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## Surface Damages in Oklahoma: Procedures for Payments and Penalties

Paula E. Pyron

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# RECENT DEVELOPMENTS

## SURFACE DAMAGES IN OKLAHOMA: PROCEDURES FOR PAYMENTS AND PENALTIES\*

The process of exploring and producing oil and gas invariably has some detrimental effects on the surface of the land involved. Prior to July 1, 1982, the Oklahoma oil and gas lessee was not liable for surface damages unless the lessee was negligent, abused his right of reasonable access, breached a specific lease provision, or committed some act for which liability could be imposed apart from the governing lease.<sup>1</sup> With the enactment of the Surface Damages Act,<sup>2</sup> Oklahoma has drastically

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1. 4 E. KUNTZ, A TREATISE ON THE LAW OF OIL AND GAS § 49.4, at 243 (1972); 4 W. SUMMERS, THE LAW OF OIL AND GAS § 652, at 20 (1962). For an overview of the historical conflict between surface and mineral owners, see Browder, *Accommodation of the Conflicting Interests of the Mineral Owner and the Surface Owner*, 25 INST. ON OIL & GAS L. & TAX'N 85, 86 (1974); Ferguson, *Severed Surface and Mineral Estates—Right to Use, Damage or Destroy the Surface to Recover Minerals*, 19 ROCKY MTN. MIN. L. INST. 411, 412 (1974); Lungren, *Landowners' Remedies for Property Damage by Oil and Gas Lease Operators*, 50 J. KAN. B.A. 200, 204 (1981) (summarizing Kansas law).

2. Act of June 2, 1982, ch. 341, 1982 Okla. Sess. Law Serv. 1062 (West) (to be codified at OKLA. STAT. tit. 52, §§ 318.2 to .9 (Supp. 1982)) [hereinafter referred to as the Surface Damages Act]. The Surface Damages Act provides in part:

### Section 1. Definitions

For purposes of Sections 1 through 8 of this act:

1. "Operator" means a mineral owner or lessee who is engaged in drilling or preparing to drill for oil or gas; and

2. "Surface owner" means the owner or owners of record of the surface of the property on which the drilling operation is to occur.

### Section 2. Notice of intent to drill—Negotiating surface damages

Before entering upon a site for oil or gas drilling, except in instances where there are non-state resident surface owners, non-state resident surface tenants, unknown heirs, imperfect titles, surface owners, or surface tenants whose whereabouts cannot be ascertained with reasonable diligence, the operator shall give to the surface owner a written notice of his intent to drill containing a designation of the proposed location and the approximate date that the operator proposes to commence drilling.

Such notice shall be given in writing by certified mail to the surface owner. If the operator makes an affidavit that he has conducted a search with reasonable diligence and the whereabouts of the surface owner cannot be ascertained or such notice cannot be delivered, then constructive notice of the intent to drill may be given in the same manner as provided for the notice of proceedings to appoint appraisers.

Within five (5) days of the date of delivery or service of the notice of intent to drill,

altered an oil and gas operator's potential liability to a surface owner for damages to his property by imposing statutory requirements in the negotiation and payment of surface damages. The purpose of this Recent Development is to briefly analyze the scope of Oklahoma's new Surface Damages Act, its relationship to previously recognized theories of liability, and the need for legislative reform.

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it shall be the duty of the operator and the surface owner to enter into good faith negotiations to determine the surface damages . . . .

Section 4. Negotiating surface damages—Appraisers—Report and exceptions thereto—Jury trial

A. Prior to entering the site with heavy equipment, the operator shall negotiate with the surface owner for the payment of any damages which may be caused by the drilling operation. If the parties agree, and a written contract is signed, the operator may enter the site to drill. If agreement is not reached, or if the operator is not able to contact all parties, the operator shall petition the district court in the county in which the drilling site is located for appointment of appraisers to make recommendations to the parties and to the court concerning the amount of damages, if any. Once the operator has petitioned for appointment of appraisers, he may enter the site to drill.

B. Ten (10) days' notice of the petition to appoint appraisers shall be given to the opposite party, either by personal service or by leaving a copy thereof at his usual place of residence . . . or, in the case of nonresidents, unknown heirs or other persons whose whereabouts cannot be ascertained, by publication . . . as provided in Section 106 of Title 25 of the Oklahoma Statutes . . . .

C. The operator shall select one appraiser, the surface owner shall select one appraiser, and the two selected appraisers shall select a third . . . . They shall inspect the real property and consider the surface damages which the owner has sustained or will sustain by reason of entry upon the subject land and by reason of drilling or maintenance of oil or gas production on the subject tract of land. The appraisers shall then file a written report within fifteen (15) days of the date of their appointment with the clerk of the court. The report shall set forth the quantity, boundaries and value of the property entered on or to be utilized in said oil or gas drilling, and the amount of the surface damages done or to be done to the property. The appraisers shall make a valuation and determine the amount of compensation to be paid . . . . The compensation of the appraisers shall be fixed and determined by the court. The operator and the surface owner shall share equally in the payment of the appraisers' fees and court costs . . . .

F. The report of the appraisers may be reviewed by the court, upon written exceptions filed with the court by either party within thirty (30) days after the filing of the report. After the hearing the court shall enter the appropriate order either by confirmation, rejection, modification, or order of a new appraisal for good cause shown. Provided, that in the event a new appraisal is ordered, the operator shall have continuing right of entry subject to the continuance of the bond required herein. Either party may, within sixty (60) days after the filing of such report, file with the clerk a written demand for a trial by jury, in which case the amount of damages shall be assessed by a jury. The trial shall be conducted and judgment entered in the same manner as railroad condemnation actions tried in the court. If the party demanding the jury trial does not recover a verdict more favorable to him than the assessment award of the appraisers, all court costs including reasonable attorney fees, shall be assessed against him . . . .

Section 6. Effect of act on existing contractual rights and contract to establish correlative rights—Indian lands

Nothing herein contained shall be construed to impair existing contractual rights nor shall it prohibit parties from contracting to establish correlative rights on the subject matter contained in this act.

This act shall not be applicable to nor affect in any way property held by an Indian whose interest is restricted . . . .

# I. THEORIES OF LIABILITY PREVIOUSLY RECOGNIZED UNDER OKLAHOMA JURISPRUDENCE

The principles of law relied upon by Oklahoma courts to hold a lessee liable for surface damages are frequently commingled, thus rendering the identification of a single rationale in a given case difficult. One fundamental principle, however, predominates in Oklahoma jurisprudence.

[T]he basic rule as to the rights of the lessor and lessee in an oil and gas lease is set forth . . . as follows:

"The right of possession of the leased premises under an oil and gas mining lease is concurrent in the lessor and lessee; the lessee being entitled to enter upon the premises and to use so much thereof as is reasonably necessary for the development thereof for oil and gas under the terms of the lease and for the successful operation thereof, and the lessor being entitled to the possession of the land for all other purposes."<sup>3</sup>

In the absence of a contrary agreement, the lessee has such rights to the surface as may be necessarily incident to the exercise of his rights under the lease, but he must otherwise protect the rights of the lessor.<sup>4</sup> The operator who damages the interests of the surface owner can be liable for his actions, however, under a surface damages clause contained in the instrument creating the mineral interest.<sup>5</sup> In addition to contractual liability and liability under a theory of excessive use of surface easements,<sup>6</sup> Oklahoma courts have also recognized an operator's liability under theories of nuisance,<sup>7</sup> negligence,<sup>8</sup> and strict liability,<sup>9</sup> including the breach of a statute or regulatory order.<sup>10</sup>

Many leases and deeds contain express provisions requiring the

3. *Tenneco Oil Co. v. Allen*, 515 P.2d 1391, 1396 (Okla. 1973) (quoting *Schlegel v. Kinzie*, 158 Okla. 93, 93, 12 P.2d 223, 223 (1932)).

4. *Id.*

5. 1 H. WILLIAMS & C. MEYERS, *OIL AND GAS LAW* § 218.11 (1981); *see, e.g.*, *Davon Drilling Co. v. Ginder*, 467 P.2d 470, 474 (Okla. 1970) (contractual damages awarded for lessee's use of surface).

6. *See generally* Annot., 53 A.L.R.3d 16 (1973) (exhaustive analysis of liability for the excessive use of surface easements).

7. *See, e.g.*, *Sunray DX Oil Co. v. Brown*, 477 P.2d 67, 71 (Okla. 1970) (recovery on nuisance theory for injury to land from salt water leakage from lessee's pipelines).

8. *See* 1 H. WILLIAMS & C. MEYERS, *supra* note 5, § 218.10, at 230-34 (citing various examples of negligence).

9. *See, e.g.*, *Superior Oil Co. v. King*, 324 P.2d 847, 848 (Okla. 1958) (lessee liable for damages to water well caused by use of explosives).

10. *See, e.g.*, *Gulf Oil Corp. v. Lemmons*, 198 Okla. 596, 598, 181 P.2d 568, 570 (1947) (violation of oil refuse statute is negligence per se).

mineral owner or lessee to compensate the surface owner for damages arising from oil and gas operations on the premises,<sup>11</sup> but such clauses vary considerably in their scope<sup>12</sup> and may even be illusory.<sup>13</sup> The purpose of a surface damages clause is not to deprive the lessee of his operating rights, but "to restrict them indirectly by requiring the lessee to compensate the lessor for the specified loss or injury which he suffers as the result of the lessee's lawful exercise of his rights under the lease."<sup>14</sup> The presence of a surface damages clause, however, does not waive the lessor's right to recover damages arising from the lessee's wrongful conduct.<sup>15</sup>

The typical oil and gas lease or mineral grant expressly provides for certain easements in the surface. When an instrument is silent on the subject, by implication a lessee or mineral owner can use the surface as is reasonably necessary for the exercise of his interests.<sup>16</sup> Even in most express easements, the terms are general enough to encompass the lessee's reasonably necessary use of the surface.<sup>17</sup> The Supreme Court of Oklahoma has recognized that the grant, or reservation, of the right to operate for oil and gas includes the right to use the surface to the extent reasonably necessary for that purpose; therefore, the damage to soil, trees, or crops upon the land that is incidental to reasonable operations is *damnum absque injuria*.<sup>18</sup>

Negligent operations, however, are to be distinguished from rea-

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11. A surface damages clause may be of particular importance in a lease that provides for pooling or unitization; when a well is upon his land, the lessor receives only a portion of the royalties, but incurs all of the damages to the surface. 1 H. WILLIAMS & C. MEYERS, *supra* note 5, § 218.11, at 239-40.

12. An example of a simple clause would be: "Lessee shall be responsible for and agrees to make payment of all damages to lands, crops, timber and improvements caused by its operations hereunder." 4 E. KUNTZ, *supra* note 1, § 49.4, at 243 (footnote omitted) (examples of more elaborate clauses are also noted).

13. A clause could do nothing more than describe what would otherwise be the rights of the parties. *See id.* at 244.

14. *Id.* (footnote omitted); *see, e.g.*, Phillips Petroleum Co. v. Sheel, 206 Okla. 330, 333, 243 P.2d 726, 729 (1952) (interpreting a surface damages clause to exclude injuries to cattle).

15. 4 E. KUNTZ, *supra* note 1, § 49.5, at 248.

16. 1 H. WILLIAMS & C. MEYERS, *supra* note 5, §§ 218.1 to .2; 4 W. SUMMERS, *supra* note 1, § 652, at 5.

17. 1 H. WILLIAMS & C. MEYERS, *supra* note 5, § 218.1, at 187.

18. Marland Oil Co. v. Hubbard, 168 Okla. 518, 518-19, 34 P.2d 278, 279 (1934). For an example of an unreasonable use, *see* Denver Prod. & Ref. Co. v. Meeker, 199 Okla. 588, 590, 188 P.2d 858, 860 (1948) (holding an oil and gas lessee liable, inter alia, for building unnecessary roads and causing unnecessary injury to fences). The theory of excessive use has been applied to limit the physical area of liability and the amount of time that the leased land is used. *See* Annot., *supra* note 6, §§ 11, 15.

sonable use.<sup>19</sup> Oklahoma courts have applied the doctrine of *res ipsa loquitur* to allow the recovery of damages for negligence from even an adjacent lessee.<sup>20</sup> Moreover, while the drilling of an oil well has not been found to be a nuisance *per se*,<sup>21</sup> damages can be recovered in an action brought on a private nuisance theory. In *Tenneco Oil Co. v. Allen*,<sup>22</sup> the Supreme Court of Oklahoma held that an oil and gas lessee's occupation of more of the surface than was reasonably necessary constituted a private nuisance since the lessee failed to remove equipment, restore pits, and level drilling sites. The theory of liability without fault has also been applied in the recovery of surface damages in Oklahoma. For example, in *Superior Oil Co. v. King*,<sup>23</sup> the lessee was held liable without regard to his duty of care for surface damages resulting from his use of explosives. More frequently, however, Oklahoma courts have relied on theories of negligence<sup>24</sup> and breach of statutory duty. Most litigation in the latter area has involved the breach of statutes that require the safe disposal of salt water and other refuse.<sup>25</sup> When liability is imposed on a lessee or mineral owner, permanent injury to the surface is measured by the difference between the fair market value of the land before and after the injury; in cases of wanton disregard of the rights of the surface owner, punitive damages may be awarded.<sup>26</sup> Temporary damage to the land is measured by the difference in its rental value before and after the injury or, if the property is restorable, the cost of such restoration.<sup>27</sup>

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19. See, e.g., *Hamon v. Gardner*, 315 P.2d 669, 675 (Okla. 1957) (holding operator liable for his failure to advise the landowner of his drilling plans); see also 1 H. WILLIAMS & C. MEYERS, *supra* note 5, § 218.10, at 230-34 (summarizing the theory of negligence as applied to an operator).

20. See *Norman v. Greenland Drilling Co.*, 403 P.2d 507, 510 (Okla. 1965) (plaintiff surface owners entitled to benefit of *res ipsa loquitur* after proving that once an adjacent lessee properly encased his well, salt water pollution ceased).

21. Lambert, *Surface Rights of the Oil and Gas Lessee*, 11 OKLA. L. REV. 373, 382 (1958) (citing *Indian Territory Illuminating Oil Co. v. Henning*, 179 Okla. 462, 66 P.2d 83 (1937)).

22. 515 P.2d 1391, 1395-98 (Okla. 1973); see also Lopez, *Upstairs/Downstairs: Conflicts Between Surface and Mineral Owners*, 26 ROCKY MTN. MIN. L. INST. 995, 1011 (1980) (*Allen* represents a minority position).

23. 324 P.2d 847, 848 (Okla. 1958); see 1 H. WILLIAMS & C. MEYERS, *supra* note 5, § 218.10, at 234-35; 4 W. SUMMERS, *supra* note 1, § 654.

24. See, e.g., *Mazda Oil Corp. v. Gauley*, 290 P.2d 143, 147 (Okla. 1955) (finding negligence in failure to guard against escape of gas).

25. See, e.g., *Nichols v. Burk Royalty Co.*, 576 P.2d 317, 320 n.2, 323 (Okla. Ct. App. 1977) (liability for escaping oil well substances under OKLA. STAT. tit. 52, § 296 (1971) (identical to current statute)); see also 1 H. WILLIAMS & C. MEYERS, *supra* note 5, § 218.10, at 235-37 (summarizing theory of liability for breach of statutory duty); Lambert, *supra* note 21, at 382-83 (summarizing salt water disposal litigation in Oklahoma).

26. *Nichols v. Burk Royalty Co.*, 576 P.2d 317, 321-22 (Okla. Ct. App. 1977).

27. Annot., *supra* note 6, § 2(e), at 52.

## II. ANALYSIS OF THE SURFACE DAMAGES ACT

Oklahoma's Surface Damages Act<sup>28</sup> requires good faith negotiation between oil and gas operators and surface owners for the payment of "any damages which may be caused by the drilling operation."<sup>29</sup> Before entering upon a specific site for oil and gas drilling, an operator must give written notice by certified mail to all surface owners within the state, whose whereabouts can be ascertained, of the proposed drilling location and date.<sup>30</sup> Constructive notice may be given if the whereabouts of a surface owner cannot be obtained through reasonable diligence, but the application of this provision to out-of-state residents is uncertain. Within five days of the service of the notice of intent to drill, the operator and surface owner are to enter into good faith negotiations regarding surface damages; however, the extent of this duty to nonresident surface owners is ambiguous since the notice requirements may not apply.<sup>31</sup>

Prior to an operator's entry upon property for the commencement of oil and gas operations, he must file a corporate surety bond or letter of credit from a banking institution with the secretary of state, and in the event the operator agrees to a sum greater than the initial bond requirement of \$25,000 as damages, or is so ordered by a court, the damages must be immediately paid or the bond increased.<sup>32</sup> Before entering the site with heavy equipment, which is an undefined moment in time, an operator must negotiate the payment of surface damages with the surface owner, who is defined as the "owner or owners of record."<sup>33</sup> "Surface damages," however, are not defined. If agreement is not reached between all parties, the operator must petition the district

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28. Act of June 2, 1982, ch. 341, 1982 Okla. Sess. Law Serv. 1062 (West) (to be codified at OKLA. STAT. tit. 52, §§ 318.2 to .9 (Supp. 1982)). Relevant portions of the Act appear in note 2 *supra*.

29. Surface Damages Act § 4.

30. *Id.* § 2. Apparently, the right of an operator to enter upon the leasehold may begin either at the posting of the bond or after the notice of intent to drill is served, depending on whether the surface owner is a resident. Sections 2 and 3 appear inconsistent in this regard. See Op. Okla. Att'y Gen. Request No. 82-243 by Sen. Bill Dawson (Aug. 5, 1982) (request file closed Oct. 22, 1982, because of pending litigation on Act's constitutionality) (copy on file at *Tulsa Law Journal* office) [hereinafter cited as Dawson Request].

31. The requirement of actual notice in § 2 is generally limited to state residents, so an argument can be made that the duty to negotiate within five days in § 2 applies only to these surface owners.

32. Surface Damages Act § 3. Op. Okla. Att'y Gen. No. 82-232 (Sept. 22, 1982) interprets the bond requirement literally to require a corporate surety bond or letter of credit, stating that the posting of cash or negotiable instruments would not satisfy the requirement.

33. Surface Damages Act § 1.

court in which the drilling site is located for the appointment of appraisers before entering the site to drill.<sup>34</sup>

After proper notice to the parties, the appraisers are to file their assessment of the surface damages within fifteen days of their appointment.<sup>35</sup> The assessment may be reviewed by the court upon the filing of written exceptions within thirty days, and the court "shall enter the appropriate order either by confirmation, rejection, modification, or order of a new appraisal for good cause shown."<sup>36</sup> Section 4(F) further provides:

[I]n the event a new appraisal is ordered, the operator shall have continuing right of entry subject to the continuance of the bond required herein. Either party may, within sixty (60) days after the filing of *such report*, file with the clerk a written demand for a trial by jury, in which case the amount of damages shall be assessed by a jury.<sup>37</sup>

Although the legislature probably intended a right to jury trial in all cases, an argument can be made that the right arises only after a second appraisal. Section 4 creates even further confusion because the qualifications for the appointment of appraisers are not defined and the timing and substance of an appraisal are not specified.<sup>38</sup> The saving grace of this provision is more than likely its imposition of the appraisers' fees and court costs equally on the surface owner and the operator,<sup>39</sup> thus encouraging pre-litigation settlement.<sup>40</sup>

The Surface Damages Act does not impair contractual rights in existence before July 1, 1982, nor does it apply to property held by a

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34. *Id.* § 4(A). The combined reading of § 3 with § 4 would seem to require both the posting of the bond and either a signed agreement or the filing of a petition for appraisal prior to the commencement of drilling. J. Zarbano, Discussion of Surface Damages, OBA/CLE Oil and Gas Litigation Seminar, at 17 (paper presented Nov. 9 & 19, 1982) (manuscript on file at *Tulsa Law Journal* office). The inability to file a petition over a weekend could be costly to an operator if negotiations fail late on a Friday.

35. Surface Damages Act § 4(C).

36. *Id.* § 4(F).

37. *Id.* (emphasis added).

38. See J. Zarbano, *supra* note 34, at 17-18. Section 5 provides for appellate review of court orders based on appraisals or jury verdicts.

39. Surface Damages Act § 4(C).

40. Furthermore, if a party requesting a jury trial does not receive a verdict more favorable than the appraisal, § 4(F) assesses all court costs, including reasonable attorney fees, against him. Judicial review of the appraisers' report, however, does not expose a party to this liability. Hultin, *Recent Developments in Statutory and Judicial Accommodation Between Surface and Mineral Owners*, at 20 (to be published at 28 ROCKY MTN. MIN. L. INST. 1015 (1983)) (manuscript on file at *Tulsa Law Journal* office).

restricted Indian.<sup>41</sup> Moreover, operators and surface owners are free to establish correlative rights,<sup>42</sup> which presumably might include express surface use easements and specific damages clauses in leases that are not in derogation of the legislation. Treble damages can be assessed, however, against "[a]ny operator who willfully and knowingly fails to keep posted the required bond or who fails to notify the surface owner, prior to entering, or fails to come to an agreement and does not ask the court for appraisers."<sup>43</sup>

### III. CONCLUSION

Not only is the Surface Damages Act in need of "technical" legislative reform, but the Act also raises serious constitutional issues. The Act calls for the payment of damages that may be caused by the drilling operation.<sup>44</sup> "It is well known that some surface damage inevitably results from oil and gas operations on the premises. . . . The parties . . . must be viewed as having this fact in mind. Their deed or lease contemplated reasonable surface user by the mineral owner or lessee."<sup>45</sup> The scope of the Surface Damages Act imposes liability, however, in derogation of this well established principle. "The authorities which have considered the issue appear to be in agreement that such damages are *damnum absque injuria* and no recovery can be had against the mineral estate owner or lessee."<sup>46</sup> This conclusion rests on the principle that injury necessarily inflicted in the exercise of a lawful right does not create a liability without the commission of a wrong.<sup>47</sup>

An oil and gas lease carries rights to the surface "as may be necessarily incident to performance of the objects of the contract, because a grant or reservation of minerals would be wholly worthless if the

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41. Surface Damages Act § 6.

42. *Id.* "Correlative," however, normally refers to the relative rights among mineral owners and not to surface ownership. Dawson Request, *supra* note 30, at 4.

43. Surface Damages Act § 8.

44. *Id.* § 4(A).

45. 1 H. WILLIAMS & C. MEYERS, *supra* note 5, § 218.12, at 245-46 (in the context of an argument against a lessee's duty to restore the condition of the premises).

46. *Hunt Oil Co. v. Kerbaugh*, 283 N.W.2d 131, 135 n.4 (N.D. 1979) (dictum) (citing *Frankfort Oil Co. v. Abrams*, 159 Colo. 535, 413 P.2d 190 (1966); *Union Prod. Co. v. Pittman*, 245 Miss. 427, 146 So. 2d 553 (1962); *Getty Oil Co. v. Jones*, 470 S.W.2d 618 (Tex. 1971); 4 W. SUMMERS, *supra* note 1, § 652; Browder, *The Dominant Oil and Gas Estate—Master or Servant of the Servient Estate*, 17 Sw. L.J. 25 (1963)). The court in *Hunt* also noted that equity and the growing demand for energy resources require a closer examination of who should bear the cost of surface damages from mineral development. 283 N.W.2d at 135 n.4; see Lopez, *supra* note 22, at 1010 (proposing a test of reasonableness under the circumstances for both the mineral owner and surface owner).

47. *Hunt*, 283 N.W.2d at 135 n.4.

grantee or reserver could not enter upon the land in order to explore for and extract the minerals granted or reserved."<sup>48</sup> By implication, the lessor through the mineral lease authorized the lessee to do such damage as is reasonably necessary to conduct the operations permitted under their contract.<sup>49</sup> Without this fundamental assumption of reasonable use to extract the minerals, an operator faces an unknown liability in Oklahoma.

Three other jurisdictions share legislation similar to that of Oklahoma: North Dakota since 1979;<sup>50</sup> Montana since 1981;<sup>51</sup> and South Dakota since 1982.<sup>52</sup> All of these enactments raise constitutional questions of a retroactive impairment of contractual rights and a taking of property without due process of law.<sup>53</sup> The Oklahoma Act also appears to have the potential of being unconstitutionally vague since a reasonable understanding of the Act borders on the impossible, thus rendering compliance unattainable.<sup>54</sup> A reported case has yet to address any of these surface damages acts on the merits of the constitutional issues, although litigation challenging the constitutionality of Oklahoma's Surface Damages Act has been filed.<sup>55</sup> Since section 6 of the Oklahoma statute provides only for prospective application,<sup>56</sup> there does not seem to be a justifiable argument for the retroactive impairment of contract rights unless the Act is applied to a lease already in effect on July 1, 1982.

If Oklahoma's Surface Damages Act is interpreted as imposing strict liability on an oil and gas operator for surface damages without

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48. Annot., *supra* note 6, § 2(a), at 25-26.

49. *Id.* at 31.

50. N.D. CENT. CODE §§ 38-11.1-01 to -10 (1980) (requiring the payment of damages to the surface owner for the loss of agricultural production and income, lost land value, and lost value of improvements caused by drilling operations).

51. MONT. CODE ANN. §§ 82-10-501 to -511 (1981) (largely based on the North Dakota Surface Damages Act). For a detailed comparison of the acts of Montana, North Dakota, and Oklahoma, see Hultin, *supra* note 40, at 9-22.

52. S.D. CODIFIED LAWS ANN. §§ 45-5A-1 to -11 (Supp. 1982) (similar to the legislation in North Dakota).

53. Hultin, *supra* note 40, at 22.

54. Dawson Request, *supra* note 30, at 1.

55. See, e.g., Brief for Petitioner's Motion for Summary Judgment, Hughes Group, Inc. v. Morgan, No. 82-C-995 (N.D. Okla. filed Nov. 19, 1982) (challenging the constitutionality of the Act if applied to a lease in existence prior to the Act); Brief for Petitioner, Marshall Oil Corp. v. Cast, No. C-82-356 (Okla. D. Ct. Grady Cty. filed Oct. 22, 1982) (challenging the Act as a violation of due process in its taking of private property and as a retroactive impairment of contractual rights if applied to a lease already in existence on the Act's effective date); Harper Oil Co. v. Aspel, No. C-82-653 (Okla. D. Ct. Garfield Cty. filed Sept. 8, 1982) (challenging the constitutionality of the Act and its applicability to an existing lease).

56. Hultin, *supra* note 40, at 22.

regard to whether the use of the surface was reasonably necessary, then the operator is deprived of the inherent rights of his mineral estate. On the other hand, if the legislation, which does not define "surface damages," is construed in accordance with the established principle of reasonably necessary use, an operator would be liable only for excessive use.<sup>57</sup> Another possibility is to construe surface damages in light of the due regard or accommodation doctrine of *Getty Oil Co. v. Jones*,<sup>58</sup> which requires the lessee, when alternative practices are available to recover the minerals, to adopt one of the alternatives if the existing use by the surface owner would otherwise suffer. The due regard rule could be applicable to determine location damages from the selection of a particular drilling site.<sup>59</sup> Additionally, it is possible to argue that in determining surface damages, the statutory requirements for the removal of debris and the grading of the surface<sup>60</sup> should be netted out until the breach of such duties gives rise to a subsequent damages claim as allowed under section 8.

The Surface Damages Act, however, does not contain any limitation of reasonableness. The plain language of the statute imposes strict liability<sup>61</sup> and, in doing so, seems to violate the due process rights of the holder of a severed mineral estate.<sup>62</sup> In reality the legislation codifies what seems to have become custom in the area, the paying of "getting along money" to the surface owner by the operator notwithstanding his legal rights to reasonable use.<sup>63</sup> Although a trend of judicial recognition of surface owner interests is beginning,<sup>64</sup> the scope of the reasonable use easement seems fundamental to the enjoyment of a severed

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57. J. Zarbano, *supra* note 34, at App. 2; see also Pearce, *Surface Damages and the Oil and Gas Operator in North Dakota*, 58 N.D.L. Rev. 457, 496 (1982) (suggesting that the North Dakota act requires an element of negligence or nuisance for liability to arise under § 38-11.1-06). *Contra* Hultin, *supra* note 40, at 12 n.33 (the plain language of § 38-11.1-04 imposes strict liability).

58. 470 S.W.2d 618, 622 (Tex. 1971); see J. Zarbano, *supra* note 34, at 23.

59. J. Zarbano, *supra* note 34, at 23. The only Oklahoma case that mentions the due regard rule is *Gulf Pipe Line Co. v. Pawnee-Tulsa Petroleum Co.*, 34 Okla. 775, 778, 127 P. 252, 253 (1912) (holding that a lessee cannot select a drilling site that endangers the property and lives of the surface owners when equivalent alternatives are available).

60. See Act of Apr. 27, 1982, ch. 205, 1982 Okla. Sess. Law Serv. 459 (West) (to be codified at OKLA. STAT. tit. 17, §§ 53.1 to .2 (Supp. 1982)).

61. Hultin, *supra* note 40, at 22.

62. When the surface and mineral owner are the same, there is no deprivation of a property right. In these circumstances, a landowner normally can negotiate to protect his interest. See Lowe, *Representing the Landowner in Oil and Gas Leasing Transactions*, 31 OKLA. L. REV. 257, 268 (1978).

63. Hultin, *supra* note 40, at 15.

64. *Id.* at 48 (e.g., the due regard doctrine).

mineral estate and to due process.<sup>65</sup>

*Paula E. Pyron*

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65. See Pearce, *supra* note 57, at 493-97 (contending that the imposition of liability without proven fault constitutes a taking of the mineral owner's property without due process of law). *Contra* Dycus, *Legislative Clarification of the Correlative Rights of Surface and Mineral Owners*, 33 VAND. L. REV. 871, 913 (1980) (proposing a model act to protect a surface owner from substantial interference with his use of the surface and contending that it is not a violation of due process). See generally L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 9-2 to -4 (1978 & Supp. 1979) (discussing the taking of private property without just compensation as a violation of due process).