RIGHTS OF ACCESS BETWEEN SURFACE OWNERS AND MINERAL LESSEES

By

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Paper 3

Biographical Sketch

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Rick D. Davis, Jr. is an attorney with the law firm of Cotton, Bledsoe, Tighe & Dawson, with offices in Midland and Houston, Texas, where his practice focuses on civil litigation. He received a Bachelor of Business Administration degree from the University of Texas at Austin in 1982 and received his Juris Doctor degree graduating, magna cum laude, from Texas Tech University School of Law in 1985, where he was a member of the Order of the Coif, served as Articles Editor for the Texas Tech Law Review, and received the George and Sarah Dupree award as the Outstanding Law School Graduate. Following his graduation from law school, he served as a briefing attorney for the Honorable Chief Justice John L. Hill of the Supreme Court of Texas.

Mr. Davis has been author and speaker on numerous occasions for organizations including the Southwestern Legal Foundation, Texas Oil and Gas Journal, the Permian Basin and San Antonio Geological Societies, the Permian Basin, Houston, Dallas, San Antonio, and Denver Associations for Petroleum Landmen, the American Association for Professional Landmen, the Energy Law Sections of the Houston and Dallas Bar Associations, and several Texas oil and gas legal institutes.

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§ 1.0 INTRODUCTION

Many states have long allowed the severance of the surface estate from the mineral estate.[1] As a result, many surface owners today do not own the minerals underneath their own land. This severance can lead to many problems because the surface owner's use is often inconsistent with either mineral exploration or production activities. This inherent conflict between the surface estate and mineral estate was accurately articulated by the 5th Circuit Court of Appeals as follows:

> From the viewpoint of the surface owner when mineral operations are conducted all across his land, interfering constantly with his ranching or farming, the mineral use becomes unreasonable. But the mineral operator who employs the usual and customary methods of the industry views the matter differently; it would be unreasonable for him to give way to grazing animals by not developing the underlying minerals, i.e., by not drilling wells and building roads and power lines and flow lines and tank batteries. The viewpoint of these parties on reasonableness is quite different. Sadly for the surface owner, Texas Law, which governs in the present case, implies that a mineral lease gives a large measure of deference to the lessee's view of reasonableness.[2]

Given this context, what happens when the mineral owners decide to drill a well, and the best possible location is in the middle of a surface owner's crop? Or mineral lessees decide to conduct a seismic survey and need access to a pasture currently in use by the surface owner? This paper will address the respective rights of the surface owner and the mineral owner or its lessee. Its primary focus will be on Texas law as it is generally looked to for leadership on oil and gas legal issues. However, the law of other states is also included.

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1 *E.g., Texas Co. v. Daugherty*, 107 Tex. 226, 176 S.W. 717 (Tex. 1915); *Holcombe v. Superior Oil Company*,35 So.2d 457, 458 (La. 1948) (when minerals have been severed from the surface, the mineral owner is the exclusive owner of the right to explore for minerals); 1 *H. Williams and C. Meyers, Oil and Gas Law* § 202.2 (1997).

2 *Vest v. Exxon*, 752 F.2d 959, 960-61 (5th Cir. 1985).

§ 2.0 THE GENERAL RULE - THE MINERAL ESTATE IS THE DOMINANT ESTATE

The general rule is that the mineral estate owner has the right to use so much of the surface as may be reasonably necessary to enjoy the mineral estate, *Harris v. Currie*, 142 Tex. 93, 176 S.W.2d 302, 305 (Tex. 1943), and to interfere with the surface owner's use of it. *Vest v. Exxon*, 752 F.2d 959, 961 (5th Cir. 1985). This is because, as the Texas Supreme Court noted in its comprehensive decision in *Harris*:

> a grant or reservation of minerals would be worthless if the grantee and reserver could not enter upon the land in order to explore for and extract the minerals granted or reserved.

176 S.W.2d at 305. *See also Texaco, Inc. v. Faris,* 413 S.W.2d 147, 149 (Tex. Civ. App.--El Paso 1967, writ ref'd n.r.e.) ("the mere granting of the lease creates and vests in the lessee the dominant estate ...."); *Ball v. Dillard,* 602 S.W.2d 521, 523 (Tex. 1980) (a mineral lessee has the right to use as much of the surface and in such manner as is reasonably necessary to comply with the terms of the lease and to effectuate its purposes).

Arkansas

Cranston v. Miller, 208 Ark. 156, 185 S.W.2d 920 (1945) (the mineral lessee has the right to use so much of the surface as is reasonably necessary to enable the lessee to perform obligations imposed upon him by the oil and gas lease).

Colorado

Frankfort Oil v. Abrams, 413 P.2d 190, 195 (Colo. 1966) (mineral owner's surface access rights are superior to those of the surface owner in the event of irreconcilable conflict).

Oklahoma

Wellsville Oil Co. v. Carver, 206 Okla. 181, 242 P.2d 151 (1952) (holder of a prior oil lease owns the dominant estate and possesses exclusive right to use so much of the leased premises as is reasonably necessary to oil operations).

North Dakota

Feland v. Placid Oil Co., 171 N.W.2d 829 (N.D. 1969) (whether express uses are set out or not, the mere granting of an oil and gas lease creates and vests in the lessee the dominant estate in the surface of the land for the purposes of the lease).

Kansas

Mai v. Youtsey, 231 Kan. 419, 646 P.2d 475 (1982) (minerals lessee may make reasonable use of surface of leased land in carrying out legitimate object of the lease).

New Mexico

Amoco Oil Co. v. Carler Farms Co., 703 P.2d 894 (N.M. 1985) (mineral lessee is entitled to use so much of the surface as is reasonably necessary for its drilling and production operations).

Oklahoma

Ricks Exploration Co. v. Oklahoma Water Resources Bd, 695 P.2d 498 (Okla. 1984) (ordinary lease carries with it the incidental or implied right to enter and use surface to extent and in such manner as is reasonably necessary to enable lessee to perform all legitimate obligations imposed upon them by the lease); *Turley v. Flag-Redfern Oil Co.*, 782 P.2d 130 (Okla. 1989) (ordinary lease carries with it the incidental or implied right to enter and use surface to extent and in such manner as is reasonably necessary to enable lessee to perform all legitimate obligations imposed upon them by the lease); *Davon Drilling Co. v. Ginder*, 467 P.2d 470 (Okla. 1970) (lessee has right of ingress and egress and to occupy the surface of the land to the extent reasonably necessary for exploring and marketing oil and gas); *Mid-Continent Petroleum Corp. v. Rhodies*, 205 Okla. 651, 240 P.2d 95 (1951) (lessee possesses exclusive right to use so much of the leased premises as is reasonably necessary to oil operations).

§ 3.0 LIMITATIONS TO THE MINERAL ESTATE'S DOMINANCE

There are four limitations to the mineral estate's right of dominance over the surface estate:

(1) the mineral owner may only use so much of the surface as is reasonably necessary for the exploration and production of the minerals;

(2) the mineral owner must use the surface and conduct his exploration and production operations in a non-negligent manner;

(3) the mineral owner must conduct his activities with due regard for the surface estate; and

(4) the mineral owner must comply with statutory limitations.

3.01 Reasonably Necessary Surface Use.

Texas courts often express the mineral owner's right to use of the surface as the right to use as much of the surface, and in such a manner, as is reasonably necessary to comply with the terms of the lease and to effectuate its purpose. *Ball v. Dillard*, 602 S.W.2d 521, 523 (Tex. 1980); *TDC Engineering, Inc. v. Dunlap*, 686 S.W.2d 346, 348 (Tex. Civ. App. -- Eastland 1985, writ ref'd n.r.e.). *Lomax v. Henderson,* 559 S.W.2d 466, 467 (Tex.Civ.App.- Waco 1977, writ ref'd n.r.e.). This is an important rule of law for the mineral interest owner because its application means that the surface owner has no right, absent some express contractual provision, to recover surface damages from the mineral interest owner or their lessee unless the surface owner can prove that the mineral interest owner or lessee used more of the land than was reasonably necessary or the surface owner can prove specific acts of negligence. *Humble Oil & Refining Co. v. Williams*, 420 S.W.2d 133, 134 (Tex. 1967). *See also Vest v. Exxon*, 752 F.2d 959, 961 (5th Cir. 1985) (the "reasonably necessary" limitation is "simply a limit on the manner in which the mineral operation is done, and it does not limit the right of lessee to develop and extract minerals in accordance with the lease."). If, however, a mineral interest owner or their lessee makes an unreasonable use of the surface, they can be held accountable in damages. *Ball v. Dillard*, 602 S.W.2d 521, 523 (Tex. 1980).

California

California Callahan v. Martin, 43 P.2d 788 (1935) (oil and gas lessee has a right to such possession of the surface as is necessary and convenient for the exercise of the profit).

Colorado

Frankfort Oil Company v. Abrams, 413 P.2d 190, 195 (Colo. 1966) (absent unreasonable or negligent use, contractual requirements of a lease or other agreement, or statutory provision, no payment is due the surface owner for damages resulting from the mineral owner's exercise of its right of access).

Montana

Stokes v. Tutvet, 328 P. 2d 1096 (1958) (mineral fee grantee has incident rights to go upon and to conduct exploratory operations and produce oil and gas).

Oregon

Oregon Yaquina Bay Timber & Logging Co. v. Shiney Rock Mining Corp., 556 P.2d 672 (1976) (grantee of minerals in tract acquires by implication the right to occupy and use so much of surface as may be reasonably necessary to beneficial and profitable working of the mine).

The extent of the mineral estate's dominance over the surface estate and what activities are included within the scope of reasonable activities has been the subject of much litigation. The following is a review of some of the specific rights granted to the mineral estate.

[1] The Right to Enter Upon the Surface.

A mineral lessee has the right of ingress and egress upon the land for exploration and production of oil and gas. *Ball v. Dillard*, 602 S.W.2d 521, 523 (Tex. 1980). Consequently, a surface owner has no legal right to deny a mineral lessee access to the land for mineral development purposes. *Id.*; *Parker v. Texas Co.*, 326 S.W.2d 579, (Tex. Civ. App. -- El Paso 1959, writ ref'd n.r.e.); *Phillips Petroleum Co. v. Cargill*, 340 S.W.2d 877 (Tex. Civ. App. -- Amarillo 1960, no writ).

[2] The Right to Construct Roads to Drill Sites.

The lessee has the right to construct roads and absent excessive, unnecessary, or unreasonable use, owes no damages for exercising this right. *Gulf Oil Corp. v. Walton*, 317 S.W.2d 260, 262 (Tex. Civ. App. -- El Paso 1958, no writ). *See also Humble Oil & Refining Co. v. Williams*, 420 S.W.2d 133, 135 (Tex. 1967) (a mineral lease gives a lessee the right to build roads upon the leased premises); *Property Owners of Leisure Land, Inc. v. Wood & Mager, Inc.*, 786 S.W.2d 757, 760-61 (Tex. Civ. App. -- Tyler, 1990, no writ) (it was held a reasonable use of surface for mineral lessee to build an emergency access road from a well capable of producing hydrogen sulfide gas when such road was required by the Railroad Commission even though subdivision restrictions applicable to the area prohibited such use).

Louisiana

Rohner v. Austral Oil Exploration Co., 104 So. 2d 253 (La. App. 1958) (reasonable necessary use of surface includes the building of roads for ingress and egress).

Mississippi

Sun Oil Co. v. Nunnery, 251 Miss. 631, 170 So. 2d 24 (1964) (lessee had right to make graded road as a reasonable use of surface for development purposes);

Central Oil Co. v. Shows, 246 Miss. 300, 149 S.W.2d 306 (1963) (lessee construction of gravel road to drill site reasonable use of surface).

[3] The Right to Take a Reasonable Amount of Water.

The lessee has the right to take water in an amount which is reasonably necessary for the development and production of minerals. *Stradley v. Magnolia Petroleum Co.*, 155 S.W.2d 649 (Tex. Civ. App. -- Amarillo 1941, error ref'd). This includes the right to take water for water flood purposes. *Sun Oil Co. v. Whitaker*, 483 S.W.2d 808 (Tex. 1972). However, a mineral lessee's ability to use water for secondary recovery purposes has now been restricted by Section 27.0511(c), (d) of the TEXAS WATER CODE which provides that the Railroad Commission must first consider whether there is some other "solid, liquid, or gaseous substance" economically feasible and technically available to the lessee for enhanced recovery purposes and if there is, require the lessee to use such other substances instead of fresh water. Furthermore, a mineral owner's right to use water does not extend to uses off the premises. *Robinson v. Robbins Petroleum Corp.*, 501 S.W.2d 865, 867 (Tex. 1973).

Kansas

Wycoff v. Brown, 135 Kan. 467, 11 P.2d 720 (1932) (lease which provided lessee right to use [water produced on said land for its operations] except water from the lessor's water wells, gave lessee the right to take water from a pond in the lessor's pasture).

Oklahoma

Mack Oil Co. v. Laurence, 389 P.2d 955 (Okla. 1964) (owner of mineral rights is entitled to use that amount of water which is reasonably necessary for his purposes to explore and produce minerals and leased premises, but not for use off the premises for purposes unrelated to the development or the subject mineral estate).

[4] The Right to House Employees.

A mineral lessee has the right to house employees on the premises while they labor. In *Joyner v. R. H. Dearing & Sons*, 134 S.W.2d 757, 759 (Tex. Civ. App. -- El Paso 1939, error dism'd judg. cor.), the court affirmed a jury finding that it was reasonably necessary for the mineral lessee to construct a one-story, twenty-four by thirty foot house for use as living quarters for its employees to guard, care for, preserve, and maintain the lessee's mineral production operations.

Wyoming

Holbrook v. Continental Oil Co., 73 Wyo. 321, 278 P.2d 798 (1955) (lessee entitled to construct three residences on leasehold).

[5] The Right to Mine Caliche.

A mineral lessee has the right to mine caliche for his use in constructing roads and pads for drill sites and tank batteries. *B. L. McFarland Drilling Contractor v. Connell*, 344 S.W.2d 493, 497 (Tex. Civ. App. -- El Paso 1961), case dism'd as moot, sub. nom., *Connell v. B. L. McFarland Drilling Contractor*, 162 Tex. 345, 347 S.W.2d 565 (1961) (court found that it was not unreasonable for mineral lessee to open a pit one acre in size and eight feet deep and extract 2,105 cubic yards of caliche for use in constructing roads and pads for drill sites and tank batteries).

Louisiana

Prather v. Chevron U.S.A., Inc., 563 F. Supp. 1366 (M.D. La. 1983) (lessee had right to use dirt from pits to build up well site).

Mississippi

Central Oil Co. v. Shows, 246 Miss. 300, 149 So. 2d 300 (1963) (lessee not liable to surface owner for using about 38 loads of gravel for road and wellsite as such use was reasonably necessary).

[6] The Right to Construct Production and Storage Facilities.

The mineral estate owner is entitled to use the surface to lay pipelines and build storage tanks, power stations, and other structures necessary "to produce, save, care for and dispose" of oil and gas production. *Joyner v. R. H. Dearing & Sons*, 134 S.W.2d 757, 759 (Tex. Civ. App. -- El Paso 1939, error dism'd judg. cor.). *See also Ottis v. Haas*, 569 S.W.2d 508, 513 (Tex. Civ. App. -- Corpus Christi 1978, writ ref'd n.r.e.) (mineral lessee is entitled to use so much of the land immediately surrounding a well as is reasonably necessary for his operations including the installation of tanks and other surface equipment).

Kentucky

Lindsey v. Wilson, 332 S.W.2d 641 (Ky. 1960) (lessee's construction of two temporary pipelines held reasonably necessary use of the surface).

Louisiana

Rohner v. Austral Oil Exploration Co., 104 So. 2d 253 (La. App. 1958) (lessee's ability to construct and maintain pipeline and storage facilities included among lessee's right to use as much of surface as is reasonably necessary).

[7] The Right to Select Drilling Sites.

Texas courts have traditionally given mineral lessees broad rights to select the drilling site of their choice. *See e.g.*, *Stephenson v. Glass*, 276 S.W. 1110, 1112 (Tex. Civ. App. -- San Antonio 1925), *writ ref'd per curiam*, 279 S.W. 260 (Tex. 1926) (lessee had the primary and exclusive right to locate and drill wells wherever he chose in the development of the premises). Perhaps the most startling application of this principle is found in *Grimes v. Goodman Drilling Co.*, 216 S.W.2d 202, 204 (Tex. Civ. App. -- Fort Worth 1919, writ dism'd), where the court held the surface owner could not force a mineral lessee to change a drilling location from his front yard to his back yard after the lessee produced evidence that the front yard was a better location for preventing drainage than the back yard. *See also Gulf Oil Corp. v. Walton*, 317 S.W.2d 260, 263-64 (Tex. Civ. App. -- El Paso 1958, no writ) (surface owner could not compel mineral lessee to use abandoned wells or abandoned drilling locations rather than drilling new wells at new locations); *Ottis v. Haas*, 569 S.W.2d 508, 513 (Tex. Civ. App.--Corpus Christi 1978, writ ref'd n.r.e.) (lessee may select any portion of the surface for his well subject to whatever restrictions there may be in the lease). *Cf.*, *Reading & Bates Offshore Drilling Co. v. Jergenson*, 453 S.W.2d 853, 855-56 (Tex. Civ. App. -- Eastland 1970, writ ref'd n.r.e.). In *Jergenson*, the mineral lessee placed a well on the edge of the surface owner's ensilage pit. That location prevented the surface owner from using his property for a cattle feeding business. The court upheld a jury's finding that the mineral lessee had made an unreasonable use of the surface owner's property and upheld the jury's award of damages.

Arkansas

Le Croy v. Barney, 12 F.2d 363 (8th Cir. 1926) (lessee's cutting and removal of timber to prepare drilling location was reasonable use of surface); *Arkansas Louisiana Gas Co. v. Wood.*, 240 Ark. 948, 403 S.W.2d 54 (1966) (lease which gave lessee the right to free use of water from the leasehold premises, except water from lessor's wells, for its operations did not give the lessee the right to take water from lessor's artificial stock pond to such an extent that the lessor was deprived for four months from the use of the pond).

Louisiana

Rohner v. Austral Oil Exploration Co., 104 So. 2d 253 (La. App. 1958) (lessor not able to recover from lessee for destruction of four acres of surface upon which

drilling site was located, absent negligence, because damages to surface were found to be reasonably necessary for drilling operations).

Mississippi

Central Oil Co. v. Shows, 246 Miss. 300, 149 So. 2d 306 (1963) (lessee able to select drilling site over protest of surface owners); *Westmoreland v. California Co.*, 240 Miss. 562, 128 So. 2d 113 (1961) (general rule is that lessee may drill anywhere on lands covered by lease).

[8] The Right to Select the Timing of Drilling Operations.

In *Robinson Drilling Co. v. Moses*, 256 S.W.2d 650, 652 (Tex. Civ. App. -- Eastland 1953, no writ), the court held the mineral lessee was not liable to the surface owner for damages caused to a mature crop caused by beginning drilling operations before the surface owner could harvest his crop. Although not advisable, one court has also held that a mineral owner or his lessee does not have to give advance notice to a surface owner as to when drilling operations will begin. *Parker v. Texas Co.*, 326 S.W.2d 579, 583 (Tex. Civ. App. -- El Paso 1954, writ ref'd n.r.e.).

[9] The Right to Dispose of Salt Water.

It is not unusual to produce salt water with oil and gas. This may be disposed of by the non-negligent use of slush pits, *Brown v. Lundell*, 164 Tex. 84, 344 S.W.2d 863, 866-67 (Tex. 1961), and by re-injection. *TDC Engineering, Inc. v. Dunlap*, 686 S.W.2d 346, 349 (Tex. Civ. App. -- Eastland 1985, writ ref'd n.r.e.) (absent showing that salt water injection well was not reasonably necessary, lessee has right to re-inject salt water in a nonproductive well). However, this right is subject to stringent Railroad Commission regulation. STATEWIDE RULE 8, 16 TEX. ADMIN. CODE § 3.8 applies to slush pit disposal. STATEWIDE RULE 9, 16 TEX. ADMIN. CODE § 3.9 applies to salt water re-injection. Either operation requires prior Railroad Commission approval.

Kansas

Colburn v. Parker & Parsley Dev. Co., 17 Kan. App. 2d 638, 842 P.2d 321 (1992) (a standard lease permits lessee to drill a salt water disposal well on leased premises).

Mississippi

Gulf Oil Refining Co. v. Davis, 224 Miss. 464, 80 So. 2d 467 (1955) (lessee not liable for damages to surface caused by construction of a second salt water pit because such construction was reasonably necessary for exploration of natural gas);

Central Oil Co. v. Shows, 246 Miss. 300, 149 So. 2d 306 (1963) (lessee not liable to surface owner for building a 200-foot gravel road to drilling site, leveling the ground for a turnaround, digging two pits, and using about 39 loads of gravel upon road and well site as such activities were reasonably necessary).

Oklahoma

Dunn v. Southwest Andmore Tulip Creek Sand Unit, 548 P.2d 685 (Okla. App. Ct. 1976) (use of salt water well located on surface estate permissible); *Powell Briscoe, Inc. v. Peters*, 269 P.2d 787 (Okla. 1954) (construction of slush pits was reasonably necessary for exploration of minerals).

[10] The Right to Conduct Geophysical Exploration and Seismic Operations

The right of the mineral owner to conduct geophysical exploration on his own property or to grant a permit to have others do so has been recognized by Texas courts as a valuable property right. *Wilson v. Texas Co.*, 237 S.W.2d 649, 650 (Tex. Civ. App. -- Ft. Worth 1951, writ ref'd n.r.e.); *Phillips Petroleum Co. v. Cowden*, 241 F.2d 586, 590 (5th Cir. 1957). Specifically, Texas courts have recognized that seismic tests are within the lessee's implied easement to make reasonable, necessary use of the surface, even if at the time the lease was extended, seismic operations were not actually contemplated by any party. *Yates v. Gulf Oil Corp.*, 182 F.2d 286, 289 (5th Cir. 1950). *See also* KELLER, *Legal Aspects of Geophysical Explanation*, 13 Eastern Min. L. Inst. 17-1, 17-4 (1992). Furthermore, it is a property right of the mineral interest owner, not the surface owner if the two estates have been severed. *Wilson*, 237 S.W.2d at 650. Consequently, when the mineral estate has been severed from the surface estate, the mineral estate owner is the one who has the right to conduct or permit others to conduct geological and geophysical operations. *Phillips*, 241 F.2d at 590.

If the mineral interest owner has executed a lease, the language of the lease may determine whether the lessee has been granted the exclusive right to conduct geological and geophysical operations. *Wilson v. Texas Co.*, 237 S.W.2d 649, 650 (Tex. Civ. App.--Fort Worth 1951, writ ref'd n.r.e.) (if lease grant lessee exclusive right to explore, the lessor can neither conduct exploration operations nor grant the right to a third party.). *See also* Comment, *The Oil and Gas Lessee's Right to Geophysical Exploration: Incidental or Exclusive?* 20 Tulsa L.J. 97, 103-05 (1984). For example, in *Shell Petroleum v. Puckett*, 29 S.W.2d 809, 810 (Tex. Civ. App.--Texarkana 1930, no writ), the lease provided that it was executed "for the sole and only purpose of mining and operating for oil and gas and of laying pipelines and of building tanks, power stations, and structures thereon to produce, save, and take care of said products." *Id.* at 810. In construing such language, the court, in dictum, opined that despite the lease's language, the lessee had the

implied right to explore the lease and lands by geophysical operations, but not the exclusive right to do so.

The necessity of implying the right of a lessee to conduct geophysical exploration when not expressly granted by the lease, was more squarely addressed by the 5th Circuit Court of Appeal in *Yates v. Gulf Oil Corporation*, 182 F.2d 286 (5th Cir. 1950), where the court held that lessee had an implied right to conduct seismic operations even under a lease which was granted "for the sole and only purpose of mining and operating for oil, gas, pot ash, or any other minerals," because the court reasoned that it would be inconsistent for a lessee, burdened with an implied duty reasonably develop a lease, to prohibit that lessee from taking advantage of the most modern and effective scientific developments in exploring for minerals. *Id.* at 289.

Fortunately, today's modern lease forms utilize language which expressly address a lessee's right to conduct geophysical exploration and further transfers to the lessee the exclusive right to do so. *E.g. ,Wilson v. Texas Co.* 237 S.W.2d 649, 650 (Tex. Civ. App.-Ft. Worth 1951, writ ref'd n.r.e.) (the lease language granted the lessee the "exclusive right to prospect, explore. . ." and the court held that the lessor had leased his exclusive right to conduct geological and geophysical operations to the lessee).

Seeking Permission From Multiple Mineral Owners

As noted above, Texas law is clear that permission must be obtained from the owners of the mineral estate, not the surface estate, before conducting a geophysical survey. Surprisingly, however, there is no Texas case which clearly describes what is legally required to conduct a lawful geophysical survey when there are multiple mineral estate owners. Unfortunately, there is not even unanimity among commentators. One view is that permission must be obtained from "all owners of leasing rights in the land." Walker, *Pitfalls in Shooting-Options and Section-Leases*, 1 Rocky Mountain Mineral Law Institute 239, 249-50 (1955) ("obviously, the agreement should be executed by all owners of leasing rights in the land."). Another view, and the one most-widely held by most Texas practioners, is that it is not necessary to secure permission from all of the owners of the mineral estate and a geophysical survey may be lawfully conducted if any owner of an undivided mineral interest has granted permission to conduct geophysical operations. Earl A. Brown, Jr., *Geophysical Trespass*, 3 Rocky Mountain Mineral Law Institute 57, 59-60 (1957) ("any one of the mineral owners may grant a permit for geophysical operations, and it is not necessary to secure permission from all of the other mineral owners."). *See also* Dancy & Humphreys, *Legal Considerations Involved in the Geophysical Exploration for Oil & Gas*, 57 Okla. B.J. 1802, 1805 (1986) (any co-tenant who has an interest in the mineral estate should be able to grant a seismic permit to a third party). Meanwhile, one

commentator has noted that many companies have taken a more pragmatic approach and "settle for 50% or less, or simply use their 'best efforts.'" Jones & Faber, *Subsurface Trespass and Seismic Options*, 11th Annual Advanced Oil, Gas & Mineral Law Course J-1 (1993).

While numerous seismic surveys have been conducted on the basis of seismic permits obtained from less than all of the owners of the mineral estate, that is generally not the practice when a seismic survey is to be conducted pursuant to an option agreement. Because an option agreement grants permission to conduct a seismic survey with an option to lease the property, most companies try to option one hundred percent of the mineral owners to protect their leasehold position. However, some companies still option only one owner in order to gain somewhat protected access to the acreage and proceed with the shoot. *Blomquist*, 48 Baylor L. Rev. 21, 36 (1996).

The logic behind the "one permit is enough" rationale relates back to the notion that a co-tenant has a right to enter upon the common estate and explore for oil and gas without the consent or approval of the other co-tenants. *Id.* at 36-37, *citing*, *Burnham v. Hardy Oil Co.*, 147 S.W. 330, 335 (Tex. Civ. App.--San Antonio 1912), *aff'd.* 195 S.W. 1139 (Tex. 1917). *See also* DANCY AND HUMPHREYS, 57 Okla. B.J. at 1805 ("[b]ecause each co-tenant has the right to explore for oil and gas or other minerals, and because geophysical surveys have been recognized as exploration activities . . . any co-tenant who has an interest in the mineral estate should be able to grant permission to a third party to conduct geophysical surveys.").

However, one recent commentator has raised interesting questions (and accompanying concerns) about the legal viability of analogizing the drilling of a well with the granting of a seismic permit. *Blomquist*, 48 Baylor L. Rev. at 37. More specifically, he notes that an oil and gas lessee by virtue of its leasehold ownership becomes a co-tenant in fee with the other undivided owners of the mineral estate. *Id. citing Wilson v. Superior Oil Co.*, 274 S.W.2d 947, 950 (Tex. Civ. App.--Texarkana 1955, writ ref'd n.r.e.). Based upon his status as a co-tenant, a lessee can drill a well on the common property without the concurrence of the other co-tenants, subject to the duty of accounting for profits. *Id. citing Cox v. Davison*, 397 S.W.2d 200, 201 (Tex. 1965). However, this commentator asserts that a geophysical permit does not entitle a geophysical company to any rights of ownership that would afford it the status of a co-tenant. *Id.* The permit merely provides a right to conduct seismic tests or other geophysical operations. *Id.* Consequently, unless the geophysical company is granted the permit to conduct operations as an agent of the co-tenant, or for the co-tenant's use, this commentator reasons that the right granted is more in the nature of an easement or a license and notes that one co-tenant cannot grant an easement across the common estate without

the consent of the other co-tenants is well established. *Id. citing Texas Mortgage Co. v. Phillips Petroleum Co.*, 470 F.2d 497, 499 (5th Cir. 1972) (noting that "[i]t is well settled that a tenant in common cannot, without the precedent authority or subsequent ratification of his co-tenants, impose an easement or dedication upon the common property in favor of a third party."). *Id.* at 37-38. This commentator acknowledges that while this reasoning has not been applied to a mineral cotenancy "by way of analogy, it is logically reconcilable." *Id.*

He also notes that another potential reason to reject the widely-accepted theory that granting permission to conduct seismic is no different than granting permission to drill a well is that unlike the public policy rationale behind allowing a co-tenant to drill a well without the concurrence of all the co-tenants -- that due to the fugitive nature of oil, a co-tenant should be allowed to remove it promptly to prevent drainage -- no such potential exists in connection with the acquisition of geophysical data. *Id.* at 38-39. To the contrary, the fact that a geophysical survey, conducted pursuant to the permission of a small interest owner, could destroy the value of the minerals, could be cited as a public policy reason to deny the right of one co-tenant with a small interest to alone permit geophysical exploration. *Id.*

Because the potential exists for making "new law" in this area, a geophysical explorer would be wise to make a good faith effort to permit or option all of the mineral owners prior to conducting geophysical operations. *Id.* The geophysical explorer might also consider leasing a portion of the minerals, instead of merely permitting, thereby obtaining the status and rights of a co-tenant. *Id.*

Federal Leases

The right to conduct geophysical activities is not specifically granted by the federal lease forms. *E.g.*, *Form 3100-11* (March 1984). However, excepting leases in Alaska, the right to conduct geophysical activities, albeit a non-exclusive one, is assumed to exist under applicable regulations as an incident of rights specifically granted. *See* 43CFR § 3045.01. More specifically, because the geophysical exploration regulations specifically except exploration activities conducted by a federal lessee or federal lands, no permit is required when a lessee conducts geophysical operations on his own lease except in the state of Alaska. *See Law of Federal Oil and Gas*, Ch. 27, Rocky Mtn. Min. Law Found. (1997) ("Federal Oil and Gas Leasing in Alaska"). However, the lessee of a federal oil and gas lease conducting geophysical operations on his lease is required to post a geophysical exploration bond or to obtain a rider to his statewide or nationwide oil and gas lease bond to include coverage for geophysical exploration operations. 43 CFR § 3045.0-1, 3045.4(a).

Colorado

Grynberg v. City of Northglenn, 739 P.2d 230, 232 (Colo. 1987) ("The recognition of the exclusivity of the right of the mineral owner to consent to such exploration is based upon the central importance of information concerning mineral deposits to the value of the mineral estate.").

Kansas

Mustang Producing Co. v. Texaco, 754 F.2d 892, 894 (10th Cir. Kan. 1985) (lessee had nonexclusive right to conduct geophysical operations even when lessor had granted unto lessee for sole and only purpose of exploring by geophysical and other methods, mining, and operating for oil and gas).

Louisiana

Tinsley v. Seismic Explorations, Inc., 239 La. 23, 117 So. 2d 897 (1960) (oil and gas lease granting the lessee the specific right to explore for minerals includes the right to explore by geophysical methods); *Lane Louisiana Co. v. Superior Oil Co.*,26 So.2d 20 (La. 1946) (right to conduct seismic operations belongs to the mineral owner). *But see Pennington v. Colonial Pipeline Co.*, 260 F.Supp. 643 (E.D. La. 1966) (when mineral lessee sought to completely shut down the surface owner's pump station to conduct geophysical operations of an alleged loss to the surface owner of $196,000 per day, the Court held that the lessee's proposed exploration would constitute an undue, unnecessary, and unreasonable interference with the surface owner's property).

It is important to note that Louisiana has specific statutes, amended in 1995, that provide that a mineral lessee or geophysical permitee shall not conduct a geophysical survey unless they have obtained the consent of at least 80% of the owners of the land or 80% of the owners of the mineral estate if the mineral estate has been severed from the surface estate. *Louisiana Revised Statutes* 31: 166, 175 (West Supp. 1996). *See also Louisiana Revised Statutes* 30: 217(A) and (B)(1)(West Supp. 1996). While prior legislation requiring the consent of the co-owners had been in effect, the statutes were amended in 1995 to clarify confusion caused by the decision in *Jeanes v. G.F.S. Co.*, 647 So.2d 533 (La. App. 3d Cir. 1994), *writ denied*, 650 So.2d 255 (La. 1995), which was viewed by many as standing for the proposition that a mineral lessee or a geophysical permitee had to obtain the consent of 80% of the mineral owners and 100% of the surface owners. However, at least one commentator is of the opinion that the 1995 amendments may not have completely solved the problems caused by the decision in *Jeanes* and that the amendments may have, instead, created additional confusion. ABELS, *Legislative Update*, 43 Min. L. Inst. 1, 2-3 (1996). More significantly, the statute

has recently been ruled **unconstitutional** as violating individual property rights, but the decision is not final and is on appeal to the Louisiana Supreme Court. *Allain v Texstar North America, Inc.*, 18 JDC, Iberville Parish, Louisiana (December 11, 1997) (district court ruled that statute was unconstitutional because it violates individual property rights under Sections 2, 4, and 19 of Article 1 of the Louisiana Constitution of 1974). If the Louisiana Supreme Court affirms the lower court's ruling, then the confusion caused by the *Jeanes* decision will be back.

New Mexico

Tidewater Associated Oil Co. v. Shipp, 59 N.M. 37, 278 P.2d 571 (1954) (lessee of public lands has the sole right to explore the property for oil and gas, and geophysical or seismographic work has become an inseparable part of oil and gas discovery procedure in advance).

North Dakota

Hunt Oil Co. v. Kerbaugh, 283 N.W.2d 131 (N.D. 1979) (right of mineral estate to conduct seismic operations may be limited by an accommodation doctrine). *See also N.D. Cert Code* § 38.11.1-01 to 38.11.1-09.

Oklahoma

Enron Oil & Gas Co. v. Worth, 947 P.2d 610 (Okla.Ct. App. 1997) (mineral estate owners have the exclusive right of reasonable ingress and egress for the purpose of exploration, development, and production and while such right of surface entry may be severed and assigned for the limited purpose of conducting geophysical exploration and permission from all such factional mineral interest owners is not necessary to conduct seismic operations, a fractional undivided mineral interest owner cannot exclude the exercise of such rights by other undivided mineral interest owners). Anschutz *Corp. v. Sanders,* 734 P.2d 1290 (Okla. 1987) (lessee entitled to enter upon surface to conduct seismic testing without complying with Oklahoma Surface Damage Act, 52 Okla. Stat. § 318.2 - 319.9 (Supp. 1992); *Royce Realty & Developing, Inc. v. Southern Seismic*, 711 P.2d 946 (Okla. App. 1985) (lessee did not have exclusive right to conduct geophysical operations, even when lease stated it was being given "for the sole and only purpose of exploring by geophysical and other methods, mining, and operating for oil. . . gas. . . ," locating the well and drilling it).

Wyoming

Ready v. Texaco, Inc., 410 P.2d 983 (Wyo. 1966) (a lease giving the lessee the exclusive right to "drill for, mine, extract, remove, and dispose of" oil and gas,

give the lessee the incidental right, but not exclusive right, to explore by geophysical means).

[11] The Right to Enter Premises With Growing Crops.

Absent evidence of unreasonable or negligent use of the premises, mineral lessee has the right to enter upon the surface and use it in such a manner as is reasonably necessary to effectuate the purpose of the lease despite the existence of growing crops. *E.g.*, *Robinson Drilling Co. v. Moses*, 256 S.W.2d 650, 651 (Tex. Civ. App. --Eastland, 1953, no writ); *Robinson Drilling Co. v. Thomas*, 385 S.W.2d 725, 726 (Tex. Civ. App. -- Eastland 1964, no writ).

Arkansas

Arkansas Louisiana Gas Co. v. Wood, 240 Ark. 948, 403 S.W.2d 54 (1966) (oil and gas lease allows lessee to use so much of the surface as is reasonably necessary to perform its obligations under the lease); *Wood v. Hay*, 206 Ark. 892, 175 S.W.2d 189 (1943) (oil and gas reservation empowered mineral owner with implied right to enter upon the surface and make reasonable use of it to extract minerals).

Louisiana

Broussard v. Northcott Exploration Co., 481 So. 2d 125 (La. 1986) (mineral lessee entitled to destroy only so much of surface owner's soybean crop as was required to allow lessee reasonably to exercise contractual rights).

Colorado

Radke v. Union Pacific Railroad Company, 334 P.2d 1077, 1088 (Colo. 1959) (mineral owner owns the right to explore for and produce the underlying minerals).

Kansas

Mai v. Youtsey, 646 P.2d 475 (Kan. 1989) (mineral owner has right of ingress and egress upon surface as is reasonably necessary to explore, recover, and develop minerals); *McLeod v. Cities Service Gas Co.*, 131 F.Supp. 449, aff'd, 233 F.2d 242 (10th Cir. 1955, applying Kansas law) (lessee of mineral estate entitled to use as much of the surface as is reasonably necessary).

Kentucky

Lindsey v. Wilson, 332 S.W.2d 641 (Ky. 1960) (oil and gas lessee has the right to use so much of the surface as may be necessary and reasonably convenient in the exercise of his operating rights even to the exclusion of any other surface possession).

Louisiana

East v. Pan American Petroleum Corp., (La. App. -- 1964) (lessee's surface use must be ordinary, customary, reasonable, and necessary to the mineral operation); *Smith v. Schuster*, 66 So. 2d 430 (La. App. -- 1953) (oil and gas lease allows lessee to use so much of the surface as is reasonably necessary to perform its obligations under the lease); *Rohner v. Austral Oil Exploration Co.*, 104 So. 2d 253 (La. App. -- 1958) (lessor not able to recover from lessee for destruction of four acres of surface upon which drilling site was located, absent negligence, because damages were found to be reasonably necessary for drilling operations).

Mississippi

Central Oil Co. v. Shows, 246 Miss. 300, 149 So. 2d 306 (1963); *Union Producing Co. v. Pittman*, 245 Miss. 427, 146 So. 2d 553 (1962) (a grant or reservation of minerals vest in the mineral owner the incidental rights of entering and occupying the lands and making such use of the surface as is reasonably necessary to explore, mine, remove, and market the minerals thereunder); *Sun Oil v. Nunnery*, 251 Miss. 631, 170 So. 2d 24 (1964); *Gulf Oil Refining Co. v. Davis*, 224 Miss. 464, 80 So. 2d 467 (1955) (lessee not liable for damages to surface caused by construction of salt water pit because such construction was reasonably necessary for exploration of natural gas).

Montana

Hurley v. Northern P.R. Co., 153 Mont. 199, 455 P.2d 321 (1969) (oil and gas lease allows lessee to use so much of the surface as is reasonably necessary to perform its obligations under the lease); *Northern Cheynne Tribe v. Hollowbreast*, 349 F.Supp. 1302 (D.Mont. 1972) (mineral developer not liable for damages arising from reasonably necessary exploration activities).

[12] Unreasonable Surface Use.

Looking first at the question of reasonable use, Texas courts have found unreasonable surface use in a variety of circumstances.

[a] Use of an Excessive Amount of Surface.

In *Stradley v. Magnolia Petroleum Co.*, 155 S.W.2d 649 (Tex. Civ. App. -- Amarillo 1941, error ref'd), the operator used six acres more than was reasonably necessary for the full enjoyment of the minerals and the court held the operator was liable to the surface owner for the value of the use of these six acres.

[b] Use of Fresh Water for Secondary Recovery.

Section 27.0511 of the TEXAS WATER CODE provides that the Railroad Commission may not approve re-injection of fresh water for secondary recovery if there is a solid, liquid or gaseous substance other than fresh water available that is economically and technically feasible for use.

[c] Excessive Use of Water.

Gulf Oil Corp. v. Whitaker, 257 F.2d 157 (5th Cir. 1958). The mineral lessee was entitled to only one half of the surface water in a particular tank. The Court remanded the case because of insufficient evidence, but held that upon proper proof, the mineral lessee would be liable for the value of the extra water taken.

[d] The Use of Obstructing Equipment.

Getty Oil Co. v. Jones, 470 S.W.2d 618 (Tex. 1971). This case established the accommodation doctrine and is discussed in greater detail hereafter. Its holding, however, was that the mineral lessee was required to place his pumping units in cellars so that the surface owner could continue using a preexisting circular irrigation system.

Alaska

United Geophysical Corp. v. Culver, 394 P.2d 393 (Alaska 1964) (court held mineral lessee liable for excessive use of land when evidence showed that the lessee had cleared a helicopter landing field fifty feet wider than was reasonably necessary and had, thus, cut down fifty percent more trees than necessary to conduct geophysical operations).

Arkansas

Arkansas Louisiana Gas Co. v. Wood, 240 Ark. 948, 403 S.W.2d (1966) (lessee liable for using more land than was reasonably necessary and taking water from lessor's artificial stockpond).

Louisiana

Pennington v. Colonial Pipeline Co., 260 F.Supp. 643 (E.D. La. 1966) (when mineral lessee sought to completely shut down the surface owner's pump station to conduct geophysical operations of an alleged loss to the surface owner of $196,000 per day, the Court held that the lessee's proposed exploration would constitute an undue, unnecessary, and unreasonable interference with the surface owner's property).

Mississippi

Union Producing Co. v. Pittman, 245 Miss. 427, 146 So. 2d 553 (1962) (lessee cannot use more of the surface than is reasonably necessary).

Oklahoma

Lanahan v. Myers., 389 P.2d 92 (Okla. 1963) (lessee's use of the surface for an excessive length of time constituted an unreasonable use of surface); *Wilcox Oil Co. V. Lawson*, 301 P.2d 686 (Okla. 1956) (lessee can be liable for surface damages to acreage not reasonably necessary for oil and gas development); *Denver Producing and Refining Co. v. Meeker*, 199 Okla. 588, 188 P.2d 858 (1948) (lessee liable for building unnecessary roads).

Utah

Flying Diamond Corp. v. Rust, 551 P.2d 509 (Utah 1976) (construction of road by mineral lessee over six acres of lessor's land, which interfered with lessor's irrigation, held not reasonably necessary, especially after mineral lessee ignored surface owner's request that the mineral lessee build its access road from a different direction so that minimum damage would be done to the surface owner's land).

§ 3.02 Non-Negligent Use.

A mineral owner or its lessee's operation, even if reasonable, must also be conducted non-negligently. The lessee has the duty to avoid committing negligent acts while using the surface. If they fail, the surface owner may recover damages caused by

any negligent activity. *E.g., Texaco, Inc. v. Spires*, 435 S.W.2d 550, 553 (Tex. Civ. App. -- Eastland 1968, writ ref'd n.r.e.); *McCarty v White*, 314 S.W.2d 155 (Tex. Civ. App.--Eastland 1958, no writ) (even though lessee holds the dominant estate, they may be liable to a subsequent surface lessee for negligence in the maintenance of the surface taken through reasonable surface use). *See also Brown v. Lundell, 162 Tex. 84, 344 S.W.2d 863, 865-67 (Tex. 1961)* (if the lessee negligently and unnecessarily damages the lessor's land, either surface or subsurface, their liability to the lessor is no different from what it would be under the same circumstances to an adjoining landowner).

[1] Instances of Negligence.

[a] *Brown v. Lundell*, 162 Tex. 84, 344 S.W.2d 863 (Tex. 1961) (lessee liable for damages caused by negligently allowing salt water to escape from a disposal pit and pollute an underground stratum).

[b] *General Crude Oil Co. v. Aiken*, 162 Tex. 104, 344 S.W.2d 668, 671 (Tex. 1961) (lessee negligently allowed salt water to escape and pollute a spring, killing cattle and reducing the value of the land).

[c] *Curre v. Ingram*, 397 S.W.2d 484, 486 (Tex. Civ. App. -- Eastland 1965, writ ref'd n.r.e.) (lessee's negligent disposal of salt water caused him to be liable for damages to surface owner's real property, livestock, and growing crops).

[d] *Ellis Drilling Corp. v. McGuire*, 321 S.W.2d 911, 914 (Tex. Civ. App. -- Eastland 1959, writ ref'd n.r.e.) (court upheld jury verdict which found that lessee had negligently drilled into a salt water and air strata and held lessee liable for the damages to surface owner's land caused by the escape of salt water which flooded the surface).

[e] *Texaco, Inc. v. Spires*, 435 S.W.2d 550, 553 (Tex. Civ. App. -- Eastland 1968, writ ref'd n.r.e.) (lessee liable for the value of a registered quarter horse stud destroyed because of injuries received from a cattle guard that had been negligently constructed and maintained by the mineral lessee).

[f] *Texaco, Inc. v. Joffrion*, 363 S.W.2d 827 (Tex. Civ. App. -- Texarkana 1962, writ ref'd n.r.e.) (mineral lessee held liable for diminution in value of surface estate for negligently damaging the surface estate and using more of the surface estate than was reasonably necessary when mineral lessee (I) allowed oil and salt water pits to overflow and pollute water supply; and (ii) cut surface owner's fence without installing gates and cattle guards).

[g] *Scurlock Oil Co. v. Harrell*, 443 S.W.2d 334, 337 (Tex. Civ. App. -- Austin 1969, writ ref'd n.r.e.) (lessee liable for damages caused by negligently allowing oil to escape from a leaking pipeline).

Louisiana

Lloyd v. Hunt Exploration, Inc., 430 So. 2d 298 (La. Int. App. Ct. 1983) (surface owner awarded damages for negligent exploration by mineral lessee); *Picou v. Fohs Oil Co.*, 64 So. 2d 434 (La. 1953) (oil company held liable to surface owner for destruction of trees proximately resulting from negligent geophysical operations).

Mississippi

Placid Oil Co. v. Byrd, 217 So.2d 117 (Miss. 1968) (surface owner's action for damages must be founded on negligence); *Cities Service Oil Co. v. Corley*, 197 So.2d 244 (Miss. 1967) (surface owner could not recover damages to a water well in absence of negligence); *Union Producing Co. v. Pittman*, 245 Miss. 427, 146 So. 2d 553 (1962) (lessee liable for surface damages caused by lessee's wanton or negligent destruction of surface).

Oklahoma

Wilcox Oil Co. v. Lawson, 301 P.2d 686 (Okla. 1956) (lessee liable for surface damages caused by lessee's wanton negligent destruction of surface).

[2] Instances of Non-Negligent Operations.

The following cases are ones which the fact finder did not find that the mineral lessee had operated the premises in a negligent manner. However, most of the decisions were the result of the surface owner's failure to put forth sufficient evidence of negligence.

[a] *Warren Petroleum Corp. v. Martin*, 271 S.W.2d 410, 412 (Tex. 1954) (mere fact that lessee allowed oil to escape, which formed small pools and which plaintiff's cattle drank, is not evidence of negligence).

[b] *Amerada-Hess Corp. v. Iparrea*, 495 S.W.2d 60, 63 (Tex. Civ. App. -- El Paso 1973, writ ref'd n.r.e.) (no liability for sheep drinking oil).

[c] *Weaver v. Reed*, 303 S.W.2d 808, 810 (Tex. Civ. App. -- Eastland 1957, no writ) (no liability for cattle licking lubricant off of the threads of stacked pipe because pipe was reasonably necessary to effectuate purpose of lease).

[d] *Carter v. Simmons*, 178 S.W.2d 743, 746 (Tex. Civ. App. -- Waco 1944, no writ) (mere fact that tanks overflowed is no evidence of negligence).

[e] *Austin Road Co. v. Boston*, 292 S.W.2d 373, 375 (Tex. Civ. App. -- Eastland 1956, writ ref'd n.r.e.) (no evidence that rock mining operations were conducted negligently).

[3] Standard of Care.

Lessees have the duty to conduct their operations as would a reasonably prudent person. Courts have defined reasonable operations as those which are conducted in the usual and customary way, consistent with the purpose for which the land was leased. *Sinclair Prairie Oil Co. v. Perry*, 191 S.W.2d 484, 486 (Tex. Civ. App. -- Texarkana 1945, no writ).

Courts have also specifically held that mineral lessees who own pipelines have a duty to protect people and property in its vicinity from the types of harm ordinarily resulting from the construction or operation of pipelines. *Scurlock Oil Co. v. Harrell*, 443 S.W.2d 334, 337 (Tex. Civ. App. -- Austin 1969, writ ref'd n.r.e.). The lessee's duty is to use ordinary care while installing and maintaining the line to avoid such problems as leaks and breaks. *Id.*

[4] Negligence Per Se.

Texas courts adhere to the general rule that violation of a regulatory body's statute, ordinance, or rule is negligence per se if the damage was the type intended to be prevented by the rule. *E.g.*, *Peterson v. Grayce Oil Company*, 37 S.W.2d 367 (Tex. Civ. App. -- Fort Worth 1931, aff'd), 128 Tex. 550, 98 S.W.2d 781 (Tex. 1936); *Gulf Oil Corp. v. Alexander*, 291 S.W.2d 792, 794 (Tex. Civ. App. -- Amarillo 1956) *writ ref'd n.r.e. per curiam*, 156 Tex. 455, 295 S.W.2d 901 (Tex. 1956) (mineral lessee liable to surface owner, without a finding negligence, for damages caused by pollution of fresh water, because pollution resulted from a violation of RAILROAD COMMISSION STATEWIDE RULE 20). But see *Murphee v. Phillips Petroleum Co.*, 492 S.W.2d 667, 674 (Tex. Civ. App. -- El Paso 1973, writ ref'd n.r.e.) (under the facts in this case, the court rejected negligence

per se application of Railroad Commission Statewide Rule 20 and ruled that a specific finding of negligence was necessary to hold mineral lessee liable for surface damages).

§ 3.03 The Accommodation Doctrine.

[1] Due Regard.

Texas courts have long held that mineral lessees, even though they possess certain exclusive rights, must conduct their operations with "due regard" for the surface owner's rights. *See e.g., General Crude Oil Co. v. Akien*, 162 Tex. 104, 344 S.W.2d 668, 669 (1961); *Warren Petroleum Corp. v. Martin*, 153 Tex. 466, 469, 271 S.W.2d 410, 413 (1954); *Gulf Production Co. v. Continental Oil Co.*, 139 Tex. 183, 132 S.W.2d 553, 563 (1939); *Reading & Bates Offshore Drilling Co. v. Jergenson*, 453 S.W.2d 853 (Tex. Civ. App.--Eastland 1970, writ ref'd. n.r.e.) (rights of lessee and surface owner must be exercised with due regard for the rights of others); *Texaco, Inc. v. Spires*, 435 S.W.2d 550 (Tex. Civ. App.--Eastland 1968, writ ref'd. n.r.e.) (although surface estate is servient to mineral estate, mineral lessee must exercise their rights with due regard to rights of surface owner). *See also Miller v. Crown Cent. Petroleum Corp., 309 S.W.2d 876, 877 (Tex. Civ. App. -- Eastland 1958, no writ)* (mineral owner must exercise due regard for the landowner's rights when pumping salt water); *Weaver v. Reed*, 303 S.W.2d 808, 809 (Tex. Civ. App. -- Eastland 1957, no writ) (lessee must exercise due regard for surface owner's right to graze cattle). This due regard for the surface owner's rights is not intended to limit the decision of the mineral owner on whether to extract any or part of the minerals. Rather it refers to the method of the mineral owner's or their lessee's operations. *Vest v. Exxon*, 752 F.2d 959, 963 (5th Cir. 1985).

[2] *Getty Oil Co. v. Jones.*

The accommodation doctrine is based on this concept of "due regard." The accommodation doctrine, also known as the "alternative means" doctrine, was first clearly articulated by the Texas Supreme Court in *Getty Oil Co. v. Jones*, 470 S.W.2d 618, 621 (Tex. 1971). In that case, Jones was a surface owner who purchased land subject to a prior mineral lease. Getty owned the lease. Jones installed a self-propelled irrigation system. This system could only clear surface obstructions up to 7' tall. Getty then drilled two wells and installed pumping units. One unit was 17' high and the other was 34' high. Their installation prevented Jones from using his irrigation system and decreased the value of his property. Jones

brought suit seeking to enjoin Getty from utilizing pumping units that prevented him from using his irrigation system. Jones introduced evidence that other operators in the area placed their pumping units in cellars or utilized hydraulic pumping units. Jones also introduced evidence that the cost of installing and maintaining lower profile units was nominal and the burden imposed minimal. *Id.* at 622. Finally, Jones introduced evidence that either alternative would allow Jones to continue using his circular irrigation system.

The Supreme Court relied on prior due regard decisions, and held Getty had the obligation to accommodate Jones' circular irrigation system. Specifically, the Court wrote the following which has now become known as the accommodation doctrine:

> 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 adoption of an alternative by the lessee.

Id. at 622.

The Supreme Court's holding recognizes a greater duty on the mineral lessee, but it does not stand for the proposition that the surface estate is now the dominant estate, nor that the mineral lessee must, at all costs, avoid interference with the surface owner's use. Rather, the Court held:

> If the manner of use selected by the dominant lessee is the only reasonable, usual and customary method that is available for developing and producing the minerals on this particular land then the owner of the servient estate must yield. However, if there are other usual, customary and reasonable methods practiced in the industry on similar lands put to similar uses which would not interfere with the existing uses being made by the servient surface owner, it could be unreasonable for the lessee to employ an interfering method or manner of use.

Id. at 628. *See also Sun Oil Co. v. Whitaker*, 483 S.W.2d 808, (Tex. 1972) (if there is no reasonable alternative to the one complained of by the surface

owner, and the activity is consistent with industry standards, the mineral owner is entitled to proceed).

[3] The Accommodation Doctrine Test.

This right of accommodation between the surface and mineral estates is dependent upon the state of the evidence and the findings of the trier of fact. *Id. at 623*. To prevail on an accommodation doctrine claim, a surface owner must prove:

(1) their surface use was in existence prior to the mineral lessee's conflicting use (not merely the mineral lease);

(2) they have no reasonable means to develop their land other than with the preexisting use; and

(3) the mineral lessee has other options which are:

(i) usual, customary, and reasonable methods;

(ii) practiced in the industry on other similar lands put to similar uses;

(iii) would not interfere with the surface owner's preexisting use; and

(iv) are available on the premises.

Absent proof of these elements, the surface owner must yield to the mineral lessee. In other words, if there is but one means of surface use by which to produce the minerals, the mineral owner has the right to pursue that use, regardless of surface damages. *Id. at 622*. On the other hand, 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 (especially when there is only one reasonable manner in which the surface may be used) 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. *Id. at 622-23*. See also Hanen, Comment, *The Surface Mineral Producer: A Need for Peaceful Coexistence*, 29 Baylor L. Rev. 907, 923 (1977); Ferguson & Jones, Comment, *A New Approach to the use of the Surface Estate by a Lessee Under an Oil and Gas Lease*, 13 S. Tex. L.J. 269, 292-93 (1972).

The Texas Supreme Court recently affirmed the principles of the accommodation doctrine, albeit in an inverse condemnation context, in its decision in *Tarrant County Water Control and Improvement District Number One v. Haupt, Inc.*, 854 S.W.2d 909 (Tex. 1993). In that decision, the court described the surface owner's burden of proof as follows:

> The burden of proof to show that the use of the surface by the lessee is not reasonably necessary is upon the surface owner. This may be proven by showing that the lessee's use of the surface is not reasonably necessary because of non-interfering and reasonable ways and means of producing the minerals that are available, the use of which will permit the surface owner to continue the existing use of the surface.

Id. at 911.

Arkansas

Martin v. Dale, 21 S.W.2d 428, 429 (Ark. 1929) (mineral owner is imposed with a duty to use the surface "in the manner least injurious to his grantor. . . although it was not the most convenient."); *Diamond Shamrock Corporation v. Phillips*, 511 S.W.2d 160, 163 (Ark. 1974) (while mineral owner has right to go upon surface for exploration purposes, the use of surface must be reasonable under circumstances).

Colorado

Colorado courts have not been called on to determine expressly whether, and the extent to which, the relationship between the mineral and surface estates requires accommodation of surface interests. SEE MORGAN & DROEGEMUELLER, *Accommodation Between Surface Development and Oil and Gas Drilling*, 24 Colo. Law. 1323 (1995).

Kentucky

Lindsey v. Wilson, 332 S.W.2d 641 (Ky. 1960) (the rights of an oil and gas lessee and a surface owner are correlative and must exercised with due regard).

Louisiana

Article 11 of the Louisiana Mineral Code provides that the surface owner and mineral owner "must exercise their respective rights with reasonable regard from those of the other." *Louisiana Revised Statutes 31:11.*

Mississippi

Placid Oil Company v. Byrd, 217 So. 2d 17 (Miss. 1968) (when minerals have been severed from surface each party is charged with the duty of exercising a due regard for the rights of the other); Charles *F. Hayes & Association, Inc. v. Blue*, 233 So. 2d 127 (Miss. 1970) (mineral owner must exercise his rights with due regard for rights of surface owner).

New Mexico

Amoco Oil Co. v. Carter Farms Co., 703 P.2d 894 (N.M. 1985) (mineral lessee's surface rights must be exercised with due regard for the right of surface owner).

North Dakota

Hunt Oil Co. .v. Kerbaugh, 283 N.W.2d 131 (N.D. 1979) (right of mineral estate to shoot seismic may be limited by the accommodation doctrine).

Oklahoma

Gulf Pipe Line Co. v. Pawnes-Tulsa Petroleum Co., 34 Okla. 775, 127 P. 252 (1912) (court enjoined drilling of well that was found to be dangerously close to surface owner's installations when other drilling locations were available).

Pennsylvania

Chartiers Black Coal Co. v. Mellon, 162 Pa. 286, 25 A. 597 (1893) (a mineral owner's reasonable right of access to the surface must be "exercised with due regard to the owners of the surface.").

Utah

Flying Diamond Corp. v. Rust, 551 P.2d 509 (Utah 1976) (recognizing that mineral owner may exercise rights "consistent with allowing the fee owner the greatest possible use of his property consistent therewith").

[4] Subsequent Limitations to the Accommodation Doctrine.

The few cases that have applied the accommodation doctrine have interpreted it narrowly, rather than broadly. As a result, the accommodation doctrine has been substantially limited to the facts of *Getty Oil Co. v. Jones.*

[a] Lessee Does Not Have to Purchase Water Off-Premises.

In *Sun Oil Co. v. Whitaker*, 483 S.W.2d 808, 812 (Tex. 1972), the Court held the mineral lessee was not required to obtain water off of the leased premises for use in a waterflood project. The Court distinguished the *Getty* holding, noting in that case that Getty had alternative methods of production existing on the leased premises. *Id.* at 812. The Court in *Sun Oil*, concluded that the use of water by the lessee for waterflooding was reasonably necessary to effectuate the lease's purposes. *Id.* at 811.

[b] Lessee May Take Salt Water for Water Flooding.

In *Robinson v. Robins Petroleum Corp.*, 501 S.W.2d 865 (Tex. 1973), the Court held that salt water is not a mineral and therefore belonged to the surface. But, the Court further held that the mineral lessee had an implied right to use a reasonable amount of the salt water to produce oil from under the surface owner's tract.

[c] Surface Owner Must Show More Than Inconvenience.

In *Ottis v. Haas*, 569 S.W.2d 508, 514(Tex. Civ. App.--Corpus Christi 1978, writ ref'd n.r.e.), the surface owners brought suit, in part, to seek an injunction requiring the lessee to move its tank batteries, at minimal cost, to a location considered more convenient to the surface owners. However, the court rejected such request noting that plaintiffs had to show more than mere inconvenience to invoke the rule of reasonable accommodation -- they had to show that the location of the tank batteries materially interfered with their pre-existing use of the surface which they failed to do.

§ 3.04 Statutory Limitations -- Surface Damage Legislation.

Prior to 1979, there was no comprehensive state statutes regulating a mineral lessee's use of the surface for oil and gas exploration and production. However, in recent years, a growing number of states have adopted surface damage statutes which can govern

and, in most instances, alter the common law relationship between mineral owners and surface owners. *See* POLSTON, *Redefining the Relationship Between the Surface Owner and the Mineral Developer*, 12 E. Min. L. Found. § 22.02 (1991).

[1] The North Dakota Act.

The North Dakota statute, which was the first to impose strict liability on the lessee for surface damages caused by drilling operations and has served as the model which other states have followed, provides that the mineral developer must pay the surface owner for damages resulting from drilling operations. *N.D. Cent. Code § 38-11.1-01 to 38-11.1-10 (1987)* ("The mineral developer shall pay the surface owner a sum of money equal to the amount the amount of damages sustained by the surface owner for loss of agricultural production and income, lost land value, and lost value of improvements caused by drilling operations."). *See also Murphy v. Amoco Production Co.*, Civil Action Nos. 3614, 3633 (District Court Dunn County, North Dakota) (construing the North Dakota Statute as not applying to leases entered into before June 30, 1979). To make certain that this legislative mandate is not interpreted as just referring to those instances in which the common law would have required the payment of damages (i.e., damages resulting from the mineral owner using more of the surface land than is reasonably necessary), the statute provides that damages must be paid for all damages resulting from drilling operations including "loss of agricultural production and income, lost land value, lost use of and access to the surface owner's land, and lost value of improvements." *Id.* Furthermore, there is no exception for those situations when the surface owner expressly waived their right to recover damages at the time the minerals were severed from the surface nor is there any exception in favor of a mineral owner or their lessee who may have expressly reserved an easement to enter the surface. *See also* PEARCE "*Surface Damages and the Oil and Gas Operator in North Dakota*," 58 N.D. L. Rev. 456 (1982). The North Dakota Act also requires twenty days notice of intent to drill and requires that an offer of settlement must accompany such notice. *Id.* Significantly, failure to give notice may permit the surface owners to recover punitive damages. *Id.* § 38-11.1-05. Further, if the surface owner rejects the mineral developer's offer to settlement accompanying the notice of intent to drill and subsequently recovers a greater amount in a legal action, the surface owner may recover attorneys' fees, costs, and interest accruing from the day drilling commenced in addition to his actual surface damages. *Id.* § 38-11.1-09. *See also* MONTANA CODE ANN. § 82-10-501 TO 511 (1989),WEST VIRGINIA. CODE § 22B-2-1 TO-9 (1985), and TENNESSEE CODE ANN. § 60-1-601 TO 608 (1989) which like the North Dakota Act, allow the surface owner to recover damages caused by mineral operations. *See also*, POLSTON, *Redefining the Relationship Between the Surface Owner and the Mineral Developer,*12 E. Min. L. Found. § 22.02 (1991) and HULTIN, *Recent Developments in Statutory and Judicial Accommodation Between Surface and*

Mineral Owners, 28 Rocky Mtn. Min. L. Inst. 1021, 1036 (1983) (comparing the Montana Statute with the North Dakota Statute).

[2] The Oklahoma Act.

The Oklahoma Act, OKLA. STAT. ANN. TITLE 52, § 318.2-318.9 (1991), completely changes Oklahoma common law that governed the relationship between the surface owner and mineral developer and, although specific terms of the legislation do not clearly mandate that conclusion, it has been construed by the Oklahoma Supreme Court as creating an obligation on the part of the mineral developer to pay for all surface damage caused by drilling operations even if the mineral interest was created before the adoption of the statute. *Davis Oil Co. v. Cloud*, 766 P.2d 1347 (Okla. 1986). However, the Oklahoma Statute does provide that "nothing herein contained shall be construed to impair existing contractual rights. . . ." *Id.* 3318.7. It would seem, however, that an express easement reservation, even in a mineral lease, would not qualify as an exception. *Davis Oil Co. v. Cloud*, 766 P.2d 1347 (Okla. 1986). Instead, it appears that the exception for "existing contractual rights" only applies to "contracts in which damage provision standards are specifically set forth in the contract." *Id.* at 1351 n.11. *See also* PYRON, *"Surface Damages in Oklahoma: Procedures for Payments and Penalties,"* 18 Tulsa L.J. 338 (1982).

[3] The Illinois Act.
The Kentucky Act.

Meanwhile, the Illinois Statute, Ill. Ann. Stat. Ch. 96 ½, §§ 9651 to 9657 (Smith-Hurd 1996) and Kentucky Statute, Ky. Rev. Stat. Ann. § 353.595 (Baldwin 1996), appear to be the results of an industry effort to head off legislation similar to that enacted in North Dakota and Oklahoma. *See* POLSTON, 12 E. Min. L. Found. at § 22.02[4]

For example, the Illinois Statute only applies to the two instances in that state where drilling operations can occur in which the surface owner has not consented in writing to the drilling operations: (1) forced pooling and (2) when a majority owner's interest is developed pursuant to a legal proceeding brought about by the majority owners. ILL. ANN. STAT. CH. 96, § 9653 (SMITH-HURD 1990). The latter situation is possible in Illinois because it is one of two or three states which does not recognize the right of a cotenant to develop minerals without the consent of the other co-tenants. *E.g., Zeigler v. Brenneman*, 86 N.E. 597 (Ill. 1908). Thus, in Illinois, if the mineral interest is held in common by two or more people and they cannot agree, development may be had through a statutory proceeding brought about by the majority owner or owners. ILL. ANN. STAT. CH. 96, § 4901 (SMITH-HURD 1990).

Similarly, the Kentucky Statute limits its application only to those situations where the surface owner has not consented in writing to development and "(a) there has been a complete severance...; or (b) the surface owner owns an interest in the oil and gas." KY. REV. STAT. § 353.595(2) (MICHE 1990). These provisions apparently were included to expressly cover the situation where a cotenant might develop without the consent of an objecting cotenant surface owner. POLSTON, 12 E. Min. L. Found. at § 22.02[4]. Neither of these acts alters the common law right of the mineral owner in any situation where the surface owner authorizes the development. *Id.* However, when these statute are applicable, the surface owner may recover "damages to growing crops, trees, fences, roads, structures, improvements, and livestock...." ILL. ANN. STAT. CH. 96, § 9656(A) and KY. REV. STAT. § 353.595(5).

[4] The Indiana Act.

The Indiana Act, IND. CODE ANN. §§ 32-5-7-1 to -6 (West 1979), also provides for payment of surface damages by the oil and gas developer to surface owners who have not signed an oil and gas lease. Although it creates a right of entry for the severed mineral owner or their developer, it requires payment to the "owner of the surface of such lands for the actual damage resulting therefrom to the surface of such lands or improvements or growing crops...." *Id.* § 32-5-7-2© (West 1979). The Act then excepts, from its application, any situation in which the oil and gas lease between the parties "purports to deal with the subject of damages." *Id.* Thus, it has about the same coverage as the Illinois and Kentucky acts in that it only applies to where the surface owner has not signed an oil and gas lease. However, it differs from those acts in that it requires the payment of damages for land consumed in the drilling operation rather than just "growing crops" and other items specified in the Kentucky and Illinois acts. POLSTON, 12 E. Min. L. Found. at § 22.02[5].

[5] Colorado Regulations.

While not having the drastic law-changing effect of the above-described surface damage statutes, the COLORADO OIL AND GAS CONSERVATION COMMISSION has, in recent years, enacted rules to protect the interests of surface owners. For example, when a surface owner is not a party to the oil and gas lease, the mineral developer must post a bond to protect the surface owner from unreasonable crop losses or land damages. COLO. REV. ST. § 34-60-06(3.5). Rules have also been promulgated regarding setback distances for wells and tank batteries from occupied structures, roads, and surface property lines. *E.g., 2 C.C.R. 401-1, Rules 603(a) and 604(a).*

Furthermore, many local governments in Colorado also regulate surface use by oil and gas developers. *See* MORGAN & DROEGEMUELLER, 24 Colo. Law 1323, 1324 (1995).

[6] Federal Regulations

Notwithstanding the rights granted in the federal lease forms, almost all activities of a federal lessee are the subject of federal regulations and restrictions not contained in the federal lease form. *See* 1 LAW OF FEDERAL OIL AND GAS LEASES, Ch. 15, Rocky Mtn. Min. Law Found. (1997) ("Surface Management Requirements and Specific Stipulations").

§ 4.01 Pooling and Unitization Surface Access Issues.

Although the terms "pooling" and "unitization" are often used interchangeably, pooling generally refers to the bringing together of two or more smaller tracts sufficient to form a drilling or production unit in accordance with applicable spacing rules while unitization generally refers to the joint operation of separately owned tracts within an oil or gas field, oftentimes for the purpose of secondary recovery. *See* H. WILLIAMS & C. MEYERS, *Oil & Gas Law*, § 901 (1997). *But see* Tex. Nat. Res. Code Ann. §§ 101.001-.52 (the terms "unitization" and "pooling" are used synonymously in Texas' Unitization Statute). In either instance, when two or more tracts that are the subject of separate oil and gas leases are pooled or unitized, the question arises as to whether the surface of one of the joined tracts can be accessed or otherwise burdened by activities or equipment utilized in connection with the exploration or production of oil or gas from one of the other tracts.

[a] The General Rule.

In the absence of a contractual provision to the contrary, the general rule is that an owner of the mineral estate underlying a particular tract of land may not use the surface estate of that tract to facilitate or otherwise assist any exploration or production operations occurring on adjacent, adjoining, or other tracts of land. *See* Annotation, *Right of Owner of Title to or Interest in Minerals Under One Tract to Use Surface, or Underground Passages, in Connection With Mining Other Tract*, 83 A.L.R.2d 665 (1962).

The landmark case in Texas establishing this general rule is *Robinson v. Robbins Petroleum Corp.*, 501 S.W.2d 865 (Tex. 1973). In this case, the lessor, at a time when he owned both the mineral estate and surface estate, executed a mineral lease covering 221 acres. Thereafter, the lessor conveyed 80 acres of the surface estate to *Robinson* and after that conveyance occurred, the mineral lessee began operating three water flood

units of varying sizes, each of which included all or a part of the 221 acres under lease. The water flood program involved the taking of salt water from underneath the 80 surface acres owned by *Robinson* and transporting it to injection wells located elsewhere on the unit. *Robinson*, as owner of the surface estate, brought suit seeking damages for the unauthorized use of the salt water. Although the court ruled that the lessee had the right to use the salt water for production of oil underlying the 221-acre lease, the lessee did not have the right to use the salt water for the production of oil underlying acres that were not included within the 221-acre lease. *Id.* at 868. *Robinson* was, accordingly, entitled to recover the value of the salt water which had been used off-lease. *Id.* In so ruling, the court was careful to distinguish the facts in *Robinson* from those before the court in *Sun Oil Company v. Whitaker*, 483 S.W.2d 808 (Tex. 1972), by noting that the lessee in *Sun Oil* was held to have an implied right to use water underlying the surface estate for a water flood program because in that case the water was being used only to produce minerals from underneath the leased premises. *See also Phillips Petroleum Company v. Cowden*, 241 F.2d 586 (5th Cir. 1957) (the court, in *dictum*, suggested that a mineral owner's easement to invade the surface for the purpose of exploring and exploiting his own property did not extend to the point of authorizing an invasion of the surface for the purpose of exploring neighboring property).

Alabama

Tutwiler v. Etheredge, 258 Ala. 219, 231 So.2d 93 (1970).

California

Bourdieu v. Seaboard Oil Corp., 48 Cal. App. 2d 429, 119 P.2d 973 (1941); *Lineberger v. Delaney Petroleum Corp.*, 8 Cal. App. 2d 153, 47 P.2d 326 (1935)

Kentucky

Wiser Oil Co. v. Conley, 346 S.W.2d 718 (Ky. 1960) (mineral owners may not use the surface for the production of minerals from other premises even where the lease gave them a right-of-way "for all purposes"), *on second appeal*, 380 S.W.2d 217 (Ky. 1964); *Kentucky Pipe Line Co. v. Hatfield*, 223 Ky. 315, 3 S.W.2d 654 (1928).

Louisiana

East v. Pan American Petroleum Corp., 168 So. 2d 426 (La.Ct.App. 1964) mineral lessee used more surface than reasonably necessary when he used dirt from the surface of one leased tract to construct a road on an adjacent tract).

Mississippi

Farragut v. Massey, 612 So.2d 325 (Miss. 1992) (lease did not authorize lessees to accept salt water from third parties holding leases on adjoining lands and that a release executed by lessor should not be read so broadly as to permit disposal of salt water produced by such third parties).

Oklahoma

Mack Oil Co. v. Laurence, 359 P.2d 955 (Okla. 1964) (the right to use water for the recovery of minerals is limited to use for the benefit of only the leased premises and mineral owner found liable in damages to surface owner for the value of water the mineral owner sold for use off the lease); Wise *v. Tabor*, 201 Okla. 428, 206 P.2d 1970 (1949).

[b] Effect of Pooling or Unitization.

When two or more oil and gas leases are pooled or unitized the question of whether the surface estate of one tract can be used to benefit the mineral estate of another tract that has been pooled or joined within a unit presents a more complicated question which may turn on whether the mineral estate was severed from the surface estate at the time authorization to pool or unitize was granted. *See* E. Miller, *Field Wide Unitization and Secondary Recovery*, 11th Annual Advanced Oil, Gas, and Mineral Law Course, State Bar of Texas (October 1993).

Under the general rule announced by *Robinson*, if there is no pre-existing authority from the owner of the surface agreeing to allow the surface to be used for pooling or unit operations, the lessee will only have the right to use only so much of the surface as is reasonably necessary to explore for or develop the minerals lying directly underneath the acreage under lease.

However, if a lease or other written agreement permits the pooling or unitization of the acreage covered by the lease and it was executed by a lessor at a time when he owned title to both the surface and minerals, it would seem logical that the lessee shall have the right to use the surface for

such joint operations because the lessor executed the lease in two capacities with rights that are incidental to both ownership of the surface and ownership of the minerals: as a mineral owner, he gave the lessee all necessary easements for the exploration and production of the minerals and, as a surface owner, he could burden the surface with any and all easements including the use of the surface for pooled or unitized operations. *Id. Pfulger v. Clack*, 897 S.W.2d 956 (Tex. App. -- Eastland 1995, writ denied). It also stands to reason that a subsequent purchaser of the surface who takes with notice of an oil and gas lease takes the surface title subject to the additional rights allowing the land to be used for joint operational activities because it is a general rule of law that a subsequent surface owner takes the land subject to all of the provisions of an oil and gas lease of which the new owner has notice. *E.g., Texaco, Inc. v. Faris*, 413 S.W.2d 147 (Tex. Civ. App.-- El Paso 1967, writ ref'd n.r.e.); *Grimes v. Goodman Drilling Company*, 216 S.W.2d 202 (Tex. Civ. App. — Ft. Worth 1919, writ dism'd).

On the other hand, when the lease or other written agreements permitting pooling or unitization of the leased acreage was executed by the lessor after the mineral estate has been severed from the surface estate and the grant of the mineral estate does not include easements covering pooling or unit operations, the logical rule would appear to be that the mineral owner cannot unilaterally subject the surface to pooling or unit operations benefitting other leases either through clauses in an oil and gas lease or by execution of a unitization agreement. *Field Wide Unitization and Secondary Recovery*, at D-15. *But see Delhi Gas Pipeline Corporation v. Dixon*, 737 S.W.2d 96 (Tex.Civ.App. - Eastland 1987, writ denied).

Another Texas case addressing this problematic issue is *Miller v. Crown Central Petroleum Corporation*, 309 S.W.2d 876 (Tex. Civ. App. — Eastland 1958, writ dism'd by agr.). Although *Miller* was decided fifteen years before *Robinson*, it was, inexplicably, not cited in the *Robinson* decision. The *Miller* case may or may not conflict with the *Robinson* decision depending upon facts which, unfortunately, are not apparent from the opinion. More specifically, the Millers had purchased the surface of two tracts of land that were already the subject of an oil and gas lease which contained a pooling provision. A few years after the Millers purchased the two surface tracts, the production from the wells located on the two tracts began to decline and so the lessee began a waterflooding program which covered several tracts including the two tracts purchased by the Millers. As part of this waterflood program, it was necessary to pipe saltwater across the two Miller tracts and inject it into a well located on yet another tract in the waterflood program. The Millers

then sued to prohibit the piping of salt water across their land and sought damages.

The Court of Appeals ruled that the lessees were entitled to use the surface of the Miller land for unit operations apparently because the lease contained a pooling provision that was unlimited as to the amount of acreage that could be included in the unit. Although the pooling clause made no mention of pooling for waterflood operations, the court found that it was sufficient to grant the right to pool the land for waterflood purposes and therefore the Millers took title to the surface with notice of the right of the mineral lessee to use the surface for unit operations. *Id.* at 877

If the oil and gas lease in *Miller* was executed by the lessor at a time when he owned title to both the surface and the minerals, then the *Miller* decision appears to be consistent with the *Robinson* decision since, under the court's reasoning in *Miller*, the unit operations had been authorized by the surface owner. However, if the oil and gas lease in *Miller* was executed by a lessor at a time when he owned only the minerals, the court's decision would seem to conflict with *Robinson* because it allowed the mineral owner to increase the burdens on the Miller's surface estate without their permission. *See Delhi Gas Pipeline Corporation v. Dixon*, 737 S.W.2d 96 (Tex.Civ.App.-Eastland 1987, writ denied) (*citing Crown Miller*, Court held that mineral lessee could lay a gas gathering line across the surface owners' 29.98 acre tract to transport gas produced from a well located on a 687 acre pooled unit even though the well was not located on the surface owners' 29 acre tract and the lease was executed after the 29 surface acres had been severed from mineral estate).

The *Robinson* case is also troublesome because there is some indication in the opinion that the unitization was accomplished by agreement of the mineral owners after the Millers had purchased their surface and not by virtue of the pooling clause already contained in the lease. *Id.* at 877 (the water flood program "was done by agreement of all owners of minerals and royalty, including the lessors and lessees of the two tracts in which the Millers own the surface").

One other interesting aspect of the Miller decision is that the pooling clause in that case contained no limitation on the site or the tracts to be posted or otherwise conbined. However, as noted by a prior author on this subject, in most modern lease forms in use today, the pooling clause will limit the size of the unit to 40 or 80 acres for oil and 320 or 640 acres for gas. Therefore, it would be difficult to use one of these modern lease forms to bind a subsequent purchaser of the surface to operations on a unit which

exceeded the size authorized by the pooling clause. *Field Wide Unitization and Secondary Recovery*, at D-16.

It should also be noted that it is a standard practice in Texas in the case of field wide unitization that the rights of the surface owners are carefully reviewed and, in many instances, it is necessary to take one or two approaches to the problem. Either the surface owner, if he is a royalty owner in a unit is requested to and does ratify the entire unit agreement, thereby entitling his lessee to conduct operations on any part of the unitized surface or a separate surface lease is obtained from the surface owner granting explicit rights to the use of his land in a manner that is consistent with *Robinson*.

Oklahoma

Holt v. Southwest Antioch Sand Unit, Fifth Enlarged, 292 P. 2d 998 (Okla. 1965) (water produced on one lease within a secondary recovery unit may be used throughout the unit). *Accord Dunn v. Southwest Ardmore Tulip Creek Sand Unit*, 548 P. 2d 685 (Okla. App. 1976).

§ 5.01 Injury-to-Livestock -- A Different Standard.

Different standards apply to injury-to-livestock cases than in injury-to-land cases. *General Crude Oil Co. v. Akien*, 344 S.W.2d 668, 670-71 (Tex. 1961); *Amerada-Hess Corp. v. Iparrea*, 495 S.W.2d 60, 61 (Tex. Civ. App. -- El Paso 1973, writ ref'd n.r.e.). Specifically, the standard applicable in injury-to-livestock cases is that so long as the lessee is not using more land than reasonably necessary for his operation, the only duty owed by the operator of an oil and gas lease to the surface owner or its lessee who is pasturing livestock, is not to injure such livestock intentionally, wilfully, or wantonly. *Warren Petroleum Corp. v. Martin*, 271 S.W.2d 410, 413 (Tex. 1954). Furthermore, a mineral lessee or operator has no duty to put fences around his mineral operations. *Id. at 411*; *General Crude Oil*, 344 S.W.2d at 671; *Amerada-Hess*, 495 S.W.2d at 63.

If, however, the surface owner can show that the lessee is using more land than is reasonably necessary to conduct his operations, then the surface owner must then show that the lessee was negligent in some manner and that such negligence proximately caused the injury to the livestock. *Warren*, 271 S.W.2d at 413; *Weaver v. Reed*, 303 S.W.2d 808, 809 (Tex. Civ. App. -- Eastland 1957, no writ). For example, if the surface owner's cattle are injured as the result of ingesting oil that has spilled onto the ground, the cattle owner must show that the oil spill is on the ground outside the legitimate area of the oil and gas lessee's operations and that the spill was caused by the negligence of the mineral lessee. *General Crude Oil*, 344 S.W.2d at 671; *Warren*, 271 S.W.2d at 412; *Amerada-Hess*, 495 S.W.2d at 64.

In sum, in order for the surface owner to recover damages for injuries to his livestock, the surface owner has the burden of proof to show one of the following:

(1) that the mineral lessee or operator, intentionally, wilfully, or wantonly injured the livestock; or

(2) that the mineral lessee or operator, used more land than was reasonably necessary for carrying out the purposes of the lease and that as a result of some negligent act or omission on their part, that such act or omission proximately caused an injury to the surface owner or surface lessee's livestock.

E.g., *Santana Oil Company v. Henderson*, 855 S.W.2d 888 (Tex. App. -- El Paso, 1993, no writ) (court reversed and rendered a judgment in favor of mineral lessee because surface owner failed to prove that the mineral lessee either intentionally injured the surface owner's cattle or that the mineral lessee used more land that was reasonably necessary for his operations and that its negligence proximately caused the injury to the surface owner's cattle). *See also Young v. McGill*, 473 S.W.2d 672, 673 (Tex. Civ. App. -- El Paso 1971, no writ) (the fact that oil was on the ground does not establish an unreasonable use of the surface nor a use of the surface more than was reasonably necessary).

Kansas

McLeod v. Cities Service Gas Co., 131 F.Supp. 449 (D.C. Kan. 1955), aff'd, 233 F.2d 242 (apparently applying Kansas law) (lessee owes no legal duty to prevent injury to livestock); *Thurner v. Kaufman*, 237 Kan. 184, 669 P.2d 435 (1984) (lessee or operator owes no legal duty to fence operating area to protect livestock); *Coffman v. Harris*, 187 Kan. 516, 358 P.2d 673 (1961) (lessee liable for injuries to cattle caused by negligence of lessee in permitting oil to escape from well).

New Mexico

Wilson v. Schermerhorn Oil Co., 56 NM 512, 245 P.2d 845 (1952) (lessee liable for negligence in utilizing a leaky wooden tank for the storage of oil in a pasture where cattle grazed).

Oklahoma

Magnolia Petroleum Co. v. Howard, 182 Okla. 101, 77 P.2d 18 (1938) (a lessee owes no duty to fence that part of the leased premises which is reasonably necessary in producing and saving the oil and gas); *Mid-Continent Petroleum Corp. v. Rhoades*, 205 Okla. 651, 240 P.2d 95 (1951) (lessee owes no legal duty to fence its oil and gas operations in order to prevent injury to livestock). *But see Lanahan*

v. Myers, 389 P.2d 92 (Okla. 1963) (recognizing that lessee has a duty to fence certain slush pits during periods in which they are not reasonably necessary to lessee's operations); *Hamon v. Jardner.*, 315 P.2d 669 (Okla. 1957) (lessee has duty to exercise reasonable care to discover and protect cattle until surface owner has notice of the drilling operations and an opportunity to protect his cattle himself); and *Gage v. Texas Co.*, 395 P.2d 411 (Okla. 1964) (when lessee moves upon pasture lands where cattle are grazing and commences drilling operations without giving notice to the surface owner and the surface owner has no knowledge of such operations, lessee has a duty to exercise reasonable care to discover and protect the cattle until surface owner has notice of the drilling operations and an opportunity to protect his cattle).

Oklahoma also has an oil well pollution statute that has been the basis for holding an oil and gas lessee liable for injuries to or death of livestock when such injuries were caused from coming into contact with substances in situations prohibited by the statute. OKLA. STAT. ANN., TITLE 52, § 296. The purpose of this statute is to prevent oil and gas operators from allowing salt water and other "deleterious substances" to spread indiscriminately over the surface of land. *Wellsville Oil Co. v. Carver*, 206 Okla. 181, 242 P.2d 151 (1952). When such substances "escape" and cause an injury to livestock, it has been held that such violation of a statute constitutes negligence as a matter of law. *Mid-Continent Petroleum Corp. v. Rhoades*, 205 Okla. 651, 240 P.2d 95 (1951); *Wellsville Oil Co. v. Carver*, 206 Okla. 181, 242 P.2d 151 (1952); *Midland Oil Co. v. Ball*, 115 Okla. 229, 242 P.2d 161, *error dism'd*, 274 U.S. 721, 47 S.Ct. 589 (1924); *Texas Co. v. Mosshammer*, 175 Okla. 202, 51 P.2d 757 (1935) (a violation of the statute is negligence per se, no other negligence need be plead or proved).

§ 6.01 Lease-Imposed Obligation to Pay Surface Damages.

In the absence of an express provision in the lease or specific statute providing otherwise, a mineral lessee has the right to use as much of the surface and in such a manner as is reasonably necessary for the exploration and production of minerals and be free from liability for any damages caused by his reasonably necessary use so long as his use is performed non-negligently and with due regard for the surface owner's activities. *Otis v. Haas*, 569 S.W.2d 508 (Tex.Civ.App. - Corpus Christi 1978, writ ref'd n.r.e). *See also Mcloud v. Cities Service Gas Co.*, 131 F. Supp. 449 (D. Kan. 1955), *aff'd*, 233 F.2d 242 (10th Cir. 1956).

However, if the lease contains a surface damage clause obligating lessee to pay the surface owner for all damage done to the surface by the lessee's operations, the lessee's common-law exemption from such liability shall be superseded by this express contractual provision. *E.g.*, *Warren Petroleum Corporation v. Monzingo*, 157 Tex. 479, 304 S.W.2d 362, 363 (1957); *Meyer v. Cox*, 252 S.W.2d 207, 208 (Tex. Civ. App. -- San Antonio

1952, writ ref'd); (because lease provided that lessee would pay lessors for all surface damages caused by lessee's operations, lessees were liable to lessor for all such damages even if the lessee's acts which caused the damages were reasonably necessary for proper development of the leased premises). *See also Finder v. Stanford*, 351 S.W.2d 289, 291 (Tex. Civ. App. -- Houston 1961, no writ) (lease-imposed obligation to pay surface damages to surface owner is payable to surface owner, not surface owner's lessee).

§ 7.01 Surface Owner's Liability for Interference

If a surface owner unreasonably interferes with the rights of the mineral owner or their lessee to explore for and produce minerals, the surface owner may be liable to the mineral estate for damages caused by such interference. *See e.g.*, *Ball v. Dillard*, 602 S.W.2d 521, 523 (Tex. 1980) (surface owner was liable to mineral lessee for additional drilling costs caused by surface owner's unjustified refusal to permit mineral lessee onto land).

Colorado

Davis v. Cramer, 793 P.2d 605, 608 (Colo. App. 1990) ("a surface owner who unreasonably interferes with a mineral lessee's right to enter the property is liable for such damages as are the natural and probable result of such interference.").

Mississippi

Lewis v. Ada Oil Company, 279 So. 2d 622 (Miss. 1973) (surface owners who deny or block a mineral owner's surface acres are subject to being enjoined and may be required to pay damages).

§ 8.01 Geophysical Trespass

[1] Physical Entry Requirement.

"Geophysical trespass" has been defined as a "wrongful entry on land for the purpose of making a geophysical survey on the land." H. WILLIAMS & C. MEYERS, *Manual of Oil & Gas Terms, 374 (9th Ed. 1994)*. Consequently, there is no question a geophysical trespass occurs when the trespasser has made a physical entry upon the surface of the land and utilized geophysical equipment to collect seismic data directly under the property where the equipment is located. All reported Texas cases allowing recovery for a geophysical trespass involve a physical entry upon the subject land. *E.g.*, *Phillips Petroleum Co. v. Cowden*, 241 F.2d 586 (5th Cir. 1957), *aff'd on rehearing*, 256 F.2d 408 (5th Cir. 1958).

Furthermore, most commentators on this issue agree that under current law there is no action for geophysical trespass unless there has been a physical entry upon the property in question:

(1) DANCY AND HUMPHREYS, *Legal Considerations Involved in the Geophysical Exploration for Oil & Gas, 57 Okla. B.J. 1802, 1804 (1986)*:

> A general proposition can be formulated that a geophysical explorer is not liable for trespass to a nonconsenting landowner for information gained involving adjoining lands, so long as the exploring party *refrains from entry upon or injury to the property* of the nonconsenting owner.

(2) ROGERS, *Liability for the Invasion of a Landowner's Rights by Geophysical Explorations, 18 Cal. W.L. Rev. 460, 463 (1982)*:

> One of the necessary elements to an action based on trespass requires proof of an *actual intrusion onto the land* in the possession of another.

(3) CHRISTIANSEN, *Note, Oil & Gas: Improper Geophysical Exploration -- Filling in the Remedial Gap, 32 Okla. L. Rev. 903, 907 (1979)*:

> The commentators today generally agree that in the *absence of entry upon or injury to the property* of the nonconsenting landowner, the conduct of a geophysical explorer on adjoining lands is not actionable, and this is so even where the vibrations are transmitted through his land from one side to receiving sets on the other side.

(4) WARNER, *Oil & Gas: Recovery for Wrongful Geophysical Exploration -- Catching Up With Technology, 23 Washburn L.J. 107, 130 (1983)*:

> Presently, the law respecting wrongful geophysical exploration has recognized a landowner's right to recover damages for a wrongful survey involving a physical trespass. When geophysical exploration is conducted from adjacent property or public roads *without an actual physical trespass*, the landowner has been denied any recovery.

(5) RICE, *Wrongful Geophysical Exploration, 44 Mont. L. Rev. 53, 59 (1983)*:

> Most courts, drawing from blasting case analogies, appear to hold that mere seismic waves or explosive vibrations, *without*

accompanying physical entry, are insufficient to constitute a trespass.

(6) H. WILLIAMS AND C. MEYERS, *Oil & Gas Law, Sec. 230 (rev.ed. 1985)*:

> So long as *no physical entry* is made on the land of the complainant for the purposes of the survey, there is no liability incurred merely because the shock waves set off by the defendant in his survey passed through the complainant's land, even though the conduct of the survey affords (or is believed to afford) information concerning the structure underlying the complainant's land and the speculative value thereof is effected thereby.

(7) HEMMINGWAY, *The Law of Oil & Gas, Sec. 230 (rev.ed. 1983)*:

> Where the geophysical explorer has not made an *entry upon the land* in order to obtain the information, the landowner has generally been denied recovery for a taking of information concerning his mineral rights.

(8) COMMENT, *The Oil & Gas Lessee's Right to Geophysical Exploration: Incidental or Exclusive, 20 Tulsa L.J. 97, n.17:*

> Although damages were awarded in *Phillips Petroleum Co. v. Cowden*, it must be recognized that a necessary element of the geophysical trespass is *actual surface trespass*. Accordingly, the right protected was that of the landowner to acquire information regarding the subsurface structure of his land through geophysical operations performed within the surface boundaries of his land.

S. MARRS, *58 Tex. Bar J. 128-30 (1995).*

Louisiana

LeBleu v. Vacuum Oil Co., 15 La. App. 689, 132 So. 233, *on rehearing*, 15 La. App. 692, 132 So. 776 (1946) (landowner entitled to recover damages, but not punitive damages, for an unauthorized entry upon the surface of his land by a torsion balance crew even though work was performed to gain information regarding character of lands two miles away).; *Layne Louisiana Co. v. Superior Oil* Co., 209 La. 1014, 26 So. 2d 20, 22 (La. 1946) (when seismic information is unlawfully obtained by others, owner is entitled to recover compensatory damages); *Angelloz v. Humble Oil & Refining Co.*, 199 So. 656 (La. 1940) (recognizing geophysical trespass cause of action).

Mississippi

Bynum v. Mandrel Indus., Inc., 241 So. 2d 629 (Miss. 1970) (violation of contract terms not to conduct geophysical operations near ponds constituted trespass).

Oklahoma

Burns v. Western Geophysical Co., Cause No. 89-6259 (10th Cir. Dec. 12, 1990) (geophysical trespass occurred when geophysical company conducted seismic operations after only obtained permission of surface owners, not the mineral owners).

Furthermore, it appears clear that no geophysical trespass occurs by simply extrapolating data lawfully obtained from one lease to determine geophysical characteristics of adjoining acreage where there has not been any physical entry on the adjoining property and no data has been collected under the adjoining property. *Phillips*, 241 F.2d at 593 ("the mere obtaining of information by extrapolation of data relating to one site does not constitute an invasion of other sites."). *See also* KUNTZ, *Oil and Gas* § *12.7 (1987)* ("It is clear that no wrong is committed if information regarding a particular tract of land is obtained by extrapolation on the basis of information obtained regarding neighboring land.").

[2] Non-Physical Entry Possibility.

The more difficult question to answer is whether a subsurface trespass occurs when there is no physical entry onto the surface of the land under which the data is collected. The only reported case in Texas which comes close to addressing this issue is *Kennedy v. General Geophysical Co.*, 213 S.W. 707 (Tex. Civ. App.--Galveston 1948, writ ref'd n.r.e.).

In *Kennedy*, General Geophysical had attempted to obtain the permission of Kennedy to conduct geophysical operations on a tract whose surface and minerals were owned by Kennedy, but Kennedy refused. General Geophysical then opted to "shoot" along a public highway adjacent to Kennedy's tract. General Geophysical did not enter upon the surface or conduct any operations or place any shot-point or receiving sets on the surface Kennedy's tract. Additionally, there was never a "shooting" which ran in a line from a shot-point to a receiving set which crossed any part of Kennedy's tract. Nevertheless, Kennedy brought a lawsuit claiming that a geophysical trespass had occurred to his mineral interest because vibrations caused by the seismic operations conducted on the adjacent property had traveled through and under his tract. Kennedy also sought exemplary damages for General Geophysical's alleged willful and malicious acts in conducting such operations and in securing valuable information relative to the subsurface structure of his property. However, the court refused to recognize any cause of action

under such facts because no physical trespass on Kennedy's tract had occurred. Id. at 910-13. The court further held, citing numerous "blasting" cases and other legal authorities, that mere seismic vibrations do not constitute a trespass without a physical invasion onto the surface of the property. *Id.* In addition, the court found that General Geophysical acted without malice, and that *Kennedy* failed to prove that General Geophysical had obtained any geophysical information as to Kennedy's mineral estate.

The *Kennedy* decision remains the only reported case in Texas on this issue and there are no reported cases that allow damage recovery when there has been no physical trespass onto the surface of the property. Consequently, the *Kennedy* decision has been cited as authority for the proposition that in absence of injury to or entry upon the surface of the claimant's property, geophysical operations on adjoining lands are not actionable. WARNER, *Oil & Gas: Recovery for Wrongful Geophysical Exploration -- Catching Up with Technology, 23 Washburn L.J. 107, 111 (1983)*; HEMMINGWAY, *Law of Oil & Gas, Sec. 4.1 (2nd ed. 1983)*; H. WILLIAMS AND C. MEYERS, *Oil & Gas Law, Sec. 12.7 (rev.ed. 1962)*. However, it is important to remember that there are no cases dealing with situations where the line between the receiver and the shot-point crosses land which is the subject of the suit. Accordingly, any party wishing to rely upon the general language of *Kennedy* stating that mere seismic vibrations do not constitute trespass without a physical invasion of the property should be wary of Kennedy's precedental value because a major factor in the court's decision seemed to be the fact that no seismic data acquisition was attempted, or collected from, beneath the alleged trespassed property. In fact, one commentator reasons that because the court in *Kennedy* (1) repeatedly emphasized, in dictha, that Kennedy failed to prove that General Geophysical obtained reliable information regarding Kennedy's subsurface, and (2) there was no straight line running from a shot point to a receiver cross any part of Kennedy's land, the Court has:

> inferentially left the door open for an actionable trespass on the mineral estate without physical entry, conditioned upon a showing that the trespasser has obtained valuable subsurface information under the subject property."

Blomquist, 48 Baylor L. Rev. 21 (1996).

It is also important to remember that *Kennedy* was decided at a time of 2-D technology and the advances in 3-D seismic technology, which now permit subsurface data to be retrieved without physically entering the surveyed property, make this area of the law ripe for revisitation to abrogate the physical entry requirement and recognize other, perhaps more appropriate, theories of recovery for unauthorized appropriation of the valuable right to conduct seismic operations without regard to the location of the seismic equipment. More specifically, the *Kennedy* decision has been criticized and there are several articles dealing with this issue which assert that recovery against the trespassing party should be permitted under theories other than the traditional trespass one. *E.g.*,

SLATER, *The Surreptitious Geophysical Survey: An Interference With Prospective Advantage, 15 Pac. L.J. 381 (1984)*; HEMMINGWAY, *The Law of Oil & Gas, Sec. 4.1, p. 135 (2nd ed. 1983)*; *Note, Oil and Gas: Recovery for Wrongful Geophysical Exploration--Catching Up With Technology, 23 Washburn L.J. 107, 126 (1983)*; RICE, *Wrongful Geophysical Exploration, 44 Mont. L. Rev. 53, 70 (1983). Note, Oil and Gas: Improper Geophysical Exploration -- Filling in the Remedial Gap, 32 Okla. L. Rev. 903 (1979)*; 1 KUNTZ, *A Treatise on the Law of Oil & Gas, § 12.7 (1962)*. Generally speaking, these authors' solution is to discard the traditional trespass cause of action and utilize other, more appropriate legal theories of recovery such as wrongful appropriation of the right to explore, unauthorized use of trade secrets, or interference with a prospective advantage. WARNER, *Oil & Gas: Recovery for Wrongful Geophysical Exploration -- Catching Up with Technology, 23 Washburn L.J. 107, 111 (1983)*; HEMMINGWAY, *Law of Oil & Gas, Sec. 4.1 (2nd ed. 1983)*; H. WILLIAMS AND C. MEYERS, *Oil & Gas Law, Sec. 12.7 (rev.ed. 1962)*. Other authors, however, suggest that modern industry practice, modern technology, and a shift in public policy promoting the development of mineral resource require a change in the law and argue that a mineral owner should no longer be deemed to have a legally protected right to prohibit collection of geophysical data concerning the parcel in which they have an ownership interest if the party collecting the data has placed his equipment in a location they are legally entitled to occupy. K. JONES & R. FABER, *Subsurface Trespass and Seismic Options, 11th Annual Advanced Oil and Gas and Mineral Law Course (1993)*.

This author believes that the former view will prevail -- that a cause of action, whether it be trespass or a newly-recognized action, will exist against a person or entity who obtains geophysical information about a mineral estate without first obtaining the permission of the mineral estate owner even if the person acquiring the information has not made a physical entry onto the property under which the information is obtained. *See also* E. KUNTZ, *Oil and Gas § 12.7 (1987)*. ("[N]othing definite can be concluded except that there appears to be a growing but yet undefined notion that a wrong is committed if the explorer deliberately projects shock waves through the land of another and picks them up on another side for the purpose of obtaining information regarding the subsurface structures of such land.").

One recent event in this area which may have signaled the beginning of the end for *Kennedy's* physical entry requirement was a case filed in the 288th District Court of Bexar County, styled *B.G.M. Airborne Surveys, Inc. v. Theodosia Coppock*, Cause No. 92-CI-13993. In this case, B.G.M. Airborne Surveys conducted an aeromagnetic survey of 77,000 unleased acres. B.G.M. conducted this survey without first obtaining the mineral owner's permission and later attempted to sell the aerial magnetic data it had obtained from flying over Ms. Coppock's acreage. When the mineral owner complained, B.G.M. filed a declaratory judgment action seeking a judgment that it had done nothing wrong. The mineral owner, however, relying in part upon the arguments made in the law review articles cited above, filed a counterclaim alleging that B.G.M. was liable in damages for:

(1) geophysical trespass; (2) invasion of privacy; (3) misappropriation of trade secrets; (4) slander of title; (5) nuisance; (6) quasi-contract; (7) misappropriation of the right to explore; and (8) interference with prospective advantage. Both sides filed motions for summary judgment regarding their respective positions and the court granted summary judgment in favor of the mineral owner on her (1) geophysical trespass; (2) misappropriation of trade secrets; and (3) misappropriation of the right to explore causes of action. The case was subsequently settled thereby avoiding the necessity of the trial court to hear evidence regarding damages.

If the case had not settled and if the trial court's judgment had been upheld on appeal, it would have been the first Texas case to allow a mineral interest owner to recover damages without a physical trespass onto the surface of the property and the first case to recognize causes of action for misappropriation of trade secrets and misappropriation of the right to explore in this context. While settlement prevented the decision from becoming reported legal precedent, it does serve as a warning bell for what may ultimately become the law in Texas. *See also* R. HEMMINGWAY, *The Law of Oil and Gas § 4.1 (1991)* ("although no tort has been recognized for invasion of privacy or of conversion of information as to the mineral estate, it would seem that where valuable subsurface information has been obtained without entry upon the property [such as information gathered by a magnetometer in an aircraft passing over the property] recovery should be allowed."). *See also Gulf Coast Real Estate Auction Co. v. Chevron Industries,* 665 F.2d 574, 577 (5th Cir. 1982) (while apparently recognizing a cause of action for an unauthorized aerial survey, the court upheld a directed verdict in favor of defendant because they failed to prove the value of the use of the land for exploration.).

Another case which comes close to addressing physical entry requirement is the Tenth Circuit Court of Appeals case of *Ohio Oil Co. v. Sharp*, 135 F.2d 303 (10th Cir. 1943). In that case, an oil company hired a geophysical exploration company to conduct geophysical tests on a public highway adjacent to private tracts of land. No entry was made upon these private lands. However, the tests were conducted without the consent or approval of the owners of the private mineral interest. An employee of the geophysical exploration company disclosed the geophysical test results to the defendant and the defendant, acting upon the information, entered into several leases on the surveyed land. The oil company who conducted the survey sought to have a constructive trust imposed on the defendant's leases. The defendant, in turn, invoked the maximum of equitable jurisprudence, and alleged that the Plaintiff was guilty of inequitable conduct and should be denied relief because geophysical testing was conducted without the consent of the mineral owners.

The majority opinion, conceded, for the purposes of the argument, that the geophysical tests constituted a trespass upon the adjacent mineral estate because the adjacent mineral owners had not consented to the survey. *Id.* at 308. However, the court concluded that, even assuming there was trespass, the oil company was an innocent

trespassor whose "good faith conduct, although said to be actionable wrong, is not unconscionable or sufficiently culpable to repel it from a court of equity." *Id.* at 309. Therefore, the majority opinion avoided a clear holding on the issue of whether a geophysical trespass can occur on other lands in the absence of a physical entry. The concurring opinion, on the other hand, was of the view that no geophysical trespass had occurred with respect to the adjacent mineral estate. *Id.* at 310.

§ 9.01 Geophysical Trespass Causes of Action and Damages

[1] Mineral Interest Owner/Lessee.

When a geophysical trespass has occurred, the mineral interest owner or its lessee may bring an action in trespass, *Thomas v. Texas Co.*, 12 S.W.2d 597 (Tex. Civ. App.--Beaumont 1928, no writ), or waive the trespass and sue in assumpsit for the reasonable value of the use and occupation of the property. *Phillips Petroleum Co. v. Cowden*, 241 F.2d 586, 592 (5th Cir. 1957).

Under the trespass theory, "a claimant may attempt to recover the decrease in value of the mineral rights caused by the unlawful trespass." *Id.*

However, because such evaluations may be difficult to ascertain, the affected mineral interest owner or the lessee may waive the trespass action and sue for the reasonable value of the use and occupation of the property; however, value is not necessarily limited to the amount of acreage that was actually trespassed. Rather, the recovery includes the reasonable value of the land that would have been included in a contract between the parties if the person committing the subsurface trespass had obtained the mineral interest owner's permission to conduct seismic operations. *Id.*

For example, in the *Cowden* case, the mineral interest owner owned 2,682 acres and sued to recover for the value of the right to geophysically explore all of those acres. The defendant responded that he had trespassed but claimed that he had only occupied 82 acres of the mineral interest owner's total acreage and that the mineral interest owner's recovery should be limited to just those 82 acres. The court determined that all 2,682 acres of the mineral interest owner's estate would have been included in this type of contract and further found what a reasonable price per acre would have been and allowed the mineral interest owner to recover that amount. *Id.*

Recovery may also be had in an action for conversion of the information obtained. *Shell Petroleum Corp. v. Scully*, 71 F.2d 772 (5th Cir. 1934). However, this theory has been explicitly rejected in Texas. *Shell Petroleum Corp. v. Moore*, 46 F.2d 959 (5th Cir. 1931); *Wilson v. Texas Co.*, 237 S.W.2d 649 (Tex. Civ. App.--1951).

Louisiana

Layne Louisiana Co. v. Superior Oil Co., 209 La. 1014, 26 So.2d 20, 22 (La. 1946) (mineral owner may recover damages in the amount of loss of value for leasing purposes caused by information obtained by trespass); *Angelloz v. Humble Oil Refining Co.*, 196 La. 604, 199 So. 656 (La. 1940) (only compensatory and not exemplary damages are recoverable for damages caused to property by geophysical trespass).

[2] Surface Owner.

Generally speaking, a geophysical trespass occurs when a geophysical company trespasses upon the surface of the property under which the seismic data is obtained. In addition to the above-described damages owed to the mineral owner or their lessee, additional damages are owed to the surface owner for damages caused to the surface by the trespass. In addition to any actual damages to the surface, there is precedent in allowing the surface owner to additionally recover damages for mental anguish to compensate the surface owner's feeling of disorientation, shock, outrage, indignation, and the feeling of having been "violated." *Teledyne Exploration Co. v. Klotz*, 694 S.W.2d 109, 111 (Tex. App. -- Corpus Christi 1995, writ ref'd n.r.e.) (a $50,000 judgment was entered as compensation for past and future mental distress when the defendant destroyed plaintiff's trees without permission).

Furthermore, if the trespass is willful, meaning "an act that is wanton or malicious or actuated by evil intent," punitive damages can also be recoverable. *Teledyne*, 694 S.W.2d at 111.

Presumably, such damages could also be recoverable by the mineral interest owner or its lessee.