STATE OF NEW MEXICO
ENERGY, MINERALS AND NATURAL RESOURCES DEPARTMENT
OIL CONSERVATION COMMISSION

RECEIVED
APR 11 2003
Oil Conservation Division

APPLICATION OF PRONGHORN MANAGEMENT CORPORATION FOR APPROVAL OF A SALT WATER DISPOSAL WELL, LEA COUNTY, NEW MEXICO.

CASE NO.: 12905 (*de novo*)

SUPPLEMENTAL MEMORANDUM IN OPPOSITION TO APPROVAL OF SALT WATER DISPOSAL WELL

DKD, LLC, an interested party herein, by and through counsel, Montgomery & Andrews, P.A., submits this Supplemental Memorandum in Opposition to Approval of Salt Water Disposal Well. The Application should be denied because the Applicant has not secured the necessary approval and mineral lease to inject.

This Supplemental Memorandum incorporates the legal argument and authority set forth in the Memorandum in Opposition which was filed with the Commission and handed to the Commissioners at the March 20, 2003 Hearing Date. In particular, Pronghorn as surface owner cannot inject salt water into the well because it does not have permission to do so from the mineral estate owner. *See Cassinos v. Union Oil Co. of California*, 14 Cal.App.4th 1770, 18 Cal.Rptr.2d 574 (1993); *Gill v. McCollum*, 19 Ill.App.3d 402, 311 N.E.2d 741 (Ct. App. 1974); *TDC Engineering, Inc. v. Dunlap*, 686 S.W.2d 346 (Ct. App. Tex. 1985); *Farragut v. Massey*, 612 So. 325 (Miss. 1993). This is not a case of the Commission determining private property rights or trespass–simply one of the Commission determining whether the Applicant has the right to conduct the salt water disposal operations which it proposes. Simply stated, Pronghorn has no right to inject, and the Commission should not overlook that fact.

This Supplemental Memorandum is expressly limited to the subject which the Commission directed counsel to brief: the policy of the New Mexico State Land Office with respect to salt water disposal injection into minerals owned by the State. The other issues raised at the March 20, 2003 hearing are expressly not treated in this Supplemental Memorandum, as they are beyond the scope of the direction of the Commission.

The New Mexico State Land Office Rule respecting salt water disposal wells is attached hereto as Exhibit "A." In particular, that rule provides that:

> Lessees are expected to comply with all lawful rules of the New Mexico Oil Conservation Division pertaining to the prevention of waste, which includes disposal of produced salt water or brine. If state lands are needed for a salt water disposal operation, then application for a Salt Water Disposal Easement Site shall be made . . . .

State Land Office Rule 1.063 (attached hereto as Exhibit "A").

Two aspects of SLO Rule 1.063 are particularly relevant in this matter. First, in the opening word of the Rule, the Rule contemplates that "Lessees" are the parties which are authorized to dispose of salt water on State lands, subject to the remaining provisions of the Rule. In this case, the lessee of the minerals underlying Pronghorn's proposed injection well is Chesapeake Operating, Inc., not Pronghorn. Pronghorn has no assignment or other conveyance of any right to inject.

The second aspect of SLO Rule 1.063 which is particularly relevant is that the party seeking to conduct salt water disposal applications must obtain a Salt Water Disposal Easement. Staff of the State Land Office were unclear on the State Land Office's position on how an application for a Salt Water Disposal Easement would be handled if the minerals underlying the proposed salt

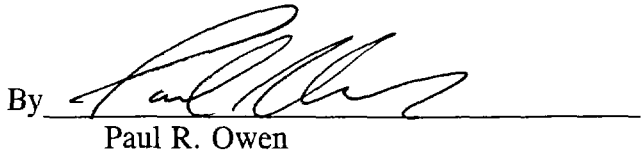
water disposal injection well were already leased. However, in light of SLO Rule 1.063's contemplation that lessees are the parties authorized to conduct disposal operations, it is DKD's position that Pronghorn has no authority to conduct such operations under State Land Office Rules.

Although the Commission directed that this Supplemental Memorandum be filed by April 9, 2003, DKD files this document on April 11, 2003, after determining that neither counsel for the Commission, Stephen Ross, Esq., nor counsel for Pronghorn, Ernest Padilla, Esq., are opposed to such submission.

Therefore, DKD, LLC requests that the Commission deny the application of Pronghorn Management Corporation.

Respectfully Submitted,

MONTGOMERY & ANDREWS, P.A.

By 

Paul R. Owen
Post Office Box 2307
Santa Fe, New Mexico 87504-2307
(505) 982-3873

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of April, 2003, I have caused a copy of our Supplemental Memorandum in Opposition to Approval of Saltwater Disposal Well in the above-captioned case to be served via first class U.S. Mail upon the following named parties:

Earnest L. Padilla, Esq.
Padilla Law Firm, P.A.
Post Office Box 2523
Santa Fe, NM 87504-2523
facsimile: (505) 988-7592
ATTORNEYS FOR APPLICANT PRONGHORN MANAGEMENT CORPORATION

Paul R. Owen

1. Location of well.

2. Depth, Log and Casing Record Production Data.

1.063 Salt Water Disposal. Lessees are expected to comply with all lawful rules of the New Mexico Oil Conservation Division pertaining to prevention of waste, which includes disposal of produced salt water or brine. If state lands are needed for a salt water disposal operation, then application for a Salt Water Disposal Easement Site shall be made to the "Oil and Gas Division" or application for a business lease shall be made to the "Land Surface Division" of the State Land Office, depending upon whether underground or surface disposal, respectively, is desired. Ordinarily, water produced on lease may be disposed of on lease without the Commissioner's permission if the disposal operation otherwise meets the approval of the Oil Conservation Division and is otherwise reasonable and accepted practice in the industry.

1.064 Royalty Purchase--Preference Right. Requests made by petroleum refineries within the state to the Commissioner to purchase state royalty oil as a preference right under the provisions of §§ 19-10-64 through 19-10-70 NMSA 1978 shall be accompanied by an order or ruling of the New Mexico Oil Conservation Division determining that the applicant is qualified and otherwise entitled to such preference. Requests to purchase state royalty oil on a bid basis may be made directly to the Commissioner in letter form. In either case, the applicant must identify the wells from which he desires to purchase the royalty oil.

1.065 Reservation of Right to Purchase Production. The state reserves a continuing option to purchase at anytime and from time to time, at the market price prevailing in the area on the date of purchase, all or part of the oil and gas that may be produced from the lands embraced in all leases issued on or after June 11, 1973.

1.066 Appeals from Decision of the Commissioner. Any party aggrieved by any ruling or decision of the Commissioner affecting such party's interest in any oil and gas lease may appeal to the appropriate District Court within sixty (60) days after such ruling or decision is rendered pursuant to § 19-10-23 NMSA 1978.

1.067 Fees.

A. Filing each application for oil and gas lease.....$30.00

STATE OF NEW MEXICO
ENERGY, MINERALS AND NATURAL RESOURCES DEPARTMENT
OIL CONSERVATION COMMISSION

IN THE MATTER OF THE HEARING CALLED BY THE OIL CONSERVATION DIVISION FOR THE PURPOSE OF CONSIDERING

RECEIVED

APR 9 2003

Oil Conservation Division

CASE NO. 12905
(de novo)

IN THE MATTER OF THE APPLICATION OF PRONGHORN MANAGEMENT CORP. FOR SALT WATER DISPOSAL, LEA COUNTY, NEW MEXICO

MEMORANDUM IN SUPPORT OF SALT WATER DISPOSAL WELL

Pronghorn Management Corp., by its attorney Ernest L. Padilla, PADILLA LAW FIRM, P. A., for its Memorandum in Support of Salt Water Disposal Well states:

A. Introduction.

This matter came before the Oil Conservation Division initially as an administrative application which resulted in an administrative order, SWD 836, being issued by the Oil Conservation Division. Thereafter, DKD, LLC, (DKD) the opposing party to this application filed a request for hearing before the Division on the basis that it had not received notice of the application. The record before the Division is clear that DKD's predecessor in interest, Chesapeake Operating, Inc. did in fact receive notice of the application and did not file a protest. The record is also clear that DKD did not file its assignment from Chesapeake Operating, Inc. with the Lea County Clerk until after Pronghorn had filed its initial application with the Division.

The first basis of DKD's opposition to the application has been lack of notice, which at the Commission hearing was not raised. The second basis for DKD's

opposition at the Division hearing was that Pronghorn did not have authority to inject produced water in the San Andres and Glorieta formations, the proposed injection zones. DKD contends that an element or condition precedent to inject is that Pronghorn must have authority from the surface owner and/or the mineral owner prior to Commission having authority to issue an order approving the application. In support of its position, DKD has not presented any geological or engineering evidence of how the application would impair its correlative rights or how approval of the application would cause waste, which is the statutory purview of the Commission. See, Continental Oil Co. v. Oil Conservation Division, 70 NM 310, 373 P2d 809 (1962). Its attack, instead, is that approval of the application would sanction trespass by Pronghorn. This notion of trespass is clearly beyond the jurisdiction of the Commission.

B. The Commission lacks jurisdiction to consider whether Pronghorns's application will constitute trespass.

In its Memorandum in Opposition to Approval of Salt Water Disposal Well, DKD would have the Commission believe that it must determine what rights, if any, Pronghorn or its partners as owners of the surface estate on which the proposed injection well is located, have in the mineral estate and to what extent it may inject produced water not produced from Chesapeake Operating's oil and gas lease covering the injection zone. Approval of the Pronghorn's salt water is clearly within the Commission's regulatory power. A determination of a property right to inject is not. A determination of trespass is also not within the Commission's regulatory power.

Snyder Ranches, Inc. v. Oil Conservation Commission, 110 NM 637, 798 P2d 587 (1990) gives us a good idea of the distinction between approval of an application for

salt water injection and trespass. At 110 NM 640, the New Mexico Supreme Court states:

> Having found substantial evidence to support the Commission and district court's conclusions, our analysis should end. However, in order to avoid future error, we take the opportunity to answer Snyder Ranches' assertion that the granting of Mobil's application to inject salt water into the disposal well authorizes a trespass against Snyder Ranches' property. We do not agree.
>
> The State of New Mexico may be said to have licensed the injection of salt water into the disposal well; however, such license does not authorize trespass. The issuance of a license by the State does not authorize trespass or other tortuous conduct by the licensee, nor does such license immunize the licensee from liability for negligence or nuisance which flows from the licensed activity. (citations omitted). In the event that an actual trespass occurs by Mobil in its injection operation, neither the Commission's decision, the district court's decision, nor this opinion would in any way prevent Snyder Ranches from seeking redress for such trespass.

It is clear from the foregoing that regulatory approval by the Commission of a salt water disposal operation and a determination of property rights and trespass are two different things, having separate jurisdictional bases. Continental Oil Co., supra, the landmark New Mexico case establishing the Commission's regulatory power said as much. In discussing the question of whether correlative rights were a corollary of waste, the New Mexico Supreme Court at 70 NM 324 said:

> ...If the protection of correlative rights were completely separate from the prevention of waste, then there might be no need of the commission as a party; but if such were true, it is very probable that the commission would be performing a judicial function, i.e., determining property rights and grave constitutional problems would arise. For the same reason, it must follow that, just as the commission cannot perform a judicial function, neither can the court perform an administrative one....(emphasis ours).

The Commission cannot determine, for example, whether injection of salt water in this case, and under the circumstances that DKD has posed for the Commission will be good or bad faith trespass.

C. *Surface/Mineral Estate distinctions are not relevant or material to the Commission's determination of whether salt water disposal is appropriate in this case.*

Irrespective of the foregoing analysis of the Commission's jurisdiction, Pronghorn feels compelled to address the interrelationship of the split surface and mineral estate. First, Pronghorn does not claim, nor does it want to test, the issue that surface ownership allows it to inject produced water. Pronghorn has obtained from Chesapeake Operating a letter which states that Chesapeake does not object to the proposed injection operation. Additionally, it has made application to the Commissioner of Public Lands for a salt water disposal easement. A copy of that application is attached hereto as Exhibit A, together with undersigned counsel's letter stating Pronghorn's position that the circumstances require a salt water disposal easement irrespective of its surface ownership.

Also attached, as Exhibit B, is a copy of the applicable rule of the Commissioner of Public Lands that an order of the Commission should be obtained before application for a salt water disposal easement. Because of the argument made by DKD, and apparently accepted by the Division, that a property right is an element or condition precedent of a salt water disposal application, Pronghorn has asked the Commissioner issue the salt water disposal easement subject to the Commission's approval of the instant application. By making the application for salt water disposal easement with the Commissioner of Public Lands, Pronghorn has conceded the issue of whether as surface owner it owns or has a property right to the "pore space" at the disposal interval at 6000 to 6,400 feet below the surface.

D. DKD's witness testified falsely on a material issue before the Commission.

It is interesting that DKD accuses Pronghorn of not having a salt water disposal easement from the Commissioner of Public Lands. It is more interesting that DKD does not itself have a salt water disposal easement from the Commissioner of Public Lands. Attached hereto as Exhibit C, are certified copies of tract book entries for the land involved which do not show that DKD has been issued a salt water disposal easement from the Commissioner. It is most interesting that Danny Watson, DKD's principal, testified in cross-examination that DKD had a salt water easement from the Commissioner. Attached as Exhibit D is a portion of Mr. Watson cross-examination concerning Mr. Watson's false testimony, amounting to perjury.

NMSA 1994, Section 30-25-1 defines perjury as follows:

> Perjury consists of making a false statement under oath or affirmation, material to the issue or matter involved in the course of any judicial, administrative, legislative or other official proceeding, knowing such statement to be untrue.
>
> Whoever commits perjury is guilty of a fourth degree felony.

Understandably, DKD is concerned about competition to its salt water disposal operation, but false testimony cannot be tolerated. Mr. Watson's false statement goes to a material issue involved this proceeding, which he raised and upon which the Division's examiner relied to rescind Administrative Order SWD-836.

E. Conclusion.

The notice deficiencies cited in the Division's order are now moot. Whether or not Pronghorn has a salt water disposal easement from the Commissioner of Public Lands should not be considered by the Commission and is not an element or condition precedent

for issuance of an order approving Pronghorn's application. Finally, the Commission cannot allow litigants before it to conveniently falsify testimony, for profit motives, such that the seriousness and fundamental basis, upon which oaths and affirmations are made by such litigants, undermine and diminish the solemnity and fair play of the Commission's proceedings.

For the foregoing reasons, the Commission should approve Pronghorn's application.

PADILLA LAW FIRM, P. A.

By: _____

ERNEST L. PADILLA
P. O. Box 2523
Santa Fe, New Mexico 87504-2523
(505) 988-7577

CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of this Memorandum in Support of Salt Water Well to be served upon Paul R. Owen, MONTGOMERY & ANDREWS PA, P.O. Box 2307, Santa Fe, New Mexico 87504-2307, on this 9th day of April, 2003.

_____
ERNEST L. PADILLA

PADILLA LAW FIRM, P.A.
STREET ADDRESS
1512 ST. FRANCIS DRIVE
SANTA FE, NM 87505
TELEPHONE
505-988-7577
MAILING ADDRESS
P.O. BOX 2523
SANTA FE, NM 87504-2523
FACSIMILE
505-988-7592

HAND-DELIVERED

April 3, 2003

Patrick Lyons
Commissioner of Public Lands
State Land Office Building
Santa Fe, New Mexico 87501

Re: Application for Salt Water Disposal Easement
Pronghorn Management Corp.

Dear Commissioner Lyons:

Enclosed is the application of Pronghorn Management Corp. for a salt water disposal easement, together with its check for $500.00.

We are filing this application prior to obtaining an order from the Oil Conservation Commission which is considering Pronghorn's application for salt water disposal following a de novo hearing before the Commission. Enclosed also are two prior orders issued by the Oil Conservation Division, the first approving the application and the second suspending the original order. The second Division Order R-11855 suspended the prior SWD-836 due to Pronghorn's failure to notify certain surface owners and due to not having a salt water disposal easement from your office.

In the hearing before the Commission we introduced a deed from the surface owners (Felipe A. Moreno and Adelaida P. Moreno) to Gandy Corporation, one of Pronghorn's partners in the salt water disposal venture, thus negating the notice requirement. Similarly, we feel that the second issue was satisfied by introduction of a letter from Chesapeake Operting Inc., the state oil and gas lessee, waiving objections to Pronghorn's intended salt water disposal project. A copy of that letter is enclosed. Additional evidence before the Commission and the Division, introduced at both hearings, was that the San Andres and Glorieta formations have not and will not be productive of oil and gas in the future because these formations are water saturated. Only the deep oil and gas rights appear commercially viable in the area.

In the Division and Commission hearings, Pronghorn was opposed by DKD, LLC, which operated a commercial salt water disposal well less than one-half mile from Pronghorn's proposed injection well. It claims, in addition to the issues identified above, that a salt water disposal easement is necessary from your office. We have discussed this issue with Joseph Lopez in your Commercial Division and have been informed that an order from the Oil Conservation Division or the Commission is necessary prior to consideration of a salt water disposal easement application, which is consistent with State Land Office policy. More recently, we have discussed our predicament with Bruce Frederick of your legal department who is very cognizant of the legal issues involved given the split estate (surface/mineral).

Our position has been that irrespective of the split estate, Pronghorn will require a salt water disposal easement since disposed water will be coming from off-lease (Chesapeake's) oil and gas wells. Mr. Frederick does not disagree. Our approach is simply that we want to avoid the issue of whether a salt water disposal easement is necessary; we agree that it is required due to disposal of produced water within the state mineral estate.

Interestingly, DKD, LLC's principal, Danny Watkins, testified at the Commission hearing that DKD, LLC had a salt water disposal easement from your office. Our search of State Land Office records does not disclose any such easement.

Accordingly, in order to avoid further legal wrangling over split estate issues and the respective rights thereunder, we ask that a salt water disposal easement be issued by your office subject to approval by the Commission of technical and regulatory aspects of the application before the Commission.

Should you or your staff have any questions, please let us know.

Thank you.

Very truly yours,

ERNEST L. PADILLA

ELP/maq
Enclosures

cc: Pronghorn Management Corp.

NEW MEXICO STATE LAND OFFICE

QUESTIONAIRE TO BE COMPLETED IN CONNECTION
WITH SALT WATER DISPOSAL WELL EASEMENT

1. What is the oil and gas mineral ownership of the land from which the salt water will be produced?
   Private 25 %, State 50 %, Federal 25 %.
2. What is the approximate number of barrels of salt water that will be injected into the well per day?
   approx 1500 bpd .
3. What is the formation into which the salt water will be injected? SA and Glorietta
4. Have you enclosed consent of the oil and gas lessee for the use as a salt water disposal well? Yes
5. From which well(s) is the salt water being produced and to be injected? (Give complete description of oil wells.) The application is for commercial use and may come from all around the area. The well being used is The State T #2 Sect 6 T16 R36E
6. What is your O.C.C. Order No. ~~SWD-836~~
7. What reaction have the adjacent wells reflected from the injected water? (Answer only if this is a renewal application.) NA
8. What is estimated reservoir of oil still to be recovered from wells which are the source of the salt water?
   Indefinate
9. What is the estimated time that it will take to deplete the well or wells?
   many years

Signed by: [signature] 393-9176
Address: Box 1772
Hobbs NM 88241

FOR OFFICE USE ONLY

Approved by O.C.C.:

S-1 8/17/82

PRONGHORN MANAGEMENT CORPORATION
PO BOX 1772 392-5516
HOBBS, NM 88241-1772

1856

DATE April 2 20 03

PAY TO THE ORDER OF New Mexico State Land Office $ 500.00

Five hundred and no/100********** DOLLARS

Lea County State Bank
P.O. Box 400 • Hobbs, New Mexico 88241

FOR [redacted]

WHITE CO C

COMMISSIONER OF PUBLIC LANDS
NEW MEXICO STATE LAND OFFICE
P. O. BOX 1148, SANTA FE, NEW MEXICO 87504-1148

SLO RULE 11 JANUARY 20, 1984

RELATING TO SALT WATER DISPOSAL SITE EASEMENTS

11.001 Scope of Rules. The following rules govern the issuance of easements upon State lands for sites for the underground disposal of salt water produced in connection with oil and gas operations. Because an oil and gas lessee is entitled to use so much of the land as is necessary to explore for and remove the oil and gas, he does not need additional permission of the Commissioner to dispose of the salt water upon or under the leased land so long as the water being disposed of is produced exclusively from wells upon the state trust land and so long as it is reasonable under the circumstances to do so. Conversely, if any of the salt water to be injected is produced from land not under the applicant's state oil and gas lease, then the applicant, in addition to a disposal site easement, will be required to secure a regular right-of-way and easement for a pipeline, roadway, or other means of conveyance under the rules pertaining to rights-of-way and easements generally. (See" Rules relating to Easements and Rights-of-Way.") Permission to dispose of produced salt water in natural salt lakes, or other surface facilities located upon State lands and approved by the New Mexico Oil Conservation Commission, shall be given at the discretion of the Commissioner by means of issuance of a "Business Lease." (See "Rules Relating to Business Leases.")

11.002 Lands Available for Disposal Site Easements.

A. Subject to the Commissioner's right to exercise his discretion, all lands listed as State owned on Land Office tract books are subject to application for salt water disposal easement sites; however, reference must be had to Land Office records in each case to determine which prior rights, if any, have been conveyed to or contracted for by third parties which would limit or prohibit the Commissioner from issuing a salt water disposal site easement. In any case, such easements are issued subject to prior rights.

B. The Commissioner reserves the right to refuse to grant an easement when to do so would be detrimental to the trust. The following are some of the factors which may have bearing on the Commissioner's decision:

1. That an abandoned oil or gas well may have greater value for foreseeable future oil or gas production from a different zone.

2. That the salt water storage space proposed to be used may be needed for disposal of salt water produced from wells on State lands in the foreseeable future.

3. That disposal of salt water in the particular zone may interfere with development and production of oil and gas or other minerals owned by the State of New Mexico in trust.

C. Although applications will be accepted for filing on disposal sites prior to the approval of the disposal facility or operation by the New Mexico Oil Conservation Division, the Commissioner may withhold or deny issuance of the salt water disposal easement pending approval or disapproval by the OCD.

11.003 Application. Each application for a salt water disposal easement shall be made in ink or typewritten upon forms prescribed and furnished by the Commissioner, under oath, and accompanied by the following:

A. a filing fee of $30.00;

B. a plat showing disposal well and wells from which produced salt water is to be disposed together with pipelines and haul roads;

C. if the land is under an oil and gas lease, the written consent of the record owner that the easement may be issued, or in the event of his refusal to consent, then a statement of the reasons, if any, given for the refusal;

D. statement as to the estimated number of barrels of salt water to be disposed; and

E. a written appraisal of the land made under oath by some disinterested and credible person familiar with the land. All easements, except as to the true value of the land, must be based upon personal knowledge and not upon information and belief.

11.004 Term and Conditions. Salt water disposal site easements shall be issued for five (5) years or less with a preference right of renewal, subject to the Commissioner's decision not to continue the easement. The easement shall normally cover not more than two and one half (2½) acres

surrounding the proposed injection site. Applicant shall also file an appraisal of the land with regard to the value for water easement purposes made under oath by some disinterested party who is familiar with the land. Such appraisal shall take into account the extent and nature of the use that the application indicates will be made of the surface.

11.005 Consideration. Payment for such water disposal easement sites shall be at a negotiated rate but not less than $250.00 annual rental.

11.006 Bond. Before any disposal site easement is issued, the applicant shall post with the Commissioner a sufficient bond or undertaking in an amount to be fixed by the Commissioner, in favor of the owner of improvements lawfully located upon the land, to secure payment of damage, if any, done to such improvements by reason of the operations of the applicant. Upon written notice to the holder of a salt water disposal site easement, the Commissioner may require such holder to fence the site for the protection of the surface user's livestock.

11.007 Assignment - Relinquishment - Cancellation. A disposal site easement may, with the prior written approval of the Commissioner, upon such terms and conditions as he may require, and payment of a thirty dollar ($30.00) fee, be assigned to third parties or relinquished to the State and the Commissioner may cancel such easement for breach or violation of the terms and conditions thereof after thirty (30) days registered notice is given as required by law.

INSTITUTIONAL GRANT LANDS

NOTE: FOR PRIOR ENTRIES REFER TO TRANSFER TRACT BOOK No. 16 Surface

Section 6
Township 16S
Range 36E
Institution M.H.
Acres 982.59

STATE LAND OFFICE

LEA County, New Mexico

SELECTIONS						APPROVED BY INTERIOR DEPARTMENT				REJECTIONS, ELIMINATIONS, ETC			
DATE	LIST NO	SERIAL NO	GRANT	SUB-DIVISION	ACRES	DATE	LIST NO	SUB-DIVISION	ACRES	DATE	LIST NO	SUB-DIVISIONS	ACRES
8/19/12		026340	M.H.	Lots 11,12,13,14,E½SW¼	233.36	6/10/13	1	Lots 11,12,13,14,E½SW¼	233.36				
	COMMENT: Patent No. 3292, dated 9/9/75, conveyed the Surface Estate as to Lots 11,12,13,14,E½SW¼ (233.36 acres) ~~of this section.~~												

4	3	2	1
46.85	50.85	50.83	50.81
5	6	7	8
36.77	40.00	40.00	40.00
12	11	10	9
36.71	40.00	40.00	40.00
13	14	15	16
36.65	40.00	40.00	40.00
17			
36.59			
18			
36.53			

ABSTRACT OF ENTRIES

CONTRACT PATENT LEASE NO.	ASSIGNMENT NO	NAME	ADDRESS	LOTS 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16	SW NE NW SW SE	SE NE NW SW SE	ACRES	DATE EXPIRATION	DATE CANCELLATION OR RELINQUISHMENT	REMARKS
929		Inland Utilities Co.	Hobbs, N.M.				.319	Dated 8-1-38		R.W.
14163		Warren Petroleum Corp.	Tulsa, OK.	XX			1.23	Dated 3-7-58	9-5-96	R/W Assign
RW-14163		MidStream Combination Corp.	Houston, Tx	XX			1.23	Dated 9-5-96	9-1-98	Assign
RW-14163		Warren Petroleum Co., L.P.	Houston TX.	XX			1.23	Dated 9-1-98	9-1-98	Assign
RW-14163		Versado Gas Processors L.L.C.	Houston TX.	XX			1.23	Dated 9-1-98		

CERTIFICATION
I certify that the foregoing instrument S-TRACT BOOK P990-1, SEC 1, T16S, R36E containing 1 page(s) is a true and exact photocopy of the original in my custody and on file in the State Land Office.
Date: 4-8-03
Patrick H. Lyons
Commissioner of Public Lands

clw 8-22-57

INSTITUTIONAL GRANT LANDS

STATE LAND OFFICE
LEA County, New Mexico

Section 6
Township 16S
Range 36E
Institution M. Hospital
Acres 982.59

4	3	2	1
36.85	50.95	51.63	50.81
5	6	7	8
36.77			
12 ✓	11 ✓	10	9
36.71			
13 ✓	14 ✓	15	16
36.65			
17	✓		
36.59			
18	✓		
36.53			

SELECTIONS						APPROVED BY INTERIOR DEPARTMENT				REJECTIONS, ELIMINATIONS, ETC.			
DATE	LIST NO.	SERIAL NO.	GRANT	SUB-DIVISION	ACRES	DATE	LIST NO.	SUB-DIVISION	ACRES	DATE	LIST NO.	SUB-DIVISIONS	ACRES
8/19/12		026340	M.H.	Lots 11,12,13,14, E½SW¼	233.36	6/10/13	1	Lots 11,12,13,14, E½SW¼	233.36				

ABSTRACT OF ENTRIES

APPLICATION NO.	CONTRACT OR LEASE NO.	ASSIGNMENT NO.	NAME	ADDRESS	LOTS 1 2 3 4 5 6 7 8	NE NE NW SW SE	NW NE NW SW SE	SW NE NW SW SE	SE NE NW SW SE	ACRES	DATE EXPIRATION	DATE CANCELLATION OR RELINQUISHMENT	REMARKS
Cont	4245		F. B. Macatee	Lovington, N.M.			/ / / /	/		233.36	Cancelled 6-27-47		Cont- 4245
Cont	4245	1	J. B. Selman & Ruth S Patterson,	Lovington, N.M.			/ / / /	/		233.36	6-15-70 Date		Assignment #1
Pat.	3292		J.B. Selman & Ruth S. Patterson	Lovington, N.M.			/ / / /	/		233.36	9-9-75		Patent

CERTIFICATION
I certify that the foregoing instrument M-Tract Book page-56 T16S R36E Containing 1 page(s) is a true and exact photocopy of the original in my custody and on file in the State Land Office.
Date 4-8-2003
Patrick H. Lyons
Commissioner of Public Lands

INSTITUTIONAL GRANT LANDS

STATE LAND OFFICE
LEA County, New Mexico.

Section 6
Township 16S
Range 36E
Institution M.Hospital
Acres 982.59

4 46.85	3 50.85	2 50.83	1 50.81	
5 36.77	6	7	8	
12 36.71	11	10	9	T N
13 36.65	14	15	16	
17 36.59				S
18 36.53				

SELECTIONS

Date	List No.	Serial No.	Grant	Sub-division	Acres
8/19/12		026340	M.H.	Lots 11,12,13,14,E½SW¼	233.36

APPROVED BY INTERIOR DEPARTMENT

Date	List No.	Sub-division	Acres
6/10/13	1	Lots 11,12,13,14,E½SW¼	233.36

REJECTIONS, ELIMINATIONS, ETC.

Date	List No.	Sub-divisions	Acres

ABSTRACT OF ENTRIES

Application No.	Contract or Lease No.	Assignment No.	NAME	ADDRESS	LOTS 1 2 3 4 5 6 7 8	NE NE NW SW SE	NW NE NW SW SE (11 12 13 14)	SW NE NW SW SE	SE NE NW SW SE	Acres	Date Expiration	Date Cancellation or Relinquishment	Remarks
	A-1147		Marland Oil Co.	Ponca City, Okla						233.36	9-25-33		
	"	1	Continental Oil Co.	" " "						233.36	9-25-33	12-22-32	Rel.
	B-1534		"	" " "						233.36	9-25-38	Expired	
R.W.D.	#929		Leland Utilities Co.	Hobbs, N.M.						0.319	8-1-38		Rel. Easement in Lse
	#7891		Ohio Oil Co.	Casper, Wyo.						233.36	12-10-48	Rel. 11-28-42	
	B-10697		A.S. Magruder,	El Paso, Tex.						233.36	10-11-53		
	B-10697	1	Superior Oil Co.	Los Angeles, Calif.						233.36	10-11-53	10-11-53	Exp.
Cont	4245		F.B. Macatee	Lovington, N.M.			THIS ENTRY TRANSFERRED TO MINERAL TRACT BOOK			233.36	6-27-47		Cont. 4245
	M-11849		C. Andrade III et al	Dallas, Tex.						233.36	3-1-55	3/1/56 Patented	Exp. Rec'd
	E-9335		Texas Pacific Coal & Oil Co.	Ft. Worth, Tex.						233.36	9-20-65		
	E-9335	1	Joseph E. Seagram & Sons Inc.	Dallas, Texas						233.36	9-20-65		
	E-9335	2	Texas Pacific Oil Co. Inc.	Dallas, Texas						233.36	9-20-65		
Cont	4245	1	J.B. Selman & Ruth Patterson	Houston, Tex.						233.36	6-17-70		Assignment to
	3292		B. Selman & Ruth Patterson	Lovington, N.M.						233.36	Patented 4-9-75		Patent
	E-9335	3	Sun Oil Company	Dallas, Texas						233.36	9-20-65		
	E-9335	4	Sun Operating Limited Partnership	Dallas, Texas						233.36	9-20-65		
	E-9335	5	Jerry Jerno Simpson Exploration Co.	Midland, Texas						153.36	9-20-65		
	E-9335	6	Boyd Well Service Company	Hobbs, N. Mex.						153.36	9-20-65	04-15-94	Exp.
	E-9335	7	Matador Petroleum Corporation	Dallas, Texas						80.	9-20-65	04-15-94	Exp.
	V-4886		Chesapeake Operating, Inc.	Oklahoma City, Ok.						233.36	6-1-2001		

CERTIFICATION
Book page(s) S6, T16S, R36E
I certify that the foregoing instrument O/G Tract containing 1 page(s) is a true and exact photocopy of the original in my custody and on file in the State Land Office.
Date 7/8/03
Patrick H. Lyons /BR
Commissioner of Public Lands

STATE OF NEW MEXICO

ENERGY, MINERALS AND NATURAL RESOURCES DEPARTMENT

OIL CONSERVATION COMMISSION

IN THE MATTER OF THE HEARING CALLED BY THE OIL CONSERVATION COMMISSION FOR THE PURPOSE OF CONSIDERING:	)	CASE NO. 12,905
APPLICATION OF PRONGHORN MANAGEMENT CORPORATION FOR APPROVAL OF A SALTWATER DISPOSAL WELL IN LEA COUNTY, NEW MEXICO	)	

ORIGINAL

REPORTER'S TRANSCRIPT OF PROCEEDINGS

COMMISSION HEARING

BEFORE: LORI WROTENBERY, CHAIRMAN
JAMI BAILEY, COMMISSIONER
ROBERT LEE, COMMISSIONER

March 20th, 2003

Santa Fe, New Mexico

This matter came on for hearing before the Oil Conservation Commission, LORI WROTENBERY, Chairman, on Thursday, March 20th, 2003, at the New Mexico Energy, Minerals and Natural Resources Department, 1220 South Saint Francis Drive, Room 102, Santa Fe, New Mexico, Steven T. Brenner, Certified Court Reporter No. 7 for the State of New Mexico.

* * *

Q. Well, I don't believe you answered my question earlier. Did you make a study of what effect on your saltwater disposal operation the proposed well would have?

A. Yeah, pretty well, I pretty well know what it would do to it.

Q. What would it do?

A. Well, it would cut my business somewhat.

Q. How much?

A. Probably 35 percent, 40.

Q. What does that mean in terms of money?

A. Oh, if I was making $1000 a month, I'd be making $600.

Q. Well, I'm asking actual effect. Say 35 percent, what does that translate to on a monthly basis?

A. Thirty-five percent would probably run around $3500 a month.

Q. Do you still owe money for the saltwater disposal --

A. Yes, sir --

Q. -- investment you made?

A. -- some, yes, sir.

Q. Do you have a saltwater disposal easement from the Land Commissioner's Office?

A. Yes, I do.

Q. You're paying royalties to the Land Commissioner?

A. Yes, sir.

Q. When did you get your saltwater disposal easement from the Land Office?

A. I got it just a very few weeks after I received the permit from the OCD.

Q. So you got the OCD permit first, right?

A. That is correct.

Q. Did you have to file a copy of Exhibit 2 with your application for saltwater disposal easement with the Land Commissioner?

A. I believe I did, but it's been a while back. I do not remember exactly.

Q. My point is that you had to have this saltwater disposal order from the OCD before you applied with the Land Commissioner for a saltwater disposal easement, right?

A. That's the way I did it.

Q. And that makes sense, right?

A. As far as I know.

MR. PADILLA: I don't have any further questions.

CHAIRMAN WROTENBERY: Thank you, Mr. Padilla.

Mr. Owen, before you and I forget again, I think we need to introduce the exhibits into evidence.

MR. OWEN: Thank you, madame Examiner. I move the admission of DKD Exhibits Numbers 1 through 4.

CHAIRMAN WROTENBERY: Any objection, Mr. Padilla?

RECEIVED

MAR 20 2003

Oil Conservation Division

STATE OF NEW MEXICO
ENERGY, MINERALS AND NATURAL RESOURCES DEPARTMENT
OIL CONSERVATION COMMISSION

APPLICATION OF PRONGHORN MANAGEMENT CORPORATION FOR APPROVAL OF A SALT WATER DISPOSAL WELL, LEA COUNTY, NEW MEXICO.

CASE NO.: 12905 (*de novo*)

MEMORANDUM IN OPPOSITION TO APPROVAL OF SALT WATER DISPOSAL WELL

DKD, LLC, an interested party herein, by and through counsel, Montgomery & Andrews, P.A., submits this Memorandum in Opposition to Approval of Salt Water Disposal Well. The Application should be denied because the Applicant has not secured the necessary approval and mineral lease to inject.

Chesapeake Operating, Inc. has a lease from the State, which grants it the exclusive right to explore, develop and produce oil or gas and also grants it rights-of-way, easements and servitudes for pipelines, and other utilities and fixtures incident to or convenient for economic operation of lease. Such Lease does not state that Lessee has right to use its Lease to dispose of salt water. The Lease further requires the Lessee to obtain the consent of the Lessor if it assigns its lease in whole or in part and further states that it will not approve an assignment of "an undivided interest in the lease or in any part thereof nor any assignment of less than a legal subdivision." (Section 7).

Pronghorn as surface owner cannot inject salt water into the well because it does not have permission to do so from the mineral estate owner. *See Cassinos v. Union Oil Co. of California*, 14 Cal.App.4th 1770, 18 Cal.Rptr.2d 574 (1993) (Surface owner retains rights to use surface which do not interfere with operation of mineral estate. Surface owner's ownership of "pore space" did not permit surface owner to authorize injury by adjacent surface owner caused to mineral

rights owner's mineral estate through injection of off-site wastewater into mineral estate, damaging mineral rights owner's interest in minerals, oil and gas throughout the field.).

The letter from Chesapeake to Pronghorn stating it has no objections to Pronghorn's salt water injection application is ineffective to grant Pronghorn permission for such operation:

First, Chesapeake does not have authority to dispose of salt water from other leases into the well under its Lease and thus does not have authority to grant such permission to Pronghorn. *See Gill v. McCollum*, 19 Ill.App.3d 402, 311 N.E.2d 741 (Ct. App. 1974) (oil and gas lease allowing lessee to inject water into subsurface strata did not entitle lessee to use well for disposal of salt water from other leases, inasmuch as the injection did not have any relation to primary purpose of lease of obtaining production); *TDC Engineering, Inc. v. Dunlap*, 686 S.W.2d 346 (Ct. App. Tex. 1985) (oil and gas lease granted by surface owner's predecessor did not give lessee or his operator right to inject salt water into nonproductive well); *Farragut v. Massey*, 612 So. 325 (Miss. 1993) (lease did not authorize mineral lessees to dispose of saltwater produced of the leasehold by third party).

Further, even if Chesapeake did have authority under its Lease to dispose of salt water from other leases into the well the letter from Chesapeake to Pronghorn would be ineffective to grant Pronghorn permission to do so. First, the letter does not authorized Pronghorn to be a contractor of Chesapeake for such operation. Second, the letter does not effectuate an assignment of Chesapeake's interest to Pronghorn. Further, even if the letter did create an assignment of Chesapeake's interest to conduct such operation by Pronghorn, permission to assign such interest was not obtained from the mineral estate owner as required by Chesapeake's Lease. *See Farrugut*, 612 So.325 (Release was ambiguous as to whether it gave mineral lessees authority to import salt water from third parties on adjacent tracks for disposal in abandoned well where two clauses seemed to extend waiver only to

surface damages resulting from drilling in preparation of two wells whereas third clause appeared to extend the waiver to continuous disposal of salt water; release given by owner of royalty interest to mineral lessee permitted lessees to dispose of salt water from their own wells in abandoned well but could not be read so broadly as to permit dumping of salt water by third parties from adjacent lands.).

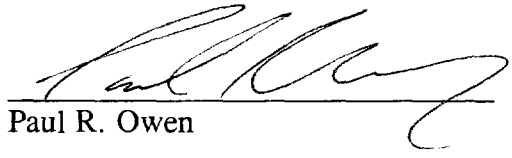
Therefore, DKD, LLC requests that the Commission deny the application of Pronghorn Management Corporation.

Paul R. Owen
ATTORNEY FOR DKD, L.L.C.

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of March, 2003, I have caused a copy of our Memorandum in Opposition to Approval of Saltwater Disposal Well in the above-captioned case to be served via hand delivery upon the following named parties:

Earnest L. Padilla, Esq.
Padilla Law Firm, P.A.
Post Office Box 2523
Santa Fe, NM 87504-2523
facsimile: (505) 988-7592
ATTORNEYS FOR APPLICANT PRONGHORN MANAGEMENT CORPORATION



Paul R. Owen

18 Cal.Rptr.2d 574
(Cite as: 14 Cal.App.4th 1770, 18 Cal.Rptr.2d 574)

Court of Appeal, Second District, Division 6, California.

Gus CASSINOS et al., Plaintiffs and Respondents,
v.
UNION OIL COMPANY OF CALIFORNIA et al., Defendants and Appellants.

No. B065018.

April 20, 1993.
Rehearing Denied May 14, 1993.
Review Denied July 15, 1993.

Mineral rights owner filed action against adjacent property owner seeking declaratory and injunctive relief, as well as damages under theories of subsurface trespass, nuisance and quasi-contract, arising from adjacent owner's injection of off-site wastewater into plaintiff's reserve mineral estate through oil well. The Superior Court, Santa Barbara County, No. SM46830, Lester E. Olson, Temporary Judge, awarded mineral rights owners judgment of $5,298,198 and adjacent owner appealed. The Court of Appeal, Steven J. Stone, P.J., held that: (1) adjacent owner was liable in trespass for interfering with and damaging mineral estate; (2) trial court used proper measure of damages in using cost of paying for disposing other wastewater; and (3) prejudgment interest could be awarded from date of filing of complaint.

Affirmed as modified.

West Headnotes

[1] **Mines and Minerals** 51(1)
260k51(1)

Causing subsurface migration of fluids into a mineral estate without consent constitutes trespass.

[2] **Mines and Minerals** 55(6)
260k55(6)

Surface owner retains all rights to use the surface which do not interfere with operation of the mineral estate.

[3] **Mines and Minerals** 73.1(6)
260k73.1(6)

Right of surface owner is subordinate to oil and gas lessee, and he may not affect mineral estate owner's rights so as to prevent his enjoyment thereof or unreasonably interfere therewith.

[4] **Mines and Minerals** 51(1)
260k51(1)

Authorization given by surface rights owners for adjacent landowner to pump offsite wastewater into oil well did not justify adjacent landowner's interference and degradation of rights in mineral estate through injection of wastewater into mineral estate.

[5] **Trespass** 13
386k13

Where one has permission to use land for particular purpose and proceeds to abuse the privilege or commits any act hostile to interests of lessor, he becomes trespasser.

[6] **Mines and Minerals** 51(3)
260k51(3)

Substantial evidence supported finding that adjacent landowner's injection of offsite wastewater into oil well interfered with and damaged wells in mineral estate which were subject to lease; lease experienced sudden drop in oil production, activity resulted in concomitant increase in water to oil ratio which directly corresponded with use of site to dispose of off-site wastewater and after adjacent landowner stopped injecting the wastewater, oil production increased and the water to oil ratio decreased in the wells and throughout the mineral estate owner's field.

[7] **Mines and Minerals** 51(1)
260k51(1)

Adjacent landowner's injection of off-site wastewater into oil well to maintain production of oil on leases other than mineral rights owner's lease exceeded scope of consent under lease; injection activities caused injury to rights mineral rights owner reserved to itself in mineral field, and thereby constituted trespass.

[8] **Mines and Minerals** 55(6)
260k55(6)

Surface owners typically own nearly all rights in land

except for exclusive right to drill for and produce oil, gas and other hydrocarbons.

[9] **Mines and Minerals** ⚿**73.1(6)**
260k73.1(6)

Owners of mineral estate and their lessees typically hold only very limited right, analogous to an easement, to drill and capture subsurface oil and gas, and incidental rights necessary to accomplish this.

[10] **Mines and Minerals** ⚿**73.1(2)**
260k73.1(2)

Under typical oil and gas lease, lessee generally obtains only nonpossessory interests in real property to capture such substances, which is in nature of easement.

[11] **Mines and Minerals** ⚿**51(1)**
260k51(1)

Surface owner's ownership of "pore space" did not permit surface owner to authorize injury adjacent landowner caused to mineral rights owner's mineral estate through injection of off-site wastewater into mineral estate, damaging mineral rights owner's interests in minerals, oil and gas throughout the field.

[12] **Mines and Minerals** ⚿**51(1)**
260k51(1)

Issues as to ownership of pore space or injection rights did not affect adjacent property owner's liability for permanent trespass in mineral owner's estate where adjacent property owner's activity of injecting off-site wastewater into mineral estate caused migration of its wastewater from site where water was injected, which communicated with oil in wells and elsewhere on mineral lease thereby damaging mineral rights owner's right to drill for oil and gas and to extract other minerals on the lease.

[13] **Mines and Minerals** ⚿**51(5)**
260k51(5)

Adjacent property owner which damaged mineral rights owner's mineral estate without its consent, through injection of off-site wastewater, was liable in damages to owner of mineral estate, regardless of whether damages could be measured with exactness.

[14] **Trespass** ⚿**50**
386k50

One measure of damage for trespass is reasonable rental value of property during wrongful occupation.

[15] **Nuisance** ⚿**50(2)**
279k50(2)

Deterioration in market value of property is proper measure of damages for continuing nuisance which cannot be abated, even if actual injury to property is nominal.

[16] **Damages** ⚿**6**
115k6

[16] **Damages** ⚿**184**
115k184

Difficulty in determining damages does not bar recovery.

[17] **Mines and Minerals** ⚿**51(5)**
260k51(5)

Fair market cost to dispose of injected wastewater at available sites in area during pertinent period was reasonable quasi-contractual measure of damages for adjacent property owner's trespass through injection of off-site wastewater into adjacent property, damaging mineral estate; operators in the area charged $1.75 per barrel delivered to disposal site, and adjacent property owner injected 2,067,343 barrels of wastewater into oil well to preserve disposal capacity in its own field and boost production of oil and gas on that field.

[18] **Interest** ⚿**39(2.15)**
219k39(2.15)

Ordinarily, where defendant could keep complete records of transaction from which it could calculate its indebtedness, prejudgment interest could be awarded from inception of occurrence.

[19] **Interest** ⚿**39(2.20)**
219k39(2.20)

In actions in quantum meruit, exact amount of interest to which plaintiff is entitled is usually considered uncertain until it has been determined by court upon presentation of evidence.

[20] **Interest** ⚿**39(2.50)**
219k39(2.50)

In action for trespass based on adjacent property owner's injection of off-site wastewater into oil well, damaging mineral rights owner's mineral estate, prejudgment interest could be awarded from filing of mineral estate owner's complaint, as adjacent owner knew fair market value of disposal of off-site

wastewater at the time was $1.75 per barrel, it knew the amount of water it had disposed of into the well at the time of injection, and mineral estate owner's complaint placed adjacent owner on actual notice of demand and means of calculating damages. West's Ann.Cal.Civ.Code § 3288.

[21] **Interest 39(2.6)**
219k39(2.6)

Policy underlying authorization of award of prejudgment interest is to compensate injured party, to make that party whole for accrual of wealth which could have been produced during period of loss.

****576 *1775** Hanna and Morton and Edward S. Renwick, Allison L. Malin and David C. Karp, Los Angeles, for defendants and appellants.

Bright and Brown and Gregory C. Brown, Glendale, for plaintiffs and respondents.

STEVEN J. STONE, Presiding Justice.

Union Oil Company of California et al. (Union) appeals from the $5,298,198 judgment of the trial court for injecting offsite wastewater into the mineral estate owned by respondents, Gus Cassinos et al. [FN1] We affirm, except for part of the prejudgment interest awarded by the trial court.

> FN1. Gus Cassinos et al. are the successors in interest to the previous owners of the land, the Escolle Estate Company (Escolle), and they are referred to herein as the Escolle TIC or as Escolle.

Before 1917, Escolle owned the subject property in fee simple absolute. In 1917, Escolle deeded the surface estate to E. Righetti. [FN2] Escolle very broadly and specifically reserved to itself the mineral estate.

> FN2. The E. Righetti named in this action is the successor to the original grantee and is a nominal defendant here.

In 1946, Escolle entered into an oil and gas lease with Union. In 1980, successor Escolle TIC entered into a revised oil and gas lease with Union which was amended on January 1, 1983. Pursuant to these leases, Union drilled various oil and gas wells on the subject mineral estate, including one known as A-16 which produced small quantities of oil and gas.

During the early 1980's, Union developed an excess wastewater problem on adjacent property it owns. This wastewater hindered production of Union's oil and gas on that property. Union determined that its best solution to this problem would be to inject the water into A-16 on the Escolle lease.

Union obtained permission to do so from Righetti, the owner of the surface estate of the Escolle property. Union also obtained a permit from the State Division of Oil and Gas to do so. In its application to the State, Union declared, inter alia, that the wastewater will come from several leases, *including the Escolle lease.* All of the wastewater, however, came from Union's offsite sources.

Union never sought permission from the Escolle TIC to inject its wastewater into A-16. In July 1984, Union began to inject this water into A-16 ***1776** through pipes it laid across the surface of the Escolle property from its adjacent land.

On July 1, 1985, respondents filed a complaint to halt Union from injecting this water into the Escolle mineral estate. The complaint sought declaratory and injunctive relief, as well as damages under theories of subsurface trespass, nuisance and quasi-contract. The gist of the complaint is that Union injected its offsite wastewater into Escolle's reserved mineral estate through A-16 in contravention of the terms of the lease provisions and without Escolle's permission. Union's lengthy injection activities caused injury to the mineral ****577** estate and to Escolle's reservation of rights under deed to produce minerals, oil and gas in the field and to its right to use the disposal capacity of that field.

The trial court bifurcated the liability and relief issues. On stipulated facts, the trial court found that the Escolle TIC "own the entire mineral fee ... pursuant to the 1917 deed. They own not only the oil and gas, but also the hard rock mineral, surface rights [subject to those granted to Righetti] and the right to dispose of waters related to the extraction of minerals on the property."

The injection of the wastewater by Union into A-16 interfered with and adversely affected these rights exclusively owned by the Escolle TIC as successors in interest under the 1917 deed. Union could not have drilled A-16 without benefit of the lease from the Escolle TIC, and no express or implied right to inject offlease wastewater exists under that lease or otherwise. Righetti's successors, under whom defendant now

claims, "could not grant [this right] to defendant in the 1984 agreement upon which defendant now bases its right to inject waste water."

The wastewater Union injected into A-16 spread and communicated with other oil-producing lease wells in the unusual fractured shale Escolle formation, although the extent of migration is "largely impossible to predict."

Because Union intended to inject its offsite wastewater into A-16 for a non- lease purpose, thereby causing the water to interfere with and adversely affect the mineral rights owned by the Escolle TIC, Union committed trespass. Accordingly, the trial court held Union liable to the Escolle TIC for damage to its mineral rights in the lease area and barred Union from injecting such offsite wastewater into respondents' mineral zones.

In its trial brief for the damages phase of this case, Escolle argued that the correct measure of damages is "the fair market value of the disposal rights ***1777** taken by Union." Escolle stated that the usual measure of damages for a continuing or permanent trespass is the reasonable rental value of the use of the property. (Civ.Code, § 3334.) Typically, that value is the reasonable rental value during the period of wrongful occupation of the property. (See generally *Lindberg v. Linder* (1933) 133 Cal.App. 213, 218- 219, 23 P.2d 842; *Murphy v. Nielsen* (1955) 132 Cal.App.2d 396, 399, 282 P.2d 126.) But, this is a unique case.

Here it is impossible to trace the entire migration or effect of the wastewater injected. Thus, the exact amount of injury to the mineral estate is difficult to ascertain.

Escolle argued that because Union intentionally trespassed into the mineral estate to solve its offlease wastewater disposal problem and to benefit its other, offsite mineral holdings, the appropriate measure of damages under these circumstances is the cost to dispose of the wastewater injected during the pertinent period. This theory of damages sounds in quasi-contract, a remedy sought in its complaint. Thus, Escolle maintains that the benefit to Union from this trespass is the proper measure of damages. We agree.

Escolle established that the fair market value of such rights was $1.75 per barrel of water disposed. Oil operators, including Union, paid this price in this area during the pertinent period of time. Escolle also argued it is entitled to transportation costs of between 68 and 72 cents per barrel.

At the end of the relief phase of trial, the trial court concluded, inter alia, "that defendant Union has committed a trespass upon the property rights of plaintiffs and the measure of damages to be applied in this case is set forth in Civil Code Section 3334...."

The trial court determined that the fair market value of disposing of wastewater was $1.75 per barrel, exclusive of transportation costs. Union injected 2,067,343 barrels of offsite wastewater into A-16 between June 1984 and April 1986, when Union voluntarily stopped disposing of this water there. The trial court found that the Escolle TIC plaintiffs are entitled to judgment against Union in the principal sum of $3,617,843.

****578** In addition, the trial court concluded that the Escolle TIC are entitled to prejudgment interest in the amount of $1,680,355, under both Civil Code section 3287, subdivision (a), and Civil Code section 3288, because the damages are capable of being made reasonably certain and the interest would make them whole. (*Howe v. City Title Ins. Co.* (1967) 255 Cal.App.2d 85, 63 Cal.Rptr. 119; ***1778***Bare v. Richman & Samuels, Inc.* (1943) 60 Cal.App.2d 413, 140 P.2d 895; *Greater Westchester Homeowners Assn. v. City of Los Angeles* (1979) 26 Cal.3d 86, 160 Cal.Rptr. 733, 603 P.2d 1329; *In re Pago Pago Aircrash of January 30, 1974* (1981) 525 F.Supp. 1007, 1016.) The trial court determined the total judgment to be the sum of $5,298,198 and costs of suit.

DISCUSSION

Three issues are before us on appeal: 1. Did the trial court correctly hold Union liable in trespass for interfering with and damaging the mineral estate reserved by Escolle? 2. If so, did the trial court use the proper measure of damages? and 3. Did the trial court properly award prejudgment interest to Escolle?

Liability

The parties urge this court to consider who owns the right to inject offsite wastewater into A-16 for a purpose other than operating the Escolle mineral lease. Because Union injured the mineral estate owned by Escolle under deed without Escolle's consent, Union committed trespass. Therefore, we need not decide who owns the injection right, which would be a question of first impression in the State of California. (See generally *Rozewski v. Simpson* (1937) 9 Cal.2d 515, 520, 71 P.2d 72; *Palermo v. Stockton Theatres, Inc.* (1948) 32 Cal.2d 53, 65-66, 195 P.2d 1.)

"The essence of the cause of action for trespass is an 'unauthorized entry' onto the land of another." (*Civic Western Corp. v. Zila Industries, Inc.* (1977) 66

Cal.App.3d 1, 16, 135 Cal.Rptr. 915.) "[A] trespass may occur if the party, entering pursuant to a limited consent, i.e., limited as to purpose or place, proceeds to exceed those limits by divergent conduct on the land of another. 'A conditional or restricted consent to enter land creates a privilege to do so only in so far as the condition or restriction is complied with.' [Citation.]" (*Id.*, at p. 17, 135 Cal.Rptr. 915; accord, *Mangini v. Aerojet-General Corp.* (1991) 230 Cal.App.3d 1125, 1141, 281 Cal.Rptr. 827.)

[1] In particular, causing subsurface migration of fluids into a mineral estate without consent constitutes a trespass. (See generally *Tidewater Oil Company v. Jackson* (10th Cir.1963) 320 F.2d 157, 163, holding oil and gas lessee liable for intentional, non-consensual flooding operations which caused damage to neighbor's lease; see also *Hancock Oil Co. v. Meeker-Garner Oil Co.* (1953) 118 Cal.App.2d 379, 257 P.2d 988, holding that slant drilling which drains a pool of oil owned by another on adjacent parcel constitutes subsurface trespass.)

***1779** In cases involving grants and reservations of mineral rights, our Supreme Court has stated that "[t]he rules of law should be sufficiently adaptable to reach a desirable result in this developing field of the law." (*Callahan v. Martin* (1935) 3 Cal.2d 110, 126, 43 P.2d 788.) Deeds dealing in the transfer of oil interests "must be construed as a whole in the light of the circumstances under which they were executed and the expressed intent of the parties at that time." (*Dabney-Johnston Oil Corp. v. Walden* (1935) 4 Cal.2d 637, 651, 52 P.2d 237.)

For example, in *Dabney-Johnston*, after our Supreme Court noted the general rule that nonproducing cotenants "are generally subject to a charge or deduction for their proportion of drilling and operation expenses," it stated that "*the general rule is controlled by such agreement of the parties, express or necessarily implied.*" (*Dabney-Johnston Oil Corp. v. Walden, supra*, 4 Cal.2d at p. 657, 52 P.2d 237, emphasis added.) "Also, a reservation in a grant is to be interpreted in favor of the grantor...." (*People ex rel. Dept. Pub. Wks. v. Ward* (1968) 258 Cal.App.2d 15, 21, 65 Cal.Rptr. 508; Civ.Code, § 1069.)

****579** In *Brookshire Oil Co. v. Casmalia Etc. Co.* (1909) 156 Cal. 211, 103 P. 927, the Supreme Court considered a dispute between an oil and gas lessee and a parol licensee over the right to lay pipeline. Lessee destroyed pipeline laid down by licensee even though the pipeline did not interfere with lessee's operation. Lessee defended by asserting an exclusive right to lay pipeline pursuant to its lease.

The Supreme Court considered the language of the lease as a whole and found that although owner granted lessee the right, inter alia, to "lay and operate pipe-lines," that right was "limited to the use of the land for the purpose of producing the minerals. Any use by the owner, or others operating under him, *which does not affect the search for and production of the minerals,* is lawful, and the defendants have no right to interfere with such use, except when in the actual exercise of the lessees' rights under the lease...." (*Brookshire Oil Co. v. Casmalia Etc. Co., supra*, 156 Cal. at p. 217, 103 P. 927, emphasis added.)

The Supreme Court found that the rights granted by the lease were "for special purposes only, and so far as may be necessary and convenient for such purposes and no further." (*Brookshire Oil Co. v. Casmalia Etc. Co., supra*, 156 Cal. at p. 215, 103 P. 927.)

[2] The Supreme Court found that lessor retained the right of possession and dominion over the rest of the land and "*may use it for any purpose not* ****1780*** *inconsistent with the rights granted by the agreement.*" (*Brookshire Oil Co. v. Casmalia Etc. Co., supra*, 156 Cal. at p. 217, 103 P. 927, emphasis added.) Accordingly, the Supreme Court found that owner's licensee had the right to lay and maintain the pipeline, "*so long as it does not interfere with the actual operations of the defendant under the lease.*" (*Id.*, at p. 218, 103 P. 927, emphasis added.) Thus, the surface owner retains all rights to use the surface *which do not interfere with the operation of the mineral estate.*

[3] "Reasonableness in the exercise of rights is a fundamental tenet of the law, whether in the field of real property or in the countless other areas...." (*Wall v. Shell Oil Co.* (1962) 209 Cal.App.2d 504, 516, 25 Cal.Rptr. 908.) Even under traditional rules, *supra*, the right of the surface owner is subordinate to an oil and gas lessee, and he may not affect the mineral estate owner's rights so as to prevent his enjoyment thereof or unreasonably interfere therewith. (*ante*, at pp. 516-517, 25 Cal.Rptr. 908; *Tidewater Oil Company v. Jackson, supra*, 320 F.2d at p. 163.)

In *Don v. Trojan Construction Co.* (1960) 178 Cal.App.2d 135, 2 Cal.Rptr. 626, defendant dumped dirt on plaintiff's property without permission. The appellate court stated that " '[o]ne who intentionally enters land in the possession of another without a privilege to do so is liable ... although he acts under a mistaken belief of law or fact, however reasonable, not induced by the conduct of the possessor, that he ... (b) has the consent of the possessor or of a third person who has the power to give consent on the possessor's behalf....' [Citation.]" (*Id.*, at p. 138, 2 Cal.Rptr. 626.)

[4][5] The "authorization" given by the Righetti successors does not justify Union's interference and degradation of Escolle's rights in its mineral estate. (*Smith v. Cap Concrete, Inc.* (1982) 133 Cal.App.3d 769, 778, 184 Cal.Rptr. 308.) Where one has permission to use land for a particular purpose and proceeds to abuse the privilege, or commits any act hostile to the interests of the lessor, he becomes a trespasser. (*Rogers v. Duhart* (1893) 97 Cal. 500, 506-507, 32 P. 570.)

"A good faith belief that entry has been authorized or permitted provides no excuse for infringement of property rights if consent was not in fact given by the property owner whose rights are at issue. [Citations.] Accordingly, by showing they gave no authorization, [Escolle] established the lack of consent necessary to support their action for injury to their ownership interests. [Citations.]" (*Smith v. Cap Concrete, Inc., supra,* 133 Cal.App.3d at p. 778, 184 Cal.Rptr. 308.)

[6] Substantial evidence supports the finding of the trial court that Union's injection ****580** of wastewater interfered with and damaged wells in the mineral ***1781** estate which are subject to the lease. The Escolle lease experienced a sudden drop in oil production in A-16 and in its other wells after Union began to inject the wastewater into A-16. This activity resulted in a concomitant increase in the "water to oil ratio" ("WOR") which directly corresponded with Union's use of A-16 to dispose of its offsite wastewater. After Union stopped injecting the wastewater into A-16, oil production increased and the WOR decreased in these wells and throughout the Escolle field.

Ordinarily, the production of oil wells predictably and steadily decreases over time, while the amount of water produced increases. As the trial court found, the evidence did not support a theory promulgated by one of Union's experts that an impenetrable shale layer separated the disposal area from the producing area of the Escolle lease. Even that expert admitted that the evidence substantiated the position that the wastewater "communicated" with and affected these oil wells and other oil and mineral producing areas of the Escolle lease.

[7] Union's injection of offsite wastewater "to maintain production of oil on leases other than the Escolle Lease" exceeded the scope of consent under the lease. And even if Righetti could authorize injection of offsite water for purposes other than operating onsite mineral operations, a point we do not decide, he could not authorize degradation of the mineral estate. Union's injection activities caused injury to the rights Escolle reserved to itself in this mineral field and thereby it committed trespass thereto.

The instant case is analogous to *West Edmond Hunton Lime Unit v. Lillard* (Okla.1954) 265 P.2d 730, 731-732. In that case, the appellate court upheld recovery of an assignee of an oil and gas lease for expenses incurred in attempting to shut off the flow of salt water injected by defendant and the resultant inability to recover casing from a formerly producing oil well.

The instant case is unlike *Sunray Oil Co. v. Cortez Oil Co.* (1941) 188 Okl. 690, 112 P.2d 792, in which the court found "there is no probability that any possible oil producing formation exists in the land in question which would be materially affected to plaintiff's detriment by the use of the well in question for the disposal of salt water by defendant." (At 112 P.2d at p. 795.) No oil or gas had been found at the well in question, nor had any been found in the 80-acre tract in question. (*Id.*, at pp. 793, 794.)

In *West Edmond Salt Water Disposal Ass'n v. Rosecrans* (1950) 204 Okl. 9, 226 P.2d 965, defendants' injection of salt water into land adjacent to the subject property caused no actual damage to the full and complete use, occupation and enjoyment of plaintiffs' property. (226 P.2d at 969.) Even if the ***1782** injection of salt water could migrate and percolate under plaintiffs' land, that formation had already been "completely saturated with salt water, and ... no oil or gas was being or could be produced therefrom." (*Id.*, at p. 968.)

The *Rosecrans* court explained that "if the formation into which such valueless substance [salt water] is injected is already filled with a similar or identical valueless substance, a portion of which is displaced by the water migrating from the lands of the defendants into and under the lands of the plaintiffs, we are unable to see where any injustice has been done to plaintiffs, or the value of their property or their rights in their property in any wise diminished." (*West Edmond Salt Water Disposal Ass'n v. Rosecrans, supra,* 226 P.2d at p. 970.) Not so here.

Unlike *Rosecrans* and *Sunray,* the Escolle TIC alleged and proved they were damaged by Union's injection of its offsite wastewater, even though Escolle could not quantify the extent of that damage. (Cf. *West Edmond Salt Water Disposal Ass'n v. Rosecrans, supra,* 226 P.2d at p. 972.)

In *Phillips Petroleum Co.* (Nov. 17, 1988, 87-97) 105 Interior Board of Land Appeals 345, the court rejected the contention of the Federal Bureau of Land

Management that Phillips must obtain a permit to inject salt water into mineral space owned by the United States. In that case, ****581** however, the court relied upon the rule that "once the minerals have been removed from the soil, the space occupied by the minerals reverts to the surface owner by operation of law." (*Id.*, at p. 350.) The court explained that this general rule derived from the "general interpretation of a mineral grant as giving the grantee the right to explore for, produce, and reduce to possession if found, the minerals granted, but not the stratum of rock containing the minerals." (*Ibid.*)

In *Phillips,* apparently the subject well was devoid of minerals by the time of injection and " '... there should be no communication [between the injected water and other mineral zones]'...." (*Phillips Petroleum Co., supra,* 105 Interior Board of Land Appeals at p. 350.) In dicta, the court stated, "[f]inally, we note that an operator would be liable to the United States for damages should its water injection activities adversely affect the United States owned mineral interest. [Citations.]" (*Id.*, at p. 352.)

[8][9][10] Surface owners typically own nearly all rights in the land except for the exclusive right to drill for and produce oil, gas and other hydrocarbons. The owners of the mineral estate, and their lessees, typically hold only the very limited right, analogous to an easement, to drill and capture subsurface oil and gas, and the incidental rights necessary to accomplish this. Thus, under ***1783** a typical oil and gas lease, the lessee generally obtains only a non-possessory interest in real property to capture such substances, which is in the nature of an easement.

[11] Union opines that because the surface owner, Righetti, owns the "pore space" of A-16 under these rules, Union properly obtained permission to inject its wastewater into A-16 from Righetti and the State. But, even if Righetti did own the pore space and could authorize injection into A-16, Righetti could not authorize the injury Union caused to Escolle's mineral estate. Under the instant deed, Escolle owns the minerals, oil and gas throughout the field and the right to capture such substances. Union's activity damaged these interests held by Escolle.

Courts have adopted general rules regarding divided estates in land as a reasonable way to account for royalties to substances mined which by nature are vagrant and fugacious.

Union places great reliance upon the case of *Callahan v. Martin, supra,* 3 Cal.2d 110, 43 P.2d 788, and its progeny, which discuss these rules to substantiate its position. Such reliance is misplaced.

Callahan is a quiet title action concerning a traditional assignment of a 3 percent royalty fee to " '... all oil, gas and other hydro-carbon substances and/or minerals produced, extracted and saved' " on the subject property. (*Callahan v. Martin, supra,* 3 Cal.2d at pp. 112-113, 43 P.2d 788.) This assignment derived from a simple reservation of "a one-sixth landowner's royalty in the oil and other substances to be produced...." (*Id.*, at p. 112, 43 P.2d 788.) The question presented in *Callahan* was whether an assignment of a percentage royalty interest in an oil and gas lease survived a transfer of the land by the owner in fee. The *Callahan* court discussed and determined the nature of the interests transferred by such typical oil and gas leases.

In recognition that oil, gas and other hydrocarbon substances are fugacious and vagrant in nature, the *Callahan* court adopted the general rules, *ante:* "that the owner of land does not have an absolute title to oil and gas in place as corporeal real property, but, rather, the exclusive right on his premises to drill for oil and gas, and to retain as his property all substances brought to the surface on his land." (*Callahan v. Martin, supra,* 3 Cal.2d at p. 117, 43 P.2d 788; see generally *Gerhard v. Stephens* (1968) 68 Cal.2d 864, 877-880, 69 Cal.Rptr. 612, 442 P.2d 692, which summarizes *Callahan* and its progeny on these points.)

The *Callahan* court further explained that "[i]t was not contemplated that the rights assigned to the Martins should in any way infringe upon the rights ***1784** of the operating and producing lessee." (*Callahan v. Martin, supra,* 3 Cal.2d at p. 114, 43 P.2d 788.)

****582** [12] These rules are largely irrelevant here because of Union's permanent trespass in Escolle's estate. Regardless of who owns the pore space or injection rights, Union's injection activity caused the migration of its wastewater from A-16 which communicated with oil in wells and elsewhere on the lease thereby damaging Escolle's right to drill for oil and gas and to extract other minerals on the lease. These are rights reserved solely to Escolle under the terms of the deed.

[13] Union argues it should not be held liable because Escolle did not establish the extent of damage. "One whose wrongful conduct has rendered difficult the ascertainment of the damages cannot escape liability because the damages could not be measured with exactness." (*Zinn v. Ex-Cell-O Corp.* (1944) 24 Cal.2d 290, 297-298, 149 P.2d 177; *Bertero v. National General Corp.* (1967) 254 Cal.App.2d 126, 151, 62 Cal.Rptr. 714.) Because Union damaged Escolle's

mineral estate without its consent, it is liable to Escolle in damages.

Damages

Generally, "[t]he measure of damages suffered by reason of a tortious act is the amount which will compensate for all the detriment proximately caused thereby whether it could have been anticipated or not. (Civ.Code, § 3333.) For such wrongs damages will be awarded to the extent that the injured party will be restored to the position he would have occupied had the trespass not occurred. [Citations.]" (*Alphonzo E. Bell Corp. v. Listle* (1946) 74 Cal.App.2d 638, 650, 169 P.2d 462.)

[14] Civil Code section 3334 states, in pertinent part, that "[t]he detriment caused by the wrongful occupation of real property ... is deemed to include the value of the use of the property for the time of that wrongful occupation ... and the costs, if any, of recovering the possession." Accordingly, one measure of damage for trespass is the reasonable rental value of the property during the wrongful occupation. (See generally *Lindberg v. Linder, supra*, 133 Cal.App. at pp. 218-219, 23 P.2d 842; *Murphy v. Nielsen, supra*, 132 Cal.App.2d at p. 399, 282 P.2d 126; *Don v. Trojan Construction Co., supra*, 178 Cal.App.2d at pp. 138-139, 2 Cal.Rptr. 626.)

There are many ways, however, to determine the proper measure of damages for wrongful occupation of property, and courts are very flexible in choosing a measure of recovery which is most appropriate to the particular ***1785** facts of the case. (See *Basin Oil Co. v. Baash-Ross Tool Co.* (1954) 125 Cal.App.2d 578, 606, 271 P.2d 122, citing cases.) "There is no fixed rule with respect to the measure of damages for the wrongful injury or destruction of property. Each case must be determined on its particular facts." (*Givens v. Markall* (1942) 51 Cal.App.2d 374, 379, 381, 124 P.2d 839--cost to replace fixtures in same condition as those removed held to be proper measure.) " '... [W]hatever rule is best suited to determine the amount of the loss in the particular case should be adopted....' " (*Id.*, at pp. 379-380, 124 P.2d 839.)

In 15 American Jurisprudence at page 514, section 106 states, in pertinent part: " '... The amount to be awarded depends upon the character of the property and the nature and extent of the injury, and the mode and amount of proof must be adapted to the facts of each case....' " (*Givens v. Markall, supra*, 51 Cal.App.2d at p. 379, 124 P.2d 839.)

In *Lineberger v. Delaney Petroleum Corp.* (1935) 8 Cal.App.2d 153, 47 P.2d 326, for example, lessor sued oil and gas lessee for wrongful use and occupation of land which was not covered under the lease. Lessee asserted that its entire use and occupancy was under authority of the lease, although evidence showed lessee used the leased land for both lease and non-lease purposes and erected buildings on part of the property in derogation of express provisions of the lease.

Lessee argued that such unauthorized use is compensated by rental or royalty under the lease or that the applicable measure of damages is the damages resulting from the unauthorized use of leased property under Civil Code section 1930 (providing ****583** for recovery of all damages resulting from non- lease uses of "things" let).

Lessor in *Lineberger* did not sue under the lease, but sued for wrongful use and occupation of its land not under the lease. The *Lineberger* court found that the proper measure of damages was the reasonable value for trespassory use and occupation under Civil Code section 3334. (*Lineberger v. Delaney Petroleum Corp., supra*, 8 Cal.App.2d at pp. 155, 157, 47 P.2d 326.)

[15] In *Dandoy v. Oswald Bros. Paving Co.* (1931) 113 Cal.App. 570, 572- 573, 298 P. 1030, the appellate court stated that the remedy for wrongful dumping of rock, even where the value of the land is not affected, is the reasonable cost of restoration (removal of material dumped). Deterioration in market value of property is the proper measure for continuing nuisance which cannot be abated. Such measures of damages are proper even if the actual injury to the property is nominal. (*Don v. Trojan Construction Co., supra*, 178 Cal.App.2d at pp. 137-138, 2 Cal.Rptr. 626.)

***1786** In *Inyo Chemical Co. v. City of Los Angeles* (1936) 5 Cal.2d 525, 540-543, 55 P.2d 850, the appellate court approved a measure of damages for negligent flooding of a field covered with the mineral trona as the value of the mineral destroyed, less the cost of producing and marketing it, reduced to present value and the costs of various related infrastructure repairs.

The *Listle* court states that "[w]hile the general rule for ascertaining damages to real property injured or destroyed by a trespass is to prove its diminution in value resulting from the wrongful act [citations], yet there is no universal test for determining such sum. [Citation.] One method is by estimating the cost of replacement of improvements. [Citations.] But in view of the doubt as to the correct measure where the injuries affect the entire freehold as well as the value of separate structures thereon, care must be exercised in selecting the rule as to the measure of damages applicable in any

given case. [Citation.]" (*Alphonzo E. Bell Corp. v. Listle, supra*, 74 Cal.App.2d at p. 650, 169 P.2d 462.)

Indeed, courts need not "rely upon the familiar principles declared by the foregoing authorities." (See *Alphonzo E. Bell Corp. v. Listle, supra*, 74 Cal.App.2d at pp. 650-651, 169 P.2d 462, citing a case from a sister state for the proposition that even though the value of a destroyed prospect hole in a producing oil field cannot be established, a remedy for damage thereto is the amount of money necessary to redrill the well to the horizon at which the destruction occurred and not for prospective profits or the value of an oil well; also see *Pacific Gas & Elec. Co. v. County of San Mateo* (1965) 233 Cal.App.2d 268, 273-275, 43 Cal.Rptr. 450, which discusses the myriad means courts use to measure damages for injury to real property.)

" 'California recognizes that: "Equity does not wait upon precedent which exactly squares with the facts in controversy, but will assert itself in those situations where right and justice would be defeated but for its intervention." [Citation.] In the same spirit it is said ... "Living as we do in a world of change, equitable remedies have necessarily and steadily been expanded to meet increasing complexities of such changing times, and no inflexible rule has been permitted to circumscribe the power of equity to do justice. As has been well said, equity has contrived its remedies 'so that they shall correspond both to the primary right of the injured party, and to the wrong by which that right has been violated,' and 'has always preserved the elements of flexibility and expansiveness, so that new ones may be invented, or old ones modified, in order to meet the requirement of every case, and to satisfy the needs of a progressive social condition, in which new primary rights and duties are constantly arising, and new kinds of wrong are constantly committed.' [Citation.]" ...' " ***1787**(*Bertero v. National General Corp., supra*, 254 Cal.App.2d at pp. 145-146, 62 Cal.Rptr. 714.) "A court of equity is empowered, under appropriate conditions, to award damages along with declaratory relief." (*Id.*, at p. 147, 62 Cal.Rptr. 714.)

Awarding the amount of money necessary to redrill a well "was the most equitable means of compensating the owner, ****584** since there was no way of knowing whetherthe hole would ever be a producer and, if so, what profits would be made." (Dicta in *Basin Oil Co. v. Baash-Ross Tool Co., supra*, 125 Cal.App.2d at p. 609, 271 P.2d 122, commenting on *Alphonzo E. Bell Corp. v. Listle, supra*, 74 Cal.App.2d 638, 169 P.2d 462.)

Here, however, Union did not simply destroy a particular oil well. Its lengthy injection of wastewater resulted in widespread damage throughout a large oil, gas and mineral field. As the appellate court stated in *Samuels v. Singer* (1934) 1 Cal.App.2d 545, 548-549, 36 P.2d 1098, "the [trial] court has jurisdiction to grant 'any relief consistent with the case made by the complaint and embraced within the issue'. [Citations.]"

In most respects, the *Samuels* case is a routine action for wrongful occupation of rental property for which the appropriate measure of damages is the reasonable rental value of the premises. The facts contain one significant twist, however. A subtenant involved in the ejectment proceeding was not in privity of contract with the lessor.

After reviewing case law, the appellate court in *Samuels* "deduce[d] the proposition that one wrongfully occupying the real property of another is liable to the owner for damages in tort; that the owner may waive the tort and sue on the contract implied in law as resulting from such tort, and that such contract, thus implied in law, obligates the wrongful occupant of real property to pay to the owner thereof the reasonable value of the use thereof during the period of such occupancy." (*Samuels v. Singer, supra*, 1 Cal.App.2d at p. 554, 36 P.2d 1098; see also *Herond v. Bonsall* (1943) 60 Cal.App.2d 152, 155-156, 140 P.2d 121--quasi-contract is proper measure of damages for benefit of storage in continuing trespass where cross-defendant refused to remove trade fixtures upon termination of lease. Tort may be waived and action is in implied assumpsit to recover value of use taken--benefit to trespasser for use.)

In the instant case, the trial court arrived at a measure of damages reflecting such quasi-contract principles, even though it purported to do so under Civil Code section 3334. Such a measure is apropos.

[16] The circumstances here are unique. Substantial evidence established that Union's injection activities damaged A-16, other wells in the leased field ***1788** and the mineral estate generally. Because Union's activities render it difficult, if not impossible, to trace completely the injuries it caused, resort to more traditional measures of damages such as cost of replacement, cost of restoration, diminution in value or fair rental value cannot be readily used. But the difficulty in determining damages does not bar recovery. (See *Zinn v. Ex-Cell-O Corp., supra*, 24 Cal.2d at pp. 297-298, 149 P.2d 177.)

[17] Under theories and damages propounded and prayed for in the complaint, in Escolle's trial brief and through evidence presented during the damages phase of trial, the trial court arrived at a reasonable

quasi-contractual measure of damages--the fair market cost to dispose of the injected wastewater at available sites in the area during the pertinent period. This is the amount of money Union would have had to pay to others to dispose of the excess water, and therefore the amount of Union's unjust enrichment.

The trial court found that operators in the area charged $1.75 per barrel delivered to disposal sites. For its own benefit, Union injected 2,067,343 barrels of wastewater into A-16 to preserve disposal capacity in its own field and to boost production of oil and gas on that field. The trial court found that Union should disgorge the benefit, implied in law, that it derived by the trespass and accordingly awarded the Escolle TIC judgment in the principal sum of $3,617,843. The trial court did not include the additional fair market sum of 68 cents per barrel then charged to move the water to the disposal site.

Substantial evidence supports the judgment as prayed for in the complaint. At all pertinent times there was an extreme shortage of wastewater disposal sites in the area. The only two available sites in ****585** the region both charged $1.75 per barrel. Conoco, an oil company operating as a farmee of Union, used one of these two sites and paid $1.75 and transportation costs to dispose of its wastewater. Union knew of the monthly amount of wastewater it injected into A-16, as shown in the statement of decision.

Evidence proffered by Union for measure of damages did not present parties similarly situated to the instant ones. In each transaction presented by Union, the landowner offering the right to dispose of wastewater had a preexisting relationship with Union and Union stood to benefit in collateral ways from these arrangements. Thus, these business relationships presented by Union were not at arms length. They do not represent an accurate fair market valuation.

Also, almost all of the agreements proffered by Union fell outside the relevant time period which was marked by a critical shortage of disposal ***1789** capacity and sites. Furthermore, the Escolle TIC had no comparable protections for risk and indemnity against such damage as occurred here.

Union failed to properly substantiate any fair market value other than that presented by Escolle. The conduct of Conoco and Union at the time of paying the cost utilized by the trial court for disposing of other wastewater particularly supports the judgment. We agree with the trial court that the analysis of the available market for such injection proffered by Escolle provides the best basis shown for evaluating the value of damages in this unique situation.

Prejudgment Interest

Civil Code section 3287, subdivision (a) states, in pertinent part: "Every person who is entitled to recover damages certain, or capable of being made certain by calculation, ... is entitled also to recover interest thereon...." The test for recovery of prejudgment interest under section 3287, subdivision (a) is whether "*defendant* actually know[s] the amount owed or from reasonably available information could the defendant have computed that amount." (*Chesapeake Industries, Inc. v. Togova Enterprises, Inc.* (1983) 149 Cal.App.3d 901, 907, 911, 197 Cal.Rptr. 348.)

[18] Ordinarily, where, as here, defendant "could keep complete records of the transaction [the monthly amounts of wastewater disposed of] from which it could calculate its indebtedness," prejudgment interest may be awarded from the inception of the occurrence. (*Chesapeake Industries, Inc. v. Togova Enterprises, Inc., supra,* 149 Cal.App.3d at p. 911, 197 Cal.Rptr. 348.) "It is the rule that if damages may be determined by reference to reasonably ascertainable market values, they are 'capable of being made certain by calculation' within the meaning of section 3287 *supra*." (*Howe v. City Title Ins. Co., supra,* 255 Cal.App.2d at p. 88, 63 Cal.Rptr. 119.)

"The mere fact that proof is required to determine *the market value* of property on a designated date, will not prevent the allowance of interest under section 3287...." (*Bare v. Richman & Samuels, Inc., supra,* 60 Cal.App.2d at p. 419, 140 P.2d 895--concerning market value of grapes which could be ascertained.)

[19] In actions in quantum meruit, however, the exact amount to which the plaintiff is entitled is usually considered uncertain until it has been determined by the court upon presentation of evidence. Typically, plaintiff's claim is in the nature of an unliquidated and uncertain demand and therefore prejudgment interest is disallowed. (See *Samuels v. Singer, supra,* 1 Cal.App.2d at pp. 555-556, 36 P.2d 1098.)

***1790** [20] Although Union disagrees with the *standard* to be applied to damages here, it had available to it the values by which to calculate damages. It actually knew that the fair market value of disposal of offsite wastewater at the time was $1.75 per barrel because it entered into a disposal agreement, along with Conoco, during the relevant time period. Union also knew the amount of water it disposed of into A-16 at the time of injection.

Escolle stated the approximate number of barrels of water injected and the reasonable disposal rate in its complaint. Because ****586** Escolle placed Union on actual notice of demand, and the means of calculating damages, as of the filing of its complaint, prejudgment interest dating from the filing of the complaint is hereby allowed.

Moreover, the trial court also found that Civil Code section 3288 supports the award of prejudgment interest. We agree. Section 3288 states, in pertinent part: "In an action for the breach of an obligation not arising from contract, ... interest may be given, in the discretion of the jury." Our Supreme Court has interpreted this statute to accord the same discretion to a trial judge acting as the trier of fact. (*Bullis v. Security Pac. Nat. Bank* (1978) 21 Cal.3d 801, 814, fn. 16, 148 Cal.Rptr. 22, 582 P.2d 109.)

[21] The policy underlying authorization of an award of prejudgment interest is to compensate the injured party--to make that party whole for the accrual of wealth which could have been produced during the period of loss. (See *In re Pago Pago Aircrash of January 30, 1974, supra,* 525 F.Supp. at pp. 1013-1015; *Greater Westchester Homeowners Assn. v. City of Los Angeles, supra,* 26 Cal.3d at pp. 102-103, 160 Cal.Rptr. 733, 603 P.2d 1329.) We hold that the trial court did not abuse its discretion in awarding prejudgment interest to Escolle; however we direct the trial court to modify the amount of such interest by calculating it as of the date of the filing of the complaint, July 1, 1985.

The trial court is directed to compute the amount of prejudgment interest in accordance with this opinion. In all other respects, the judgment is affirmed. Costs to the Escolle TIC.

GILBERT and YEGAN, JJ., concur.

18 Cal.Rptr.2d 574, 14 Cal.App.4th 1770

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311 N.E.2d 741.
(Cite as: 19 Ill.App.3d 402, 311 N.E.2d 741)

Appellate Court of Illinois, Fifth District.

Bertha GILL, Plaintiff-Appellee,
v.
James F. McCOLLUM, Defendant-Appellant.

No. 74--8.

April 17, 1974.
Rehearing Denied May 20, 1974.

Suit to enjoin defendant from using well on her land for disposal of salt water from other leases and for damages. The Circuit Court, Clay County, Harold Wineland, J., granted injunction and defendant appealed. The Appellate Court, Crebs, J., held that oil and gas lease allowing lessee to inject water into subsurface strata did not entitle lessee to use well for disposal of salt water from other leases, inasmuch as the injection did not have any relation to primary purpose of obtaining production.

Affirmed.

West Headnotes

[1] **Mines and Minerals** ⚿**78.1(5)**
260k78.1(5)

Oil and gas lease allowing lessee to inject water into subsurface strata did not entitle lessee to use well for disposal of salt water from other leases, inasmuch as the injection did not have any relation to primary purpose of obtaining production.

[2] **Mines and Minerals** ⚿**78.1(5)**
260k78.1(5)

Since primary purpose of oil and gas lease is to obtain production, provisions permitting injection of water, other fluids and air into subsurface strata must be read with that purpose in mind and the injection must have some relation to primary purpose of obtaining production.

***403 **742** Glenn & Logue, Mattoon, for defendant-appellant.

Robert F. A. Stocke, Louisville, William R. Todd, Flora, for plaintiff- appellee.

CREBS, Justice.

Plaintiff filed suit in the Circuit Court of Clay County to enjoin defendant from using a well on her land for disposal of salt water from other leases and for damages. After a hearing, the injunction was granted. This case is an interlocutory appeal from an Order entered on December 5, 1973 temporarily enjoining the defendant from injecting disposal salt water from adjoining leases into the oil well in question.

The well in question was drilled in May 1973 to the Aux Vases formation. Defendant claims it is a producing well from that formation, while plaintiff claims it is a dry hole. No oil has been sold from the lease. There are tanks on the lease which contain a mixture of oil and salt water, but defendant was unable to state how much of the fluid was oil. It is undisputed that defendant obtained a permit to convert the well into a combination oil and disposal well; that a packer was inserted above the Aux Vases formation and below the Cypress formation. This permits pumping from the Aux Vases formation and injection of salt water in the Cypress formation. At the time of the hearing defendant was injecting salt water pumped from the Aux Vases and salt water from three other leases he owned into the Cypress formation. Since there was no attempt to produce the Cypress formation, it was admitted that it was of no benefit to plaintiff to inject salt water from other leases into the well.

Defendant's position is that the right to use this well for the disposal of salt water from other leases is granted to him by the terms of the lease.

The relevant provisions of the lease are as follows:

"(1) Lessor, in consideration of ONE DOLLAR ($1.00) in hand paid, receipt of which is hereby acknowledged, and of the royalties herein provided and of the agreements of the Lessee, herein contained, hereby grants, leases and lets exclusively unto Lessee for purpose of investigating, exploring, prospecting, drilling, mining and operating for and producing oil, liquid hydrocarbons, all gases and their respective constituent products, injecting gas, waters, other fluids and air into subsurface strata, laying pipe lines, storing oil, building tanks, ponds, power stations, telephone lines, and other structures and things thereon to produce, save, take care of, treat, manufacture, ***404** process, store and transport said oil, liquid, hydrocarbons, gases and their respective constituent products and other products

manufactured therefrom together with the rights of ingress and egress thereto or to other land under Lease to Lessee.' . . .
'(2) Subject to the other provision herein contained, this Lease shall remain in force for a term of one year from this date (called 'primary term') and as long thereafter as oil, liquid, hydrocarbons, gas, or their respective constituent **743 products or any of them is produced from said land or land with which said land is pooled; provided, however, that for injection purposes this Lease shall continue in full force and effect only as to the subsurface strata or stratas into which such injections are being made together with such surface privileges as may be necessary or desirable to continue such injections."

[1][2] Since the primary purpose of an oil and gas lease is to obtain production the above provisions must be read with this purpose in mind. The injection must have some relation to the primary purpose of obtaining production. Since in this case there was none, the injunction was properly granted.

Judgment affirmed.

GEORGE J. MORAN, P.J., and CARTER, J., concur.

311 N.E.2d 741, 19 Ill.App.3d 402

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686 S.W.2d 346
(Cite as: 686 S.W.2d 346)

H

Court of Appeals of Texas,
Eastland.

TDC ENGINEERING, INC., Appellant,
v.
Gene DUNLAP, Appellee.

No. 11-84-167-CV.

Feb. 14, 1985.
Rehearing Denied March 14, 1985.

Landowner sued operator of oil and gas lease for an unnecessary use of surface estate. The 32nd District Court, Fisher County, Weldon Kirk, J., entered judgment awarding damages for diminution of market value, for occupancy of 40- acre tract upon which salt water injection well was located, and as exemplary damages, and operator appealed. The Court of Appeals, Dickenson, J., held that: (1) oil and gas lease granted by owner's predecessor did not give lessee or his operator right to inject salt water into nonproductive well; (2) since certain other leases covered different tracts of land, they did not give lessee or its operator right to dispose of salt water produced from some of the leases on land covered by different lease; (3) operator for lessee of lease from owner of one-sixteenth undivided interest in mineral estate had right to produce oil belonging to that undivided mineral interest's owner and to make such reasonable use of the surface estate related to it as was necessary to produce oil; (4) evidence established that operator was required to dispose of salt water produced with the oil in order to produce the oil and that there was no alternative method for disposing of the salt water other than through salt water injection well located on the leased premises; and (5) jury finding that salt water injection well was "unnecessary use" was not sufficient to establish that such use did not constitute reasonably necessary use of the surface of the leasehold.

Judgment reversed.

West Headnotes

[1] **Mines and Minerals** ⚿ **73.1(6)**
260k73.1(6)

Oil and gas lease granted by surface owner's predecessor in title did not give operator of the lease right to inject salt water into nonproductive well.

[2] **Mines and Minerals** ⚿ **73.1(6)**
260k73.1(6)

Oil and gas leases did not give lessee or operator of leases right to dispose of salt water produced from some of its leases onto land covered by a different lease.

[3] **Mines and Minerals** ⚿ **73.1(6)**
260k73.1(6)

Operator of an oil and gas lease has right to use so much of the land, both surface and subsurface, as is reasonably necessary to comply with terms of the lease contract.

[4] **Mines and Minerals** ⚿ **73.1(6)**
260k73.1(6)

Mineral estate is the dominant estate and the right to use so much of the premises as is reasonably necessary to comply with terms of lease contract does not obligate oil and gas operator to use alternative methods unless they may be employed on leased premises to accomplish the purposes.

[5] **Mines and Minerals** ⚿ **73.1(6)**
260k73.1(6)

Oil and gas lease from owner of one-sixteenth interest in undivided mineral estate gave lessee and his operator right to dispose of salt water in injection well located on surface of land of undivided mineral interest.

[6] **Mines and Minerals** ⚿ **73.1(6)**
260k73.1(6)

Operator for lessee of owner of one-sixteenth undivided interest in mineral estate had right to produce oil belonging to that undivided mineral interest's owner and to make such reasonable use of the surface estate related to it as was necessary to produce the oil, and thus, where evidence conclusively established that operator had to dispose of salt water produced with the oil in order to produce the oil and that there was no alternative method for disposing of salt water, owner of surface estate could not recover for trespass based on operator's actions in disposing of salt water in injection well located on leasehold estate.

[7] **Mines and Minerals** ⚿ **73.1(6)**
260k73.1(6)

Jury's finding in trespass suit that operator's use of surface estate in order to dispose of salt water produced with oil was "unnecessary" was not sufficient to show that operator's use of the land was not "reasonably necessary" to produce the oil, in view of objections to the charge and tender of proper issues and instructions.

*347 James C. Gordon, McMahon, Smart, Surovik, Suttle, Buhrmann & Cobb, Abilene, for appellant.

Lance Hall, Sweetwater, for appellee.

DICKENSON, Justice.

The landowner, Gene Dunlap, [FN1] sued the operator of an oil and gas lease, TDC Engineering, Inc., [FN2] for "an unnecessary use" of the surface estate (injecting salt water in an unproductive oil well on land owned by Dunlap). Following a trial by jury, judgment was rendered that Dunlap recover $57,150 for diminution of the market value of his 1143.5-acre tract of land; $12,000 for occupancy of the 40-acre tract upon which the salt water injection well was located; and $60,000 as exemplary damages. TDC Engineering, Inc. appeals. We reverse and render.

FN1. Gene Dunlap died after the rendition of judgment in the trial court. Pursuant to TEX.R.CIV.P. 369a this Court will proceed to adjudicate the cause and render judgment "as if all the parties thereto were living."

FN2. TDC Engineering, Inc. is a wholly owned subsidiary of Texas Drilling Company. Scott Taliaferro is President of both corporations. He also owns certain oil and gas leases which are involved in this lawsuit and which are being operated by TDC Engineering, Inc.

The verdict of the jury can be summarized as set forth below:

1. "We do" find that TDC Engineering, Inc. made an unnecessary use of the entire surface estate belonging to Gene Dunlap on or about February 2, 1983, and thereafter, in its operation of injecting the salt water in the well on land owned by Gene Dunlap.
2. "We do" find that such unnecessary use was a proximate cause of the loss of value to the 1143.5 acres of land belonging to Gene Dunlap.
3. "$57,150.00" is the difference in market value as a result of the unnecessary use of that land.
4. "We do" find that TDC Engineering, Inc. has entered upon Gene Dunlap's 40 acre tract of land which surrounds the salt water injection well without consent or legal right.
5. "We do" find that this entry was a proximate cause of injury.
6. "$12,000" would compensate Gene Dunlap for the injury caused by the entry of TDC Engineering, Inc. on this 40-acre tract of land.
7. "We do" find that this entry constituted gross indifference to the rights of Gene Dunlap.
8. "$60,000" should be awarded against TDC Engineering, Inc. as exemplary damages.
9. "None" is the reasonable value of improvements made by TDC Engineering, Inc. on the 40-acre tract.
10. "No," the casing and other equipment in the salt water disposal well cannot be removed without permanent damage to the property.

Appellant has briefed 32 points of error, complaining of: (1) the trial court's overruling of its motion for instructed verdict; (2) the trial court's overruling of its motion for judgment non obstante veredicto; (3) the issues which were submitted to the jury; (4) the defensive issues and instructions *348 which were requested and refused; and (5) the trial court's overruling of objections to the issues and instructions which were submitted to the jury. We sustain the second point [FN3] and the thirty-second [FN4] points of error.

FN3. Point of Error Two: The trial court erred in overruling Defendant's Motion for Judgment Non Obstante Veredicto with respect to plaintiff's cause of action in trepass.

FN4. Point of Error 32: The trial court erred in refusing to grant Defendant's Motion for Judgment Non Obstante Veredicto with respect to plaintiff's cause of action in trespass to try title.

In 1978, Gene Dunlap purchased all of the surface plus an undivided mineral interest in this 1143.5-acre tract of land from Billy Bowden. Bowden's rights in this property were subject to an oil and gas lease owned by Taliaferro. The James Petroleum Trust owns an undivided one-sixteenth mineral interest in a 700-acre tract of land. This interest covers the portion of Dunlap's property where the four oil and gas wells are located, and it also covers the 40-acre tract where the salt water disposal well is located. Taliaferro owns the leasehold estate under the James Petroleum Trust in

addition to his rights under the Bowden Lease. The other undivided mineral interests are leased to Maguire Oil Company and operated by TDC Engineering, Inc., but there are separate leases for the various tracts of land.

The Bowden lease contains a "Pugh Clause" which provides that:

> Any provisions above to the contrary notwithstanding, this lease shall ipso facto terminate three (3) years after the date of the expiration of the primary term save as to the number of acres allocated by the Railroad Commission of Texas for each well from which oil and gas in paying quantities is being produced and sold; however, as to all wells from which oil and/or gas is being produced and sold in paying quantities said lease shall ipso facto terminate as to all formations below the then producing formations.

Since the lease was effective August 27, 1976, for a three year primary term, the Pugh Clause became effective on August 27, 1982. At that time the Bowden lease was continued in effect as to 40 acres around each producing well. It terminated as to the 40-acre tract upon which the salt water injection well is located. Dunlap advised TDC Engineering, Inc. and Taliaferro that they did not have the right to inject salt water in the nonproductive well on this 40- acre tract without his consent and that they should either transport the salt water off his property for disposal or make an agreement with him and pay him for the right to dispose of the salt water by injection into the well on his property. TDC Engineering, Inc. and Taliaferro maintained the right to dispose of the salt water by injection into the well on Dunlap's property without his permission, and Dunlap filed this lawsuit.

[1][2] We agree with Dunlap that the Bowden lease did not give the lessee or his operator the right to inject salt water into the nonproductive well. We also agree with Dunlap that, since the Maguire Oil Company leases cover different tracts of land, they do not give the lessee or its operator the right to dispose of salt water produced from some of the leases on land covered by a different lease.

We do not, however, agree with Dunlap as to the operator's claims under the oil and gas lease from the James Petroleum Trust, and we hold that the oil and gas lease from the James Petroleum Trust gave the lessee, Taliaferro, and his operator, TDC Engineering, Inc., the right to dispose of the salt water in the injection well involved in this lawsuit. It is rare that mineral rights to an undivided one-sixteenth interest would have this result, but it must logically follow from the application of well established legal principles.

[3] *Brown v. Lundell*, 162 Tex. 84, 344 S.W.2d 863 at 865 (1961), affirms the rule that the operator of an oil and gas lease "has the right to use so much of the land, both surface and subsurface, as is *reasonably necessary* to comply with the terms of ***349** the lease contract." (Emphasis added) *Brown* states, 344 S.W.2d at 867:

> It was necessarily incident to production operations here that the salt water be separated from the oil and that it be disposed of ....
> The ultimate issue was whether (the operator of the oil and gas lease) was negligent in the way and manner in which he disposed of the salt water.

[4] *Sun Oil Company v. Whitaker*, 483 S.W.2d 808 (Tex.1972), recognizes the rule that the mineral estate is the "dominant estate" and that the right to use so much of the premises as is "reasonably necessary" does not obligate the oil and gas operator to use alternative methods unless they "may be employed *on the leased premises* to accomplish the purposes." 483 S.W.2d at 812. See also *Ball v. Dillard*, 602 S.W.2d 521 at 523 (Tex.1980), which notes that: "A grant of minerals would be worthless to a grantee if he could not enter upon the land for exploration and extraction of the minerals granted."

[5][6] *Cox v. Davison*, 397 S.W.2d 200 at 203 (Tex.1965), discussing the right of a tenant in common of an undivided mineral interest, such as the James Petroleum Trust and its lessee, to make such use of its property as it sees fit, said:

> (T)he mineral estate is such that necessarily the rights of one cotenant must be interferred with if another cotenant is to be permitted to exercise those rights properly belonging to him.

Since TDC Engineering, Inc. was the operator for the lessee of the James Petroleum Trust lease, it had the right to produce the oil belonging to that undivided mineral interest's owner and to make such reasonable use of the surface estate related to it as is necessary to produce the oil. The evidence conclusively establishes that the operator must dispose of the salt water (which is produced with the oil) in order to produce the oil and that there is no alternative method for disposing of the salt water on the leased premises covered by the oil and gas lease from the James Petroleum Trust. Consequently, the recovery for trespass cannot be allowed.

[7] Dunlap failed to secure findings that the salt water injection well was not reasonably necessary. See Annotation, "What Constitutes Reasonably Necessary Use of the Surface of the Leasehold by a Mineral

Owner, Lessee or Driller under an Oil and Gas Lease or Drilling Contract," 53 A.L.R.3d 16- 174 (1973). The finding of an "unnecessary use" is not sufficient [FN5] in view of the objections to the charge and the tender of proper issues and instructions. The motion for judgment non obstante veredicto should have been granted.

FN5. *Texaco, Inc. v. Faris*, 413 S.W.2d 147 (Tex.Civ.App.--El Paso 1967, writ ref'd n.r.e.), is not in point because there was a lease in *Faris* which set forth the uses of the surface and specified the extent of such uses. *Faris* recognized that in the absence of such an express lease provision, the extent of use is said to be that which is "reasonably necessary." Since Dunlap's lease had terminated as to the 40-acre tract upon which the salt water injection well is located, those lease provisions are not applicable. The operator had the right in this case to make reasonable use of the surface to produce the oil belonging to the 1/16 th mineral interest belonging to the James Petroleum Trust.

The judgment of the trial court is reversed, and this Court renders judgment that Gene Dunlap take nothing and that TDC Engineering, Inc. recover its costs of suit.

686 S.W.2d 346

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612 So.2d 325
(Cite as: 612 So.2d 325)

Supreme Court of Mississippi.

Mrs. Rosemary T. FARRAGUT
v.
David H. MASSEY, Mary A. Barnett, Graham Royalty, Ltd., E.V. "Buddy" Cleveland.

No. 89-CA-0675.

May 20, 1992.
As Modified on Denial of Rehearing Feb. 4, 1993.

Owner of royalty interest brought action against mineral lessees and third parties. The Circuit Court, Jones County, Billy Joe Landrum, J., entered judgment in favor of defendants, and royalty interest owner appealed. The Supreme Court, McRae, J., held that: (1) lease did not authorize mineral lessees to dispose of saltwater produced off the leasehold by third party; (2) release did not allow disposal of saltwater from third party's operation; and (3) genuine issue of fact existed as to whether third parties entry onto land exceeded scope of lessees' possessing interest.

Reversed and remanded.

West Headnotes

[1] **Mines and Minerals** 🔑**73.1(6)**
260k73.1(6)

Mineral lease permitted importation of saltwater from adjoining properties to be disposed of in abandoned well on property but only to the extent that the mineral lessees' operations extended to the adjoining properties and lease did not permit importation of saltwater from other parties' wells.

[2] **Landlord and Tenant** 🔑**37**
233k37

Where language of lease is unambiguous, it must be enforced according to its meaning.

[3] **Landlord and Tenant** 🔑**37**
233k37

In the absence of ambiguity in lease, industry customs must bow to terms of lease.

[4] **Release** 🔑**30**
331k30

Release was ambiguous as to whether it gave mineral lessees authority to import saltwater from third parties on adjacent tracks for disposal in abandoned well where two clauses seemed to extend waiver only to surface damages resulting from drilling in preparation of two wells whereas third clause appeared to extend the waiver to continuous disposal of saltwater.

[5] **Release** 🔑**25**
331k25

Release was to be construed against party who drafted it.

[6] **Mines and Minerals** 🔑**124**
260k124

Release given by owner of royalty interest to mineral lessee permitted lessees to dispose of saltwater from their own wells in abandoned well but could not be read so broadly as to permit dumping of saltwater by third parties from adjacent lands.

[7] **Judgment** 🔑**185.1(3)**
228k185.1(3)

Affidavit which stated that opposing party "was informed" and "knew" about certain matters but did not indicate that the affiant had personal knowledge of those facts and which did not have attached to it copies of documents referred to in the affidavit did not comply with rules governing affidavits in support of summary judgment. Rules Civ.Proc., Rule 56(e).

[8] **Trespass** 🔑**25**
386k25

Right to rely on third party's permission to enter land extends no further than the third party's possessory interest in the land.

[9] **Judgment** 🔑**181(24)**
228k181(24)

Genuine issue of fact existed as to whether entry onto land to deposit salt water in well with permission of mineral lessees exceeded the bounds of the possessory interest of the mineral lessees.

***325** Thomas W. Tardy, III, Terryl K. Rushing, Alston Rutherford Tardy & Van Slyke, Mark F. McIntosh,

Jackson, for appellant.

*326 David H. Massey, Clark & Massey, Laurel, Robert H. Bass, Tollison Austin & Twiford, Oxford, for appellees.

Before DAN M. LEE, P.J., and ROBERTSON and McRAE, JJ.

McRAE, Justice, for the Court:

Appellees David Massey and Mary Barnett, oil producers, hold a mineral lease covering property owned by appellant Rosemary Farragut. Appellees E.V. Cleveland and Graham Royalty, Ltd. [FN1] have conducted drilling operations on adjoining property. Both groups of appellees produce salt water as a by-product of their operations. Massey and Barnett began to dispose of their own salt water in an abandoned well situated on the leasehold property. When Farragut discovered that Massey and Barnett had additionally begun to dispose of salt water from the adjoining property, she sued for damages. The trial court granted summary judgment against Farragut. On appeal, Farragut raises the following issues:

> FN1. Cleveland and Graham Royalty were consecutive operators of the drilling operations on the adjoining property. An assignment from Cleveland to Graham Royalty was executed on or about January 3, 1984.

I. Whether the lower court erred in finding the oil, gas and mineral lease authorized disposal of salt water produced off the leasehold?

II. Whether the lower court erred in finding that a release executed in favor of Massey and Barnett extinguished Farragut's right to recover?

III. Whether the lower court erred in denying Farragut's motion to strike the affidavit of David Massey and in considering the affidavit in deliberating on the parties' motions for summary judgment?

IV. Whether the lower court erred in granting summary judgment to defendants?

In their separate appellate brief, Cleveland and Graham Royalty raise the following additional issue:

V. Whether consent by the possessor of property creates privilege or license to enter?

Finding that summary judgment was wrongfully granted in favor of the appellees, we reverse and remand for a trial against all defendants.

FACTS

Rosemary Farragut owns a one-seventh royalty interest in a 212-acre parcel in Jones County, Mississippi. In February of 1980, she, along with her cotenants, executed a mineral lease in favor of Massey and Barnett. The lease agreement contained the following clause:

> [Lessors do] hereby grant, lease and let unto lessee the land covered hereby for the purposes and with the exclusive right of exploring, drilling, mining and operating for, producing and owning oil ..., together with the right to make surveys on the land, lay pipe lines, establish and utilize facilities for surface and subsurface disposal of salt water, construct [other improvements], necessary or useful in lessee's operations in exploring, drilling for, producing, treating, storing and transporting minerals produced from the land covered hereby or any other land adjacent thereto.

Massey and Barnett drilled an oil well ("Townsend No. 1") on the property in September, 1980. In February, 1981, Massey and Barnett obtained permission from the Mississippi State Oil and Gas Board to convert an abandoned well ("Townsend No. 3") located on the property for use as a salt water repository.

According to Farragut's affidavit, she knew nothing about the salt water repository until she discovered a crew reworking the Townsend No. 3 well. She allegedly made a demand for surface damages in the amount of $1,500.

In the Spring of 1981 Massey and Barnett drilled a second oil well ("Townsend No. 2") on Farragut's property and tied the new well into the Townsend No. 3 salt water disposal system. Massey and Barnett subsequently sent Farragut two *327 checks totaling $1,500 and submitted a release containing the following language:

> [T]he undersigned does hereby release and relinquish any and all claims against David H. Massey, Mary A. Barnett, and Barnett and Massey, resulting from their preparation and the making location for the drilling and continuous operations of the Townsend No. 2 Well and Townsend No. 3 Well, and the establishment of production and the continuous production operations and disposal of salt water on the above set out land. The undersigned party does hereby release any and all claims against David H. Massey, Mary A. Barnett, and Barnett and Massey

covering damages occurring on the lands set out above.

Farragut executed the release on September 23, 1981.

In April, 1982, Anderson Oil Co., Inc., and Adams Exploration Company (collectively: "Anderson") completed a well ("N.G. Stainton No. 1") located on a separate parcel of land to the southwest of Massey and Barnett's wells. In June, Massey and Barnett offered to dispose of Anderson's salt water in the Townsend No. 3 well.

Meanwhile, Cleveland had drilled a well ("Ramsey 3-15 No. 2") on property to the south of and adjacent to the property covered by the Farragut- Massey/Barnett lease. Cleveland inquired with Massey and Barnett concerning the possibility of injecting saltwater from the Ramsey 3-15 No. 2 well into the Townsend No. 3 repository.

Late in 1982, Anderson and Cleveland constructed pipelines connecting the N.G. Stainton No. 1 well and the Ramsey 3-15 No. 2 well to the Townsend No. 3 salt water repository. Massey and Barnett began to dispose of salt water from Anderson's and Cleveland's operations at a charge of twenty cents per barrel.

According to Farragut, an employee of Graham Royalty approached her in May or June of 1986 and offered to pay damages for a spillage from the salt water pipeline. Farragut claims that prior to being approached by Graham Royalty she did not know that Massey and Barnett were accepting salt water from other operations. She avers in her affidavit that Massey and Barnett had misled her to believe that the pipelines carried natural gas.

On April 30, 1987, Farragut filed suit against the appellees. She sought recovery from Massey and Barnett on grounds of trespass, unjust enrichment, fraud and concealment, intentional breach of contract, breach of fiduciary duty and tortious breach of contract. Farragut sought relief from Cleveland and Graham Royalty on grounds of trespass.

The defendants filed a motion for summary judgment in which they asserted that the granting clause in Farragut's lease to Massey and Barnett, along with the release Farragut signed, defeated the plaintiff's claims. Farragut filed a motion for partial summary judgment on grounds that the lease agreement did not provide for the importation of salt water from off the leasehold premises and that the release was void as against public policy. On May 9, 1989, the trial court granted summary judgment for the defendants and denied Farragut's motion.

LAW

I. WHETHER THE LOWER COURT ERRED IN FINDING THE OIL, GAS AND MINERAL LEASE AUTHORIZED DISPOSAL OF SALT WATER PRODUCED OFF THE LEASEHOLD?

The appellees note that the Farragut's lease agreement grants Massey and Barnett the authority to construct and operate facilities for disposing of salt water "produced from the land covered hereby *or any other land adjacent thereto.*" They concede that the lease requires the facilities to be "necessary or useful" to the lessees operations, but argue that disposing of salt water from adjoining properties is both necessary and useful: "useful" in that the proceeds paid by Cleveland and Graham Royalty make Massey's and Barnett's operation more profitable; "necessary" in that reinjecting saltwater produced by other wells extends the useful life of the oil field and thus prevents waste.

***328** The trial court below agreed. In its Findings of Fact and Conclusions of Law, the court found that the lease was "without ambiguity" and "gave the Defendants the right to dispose of salt water, subsurface and surface from lands and adjacent lands to the lease."

[1] The trial court is superficially correct in finding that the lease agreement permits the importation of salt water from adjoining properties. Both the trial court and the appellees neglect to note, however, that the lease permits the practice only where the *lessee's operations* extend to the adjoining properties. The lease clearly states:

> [Lessee may] establish and utilize [salt water disposal facilities] necessary or useful *in lessee's operations in ... producing ... minerals ... from the land covered hereby or any other land adjacent thereto.*

The phrase "adjacent thereto" unambiguously refers to properties from which the *lessee* extracts minerals; it is not syntactically tied to the source of the salt water.

[2] Where the language of a lease is unambiguous, it must be enforced according to its plain meaning. *See* Barnett v. Getty Oil Co., 266 So.2d 581, 586 (Miss.1972) (where lease is clear and unambiguous, Court should look solely to language of instrument and give same effect as written); Wagner v. Mounger, 253 Miss. 83, 90-91, 175 So.2d 145, 147-48 (1965) (where terms of lease are clear and unambiguous, court should not enlarge terms by needless construction). Guided by this principle, an Illinois Court in Gill v. McCollum, 19 Ill.App.3d 402, 311 N.E.2d 741 (Ill.App.Ct.1974)

found that the holder of a mineral lease does not have the right to import salt water from adjacent lands absent an express grant of authority. Professor Kuntz recognizes the same rule:

> The right of the mineral owner to use and occupy the land is restricted to operations for exploring for and extracting minerals from that land. Thus, the land cannot be used ... to dispose of salt water from other land.

1 E. Kuntz, A Treatise on the Law of Oil and Gas, § 3.2 at 87-88 (1987).

Citing *Gill*, Kuntz notes that "[the] grant of the right to inject liquids and gas does not give the lessee the right to use a well on the leased premises for the disposal of salt water from other leases." 4 E. Kuntz, § 50.4(c) (Supp.1989).

[3] Appellees Cleveland and Graham Royalty argue in their brief that "it has been the custom in Mississippi for several operators in a field to dispose of salt water into an existing salt water disposal well whether it was on their lease hold premises or not." In the absence of ambiguity, however, industry customs must bow to the terms of the lease. *See* Barnett, 266 So.2d at 586 (court should not resort to extrinsic aid when construing clear and unambiguous lease); *see also In re Estate of Fike*, 385 Pa.Super. 627, 631, 561 A.2d 1268, 1270 (Pa.Super.Ct.1989) (court may look to evidence of custom and usage only where terms of lease are ambiguous).

The unambiguous lease agreement between Farragut and appellees Massey and Barnett does not authorize the lessees to accept salt water from third parties holding leases on adjoining lands. The trial court's findings to the contrary are erroneous.

II. WHETHER THE LOWER COURT ERRED IN FINDING THAT A RELEASE EXECUTED IN FAVOR OF MASSEY AND BARNETT EXTINGUISHED FARRAGUT'S RIGHT TO RECOVER?

[4] The appellees argue that even if the lease agreement did not give Massey and Barnett the authority to import salt water from third parties on adjacent tracts, the release Farragut executed prevents them from incurring liability. Pursuant to the release, Farragut relinquished all claims against Massey and Barnett relating to "Townsend No. 3 Well, and the establishment of production and the continuous production operations and disposal of salt water on the above set out land." The release further waived "any and all claims against David H. Massey, Mary A. Barnett, and Barnett and Massey covering damages occurring ***329** on the lands set out above." The court below found that the language of the release was unambiguous and that the instrument extinguished Farragut's right to recover against the defendants.

On appeal, the appellees insist that the importation of salt water from the operations of Cleveland and Graham Royalty fall within "the continuous production operations and disposal of salt water on the above set out land." The release "speaks for itself," the appellees maintain. They cite *McCorkle v. Hughes*, 244 So.2d 386 (Miss.1971) for the proposition that

> every person must be presumed to know the law, and in absence of some misrepresentation, or illegal concealment of facts, the person must abide the consequences of his contracts and actions.

Id. at 388 (quoting *Fornea v. Goodyear Yellow Pine*, 181 Miss. 50, 65, 178 So. 914, 918 (1938)).

The trial court's ruling--and the appellees' defense thereof--is misguided. The terms of the release are ambiguous, and the court below should not have construed it without the aid of extrinsic evidence of intent. In *Sumter Lumber Co. v. Skipper*, 183 Miss. 595, 184 So. 296 (1938), this Court stated:

> The rules for the construction of deeds or contracts are designed to ascertain and to follow the actual or probable intention of the parties and are: When the language of the deed or contract is clear, definite, explicit, harmonious in all its provisions, and free from ambiguity throughout, the court looks solely to the language used in the instrument itself, and will give effect to each and all its parts as written. When, however, the language falls short of the qualities above mentioned and resort must be had to extrinsic aid, the court will look to the subject matter embraced therein, to the particular situation of the parties who made the instrument, and to the general situation touching the subject matter, that is to say, to all the conditions surrounding the parties at the time of the execution of the instrument, and to what, as may be fairly assumed, they had in contemplation in respect to all such said surrounding conditions, giving weight also to the future developments thereinabout which were reasonably to be anticipated or expected by them; and when the parties have for some time proceeded with or under the deed or contract, a large measure, and sometimes a controlling measure, of regard will be given to the practical construction which the parties themselves have given it, this on the common sense proposition that actions generally speak even louder than words.

Id., 183 Miss. at 608-09, 184 So. at 298-99, *quoted in*

Brashier v. Toney, 514 So.2d 329, 332 (Miss.1987) *and* *Clark v. Carter*, 351 So.2d 1333, 1335 (Miss.1977).

The release at issue in the case *sub judice* is not "clear, definite, explicit, harmonious in all its provisions, and free from ambiguity throughout." Two clauses contained in the instrument seem to extend the waiver only to surface damages resulting from the drilling and preparation of the Townsend No. 2 and Townsend No. 3 wells while a third appears to extend the waiver to the continuous disposal of salt water. The second paragraph reads:

> WHEREAS, Rosemary T. Farragut and David H. Massey have agreed for *surface damages releases on said land on which there is located the Townsend No. 2 and Townsend No. 3 salt well* ...

(emphasis added).

The third paragraph similarly states:

> WHEREAS, it is the desire of the parties set out herein to settle any and all claims for *surface damages for the location of the Townsend No. 2 and Townsend No. 3 Wells located on above land* ...

(emphasis added).

The fourth paragraph adds the language on which the appellees rely:

> NOW THEREFORE ... the undersigned does hereby release and relinquish any and all claims against David H. Massey, Mary A. Barnett, and Barnett and Massey, resulting from their preparation and the making location for the drilling and continuous operations of the Townsend No. 2 Well and Townsend No. 3 Well, *and the establishment of production* ***330** *and the continuous production operations and disposal of salt water on the above set out land.*

(emphasis added).

The fourth paragraph expresses a much broader waiver than do the preceding two paragraphs. The conflict creates ambiguity. The instrument is also indefinite and unclear concerning the scope of permissible salt water disposal operations. Does the release permit unlimited disposal, or does it permit only the disposal of salt water produced in Massey's and Barnett's operations? This question is crucial to the instant dispute, and the release does not resolve it. Accordingly, the trial court should have looked beyond the document in order to determine the parties' intent.

[5] The circumstances existing when Farragut executed the release indicate that she did not intend a waiver as broad as the appellees assert. At the time, the dispute between Farragut and her lessees focused entirely upon operations occurring within the boundaries of the leasehold property. No third parties were involved. All the salt water flowing into the Townsend No. 3 well came from the other Townsend wells. There is nothing to indicate that Farragut could reasonably have anticipated or contemplated the importation of salt water from the Cleveland well, particularly since the lease agreement did not provide for it. Furthermore, the release must be construed against Massey, the party who drafted it. *See* *Leach v. Tingle*, 586 So.2d 799, 801 (Miss.1991) (ambiguities in contract should be construed against party who drafted the instrument); *see also* *State Farm Mutual Automobile Ins. Co. v. Scitzs*, 394 So.2d 1371, 1372 (Miss.1981).

[6] Even if the release were not ambiguous, it would still not relieve the appellees of liability in the case *sub judice*. According to 17 Am.Jur.2d Contracts § 297 n. 74 (1991): "Clauses limiting liability are given rigid scrutiny by the courts, and will not be enforced unless the limitation is fairly and honestly negotiated and understandingly entered into." Again, the record contains nothing to indicate an understanding with regard to the importation of salt water from third parties on adjoining lands. Moreover, this Court has held on more than one occasion that a party may not use an anticipatory release as a means to escape liability for tortious acts. In *Yazoo & Mississippi Valley Railroad Co. v. Smith*, 90 Miss. 44, 43 So. 611 (1907), a plaintiff landowner had conveyed a right of way to the defendant railroad. The right-of-way conveyance contained the following release: "I do hereby release the said [railroad company] from any and all damages, whether past, present or future, for the construction and operation of its tracks along said street in front of said property." *Id.*, 43 So. at 611. Subsequently, the railroad raised the grade of the street by three feet. The resulting flooding prompted the landowner to file suit.

The trial court determined that the release was immaterial and refused to admit it into evidence. This Court agreed, stating:

> The deed releases all damages arising out of the "construction and operation of its tracks." At that date the road had been constructed and was in operation, and the contract cannot be interpreted to mean, in the use of the word "future," that grades of the street might be elevated, so as to flood the property, without complaint. This would be an unreasonable construction.

Id., 43 So. at 611-12.

Obviously, the Court in *Smith* concluded that the release applied only to damages incident to the normal,

everyday operations of the railroad. Raising the grade of the street was not within the scope of the parties' understanding at the time the right-of-way deed was executed.

The Court similarly refused to liberally construe an anticipatory release in *L & A Contracting Co. v. Hube*, 241 Miss. 710, 133 So.2d 394 (1961). In *Hube*, the plaintiff had executed a right-of-way deed to the Highway Commission for the purposes of road construction. The instrument contained the following language:

> It is further understood and agreed that the consideration herein named is in full payment and settlement of any and all claims or demands for damage accrued, ***331** accruing, or to accrue to the grantors herein, their heirs, assigns, or legal representatives, for or on account of the construction of the proposed highway, change of grade, water damage, and/or any other damage, right or claim whatsoever.

Id., 133 So.2d at 395.

L & A Contracting Co., a subcontractor for the Highway Commission, destroyed a number of pine seedlings on the plaintiff's adjoining property while installing a culvert. When the plaintiff sued for damages, L & A sought protection under the release contained in the right-of-way deed. This Court affirmed a judgment in favor of the plaintiff and held:

> We do not think this release was intended to extend to wilful or grossly negligent damage to the surface of and timber on grantor's adjacent property.... The release covers the normal and necessary public operations of the Commission and its contractors. [Cites omitted]. It was not within the intent of the parties to release the Commission's contractor from tortious acts committed on the grantor's adjacent land either intentionally or through gross negligence.

Id., 133 So.2d at 395-96.

As in *Smith* and *Hube*, the activities of which Farragut complains exceed the scope of the operations contemplated in the release. The release clearly permits Massey and Barnett to dispose of salt water from their own wells. The release cannot be read so broadly, however, as to permit dumping by third parties. The trial court erred in finding that the release foreclosed Farragut's right to proceed against the appellees.

III. WHETHER THE LOWER COURT ERRED IN DENYING FARRAGUT'S MOTION TO STRIKE THE AFFIDAVIT OF DAVID MASSEY AND IN CONSIDERING THE AFFIDAVIT IN DELIBERATING ON THE PARTIES' MOTIONS FOR SUMMARY JUDGMENT?

[7] Attached to the defendants' motion for summary judgment was an affidavit by David Massey. In the affidavit, Massey averred that

> Mrs. Farragut was informed that salt water was being disposed of from adjacent wells and knew that the pipeline came across her brother's land and not hers.... Mrs. Farragut never objected to my operations on her land, and even leased the deep rights to me in February of 1987. This lease has the same language for disposal of salt water as the lease taken in 1980.

In essence, Massey alleged that Farragut knowingly consented to the disposal of salt water from the Ramsey 3-15 No. 2 well.

According to Miss.R.Civ.Pro. Rule 56(e):

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence and shall show affirmatively that the affiant is competent to testify to the matter stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith.

Massey's affidavit fails to meet the requirements of Rule 56(e) in at least two respects. First, it merely states that Farragut "was informed" and "knew" about the imported salt water. Nowhere does it indicate that Massey had personal knowledge of these alleged facts. Secondly, Massey failed to attach copies of the documents to which he referred in the affidavit. In *Briscoe's Foodland v. Capital Associates*, 502 So.2d 619, 622 (Miss.1986), this Court found a supporting affidavit to be worthless for the same two reasons. The lower court thus erred in denying Farragut's motion to strike Massey's affidavit.

IV. WHETHER THE LOWER COURT ERRED IN GRANTING SUMMARY JUDGMENT TO DEFENDANTS?

Miss.R.Civ.Pro. Rule 56(c) states that summary judgment is proper only where "there is no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law." The movant bears the burden of proof. *Pargo v. Electric Furnace Co.*, 498 So.2d 833, 835 (Miss.1986); ***332***Shaw v. Burchfield*, 481 So.2d 247, 252 (Miss.1985). In the instant case, the defendants' motion for summary judgment is supported only by a defective affidavit along with a lease agreement and a release, neither of

which says what the appellees interpret it to say. The lower court should not have granted the defendants' motion for summary judgment.

V. WHETHER CONSENT BY THE POSSESSOR OR PROPERTY CREATES PRIVILEGE OR LICENSE TO ENTER?

[8][9] Cleveland and GrahamRoyalty argue that they should be absolved of liability for trespass since Massey and Barnett gave them permission to dispose of salt water in the Townsend No. 3 well. They quote 75 Am.Jur.2d Trespass § 341 which states: "Consent or license may be a defense to an action of trespass, provided it is granted by one in possession, or entitled to possession, of the premises, even though given under mutual mistake of fact." Indeed, this Court has held that where a tenant in possession grants permission or license for a third party to enter, the owner cannot prevail in an action for trespass against the third party. *See* Hicks v. Mississippi Lumber Co., 95 Miss. 353, 48 So. 624, 625 (1909); *Bollinger-Franklin Lumber Co. v. Tullos*, 124 Miss. 855, 87 So. 486, 486-87 (1921).

The third party's right to rely on a third party's permission to enter, however, extends no further than the third party's possessory interest in the land. *See generally,* Restatement (Second) of Torts § 164 (1965) (one who enters land upon consent by a non-possessor is liable for trespass); 87 C.J.S. Trespass § 51 (1954) (permission to enter given by person having no authority to grant it is no defense in action for trespass). In *Grisham v. Hinton*, 490 So.2d 1201, 1205 (Miss.1986), we held that when a party comes upon another's property, he incurs a duty "to take whatever precaution and safeguards as are reasonably necessary under the facts of that case to assure himself that he has the lawful authority to do so."

We hold that a genuine issue of material fact remains unresolved regarding whether the entry of Cleveland and Graham upon Farragut's land exceeded the bounds of Massey's and Barnett's possessory interest. This being so, we find that the trial court erred in granting summary judgment in favor of Cleveland and Graham Royalty.

CONCLUSION

Contrary to the court's finding, the mineral lease that Farragut granted to Massey and Barnett did not authorize the lessees to dispose of salt water from third-party wells on adjacent tracts. Further, the release Farragut signed cannot reasonably be construed as permitting Massey and Barnett to dispose of salt water from third parties in addition to their own. The trial court, therefore, should not have found that the defendants were entitled to judgment as a matter of law.

Although Massey alleged in an affidavit that Farragut knew about and consented to the disposal of salt water from adjoining lands, the affidavit was defective and thus immaterial to the defendants' motion for summary judgment. The defendants offered nothing else to support their motion, so they clearly failed to establish the absence of a genuine issue of material fact.

Cleveland and Graham Royalty claim that they cannot be held liable for trespass since Massey and Barnett granted them permission to transmit salt water across the leasehold property. The law on which Cleveland and Graham Royalty rely is sound, but a question of fact exists concerning the extent of Massey's and Barnett's possessory interest and, consequently, concerning whether Cleveland and Graham Royalty could rightfully rely on Massey's and Barnett's grant of permission to enter. The grant of summary judgment in favor of Cleveland and Graham Royalty was thus erroneous.

We hold that the trial court erred in granting summary judgment to the defendants, and we remand for proceedings consistent with this opinion.

REVERSED AND REMANDED.

***333** ROY NOBLE LEE, C.J., HAWKINS and DAN M. LEE, P.JJ., and PRATHER, ROBERTSON, SULLIVAN, PITTMAN and BANKS, JJ., concur.

612 So.2d 325

END OF DOCUMENT

NEW MEXICO ENERGY, MINERALS and NATURAL RESOURCES DEPARTMENT

GARY E. JOHNSON
Governor
BETTY RIVERA
Cabinet Secretary

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November 25, 2002

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Re: *Case No. 12905, de novo,* Application of Pronghorn Management Corp. for Salt Water Disposal, Lea County, New Mexico

Dear Counsel,

This matter is to be heard *de novo* by the New Mexico Oil Conservation Commission pursuant to NMSA 1978, § 70-2-13. Ordinarily, the matter would be docketed for hearing during the Commission's December 13 meeting. I am sure you are aware that the practice of the Commission in recent years has been to hear a contested case in one month and issue an order during the meeting the following month. This year it is possible that one or more members of the present Commission may not serve during the next administration; were this case heard during the December hearing, a different Commission could be called upon to decide the matter in January. Therefore, the Chair has decided that no contested matters will be heard on December 13. Thus, this case will be placed on the docket for the Commission's first meeting in January 2003. The date for that meeting has not yet been set.

Once the hearing is scheduled, please provide a copy of each exhibit that is to be offered to the Commission Secretary no later than one week prior to the date set for hearing. If a continuance results in the matter being set in a subsequent month, exhibits should be submitted no later than one week prior to the re-scheduled hearing. It would also helpful if you could provide a more detailed statement of your positions in the pre-hearing statement than is customary. Please provide the pre-hearing statement no later than one week prior to the scheduled hearing as well. Thank you in advance for your cooperation on this issue.

With respect to the exhibits, current practice varies concerning the number of copies submitted to the Commission Secretary and during the hearing. During at least one recent hearing, not enough sets of exhibits were submitted so that each Commissioner, Commission counsel and the Court Reporter had a complete set of exhibits. Please provide one complete set of exhibits for each Commissioner, Commission counsel, and the Court Reporter (5 sets). If you wish, the set used for witnesses to testify at the witness table from may become the Court Reporter's set.

As always, if you have any questions, please do not hesitate to give me a call at 476-3451.

Sincerely,

Stephen C. Ross
Assistant General Counsel

Cc: Florene Davidson, Commission Secretary

NEW MEXICO ENERGY, MINERALS and NATURAL RESOURCES DEPARTMENT

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