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Mineral Law-Surface Conflicts-Mineral Lessee Held Liable for Depreciated Value of Land Under "Growing Crops" Lease Provision-Fly ing Diamond Corp. v. Rust

Mineral Law—SURFACE CONFLICTS—MINERAL LESSEE HELD LIABLE FOR DEPRECIATED VALUE OF LAND UNDER "GROWING CROPS" LEASE PROVISION—*Flying Diamond Corp. v. Rust*, 551 P.2d 509 (Utah 1976).

Flying Diamond Corporation (Flying Diamond) held a lease for the oil and gas rights on the property of Anthon Rust.[1] Flying Diamond attempted to commence development of the minerals[2] on Rust's property by constructing an access road and an oil and gas well site. With the aid of the sheriff, Rust prohibited the operations and ordered Flying Diamond from the property.[3]

Thereafter Flying Diamond brought an action against Rust, seeking a preliminary injunction to restrain Rust from further interference with the mineral development, an order to show cause as to why a permanent injunction should not be issued, and damages.[4]

The temporary injunction was issued, whereupon Flying Diamond proceeded with the construction. Rust then brought a counterclaim for damages, alleging trespass, a taking by eminent domain,[5] and unreasonable and excessive use of the surface by Flying Diamond.[6] The trial court dismissed Flying Diamond's

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1. Rust's estate was actually held jointly with his wife. Both Flying Diamond and the Rusts obtained their severed interests from third parties. Brief of Appellant at 1-2, Flying Diamond Corp. v. Rust, 551 P.2d 509 (Utah 1976).

2. The word "minerals" in an instrument includes gas and oil. Patterson v. Wilcox, 11 Utah 2d 264, 265 n.2, 358 P.2d 88, 89 n.2 (1961); Western Dev. Co. v. Nell, 4 Utah 2d 112, 114-15, 288 P.2d 452, 453-54 (1955).

3. Trial Record at 14, 16.

4. Flying Diamond sought damages of $1000 for defendant's initial interference with operations and $2,500 per day for each day it was prohibited from entering the property. Plaintiff's Complaint.

5. Rust's third cause of action and prayer stated:

> In the event that the Court shall not award the defendants the foregoing relief, defendants pray that they be awarded reasonable compensation for the taking of their property under the Eminent Domain Statutes of the State of Utah in sum of $61,000.00, together with punitive damages in the sum of $30,000.00.

Defendant's Answer & Counterclaim. Rust's claim for compensation for the use of the surface by the mineral owner, alleged to be a taking under Utah's eminent domain statutes, may have contributed to the confusion concerning the rights of the parties. Utah is one of the few states to designate mining as a use for which property may be taken under eminent domain powers. *See* UTAH CODE ANN. § 78-34-1 (Supp. 1975); Ferguson, *Severed Surface and Mineral Estates—Right to Use, Damage or Destroy the Surface to Recover Minerals*, 19 ROCKY MTN. MIN. L. INST. 411, 431 (1974). The courts may have felt that the mineral owner should pay for any surface used as required in eminent domain. Eminent domain is, however, inapplicable when a party already has the right to use the surface.

6. Rust also claimed $30,000.00 in punitive damages, alleging that Flying Diamond

complaint, holding that the surface owner was entitled to two awards of damages. First, Rust was entitled to compensation based on a "growing crops" lease provision for the reasonable value of 5.88 acres of property taken in construction of the access road and well site.[7] Second, Rust was entitled to compensation for the depreciated value of 15 acres, the irrigation of which had been disrupted by the placement of Flying Diamond's access road.[8] The Utah Supreme Court affirmed the decision of the lower court.[9]

I. BACKGROUND

A. Dominance of the Mineral Estate

Mineral and surface estates may become separated[10] in various ways;[11] oil and gas rights, however, are usually severed from the fee by a lease between the mineral lessee and the holder of the fee estate. The lease form may vary considerably but usually

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acted maliciously and with a wanton disregard of his rights.

7. Memorandum Decision Civil No. 5035, District Court of Duchesne County, ¶ 4:

> Defendant is entitled to compensation for the reasonable value of the 5.88 acres of land taken for the well site and road, under paragraph 10 of the lease dated April 6, 1964. The Court believes that the lands taken had thereon growing crops at the time within the meaning of that term in the lease, and that the lessee agreed in the lease to pay the lessor damages thereto. The use of the land taken by plaintiff for the well site and the road is effectively and permanently denied to the surface owner for any use theretofore made of the land, and the Court holds that such damage is the fair market value of the land at the time it was taken which is determined to be the sum of $900.00 per acre, totaling $5,292.00.

8. The trial court stated:

> 1. The location of the road where it was located was not reasonably necessary, and unreasonably interferes with the surface owners' preexisting use of the surface making it virtually impossible for him to irrigate a portion of his land.
>
> 2. Such unreasonable interference depreciated the value of approximately 15 acres of defendants' surface rights in the amount of $750.00 per acre, totaling $11,250.00.

Memorandum Decision Civil No. 5035, District Court of Duchesne County, ¶¶ 1-2.

9. Flying Diamond Corp. v. Rust, 551 P.2d 509 (Utah 1976).

10. Ownership of the mineral rights separate from the fee estate is not a recent concept. *See* Ferguson, *supra* note 5. Under common law the "royal mines," those containing gold and silver, belonged exclusively to the crown despite the surface ownership resting in a subject. 1 C. LINDLEY, A TREATISE ON THE AMERICAN LAW RELATING TO MINES AND MINERAL LANDS § 3, at 7-9 (3d ed. 1914). As early as 1900 Utah recognized that the minerals could be held by someone other than the surface owner. Smith v. Jones, 21 Utah 270, 278, 60 P. 1104, 1106 (1900).

11. The mineral estate may be severed from the fee estate by a federal mineral reservation, a state mineral reservation, or a private mineral grant or reservation. *See* Fleck, *Severed Mineral Interests*, 51 N.D. L. REV. 369 (1974).

grants the lessee the right to explore and develop the oil and gas on the subject property for a specified time. If at the end of the specified time period either gas or oil is still being commercially produced, the lessee may continue operations until the minerals are exhausted. Of course, the lessor will continue to receive royalty payments for as long as the minerals are produced.[12]

The estates of the lessee and lessor under oil and gas leases have been consistently characterized respectively as the dominant and servient estates.[13] The lessee has an implied grant, absent an express provision for payment, to use so much of the leased premises as is reasonably necessary to effectuate the purposes of the lease without an obligation to pay for damages.[14] Because the oil and gas lease grants extensive rights to the lessee, it has even been regarded as a grant of the land itself.[15]

The dominance of the leasehold estate is based on the concept that "when a thing is granted, all the means to obtain it and all the fruits and effects of it are also granted."[16] Pursuant to these rights the lessee has been allowed to locate his wells where he desires,[17] to build roads to the drill site,[18] to construct and use storage and processing facilities for the oil and gas,[19] to dig ditches for the removal of wastes,[20] and to use fresh and salt water from the premises in secondary recovery operations,[21] all without legal liability for damages to the servient surface estate.[22]

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12. *See, e.g.*, 6 W. SUMMERS, THE LAW OF OIL AND GAS § 1160 (1967).

13. *See, e.g.*, Getty Oil Co. v. Jones, 470 S.W.2d 618, 621 (Tex. 1971); Flying Diamond Corp. v. Rust, 551 P.2d 509, 511 (Utah 1976); Davis, *Selected Problems Regarding Lessee's Rights and Obligations to the Surface Owner*, 18 ROCKY MTN. MIN. L. INST. 315, 316 (1963).

14. Diamond Shamrock Corp. v. Phillips, 256 Ark. 886, 511 S.W.2d 160 (1974); Dunn v. Southwest Ardmore Tulip Creek Sand Unit, 548 P.2d 685 (Okla. Ct. App. 1976); Sun Oil Co. v. Whitaker, 483 S.W.2d 808 (Tex. 1972); Texaco, Inc. v. Spires, 435 S.W.2d 550 (Tex. Ct. App. 1968).

15. Gray, *A New Appraisal of the Rights of Lessees Under Oil and Gas Leases to Use and Occupy the Surface*, 20 ROCKY MTN. MIN. L. INST. 227, 256-57 (1975).

16. 4 W. SUMMERS, THE LAW OF OIL AND GAS § 652 (1958).

17. Gulf Oil Corp. v. Marathon Oil Co., 137 Tex. 59, 82, 152 S.W.2d 711, 724 (1941); *see* Felmont Oil Corp. v. Pan Am. Petroleum Corp., 334 S.W.2d 449, 456 (Tex. Ct. App. 1960); Stephenson v. Glass, 276 S.W. 1110 (Tex. Ct. App. 1925); Grimes v. Goodman Drilling Co., 216 S.W. 202 (Tex. Ct. App. 1919) (finding the erection of an oil derrick on the same lot as a residential house, the placement of a slush pit next to the house, and the operation of the well so as to splash oil on one side of the house all to be reasonable).

18. *See* Gulf Oil Corp. v. Walton, 317 S.W.2d 260 (Tex. Ct. App. 1958); Adkins v. United Fuel Gas Co. 134 W. Va. 719, 61 S.E.2d 633 (1950).

19. *See* Holbrook v. Continental Oil Co., 73 Wyo. 321, 278 P.2d 798 (1955).

20. *See* Adkins v. United Fuel Gas Co., 134 W. Va. 719, 61 S.E.2d 633 (1950).

21. *See* Robinson v. Robbins Petroleum Corp., 501 S.W.2d 865 (Tex. 1973); Sun Oil Co. v. Whitaker, 483 S.W.2d 808 (Tex. 1972).

22. *See* Keeton & Jones, *Tort Liability and the Oil and Gas Industry*, 35 TEX. L. REV. 1, 3 (1956).

B. Restraints on the Mineral Estate

The mineral lessee's broad rights, however, are subject to the restraints of contract and tort liability.[23]

1. Liability in Tort

The courts have imposed a duty upon the mineral lessee to use only so much of the surface as is reasonably necessary, having due regard for the rights of the surface owner, to effectuate the purpose of the lease.[24] Damages for breach of this duty have been upheld on a variety of tort theories.[25] For example, damages have been awarded in nuisance where an oil and gas lessee failed to restore the surface of the land after abandoning a well site; such failure amounts to a taking of more surface than is reasonably necessary and therefore creates liability for the cost of clean up.[26] Negligence has been a basis for damages where the lessee conducted operations during a wet period, resulting in substantial injury to the surface.[27] Unreasonable location of a drill site has been recognized as a ground of recovery where the lessee constructed a well site upon the very location that the surface owner had selected for the building of his retirement home.[28] Courts have allowed recoveries under a broad range of findings that the surface use or injury was not reasonably necessary or that the mineral lessee did not exercise his rights with due regard to the surface owner's rights.[29]

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23. Scott, *Oil and Gas Lease Clauses Relating to Surface Damage and Use of the Surface,* 13 ROCKY MTN. MIN. L. INST. 317, 317 (1967).

24. Diamond Shamrock Corp. v. Phillips, 256 Ark. 886, 511 S.W.2d 160 (1974); Blue v. Charles F. Hayes & Assoc., 215 So. 2d 426 (Miss. 1968); Dunn v. Southwest Ardmore Tulip Creek Sand Unit, 548 P.2d 685 (Okla. Ct. App. 1976); Sun Oil Co. v. Whitaker, 483 S.W.2d 808 (Tex. 1972); Macha v. Crouch, 500 S.W.2d 902 (Tex. Ct. App. 1973); Comment, *Concurrent Right to Surface Use in Conjunction with Oil and Gas Development in Louisiana,* 33 LA. L. REV. 655, 656 (1973).

25. *See* Keeton & Jones, *supra* note 22.

26. *E.g.,* Tenneco Oil Co. v. Allen, 515 P.2d 1391 (Okla. 1973).

27. *E.g.,* Illinois Basin Oil Ass'n. v. Lynn, 425 S.W.2d 555 (Ky. 1968); *see* 4 W. SUMMERS, *supra* note 16, § 652.

28. Diamond Shamrock Corp. v. Phillips, 256 Ark. 886, 511 S.W.2d 160 (1974). *But see* Grimes v. Goodman Drilling Co., 216 S.W. 202 (Tex. Ct. App. 1919).

29. The courts have awarded damages to the surface owner upon a finding that the mineral developer made unreasonable use of the surface in connection with waterflooding; disposal of wastes; exploratory operations on adjacent tracts; seismographic tests; location, construction, and maintenance of well sites, slush pits, ditches, storage tanks, reservoirs, pickup stations, buildings, pipelines, and roads; and the use of the surface for shutdown and removal operations. *See* Annot., 53 A.L.R.3d 16 (1973). These recoveries, based on a finding of unreasonable use, are indistinguishable from awards made upon conventional negligence, nuisance, and trespass theories, since these conventional torts are in fact based upon findings of unreasonable use of the surface.

2. Liability in Contract

An oil and gas lease is a contract, and as such determines the respective rights of the parties.[30] The parties to the lease frequently include a clause requiring the lessee to pay for any damage caused to specific items such as land, livestock, growing crops, or improvements.[31] Liability under such a contract arises upon the terms of the contract and is not dependent upon any proof of tort.[32] The lessee agrees to pay the surface owner for injuries to his property "independent of breach of contract or liability for tort."[33] Therefore, if the item is identified in the lease, damages may be awarded. Problems of recovery under a lease clause do arise, however, in determining what items are included within the definition of a particular term.

The term "growing crops" in a mineral lease has frequently been the subject of litigation. It is generally agreed that growing crops includes wheat, corn, alfalfa, and other products of the soil that are raised and gathered annually.[34] The jurisdictions differ, however, when considering natural products of the soil such as range and native grasses. The Utah Supreme Court has held that natural products of the soil are growing crops within the provisions of an oil and gas lease;[35] other courts have concluded that natural products of the soil such as native grasses on uncultivated lands used for cattle grazing are not crops under a mineral lease.[36]

Courts have consistently held that the use of a growing crops clause in a mineral lease cannot justify an award of damages for injury to land as contrasted with injury to crops growing on the

30. Dilworth v. Fortier, 405 P.2d 38, 50 (Okla. 1964); *see* Fast v. Kahan, 206 Kan. 682, 481 P.2d 958 (1971).

31. For example: "Lessee shall be liable and agrees to pay for *all damages* to the *land, livestock, growing crops,* or *improvements caused by lessee's operations on said lands.*" Frankfort Oil Co. v. Abrams, 159 Colo. 535, 539, 413 P.2d 190, 192 (1966) (state granted lease).

32. *See, e.g.,* Humble Oil & Ref. Co. v. Grucholski, 376 S.W.2d 950 (Tex. Ct. App. 1964); Primier Petroleum Co. v. Box, 255 S.W.2d 298 (Tex. Ct. App. 1953), *aff'd per curiam,* 152 Tex. 321, 257 S.W.2d 105 (1953).

33. Meyer v. Cox, 252 S.W.2d 207, 208 (Tex. Ct. App. 1952). The statement by the court that liability arises independent of breach of contract is intended to be used in a very narrow sense. If the mineral owner refuses to pay for damages as required under the contract, the surface owner will sue on breach of contract. What is meant by liability independent of contract, however, is that liability for damages as provided for in the lease arises *before* any breach of contract occurs.

34. *See, e.g.,* Davis, *supra* note 13, at 340-43 (defining the term "crops").

35. Flying Diamond Corp. v. Rust, 551 P.2d 509 (Utah 1976); Francis v. Roberts, 73 Utah 98, 272 P. 633 (1928).

36. Wohlford v. American Gas Prod. Co., 218 F.2d 213 (5th Cir. 1955); Union Producing Co. v. Allen, 297 S.W.2d 867, 871 (Tex. Ct. App. 1957) (dictum).

land. In the recent decision of *Phillips Petroleum Co. v. Morris,*[37] the Texas court of appeals considered an oil and gas lease provision that required payment by the lessee for any injury to crops.[38] The lessee had used 4.23 acres of surface for the location of a well site and access road. After the lessee ceased operations, the surface owner attempted to produce crops on the abandoned surface. Because of the lessee's prior operations, however, the soil was unproductive and the crops failed. The surface owner brought an action against the lessee for damage to his crops, claiming that the lessee was contractually liable for the damage by reason of the lease provision under which the lessee agreed "to pay for the damage to crops."[39] Although the appellate court recognized that damage to the fertility of the soil resulted in injury to future crops,[40] it held that "lessee was not liable to lessors for the loss of anticipated future crops occasioned by damage to the soil" under the lease agreement and, therefore, the award for injury to the fertility of the soil was in error.[41] Other courts considering the question have similarly concluded that a damage-to-crops clause in a lease is not a basis for an award for injury to the land or future crops.[42]

One exception to the general rule discussed above arises when the damaged crops are trees. In these cases damages are determined by the use of the "depreciation in value" method. For example, in *Cities Service Gas Co. v. Christian,*[43] the court allowed damages equal to the decreased value of the land when the lessee's operations destroyed pecan trees growing on the land.[44]

37. 518 S.W.2d 444 (Tex. Ct. App. 1975).

38. The applicable lease contained the following clause: "The Lessee agrees to pay for damages to crops or improvements caused by operations of Lessee." *Id.* at 445.

39. *Id.* at 444.

40. The Texas court of appeals explained the relationship in these terms: "Texas courts have made a clear distinction between damage to crops and damage to the fertility of the soil, which in turn, results in a failure to produce or a reduction in production of future crops." *Id.* at 446.

41. *Id.*

42. *See* Rohner v. Austral Oil Exploration Co., 104 So. 2d 253 (La. Ct. App. 1958) (award for crop damage upheld but award for injury to land reversed); *cf.* Transcontinental Gas Pipe Line Corp. v. Hill, 57 So. 2d 162 (Miss. 1952) (pipeline easement clause allowing payment for damages to fences, improvements, growing crops, and timber did not include payment for destruction of top soil where it was necessary to remove or destroy the same in the proper laying of a pipeline); Lone Star Gas Co. v. Baccus, 11 S.W.2d 355 (Tex. Ct. App. 1928) (arbitration award based on pipeline easement contract providing payment for damage to crops or fences in error if award includes injury sustained to land).

43. 340 P.2d 929 (Okla. 1959).

44. "The rule for measuring damages arising from injury or loss of trees is the value of the premises upon which the trees grew immediately prior to the destruction and the value immediately thereafter." *Id.* at 937 (citations omitted).

The court made clear, however, that it applied this rule only to trees.[45] As to the other crops destroyed (grasses), the court allowed no recovery for future crops or for injury to productivity of the soil,[46] and approved the procedure employed by the trial court wherein the award was based on expert testimony as to the actual value of the crops as they stood.[47]

II. INSTANT CASE

The trial court in the instant case based the award for the 5.88 acres taken for the road and drill site upon the growing crops lease provision that provided that the lessee would "pay for damage directly and immediately caused by its operations to growing crops theretofore planted on said land."[48] The supreme court affirmed this award, but did not address the major issue raised by the appellant of whether the award was proper under the growing crops clause.[49] Instead, the supreme court erroneously perceived the trial court's award of the value of the 5.88 acres to be based on a finding that the use of the land by the mineral lessee was unreasonable[50] and upheld the award on that ground.

The supreme court also upheld the award for the diminished value of the 15 acres of irrigated land resulting from placement of the access road. Here, however, the court pointed to the growing crops clause of the lease as if it were the basis for the trial court's second award,[51] although the trial court had based its award for the 15 acres on a finding that the access road had been unreasonably placed.[52] The supreme court found that clover, al-

45. *Id.*

46. The Oklahoma Supreme Court affirmed a disallowance by the trial court of "[d]amages resulting from loss of future crops through land . . . being rendered nonproductive for a number of years . . . ." *Id.* at 933.

47. *Id.* at 936-38.

48. 551 P.2d at 511.

49. *See* Brief of Appellant at 12-20.

50. The trial court expressly stated:

> There is not sufficient evidence from which the court can find, with regard to the amount of land taken, that the 5.88 acres of surface "taken" for the well site and the road was in excess of that reasonably necessary, or that use of such amount by plaintiff is unreasonable to accomplish the purposes contemplated by the lease.

Findings of Fact and Conclusion of Law ¶ 7, at 3.

51. 551 P.2d at 511-12. The court referred to the growing crops provision as if Flying Diamond had contended it was incorrectly used in relation to the 15 acres. Flying Diamond's references were entirely made, however, in respect to the award for the 5.88 acres. *See* Brief of Appellant at 12-20.

52. *See* note 8 *supra.*

falfa, and natural grasses on defendant's land were crops within the meaning of the growing crops clause and that the trial court was justified in including the value of future crops in computing damages for the 15 acres injured by unreasonable placement of the roadway.[53]

III. Analysis

The instant case significantly extends the rights of surface owners; it appears to be the first instance allowing a surface owner to recover for the depreciated value of his land under a growing crops damage clause despite a finding that the mineral lessee's use was reasonable. This case note will first show that neither the trial court's award in respect to the 5.88 acres used as an access road and drill site nor the supreme court's affirmation in respect to the 15 acres of irrigated land were properly made under the growing crops damage clause of the lease. The case note will then examine the possibility that the awards could have been granted in tort.

A. Liability Under the Lease Provision for Damage to Growing Crops

If a court were to extend a growing crops lease provision to allow recovery for future crops, damages could be accurately measured by the decrease in present value of the land for agricultural production. The supreme court in the instant case evidently adopted this approach and allowed damages for future crops in the amount of the diminished present value of the land for agricultural purposes. This holding, however, is inconsistent with the treatment given this issue by other courts that have interpreted similar clauses. The uniform response of the courts is exemplified by *Phillips,* where the court disallowed an award for injury to the fertility of soil under a growing crops clause.

The *Phillips* holding is clearly preferable. The term "growing crops implies that it applies only to crops *growing* on the land at the time of injury. Most courts have interpreted this language literally and have concluded that the lessee under such a clause is liable only for actual damages to growing crops resulting from development operations and not for injury to the land.[54] This interpretation is strengthened by the fact that the lessor has the

53. 551 P.2d at 511-12.

54. *See* notes 34-47 and accompanying text *supra.*

option of requiring that the lessee be liable for damage to *land,* making an award for the decrease in value appropriate.[55] If the lessor fails to require a provision for payment for injury to land, the growing crops clause can hardly be stretched to achieve that result.

Moreover, the language of the lease in the instant case stated that the lessee would pay for damage to growing crops "*therefore* planted on said land."[56] The addition of the word *theretofore* demonstrates that the parties to the lease did not intend that the lessee be liable for crops that might later be grown on the land.

Although the respondent cited *Cities Service* in support of the trial court's award of the entire depreciated value of the 5.88 acres,[57] a close reading of that case indicates that the depreciation-in-value rule was applied only when the "crops" were *trees.*[58] As to the other growing crops such as grasses, the *Cities Service* court allowed damages only for the actual value of the crops as they stood. Since the respondent in the instant case did not claim damage to trees, the court could not have properly relied upon *Cities Service* to award an amount equal to the diminished value of the land.

Consequently, based upon the clear meaning of the growing crops clause and the weight of authority holding that such a clause requires payment for the value of the crop as injured but not for any injury to the future productivity of the land, neither the supreme court's award for the depreciated value of the 15 acres that resulted from location of the access road nor the trial court's award for the value of the 5.88 acres used as a well site and access road can be upheld under the growing crops provision of the lease.

The Utah Supreme Court should have applied a rule of measurement that would have reflected accurately the value of the injured crops growing on Rust's property and not the decreased value of the land for agricultural purposes. The clover, alfalfa, and natural grasses injured in the instant case were all perennials used for grazing.[59] For determination of damages to similar perennial crops, an estimate by an expert with special knowledge

55. *See* note 31 *supra* (clause including damage to land).
56. 551 P.2d at 511 (emphasis added).
57. Brief of Respondent at 19-20.
58. *See* notes 43-47 and accompanying text *supra.*
59. 551 P.2d at 511.

concerning the value of the crops for pasturage has been used.[60] The instant case should have been remanded for the taking of similar testimony of the value of the crops as they stood for grazing separate from the depreciated value of the land as used for future crop production.

B. Alternative Grounds for Recovery in Tort

Although the award for injury to the 15 acres could not have been properly justified under the lease provision, grounds for the award existed in tort. Since the trial court found the location of the access road to be unreasonable because it interfered with preexisting irrigation patterns, damages could appropriately have been awarded in tort for the actual amount that the land had depreciated in value.[61] In attempting to justify the award in contract through a tortured definition of growing crops, the Utah Supreme Court failed to distinguish the two forms of liability and unnecessarily broadened the scope of contract liability.

Although there was an alternative ground for the award for the depreciated value of the 15 acres, no basis existed for awarding damages for the entire value of the 5.88 acres taken as a well site and access road. Since the trial court expressly stated that it did not find the well site to be unreasonable in its location, use, or amount of surface taken,[62] there were no tort grounds upon which damages could have been based. Damages, if any, would have to be based upon the growing crops clause of the lease and, as discussed above,[63] the only damages allowable would be for the actual value of the crops then growing on the land. The trial court did find that the access road was unreasonably located, but not unreasonable as to the amount of land used.[64] Although an award might have been made for the difference in value between the land actually used for the access road and the land that should have been used, there was no legal basis for an award for the entire value of the land.

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60. *See, e.g.*, Cities Services Gas Co. v. Christian, 340 P.2d 929, 936 (Okla. 1959).

61. *See* Diamond Shamrock Corp. v. Phillips, 256 Ark. 886, 511 S.W.2d 160 (1974); Union Producing Co. v. Pittman, 245 Miss. 427, 436, 146 So. 2d 553, 556 (1962) (diminution in value of real property is proper measurement for wrongful injury). A finding of unreasonable use is sufficient grounds for an award in tort. The plaintiff is not limited to the conventional theories of negligence, nuisance, or trespass. *See* note 29 *supra*.

62. Note 8 *supra*.

63. *See* notes 37-42, 54-58 and accompanying text *supra*.

64. Notes 8 & 50 *supra*.

IV. Conclusion

The rules of law that govern the respective rights and duties of the owners of the surface and mineral estates reflect a carefully developed balance between two conflicting interests. The rules attempt to preserve the rights of the mineral owner to the use of so much of the surface land as is reasonably necessary to the development of his property. At the same time, however, the courts have allowed the parties to agree through contract on what actions will result in liability, and have also imposed liability when the mineral lessee has acted unreasonably.

Prior to this decision, a surface owner suing under a growing crops lease provision could recover only for the value of the crops which were destroyed. The instant case greatly expands the surface owner's rights to include recovery for the depreciation in value of the land resulting from the lessee's operations. This interpretation is unsupported by prior precedent, and contravenes the basic rules of construction. Moreover, it was probably unnecessary in this case since the court could have reached the same result—at least as to the 15 acres—if traditional tort theories had been correctly applied.