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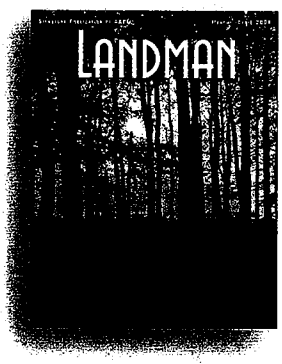

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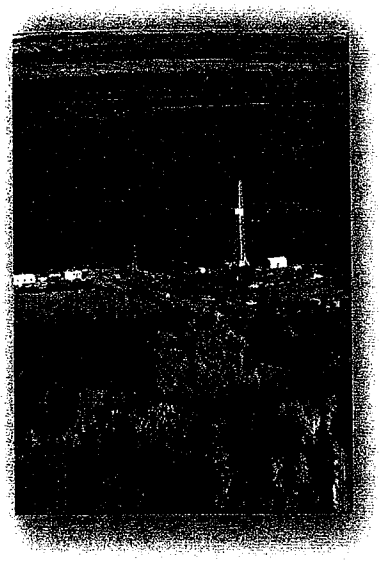

In the Age of Directional Drilling, Accommodation Grows Teeth

By Martin P. Averill, Esq.

For decades in Texas, the owners of mineral rights and their lessees had broad discretion to choose drillsites and other surface operational sites. Their choices could be based primarily on their own considerations of cost and convenience, with secondary regard to the impact of those choices on the surface of the property, although many operators traditionally would pay some nominal surface damages in an effort at maintaining good relations with the surface owner. Absent an express limitation on surface use in the instrument severing the minerals — or in the operative mineral lease or other writing — the surface owner had only the "accommodation" or "alternative means" doctrine with which to challenge mineral operations.

Recent events may signal a different trend, one with potentially troublesome consequences to operators in hot plays like the Barnett Shale in heavily populated areas.

The Accommodation Doctrine Generally

The accommodation doctrine requires the mineral owner to exercise its development rights with "due regard" for existing uses by the surface owner. As articulated by the Texas Supreme Court in the seminal 1971 decision of *Getty Oil Co. v. Jones:*

> Where there exists an existing use by the surface owner which would otherwise be precluded or impaired, and where under the established practices in the industry there are alternatives available to the [mineral owner] whereby the minerals can be recovered, the rules of reasonable usage of the surface may require the adoption of an alternative by the [mineral owner].[1]

The Court later expanded on the *Getty* standard in *Tarrant County Water Control & Improv. Dist. No. 1 v. Haupt Inc.*,[2] holding: "[I]f the mineral owner has reasonable alternative uses of the surface, one of which permits the surface owner to continue to use the surface in the manner intended (especially when there is only one reasonable manner in which the surface may be used) and one of which would preclude that use by the surface owner, the mineral owner must use the alternative that allows continued use of the surface by the surface owner."

Getty specifically instructs us that the accommodation doctrine does not call for a weighing of harm or inconvenience to the surface owner against considerations pertaining to the mineral owner.[3] Rather, the surface owner bears the burden of proving that under all the circumstances, the use of the surface by the operator in the manner under attack is not reasonably necessary. Id. In overruling *Getty*'s motion for rehearing, the court again stressed that the question is not one of inconvenience to the surface owner.[4] Thus, as originally set forth in *Getty*, the accommodation doctrine was basically a variation on standard negligence and "reasonably prudent operator" concepts used in other states.[5]

In most disputes between operators and surface owners, both pre- and post-*Getty*, after reciting that surface owners were entitled to some deference and regard, the Texas favor for mineral production ultimately prevailed and the operator's discretion in choosing the method and location of drilling operations was upheld.[6]

One case particularly instructive on the operator-friendly environment in Texas — even after *Getty* — is the majority opinion of the Supreme

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Martin P. Averill, an attorney with Quilling, Selander, Cummiskey & Lownds P.C. in Dallas, works in the areas of oil and gas litigation and transactions and commercial disputes. His practice is diversified among various issues common to oil and gas production and pipeline operations, including complex contractual and property disputes; gas processing and gathering; lease and title issues; joint operating agreements and operatorship issues; oil and gas joint ventures; pipeline regulation and condemnation proceedings; federal preemption and takings; title disputes; and regulatory matters. He also frequently represents real estate developers and golf course operators in oil and gas leasing matters with sensitive surface use issues. Averill is a member of the bar associations of the Federal 5th Circuit, Texas and Dallas, as well as the Petroleum Landman's Association of Dallas and AAPL. He earned his BA from Gannon University and his JD from the University of North Carolina at Chapel Hill.

Court in *Sun Oil Co. v. Whitaker.*[7] In *Whitaker*, the court upheld Sun Oil's use of millions of gallons of fresh water[8] underlying the surface of a 267-acre tract for a waterflood project that was estimated to be worth an additional $3.2 million of production. However, Sun Oil admitted it could have purchased the water off-lease, and Sun's own expert estimated that it would have cost only $42,000 to do so.[9] The court's holding came despite evidence and a jury verdict that the value of the surface estate as a farming operation would be substantially depleted were Sun allowed to continue taking all of this fresh water from the farm's reservoir. There was also evidence that other operators, and even Sun itself, engaged in the practice of buying off-lease water for other waterflood operations in the area.

Despite these indications that "reasonableness" may have required other methods of water usage, the operator's judgment prevailed. Boiled down, *Whitaker* stood for the dual propositions that: (1) the alternative use proposed by the surface owner must be available on the surface of the tract in question, rather than some other surface location or lands; and (2) the operator's judgment of what is reasonable for its own operations should be given substantial weight by the Texas courts.

Texas Genco v. Valence Operating (Waco 2006)

A recent decision from the Waco Court of Appeals, and related proceedings before the Texas Railroad Commission, may signal a departure from Texas courts' historical deference to operators. In *Texas Genco LP v. Valence Operating Co.*,[10] after obtaining a restraining order and a temporary injunction, the owner of an ash-disposal landfill tied to a nearby electrical power generation plant sought a permanent injunction against the drilling of a vertical well through one of its clay-cell ash disposal units. This particular unit was not being actively used to dispose of ash, but was planned for such use seven to 10 years down the road.

The surface owner, Genco, offered the use of a portion of the tract outside the boundaries of the landfill and additionally offered to give Valence, the operator, $400,000 to help defray the additional costs of directionally drilling the well from the proposed alternative location. Valence refused the offer and began laying down a drilling pad in the disposal cell. After the trial court issued its injunction, Valence counterclaimed against the surface owner Genco for damages from the issuance of the temporary injunction and concomitant delay in drilling.

Based on a jury verdict, the trial court rendered judgment denying a permanent injunction to the surface owner and awarded Valence $400,000 in compensatory damages for the delay in drilling caused by the proceedings.[11] The jury's verdict was based on the following three questions (paraphrased for brevity):

> **Question 1:** Is there an existing surface use at this location that would be precluded or substantially impaired if the well is drilled there? The jury answered "yes."

Question 1A: Is directional drilling from an alternate location an established industry practice that would provide a reasonable alternative to recover the gas? The jury answered "yes."

Question 1B: Do you find that Valence's proposed use of the surface is an unreasonable use of the surface that requires Valence to directionally drill to recover its minerals? The jury answered "no" (after scratching out an initial answer of "yes").

On appeal, a majority of the court reversed the trial court's ruling, disregarded the jury's answer to question 1B as superfluous and held that a permanent injunction in favor of the surface owner was justified. After first discussing Getty Oil and the accommodation doctrine generally, the court held that directional drilling was a reasonable alternative available to Valence that would avoid substantial impairment of the existing surface use. More specifically, the court held: (1) there was an existing use of the land that would be precluded or substantially impaired by the proposed well, because if the well were drilled, Genco would have to redesign some clay cells and lose the use of others and (2) directional drilling is a reasonable, industry-accepted alternative to vertical drilling.[12] For the last holding, the court specifically rejected Valence's protests regarding the increased cost of directional drilling and even held that the projected yield in gas reserves from the proposed well was significant enough to "warrant Valence's directional drilling, regardless of the increased costs."[13]

The parallel proceedings at the Railroad Commission were Case Nos. 05-0241501 and 05-0241818. In these proceedings, the commission flipped the burden of proof from the surface owner to Valence and required Valence to prove that groundwater contamination would

not result from disturbance of waste during drilling operations. Because Valence was unable to demonstrate that there would be no negative effects on groundwater, one of Valence's applications for a permit to drill was denied. One of the most important aspects of this ruling was the commission's determination that it had jurisdiction over the dispute pursuant to Section 91.101 of the Texas Natural Resources Code, over Valence's protests that this was just a private contractual dispute over surface usage.

The Texas Qualified Residential Subdivision Act (QRSA)

In 1993, the Texas Legislature enacted the QRSA (sometimes called the Mineral Use of Subdivided Land Act) in recognition of the conflicts presented by mineral development in heavily populated areas. Codified in Chapter 92 of the Texas Natural Resources Code, the QRSA provides a mechanism by which a surface owner may adopt a plat binding on mineral owners within a qualified subdivision. The statute applies only to counties with populations over 400,000 or counties with more than 140,000 citizens bordering counties having a population topping 400,000 or that are located on a barrier island.

Under the QRSA, the owner of a parcel of land not to exceed 640 acres must secure Railroad Commission approval of a plat of the subdivision and file the plat with the clerk of the county where the subdivision is located. The commission requires a 2-acre operations site for every 80 acres (a total of 16 acres out of the maximum 640-acre tract allowed by the statute).[14] After notice to the applicant and owners of possessory mineral interests, the commission must consider the adequacy of the number and location of operations sites and road and pipeline easements. The default factor in approval of any proposed subdivision is the commission's judgment that the minerals under the tracts may be fully and efficiently developed using the operations sites proposed by the surface owner.[15]

Once a plat is approved by the commission — and assuming that the mineral owners do not successfully appeal from such approval — the mineral owners will be limited to the activities and uses defined in the final approved plat. Note, however, that the surface owner must commence actual construction of roads and utilities within the subdivision and sell a lot to a third party by the third anniversary date of the commission's order for the subdivision to maintain its status under Chapter 92.[16]

The Accommodation Doctrine and Surface Damage Statutes of Other States

Versions of the accommodation doctrine have been judicially adopted or codified in several other states, including Arkansas, Colorado, Kentucky, Louisiana, Mississippi, New Mexico, North Dakota, Utah, West Virginia and Wyoming. For convenient reference, Appendix A hereto is a chart identifying some of the primary "accommodation" or "reasonable use" cases from around the country.

Despite some form and language differences between states, the primary focus is on whether the operator's actions were reasonable. What is "reasonable" is viewed differently from state to state, with some courts focusing more on the operator's objective reasonableness[17] and others giving more weight to the surface owner's plans and concerns.[18] Some states, like Texas, place the burden of proof to demonstrate unreasonableness on the surface owner, while others require the operator to essentially prove its own innocence.[19] The result: a patchwork quilt of ad hoc decisions without bedrock guiding principles.[20]

It is important to note that aside from accommodation or initial surface damage concerns, all of these states (and Texas) still permit traditional common law claims of negligent or excessive use of the surface. Thus, regardless of whether the state has adopted the accommodation doctrine or a surface-damages statute, an operator's negligent or excessive use of the surface during operations would expose an operator to a damage claim regardless of the state of its occurrence. An operator's failure to restore the premises or remediate operational damage has on occasion been categorized as an offshoot of negligent operations, and some states have recently struggled with the issue of implying a duty of restoration in the absence of an express contractual obligation.[21]

Surface Damage Statutes

Starting in 1978, a number of states enacted surface damage statutes that altered the common law relationship between mineral owners and surface owners, with North Dakota being first among them.[22] Appendix A provides citations to the statutory or codal provisions from each of these states.

These surface-damage acts run the gamut from inordinately technical and burdensome (Oklahoma) to simple and straightforward (Indiana). Some require notice and negotiation with the surface owner before entry on the premises is allowed (Oklahoma, Illinois and Kentucky, for example). Some allow attorneys' fees to be awarded if the landowner challenges the operator's

damage settlement offer and ultimately obtains more from the court or, in some cases, if the operator has otherwise violated the statute (Illinois, Kentucky, Oklahoma, North Dakota). The Oklahoma and North Dakota acts permit assessment of punitive damages for certain violations, while the Montana Code actually expressly makes noncompliant operations "unlawful" and includes certain violations in its criminal provisions.

All of these statutes obviously require payment of damages to the surface owner, but the recoverable categories of damage vary between states. One prime differentiator is that some states allow damage for the value of the land used or negatively affected by the operator (Oklahoma, Indiana, Montana, North Dakota, West Virginia), while others limit the recoverable categories of damage essentially to surface improvements and operations, without any general "lost land value" provision (Kentucky and Illinois). One (Colorado) does not have a surface damages statute per se, but instead requires operators to post security to ensure the protection of the surface and post-operations remediation.

One common policy motive behind surface damage statutes is to achieve a balance between the need for mineral production and the need to encourage productive use of the land surface over the minerals being produced. The states adopting these statutes clearly hoped that the existence of strict liability for surface damages and a statutory process for damage claims would provide certainty to both surface and mineral owners and limit the amount of litigation over these issues.

While most of the surface-damage statutes cited in Appendix A expressly reserve all other rights provided by law — including common law and contractual rights and remedies — there is a relative lack of litigation in those states regarding accommodation-type claims. In this regard, at least, it appears that these statutes served their intended purpose. Operators in states with surface damage legislation will logically seek to use the least invasive portion of the surface estate to thereby minimize the damages they must pay for that use. Barring some vital operational necessity, there is simply no advantage to be gained by

using a more sensitive portion of the surface, since the landowner will be compensated for that use no matter what. Because of this inevitability, there have been few if any accommodation doctrine cases in those states since the passage of their respective surface damage statutes. Operators will most often avoid operations on potentially objectionable areas of the surface because those areas logically would involve the most damage to the surface owner.

In contrast, Texas law has historically held that no damages will be paid to the surface owner except to the extent the operator negligently damaged the surface or used more of it than necessary. Barring such negligent or excessive use, operators in Texas were free to use any portion of the surface estate they wished — without the payment of damages to the surface owner — subject only to the relatively weak limitations of "due regard" for the surface owners' rights. As a result, for many operators the perceived risk of losing an accommodation challenge was likely minimal and the battle deemed worthy of fighting. After *Texas Genco*, that calculus will likely change.

Implications of the Texas Genco Decision

Legal Considerations

Has the focus switched to the surface owner?

Despite the *Getty* admonition against making inconvenience to the surface owner a key consideration, the *Texas Genco* court appeared to do just that. This particular part of the surface was not in active use as an ash-disposal facility, but was merely planned for such use some years down the road. It is unclear how the landowner met its initial burden of proving an existing use or, for that matter, of demonstrating that any such existing use would be significantly impaired or destroyed by the proposed well.[23] Moreover, the court's holding appears to conflict with a basic principle espoused by some commentators that if the lessee's activities are "objectively reasonable within the industry, they will not expose the lessee to liability to the surface owner irrespective of their impact to the surface estate."[24] Drilling a vertical well on a part of the surface not actively being used by the surface owner, without any effect on growing crops, trees, livestock or existing structures, would doubtless be considered objectively reasonable within the oil and gas industry.

Moreover, the court appeared to weigh the "reasonableness" of directional drilling by considering the potential profits to be gained from the production of these minerals, rather than the difference in the costs and risks of drilling vertically versus directionally. Logically, if the ultimate question — viewed through 20/20 hindsight — is whether the operator can possibly make a profit (if the well realizes its full anticipated potential) regardless of the method of drilling, the surface owner's burden of proof is minimal at best. In most, if not all, cases, focusing on the estimated recoverable reserves will lead courts employing the *Genco* rationale to decide that directional drilling is a reasonable

alternative to vertical drilling, and the cost difference will be rendered legally immaterial.

Clearly, the substantial cost increase involved in directional drilling would have been a factor in Valence's favor to the Whitaker majority had it decided the *Genco* case 30 years earlier. Indeed, the Waco court itself has previously opined (in dictum) that directional drilling was almost per se unreasonable as an alternative to straight drilling: "What little evidence the record does contain relating to the economics of accessing the minerals by slant-hole drilling is that the drilling and operating costs and increased risk associated with that method of production makes it unreasonable, especially when compared to drilling a vertical well on dry land."[25]

What happens if the lease terminates?

When a surface owner obtains an injunction against drilling like the one in this case, the operator obviously cannot obtain production. If the primary term expires during the pendency of the lawsuit (including appeals), and the operator still has been unable to conduct operations, the lease cannot be held under a typical habendum clause. If the leased premises are not otherwise held by production or operations, the lessor might have a viable claim for lease termination.[26]

Shut-in royalties could not be paid because there is no well on the premises "capable of producing." If the lease allows extensions upon payment of certain sums, the operator would have to pay those sums to extend the primary term, but typical extension clauses are limited in duration. Could the operator rely on force majeure? The fundamental requirement of force majeure is a delaying cause outside of the lessee's reasonable control. At least in this case, the operator had the option of drilling from another location on the leased premises. Arguably, the operator's inability to produce or conduct operations was caused by the operator's own decision not to drill in the alternate location, rather than something the operator could not control. As such, force majeure may be inapplicable and the operator left without a viable defense to a termination claim.[27]

Given the rise in lease termination claims, particularly in the Barnett Shale where operators often encounter limited availability of service companies and equipment, this aspect of the *Texas Genco* decision may turn out to be the most troublesome of all. Operators are advised to, at the very least, add surface-damage claims to the force majeure clauses in their leases as a permissible cause of delay, although negotiation of such changes will likely be contentious.

Is this judicial legislation?

One might also question the need for a statutory "exception" like the QRSA if surface owners could simply force operators to directionally drill to avoid planned areas of development or use. (Just as in this case, where the landfill owner had planned to use this cell and had obtained state approval of its plan, a developer submits plats and plans for the use of large tracts of land for various mixed-use purposes). The QRSA default standard — focusing on full development of the minerals, not on full use of the surface — differs from the *Genco* standard, which appears to focus only on whether it is possible to develop the minerals a different way while allowing the surface owner to dictate the location and cost of that development without the necessity of meeting QRSA's requirements. The state appeared to make a policy choice in favor of residential developers over mineral owners in the QRSA or at least a statutory accommodation for those developers that would otherwise (logically) be unavailable to other surface owners, including other types of commercial interests. In *Texas Genco*, the court appears to expand the legislative spirit of the QRSA to include all types of commercial interests, thus rendering the need for a statutory allowance moot.

Would Texas operators be better off with a damage statute?

What would have happened if this particular operation took place in a state with a surface damages statute? How would *Texas Genco* have established its damages from Valence's operations, even in a state like Oklahoma or Indiana that allows damages for lost land value? This particular disposal cell was not in active use, and it is unclear how quickly the other changes to the overall landfill would have needed to happen. Nor is it clear that the "damage" would even be

permanent, given that the well could have been dry or not commercially productive. Strange as it may sound, if Texas had a surface damage statute in place, Valence may have actually been better off than it was under the accommodation doctrine.[28]

Practical Lessons

Aside from its legal implications, the *Texas Genco* decision teaches the following practical lessons to operators in Texas and states that have followed the *Getty Oil* approach:

a. Negotiating an amicable resolution with the surface owner is now a much more pressing goal. Operators no longer have wide discretion in choosing operations sites when those choices may materially impact surface development, even if the use claimed by the surface owner is a future use with only a partial connection to the present.

b. Surface owners have greater leverage than in years past and can greatly influence the location and method of drilling by occupying the surface with a commercial enterprise that makes it difficult to straight drill.

c. Texas courts will give latitude to a surface owner's claims that an existing (or even a partially existing) surface use will be nearly destroyed by a proposed mineral operation. In this case, the use of this particular part of the surface was not to be active until some years down the road, but the court still stopped Valence from using it.

d. Unless an operator can clearly show that directional drilling on a particular prospect is patently unreasonable (for reasons of exorbitant cost, lack of

nearby drillsites or access, or impropriety of the technology for the particular formation at issue), the operator will be required to directionally drill to avoid impacting existing surface uses, particularly where those existing surface uses are the only (alleged) use of the surface by the owner of the surface.

e. Bad facts make bad law. Here, Genco offered an alternative site for the well and $400,000 to defray the costs of directional drilling. Valence refused those offers at cooperation, and that failure to negotiate a mutually acceptable solution may have cost them in the eyes of the court of appeals. Also, Genco introduced testimony at trial that Valence's operations in one of its clay cells could significantly impact other disposal cells on the surface, such that the negative effect of the proposed location appeared to be more widespread than just the loss of one smaller area of surface.

f. The costs of directional drilling will be balanced against the anticipated reserves to be recovered by the operation. The Texas courts — at least this court — will not give much weight to the potential for a dry hole or other risks. The rationale would appear to be that the operator was willing to take those risks for the cost of a vertical well, and the incremental costs for a directional well in light of the anticipated profit are not enough to demonstrate that directional drilling is unreasonable.

Conclusion

Taken together, the decisions by both the Waco Court of Appeals and the Texas Railroad Commission in favor of *Texas Genco* give teeth to what was previously a relatively pyrrhic protective device for surface owners. If "reasonable alternatives" include all technologically feasible methodologies — regardless of their cost (assuming they do not exceed the potentially recoverable reserves) — operators will have no choice but to directionally and/or horizontally drill their wells in the future every time the surface is occupied by another commercial enterprise that makes vertical drilling untenable. This is particularly so given the very real possibility of a lease termination claim if the operator's proposed use is enjoined by a court and no other production holds the lease in question.

In any event, this dual strategy of litigating in court while raising environmental concerns at the state's regulatory body could cause major headaches for operators in the coming years. Operators would be well advised to use their absolute best efforts to negotiate a mutually acceptable drilling plan with their surface owners, giving increased deference to surface uses and downplaying the traditional trump card of increased cost and risk from deviated wellbores.

Appendix A

State	Accommodation Doctrine?	Surface Damage Act?
Arkansas	Yes. *Diamond Shamrock Corp. v. Phillips*, 511 S.W.2d 160 (Ark. 1974); *see also Chevron U.S.A. Inc. v. Murphy Expl. & Prod. Co.*, 151 S.W.3d 306 (Ark. 2004) (implying duty to restore surface after lease termination, as part of "reasonable use" mandate).	No.
Colorado	Yes. *Gerrity Oil & Gas Corp. v. Magness*, 946 P.2d 913 (Colo. 1997).	No. *But see* 14 COLO. REV. STAT. § 34-66-106(3.5) (financial security required to protect surface owners and ensure restoration at termination) and C.C.R. 401-1, Rules 603(a) (well setbacks) and 604(a) (tank setbacks).
Illinois	No, reasonableness/negligence only. *See Phoenix v. Graham*, 110 N.E.2d 669 (Ill. App. 4th Dist. 1953).	765 ILCS 530/1 *et seq.*
Indiana	No, reasonableness/negligence only.	IND. CODE ANN. § 32-23-7-6 (West. 2002).
Kentucky	Yes. *Lindsey v. Wilson*, 332 S.W.2d 641 (Ky. 1960) (due regard for correlative rights).	KY. REV. STAT. ANN. § 353.595 (2003).
Louisiana	Yes, Mineral Code requires "due regard" and "reasonably prudent operator." *See* LSA-R.S. 31:11; LSA-R.S. 31:122; *Terrebonne Parish Sch. Bd. v. Centex Energy Inc.*, No. 2004-C-0968 (La. 1/19/05), 893 So.2d 789 (lessee has duty to restore premises only where: (1) lessee operated excessively or unreasonably or (2) parties' contract expressly provides for same); *Ashby v. IMC Exploration Co.*, 496 So.2d 1334 (La. App. 3rd Cir. 1986), *aff'd*, 506 So.2d 1193.	No.
Mississippi	*Placid Oil Co. v. Byrd*, 217 So.2d 17 (Miss. 1968); *EOG Resources Inc. v. Turner*, 908 So.2d 848 (Miss. App. 2005).	No.
Montana	No, reasonableness/negligence only. *See Hurley v. Northern Pacific Railway Co.*, 455 P.2d 321 (Mont. 1969).	MONT. CODE ANN. 82-10-501 to -511 (2001).
New Mexico	Yes, "due regard." *Amoco Prod. Co. v. Carter Farms Co.*, 703 P.2d 894 (N.M. 1985); *Kysan v. Amoco Production Co.*, 93 P.3d 1272 (N.M. 2004).	No.
North Dakota	*Hunt Oil v. Kerbaugh*, 283 N.W.2d 131 (N.D. 1979).	N.D. CENT. CODE 38-11.1-.01 *et seq.* (2003 & Supp. 2007).
Oklahoma	No, reasonableness/negligence only. *See, YDF, Inc. v. Schluman Inc.*, 136 P.3d 656, 660 (Okla. 2006).	52 OKLA. STAT. ANN. § 318.2 *et seq.* (2000 & Supp. 2007).
Texas	Yes, *Getty Oil*, 470 S.W.2d 618, 619 (Tex. 1971).	No.
Utah	Yes, *Flying Diamond Corp. v. Rust*, 551 P.2d 509 (Utah 1976); *see also Smith v. Linman Energy Corp.*, 790 P.2d 1222 (Utah App. 1990) (only "reasonable and practical alternatives need be explored by lessee," and damages only if required by the parties' contract).	No.
West Virginia	No, reasonableness/negligence only. *Buffalo Mining Co. v. Martin*, 267 S.E.2d 721, 726 (W. Va. 1980); *see also, In Re Flood Litigation*, 607 S.E.2d 863 (W. Va. 2004) (compliance with regulations does not prevent a negligence claim by surface owner).	W. VA. CODE § 22-7-1, *et seq.* (2003 & Supp. 2007).
Wyoming	*Mingo Oil Producers v. Kamp Cattle Corp.*, 776 P.2d 7365 (Wyo. 1989) (echoing *Getty Oil*).	No.

End Notes

[1] 470 S.W.2d 618, 622 (Tex. 1971). A good discussion of conflicts between surface owners and mineral lessees, and the law of various states regarding same, is found in the November/December 2003 issue of Landman at page 15. Rick D. Davis Jr., Conflicts Between Surface Owners and Mineral Lessees, Landman (Nov./Dec. 2003); see also Christopher M. Alspach, Surface Use by the Mineral Owner: How much Accommodation is Required Under Current Oil and Gas Law?, 55 Okla. L. Rev. 89 (2002) (good overall discussion of accommodation doctrine in the various states).

[2] 854 S.W.2d 909, 911-12 (Tex. 1993).

[3] 470 S.W.2d at 623.

[4] Getty, 470 S.W.2d at 628.

[5] Note also that the accommodation doctrine does not apply where an oil and gas lease expressly reserves to the lessee the right to use "all usual, necessary and convenient means" to explore for and product oil and gas. Alspach, Surface Use, 55 Okla. L. Rev. at 106, citing Landreth v. Melendez, 948 S.W.2d 76, 81 (Tex. App.—Amarillo 1997).

[6] See, e.g., Ottis v. Haas, 569 S.W.2d 508, 513 (Tex. App.—Corpus Christi 1978, writ ref'd n.r.e.) (lessee may select any portion of surface for its well, subject to restrictions in the lease; inconvenience to surface owner immaterial); Grimes v. Goodman Drilling Co., 216 S.W.2d 202, 204 (Tex. App.—Fort Worth 1919, writ dism'd) (locating well in surface owner's front yard instead of back yard upheld against surface owner's protests).

[7] 483 S.W.2d 808 (Tex. 1972).

[8] A mineral lessee's ability to use fresh water for secondary recovery purposes has since been legislatively restricted under Section 27.0511(c), (d) of the Texas Water Code, which require the lessee to use other substances instead of fresh water if they are economically feasible and technically available to the lessee.

[9] Id. at 821 (dissenting opinion of Justice Daniel).

[10] 187 S.W.3d 118 (Tex. App.—Waco 2006, rev. denied, reh'g of rev. denied).

[11] Valence's proofs relating to these damages are not recited in the published opinion. The burden would presumably be heavy, however, given the possibilities of a dry hole, marginal production from the well Valence proposed to drill, and/or operational delays. Some rentals for rig and equipment standby might be recoverable, but once the temporary injunction issued, Valence logically would have been required to mitigate its alleged damages by putting the rig on another assignment.

[12] Texas Genco at 124-25.

[13] Id. at 125.

[14] 16 TEX. ADMIN. CODE § 3.76.

[15] Id. (d).

[16] Tex. Nat. Res. Code §92.005(c).

[17] See, e.g., EOG Resources, Inc. v. Turner, 908 So.2d 848 (Miss. App. 2005) (no damages due surface owner without finding of negligence or excessive use of surface, lessee did not have a duty to reasonably accommodate the surface owners' future plans for the property, and lessee's location of well site and access road met reasonably prudent operator standard).

[18] See, e.g., Diamond Shamrock Corp. v. Phillips, 511 S.W.2d 160 (Ark. 1974) (relying on Getty Oil but applying it to a proposed use of the surface; operator also reneged on promise not to drill in a particular location).

[19] See Gerrity Oil & Gas Corp. v. Magness, 946 P.2d 913 (Colo. 1997) (mineral owner must explain necessity of its conduct and present evidence that operations conformed to standard customs and practices in the industry). At least one commentator views Gerrity as a drastic modification of the accommodation doctrine announced in Getty, claiming that the court's "balancing" of interests is too heavily weighted toward the surface owner's concerns, and in particular that Colorado courts would be under no obligation to consider the added costs and risks of alternatives like directional drilling. Alspach, Surface Use, 55 Okla. L. Rev. at 104. After the Texas Genco decision, this author's concerns would seem to apply equally in Texas.

[20] See, e.g., Ashby v. IMC Exploration Co., 496 So.2d 1334 (La. App. 3rd Cir. 1986) (hinting that loss of timber or crops, or damage to an existing home or water well, might automatically rise to the level of unreasonable use under prudent operator standard, and noting that proof of negligence is not a necessary predicate to recovery on a claim of unreasonable use), aff'd, 506 So.2d 1193.

[21] See, e.g., Terrebonne Parish Sch. Bd. v. Centex Energy, Inc., No. 2004-C-0968 (La. 1/19/05), 893 So.2d 789. In Terrebonne Parish, the Louisiana Supreme Court held that the mineral lessee has a duty to restore only where: (1) the lessee operated the land excessively or unreasonably; or (2) the parties' contract expressly requires such restoration. This holding came despite the legislature's official "Comment" to Mineral Code Art. 122 that "the obligation of the lessee to restore the surface of the lease premises on completion of operations may be viewed as a part of this general [prudent operator] standard," and the Comment's subsequent citation to Civil Code Articles 2719 and 2720, and previous Louisiana cases, in support of this notion. For a more extended discussion of Terrebonne Parish, see Cindy M. Amedee, Terrebonne Parish Sch. Bd. v. Centex Energy, Inc.: The Louisiana Supreme Court gives oil and gas companies a hall pass on restoration of the surface, 34 S. U. L. Rev. 201 (2007).

[22] See Davis, Conflicts, at 58-60 for a good summary of the surface damage statutes in North Dakota, Montana, Tennessee, West Virginia, Oklahoma, Illinois, Kentucky and Indiana.

[23] Again, given the possibility that well could have been a dry hole, or a marginal producer that would be plugged and abandoned prior to the actual use of this clay cell by Texas Genco, it seems illogical to hold that the initial drilling of the well would preclude a use that was not even exigent at the time, nor did anything in the court's opinion indicate the timing and/or immediacy of the platting and State-landfill approval changes allegedly required if this cell were lost for ash disposal. Indeed, one might question whether this dispute was even ripe for decision given that there was no present use of this portion of the surface as intended by the surface owner. And nothing in the published opinion indicates any evidence tending to show that the mere presence of a plugged and abandoned wellbore in this clay cell would somehow destroy or substantially impair its planned future use.

[24] David H. O. Roth, Mineral Interests and Surface Development—The Past Dominance of Mineral Rights and Royalty Interests In An Increasingly Urbanized Texas at 18 (Dec. 3, 1999) (Cox Smith, Inc. library), citing Burney, Accommodating and Condemning Surface and Mineral Estates—The Implications of Tarrant County Water Control and Imp. Dist. No. 1 v. Haupt, Inc., 1994 Adv. Oil, Gas & Min. Law Inst. (Oct. 6-7, 1994).

[25] Haupt, Inc. v. Tarrant Cty. Water Control & Improv. Dist. No. 1, 870 S.W.2d 350 (Tex. App.—Waco 1994); cf. Landreth, 948 S.W.2d at 79 (accepting without discussion that directional drilling was impractical to the lessee).

[26] If the lessor is also the surface owner, the operator could try to oppose such claims by relying on doctrines of estoppel, waiver and contractual obligation to allow development. The Texas Genco opinion just refers to Genco as the surface owner and Valence as the "mineral estate owner." It does not indicate whether Valence owned the minerals in fee or had taken them under a lease from a third party mineral owner, or even from Genco itself. If Genco itself granted this lease, the decision obviously makes even less sense because Genco could have protected its surface interests in the lease instrument.

[27] This might be the case even if the lessor is also the allegedly aggrieved surface owner. The surface owner could claim that the operator chose not to drill in the proffered alternate location, and thus that the failure to produce according to the lease's terms was the operator's fault.

[28] The idea of a surface damage statute in Texas is not new. See, e.g., Andrew M. Miller, A Journey Through Mineral Estate Dominance, the Accommodation Doctrine, and Beyond: Why Texas is Ready to Take the Next Step With a Surface Damage Act, 40 Hou. L. Rev. 461 (2003). Mr. Miller's proposal is based on a policy "to provide surface owners with protection from the undesirable effects of oil and gas development and the maximum amount of compensation." Id. at 492. While there is no doubt that surface concerns are worthy of protection of some sort, whether it be in the form of the accommodation doctrine or a surface-damages act, it should be pointed out that surface owners have, or their predecessors had, the theoretical ability to protect themselves by expressly limiting the nature and extent of allowable surface usage in the instrument by which the minerals were severed (either the lease, a deed assigning the minerals, or a deed reserving the minerals). For this reason, surface damage proponents should be careful to avoid blanket characterizations of surface owners as innocent victims. Presumably, at some point in the past, a mineral owner or operator paid value to the surface owner for the right to own and develop the minerals under the surface. Requiring subsequent payment to the surface owner for the exercise of that right would, in many cases, result in some degree of overlapping and duplicative consideration.