

THE GROWING DEMAND FOR OIL AND GAS AND THE POTENTIAL IMPACT UPON RURAL LAND

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I. INTRODUCTION**

Concerns over the escalating price of oil and gas, the rising demand for oil from countries such as China and India, dwindling proven reserves of crude oil, and national security have led to renewed proposals to increase domestic production of both oil and natural gas.¹ Although any significant increase of crude oil production in the United States will almost inevitably come from the development of public lands, both on-shore and off-shore, natural gas reserves are not so restricted. Not only do recoverable reserves of natural gas appear to be more plentiful and accessible through the use of new technology than previously thought, but such reserves have increasingly been found and developed on privately-owned land.² Both the majority and the concurring justices in *Coastal Oil & Gas Corp. v. Garza* cite the need to develop such reserves.³ The justices make specific mention of the “insatiable appetite for energy,” falling oil and gas production, and similar factors.⁴ Both the majority and concurring opinions point out that allowing a mineral owner to recover damages for oil or gas drained from his land by hydraulic fractures extending into his land from neighboring land will effectively preclude the use of an essential technique for producing hitherto unrecoverable oil and natural gas reserves.⁵ Much of the current gas boom is centered on the Barnett Shale in urban and exurban areas in and around population centers such as Fort Worth, but other promising reserves have been identified in predominantly rural areas. In any event, both the price and increasing demand for domestic production of both oil and gas will necessarily lead to exploratory and developmental drilling on large swaths of rural land that are now used primarily, and often exclusively, for farming, ranching, or recreational purposes.

A. *Concerns of the Rural Landowner*

Although most of the current controversy over disruptions caused by natural gas development has arisen in suburban areas where homeowners have found themselves unexpectedly faced with near-by drilling and proposals for pipelines across residential areas, exploration and drilling in

** This article is based upon Ernest E. Smith, *Oil and Gas Issues Affecting Farm and Ranch Property: Old Doctrines and Recent Cases*, 2008 Agricultural Law Course 6 (State Bar of Tex.).

1. See Jacqueline L. Weaver, *The Traditional Petroleum-Based Economy: An “Eventful” Future*, 36 CUMB. L. REV. 505 (2006), and the books and articles cited therein that both support and dismiss the projections that global crude oil supplies will begin running short in the next few decades.

2. See, e.g., Ben Casselman, *Natural-Gas Firms Seek Outlet for Growing Supplies*, WALL ST. J., Aug. 11, 2008, at A4.

3. See *Coastal Oil & Gas Corp. v. Garza Energy Trust*, No. 05-0466, 2008 WL 3991029 (Tex. Aug. 29, 2008, pet. filed).

4. *Id.* at *15.

5. *Id.* at *7-8, *30.

rural areas may reasonably be expected to arouse equivalent concerns. A major issue for the landowner who is either using or leasing his or her land for farming or grazing is the potential such operations have to interfere with agricultural operations and thereby either directly or indirectly reduce the agricultural income produced from the land. The owner of recreational land used primarily for outdoor enjoyment—such as hunting, bird-watching, hiking, or ecotourism—may fear significant disruption of wildlife habitat and destruction of hitherto unspoiled scenic landscapes and views. Such fears will be shared with the landowner who has purchased rural land with the intent of subdividing and selling it for outdoor recreational and second-home purposes. The potential for long-term permanent damage to the land is also a cause of concern for all landowners, regardless of how they use their land.

Such concerns are not necessarily ill-founded. An oil or gas company's operations typically include geophysical exploration, building one or more drill pads, road building, drilling, laying pipelines, moving equipment on the land, and other related activities, all of which may have a negative impact on ranching and farming operations and wildlife habitat. Upon being notified or otherwise discovering that an oil or gas company holds a lease on the underlying minerals and plans to commence such activities, those seeking legal advice, such as farmers, ranchers, tenants holding grazing or farming leases, and recreational landowners, will likely be told that the company does indeed have the right to conduct such operations and that they should negotiate a surface use and damage agreement with the oil company.

In practice, the majority of oil and gas companies are highly responsible and are likely to have initiated such negotiations themselves, either in order to retain the surface owner's and surface lessee's goodwill and cooperation or to comply with statutory mandates. There are, of course, inevitable exceptions. A few companies are willing to take advantage of every legal right, and even oil and gas companies wishing to retain the goodwill of the surface owner and surface lessee by paying for damages are likely to be unwilling to move or modify their operations if alternative locations or types of operations are riskier or more expensive than the ones the company has been planning. This is especially likely to be the case if changes are requested by the landowner primarily for greater convenience in farming or ranching operations or to preserve scenic views and wildlife habitat.⁶ In these situations, oil and gas companies often invoke their full legal rights. Such rights differ significantly depending upon the state in which the land is located. The

6. If the wildlife involved is a federally-listed endangered species, its habitat is protected by regulations issued under the Endangered Species Act, 16 U.S.C. § 1538—a topic that is beyond the scope of this paper. See Endangered Species Act of 1973, 16 U.S.C. § 1531-1544 (2008).

neighboring states of Texas and Oklahoma provide a good example of sharply contrasting legal doctrines.⁷

B. The Contrasting Approaches of Texas and Oklahoma

Texas closely follows basic common law doctrines with few statutory modifications. The relatively new Common Courtesy Act requires a company to give notice to the surface owner within fifteen days after the company has obtained a drilling permit or a permit to re-enter an existing well, but it does not otherwise affect traditional common law doctrines.⁸ The much older subdivision statute makes a deeper inroad into traditional common law but does not apply to rural land.⁹ It applies to landowners proposing to subdivide their land and provides that a developer can obtain Railroad Commission approval of a subdivision plat that designates a specific site of at least two acres, along with provisions for road and pipeline easements, for each 80-acre site within the subdivision. A landowner planning a subdivision of the maximum 640-acre size permitted by the statute could thus designate sites for a maximum of eight wells and require their location at sites that cause the least interference with the resulting subdivision. The statute is limited to subdivision for residential, retail, or industrial purposes and thus has no application to typical rural land. Although a landowner planning to subdivide for a second home in a recreational area can, in theory, take advantage of the statute, the further restriction that the subdivision be located in a county with a population of over 400,000 or in an adjacent county with a population that exceeds 140,000 makes the statute's use by this type of landowner highly improbable, since land in such high-density population areas is rarely sought for rest and recreational purposes unless it is located on a lake or similar waterway.¹⁰

Except for receiving notice of plans for drilling, the rural landowner in Texas must therefore deal with the competing common law rights of surface and mineral owners. *Vest v. Exxon Corp.* is a good illustration of

7. Municipal zoning ordinances and related regulations also significantly modify, or even purport to abolish, many of the traditional common law rights of oil and gas operators, and farming or ranch land within a municipality's city limits may well be subject to such regulations. However, the bulk of such land is, at least in Texas and Oklahoma, beyond the reach of municipal jurisdiction.

8. TEX. NAT. RES. CODE ANN. § 91.701 (Vernon 2008).

9. *See id.* §§ 92.001-.007 (Vernon 2001).

10. For a more detailed discussion of the Texas subdivision statute and regulations issued by the Railroad Commission, see ERNEST E. SMITH & JACQUELINE L. WEAVER, TEXAS LAW OF OIL AND GAS § 9.2 (Matthew Bender 2d ed. 1998 & 2008 Update) [hereinafter SMITH & WEAVER].

what a Texas farmer or rancher may face.¹¹ Judge Reavley begins the court's opinion by pointing out the following:

[This case] display[s] a predicament and frustration of surface-only landowners when the mineral lessees interfere with the surface use in order to pursue their opportunities and obligations in the extraction of minerals. 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.¹²

The facts and result reached in *Vest* bear out Judge Reavley's initial point: West Texas ranchers, who owned surface rights of land subject to an oil and gas lease, had previously been able to reach an agreement with Exxon for damages and interference with their ranching operations. When Exxon began a new drilling program involving twenty-one wells and extensive new roads to the well-sites, the ranchers again sought to reach a negotiated agreement, but Exxon concluded that the ranchers' "Price Schedule For Right Of Way And Damages," which set a stipulated price for each well-site and per rod of roadway and flow line for tank batteries, etc., was too high.¹³ When Exxon refused to comply with the price schedule, the plaintiffs sued and received a jury verdict for extensive damages based on the plaintiffs' testimony that the location of the roads and well-sites, the debris and toxic materials dumped in open caliche pits dug in order to construct the roads, and the destruction of grass had made it impossible to run cows over more than 1,300 acres.¹⁴

As the Fifth Circuit pointed out in Exxon's successful appeal, there was a major difficulty with the jury verdict: Texas law.¹⁵ Unless there is an express lease provision to the contrary, an oil and gas lessee has the right to use as much of the surface estate as is reasonably necessary for its

11. See *Vest v. Exxon Corp.*, 752 F.2d 959 (5th Cir. 1985). For a more detailed discussion of the Texas subdivision statute and regulations issued by the Railroad Commission, see David M. Patton, *The Expansion of Chapter 92 of the Texas Natural Resources Code Restricting Mineral Development on Qualified Subdivisions to Designated Drillsites*, 32 OIL, GAS & ENERGY RESOURCES LAW 3 (2008) and SMITH & WEAVER, *supra* note 10.

12. *Vest*, 752 F.2d at 960.

13. *Id.* at 961.

14. *Id.*

15. *Id.* at 960.

operations. This right includes the legal privilege to use the surface in a way that interferes with the surface owner's use of the land and that significantly damages the surface, without the legal obligation to make any compensation whatsoever. Texas farmers, ranchers, and agricultural lessees are likely to find themselves in the position of the *Vest* plaintiffs if their rights in the land are limited to the surface only, if the land is subject to an oil and gas lease that makes no express provisions for surface damages, or if the express lease provisions are not comprehensive enough to cover the situation.

By contrast, owners of rural land in Oklahoma will find themselves in significantly better bargaining positions. Oklahoma, like several other states,¹⁶ has enacted a surface damage act.¹⁷ Such statutes typically require an oil company to attempt to reach a negotiated damage settlement agreement with the surface owner rather than leaving the matter to the discretion of the oil company. If the parties are unable to reach an agreement, the oil company can usually still proceed with its planned operations, as at common law, and the amount of damages is determined by arbitration or litigation.¹⁸ In Oklahoma, the company must request a court to appoint appraisers, who then make the determination of surface damages owed by the oil company. Although a party that is dissatisfied with the appraisers' report can appeal to the courts, the trier of fact usually finds such reports highly persuasive.

The Oklahoma statute specifies that the surface owner is entitled to "any damages which may be caused by the drilling operation" or "maintenance of oil or gas production."¹⁹ At least one court has held that in making that determination, appraisers may take into account not only the area actually occupied by the well, associated equipment, storage tanks, fixtures, and roads, but they may also consider any diminution in value to other land if the company's wells, roads, or other installations cause inconvenience in the owner's use of or operations on that land or otherwise result in some diminution in value. Even temporary use, such as parking or a water spill, has been deemed a valid basis for assessing damages to such land when there was evidence of long-term injury to the land.²⁰ If a case such as *Vest* arises in Oklahoma, an appraisal report reaching essentially the same conclusion as the Texas jury did in that case would presumably comply with the mandates of the state's statute.

16. For example, New Mexico, North Dakota, South Dakota, Montana, and Wyoming have enacted surface damage acts.

17. OKLA. STAT. tit. 52, § 318.2 (2000).

18. See Norman D. Ewart, *State Surface Access and Compensation Statutes*, 54 ROCKY MTN. MIN. L. INST. 4, 7 (2008).

19. OKLA. STAT. tit. 52, § 318.5(A), (C) (2000).

20. *Chesapeake Operating, Inc. v. Loomis*, 164 P.3d 254 (Okla. Civ. App. 2007).

It seems probable that an oil or gas company's justifiable concern over the potential level of damages imposed by appraisers, a jury, or the court gives the Oklahoma landowner some leverage in negotiating, not only for damages, but also for the location of a company's operations. An oil or gas company might agree to locate its well, roads, pipelines, and other installations at sites that are less convenient and less desirable from its standpoint in exchange for a reduction in the price of the negotiated settlement with the landowner.

II. BASIC COMMON LAW DOCTRINES GOVERNING SURFACE AND SUBSURFACE USE: RIGHTS OF THE OIL AND GAS OPERATOR

The doctrines that lead to the results in cases such as *Vest* have been in existence for decades and fall into two related general categories: express and implied rights, and the dominant estate theory. Although surface damage acts and related state statutes make some modifications to these basic doctrines and may give a rural landowner some bargaining power, most of the basic doctrines remain in place even in these states. Even though the oil or gas company may be required to give notice before commencing operations and to pay for the use of or injury to the surface, the company's rights are otherwise generally unaffected.

A. *Express and Implied Rights*

An oil and gas lease almost invariably sets out express rights in the granting clause that are not limited to exploration, drilling and operating, but include rights to build roads and bridges, erect storage tanks, construct electric and telephone lines and power stations, and provide temporary housing for employees. Even if such rights are not expressly set out, the lessee has an implied right to do such things. Indeed, the oil and gas company has an implied right to use the land *in any way* that is reasonably necessary in exploring, drilling, producing, transporting, and marketing—including, for example, the implied right to dispose of salt water by injecting the water into a disposal well on the leased land.²¹

1. Choice of Location

An oil company has considerable freedom in deciding where its operations will take place on the leased premises. These operations include not only drilling, but also conducting geophysical exploration, building roads, installing storage tanks, laying pipes, housing employees,

21. See, e.g., *Stephens v. Finley Res., Inc.*, No. 07-05-0023-CV, 2006 WL 768877 (Tex. App.—Amarillo Mar. 27, 2006, no pet.) (mem. op.). See also SMITH & WEAVER, *supra* note 10, § 2.1(B)(1) (discussing the oil and gas lessee's implied rights).

and carrying out other operations reasonably necessary to effectuate the purpose of the lease.²² If the surface owner also owns the minerals, or a share of the minerals sufficiently large enough that the oil and gas company needs the owner to sign the oil and gas lease, the owner can negotiate express provisions imposing restrictions on where certain operations will be conducted or, as is often the case, requiring the company to consult with the landowner with respect to the location of roads.²³ To be binding, such requirements must normally be in writing and should contain all of the provisions that the parties agreed upon. *Moore v. Pennsylvania Castle Energy Corp.* illustrates the hazard of relying on supplemental oral understandings.²⁴ In *Moore*, the lessee and the surface owner orally agreed on the location of certain drills sites. When the lessee was unable to reach an agreement with the surface owner over the location of a new well that was allegedly not within the original plan, the lessee began building a road across a fifty-acre field that the surface owner claimed the parties had orally agreed would not be developed. In the resulting litigation, the court held that the parties' oral agreements had been merged into the written surface damage agreement and that evidence of the oral understanding regarding the field was inadmissible.²⁵

An attorney drafting restrictive surface use provisions for a landowner must be careful to cover all eventualities; if there is any uncertainty as to the meaning of the clause, it is possible that it will be construed in a way that is unfavorable to the landowner. This possibility becomes a probability if industry custom and usage point toward a construction that favors the oil and gas company's interpretation. *Lionheart Co. v. PGS Onshore, Inc.* provides a good example.²⁶ The landowner owned a 2,700-acre ranch used as a sanctuary for exotic animals, such as giraffes, zebras, and wildebeests. He executed an oil and gas lease containing several special use-restrictive clauses, including a stipulation that there would be "no drilling" in a specified 650-acre area that was presumably especially sensitive in terms of its use by some of the animals for breeding, calving, browsing, or territorial claims. Unfortunately, if the landowner intended to keep such disruptive operations out of the area, the clause turned out to be ineffective for that purpose.

22. See, e.g., *Rostocil v. Phillips Petrol. Co.*, 502 P.2d 825 (Kan. 1972); *Livingston v. Indian Territory Illuminating Oil Co.*, 91 F.2d 833 (10th Cir. 1937); *Yates v. Gulf Oil Corp.*, 182 F.2d 286 (5th Cir. 1950).

23. See generally Jamie L. Jost, *Surface Use Agreements: An Outside Counsel's Perspective on Resolving Landowner and Operator Differences*, 45 ROCKY MTN. MIN. L. FOUND. J. 119 (2008).

24. See *Moore v. Pa. Castle Energy Corp.*, 89 F.3d 791 (11th Cir. 1996).

25. *Id.* at 759-799.

26. See *Lionheart Co. v. PGS Onshore, Inc.*, No. 10-06-00303-CV, 2007 WL 1704906 (Tex. App.—Waco June 13, 2007, no pet.) (mem. op.).

The lessee contracted with PGS Onshore (PGS), a geophysical exploration company, to perform a 3-D seismic survey. PGS entered the exotic game sanctuary and began clearing a strip to conduct the 3-D seismic within the 650-acre “no drilling” area and began drilling seismic test holes. After a confrontation with PGS employees over the drilling, the landowner changed the locks on the gate to keep PGS out. PGS then sought a temporary injunction restraining the landowner from denying it access to the land and from harassing its employees. The landowner countered with a request for a temporary injunction to keep PGS from drilling additional seismic shot holes in the “no drilling” area.

In upholding the trial judge, who granted PGS an injunction and denied one to the landowner, the court pointed out that it is settled law that a lessor cannot keep out his lessee or parties his lessee has contracted with to do exploratory drilling or other work on the land.²⁷ Moreover, where there is conflicting evidence as to a matter, the trial court has considerable discretion in reaching a decision.²⁸ Here, there was conflicting evidence as to whether the “no drilling” provision included all types of drilling or only oil and gas well drilling. Since “drilling” in the oil and gas industry almost always refers to drilling a well, the appellate court ruled that the trial judge reasonably concluded that PGS was not violating the restrictive provisions of the oil and gas lease by drilling shot holes in the 650-acre area.²⁹

2. Use of Road Building Materials, Water, and Other Surface and Subsurface Substances

The oil and gas company’s implied rights include not only the right to choose a reasonable location for its operations but also to use the surface and subsurface substances, such as sand, gravel, and caliche, for road building.³⁰ Even more significantly, unless there is an express lease clause to the contrary, an oil and gas company has the right to use both surface and subsurface water for drilling operations³¹ and even for water flood operations. The latter use is of special importance in areas such as the Texas Panhandle where persons conducting irrigated farming operations rely heavily upon the largely non-replenishing Ogallala aquifer and may find themselves in a losing competition with an oil and gas company for the water beneath their land.

27. *Id.* at *2.

28. *Id.*

29. *Id.*

30. *See, e.g.,* B. L. McFarland Drilling Contractor v. Connell, 344 S.W.2d 493 (Tex. Civ. App.—El Paso 1961, writ granted), *rev’d on other grounds*, 162 Tex. 345, 347 S.W.2d 565 (Tex. 1961) (per curiam).

31. *See, e.g.,* Stradley v. Magnolia Petrol. Co., 155 S.W.2d 649 (Tex. Civ. App.—Amarillo 1941, writ ref’d).

In the leading case on the water-flood issue, *Sun Oil Co. v. Whitaker*, the Texas Supreme Court confirmed the right of the oil company to commence water flood operations and to pump out enormous quantities of potable water from the Ogallala aquifer for use in water flooding, even though the company's withdrawals significantly affected the water flow to the surface owners, who were using water from the Ogallala for irrigation and who knew that the withdrawals would greatly shorten the life of irrigated farming on the land.³²

B. *The Dominant Estate Theory*

An oil company's exercise of its implied rights frequently disrupts existing or potential surface uses. It is well established, however, that the mineral estate is the dominant estate, and in the event of conflicts between the oil company and the surface owner or lessee of surface uses, the oil and gas company has the paramount legal right. As the *Lionheart* case demonstrates, an oil and gas lessee can enjoin attempts by the surface owner or surface lessee from keeping the oil and gas lessee out of all or any part of the leased premises, from interfering with its operations or the operations of any of its independent contractors, and from harassing its employees.³³ Some of the other implications of the dominant estate theory are set out in the following subsection.

1. Protection of Livestock, Game Animals, and Other Wildlife

Equipment used in drilling and pumping oil or gas can cause injury to livestock. Further, oil and gas operations require the use of fluids that are poisonous to humans, livestock, and wildlife, and salt water and polluted water are often produced along with oil. Under the dominant estate theory, however, the oil and gas company is rarely found liable for livestock deaths and injuries that result from the animals drinking oil field poisons. Liability for death to wildlife is generally predicated upon federal statutes, such as the Endangered Species Act and the Migratory Bird Treaty Act, and usually requires action by a federal agency.³⁴ It is arguable that potential liability for violations of the Migratory Bird Treaty Act provides the greatest legal incentive for the proper disposal of liquid pollutants and for covering pits or storage tanks that contain the pollutants.

Satanta Oil Co. v. Henderson is a good example of the problem of recovering for loss of livestock.³⁵ The plaintiff was a rancher in Ector

32. *Sun Oil Co. v. Whitaker*, 483 S.W.2d 808 (Tex. 1972).

33. *Lionheart*, 2007 WL 1704906; see also SMITH & WEAVER, *supra* note 10, § 2.1(B)(1).

34. See Endangered Species Act, U.S.C. § 1538; see also Migratory Bird Treaty Act of 1918, 16 U.S.C. §§ 703-712 (2008).

35. *Satanta Oil Co. v. Henderson*, 855 S.W.2d 888 (Tex. App.—El Paso 1993, no writ).

County who bred and raised cattle for show purposes. An oil and gas operator had six or seven oil wells on the plaintiff's ranch along with related oil flowlines, tank batteries, and one "slush pit" where it stored used drilling mud. The rancher discovered that two of his cows were quite sick, and one of them, a pregnant Maine Anjou, subsequently died. The veterinarian determined that one cow died because it oil and other gunk from the slush pit. The rancher sued the oil and gas company for damages. The court, however, concluded that because the company had dug the slush pit within its reasonable area of operations, the company was not liable to the rancher.³⁶ Under Texas law, an oil company only has a duty not to injure a landowner's livestock intentionally, willfully, or wantonly. To recover for negligent injury and death of the cow, a rancher would have to prove that the oil company used more land than was reasonably necessary for its operations and that the negligence occurred in such an "excess" area.³⁷

As *Satanta* illustrates, and as other Texas cases expressly state, the oil company has no duty to fence off locations where drilling equipment or pits filled with oil or other toxic materials may injure or kill the rancher's cattle, sheep, goats, or game animals such as whitetail deer.³⁸ If a landowner wants to protect his livestock or game animals, he must either require fencing in the oil and gas lease or put up the fence himself.

Even if the parties include a clause in the lease requiring the lessee to pay for damages, a rancher may have trouble proving that the oil company caused the injury to his livestock. *Duke Energy Field Services v. Meyer* provides a good example.³⁹ The landowner had granted a pipeline easement and included a clause providing that the pipeline would "pay grantors for any other or additional damages to growing crops, grass, fences, improvements and livestock which may result from the exercise of the rights" granted.⁴⁰ The plaintiff in the case had held a grazing lease on the property since about 1998 and ran a cow/calf operation. One day he discovered his cows standing in and around a pipeline leak, where they were licking the oil. The cows, which were bred to begin calving in early March, began to abort their calves the following morning. After thirty of the plaintiff's forty-five cows either aborted their calves or gave birth to stillborn calves, the plaintiff filed suit against the pipeline. The pipeline claimed that the abortions and stillbirths were caused by poor nutrition. Although the plaintiff got a judgment in his favor at the trial court, the Amarillo Court of Appeals reversed on the ground that there was

36. *Id.* at 890.

37. *See id.*

38. *See id.*; *see, e.g.*, Warren Petrol. Corp. v. Martin, 153 Tex. 465, 271 S.W.2d 410 (1954).

39. *Duke Energy Field Servs. v. Meyer*, 190 S.W.3d 149 (Tex. App.—Amarillo 2005, pet. denied).

40. *Id.* at 151.

insufficient evidence that the problems were caused by the leaking oil. The livestock owner had not presented evidence of the quantity of oil the cows had ingested, which cows actually ingested oil, and the quantity required to cause a cow to abort.⁴¹

2. Surface Damage and Surface Restoration

In Oklahoma and other states with surface damage legislation, an oil and gas company is not prohibited from using the surface in a way that causes long-term changes in vegetation and topography so long as such usage is reasonably necessary to its operations. The company must, however, pay the landowner for the value of all land that it uses and for any additional damage that the company does to the surface.⁴² Generally recognized common law doctrines are to the contrary.⁴³ Texas continues to follow the rule, based on the dominant mineral estate doctrine, that an oil and gas lessee has no legal duty to pay for injury to the land if the injury resulted from the company's reasonable operations and, similarly, has no duty to restore the area used unless obligated to do so by an express contractual provision.⁴⁴

Recent attempts to get around these doctrines have been largely unsuccessful. In two relatively recent cases, the landowner argued that an oil and gas lessee is at least required to remove old oil field debris, such as concrete derrick corners, concrete slabs, pumping unit foundations, and rusted pipe.⁴⁵ This argument was based on a fairly common lease clause providing the lessee with "the right at any time during or after the expiration of this lease to remove all property and fixtures placed by Lessee on said land."⁴⁶ The courts rejected the argument on the ground that the clause does not obligate the lessee to do anything. The clause clearly gives the oil and gas lessee a "right" to remove the old fixtures, and it can exercise that right or choose not to exercise that right, whichever it prefers.

3. The Dominant Estate Doctrine and the Agricultural Lessee

The dominant estate theory applies to a person with a grazing, cotton, wheat, or other agricultural lease, as well as to the landowner himself. If the agricultural lease was entered into after the oil and gas lease was executed or after some other severance of the mineral estate, the

41. *Id.* at 154.

42. *See, e.g.*, Chesapeake Operating, Inc. v. Loomis, 164 P.3d 254 (Okla. Civ. App. 2007).

43. *See, e.g.*, Amoco Prod. Co. v. Carter Farms Co., 703 P.2d 894 (N.M. 1985).

44. Warren Petrol. Corp. v. Monzingo, 157 Tex. 479, 304 S.W.2d 362 (1957).

45. Exxon Corp. v. Tyra, 127 S.W.3d 12 (Tex. App.—Tyler 2003, pet. denied); Exxon Corp. v. Pluff, 94 S.W.3d 22 (Tex. App.—Tyler 2002, pet. denied).

46. Tyra, 127 S.W.3d at 13-15; Pluff, 94 S.W.3d at 29-30; *see also* OXY USA, Inc. v. Cook, 127 S.W.3d 16, 18 (Tex. App.—Tyler 2003, pet. denied).

individual has no right to automatically prevent oil and gas operations that interfere with his ranching or farming operations. This is the result in virtually every situation where the oil and gas lease preceded the agricultural lease.

Surprisingly, little case law exists in the reverse situation, where the agricultural lease was executed before the oil and gas lease:

The lack of litigation over this issue may be due to the common practice of oil and gas companies of paying the surface lessee for damages to his crops or grasses and for interference with his operations. However, the few cases that exist suggest that a prior surface lessee cannot prevent development under a subsequent mineral or oil and gas lease. [citing *Ball v. Dillard*, 602 S.W.2d 942 (Tex. 1980); *Hagar v. Martin*, 227 S.W.2d 195 (Tex. Civ. App.—Dallas 1955, writ ref'd n.r.e.) and *Mobil Pipe Line Co. v. Smith*, 860 S.W.2d 157 (Tex. App.—El Paso 1992, writ dism'd w.o.j.)]

...
These results may be justified by analogizing the relationship between the surface lessee and his lessor to that which exists between a surface owner and the owner of a severed mineral estate. Just as the surface estate is subject to an implied easement in the mineral estate, so the surface lease may be deemed subject to an implied easement for mineral extraction retained by the lessor. Such reasoning is bolstered if the surface lessee is expressly limited to grazing rights, raising crops, or other agricultural purposes.⁴⁷

This does not mean that the agricultural lessee is completely helpless. In some situations he may have recourse against his own lessor for breach of covenants in his lease, and in any event, he can take advantage of the doctrines discussed later in Section III of this paper.

4. The Dominant Estate Doctrine and Wind Leases⁴⁸

In much of the state of Texas, including in particular parts of the Panhandle and West Texas, wind leases have become as great and, in some instances, a greater source of income to farm and ranch owners than agriculture leases, hunting leases, or oil and gas leases. The dominant estate theory is of considerable importance not only to farmers, ranchers, and people who have bought land for recreational use, but also to the owner of rural land who has been approached about executing a wind lease.

As of yet, no case law exists on this subject. In terms of relative rights of surface use, the wind lessee is probably in the same basic legal position

47. SMITH & WEAVER, *supra* note 10, § 2.3(B)(2)(a).

48. This section is based on Ernest E. Smith, *Wind Energy in Texas*, 19 ADVANCED OIL, GAS & MINERAL LAW COURSE 3 (State Bar of Tex. 2001).

as an agricultural lessee. Because the wind lease is limited to surface uses, it seems probable that in any litigation over rights of surface use, the wind lease will be deemed subservient to the surface rights of both a mineral owner and his oil and gas lessee, even though the wind lease was prior in time. Hence, a wind lessee may be subject to the risk that exploratory and drilling activities will, at least temporarily, have some impact on wind conditions and that placement and use of the wind company's roads and electric lines may have to yield to the needs of an oil and gas lessee. Somewhat similarly, the rancher or farmer who executes a wind lease may be at some risk for breach of any covenant of quiet enjoyment or other similar covenant included in the wind lease.

A landowner executing a wind lease can deal with these potential problems in at least two ways. The surest method would be through express language in the oil and gas lease that protects the location of wind turbines, roads, and other installations from interference by the oil company and its assignees by limiting oil and gas operations to certain specified areas or, alternatively, by prohibiting such operations within areas designated by the wind lessee. In fact, a wind company may want the landowner to include covenants in the wind lease itself that the landowner/wind lessor will include such provisions in any oil and gas leases that he subsequently executes. This alternative is realistic only if there is no outstanding oil and gas lease on the premises and if the lessor owns a sufficiently large fraction of the mineral estate that his joinder in a lease is essential to any subsequent oil and gas development. However, in many instances, the land that the wind company wants to lease is already subject to an oil and gas lease or the prospective wind lessor owns only the surface. In such situations, a wind lessee can at least expect to receive the benefit of the accommodation doctrine, which is discussed in the next section.

III. BASIC COMMON LAW DOCTRINES GOVERNING SURFACE AND SUBSURFACE USE: RIGHTS OF THE SURFACE OWNER AND SURFACE LESSEE⁴⁹

The surest way for a landowner to protect his land and operations against interference is through express provisions in the oil and gas lease coupled with the ability and will to enforce them and to sue immediately if the provisions are breached. Among other things, such provisions can restrict operations to specified areas, prohibit certain operations, require

49. There are, of course, a variety of regulations that also provide protection for the surface, such as the requirement that a company plug an abandoned well within a specified period, line slush and other disposal pits with impervious materials so that underground water sources are not polluted, etc. However, those regulations are the subject for a different paper by some other author.

consultation on the location of installations such as roads, require the oil company to fence off its operations, provide for payment for damage to crops and livestock, and require surface restoration. As the preceding material indicates, however, it is often difficult to foresee the various contingencies that should be covered in such provisions, and, of course, there is always the possibility that if the lessor is too insistent on clauses that are far-reaching or require too great a payment, the oil and gas company will abandon negotiations and not lease the land.

There is also a realistic possibility that the land is already subject to an oil and gas lease that does not contain adequate or even any such clauses. In Texas, unlike Oklahoma, it is also possible that the person negatively impacted has no interest in the mineral estate and, therefore, was not a necessary party to the negotiation and execution of the oil and gas lease. The typical grazing lessee or farming tenant often finds himself in this situation. In these instances, the surface owner or his tenant can look to three principal doctrines that may be of assistance in restricting the oil and gas company's operations: the "reasonable use" requirement, liability for negligence, and—most importantly—the accommodation doctrine.

A. Reasonable Use

A surface owner can prevent an unreasonable use or an excessive use of the surface or recover in damages if the use has already taken place. In practice, landowners successfully use this doctrine most often when the surface owner wishes to prevent the use of his land for activities connected with the oil company's operations on other oil and gas leases that are not pooled with the land in question. For example, a company that drills a salt water disposal well on leased premises has no legal right to dispose of salt water from wells on other leases by injecting it into the well.⁵⁰

Although the unreasonable use/excessive use doctrine is certainly not limited to the situations described above and can be used when oil and gas companies or their contractors use excessive space on the leased premises, surface owners and agricultural lessees rarely invoke the doctrine in this context successfully. The oil company is usually able to establish that the type of use or the amount of land used was reasonably necessary from the perspective of the oil and gas company, although seemingly unreasonable from the standpoint of the agricultural user. Examples of such uses include a blacktop road constructed about two feet higher than surrounding land used primarily for grazing cattle,⁵¹ a raised

50. See, e.g., *Stephens v. Finley Res., Inc.*, No. 07-05-0023-CV, 2007 WL 1704906 (Tex. App.—Amarillo Mar. 27, 2006, no pet.) (mem. op.).

51. *Humble Oil & Ref. Co. v. Williams*, 420 S.W.2d 133, 134 (Tex. 1967).

caliche road across a cotton field,⁵² and eight-acre sites built over an existing cotton crop and land plowed for planting.⁵³ In one relatively recent case, the court rejected a claim of unreasonable and excessive use based on the amount of trash and debris scattered about the property, citing conflicting evidence as to whether the oil company had cleaned up most of the trash after the landowner took pictures showing the trash on his land.⁵⁴

The doctrine prohibiting excessive or unreasonable use was, however, applied in *Getty Oil Co. v. Jones* where the Texas Supreme Court based its decision in part upon the oil company's excessive use of the air space above its operations.⁵⁵ Unlike other oil companies operating in the area, the defendant oil company had installed pumps that were so high that they interfered with the surface owner's irrigation system. The *Getty* case is discussed in greater detail below in Subsection C.

B. Negligence

A second doctrine that a farmer, rancher, or agricultural lessee may look to in order to protect against interference is the possibility that the company can be held liable for injury resulting from negligent operations. The Texas Supreme Court established an oil and gas company's liability for negligent injury to the land at least as early as 1961 when it held that a lessee was liable for negligently allowing salt water to pollute fresh water sources.⁵⁶ There are, however, at least four potentially limiting factors.

1. Effect of Change in Ownership

A doctrine in effect in virtually all jurisdictions that constitutes a significant limiting factor is the judicial rule, based on standing, that the landowner filing suit must have owned the land at the time the injury occurred or have been assigned that owner's cause of action.⁵⁷ Texas courts have repeatedly said that a cause of action for injury to land is a personal right in the owner of the land as of the time of injury. If that owner sells the land, the new owner cannot sue the oil and gas lessee for its past negligent actions unless the seller has expressly assigned his cause of action to the new landowner.⁵⁸

52. *Davis v. Devon Energy Prod. Co.*, 136 S.W.3d 419 (Tex. App.—Amarillo 2004, no pet.).

53. *Robinson Drilling Co. v. Moses*, 256 S.W.2d 650, 651 (Tex. Civ. App.—Eastland 1953, no writ).

54. *Montfort v. Trek Res. Inc.*, 198 S.W.3d 344, 357-58 (Tex. App.—Eastland 2006, no pet.).

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

56. *Brown v. Lundell*, 334 S.W.2d 863 (Tex. 1961).

57. Claire B. Chandler, Note, *Standing Up for Justice: A Case for Amending a Rule That Unreasonably Restricts Who May Sue for Injury to Real Property*, 86 TEX. L. REV. 1327 (2008).

58. See *Brown*, 334 S.W.2d 863; *Cook v. Exxon Corp.*, 145 S.W.3d 776 (Tex. App.—Texarkana 2004, no pet.); *Denman v. Citgo Pipeline Co.*, 123 S.W.3d 728 (Tex. App.—

2. Statute of Limitations

A second, somewhat related restriction is that the suit must be filed before the expiration of the relevant statute of limitations. The Texas statute of limitations for actions alleging negligence is two years from the time the cause of action accrues,⁵⁹ which for injury to real property is usually when the injury or damage to land occurs. The fact that the landowner owns several thousand acres used for raising cattle and had no reason to inspect every acre and to notice the injury earlier does not affect the running of the limitations period.

Bradley v. Chevron U.S.A. involved a 3,680-acre ranch that a cattleman bought in 1993.⁶⁰ Sometime in 2003, his ranch hands discovered salt water flowing from two old wells onto the surface of the ranch. The wells had not been properly plugged with concrete when they were abandoned before 1958 and had caused significant contamination of the surrounding land and ground water. The rancher brought suit for damages in 2004. The court ruled that the cause of action was barred by the statute of limitations.⁶¹ The statute began to run, at the latest, when the rancher bought the land—about eleven years before he filed suit.⁶² The court said that he should have conducted a “due diligence” inspection before he bought the land.⁶³ Had he done so, he would have discovered the leaking wells at that time, rather than ten years later when his ranch hands pointed it out to him.

Even if the injury is hidden, as may well be the situation where there is no surface damage and an improperly plugged well is leaking pollutants into an underground water source, the landowner may find his cause of action barred by the statute of limitations. Most states apply what is called the “discovery rule” and hold that in such a situation the statute of limitations does not begin to run until the landowner knows or should have known of the damage. Texas applies a far more rigorous standard to the hidden injury, requiring it to be “inherently undiscoverable” to delay the running of the statute of limitations.

The leading case is *HECI Exploration Co. v. Neel*, which held, among other things, that if public records, such as Railroad Commission filings or reports, reveal a potential injury, the injury is not inherently undiscoverable and the statute of limitations is not tolled.⁶⁴ This is the

Texarkana 2003, no pet.); *Exxon Corp. v. Pluff*, 94 S.W.3d 22 (Tex. App.—Tyler 2002, pet. denied); *Senn v. Texaco, Inc.*, 55 S.W.3d 222 (Tex. App.—Eastland 2001, pet. denied).

59. TEX. CIV. PRAC. & REM. CODE ANN. § 16.003(a) (Vernon 2005).

60. *Bradley v. Chevron U.S.A., Inc.*, No. Civ.A. 204CV092J, 2004 WL 2847463 (N.D. Tex. Dec. 10, 2004, no pet.).

61. *Id.* at *3.

62. *Id.* at *2.

63. *See id.* at *2.

64. *HECI Exploration Co. v. Neel*, 982 S.W.2d 881 (Tex. 1998).

case even though the landowner has no reason to suspect that the oil company operating on his land has not properly cased a well or has failed to plug the well properly and so has nothing to alert him to the possibility that an agency's records may reveal such a default.

3. Measure of Damages

Even if a landowner is aware of the negligent injury and brings suit promptly, he still might be unable to establish the proper measure of damages or present sufficient evidence to support a judgment in his favor. Where the injury is more than temporary, courts usually hold that the cost of restoring the land is an improper measure of damages and suggest that the measure should instead be the land's diminution in value. Some decisions, however, including a recent case out of the New Mexico Supreme Court, have rejected this approach. In *McNeill v. Burlington Resources Oil & Gas Co.*, the plaintiffs, who owned the surface rights in a 31,000-acre ranch, sought damages for contamination of their land by "produced water" containing petroleum, salt water, and other contaminants.⁶⁵ The court ruled that even if injury to the land was deemed permanent, the trial judge had improperly excluded evidence of the cost of restoration:

[E]vidence of the cost of repair is relevant in those cases where it would be natural for a surface estate owner to use it as a proxy or a means to gauge the diminution in value of the property. In many cases, the cost of repair bears on the diminution in value because it *informs* the diminution in value. . . . The cost of repair and the diminution in value of real property are closely related concepts.⁶⁶

The court in *McNeill* went even further, stating that the distinction between temporary and permanent injury was artificial and no longer useful in analyzing damage caused to the surface estate by a mineral lessee.⁶⁷

Texas, however, adheres to the traditional distinction between temporary and permanent injury to the land and the traditional difference in the measure of damages. One effect of this approach is that if the land has been subject to significant salt water or other pollution from past operations, its actual diminution in value resulting from new pollution may be minimal.

65. *McNeill v. Burlington Res. Oil & Gas Co.*, 182 P.3d 121 (N.M. 2008).

66. *Id.* at 126.

67. *Id.* at 123.

In *Mieth v. Ranchquest, Inc.*, the oil and gas lessee re-entered an abandoned oil and gas well on the property.⁶⁸ It did not dig a reserve pit or construct a ring levee around the first well and instead simply discharged its drilling fluids, diesel fuel, oil, and saltwater directly onto the landowners' pastures. In drilling a new well, it pumped drilling fluids into a ditch dug to run the fluids into a nearby creek. The Railroad Commission inspected the operations twenty-four times over a two-year period and cited violations of its rules protecting fresh water from salt water pollution on almost every occasion. The landowners presented evidence that the cost of cleaning up was \$200,000, but the court ruled that the proper measure of damages was the land's reduced value resulting from the oil company's actions.⁶⁹ However, levels of chloride and salt in the lands surrounding old wells had been constant for at least ten years, so the new pollution apparently did not further devalue the land, and the court held that the landowners suffered no compensable damage.⁷⁰

4. Location of Injury

A final possible barrier to relief for negligent conduct may be that the injury took place entirely within the area necessary for use in the oil company's operations. This is rarely true of salt water pollution, which commonly involves seepage or drainage outside and underneath the land used by the oil company, but other types of injury may be limited to the drill site and its immediate vicinity used for storage tanks, equipment, etc. As indicated earlier, at least one court has ruled that an oil company has no liability for the death of cattle that drank oil from the company's unfenced slush pit.⁷¹

C. Accommodation Doctrine

The accommodation doctrine is the major legal theory that can be used to provide some recourse for a landowner who does not include adequate surface-use and damage clauses in his lease or who owns none of the minerals and therefore is not a party to the oil and gas lease. The leading case establishing the doctrine is *Getty Oil Co. v. Jones*.⁷² The plaintiffs, who were Panhandle farmers, had gone to considerable expense to install a center-pivot, self-propelled irrigation system. Some time thereafter the oil and gas company began to install pumping units that were taller than

68. *Mieth v. Ranchquest, Inc.*, 177 S.W.3d 296 (Tex. App.—Houston [1st Dist.] 2005, no pet.).

69. *Id.* at 303.

70. *Id.* at 306-08.

71. *Satanta Oil Co. v. Henderson*, 855 S.W.2d 888, 888 (Tex. App.—El Paso 1993, no writ).

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

the irrigation system, which would have prevented use of the system. In the resulting litigation, the oil company argued that pumping units were necessary in order for the company to produce oil. The case reached the Texas Supreme Court. The court pointed out that other oil companies operating in the area had either placed similar pumps in concrete cellars or used a shorter type of pump that didn't interfere with the movement of the irrigation pipes and that the defendant in the suit could do the same thing.⁷³ The court then stated what came to be known as the accommodation doctrine:

[W]here there is an existing use by the surface owner which would otherwise be precluded or impaired, and where under the established practices in the industry there are alternatives available to the lessee whereby the minerals can be recovered, the rules of reasonable usage of the surface may require the adoption of an alternative by the lessee.⁷⁴

As articulated in *Getty*, a farmer, rancher, other surface owner, or surface tenant who wants to invoke the accommodation doctrine must show three things: (1) there is an existing use of the surface; (2) the oil and gas lessee's proposed use of the surface will prevent or significantly impair that existing use of the surface; and (3) there is a reasonable alternative available to the oil and gas company.⁷⁵

1. Existing Use

To qualify as an existing use, the landowner's use of the surface does not have to be in existence at the time the oil and gas lease was executed or the minerals were severed from the surface estate, but it must be in existence at the time the oil and gas company proposes its new use.

What qualifies as an "existing use" is a matter of some dispute. It has long been assumed that a planned use, no matter how soon the use is to take place, does not qualify. If, however, the planned use is already partly in effect, and the oil and gas company's proposed use will preclude or significantly impair the ability to carry out the remainder of the plan, it is possible that the surface user has met his burden of proof on this issue, even though the oil company's proposed use will not directly impact the part of the plan that the surface owner is already carrying out. This, at least, seems to be the conclusion reached in one recent decision.

73. *Id.* at 620-22.

74. *Id.*

75. *See id.* at 623.

In *Texas Genco, LP v. Valence Operating Co.*, the surface owner was a retail electric company that generated electricity by burning lignite.⁷⁶ The company bought 450 acres to use as a landfill for ash produced by its operations and calculated that this area would be sufficient for the disposal of its waste lignite ash over the next twenty to thirty years. Since the waste ash contains heavy metals and various toxic chemicals, the landfill had to comply with the environmental regulations of the Texas Commission on Environmental Quality (TCEQ). Texas Genco designed the landfill as a unit composed of a series of pre-determined locations for clay-lined “cells” that would be built and filled to a specified height and grade so that none of the toxic material from the waste ash would seep downward into the water supply and so that the cells would not erode as a result of runoff.

An oil and gas lease was in place on the 450 acres at the time Texas Genco acquired the area, and Valence Operating Co., the oil and gas lessee, initially drilled its wells around the periphery of the acreage and not on the landfill itself. Eventually, however, Valence determined that it needed to drill within the landfill and proposed to drill two wells there. Valence planned to drill the first well in an area of the landfill that would not be used for waste-ash disposal for several years. Although Valence argued that there was no existing use of this area, the court agreed with Texas Genco that the entire landfill should be considered an existing use because a drill pad and road, even if built in an area not designated for ash disposal until nine or ten years in the future, would adversely effect the height and grade of other parts of the landfill.⁷⁷ The drill pad and related construction would not only shorten the life of the landfill by precluding use of the site for future waste disposal but would also force Texas Genco to reconfigure and partially redesign much of the rest of the landfill to comply with TCEQ regulations.

Although the specific situation involved in *Texas Genco* is unique, the court’s approach might also apply to other types of planned developments or uses that are already partially in effect with completion of the plan depending upon non-interference with areas designated for future use. It is possible, for example, that a farmer might purchase and install a rolling irrigation system that is designed to irrigate a considerable amount of acreage and may already be using it for cotton or wheat in one area but not for farming in other areas. It can be argued that the reasoning in *Texas Genco* would justify the as yet unirrigated areas as an existing use. The same argument could be made with respect to a planned recreational subdivision, at least if the developer surveyed the

76. *Tex. Genco, LP v. Valence Operating Co. (Tex. Genco I)* 187 S.W.3d 118 (Tex. App.—Waco 2006, pet. denied).

77. *Id.* at 124.

lots, filed a plat in the county deed records, and took similar steps towards the subdivision's accomplishment. There is dictum in one Colorado case that might arguably support such an approach.⁷⁸

A related question is whether an existing use that does not involve any modification of the land or installation of buildings or structures allows the owner to invoke the accommodation doctrine. A person who has acquired land for entirely recreational purposes, such as hunting or bird-watching, might reasonably argue that such activities constitute a pre-existing use and that an oil or gas company must attempt to accommodate these uses by avoiding sensitive wildlife habitats, such as wild turkey roosts and breeding areas. Given the courts' emphasis upon physical structures, equipment, and planted fields, it seems somewhat unlikely that a court will apply the accommodation doctrine in such situations.⁷⁹ An argument based on utilization of largely unaltered wild areas for an income-producing activity, such as ecotourism or hunting leases, may generate a more positive response, especially if the landowner has invested money in accommodations for hunters or ecotourists.

2. Prevention or Significant Impairment

The second element of the accommodation doctrine that a farmer or rancher must establish is that the use of the premises proposed by the oil and gas company will prevent or significantly impair the farmer's or rancher's own use or, as the courts have sometimes phrased the issue, that the lessee's proposed use is unreasonable under the circumstances. This is a question of fact that will vary with each situation. As the *Getty* court pointed out, "[w]hat might be a reasonable use of the surface by the mineral lessee on a bald prairie used only for grazing by the servient surface owner could be unreasonable within an existing residential area of the city of Houston, or on the campus of the University of Texas, or in the middle of an irrigated farm."⁸⁰

A showing of significant inconvenience to the surface owner is insufficient. *Davis v. Devon Energy Production Co.* provides a good example.⁸¹ The landowners and their agricultural lessees were using the land for irrigated cotton farming. At various times they plowed over the dirt roads used by the oil and gas company in its oil and gas operations, and occasionally the roads became difficult to use or even impassable after heavy rains or the farmers' use of their irrigation system. When the roads became muddy the oil company's vehicles often had to back up a

78. See *Amoco Prod. Co. v. Thunderhead Invs., Inc.*, 235 F.Supp. 2d 1163 (D. Colo. 2002).

79. *Id.* at 1171-74.

80. *Getty Oil Co.*, 470 S.W.2d at 627.

81. *Davis v. Devon Energy Prod. Co.*, 136 S.W.3d 419 (Tex. App.—Amarillo 2004, no pet.).

quarter of a mile or got stuck and had to be pulled out with a bulldozer. The company's employees were sometimes forced to walk to well sites, and over two hundred proposed well treatments had to be cancelled or delayed because of the problems with the roads. After a series of heated verbal exchanges between the cotton farmers and oil company employees, the oil company obtained an injunction against the farmers' interference with its access to and use of the land and a declaration of its right to replace the existing dirt roads with wider caliche roads that would be raised slightly above the surrounding fields.

In opposing the injunction and in their appeal, the surface owners and their lessees testified that the raised caliche roads would cause serious problems because it would be difficult to cross them with their plows. In spite of this showing, the Amarillo Court of Appeals upheld the trial court's decision. The court ruled that the accommodation doctrine applies only when the lessee's proposed use will destroy or substantially impair use of the surface.⁸² While the surface owners presented evidence of substantial inconvenience, the court held there was no evidence that the roads would prevent profitable farming operations.⁸³ Given the circumstances, the oil and gas company could properly insist upon its right to all-weather roads to well sites because this was the customary industry standard.

3. Reasonable Alternative

The third element that a farmer or rancher must show for the accommodation doctrine to apply is that there is a reasonable alternative available to the lessee. Again quoting *Getty*, "[t]he reasonableness of the method and manner of using the dominant mineral estate may be measured by what are usual, customary and reasonable practices in the industry under like circumstances of time, place and servient estate uses."⁸⁴ As the facts of that case demonstrate, an alternative may be deemed reasonable even though it will cost the oil company significantly more than the company's initial proposed use. The alternative must, however, be a usual and customary practice in the industry, as was the case in *Getty*, where other oil companies were using shorter hydraulic pumps or placing beam-type pumps in concrete cellars so that they would not interfere with other farmers' irrigation systems.

Both the first and second proposed wells in *Texas Genco* raised the issue of whether Valence had a reasonable alternative to drilling on the landfill. In the two *Texas Genco* cases, the electric company convinced

82. *Id.* at 423-24.

83. *Id.* at 425.

84. *Getty Oil Co.*, 470 S.W.2d at 627.

the courts that directional drilling was a reasonable, industry-accepted alternative to direct vertical drilling and that through directional drilling Valence could reach its target bottom-hole locations from other sites off the landfill.⁸⁵

Texas Genco II presented an especially important issue in this regard. The electric company pointed out that Valence could drill a directional well from two locations that were on the lease but off the landfill—which would require very long directional drilling—or, alternatively, could drill from a site on adjacent land off the leased premises whose owner had granted written consent for drilling the well there. This off-lease location would enable Valence to drill a significantly shorter and less-expensive directional well.⁸⁶

Sun Oil Co. v. Whittaker is the leading case addressing the issue of whether an oil and gas company has to accommodate an existing use by going off-lease.⁸⁷ In that case the oil and gas company had commenced water flooding operations and was withdrawing enormous quantities of potable water from the Ogallala aquifer. The surface owners were using water from the aquifer for irrigation, and Sun's withdrawals not only adversely affected the water flow to their irrigation wells but also threatened to significantly shorten the life of their irrigation system. The surface owners argued that Sun could accommodate the owners' pre-existing use by purchasing water somewhere else. The Texas Supreme Court ruled against the farmers, stating that requiring the oil and gas company to purchase water elsewhere would be inconsistent with the dominant estate theory.⁸⁸ The court specifically limited its holding in *Getty* "to situations in which there are reasonable alternative methods that may be employed by the lessee on the leased premises to accomplish the purposes of this lease."⁸⁹

Texas Genco II is one of the few cases since *Sun Oil* in which an off-site alternative has been at issue. It is possible to distinguish the situation in *Texas Genco II* from that in *Sun Oil*. In *Sun Oil*, the lessee would have had to buy water elsewhere, whereas in *Texas Genco II*, Valence had an alternative drill site off the lease for free. That may or may not be a viable distinction, but the court said it did not need to decide the off-site issue since Texas Genco had proposed two on-lease drill sites where Valence could drill. The court did suggest in dictum, however, that *Sun Oil* was probably controlling.

85. Valence Operating Co. v. Tex. Genco, LP (*Tex. Genco II*), 255 S.W.3d 210 (Tex. App.—Waco 2008, no pet.).

86. These facts are not in the case as reported but have been confirmed by attorneys in the case.

87. *Sun Oil Co. v. Whittaker*, 483 S.W.2d 808, 808 (Tex. 1972).

88. *Id.* at 812.

89. *Id.* at 812.

IV. CONCLUSION

By looking exclusively at the potential negative impact on the agricultural use and recreational enjoyment of rural land, this paper has necessarily focused on the negative aspects of oil and gas development and the relevant statutory and case law. Obviously, many landowners receive substantial financial benefits from the bonus, delay rentals, and royalties paid by oil companies, and these financial benefits usually outweigh the downsides. Ranching and farming lessees obviously do not share in these benefits, but in most instances, oil and gas companies are willing to negotiate with these lessees with respect to payment of damages and, in some instances, are willing to move some of their operations to locations that cause less interference with the farming or ranching.

In these and all other situations, however, landowners and their lessees are always better off if the person entering into the oil and gas lease has negotiated a comprehensive clause imposing some restrictions on, and providing for payments for, surface use. In lieu of such a clause or a statutory requirement such as the Oklahoma Surface Damage Act, the best legal protection afforded the farmer and rancher is the accommodation doctrine. Moreover, as the two cases involving Texas Genco and Valence Operating Company suggest, several courts have somewhat expanded the benefit of that doctrine and have taken a more relaxed view of what constitutes an existing use. These courts have required the oil and gas lessee to undertake significantly more costly alternative operations to avoid interference with the surface owner's existing use. Whether the doctrines will be expanded to include recreational and related surface uses that leave the land unaltered remains to be seen.