

Tulsa Law Review

Volume 33
Number 3 *Mineral Law Symposium*

Volume 33 | Number 3

Spring 1998

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Recommended Citation

John E. Johnson, *Gerrity Oil & Gas Corp. v. Magness: Colorado's Furtive Shift toward Accommodation in the Surface-Use Debate*, 33 *Tulsa L. J.* 943 (1998).

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GERRITY OIL & GAS CORP. v. MAGNESS: COLORADO'S FURTIVE SHIFT TOWARD ACCOMMODATION IN THE SURFACE-USE DEBATE

I. INTRODUCTION

Within recent years, there has been a significant increase in the exploration and production of petroleum and natural gas reserves in the state of Colorado.¹ While oil and gas wells are widely distributed across the state, one county in particular has seen most of the drilling in Colorado.² Weld County, a large, rural county in northeastern Colorado, located atop the Denver-Julesberg geologic basin and the Wattenberg natural gas field, presently holds claim to the greatest number of wells (over 10,000) drilled within its confines.³ The mineral reserves of Weld County are not the county's only asset. On top of being "the most drilled county" in the United States, Weld County also ranks fourth in the nation in agricultural production.⁴ Much of Weld County consists of highly productive irrigated cropland where farmers produce surface-intensive crops, such as carrots and onions.⁵ With such strong agricultural and mineral interests competing, it is not surprising that the surge in drilling has led to increased complaints by the agricultural community, fueling surface owners' efforts to gain greater control over and compensation for oil and gas operations on their lands.⁶

Several factors amplify the antagonism between the oil companies and

1. See Jeanine Feriancek & Cynthia L. McNeill, *Oil Company Surface Use: Do Farmers Need Protection?*, 9 NAT. RESOURCES & ENV'T 28 (Winter 1995).

2. See *Colorado Oil and Gas Online: Oil & Gas Conservation Commission Statistics and Frequently Asked Questions* (visited Mar. 20, 1998) <<http://www.dnr.state.co.us/oil-gas/info/ogstat.html>>. At the time of this article, Colorado has roughly 23,000 active wells and 40,000 abandoned and plugged wells. See *id.* Two-thirds of all Colorado counties contain wells, with thirty percent of Colorado counties containing at least two hundred wells. See *id.*

3. See *id.* Exploration and production is nothing new to Weld County. The Denver-Julesberg basin was discovered in 1949 and the Wattenberg gas field in 1970. See Feriancek & McNeill, *supra* note 1. Helping to contribute to this hurried pace of drilling was the high probability of successful drilling and a federal tax credit for wells drilled in "tight sand" formations prior to Jan. 1, 1993. See Feriancek & McNeill, *supra* note 1. See also 42 U.S.C. § 13413 (1992).

4. See Laura H. Burney, *A Pragmatic Approach to Decision Making in the Next Era of Oil & Gas Jurisprudence*, 16 J. ENERGY NAT. RESOURCES & ENVTL. L. 1, 76 (1996). See also Gerald Karey, *Regulation & The Environment*, PLATT'S OILGRAM NEWS, Dec. 6, 1993, at 3.

5. See Feriancek & McNeill, *supra* note 1.

6. See *id.* An exploration drill site in the Wattenberg area can require up to four acres of land, including a drilling pad and a reserve pit. The drill site diminishes to about 300 feet by 300 feet upon completion. See *id.*

agricultural interests in Weld County. Mineral rights are often severed (owned separately) from the surface estate.⁷ Because the surface estate owner holds no interest in the mineral estate, the surface owner can neither force oil companies to pay compensation for lost crops nor impose contractual restrictions on surface use.⁸ The mineral rights held by an oil company are valuable only if the mineral can be recovered and sold on the market. Therefore, in these environmentally conscious times, some "accommodation" of the economic needs of both parties is necessary.

When oil companies impede the ability of surface owners to put the land to use, legal and economic issues arise. Should the oil company have an unrestricted right to drill for resources? What rights and remedies should surface owners have when their land is used and damaged? What is the role the courts, the legislature, and the administrative agencies should play?

The Supreme Court of Colorado recently addressed a dispute over surface rights in a case of first impression concerning the distinction between trespass and negligence causes of action in the context of oil and gas operations. *Gerrity Oil & Gas Corp. v. Magness*⁹ turned on the court's interpretation of Colorado's Oil and Gas Conservation Act and regulations promulgated by the Colorado Oil and Gas Conservation Commission (COGCC).

The landowner claimed that Gerrity Oil Corporation (Gerrity) damaged the property while drilling for oil on the property. The question before the court was whether the oil company had violated commission rules and whether Gerrity trespassed or acted in a negligent manner on his property while operating the well.

This Note scrutinizes the *Gerrity* opinion and concludes that the court, while upholding the common-law reasonable-use rule, takes the appropriate steps towards the rights of the property holders, by allowing them to present rebuttable expert testimony as to reasonable alternatives available to the operator. The decision places landowners in a better position than before to present claims of trespass against oil operators.

Part II of this Note provides a general overview of the law relating to severed mineral estates and the judicial, legislative and administrative attempts to accommodate the needs of the landowners while valuing the reasonable use of the mineral owner. Part III sets forth the procedural history of the case. Part IV analyzes the majority's opinion in regard to the ruling of the appellate court and considers other jurisdictions' treatment of this issue. Part V concludes that the court, in a coherent and well reasoned opinion, expands the rights of surface

7. See *id.* Professor Fox is careful to point out that the term "surface estate" is often used in an imprecise manner. See Cyril A. Fox, Jr., *Private Mining Law in the 1980's: The Last Ten Years and Beyond*, 92 W. VA. L. REV. 795, 818 (1990). The so-called surface estate is usually a remainder interest, in that the mineral estate generally terminates upon exhaustion or abandonment of the mineral, depending on whether the mineral estate is a freehold or a leasehold, respectively. See *id.* Thus the "surface estate" will expand to encompass both the surface and subsurface estates once the mineral estate terminates, unless the parties have agreed otherwise. See *id.*

8. See Feriancek & McNeill, *supra* note 1.

9. 946 P.2d 913 (Colo. 1997) (en banc).

owners against oil and gas operators.

II. BACKGROUND

In early English common law, the maxim *cujus est solum, ejus est usque ad caelum et ad inferos*¹⁰ and the ritual of "livery of seisin"¹¹ governed the unseverable estate.¹² The doctrine of estate severance gained a foothold in English legal theory when the Sovereign declared lands "royal mines" which could exist independent from surface ownership.¹³ It was not until the Industrial Revolution that severance for private parties took hold.¹⁴ At the turn of the century, entrepreneurs began to sever their valuable mineral estate and reinvest the revenue into surface improvements.¹⁵ In every jurisdiction, the owner of real property in fee simple title may create as many separate estates as there are different minerals under his or her land.¹⁶ Severance of the surface and mineral estates can be accomplished by exception, lease, grant or reservation.¹⁷ Once severance is effected, the severed estate is held under a separate and distinct title that is subject to the laws of descent, devise, and conveyance, with each independently taxable and lienable.¹⁸

Since the severed land and mineral holders have a need for use of the surface, the common law had to provide for a mineral owner's access to his property. Out of this concern, the courts recognized an implied easement, burdening the surface interest and empowering the mineral owner to make reasonably necessary use of the surface to explore, produce, and market the minerals from the property.¹⁹ Out of this concern, courts have recognized an implied

10. "To whomever the soil belongs owns also to the sky and to the depths," BLACK'S LAW DICTIONARY 378 (6th ed. 1990).

11. For a detailed discussion, see CORNEILUS J. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 162 (2d ed. 1988).

12. See Michelle Andrea Wenzel, Comment, *The Model Surface Use & Mineral Development Accommodation Act: Easy Easements for Mining Interests*, 42 AM. U. L. REV. 607, 613-614 (1993). See, e.g., 2 WILLIAM BLACKSTONE, COMMENTARIES *2 (explaining absolutist vision of property ownership as "that sole and despotic dominion which one [person] claims and exercises over the external things of the world, in total exclusion of the right of another individual in the universe").

13. See Wenzel, *supra* note 12, at 615. See, e.g., William B. Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 562 (1972) (*analyzing The Case of Mines*, 75 Eng. Rep. 472, 477 (Ex. 1567)).

14. See Wenzel, *supra* note 12, at 616.

15. See *id* at 617.

16. See *id* at 618. See, e.g., Marla E. Mansfield, *On the Cusp of Property Rights: Lessons from Public Land Law*, 18 ECOLOGY L.Q. 43, 67 n.144 (1991).

17. See Wenzel, *supra* note 12, at 618. In the late 1920's, Justice Cardozo first expressed the idea that property ownership is analogous to ownership of a "bundle of sticks." Compare BENJAMIN N. CARDOZO, THE PARADOXES OF LEGAL SCIENCE 129 (1928) (arguing that "[t]he bundle of power and privileges to which we give the name of ownership is not constant through the ages. The [sticks] must be put together and rebound from time to time.") with *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979) (using Cardozo analogy).

18. See Wenzel, *supra* note 12, at 618.

19. See John S. Lowe, *The Easement of the Mineral Estate for Surface Use: An Analysis of its Rationale, Status, and Prospects*, 39 ROCKY MTN. MIN. L. INST. § 4.01, § 4.02 at 4-3 (1993). For a general analysis of the implied easement see, for example, 2 AMERICAN LAW OF PROPERTY § 10.28 (1952); HOWARD R. WILLIAMS & CHARLES J. MEYERS, OIL AND GAS LAW § 218 (1997); and Douglas Hale Gross, Annotation, *What Constitutes Reasonably Necessary Use of the Surface of the Leasehold by a Mineral Owner, Lessee, or*

easement that gives the mineral owner or lessee a right to possess and use the surface of the leasehold to the extent reasonably necessary to allow the lessee to perform the undertaken lease obligations.²⁰ These obligations include the right to enter upon the premises and use and occupy so much of the land in such a manner, as may be reasonably necessary to carry out the terms and obligations of the lease and to effectuate its purpose and legitimate objects.²¹

Broad application is given to this general rule, both as to the kinds of uses and as to the location of these uses, with the sole limitation that the easement holder may not destroy the surface.²² The right to enjoy use of the surface is extracted from the intent that the parties would not sever the minerals from the surface or lease the minerals if they did not intend that the mineral owner should have the right to obtain the materials.²³ Public policy also supports the implied easement for surface use, in that society has an interest in the availability of plentiful supplies of extracted minerals.²⁴ The end result is that the two parties have the ability to employ the surface of the land for different purposes.²⁵

Thus, it has been said that at common law the mineral estate should be considered the "dominant estate," with an appurtenant easement implied to use the "servient" surface estate.²⁶ Although considering the right of access to petroleum, natural gas and other minerals absolute, earlier courts restricted the scope of the easement by requiring "reasonable use," which prohibited using more land than reasonably necessary and using a reasonable amount of land in a negligent manner.²⁷ Courts, however, maintained mineral estate dominance by interpreting "reasonableness," strictly from the mineral owners point of view.²⁸ Therefore, as long as the lessee's use was reasonable according to industry practices, the restriction was abrogated.²⁹

Beginning in the early 1970s, the broad scope of the implied easement began to evolve. Environmental issues arose to the political forefront and a policy shift began eroding the vast scope of the mineral estate's surface easement.³⁰ This erosion stemmed from federal and state legislation and in some

Driller Under an Oil and Gas Lease or Drilling Contract, 53 A.L.R.3d 16 (1974).

20. See Lowe, *supra* note 19, at 4-3.

21. See *id.*

22. See *id.* See, e.g., Callahan v. Martin, 43 P.2d 788, 796 (Cal. 1935) (stating "[o]ne who grants a thing is presumed to grant also whatever is essential to its use. The right of entry is an incident to the grant of an estate in the mineral rights").

23. See Lowe, *supra* note 19, at 4-5.

24. See *id.*

25. See David E. Pierce, *The Impact of Landowner/Lessor Environmental Risk On Oil & Gas Lessee Rights and Obligations*, 31 TULSA L.J. 731, 738 (1996).

26. See Wenzel, *supra* note 12, at 622.

27. See Feriancek & McNeill, *supra* note 1, at 28.

28. See Wenzel, *supra* note 12, at 628. See also Stephen John Berry, Comment, *Surface Damage In Texas: A Proposal for Legislative Intervention*, 17 ST. MARY'S L.J. 121, 143 (1985).

29. See Lowe, *supra* note 19, § 4.03[1], at 4-11.

30. For further discussions on the role of the environmental movement and surface-use law, see James M. Colosky, *The Implied Covenant for Diligent & Prudent Operators in an Environmental Era*, 39 ROCKY MTN. MIN. L. INST. § 15.01, at 15-2,3 (1993). For a general discussion of the environmental movement, see ANDERSON, MANDELEKER & TARLOCK, *ENVIRONMENTAL PROTECTION: LAW AND POLICY* 5 (2d ed. 1990).

jurisdictions, from court decisions. States began to pass surface damage acts, while others, including Colorado, began charging regulatory agencies with protection of natural resources, in addition to their traditional responsibilities of preventing waste of oil and gas.³¹ Courts in some jurisdictions began to restrict the scope of surface easements by adopting the accommodation doctrine.³²

The accommodation doctrine was first recognized in *Getty Oil Co. v. Jones*,³³ decided by the Supreme Court of Texas in 1971. In this case, the court redefined the scope of the surface easement and reassessed the concept of reasonableness by requiring mineral owners to exercise their rights with "due regard" for the surface owner. In essence, the court held that mineral owners must "accommodate" the surface owners if the mineral owner has reasonable alternatives that would avoid interference with any existing surface use.³⁴

The legal relationship between severed surface and mineral estates has been developed in Colorado by the supreme court in a traditional manner. As a result, under Colorado law, the severed mineral owner owns such rights of ingress, egress, exploration, and surface usage as are reasonably necessary for the successful exploitation of the mineral interests.³⁵ If a surface owner interferes in an unreasonable manner with the right-of-entry of the mineral owner, the surface owner may be liable in damages to the mineral owner.³⁶ Frequently cited for the proposition that Colorado strictly adheres to the common-law concept of unabashed mineral estate dominance is a 1966 Colorado Supreme Court decision, *Frankfort Oil Co. v. Abrams*.³⁷ In *Frankfort*, the court held that "[w]ithout a lease provision the rule seems to be that absent unreasonable use or statutory provisions or a suit brought in tort for negligence, no payment is due the surface owner for damages due to exploration or drilling."³⁸

While Colorado has not passed a surface damage act, the Colorado legislature has authorized its conservation agency, the COGCC, to issue regulations to avoid environmental problems caused by oil and gas production.³⁹ Special

31. See John F. Welborn, *New Rights of Surface Owners: Changes in the Dominant/Servient Relationship Between the Mineral & Surface Estates*, 40 ROCKY MTN. MIN. L. INST. § 22.01, §22.03, at 22-13 to 22-40 (1993).

32. See HOWARD R. WILLIAMS & CHARLES J. MEYERS, *MANUEL OF OIL AND GAS TERMS* 10 (10th ed. 1997).

33. 470 S.W.2d 618 (Tex. 1971).

34. See Welborn, *supra* note 31, at § 22.03[3], at 22-22. For further discussion on *Getty Oil*, see Wenzel, *supra* note 12, at 631-634; and Berry, *supra* note 28, at 129.

35. See Welborn, *supra* note 31, at § 22.05[1], at 22-29 *citing* Rocky Mt. Fuel Co. v. Heflin, 366 P.2d 577, 580 (Colo. 1961). See, e.g., *Frankfort Oil Co. v. Abrams*, 413 P.2d 190, 194 (Colo. 1966) (en banc).

36. See Welborn, *supra* note 31, at 22-29 *citing* Davis v. Cramer, 793 P.2d 605, 608 (Colo. Ct. App. 1990), *rev'd on other grounds*, 808 P.2d 358 (Colo. 1991) (en banc). See, e.g., *Smith v. Moore*, 474 P.2d 794 (Colo. 1970) (en banc) (holding ownership of the rights in the surface by the mineral owner does not carry with it the right to destroy the surface unless that right is expressly reserved). See, e.g., *Barker v. Mintz*, 215 P. 534 (Colo. 1923) (en banc).

37. 413 P.2d 190 (Colo. 1961) (en banc).

38. *Id.* at 195.

39. See Burney, *supra* note 4, at 78. An amendment to Colorado's Oil and Gas Conservation Act authorizes the commission to regulate oil and gas resources "in a manner consistent with protection of public health, safety and welfare." COLO. REV. STAT. § 34-60-102 (1994). "Prior to the amendment, the Commission's role was simply to foster, encourage and promote development, production and utilization of the natural resources of oil and gas in the state of Colorado." Feriancek & McNeill, *supra* note 1, at 30.

rules adopted by the COGCC have embraced the “‘due regard’ concept and expressly addressed cost considerations.”⁴⁰ In addition to the rules promulgated by the COGCC, there have been a number of municipal and county oil and gas ordinances, many of which require permitting, separate bonding, and surface owner agreement or consent, all prior to entry of the mineral owner.⁴¹ While these rules are questionable as to jurisdiction and while preemption continues to be debated, what is clear is that the problem of surface-versus-mineral use of the land has pushed many local governments to try to protect surface uses from mineral development.⁴²

III. STATEMENT OF THE CASE

A. Facts

In 1983, Bob Magness⁴³ (Magness) purchased a surface estate subject to reservation of the underlying mineral estate.⁴⁴ This 1,200-acre estate, located in Weld County, Colorado, was used for Arabian horses, Limousin cattle, and agricultural operations to provide for the livestock.⁴⁵ The petroleum, natural gas, and mineral estate is owned by a party not involved in this litigation.⁴⁶ In 1992, Gerrity⁴⁷ succeeded Amoco Petroleum Corp. as the successor lessee.⁴⁸ Under the terms of the lease, Gerrity was required to commence drilling on the lease before December 31, 1992.⁴⁹ Failure to fulfill this contract would require

40. Burney, *supra* note 4, at 78. The Wattenberg Special Area Rules, adopted by the COGCC in 1993, resulted from a task force “comprised of representatives from the oil and gas industry and Colorado’s agricultural communities.” Feriancek & McNeill, *supra* note 1, at 30. See also J. Michael Morgan & Glen Groegemueller, *Accommodation Between Surface Development and Oil & Gas Drilling*, 24 COLO. LAW. 1323-4 (1995) (discussing the concepts of “due regard,” prospective rights to surface use, preservation of oil and gas access, and the balancing of competing interests in Colorado).

41. See Welborn, *supra* note 31, § 22.05[3], at 22-35. Oil and gas ordinances have been promulgated in La Plata, Mesa and Larimer Counties in Colorado. In addition, the Colorado towns of Greeley, Broomfield, Thornton, Westminster, and Lafayette have all passed comprehensive oil and gas ordinances. Ordinances are being considered by Eaton, Milliken and other smaller northeastern Colorado towns. Weld County has proposed an extensive ordinance which would establish the county as a small oil and gas commission. As of 1994 this was being debated extensively. See Welborn, *supra* note 31, at 22-34 to 22-35.

42. See *id.* For cases dealing with preemption, see, e.g., Bowen/Edwards Assoc’s., Inc. v. Board of County Commr’s, 812 P.2d 656 (Colo. Ct. App. 1990), *aff’d in part and rev’d in part*, 830 P.2d 1045 (Colo. 1992) (en banc) and Voss v. Lundvall Bros., Inc., 830 P.2d 1061 (Colo. 1992) (en banc).

43. Before his death in 1996, Magness was the founder and chairman of Tele-Communications, Inc. See John Sanko, *Magness Court Fight to Continue Late Cable Magnate Sued Drilling Company Over Environmental Damage to Property*, Rocky Mountain News, September 16, 1997, at 3B.

44. See Gerrity, 946 P.2d at 920.

45. See *id.*

46. See *id.*

47. In May 1996, Gerrity Oil & Gas Corp. and Snyder Oil Corp. agreed to combine their assets and operations in Colorado’s Wattenberg oil field into the Patina Oil & Gas Corp. See *SOCO, OIL & GAS J.*, May 13, 1996, at 46. See also Snyder Oil Corp., S.E.C. Form 10-Q, August 7, 1997, (visited Mar. 20, 1998) <<http://www.sec.gov/Archives/edgar/data/860713/0000860713-97-000010.txt>>.

48. See Gerrity, 946 P.2d at 920. The owner of the mineral estate named T.S. Pace as lessee in 1970. See *id.* Pace assigned rights acquired under the lease to Pan American Petroleum Co., now doing business as Amoco Production Co. See *id.*

49. See *id.* The terms of the lease were engendered in the “Farmout Contract” signed between Gerrity and Amoco. See Petitioner’s Opening Brief at 5, Gerrity Oil and Gas Corp. v. Magness, 946 P.2d 913 (Colo. 1997) (No. 96-SC-215). The terms mandated in order to qualify as a “earning well,” a well must be drilled on

Gerrity to pay a penalty and forfeit the rights to drill other wells on the property thereafter.⁵⁰

Gerrity informed Magness in early October of 1992 of his plans to drill four wells on the property.⁵¹ Negotiations on sites for well-drilling went forward, and on November 11th, Magness and Gerrity formally agreed on the location of the first well, and drilling began.⁵² Seven days later, Gerrity advised Magness' representatives that the site for the second well would be built on November 19th.⁵³ Magness' agent responded to Gerrity, alerting them that they lacked authority to commence operations on any additional wells.⁵⁴

Negotiations between the parties over the drilling of the wells essential to the contract were at an impasse, with Magness refusing entry onto the property.⁵⁵ Gerrity commenced action to enjoin Magness from preventing access to the property on November 27th by filing a motion for a temporary restraining order and a preliminary injunction with the District Court of Weld County.⁵⁶ The district court granted Gerrity the relief sought, allowing Gerrity to complete all four wells on the Magness property.⁵⁷

B. Procedural History

After the district court issued its motion, Gerrity filed to convert his granted relief into a permanent injunction.⁵⁸ In response, Magness filed counterclaims of negligence and trespass in addition to a request for a declaratory judgment.⁵⁹ These counterclaims dealt primarily with Gerrity's conduct in post-drilling cleanup of the surface area.⁶⁰ At the conclusion of the trial, the district

the Magness property to a subsurface depth sufficient to test the Dakota formation. *See id.*

50. *Gerrity Oil and Gas Corp. v. Magness*, 923 P.2d 261, 262 (Colo. Ct. App. 1996) (en banc), *aff'd in part and rev'd in part*, 946 P.2d 913 (Colo. 1997) (en banc).

51. *See Gerrity*, 946 P.2d at 920.

52. *See id.*

53. *See id.* This first well drilled was not the "earning well" specified by the "Farmout Contract." Gerrity could not earn any interest on the Magness acreage until the second well, the "earning well" was drilled. *See* Petitioner's Brief at 7, *Gerrity* (No. 96-SC-215).

54. *See Gerrity*, 946 P.2d at 920.

55. *See id.*

56. *See id.*

57. *See id.* n.1.

58. *See id.* at 920.

59. *See Gerrity*, 946 P.2d at 921. Specifically, Magness asserted seven counterclaims against Gerrity:

(i) declaratory judgment to "construe and declare the rights, status and legal relationship of these parties with regard to the [applicable oil and gas] lease provisions..."; (ii) breach of contract; (iii) negligence; and (iv) termination of the applicable oil and gas lease. Magness subsequently amended his answer to include the following counterclaims: (v) that Gerrity negligently and unreasonably failed to properly and completely restore its drill sites on the property; (vi) that Gerrity trespassed on the property by failing to properly and completely restore the drill sites and; (vii) that Gerrity trespassed on the property by failing to utilize directional drilling, to dually complete wells and by failing to "place the wells at locations that would minimize damage to [the property]."

Appellee's Reply Brief at 1-2, *Gerrity Oil and Gas Corp. v. Magness*, 923 P.2d 261 (Colo. Ct. App. 1995) (No. 94-CA-1319).

60. *See Gerrity*, 923 P.2d at 262. Magness alleged that Gerrity unnecessarily delayed in filling several holes and water pits. *See id.* These pits were alleged to have caused settling of the land that impeded its agricultural use. *See id.* Magness further alleged that Gerrity had buried large pieces of plastic lining materials in these pits and that Gerrity had failed to remove from the land numerous substances used or unearthed during the drilling process, including liquid petroleum, bentonite and other drilling muds. *See id.* at 263.

court denied Gerrity's request for a permanent injunction.⁶¹ The trial court also denied Magness relief on all seven of his counterclaims.⁶² In addressing Magness's claim of negligence, the district court concluded that Magness had failed to prove Gerrity "acted unreasonably in the drilling, restoration, and the operation of the drill sites" and that Magness' evidence was insufficient because Magness failed to present expert testimony concerning oil well operations.⁶³ In resolving the trespass claim, the trial court found that "[b]ecause Magness failed to present the expert testimony needed to [prove] Gerrity unreasonably operated and reclaimed the well sites...Magness did not meet his burden of showing that Gerrity's unreasonable use of the surface constituted a trespass."⁶⁴

Magness appealed the decision of the district court to the Colorado Court of Appeals, Division I.⁶⁵ Magness presented arguments under theories of negligence, negligence per se, and trespass that the district court erred in not finding Gerrity liable for damages.⁶⁶ The appellate court reversed and remanded the case, finding *inter alia*: (1) Colorado Revised Statute section 34-60-114 creates a private right of action "for those injured as a result of the failure of another to comply with certain statutes and regulations relating to the oil and gas industry"; (2) that the district court erred in finding expert testimony regarding the standard of care in the industry was necessary because "the [Oil and Gas Conservation] Act and the rules promulgated by the Commission define the relevant duty owed by Gerrity to Magness"; (3) that the trial court stated that "the reasonableness of Gerrity's conduct is irrelevant" and that the trial court erroneously believed that trespass lies "primarily in negligence."⁶⁷

In response to these findings, Gerrity petitioned the Supreme Court of Colorado for a writ of certiorari. Certiorari was granted and the supreme court, *en banc*, affirmed the appellate court's decision in part and reversed in part.⁶⁸

61. See *Gerrity*, 946 P.2d at 921.

62. See *id.*

63. See *id.* at 922. The trial court found that Gerrity acted reasonably and did not violate the rules of the Colorado Oil and Gas Conservation Commission by "failing to notify and consult with Magness before commencing reclamation operations, failing to reclaim and restore the well sites in a timely fashion following the completion of operations, failing to remove liquids plastics, and other materials associated with drilling activity, and otherwise neglecting to restore the well sites to their original condition." *Id.* at 921. The trial court further ruled that "even if certain rules provisions had been violated, Magness failed to adequately prove any resultant damages." *Id.* at 922. The pertinent rules alleged to be violated by Gerrity are:

Rule 513(q): all the materials and equipment associated with the drilling, reentry or completion operations including but not limited to concrete, sack bentonite, and other drilling mud additives, sand, plastic, pipe, cable, and other waste materials shall be removed In addition, material may be burned or buried on the premises only with the prior written consent of the surface owner, and with prior written notice to the surface tenant

Rule 513(r): The operator shall notify the surface owner and surface tenant not less than seven (7) days before any final site reclamation and restoration is to take place and when it is to occur The party responsible for such reclamation shall consult with the local district of the state soil conservation service, the surface owner and the surface tenant with respect to the proposed reclamation operations including any special aspects thereof.

Id. at 932.

64. *Gerrity*, 946 P.2d at 922.

65. See *id.*

66. See *id.*

67. *Id.* at 922-3.

68. See *id.* at 913.

The supreme court reversed the appellate court in holding that section 34-20-114 does not create a private right of action for violations of the Oil and Gas Conservation Act or COGCC rules.⁶⁹ Concerning an action for negligence, the supreme court rejected the contention that an operator who violates the rules of the COGCC should be held strictly liable for violations.⁷⁰

The court clarified the distinction between trespass and negligence causes of action in the context of oil and gas operations.⁷¹ With regard to the claim of trespass, the supreme court found the trial court correctly ruled that "in its necessary use of the surface the lessee has a responsibility to exercise its privilege reasonably, in a manner designed to minimize intrusion and surface damage. When [the lessee] fails in such responsibility, [the lessee] commits a trespass."⁷² The supreme court corrected the trial court by ruling a surface owner is not required to present expert testimony to establish trespass or negligence, so long as the evidence of the applicable standard of care could be understood by the common person.⁷³ Further, the court ruled a surface owner seeking to establish trespass by the operator can present expert rebuttal evidence as to reasonable alternatives available to the operator.⁷⁴

IV. ANALYSIS

In the *Gerrity* case, the Supreme Court of Colorado was presented with an opportunity to clarify the rights and remedies of surface and mineral owners under Colorado mineral law. The trial and appellate courts were in sharp disagreement over what position should be taken with regards to the accommodation doctrine. The district court reasserted mineral-estate dominance and expressly rejected the accommodation doctrine, while the appellate court embraced the accommodation doctrine, concluding the COGCC's rules demonstrated a legislative desire "that the negative environmental impact of oil and gas extraction be minimized."⁷⁵ It appears that by interpreting the conservation statutes as neither creating a private right of action nor delineating the operator's use of the surface, the supreme court was again embracing the dominance of the mineral interests, but, on closer inspection, the court allowed some room for adoption of the accommodation doctrine by shifting the evidentiary burden to explain why "its surface conduct was reasonable and necessary, from prospective of the operator" when the surface owner alleges trespass.⁷⁶ This shift toward accommodation in the surface-use debate silently recognizes the

69. See *Gerrity*, 946 P.2d at 926.

70. See *id.* at 931.

71. See *id.* at 920.

72. *Id.* at 928.

73. See *id.* at 928.

74. See *Gerrity*, 946 P.2d at 933.

75. *Gerrity*, 923 P.2d at 264. See also Burney, *supra* note 4, at 79, citing *Gerrity Oil and Gas Corp. v. Magness*, No. 92CV802 (D.C. Colo. Apr. 22, 1992) (unpublished oral opinion).

76. *Gerrity*, 946 P.2d at 933. See also NAT. RESOURCES, ENERGY & ENVTL. L.: THE YEAR IN REVIEW 89 (1997).

friction in Colorado between surface and mineral owners. The court resolutely refers to the long-standing rule of reasonable surface use by stating: "in the absence of clear indication that the legislature intended such a result, we decline to treat the Act as effecting 'such a fundamental reallocation of the rights of the owners of [the surface and mineral] estates.'"⁷⁷

This shift by the court opens the question of what is the best means to limit the friction between the surface and mineral owner. In lieu of the legislature, which has been hesitant to enact a surface damage act, should the court have taken the opportunity to restrict the scope of surface easement by embracing the finding for strict liability by the court of appeals? Or did the ruling of the supreme court provide a judicial accommodation doctrine that is more acceptable? Courts in several states have restricted the scope of a surface easement by adopting the accommodation doctrine. This judicial doctrine requires the mineral owner to act prudently and to have "due regard" for the interests of the surface owner in exercising its right to use the surface to extract the minerals.⁷⁸ The doctrine was first adopted in Texas by the *Getty Oil* case and restated in *Haupt, Inc. v. Tarrant County Water Control & Improvement Dist. No. One*.⁷⁹ As a result of these decisions, the burden of proof is placed upon the surface owner to show the mineral owner had reasonable alternatives and that any other use of the surface by the surface owner would be impracticable and unreasonable.⁸⁰ Several other states have followed this rationale and adopted the accommodation doctrine as their own.⁸¹

The accommodation doctrine embodies a judicial attempt to balance competing surface use and mineral interests. This approach is not without consequences, however. Commentators have criticized the accommodation doctrine on the ground that it creates uncertainty.⁸² The court is placed in the position of "second-guessing" the reasonableness of the business judgment of the operator.⁸³ Also, the accommodation doctrine may fail to take into account the in-

77. *Gerrity*, 946 P.2d at 931 (quoting *Grynberg v. City of Northglenn*, 739 P.2d 230, 236 (Colo. 1987) (en banc)).

78. See Welborn, *supra* note 31, § 22.03[3], at 22-22. See also Morgan & Droegemueller, *supra* note 40, at 1324.

79. 870 S.W.2d 350, 353 (Tex. App.-Waco 1994, no writ). See also *Getty Oil*, 470 S.W.2d 620.

80. See Welborn, *supra* note 31, at 22-22.

81. See *id.* Utah, in adopting the accommodation doctrine, held that "wherever there exists separate ownership of interests in the same land, each should have the right to the use and enjoyment of his interest in the property to the highest degree possible, not inconsistent with the rights of others." *Flying Diamond Corp. v. Rust*, 551 P.2d 509, 511 (Utah 1976). The mineral owner is required to do that which is practical and reasonable "under the circumstances." *Id.* The accommodation doctrine was also adopted in Arkansas in *Diamond Shamrock Corp. v. Phillips*, 511 S.W.2d 160 (Ark. 1974) See also T. Craig Jones, *Implied Covenant to Restore Surface—Judicial "Wildcatting" Yields Valuable Rights for Surface Owners: Bonds v. Sanchez-O'Brien Oil and Gas Co.*, 41 ARK. L. REV. 173 (1988)). The doctrine was also adopted in New Mexico in *Amoco Prod. Co. v. Carter Farms Co.*, 703 P.2d 894 (N.M. 1985) and in North Dakota in *Hunt Oil Co. v. Kerbaugh*, 283 N.W.2d 131 (N.D. 1979), before adoption of their Surface Accommodation Act at N.D. CENT. CODE § 38-11.1-04 (1987). Wyoming, while citing *Getty Oil* favorably, did not adopt "due regard" in *Mingo Oil Produces v. Kamp Cattle Co.*, 776 P.2d 736 (Wyo. 1989).

82. See Feriancek & McNeill, *supra* note 1, at 31. See also Morgan & Droegemueller, *supra* note 40, at 1326 (discussing the balance of competing interests).

83. See Feriancek & McNeill, *supra* note 1, at 31. Retroactive third party decisions based on comparative economics render exploration companies' economic projections futile. See *id.* While this risk did exist at

creased risks associated with available alternatives, such as directional drilling.⁸⁴

As the accommodation doctrine began to readjust the common law of surface use, several states began to take legislative action in this area.⁸⁵ The rationale behind these surface damage statutes has generally been to protect agricultural and ranching uses from disruption by mineral development.⁸⁶ By imposing strict liability for surface damages, these statutes reverse the common-law rule that mineral owners have the right to reasonable surface use without any obligation to pay damages.⁸⁷ Thus, the mineral developers only defense is that the damage did not occur or was not as serious as claimed.⁸⁸ Most statutes also require mineral developers to attempt to negotiate damage settlements before commencing operations, although the developer still has the right to proceed to develop.⁸⁹ Generally, these statutes have not been found to be an unconstitutional taking.⁹⁰

States that have enacted a surface damage act have avoided some of the uncertainties associated with the accommodation doctrine.⁹¹ Commentators believe the strict liability standard merely transfers wealth from the oil and gas industry to the agriculture industry.⁹² Because of the inelastic pricing structure inherent to agricultural and mineral production, the transfer of wealth to agricultural interests cannot be justified unless the use and damage to the surface resulting from oil and gas drilling become significantly greater than could have

common law, the accommodation doctrine increases the risk that an operator's business judgment will be ignored because the accommodation rationale demands a much more subjective approach than if an operator's use was reasonably related to the production of the minerals. *See id.*

84. *See id.*

85. States with enacted surface damage acts include: North Dakota: N.D. CENT. CODE §§ 38-11.1-01 to -10 (1997); Montana: MONT. CODE ANN. §§ 82-10-501 to -511 (1997); Oklahoma: OKLA. STAT. tit. 52 §§ 318.2 to 318.9 (1997); South Dakota: S.D. CODIFIED LAWS §§ 45-5A-1 to 11 (Michie 1997); Tennessee: TENN. CODE ANN. §§ 60-1-601 to 608 (1997); West Virginia: W.VA. CODE §§ 22-7-1 to 8 (1997); Kentucky: KY. REV. STAT. ANN. § 353.595 (Michie 1997); Illinois: ILL. COMP. STAT. ANN. 530/1 to 7 (West 1997). Texas has enacted the Mineral Use of Subdivided Land Act which gives the Railroad Commission the authority to establish "qualified subdivisions" those which contain mineral development sites and then regulates the surface use so that there is not conflict between mineral and surface owners. TEX. NAT. RES. CODE ANN. §§ 92.001-007 (West 1997). In 1990, the National Conference of Commissioners on Uniform State Laws drafted the Uniform Law Commissioners' Model Surface Act and Development Accommodation Act, 14 U.L.A. 138 (Supp. 1997). This law, which has not been adopted by any jurisdiction, has been analyzed by Clyde O. Martz, *The New Model Surface Use and Mineral Development Accommodation Act*, 5 NAT. RESOURCES & ENV'T 30 (Winter 1991).

86. *See Lowe, supra* note 19, § 4.04[2], at 4-18.

87. *See id.* Surface owners' rights may be limited by surface damage acts. *See, e.g., Turley v. Mewbourne Oil Co.*, 715 F. Supp. 1052 (W.D. Okla. 1989). The court denied surface owner's request for injunction against mineral developer on grounds that Oklahoma's Surface Damage Act provided an adequate remedy for surface owner. Note that W.VA. CODE § 22B-2-4 (Supp. 1992) preserves common-law remedies to the landowner.

88. *See Welborn, supra* note 31, § 22.03[2], at 22-17.

89. *See id.* (stating damages will be had by litigation or arbitration).

90. *See id.* (referring to North Dakota's statute being found constitutional by *Murphy v. Amoco Prod. Co.*, 729 F.2d 552 (8th Cir. 1984)). The court referred to the loss of the common-law right not to compensate for unavoidable damages to the surface was "only a minor strand in the full bundle of rights" which constitute the mineral estate. *Id.* at 558. Oklahoma's Surface Damage Act was found constitutional in *Davis Oil v. Cloud*, 766 P.2d 1347 (Okla. 1989).

91. *See Feriancek & McNeill, supra* note 1, at 31.

92. *See id.*

been anticipated when the mineral estate was severed.⁹³ Other commentators believe the statutes provide a codified remedy to landowners who are unhappy with the amount received or speed with which damages have been paid by those operators inflicting damage.⁹⁴

Colorado's legislature considered adopting a surface damage act, but the attempt was defeated.⁹⁵ Understanding some action was necessary to control surface damage, in 1994 the Colorado legislature amended the Colorado Oil and Gas Conservation Act so the COGCC could issue regulations to prevent and mitigate adverse environmental impacts caused by operators.⁹⁶ Further, in 1993 the COGCC adopted the "Wattenberg Area Special Rules."⁹⁷ These rules mandate operators provide detailed notice to the surface owner before operations commence and that "due regard" be given to the surface owner for any improvements made upon the easement.⁹⁸ Although not mandated, these rules imply an operator may need to accept location or timing changes proposed by the surface owner that do not unreasonably increase the cost of the operations.⁹⁹

While this power should provide some relief to surface owners concerned with overzealous operators, the rules do not create a strict liability standard for oil and gas operators or give the Commission authority to require compensation to surface owners for loss of productivity.¹⁰⁰ In essence, the rules are an attempt by the legislature to adopt an accommodation standard with the COGCC, rather than allowing the courts or juries to determine reasonableness.¹⁰¹ The *Gerrity* court was given several options to alleviate the problems faced by surface owners.

With Magness' appeal of the findings of the Colorado Court of Appeals, the Supreme Court of Colorado was presented with an opportunity to redefine the relationship between the mineral interest holder and the surface owner. Mineral owners, already under pressure from increasingly restrictive regulations being levied by the COGCC, were looking for some clarity and consolidation of the sources of action against mineral owners. Surface owners, growing weary of the increasing use of their land by oil and gas operators, were looking for adoption of the accommodation doctrine so as to restrict the rights of mineral devel-

93. *See id.*

94. *See* Lowe, *supra* note 19, § 4.04[3], at 4-19.

95. In 1993, the Colorado legislature considered but defeated two bills for surface owner's rights: S.B. 230 and H.R. 1345. *See* Burney, *supra* note 4, at 76. The Colorado Oil and Gas Conservation Commission reports that no further bill is in or going to be proposed to the legislature at this time. Telephone Interview with Tricia Beaver, legislative aide to the Colorado Oil and Gas Conservation Commission (Feb. 11, 1998).

96. *See* Feriancek & McNeill, *supra* note 1, at 30.

97. *See* Welborn, *supra* note 31, § 22.05[2], at 22-33. *See also* C.O.G.C.C. Rules 1000-1005 (1993).

98. *See* Welborn, *supra* note 31, at 22-33. Due regard is defined in Rule 1002.g(4) as:

the consideration of reasonable requests by the surface owner/agent to move such locations in order to minimize inconvenience to then existing surface uses. Due regard shall not mean that the operator shall be required to accept locations or time schedules which would unreasonably increase the operators cost.

99. *See* Feriancek & McNeill, *supra* note 1, at 30.

100. *See id.* at 31.

101. *See id.* at 30.

opers. The supreme court granted certiorari so as to clarify this problematic situation.

The supreme court first held the Colorado Oil and Gas Conservation Act did not create a private right of action for alleged violations of the COGCC rules.¹⁰² Citing several express remedies available to surface owners under common law, the court reasoned the legislature's intent was not to confer upon surface owners private rights of action.¹⁰³ In denying surface owners the ability to bring suit under COGCC rules, the court, in essence, found the COGCC, while responsible for balancing mineral development with the protection of the public interest, was the single source of state regulatory authority and jurisdiction over the technical aspects of oil and gas development and production.¹⁰⁴ This decision, while not allowing for an increase in the rights of surface owners, did achieve some clarity by discouraging surface owners from trying to circumvent the COGCC by pursuing claims in court.¹⁰⁵

The court's ruling on the second issue at bar, namely that the reasonableness of an oil and gas operator's conduct is relevant to a determination of whether such activities constitute a trespass, recognized that "the trier of fact must consider [if] the operator's use of the surface was reasonable and necessary."¹⁰⁶ In deciding this issue, the court reaffirmed its belief in the rule of reasonable surface use found in *Frankfort*.¹⁰⁷ Affirming the necessity of reasonable conduct by an operator, the supreme court curtailed the rights of surface owners, denying them the right to subject operators to trespass claims regardless of whether they had made lawful use of the property.¹⁰⁸

The court then considered the necessity of presenting expert testimony when a surface owner brings trespass and negligence claims against an operator.¹⁰⁹ Relying on its prior finding that section 34-20-114 did not provide a private right of action, the court held that this statute only provided "evidence of the applicable standard of care" in a negligence case.¹¹⁰ Also drawing on the need for a standard of reasonable care in a trespass cause of action, the court ruled a trespass cause of action need not present evidence of an applicable standard of care, but requires evidence of a prima facie case that "the operator's

102. *Gerrity*, 946 P.2d at 926.

103. *See id.* at 925-6. For further discussion on common-law remedies associated with surface damages, see Richard J. Denny, Jeanmarie B. Tate & Cynthia J. Thomson, *Contamination from Oil & Gas Production: Who Pays for Cleanup?*, 35 ROCKY MTN. MIN. L. INST. § 6.01, § 6.04[1-5], at 6-27 to 6-39 (1989). *See also* William R. Keffer, *Drilling for Damages: Common Law Relief in Oilfield Pollution Cases*, 47 SMU L. REV. 523 (1994).

104. *See* Petitioner's Brief at 2, *Gerrity* (No. 96-SC-215). *See also* *Board of County Commr's*, 830 P.2d at 1045.

105. *See* Petitioner's Brief at 22, *Gerrity* (No. 96-SC-215).

106. *Gerrity*, 946 P.2d at 926.

107. *See* Petitioner's Brief at 11, *Gerrity* (No. 96-SC-215).

108. *See id.* at 14. *See also* Burney, *supra* note 4 at 80.

109. *See* *Gerrity*, 946 P.2d at 929.

110. *Id.* at 931. The court rejected the holding of the court of appeals which stated "the Act and the rules promulgated by the commission define the relevant duty owed by Gerrity to Magness." *Id.* at 929 (citing *Gerrity*, 923 P.2d at 264) (stating common knowledge does not need expert, but greater than common knowledge does require an expert).

surface use materially interfered with the surface owner's use of the surface."¹¹¹ It is with regard to the evidentiary standard of the trespass cause of action that the court sparingly recognized the accommodation doctrine.

The court opted for a procedural maneuver which provides that operators must rebut the surface owners prima facie trespass case by "present[ing] evidence, by means of expert testimony or otherwise, that explains why its surface contact was reasonable and necessary from the perspective of the operator."¹¹² If the operator presents such evidence, the surface owner can "present its own rebuttal evidence that reasonable alternatives were available to the operator at the time of the alleged trespass."¹¹³ This rebuttal would "focus on alternative methods available in the industry which could have been used by the operator and which would have resulted in less interference with the surface owner's existing uses."¹¹⁴ While the operator is not required to present expert rebuttal evidence to maintain a prima facie case, the fact finder can rule an operator acted unreasonably by not accommodating the surface owner.¹¹⁵ Thus, while the rebuttal evidence is not essential to sustaining the burden of proof of the surface owner, as in the *Getty Oil* case, it is all the same a step toward the accommodation doctrine in Colorado.¹¹⁶

While the court struck down several attempts by the court of appeals to increase the rights of surface owners, the supreme court did signal recognition of the friction between surface and mineral interests. The court, writing a coherent and well reasoned opinion, respecting the common law and the rules promulgated by the COGCC, allowed for an expansion of the rights of surface owners by adjusting the evidentiary standard for an alleged trespass by an oil and gas operator of a surface owner's property.¹¹⁷

V. CONCLUSION

In *Gerrity*, the court took a small but significant step in perceiving friction between surface and mineral interest holders, which has built up due to recent expansion in population and in mineral development. To alleviate this tension, the court applied an evidentiary procedure grounded in the accommodation

111. *Gerrity*, 946 P.2d at 929.

112. *Id.* at 933. "This burden properly lies with the operator because the operator is in a much better position, from an evidentiary standpoint, to explain the necessity of its conduct and to present evidence that its operations conformed to standard customs and practices in the industry." *Id.*

113. *Id.* "[A] surface owner's failure to present expert testimony does not relieve the trier of fact of the responsibility of deciding the ultimate question of whether the operator's conduct was reasonable and necessary." *Id.* at 934 n.15.

114. *Id.* at 934.

115. *See id.*

116. *See* Welborn, *supra* note 31, at 22-22.

117. After the Supreme Court issued their decision, *Gerrity* filed a Petition of Rehearing arguing: "Where a surface owner asserts a claim that an oil and gas lessee has breached its duty to use no more of the surface than reasonably was necessary to extract the minerals, the burden of proof should be the same regardless of whether the claim sounds in negligence or trespass." Petition for Rehearing at 1, *Gerrity Oil and Gas. Corp. v. Magness*, 946 P.2d 913 (Colo. 1997) (en banc) (No. 96-SC-215). The petition was denied on rehearing on Oct. 20, 1997. *See Gerrity*, 946 P.2d at 913.

doctrine which should aid surface owners in their claims against nefarious mineral developers in Colorado. This shift toward accommodation may pressure mineral interests to join with land owners in support of a surface damage statute that ensures access to minerals lying sub-surface and clearly assigns responsibility for the cost of mineral development. Although painful to the mineral developers purse, the predictability and clarity that are ensured by such a statute may be worthwhile to disputes between surface and mineral owners.

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