THE OKLAHOMA SURFACE DAMAGES ACT

A SUMMARY OF JUDICIAL CONSTRUCTION
SINCE ITS INCEPTION

Oil and Gas Law 2002

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I. Introduction

Effective July 1, 1982, the Oklahoma legislature changed the long-standing law in Oklahoma regarding an oil and gas operator’s liability to a surface owner for damages caused by locating a drill site on the surface owner’s land. The legislature changed, among other things, the operator’s obligations to notify and negotiate with the surface owner, as well as the measure of damages applicable to drill site locations, it provided a mandatory method for resolving surface damage disputes through the courts, it imposed potential statutory liability upon operators for treble damages, and it exposed both operators and surface owners to the possibility of paying not only their own, but also the other’s, attorney fees for a trial of the surface damage issues.

Effective July 1, 1982, the Oklahoma legislature enacted the Oklahoma Surface Damages Act, codified as Title 52 Oklahoma Statutes §§ 318.2 – 318.9.1 The legislation, principally authored by State Representative Vernon Dunn2 and State Senator Paul Taliaferro,3 was in response to perceived “difficulties” which they, and their agricultural and ranching constituents, had been experiencing with less-than-respectful oil and gas operators.4 You may recall that 1982 came around the conclusion of Oklahoma’s “drill everything and everywhere” phase, a/k/a the last “oil boom”, when certain operators and drillers were rumored to have routinely conducted themselves in a manner that the industry would not be especially proud of today.

II. The Law of Drill Site Surface Damages Before Passage of the Act

To understand the scope of change which passage of the Act brought about, it is necessary to first understand the common law standard of damages for drill site locations which had existed in Oklahoma for many years before the Act. Numerous excellent law review notes and bar association journal articles have been written on the subject,5 and,
for brevity's sake, the wheel will not be reinvented here. Also, several of the cases cited
in the appendices to this paper recount a historical perspective of the law relating to drill
site surface damages before, as opposed to after, passage of the Act.6 Perhaps one of the
more-succinct summaries of the pre-Act and post-Act differences was given by the 10th
Circuit Court of Appeals in Collins v. Oxley, 897 F.2d 456 (10th Cir. 1990), wherein the
Court stated,

"The effective date of the Act was July 1, 1982. Prior to that date,
under Oklahoma law the holder of an oil and gas lease had an implied
right to enter upon the leased premises and make such use of the
surface as was reasonably necessary to develop and produce oil and
gas without liability to the surface owner for damage to the surface.
He would, however, have been liable to the surface owner for damages
resulting from unreasonable entry on the land or unreasonable use of
the surface (citations omitted). The Act purported to change the duty
owed by the lessee to the surface owner to one of so-called strict
liability whereby the lessee would be liable to the surface owner for
any damage caused the surface by his drilling operation."

Needless to say, the abrupt about-face which the legislature imposed upon the
industry (including operators and surface owners alike) did not come without its share
uncertainties and ensuing litigation. The purpose of this paper is to chronicle the judicial
decisions handed down since July 1, 1982, which deal primarily with interpretation and
enforcement of the courts’ perceived legislative intent underlying the Act. In performing
the research for this paper, I have located thirty decisions (included in which are four
unpublished opinions), as well as one Oklahoma Attorney General’s opinion, with which
I believe the well-informed oil and gas practitioner who may deal with drill site surface
damages should be familiar. Those decisions, listed in chronological order, appear as
Appendix II hereto. In Appendix III hereto, these cases are grouped according to what I
believe to be their subject matter of primary import, and I have attempted to summarize
such import by subject matter headings, followed by a very brief statement of what I
believe the case says with regard to that particular subject matter. While Appendix III

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6 See, for instance, Cormack v. Wil-Mc Corp., 661 P.2d 525 (Okl. 1983); Thompson v. Andover Oil Co.,
groups the thirty decisions into eighteen subject matter categories, the decisions may be combined into the following five related topics, for purposes of the below discussion.

III. Constitutionality of the Act, Application of the Act to Oil and Gas Leases Which Pre-Date the Act’s Effective Date, and Application of the Act to Wells Drilled Before the Act’s Effective Date

Not surprisingly, the two earliest cases to deal with substantive issues presented by the new Act concerned the oil and gas operator’s challenge to the constitutionality of the Act, with the operator’s primary argument being that the Act was unconstitutional because it purportedly deprived the operator of vested rights held under pre-Act oil and gas leases.\(^7\)

The first appellate decision arose from two actions filed under the Act in Grant County, Oklahoma. In Bowles v. Kretchmar, 55 Okla. B. J. 967 (Okla.App. 1984) (cert. denied. Withdrawn from publication by Oklahoma Supreme Court Order dated October 1, 1984 at 55 Okla. B.J. 1991), oil and gas leases which pre-dated the Act contained the typical provision that, “Lessees shall pay for all damages caused by its operations to growing crops on said land.” The operator requested the trial court to instruct the appraisers that any award must be limited to damage to growing crops, as provided in the leases. The trial court, however, instructed the appraisers that the measure of damages must take into account all injuries to the land, and not be limited to the valuation of damages to only the growing crops. Operator asserted on appeal that pursuant to the Act, his liability should be limited to those damages stated in the pre-Act leases (i.e. damages only to growing crops), or, in the alternative, that the Act did not apply to pre-Act leases. The Court of Appeals agreed with the operator’s alternative argument, and held,

“The Court is of the opinion that the language of §318.7 is clear and that the Legislature did not intend the Act to have retroactive effect. To apply the Act to Appellant’s oil and gas leases ‘would indeed impair the lease contract and prejudicially affect rights vested upon execution of...

\(^7\) Although the first case to mention the Act was Cormack v. The Wil-Mc Corporation, 661 P.2d 525, at 527 (Okla. 1983), the Supreme Court, therein, did not address any substantive issues pertaining to the Act, or interpret or construe the Act. The Supreme Court merely stated, “Moreover, since the filing of this appeal, the legislature has seen fit to enact a series of provisions, 52 O.S. Supp. 1982, §318.2 through §318.9, specifically recognizing the owner’s right to maintain a cause of action for surface damages against the unit operator. These provisions also outline a method for negotiation of surface damages. While not before us in this appeal, these provisions set out guidelines for a cause of action whose existence we recognize in our State Constitution.”
the contract’ (citation omitted). We therefore hold that the Act applies to leases entered into after July 1, 1982, the effective date of the Act.”

In acting on Appellee’s writ of certiorari (which was denied), the Oklahoma Supreme Court ordered the Court of Appeals opinion withdrawn from publication, signaling its disagreement with the Court of Appeals result.

The second (and landmark) case, in which the Oklahoma Supreme Court announced its standard on this issue, arose out of an action filed under the Act in Haskell County, Oklahoma. In Davis Oil Company v. Cloud, 766 P.2d 1347 (Okla. 1986), the trial court had instructed the jury that the measure of damages was the diminution in fair market value of the landowner’s property resulting from operator’s drilling activity (a dry hole, by the way). Appellant operator’s primary assertion on appeal was that such instruction was constitutionally improper, in that the proper measure of damages should have been the pre-Act standard, being, as the Supreme Court stated, “Under that standard an oil and gas operator would be held liable for surface damages only if such damages resulted from wanton or negligent operations or if the operations affected more than a reasonable area of the surface” (citations omitted). After discussing numerous authorities, the Supreme Court concluded, “We thus find that the standard of liability for damages to the surface estate flowing from the exercise of the mineral estate holder’s right to enter and use the land was a subject clearly susceptible to modification by exercise of the state’s police power…Our review of the challenged legislation in light of these standards impels a finding of validity.”

In four subsequent cases, the Oklahoma Supreme Court made quick work of dismissing the challenger’s constitutional arguments. In Andress v. Bowlby, 773 P.2d 1265 (Okla. 1989), arising from an action filed in Pittsburg County, Oklahoma the Court stated, “The first argument presented challenges the constitutionality of the application of the Oklahoma oil and gas surface damages act, 52 O.S.Supp 1882 §§318.2 through 318.9, to the present case. The arguments presented have been rejected by this Court in the Case of Davis Oil Company v. Cloud (citation omitted).”
In *Darling v. Quail Creek Petroleum Management Corporation*, 778 P.2d 943 (Okl.App. 1989), a case appealed from the District Court of Love County, Oklahoma, the Court of Appeals stated,

"Appellant contends that the trial court committed reversible error in applying the Act retroactively to this case. Under this proposition, Appellant has listed five sub-issues, addressing the Act’s constitutionality and its lack of application to non-resident surface owners under §318.3. This proposition is without merit in its entirety. The issue of the application of the Act to this case was answered in Davis. The Supreme Court upheld the constitutionality of the Act and held that it would apply to leases existing at the time of its enactment (citation omitted)."

In *Jerry Scott Drilling Company, Inc. v. Scott*, 781 P.2d 826 (Okla. 1989), a case arising out of Seminole County, Oklahoma, the Oklahoma Supreme Court afforded its comments on appellant’s argument that “it was neither constitutional nor consistent with legislative intent to apply the standard of liability contained in the Act...in a situation as here under a lease entered into prior to the effective date of the Act”, to only footnote status, stating (footnote 4, at 828),

"Similar arguments concerning the constitutionality of the Act were considered and rejected in *Davis Oil Co. v. Cloud*, 766 P.2d 1347 (Okl. 1986).

The federal judiciary then took the opportunity to comment on the issue of application of the Act to pre-Act leases in *Collins v. Oxley*, 897 F.2d 456 (10th Cir. 1990). Here, the U.S. District Court for the Eastern District of Oklahoma had found that because the operator’s leases pre-dated the Act, the operator had a vested property right under the pre-existing leases to enter on the leased premises and make such use of the surface as was reasonably necessary, without liability to the surface owner. In reversing the trial court, the 10th Circuit noted that when the trial court issued its decision, a petition for rehearing was pending in *Davis Oil Company v. Cloud*. In rejecting the “unconstitutionality of the Act” argument, the 10th Circuit stated, “That line of reasoning has now been finally rejected by a majority of the Oklahoma Supreme Court in *Davis Oil Co. v. Cloud*, supra.”
The final case in this line presents a somewhat different and interesting twist. In *Houck v. Hold Oil Corporation*, 867 P.2d 451 (Okla. 1993), arising out of Pittsburg County, Oklahoma, the operator had drilled two wells on the landowner’s property, one before the effective date of the Act, and one after the effective date of the Act. The trial court had found that from commencement of the first well (before the Act) to completion of the second well (after the Act), the drilling activities on the property were one continuous operation. Accordingly, he ruled that the damage provisions of the Act were retroactive to the first well. The Oklahoma Supreme Court rejected the trial court’s “continuous operation” conclusion, based upon lack of evidence in support thereof, and found that the Act did not apply retroactively to the first well, because

"Nowhere in the Act is there an express provision indicating legislative intent to apply the Act to wells drilled prior to the Act’s effective date... In that the Act by express language is geared toward future activity we fail to find any legislative intent that would require application to the first well which was completed prior to the effective date of the Act."

In a final parting blow to the argument that the Act is unconstitutional because it deprives the operator of vested property rights under pre-existing oil and gas leases, the Supreme Court in *Houck* again stated,

"...we held in *Davis* the Act’s application to leases pre-dating the effective date of the Act was not an impermissible impairment of contract in violation of either the Oklahoma or United States Constitutions... we adhere to our decision there and hold that as to the second well it would be permissible to apply the Act as to the standard of liability for damages rather than the prior common law notwithstanding the fact (operator’s) lease pre-dated the effective date of the Act."

*Houck* seems to have rung the death knell for the unconstitutionality argument, as such arguments do not appear to have been raised in any reported decision since 1993.

IV. **Measure of Actual Damages and Liability for Treble Damages**

As discussed above, upon the 1982 enactment of the Act, the Oklahoma legislature changed, by statutory declaration, the long-standing law in Oklahoma regarding liability for drill site damages. Since then, the Oklahoma courts have firmly
and conclusively confirmed the constitutionality of the Act as a valid exercise of the state’s police power, even with regard to arm’s length contracts (oil and gas leases) which were negotiated between and consummated by the surface owner and drilling operator long before the Act. Prior to the Act, the operator had the right, under its leases, to utilize so much of the surface as was reasonably necessary to develop the mineral and leasehold estate, being liable to the surface owner only for unreasonable use or negligent destruction of the surface owner’s property, or such other damages as may be specified in the oil and gas lease. As the Oklahoma Supreme Court stated early on, the common pre-Act assumption was,

"...that when a lessor negotiates with a lessee for the right to extract minerals, he knows the lessee will have to enter upon the surface to establish drilling operations. Presumably, the lessor negotiates a price for his lease that includes compensation for damages to the surface which both parties contemplate at the time. If desired, the lessor can negotiate into the contract a provision requiring the lessee to compensate him for damages to the surface caused by the oil and gas exploration."\(^8\)

The first case to consider the new post-Act measure of (actual) damages was *Davis Oil Company v. Cloud*, 766 P.2d 1347 (Okla. 1986). As noted in Section III above, the Oklahoma Supreme Court in *Davis* affirmed the trial court’s jury instruction that, “the measure of damages which they should use in the case was the diminution in fair market value of appellee’s property.” *Davis*, however, also contains an informative discussion of the issue of personal inconvenience to the surface owner as an element of damages. The trial court’s Jury Instruction No. 4, to which the operator objected in its appeal, stated that the jury could consider, “inconvenience suffered in actual use of the land by operator”. In issuing its guidance that inconvenience, with certain qualifications, may properly be considered as an element of damages, the Oklahoma Supreme Court stated,

"As the nature of the action under the surface damages act clearly partakes of the nature of a condemnation action (citation omitted), such an element of inconvenience, if present would properly be considered. Inconvenience in the use of the land resulting from

appellant’s operations remains a viable consideration in this action. The point which seems to be missed is that the inconvenience must have an effect on the value of the land to be an element in the assessment of damages in the present action.” (emphasis added)

I’m not sure exactly how the value of a parcel of farm land is diminished due to the personal inconvenience of its owner; but no doubt a creative surface owner’s attorney could come up with any number of ways.

Four months after Davis, the Oklahoma Court of Appeals considered in Santa Fe Minerals, Inc. v. Simpson, 735 P.2d 1206 (Okla.App. 1987) the trial court’s jury instructions given in a surface damages case tried in Okfuskee County, Oklahoma. In this case brought under the Act, the court had instructed the jury that it, “cannot award any sum unless you find that (Santa Fe) used more land than was reasonably necessary for the drilling of wells”. Another instruction stated,

“You are hereby instructed that the plaintiff, Santa Fe Minerals, Inc., has the right of ingress and egress across the defendant’s real property together with the right to occupy the surface of the land to the extent reasonably necessary for exploring and marketing oil and gas, and unless you find that Santa Fe Minerals, Inc.’s use of the surface for this purpose was unreasonable, then you shall render a verdict for the plaintiff.”

In remanding the case for new trial because of the erroneous jury instructions, the Court of Appeals stated, “Even though these were correct statements of common law prior to enactment of the Surface Damages Act, they do not define the respective rights of the parties recognized by the Act.”

Evidence of remaining confusion within the legal community and judiciary regarding the proper measure of damages under the Act can be seen from the fact that after Davis and Santa Fe, there followed in 1989 three unpublished appellate opinions arising from cases tried under the Act in three other counties -- Canadian, Cleveland, and McClain. In both Ralph E. Plotner Oil and Gas Investments v. Rauch, 60 Okla. B. J. 576 (Okla. 1989) and Settlers Energy Corporation v. United Bank and Trust, 60 Okla. B. J. 576 (Okla. 1989), the Oklahoma Supreme Court stated,

“Trial court instructed appraisers that liability for damages to the surface was limited to unreasonable use of the surface...Held: instructions of the trial court improperly limited liability for oil and
gas drilling operations...Reversed and cause remanded for
proceedings consistent with Davis Oil Co. v. Cloud.” (citation omitted)

And in Sabine Corporation v. Poteet, 60 Okla. B. J. 582 (Okl.App. 1989), the
Court of Appeals made it clear that, “The common law rule (regarding measure of
damages) did not survive with the enactment of the Surface Damages Act. See Davis Oil
Company v. Cloud.” (citation omitted)

Following these unpublished opinions, the Oklahoma Supreme Court in Dyco
Petroleum Corporation v. Smith, 771 P.2d 1006 (Okla. 1989) again considered
challenged appraisers’ instructions, now from a case tried in Washita County. Appellant
first contended that the trial court improperly instructed the appraisers that they could
consider personal inconvenience to the landowners as an element of damages. Citing
Davis, the Supreme Court echoed that personal inconvenience may be considered an
element of damages, but only insofar as the inconvenience affects the value of the land.
Appellant’s second contention was that the trial court erred in failing to instruct the
appraisers that damages could only be assessed for damages to the land actually used in
the drilling operations. The Supreme Court found no merit in this contention, stating,

“The present case presents an excellent example of the propriety of
considering damages to the surface beyond the land actually taken.
Here the entire 160 acres was irrigated farm land, serviced by a center
pivot irrigation system. The placement of the well in this case
interfered with the irrigation system and as a result took a portion of
the land outside of the irrigation system’s reach, which in turn directly
affected the productivity of that portion of the land.”

The Supreme Court found no merit in appellant’s third contention that the
appraisers were improperly allowed to assess damages prior to completion of drilling
operations. The Court stated that the Act, “clearly indicates that the appraisers are to
consider damages which have occurred or which will occur.”

The next two 1989 cases (1989 seems to have been the watershed year for Surface
Damage Act cases) to consider the proper measure of damages didn’t add much, if
anything, new to the equation, but reaffirmed the Court’s prior pronouncements. In
Andress v. Bowlby, 773 P.2d 1265 (Okla. 1989), the Supreme Court reaffirmed Davis,
stating, “As we stated in Davis, supra, the damages to be assessed by the jury in a surface
damages act case is the diminution of the fair market value of the surface estate resulting
from the drilling operations”; and restated its position in *Dyco* that, “...(the Act) clearly indicates that future events may be considered in determining loss of market value.” In *Darling v. Quail Creek Petroleum Management Corporation*, 778 P.2d 943 (Okl.App. 1989), the Court of Appeals cited *Davis, Dyco, and Andress* for the propositions that, “Again, in an action under the Surface Damages Act the measure of damages is the diminution of fair market value; and, inconvenience or annoyance may be considered, but only as it affects fair market value of the land.”

Lastly, the 1993 case of *Houck v. Hold Oil Corporation*, 867 P.2d 451 (Okla. 1993) and the 1994 case of *Schneberger v. Apache Corporation*, 890 P.2d 847 (Okla. 1994) (rehearing denied) gave the Oklahoma Supreme Court the opportunity to again emphasize that the measure of damages for surface drilling operations was different after the Act than before the Act. In *Houck*, the court ruled that it would be improper to apply the pre-Act measure of damages to a well drilled after the July 1, 1982, and in *Schneberger*, the Court stated, “The Surface Damage Act changed the standard of liability for damages to the surface estate...”

Another important case dealing with measure of damages under the Act was handed down by the Oklahoma Court of Civil Appeals in May 2001. In the case of *Vastar Resources, Inc. v. Betty J. Howard, ___ P.3d ____* (Okla.Civ.App.Div.2 Case No. 93,285, consolidated with Case No. 93,463 - May 1, 2001) (cert. denied Nov. 20, 2001), the operator brought an action under the Act to determine surface damages incident to its drilling operations. At trial, the surface owner was allowed to introduce evidence in support of its contention that Vastar’s drilling operations had caused groundwater and subsurface pollution. In reversing and remanding the case, the Court of Civil Appeals held that the introduction of such evidence into a case brought under the Act was improper, and could be properly entertained only in a separate action. The Court stated, “...contrary to Landowner’s argument, the Act does not cover all their damage claims. We hold the trial court abused its discretion by allowing the jury to hear evidence about damages due to Vastar’s allegedly tortious conduct.”

9 *Schneberger* primarily deals with damages to the sub-surface estate, and contains a lengthy and very informative discussion and historical analysis of the measure of damages for temporary and permanent injury to land.

10 As January 16, 2002, mandate had not issued in this case, and thus this decision had not yet been placed on Westlaw’s on-line legal research system, nor does it appear in the hardbound Pacific Reporter.
Also with regard to actual damages awards, this would be a good place to mention the most recently reported case of the thirty decisions construing the Act, which decision is Comanche Resources Company v. Turner, 33 P.3d 688 (Okla.Civ.App.Div.2 2001) (cert. denied). In Comanche, the operator had negotiated a satisfactory surface damages settlement with the surface owner for the operator’s reentry of a previously abandoned wellbore. Rather than conducting the reentry operation, however, the operator ultimately drilled a new well at a different location on the surface owner’s property. As an exception to the appraiser’s report for damages to the new location, the operator asserted that it was entitled to a partial set-off of the damages for the new location by the amount it had paid to the surface owner for the reentry operation. Not so, said the Oklahoma Court of Appeals, primarily based upon the surface damages agreement for the reentry operation entered into by the operator and the surface owner, which by its express language clearly limited the dollars paid to damages for the anticipated reentry operation, and not for a new location.

The Act also contains punitive provisions, providing that the court may award treble damages to the surface estate owner if the operator “willfully and knowingly” (1) enters upon the land for the purpose of commencing drilling operations before giving the surface owner notice, or (2) does so without the agreement of the surface owner and without requesting the court to appoint appraisers, or (3) fails to keep the required bond posted. 11 Several interesting appellate decisions have dealt with the treble damages issue.

In Tower Oil & Gas Company, Inc. v. Harmon, 782 P.2d 1355 (Okla. 1989), the operator had withdrawn its demand for a jury trial and paid into court the amount of the appraiser’s award. Upon the surface owner’s motion, the court also awarded treble damages to the surface owner, based upon the operator’s alleged failure to give proper notice and alleged failure to enter into good faith negotiations. The Oklahoma Supreme Court reversed the treble damages award, finding that the procedural requirement of the Act (§381.9) that treble damages issues be tried to the court in a separate action had not been met. The Court stated, “The statute on this point is very clear, the evidence to support the imposition of treble damages must be developed in the course of a separate hearing in which the issue to be determined is liability for treble damages.” The Court

11 § 318.9 of the Act.
also noted that, "...the failure to negotiate in good faith is (not) a proper ground for award of treble damages."

Beasley Oil Company v. Nance, 801 P.2d 745 (Okla.App. 1990) is another case in which the operator paid the appraiser's award into court, and then dismissed its case without the occurrence of a jury trial. The trial court overruled the surface owner's motion for treble damages. In affirming the trial court's denial of treble damages, the Court of Appeals found that operator had met all of the requirements necessary under the Act before commencing operations.

Perhaps the most interesting treble damages case is Samson Resources Company v. Cloud, 812 P.2d 1378 (Okla.App. 1991). Samson had met all of the procedural requirements of the Act. It had adequately notified the surface owner, by certified mail, of its intent to drill on the surface owner's land. It had attempted to negotiate in good faith. When the negotiations failed, it had filed a petition for appointment of appraisers with the Atoka County District Court, and then entered onto the surface owner's land and commenced operations. Only problem was, the land was in Haskell, not Atoka County. Woops! Upon discovery of its mistake, it refiled its petition in Haskell County, wherein appraisers were appointed and an appraiser's report determining damages was filed. The trial court imposed treble damages, finding that Samson had violated the Act by having entered upon the surface owner's land without having filed its petition in the right county. The Court of Appeals reversed the treble damages award, stating,

"Appellant attempted to comply with the spirit of the Act in all its actions, and committed only a procedural error in filing in the wrong county. We cannot say that this is the type of evil the legislature sought to protect against when it enacted the treble damages provision of Section 318.9 or that Appellant's acts were 'willfully and knowingly' consummated as those terms are commonly understood...The trial court erred in awarding treble damages under these facts."12

In Houck v. Hold Oil Corporation, 867 P.2d 451 (Okla. 1993), the Oklahoma Supreme Court reversed another treble damages award.13 In Houck, the operator had

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12 The Court of Appeals also reversed the trial court's award of attorney fees, expenses, and costs.
13 In Houck, the trial court refused to award treble damages. However, the Court of Appeals found that the trial court had abused its discretion in not doing so, and ordered a treble damages award.
entered into negotiations with the surface owner, thought it had a verbal agreement as to damages, and sent a written agreement to the owners to be signed. It then entered onto the site and commenced drilling operations. The surface owner, however, never signed and returned the written agreement, and argued that the operator’s commencement of operations in the absence of a written agreement was a violation of §318.5 A of the Act, entitling it to treble damages. In reversing the treble damages award, the Oklahoma Supreme Court emphasized that an operator’s non-compliance with the Act must be willful in order to merit treble damages. The Court stated,

“...although the evidence is probably sufficient to meet the clear, cogent and convincing standard as to entering the site to drill prior to the signing of a written agreement on the issue of surface damages we believe the evidence of Hold’s belief it had an oral agreement with the Houck’s as to surface damages, coupled with the failure of the Houcks to point to any evidence in the record which would show a wrongful intent or motive on the part of Hold to violate the Act’s provisions, leads to the conclusion the Houcks failed to carry their burden to show such was a willful violation...as we view the record it supports only a determination Hold’s conduct was based on an innocent misapprehension, rather than a willful violation of any of the Act’s provisions.

Thus, in each of the first four cases dealing with treble damages, the ultimate result was no treble damages award, despite the obvious failure of the operator to strictly comply with certain provisions of the Act. Not so, however, with the most recent case. In R.L. Sanford v. Anadarko Petroleum Corporation, 32 P.3d 218 (Okla.Civ.App.Div.3 2001) (cert. denied), the Court of Appeals affirmed the trial court’s award of treble damages. Here, the operator had given the surface owner adequate notice of its intent to drill, and was sufficiently bonded. However, it first entered onto the surface owner’s property with equipment, then, eight days later, petitioned the court for appointment of appraisers. On appeal, the operator argued that the language of the second paragraph of §318.9 of the Act required only the posting of a bond and notification of the surface owner prior to entry. It also argued that its “usual procedure” was to file a petition prior to entry upon the property, and that the reason it did not do so in this case was due to the availability of the equipment it had placed on the surface owner’s land. Nice try, said the Court of Appeals, but
“Regardless of the reason the events occurred in that sequence, §318.5 required Anadarko to file its petition before commencing its operations, and the evidence shows that the violation of the statute was ‘wilfully and knowingly’ done. Section 318.9 supports the judgment against Anadarko for treble damages.”

V. Application of the Act to Seismic, Geophysical Work, and Other Exploration Activities Outside of Drilling Operations

In two cases, the Oklahoma Supreme Court has addressed the issue of the nature of activities to which the Act applies. The first of these cases is The Anschutz Corporation v. Sanders, 734 P.2d 1290 (Okla. 1987), in which the surface owner argued that the Act applied to an operator’s entry upon its property for the purpose of conducting seismic testing. The surface owner’s argument, as stated by the Supreme Court, was, “that because the States of Montana, South Dakota and North Dakota have provided that their respective surface damages acts shall apply to exploration activities, the State of Oklahoma must likewise have so intended.”14 The Oklahoma Supreme Court made quick work of dismissing the surface owner’s position, stating that, “This reasoning founders on the basic tenets of statutory construction” and further stated,

“The right of entry for the purpose of exploration has been previously recognized as part of Oklahoma decisional law. The legislation which appellant argues derogates that right is specifically addressed only to drilling and production operations. To infer an intent of the Legislature that this statutory scheme was also to function to limit the right to engage in exploratory activities is not a permissible result.”15

The case of Alpine Construction Corporation v. Fenton, 764 P.2d 1340 (Okla. 1988) actually concerned coal mining rights, rather than oil and gas drilling rights, in Haskell County. This case did not afford the Oklahoma Supreme Court an opportunity to extensively comment on the Act, but the Supreme Court did note that “The trial court

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15 It should be noted here that effective June 5, 1998, the Oklahoma legislature enacted the Seismic Exploration Regulation Act, codified at 52 Oklahoma Statutes §§ 318.22 et. seq. Anyone conducting seismographic testing in the state of Oklahoma must be aware of the requirements of this act, as violation of its provisions for the posting of financial security, giving notice to surface owners, being permitted by the Oklahoma Corporation Commission, etc. subjects the violator to a fine of $1,000 per violation per day.
also concluded that the oil and gas surface damages act (citation omitted) would provide an equitable guide to determining the amount of damages recoverable by the (surface owners for the coal mining operations).” The Supreme Court noted in passing that, “We would point out however that by its specific terms the applicability of (the Act) is limited to oil and gas drilling and preparations for drilling.”

The federal judiciary then weighed in on this issue in the case of Union Oil Company v. Heinsohn, 43 F.3d 500 (10th Cir. 1994). At the outset, let me admit that the 10th Circuit’s opinion in this case is, at least to me, somewhat perplexing, especially in light of the rulings in Anschutz and Alpine, and you are cautioned to read the case yourself and draw your own conclusions. That having been said, Union Oil brought this case seeking a declaratory judgment as to whether the Act would apply to the construction of a sour gas processing plant on the surface owner’s property, and if it did apply, what the damages would be. Based upon recent conversations with attorneys who were involved in the trial and appeal of this case, I understand that Union Oil did not feel especially strongly that the Act would, or should, apply to construction of a sour gas plant, that Union sought the declaratory judgment out of an abundance of caution, and that all parties in the case were somewhat surprised when the trial court found that the Act did apply. Such notwithstanding, however, and despite the Oklahoma Supreme Court’s earlier pronouncements in Anschutz and Alpine, the 10th Circuit’s opinion seems, by implication, to assent to the trial court’s determination. The opinion states,

“The record demonstrates that the Oklahoma Surface Damages Act was followed in the proof, instructions, and award. The decline in the fair market value of the land was shown. The Act allows for no award for personal injuries...The judgment against Union Oil Company in the cause of action under the Oklahoma Surface Damages Act is Affirmed...”

Based upon further conversations with attorneys who were involved in the case, I understand that the issue of the applicability of the Act to the construction of the sour gas plant was not raised on appeal. Thus, although the 10th Circuit did not specifically rule on this issue, you should be aware that at least one federal district court judge has found the Act to be applicable to oil and gas activities outside of strict drilling operations, despite Anschutz and Alpine.
VI. Attorney Fees, Expert Witness Fees, and Sanctions

Section 318.5(F) of the Act states, "If the party demanding the jury trial does not recover a verdict more favorable to him than the assessment award of the appraisers, all court costs including reasonable attorney fees shall be assessed against him." This simple, seemingly straightforward language notwithstanding, the prudent attorney will advise his or her oil company client that if they insist on going through with an action under the Act, they had best be prepared to pay not only their own, but also the surface owner’s attorney fees, as the courts have found a number of ways to make that happen. The following series of cases illustrates this point.

In Andress v. Bowlby, 773 P.2d 1265 (Okla. 1989), the appraisers assessed surface damages in the amount of $7,500. Both the operator and surface owner then filed demands for jury trial. On the day set for commencement of the trial, the operator withdrew its demand, and trial proceeded under the surface owner's demand, with the jury returning an award of $20,000. The trial court denied the surface owner’s request for attorney fees, but the Oklahoma Supreme Court reversed on this issue and awarded attorney fees to the surface owner. Recall that the Act states that if the party demanding jury trial does not get more than the appraisers’ award, then he/she has to pay the other party’s attorney fees. In this case, just the opposite happened -- the party who demanded the jury trial did get more than the appraisers’ award, and the Supreme Court awarded his attorney fees to him anyway. The Court reasoned that because Section 318.5(F) of the Act states, “The trial shall be conducted and judgment entered in the same manner as railroad condemnation actions tried in the court”, and because attorney fees would have been awarded under similar circumstances in a railroad condemnation case, they must be awardable here as well.

Commenting on the surface owner’s request for expert witness fees, however, the Andress court strictly construed the Act, and held that the surface owner was not entitled to recover expert witness fees, because the Act did not specifically so allow. I would respectfully offer that the Act, by its explicit wording, doesn’t allow a party who demands a jury trial, and who gets more from the jury than from the appraisers, to recover its attorney fees, either. Obviously, the Supreme Court sees it differently.
A result just as perplexing as Andress, with respect to attorney fees, issued four years later in TXO Production Corporation v. Stanton, 847 P.2d 821 (Okl.App. 1992) (cert. denied). In this case, Mr. Stanton had demanded damages from TXO of $130,000, being $35,000 for diminution in value to his land, and $95,000 for alleged surface pollution. The appraisers returned an assessment of $6,850, and Mr. Stanton demanded a jury trial. The jury returned a total award of $22,000 in damages. Remember that the rule under the Act with regard to attorney fees is, that if the party who demands the jury trial does not get more from the jury than from the appraisers, then he has to pay the other party’s attorney fees. As in Andress, the exact opposite happened, that is, the party who demanded the jury trial did get more from the jury than from the appraisers. But TXO ultimately still found itself paying $15,000 of Mr. Stanton’s attorney fees. Why? The Oklahoma Court of Appeals decided that the legislature did not intend, by the express attorney fees language in the Act, to limit the recovery of such fees to that situation clearly spelled out in the Act. The Court stated,

“The controlling principle in determining whether a statute authorizing attorney fees applies to a particular proceeding is the ‘underlying nature of the suit.’ (citation omitted) (T)he nature of the action under the surface damages act clearly partakes of the nature of a condemnation action. (citation omitted) Accordingly, we hold that the legislature did not intend to restrict the recovery of attorney fees to situations covered by § 318.5 (F), but contemplated application of 66 O.S. 1991 § 55(D), by virtue of the kindred nature of those actions and the reference to railroad condemnation statutes in § 318.5(F).”

1989 was a bad year for Tower Oil & Gas Company, insofar as liability for attorney fees under the Act. The Oklahoma Supreme Court decided three cases that year against Tower, Tower Oil & Gas Company, Inc. v. Keeler, 776 P.2d 1277 (Okla. 1989), Tower Oil & Gas Company, Inc. v. Paulk, 776 P.2d 1279 (Okla. 1989), and Tower Oil & Gas Company, Inc. v. Harmon, 782 P.2d 1355 (Okla. 1989). The facts in all three cases were similar. Tower had demanded a jury trial, but shortly before trial withdrew its demand and paid the appraisers’ award into court. The surface owner then filed a motion

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16 The relevant portion of 66 O.S. § 55 (D) states, “if the award of the jury exceeds the award of the court appointed commissioners by at least ten percent (10%), then the owner of any right, title or interest in the property involved may be paid such sum as in the opinion of the court will reimburse such owner for his reasonable attorney, appraisal, engineering, and expert witness fees actually incurred because of the condemnation proceeding.”
to recover its attorney fees and costs, which the trial court granted. On appeal, the Oklahoma Supreme Court affirmed the attorneys' fee award, stating, in Keeler,

"The quoted portion of section 318.5(F) very clearly states that if a party demanding a jury trial fails to obtain a verdict more favorable than the appraisers' award, that party shall be subject to having court costs and attorney fees assessed against him. If, as here, a party demands a jury trial and then later withdraws that request, that party has clearly failed to recover a verdict more favorable than the appraisers' award."

and, in Paulk, "We find that the proper reading of the provision is that the filing of the demand for jury trial is the activating event rather than the entry of a jury verdict." The Court then dismissed the issue in Harmon by stating that the issue was addressed and resolved in Keeler and Paulk.

Contrast these cases, however, with the result reached in Union Oil Company v. Heinsohn, 43 F.3d 500 (10th Cir. 1994). As stated above, this case was commenced by Union as a declaratory judgment action. Although the surface owner's damages were ultimately determined by a jury, and the Act was "followed in the proof, instructions, and award," the 10th Circuit Court of Appeals reversed the trial court's award of attorney fees to the surface owner because,

"This is challenged by Union on the basis that the Act has an express attorney fee provision which must be followed, and the trial court should not have applied the railroad condemnation doctrines instead. The express fee provision in the Act should prevail and it does not permit the fees here ordered against Union because Union did not request a jury which is an express condition of the Act."17

In Beasley Oil Company v. Nance, 801 P.2d 745 (Okla.App. 1990), the operator had filed an action under the Act, and the appointed appraisers had returned their assessment. Operator paid the assessment into court and, without either the operator or surface owner having demanded a jury trial, dismissed its action. The surface owner subsequently filed a motion, among other things to recover its attorney fees. The trial court awarded the surface owner its attorney fees, finding that it was a "prevailing party" in the litigation. The Oklahoma Court of Appeals reversed the attorneys fees award,

17 Contrast the 10th Circuit's refusal to apply railroad condemnation principles with regard to attorney fees awards with the earlier specific application of such condemnation cases to attorney fee issues by the Oklahoma Court of Appeals in TXO vs. Stanton.
finding that, "(under the Act) a party is only entitled to attorney's fees if it makes a demand for a jury trial. (citations omitted)."

VII. Other Surface Damages Act Issues and Cases

As noted in Appendix III hereto, the appellate courts have dealt with numerous additional issues under the Act since the Act's inception. Because these issues are mostly single case type issues, as opposed to issues which reoccur throughout a number of cases, they will not be discussed in detail here. Rather, the reader is encouraged to refer to Appendix III for the brief case summaries of the following topics: The Act as Surface Owner's Sole Remedy; Application of the Act to Non-Oklahoma Residents; Appraiser's Award as "Judgment" Subject to Dormancy and Unenforceability; Appellate Procedure; Bonding Requirements; Force Pooled Surface/Mineral Owner's Rights Under the Act; Prejudgment Interest; and Real Parties in Interest.

Although the Act, as of the time of writing of this paper, has been the prevailing law of drill site surface damages in Oklahoma for almost twenty years, it continues to prompt litigation. Such is evidenced by the three case cited in Appendix II hereto, which were decided in 2001. The oil and gas practitioner would be wise to keep a sharp eye out for the new cases and decisions which are yet to come.
The Oklahoma Surface Damages Act

§ 318.2, Definitions
For purposes of Sections 1 through 8 of this act:

1. "Operator" means a mineral owner or lessee who is engaged in drilling or preparing to drill for oil or gas; and

2. "Surface owner" means the owner or owners of record of the surface of the property on which the drilling operation is to occur.

§ 318.3, Notice of intent to drill--Negotiating surface damages
Before entering upon a site for oil or gas drilling, except in instances where there are non-state resident surface owners, non-state resident surface tenants, unknown heirs, imperfect titles, surface owners, or surface tenants whose whereabouts cannot be ascertained with reasonable diligence, the operator shall give to the surface owner a written notice of his intent to drill containing a designation of the proposed location and the approximate date that the operator proposes to commence drilling.

Such notice shall be given in writing by certified mail to the surface owner. If the operator makes an affidavit that he has conducted a search with reasonable diligence and the whereabouts of the surface owner cannot be ascertained or such notice cannot be delivered, then constructive notice of the intent to drill may be given in the same manner as provided for the notice of proceedings to appoint appraisers.

Within five (5) days of the date of delivery or service of the notice of intent to drill, it shall be the duty of the operator and the surface owner to enter into good faith negotiations to determine the surface damages.

§ 318.4, Undertakings which may be posted as damage deposit
A. Every operator doing business in this state shall file a corporate surety bond, letter of credit from a banking institution, cash, or a certificate of deposit with the Secretary of State in the sum of Twenty-five Thousand Dollars ($25,000.00) conditioned upon compliance with Sections 318.2 through 318.9 of this title for payment of any location damages due which the operator cannot otherwise pay. The Secretary of State shall hold such corporate surety bond, letter of credit from a banking institution, cash or certificate of deposit for the benefit of the surface owners of this state and shall ensure that such security is in a form readily payable to a surface owner awarded damages in an action brought pursuant to this act. Each corporate surety bond, letter of credit, cash, or certificate of deposit filed with the Secretary of State shall be accompanied by a filing fee of Ten Dollars ($10.00).

B. The bonding company or banking institution shall file, for such fee as is provided by law, a certificate that said bond or letter of credit is in effect or has been canceled, or that a claim has been made against it in the office of the court clerk in each county in which the operator is drilling or planning to drill. Said bond or letter of credit must remain in full force and effect as long as the operator continues drilling operations in this state. Each such filing shall be accompanied by a filing fee of Ten Dollars ($10.00).

C. Upon deposit of the bond, letter of credit, cash, or certificate of deposit, the operator shall be permitted entry upon the property and shall be permitted to commence drilling of a well in accordance with the terms and conditions of any lease or other existing contractual or lawful right.
D. If the damages agreed to by the parties or awarded by the court are greater than the bond, letter of credit, cash, or certificate of deposit posted, the operator shall pay the damages immediately or post an additional bond, letter of credit, cash, or certificate of deposit sufficient to cover the damages. Said increase in bond, letter of credit, cash, or certificate of deposit shall comply with the requirements of this section.

§ 318.5. Negotiating surface damages--Appraisers--Report and exceptions thereto--Jury trial

A. Prior to entering the site with heavy equipment, the operator shall negotiate with the surface owner for the payment of any damages which may be caused by the drilling operation. If the parties agree, and a written contract is signed, the operator may enter the site to drill. If agreement is not reached, or if the operator is not able to contact all parties, the operator shall petition the district court in the county in which the drilling site is located for appointment of appraisers to make recommendations to the parties and to the court concerning the amount of damages, if any. Once the operator has petitioned for appointment of appraisers, he may enter the site to drill.

B. Ten (10) days’ notice of the petition to appoint appraisers shall be given to the opposite party, either by personal service or by leaving a copy thereof at his usual place of residence with some member of his family over fifteen (15) years of age, or in the case of nonresidents, unknown heirs or other persons whose whereabouts cannot be ascertained, by publication in one issue of a newspaper qualified to publish legal notices in said county, as provided in Section 106 of Title 25 of the Oklahoma Statutes, said ten-day period to begin with the first publication.

C. The operator shall select one appraiser, the surface owner shall select one appraiser, and the two selected appraisers shall select a third appraiser for appointment by the court. Unless for good cause shown, additional time is allowed by the district court, the three (3) appraisers shall be selected within twenty (20) days of service of the notice of the petition to appoint appraisers or within twenty (20) days of the first date of publication of the notice as specified in subsection B of this section. If either of the parties fails to appoint an appraiser or if the two appraisers cannot agree on the selection of the third appraiser within the required time period, the remaining required appraisers shall be selected by the district court upon application of either party. Before entering upon their duties, such appraisers shall take and subscribe an oath, before a notary public or some other person authorized to administer oaths, that they will perform their duties faithfully and impartially to the best of their ability. They shall inspect the real property and consider the surface damages which the owner has sustained or will sustain by reason of entry upon the subject land and by reason of drilling or maintenance of oil or gas production on the subject tract of land. The appraisers shall then file a written report within thirty (30) days of the date of their appointment with the clerk of the court. The report shall set forth the quantity, boundaries and value of the property entered on or to be utilized in said oil or gas drilling, and the amount of surface damages done or to be done to the property. The appraisers shall make a valuation and determine the amount of compensation to be paid by the operator to the surface owner and the manner in which the amount shall be paid. Said appraisers shall then make a report of their proceedings to the court. The compensation of the appraisers shall be fixed and determined by the court. The operator and the surface owner shall share equally in the payment of the appraisers’ fees and court costs.

D. Within ten (10) days after the report of the appraisers is filed, the clerk of the court shall forward to each attorney of record; each party, and interested party of record, a copy of the report of the appraisers and a notice stating the time limits for filing an exception or a demand for jury trial as provided for in this

Appendix I

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section. The operator shall provide the clerk of the court with the names and last-known addresses of the parties to whom the notice and report shall be mailed, sufficient copies of the notice and report to be mailed, and pre-addressed, postage-paid envelopes.

1. This notice shall be on a form prepared by the Administrative Director of the Courts, approved by the Oklahoma Supreme Court, and supplied to all district court clerks.

2. If a party has been served by publication, the clerk shall forward a copy of the report of the appraisers and the notice of time limits for filing either an exception or a demand for jury trial to the last-known mailing address of each party, if any, and shall cause a copy of the notice of time limits to be published in one issue of a newspaper qualified to publish legal notices as provided in Section 106 of Title 25 of the Oklahoma Statutes.

3. After issuing the notice provided herein, the clerk shall endorse on the notice form filed in the case the date that a copy of the report and the notice form was forwarded to each attorney of record, each party, and each interested party of record; or the date the notice was published.

E. The time for filing an exception to the report or a demand for jury trial shall be calculated as commencing from the date the report of the appraisers is filed with the court. Upon failure of the clerk to give notice within the time prescribed, the court, upon application by any interested party, may extend the time for filing an exception to the report or filing a demand for trial by jury for a reasonable period of time not less than twenty (20) days from the date the application is heard by the court. Appraisers' fees and court costs may be the subject of an exception, may be included in an action by the petitioner, and may be set and allowed by the court.

F. The report of the appraisers may be reviewed by the court, upon written exceptions filed with the court by either party within thirty (30) days after the filing of the report. After the hearing the court shall enter the appropriate order either by confirmation, rejection, modification, or order of a new appraisal for good cause shown. Provided, that in the event a new appraisal is ordered, the operator shall have continuing right of entry subject to the continuance of the bond required herein. Either party may, within sixty (60) days after the filing of such report, file with the clerk a written demand for a trial by jury, in which case the amount of damages shall be assessed by a jury. The trial shall be conducted and judgment entered in the same manner as railroad condemnation actions tried in the court. If the party demanding the jury trial does not recover a verdict more favorable to him than the assessment award of the appraisers, all court costs including reasonable attorney fees shall be assessed against him.

§ 318.5. Negotiating surface damages—Appraisers—Report and exceptions thereto—Jury trial

A. Prior to entering the site with heavy equipment, the operator shall negotiate with the surface owner for the payment of any damages which may be caused by the drilling operation. If the parties agree, and a written contract is signed, the operator may enter the site to drill. If agreement is not reached, or if the operator is not able to contact all parties, the operator shall petition the district court in the county in which the drilling site is located for appointment of appraisers to make recommendations to the parties and to the court concerning the amount of damages, if any. Once the operator has petitioned for appointment of appraisers, the operator may enter the site to drill.

B. Ten (10) days' notice of the petition to appoint appraisers shall be given to the opposite party, either by personal service or by leaving a copy thereof at the party's usual place of residence with some family member over fifteen (15) years of age, or, in the case of nonresidents, unknown heirs or other persons
whose whereabouts cannot be ascertained, by publication in one issue of a newspaper qualified to publish legal notices in said county, as provided in Section 106 of Title 25 of the Oklahoma Statutes, said ten-day period to begin with the first publication.

C. The operator shall select one appraiser, the surface owner shall select one appraiser, and the two selected appraisers shall select a third appraiser for appointment by the court, which such third appraiser shall be a state-certified general real estate appraiser and be in good standing with the Oklahoma Real Estate Appraisal Board. Unless for good cause shown, additional time is allowed by the district court, the three (3) appraisers shall be selected within twenty (20) days of service of the notice of the petition to appoint appraisers or within twenty (20) days of the first date of publication of the notice as specified in subsection B of this section. If either of the parties fails to appoint an appraiser or if the two appraisers cannot agree on the selection of the third appraiser within the required time period, the remaining required appraisers shall be selected by the district court upon application of either party, of which at least one shall be a state-certified general real estate appraiser and be in good standing with the Oklahoma Real Estate Appraisal Board. Before entering upon their duties, such appraisers shall take and subscribe an oath, before a notary public or some other person authorized to administer oaths, that they will perform their duties faithfully and impartially to the best of their ability. They shall inspect the real property and consider the surface damages which the owner has sustained or will sustain by reason of entry upon the subject land and by reason of drilling or maintenance of oil or gas production on the subject tract of land. The appraisers shall then file a written report within thirty (30) days of the date of their appointment with the clerk of the court. The report shall set forth the quantity, boundaries and value of the property entered on or to be utilized in said oil or gas drilling, and the amount of surface damages done or to be done to the property. The appraisers shall make a valuation and determine the amount of compensation to be paid by the operator to the surface owner and the manner in which the amount shall be paid. Said appraisers shall then make a report of their proceedings to the court. The compensation of the appraisers shall be fixed and determined by the court. The operator and the surface owner shall share equally in the payment of the appraisers' fees and court costs.

D. Within ten (10) days after the report of the appraisers is filed, the clerk of the court shall forward to each attorney of record, each party, and interested party of record, a copy of the report of the appraisers and a notice stating the time limits for filing an exception or a demand for jury trial as provided for in this section. The operator shall provide the clerk of the court with the names and last-known addresses of the parties to whom the notice and report shall be mailed, sufficient copies of the notice and report to be mailed, and pre-addressed, postage-paid envelopes.

1. This notice shall be on a form prepared by the Administrative Director of the Courts, approved by the Oklahoma Supreme Court, and supplied to all district court clerks.

2. If a party has been served by publication, the clerk shall forward a copy of the report of the appraisers and the notice of time limits for filing either an exception or a demand for jury trial to the last-known mailing address of each party, if any, and shall cause a copy of the notice of time limits to be published in one issue of a newspaper qualified to publish legal notices as provided in Section 106 of Title 25 of the Oklahoma Statutes.

3. After issuing the notice provided herein, the clerk shall endorse on the notice form filed in the case the date that a copy of the report and the notice form was forwarded to each attorney of record, each party, and each interested party of record, or the date the notice was published.

E. The time for filing an exception to the report or a demand for jury trial shall be calculated as commencing from the date the report of the appraisers is filed with the court. Upon failure of the clerk to
give notice within the time prescribed, the court, upon application by any interested party, may extend the
time for filing an exception to the report or filing a demand for trial by jury for a reasonable period of
time not less than twenty (20) days from the date the application is heard by the court. Appraisers' fees
and court costs may be the subject of an exception, may be included in an action by the petitioner, and
may be set and allowed by the court.

F. The report of the appraisers may be reviewed by the court, upon written exceptions filed with the court
by either party within thirty (30) days after the filing of the report. After the hearing the court shall enter
the appropriate order either by confirmation, rejection, modification, or order of a new appraisal for good
cause shown. Provided, that in the event a new appraisal is ordered, the operator shall have continuing
right of entry subject to the continuance of the bond required herein. Either party may, within sixty (60)
days after the filing of such report, file with the clerk a written demand for a trial by jury, in which case
the amount of damages shall be assessed by a jury. The trial shall be conducted and judgment entered in
the same manner as railroad condemnation actions tried in the court. A copy of the final judgment shall be
forwarded to the county assessor in the county or counties in which the property is located. If the party
demanding the jury trial does not recover a more favorable verdict than the assessment award of the
appraisers, all court costs including reasonable attorney fees shall be assessed against the party.

§ 318.6. Appeal of decision on exceptions to report of appraiser or verdict upon jury trial—Execution of
instruments of conveyance

Any aggrieved party may appeal from the decision of the court on exceptions to the report of the
appraisers or the verdict rendered upon jury trial. Such appeal shall not serve to delay the prosecution of
the work on the premises in question if the award of the appraisers or jury has been deposited with the
clerk for the use and benefit of the surface owner. In case of review or appeal, a certified copy of the final
order or judgment shall be transmitted by the clerk to the appropriate county clerk to be filed and
recorded.

When an estate is being probated, or when a minor or incompetent person has a legal guardian or
conservator, the administrator or executor of the estate, or guardian of the minor or of the incompetent
person or the conservator, shall have the authority to execute all instruments of conveyance provided for
in this act on behalf of the estate, or minor or incompetent person with no other proceedings than approval
by the judge of the court of jurisdiction being endorsed on the instrument of conveyance.

§ 318.7. Effect of act on existing contractual rights and contracts to establish correlative rights—Indian
lands

Nothing herein contained shall be construed to impair existing contractual rights nor shall it prohibit
parties from contracting to establish correlative rights on the subject matter contained in this act.

This act shall not be applicable to nor affect in any way property held by an Indian whose interest is
restricted against voluntary or involuntary alienation under the laws of the United States or property held
by an Indian Tribe or by the United States for any Indian Tribe.

§ 318.8. Effect of act on jurisdiction, authority and power of Corporation Commission

Nothing in this act shall be construed as repealing or limiting the jurisdiction, authority and power of the
Oklahoma Corporation Commission.

Appendix I
§ 318.9. Violation of act—Damages.

Upon presentation of clear, cogent and convincing evidence that the operator willfully and knowingly entered upon the premises for the purpose of commencing the drilling of a well before giving notice of such entry or without the agreement of the surface owner, the court may, in a separate action, award treble damages. The issue of noncompliance shall be a fact question, determinable without jury, and a de novo issue in the event of appeal.

Any operator who willfully and knowingly fails to keep posted the required bond or who fails to notify the surface owner, prior to entering, or fails to come to an agreement and does not ask the court for appraisers, shall pay, at the direction of the court, treble damages to the surface owner.

Damages collected pursuant to this act shall not preclude the surface owner from collecting any additional damages caused by the operator at a subsequent date.
The Oklahoma Surface Damages Act
Cases by Chronological Order

1983
Cormack v. The Wil-Mc Corporation, 661 P.2d 525 (Okla. 1983)

1984

1986
Davis Oil Company v. Cloud, 766 P.2d 1347 (Okla. 1986)

1987
The Anschutz Corporation v. Sanders, 734 P.2d 1290 (Okla. 1987)

1988
Alpine Construction Corporation v. Fenton, 764 P.2d 1340 (Okla. 1988)

1989
Ralph F. Plotner Oil and Gas Investments v. Rauch, 60 Okla. B. J. 576 (Okla. 1989)
unpublished opinion
(unpublished opinion)
904 F.2d 43 (10th Cir. 1990)
Turley v. Flag-Redfern Oil Company, 782 P.2d 130 (Okla. 1989)

1990
Collins v. Oxley, 897 F.2d 456 (10th Cir. 1990)

1991
1992

1993
Houck v. Hold Oil Corporation, 867 P.2d 451 (Okla. 1993)

1994
Union Oil Company v. Heinsohn, 43 F.3d 500 (10th Cir. 1994)

1996

1997

2001

1982 Oklahoma Attorney General Opinion
Opinion No. 82-232 (Sep. 1982)
The Oklahoma Surfaces Damages Act
Cases by Significant Subject Matter

I. The Act as Surface Owner’s Sole Remedy

II. Application of the Act to Wells Drilled on Leases Which Pre-date the Act

III. Application of the Act to Wells Drilled Before the Effective Date of the Act

IV. Application of the Act to Seismic, Geophysical Work, and Other Exploration Activities Outside of Drilling Operations

V. Application of the Act to Non-Oklahoma Residents

VI. Appraiser’s Award as “Judgment” Subject to Dormancy and Unenforceability

VII. Appellate Procedure

VIII. Attorney Fees

IX. Bonding Requirements

X. Constitutionality of the Act

XI. Expert Witness Fees

XII. Force Pooled Surface/Mineral Owner’s Rights Under the Act

XIII. Measure of Damages

XIV. Prejudgment Interest

XV. Real Parties in Interest

XVI. Right of Set-off

XVII. Sanctions

XVIII. Treble Damages

Caution: The statements which follow herein regarding the substantive rulings of each respective case are the author’s subjective opinion. These cases are subject to differing interpretations and opinions as to their import and effect. Parties utilizing this paper are urged to read and carefully form their own independent opinion about the holdings of each case, rather than relying solely on the author’s judgment.
I. The Act as Surface Owner’s Sole Remedy

Turley v. Mewbourne, 715 F.Supp 1052 (W.D. of Okla. 1989), aff’d (without opinion) at 904 F.2d 43 (10th Cir. 1990)

Party who owned surface only challenged in federal court an OCC order allowing operator to drill additional wells on the surface owner’s land, claiming the order to be an unconstitutional taking of his property. Judge Lee West held such was not an unconstitutional taking, and the remedy of the surface owner (who was not entitled to notice of the OCC proceeding) was under the Surface Damages Act.

Turley v. Flag-Redfern Oil Company, 782 P.2d 130 (Okla. 1989)

Oklahoma Supreme Court held that a party who owns only a surface interest in the subject property (no minerals) does not have standing to prosecute an appeal from an OCC order establishing drilling and spacing units on his land. The Court stated, “The surface owner’s remedy is under the Oklahoma Surface Damages Act, 52 O.S. Supp.1982 §318.2 et. seq.”

II. Application of the Act to Wells Drilled on Leases Which Pre-Date the Act


Oklahoma Court of Appeals held that the Act did not apply to leases which pre-date the Act. This ruling was withdrawn from publication by the Oklahoma Supreme Court, and is contrary to the subsequent rulings note below.

Davis Oil Company v. Cloud, 766 P.2d 1347 (Okla. 1986)

In response to appellant oil company’s challenge to the Act’s application to pre-existing leases, the Oklahoma Supreme Court held that, “...the standard of liability for damages to the surface estate...was a subject clearly susceptible to modification by exercise of the state’s police power” and held that, “...we thus find no merit in appellant’s assertions that the application of the surface damages act to existing leases serves no legitimate public interest.”


The Court of Appeals held, “The issue of the application of the Act to this case was answered in Davis. The Supreme Court upheld the constitutionality of the Act and held that it would apply to leases existing at the time of its enactment. 766 P.2d at 1351.”

Collins v. Oxley, 897 F.2d 456 (10th Cir. 1990)

U.S. District Court for the Eastern District of Oklahoma held the Act did not apply to pre-existing leases. In overruling the District Court, the 10th Circuit noted that when the District Court ruled, a petition for rehearing was pending in Davis v. Cloud, and
stated "Certainly at this point in time we are bound by Davis Oil Co. v. Cloud, supra.
The primary reason given by the district court for granting Oxley summary judgment was
that since his leases predated the Act, Oxley had an implied, but vested right to enter onto
the Collins ranch and drill without liability to Collins, except for unreasonable entry or
use. That line of reasoning has now been fully rejected by a majority of the Oklahoma
Supreme Court in Davis Oil Co. v. Cloud, supra."

**Houck v. Hold Oil Corporation, 867 P.2d 451 (Okla. 1993)**

In reasserting its ruling in Davis Oil Company v. Cloud, the Oklahoma Supreme
Court stated, "In Davis we upheld the authority of the Legislature to modify this rule of
the common law over an argument (that) to do so was a violation of the constitutional
provisions prohibiting the impairment of contracts when applied to leases pre-dating the
effective date of the Act."

**III. Application of the Act to Wells Drilled Before the Effective Date of the Act**

**Houck v. Hold Oil Corporation, 867 P.2d 451 (Okla. 1993)**

- Hold drilled a well on surface owner's property before the effective date of the act, and drilled another well after the effective date of the act. The Oklahoma Supreme Court ruled, "In that the Act by express language is geared toward future activity we fail
  to find any legislative intent that would require application to the first well which was
  completed prior to the effective date of the Act."

**IV. Application of the Act to Seismic, Geophysical Work, and Other Exploration
Activities Outside of Drilling Operations**


- Oil company sought injunctive relief to prohibit surface owner from interfering
  with its entry onto surface owner's land to conduct seismic testing. Surface owner
  argued that the Surface Damages Act applied. Oklahoma Supreme Court held, "The
  legislation which appellant argues derogates that right is specifically addressed only to
  drilling and production operations. To infer an intent of the Legislature that this statutory
  scheme was also to function to limit the right to engage in exploratory activities is not a
  permissible result."


- Alpine sought injunctive relief when it was denied access to surface owner's
  property for coal strip mining. Trial court concluded that the Act would provide an
  equitable guide to determining the amount of damages recoverable by surface owner.
  The Oklahoma Supreme Court stated, "We would point out however that by its specific
  terms the applicability of the oil and gas surface damages act is limited to oil and gas
  drilling and preparations for drilling."

Appendix III 3
Union Oil Company v. Heinsohn, 43 F.3d 500 (10th Cir. 1994)

Oil company sought a declaratory judgment to determine if it would be liable to the surface owner under the Act if it built and operated a sour gas processing plant. Case was tried to a jury utilizing the Act for proof, instructions, and award. The 10th Circuit affirmed the judgment against Union under the Act (except as to attorney fees).

V. Application of the Act to Non-Oklahoma Residents


Surface owner, who was a Texas resident, asserted that the Act lacked application to non-resident surface owners. The Court of Appeals stated, “The Act applies to resident and non-resident surface owners alike. Section 318.3 sets non-residents apart from residents only as to giving notice of the intent to commence drilling operations. It does not exclude them from the application of the Act.”

VI. Appraiser’s Award as “Judgment” Subject to Dormancy and Unenforceability


Surface owner failed to seek enforcement of a court-approved appraisers’ report of damages under the Act within the five-year time limit provided for execution on judgments. Trial court held the same rendered the award unenforceable as a matter of law. The Court of Appeals held, “We hold that the award, once confirmed by the trial court, and after affirmance on appeal, was a judgment subject to the dormancy statute. Therefore, when Appellant failed to seek enforcement of the award within five years after the mandate was spread of record, the award became unenforceable.”

VII. Appellate Procedure


Trial court issued an order confirming appraisers’ report under the Act. Oil company appealed said order to the Oklahoma Supreme Court. Surface owner moved to dismiss the appeal as premature, because a jury trial had been demanded and not held, and as such, the order confirming the appraisers’ report was not a final order subject to appeal. Supreme Court dismissed the appeal, stating, “To allow Appellant to appeal from the (order) would not promote judicial economy and would entail this Court having to decide issues concerning the proper measure of compensation before the jury has reached a final determination on said issue. We do not believe the Legislature so intended...”
Operator filed exceptions to the appraisers’ award under the Act. Apparently the trial court did not issue a ruling on the operator’s exceptions. Operator then demanded jury trial. Case was tried to jury, and operator appealed. Court of Appeals held operator waived its right to raise its exceptions to the appraisers’ award on appeal, because it did not object to the pending status of its exceptions before demanding, and proceeding through, jury trial.

VIII. Attorney Fees

Oil company filed action under the Act. Appraisers issued their report, and oil company demanded jury trial. One week before trial, company withdrew its demand for jury trial, and paid into court the amount of appraisers’ award. Surface owner moved for attorney fees. In upholding the trial court’s award of attorney fees to surface owner, the Oklahoma Supreme Court held, “If, as here, a party demands a jury trial and then later withdraws that request, that party has clearly failed to recover a verdict more favorable than the appraisers’ award. We find that the proper reading of (the Act) is that the filing of the demand for jury trial is the activating event rather than the entry of the jury verdict.”

Same basic facts as Tower v. Keeler above, but involving different land and a different surface owner. Same ruling from the Oklahoma Supreme Court as noted in Tower v. Keeler above.

Same basic facts as Tower v. Keeler and Tower v. Paulk above, but involving different land and a different surface owner. Same result from the Oklahoma Supreme Court. The Court stated, “Appellant’s contentions in this matter as to the authority of the trial court to award court costs and a reasonable attorney fee for Appellee’s attorney pursuant to the terms of (the Act) have been addressed and answered adversely to Appellant, in Tower Oil and Gas Company, Inc. v. Keeler and in Tower Oil and Gas Company, Inc. v. Paulk (citations omitted).”

Both oil company and surface owner demanded jury trial after appraisers’ award was made. On the day of trial, oil company withdrew its demand, but the case was tried to a jury under surface owner’s demand. Jury verdict was more than appraiser’s award. Oklahoma Supreme Court held that surface owner was entitled to recover its attorney fees, based on analogous condemnation statute.

Oil company filed action under the Act. Surface owner selected an appraiser in 1985. Appraiser’s report not filed until 1988. Oil company paid the appraiser’s award, and dismissed the case. Trial court held surface owner entitled to recover attorney fees as the “prevailing party”. Court of Appeals reversed because there was no demand for jury trial made, stating, “…a party is only entitled to attorney’s fees if it makes a demand for a jury trial”.


Oil company mistakenly filed its action against surface owner under the Act in the wrong county, then entered onto owner’s land and commenced operations. After discovering its mistake (and after commencing operations) oil company refilled the action in the correct county. Trial court found that oil company’s entry upon owner’s property after filing in the wrong court constituted a violation of the Act and warranted imposition of treble damages, attorney’s fees, expenses and costs. Court of Appeals disagreed, finding the surface owner had actual notice, and operator had met all of its obligations under the Act in dealing with the owner before commencing operations.


Appraisers awarded $6,850. Surface owner demanded jury trial. Jury awarded $22,000. Although the Act’s only attorney fees provision (§ 318.5(F)) states, “If the party demanding the jury trial does not recover a verdict more favorable to him than the assessment award of the appraisers, all court costs including reasonable attorney fees shall be assessed against him”, the court awarded attorney fees to the surface owner. The Court of Appeals affirmed, stating “…we held that the legislature did not intend to restrict the recovery of attorney fees to situations covered by § 318.5 (F), but contemplated application of 66 O.S. 1991 § 55(D), by virtue of the kindred nature of those actions and the reference to the railroad-condemnation statutes in § 318.5 (F).”

Union Oil Company v. Heinsohn, 43 F.3d 500 (10th Cir. 1994)

Oil company filed for declaratory judgment as to whether the Act would apply to construction of a sour gas treatment plant, and if so, what the damages would be. Company then commenced and completed the plant. Surface owners then counterclaimed, upon nuisance theory. Case was tried, following procedures of the Act in proof, instructions, and award. Trial court awarded attorney fees to surface owner. 10th Circuit reversed, stating, “…the Act has an express attorney fee provision which must be followed, and the trial court should not have applied the railroad condemnation doctrines instead. The express fee provision in the Act should prevail and it does not permit the fees here ordered against Union because Union did not request a jury which is an express condition of the Act.”

Appendix III
IX. Bonding Requirements

Attorney General Opinion No. 82-232 (September 22, 1982)

Under the plain wording of the Act, operator must file either a corporate surety bond or letter of credit, and operator may not, in lieu thereof, post cash, negotiable government securities, certificates of deposit, etc. (Author's note: In 1986 the legislature amended §318.4 of the Act to provide that in addition to a corporate surety bond or letter of credit, the operator may also deposit cash or a certificate of deposit. As such, this AG's opinion is now partially moot.)

X. Constitutionality of the Act

Davis Oil Company v. Cloud, 766 P.2d 1347 (Okla. 1986)

Oil company asserted that is was constitutionally improper for trial court to instruct jury that measure of damages under the Act is diminution in market value of surface owner's property, rather than the pre-Act standard of liability only for damages resulting from wanton or negligent operations, or if the operations affecting more than a reasonable area. Oklahoma Supreme Court upheld the new standard, finding that, "...the standard of liability for damages to the surface estate...was clearly susceptible to modification by exercise of the state's police power...Our review of the challenged legislation in light of these standards impels a finding of validity."


Oklahoma Supreme Court summarily stated, "On appeal appellant presents four propositions of error. The first argument presented challenges the constitutionality of the application of (the Act) to the present case. The arguments presented have been rejected by this Court in the case of Davis Oil Company v. Cloud, (citation omitted)".


The Court of Appeals cited Davis v. Cloud in stating, "The issue of the application of the Act to this case was answered in Davis. The Supreme Court upheld the constitutionality of the Act and held that it would apply to leases existing at the time of its enactment...Thus, under Davis, the instant case is governed by the Act."


Oil company asserted that is was unconstitutional for the court to apply the diminution in market value standard of damages to leases that pre-date the Act. The Oklahoma Supreme Court stated, "Similar arguments concerning the constitutionality of the Act were considered and rejected in Davis Oil Co. v. Cloud (citation omitted)".

Appendix III


**Houck v. Hold Oil Corporation, 867 P.2d 451 (Okla. 1993)**

The Oklahoma Supreme Court stated, “As we...held in Davis, the Act’s application to leases pre-dating the effective date of the Act was not an impermissible impairment of contract in violation of either the Oklahoma or United States Constitutions.”


**XI. Expert Witness Fees**

**Andress v. Bowlby, 773 P.2d 1265 (Okla. 1989)**

Oklahoma Supreme Court held that surface owner was entitled to recover its attorney fees, based on analogous condemnation statute. However, surface owner not entitled to expert witness fees. The Oklahoma Supreme court stated, “We do not...agree that the provision supports a claim for expert witness fees. Such fees are only recoverable when specifically made so by statute. (The Act) only speaks to court costs and reasonable attorney fees. The term court costs does not include expert witness fees.”


**XII. Force Pooled Surface/Mineral Owner’s Rights Under the Act**

**Cormack v. The Wil-Mc Corporation, 661 P.2d 525 (Okla. 1983)**

The Oklahoma Supreme Court states that a surface owner, whose minerals were force pooled rather than being leased, is entitled to compensation for the use of his surface property, and the Court mentions the newly enacted Act as “specifically recognizing the owner’s right to maintain a cause of action for surface damages against the unit operator. These provisions also outline a method for negotiation of surface damages.”


**XIII. Measure of Damages**

**Davis Oil Company v. Cloud, 766 P.2d 1347 (Okla. 1986)**

Diminution in fair market value of the property is the correct measure of damages under the Act, rather than the pre-Act standard. The Oklahoma Supreme Court also held that inconvenience to the surface owner may be considered as a factor in damages, but only insofar as such inconvenience has an effect upon the fair market value of the land.


In a case brought under the Act, the trial court instructed the jury, “...unless you find that (oil company/plaintiff) Santa Fe Minerals, Inc.’s use of the surface for this purpose was unreasonable, then you shall render a verdict for the plaintiff (oil company).” In reversing and remanding the case for new trial, the Court of Appeals held, “Even though these were correct statements of common law prior to enactment of (the
Act) they do not define the respective rights of the parties recognized by the Act” and “...the Act does not include reasonableness or necessity as considerations for determining damages.”


In response to appellant/oil company’s challenge to jury instructions, the Oklahoma Supreme Court held, “...inconvenience may be a proper element of damages, but to be compensable the inconvenience must have an effect on the value of the land. Purely personal inconvenience is not compensable under (the Act).” The Court also held that consideration of damages to the surface beyond the land actually taken for drilling operations is proper. Also, the Court held that “...(the Act) clearly indicates that appraisers are to consider damages which have occurred or which will occur.”

**Andress v. Bowlby, 773 P.2d 1265 (Okla. 1989)**

The Oklahoma Supreme Court stated, “As we stated in Davis, the damages to be assessed by the jury in a surface damages act case is the diminution of the fair market value of the surface estate resulting from the drilling operations.” Also, “Appellant’s final proposition of error presents the argument that the trial court improperly allowed testimony concerning future events. We find no merit to this argument as (the Act) clearly indicates that future events may be considered in determining loss of market value.”

**Darling v. Quail Creek Petroleum Management Corporation, 778 P.2d 943 (Okl.App. 1989)**

Citing Davis, Dyco, and Andress, the Court of Appeals stated, “Again, in an action under (the Act) the measure of damages is the diminution of fair market value; and, inconvenience or annoyance may be considered, but only as it affects fair market value of the land.”

**Ralph E. Plotner Oil and Gas Investments v. Rauch, 60 OBAJ 576 (Okla. 1989)**
**Settlers Energy Corporation v. United Bank and Trust, 60 OBAJ 576 (Okla. 1989)**
**Sabine Corporation v. Potteet, 60 OBAJ 582 (Okl.App. 1989)**

In the first two of these unpublished opinions, the Supreme Court stated that in cases under the Act, “Trial court instructed appraisers that liability for damages to the surface was limited to unreasonable use of the surface...Held: instructions of the trial court improperly limited liability for oil and gas drilling operations.” In the third case, the Court of Appeals stated, “Appellant’s contention that the common law rule regarding the measure of damages as to wantonness or negligence of the operator, or unreasonable use of the land by the operator, is without merit. The common law rule did not survive with the enactment of the Surface Damages Act.”

**Houck v. Hold Oil Corporation, 867 P.2d 451 (Okla. 1993)**

In construing the Act’s application to a well drilled after the Act’s effective date as opposed to its non-application to a well drilled before the Act’s effective date, the Oklahoma Supreme Court ruled, “...we hold that as to the second well it would be permissible to apply the Act as to the standard of liability for damages rather than the...
prior common law notwithstanding the fact (that the oil company’s) lease pre-dated the effective date of the Act.”

**Schneberger v. Apache Corporation,** 890 P.2d 847 (Okla. 1994) (rehearing denied)

In this case, the Oklahoma Supreme Court presents a comprehensive review of the law of surface damages both before and after the effective date of the Act.


In a case brought under the Act, trial court had allowed the jury to consider evidence of groundwater and subsurface pollution. Oklahoma Court of Appeals reversed and remanded the case, stating “(The trial court) erred by allowing evidence of pollution that essentially involves allegedly tortious conduct...contrary to Landowner’s argument, the Act does not cover all their damage claims. We hold the trial court abused its discretion by allowing the jury to hear evidence about damages due to Vastar’s allegedly tortious conduct...The remedy for injury to Landowners’ land caused by Vastar’s allegedly willful or negligent conduct is through a separate and distinct cause of action, not one brought under the Act.”

XIV. Prejudgment Interest


In response to appellant oil company’s argument, the Oklahoma Supreme Court stated, “Appellant argues that there is no authority for the trial court's grant of prejudgment interest on the award of the appraisers. As appellant correctly states, interest may not properly be awarded in the absence of a statutory authorization. The (Act) contains no such authorization.”


The Oklahoma Supreme Court stated, “The judgment rate of interest applies only from the date of entry of the judgment and does not relate back to the date of taking or the date of the appraisers’ award.”


Citing **Dyco v. Smith** and **Tower v. Pauk**, the Court of Appeals stated, “Appellees (surface owners) lastly contend in their counter-appeal that they are entitled to prejudgment interest. There is, however, no authority for prejudgment interest under (the Act), and the judgment rate of interest applies only from the date of entry of the judgment and does not relate back to the date of the appraiser’s award.”
XV. Real Parties in Interest

Collins v. Oxley, 897 F.2d 456 (10th Cir. 1990)
Plaintiff sold and conveyed the subject property to a third party during the course of the litigation. 10th Circuit Court of Appeals found that plaintiff, who was record owner of the property when the wells were drilled and damage occurred, was record owner when the instant case was filed, and who expressly reserved its rights against oil company in its contract of sale, was the real party in interest, as opposed to its assignee.

VI. Right of Set-off

Operator paid damages to surface owner in anticipation of re-entering an existing well bore. Rather than re-entering the well bore, operator drilled a new hole at a different location. Operator asserted that it was entitled to set off damages for the second location by the damages it had paid relating to re-entry of the existing well bore. Court of Civil Appeals found that the language of the settlement agreement signed in anticipation of the re-entry operation limited the damages to that proposed operation, and operator was thus not entitled to a set-off.

XVII. Sanctions

Collins v. Oxley, 897 F.2d 456 (10th Cir. 1990)
In a companion action, surface owner had sued operator for $14,000,000 in compensatory damages and $52,000,000 in punitive damages. The appraisers later awarded $15,000 total. Operator asserted that the exorbitant claim for damages demonstrated that the suit was not brought in good faith. In denying sanctions, the 10th Circuit Court of Appeals agreed with the trial court’s finding that under Davis v. Cloud, surface owner had “some basis for instituting the action”.

XVIII. Treble Damages

After oil company dismissed its demand for jury trial and paid the appraisers’ award into court, the trial court awarded surface owners treble damages. On appeal, the Oklahoma Supreme Court stated, “An issue not controlled by the above cited decisions is however presented by the Appellant’s challenge to the propriety of the award of treble damages entered by the trial court against the Appellant... We must agree with (appellant) that the award of treble damages in this case is improper... The statute on this point is
very clear, the evidence to support the imposition of treble damages must be developed in the course of a separate hearing in which the issue to be determined is liability for treble damages."


Surface owner asserted that the trial court erred in refusing to award treble damages. Although the basis of surface owner’s argument is not clear from the opinion, Court of Appeals upheld the trial court’s decision, noting that operator gave adequate notice to surface owner.


Oil company mistakenly filed action under the Act in the wrong county, then commenced operations on owner’s land. After discovering its mistake (and after commencing operations) oil company refilled the action in the correct county. Trial court found that oil company’s entry upon owner’s property after filing in the wrong court violated the Act and warranted imposition of treble damages. Court of Appeals reversed, stating, “We cannot say that this is the type of evil the legislature sought to protect against when it enacted the treble damages provisions of (the Act) or that (oil company’s) acts were ‘willfully and knowingly’ consummated as those terms are commonly understood… The trial court erred in awarding treble damages under these facts.”

Houck v. Hold Oil Corporation, 867 P.2d 451 (Okla. 1993)

Operator gave adequate notice to surface owner under the Act. Operator then thought it had reached a verbal agreement with surface owner for surface damages, but surface owner did not sign and return a written settlement agreement. Trial court did not award treble damages, but Court of Appeals did. On cert., the Oklahoma Supreme Court reversed the award of treble damages, stating, “As we view the record it supports only a determination (that the operator’s) conduct was based on an innocent misapprehension, rather than a willful violation of any of the Act’s provisions.”


Operator had complied with the Act insofar as the bonding and giving notice to surface owner of its intent to drill. However, it entered onto surface owner’s land without an agreement as to damages, and eight days before filing its petition. Trial court awarded treble damages. Operator argued the “prior to entering” provision of the Act applied only to bonding and notice. Court of Appeals upheld imposition of treble damages, stating, “Regardless of the reason the events occurred in that sequence, (the Act) required Anadarko to file its petition before commencing its operations, and the evidence shows that the violation of the statute was ‘willfully and knowingly’ done. Section 318.9 supports the judgment against Anadarko for treble damages.”

Surface owner’s predecessor accepted $4,000 from Keener Oil in surface damages for drilling of the Janis 1 well, and signed a release discharging Keener Oil and its assigns from all claims for road and location damages relating to drilling and completing the well. Scott Drilling succeeded Keener, and Hulsey succeeded the original surface owner. Last production from the well was in 1991. Scott Drilling sought to rework the well in 1994. Held, that the Surface Damages Act did not apply to the reworking operation. “We find that under the facts of this particular case, where there was no evidence that the original lease had expired, ‘re-working’ is not ‘drilling’ nor a ‘drilling operation’ so as to bring the acts of re-working the well under the aegis of the Act...The re-worker does not have to pay again just because there is a new surface owner.”


This case restates that the Surface Damages Act does not apply to wells drilled before the Act’s effective date. The Court of Appeals stated, “(Surface owners) raised the issue of liability for Texaco and Titan under the Oklahoma Surface Damages Act (cite omitted) in their motion for summary judgment. However, as correctly noted, the Act does not apply to wells drilled and completed before July 1, 1982. Houck v. Hold Oil Corp., 867 P.2d 451 (Okl. 1993).”

Amoco Production Company v. Fred James; The Hawkins Family Trust, Oklahoma Court of Appeals, Div. 2 Unpublished Opinion No. 87,724 (1997)

Amoco filed Surface Damages Act case, then moved for summary judgment based upon the assertion that surface owners did not disagree with the report of the appraisers. Trial court granted summary judgment to Amoco. Surface owners disputed operator’s right to summary judgment, and asserted their right to a jury trial. Court of Appeals reviewed the record, found evidence that surface owners did not agree with the appraisers’ report, and remanded the case for jury trial.


Exok was named operator under a force pooling order. Exok assigned operator duties to Chaparral. Two days before expiration of the pooling order, Chaparral entered the property and did work to prepare the site for drilling. Three days after entering the site, Chaparral filed its petition for appointment of appraisers under the Act. Trial court refused to award treble damages to surface owner, and awarded Chaparral its attorney fees. Court of Appeals reversed, holding Chaparral liable for treble damages and vacating the trial court’s award of attorney fees to Chaparral.

1 Okla.Sup.Ct.R. 1,200(b)(5) (Part VII) provides that, “Because unpublished opinions are deemed to be without value as precedent and are not uniformly available to all parties, opinions so marked shall not be considered as precedent by any court or cited in any brief or other material presented to any court, except to support a claim of res judicata, collateral estoppel, or law of the case.”

Appendix IV
LeNorman Energy Corporation v. Lowery, Oklahoma Court of Appeals, Div. 3
Unpublished Opinion No. 90,698 (1999)

Operator appealed the trial court’s decision affirming the report of appraisers. Operator’s dispute with the report was that the appraiser appointed by the surface owner had knowledge of the parties’ settlement negotiations. Trial court determined that the appraiser’s knowledge of the settlement negotiations did not influence the appraisers’ report, and that the appraisers’ damages recommendation was reasonable. Court of Appeals affirmed the trial court’s decision, finding that the trial court did not abuse its discretion in confirming the appraisers’ report.