternative method of the existing use of the surface is not available also requires more facts. But it is reasonable to assume that even had there been an alternative method of using the surface, Vastar would still be required to modify the way it drilled because of evidence that it acted willfully or negligently in causing unnecessary damage.

The third element requiring proof that the operator’s drilling procedures would impair the surface owner’s property use is likely met in this case. Vastar caused vast amounts of damage to the subsurface when it trenched pits filled with pit liquids, drilling mud, and other substances, causing a break in the plastic liners that held the reserves, leading to pollution of groundwater and contamination of the land.¹⁵⁰ Additionally, dumping

146. *Id.*

147. *Id.*

148. *See* Getty Oil Co. v. Jones, 470 S.W.2d 618, 623 (Tex. 1971).

149. *Vastar Res. Inc.*, ¶ 7, 38 P.3d at 238.

150. *Id.* ¶ 4, 38 P.3d at 238.

hydrochloric acid onto the surface polluted the soil.¹⁵¹ The consequences of Vastar's actions were severe, decreasing the fair market value of the land and leading to several thousand dollars in damages to the land.¹⁵² This damage likely precluded Howard from his right to use and enjoyment of the land. Finally, the fourth element of the Accommodation Doctrine would be met without much question because Vastar allegedly acted willfully or negligently in causing the damage to the surface.¹⁵³ This is a clear indication that it could have conducted operations in a reasonable, alternative way in order to accommodate the surface owner while still exercising its mineral interest rights. An investigation into local industry norms and the presentation of expert testimony would likely show that operators do not freely dump wastes or behave in any way similar to the way Vastar behaved.

The use of the Accommodation Doctrine in this situation would have resolved the conflict between Vastar and Howard before its inception. If Vastar had been made to find alternative methods of drilling prior to even starting operations, damages would likely have been significantly minimized. Instead, it operated under the assumption that the Surface Damages Act would only require it to pay damages upfront to Howard in order to freely use the land in whichever way it wished.¹⁵⁴ Howard mistakenly depended on this act to protect him in the event that Vastar acted willfully or negligently in damaging the property. Through this reliance, he lost a substantial amount of time and money in court costs and attorney fees when he filed his claim under the Surface Damage Act, only to be rejected from the courts and told to re-file under a claim of negligence.¹⁵⁵ If the Accommodation Doctrine had been available to him, he could have initiated court proceedings prior to Vastar's drilling and the two parties could have reached a mutually agreeable decision before the situation turned hostile.

3. Tenneco Oil Co. v. Allen

Tenneco Oil Co. v. Allen is a pre-Surface Damage Act case, allowing an analysis of the outcome under the Surface Damage Act and the proposed Accommodation Doctrine.¹⁵⁶ The surface owner and appellee, Allen,

151. *Id.*

152. *Id.* ¶¶ 7, 14, 38 P.3d at 238-39.

153. *Id.* ¶ 17, 38 P.3d at 240.

154. *Id.*

155. *Id.*

156. 1973 OK 129, 515 P.2d 1391.

sought remedy under a private nuisance claim.¹⁵⁷ Appellant, Tenneco Oil Co. (Tenneco), was the mineral lessee under an oil and gas lease to an entire tract of land in Lincoln County, OK, when Allen obtained the surface rights to the tract through a deed in 1967.¹⁵⁸ The oil and gas lease included several provisions allowing Tenneco to use the land to mine and operate in order to produce oil and gas, amongst other minerals.¹⁵⁹ The lease also contained a clause that stated the surface interest owner could require Tenneco to bury pipe lines below plow depth and pay for any damage to crops caused by drilling operations.¹⁶⁰ Finally, the contract gave the lessee the right to remove all equipment used for drilling within ninety days of the termination of the lease.¹⁶¹ Tenneco's drilling operations included divvying the land into fifteen ten-acre segments, some of which belonged to Allen.¹⁶² Seven of these tracts that belonged to Allen had oil and gas wells drilled into the center of them.¹⁶³

The dispute arose when Allen claimed that under the lease, Tenneco was given "the right to occupy and use so much, but only so much, of the surface of the leased land as is reasonably necessary to produce and save oil and gas from the leased land."¹⁶⁴ Allen claimed Tenneco violated this provision by using portions of the land not reasonably necessary for drilling operations.¹⁶⁵ Tenneco's alleged unreasonable use of the surface precluded Allen from using areas of the surface for agricultural and other purposes.¹⁶⁶ Additionally, Allen claimed that Tenneco's unreasonable use caused oil and/or salt water to escape from the drilling wells, salt-water pits, or pipelines.¹⁶⁷ The contaminated water subsequently spread throughout the property and into ponds used to water Allen's cattle, preventing his cows from drinking water and causing damage to the land.¹⁶⁸ Allen alleged that this incident caused \$4,000 in damages.¹⁶⁹

157. *Id.* ¶¶ 12-14, 515 P.2d at 1394.

158. *Id.* ¶ 2, 515 P.2d at 1392.

159. *Id.* ¶ 6, 515 P.2d at 1393.

160. *Id.* ¶ 7, 515 P.2d at 1393.

161. *Id.*

162. *Id.* ¶ 5, 515 P.2d at 1393.

163. *Id.*

164. *Id.* ¶ 16, 515 P.2d at 1394.

165. *Id.* ¶ 17, 515 P.2d at 1394.

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

Tenneco also left dug-out pits unfilled, although their use expired years prior to the commencement of this action.¹⁷⁰ Additionally, equipment, concrete foundations, and guy-wire “dead men” used for the drilling operations that had been abandoned years prior still remained on the property.¹⁷¹ Although Tenneco did remove rod lines that were connected to the wells, heavy, concrete rod-supports were left protruding from the ground, inhibiting Allen from using areas of the surface for agricultural and grazing purposes.¹⁷² Finally, Allen alleged that Tenneco refused to bury pipelines below the surface as required by the oil and gas lease, disallowing Allen from mowing or using the land for his cattle operations.¹⁷³ Tenneco claimed it had no duty to clear portions of the land, demurring to each claim based on the failure to state a cause of action by Allen.¹⁷⁴ The trial court overruled the demurrers.¹⁷⁵ It instructed the jurors that there was no clear-cut rule for determining the amount of damages, if any, owed to Allen.¹⁷⁶ Instead, the jury was to measure the damages by “the amount of money which [would] reasonably and fairly compensate the plaintiff for such personal inconvenience and annoyance.”¹⁷⁷ The jury returned a judgment of \$6,150 for Allen’s two private nuisance claims.¹⁷⁸

Tenneco appealed this verdict to the Supreme Court of Oklahoma from the District Court of Lincoln County,¹⁷⁹ claiming that it owed no duty or obligation to the surface owner to remove or restore the land during and after drilling operations.¹⁸⁰ The court relied on precedent to fashion a rule in regards to an oil and gas lease where the mineral lessee does not own the surface rights.¹⁸¹ The court discussed a prior case in which the oil and gas lessees had an obligation to restore the land and remove any materials used for drilling upon completion of operations in order to allow the surface interest holder to use the land freely.¹⁸² Citing several other cases that all

170. *Id.* ¶ 18, 515 P.2d at 1394.

171. *Id.*

172. *Id.*

173. *Id.* ¶ 20, 515 P.2d at 1394-95.

174. *Id.* ¶ 21, 515 P.2d at 1395.

175. *Id.*

176. *Id.* ¶ 48, 515 P.2d at 1398.

177. *Id.*

178. *Id.* ¶ 24, 515 P.2d at 1395.

179. *See id.* ¶¶ 1-2, 515 P.2d at 1392.

180. *Id.* ¶ 28, 515 P.2d at 1396.

181. *Id.* ¶¶ 29-36, 515 P.2d at 1396-97.

182. *Id.* ¶¶ 31-33, 515 P.2d at 1396 (citing *Schlegel v. Kinzie*, 1932 OK 243, 12 P.2d 223).

concluded this rule was proper, the court upheld the lower court's verdict in favor of Allen.¹⁸³

a) Applying the Surface Damage Act

Because the Surface Damage Act did not exist at the time of *Tenneco Oil Co.*, this case was settled through a private nuisance claim.¹⁸⁴ However, if such a case were to arise today, a court would most likely decide it through the Surface Damage Act. Under the act, the first step for Tenneco and Allen would be good-faith negotiations in an attempt to reach an agreed-upon amount of compensation for surface damages.¹⁸⁵ This initial step could have prevented further litigation, as it could provide a potential legal remedy prior to damage occurring on the land.

Additionally, even if Tenneco and Allen would be unable to reach an agreement through these negotiations, they could each request court-appointed appraisers to estimate the amount of surface damage and reach a solution.¹⁸⁶ This would allow an unbiased conclusion regarding compensation, rather than creating the hostile environment between Tenneco and Allen—one that actually occurred.

The Surface Damage Act provides even further remedies to the two competing interests if one or both parties disagree with the appraisers' estimates. A jury trial is available to either party contesting the third party calculations.¹⁸⁷ It is well settled that the jury should estimate damages based on the diminution of the fair market value of the surface.¹⁸⁸ This is a significant difference from the remedy under the private nuisance claim that Allen successfully argued. In the actual case, the jury was instructed to assess damages only for the inconvenience and annoyance that Allen suffered.¹⁸⁹ This is likely a considerably smaller amount of compensation compared to the remedy of the decrease of fair market value under the Surface Damage Act because inconvenience and annoyance lack objectivity, making it difficult to measure.¹⁹⁰ When basing a claim on an

183. *Id.* ¶¶ 34-35, 51, 515 P.2d at 1396-98.

184. *Id.* ¶ 10, 515 P.2d at 1393.

185. 52 OKLA. STAT. § 318.5(A) (2011).

186. *Id.*

187. *Id.* § 318.5(F).

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

189. *Tenneco Oil Co.*, ¶ 48, 515 P.2d at 1398.

190. John A. Sebert, Jr., *Punitive and Nonpecuniary Damages in Actions Based upon Contract: Toward Achieving the Objective of Full Compensation*, 33 UCLA L. REV. 1565, 1578, 1587-88 (1986) (“[T]he difficulties exist not only at the measurement stage, where the court or jury is asked to perform the difficult if not impossible task of monetizing a

individual's mental and emotional state, there is no physical harm that could be assessed monetarily. Therefore, courts generally award lower damages in these types of cases to prevent nonsensical claims from entering the judicial system.¹⁹¹ On the other hand, when actual physical damage is evident, it is reasonable that a jury would grant larger awards because there are monetary measurements to assess the change in fair market value or the costs of repairing the damage. Although the Surface Damage Act does not allow the recovery of pure inconvenience to the surface owner, the Oklahoma courts have decided that it does call for its consideration when investigating actual damages.¹⁹² This causes actual damages that can be recovered through the Surface Damage Act to generally outweigh damages recoverable through mere nuisance.¹⁹³

Therefore, Allen would probably have preferred compensation for actual surface damages under the Surface Damage Act in this case, rather than the speculative damages valued at a mere \$6,150 he received under the private nuisance claim. It is implicit in the above analysis that disputes involving surface interest owners and mineral interest owners are better served through the Surface Damage Act rather than a tortious claim in the majority of cases in order to allow for calculations of actual damages rather than mere inconvenience.

b) Practicing the Accommodation Doctrine

An even better solution to disputes between surface and mineral owners could be the application of the Accommodation Doctrine. If Allen had been able to bring his claim under the Accommodation Doctrine prior to this damage ever occurring, both parties could have potentially protected their interests and the land. And all while saving time and money. Application of the elements of this type of claim illustrates how these competing interests could have been balanced.

The first part of the Texas Accommodation Doctrine requires an *existing* use of the surface.¹⁹⁴ This element is not met in *Tenneco Oil Co.* because Tenneco owned the mineral interests prior to Allen's procurement of the land.¹⁹⁵ However, this Comment's proposed Oklahoma Accommodation

nonpecuniary loss, but also at the prior stage, when it must be determined whether any emotional trauma worthy of compensation has occurred.”).

191. *Id.* at 1572-73.

192. *Davis Oil Co. v. Cloud*, 1986 OK 73, ¶¶ 24-26, 766 P.2d 1347, 1353.

193. *See, e.g., Dyco Petroleum Corp. v. Smith*, 1989 OK 51, ¶ 9, 771 P.2d 1006, 1008.

194. *Getty Oil Co. v. Jones*, 470 S.W.2d 618, 622 (Tex. 1971).

195. *Tenneco Oil Co. v. Allen*, 1973 OK 129, ¶ 2, 515 P.2d 1391, 1392.

Doctrine would modify this component. Therefore, the analysis will continue for the purposes of showing how the application of a new law would lead to yet another outcome in this case.

The second element requires that Allen show he has no reasonable alternative methods of the existing surface use.¹⁹⁶ Allen used his land to raise cattle.¹⁹⁷ This included planting grass so that his cows could graze and drink from ponds across the land.¹⁹⁸ Therefore, there would be no reasonable alternatives to exercising this use of the surface in order to accommodate Tenneco's manner of using the land for drilling purposes. Although Allen could have potentially baled hay and built an irrigation system to pump water from the ponds into a designated area where his cows could have been confined, there are two problems with this alternative. First, Allen complained of being unable to mow properly due to Tenneco's pipes running along the ground.¹⁹⁹ Consequently, mowing the planted grass and baling it to feed cattle in a designated area would be precluded if Tenneco used the land in the manner it did. Second, the cost of the farming equipment required to bale hay and build an irrigation system is likely too expensive to deem this alternative use of the surface as reasonable. Therefore, Allen would have succeeded in showing that the inconvenience of modifying his existing use greatly outweighed the benefits of a compromise between himself and Tenneco.

The present facts satisfy the third element requirement to show that Tenneco's drilling operations would preclude the existing use.²⁰⁰ Howard made several allegations against Tenneco regarding the interference of his existing use of the surface.²⁰¹ One claim included the contamination by salt water and/or oil of several watering ponds on the property as a result of Tenneco's drilling operations.²⁰² If contamination of land or water sources within the land could have been a foreseeable consequence of drilling operations, perhaps to be shown by expert testimony or evidence of similar industrial practices, then this alone would meet the third requirement of the Accommodation Doctrine. Even if this claim could not be supported, Allen would have likely succeeded on the other claims involving Tenneco's abandoned equipment and pipelines that were strewn throughout the

196. *See Getty Oil Co.*, 470 S.W.2d at 622.

197. *Tenneco Oil Co.*, ¶¶ 17-18, 515 P.2d at 1394.

198. *Id.* ¶¶ 17, 20, 515 P.2d at 1394.

199. *Id.* ¶ 20, 515 P.2d at 1394.

200. *Getty Oil Co.*, 470 S.W.2d at 622.

201. *Tenneco Oil Co.*, ¶¶ 17-18, 515 P.2d at 1394.

202. *Id.* ¶ 17, 515 P.2d at 1394.

property.²⁰³ The concrete foundations, guy-wires, concrete rod-supports, and pipelines unreasonably covered portions of the land, thereby directly interfering with Allen's use of the land for agricultural and grazing purposes.²⁰⁴

The fourth and final element required under the Accommodation Doctrine is Allen's showing that Tenneco could have exercised reasonable alternative methods of drilling, accepted by the local oil and gas industry.²⁰⁵ This element is perhaps the easiest shown in regard to the current situation. While it is unclear why the salt water and/or oil leaked due to Tenneco's drilling operations, Allen could show that Tenneco could have used a better storage tank for these liquids if the local oil and gas industry used different storage methods to adapt to the environment. Using different materials to better retain minerals incident to drilling could have prevented the pollution of land and water. Additionally, a solution for leaving pits unfilled for several years after their use had been exhausted can easily be shown by Allen.²⁰⁶ Unfilled pits served virtually no purpose to Tenneco and could have simply been filled in order to allow Allen to use the surface for agricultural purposes.²⁰⁷ Also, as the court found, the wells and related equipment abandoned by Tenneco²⁰⁸ should have been cleared out pursuant to accepted industry operations.²⁰⁹ The alternative to leaving the equipment there is completely reasonable as it would not have created an undue burden on Tenneco and would have allowed Allen to use more of the land.²¹⁰ Finally, Allen could have shown a reasonable alternative for the pipelines constructed by Tenneco that ran across the surface of the ground.²¹¹ Even the lease between Tenneco and Allen required Tenneco to bury pipelines below plow depth.²¹² This, combined with additional research into the local practices, might indicate that burying pipelines was an acceptable method of drilling operations throughout the oil and gas industry. If Tenneco had adhered to this provision within the lease, Allen would have been able to

203. *Id.* ¶ 18, 515 P.2d at 1394.

204. *Id.*

205. *Getty Oil Co.*, 470 S.W.2d at 622.

206. *Tenneco Oil Co.*, ¶ 18, 515 P.2d at 1394.

207. *Id.* ¶ 18, 515 P.2d at 1394, 1397.

208. *Id.* ¶ 15, 515 P.2d at 1394.

209. *Id.*

210. *See id.* ¶¶ 25-30, 515 P.2d at 1394-97 (citing *Schlegel v. Kinzie*, 1932 OK 243, 12 P.2d at 223).

211. *Id.*

212. *Id.* ¶ 7, 515 P.2d at 1393.

continue mowing the land, planting grass, and feeding his cows.²¹³ Therefore, a reasonable alternative existed to Tenneco, and this substitute would have allowed Allen to exercise his right to use the surface while continuing to allow Tenneco to utilize their mineral interest rights by drilling for oil and gas.

As shown, the implementation of an Accommodation Doctrine would allow a balance of interests between Tenneco and Allen. Under this situation, because Tenneco was already exercising its mineral rights when Allen acquired possession of the surface, the damage to the surface could have been mitigated and steps could have been taken by Tenneco to accommodate the new surface owner.²¹⁴ These steps appear to be reasonable under the circumstances, as most of the issues seemed to be related to equipment and pits that had been abandoned years prior to this action.²¹⁵ In general, oil and gas operators could be better incentivized to practice better drilling operations if they are threatened with the possibility of a new surface owner seeking to make reasonable use of the surface that would not cause serious preclusion to the current practices of the mineral interest holder. These improved procedures could include instant removal of equipment after a well's purpose is fulfilled. Additionally, pits could be filled and leveled when their use is terminated. Finally, even if an operator chooses to lay pipes on the surface of land, burying them to allow a surface owner to use the land could potentially avoid litigation like *Tenneco Oil Co.* Taking steps to compromise with the surface owner could prevent damages of a greater nature when the surface owner sues the operator in order to exercise surface use rights.

The Surface Damage Act would allow monetary compensation for a surface owner's loss of land use.²¹⁶ But the Accommodation Doctrine in this case, and in many cases, would allow the continued use of both the surface owner and the mineral interest owner. This is a better solution because the competing interest owners could reach a mutually beneficial remedy to avoid the preclusion of one party's rights.

III. Texas and Oklahoma Energy Industry Similarities

The wind energy industry in Texas has been growing substantially since research began in 1970, coupled with the creation of the Alternate Energy

213. *Id.* ¶ 18, 515 P.2d at 1394.

214. *See id.* ¶ 3, 515 P.2d at 1392.

215. *See id.* ¶¶ 17-18, 515 P.2d at 1394.

216. *See* 52 OKLA. STAT. § 318.9 (2011).

Institute in 1977.²¹⁷ Texas has since become the leading state in the nation in wind energy development and research, producing 12,214 megawatts of wind capacity in 2013.²¹⁸ Additionally, it boasts 8646 turbines, and includes forty-three of the 500 manufacturing facilities in the United States.²¹⁹ In 2005, Texas modified its renewable portfolio standard to reach 10,000 megawatts of renewable energy by 2025, and the wind energy industry met that goal in 2010.²²⁰

Wind energy potential is measured by what is termed “hub height.”²²¹ Hub height is measured as the distance from a wind turbine platform to the rotor of the turbine itself to show the height of a windmill.²²² While the wind energy industry is booming in Texas, with wind energy potential at eighty meters hub height set at 1,901,530 megawatts by the National Renewable Energy Laboratory, the oil and gas industry is just as prosperous in the Lone Star State.²²³ Texas is the leading state in crude oil production, with the Railroad Commission of Texas reporting an average of 1,685,786 barrels of crude oil production per day in July 2013.²²⁴ This is an increase from 1,300,694 barrels of crude oil production averaged per day in July 2012.²²⁵ Additionally, “571,285,336 Mcf (thousand cubic feet)” of natural gas was produced in July 2013, an increase from the 533,864,038 Mcf of gas production in July 2012.²²⁶ Because wind energy is abundant in Texas,²²⁷ where many oil and gas companies also maintain operations, the likelihood of a wind energy facility wishing to construct windmills on land used by oil and gas operators is potentially high.²²⁸ The Texas

217. *About Us*, ALT. ENERGY INST., <http://www.windenergy.org/about.html> (last visited Feb. 12, 2014).

218. AM. WIND ENERGY ASS'N, TEXAS WIND ENERGY 1 (n.d.) [hereinafter AWEA, TEXAS WIND ENERGY], available at <http://www.awea.org/Resources/state.aspx?ItemNumber=5183>.

219. *Id.*

220. *Id.* at 2.

221. *What Is a Hub Height?*, 3TIER, <http://www.3tier.com/en/support/wind-prospecting-tools/what-prospecting-hub-height/> (last visited Feb. 12, 2014).

222. *Id.*

223. AWEA, TEXAS WIND ENERGY, *supra* note 218, at 2.

224. *Texas Monthly Oil and Gas Statistics*, R.R. COMM'N OF TEX. (Sept. 27, 2013), <http://www.rrc.state.tx.us/all-news/092713a/>.

225. *Id.*

226. *Id.*

227. Joshua S. Hill, *US Installs Record Wind Capacity in Q2'15, Texas Reigns Supreme*, CLEANTECHNICA (Aug. 6, 2015), <http://cleantechnica.com/2015/08/06/us-installs-record-wind-capacity-q215-texas-reigns-supreme/>.

228. Marks, *supra* note 81.

Accommodation Doctrine will help alleviate disputes arising between these two competing interests as these industries continue to grow and search for more land and minerals to develop, with the eventual result of both sectors seeking the same tract of land to increase production and profits.

Oklahoma is similar to Texas in terms of national rank and location of oil and gas operations and wind energy facilities.²²⁹ Oklahoma is ranked sixth in the nation for crude oil production, producing 11,504 barrels of crude oil in March 2015.²³⁰ Additionally, Oklahoma is sixth for total megawatts of renewable wind energy installed.²³¹ The National Renewable Energy Laboratory has measured Oklahoma's wind energy potential at eighty meters hub height to be 516,822 megawatts.²³² Just as in Texas, Oklahoma's wind energy farms are located in west Oklahoma.²³³ While oil and gas is developed all across Oklahoma, primary production of minerals occurs in the western part of the state.²³⁴ The growth of both industries in the same locations across Oklahoma could also lead to a struggle over the surface of land when wind energy companies seek to construct renewable energy facilities on the same tract of land that oil and gas operators are using. This could explain why no wind energy facility has yet tried to construct a wind farm over oil and gas operations, even though there may be evidence of powerful wind sources in a particular area.

The best solution to this impending problem is to solve it before it begins. The Surface Damages Act will not suffice for wind energy companies wishing to use the land, or for wind energy farms that are already in operation.²³⁵ The potential for an oil and gas operator to obtain mineral interests and use the Surface Damages Act to pay damages to the wind energy companies in order to drill for minerals is a risk that should be avoided to better serve both wind and oil and gas industries. The implementation of the Oklahoma Accommodation Doctrine can help these

229. Compare AWEA, TEXAS WIND ENERGY, *supra* note 218, at *passim*, with AWEA, OKLAHOMA WIND ENERGY, *supra* note 58, at *passim*.

230. *Rankings: Crude Oil Production, March 2015 (Thousand Barrels)*, U.S. ENERGY INFO. ADMIN., <http://www.eia.gov/state/rankings/?sid=US#/series/46> (last visited June 15, 2014).

231. AWEA, OKLAHOMA WIND ENERGY, *supra* note 58, at 2.

232. *Id.*

233. *Wind Energy: Electricity and Economic Potential in Oklahoma*, available at <https://stateimpact.npr.org/oklahoma/tag/wind-energy/>.

234. Wertz, *supra* note 58.

235. 52 OKLA. STAT. § 318.5(A) (2011) ("Prior to entering the site with heavy equipment, the operator shall negotiate with the surface owner for the payment of any damages which may be caused by the drilling operation.").

two industries to work in harmony, rather than seeking judicial remedies through litigation—something both expensive and time-consuming.

IV. Proposing an Oklahoma Accommodation Doctrine

As indicated in this Comment, the Texas Accommodation Doctrine heavily influences the Accommodation Doctrine that should be adopted in Oklahoma.²³⁶ However, the proposed Oklahoma Accommodation Doctrine has a slight modification from the Accommodation Doctrine used in Texas courts. Because Oklahoma is different from Texas in the sense that it has the Surface Damage Act, the Accommodation Doctrine should be used in conjunction with the act.

As evidenced from the case studies in Part II, subpart B, the Surface Damage Act has gaps and disadvantages, at times leaving surface owners with potentially inadequate legal remedies.²³⁷ *Vastar Resources, Inc. v. Howard* illustrated this when the court reversed the trial court's ruling because Howard should have filed a negligence claim against Vastar.²³⁸ Other situations arise when the surface owner would not want to only accept damages for the destruction of his existing property uses in favor of mineral extraction.²³⁹ Any person with surface ownership or rights should be able to use that land as he reasonably sees fit, rather than being forced to succumb to the oil and gas industry by accepting monetary compensation for the loss of that use. Some surface owners use the land for farming, selling crops for a profit. The Surface Damages Act makes the loss of surface use unfair to those people by taking away a person's livelihood and enjoyment of land without providing adequate recourse. The Accommodation Doctrine can be used in these situations to settle claims between surface owners and mineral owners, while the Surface Damages Act can be used to reach monetary compensation agreements when a surface owner finds this remedy to be acceptable.

The Oklahoma Accommodation Doctrine should have five elements, differing from the four required by the current Texas Accommodation Doctrine. This will better serve the wind energy facilities that continue to appear across Oklahoma, with the potential of acquiring leases to use the

236. *See supra* Parts I.A., II.A.

237. *Vastar Res., Inc. v. Howard*, 2002 OK CIV APP 13, ¶ 13, 38 P.3d 236, 239 (noting there is no remedy under the Act, but only in tort).

238. *Id.* ¶¶ 17, 19, 38 P.3d at 240.

239. *Davis Oil Co. v. Cloud*, 1986 OK 73, 766 P.2d 1347 (noting the surface owner sought greater damages than those granted for loss of use of the surface).

surface of which oil and gas operations are already being fulfilled. While the Texas Accommodation Doctrine demands that there be an existing use by the surface owner,²⁴⁰ the Oklahoma Accommodation Doctrine should not have this requirement. The Oklahoma Accommodation Doctrine should only require either an existing use of the land or an *intent* that the surface owner will use the surface of the land in a reasonably necessary way.

The second element of the proposed Oklahoma Accommodation Doctrine should require that the oil and gas operations, whether existing or potential, to only preclude the surface interest owner from using the surface of the land in a reasonably necessary way. Additionally, there must be no reasonable alternative method of using the surface of the land in the way as the surface owner wishes. The Texas Supreme Court, in *Merriman v. XTO Energy, Inc.*, clarified this component for the Texas Accommodation Doctrine when it decided that there should only be evidence that an alternative method to the specific use of land does not exist, and not just evidence that there are other ways to generally use the land.²⁴¹ Also, just as in the Texas Accommodation Doctrine,²⁴² the proposed Oklahoma Accommodation Doctrine would require the surface owner to bear the burden of proving that there is a readily available alternative method of operations for the drilling company, and that the method is widely accepted in local practices. Lastly, in order to prevent one competing interest from bullying another, if there is evidence of alternative methods of both surface use and mineral operations, there would be a balancing test to determine the public economic benefit and the cost of changing proposed or existing uses of either the surface or the minerals.

For example, if the surface owner would like to water crops by installing an underground irrigation system, interrupting oil and gas pipes that have already been placed, the court would look at the Oklahoma Accommodation Doctrine to solve the dispute, rather than a separate claim apart from the Surface Damage Act.²⁴³ First, the surface owner wishes to use the surface of the land, so the first element of the doctrine is met. Second, the existing oil and gas pipes running beneath the land would preclude the surface owner from installing his proposed underground irrigation system. Third, the court would determine reasonable alternatives to the irrigation system, such as a suspended system that would similarly provide water to the soil as an underground technique. However, even if

240. *See, e.g.*, *Getty Oil Co. v. Jones*, 470 S.W.2d 618, 622 (Tex. 1971).

241. 407 S.W.3d 244, 250-51 (Tex. 2013).

242. *Getty Oil Co.*, 470 S.W.2d at 622.

243. *See, e.g., id.* at 620 (dealing with a similar above-ground irrigation system).

this is shown, the surface owner could suggest a reasonable alternative method of oil and gas operations that is accepted by the local industry. If an alternative method could also be shown in this situation, the court should balance the competing interests of the surface owner and oil and gas operator in order to determine which interest should have to accommodate the other.

Another example includes the appearance of wind energy companies in Oklahoma. If a wind energy facility wished to erect a windmill that would interfere with oil and gas operations and would be precluded by the drilling, the first element would be met because there is an indication of a desire to use the surface of the land, which would be acceptable in the absence of an existing use of the property's surface.

The second element would be met as well because of the oil and gas operations hindering the wind energy developments. There would then need to be an investigation into whether there are any alternative methods for the surface interest holder to construct the windmill. For example, a different location on the tract of land that might supply the same amount of wind power, away from the oil and gas operations, could be an option. Even if there are reasonable alternatives for the surface owner, he could still succeed by showing evidence of the fourth element. The surface owner would bear the burden of showing that the oil and gas operations could be reasonably altered in order to accommodate the manufacturing of wind energy facilities on the surface.

If evidence can be shown that there are alternative methods that are accepted by the local industry, then the fifth element of the Accommodation Doctrine could be reached. The court may then apply the balancing test, weighing the public economic benefit against the costs of changing existing or potential methods of operations of both the surface interest holder and mineral interest holder, in order to determine which interest should have to modify its procedures to accommodate the other.

The addition of the fifth factor prevents one property interest owner from dominating the situation, which is currently permitted in Oklahoma under the Surface Damages Act.²⁴⁴ The Act allows operators to dominate the energy industry, giving surface owners access only to monetary remedies, unless they pursue relief through a negligence claim or seek a separate

244. *See* 52 OKLA. STAT. §§ 318.3, 318.5, 318.9 (2011) (stating that an operator may drill for minerals so long as it does not act willfully or negligently to create unnecessary harm and pays for damages of the surface to the surface owner).

cause of action.²⁴⁵ However, the Oklahoma Accommodation Doctrine keeps both surface owners and mineral owners on a level playing field within the judicial system through the five factors, ending with a balancing test to determine the benefit to the public and costs of modifying the operations of each party. This gives the court the opportunity to reach the most economically viable solution for both parties, enabling a full investigation into both the mineral and surface interest holders. This allows for a better balance overall, and could solve conflicts while accommodating two competing interests.

Conclusion

The Oklahoma energy industry is growing substantially each year. While the Surface Damages Act sometimes provides surface owners sufficient legal remedies when oil and gas drillers obtain mineral rights on the same tract of land, it does not solve all issues. When wind energy companies seek to develop the surface of land over which an oil and gas company is producing minerals, they may be precluded from doing so based on the current law in Oklahoma.

However, Oklahoma could learn a lesson from the methods used in Texas through its Accommodation Doctrine. Instead of allowing oil and gas companies to bully their way onto a tract of land by simply compensating the surface owner, Texas allows the surface owner to have a say in the way the surface of the land is used when each element of the Accommodation Doctrine is met. This allows a property owner to use a plot of land as he wishes, within the bounds of the law. Also, with the proposed alternative version of an Oklahoma Accommodation Doctrine, Oklahoma would be ready to solve problems between wind energy and oil and gas concerns, allowing them to work harmoniously rather than against one another.

Oklahoma and Texas have many similarities when it comes to the energy industries.²⁴⁶ As of present, Texas is better equipped to solve legal disputes when wind energy facilities and oil and gas drillers begin to overlap one another. Taking a modified version of Texas's Accommodation Doctrine

245. See *Vastar Res., Inc. v. Howard*, 2002 OK CIV APP 13, 38 P.3d 236, *abrogated by* *Ward Petroleum Corp. v. Stewart*, 2003 OK 11, 64 P.3d 1113. *Ward Petroleum Corp.* abrogates *Vastar Res., Inc.* only to the extent that it allows a judge to hear a Surface Damages Act claim and a tort claim simultaneously in certain instances. *Ward Petroleum Corp.*, ¶ 11, 64 P.3d at 1116.

246. See AWEA, OKLAHOMA WIND ENERGY, *supra* note 58, at *passim*; AWEA, TEXAS WIND ENERGY, *supra* note 218, at *passim*; see also Wertz, *supra* note 58.

will allow Oklahoma to be ready for the same issues to arise within its boundaries. This legal remedy will prevent any potential delays in wind energy and oil and gas developments, as without a solution already prepared, litigation between the two industries could become very time consuming and expensive. As a result of potential legal processes, the Oklahoma economy could take a downturn, as these industries dominate the financial systems of the state. Oklahoma needs the Accommodation Doctrine now to prevent a bogged down judicial system, a drop in economic performance, and a delay in energy progression.

Chantel James