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Mines and Minerals - A Mineral Lessee's Rights and Obligations in New Mexico

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In New Mexico, a mineral lessee’s liability for injury to the surface estate is predicated on the mineral lessee’s unreasonable, excessive, or negligent use of the surface, and the appropriate measure of damages is the change in fair market value of the real property. *Amoco Production Co. v. Carter Farms Co.*, 103 N.M. 117, 703 P.2d 894 (1985).

**INTRODUCTION**

*Amoco Production Co. v. Carter Farms Co.*\(^1\) illustrates the tension between a mineral lessee’s right to use the surface for drilling and production operations, and the surface owner’s possessory rights. The issues presented in *Carter Farms* were questions of first impression in New Mexico. The effect of this decision, rendered by the New Mexico Supreme Court, was far-reaching in that it established guidelines for the lower courts to follow in determining the relative rights of surface owners vis-à-vis mineral lessees. The Court clarified a mineral lessee’s rights and obligations with respect to the rights of the surface owner, the theories of recovery available to a surface owner when the mineral lessee has caused injury to the surface estate, and the appropriate measure of damages.

**FACTS**

This case arose over injury caused by Amoco Production Company (Amoco), a mineral lessee, to a surface estate owned by Carter Farms Company (Carter Farms).\(^2\) The mineral lease required Amoco to drill a test well on the property.\(^3\) The injury to Carter Farms’ surface estate resulted from drilling operations.

Carter Farms complained that Amoco had negligently constructed and operated the drilling site causing damage to their surface estate.\(^4\) Carter Farms claimed that, because of the manner in which Amoco constructed

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1. 103 N.M. 117, 703 P.2d 894 (1985) [hereinafter Carter Farms].
3. Id.
the reserve pit, the proposed clean-up operations would have resulted in injury to an unreasonably large surface area. The proposed clean-up operations would have affected an unusually large surface area. Carter Farms sought damages sufficient to restore the surface to the condition it had been in prior to Amoco's operations.

Amoco built a reserve pit at the well site to contain drilling fluids, salt water, mud, and other solids. The presence of underground water two feet below the surface compelled Amoco to build the pit partially above the surface instead of digging out the pit in the usual manner. Amoco used caliche that it had hauled onto the well site to build up the outside walls of the pit. After drilling operations ceased, Amoco planned to spread the caliche and other pit materials over the surface.

The procedure Amoco proposed to follow in its clean-up operations was to cover any debris from the operations using a bulldozer and then to level the pit area. This is the customary practice in the oil and gas industry. Because Amoco built the reserve pit above ground, the proposed clean up would have affected an unusually large surface area.

Carter Farms would not permit Amoco to proceed with the planned clean-up operation and demanded that Amoco restore the pit area to the condition it was in prior to the commencement of drilling operations. Restoring the surface would have required removal of the drill cuttings and contaminated soils, including the caliche used to construct the reserve pit. The estimated cost of restoring the surface was as much as $27,000, or 54 times the value of the land. Amoco refused to comply with Carter Farms' demands.

Carter Farms pursued an action in the District Court of Eddy County seeking damages adequate to restore the surface. The jury awarded damages to Carter Farms on theories of negligence and private nuisance.

5. The Court's discussion of the facts of the case imply that Carter Farms, would not have objected to Amoco's use of the surface if the damage caused by Amoco's clean up operations would have affected a smaller surface area. Carter Farms, 103 N.M. 117, 703 P.2d 894. The pit area occupied less than one acre of the 4.53 acre location. Id. at 119, 703 P.2d at 896.
6. Id. at 118, 703 P.2d at 895. Well site operators are required to build reserve pits under New Mexico Oil Conservation Div. Reg. No. 105 (1986).
7. Id. Pits are normally built by scooping out enough dirt from the center of the pit to build up the dike walls. In this case, Amoco was not able to scoop out a sufficient quantity of dirt and had to haul materials to the site to build up the walls. Id.
8. Id. at 118-19, 703 P.2d at 895-96.
9. Id. at 119, 703 P.2d at 896.
10. Id.
11. Id.
12. Estimates for the cost of restoration ranged from approximately $10,000 to more than $27,000. Petition for Writ of Cert. at 2, Amoco Prod. Co. v. Carter Farms Co., 103 N.M. 117, 703 P.2d 894 (1985). The market value of the land that would have been left unusable was $500. Carter Farms, 103 N.M. at 119, 703 P.2d at 896.
13. The jury found that Amoco had created a private nuisance and awarded damages of $13,485. These damages were based on the cost of restoring the surface to its original condition. The jury also awarded damages for Amoco's negligence or unreasonable use of the surface in the amount of $1,834. Carter Farms, 103 N.M. 118-19, 703 P.2d 895-96.
The trial court found that the jury award for damages under a theory of private nuisance was unsupported by existing New Mexico law and granted a judgment notwithstanding the verdict as to those damages.\textsuperscript{14}

The Court of Appeals reversed, holding that a mineral "lessee had an implied duty of restoring the surface, as nearly as possible, to its original condition once the drilling operation is over. . . ."\textsuperscript{15} The court adopted private nuisance as the theory of recovery.\textsuperscript{16}

The Supreme Court of New Mexico rejected the Court of Appeals' view that a mineral lessee has a duty to restore the surface.\textsuperscript{17} The Supreme Court also declined to adopt private nuisance as a theory under which Carter Farms could recover damages for injury to the surface estate.\textsuperscript{18} The Court held that a mineral lessee's liability for injury to the surface estate is predicated on the unreasonable, excessive or negligent use of the surface and that the appropriate measure of damages is the change in the fair market value of the land.\textsuperscript{19}

The dispute in \textit{Carter Farms} exemplifies the kinds of conflicts created when the mineral estate is severed from the surface estate. This note discusses the choices that the New Mexico Supreme Court made in \textit{Carter Farms} to reconcile these conflicts. The Court's decision affirmed the dominance of the mineral estate over the surface estate in New Mexico and established guidelines for assessing a mineral lessee's liability for injury to the surface estate.

\section*{BACKGROUND}

A desire to profit from the minerals underlying their lands has prompted many land owners to part with some or all of their rights in the mineral estate. An owner in fee of the entire estate may choose to sever the mineral estate from the surface and sell it outright. In the alternative, he may choose to retain title to the mineral estate and lease his rights to another. In either case, some right to use the surface is necessarily appurtenant to the property right vested in the mineral owner or lessee.\textsuperscript{20}

\begin{footnotesize}
\begin{itemize}
\item 15. Id. at 1175.
\item 16. Id. at 1175-76.
\item 17. Carter Farms, 103 N.M. at 120, 703 P.2d at 897.
\item 18. Id. at 119, 703 P.2d at 896. The Court declined to adopt the private nuisance theory as a theory of recovery in this case on the narrow grounds that Carter Farms, had not pleaded private nuisance. The Court's discussion of the private nuisance theory, however, suggests that it would not have been applicable anyway. Id. at 119-20, 703 P.2d at 896-97.
\item 19. Id. at 120-21, 703 P.2d at 897-98.
\item 20. Craft v. Freeport Oil Co., 563 S.W.2d 866, 867 (Tx. Civ. App. 1978). Without some right to use the surface, the mineral owner would be without access to the mineral estate and his property interest would be without value. Id. The recognition that a mineral owner has a right to access to the mineral estate is analogous to the recognition of easements of necessity.
\end{itemize}
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The result is a potential conflict between the rights of the mineral interest owner and the rights of the surface owner. When the surface owner is a direct beneficiary of the exploitation of the mineral estate there is little impetus for either complaint by the surface owner or public concern for his predicament.

As time passes and estates are conveyed and reconveyed, however, more and more surface owners have never held title to the mineral estate underlying their lands and do not stand to gain from its exploitation. The position of the surface owner, therefore, becomes more sympathetic. The surface owner, however, bargained and paid for an estate that was subject to the rights of the mineral interest owner. Finding the appropriate balance between the rights of the parties requires the consideration of competing public policies regarding freedom of contract, the promotion of economic growth, and the protection and conservation of resources.

Prior to *Carter Farms*, New Mexico courts had not delineated the rights and obligations incident to the interest in real property created by a mineral lease. The Supreme Court used *Carter Farms* as a vehicle to define the scope of a mineral lessee’s rights and the circumstances which would entitle a surface owner to recover damages for injury to the surface estate. The Court also defined the proper measure of such damages in New Mexico.

The mineral estate historically has been treated as dominant over the surface estate. Generally, a mineral lessee is not liable for damages if the injury was caused by the lessee’s reasonably necessary use of the surface. Reasonably necessary use may be defined, in part, by the common and accepted practices in the industry. If a mineral lessee used the surface in a manner that was not reasonably necessary, then the surface owner could recover damages under a theory of negligence. This limitation on the right of the owner of the dominant mineral estate to use the

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21. Mineral interest owner and mineral lessee are used interchangeably in this note. A mineral lessee is simply a party to whom the mineral interest owner has transferred some of his rights. See *BLACK'S LAW DICTIONARY* 800-801 (5th ed. 1979). The discussion in this note is limited to the rights of private, rather than public, mineral interest owners and lessees.

22. The New Mexico courts had established that a mineral lease conveys an interest in real property. That is, a mineral lease is more than a license or mere permission to prospect on the property. See *Terry v. Humphreys*, 27 N.M. 564, 203 P. 539 (1922); *Rock Island Ref. Co. v. Simmons*, 73 N.M. 142, 386 P.2d 239 (1963). Further, the New Mexico Supreme Court has held that “the right to receive bonuses, delay rentals, and royalties; and the right of ingress and egress to explore for and produce oil and gas” are incident to a mineral interest. *HNG Fossil Fuels Co. v. Roach*, 99 N.M. 216, 219, 656 P.2d 879, 882 (1982). These are the only rights that the New Mexico courts had expressly recognized as belonging to a mineral interest owner.


24. Id. at 386. See, e.g., *Getty Oil Co. v. Jones*, 470 S.W.2d 618 (Tex. 1971).

25. Comment, *Oil and Gas: Does the Oil and Gas Lessee Have a Duty to Restore the Surface?*, 25 OKLA. L. REV. 572, 575 (1972).
servient surface estate was intended to curb abuses of the surface by mineral lessees.\textsuperscript{26}

As a practical matter, however, the reasonably necessary use rule does little to curtail the mineral lessee's broad freedom to use the surface. Many jurisdictions have strengthened the rule by an accommodation test whereby a mineral lessee is required to exercise his right to use the surface with due regard for the rights of the surface owner.\textsuperscript{27} This test may require a mineral interest owner to adopt an alternative practice when there is an existing use by the surface owner that will be precluded or impaired by the mineral owner's chosen use, and there are reasonable alternatives available under the established practices in the industry.\textsuperscript{28} If no reasonable alternative practice exists, then the mineral lessee is free to continue with his chosen mode of operation and the accommodation doctrine offers no additional protection to the surface owner.\textsuperscript{29}

Some of the rights generally recognized as incident to a mineral lease are: the right to access, the right to select the method and surface location of mineral development, the right to build necessary facilities, the right to explore for minerals, and the right to use a reasonably necessary amount of water.\textsuperscript{30} These permissible surface uses illustrate ways in which the reasonably necessary use rule allows the mineral interest owner to appropriate the surface for his own use.

A surface owner who also owns the mineral estate may protect his surface rights by expressly defining the mineral lessee's liability for injury to the surface in the lease.\textsuperscript{31} A surface owner who has no interest in the severed mineral estate, however, cannot control the terms of the mineral lease and is unable to protect his surface estate by contract.\textsuperscript{32} Without appropriate express lease provisions, the surface owner's recourse, in most jurisdictions, is a claim for damages under a theory of negligence.\textsuperscript{33}

Some states recognize alternative theories of recovery. For example, some jurisdictions recognize private nuisance as an appropriate theory of recovery for damage to the surface estate.\textsuperscript{34} In other jurisdictions a pro-

\textsuperscript{26} See Truhe, supra note 23, at 385-86.
\textsuperscript{27} Id. at 388.
\textsuperscript{28} Getty, 470 S.W.2d at 622.
\textsuperscript{29} Id.
\textsuperscript{30} See Truhe, supra note 23, at 392-97.
\textsuperscript{31} "A mineral interest may be created and, by appropriate language in the deed, be stripped of one or more of its normal incidents." HNG Fossil Fuels Co. v. Roach, 99 N.M. 216, 219, 656 P.2d 879, 882 (1982).
\textsuperscript{32} For example, in the instant case Carter Farms, had no interest in the mineral estate and, therefore, was not a party to Amoco's mineral lease and had no control over the terms of the lease.
\textsuperscript{33} See generally Truhe, supra note 23, at 399-401.
\textsuperscript{34} See, e.g., Tenneco Oil Co. v. Allen, 515 P.2d 1391 (Okla. 1973). The New Mexico Supreme Court noted that "state courts have rarely utilized a private nuisance theory since recovery ordinarily can be based upon standard theories of negligence." Carter Farms, 103 N.M. at 120, 703 P.2d at 897.
ective statute or regulation may subject a mineral lessee to liability for injury to the surface regardless of whether his use of the surface was reasonably necessary.\(^3\) Before \textit{Carter Farms}, the theory or theories of recovery applicable in New Mexico had not been established.

The measure of damages is largely contingent on the theory of recovery adopted. The majority rule that negligence is the appropriate theory of recovery favors mineral owners. Under a theory of negligence, the maximum amount that an aggrieved surface owner can recover is the market value of the injured property.\(^3\) Relief granted under a theory of private nuisance, however, may exceed the market value of the real property. In addition to injury to the real property, annoyance, discomfort, and inconvenience are compensable elements of damage under a theory of private nuisance.\(^3\) Thus, the value of a surface owner’s claim against a mineral lessee may be significantly affected by the theory of recovery adopted.

\section*{ANALYSIS}

New Mexico has traditionally encouraged development of the state’s rich mineral resources.\(^3\) Mineral exploitation promised economic growth, and, historically, that promise outweighed any concern for the rights of surface owners. The rush to promote economic development of mineral resources created an imbalance of rights in favor of the mineral owner or lessee. A growing awareness of environmental issues and the need to conserve our natural resources has set the stage for a shift in the balance.\(^3\) An expansion of a mineral lessee’s obligations, however, could have a significant negative impact on the economic health of the state.

The decision of the New Mexico Supreme Court in \textit{Carter Farms} left little doubt that encouraging the exploitation of mineral resources continues to be a decisive policy in New Mexico. The decision was a victory,
not only for Amoco, but for all mineral lessees in New Mexico. The Court had the opportunity in Carter Farms to bring the rights of surface owners and mineral lessees into better balance. Instead, the Court chose to cling to traditional views. The Court borrowed time-tested doctrines from the common law of other jurisdictions to fashion a decision that reaffirmed the dominant nature of the mineral estate.  

Negligence

Negligence is the theory of recovery adopted by a majority of jurisdictions. Recovery under this theory is predicated on the mineral lessee's unreasonable use of the surface. An unreasonable use of the surface is a use that is not reasonably necessary to fully effectuate the mineral lessee's rights and obligations under the mineral lease. Whether a mineral lessee's use of the surface comports with usual and customary practices in the industry is relevant to determining whether such use is reasonable.

A second component of reasonably necessary use, formally recognized by some jurisdictions as the due regard or accommodation doctrine, restricts the mineral lessee's discretion to choose the means of exploiting the mineral estate. This doctrine may require the mineral lessee to choose means, if available, that accommodate an existing use by the surface owner.

In Carter Farms, the Court adopted the reasonably necessary use rule. Following Texas case law, the Carter Farms decision formally limited a mineral lessee's right to use the surface in New Mexico to the right "to use as much of the surface area as is reasonably necessary for its drilling and production operations." Adoption of this widely recognized rule will have little, if any, practical effect. Although the reasonably necessary use rule had not been articulated by a New Mexico court before Carter Farms, it has undoubtedly governed relationships between surface owners and mineral lessees for decades.

The reasonably necessary use rule affords the surface owner a minimum of protection from the destructive use of the surface by the mineral

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40. The Court relies most heavily on the common law of Texas and cites several Texas cases. E.g., Craft v. Freeport Oil Co., 563 S.W.2d 866 (Tex. Civ. App. 1978); Warren Petroleum Corp. v. Monzingo, 157 Tex. 479, 304 S.W.2d 362 (1957); Getty Oil Co. v. Jones, 470 S.W.2d 618 (Tex. 1971).
41. Truhe, supra note 23, at 386.
42. Carter Farms, 103 N.M. at 119, 703 P.2d at 896.
43. Truhe, supra note 23, at 388.
44. Getty, 470 S.W.2d at 622.
45. Carter Farms, 103 N.M. at 119, 703 P.2d at 896.
46. Id. (citing Warren Petroleum Corp. v. Monzingo, 157 Tex. 479, 304 S.W.2d 362, 364 (1957)).
lessee. To buttress this rule, the Court adopted the accommodation doctrine.

Accommodation is part of the reasonably necessary use analysis. This doctrine affords the surface owner some additional protection against an interfering mineral lessee. After Carter Farms, a mineral lessee in New Mexico must exercise his right to use the surface "with due regard for the rights of the surface owner." That is, a mineral lessee may have to use an alternative practice when "there is an existing use by the surface owner which would otherwise be precluded or impaired, and where under the established practices in the industry there are [reasonable] alternatives available." If a mineral lessee's conduct violates the accommodation doctrine, then his use of the surface is deemed unreasonable and he is liable for any resulting injury to the surface.

The accommodation doctrine does not limit the mineral lessee's right to use the surface when exploiting leased minerals, but merely limits his discretion in choosing the means of exploitation. This doctrine appears, on its face, to be a concession to surface owners. In reality, it does little to tip the balance which weighs heavily in favor of the mineral lessee.

**Burden of Proof**

The mineral lessee's interests are further protected by the allocation of the burden of proof. The surface estate owner bears the burden of demonstrating to the trier of fact that a mineral lessee's use of the surface is unreasonable. Relevant considerations are the usual, customary and reasonable practices in the industry under like circumstances, and whether

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47. The Getty court noted that "[t]here may be only one manner of use of the surface whereby the minerals can be produced. The lessee has the right to pursue this use regardless of surface damage." Getty, 470 S.W.2d at 622 (citing Kenny v. Texas Gulf Sulphur Co., 351 S.W.2d 612 (Tex. Civ. App. 1961)).

48. Carter Farms, 103 N.M. at 119, 703 P.2d at 896.

49. Id.; see also Getty, 470 S.W.2d at 622 (the court articulated the issue to include accommodation in the reasonable necessity analysis).

50. Id. at 119, 703 P.2d at 896 (citing Hunt Oil Co. v. Kerbaugh, 283 N.W.2d 131, 136 (N.D. 1979)); Getty, 470 S.W.2d at 622. Again, the Court accepted the doctrine as developed in Texas case law. The court cites a North Dakota case and a Texas case but the North Dakota case merely incorporates the reasoning of the Texas case.

51. Getty, 470 S.W.2d at 622.

52. The Court did not discuss the burden of proof in Carter Farms. However, the Court's wholesale adoption of the reasoning of the Getty Court suggests that the burden as described by that court would be applicable in New Mexico after Carter Farms.

53. Getty, 470 S.W.2d at 623. This merely reflects the rule that the proponent of a claim bears the burden of proof. The Getty Court did not discuss the character of the burden on the surface owner. See id. at 618. The proponent of a claim brought under a theory of negligence, however, must prove his claim by a preponderance of the evidence. See generally Littlehorn v. Stratford, 653 P.2d 1139, 1142 (Colo. 1982).

54. Hunt Oil, 283 N.W.2d at 136.
the mineral lessee acted with due regard for the rights of the surface owner. The mineral lessee, and not the surface owner, is in a position to know the common practices of the mineral industry. Yet to meet his burden of proof, an aggrieved surface owner must familiarize himself, and the jury, with those practices.

That Amoco’s activities were reasonably necessary to effectuate its rights and obligations under the lease was a question of fact determined by the trial court. The Supreme Court accepted this finding of fact and affirmed the trial court’s holding. It is not clear, however, whether the jury treated the reasonably necessary rule as pertaining to Amoco’s operations as a whole, or to each aspect of Amoco’s operations independently. As Carter Farms illustrates, the ultimate result of independently reasonable activities may be undesirable if not unreasonable. A piecemeal treatment of the mineral lessee’s operations to determine reasonability would weigh in favor of the mineral lessee because it focuses on the actions of the lessee rather than the effect of such actions on the surface estate. Further, such a narrow view of reasonably necessary use would undercut the modern trend toward comprehensive planning and protection of all of our resources.

Although Amoco’s operations resulted in injury to Carter Farms’ land,

55. Getty, 470 S.W.2d at 622.
56. Carter Farms, 103 N.M. at 120-21, 703 P.2d at 897-98. The Court declined to remand the case to the trial court for the taking of further evidence on the issue of reasonableness. Id. at 120, 703 P.2d at 897.
57. The Court acknowledges that the “jury could have decided that Amoco knew or should have known that its variation from the customary industry procedure would result in greater damage to the surrounding area once the cleaning and leveling operation was commenced.” Id. The Court accepted the jury’s answer to Special Interrogatory No. 10 as a finding that Amoco had acted reasonably. The jury answered “no” to Special Interrogatory No. 10 which asked: “[d]id the Plaintiff suffer a diminution in value of any land taken or used by Defendant which was not reasonably required for Defendant’s operation in drilling for, developing or producing oil or gas?” However, the Court could have fairly interpreted the answers to the special interrogatories to mean that the jury believed that Amoco’s operations were not reasonably necessary. See Interrogatories, Carter Farms Co. v. Amoco Prod. Co., No. CV-82-45 (5th Dist. Ct. N.M. Oct. 1983). The jury answered “yes” to Interrogatory No. 14 which asked “was [the] loss or damages attributable to a private nuisance caused by the Defendant?” Id. at 3. The conclusion that Amoco acted unreasonably is implicit in the finding that Amoco had caused a private nuisance. See infra note 66.
58. For example, Amoco’s proposed clean up operations treated independently of the fact that the pit was built above ground would be presumed to be reasonable because those operations were consistent with industry practice. Likewise, building the pit above ground was necessary because of underground water. Carter Farms, 103 N.M. at 119, 703 P.2d at 896. Treated independently, each of these two aspects of Amoco’s operations was “reasonably necessary.”
59. The history of the nation’s thinking with respect to our resources is reflected in the legislation passed affecting public lands bearing mineral resources. The early laws, such as the General Mining Law of 1872, 30 U.S.C. §§ 22-46 (1986), were aimed solely at disposal of the public lands. Through time, the notion that there is a need for conservation has become predominate in legislation effecting our public lands. The Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701-84 (1986), for example, requires submittal of an overall plan of use of public lands.
Amoco was not liable for damages. The Court declined to upset the jury's determination that Amoco had not breached its duty to restrict its surface use to that which was reasonably necessary to carry out its operations. Accordingly, the Court held that Amoco was not liable to Carter Farms for any injury to the land under a theory of negligence.

Private Nuisance

Private nuisance is an alternate theory of recovery available to surface owners in a minority of jurisdictions. The theory generally applies when there has been a non-trespassory and unreasonable interference with another's right of use and enjoyment of land. Under the private nuisance theory, the trier of fact would effectively balance the rights of the mineral lessee and the surface owner. Such consideration of the interests of the surface owner is a clear departure from the traditional notion of the servient nature of the surface estate.

Rejecting the private nuisance theory, the Carter Farms Court noted that recovery under that theory would require a showing that the mineral lessee had unreasonably encroached on the rights of the surface owner. The Court implied that private nuisance is not a viable theory of recovery for an aggrieved surface owner because a claim under that theory would

60. The Court held that Amoco had no liability for injury caused to the land under a theory of negligence, Carter Farms, 103 N.M. at 120, 703 P.2d at 897, nor under a theory of private nuisance because that theory was not pleaded. Id. at 119, 703 P.2d at 896.

61. Id. at 120, 703 P.2d at 897; see infra note 66.

62. I H. WILLIAMS & C. MEYERS, OIL AND GAS LAW, § 218.10 (1986). The Carter Farms Court notes that some jurisdictions have statutes authorizing recovery under a theory of nuisance, but cites only one common law case where the private nuisance theory was recognized. Carter Farms, 103 N.M. at 120, 703 P.2d at 897. Oklahoma recognized nuisance as an appropriate theory of recovery in Tenneco Oil Co. v. Allen, 515 P.2d 1391 (Okla. 1973).


64. Under the private nuisance theory, a court could find that a reasonably necessary use of the surface was an unreasonable invasion of the surface owner's rights. In other words, a court could find that a surface owner's rights were significant enough to justify precluding a reasonably necessary use of the surface by the mineral lessee.

65. The Court declined to adopt private nuisance as a theory of recovery in the instant case on the narrow grounds that Carter Farms did not plead a private nuisance theory in its original complaint. Carter Farms, 103 N.M. at 119, 703 P.2d at 896. The Court continued, however, to discuss the applicability of the theory. Id.

66. Carter Farms, 103 N.M. at 119-20, 703 P.2d at 896-97. The interpretation of the meaning of the jury's answers to Interrogatories, however, is interesting. The Court of Appeals concluded that the jury's answers to the special interrogatories were sufficient to establish that Amoco was liable under the theory of private nuisance, but the Supreme Court concluded that the jury's finding that Carter Farms did not "suffer a diminution in value of any land taken or used by [Amoco] which was not reasonably required for [Amoco's] operation in drilling for, developing or producing oil or gas" was conclusive with regard to the reasonableness of Amoco's actions. Interrogatories at 3, No. 10, Carter Farms Co. v. Amoco Prod. Co., No. CV-82-45 (5th Dist. Ct. N.M. Oct. 1983).
merely duplicate a claim under a theory of negligence. Further, the Court pointed out that most states which have chosen to adopt public or private nuisance as a theory of recovery for surface owners have passed statutes imposing a duty upon oil and gas lessees to restore the surface.

The Court's treatment of private nuisance suggests that a mineral lessee's reasonably necessary use of the surface can never be an unreasonable invasion of the rights of the surface owner. That is, so long as a mineral lessee's use of the surface is reasonably necessary to effectuate his rights and obligations under the lease, then any resulting encroachment on the rights of the surface owner is not unreasonable. This conclusion reflects the underlying policy accepted by the Court that society's interest in the exploitation of mineral resources is superior to the interests of the surface owner.

**Measure of Damages**

The import of rejecting the private nuisance theory as a legitimate basis for recovery is significant because the measure of damages under the two theories is different. Under a theory of negligence, the measure of damages is the change in market value of the affected real property. A surface owner whose property has been injured by a mineral lessee's unreasonable use of the surface can, at best, recover the market value of the damaged property. Under a theory of private nuisance, however, compensable elements of damage include not only injury to the land, but annoyance, discomfort and inconvenience. By limiting damages to those recoverable under a theory of negligence, the Court protected a mineral lessee's freedom to use the surface because negligence, as a theory of recovery,

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67. *Carter Farms*, 103 N.M. at 120, 703 P.2d at 897. The Court notes that a surface owner was awarded damages under the private nuisance theory in the Oklahoma case *Tenneco Oil Co. v. Allen*, 515 P.2d 1391 (Okla. 1973). *Id.* The Court suggests that the surface owner in *Tenneco* could have recovered under a theory of negligence and that adoption of private nuisance is a minority view. *Id.*

68. *Id.* at 119-20, 703 P.2d at 896-97.

69. Damages are measured by the diminution in market value of the property. *Id.* at 120-21, 703 P.2d at 897-98.

70. Measuring damages by the diminution in the market value of the land overlooks the possibility that the real estate may be unique and, therefore, irreplaceable. However, measuring money damages by restoration costs, rather than replacement costs, would result in a greater economic benefit to the surface owner from a mineral owner's breach of his duty than if he had complied with his duty. See *Peevyhouse v. Garland Coal & Mining Co.*, 382 P.2d 109, 113, *cert. denied*, 375 U.S. 906 (1963). That is, measuring money damages by restoration costs would result in a windfall to the surface owner who chose to replace his property rather than restore it.

provides a more predictable, and generally much lower, measure of damages.\textsuperscript{72}

**Implied Contractual Duty**

The mineral lessee's rights and obligations flow from the mineral lease. Determining those rights and obligations is essentially a matter of ascertaining the intent of the parties.\textsuperscript{73} Courts traditionally have chosen not to infer that the parties intended that the lessee have an obligation to restore the surface.\textsuperscript{74} Therefore, a mineral lessee generally has no obligation to restore the surface in the absence of an express lease provision to that end.\textsuperscript{75} The *Carter Farms* Court seems to adopt this view.\textsuperscript{76} In this case, there was no express lease provision requiring that Amoco restore the surface to its prior condition.\textsuperscript{77}

The Court of Appeals did not address the issue of the expectations of the parties when it held that "the lessee has an implied duty of restoring the surface."\textsuperscript{78} The Supreme Court should have rejected this holding more strongly. A surface owner bargains for the surface estate knowing that the estate is burdened by a subservience to the mineral estate, and that some damage to the surface will inevitably result from mineral operations.\textsuperscript{79} Imposing a duty on the mineral lessee to restore the surface would effectively be giving the surface owner greater rights than he purchased.\textsuperscript{80} By not facing the issue of implied contractual duty squarely, the Court left this issue open for future litigation.\textsuperscript{81}

Acceptance of an implied duty to restore the surface would represent

\textsuperscript{72} In *Carter Farms*, for example, the value of the land affected was $500 and the cost of restoration might have been as much as $27,000. *Carter Farms* at 119, 703 P.2d at 896; Petition for Writ of Cert. at 2, Amoco Prod. Co. v. Carter Farms Co., 103 N.M. 117, 703 P.2d 894 (1985).

\textsuperscript{73} See, e.g., *City of Farmington v. Amoco Gas Co.*, 568 F.Supp. 1265, 1267 (D.N.M. 1983), aff'd 777 F.2d 554 (10th Cir. 1985).

\textsuperscript{74} See *Cole, Oil and Gas: Does the Oil and Gas Lessee Have a Duty to Restore the Surface?*, 25 OKLA. L. REV. 572, 573 (1972). The underlying reason given is that both parties were aware that there would inevitability be damage to the surface from mineral operations. *Id.*, (citing I H. WILLIAMS & C. MEYERS, *OIL AND GAS LAW* § 218.12 (1959)).

\textsuperscript{75} *Carter Farms* at 120, 703 P.2d at 897. The Court notes that mineral lessees in some jurisdictions are required by statute to restore the surface. *Id.* (citing N.D. CENT. CODE §§ 38-11.1-01 to -10 (1980 & Supp. 1983); MONT. CODE ANN. §§ 82-10-501 to -511 (1983); OKLA. STAT. ANN. tit. 52, §§ 318.2 to .9 (West Supp. 1984-85)).

\textsuperscript{76} While the Court does not explicitly state its view, one can infer from the opinion that the Court adopts this view. *See id.*

\textsuperscript{77} While the Court does not discuss the lease provisions specifically, one can infer from the opinion that there was no express lease provision relating to surface restoration. *See Carter Farms*, 103 N.M. 117, 703 P.2d 894.


\textsuperscript{79} *See Cole*, supra note 74, at 573.

\textsuperscript{80} *See Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922).

\textsuperscript{81} The Court suggests that the issue of implied contractual duty was not before the Court because *Carter Farms* did not raise it in the pleadings. *Carter Farms*, at 120, 703 P.2d at 897.
a major change in policy away from promoting mineral exploitation and toward protection of resources. The Court noted that several jurisdictions have shifted the balance in favor of conservation and protection of the rights of the surface owner by enacting statutes that impose strict liability on the mineral lessee for injury to the surface. Interestingly, these statutes are designed to conserve private, as well as public, resources. The Court of Appeals attempted to reach the same result in New Mexico without legislative approval. The Supreme Court's failure to more squarely address the issue of implied contractual duty may reflect a belief that the political process is the more appropriate forum for implementing such a sweeping change in policy.

**Effect of the Court's Conclusions**

The Court's discussion of private nuisance, implied contract, and measure of damages was entirely unnecessary to its holding in *Carter Farms*, but it clarified the common law of New Mexico in the area of mineral lessees' rights and obligations. The Court's conclusions, while not binding on the lower courts, will serve as guidelines in future cases and reduce the likelihood of appeals. *Carter Farms* suggests that the policy of promoting mineral development is alive and well in New Mexico, and leaves little flexibility in the common law to expand a mineral lessee's obligations.

New Mexico has a high stake in encouraging mineral development.

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82. *Id.* at 119-20, 703 P.2d at 896-97; See Cole, *supra* note 74.

83. The legislative assembly of North Dakota enacted the Oil and Gas Production Damage Compensation Act after finding that "[i]t is necessary to exercise the police power of the state to protect the public welfare of North Dakota which is largely dependent on agriculture, and to protect the economic well-being of individuals engaged in agricultural production." N.D. CENT. CODE § 38-11.1-01 (1980 & Supp. 1983). Similarly, the legislature of South Dakota stated that "safeguards must be provided . . . to ensure that . . . upon depletion of the mineral resources and after disposal of tailings the affected land is usable and productive to the extent possible for agricultural or recreational pursuits or future resource development; that water and other natural resources are not endangered; and that esthetics and a tax base are maintained, all for the health, safety and general welfare of the people of the state." S.D. CODIFIED LAWS ANN. § 45-6B-2 (1985). These statutes have been carefully drafted to purportedly serve a public interest. The primary beneficiaries of such legislation, however, are private interests. In fact, the stated purpose of the North Dakota act is "to provide the maximum amount of constitutionally permissible protection to surface owners . . . from the undesirable effects of development of minerals." N.D. CENT. CODE § 38-11.1-02. Section 38-11.1-4 goes on to provide that "[t]he amount of damages may be determined by any formula mutually agreeable between the surface owner and the mineral developer." N.D. CENT. CODE § 38-11.1-04. A surface owner could, therefore, bargain away his right to compensation for surface damages in favor of mineral exploration and exploitation regardless of the impact on the "public" interest.

84. *See supra* notes 18, 65.

The state relies heavily on income from the minerals industries, industries that have suffered serious setbacks in the 1980s. Aware that imposing additional obligations on mineral lessees would serve to discourage mineral development, the Court chose to emphasize mineral lessees' rights, rather than their obligations. *Carter Farms* didn't relieve mineral lessees of any previously recognized obligations, but the decision may serve to promote mineral development by making the costs of mineral exploitation more predictable.

**CONCLUSION**

The Court's approach in *Carter Farms* was a conservative rather than a creative one. The decision reaffirmed the dominance of the mineral estate and left little room for the expansion of a surface owner's rights under the common law of New Mexico. Environmental concerns and the changing nature of the balance between the need for economic growth and conservation of resources, public and private, received none of the Court's attention in *Carter Farms*. Instead, the focus of the decision was on the rights of mineral lessees. A mineral lessee in New Mexico may use the surface in any way that is reasonable and necessary to fully effectuate his rights and obligations under the lease without exposure to liability for injury to the surface.

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86. *Id.*