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Flying Diamond Corporation v. Anthon Rust : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE

STATE OF UTAH

FLYING DIAMOND CORPORATION, Plaintiff-Appellant, vs. ANTHON RUST, Defendant-Respondent.	)	Case No. 14338

BRIEF OF APPELLANT

An Appeal From the Judgment of the District Court
of the Fourth Judicial District, The Honorable
J. Robert Bullock, Judge.

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STATEMENT OF NATURE OF CASE

Respondent, owner of a surface estate, counterclaimed for damages when Appellant, holder of an oil and gas lease, brought this action for an order restraining and enjoining Respondent from interfering with Appellant's establishment of an oil and gas well drill site.

DISPOSITION IN THE LOWER COURT

The lower court restrained and enjoined Respondent from interfering with the establishment of the well site and then awarded judgment against Appellant in the amount of $16,542.00 and interest for the use of lands in connection with establishing the drill site.

RELIEF SOUGHT ON APPEAL

Appellant seeks to have this Court reverse the judgment for damages and remand the case to the district court for new findings and entry of a new judgment consistent with the requirements of the law and the terms of the Oil and Gas Lease involved.

STATEMENT OF FACTS

In 1961, Respondent, Anthon Rust and his wife, Ona Rust, purchased the land involved in this case from Gilbert and Ethel Beebe. The Rusts, however, did not purchase or acquire any min-

eral rights with the property. (TR. of Hearing, January, 28, 1974, Pages 83 & 84) The Beebes reserved from the sale to the Rusts all gas, oil, and other mineral rights, The conveyance to the Rusts was made by Warranty Deed and after the description of the property in the deed, the following language was inserted: "Reserving therefrom all gas, oil, and other mineral rights". (Exhibit 2) In 1964, Gilbert and Ethel Beebe granted to Shell Oil Company an oil and gas lease on the property. (Exhibit 3) Appellant, Flying Diamond Corporation, then acquired the interest of the lessee, Shell Oil Company, by a Farm-Out Agreement and proceeded to prepare to drill a gas well. (TR. of Hearing, January 28, 1974, P.15)

The Utah Oil and Gas Conservation Commission has promulgated a spacing order for the particular oil and gas field in which the land in question is located, requiring that an oil or gas well be drilled within a 660-foot radius of the center of the Northeast quarter of each section. (TR. 113) In the Summer of 1973, Plaintiff's engineer, Mr. Reese, and an independent land man hired by Plaintiff, Mr. Wheatley, went to look at possible locations for drilling a well. (TR. 38 & 113) The area within the permissible limitations of the spacing order was viewed and examined, and after walking the area

ınd taking into account the circumstances existing there, it ıas determined that the only feasible location for a well would ›e on Defendant's property where it was eventually placed. (TR. .13 & 116)

The decision to place the well there was based on the fact :hat the land at that location is higher in elevation than at ıny other location within the area allowable under the spacing or- ler. (TR. 40) To put the well to the South of the present site on Respondent's land) or to the West (on another landowner's ›roperty) would have cost up to an extra $40,000.00 (TR. 39 & .14) doubling the cost of setting up the location. The engineer n charge of establishing the location, Mr. Reese, testified hat the cost of establishing the location elsewhere within the rea allowed by the spacing order would have been very costly s fill would have to be obtained from some distance away due o the wet and swampy conditions. (TR. 116) No contradictory estimony was presented by Respondent.

The safety of the men working at the location was also ta- en into account by Mr. Reese who testified about the danger in- olved when heavy equipment is located on lands without a solid ooting. (TR. 114) Mr. Reese further testified that he con-

sidered the existing water flow patterns in determining the location of the well site and access road and placed them where there would be the least amount of interference with water flow. (TR. 114) The land where the well was placed is a high spot and was covered with sage brush and rocks. (TR. 40) The well was located on the only place within the area allowed by the spacing order which was not covered with grass and other feed for cattle which would have been destroyed by the establishment of the location. (TR. 40)

Once the well location was determined, alternative methods of access to the location were considered and discussed with the Respondent. The decision to locate the road where it was actually built was supported by the following reasons:

(a) The present route is the shortest distance from the well location to an adequate county road. (TR. 33 & 34)

(b) The construction of a road from the North to the well location would have required building a road through a swampy area, at great additional expense. (TR. 40, 49, 50, 51, 52, & 53)

(c) A road from the North would have interfered substan-

tially more with the natural flow of water than does the road placed at its present location. (TR. 114)

(d) To enter the property from the North or West would have required the Appellant to improve approximately one-quarter mile of county road, probably including the building of a bridge at a prohibitive cost. (TR. 114, 115 & 116)

(e) Discussions between Appellant and Respondent broke down to a point that conversations could not be carried on with Respondent to determine his preference among the feasible alternatives. (TR. of Hearing, January 28, 1974, P. 34 & 35)

After the well and access road locations were determined in October 1973, Mr. Wheatley went to talk with the Respondent to make arrangements for peaceable entry and to keep the Respondent informed as to Appellant's plans; (TR. 6) Mr. Wheatley returned to visit Respondent again at a later time. (TR. 7) In addition, Mr. Charles Rich, Appellant's agent, talked with the Respondent in early January of 1974 in an attempt to work out some arrangement satisfactory to the Respondent for entry upon the land. (TR. 15)

When it became clear that Respondent intended to refuse Appellant's crew a right to enter at any location, it was decided to go ahead without further attempts to secure Respondent's cooperation. On January 8, 1974, Appellant took equipment to the area to commence working on the site, but was prohibited by Respondent from entering upon the property. (TR. 16) On January 13, 1974, a crew of men returned to the area and started to construct a road into the property. (TR. 16) On January 13, 1974, a crew of men returned to the area and started to construct a road into the property. The Respondent arrived shortly thereafter with the Duchesne County Sheriff who required the Appellant to obtain a court order before entering upon the property. (TR. 16) A temporary order restraining the Respondent from interfering with Appellant's operations was promptly secured, and a preliminary injunction pending the outcome of the suit was entered at a hearing subsequent to that time. The road and the well location were then built by the Appellant in January of 1974.

In December 1974, eleven months after the well site was built, Respondent filed its counterclaim and raised its claim that the use made by Flying Diamond Corporation was "not reasonably necessary to any legitimate purposes of" Appellant.

BACKGROUND ON APPLICABLE LAW

AN OIL AND GAS LESSEE IS ENTITLED TO USE THE SURFACE OF THE PREMISES EMBRACED BY ITS OIL AND GAS LEASE WITHOUT LIABILITY FOR SURFACE DAMAGE CAUSED BY ITS OPERATIONS ON THE LEASEHOLD, SO LONG AS SUCH USE AND THE MANNER OF ITS EXERCISE ARE REASONABLY NECESSARY TO EFFECTUATE THE PURPOSES FOR WHICH THE LEASE WAS MADE.

Although no case has been found in which the Supreme Court of Utah has decided the question, the law in every jurisdiction where the question has arisen is that the holder of a valid oil and gas lease has the right to use so much of the surface of the property as may be reasonably necessary for its operations. Harris vs. Currie, 142 Tex. 93, 176 SW2d 302, 305 (1943); Luttrell vs. Parker Drilling Co., 341 P.2d 244 (Okla); Wilcox Oil Co. vs. Lawson, 301 P.2d 686 (Okla.); Cities Service Oil Co. vs Dacus, 325 P.2d 1035 (Okla.); Frankfort Oil Co. vs. Abrams, 413 P.2d 190, 159 (Colo. 535 (1966); Pitsenbarge vs. Northern Nat. Gas Co., 198 F. Supp. 665, 672 (Iowa 1961); Magnolia vs. Howard, 182 Okla. 101. 77 P.2d 18; and Marland Oil Co. vs. Hubbard, 168 Okla. 518, 34 P.2d 278. See 53 ALR 3d 16 for annotation citing cases from the following states applying that rule: California, Colorado, Wyoming, Kansas, Texas, Oklahoma, Kentucky, Ohio, Mississippi, Louisiana, Arkansas, Montana, New Mexico, Alabama, North

Dakota, West Virginia, Illinois, and Canada. No cases applying any other rule are cited.

The writers who have treated this subject concur unanimously in supporting Appellant's position on the law. See for example: 4 Summers Oil and Gas, Section 652, Permanent Edition, 1962; 1 Williams and Meyers, Oil and Gas Law, Section 218.7; 2 American Law of Property, Section 10.28; American Law of Mining, Volume I, Section 3.50; and 1 Rocky Mountain Mineral Law Institute, 85. L. Sellers, "How Dominant is the Dominant Estate, Or, Surface Damages Revisited", Thirteenth Annual Institute Southwest Legal Foundation, 377. T. J. McMahon, "Rights and Liabilities with Respect to Surface Usage by Mineral Lessee", Sixth Annual Institute Southwest Legal Foundation, 231.

A cause of action for damages by a surface owner against a mineral lessee must proceed either on a theory of tort and negligence or a theory of contract and breach of covenants. An oil and gas lessee may injure land, crops and improvements without responding in damages if no tort or contractual liability can be shown. 53 ALR 3d 16 at 33, and cases cited there. As stated at Page 31 of 53 ALR 3d:

> " . . . . in cases involving alleged damages on the surface of the leasehold, the legal principle employed by the courts as a starting point for a determination of the problem is that an oil and gas lease creates and vests in the lessee the dominant estate in the surface of the leasehold for the attainment of the legitimate purposes of the lease, the holder of the dominant estate being permitted to occupy such space and do such damage as is reasonably necessary to conduct the operations permitted by the lease, because the lessor, through the mineral lease, authorized by implication such conduct by the lessee, and no recovery is allowed for damage resulting from authorized conduct. Thus, it is often stated that an oil and gas lessee is entitled to use the surface of the premises embraced by his oil and gas lease without liability for surface damage caused by his operations on the leasehold, so long as such use and the manner of its exercise are reasonably necessary to effectuate the purposes for which the lease was made . . . . "

The burden is on the surface owner to show that the owner of the mineral interest was excessive in his use of the surface or that wanton and negligent destruction occurred. Cities Service Oil Co. vs. Dacus, 325 P.2d, 1035 (Okla.) 1958; Marland Oil vs. Hubbard, 168 Okla. 518, 34 P.2d 278 (1934); Norum vs. Queen City Oil Co., 81 Mont. 527, 264 P. 122 (1928); and 53 ALR 3d 16 at 49 and numerous cases therein cited. It is necessary to specify and prove specific acts of negligence in order for the surface owner to recover for damages caused by an oil and gas lessee's excessive surface use. Asbury Oil and Gas;

Rights of Surface and Mineral Owners, 7 Baylor L.Rev. 188, 191 (1958). See also 53 ALR 3d 16 at 35 and 36. To sustain a cause of action based on alleged negligence, the Plaintiff must prove not only negligence but also proximate cause. Hurley vs. Northern Pacific Railway Company, 455 P.2d 321 (Mont. 1969).

The surface owner is not entitled to compensation for the minerals taken or the use made of the surface. Kinney-Coastal Oil Co. vs. Kieffer, 277 U.S. 488 (1928); Holbrook vs. Continental Oil Co., 73 Wyo. 321, 278 P.2d 798 (1955). The severence of the mineral and surface interests places a servitude on the surface. This servitude or implied easement has the same effect as if the parcel of land were sold with an easement expressly reserved, and the effect is that the surface and mineral owners are co-tenants of the property. Since the mineral interest is the dominant interest, the owner thereof is entitled to possess so much of the surface as is necessary to explore for and extract the minerals. The surface is not taken in the sense spoken of in condemnation suits, instead the mineral owner uses his implied easement to occupy so much of the surface as is necessary for as long as there is exploration or production. When those activities cease, the mineral owner's rights cease and sur-

face owner regains the exclusive right to possession of the land. Harris vs. Currie, 142 Tex. 93, 176 SW2d 302, 305 (1943); Luttrell vs. Parker Drilling Co., 341 P.2d 244 (Okla.); Wilcox Oil Co. vs. Dacus, 301 P.2d 686 (Okla. 1956); Frankfort Oil Co. vs. Abrams, 413 P.2d 190, 159 Colo. 535 (1966); Pitsenbarge vs. Northern Nat. Gas Co., 198 F. Supp. 665, 672 (Iowa 1961); Magnolia vs. Howard, 182 Okla. 101, 77 P.2d 18; and Marland Oil Co. vs. Hubbard, 168 Okla. 518, 34 P.2d 278.

The fairness of the rule of law involved is readily apparent when it is understood that when mineral rights are reserved by the grantor, the grantee naturally does not obtain as valuable a right as when the minerals are conveyed with the property, and that less money is paid for land when the mineral rights have been reserved. Adkins vs. United States Fuel Gas Co., 134 W.Va. 719, 61 SE2d 633 (1950). The price is lower for two reasons. First, no income can be anticipated from the mineral extraction; and second, the surface owner knows that the use of the surface will be subject to the reasonable use of the mineral owner in his exploration, production and extraction of the minerals. To allow a surface owner to recover damages because the mineral lessee is using the land in such a way as to interfere with sur-

face owners operations would be giving him a more valuable estate than the one he originally contracted to buy.

ARGUMENT

I.

THE OIL AND GAS LEASE PROVISION THAT LESSEE SHALL "PAY FOR DAMAGE DIRECTLY AND IMMEDIATELY CAUSED BY ITS OPERATIONS TO GROWING CROPS THERETOFORE PLANTED ON SAID LAND" DOES NOT ENTITLE THE SURFACE OWNER TO BE COMPENSATED FOR THE USE OF THE LAND.

Paragraph No. 1 of the Oil and Gas Lease held by Respondent provides in pertinent part as follows:

> " . . . . Lessor . . . has this day granted, demised, leased, and let, and hereby grants, demises, leases, and lets exclusively unto Lessee for the purpose of investigating, exploring, and prospecting, by geophysical and other methods, and drilling, mining and operating for and producing oil, gas, casing-head gas, and casing-head gasoline, laying pipelines, building tanks, stations, power lines, telephone lines and other structures thereon to find, produce, save, store, treat, transport, and take care of all such substances, and for housing and boarding employees in its operations on said land or adjacent land . . . . "

There appears to be no question that the mineral lease involved authorizes the holder thereof to establish a well site and build an access road to it as was done by Appellant in this case. Any liability on the part of Appellant to compensate Respondent for having built the road and well site must be based, then, on

the premise that the owner of the minerals did not have the right to authorize the building of the well site and the road or from the fact that the lease requires it and because Respondent is a third party beneficiary under the lease. From the statement of the law, included in the preceding section of this brief, it is abundantly clear that the owner of the minerals has the right to use so much of the surface as is reasonably necessary to develop and produce the minerals so long as he exercises that right reasonably. The mineral owner could, therefore, by granting a lease such as that involved in this case authorize the lessee to do all things he himself could do. If the surface owner could show that the lessee used more land than reasonably necessary or was negligent or wanton and careless in its operations, the lessee would be liable to the surface owner for damages. Absent a showing of negligence the surface owner is entitled to be compensated only as provided by the terms of the lease agreement itself.

In the instant case, the District Court found that the 5.88 acres used by Flying Diamond Corporation for the well site and access road was necessary to accomplish the purposes contemplated by the lease. Notwithstanding that finding and the clear state

of the law that so long as the use made of the surface by the lessee of the mineral interest is reasonable there is no liability for damages, the court found that the Defendants were entitled to compensation for the reasonable value of the land. The court then found the fair market value of the land and awarded damages in that amount.

At times, a deed, patent, lease or other instrument will contain specific language to require payment of damages for such things as growing crops. These matters are the subject of negotiation between buyer and seller at the time the transaction takes place. Language representative of that used in patents and other conveyances is found in Paragraph No. 10 of the Oil and Gas Lease before the Court in this case, which provides that the lessee shall pay "for damage directly and immediately caused by its operations to growing crops theretofore planted on said land."

Because of the general use of the term "growing crops" in patents, leases and other instruments relevant in land and mineral law, this term has been reviewed by the courts and has a well established meaning. For example, Black's Law Dictionary, Deluxe Fourth Edition, defines crops as follows: "Such

products of the soil as are annually planted, severed and saved by manual labor, as cereals, vegetables . . . but not grass on lands used for pasturage." Cited in support of that definition are the following cases: Moore vs. Hope Natural Gas Co., 76 W. Va. 649, 86 S.E. 564, 567; Kennedy vs. Spalding, 143 Kan. 76, 53 P.2d 804, 806; Miethke vs. Pierce County, 173 Wash. 381, 23 P.2d 405; and Weddle vs. Parrish, 135 Ore. 345, 295 P. 454, 456.

A similar definition of growing crops is found throughout oil and gas case law. Crops are defined to mean all products of the soil that are grown, raised and gathered annually during a single season, which definition obviously excludes grasses growing on the land and utilized solely for the purpose of grazing livestock. See Holbrook vs. Continental Oil Co., 73 Wyo. 321, 278 P.2d 798, (1955); and Weddle vs. Parrish, 135 Ore. 34, 295 P. 454, 456. Other cases have included in special circumstances such plants as cultivated trees and grasses which are planted and seeded annually. Cities Service Gas Company vs. Christian, 340 P.2d 929 (Okla. 1959).

In its Memorandum Decision dated July 1, 1975 at Paragraph No. 3 thereof, the Court found:

"there is not sufficient evidence from which the Court

> can find that the 5.88 acres of surface 'taken' for the well site and the road was in excess of that reasonably necessary, or that its use by the Plaintiff is unreasonable to accomplish the purposes contemplated for the lease."

The Court then, in Paragraph No. 4 of the Memorandum Decision, stated:

> "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 No. 10 of the lease dated April 6, 1964."

The Court then referred to the requirement of Paragraph No. 10 that damages to growing crops be paid and stated that it found that the lands used for the road and drill site had thereon growing crops. The Court then held that because the use of the land under the drill site and road was denied to the surface owner that the measure of the value of the growing crops was the fair market value of the land.

The specific language of the lease reads: " . . . and shall pay for damage directly and immediately caused by its operations to growing crops theretofore planted on said land." (Emphasis added) The fact is that there were no growing crops on the properties involved when the well site and road were built. (TR. 16 & 17) The ground was covered with two feet of

snow. Any reasonable construction given the word "growing" rules out assessing damages for crops which might be planted in the future as the Court did here. Also, what do the words "theretofore planted" mean? They can reasonably be said to mean those crops planted prior to the point in time when the use was made of the surface by the oil and gas lessee. Furthermore, the only testimony concerning the planting of any plants was that Defendant had "throwed some grass seed on all my pastures". (TR. 84 & 85) Likewise, are we to ignore the words 'directly and immediately caused'? The trial court did. There is no testimony as to the value of any crops growing at the time of construction because there were no growing crops. It was winter. Furthermore, Mr. Gerber testified that he looked and was unable to find any stand of tame or seeded grasses on the lands, but found instead native or wild grasses interspersed with sagebrush. (TR. 140) Grasses and forage are not usually considered crops and then only when they are seeded or harvested annually. All testimony of damages presented by Respondent related to damages to land, not to growing crops, and Appellant has voiced its disapproval of this "eminent domain" approach to the case continuously since the pre-trial conference in this action when it saw

that the court might adopt such a concept. (TR. 30) To illustrate how far from "growing crops theretofore planted on said land" and "directly and immediately" damaged, the trial court went in its decision one need only consider that the rationale used by the court to require compensation here would equally apply if the land involved were non-agricultural, for example, a parking lot. Whether the owner of the surface estate is deprived of the use of land, the test used by the trial court is simply an impermissible judicial rewriting of the lease agreement. No justification of the use of that test can be found in the language of Paragraph No. 10 of the lease. The error which the court below fell into is caused by its failure to adhere to the language of the agreement or to distinguish between an eminent domain case where the test used might be permissible, and the case at hand where the mineral lessee is actually a co-owner of the property and owns a right to use so much of the surface as is necessary to develop his dominant estate. The lower court appears to have forgotten completely that it expressly based its decision that compensation was due for 5.88 acres on Paragraph No. 10 of the lease. It leaped to

the conclusion that damages assessed should be based on denial of use. The court even used the language of eminent domain and refers to lands as being "taken".

When by contract the parties have agreed that the surface owner will be paid damages for growing crops, the method of calculating damages is well established. The measure of damages for injury to growing crops is the potential value of the crop as it stood on the ground at the time and place of its destruction, the value at the time of the loss being determined by the probable yield of the crop when matured and its reasonable probable market value when matured, less the probable future production costs of cultivating, harvesting, transporting and marketing. Cities Service Gas Company vs. Christian, 340 P.2d 929 (Okla. 1959); 53 ALR 3rd 16 at 53. Furthermore, damages are awarded only for the crops on the land actually used by the lessee in its operations. See for example Frankfort Oil Co. vs. Abrams, 159 Colo. 535, 413 P.2d 190, (1966), where the trial court allowed damages for depreciation in the value of the Plaintiff's ranch as a unit, but the Supreme Court of Colorado reversed and held that damages were only applicable to the lands actu-

ally used by the lessee in the operations.

In the case of the language in the lease before the Court, the damages allowed are only those "directly and immediately caused to growing crops theretofore planted." Because of the eminent domain concept asserted by Respondent and the Court's adoption of those concepts, the only evidence before the Court was to do with land values. Not one sentence of testimony was presented by Respondent with respect to the value of crops growing on the land. Appellant respectfully submits that the judgment of the court below should be reversed and the case be remanded for entry of new findings, that no evidence was presented on the issue of damages to growing crops.

II.

A ROAD PERMITTING ACCESS TO THE DRILL SITE ESTABLISHED BY APPELLANT WAS REASONABLY NECESSARY AND APPELLANT ACTED REASONABLY IN LOCATING AND CONSTRUCTING THE ROAD IT BUILT.

In the absence of an express provision in the lease to the contrary, the location of wells, access roads and the necessary facilities is to be determined by the oil operator, not by the surface owner. Gulf Oil Corp. vs. Marathon Oil Co., 152 SW2d 711, 724; Stephenson vs. Glass, 276 SW 1110; Hoffman vs. Magnolia Petroleum Co., 260 SW 950; Felmont Oil

Corp. vs. Pan American Petroleum Corp., 334 SW2d 449, 456. The general rule on the question is stated in the following quotation from a California case:

> "If a particular facility is necessary and convenient to the operation of the oil and mineral owner, it may be placed anywhere upon the surface area in which he has the right of user, so long as such placement is reasonable under prevailing conditions and even though such placement in particular instances may work a hardship on the surface owner. Wall vs. Shell Oil Company, 209 Cal. App. 2d 504, 25 Cal.Rptr. 908, 911."

At Page 915, the California Court in Wall further stated:

> " . . . . No owner of a particular surface division could be heard to assert that the particular placement of a facility was unreasonable solely because it could have been placed elsewhere just conveniently."

The courts have specifically held that the issue is not a question of inconvenience to the surface owner, and to so instruct a jury is error. Getty Oil vs. Jones, 470 SW2d 618, 53 ALR 3d 1 at 14 (Tex. 1971). To hold otherwise would be to say that the mineral estate is not really the dominant estate. Notwithstanding the overwhelming case authority on this point, the trial court in this case in its Memorandum Decision dated July 1, 1975, which was incorporated into its Findings of Fact and Conclusions of Law at Paragraph No. 1 thereof stated in pertinent part:

"The location of the road where it was located was not reasonably necessary, and unreasonably interferes with the surface owner's pre-existing use of the surface . . . "

In order to prevail on the issue in this case under the correct interpretation of the rule of law, Respondent has the burden of showing that Appellant in the establishment of the well location and the road, and in operating its facilities, used an amount of property in excess of that reasonably necessary, or that it caused destruction by its wanton and negligent conduct. Cities Service Oil Co. vs. Dacus, 325 P.2d 1035 (Okla.) 1958. Marland Oil vs. Hubbard, 168 Okla. 518, 34 P.2d 278 (1934) Norum vs. Queen City Oil Co., 81 Mont, 527, 264 P. 122 (1928); and 53 ALR 3rd 16 at 49, and numerous cases therein cited. No evidence before the Court shows that Appellant used more land than necessary for the operations allowed by the lease. The trial court so found. There is no evidence that Appellant was negligent in selecting the location of the access road to the well site. The evidence is clear that Appellant made a careful and professional analysis of the alternatives available for the establishment of the well location and the road, and the record is void of testimony by any person who even studied the alterna-

tives other than Appellant's engineers and construction people who found the well and road location not only reasonable, but the most reasonable.

Appellant's case below was based on the contention that the drill site and road should have been placed off Respondent's property and on that of a neighbor's in the wet, swampy area to the south of the present location. This contention is made despite the obvious extra expense, risk to safety of men and equipment, and substantial disruption of water flows the other location would entail. The only reason given in support of this contention is that Respondent would have preferred it since he did not own the mineral rights. No evidence is before the Court that would indicate that the choices made by the Appellant were unreasonable under the circumstances. There is no evidence that a reasonable oil and gas operator would have done anything different than Appellant did. Decisions as to where to drill oil wells and build roads required to carry heavy equipment where heavy equipment and mens' lives are involved are made by highly trained engineers and not by farmers or lawyers. Gulf Oil Corp. vs. Marathon Oil Co., 152 SW2d 711, 724; Stephenson vs. Glass, 276 SW 1110; Hoffman vs. Magnolia Petroleum Co., 260

SW 950; Felmont Oil Corp. vs. Pan American Petroleum Corp., 334 SW2d 449, 456.

Respondent has not met his burden of showing that what was done by Plaintiff was unreasonable. It is not Appellant's burden to support the reasonableness of the location of the access road but that of Respondent to show it unreasonable. The evidence indicates that Appellant considered the alternatives and picked the only location feasible for both the well site and the access road, and further that every reasonable effort was made to get along with Respondent in arranging and establishing the location. Appellant has cooperated with fencing, attempted to help with irrigation problems, established cattle guards, and has otherwise conducted itself in a very reasonable and professional manner, doing many things which it was not obligated to do under the law.

The road built for access to the well site was calculated to interfere with water flow in the least possible manner reasonably consistent with the necessities of the project. (TR. 114) To have built the road from the north would have interfered with the southeasterly flow of water toward the entire eastern eighty acres of Respondent's property rather than just

the fifteen acres which the court below found affected. (TR. 47)

Although the trial court failed to state what reasonable alternatives to locating the access road it thought available, it is assumed that it concurred with Respondent's preference stated at trial that it be built from the north along the fence. (TR. of Hearing, January 28, 1974, P. 46; also, TR. 54 & 66) The court found that the location of the road disrupted the flow of water to the southern fifteen acres of Respondent's property. Both Appellant's witnesses (TR. 40, 67 & 114) and Respondent himself testified that the flow of the water north of the well site was southeasterly. To build the road where Respondent asked that it be built would have disrupted the flow of water to eighty acres, not just fifteen acres. (TR. of Hearing, January 28, 1974, P. 60) Appellant considered that fact in locating the road as well as the fact that the road would have to be built through a swamp, at great expense, (TR. 48, 49, 50, 51, 52, & 53) that a county road would have to be improved so as to handle the increased traffic and a bridge would probably have to be replaced at great expenses. (TR. 114, 115 & 116) There appears to be no dispute in the evidence that if Appellant had

built the road on the line from the north along the fence as desired by Respondent, Respondent would have been affected substantially more as concerns water flows than with the road at its present location.

Appellant considered all of these factors in its decision. Apparently the trial court disagreed with Appellant's conclusion as to where the road should be located. That, however, is not the test. The test is whether Appellant was negligent or wanton. Neither is the test that urged by Respondent in the lower court that the facilities be constructed so as to inflict the least possible damage upon the surface estate. To carry that position to its logical extreme could require use of a helicoptor or an elevated road built on stilts for access to the well location. Although the lower court did not expressly say it was using the test of "least possible damage" only by that test could the court reach the conclusion it did on the basis of the evidence before it. The Court did expressly refer to the test as the "possible alternative" rule. The correct test is whether Appellant acted reasonably as a reasonably prudent operator would act. There is a substantial difference between a test requiring Appellant to act reasonably and a test

requiring it to adopt a possible alternative inflicting the least possible damage upon the surface. Under the correct test and the evidence before the Court, there can be no question but that Appellant acted within its rights and that no damages may be assessed.

From the commencement of the discussions between the Appellant and the Respondent regarding the establishment of a well location, Respondent took the position that Appellant had, without authority to do so, attempted to commence a condemnation action, that a hearing of immediate occupancy was required, and that a bond must be obtained and a sum of money paid to Respondent before Appellant had any right to go on the lands. (TR. 29) See also Defendant's Memorandum of Authorities dated February 1, 1974, submitted to the Court arguing that the temporary order restraining Respondent from interfering with Appellant's operations should be immediately dissolved and that Appellant be required to bring an eminent domain proceeding or depart from the premises. (TR. of Hearing, January 28, 1974, P. 12) The Court at that time properly denied Respondent's request and continued the protective order against Respondent's erroneous and unbending position that Appellant had no right to go on the pro-

perty without first paying Respondent. Coupled with that position was Respondent's unreasonable view that the Appellant must compensate Respondent in amounts ranging between $60,000.00 and $90,000.00 for the 5.88 acres of sagebrush pasture used for the well location and the road crossing less than an acre of hay pasture. See Defendant's counterclaim praying for damages in the amount of $91,000.00. Faced with Respondent's unreasonable position and the fact that the Oil and Gas Lease imposed upon Appellant the obligation of drilling or forfeiting the lease, Respondent took the only course reasonable under the circumstances: first, Appellant attempted to discuss the matter with Respondent; second, it commenced work on the project; and, third, when required by Respondent, it obtained a protective court order. Under this set of conditions, Appellant had to judge for itself without any cooperation from Respondent such things as where to put culverts, cattleguards, roads and gates. The attitude of Respondent is one of the circumstances which the Court should consider in determining whether Appellant's acts were reasonable at the time.

Not until after the trial (See TR. 29) and in his Trial

Memorandum did Respondent concede that the Appellant might have some rights to go on the property without buying it as in an eminent domain proceeding, but he still persisted in quoting eminent domain statutes and discussing the case in terms of a "taking for public use" and performing in the manner causing "least possible injury" to the surface. (See Defendant's Memorandum dated May 1, 1975 at Page 8) Using the concepts and language of eminent domain law led the lower court here into error as it did the trial court in Getty Oil vs. Jones, 470 SW2d 618, 53 ALR 3d 1 at 14 (Tex. 1971), in which the court stated that it was reversible error to make inconvenience to the surface owner an issue, and in Frankfort Oil Co. vs. Abrams, 413 P.2d 190 (1966) 159 Colo. 535, where the trial court was reversed for awarding damages for depreciation of a ranch as a unit as is done in eminent domain cases. The trial court, however, was improperly influenced by these eminent domain concepts and included in its Memorandum Decision and Findings of Fact and Conclusions of Law such concepts as a "taking" and "depreciation of the value of nearby lands" and damages to growing crops in the amount of "the fair market value of the lands." The judgment of the trial court should be reversed and the case remanded for application

of correct principles.

III.

APPELLANT IS NOT LIABLE TO RESPONDENT FOR ANY DAMAGES CAUSED BY A BREACH OF ANY COVENANT, CONDITION OR OBLIGATION EXPRESS OR IMPLIED UNTIL SIXTY DAYS AFTER RESPONDENT HAS GIVEN WRITTEN NOTICE SETTING OUT SPECIFICALLY IN WHAT RESPECTS IT IS CLAIMED THE LEASE AGREEMENT HAS BEEN BREACHED.

Respondent has claimed damages alleging a breach of lessee's obligation to act reasonably in locating its facilities and operating them. Appellant submits that if Respondent is to claim the benefit of the provisions in the Oil and Gas Lease, he should be required to comply with the terms of the lease himself with regard to the required notice, thus affording Appellant an opportunity to remedy any such breach. Paragraph No. 13 of the lease provides in pertinent part as follows:

> " . . . . In the event lessor considers that lessee has not complied with all its covenants, conditions, or obligations hereunder, both express and implied, lessor shall notify lessee in writing setting out specifically in what respects it is claimed that lessee has breached his contract, and lessee shall not be liable to lessor for any damages caused by a breach of any such covenant, condition, or obligation, express or implied, accruing more than sixty days prior to the receipt by lessee of the aforesaid written notice of such breach."

Respondent has not given notice, written or oral, to Appellant specifying breach of covenant under the lease. To the contrary,

Respondent first disclaimed anything to do with any lease. The trial court imposed upon the Appellant the obligation to pay for damages to Respondent's lands finding Appellant acted unreasonably in locating the access road where it did, but the court failed to require Respondent to meet the condition precedent to such compensation by giving notice and sixty days within which to correct the situation. See Getty vs. Jones, 470 SW2d 618 (Tex.) where a similar provision was found in the lease involved and where the court ordered that time be given to correct any deficiency in the lessee's activities. Appellant should be given an opportunity for sixty days to remedy any problems which it may have caused by acts contrary to or unauthorized by the provisions of the lease which Respondent claims to be a third party beneficiary. Specifically, time to relocate the road or remedy the interference to the irrigation system if it is found to unreasonably interfere.

IV.

WHILE APPELLANT DOES NOT AGREE THAT GETTY OIL CO. VS. JONES GOVERNS OR SHOULD GOVERN THE DISPOSITION OF THIS CASE, THERE IS NO EVIDENCE BEFORE THE COURT TO SUPPORT THE AWARD OF DAMAGES FOR LOCATION OF THE ACCESS ROAD EVEN IF THE RULE OF THE GETTY CASE IS FOLLOWED.

The trial court in the instant case stated that it adopted

the general concept of the Getty case as to the relative rights of the surface and mineral owners.

In Getty Oil Co. vs. Jones, 470 SW2d 618, (Tex. 1971), Jones, the surface owner of a tract of land, sued for an injunction to restrain Getty Oil Company, an oil and gas lessee, from using vertical space for two beam-type pumping units, one 17-feet high, and the other 34-feet high. Because of their height, the pumps precluded the use of Jones automatic irrigation sprinkler system. Upon trial, the jury found that it was not reasonably necessary for Getty to install pumps that prevented the operation of the irrigation system. The trial court then granted Getty's motion for Judgment Non Obstante Veredicto on the ground there was no evidence that Getty used more lateral surface than reasonably necessary.

Upon appeal, the Supreme Court of Texas first held that the reasonably necessary limitation extends to the superadjacent airspace as well as to the lateral surface and subsurface of the land. Getty argued that the placement of the beam-type pumping units on the surface was authorized by the lease as a matter of law. The court then stated the issue to be decided as follows:

"The question to be resolved, then, is whether evidence may be entertained to show the effect of Getty's manner of surface use upon the use of the surface by Jones, together with the nature of alternatives available to Getty, in resolving the issue of reasonable necessity."

The majority of the court in the Getty case confirmed that it is:

"well settled that the oil and gas estate is the dominant estate in the sense that use of as much of the premises as is reasonably necessary to produce and remove the minerals is held to be impliedly authorized by the lease".

The court recognized that in some cases there may be only one manner of use of the surface whereby the minerals can be produced and that in such a case the lessee has the right to pursue this use, regardless of surface damage. The court went on to say that where there is an existing use by the surface owner which would be precluded, and where under the established practices in the industry there are alternatives available to the lessee whereby the minerals can be recovered, the rules of reasonable usage of the surface may require the adoption of an alternative by the lessee.

In Getty, the surface owner, Jones, presented testimony that a critical shortage of labor available to farms in the area

necessitated the use of automatic sprinkling equipment in irrigating the land. A petroleum engineer, a witness for Jones, testified as to the costs of the construction by Getty of cellars for the housing of the two pumping units and as to their feasibility. He also testified with regard to the installation of a different kind of pump which could have been used to avoid the interference with the use of the automatic sprinkler irrigation system. Another witness for Jones was a pumper for another oil company who was at the time operating two beam-type pumps in cellars and twenty-five beam-type pumps on the surface. He testified that less maintenance was necessary on the unit in the cellars than on the ones on the surface and that there was less leakage of hydrogen sulfide gas. Jones' evidence showed that there were available to Getty two types of pumping installations which were reasonable alternatives to its present use of the surface, neither of which precluded the use of the existing irrigation system, and that two other oil companies were currently employing those alternative methods under their leases on other portions of Jones' tract of land.

The court said in determining whether the use made of the surface by the mineral lessee is reasonable the trier of fact

could consider the use being made by the servient surface owner, as one of the factors in determining whether the use is reasonable.

On motion for rehearing the court stated:

> "If the manner of use selected by the dominant mineral lessee is the only reasonable, usual and customary method that is available for developing and producing minerals on this particular land then the owner of the servient estate must yield. However, if there are other usual, customary and reasonable methods practiced in the industry on similar lands put to similar uses which would not interfere with the existing uses being made by the servient surface owner, it could be unreasonable for the lessee to employ an interfering method or manner of use."

The trial court in Getty was reversed because the jury instruction called for a weighing of the evidence of harm or inconvenience to Jones against the considerations pertaining to Getty. The Court specifically held that the test is not one of inconvenience to the surface owner and to suggest so in a jury instruction is reversible error. The case was sent back to the trial court for re-trial with a proper jury instruction and with the instruction that in the event it was found that Getty was making an unreasonable use of the surface, Getty would have the right to install non-interfering pumps whereupon it would not be liable for permanent damages to the land.

The Getty decision has been a controversial one. Two judges vigorously dissented arguing that the majority had made the dominant estate servient and the servient estate dominant by not holding as a matter of law that the use of the beam-type pumping units were authorized by the lease. Motions for rehearing were filed twice and the court filed an opinion on one of them further elaborating and justifying the decision. No less than four separate opinions were written by the Supreme Court of Texas in deciding the case and handling the confusion and uproar following the decisi

Shortly after Getty the Texas Supreme Court decided the case of Sun Oil Co. v. Whitaker, 15, Tex. Sup. Ct. J. 394, 483, SW2d 808 (1972). The Sun case involved the use by the mineral lessee, Sun, of subterranean water in its waterflood operation. Sun argued that it had the right to free use of the water on two theories: (1) the implied right of mineral lessee to use such part of the surface as was necessary to effectuate the purposes of the lease, and (2) the express provision in the lease granting a free right to use of water. The Texas Court held that Getty did nc apply to this fact situation, but that it would only apply to a case where there was a reasonable alternative method available to

the lessee on the premises. The court went on to hold that it need not decide if the express contract provision applied because Sun had the implied right to free use of so much of the fresh water in question as may be reasonably necessary to produce the oil from its wells. This implied grant was implied by law in all conveyances of a mineral estate and could not be altered by evidence that the parties to a particular instrument of conveyance did not intend the legal consequences of the grant unless an express limitation on the grant was stated in the conveyance.

The court held that the use of fresh water was reasonably necessary to effectuate the purposes of the lease because Sun's attempts to use available salt water had failed, there was no other source of water on the premises, and to require Sun to buy water from other sources or owners of other tracts in the area would be in derogation of the dominant estate. Behind the decision in the Sun case is the reasoning that to require the holder of the dominant estate to look for help off his premises would demean the dominant estate; the tail would be wagging the dog. Under the facts it was determined better public policy to limit the alternatives the lessee would have to consider to those

available without going off the premises to secure resources which were available on the premises.

In its Memorandum Decision of July 1, 1975, the trial court in the instant case in Paragraph No. 3 thereof adopted an approch somewhat similar to that in the Sun case with regard to alternatives for locating the well site and said that the rule should apply only to alternatives on the premises. When it came, however, to the location of the access road it did not refer to this same limitation.

It should be remembered that the Getty case represents an extension in Texas of what has been the law in all states which have decided the issue. As the law stands in 17 of the 18 jurisdictions considering the issue, in order for a mineral lessee to be liable to a surface owner for surface damages, the surface owner has the burden of bringing an action in negligence, or in the alternative, charging that the lessee has used more space than is reasonably necessary to effectuate the terms of his lease. The Getty case added the concept that the pre-existing use of the surface, and reasonable alternative methods of use, were factors which could be considered in determining whether the lessee acted reasonably in determining how much surface to use. Getty

dealt entirely with the amount of surface used; i.e., vertical space and the question of whether the lessee used more space than reasonably necessary. Getty said nothing with regard to the action based on negligence, i.e., whether in exercising its right to use so much of the surface as is reasonably necessary, the mineral lessee acted reasonably. Where the question involves not the amount of surface, but how that space is used or where facilities are located, the test is still negligence even in Texas under Getty. To hold otherwise would be to say that the mineral estate is no longer dominant and put courts into the position of deciding how to operate oil wells.

Appellant submits that the Respondent cannot prevail in this action on its claim that it is entitled to damages because of the building of the access road, either under the law accepted in all states other than Texas, or under the Getty rule. The Respondent in this case has not presented the kind of case Jones did in the Getty case. The record is barren of any evidence presented by Respondent that any reasonable alternative existed to locating the access road other than where it was eventually located. The only evidence presented with regard to the reasonableness of the location of the access road in this case was pre-

sented by Appellant. In Getty, Jones showed that two reasonable alternatives were available to Getty at the time the pumps were installed. Jones showed that those alternatives were reasonable, usual, and customary in the industry, and that they were both actually being used by other companies on lands owned by Jones. Respondent in this case presented no such kind of evidence, no evidence concerning costs, interference with irrigation water were the road to be built from the north, safety, work to be required on the county road, and bridge or any other kind of factual analysis or expert testimony regarding the feasilbility of using another way of access to the well site. The sum total of the evidence presented by Respondent on this issue was that he did not want the road at all, but that if it had to come, he wanted it to come from the north along the fence through the swamp. (TR. 66 & TR. of Hearing, January 28, 1974).

On the other hand, Appellant's evidence is uncontradicted that an analysis of the conditions as they existed at the time was made by Appellant's engineers and construction people, that calculations were made and alternatives discussed (TR. 113, 114, 115 & 116) and that reasonable conclusions were

lrawn from that analysis which determined that the location of :he road at its present place interfered least with the flow)f waters on the tract, was least expensive, used the least a- ıount of Respondent's land, and in every other way was the most :easonable access to the location. (TR. 113 & 114) Unlike n Getty where the court specified what it found to be the rea- onable alternatives to the beam-type pumps the trial court here imply said:

> "The location of the road where it was located was not reasonably necessary and unreasonably interferes with the surface owner's pre-existing use of the surface".

ere the trial court could specify no alternatives to the location f the access road because none were presented by Respondent and ppellant's evidence showed that the only feasible location was ıere it was built. Appellant submits that the evidence does)t support a finding that Appellant had reasonable alternatives) building the access road as it did.

Furthermore, if we apply the limitation of the Sun case to ıe Getty rule of reasonable alternatives, those alternatives ıst be limited to those available on the premises. If the trial ıurt chooses to look at reasonable alternatives as in Getty, it ould limit those alternatives to those available on the premises

as stated in Sun. In this case under that rule Appellant should not be required to go great distances to haul in fill material to build a road from the north if fill is available on Respondent's property any more than Sun should be required to go off the premises and purchase water. If Appellant were to construct an access road from the north along the fence as requested by Respondent, would not Appellant have the use of fill material available on Respondent's property to do so? Certainly under the Sun case the answer would be yes. If not, the mineral estate is not really the dominant estate. To build the access road from the north and use the fill material available from Respondent's fields might be an alternative available although there is no evidence regarding that in the case. If that were to occur, Respondent's surface use would be more substantially interrupted than has occurred. The building of the road straight across the property from the county road to the well site without making cuts or daming off swales was the simplest, least expensive, least detrimental approach that could have been taken. No evidence before the Court indicates otherwise

V.

ALTHOUGH THE COURT STATED THAT IT ADOPTED THE GENERAL CONCEPT

OF THE LAW AS SET OUT IN THE CASE OF GETTY OIL CO. VS. JONES AS TO THE RELATIVE RIGHTS OF THE SURFACE AND MINERAL OWNERS, IT ERRONEOUSLY APPLIED A POSSIBLE ALTERNATIVE RULE INSTEAD OF THE RULE STATED BY THE COURT IN GETTY.

Appellant respectfully submits that one need only read the Memorandum Decision of July 1, 1975 which was incorporated into the Court's Finding of Fact and Conclusions of Law to see that the trial court really did not apply the Getty rule in this case. In Paragraph No. 3 thereof, the court mentions in three places what it calls the "possible alternative" rule. The Getty rule was not that of "possible alternatives", but that of "reasonable alternatives". Although it stated it would follow the Getty rule, the court really adopted what Respondent had urged below, the rule used in condemning in easement of necessity wherein the condemnor must take the alternative causing the least possible injury to the land owner. A review of the evidence before the Court inescapably shows that only under that misconception of the test to be applied could the Court have reached the conclusions it did.

CONCLUSION

Because of the error by the trial court in computing damages to growing crops on the basis of the fair market value of the lands involved and because of the lack of evidence to support

The trial court's finding that Appellant acted unreasonably in locating the access road to the well location, as well as the obvious use by the court of a "possible alternative" rule rather than a proper test of whether the use was reasonable under the circumstances in reviewing the location of the access road and for the further reason that the trial court failed to afford Appellant the benefit of a written notice and sixty days within which to correct any breach of covenant specified in the notice, as required by the lease, the trial court's judgment should be reversed and this case remanded for a decision in accordance with correct principles of law and the provisions of the Oil and Gas Lease involved.

Respectfully Submitted,

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