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# Flying Diamond Corporation v. Anthon Rust and Ona Rust : Amicus Brief

Utah Supreme Court

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IN THE SUPREME COURT OF THE  
STATE OF UTAH

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FLYING DIAMOND CORPORATION,  
Plaintiff-Appellant,

vs.

ANTHON RUST,  
Defendant-Respondent,

UTAH MINING ASSOCIATION,  
Amicus Curiae.

BRIGHAM YOUNG UNIVERSITY  
J. Reuben Clark Law School

Case No. 14338

BRIEF OF AMICUS CURIAE

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

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IN THE SUPREME COURT OF THE STATE OF UTAH

FLYING DIAMOND CORPORATION, )  
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Plaintiff and Appellant, )  
 )  
v. )  
 )  
ANTHON RUST, ) CASE NO. 14338  
 )  
Defendant and Respondent. )  
 )  
UTAH MINING ASSOCIATION, )  
 )  
Amicus Curiae. )

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BRIEF OF AMICI CURIAE

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STATEMENT OF THE NATURE OF THE CASE

This is a suit by an Oil and Gas Lessee against the owner of the surface estate seeking a permanent injunction prohibiting the owner of the surface estate from interfering with the establishment and operation of drilling operations on the property and, also, seeking damages resulting from interference already caused by the surface owner; the surface owner counterclaimed seeking compensation for the Lessee's use of the surface claiming it to be not reasonably necessary, a taking of property and destructive of the surface owner's use of the property.

### DISPOSITION IN LOWER COURT

After a trial of the matter the trial court dismissed the complaint and held that the surface owner was entitled to damages for the property "taken" by the lessee for the location of its well site and access road, for damage to crops growing on the property, and for damage caused to the surface by the unreasonable location of the lessee's access road.

### RELIEF SOUGHT ON APPEAL

It is the position of the Utah Mining Association that the trial court did not apply the correct rule of law to the facts presented on the record and that the Utah Supreme Court should adopt the rule set forth herein and remand the case to the trial court for reconsideration in light of the proper rule, or in the alternative that the Court apply the rule set forth herein and enter a judgment in accordance therewith.

### STATEMENT OF FACTS

The Utah Mining Association is a non-profit trade association whose membership is composed of companies and individuals that produce most of the metals, coal and industrial and agricultural minerals mined in the state and includes manufacturer's and suppliers in Utah who provide goods and services to the mineral industry. Because of the obvious interest that the Association has in maintaining a favorable atmosphere for the mineral interests and industries in the State of Utah and because of the Association's interest in establishing legal precedents in the mining and mineral law of the State of Utah which are clear, unambiguous and in conformity with principles of mining and mineral law

generally accepted in the United States, the Association has sought permission to file this Amicus Brief. It is the belief of the Utah Mining Association that the Findings of Facts and Conclusions of Law and the Memorandum Decision of the trial court are both ambiguous and out of step with generally recognized principles of mining and mineral law.

In its Findings of Facts the trial court found that the defendant-respondent had acquired surface rights in the subject parcel of land by a deed which specifically reserved to the grantors "all gas, oil and other mineral rights." [Exhibit 2]. The trial court further found that the plaintiff-appellant was the successor in interest to the mineral rights reserved by defendant-respondent's grantors pursuant to the terms of an oil and gas lease. [Exhibit 3]. As the holder of the mineral rights the plaintiff-appellant sought to commence drilling operations on the 40 acre tract of which defendant-respondent was the surface owner. On January 13, 1974, the plaintiff-appellant entered the property and commenced the preparation of the drill site. Defendant-respondent and the Sheriff of Duchesne County refused to allow the preparation to continue and ordered plaintiff-appellant from the property. [T.14, 16]. On February 6, 1974, a preliminary injunction restraining defendant-respondent from further interference with plaintiff-appellant's establishment of an oil and gas well drill site and access road on the property issued. [R. 46,17]. Pursuant to the injunction plaintiff-appellant put in the access road and drill site as shown on the plat map. [Exhibit 4].

## ARGUMENT

### POINT I

THE TRIAL COURT SHOULD HAVE APPLIED THE GENERALLY RECOGNIZED RULE THAT THE MINERAL ESTATE IS DOMINANT OVER THE SURFACE ESTATE AND CARRIES WITH IT THE RIGHT TO USE AS MUCH OF THE SURFACE AS IS REASONABLY NECESSARY FOR THE ENJOYMENT OF THE MINERAL INTEREST

The generally recognized and accepted rule setting forth the respective rights of the owners of the mineral estate and the surface estate has been stated as follows:

"An oil and gas lease carries with it the right to possession of the surface to the extent reasonably necessary to enable the lessee to perform the obligations imposed upon him by the lease. 'This rule is based upon the principle that when a thing is granted all the means to obtain it and all the fruits and effects of it are also granted.' Accordingly, the right to such use of the surface is implied if it is not granted, whether the form of conveyance is a mineral deed or a lease." 4 Summers, OIL AND GAS, § 652 at 2-5 (1962).

The rule has been similarly recognized and explained in the following:

"The permissible interests that may be created in oil and gas are best identified and understood by beginning with fee simple absolute ownership of land. A, the owner in fee absolute of Blackacre, has the same rights, privileges, powers and immunities with regard to the minerals therein as he has in the surface, subject of course to regulation under the police power of the state. This totality of interest may be granted or reserved separate and apart from the surface, and such severance of minerals from surface interest creates what is called here a mineral estate, being the most complete ownership of oil and gas recognized in law. The owner of the mineral estate (B) has the same rights, privileges, powers, and immunities as A had before him: with respect to the minerals, B stands in in the shoes of A. 1 Williams and Meyers, OIL AND GAS LAW, § 301 at 431-32 (1975).

In this case, the owner of the property (mineral and surface) conveyed the surface to defendant-respondent and retained the mineral estate to himself. In retaining to himself the mineral estate the defendant-respondent's grantor certainly could not have intended to place the mineral estate beyond his own reach. The retention of the mineral estate implies a retention of the right to use so much of the surface as is reasonably necessary to the development and enjoyment of the estate retained. As the successor in interest to the rights retained by defendant-respondent's grantor, the plaintiff-appellant stands in the shoes of the grantor and may properly exercise every right retained by the grantor. The plaintiff-respondent, therefore, possesses the right to enter upon and use so much of the surface as is reasonably necessary to the development and enjoyment of the mineral estate. The surface owner suffers no injury in this as he bargained for, paid for and obtained the surface rights subject to the retained mineral estate. This is evidenced in his deed and in interfering with the plaintiff-respondent's development and enjoyment of the mineral estate the defendant-respondent is exercising right and authority over the mineral estate which he does not and never has possessed.

The above cited authorities and argument do not rest upon scholarly jurisprudence alone but rather have developed from a long line of cases beginning in the common law of England and carrying forward to the present. This Court has not had occasion to rule on this matter previously, but it is worthwhile to note

that under the common law of England the mineral estate was recognized as the dominant estate and the owner of the mineral estate had the right to use the surface to extract the minerals. Ferguson, SEVERED SURFACE AND MINERAL ESTATE - RIGHT TO USE, DAMAGE OR DESTROY THE SURFACE TO RECOVER MINERALS, 19 Rocky Mt. Mineral Law Inst., 411 at 412-414 (1974). The Utah Legislature has adopted the common law insofar as it has been generally recognized and enforced in this country and is suitable to conditions within the state.

"The common law of England so far as it is not repugnant to, or in conflict with, the Constitution or laws of the United States, or the Constitution or laws of this state, and so far only as it is consistent with and adopted to the natural and physical conditions of this state and the necessities of the people hereof, is hereby adopted, and shall be the rule of decision in all courts of this state."  
Utah Code Ann., §68-3-1 (1968).

Of course, it is not urged that the dominant estate theory known to English common law is in effect in this state as it then existed; however, it is a starting place for the development of the rule as it should be applied in Utah. Most states have modified the common law rule by placing the limitation upon the dominant mineral estate that its dominance extend only to such use of the surface as is "reasonably necessary" for the mineral development. A review of relevant law on this subject reveals that most states have adopted a theory that the mineral estate is dominant with the "reasonable necessity" limitation.

In Gulf Oil Corp. v. Deese, 153 So. 2d. 614 (Ala. 1963), the Alabama Court refused to uphold a jury verdict granting the

surface owner compensation for damage caused by the mineral owner's operation of an oil and gas well on adjacent property. The mineral owner had leveled and graded the well site, had cut trees and removed fences, part of which were on plaintiff's property. The mineral owner owned the oil and gas under several lots. Under a pool agreement, the well was located on a lot adjacent to and overlapping upon the plaintiff's surface interest. The Court questioned why the surface owner should have to suffer harm when he did not share in the ownership of oil under his land.

"If he does not own any interest in the oil, and hence receives no benefit from its production, then why should his surface interest be burdened by action taken in recovering the oil? The obvious answer is that he acquired the surface subject to the right of the owner of the oil thereunder to use the surface in such manner as is reasonably necessary to recover the oil." 153 So.2d at 618-19.

The Court concluded that since the owner of the oil had a right to enter the plaintiff's surface estate there had been no trespass and no damage.

In Arkansas Louisiana Gas Co. v. Wood, 403 SW2d 54 (Ark.1966), the owner of the mineral interest used the water from the surface owner's stock pond and left it dry. The Court held that the use of the surface by the mineral owner was in excess of that which was reasonably necessary and sustained an award of damages to the surface owner. The Court stated:

"It is true that an oil and gas lease gives with it the right to possession of the surface to the extent reasonably necessary to enable a lessee to perform the obligations imposed upon him by the lease. This includes the right to enter upon the premises and use

so much of it, and in such manner, as may be reasonably necessary to carry out the terms of the lease and effectuate its purpose." 403 SW2d at 55.

The Court concluded that the unreasonable use by the lessee in the case was shown by substantial evidence.

In MacDonnell v. Capital Co., 130 F.2d 311 (9th Cir. 1942), the Circuit Court applied California law in holding that an oil and gas lessee did not commit a trespass by entering upon the surface estate to commence drilling operations and that the surface owner had no right to recover damages for the destruction of the surface so long as the lessee followed the usual or customary methods of mining. The Court held:

"We are satisfied that the reservation of the mineral rights in the deed . . . gave it the right to enter the premises and to remove the minerals in a manner consistent with proper oil field practice." 130 F.2d at 320.

In Charles F. Haynes & Assoc., Inc. v. Blue, 233 So.2d 127 (Miss.1970), the Mississippi Court held that the surface owner was not entitled to recover damages caused to the surface when the wall of a slush pit broke causing spillage. The Court noted that the surface owner might have recovered had negligence been shown but that there was no evidence of negligence.

"We have also pointed out that the oil company, lessee, had a right to go upon the land for all reasonable purposes to explore and drill for oil and gas. . . and may use as much of the surface as is reasonably necessary to exercise its rights. . . but it cannot intentionally or negligently damage or use more of the land surface than is reasonably necessary for its mining operation." 233 So.2d at 128.

In Sun Oil Co. v. Whitaker, 483 SW2d 808 (Tex. 1972), the owner of the mineral estate was using water from its own wells drilled upon the property to inject into its oil wells to increase the pressure. The surface owner argued that Sun Oil had no right to use the water and that it greatly decreased the value of the surface estate. The Court held:

"The oil and gas lessee's estate is the dominant estate and the lessee has an implied grant, absent an express provision for payment, of free use of such part and so much of the premises as is reasonably necessary to effectuate the purposes of the lease, having due regard for the rights of the owner of the surface estate. [citations omitted] The rights implied from the grant are implied by law in all conveyances of the mineral estate and, absent an express limitation thereon, are not to be altered by evidence that the parties to a particular instrument of conveyance did not intend the legal consequences of the grant.

The implied grant of reasonable use extends to and includes the right to use water from the leased premises in such amount as may be reasonably necessary to carry out the lessee's operations under the lease. 483 SW2d at 810-11.

Finally, in Adkins v. United Fuel Gas Co., 61 SE2d 633 (W.Va. 1950), in a case dealing directly with the right of a mineral owner to place an access road on the surface, the West Virginia Court held that even though the establishment of such a road was damaging to the surface it was "damnum absque injuria" since the mineral owner had the right to use so much of the surface as was reasonably necessary.

"The defendant had the right to build a road if the same was reasonable and necessary for the production and transportation of gas. . . . [citation omitted] The owner of the minerals underlying land possesses, as

incident to this ownership, the right to use the surface in such manner and with such means as would be fairly necessary for the enjoyment of the mineral estate.'" 61 SE2d at 635.

The above cited cases are cited by way of illustration and are by no means all inclusive. A number of other states have recognized the general rule urged above. See, e.g., Illinois Basin Oil Association v. Lynn, 425 S.W.2d 555 (Ky. App. Ct. 1968); East v. Pan American Petroleum Corp., 168 So.2d 426 (La. App. Ct. 1964); McLeod v. Cities Service Gas Co., 131 F.Supp. 449 (D.C.D. Kan. 1955); Hurley v. Northern Pacific Ry. Co., 455 P.2d 321 (Mont. 1969); Feland v. Placid Oil Co., 171 N.W.2d 829 (N.D.1969); Flowler v. Delaplain, 87 N.E. 260 (Ohio 1909); and Davon Drilling Company v. Ginder, 467 P.2d 470 (Okla. 1970).

The above cited cases cut two ways. In some, the surface owner has been compensated for an unreasonable use of the surface by the mineral owner, while in others the surface use has been found reasonable and no compensation has been allowed. The important point in the above cited cases and authorities is that they apply a uniform principle of law.

It is, therefore, urged that this Court adopt a principle of law to govern this case and to establish a precedent in Utah which is in conformity with the authorities cited above. Such a principle should provide for the following considerations: (1) That the mineral estate is dominant over the surface estate; because without such dominance the mineral estate would become valueless to its owner; because the surface owner has notice of

the mineral interest as contained in the grant or reservation creating it and his bargain takes into consideration such outstanding interests; and because when a mineral interest is granted or retained it can only be implied that the grantor or retainer intended to also grant or retain the means reasonably necessary to obtain what he has granted or retained; (2) That the dominance of the mineral estate should not be absolute, else the surface owner could be unjustly and unnecessarily deprived of valuable property and valuable resources could be needlessly wasted; (3) That the proper limitation to place upon the dominant mineral estate is that the mineral estate may only enter upon, use, destroy, or damage the surface to an extent reasonably necessary to discover and recover the minerals; and (4) That the dominance of the mineral estate can be limited, controlled, or given up by specific agreement of the parties in the deed or lease granting or retaining the estate.

The adoption of the above outlined principles by this Court would promote the orderly development of the mineral industry in Utah while at the same time protecting the reasonable interest of the surface owners. It maintains a balance in the proper use of all resources and provides an incentive for mineral owners and surface owners to act reasonably and with necessary constraint.

#### POINT II

THE OPINION OF THE TRIAL COURT IS AMBIGUOUS AS TO WHAT RULE OF LAW WAS APPLIED BUT DOES NOT APPEAR TO HAVE APPLIED THE RULE SET FORTH IN POINT I ABOVE OR TO HAVE PROPERLY OR CONSISTENTLY APPLIED ANY RECOGNIZED RULE.

The counterclaim of the defendant-respondent sought damages based upon four separate theories: (1) That the plaintiff-appellant as the mineral owner had no right to enter upon or commence drilling operations using the surface; (2) That the plaintiff-appellant's use of the surface constituted a taking by eminent domain; (3) That the plaintiff-appellant's use of the surface was not reasonably necessary; and (4) That under the terms of the oil and gas lease plaintiff-appellant was required to compensate defendant-respondent for the loss of "growing crops theretofore planted on said land."

As to (1) above, the trial court apparently found initially that the mineral owner did have the right to enter upon the land and commence drilling operations. A preliminary injunction was issued by the trial court on February 6, 1974, which enjoined the surface owner from interfering with the mineral owner's establishment of drilling operations [R. at 46.] The basis for the injunction is not set forth but rather it provides that it is issued upon the same terms as the restraining order previously entered [R. at 17.] The restraining order stated that it appeared from the facts set forth in the Complaint that the order should issue. In its final order, the trial court dismissed the Complaint in its entirety [R. at 72.] No mention is made as to the status of the preliminary injunction issued on February 6, 1974, so it must be presumed that it lapsed.

The issue is, therefore, presented whether or not the trial court found that plaintiff-appellant had the right to enter upon and use the surface. Initially, the Court held that plaintiff-appellant had the right, for the injunction issued, and the Court allowed plaintiff-appellant to enter and establish a well. The injunction itself was defective. Rule 65A(d) of the Utah Rules of Civil Procedure requires that:

"Every order granting an injunction and every restraining order shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document the act or acts sought to be restrained. . . ."  
[emphasis supplied].

Of course, it can be assumed that the injunction issued for the correct reason - that the mineral owner possesses the dominant estate and has the right to enter and use the surface as is necessary to develop the minerals. If this is the case, then it is very difficult to reconcile with the rest of the decision, and the Court should either remand the case to the trial judge for clarification or clarify the matter in its final decision in this matter. On the other hand, it appears that the trial court's dismissal of the Complaint ended the injunction and failed to recognize the rights of the dominant estate. This would clearly be error under the authorities cited above and the rule recommended to the Court herein. Also, if this is the result, the trial court failed to state what rule it was adopting and its reasons for doing so.

The second contention of the defendant-respondent was that the plaintiff-appellant's use of the surface in developing the minerals was a taking by eminent domain. This is a novel approach to the problem. Once again, it must turn upon whether the owner of the mineral estate is the owner of a dominant estate. If the mineral owner is the dominant owner, then he enters the property by right so long as he does nothing which is unreasonable, or unnecessary. If the mineral owner enters by right, then he takes nothing from the surface owner, and the surface owner is not entitled to compensation.

The trial court's opinion is extremely vague as to how it dealt with defendant-respondent's "taking" argument. The trial court's Memorandum Decision repeatedly uses the term "taken" and granted the defendant-respondent the fair market value of the land "taken" in damages. In its motion objecting to the appearance of the Utah Mining Association as Amicus Curiae, the defendant-respondent takes the position that the trial court did not hold:

"That the holder of a mineral interest is required to compensate the holder of the surface rights in order to secure access to the mineral interest for purposes of exploration and extraction. To the contrary, the trial court held only that, pursuant to the terms of the mineral lease involved in this case, the owner of the surface rights was entitled to compensation for destruction of growing crops as was provided in the lease."

If the argument of the defendant-respondent is correct, then the question should be answered as to why the trial judge continually refers to the property as being "taken" in his Findings and

Decision, and why he awarded as damages the fair market value of the property "taken." The value of the crops growing thereon could not be the same as the fair market value of the land itself.

Under the authorities cited in Point I above, it was clearly error for the trial court to allow compensation for the "taking" of property when plaintiff-appellant had the right to reasonably use the surface in locating its well on the property. Damages can only be awarded where it is established that the mineral owner has used surface not reasonably necessary for the drilling operation. In this case, the trial court specifically found that the amount of surface used was reasonably necessary for the mineral owner's operations. [R. 64] If this is the case, then nothing was taken from the surface owner. He never possessed the right to exclude the mineral owner, and his use of the surface was subject to the dominant estate from the day he received his interest.

Some of the confusion in this case may have resulted from the fact that Utah is one of four western states that has adopted a statutory right of condemnation for mining and oil and gas operations. Under the provisions of Utah Code Ann., §78-34-1 (Supp. 1975), property may be condemned for, inter alia, roads and pipelines, for mining and oil and gas operations. The Utah statute recognizes that mining is a "public use." The statute, however, applies where the mining interest does not already possess the right to the use of the surface. One need not take

by eminent domain what one already possesses. The purpose of the Utah statute has been explained as follows:

"A frustrating problem that seems to arise most frequently in western states occurs when the leased premises are isolated . . . and access thereto cannot be gained except by crossing the lands of a third person. Perhaps unfortunately, one generally does not have a way of necessity over lands of a stranger even though his lands are completely surrounded by private lands, where there is no privity of ownership. In a number of western states, [Colorado, Utah, Montana and New Mexico] statutes have been enacted authorizing acquisition of easements by necessity for mining purposes." Gray, A NEW APPRAISAL OF THE RIGHTS OF LESSEES UNDER OIL AND GAS LEASES TO USE AND OCCUPY THE SURFACE, 20 Rocky Mt. Mineral Law Inst., 227 at 241 (1975). [information added]

The Utah statute was enacted precisely to take care of the problem described above. It was certainly not enacted to alter the status of the mineral estate owner or his rights to enter upon and use the surface appurtenant to his estate.

The third contention raised by the defendant-respondent was that the plaintiff-appellant's use of the surface was not reasonably necessary. The trial court specifically held that the space used by the plaintiff-appellant was reasonably necessary to the establishment of the well. This holding simply does not square with the award of damages for the space taken. If the surface use was reasonably necessary, the mineral owner had a right to its use, and there simply was no basis for paying the surface owner for the use of the space.

The trial court did hold that the location of the road was not reasonably necessary and awarded damages to the defendant-

respondent for the injury caused to his land by altering his irrigation system. If indeed the location of the road was not reasonably necessary, this award would seem to be justified in keeping with the rule set forth in POINT I of this Brief. However, the trial court stated that it was applying the concept of Getty Oil Co. v. Jones, 470 SW2d 618 (Tex. 1971). In the Getty case, the surface owner expended a great deal of money in placing an elevated irrigation system on its land. The system would clear obstacles 7 feet high. Neighbors of Jones had similar systems, and oil companies had installed two different types of wells on their property which did not interfere with their irrigation systems. Getty placed wells on the Jones property but did not follow the example of its neighbors. The Getty wells were more than 7 feet high and prevented Jones from using his irrigation system.

The Texas Court applied the "reasonable necessity" rule and held that the types of wells placed upon the property were not reasonably necessary to the mineral owner's enjoyment of its estate. The court stated:

"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; but that the rights implied in favor of the mineral estate are to be exercised with due regard for the rights of the owner of the servient estate. . . . The due regard concept defines more fully what is to be considered in the determination of whether a surface use by the lessee is reasonably necessary. There may be only one manner of use of the surface whereby the minerals can be produced. The

lessee has the right to pursue this use, regardless of surface damage. *Kenny v. Texas Gulf Sulfur Co.* 351 SW2d 612 (Tex. Civ. App. Waco 1961, writ ref'd). And there may be necessitous temporary use governed by the same principle. But under the circumstances indicated here; i.e., where there is an existing use by the surface owner which would otherwise be precluded or impaired, 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." 470 SW2d at 621-22.

The Court specified that the due regard idea was merely a means of determining reasonable necessity. Under Getty, two elements are necessary to establish a lack of due regard for the rights of the surface owner. It must be shown that (1) the surface owner has no reasonable alternatives to his preexisting use and (2) that there are reasonable and generally accepted alternatives available to the mineral owner on the property.

Upon rehearing, the Getty Court noted that some confusion had been caused by its opinion. The Court clarified its opinion by stating:

"We do not hold that a mineral lessee's surface use may be found unreasonable without regard to the surface uses otherwise available to the surface owner. The reasonableness of the surface use by the lessee is to be determined by a consideration of the circumstances of both and, as stated, the surface owner is under the burden of establishing the unreasonableness of the lessee's surface use in this light." Id at 627. [emphasis supplied]

It is therefore necessary that alternative uses available to the surface owner be considered.

In Sun Oil Co. v. Whitaker, 483 SW2d 808 (1972), the Texas Court further explained and limited Getty.

"Our holding in *Getty Oil Co. v. Jones*, 470 SW2d 618 (Tex. 1971), is not applicable under the facts of this case. It is limited to situations in which there are reasonable methods that may be employed by the lessee on the leased premises to accomplish the purposes of this lease." 483 SW2d at 812.

The Utah Mining Association has no objection to the Getty rule as it has been explained by the Texas Court. It is urged, however, that the Getty rule was not properly applied in this case. The defendant-respondent most certainly showed that the placement of the road caused damage to an existing use of his land and there was conflicting evidence as to whether the plaintiff-appellant had a reasonable alternative as to the placement of the road, but the defendant-respondent did not show that he had no alternatives to his pre-existing use of the land. Under the guise of the Getty rule, the defendant-respondent in this case has asserted the right to dictate to the mineral owner where he should place his road. Mere inconvenience to the surface owner and conflicting evidence as to alternatives available to the mineral owner does not meet the requirements of Getty. In this case, it has been established that the mineral owner placed the road in a way which required the shortest distance [R. at 27] and that the mineral owner placed culverts along the road as needed. [T. at 130]. As the Court in Getty pointed out:

"The reasonableness of the method and manner of using the dominant mineral estate may be measured by what are usual, customary, and reasonable practices in the industry under circumstances of time, place, and servient estate uses." Id. at 627.

Further, the trial court in Getty instructed the jury that it should weigh the harm and inconvenience to the surface owner against the alternatives available to the mineral owner. The Court specifically found that this was not the proper test.

"This is not the proper test particularly in the suggestion that inconvenience to Jones may be a controlling element. There must be a determination that under all circumstances the use of the surface by Getty in the manner under attack is not reasonably necessary. The burden of proof is upon Jones, the surface owner."  
470 SW2d at 623. [Emphasis supplied]

It may be concluded that Getty turned more upon the fact that all the other mineral owners in the area had adopted alternatives which would accommodate the type of irrigation system involved, than upon the inconvenience suffered by Jones.

The trial court in this case has focused upon the harm suffered by the surface owner, and there is no showing in the record that the usual, customary and reasonable practices in the industry in the area under all circumstances dictated that the mineral owner should have placed his road differently, or that the surface owner had no alternatives to the surface use impaired.

The last point raised by the defendant-respondent was that under the terms of the lease it was given the right to recover for crops growing upon the land at the time the mineral owner required its use. The Utah Mining Association is in complete agreement with the principle that limitations may be placed upon the dominant estate by the agreement of the parties. There is no question in this case that the owner of the dominant estate

agreed to pay for "growing crops theretofore planted on said land." The question is how growing crops theretofore planted could possibly be valued at the fair market value of the land itself. The lease does not provide for compensation for crops that may be planted in the future but for the use of the surface by the mineral owner, nor does the lease provide that the mineral owner will purchase the land of the surface owner, nor pay him the value of his land without purchasing it. The damages to which defendant-respondent is entitled under the lease should be determined by valuing the crops planted before the mineral owner required the land for his use and growing at the time the mineral owner required its use. The value of the crops is not the value of the land itself.

#### CONCLUSION

In summary, the Court is urged to adopt the rule which recognizes the mineral estate as the dominant estate limited by the requirement that in exercising the rights of the dominant estate the mineral owner must only use that portion of the surface which is reasonably necessary to enable him to enjoy the mineral estate. This rule is the rule accepted by most states which have dealt with these issues. The rule serves the interest of both the mineral estate owner and the surface estate owner, while insuring the most effective utilization of resources and protection of the environment.

The trial court has failed to adhere to the generally accepted rule stated above and has further failed to provide an adequate basis for its decision in the case and to maintain consistency in its decision. The issues in this case should be: (1) Did the owner of the mineral estate use only so much of the surface as was reasonably necessary for his enjoyment of the mineral estate?; (2) Was the location of the access road by the mineral owner unreasonably located without giving due regard to the rights of the surface owner?; and, (3) What rights were granted to the surface owner by the oil and gas lease?

By applying the recommended rule to these questions, it is the position of the Utah Mining Association that a just and reasonable decision can be reached. However, since the state of the trial court's decision and the record indicate a great deal of confusion, it would be in the best interest of the parties for the Court to remand this case to the trial court with instructions regarding the correct rule to be applied. This course is recommended because of the lack of evidence in the record as to whether the mineral owner used due regard in the placement of its access road. New evidence could be taken and under the proper rule the issue could be satisfactorily resolved. Further, the trial court would be given an opportunity to correct or justify its ruling in regard to the award of damages to the surface owner for the mineral owners use of the surface.

The matter should be remanded to the trial court with instructions as to the correct rule to be applied.

Respectfully submitted this 31<sup>st</sup> day of March, 1976.

  
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