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Surface Damages from Mineral Exploration and Production in Arkansas

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Shale oil and gas production has seen a boom across the nation and Arkansas has seen its share of that boom. In order to take advantage of oil and gas production a landowner can contract to sell or lease the mineral rights of the property. The two parties are now the surface owner and the mineral owner. The mineral owner now has the right to explore and extract the minerals that were given under the contract. Often times the process of mineral extraction will lead to damages to the surface of the property. These damages occur throughout the process: during surveying for minerals, drilling, ingress and egress, placement of the well pad, and during the capping or closing of the depleted well. Landowners can contract with the mineral owners to limit access to the surface or to repair the surface to a particular condition following termination of well production.¹ However if the contract does not specify these conditions, the mineral owner can leave the surface owner stuck with pricy damages.

¹ Ark. Oil and Gas Commission, [Royalty and Surface Owner Brochure](http://www.aogc.state.ar.us/PDF/Royalty%20and%20Surface%20Owner%20...), www.aogc.state.ar.us/PDF/Royalty%20and%20Surface%20Owner%20... (last accessed Jan. 27, 2015).

To solve this problem several states, such as Oklahoma, Kansas and Kentucky,² have enacted Surface Damage Acts which require the restoration of the surface to conditions as they were, or as near as possible, to the condition prior to the start of the gas production operation. Arkansas's Congress has yet to adopt such laws.

Reasonable Use

Arkansas law does *not* provide surface owners with the right to monetary damages or the repair of surface area following the completion of oil and gas production on a site. The law of Arkansas is limited to provide that the mineral owners have the duty to limit their use to actions that are reasonable and necessary during production operations.³ Reasonable necessary use would be activity such as clearing of timber and brush for the well sight, accommodating surface owner's current use of the land,⁴ considering reasonable alternative well placements,⁵ drilling, and road access to the well.

Repair and Restoration Requirement

In 1986 the Arkansas Supreme Court held that surface owners were due more protection than just reasonable use. There was also a duty to repair the land for the surface owner. The Court held that "the duty to restore the surface, as nearly as practicable, to the same condition as

²Martin P. Averill, States Differ on Surface Rights, Energy Litigation Journal, ABA Section of Litigation (Summer 2008), apps.americanbar.org/.../energy/docs/1208_surface_rights.pdf. A chart which indicates which states have Surface Damage Acts, or similar protection for mining and oil and gas production.

³ A.C.A. 15-72-213 – 214; Arkansas Louisiana Gas Co. v. Wood, 403 S.W.2d 54 (1966) (Where damages were awarded to surface owner for timber clearing and excessive surface use by the mineral owner who built a road 40 feet wide, among other things.)

⁴ Thomas A. Dailey and W. Christopher Barrier, Article: Well, Now, Ain't That Just Fugacious!: A Basic Primer on Arkansas Oil and Gas Law, 29 U. Ark. Little Rock L. Rev. 211(2007); see Bonds v. Carter, 75 S.W.3d 192 (2002) (Hanna, J., concurring) ("The rights implied in favor of the mineral estate are to be exercised with due regard for the rights of the surface owner.") citing Getty Oil Co. v. Jones, 470 S.W.2d 618 (Tex. 1971).

⁵ G. Alan Perkins, Rights and Conflicts Among Surface Owners, Mineral Owners, and Lessees in Arkansas (2006), <http://www.aogc.state.ar.us/PDF/Rights%20and%20Conflicts%20Among%20Surface%20Owners%2004-06.pdf> (last accessed Jan. 27, 2015).

it was before drilling is *implied* in the lease agreement.”⁶ This means that even if a surface owner does not contract for the repair of the surface by the mineral owner, there remains an implied requirement for repair. The Arkansas Oil and Gas Commission, which regulates oil and gas production, has adopted a similar restoration requirement.⁷ The Oil and Gas Commission requires that at the completion of production on a well, the company is not allowed to abandon the well site as is. Instead, the mineral production company must clean up the site and restore it to the same condition, or as closely as possible to the same condition, as prior to their entrance to the property. The Arkansas Supreme Court has explained that: “To hold otherwise would allow the lessee to continue to occupy the surface, without change, after the lease has ended. This would constitute an unreasonable use, and no rule is more firmly established in oil and gas law than the rule that the lessee is limited to a use of the surface which is reasonable.”⁸ At that time the court believed that the legal trend was aimed at providing more surface owner protection, including requiring restoration of the surface.⁹ In fact, a large portion of oil companies voluntarily clean up or pay for damages, recognizing current environmental concerns and surface owner rights.¹⁰ Recently, Arkansas Supreme Court noted that someone assuming the rights of an oil and gas lease “should be held to have known that it was taking on the duty to restore any existing surface damage” to the property of the oil and gas site.¹¹

Oil and Gas Spills and Surface Owners Right of Recovery

⁶ Bonds v. Sanchez-O’Brien Oil and Gas Co., 715 S.W.2d 444, 446 (1986) (emphasis added).

⁷ 178 00 CARR 001 *et al.* Arkansas Oil and Gas Commission regulation, in the Code of Arkansas Rules and Regulations (CARR) Chapter 178, subsection 00.

⁸ Sanchez-O’Brien Oil and Gas Co., at 446.

⁹ T. Craig Jones, Implied Covenant to Restore Surface – Judicial “Wildcatting” Yields Valuable Rights For Surface Owners: Bonds V. Sanchez-O’Brien Oil & Gas Co., 41 Ark. L. Rev. 173, 185 (1988).

¹⁰ *Id.*

¹¹ Chevron U.S.A., Inc. v. Murphy Exploration & Prod. Co., 151 S.W.3d 306, 310-11 (2004).

Along with general ‘wear and tear’ of their land, surface owners take the risk of oil and gas spills on their land during recovery of these minerals. Arkansas law allows surface owner the right to recover for reasonable monetary damages for spills on the land during production.¹² It also, requires that the surface must be repaired by the operator to conditions as specified by the Arkansas Department of Environmental Quality and the Oil and Gas Commission. Both of these agencies regulate the production of oil and gas, they fail however to provide other surface damage claims.¹³ The Oil and Gas Commission provide rules for the proper plugging of the well and requires that the surface should be restored as closely as reasonably possible to its prior condition.¹⁴ Surface owners also have the right to sue mineral owners for damages if the drilling company acts negligently in its actions.¹⁵

Surface owners have the right to contract for specific use and restoration of their land after oil and gas production ceases, but for those that don’t, there are standards that operators must follow to protect the surface that will be used long after the oil and gas has been depleted. Unlike many states, Arkansas legislature has not created a law to require mineral owners to repair and restore property back to pre-oil and gas operations status, they instead have left this up to the state regulatory agencies in charge of environmental concerns and oil and gas production. The main regulatory agency for oil and gas producers, the Arkansas Oil and Gas Commission requires that land be restored to pre-production conditions and that spills must be cleaned up to prevent environmental concerns. Additionally, extensive case law indicates that repair is required based on the long-standing doctrine of reasonable use.

¹² A.C.A. § 15-72-219

¹³ Tori B. Smith, Legislative Note, Skimming the Surface: Arkansas Act 507's Attempt to Limit Compensation for Spill Damages, 62 Ark. L. Rev. 885, 894 (2009).

¹⁴ 178 00 CARR 001 *et al.*

¹⁵ Diamond Shamrock Corp. v. Phillips, 511 S.W.2d 160 (1974).