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PROBLEMS OF SURFACE DAMAGE

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In order to define the subject, it should be made clear that excepting certain minor variations the context of surface damages will be limited to those problems which occur when the person allegedly damaging the surface is conducting operations on lands upon which he is entitled to access by virtue of a valid oil and gas lease. There shall be no attempts to discuss the problem of damage to the surface of other lands or problems not directly connected with operations which might be governed in certain states by the doctrine of *Rylands v. Fletcher* or absolute liability rather than liability based upon negligence.

The problem of surface damages is becoming increasingly important to the Rocky Mountain Region due to the great increase in oil activities during the past few years. Oil and gas attorneys have experienced increased frequency with respect to surface damage problems.

From time to time the subject has been mentioned as a matter for federal legislation. It has been approached in one of two ways; the surface owner should be granted by law a certain percent of the royalty received by the mineral owner and the working interest owner. It is not believed that a conveyance of this type would solve the problem because once the surface owner acquired this right, there would be no restriction upon his reserving it to himself if he conveyed the surface or conveyed the royalty to a grantee even though he retained the surface for himself. In either event, the resulting situation would be no different than initially. The second proposal is that when a mineral owner leases, the surface owner be given some interest similar to an overriding royalty during the existence of the lease. It is possible that where a person having no interest in the mineral estate is by law granted certain property rights belonging to the mineral owner and the oil operator, due process considerations may arise. Since neither solution would be of any value to the surface owner in the absence of production, adoption of one or the other would be only a partial solution.

In the last session of the Wyoming Legislature, a bill was introduced to give the surface owner a 2½% royalty on all State of Wyoming Oil and Gas Leases. The bill did not pass.

The Wyoming Stockgrower's Association and the Colorado Cattlemen's Association have been very active in their efforts to obtain some type of compensation for the surface owner. Recently, the Rocky Mountain Oil and Gas Association and the Wyoming Stockgrower's Association have formulated a code of ethics under which the members of both groups are working to obtain a "Gentlemen's Agreement" with respect to the rights and the protection of the parties involved. An understanding of this type will, if successful, undoubtedly do more toward solving the problem than any other measure. Unfortunately, human passions enter into the situation all too frequently and regardless of the initial intention of the parties, hard feelings arise, often times resulting in court actions and sometimes even in violence.

For a full understanding of the problem, it is well to remember that there are two distinct and separate estates involved; (1) the surface estate, and (2) the mineral estate. Few people would seriously contest the right of a property owner to have access to his property across surrounding property of another. The separate mineral and surface estates can be compared analagously. The mineral owner must have access upon the surface of the lands overlying his mineral estate in order to fully realize his property. Since a realization of such hydrocarbons is normally accomplished by virtue of the owner granting a lease to some oil operator for the purposes of exploration and development, the general types of leases employed shall be considered:

(1) The Fee Lease, normally one of the various types of "Producers 88."
(2) Federal Oil and Gas Leases which are of many types, the differentiation between which will not be elaborated.
(3) State Oil and Gas Leases.

The typical Fee Lease usually contains the following type clause:

> "Lessee shall have the right to use, free of cost, gas, oil, and water produced on said land for its operations thereon, except water from wells of lessor. When requested by lessor, lessee shall bury his pipeline below plow depth. No wells shall be drilled nearer than 200 feet to the house or barn now on said premises, without the written consent of the lessor. Lessee shall pay for damages caused by its operations to growing crops on said land. Lessee shall have the right at any time to remove all improvements, machinery, and fixtures placed or erected by lessee on said premises, including the right to pull and remove casing."

The first situation to be considered is that where the surface and minerals are vested in the same person. This situation usually does not create too much of a problem, because the lessor is quite anxious to further the development of his property for oil and gas purposes. Consequently he favors any necessary measures that the lessee must take in the conduct of exploration, drilling and producing operations. Unfortunately, there are times when even the best of friends "fall out." This often happens when the hoped for well is dry and the expected royalties are not forthcoming. There are also instances in which the lessor and lessee do not get along even though the lease may be on producing property. The law on this particular point is brought out in a recent Texas case decided by the Fifth Circuit Court of Appeals.[1] The lessor also owned the surface and the lease contained a clause such as that quoted above. The lessee periodically cleaned gas wells located on the property by "blowing" them. On one particular occasion, the lessee blew the gas wells and an arsenic compound was deposited on the lessor's land. The lessor brought an action for damages to grass, land, livestock and fencing. The jury awarded the lessor a verdict of $15,000. In affirming the judgment notwithstanding the verdict, the Court held that the lessor had to prove negligence on the part of the lessee; that there was no negligence; that the arsenic compound was not a foreseeable consequence of cleaning a gas well by blowing; that the operator had acted with reasonable diligence and in a proper fashion; and that the damage was only to grass which is not a crop.

A much more troublesome problem arises when the mineral lessor is not the surface owner. This occurs when the mineral estate presumably has been severed from the surface estate by reservation or conveyance. (It is commonplace in real estate law that more consideration is paid for a property which has been improved by sidewalks, curbs, gutters and other structures of this type than for the same property if unimproved. This is such a generally recognized fact that no one would argue otherwise. Yet, if this same problem is transferred to a potentially valuable mineral property, loud repercussions are often heard.) Even in unexplored areas, mineral rights have some value, as evidenced by the fact when a ranch is purchased with the mineral rights reserved to the grantor, the amount a purchaser pays for the property is considerably less than it would be if the purchase included the mineral rights. The value of minerals is often forgotten, however, when the owner of the severed mineral estate attempts to recover his property. The courts, however, have with great consistency held that the mineral estate was the dominant estate and that the owner thereof had the right to recover his property.

The rule is set forth in the California case of *MacDonnell v. Capitol Company.*[2] In this case, the minerals had been reserved by a prior grantor. The surface owner brought an action for damages claiming trespass. The court denied the claim and held that a mineral reservation is construed in favor of the grantor;

[1] Wohlford v. American Gas Production Co., 218 F2d 213 (1955).
[2] 130 F2d 311 (1942).

that there is unanimity as to the rule that the minerals may be removed even though the surface of the land may be wholly destroyed. Of course, the removal must be done in a manner consistent with proper oil field practice. This principle is also set forth in Thornton, *The Law of Oil and Gas, Vol. 1, Sec. 342.*

Often, the very interesting question is asked, "How can a mineral owner as lessor enter into a contract obligation with an oil operator as lessee under which contract the operator is granted certain rights to the surface when the lessor does not own the surface." The principle objective of a severed mineral owner is to capture his mineral property. In attempting to do this there are undoubtedly many occasions when he pays little heed to what use is made of the surface; he will grant any privileges requested by the operator insofar as they pertain to the use of the surface. In *Wood v. Hay,*[3] it was very ably argued that there was nothing in a mineral reservation expressly giving the right to drill wells, erect derricks, construct tanks or make use of the surface in exploring for oil and gas. In rejecting this argument, the court said, "The right to enter and to make reasonable use of the land in achieving in a workmanlike way, the only result the parties could have intended must be implied from the nature of the matters dealt with."

The argument that the mineral owner must extract his minerals in a way which is not inconsistent with the surface use was considered in *Trklja v. Keys,*[4]. The California court held that there was no basis for such a rule. Even in very unusual cases the courts have established a pattern which can be followed with little difficulty. Among the most unusual is *Vodopija v. Gulf Refining Co.,*[5] a decision of the Fifth Circuit Court of Appeals. The defendant had been granted a Louisiana state oil and gas lease. The plaintiff had been granted a Louisiana state oyster lease. Under the terms of the oil and gas lease, the defendant was granted privileges, "reasonably requisite" for the conduct of its operations. The Gulf Company, in conducting offshore operations over the ocean bottom, covered by both the oil and gas and the oyster lease, disturbed the oyster beds and thus greatly reduced the value of the plaintiff's lease. Plaintiff brought an action for damages.

[3] 175 S.W. 2d 190 (1943).
[4] 121 P. 2d, 54 (1942).
[5] 198 F. 2d, 344 (1952).

The court held that the plaintiff must prove negligence and that if the defendant conducted its oil operations in a normal manner, there was no negligence even if damage had been done. This doctrine is carried even further in the Oklahoma case of *Phillips Petroleum Company v. Sheel*,[6]. Three head of plaintiff's cattle were killed by the pump jacks on the defendant's, Phillips, wells. Phillips was conducting operations under an Osage Indian lease which contained the following language:

> "During operations the lessee shall pay all damages for the use of the surface, other than that included in the location and tank sites, all damages to any growing crops or any improvements on the lands and all other damages as may be occasioned by reason of operations."

It was Sheel's contention that all other damages occasioned by reason of operations covered the loss of his cattle. The court, however, held that the language did not cover the loss of the cattle. It was the court's opinion that the damages provided for in the quoted language of the lease were only damages to crops and improvements and that recovery could be had for the loss of livestock only when there was proof of negligence. The language "all other damages" was held to apply only to damages to crops and improvements. As there was no negligence on the part of Phillips, the operations having been conducted in a normal fashion, no recovery was allowed. This was a reiteration of the rule previously set forth in *Mid-Continent Petroleum Corporation v. Rhodes*,[7] another Oklahoma case in which the plaintiff's cattle died from drinking from a slush pit. The court denied recovery under the provisions of the oil and gas lease on the ground that compensation will only be allowed for damages to crops and improvements and that livestock could not be placed in either of these categories.

The above-cited cases establish the rule that any reasonable use may be made of the surface if it is necessary to obtain the dominant mineral estate. What then is a reasonable use? *Bordieu v. Seaboard Oil Corporation*,[8] was a case in which the California court held that the right of a mineral lessee cannot be enlarged by the terms of the lease. This would appear to mean that the mineral lessee has a right only to operate on the surface and to extract the minerals. However, this holding is no panacea but is only the first milestone. It is assumed that the oil operator cannot go beyond the rights necessary to extract minerals and that these rights cannot be enlarged by the lease. The ultimate question is one of defining such rights. In some jurisdictions, certain rights are included which are specifically excluded in others. Consequently, the attorney handling a case involving surface damages must complete the general outline by attempting to determine what the rights include within the jurisdiction involved. The facts in the *Bordieu* case were that the oil operator was using the sur-

[6] 243 P2d, 726 (1952).
[7] 240 P2d 95 (1951).
[8] 119 P2d, 973 (1941).

face covered by the claimant's lease as a site for processing oil which had been produced on other leases a good distance away. The court held that this was not a right granted in the lease and was an attempted enlargement of such rights.

In *Coffindaffer v. Hope Natural Gas Company*,[9] the West Virginia court rendered a decision indicating what is an unreasonable use. The oil operator built a road on the premises for the purpose of exploring and drilling for oil and gas. The road was built in good faith. However, no well was ever drilled and, consequently, the court decided that the operator was liable for restoring the land to the condition that it had been in prior to the construction of the road. This case may still be the law in West Virginia but it is extremely doubtful that it would still control in other jurisdictions.

In the case of *Yates v. The Gulf Oil Corporation*,[10] Gulf brought an action to restrain the surface owner for interfering with geophysical operations on the leased premises. The lease under which Gulf was operating had been granted in 1924 and specifically permitted mining and operating for minerals. There was no mention made in the lease of exploration or seismographing. In fact, seismographing was completely unknown at the time of the execution of the lease. The surface owner contended that because the lease was silent on these points, Gulf had no right to conduct exploration or seismograph activities. The court held that Gulf had the right to send its seismograph crews on the premises because exploration was an implied right and was reasonably necessary for the purpose of oil and gas operations.

As in *Bordieu v. Seaboard Oil Corporation, supra,* the Ninth Circuit Court of Appeals in a case arising in Montana,[11] held that an oil and gas lease does not grant a right to use the premises for operations pertaining to oil produced on other leases. In the *Franz* case the lease provided that payment should be made for damages to growing crops, fences, and other damages. The court used the "reasonably necessary" test which has become the standard, but allowed damages to the lessor because the lessee used a pumping station on the leased premises for operations in another field.

[9] 81 SE 966 (1914).
[10] 182 F2d, 286 (1950).
[11] Franz Corporation v. Fifer, 295 Fed. 106 (1924).

Interestingly, the court awarded damages based on the differences in value of the land before and after the operation. Uniformly, the decisions adopt the rule of damages as set forth in *Hatch Brothers v. Black*,[12] a case decided by the Wyoming Supreme Court. The measure of damages adopted is the value of the crops at the time of destruction, with the qualification, however, that if operations are conducted reasonably, the operator is only liable for temporary damages to the crops. If the operations are conducted in an unreasonable manner, the operator is liable for the entire amount as permanent damages.

Other guides to aid us in the determination of what is an unreasonable use of the surface are *Livingston v. The Texas Company*, an unreported case decided in the Federal District Court for the District of Wyoming, in which the plaintiff sought to recover $75,000. Judge Kennedy stated that he could not award damages for a reasonable use of the surface but that the plaintiff would be allowed an amount of $5,000 by virtue of the Texas Company's leaving casing, pipe, and other waste materials on the plaintiff's alfalfa meadows; further, the company had interferred with the plaintiff's irrigation system. Since the system, an improvement, had not been restored to its former state, compensation was ordered because of the damage to it.

In *Fowler v. Delaplain*,[13] the Ohio court held that a lease which granted the oil operator the right to use "necessary" measures for production and removal of oil and gas, did not apply to houses constructed by the operator for its employees on the property, because they were not necessary for operation and removal. This holding is contra to the holding in *Livingston v. Indian Territory Illuminating Oil Company*,[14] where the lease specifically permitted the construction of buildings and other structures. The Federal court held that buildings and other structures necessary for operations included houses for employees. It might be well argued that the distinction between the *Fowler* and *Livingston* cases is explained by the difference in the language of the two leases involved. However, in *Joyner v. R. H. Dearing & Sons*.[15] a Texas case, the lease was silent as to any specific authorization for construction of buildings or other structures. It was held that the erection of a house and fence was reasonably necessary to the full enjoyment of the right to produce oil from the premises; consequently, the operator had this right even in the absence of a specific authorization in the lease.

The opposing views expressed in *Fowler v. Delaplain*, and *Joyner v. R. H. Dearing & Sons, supra*, do not upset what might be termed as the "general rule" regarding surface operations under fee leases. To summarize, it can be said that any measure reasonably necessary for oil operations is permissible and that no damages will be allowed. On the other hand, proof of negligent conduct in the operations will result in liability and accompany-

[12] 165 P. 518, (1917).
[13] 87 NE 260.
[14] 91 Fed. 2d, 833 (1937).
[15] 134 S.W. 2d 757, (1939).

ing damages. Damage to crops or improvements must usually be compensated; this depends also upon the exact language of the lease and any agreement between the parties like the oil and gas leases executed by the Union Pacific Railroad Company.

The second type of lease to be discussed is the Federal Oil and Gas Lease granted by the Federal Government in order that operations may be conducted on lands under which the minerals are owned by the United States. There were few problems in this field until the passage of the Pickett Act in 1910. This act authorized the President of the United States to withdraw from entry all public lands potentially valuable for oil and gas. Prior to this time, mineral lands, or more specifically oil and gas lands, had been open to location and acquisition under the placer mining laws. Lands which had been opened to homestead entry had not been burdened with mineral reservations and the homesteader, upon successfully "proving up," acquired title to both the surface and minerals. A new policy was embodied in the Mineral Leasing Act of 1920, which laid the foundation for the procedure followed at this time. In the period between the passage of the Pickett Act in 1910, and the Mineral Leasing Act in 1920, there was a great deal of confusion in the field of oil and gas development on federal lands due to a lack of clear cut policy. During this interim period the Agricultural Entry Act of 1914 and the Stockraising Homestead Act of 1916 were passed by the Congress of the United States. Under the provisions of these, surface owners whose lands overlaid a severed mineral estate were afforded some protection from damage caused to their land by oil and gas operations. The Agricultural Entry Act contained a provision that the oil and gas lessee must secure a bond to compensate the surface owner for damages to crops and improvements caused by prospecting. The Act further went on to say that subsequent to prospecting the lessee could re-enter and occupy so much of the surface as was reasonably incident to his operations upon payment of damages caused thereby to the surface owner. The terms of the Stockraising Homestead Act were clear in that the only payment of damages allowed was compensation for damages to crops and improvements. The terms of the 1914 Act gave rise to the problem of whether or not compensation should be paid to a surface owner only for damages to crops and improvements or whether damages to crops and improvements were payable as a result of prospecting operations with compensation permitted for damages of any type if further operations were conducted.

In *Kinney Coastal Oil Company v. Kieffer*,[16] the Supreme Court of the United States resolved this question by holding that the intent of the Agricultural Entry Act of 1914 was to provide for damages to crops and improvements only, regardless of whether the damages occurred in prospecting or after re-entry during conduct of other oil and gas operations. As a result of this decision, the damage provisions of the Agricultural Entry Act of 1914 and the Stockraising Homestead Act of 1916 were determined to be the same. Both acts require a bond in lieu of a waiver by the surface owner or of a voluntary settlement of damages.

More recent federal legislation has gone somewhat further. For example, the Strip and Open Pit Mining Act of 1949, makes a mining operator liable for damages to lands used for grazing purposes. It is doubtful that this in any way changes the situation in regard to oil and gas operations because strip and open pit mining operations are conducted in a completely different manner.

Another problem which arose under the Mineral Leasing Act of 1920 was occasioned by the fact that the leases issued by the United States granted the lessee many rights in addition to those

[16] 277 US 488 (1927).

which were specifically set forth in the statute. Proponents of the argument that rights should be strictly limited to the terms of the statute have been answered by the fact that the Mineral Leasing Act allows the Secretary of the Interior to prescribe necessary rules and regulations and to do any and all things necessary to carry out and accomplish the purposes of the law. *Forbes v. United States*[17] and *United States v. Ohio Oil Company*,[18] have held that the secretary's rules and regulations should be given the effect of a statute in order fully to accomplish the purposes of the law; therefore the rights granted to the lessee in the oil and gas leases are valid. A contrary holding would, of course, have a tremendous effect upon almost all federal oil and gas leases. This effect would have gone beyond the problem of surface damages. It is of importance to the surface damage question because so many of the rights, such as those pertaining to transportation and storage facilities, construction of various structures, roads, etc., directly affect the surface owner. This effect was fully brought out in a Montana case.[19] The question involved in this action was whether the building of a reservoir on the surface was reasonably incident to oil and gas operations. The mineral estate had been severed from the surface estate; the United States was the owner of the mineral estate and granted a lease to the oil operator. The court disallowed the plaintiff's claim for recovery on the grounds that there was no proof that the reservoir was unnecessary and not reasonably incident to the oil and gas operations.

A more recent case involving surface damages where the minerals have been reserved by the United States is *Holbrook v. Continental Oil Company*[20] which was rendered by the Supreme Court of Wyoming. In this case, almost all of the points which have been raised in actions regarding surface damages were considered. The lessee had attained a valid federal oil and gas lease covering certain Wyoming ranch lands. At the time oil operations were commenced on the leased premises, the plaintiffs were surface lessees. During the period of oil and gas development the plaintiffs purchased the surface as an addition to their ranch. The following provisions were contained in the oil and gas leases pertaining to the lessee's rights,

> "right to drill for, mine, extract, remove and dispose of all the oil and gas deposits in or under the lands, together with the right to construct and maintain thereupon all works, buildings, plants, waterways, roads, telephone and telegraph lines, pipe lines, reservoir tanks, pumping stations or other structures necessary to the full enjoyment thereof."

In the conduct of operations, the defendant constructed houses for the use of its employees operating the lease, a battery, roads, certain other structures, and, of course, drilled for oil. Plaintiffs alleged that they were wrongly deprived of possession; that the

[17] 125 F2d 404 (1942).
[18] 163 F2d 633 (1947).
[19] Norum v. The Queen City Oil Company, 264 P 122 (1928).
[20] 278 P2d, 798 (1955).

houses constructed were not necessary for the conduct of operations and that therefore they became the property of plaintiff who was entitled to a sum equal to the rents which would have been paid by tenants for such houses; that the oil operations destroyed the plaintiff's integrated ranch unit; that defendants trod down the grass crops, left oil and debris on the property, polluted the water, destroyed the fences, left the gates open, built roads, culverts, fills and dams upon the premises, transported people and equipment across the lands; and further, that the defendant stored, processed and handled oil and gas produced on other lands upon plaintiff's lands; that the plaintiffs had been deprived of full use and enjoyment of their property and that defendant's operations had resulted in the death of some of the plaintiff's livestock, had destroyed plaintiff's water supply and forced plaintiff's to construct a reservoir because of this destruction of the water supply. For these damages, plaintiff sought a sum in excess of $35,000. All of the points involved were decided in favor of defendants and on appeal, the Supreme Court of Wyoming held:

1. The construction of the houses for defendant's employees who operated the lease on a 24-hour basis was reasonably incident to the oil operations, the facts showing that the nearest communities were Lance Creek, a distance of six to eight miles from the lease, and Lusk, a distance of forty-two miles from the lease;

2. That the processing of oil in the tank battery on the plaintiff's premises, which oil was produced from an adjoining lease, the surface of which was not owned by plaintiffs was not detrimental to plaintiffs in that another portion of the surface of the adjoining lease was owned by plaintiffs and defendants would have had a right to construct a tank battery thereon with the result that there could have possibly been two tank batteries consructed on the surface of plaintiff's lands rather than the one which had been constructed; and

3. That there was no negligence in the conduct of defendant's operations and that plaintiff's had not proved any damage to crops and improvements which in the absence of negligence would be their sole basis for recovery; the range grass not being a crop.

The last point as to whether native grass is a crop, which issue is of great importance to the Rocky Mountain region, the Supreme Courts of Wyoming, West Virginia, New Mexico, Texas, Alabama and Oregon have held that various types of native grasses are not a crop. The only authority which has been found contrary is *dictum* in the Utah case of *Francis v. Roberts,*[21] in which the court stated *"fructus industriales* and *fructus naturales* are comprehended within the term 'crops'." This case is, however, of little force in that native hay was involved rather than range grass and there was no dispute as to the fact that this hay was harvested each year whereas range grasses are not mowed and stacked.

Shortly after the decision in the *Holbrook* case *supra,* the Wyoming legislature in 1955 passed the following act:

> "For the purpose of interpreting the various laws of this state, the term 'crop' or 'agricultural crop', when not otherwise defined by Statute, shall be construed to mean corn, oats, wheat, barley, flax, sorghums and other grains, potatoes, vegetables, hay, wheat-grasses (agropyron species), needlegrasses (stipa species), bluegrasses (poa species), fescue grasses (festuca species), grama grasses (bouteloua species), sedges and rushes, shrubby or woody forage plants which include salt sages (atriplex species), sagebrushes (artemisia species), winterfat (eurotia lanata), and forage legumes which include astragalus, lupinus and other members of the family leguminosae."

The effect of this piece of legislation is that at the present time almost anything that grows in the state of Wyoming, including sagebrush, is defined as a crop. Despite the language of the statute, it is doubtful if it directly affects the *Holbrook* case in that the statute applies to the many phases of Wyoming law where the term "crop" is used without any definition thereof.

It would be a somewhat strained interpretation to apply a definition which was designed to clarify state statutes to the meaning of the word contained in a contract between two individual parties, especially in view of the fact that the word as contained in such contract has been defined by a decision of the Supreme Court of the state.

As to the third category of lease, namely the state lease, this article shall confine itself only to a form used by the state of Colorado.

With reference to surface damages Form 193 (Rev. 12/1954) Colorado Oil and Gas Lease, contains the following language:

> "Lessee shall be liable and agrees to pay for all damages to the surface of the land, livestock, growing crops, or improvements caused by lessee's operations on said lands. It is agreed and understood that no operations shall be commenced on the lands hereinabove described unless and until the lessee or his assignee shall have filed a good and sufficient bond with the lessor in an amount to be fixed by lessor, to secure the payment for such damage to the

[21] 272 P. 633 (1928).

surface of the land, livestock, growing crops or improvements as may be caused by lessee or his assignee's operations of said lands and also compliance with all the provisions, conditions, covenants and obligations of this lease and the statutes of the State of Colorado, and rules and regulations thereto appertaining. When requested by lessor, lessee shall bury pipe lines below plow depth."

This language goes beyond the language contained in the usual fee lease or in a federal oil and gas lease. The Colorado Supreme Court has not ruled upon a question of liability for damages under the provisions of the state lease form. However, the Supreme Court of New Mexico had occasion to interpret similar language contained in a New Mexico state lease form.[22] In the *Tidewater* case, Shipp had obtained a state oil and gas lease. The oil operator began the conduct of seismographing operations on the premises and the plaintiff obtained a restraining order prohibiting the conduct of such operations.

Despite the restraining order the defendant oil operator continued with the seismographing work. No damage was done to any crops or improvements. However, trucks did travel over the grazing surface of the land. The court allowed the plaintiff to recover for damage to the grazing surface and for loss of weight incurred by his cattle which was attributed to their being disturbed by the conduct of the oil lessee's operations.

In summary, the "so called" general rule may be said to be that the owner of the dominant mineral estate may use any means reasonably necessary or reasonably incident to obtain the benefits of his estate, and that in the absence of negligence, he will not be liable for any damage caused to the surface owner unless such damages are provided for in the lease contract. Therefore, an understanding and an agreement upon the terms of the lease contract are of vital importance. This, coupled with a genuine desire on the part of the parties involved to act in strict accordance with business ethics and to conduct their activities in a manner which will interfere with the activities of the owner of the other estate in the least possible way, will do more than any other measure to alleviate the problem of surface damages.

[22] Tidewater v. Shipp, 278 P2d, 571 (1955).