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The Rancher's Subservient Surface Estate

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This article takes the everyday oil and gas or mining lease situation and examines the lessor's surface estate rights and the lessee's mineral estate rights, reviewing each party's expectations and summarizing their most basic and frequent problems. Mr. Brimmer sets out what the typical lessee can do in connection with his interest and gives practical suggestions as to actions lessors can take to combat infringements on their rights.

THE RANCHER'S SUBSERVIENT SURFACE ESTATE

*Clarence A. Brimmer**

WESTERN farmers and ranchers, engaged principally in the raising of livestock with crops of native hay and occasionally small grains incidental thereto, not infrequently find themselves possessed of rights to the surface of their land, where the mineral estate has been severed and a miner or an oil company is asserting rights to the land in the course of their ceaseless hunt for our country's mineral wealth. The extent to which a rancher may or may not have a right to legal redress for damage committed in the course of such exploration is our present concern.

There are many excellent and exhaustive articles on the subject of such surface damages,[1] to which reference may be made for special situations. Our present purpose merely is to review the broad general principles applicable in this field.

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1. 1 AMERICAN LAW OF MINING tit. 111 (1964); Lambert, *Surface Rights of the Oil and Gas Lessee*, 11 OKLA. L. REV. 373 (1958); Hawley, *Problems of Surface Damage*, 33 Dicta 115 (1956); Cassin, *Land Use Permitted an Oil and Gas Lessee*, 37 TEX L. REV. 889 (1959); Thompson, *Surface Damages —Claims by Surface Estate Owner Against Mineral Estate Owner*, 14 WYO. L. J. 99 (1959); WILLIAM AND MEYERS, 1 OIL AND GAS LAW § 217-218.3 (1964).

Ranchers and farmers—almost by definition, if not by some obscure oath of allegiance to the local county farm bureau—have a sure and certain faith that a printed form entitled "Producers 88" is a time-tested, honorable document that almost any prudent person would quickly sign on the tailgate of the pickup, in the hope that either development will lead to the pot at the end of the rainbow or that at least the annual lease rentals will defray the taxes. All too seldom is the family lawyer asked to participate in the negotiation of the oil lease, and frequently he only learns of his client's problems when the lessee's development has started and his client now tells him that a big well-site is in the middle of his best field, staked out by engineers, not farmers, in the dead of winter, taking far more land than reasonably required, that the newly constructed roads for heavy equipment are dividing the field so that the mowers will have trouble, that the roads will create low spots in which water will collect and sour the meadows, and will alter his irrigation pattern, that the culverts in the road will plug and necessitate annual cleaning, that the surface water where confined by culverts will wash away topsoil, that fences will have to be built to keep cattle out of the mud pits, that the lessee is using all the water that is now needed for crops or livestock, and finally, that he has tried to find someone to talk to about it but that he missed the landman who has now returned to the home office and is on vacation for a couple of weeks.

It is also axiomatic that the severity of these problems grows in an inverse proportion to the amount of mineral interest which the rancher has in the leased premises. If snow drifts are high, cattle prices unsteady and the rancher client has a full one-eighth reserved royalty, and the driller also told him that morning in the restaurant that this was a great oil prospect, the dreams of a luxurious retirement in a sunnier clime will surely ameliorate the crisis; but, if the meadows were wet and now badly rutted, and his mineral interest is nil anyway, then quicker than can be muttered "Application for Temporary Injunction," the client will demand the balm of instant legal redress and damages as an alternative to his itchy shotgun trigger finger.

In considering the injured landowner's right to damages,

four different land situations occur: First, where the farmer or rancher has himself created the severance of the mineral estate from the surface estate by executing a mining lease; Second, where the farmer or rancher acquired a surface estate subject to a mineral estate privately owned by someone else; Third, where the farmer or rancher acquired his surface estate subject to a reserved interest by the federal or state government; and Fourth, where the surface estate is subject to a prior agricultural lease that ante-dates the mineral lease. We suggest that little, if any, distinction has been made by the cases in the first three situations,[2] and shall therefore treat generally that problem, irrespective of whether the severance is due to a private lease, a mineral conveyance, or a prior governmental reservation.

In explaining the relative rights of the surface owner and the mineral lessee, it seldom soothes the rancher's ruffled feathers to observe, audibly at least, that the lease's printed form contains many provisions, ordinarily negotiable, which could have been modified or eliminated by a timely legal consultation at its inception. But, if the inequalities unwittingly created by hasty execution of such documents are disturbing, this is to say nothing of the appalling practical inequality of the negotiators who produced the situation. On the one hand is an urbane, diplomatic landman, well schooled in the details of his lease form and versed in his petroleum landman's handbook, who is the product of a hundred negotiating sessions this year; and on the other hand is a rancher who at worst may be negotiating his first lease in a lifetime and who probably may have leased the same tract a few years before on a similar form and did not get hurt because there was no development.

It is not surprising that printed oil and gas lease forms have been suggested to be contracts of adhesion which should be construed strongly against the lessee, he being the author of their terms.[3]

These situations generally apply more to the oil and gas lease situation than to the hardrock mining lease, because in

2. Davis, *Selected Problems Regarding Lessee's Rights and Obligations to the Surface Owner*, 8 ROCKY MT. MIN. L. INST., 315, 321 (1963); Miller v. Crown Cent. Petroleum Corp., 309 S.W.2d 876 (Tex. Civ. App. 1958).
3. Wyckoff v. Brown, 135 Kan. 467, 11 P.2d 720 (1932).

the latter the negotiator is generally seeking an option to purchase, with a deed in escrow, and the very complexity of the proposal, if not the possibility of complete surface destruction, ring the legal alarm bells that send the client scurrying for legal aid.

We must also note here that generally the hard-rock developer will seek fee ownership of the entire area by option of outstanding interests within the project area, and consequently the large mining corporation will seldom attempt development of a mine subject to an outstanding surface estate.[4]

It is only during the primary term of an oil and gas lease, before commencement of development, that peaceful co-existence between lessor and lessee is truly possible, because then when the lessee has no need of the surface, the farmer is continuing to farm the land as if no lease existed. But, thereafter, and because their rights are truly distinct and reciprocal,[5] antagonistic situations will surely develop.

The lessee is considered to have the dominant estate and the surface owner the subservient estate.[6] The lessee of the mineral estate has a fundamentally superior position, which entitles him to the free and uninhibited use of the surface estate to such an extent as is reasonably necessary to explore for and develop mineral production.[7] Thus, by the very act of executing the oil and gas lease, the lessor has created a severance of the mineral estate which will entitle his lessee to go upon the land and do all things "necessary or incidental" to his operations "to the exclusion of the lessor." The only qualification made by the courts is that the lessee must exercise his rights "with due regard' 'to the rights of the owners of the surface. [8] That quantum of "due regard" means only that the rancher-lessor may use his surface in any manner not inconsistent with the lessee's rights.[9]

4. See Bernfeld, *Practices and Pitfalls in the Acquisition of Minerals in the United States*, 12 ROCKY MT. MIN. L. INST. 101 (1967), which is an excellent treatise on a large company's procedure in mineral acquisition.
5. Gregg v. Caldwell-Guadalupe Pick-up Stations, 286 S.W. 1083 (Tex. Civ. App. 1926).
6. Warren Petroleum Corp. v. Martin, 153 Tex. 465, 271 S.W.2d 410 (1954). Getty Oil Co. v. Royal, 422 S.W.2d 591 (Tex. Civ. App. 1967).
7. Lindsey v. Wilson, 332 S.W.2d 641 (Ky. 1960).
8. *Id.* at 642.
9. 4 SUMMERS, OIL & GAS § 652 (1968).

However, draftsmen have not been content to rely upon the uncertain implication of rights from the leasing of the premises, and in the granting clause of an oil and gas lease may be found a statement of the purpose for which the lease is made. Early-day leases were general in form, but in modern leases the statement of the purpose is quite detailed. Language reading, "has granted, demised, leased and let and by these presents does grant, demise, lease and let upon said lessee, with the exclusive right to prospect, explore, by use of core drills or otherwise" or stating "for the purpose of investigating, exploring, prospecting, drilling and mining for and producing oil, gas, and all other minerals," or stating, "together with the right to construct and maintain pipe lines, telephone and electric lines, tanks, powers, ponds, roadways, plants, equipment, and structures thereon to produce, save and take care of said oil and gas, and the exclusive right to inject air, gas, water, brine and other fluids from any source into the subsurface strata and any and all other rights and privileges necessary, incident to, or convenient for the economical operation of said land" is not uncommon.

In addition to the almost unlimited rights of the granting clause, the usual variation of Producers 88 generally has another paragraph that is definitive of the parties' rights, reading:

> The lessee shall have the right to use, free of cost, gas, oil and water found on said land for its operations thereon, except water from the wells of the lessor. Where required by the lessor, the lessee shall bury its pipe lines below plow depth and shall pay for damage caused by its operations to growing crops on said land. No well shall be drilled nearer than 200 feet to the house or barn now on said premises without written consent of the lessor. Lessee shall have the right at anytime during or after the expiration of this lease to remove all machinery, fixtures, houses, buildings, and other structures placed on said premises, including the right to draw and remove all casing. Lessee agrees, upon the completion of test . . . or upon the abandonment of any producing well, to restore the premises to their original contour as near

as practicable and to remove all installations within a reasonable time.[10]

By virtue of such clauses as well as the rights implied from the grant of the leasehold itself, it has been held that the lessee may select the time[11] and place[12] of his operations, irregardless of the lessor's wishes, may locate, build and improve roads,[13] dig slush pits,[14] drainage ditches and ponds for impounding salt water,[15] erect storage tanks and buildings,[16] remove trees if necessary to clear a drilling site,[17] all without liability for damages to the owner of the servient surface estate so long as the acts complained of constitute a reasonable use of surface.[18] Surface subsidence ruled by the court to be the material result of producing sulphur under a lease, is not compensable so long as the lessee uses the leasehold in a non-negligent manner.[19] A lessee has even been permitted to construct its derrick, with slush pits, beside the townsman's house, where the plaintiff purchased a town lot which his predecessor in interest had pooled with others for oil and gas development; even though windows had to be closed and the running of the engine prevented sleep or conversation, drilling could not be enjoined because the surface estate was burdened by the rights of the mineral lessee.[20]

Lessors, to no avail, have attempted to require a lessee, attempting to drill new wells and build new roads in an old oil field as part of a water flood program, to use the existing roads and drill sites in order to conserve the vegetation; but the Texas court has held that the lessee, as holder of the dominant estate, could make reasonable use of the premises, which included building roads and drilling at sites approved by its experts.[21] Demolition of the surface owner's house and outbuildings by a lessee who took the plaintiff's house apart piece

10. 88 Producers Kan., Okla., and Colo.—1957 C, Kansas Blue Print Co., Inc., LEGAL FORMS (1957 ed.).
11. New American Oil & Mining Co. v. Wolff, 166 Ind. 704, 76 N.E. 255 (1906).
12. Gulf Oil Corp. v. Walton, 317 S.W.2d 260 (Tex. Civ. App. 1958).
13. *Id.*
14. Powell Briscoe, Inc. v. Peters, 269 P.2d 787 (Okla. 1954).
15. Gulf Ref. Co. v. Davis, 224 Miss. 464, 80 So. 2d 467 (1955).
16. Conway v. Skelly Oil Co., 54 F.2d 11 (10th Cir. 1931).
17. Le Croy v. Barney, 12 F.2d 363 (8th Cir. 1926).
18. McLeod v. Cities Serv. Gas Co., 131 F. Supp. 449, (D. Kan. 1955), *aff'd*, 233 F.2d 242 (10th Cir. 1956).
19. Kenny v. Texas Gulf Sulphur Co., 351 S.W.2d 612 (Tex. Civ. App. 1961).
20. Grimes v. Goodman Drilling Co., 216 S.W. 202 (Tex. Civ. App. 1919).
21. Gulf Oil Corp. v. Watson, 317 S.W.2d 260 (Tex. Civ. App. 1958).

by piece, stacked the lumber and material on the side and proceeded with mining operations, was permitted where the surface owner had bought the leased premises subject to a second lease for clay mining.[22]

Moreover, the lessee may resort to injunction to prevent the lessor from interfering with its operations,[23] or from removing a dismantled rig left on the leased premises a reasonable time, without liability for storage, after completing a well as necessary and incidental to the drilling of wells.[24]

The rule deducible from the cases is that the lessee has the dominant sub-surface estate, with the right to reasonable use of the surface in connection with all kinds of operations on the lease, but that all such uses by the lessee must be reasonable and must be conducted in a careful and prudent manner without negligence for which the lessee may be liable.

Indeed, unreasonable use of the surface estate by the rancher has been the subject matter of successful litigation instituted by the mineral lessee. An oil and gas lessee has successfully enjoined the homestead entryman from establishing a townsite on the surface where further development would require most of the surface;[25] a surface owner has been restrained from flooding the surface by a dam, the lessee being held to have the right to explore the land at any time he saw fit, without hinderance or inconvenience;[26] a lessor has been prevented by the owner of a royalty interest from converting the premises into a cemetery which would use the entire surface and prevent mineral development;[27] and, a surface owner has been restrained from interfering with geophysical activities on the leased premises, where the lease, executed in 1924, permitted mining and operating for minerals but made no mention of seismograph operations which were then unknown, and the court held that the lessee could send its seismograph crews on the premises because exploration was an implied right, reasonably necessary for oil and gas operations.[28] Even a burgeoning real estate subdivision was legally

22. English v. Harris Clay Co., 225 N.C. 467, 35 S.E.2d 329 (1945).
23. Luttrell v. Parker Drilling Co., 341 P.2d 244 (Okla. 1959).
24. *Id.*
25. Kinney-Coastal Oil Co. v. Kieffer, 277 U.S. 488 (1928).
26. Humble Oil & Ref. Co. v. Wood, 292 S.W. 200 (Tex. Civ. App. 1927).
27. Eternal Cemetery Corp. v. Tammen, 324 S.W.2d 562 (Tex. Civ. App. 1959).
28. Yates v. Gulf Oil Corp., 182 F.2d 286 (5th Cir. 1950).

hampered where the lessee posted large signs listing its express and implied rights under a lease and threatened litigation to enforce these rights.[29]

If judicial interpretation of the lessor-lessee relation has seemingly whittled the rancher's rights to toothpick size, inquiry into the specific rights of the rancher surface owner with respect to his damage claims for his livestock, crops, and forage, use of water will lead to no particular enlargement of such rights once the mineral estate has been severed. Lease forms generally now provide that the lessee will pay for damages to growing crops and improvements on the land caused by its operations, but damages have been denied to a rancher who claimed that the oil company had trodden down the grass crops, strewn oil and refuse on the lands, polluted the water, destroyed fences, left gates open, because the term "crops" meant products of the soil grown and raised in a single season.[30] The Circuit Court of Appeals for the Fifth Circuit has held that "growing crops" did not include natural products of the soil, such as grass for cattle.[31] In *Union Producing Co. v. Allen,*[32] the court said, "[I]t has been held that natural grasses, shrubs and trees are not considered in law growing crops." However, in *McLeod v. Cities Service Gas Co.,*[33] it is noted that the surface owner was allowed $1,200 damages to brome grass destroyed by Cities Service in the process of cleaning up and removing its equipment under the clause providing for payment of damages to growing crops.

If a cow or bull (with predigree attached, of course) dies while mired in the slush pit, or if the cattle die from drinking from the slush pit,[34] or are killed by pump jacks,[35] or an inquisitive cow is killed by poking its head into a moving oil well pump,[36] the courts have held that recovery for livestock can be had only when there is proof of negligence and that livestock on the surface estate are neither crops nor improvements so as to come within that portion of the damage clause. Even where the damage clause more broadly provided also for "all

29. Conway v. Skelly Oil Co., 54 F.2d 11 (10th Cir. 1931).
30. Holbrook v. Continental Oil Co., 73 Wyo. 321, 278 P.2d 798 (1955).
31. Wohlford v. American Gas Prod. Co., 218 F.2d 213 (5th Cir. 1955).
32. 297 S.W.2d 867, 871 (Tex. Civ. App. 1957).
33. 131 F. Supp. 449 (D. Kan. 1955).
34. Mid-Continent Oil Corp. v. Rhodes, 205 Okla. 651, 240 P.2d 95 (1951).
35. Phillips Petroleum Co. v. Sheel, 206 Okla. 330, 243 P.2d 726 (1952).
36. Trinity Prod. Co. v. Bennett, 258 S.W.2d 160 (Tex. Civ. App. 1953).

other damages as may be occasioned by reason of operations," the Oklahoma court still held this referred only to damages to crops and improvements and that the cattle killed by pump jacks were neither.[37] In these situations, the lessee is entitled to the right to occupy exclusively that portion of the premises on which it is operating, and the cattle are trespassers, toward which the lessee's only duty is not to wilfully or wantonly harm them.[38] Nor does the open range concept provide a rancher sanctuary; in instances where the rancher contended that his cattle were running at large, on the open range or in instances where there was no violation of a herd law so as to require the rancher to enclose the stock, the courts have refused to hold that the livestock were lawfully on the leased premises and were not trespassers at the lessee's slush pits.[39]

Furthermore, it has been held that the mineral lessee is under no duty to fence out livestock from the surface it is occupying. In the absence of a specific provision in the lease contract requiring fencing, the Texas courts have held the lessee was under no duty to fence out the rancher's livestock, and even suggested that the owner of the cow was himself guilty of negligence in the matter.[40] The rancher's contributory negligence in turning his sheep into a field with unfenced slush pits, where the rancher knew of the presence of the slush pits and the danger to livestock posed by them, has been held to deny him recovery.[41]

The usual lease provision grants the lessee the right to free use of water found on the land except water from the wells of the lessor. Kansas has held that a lessee could use water from the lessor's pond even though the farmer had to move his cattle to another pasture because the water supply was insufficient.[42] But, Oklahoma has taken the position that this provision merely permitted the lessee to take water from the surface and spring-fed pools as long as the supply was not

37. Phillips Petroleum Corp. v. Sheel, *supra* note 35.
38. *Id.*
39. Pure Oil Co. v. Gear, 183 Okla. 489, 83 P.2d 389 (1938).
40. Baker v. Davis, 211 S.W.2d 246 (Tex. Civ. App. 1948); Sinclair Prairie Oil Co. v. Perry, 191 S.W.2d 484 (Tex. Civ. App. 1945); Trinity Prod. Co. v. Bennett, 258 S.W.2d 160 (Tex. Civ. App. 1953).
41. Pitzer & West v. Williamson, 159 S.W.2d 181 (Tex. Civ. App. 1942).
42. Wyckoff v. Brown, 135 Kan. 467, 11 P.2d 720 (1932).

diminished below the farmer's needs,[43] and in later cases Oklahoma held that the lessee could use only water produced by drilling its own wells or ponds but could not use free water from private tanks, ponds or artificial ponds.[44]

While leases ordinarily provide that pipe lines will, upon lessor's request, be buried below plow depth, in *Cranston v. Miller,*[45] the court held that the lessee did not have to bury the shacklerods running across the surface of the lease from a pumping house, which if buried in the ground would not operate.

Finally, when the lessee has concluded its operations, drilled its dry hole and abandoned the premises, or terminated production, what is the rancher's right to insist upon the removal of pits, ditches, trash and debris littering the premises? Some jurisdictions, such as Kansas[46] impose a statutory duty on the lessee requiring restoration of the land to its condition prior to operations, clean-up provisions have also been enforced, somewhat extra-legally, by state conservation commissions.[47] Leases involving state lands frequently provide for restoration of the surface. But, the courts in a majority of cases have held that a lessee is under no implied duty to restore the surface of the land to its condition prior to commencement of the work,[48] although in at least one unreported Wyoming case, the court awarded $5,000 damages for the defendant's failure to clean debris and pipes from the leased premises after the drilling program was done.[49] This award could have been predicated either upon a theory of unreasonable or negligent use of the premises, or liability for breach of an implied duty to restore the premises.

Where a surface lease precedes the mineral grant or lease, it is possible that the surface tenant's rights may rise higher that those of the mineral lessee. Oklahoma has awarded dam-

43. Mitchell v. Indian Territory Illuminating Oil Co., 178 Okla. 283, 62 P.2d 653 (1936).
44. Arnold v. Adams, 147 Okla. 56, 294 P. 142 (1930); Mohawk Drilling Co. v. Wolf, 262 P.2d 892 (Okla. 1953).
45. 208 Ark. 156, 185 S.W.2d 920 (1945).
46. KAN. STAT. ANN. § 55-132 (1964).
47. Davis, *Selected Problems Regarding Lessee's Rights and Obligations to the Surface Owner,* 8 ROCKY MT. MIN. L. INST 315, 345-6 (1963).
48. *Id.* at 347.
49. Livingston v. Texas Co., cited in Thompson, *Surface Damages—Claims by Surface Estate Owner Against Mineral Estate Owner,* 14 WYO L. J. 99, 108 (1959).

ages to an agricultural tenant in possession of the surface, even though the oil and gas lessee claimed a right to use as much of the surface as necessary for its operations.[50] While the agricultural tenant for years, whose rights predate those of the mineral lessee, may not veto oil and gas operations and development, he may recover damages for all injury suffered, whereas if the surface lease had been subsequent to the oil and gas lease, the surface lessee could not recover for damages suffered in the course of prudent, non-negligent operations.[51]

In reviewing cases mostly of private severances of minerals, we have seen that the right to the use of the surface is an incident to the dominant mineral estate and that the mineral owner is not liable to the surface owner for damages caused by reasonably necessary surface use. But, over thirty-three million acres of public lands have been patented with a reservation to the United States of all the coal and other minerals pursuant to the provisions of the Stock Raising Homestead Act of 1916.[52] The Agricultural Entry Act of 1914[53] authorized non-mineral appropriation of public land with a reservation of specified minerals. Land exchanges with states, as well as individuals and dispositions of public land under the Small Tract Act of 1938[54] have also resulted in reservations to the United States of minerals and the right to prospect for, mine and remove the same. What rights has the rancher surface owner in such cases? Although the feverish uranium hunt of the 1950's caused such surface owners anxious moments of inquiry for their rights, the statutes defining them are more than a little perplexing and the decided cases are scant.

The Act of March 3, 1909,[55] first protected the rights of the surface entryman by providing that one entering upon such lands to prospect for, mine or remove coal must meet conditions for security for and payment of all damages to the surface owner caused thereby, as determined by a court of competent jurisdiction. The Section 2 of the Agriculture Entry Act

50. Republic Natural Gas Co. v. Melson, 274 P.2d 543 (Okla. 1954); Mikel Drilling Co. v. Dunkin, 318 P.2d 435 (Okla. 1957).
51. 1 WILLIAM & MEYERS, OIL & GAS LAW § 218.3 (1964).
52. 1 AMERICAN LAW OF MINING § 3.32 (1964).
53. 30 U.S.C. § 121 (1964).
54. 43 U.S.C. § 682b (1964).
55. 30 U.S.C. § 81 (1964).

of 1914[56] improved upon this approach by requiring a person proposing to enter upon lands for prospecting to file a bond or undertaking, approved by the Secretary of the Interior, as security for payment of all damages to the crops and improvements upon the land. Then, in the Stock Raising Homestead Act of 1916,[57] it was provided that a miner shall not injure, damage or destroy the permanent improvements of the surface entryman, and shall be liable for all damege to the crops on such lands. The person claiming a right to coal or other mineral deposits could enter upon and use the surface by either obtaining the consent of the surface owner and paying damages fixed by agreement with him or by filing a bond in accordance with rules prescribed by the Secretary of the Interior.

In 1949 the Congress passed an act which provides that any person mining by open pit or strip mining methods shall also be liable, in addition to his liablity for damages to crops or improvements of the homesteader, for damages that may be caused to the value of the land for grazing.[58] It has been observed that the reference to open pit and strip mining may confine the application of the act to such activities, excluding liability in oil and gas operations.[59]

The paucity of cases interpreting these statutes is surprising, in view of the fact that the approach of these acts by providing compensation to the surface owner is directly contrary to the situation in cases of private severance and also because our lawmakers in these acts have apparently attempted to create separate estates with equal rights. The United States Supreme Court has held that a homesteader may be entitled to damages from operations negligently conducted which might damage the surface;[60] and the California court has recognized the liability of the mineral claimant to pay damages to the surface owner, allowing recovery for fences, corrals and structures on a stock-raising homestead entry as well as damages for wrongful use of the plaintiff's land for

56. 30 U.S.C. § 122 (1964).
57. 43 U.S.C. § 299 (1964).
58. 30 U.S.C. § 54 (1964).
59. Note, *Surface Damage Under a Federal Oil and Gas Lease*, 11 WYO. L. J. 116 (1957).
60. Kinney-Coastal Oil Co. v. Kieffer, 277 U.S. 488 (1928).

development of adjacent lands.[61] But, in *Holbrook v. Continental Oil Co.*,[62] the court held that the plaintiff surface owner could only sue the defendant federal oil and gas lessee for damages to agricultural improvements and crops, holding that erection of three houses and a tank battery on the plaintiff's homestead was a reasonable use of the surface. Lastly, and at least illustrating the truth of the ancient legal maxim, "you can't fight city hall": in *United States v. Polino*,[63] the defendant had conveyed coal land to the United States, reserving the coal rights. The United States sued to restrain him from strip mining it and he was restrained, even though strip mining was a customary method of mining in the area, because the court held that it was known at the time of the conveyance to the United States that it wanted the land for forestry purposes, and the parties could not have contemplated a use that would deprive the government of its surface rights.

Heedless of this crystalization of the law of surface damages to a holding that the mineral lessee is entitled to reasonable use of the surface, without liability for surface damage except where there has been excessive use of the surface or the operator has been negligent, many Western stockgrowers and farmers have by a bellicose attitude induced mineral lessees to provide monetary compensation that the courts might have declined. In the hope of avoiding litigation or delay, lessees have often paid location damages or surface damages, or bought water from a landowner's reservoir, or provided other compensation such as a new cattleguard, as a practical approach toward solution of conflicting interests. Such surface damage payments have varied from about $250.00 in North Texas to $500.00 in the Casper, Wyoming area and $1,250.00 in New Mexico, plus road damages measured by the rod, according to "usually reliable authorities." Such payments usually result from a laudable desire to maintain friendy relations, but the mineral lessee generally has also concluded that it is cheaper to pay than to incure the expense and inconvenience of a trial on the merits. Mineral lessees have been urged not to accede to unwarranted demands, as the only way to combat the widespread fallacy of liability for sur-

61. Bourdieu v. Seaboard Oil Corp., 38 Cal. App. 2d 11, 100 P.2d 528 (1940).
62. 73 Wyo. 321, 278 P.2d 798 (1955).
63. 131 F. Supp. 772 (N.D. W.Va. 1955).

face damage.[64] It may be that oil companies and independent operators will eventually come to that, and even sue to restrain interference with their acivities. The fact that very few uranium claim locators in the 1950's paid damages to surface owners and got by with it, would indicate the likelihood of that course of action. Ranchers and farmers may be well advised not to press their demands too far, and to seek other means of protection for their interests.

Revision of standard forms of oil and gas leases or other mineral leases, prior to the severance of the surface and mineral estates, at the time of negotiation of the lease to include clauses providing for the payment of surface damages, is probably the most practical form of self-protection available to farmers and ranchers. Some suggested clauses are:

> 3. *Buildings and Improvements.* Lessee agrees to pay for all damages to building and improvements, including fences, on the land caused by lessee's operation on said lands.
>
> 4. *Surface.* Lessee agrees to pay for all damages to the surface of the land, including fencing, soil, terracing, grading, and irrigation ditches, caused by lessee's operations on said lands.
>
> 5. *Crops.* Lessee agrees to pay for all damages to growing crops, native grasses, cultivated grasses, and orchard fruit caused by lessee's operations on said land. If the roots of perennial plants are destroyed by lessee's operations on said land, lessee agrees to pay for the costs of reseeding the number of acres damaged, and for rental of the number of acres damaged during the time necessary to restore the land.[65]

In a form suggested by Houston and Merrill,[66] there is an agreement on the part of the lessee to minimize surface damage, coupled with a clause reading,

> Lessee shall pay to the person beneficially interested in the damaged object all damages caused by its oper-

64. Sellers, *How Dominant is the Dominant Estate? Or Surface Damages Revisited*, 13 OIL & GAS INST. 377, 398 (SW. LEGAL FDN.) (1962).
65. Dye, *Specal Problems of the Farm As an Oil and Gas Lessor*, 11 KAN, L. REV. 343, 359 (1963).
66. Houston & Merrill, *A Suggested Oil and Gas Lease Form*, 43 NEB. L. REV. 471 (1964).

> ations to the surface, growing crops, pastures and improvements on said land or to animals or livestock.[67]

Also, a surface owner in buying land on which a prior mineral estate has been reserved, or in carving out a mineral interest, should in the conveyance specifically require that the right to prospect for, mine and remove the minerals therefrom shall at all times be subject to the obligation to pay for all damages to the surface of the land, including damages to growing crops, native grasses, cultivated grasses, surface and sub-surface water and water rights, irrigation ditches and systems, trees, fence, roads and livestock.

State legislation designed for protection of the surface owner has been of doubtful value to the agricultural community. Strip mining legislation, a field in which the Wyoming Fortieth Legislature recently enterd by its passage of the Open Cut Land Reclamation Act,[68] usually provides for permits for strip mining issued by licensing authorities, a bond of a prescribed minimum generally determined on an acreage basis, plus requirements for backfilling and reclamation as well as inspection and control. To the extent that the Commissioner of Public Lands, acting under the regulatory powers of the new Wyoming act, can regulate the slope of spoil-banks and require fencing of abandoned mine works, the Wyoming agricultural community will be benefitted by such legislation. New national legislation, designed to compensate surface owners for damages caused by mineral exploration, does not seem imminent.

CONCLUSION

The past practices of mineral operators have been wholly disparate from the clear body of law that has recognized the predominance of the mineral estate over the severed surface estate. But, it is doubtful that Western stockmen can count on the continuance of this dissimilarity. Their legal draftsmen must exercise greater care in preparation of documents of severance of the estates, if surface owners are to receive the protection as well as the monetary damages that past custom has led them to expect, and the livestockman's trade

67. *Id.* at 476.
68. Open Cut Land Reclamation Act, ch. 192, [1969] Wyo. Sess. Laws 393.

organizations undoubtedly will wish to take keen interest in laws and regulations promulgated for strip mining as well as general use of the surface estate for development of underlying mineral reserves.