

December 2019

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Recommended Citation

Don E. Jones, *Surface Damage under a Federal Oil and Gas Lease*, 11 Wyo. L.J. 116 (1957)
Available at: <https://scholarship.law.uwyo.edu/wlj/vol11/iss2/14>

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the habits, living conditions and state of health of the life tenant.

So long as the husband's life expectancy is a factor in computing the value of the life estate, it is extremely difficult, as well as hazardous, to advise a testator regarding provisions for a life estate for his spouse with any certainty as to whether his testamentary plan would be accomplished. Since it would depend upon the age of the surviving spouse at the death of the testator, such prediction is beyond the scope of certainty. The shorter the life expectancy of the widow at the death of the husband, the greater the chance of taking against the will when given a life estate.

In contrast to the foregoing situation is the detailed legislation of New York State, under which a provision in the will for a trust fund or life estate can only be partially defeated. The statute sets a ceiling amount that can be withdrawn from the life interest, and further provides that the value of the principal is to be used in determining election rights. Thus it is unnecessary to determine the value of a life estate under the New York statute.²¹

Insofar as legislation such as New York's provides a firm value for the widow's life interest, the task of planning distribution is eased.

EARL L. WILLIAMS, JR.

SURFACE DAMAGE UNDER A FEDERAL OIL AND GAS LEASE

The western stockraisers are owners of vast acreages of land valuable for oil and gas production, of which they own only the surface estate, with the United States having reserved the rights to the minerals, and oil and gas in the original patent. Where such minerals have been reserved, the mineral estate, including the underlying oil and gas deposits, is the dominant estate, with the surface being the servient estate. In order to fully develop the underlying minerals it is necessary to use part of the servient or surface estate, resulting in a loss of the use of the surface estate including a loss of the grass necessary for raising stock. The extent to which the surface owner may be entitled to compensation for such loss comprises the basis for the ensuing analysis.

Under the Picket Act of 1910¹ the Federal Government authorized the President to withdraw public lands from entry which were potentially valuable for minerals. Within the next decade there followed legislative

21. New York § 18(g) Decedent Estate Law. The provisions of this section with regard to the creation of a trust, with income payable for life to the surviving spouse, shall likewise apply to a legal life estate or an annuity for life or any other form of income for life created by the will for the benefit of the surviving spouse. In the computation of the value of the provisions under the will the capital value of the fund or other property producing the income shall be taken and not the value of the life estate.

1. 36 Stat. 847 (1910), 43 U.S.C. § 141 (1952 ed.).

acts which permitted surface entry on the lands withdrawn and which set forth the rights and liabilities of the lessee of the mineral estate and the surface owner. These were the Agricultural Entry Act of 1914,² the Stock-Raising Homestead Act of 1916,³ and the Mineral Leasing Act of 1920.⁴ Under these acts the oil and gas lessee is granted the right to occupy so much of the surface as is required for purposes reasonably incident to the mining and removal of minerals from the estate. So long as the lessee confines his use of the surface for purposes reasonably incident to the mining and removal of minerals from the estate in question, he is not liable under the cited acts for damage resulting to the surface.⁵ The courts have determined numerous acts by the lessee as being reasonably incident to oil and gas operations. Use of the surface for drill sites, sumps, tanks, roads, pipe lines, water lines and the use of heavy machinery are but a few of the many operations conducted by the lessee causing extensive surface damage for which the stockraiser is not compensated. In the recent case of *Holbrook v. Continental Oil Company*,⁶ the Supreme Court of Wyoming held as proper, the construction of dwelling houses by the lessee upon the leased land, when it was only about six miles from the leases to a town. Since such use was found to be reasonably incident to the removal of oil and gas, the surface owner was not entitled to compensation for the loss of use of the surface. The operations may necessitate the use of the entire surface in order to remove the oil and gas, thus nullifying any use of the surface by its owner.⁷

The surface, however, cannot be used for handling oil and gas produced off the estate, for such use is not reasonably incident to the mining and removal of oil and gas from that estate. Both the Agricultural Entry Act and the Stock-Raising Homestead Act require this limitation. In *Bordieu v. Seaboard Oil Company*,⁸ the lessee was making use of the homesteader's surface for facilities to handle production from the entire field under a unit operation involving other lands. The lessee contended that under its oil and gas lease from the Federal Government it was entitled to use on the property any and all facilities necessary to the full enjoyment of the entire lease which provided for a unit operation. The court held that the Agricultural Entry Act and the Stock-Raising Homestead Act, both here involved, did not grant the lessee the free use of the homestead land for handling oil and gas produced from other lands and

2. 38 Stat. 509 (1914), 30 U.S.C. § 121, as amended June 16, 1955, ch. 145, § 2, 69 Stat. 138.
3. 39 Stat. 864 (1916), 43 U.S.C. § 291, as amended Feb. 28, 1931, ch. 328, 46 Stat. 1454; June 9, 1933, ch. 53, 48 Stat. 119.
4. 41 Stat. 437 (1920), 30 U.S.C. § 181 (1952 ed.).
5. The particular damage provisions are found in 38 Stat. 509 (1914), 30 U.S.C. § 122 (1952 ed.), and 39 Stat. 864 (1916), 43 U.S.C. § 299 (1952 ed.).
6. 73 Wyo. 321, 278 P.2d 798 (1955).
7. *Kinney-Coastal Oil Co. v. Kieffer*, 277 U.S. 488, 48 S.Ct. 580, 72 L.Ed. 961 (1928). In this case the oil and gas lessee was granted an injunction to prevent the sale and occupancy of the surface under lease for town site purposes. This was based upon the fact that the use of practically the entire surface was necessary for the lessee to conduct reasonably efficient oil and gas operations under the lease.
8. 63 Cal.App.2d 201, 146 P.2d 256 (1944).

that the lessee's rights under the acts could not be enlarged upon by the terms of the lease.⁹

It is interesting to note that the lower court, hearing the *Bordieu* case,¹⁰ remarked that while Congress, by the acts here under consideration, intended to encourage the extraction of oil and gas, it also intended to protect the homesteader in his limited right to the use of the surface of his homestead. However, if such were the intention of Congress, the stock-raisers have received scant support, if any, in subsequent decisions.

Congress in the Agricultural Entry Act and the Stock-Raising Homestead Act accorded some protection to the surface owner for damage caused by the lessee. Under both acts the lessee is liable for damage caused to "crops and improvements."¹¹ This is true whether such damage is caused while prospecting or after re-entry. Important to the rancher, therefore, is whether the term "crops" includes native grass; and whether he may recover for damage to improvements. The problem was first present in *Kinney-Coastal Oil Company et al v. Kieffer et al.*¹² The patent to the surface estate in question was acquired under the Agricultural Entry Act. The lower court determined that under the act the term "crops" applied only to agricultural crops, and likewise, the term "improvements" could have no other significance than those of an agricultural nature. This view was affirmed by the Supreme Court of the United States on certiorari.¹³ It is, however, to be remembered that the Court was considering only the Agricultural Entry Act.

In the *Holbrook* case, previously discussed, the Wyoming Supreme Court considered the point settled that the owner of the surface estate could not recover for damage to grass. The court adhered strictly to the holding of the *Kieffer* case, that the surface owner could not sue for damage to the land but only for injuries to agricultural improvements or agricultural crops. There is one distinguishing feature the court did not consider. The *Kieffer* case was confronted with a patent to the surface issued under the Agricultural Entry Act. The United States Supreme Court in the *Kieffer* case held that under the Agricultural Entry Act it was fairly plain that the damage provisions therein referred only to damage resulting to "agricultural crops" and improvements, since the Act was intended to promote agriculture. The Court in this opinion did not even consider or mention the Stock-Raising Homestead Act because this Act was not involved. However, in the *Holbrook* case both acts were involved, but

9. In recovering for damage resulting from an unreasonable use, it is essential for the surface owner to allege that the acts committed by the lessee causing damage were an *unreasonable use of the land*. It is then necessary for the surface owner to prove the acts of the lessee, the resulting damage, and that the acts were unreasonable and unnecessary for the oil and gas operations. See *Norum v. The Queen City Oil Co.*, 81 Mont. 527, 264 Pac. 122 (1928).

10. *Bordeiu v. Seaboard Oil Corp.*, 38 Cal.App.2d 11, 100 P.2d 528 (1940).

11. See note 5 *supra*.

12. *Kinney-Coastal Oil Co. v. Kieffer*, 1 F.2d 795 (D. Wyo. 1924).

13. Note 7 *supra*.

the Supreme Court of Wyoming referred only to the Agricultural Entry Act and followed the *Kieffer* case in reaching its decision. One is readily led to believe that the interpretation of the damage provisions is the same for both acts, but such a conclusion is very questionable. It is understandable that under the Agricultural Entry Act Congress intended "crops and improvements" to be of an agricultural nature, if we reason as the Supreme Court did in the *Kieffer* case. Such reasoning with regard to the Stock-Raising Homestead Act should compel the conclusion that "crops" and "improvements" as used therein were intended to be those necessary to stockraising. By no provision of this Act, nor its title is one led to believe that "crops" or "permanent improvements" were intended by Congress to be of an agricultural nature. It is submitted that in most contexts, there is no one definitive interpretation of the word "crops", but that its definition is dependent upon the context in which it is used.

More recent legislation, passed in 1949, affords greater protection to the owner of the surface estate. This Act of 1949 first appeared as an amendment to House Rule 1754 which was primarily concerned with mining claims and suspension of assessment work, then was enacted into two separate statutes with minor differences in each.¹⁴ In general, the Act extends liability for any damage caused to the value of the land for grazing. The scope of the Act, however, is not clear. In the Act there appears the phrase "by strip or open pit mining methods,"¹⁵ and the problem for interpretation is whether this phrase, as used, limits liability under the Act to mining operations of the strip or open pit variety, thus excluding liability in oil and gas operations. In explanation of the Act the managers on the part of the House at a joint conference over House Rule 1754 submitted to the House their understanding, that the Act was *confined* to the prospecting for, mining, or removal of any minerals on such lands "by strip or open mining methods."¹⁶ At least in the minds of these Congressmen, the Act was to have limited application only to damages caused by strip or open pit mining methods. But a reading of the Senate Report 404¹⁷ on the Act may lead one to believe it was intended to protect the stockraiser from damage under all operations, including oil and gas.

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14. The Act is here set forth as found in 30 U.S.C. § 54 (1952 ed.):
Notwithstanding the provisions of any Act of Congress to the contrary, any person who hereafter prospects for, mines, or removes by strip open pit mining methods, any minerals from any land included in a stock raising or other homestead entry or patent, and who had been liable under such an existing Act only for damages caused thereby to the crops or improvements of the entryman or patentee, shall also be liable for any damage that may be caused to the value of the land for grazing by such prospecting for, mining, or removal of minerals. Nothing in this section shall be considered or construed to impair any vested right in existence on June 21, 1949. (Section 2 of Act June 17, 1949, 63 Stat. 201 and section 5 of June 21, 1949, 63 Stat. 215, are identical except that in the last sentence of section 2 the word "construed" was used whereas in the last sentence of section 5 the word "considered" was used. Also after the word "remove" in the first sentence there is a comma in section 2, while there is not a comma in section 5).
15. The phrase appears in the third line of the Act as set forth in note 14 supra.
16. H.R. Rep. No. 764, 81st Cong., 1st Sess. (1949).
17. S.Rep. No. 404, 81st Cong., 1st Sess. 3 (1949).

To date, no court has interpreted the meaning of this phrase in the Act,¹⁸ but it would seem proper that oil and gas operation should come within the Act. The Senate Report 404, referred to above, recognizes that it is inequitable not to compensate the stockraiser for damages to the surface,¹⁹ and it should make no difference whether the damage is caused by strip or open pit mining methods, or oil and gas operations. It was noted in discussion of the *Kieffer* case²⁰ that oil and gas operations may necessitate the use of the entire surface estate in order to remove the oil and gas, thus nullifying any use of the surface by its owner. Under either type of mining operation the result to the stockraiser is comparatively the same; reduction in the number of stock that can be fed and a decrease in the value of the surface estate.

In the situation here under consideration, four points are stressed in conclusion:

1. Only when the acts of an oil and gas lessee are not reasonably incident to the oil and gas operations, can the stockraiser receive any compensation for damage to the surface estate used for grazing purposes.

2. Provisions under statutes existing prior to the Act of 1949 provide recovery for damage to crops and improvements, which has been interpreted to exclude damage to grass.

3. Whether the Act of 1949 will protect the stockraiser from damage to the land for grazing purposes by oil and gas operations, remains an undecided question.

4. The stockraiser should be compensated for damage caused to his surface estate by oil and gas operations. This problem needs more legislative attention and the court's understanding.

DON E. JONES

PROBABLE INTERPRETATION OF WYOMING RULES OF DESCENT

Subsections 1, 2 and 3 of Section 6-2501, Wyoming Compiled Statutes, 1945,¹ which govern intestate succession of both real and personal prop-

18. The Wyoming Supreme Court in the *Holbrook* case, note 6 supra, could properly have made an interpretation, but the report contains no mention of the Act.

19. A portion of the report, note 17 supra, reads as follows:

" . . . , the number of head of stock an entryman can raise on his homestead is limited to some extent for both the present and future by the activities of the holder of the mineral rights on the land.

It is to correct such an anomalous and inequitable situation and to place surface entrymen on all mineral lands on an equal basis as to compensation for damages to the surface that the committee has adopted this amendment."

20. See note 7 supra.

1. Wyo. Comp. Stat. § 6-2501 (1945). . . . Except in cases above numerated, the estate of any intestate shall descend and be distributed as follows:

1. To his children surviving, and the descendants of his children who are