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Recovery of Surface Damage and Remediation Costs

Landowners whose property is damaged or destroyed by oil and gas operations face several issues. Can they recover monetary damages? If so, what is the magnitude (or measurement) of the recovery? And finally, can they recover remediation (clean-up) costs in addition to property damages to rectify the problem? This article addresses these issues.

First, the recovery of property damages from an oil company depends on two factors: the terms of the oil and gas lease and Texas case law. No Texas statutes address the recovery of property damages directly.

Oil companies generally use some version of a Producers 88 lease form. At most, the leases obligate lessees (oil companies) to pay damages only for injuries to growing crops or timber.

Knowledgeable owners who own both the surface and minerals attempt to negotiate surface and subsurface damage clauses as part of the lease. Generally, the clauses require oil companies to clean up and restore the property when operations cease and to pay property damages. However, a mineral owner who owns no surface has little incentive to negotiate surface-damage provisions. This leaves surface owners in a precarious plight.

Texas case law offers some hope for surface owners unprotected by lease terms. Early decisions by the Texas Supreme Court held that the mineral estate is dominant over the surface for purposes of exploration and production. Otherwise, reasoned the courts, the mineral estate would have little or no value.

Based on this rationale, Texas courts developed a *doctrine of implied rights*. Basically, the mineral owner (or mineral lessee) has the implied right to use the surface as reasonably necessary for mineral exploration and production without:

- asking independent permission from the surface owner,
- restoring the surface when operations cease and
- having to pay surface damages.

Over time, Texas courts recognized three exceptions to this rule. Oil companies remain liable for surface damages when they:

- use more land than is reasonably necessary,
- injure the land negligently or
- fail to reasonably accommodate the surface use.

The *Accommodation Doctrine* is the most recent exception recognized by the courts. The controversy leading to its recognition occurred when an oil company (Getty) installed a beam pump within the farmer's (Jones) circular irrigation system. The height of the pump prevented full rotation of the irrigation system.

Jones asked the oil company to either dig a pit to lower the height of the pump or install a shorter pump. Getty refused, arguing that the pump was reasonably necessary to produce the oil and gas. Eventually, the parties resorted to litigation to resolve the conflict.

The trial court and court of civil appeals agreed with Getty. However, the Texas Supreme Court introduced the Accommodation Doctrine. The surface owner is entitled to an accommodation of the surface use by the mineral estate owner under certain circumstances. The doctrine applies when the mineral owner (or lessee) has a reasonable alternative available that allows mineral development while, at the same time, permits the use of the surface for productive agriculture.

Thus, if the lease has a surface damage clause, the terms prevail. If the lease lacks a surface damage clause, the surface owner can not recover unless one of the three exceptions to the implied-rights doctrine applies.

The Real Estate Center's technical report (publication 840) elaborates on the exceptions. It describes the appellate cases concerning excess use and negligence.

Assuming the surface owner is entitled to surface or subsurface damages via the lease or case law, how are the damages measured?

Under Texas law, permanent injuries to the property permit recovery of the difference in the market value before and after the injury (*Kraft v. Langford*, 565 S.W. 2d 223). Temporary injuries give rise to damages for restoration and loss of use (*Atlas Chem. Indus., Inc. v. Anderson*, 514 S.W. 2d 309). However, under either recovery, some courts have held the measure of damages generally is the *lesser* of the loss of value or cost of restoration. This rule is called the *market value rule.*

Many times the cost of restoration greatly exceeds the value of the land. For instance, requiring a company to restore the land after strip mining coal or lignite will exceed the value of the land prior to operations. Under the market

value rule, however, property damages can never exceed the fair market value.

In addition to loss of market value, another recovery, known as *punitive damages,* may be obtained in certain circumstances. Texas courts may award punitive (sometimes called *exemplary damages*) when the injury was inflicted intentionally, maliciously or with gross negligence. Ceilings (or limitations) on punitive damages were enacted by statutes in 1989 and again in 1995. Presently, punitive damages are limited to the greater of (1) two times the economic damages (actual damages) plus an additional amount, found by the jury, not to exceed $750,000 in noneconomic damages or (2) $200,000. See Texas Civil Practices and Remedies Code Section 41.008(b). Exceptions to these limitations are cited in Section 41.008(c).

If operations cause contamination, oil companies face not only possible liability to the landowner but also to state and federal regulatory authorities. In Texas, the state authority for contamination resulting from oil and gas operations is the Railroad Commission of Texas.

The commission has the authority to:

- prevent pollution of surface water or subsurface water (Texas Natural Resources Code Section 91.101) and
- regulate all activities associated with exploration, production and transportation of oil and gas prior to refining or end use (Texas Natural Resources Code Sections 91.101-.1011).

In the exercise of its authority, the commission can:

- issue and enforce clean-up orders or undertake clean-up operations and recover the costs from the responsible parties (Texas Natural Resources Code Section 91.113),
- set clean-up standards and establish clean-up levels for ground water and soil contamination (16 Texas Administration Code Sections 3.8, 3.91 and 3.98) and
- monitor groundwater investigation and remediation activities and require modifications of remediation plans.

"No federal court decisions address the surface owner's liability for oil field contamination."

The commission's enforcement authority is limited to oil-and-gas operators. Landowners have no environmental liability to the commission unless the landowners actively participate in the operations.

On the federal level, the Environmental Protection Agency (EPA) has concurrent jurisdiction with the commission to regulate the handling, treatment, storage and disposal of nonexempt hazardous oil and gas waste (42 U.S.C. Sections 6901-6992k). If certain hazardous substances are improperly disposed of at an oil and gas site, the EPA can require cleanup or have the site cleaned up and recover response costs from the responsible parties (42 U.S.C. Section 9604). So far, no court decisions on the federal level address the liability of surface owners for oil field contamination.

If the lease requires restoration or remediation (clean up) of the property, the oil company is contractually obligated to comply. An issue now confronting Texas courts is whether landowners can legally require oil companies to pay to remediate contaminated property when the lease is silent. Some landowners have filed lawsuits claiming that the oil companies must pay the landowner for remediation cost. The commission does not have jurisdiction to award damages to private parties or decide contractual disputes or private property rights (*Railroad Commission v. City of Austin*, 524 S.W. 2d 262). At the same time, the courts do not have jurisdiction to decide matters within the exclusive jurisdiction of the commission (*Railroad Commission v. Gulf Prod. Co.*, 132 S.W. 2d 254). Does the commission, however, have exclusive jurisdiction to determine standards for remediation of oil field contamination?

In *Henderson v. Texaco Exploration & Production, Inc.* filed in Harris County, the plaintiffs sought, among other things, past and future damages plus a court order to compel the defendants to clean up the property to ensure that the fresh water aquifers will not be contaminated.

In response, the oil companies argued that the clean-up issues were under the exclusive jurisdiction of the commission and that it alone determines when and how remediation should be accomplished and what standards, tests or rules govern whether there is or is not pollution. Otherwise, the defendant could, in essence, be required to pay twice—once in clean-up costs to the landowner, then in actual performance of a cleanup under a commission order.

As yet, the courts have not decided if remediation is an issue between private parties or a matter falling within the exclusive jurisdiction of the commission to prevent pollution.

The issue could have been resolved by SB 1538 introduced in the 1995 Texas Legislature. The bill entitled "Jurisdiction over

Remediation" gave the commission exclusive jurisdiction to determine:

- whether environmental harm to real property had resulted from oil and gas exploration or production activities,
- whether the harm required remediation and
- what level of remediation would be required.

Also, the bill required a complaint to be filed with the commission before any court could determine damages. The bill was withdrawn before any debate or vote occurred.

If plaintiffs continue to seek damages based on the cost of remediation, with no obligation to actually use the money to conduct remediation, legislation similar to SB 1538 will likely reappear.

This article is based on a paper by Susan Zachos entitled "Environmental Oil, Gas & Mineral Law" presented at the 22nd Annual Oil, Gas & Mineral Law Institute. Zachos is an attorney with and a Director of the firm of Kelly, Hart and Hollman, P.C. in Austin, Texas.

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