

Rights and Conflicts Among Surface Owners, Mineral Owners, and Lessees in Arkansas: Comparing Sticks in the Bundle

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I. INTRODUCTION

The classic description of real property as a “bundle of sticks” or a “bundle of rights” is particularly useful in the context of oil and gas development. While legal scholars disagree about the philosophical and intellectual propriety of this description, its use is widespread. From a practitioner’s perspective, the “bundle of sticks” metaphor is useful to describe the multi-faceted legal relationships among owners of separate—and often competing—rights or interests in the same tract, which frequently occurs in oil and gas development.

Even with modern technological advances, production of oil and gas resources requires at least some degree of land surface use. Everyone should agree with this simple statement, but the inherent conflict it represents can prompt litigation between a surface owner and a mineral owner or operator who seeks to produce oil and gas. Several issues arise when oil and gas operations interfere with surface uses or otherwise damage the surface. Can the surface owner prohibit or restrict the operator’s surface use? Is the surface owner entitled to damage payments? If so, how are damages determined and when are payments due? When the sticks from the bundle have been separated because the mineral estate has been severed from the surface, problems can intensify. The surface owner may face the “predicament and frustration” of intrusion and damage yet reap no economic benefit from oil and gas development.¹ This

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1. *See, e.g., Vest v. Exxon Corp.*, 752 F.2d 959, 960-61 (5th Cir. 1985).

article considers these issues in the context of the origin, development, and current state of the law in Arkansas.

II. THE NATURE AND SOURCE OF COMPONENT INTERESTS: DEFINING THE STICKS

Until they are reduced to actual possession, minerals—including oil and gas—are part of the real property that makes up a unified freehold estate.² Thus, the conveyance, reservation, or devise of oil and gas interests requires the same legal formalities needed with regard to other real property transactions.³ The basic interests of primary importance to a discussion regarding oil and gas include the mineral interest, the leasehold interest, and the royalty interest.

A. Mineral Interest

Like every other state, Arkansas allows the severance of minerals from the surface estate.⁴ Arkansas is an “ownership in place” state, meaning that the owner of the mineral estate owns all of the minerals that lie beneath the surface of the tract, including oil and gas, so long as the minerals remain there.⁵ A severed mineral interest is corporeal in nature.⁶ Thus, it is perpetual, cannot be abandoned or lost if unused, is subject to partition, and cannot be lost through adverse possession of the

2. See 1 EUGENE KUNTZ, A TREATISE ON THE LAW OF OIL AND GAS § 2.2 (1987).

3. See, e.g., *Osborn v. Ark. Territorial Oil & Gas Co.*, 103 Ark. 175, 179, 146 S.W. 122, 124 (1912) (“It has been uniformly held that conveyances of gas in its natural state in the land require all the formalities of a conveyance of any other interest in the same real estate . . .”).

4. See 1 KUNTZ, *supra* note 2, § 3.1; see also *Bodcaw Lumber Co. v. Goode*, 160 Ark. 48, 59, 254 S.W. 345, 348 (1923) (“We are of the opinion that the great weight of authority supports the view that mineral rights are subject to separation from the surface rights so as to be the subject of separate sale.”).

5. See *Osborn*, 103 Ark. at 179, 146 S.W. at 124 (“It has, however, been well settled, we think, that natural gas is a mineral, and while in place in any particular land it is part of the land itself. Until severed from the realty, it is as much a part of it as coal or stone; and, so long as it remains under the ground, it is treated as a part of the realty itself under the surface of which it lies. It therefore belongs to the owner of the land in which it is found; and, as long as it remains in the particular tract of land, the owner of the surface is the owner of the gas beneath it.”); see also 1 PATRICK H. MARTIN & BRUCE M. KRAMER, WILLIAMS & MEYERS OIL AND GAS LAW § 203.3 (rev. ed. 2014) (discussing the ownership in place theory).

6. Susan Webber Wright, *The Arkansas Law of Oil and Gas*, 9 U. ARK. LITTLE ROCK L.J. 223, 225 (1986).

surface alone.⁷ The mineral estate may be further subdivided into separate estates for specific minerals, such as coal, oil and gas, and metallic ores.⁸ The mineral interest owner has control over the minerals; he can sell some or all of them, develop the minerals, or lease the minerals to others for development without the consent of the surface owner.⁹ Ownership of a severed mineral estate carries with it the implied right to use the surface for exploration and development of the minerals.¹⁰ Accordingly, the mineral estate is considered the dominant estate, and the surface estate is subservient.¹¹

B. Leasehold Interest

Most oil and gas development occurs pursuant to an oil and gas lease between the mineral owner—the lessor—and the operator or developer—the lessee. The operating interest under this lease is generally referred to as the “working interest.”¹² The working interest owner has “the right to drill and produce oil and gas, subject to a duty to pay royalty upon that production.”¹³ When the mineral owner leases the right to explore for and produce oil and gas on his land, the lessee generally succeeds to the mineral owner’s inherent right of surface use, subject to any explicit contractual restrictions in the oil and gas lease.¹⁴ Indeed, most oil and gas leases contain

7. *Id.*; see also *Bodcaw Lumber Co.*, 160 Ark. at 61, 254 S.W. at 349 (describing the corporeal nature of the interest).

8. *EnerVest Operating, LLC v. Sebastian Mining, LLC*, 676 F.3d 1144, 1146-47 (8th Cir. 2012) (applying Arkansas law and holding the operative instrument created a separate mineral estate for coal and coalbed methane); see also *Hurst v. Rice*, 278 Ark. 94, 99, 643 S.W.2d 563, 565 (1982) (holding that adverse possession of oil and gas did not constitute adverse possession of coal and other minerals).

9. See *Wright*, *supra* note 6, at 225.

10. See, e.g., *DeSoto Gathering Co. v. Smallwood*, 2010 Ark. 5, at 6, 362 S.W.3d 298, 301 (“The mineral owner’s right to reasonable use of the surface for development and production of the minerals exists without any express words of grant and is due in part to the impossibility of reaching the minerals in any other manner.”).

11. *El Paso Prod. Co. v. Blanchard*, 371 Ark. 634, 641, 269 S.W.3d 362, 368 (2007).

12. *Swaim v. Stephens Prod. Co.*, 359 Ark. 190, 200-01 n.4, 196 S.W.3d 5, 11 n.4 (2004).

13. *Id.*

14. See *Diamond Shamrock Corp. v. Phillips*, 256 Ark. 886, 890-91, 511 S.W.2d 160, 163 (1974); see also *Ark. La. Gas Co. v. Wood*, 240 Ark. 948, 950, 403 S.W.2d 54, 55 (1966) (“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 . . .”).

express language authorizing surface use,¹⁵ and often contain specific provisions dealing with monetary damages that may be due to the surface owner.¹⁶

C. Royalty Interest

A royalty interest is derived from the lessor's right to receive royalties pursuant to an oil and gas lease. A royalty may be "in kind," entitling the royalty owner to receive a share of the minerals produced, or, more typically, a right to receive some portion of the proceeds derived from the sale of oil and gas.¹⁷ The lessor's royalty interest may be conveyed to others or further subdivided among multiple owners. Like the other sticks in the bundle, a royalty interest is an interest in real property. But once oil and gas are produced and reduced to possession, they become personalty.¹⁸

15. One modern form lease states the purpose of execution as follows:

[F]or the purpose of prospecting, exploring by geophysical and other methods, drilling, mining, operating for and producing oil or gas, or both, including, but not as a limitation, casinghead gas, casinghead gasoline, gas-condensate (distillate) and any substance, whether similar or dissimilar, produced in a gaseous state or contained in such oil or gas, together with the right to construct and maintain pipelines, telephone and electric lines, tanks, powers, ponds, roadways, plants, equipment, and structures to produce, save, store and take care of the 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 the land, alone or conjointly with neighboring land, for the production, saving and taking care of oil and gas and the injection of air, gas, water, brine, and other fluids into the subsurface strata, the lands being situated in [*name of county*], State of [Arkansas], and [being described] as follows . . .

6D NICHOLS CYCLOPEDIA OF LEGAL FORMS ANNOTATED § 145:215 (2014) (second alteration in original).

16. See WILLIAM B. BURFORD, PURCHASE AND SALE AGREEMENT—PRODUCING OIL AND GAS LEASES, in 28A WEST'S LEGAL FORMS § 22:151 (2014). Damages provisions are widely divergent, but the following is similar to that found in many leases: "Lessee agrees to pay . . . for all actual damages to livestock and growing crops [sic] and to know existing trees, fences, pipelines, canals, buildings, and other improvements upon the land caused by lessee's operations." See 6D NICHOLS CYCLOPEDIA OF LEGAL FORMS ANNOTATED, *supra* note 15, § 145:206.

17. 8 PATRICK H. MARTIN & BRUCE M. KRAMER, WILLIAMS & MEYERS OIL AND GAS LAW 920 (rev. ed. 2008).

18. See *Shreveport-El Dorado Pipe Line Co. v. Bennett*, 172 Ark. 804, 811, 290 S.W. 929, 931 (1927) ("There is no controversy about the fact that oil, before it is severed, is a part of the land, and when it becomes severed, it is personal property . . .").

III. MINERAL ESTATE DOMINANCE AND THE IMPLIED EASEMENT DOCTRINE: AN EARLY PATCHWORK OF ARKANSAS CASES

Dominance of the mineral estate over the surface is a crucial legal concept for the mineral owner and lessee because ownership of subsurface minerals without the right to use the surface for exploration and production would be practically worthless.¹⁹ Stated another way, it is necessary for the mineral owner to use the surface in order to enjoy his estate. This reality generally gave rise to the implied easement of surface use in favor of the mineral owner and his lessee, although the genesis of the doctrine is often not clearly stated by the courts.²⁰ In Arkansas, application of the doctrine developed slowly through an early patchwork of cases lacking any discernible cohesiveness.

A. *Koury v. Morgan*

Koury v. Morgan,²¹ the earliest Arkansas case addressing the implied easement of surface use, involved an oil and gas lease, not a severed mineral interest. In the case, Lee Morgan purchased property burdened by an existing oil and gas lease.²² The lease contained an express easement to search for and produce oil and gas, install pipelines, and build other facilities on the land to produce and store oil and gas.²³ When operations intensified, Morgan sued on a theory of trespass, seeking an injunction and damages.²⁴ The trial court denied the injunction but awarded damages for the decrease in Morgan's property

19. See *DeSoto Gathering Co. v. Smallwood*, 2010 Ark. 5, at 6, 362 S.W.3d 298, 301. Admittedly, modern technology and the increasing use of horizontal drilling have given operators much greater flexibility with regard to surface locations. However, operators must still occupy and use the surface of the land to some degree.

20. See 1 MARTIN & KRAMER, *supra* note 5, § 218; 4 NANCY SAINT-PAUL, SUMMERS OIL AND GAS 5-7 (3d ed. 2013) (“[T]he right to reasonable use of the land is implied if it is not granted, whether the form of conveyance is a mineral deed or a lease.”); see also Bruce M. Kramer, *The Legal Framework for Analyzing Multiple Surface Use Issues*, 44 ROCKY MTN. MIN. L. FOUND. J. 273, 275-76 (2007) (“As the common law easement doctrine developed, few cases focused on the express language used to create or define the scope of the easement. Instead, the implied easement doctrine took over and the language of the deed or lease became irrelevant.” (footnote omitted)).

21. 172 Ark. 405, 288 S.W. 929 (1926).

22. *Id.* at 405-06, 288 S.W. at 929.

23. *Id.* at 406, 288 S.W. at 929.

24. *Id.* at 406-07, 288 S.W. at 930-31.

value.²⁵ On appeal, the Arkansas Supreme Court first resolved questions about the validity of the lease and then held that the landowner was not entitled to damages “unless, in operating under the terms of their lease, [the lessee] ha[d] negligently injured him.”²⁶

Quoting the Texas Court of Appeals in *Grimes v. Goodman Drilling Co.*,²⁷ the court stated: “[A]s appellant purchased the premises burdened with the terms of the lease, he is in no position to complain of conditions produced by appellees such as are usual and customary during the drilling of an oil well.”²⁸ The court also quoted *Coffindaffer v. Hope Natural Gas Co.*,²⁹ a West Virginia case: “[T]he principle is well established that injury necessarily inflicted in the exercise of a lawful right does not constitute liability. The injury must be the direct result of the commission of a wrong. . . . If defendant did no wrong, it is not liable, notwithstanding the injury.”³⁰

If the court had stopped there, the *Koury* case would be largely irrelevant to a discussion of the implied easement doctrine. Once the court held that the lease was valid, the express easement language in the lease seemed sufficient to resolve the issue. But the court then quoted an “interesting discussion” from *Thompson on Real Property*:

As against the surface owner, the owner of the minerals has a right, without any express words of grant for that purpose, to go upon the surface to drill wells to his underlying estate, and to occupy so much of the surface beyond the limits of his well or wells as may be necessary to operate his estate and to remove the product thereof. This is a right to be exercised with due regard to the rights of the owner of the surface, but, subject to this limitation, it is a right growing out of the contract of sale, the position of the stratum sold, and the impossibility of reaching it in any other manner. . . . It is a well-settled principle that injury necessarily inflicted in the exercise of a lawful right does

25. *Id.* at 407-08, 288 S.W. at 930.

26. *Koury*, 172 Ark. at 410, 288 S.W. at 931.

27. 216 S.W. 202 (Tex. Civ. App. 1919).

28. *Koury*, 172 Ark. at 410, 288 S.W. at 931 (quoting *Grimes*, 216 S.W. at 204).

29. 81 S.E. 966 (W. Va. 1914).

30. *Koury*, 172 Ark. at 410-11, 288 S.W. at 931 (quoting *Coffindaffer*, 81 S.E. at 967).

not create a liability. The injury must be the direct result of the commission of a wrong.³¹

Following this discussion, the court remanded the case with instructions “to take further proof and to develop the cause according to the principles of law herein announced.”³² While this “interesting discussion” was arguably mere dicta, *Koury* and the quoted excerpt have been cited in later Arkansas decisions involving the implied easement doctrine.³³

B. *Martin v. Dale*

Just three years later, the Arkansas Supreme Court decided another dispute between a lessor and lessee in *Martin v. Dale*³⁴ without reference to *Koury*. In *Martin*, there was no mention of an explicit surface easement provision in the lease, and presumably there was none.³⁵ Rather, the court focused solely on the scope of the lessee’s implied easement for ingress and egress.³⁶ When development first began, the lessee had at times used two different public roads to access his well location in a remote area of the lessor’s large plantation.³⁷ When both roads were plowed and became impassable, the lessee began using the lessor’s private gravel road.³⁸ After some period of use, the lessor denied access, and the lessee sued to enjoin the interference.³⁹ Unlike the prior case, the court found that the law had “been settled by prior decisions” and cited an easement by necessity case for the basic rule: “If one sells to another a tract of land surrounded by other land of the grantor, a right of way across such other land is a necessity to the enjoyment of the land granted, and is implied from the grant made.”⁴⁰ The *Martin* court then declared the gravel road “a way of necessity” because

31. *Id.* at 412-13, 288 S.W. at 932 (omission in original) (quoting 6 GEORGE W. THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY 282 (1924)).

32. *Id.* at 413, 288 S.W. at 932.

33. *See DeSoto Gathering Co. v. Smallwood*, 2010 Ark. 5, at 6, 362 S.W.3d 298, 301.

34. 180 Ark. 321, 21 S.W.2d 428 (1929).

35. *See id.* at 324, 21 S.W.2d at 429.

36. *Id.* at 324-25, 21 S.W.2d at 429-430.

37. *Id.* at 324-25, 21 S.W.2d at 429.

38. *Id.*

39. *Martin*, 180 Ark. at 323, 21 S.W.2d at 429.

40. *Id.* at 323-24, 21 S.W.2d at 429 (quoting *Vassar v. Mitchell*, 169 Ark. 792, 793, 276 S.W. 605, 605 (1925) (internal quotation marks omitted)).

the lessee could only exercise his rights under the oil and gas lease by using it.⁴¹ The court also stated that it was the lessee's duty to enter "in the manner least injurious to his grantor, and if a means of ingress existed when the lease was taken, and which continued to be available, this entry, and no other, should have been used, although it was not the most convenient."⁴² The court, however, did not evaluate—or even mention—whether the common law elements required for finding an easement by necessity⁴³ were present.

C. *Wood v. Hay*

The Arkansas Supreme Court first referred to the implied easement rule when it considered a severed mineral estate in *Wood v. Hay*.⁴⁴ *Wood* did not directly involve surface use, but the case was primarily concerned with whether a prior owner had validly reserved minerals in a deed.⁴⁵ The surface owner argued, among other things, that the deed reservation was ambiguous.⁴⁶ To support this claim, the surface owner pointed out that the reservation did not expressly reserve "the right to drill wells, to erect derricks, construct tanks, or make use of the surface in exploring for oil and gas."⁴⁷ In response, the court recited the following rule to explain why the omission of such language was immaterial:

The right to enter and to make reasonable use of the land in achieving in a workmanlike way the only result the parties could have intended (if, in fact, oil and gas in place, as distinguished from the right to lease, were retained) must be implied from the nature of the matters dealt with. . . . [T]he better rule [is] that in case of either a reservation or an exception, a grantor has the right to enter on the surface with all usual necessary appliances, and to remove the

41. *Id.* at 325, 21 S.W.2d at 430 (internal quotation marks omitted).

42. *Id.* at 324, 21 S.W.2d at 429.

43. *See Horton v. Taylor*, 2012 Ark. App. 469, at 7, 422 S.W.3d 202, 208 ("To establish an easement by necessity, a party must prove (1) that, at one time, one person held title to the tracts in question; (2) that unity of title was severed by conveyance of one of the tracts; and (3) that the easement is necessary in order for the owner of the dominant tenement to use his land, with the necessity existing both at the time of the severance of title and at the time the easement is exercised.").

44. 206 Ark. 892, 175 S.W.2d 189 (1943).

45. *Id.* at 894-95, 175 S.W.2d at 190.

46. *Id.* at 895, 175 S.W.2d at 190.

47. *Id.*

mineral without any express authority reserved to that effect. In case of a reservation of minerals, such property descends to the grantor's heirs.⁴⁸

Wood contained no further discussion and no citation to the court's prior decisions on the subject.

D. *Arkansas Louisiana Gas Co. v. Wood*

In *Arkansas Louisiana Gas Co. v. Wood*,⁴⁹ the Arkansas Supreme Court considered whether certain activities conducted by a lessee pursuant to an oil and gas lease were "reasonably necessary."⁵⁰ At trial, a jury awarded damages to the landowner for the lessee's excessive use of the drill site and access road and unreasonable use of water from the landowner's stock pond.⁵¹ In considering water use, the court examined the "free water" clause in the lease, which stated, "Lessee shall have free use of oil, gas and water from said land, except water from Lessor's wells, for all operations hereunder."⁵² The court then merely summarized the lessee's surface easement without reference to any express lease language.⁵³ Relying on oil and gas treatises and authority from other states, the court announced the following general rule regarding the scope of a lessee's right of surface use under an oil and gas lease:

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.⁵⁴

The court did not cite or rely upon any of the prior Arkansas cases.⁵⁵

48. *Id.*

49. 240 Ark. 948, 403 S.W.2d 54 (1966).

50. *Id.* at 950, 403 S.W.2d at 55.

51. *Id.* at 948-49, 403 S.W.2d at 55.

52. *Id.* at 949, 403 S.W.2d at 55 (internal quotation marks omitted).

53. *Id.* ("The lease further provided for reasonable use of the land in drilling operations.")

54. *Ark. La. Gas Co.*, 240 Ark. at 950, 403 S.W.2d at 55.

55. *See id.* at 950-51, 403 S.W.2d at 55-56.

Applying this rule, the court discussed the “substantial testimony” about damages to the land and affirmed the jury verdict in favor of the landowner.⁵⁶ In doing so, the court reasoned that “more land was used than was reasonably necessary,” and the landowner therefore succeeded on his claim.⁵⁷ With regard to whether the “free water” clause authorized the lessee’s use of stock pond water, the court adopted Oklahoma’s per se rule denying the lessee’s right to use water from a lessor’s stock pond.⁵⁸

IV. CORRELATIVE RIGHTS: REASONABLE USE EMERGES

The early patchwork of Arkansas Supreme Court cases employed divergent and detached analyses, or little analysis at all. With no effort to shape a consistent doctrine, the court relied upon various general rules from different treatises and cases from other states with little recognition of prior Arkansas decisions. This may have been due in part to the general unfamiliarity with oil and gas law of many Arkansas practitioners and judges at that time. Yet the early cases provided most of the building blocks that the court would later use to construct a more cogent statement of the law in Arkansas.

A. *Diamond Shamrock Corp. v. Phillips*

The seminal Arkansas case describing the respective rights of mineral owners, lessees, and surface owners is *Diamond Shamrock Corp. v. Phillips*.⁵⁹ For the first time, the Arkansas Supreme Court incorporated its prior decisions on the subject and began forging a more consistent and reliable statement of the law. Justice Brown, writing for the majority, introduced the case by stating, “[t]his case involves the correlative rights of the owners of the surface estate and the separate owner of the

56. *Id.* at 950-53, 403 S.W.2d 56-57.

57. *Id.* at 950, 403 S.W.2d at 56.

58. *Id.* at 951-53, 403 S.W.2d at 56-57. In adopting Oklahoma’s position, the court stated that “to hold otherwise would permit the lessee in an oil and gas lease to drain the stock ponds of the lessor without being responsible for damage to the watering ponds for his stock.” *Id.* at 952-53, 403 S.W.2d at 57. This statement appears to be result-driven, has no obvious support in the language of the lease provision itself, and ignores the fact that the parties can contract for a different result.

59. 256 Ark. 886, 511 S.W.2d 160 (1974).

minerals.”⁶⁰ The reference to “correlative rights” is significant. By framing the issue as one of correlative rights, Justice Brown made clear that Arkansas courts would attempt to balance the inherent need for surface use by mineral owners against the impact of such uses on the surface owner.⁶¹

In the case, Diamond Shamrock was the working interest owner, operating under an oil and gas lease from the severed mineral owner.⁶² Phillips owned the surface estate on two tracts of land—a five-acre tract along the highway and an eighty-acre tract of pasture located behind the first tract.⁶³ On the five-acre site—where he intended to live while building a home—Phillips had moved a house trailer and fenced a garden tract.⁶⁴ When Diamond Shamrock staked a well location on the homesite, Phillips objected, and the Diamond Shamrock representative agreed to move the well location to the pasture tract.⁶⁵ But while Phillips was out of state, Diamond Shamrock drilled a well on the homesite anyway.⁶⁶ When Phillips returned, he found three slush pits, a meter shed, a tank, and well head equipment on his homesite property.⁶⁷ At trial, Diamond Shamrock’s geologist testified: (1) that he selected the pasture location (not the homesite) to drill the well; (2) that the drilling permit for the well identified the pasture location; and (3) that the well completion report to the Arkansas Oil and Gas Commission indicated the well had been drilled there.⁶⁸ There was no clear explanation as to why the well was drilled on the Phillips homesite tract.⁶⁹

After laying out the facts and testimony, the court addressed “the respective rights of the owner of the minerals and the separate owner of the surface” by first setting forth the

60. *Id.* at 887, 511 S.W.2d at 161.

61. One prominent commentator referred to the correlative rights balancing approach as the “multidimensional approach,” as opposed to the “unidimensional approach” that focused only on the necessity of the mineral owner’s surface use. *See Kramer, supra* note 20, at 273-75. The unidimensional approach dominated the early cases in some jurisdictions. *See id.*

62. *Diamond Shamrock Corp.*, 256 Ark. at 887, 511 S.W.2d at 161.

63. *Id.*

64. *Id.* at 888, 511 S.W.2d at 161.

65. *Id.*

66. *Id.*

67. *Diamond Shamrock Corp.*, 256 Ark. at 888, 511 S.W.2d at 161-62.

68. *Id.* at 889, 511 S.W.2d at 162.

69. *Id.* at 890, 511 S.W.2d at 163.

following general rule from a prominent treatise on real property law:

As against the surface owner, the owner of the minerals has a right, without any express words of grant for that purpose, to go upon the surface to drill wells to his underlying estate, and to occupy so much of the surface beyond the limits of his well or wells as may be necessary to operate his estate and to remove the product thereof. . . . It is a well-settled principle that injury necessarily inflicted in the exercise of a lawful right does not create a liability. The injury must be the direct result of the commission of a wrong.⁷⁰

The court pointed out that the *Koury* opinion quoted the same rule from a previous edition of the same treatise.⁷¹

The court set forth four additional rules. First, the court held that “[a]n injury to the surface may be said to be the result of the commission of a wrong when the use of the surface is unreasonable.”⁷² Second, the court noted that when exercising the right of ingress and egress, the driller has a “duty to do so in the manner least injurious to his grantor.”⁷³ Third, finding the “rules of reasonable usage of the surface” as set out in *Getty Oil Co. v. Jones* to be highly persuasive, the court stated as follows:

[W]here 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.⁷⁴

Finally, the court ruled, “[i]f the acts (of the lessee) complained of are found not to constitute a reasonable use of the surface, . . . the lessee is liable for the injury done.”⁷⁵

70. *Id.* at 890-91, 511 S.W.2d at 163 (omission in original) (quoting 10 GEORGE W. THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY 585-86 (perm. ed. 1940)).

71. *Id.* at 891, 511 S.W.2d at 163.

72. *Diamond Shamrock Corp.*, 256 Ark. at 891, 511 S.W.2d at 163.

73. *Id.* (quoting *Martin v. Dale*, 180 Ark. 321, 324, 21 S.W.2d 428, 429 (1929)).

74. *Id.* (quoting *Getty Oil Co. v. Jones*, 470 S.W.2d, 618, 622 (Tex. 1971)) (internal quotation marks omitted).

75. *Id.* (omissions in original) (quoting 4 W.L. SUMMERS, THE LAW OF OIL & GAS § 652 (perm. ed. 1962)).

The court concluded that the jury's verdict in favor of the surface owner was warranted, reasoning that the jury could have based its decision on two acceptable grounds: (1) drilling on the homesite was unreasonable because it disregarded the site selected by the working interest owner's geologist; and (2) it was unreasonable for the driller, "through its agents, to make a firm commitment not to drill on the homesite and thereafter, in the absence of [Phillips], to go upon the homesite and sink the well."⁷⁶

B. *Reimer v. Gulf Oil Corp.*

In *Reimer v. Gulf Oil Corp.*,⁷⁷ Ronald Reimer, the surface-only owner, sued Gulf Oil, the working interest owner, claiming trespass when Gulf Oil improved and used a road across Reimer's land to reach a drill site on adjacent property within the same drilling unit.⁷⁸ The issue required little analysis since the oil and gas lease contained an express provision allowing such use:

The appellees' lease grants to appellees the express right to construct such roads as are necessary to drill for gas on appellant's lands and also provides that if the well site is within the same drilling unit as is appellant's surface estate, the well will be considered as upon appellant's land. Since the well is within the drilling unit, the appellees have an express right to cross appellant's surface estate and can be liable only for unreasonable use.⁷⁹

The court then merely referenced its prior decisions for a definition of "reasonable use."⁸⁰ Although it was unnecessary for the decision in this case, it is worth noting that Arkansas law provides for the same result when the Arkansas Oil and Gas Commission has integrated a drilling unit for operations.⁸¹

76. *Id.* at 891-92, 511 S.W.2d at 163-64.

77. 281 Ark. 377, 664 S.W.2d 456 (1984).

78. *Id.* at 378, 664 S.W.2d at 457.

79. *Id.*

80. *See id.* (citing *Wood and Arkansas Louisiana Gas Co.*).

81. *See* ARK. CODE ANN. § 15-72-305(b) (Supp. 2013) ("All operations, including, but not limited to, the commencement, drilling, or operation of a well upon any portion of a drilling unit for which an integration order has been entered shall be deemed for all purposes the conduct of operations upon each separately owned tract and interest in the drilling unit by the several owners thereof. The portion of the production allocated to the owner of each tract or interest included in a drilling unit formed by an integration order

C. McFarland v. Taylor

The Arkansas Court of Appeals was faced with another ingress-egress reasonable use issue in *McFarland v. Taylor*.⁸² The operator, Wayne McFarland, had used a private road across Bennie Taylor's property for several years by permission.⁸³ After Taylor's son, daughter-in-law, and the couple's three-year-old daughter moved into a mobile home near the road, conflicts arose, and Taylor blocked the road to exclude McFarland.⁸⁴ The testimony at trial indicated that Taylor closed the road because of significant amounts of traffic and concerns for the safety of the family while his son was at work.⁸⁵ An alternative road was available, but it required some modest improvements, estimated at approximately \$1500.⁸⁶ The operator argued that because his road use predated the residential use, access could not be denied.⁸⁷ There was no dispute that access to the well site was necessary for operations. The Arkansas Court of Appeals continued the theme of balancing the harms:

We are not prepared to hold that, as a matter of law, a mineral owner is always entitled to choose between two or more means of access to the minerals, without regard to necessity or to the harm it may cause the surface owner, if the surface owner's use did not predate the mineral owner's use. The respective rights of mineral and surface owners are well settled. The owner of the minerals has an implied right to go upon the surface to drill wells to his underlying estate, and to occupy so much of the surface beyond the limits of his well as may be necessary to operate his estate and to remove its products. His use of the surface, however, must be reasonable. The rights implied in favor of the mineral estate are to be exercised with due regard for the rights of the surface owner. In *Martin v. Dale*, the Arkansas Supreme Court made it clear that, in all circumstances, the mineral owner's use must be necessary

shall, when produced, be considered for all purposes as if it had been produced from the tract or interest by a well drilled thereon.”).

82. 76 Ark. App. 343, 65 S.W.3d 468 (2002).

83. *Id.* at 344-45, 65 S.W.3d at 469.

84. *Id.* at 345, 65 S.W.3d at 469-70.

85. *Id.*

86. *Id.* at 345, 65 S.W.3d at 470.

87. *McFarland*, 76 Ark. App. at 346, 65 S.W.3d at 470.

and the potential harm to the surface owner must be considered⁸⁸

This holding demonstrates that Arkansas appellate courts will take the due regard standard seriously and will seek to fairly balance the correlative rights of the competing interests.

D. *El Paso Production Co. v. Blanchard*

*El Paso Production Co. v. Blanchard*⁸⁹ arose from seismic operations conducted by the lessee of a one-half severed mineral interest in James Blanchard's property.⁹⁰ Blanchard owned the surface estate and the other one-half mineral interest and had refused access for seismic exploration, which was required at that time to comply with Arkansas Oil and Gas Commission General Rule B-42.⁹¹ Nevertheless, the lessee obtained a temporary restraining order for access and conducted the desired seismic operations.⁹² Blanchard sued for trespass, among several other legal theories, after the seismic results were unexciting.⁹³ Regarding the trespass claim, the Arkansas Supreme Court applied its prior decisions and held that the mineral estate is dominant over the surface estate and that the mineral owner is entitled to reasonably necessary surface usage to explore and develop the mineral estate.⁹⁴

E. *DeSoto Gathering Co. v. Smallwood*

The Arkansas Supreme Court's decision in *DeSoto Gathering Co. v. Smallwood*⁹⁵ is especially interesting because it involved separating yet another stick from the bundle. Richard and Shirley Chandler, who owned both the surface and minerals in sixty acres, leased ten acres to Janice Smallwood for use as a single-family residence for her life or until she abandoned the

88. *Id.* at 346-47, 65 S.W.3d at 470-71 (citations omitted).

89. 371 Ark. 634, 269 S.W.3d 362 (2007).

90. *Id.* at 636-38, 269 S.W.3d at 365-67.

91. *Id.* at 636-39, 269 S.W.3d at 365-67; *see also* 178-00-001 ARK. CODE R. B-42 (LexisNexis 2014) (relevant regulation). General Rule B-42 has since been amended and requires notice only to the surface owner. *See* 178-00-001 ARK. CODE R. B-42(h).

92. *El Paso Prod. Co.*, 371 Ark. at 638, 269 S.W.3d at 367.

93. *Id.* at 639-40, 269 S.W.3d at 367-68.

94. *Id.* at 641-43, 269 S.W.3d at 368-69. The case involved a convoluted fact pattern and numerous claims, most of which are not germane to the issues considered here.

95. 2010 Ark. 5, 362 S.W.3d 298.

property.⁹⁶ Smallwood's residential lease was expressly made "subordinate to any existing or future liens or encumbrances placed on the land by the Chandlers."⁹⁷ Two years later, the Chandlers entered into an oil and gas lease for the entire sixty acres.⁹⁸ Subsequently, the oil and gas lessee contracted with the DeSoto Gathering Company to build a pipeline to deliver natural gas produced from the sixty acres.⁹⁹ The Chandlers granted a right-of-way to Desoto Gathering for that purpose.¹⁰⁰ Smallwood objected to the pipeline construction and asserted that her consent as the surface lessee was required.¹⁰¹ Following a bench trial, the circuit judge issued a mandatory injunction to remove the pipelines and awarded Smallwood treble the amount of \$17,307.50 in compensatory damages for a total award of \$51,922.50.¹⁰²

On appeal, the Arkansas Supreme Court reversed the judgment and remanded the case to the trial court with orders to dissolve the injunction, relying both on established "principles of property law governing surface and mineral estates" and the express terms of Smallwood's "restricted-use" surface lease.¹⁰³ The court utilized precedent, including the *El Paso Production* decision, which "summarized the well-settled law in Arkansas governing the respective rights of the owner of minerals and the separate owner of the surface."¹⁰⁴ The court then added this explanation of the legal effect of a separate restricted-use surface lease:

The non-mineral lease from the Chandlers to Appellee occurred prior to any severance of the surface and mineral estates; however, by its specific terms, the lease restricted Appellant's use of the ten acres for purposes of a single-family residence. Appellee therefore obtained a restricted-use leasehold interest in the surface. Since the lease was for a restricted surface use, and not a conveyance of the

96. *Id.* at 2, 362 S.W.3d at 299.

97. *Id.*

98. *Id.*

99. *See id.*

100. *DeSoto Gathering Co.*, 2010 Ark. 5, at 2, 362 S.W.3d at 299.

101. *Id.* at 2-3, 362 S.W.3d at 299-300.

102. *Id.* at 4, 362 S.W.3d at 300. Clearly, the duplicative award of both injunctive relief to repair the alleged injury *and* a full award of monetary damages for the same injury was contrary to law, regardless of whether the underlying decision was correct.

103. *Id.* at 8-9, 362 S.W.3d at 302-03.

104. *Id.* at 6, 362 S.W.3d at 301.

minerals, it operated as a severance of the mineral estate owned by the Chandlers from the leasehold surface estate acquired by Appellee under her residential lease. As the restricted-use surface lessee, Appellee took her leasehold as a servient estate subject to the burden of a right of way or easement in favor of the dominant mineral estate, allowing the use of so much of the surface as is reasonably necessary for the development and production of the minerals.¹⁰⁵

Thus, a limited surface leasehold estate in Arkansas is treated as a severance from the mineral estate and is subservient to it in the same manner as a typical mineral/surface estate severance.¹⁰⁶

F. *Pollard v. SEECO, Inc.*

In *Pollard v. SEECO, Inc.*,¹⁰⁷ the landowner-plaintiff executed an oil and gas lease of a twenty-five-acre riverfront tract and later executed a separate surface-usage agreement with the lessee, SEECO, for a drill site.¹⁰⁸ After SEECO constructed the drill pad and drilled a producing well, the plaintiff sued the lessee, contending that the property “was a part of the future expansion plans for the existing river residential development activity which had already been commenced” and seeking damages for the diminution in value of the entire twenty-five-acre property.¹⁰⁹ The plaintiff further argued that the lessee refused to “accommodate” him by relocating the well site to other property owned by the plaintiff.¹¹⁰

SEECO denied the allegations and filed a motion for summary judgment.¹¹¹ Along with the relevant agreements, SEECO submitted an affidavit: (1) establishing that the drill pad was constructed according to industry standards and that its size was reasonable; (2) “den[ying] any spill or run-off from the drill site”; and (3) stating that the well pad was in the best location

105. *DeSoto Gathering Co.*, 2010 Ark. 5, at 6-7, 362 S.W.3d at 301-02 (citation omitted).

106. *See id.*

107. 2013 Ark. App. 331, 427 S.W.3d 776.

108. *Id.* at 1-2, 427 S.W.3d at 777-78. In the surface-usage agreement, however, the landowner retained the right to bring an action against SEECO for surface damages, compensation to which he would be entitled under the oil and gas lease, or other legal remedies available under Arkansas law. *See id.* at 2 n.2, 427 S.W.3d at 778 n.2.

109. *Id.* at 3, 427 S.W.3d at 778-79 (internal quotation mark omitted).

110. *Id.* at 4, 427 S.W.3d at 779. The landowner also alleged that drilling fluids and other pollution ran off the well pad and damaged his property. *Id.* at 3, 427 S.W.3d at 779.

111. *Id.* at 3-4, 427 S.W.3d at 779.

based on relevant factors, including a number of geological concerns.¹¹² The plaintiff responded with an affidavit contradicting some of SEECO's statements, but the court found his affidavit to be conclusory and lacking any foundation.¹¹³ The trial court granted summary judgment in favor of SEECO, and the Arkansas Court of Appeals affirmed.¹¹⁴

The *Pollard* case is most useful as a practical example of the type of evidence that will support a lessee's operations when the surface owner objects and claims that the use is unreasonable or that an alternative location is available. Referencing the *Diamond Shamrock* opinion liberally, the court explained:

Controversy arose when appellees declined appellants' requests to construct the drill pad in another location. Generally, as against the surface owner, the owner of mineral rights has a right to go upon the surface to drill wells to his underlying estate and to occupy so much of the surface beyond the limits of his well that may be necessary to operate his estate and remove the product. An injury to the surface of the land by the owner of minerals may be said to be the result of the commission of a wrong when the use of the surface is unreasonable. An injury necessarily inflicted in the exercise of a lawful right does not create a liability, and a lessee will only be liable to the surface owner for damages when the lessee's use of the surface is unreasonable. Here, appellees established that their use of the surface was reasonable, preventing any recovery at law for injury under the oil and gas lease.¹¹⁵

Because *Pollard* had executed both an oil and gas lease and a surface-usage agreement with the lessee, the court necessarily focused on the reasonableness of the lessee's activity pursuant to the written agreements.¹¹⁶ The *Pollard* decision clearly establishes that a complaining lessor must do more than allege a failure to accommodate the lessor's wishes to overcome a showing of reasonableness by the lessee.

112. *Pollard*, 2013 Ark. App. 331, at 4, 427 S.W.3d at 779.

113. *Id.* at 4-7, 427 S.W.3d at 779-80.

114. *Id.* at 5-8, 427 S.W.3d at 780-81.

115. *Id.* at 7, 427 S.W.3d at 780-81.

116. *Id.* at 7-8, 427 S.W.3d at 781.

V. THE ACCOMMODATION DOCTRINE AND REASONABLE ALTERNATIVES

The so-called “accommodation doctrine” was first articulated by the Texas Supreme Court in *Getty Oil Co. v. Jones*.¹¹⁷ The doctrine laid out in *Getty Oil* can be summarized as follows: [W]here a severed mineral interest owner or lessee asserts a right to surface uses that will substantially impair existing uses of the surface owner, the mineral owner or lessee must accommodate the existing surface uses if reasonable alternatives are available.¹¹⁸

The controversy in *Getty Oil* arose when an oil company installed a beam pump that interfered with farmer Jones’s center-pivot irrigation system.¹¹⁹ The beam pump was too high to permit the self-propelled irrigation system from traveling in its circular pattern to irrigate Jones’s field.¹²⁰ Jones contended that the oil company should have used a shorter beam pump or placed the pump in a pit to accommodate his irrigation system.¹²¹ The oil company refused, arguing that the pump was reasonably necessary for the production of oil and gas.¹²² The trial court agreed with Getty Oil that its surface use was reasonable, but an intermediate appeals court reversed.¹²³ The Texas Supreme Court affirmed and introduced the accommodation doctrine, which the court described as follows:

[W]here 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

117. 470 S.W.2d 618 (Tex. 1971).

118. 4 W.L. SUMMERS, *THE LAW OF OIL AND GAS* 37 (perm. ed. Supp. 2013). A more recent version of this treatise contains an altered summary of the doctrine, presumably to reflect what the author believes to be more recent modifications of the doctrine in subsequent case law. See 4 SAINT-PAUL, *supra* note 20, at 3 (“Where there is an existing or planned use by the surface owner which would otherwise be precluded or impaired and where under established practices in the industry there are alternatives available to the lessee whereby minerals can be recovered, the rules of reasonable usage of the surface may require the adoption of an alternative by the lessee.”). Particularly obvious is the reference to “existing *or* planned use,” which represents a significant departure from the doctrine as articulated in *Getty Oil* and its Texas progeny.

119. *Getty Oil Co.*, 470 S.W.2d at 619-20.

120. *Id.* at 620.

121. *See id.* at 622-23.

122. *See id.* at 621.

123. *Id.* at 619-20.

can be recovered, the rules of reasonable usage of the surface may require the adoption of an alternative by the lessee.¹²⁴

The court then applied its new rule to the facts:

Getty's use of an alternative method of producing its wells would serve the public policy of developing our mineral resources while, at the same time, permitting the utilization of the surface for productive agricultural uses. Under such circumstances the right of the surface owner to an *accommodation* between the two estates may be shown, dependent, of course, upon the state of the evidence and the findings of the trier of the facts.¹²⁵

In general, the accommodation doctrine is an extension of the rule that the mineral owner/lessee must operate with "due regard" for the rights of the surface owner, a concept recognized previously in both Texas and Arkansas.¹²⁶ The *Getty Oil* decision has been cited several times by Arkansas courts in describing a countervailing limitation on the mineral owner's right to reasonable use of the surface, although the decisions have stopped short of referring directly to the "accommodation doctrine."¹²⁷ The Arkansas Supreme Court has described the *Getty Oil* opinion as "very persuasive."¹²⁸ It stands to reason that the underlying public policy statement and later applications of the *Getty Oil* decision in Texas may supply persuasive arguments in future Arkansas decisions.

124. *Getty Oil Co.*, 470 S.W.2d at 622.

125. *Id.* at 622-23 (emphasis added).

126. *See id.* at 621-22 ("[T]he 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."); *see also* *Bonds v. Carter*, 348 Ark. 591, 601, 75 S.W.3d 192, 199 (2002) (Hannah, 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."); *Koury v. Morgan*, 172 Ark. 405, 413, 288 S.W. 929, 932 (1926) ("This is a right to be exercised with due regard to the rights of the owner of the surface" (quoting 6 THOMPSON, *supra* note 31, at 282)); *McFarland v. Taylor*, 76 Ark. App. 343, 346-47, 65 S.W.3d 468, 471 (2002) ("The rights implied in favor of the mineral estate are to be exercised with due regard for the rights of the surface owner.").

127. *See* *Diamond Shamrock Corp. v. Phillips*, 256 Ark. 886, 891, 511 S.W.2d 160, 163 (1974); *see also* *Bonds*, 348 Ark. at 601, 75 S.W.3d at 199 (referencing the *Diamond Shamrock* court's adoption of the rule from *Getty Oil*); *McFarland*, 76 Ark. App. at 346-47, 65 S.W.3d at 471 (same).

128. *Diamond Shamrock Corp.*, 256 Ark. at 891, 511 S.W.2d at 163.

Commentators generally consider Arkansas as being among the states that have adopted the accommodation doctrine, citing the Arkansas Supreme Court's decision in *Diamond Shamrock*.¹²⁹ Some commentators have opined that Arkansas has expanded the doctrine announced in *Getty Oil* by applying it to a "proposed surface use" of property by the surface owner, rather than an "existing use."¹³⁰ A careful reading of the *Diamond Shamrock* opinion, however, does not support that conclusion. It is correct that the plaintiffs in *Diamond Shamrock* were planning to build a retirement home and had not started construction; however, they were already using the property for their homesite.¹³¹ The couple had "moved a house trailer onto the 5-acre tract where they intended to live during the construction of their new home" and "fenced a garden tract" there.¹³² Clearly, drilling a well and installing facilities on that location constituted a substantial interference with the existing current use.¹³³ Furthermore, the Arkansas Supreme Court quoted the doctrine from *Getty Oil*— specifically limited to existing uses—and found it "very persuasive."¹³⁴ Independent of the planned future use of the location, the court in *Diamond Shamrock* determined that lessee's use could be unreasonable because: (1) the lessee disregarded the site selected by its own geologist; and (2) the lessee drilled on the property after the lessee's agent made a promise to the surface owners not to drill there.¹³⁵ Nowhere did the court suggest that a lessee must

129. 4 SAINT-PAUL, *supra* note 20, at 3 n.4 (including a reference to *Diamond Shamrock* in a section on the accommodation doctrine); Christopher M. Alspach, *Surface Use by the Mineral Owner: How Much Accommodation Is Required Under Current Oil and Gas Law?*, 55 OKLA. L. REV. 89, 92 (2002) ("To date, the accommodation doctrine established in Texas has also become law in some form in . . . Arkansas . . ."); Douglas R. Hafer et al., *A Practical Guide to Operator/Surface-Owner Disputes and the Current State of the Accommodation Doctrine*, 17 TEX. WESLEYAN L. REV. 47, 60 n.46 (2010) (including *Diamond Shamrock* in a list of cases from "jurisdictions that have followed *Getty*, and adopted the accommodation doctrine"); Kramer, *supra* note 20, at 304-05 ("The next state to adopt the multi-dimensional approach was Arkansas.").

130. *See, e.g.*, Alspach, *supra* note 129, at 99-100.

131. *Diamond Shamrock Corp.*, 256 Ark. at 888, 511 S.W.2d at 161.

132. *Id.*

133. *Id.* at 891-92, 511 S.W.2d at 163-64.

134. *Id.* at 891, 511 S.W.2d at 163.

135. *Id.* at 891-92, 511 S.W.2d at 163-64.

accommodate a surface owner's planned future use of the property.¹³⁶

VI. LESSEE'S IMPLIED DUTY TO RESTORE THE SURFACE

Arkansas has adopted a distinct minority position by imposing an implied duty on oil and gas operators to restore the surface of the land when drilling and production operations are terminated.¹³⁷ In 1986, a closely divided Arkansas Supreme Court held that every oil and gas lessee has a duty to restore the surface of the land to its pre-drilling condition when operations cease.¹³⁸

In announcing its decision, the court pointed to the "current trend" toward imposing such an implied duty, relying on the views of contemporary commentators.¹³⁹ No such trend exists, however, among judicial decisions.¹⁴⁰ Nevertheless, the rationale for the implied obligation is consistent with the Arkansas Supreme Court's approach of balancing the lessee's inherent right of surface use against the resultant harm to the surface owner. The court in *Bonds* stated as follows:

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 surface 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. Accordingly, we hold that the duty to restore the surface, as nearly as practicable, to the same

136. In the most recent Arkansas case on this issue, the plaintiff specifically argued that the lessee failed to "accommodate" his future development plans for the location. *Pollard v. SEECO, Inc.*, 2013 Ark. App. 331, at 5, 427 S.W.3d 776, 779. In affirming summary judgment in favor of the lessee, the court did not cite or refer to *Getty Oil* or the accommodation doctrine. *See id.* at 8, 427 S.W.3d at 781.

137. *See Bonds v. Sanchez-O'Brien Oil & Gas Co.*, 289 Ark. 582, 583-85, 715 S.W.2d 444, 445-46 (1986); *see also* 1 MARTIN & KRAMER, *supra* note 5, § 218.12 ("We are of the opinion that the judicial reluctance to imply the obligation [to restore the premises to their original condition] is correct."); T. Craig Jones, Note, *Implied Covenant to Restore Surface—Judicial "Wildcatting" Yields Valuable Rights for Surface Owners: Bonds v. Sanchez-O'Brien Oil and Gas Co.*, 41 ARK. L. REV. 173, 184 (1988) ("The decision [in *Bonds*] clearly reflects a minority view. . . . The overwhelming majority of cases have . . . ruled that no duty would be implied.").

138. *Bonds*, 289 Ark. at 585, 715 S.W.2d at 446.

139. *Id.* at 583-85, 715 S.W.2d at 445-46.

140. *See* 1 MARTIN & KRAMER, *supra* note 5, § 218.12.

condition as it was before drilling is implied in the lease agreement.¹⁴¹

The lessee's duty of surface restoration is implied in the lease agreement and runs with the lease.¹⁴² In 2004, the Arkansas Supreme Court noted that an assignee 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" on the assigned leasehold based on the implied duty of restoration announced in *Bonds*.¹⁴³

VII. THE ARKANSAS RULE: CORRELATIVE RIGHTS AND LIMITATIONS

No Arkansas appellate court decision attempts to set forth an exhaustive set of considerations or rules to analyze a mineral owner-lessee's surface use rights when a conflict arises with a surface owner-lessor. Based on a combination of Arkansas decisions, correlative rights with regard to surface use can be expressed as a set of countervailing statements of rights and limitations. The following list provides a summary of the law on this matter in Arkansas.

A. Rights of Surface Use

- (1) The mineral owner or lessee has an implied right to occupy and use so much of the surface as is reasonably necessary to remove and produce the minerals.¹⁴⁴
- (2) The mineral owner or lessee, absent a contractual agreement otherwise, is not liable to the surface owner for surface damages unless the surface use by the mineral owner/lessee is unreasonable (or negligent, or

141. *Bonds*, 289 Ark. at 585, 715 S.W.2d at 446.

142. *See Chevron U.S.A. v. Murphy Exploration & Prod. Co.*, 356 Ark. 324, 333-34, 151 S.W.3d 306, 312 (2004).

143. *Id.* at 334, 151 S.W.3d at 312.

144. *DeSoto Gathering Co. v. Smallwood*, 2010 Ark. 5, at 8, 362 S.W.3d 298, 302; *El Paso Prod. Co. v. Blanchard*, 371 Ark. 634, 641, 269 S.W.3d 362, 368 (2007); *Bonds v. Carter*, 348 Ark. 591, 601, 75 S.W.3d 192, 199 (2002) (Hannah, J., concurring); *Diamond Shamrock Corp. v. Phillips*, 256 Ark. 886, 891, 511 S.W.2d 160, 163 (1974); *Ark. La. Gas Co. v. Wood*, 240 Ark. 948, 950, 403 S.W.2d 54, 55 (1966); *Wood v. Hay*, 206 Ark. 892, 895, 175 S.W.2d 189, 190 (1943); *Martin v. Dale*, 180 Ark. 321, 323-34, 21 S.W.2d 428, 429 (1929); *Pollard v. SEECO, Inc.*, 2013 Ark. App. 331, at 7, 427 S.W.3d 776, 781; *McFarland v. Taylor*, 76 Ark. App. 343, 346-47, 65 S.W.3d 468, 471 (2002).

has exceeded the reasonably necessary use of the surface).¹⁴⁵

B. Limitations on Rights of Surface Use

- (3) The mineral owner or lessee's surface use must be reasonable or "reasonably necessary."¹⁴⁶
- (4) The mineral owner or lessee's use of the surface must be exercised with due regard for the rights and uses of the surface owner.¹⁴⁷
- (5) In the exceptional case where the mineral owner or lessee's use of the surface completely destroys other surface uses, he may be liable to the surface owner even if the destructive use is reasonably necessary.¹⁴⁸
- (6) Implied in every oil and gas lease is the duty to restore the surface (upon termination of surface operations), as nearly as practicable, to the same condition as it was before drilling.¹⁴⁹

VIII. CONCLUSION

Many of the conflicts arising between lessees and surface owners can be avoided by using oil and gas lease forms which clearly identify the scope of surface use rights and provide for

145. *LeCroy v. Barney*, 12 F.2d 363, 366 (8th Cir. 1926); *DeSoto Gathering Co.*, 2010 Ark. 5, at 6, 362 S.W.3d at 301; *Diamond Shamrock Corp.*, 256 Ark. at 891, 511 S.W.2d at 163; *Koury v. Morgan*, 172 Ark. 405, 410, 288 S.W. 929, 931 (1926); *Pollard*, 2013 Ark. App. 331, at 7, 427 S.W.3d at 781; *McFarland*, 76 Ark. App. at 346-47, 65 S.W.3d at 471.

146. *DeSoto Gathering Co.*, 2010 Ark. 5, at 7, 362 S.W.3d at 302; *Diamond Shamrock Corp.*, 256 Ark. at 891, 511 S.W.2d at 163; *Ark. La. Gas Co.*, 240 Ark. at 950, 403 S.W.2d at 55; *Pollard*, 2013 Ark. App. 331, at 7, 427 S.W.3d at 781; *McFarland*, 76 Ark. App. at 346-47, 65 S.W.3d at 471.

147. *Bonds*, 348 Ark. at 601, 75 S.W.3d at 199; *Diamond Shamrock Corp.*, 256 Ark. at 891, 511 S.W.2d at 163; *Martin*, 180 Ark. at 324, 21 S.W.2d at 429; *McFarland*, 76 Ark. App. at 347, 65 S.W.3d at 471.

148. *Benton v. U.S. Manganese Corp.*, 229 Ark. 181, 184-85, 313 S.W.2d 839, 842 (1958) (holding severed mineral estate owner had right to conduct open pit mining for manganese and could not be enjoined, but because open pit mining resulted in complete destruction of the surface estate, leaving "the surface owner with nothing but a 'hole in the ground' for his agricultural pursuits," the surface owner was entitled to damages for complete destruction of the surface).

149. *Chevron U.S.A. v. Murphy Exploration & Prod. Co.*, 356 Ark. 324, 330-31, 151 S.W.3d 306, 310 (2004); *Bonds v. Sanchez-O'Brien Oil & Gas Co.*, 289 Ark. 582, 585, 715 S.W.2d 444, 446 (1986).

appropriate damage payments to the lessor. Of course, if the mineral estate is severed, the surface owner has no influence over the lease terms. It is likely that Arkansas courts will tend to be sympathetic to surface owners burdened with leases to which they are not a party and from which they will reap no economic benefit. Many prudent operators negotiate separate surface use agreements with surface owners and provide damage payments, even where the damage is reasonably necessary and the lessee has no legal liability for such payments.