Don't Give Away the Farm Negotiating Surface Damage Cases

By Trae Gray

On the wall of my college adviser's office in Oklahoma State University's Ag Hall there was a printed piece of paper that read, "In business you don't get what you deserve — you get what you negotiate." This statement could be no more applicable than in the world of a landowner protecting their surface rights when an oil company comes to explore for minerals.

Oil and gas companies, typically with independent landmen, have a reputation for getting all they can when negotiating surface damages. Legally, there is nothing wrong with them getting all they can. But, the position from which these landmen negotiate results from the history of our law. Further, these negotiators are much more aware of what the law is and what the benefits of getting what they are negotiating for means to the oil company than are the landowners they are negotiating with.

Historically, the mineral owner, at no cost, was entitled to use as much surface as was *reasonably* necessary to access the mineral estate. This status of the law prevented a landowner from getting any meaningful remedy for surface damage to their land. The creation of our Surface Damage Act[1] (SDA) in 1982 created an obligation on the part of the mineral developer to pay for all surface damage caused by drilling operations. The SDA modified the common law rule that an oil and gas lessee was not liable to the surface owner for damages unless such damages were caused by wanton or negligent operations or if the operations affected more than a reasonable area of the surface.[2] After 1982, the duty of the mineral owner to landowners became one of strict liability. Many in the oil and gas industry believed the SDA would curtail production or have a negative effect on the economy. This has not been the case. Since the enactment of the act, the predominant factor affecting activity in the industry continues to be market prices, availability of rigs, bottlenecks and availability of the industry workforce. The SDA is only helping to bring balance to a long unbalanced relationship. Nonetheless, because of this historic common law relationship, an environment still exists where landowners feel they have little or no rights or choice when mineral exploration occurs on their surface.

Negotiating within this environment allows landmen to contractually get a lot more, in terms, than what the SDA provides at the end of a jury verdict or acceptance of appraisal. The present misperceptions that were brought about by the common law and today's environment are what I will try to address in this article.

The biggest problem that landowners encounter with written agreements is how one-sided those agreements can be. Typically, for a limited amount of consideration, a landowner waives more rights than what they should or more

rights than what they would under an SDA appraisal acceptance or jury trial. Here are 10 examples of overly broad language, interpretations or releases used by energy companies in an effort to better protect their position followed by some law and reasoning as to why landowners should not cave to pressure to sign something like this when an SDA case is heading their way:

1) *No surface damages because an oil and gas lease was signed* — I presently have a case where the operator is arguing the SDA does not apply because the landowner also signed an oil and gas lease so the consideration provided for the lease bonus payment constitutes a release for surface damages because the estate is not severed. (Most leases have the magic language, "Lessee shall pay for all damages caused by its operations for growing crops on said land," in my case, there are no crops, so the operator argues if the lessor/landowner wanted surface damages they should have specified so in the lease.) The argument goes on into the fact that the SDA states nothing should be construed to impair an existing contractual right;[3] here the oil and gas lease.

There is nothing contained in the SDA that states that a lessor, who is also a surface owner, is not entitled to the protection of the SDA. Operator and surface owner are both defined[4] by the SDA. If no agreement is reached prior to drilling, a petition must be filed and the strict liability of the SDA applies regardless of whether or not the landowner also owns the mineral estate.

This argument is way out in left field in my opinion. And, most landowners are not thinking about contractual surface damage rights incident to oil and gas leases[5] when they sign an oil and gas lease. Moreover, when they do sign a lease, most lessees will not allow them to insert surface provisions because of the effect those types of provisions have on the marketability of the leases. Nonetheless, it illustrates the lengths that an operator will take to run over a landowner. Thus, this example serves as a great starting point for these 10 examples. Many times in negotiations for landowners, I hear the words "that issue will never come up." This point just reinforces that eventually everything comes up if you don't cover it!

> "...in my case, there are no crops, so the operator argues if the lessor/ landowner wanted surface damages they should have specified so in the lease."

2) *Landowner warrants and agrees to defend title and landowner agrees to indemnify operator* — The operator should be responsible for determining who owns the land the operator is drilling on and if they are wrong, the landowner should not be responsible for the operator's mistake. Title problems can be expensive. The consideration for damages payments can many times be less than the legal expense for curative work. The landowner should not be burdened with this responsibility. Moreover, the apparent landowner should not be exposing itself to additional liability to the actual owner regarding representations made to the operator in good faith. The potential liability and risk generally outweigh the consideration received from surface damage payments.

3) *Release to operator and any assigns for ANY and ALL damage relating to drill site, pits, roads, pipelines and all other construction or damages of any kind OR all claims of every kind and character arising out of or in any way incident to* — Oklahoma law is well settled that a lessee in an oil and gas lease has only such rights to the surface of the leased land as may be necessarily incident to the exercise of his rights under the lease, and that he must protect the surface rights insofar as such incident necessity does not exist and must mitigate the harm to the surface.[6] The SDA did not relax the requirement to protect and mitigate harm. An SDA release should be limited to drilling operations commenced under the act and related operations and nothing more.

4) *Operations and* ***continued development*** *OR forever release and discharge ALL CLAIMS OR every claim which landowner now has or may have in the future* — Oklahoma law is clear that although a tort claim can proceed with an SDA case, the tort claim must proceed under a separate and distinct procedural track.[7] This holding clearly shows that the intent of the SDA is to compensate a landowner for damages to the surface during drilling operations only and that the SDA is not in place to compensate

for ALL CLAIMS or every possible claim which could arise. An operator has always been liable to the surface owner for damages resulting from unreasonable entry on the land or unreasonable use to the surface.[8] These types of claims should never be waived in surface damage negotiations.

5) *Release as to all claims for surface and subsurface soil and water* — The analysis applicable to this type of language is very similar to the analysis above in No. 4. In *Vastar Resources Inc. v. Howard*,[9] a jury in an SDA case considered tort claims in the trial on the SDA issue. The court was clear that these types of torts are not part of the SDA and must procedurally be treated separately. Additionally, these types of claims typically fall under nuisance law which requires abatement[10] or they can be considered trespasses or wrongful invasions to be enjoined.[11] Again, these types of claims should never be waived in surface damage negotiations.

6) *On or around the property (described as a 160-acre tract in this particular agreement)* — These types of descriptions are simply too broad. The SDA is intended to compensate for drilling operations and activities incident thereto. This should be defined by a specific location in square feet and any other areas utilized outside of the pad area should additionally be defined.

One big misconception is that a landowner is required to give an easement under the act. This is simply not the case. SDA negotiations should never be interpreted to mean an operator has a right to take any property in fee via an easement. An oil and gas lessee does not have a common law right to enter a tract of land at each and every available point of entry and a lessee does not have a common law right to access an oil or gas well at any specific point of entry regardless of the desires of the surface owner.[12] The operator only has a right to utilize the surface for reasonable uses as those uses pertain to drilling operations.

Finally, it is important to always remember the SDA covers the diminution in value to the surface owner's entire property, including the stigma to the entire property from oil and gas operations.[13] Just compensation for surface damages is the value of property taken plus any injury to property not taken.[14] An operator can argue or designate a specific tract, but the jury can always look to the diminution in value to the entire property.[15]

7) *Perpetual right to enter the property* — The right of an oil and gas operator to enter the property comes from their rights to the dominant estate. Once that right no longer exists, there is no reason for them to be there. Thus, any lapses in time should be tied to their rights in the dominant estate. Perpetual is a long time and a landowner should not allow the pressure of an SDA case to force them to agree to this type of language.

8) *Landowner can utilize the property subject to the release subject to the operator's stipulations* — Once again, the operator has a right to reasonable use for its oil and gas operations, so long as the operator complies with the law. Nonetheless, the land still belongs to the landowner who can do whatever they want so long as that does not inhibit the operator in an unreasonable manner. Regardless, this is just another provision that should not be in negotiations under the SDA.

9) *Additional Well Bores on Same Pad* — In *Comanche Resources Co. v. Turner*,[16] a landowner had signed a release that was **specific**. The operator later entered the drilling site and drilled at a different location, the court held the first release did not cover the second hole even though the operator never exercised its rights under the first release.

10) *Drilling out of section leases* — Many operators desire to drill horizontal wells in shale plays. This can result in desired surface locations that are adjacent to the lessee's rights. Most landowners are not aware that neither the SDA nor the common law grants any right to an operator to locate a well on their surface in this situation. Once they figure this out a written agreement has usually been signed and a contractual right to access will then exist. To expand on this issue, if the desired surface location was never part of a fee tract underneath the lessee's mineral interest to be developed, there is no common law or statutory right for the surface location. This issue is a bit more complex where you have a lease covering two separate units with the surface location on one unit and the extraction of minerals from the adjacent unit. With that said, there is no case law or statute in Oklahoma supporting the position that a lease covering separate units grants surface rights for exploration in an adjacent unit. And, one of the most widely recognized oil and gas treatises quashes any theory of an operator's right of access absent an express written agreement of the surface owner.[17] The important

thing to remember here is that it is very unlikely that an operator can force the location through the SDA if the landowner does not want the well on their property.

These 10 examples were not all contained in one release, but they are all examples of language or attempts to go beyond the SDA. All of the examples listed above are from preliminary negotiations with landowners that I represented prior to the filing of an SDA case. When a landowner is faced with signing an overly broad release or proceeding under the SDA, I would advocate for the later. You have certainty with the SDA as you know when the assessment of damage stops and when you have the right to go back into court for additional claims or damages, if any. If you end the SDA process at the appraisal stage, you receive this protection and if you go to trial you receive the same. Many times operators and landowners are reluctant to move forward to a jury trial. Nonetheless, the jury trial is a sacred right in our country that promotes community representation, flexibility, democracy and freedom. The jury trial is the heart of our dispute resolution system and serves to protect the people. It is my belief it should be utilized if an adequate compromise cannot be reached.

This article should in no way be interpreted to be a dig toward the oil and gas industry. Many of the issues that arise in this article come about because of ignorance of the law or greed. My experience is that there are many knowledgeable operators in our state that are fair and operate properly. The oil and gas industry is arguably the most important to our state's economy and I support it. Nonetheless, negotiations with landowners should be fair. When that happens, the wealth can be spread and goodwill will result. This creates a better environment for landowners and operators to coexist, prosper, preserve and utilize two of our state's most precious natural resources.

1. 52 OS §§ 318.2 to 318.9
2. *Ward Petroleum Corporation v. Stewart*, 2003 OK 11, 64 P.3d 1113.
3. 52 OS § 318.7
4. 52 OS § 318.2
5. "While an oil and gas lease carries within its implications, if not within its expression, such rights as to the surface as may be necessarily incident to performance of the objects of the contract, yet it is well settled that the implications go no further, and that the holder of a mining or oil and gas lease must protect the surface of the ground in so far as such incident necessity does not exist." See, also, *Cosden Oil & Gas Co. v. Hickman et al.*, 114 Okl. 86, 243 P. 226; *Sanders v. Davis*, 79 Okl. 253, 192 P. 694, and *Rennie v. Red Star Oil Co.*, 78 Okl. 208, 190 P. 391.
6. *Pulaski Oil Company v. Conner*, 62 Okl. 211, 162 Pac. 464 (1916).
7. *Ward Petroleum Corporation v. Stewart*, 2003 OK 11, 64 P.3d 1113.
8. *Lone Star Producing Co. v. Jury*, 1968 OK 124, 445 P.2d 284; *Wilcox Oil Co. v. Lawson*, 1959 OK 138, 341 P.2d 591.
9. *Vastar Resources Inc. v. Howard*, 2002 OK CIV APP 13, 38 P.3d 236.
10. 50 O.S. §13 and *Sheridan Oil Co. v. Wall*, 1940 OK 225,103 P.2d 507, 510; *Tenneco Oil Co. v. Allen*, 1973 OK 129, 515 P.2d 1391, 1392; *Meinders v. Johnson*, 2006 OK CIV APP 35, 134 P.3d 858.
11. *Angier v. Mathews Exploration Corp.*, 1995 OK CIV APP 109, 905 P.2d 826.
12. *Lierly v. Tidewater Petroleum Corp.*, 2006 OK 47, 139 P.3d 897.
13. *Chesapeake Operating Inc. v. Loomis*, 2007 OK CIV APP 55, 164 P.3d 254.
14. *Williams Natural Gas Co. v. Perkins*, 1997 OK 72, 952 P.2d 483.
15. *Bays Exploration Inc. v. Jones*, 2007 OK CIV APP 111, 172 P.3d 217.
16. *Comanche Resources Company v. Turner,* 2001 OK CIV APP 127, 33 P.3d 688.
17. Williams & Meyers, Oil and Gas Law, Vol. 1 §218.4.

ABOUT THE AUTHOR

Trae Gray is a natural resources trial lawyer. Since opening his Coalgate office in 2007, he's handled over 300 energy industry matters for landowners and was recently chosen as the attorney of choice for the Oklahoma Landowners Association. He does criminal defense work where he successfully defended an innocent Norman Ranger in the politically charged allegations of computer crimes and conspiracy.