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ferent question"[49] than the "specific portion" determined by income rights. This statement hardly removes the uncertainty as to what constitutes a "specific portion." This question should be settled quickly, and preferably settled by a ruling that the widow's appointment power cannot be stated in fixed terms.

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Oil and Gas Lessee's Right To Use Surface Owner's Fresh Water Supply for Waterflooding

Waterflooding, as a device for secondary recovery and pressure maintenance operations on oil leases, has become a fairly widespread and significant technique in recent years.[1] Not only is the increased production obtained by the process of value to the lessee and the royalty owner, but the public in general also benefits because less oil is left unrecoverable in the ground. However, these benefits do not always flow without their price. Although most waterflooding operations now conducted in Texas utilize salt water to increase pressure in the producing reservoir, technical problems in some areas require or encourage oil companies to inject fresh water rather than salt water in their waterflood projects. Where fresh water is abundant, its use for waterflooding creates few problems; but in many areas, such as West Texas, fresh water is a scarce, depleting asset, and waterflooding operations only add another burden to a water supply already overburdened by irrigation, municipal, and other demands.

I. Sun Oil Co. v. Whitaker[2]

In 1967 the first Texas case dealing with an oil company's right to use fresh water for waterflooding reached the appellate courts. The dispute arose on a tract of land in Hockley County which Sun Oil Company had leased from L. D. Gann in 1947. The defendant, Earnest Whitaker, owned title to the surface of this tract through a 1948 conveyance to him of Gann's retained title to the surface. Since the late 1940's the tract has been producing oil, but in 1965 Sun decided to begin waterflooding operations. The Texas Railroad Commission granted a permit for this purpose, specifically authorizing Sun to inject fresh water from the Ogallala formation.[3] The Ogallala, the only source of fresh water on the land, also con-

[49] Northeastern Pa. Nat'l Bank & Trust Co. v. United States, 387 U.S. 213, 227 n.2 (1967).

[1] Oil in its normal state under the ground is under pressure from some source, usually gas or salt water. When the oil reservoir is tapped by a well, this pressure pushes the oil toward the hole. Invariably, some of this pressure is lost as oil is produced, and after a period of time the pressure in the reservoir becomes so low that the oil is no longer pushed to the well. In order to prevent this decline in pressure, oil producers pump some substance into the reservoir from other wells. If this operation is conducted carefully, the remaining oil in the reservoir will be pushed ahead of the injected substance toward the producing well. "Waterflooding" refers to the injection of fresh or salt water for these operations, although gas is also suitable. For a layman's discussion of the engineering aspects of oil production, see Interstate Oil Compact Comm'n, Oil and Gas Production (1951).

[2] 412 S.W.2d 680 (Tex. Civ. App. 1967), *aff'd on other grounds*, 424 S.W.2d 216 (Tex. 1968). *See also* Flittie, *Oil and Gas, Annual Survey of Texas Law*, 22 Sw. L.J. 106, 107 (1968).

[3] Water in the Ogallala formation is subject to depletion just like oil and gas. *See* United States v. Shurbet, 347 F.2d 103 (5th Cir. 1965).

stituted Whitaker's water source for the irrigated farm which he has been operating on the surface of the tract. Objecting that Sun would remove so much of the available water that his land would be permanently damaged, Whitaker threatened to interfere with the waterflooding operations. Contending that this use of water was permitted under the free use clause in the lease,[4] Sun sought both temporary and permanent injunctions against the interference. Whitaker counterclaimed for an injunction against use of his water for waterflooding, and the High Plains Underground Water Conservation District No. 1, within which the land is located, intervened.

Prior to trial on Sun's request for a temporary injunction, the parties agreed that issue would not be joined on the defense of waste of underground water raised both in Whitaker's answer and in the water district's plea in intervention. Thus the only issue actually litigated at the trial and argued on appeal was the right of Sun to use fresh water under the free use clause in the lease. After several days of testimony the district court denied the request for a temporary injunction, and Sun appealed to the Amarillo court of civil appeals.[5] That court affirmed, holding that the free use clause was not intended by the parties to the lease to permit the lessee free use of fresh water for waterflooding.[6]

Sun appealed to the Texas Supreme Court, which also affirmed the trial court,[7] but the court rested its decision "on a ground neither urged on appeal by the appellee-respondent nor noticed by the court of civil appeals."[8]

II. Lessee's Water Rights

In deciding *Sun Oil Co. v. Whitaker*[9] the supreme court carefully avoided the substantive issues in the case, but those issues may pose great significance for both oil companies and surface owners. This significance can best be seen by an examination of the relationship between the oil and gas

[4] The free-use clause provides: "Lessee shall have free use of oil, gas, coal, wood and water from said land except water from lessor's wells for all operations hereunder."

[5] Sun Oil Co. v. Whitaker, 412 S.W.2d 680 (Tex. Civ. App. 1967).

[6] "To hold the phrase under consideration is not subject to more than one interpretation, we would be compelled to hold as a matter of law that the lessee is entitled to free water for waterflooding as an operation under its lease rights. We think such a holding would be untenable." *Id.* at 683.

[7] Sun Oil Co. v. Whitaker, 424 S.W.2d 216 (Tex. 1968).

[8] *Id.* at 218. Noting that the appeal was from a denial of a temporary injunction, the supreme court reviewed the requirements for obtaining such an order and the scope of review given by appellate courts. To obtain this form of relief, the litigant must show at the hearing a probable right to a permanent injunction when a full trial is held on the merits of the whole case. Transport Co. of Texas v. Robertson Transports, Inc., 152 Tex. 551, 261 S.W.2d 549 (1953). In other words, the litigant, though he need not show he will ultimately prevail in the litigation, must at least present evidence tending to support a right of recovery in him. Camp v. Shannon, 162 Tex. 515, 348 S.W.2d 517 (1961).

In *Whitaker* the supreme court held that the probable right of an applicant to an injunction is to be determined upon a consideration of all the defenses raised by the pleadings. 424 S.W.2d at 219. When the parties stipulated that the defense of waste would not be raised in the hearing for a temporary injunction, Sun gave up an element essential to its showing of a probable right to an injunction. Otherwise, the court concluded, litigants could use the temporary injunction as a vehicle for piecemeal trial of the action, and any opinion rendered would be only an advisory opinion. *Id.*

[9] 424 S.W.2d 216 (Tex. 1968).

lessee and three different groups having interests in underground water: (1) the relationship between the lessee and adjoining landowners; (2) the relationship between the lessee and the surface owner of the tract subject to the lessee's mineral lease; and (3) the relationship between the lessee and water conservation districts.[10]

Lessee vs. Adjoining Landowners. When a dispute over water rights arises between a mineral lessee and an adjoining landowner, the dispute should involve the usual rules applicable to water rights between adjoining landowners. This was the approach adopted by a Louisiana court in *Adams v. Grigsby*,[11] the only case to raise this issue. In that case adjoining landowners sought to enjoin a lessee from using a limited supply of fresh underground water for waterflooding. Although his use of this water had actually damaged some of the adjoining landowners' wells, the court ruled that a landowner, including the lessee, has a right to withdraw all the underground water which he can capture from beneath his land. In Texas this same rule on underground water prevails.[12] Therefore, there is no reason to expect a Texas court to reach a different result from Louisiana if a dispute should arise between an oil and gas lessee and an *adjoining* landowner.

Lessee vs. Surface Owner. When the dispute over use of water is between a lessee and the owner of the surface in the same tract of land, the question becomes slightly different, for the lessee's water rights are only easements in the surface estate.[13] When an oil and gas lease is executed, the lessor, though departing with title to his minerals, usually retains title to the surface.[14] But as an incident of his ownership the lessee gets the right to use as much of the surface estate as is reasonably necessary for exploitation of the minerals.[15] In exercising his rights under these easements, the lessee is not liable to the surface owner unless the latter can show either that the use was unreasonable or was conducted negligently.[16]

This reasoning has led to some fairly harsh cases in Texas. When a sur-

[10] These districts are organized under TEX. REV. CIV. STAT. ANN. art. 7880-3c (1954).

[11] 152 So. 2d 619 (La. Ct. App.), *error ref.*, 244 La. 662, 153 So. 2d 880 (1963), *noted in* 24 LA. L. REV. 428 (1964).

[12] City of Corpus Christi v. City of Pleasanton, 154 Tex. 289, 276 S.W.2d 798 (1955); Houston & T.C. Ry. v. East, 98 Tex. 146, 81 S.W. 279 (1904); Farb v. Theis, 250 S.W. 290 (Tex. Civ. App. 1923).

[13] There is no clear authority for this statement, for the courts like to dodge the question of who owns the fee in underground water in this context. *E.g.*, Stradley v. Magnolia Petroleum Co., 155 S.W.2d 649 (Tex. Civ. App. 1941) *error ref.* However, the view that the lessee's water rights are only easements seems generally accepted. *See* 1 H. WILLIAMS & C. MEYERS, OIL AND GAS LAW § 219.6 (1959).

[14] Harris v. Currie, 142 Tex. 93, 176 S.W.2d 302 (1943); Joyner v. R.H. Dearing & Sons, 112 S.W.2d 1109 (Tex. Civ. App. 1937).

[15] Warren Petroleum Corp. v. Monzingo, 157 Tex. 479, 304 S.W.2d 362 (1957); Warren Petroleum Corp. v. Martin, 153 Tex. 465, 271 S.W.2d 410 (1954); Harris v. Currie, 142 Tex. 93, 176 S.W.2d 302 (1943); 1 H. WILLIAMS & C. MEYERS, OIL AND GAS LAW § 218.7 (1959). *See generally* Browder, *The Dominant Oil and Gas Estate—Master or Servant of the Servient Estate*, 17 SW. L.J. 25 (1963); Sellers, *How Dominant is the Dominant Estate?*, SW. LEGAL FOUNDATION 13TH OIL & GAS INST. 377 (1962); Comment, *Land Uses Permitted an Oil and Gas Lessee*, 37 TEXAS L. REV. 889 (1959).

[16] Scurlock Oil Co. v. Roberts, 370 S.W.2d 755 (Tex. Civ. App. 1963); Finder v. Stanford, 351 S.W.2d 289 (Tex. Civ. App. 1961); Weaver v. Reed, 303 S.W.2d 808 (Tex. Civ. App. 1957); Robinson Drilling Co. v. Moses, 256 S.W.2d 650 (Tex. Civ. App. 1953).

face owner purchases land subject to a mineral lease, he is charged with knowledge of the extensive burden which the lessee may impose on the surface.[17] Texas courts, therefore, have held that the surface owner could not complain when the surface subsided as a result of sulfur mining[18] or when the lessee located a well in the surface owner's front yard, a boiler on one side of his house, and a slush pit on the other.[19]

In a recent case[20] the Kentucky Court of Appeals refused to impose this harsh rule. In that case the lessee wanted to begin waterflood operations on a lease executed in 1917,[21] but the surface owner sought an injunction against this operation because it would cause substantial damage to his estate. In addition to the surface, he owned a seam of coal in the land. The lessee's injection wells for the waterflood would run through this coal, forcing the surface owner to leave a large block of his coal in the land to prevent injury to the well bores. Although there was no dispute over the substance to be injected into these wells, the surface owner contended that the lessee should not be permitted to increase the number of wells drilled on his land through the use of the waterflooding technique which was unknown when the lease was executed. While the court refused to enjoin the waterflooding operation, it did award the surface owner damages for the injury to his estate. The case holds that if the lessee employs a new method of withdrawing oil, not in the minds of the parties when the lease was made, and if that process will destroy or substantially damage the landowner's estate, then "principles of justice and humanity" require that reasonable compensation be paid for the damage.[22]

In *Whitaker* the court of civil appeals sought to apply similar reasoning to the use of fresh water for waterflooding. Normally, the lessee gets the right to use water found on the premises as an incident of his mineral ownership.[23] This includes the right to use that amount of water which is reasonably necessary for his operations on the lease.[24] Most modern leases, however, make express provision for the lessee's water rights and usually place some restrictions on them. While these restrictions normally prohibit the lessee from taking water from the lessor's wells,[25] there is a question whether they restrict the *quantity* of water which the lessee may withdraw. In a recent Texas case[26] involving a lease containing such re-

[17] Robinson Drilling Co. v. Moses, 256 S.W.2d 650 (Tex. Civ. App. 1953); Grimes v. Goodman Drilling Co., 216 S.W. 202 (Tex. Civ. App. 1919) *error dismissed*; *see* Wall v. Shell Oil Co., 209 Cal. App. 2d 504, 25 Cal. Rptr. 908 (Dist. Ct. App. 1962).

[18] Kenny v. Texas Gulf Sulphur Co., 351 S.W.2d 612 (Tex. Civ. App. 1961) *error ref.*

[19] Grimes v. Goodman Drilling Co., 216 S.W. 202 (Tex. Civ. App. 1919) *error dismissed.*

[20] Wiser Oil Co. v. Conley, 346 S.W.2d 718 (Ky. 1960).

[21] The language of this lease is quite different from that in the Whitaker lease and in Texas lease forms.

[22] Wiser Oil Co. v. Conley, 346 S.W.2d 718, 721 (Ky. 1960); *cf.* Benton v. U.S. Manganese Corp., 229 Ark. 181, 313 S.W.2d 839 (1958) (surface owner should receive damages for the "complete destruction" of the surface by open pit mining, though the opening of pits on the surface was contemplated).

[23] Stradley v. Magnolia Petroleum Co., 155 S.W.2d 649 (Tex. Civ. App. 1941) *error ref.*

[24] Russell v. Texas Co., 238 F.2d 636 (9th Cir. 1956), *cert. denied*, 354 U.S. 938 (1957).

[25] The clause in the Whitaker lease is typical of these restrictions. Note 4 *supra.*

[26] Carroll v. Roger Lacy, Inc., 402 S.W.2d 307 (Tex. Civ. App. 1966) *error ref. n.r.e.*; *accord*, Wyckoff v. Brown, 135 Kan. 467, 11 P.2d 720 (1932). *Contra*, Arkansas La. Gas Co. v. Wood, 240 Ark. 948, 403 S.W.2d 54 (1966); Arnold v. Adams, 147 Okla. 57, 294 P. 142 (1930).

strictions, the lessee was permitted to use *all* of the water in a pond for his operations. The court reasoned that the lease restriction prohibited the lessee from taking water from the lessor's wells but did not cover water from stock ponds.

When a lessee seeks to use fresh water for waterflooding, the quantity he is entitled to withdraw becomes important, for waterflooding requires fairly large amounts of water. Standard lease forms now expressly authorize the lessee to use water found on the premises for this purpose,[27] but the leases executed before waterflooding was known contain no express provision for this use. Under the approach taken by the court of civil appeals in *Whitaker* a lessee may not utilize fresh water for waterflooding on these older leases over the surface owner's objection. Although the exact theory adopted is not altogether clear, the Amarillo court apparently based its decision on findings that this use of fresh water was not contemplated by the parties when the lease was executed and that it will involve the substantial destruction of the surface estate.[28]

The major issue before the court of civil appeals in *Whitaker* was interpretation of the free use clause in the lease. That court held that the clause became ambiguous when applied to the subject matter of the lease, thus justifying admission of parol evidence of the parties' intention when they executed the lease.[29] Since Sun's lessor, L. D. Gann, was neither a party nor a witness at the trial, there was no direct evidence of the parties' intention. Actually, what the court considered as indicative of that intention were the circumstances surrounding execution of the lease. Based on evidence that waterflooding was not being used in West Texas when the lease was executed, the court concluded that waterflooding was not contemplated by the parties.[30] From this they inferred that Gann would not have intended to grant a right to use fresh water for this purpose if he had known of the potential damage to the surface estate which it would involve.

The approach adopted by the Amarillo court probably must be viewed as a departure from the usual approach taken by Texas courts when asked to determine the lessee's surface rights. Because the lessee receives by operation of law a body of implied rights in the surface, the language contained in the lease agreement does not necessarily encompass all of the rights which pass to the lessee on execution of the lease.[31] While that language may always expand or contract the rights which would be implied in law, the absence of language expressly granting certain rights does not preclude the lessee from exercising those rights. Nor does it seem that language in the lease may be relied on as restricting those rights unless it does so expressly. Silence in the lease on a particular use, therefore,

[27] This fact indicates the limited nature of the problem presented by *Whitaker*. If the lease expressly authorizes the lessee to use water for waterflooding, there should be no question over whether the lessee may use water for this purpose.

[28] Sun Oil Co. v. Whitaker, 412 S.W.2d 680, 684 (Tex. Civ. App. 1967). *See* discussion accompanying note 6 *supra*. Note the similarity of this holding with that of Wiser Oil Co. v. Conley, 346 S.W.2d 718 (Ky. 1960), which the court discussed. Note 20 *supra*.

[29] Sun Oil Co. v. Whitaker, 412 S.W.2d 680, 682 (Tex. Civ. App. 1967).

[30] *Id.* at 684.

[31] *E.g.*, Joyner v. R.H. Dearing & Sons, 112 S.W.2d 1109 (Tex. Civ. App. 1939); *see* cases cited note 15 *supra*.

means only that the inquiry is shifted to whether the use is one of those reasonably necessary uses permitted the lessee by virtue of his ownership of the dominant estate in the land. Thus in *Whitaker* the court's interpretation that the free use clause was not intended by the parties to permit use of fresh water for waterflooding did not dispose of the entire case. Absent a finding that the free use clause in some way *prohibited* the lessee from using water for this purpose, the court still should have considered whether that use was reasonably necessary for exploitation of the minerals.

In answering this latter question, the issue for the court would be whether the use of a technique unknown when the lease was executed will be permitted when that technique will cause substantial damage to the surface estate. There is already a fairly well-established group of cases in which the lessee has been permitted to use techniques unknown when the lease was executed.[32] Included in this group are cases permitting the lessee to waterflood,[33] but none of the cases permitting the unknown uses has raised the question of substantial damage to the surface.[34] The presence of this additional factor may require a somewhat different result. The usual rules permitting the lessee to cause damage to the surface by his operations grew out of situations in which the lessee was seeking to use ordinary techniques which the lessor could expect that the lessee would need to utilize when the lease was executed.[35] When the damage stems from an unknown use, the wisdom of applying the same rule becomes less apparent. Therefore, it might be somewhat more equitable to conclude as a matter of law that the usual rule on reasonably necessary uses should not apply to unknown uses which will substantially damage or destroy the surface estate. Ultimately, this reasoning comes down to a question of policy: whether the use to be made of the surface possesses greater value to the community than the full exploitation of the underground minerals.

The strongest case for applying such a principle would be one in which the lessor's own enjoyment of the surface would be impaired by the new technique. In *Whitaker*, however, the situation is somewhat different. The dispute is between the lessee and a subsequent purchaser of the surface. The latter took his title to the surface subject to the mineral lease and

[32] Yates v. Gulf Oil Corp., 182 F.2d 286 (5th Cir. 1950) (geophysical prospecting); Utilities Prod. Corp. v. Carter Oil Co., 72 F.2d 655 (10th Cir. 1934) (repressuring with gas); Armstrong v. Skelly Oil Co., 55 F.2d 1066 (5th Cir. 1932) (case no. 6406) (repressuring with casinghead gas).

[33] Tidewater Oil Co. v. Penix, 223 F. Supp. 215 (E.D. Okla. 1963); Holt v. Southwest Antioch Sand Unit, Fifth Enlarged, 292 P.2d 998 (Okla. 1955) (use of salt water for waterflooding); Miller v. Crown Central Petroleum Corp., 309 S.W.2d 876 (Tex. Civ. App. 1958) (unitized waterflood); 1 H. WILLIAMS & C. MEYERS, *supra* note 15, at § 218.5.

[34] *E.g.*, Tidewater Oil Co. v. Penix, 223 F. Supp. 215 (E.D. Okla. 1963). The lessee in this case sought to waterflood a lease executed in 1912. The court found that this process was not in contemplation of the parties when the lease was executed, but they still permitted the lessee to waterflood. The court said, "[T]he Lessee not only had a right, but had a duty, to waterflood the premises for the benefit of the mineral owners should it be determined by a prudent operator to be profitable." *Id.* at 217. It should be noted, however, that no damage to the surface estate was involved in this waterflood, and the surface owners acquired their interest in the land in 1956, when waterflooding was already a widely-used technique.

[35] *See* Grimes v. Goodman Drilling Co., 216 S.W. 209 (Tex. Civ. App. 1919) *error dismissed* (surface owner cannot complain of conditions which are "usual and customary" during drilling); *cf.* Wiser Oil Co. v. Conley, 346 S.W.2d 718 (Ky. 1960) (distinguishing damage of "an anticipatory character" from that caused by an unknown use); cases cited note 15 *supra*.

charged with knowledge of the extensive burden which the lessee could impose on his estate. As already noted,[36] Texas courts have not been overly concerned with the well-being of these surface owners, and it may not be desirable to depart from that approach in this case. It seems clear that Whitaker could not complain if Sun sought to cause the complete destruction of his surface estate through the reasonably necessary use of a technique which was *known* when the lease was executed. (*E.g.*, if Sun found sulfur under the land, it could mine for it even if the surface subsided as a result.)[37] Therefore, if use of fresh water for waterflooding is a reasonably necessary use of the surface estate, the surface owner should not be entitled to prohibit the lessee from making that use by asserting that it was not contemplated, for the surface owner is charged with contemplation of burdens of equal magnitude from other uses.

This reasoning does not mean that the lessee may impose on the surface any burden he wishes. Many cases dealing with the lessee's surface rights state that both lessor and lessee must exercise their rights with due regard for those of the other.[38] This concept appears to be no different from the doctrine that a lessee may make any use of the surface as long as it is reasonably necessary for exploitation of the minerals and he is not negligent in its use.[39] A slight change in emphasis, however, might lead a court to conclude that, in some uses, a lessee may not be exercising his rights with due regard for those of the surface owner, even though those uses are reasonably necessary for exploitation of the minerals. This change would be essentially a shift in the viewpoint from which the lessee's rights are judged. Under the "reasonably necessary" idea, the viewpoint is that of the lessee determining what he needs to do to remove the minerals. To determine what rights the lessee should exercise under the somewhat different approach suggested here, the courts would balance the competing rights of the two owners.

Lessee vs. Water District. The final relationship to be considered here is that between the lessee and water conservation districts organized under article 7880-3c.[40] When a tract of land comes within one of these districts, the landowner's right to withdraw underground water becomes subject to the water district's regulations. Therefore, the initial question is whether an oil and gas lessee's waterflooding operations may be regulated by a water district. Article 7880-3c neither expressly includes nor excludes oil and gas lessees from the rules and regulations of water districts, but the statute does not purport to govern all uses of underground water.[41] It provides, for example, that water district permits are not to be required for the drilling or producing of water supply wells for water injection pur-

[36] *See* text accompanying note 17 *supra.*

[37] *See* text accompanying note 18 *supra.*

[38] General Crude Oil Co. v. Aiken, 162 Tex. 104, 344 S.W.2d 668 (1961); Warren Petroleum Corp. v. Martin, 153 Tex. 465, 271 S.W.2d 410 (1954); *cf.* Brown v. Lundell, 162 Tex. 84, 344 S.W.2d 863 (1961).

[39] *See* text accompanying note 15 *supra.*

[40] TEX. REV. CIV. STAT. ANN. art. 7880-3c (1954).

[41] *See id.* art. 7880-3c D.

poses.[42] One inference from this provision is that the legislature intended to exempt waterflooding operations from control by the water districts. If so, the water district's rules and regulations on waste are irrelevant to the lessee's right to waterflood, although he probably is subject to technical provisions designed to protect underground water from pollution and negligent escape.[43]

If, however, it is assumed that water used for waterflooding is subject to regulation by the water districts, there is still the question of whether waterflooding constitutes waste, as defined by article 7880-3c. The statutory definition of waste includes the withdrawal of underground water when the water is not used for a beneficial purpose.[44] Exploring for, producing, handling, and treating oil and gas, however, are defined as beneficial purposes,[45] so the use of underground water for purposes such as waterflooding would seem to fall within the "beneficial purpose" category under the statute. The statute also defines waste as "the escape of underground water from one underground water reservoir to any other reservoir not containing underground water."[46] Whitaker and the water district alleged in their pleadings that Sun would be committing waste under this provision when it injected water from the Ogallala formation, an underground water reservoir, into its oil-producing formation. Although the statute does not define "escape," a reasonable inference might be that the legislature did not intend for its definition of waste to be construed in this manner. "Escape" in this context suggests a migration of water between reservoirs caused by someone's negligence in opening a connection between the strata. It is hard to see why the legislature would have used the word if they meant to include intentional operations designed to effectuate what would otherwise be a beneficial purpose.[47]

III. Conclusion

The supreme court, in resting the *Whitaker* decision on procedural grounds, probably was trying to avoid deciding the substantive issues in the case. This approach, however, may have been a desirable one in this situation. When finally determined, the case will affect the rights of many persons other than the parties to the lawsuit. Since the language in the Whitaker lease is virtually identical with the language in a great many other leases across Texas, the construction adopted by the court in this case will serve as precedent in construing those leases. Also, if the court should determine that waterflooding constitutes waste under article 7880-3c, no leases located within underground water conservation districts could be flooded with fresh water without permission from the water district. In

[42] *Id.* art. 7880-3c D(4)(a) (Supp. 1967).
[43] *Id.* art. 7880-3c D(4)(c) (1954).
[44] *Id.* art. 7880-3c A(6)(b).
[45] *Id.* art. 7880-3c A(7).
[46] *Id.* art. 7880-3c A(6)(c).
[47] In other words, the statutory definition of waste seems to apply to two different things. First, it protects against the loss of underground water through negligence ("escape"). Secondly, it protects against intentional uses of underground water when those uses are not deemed "beneficial." *Id.* art. 7880-3c A.

Whitaker the court did not have complete information on the effect of such a determination, and it was probably correct in refusing to reach the substantive issues without that information. Particularly, the testimony in the trial court had not developed fully the complex set of hydrological facts involved. Since the case is one of first impression, the ultimate decision probably will rest largely on policy grounds, and a full understanding of whose water is involved and how much will be used is essential to a wise decision.

Since the case must now go back to the district court for a full trial, one can only speculate on the ultimate outcome. The fact that the dispute arose in the first place, however, suggests some needed changes in oil and gas lease forms. From the standpoint of the oil companies the case suggests that leases should provide for use of techniques unknown when the lease is executed.[48] In addition, a decision for Whitaker would indicate that the lessee's rights in the surface are not so broad as past cases suggest, and all oil companies, not just those seeking to use fresh water for waterflooding, should re-examine their attitudes toward surface uses. In particular, these rights should be considered from the standpoint of how much of the surface estate will be needed by the lessee for his operations.

The same consideration is applicable to the lessor. From his standpoint the case indicates what should already be clear: an oil company lease form should not be signed without giving some thought to the surface rights being surrendered. Though most forms are not *too* one-sided in their terms, the oil companies are concerned with insuring that they have all surface rights they will need, not with protecting the lessor against damage to his retained estate. The mere fact that a form contains some restrictions on the lessee's surface rights should not delude the lessor into thinking that those restrictions necessarily encompass all situations in which his enjoyment of the surface will conflict with the lessee's operations. In water rights provisions especially, the lessor should consider his own needs for water and should insist that the lease restrictions control the quantity of water to be removed as well as the location from which the lessee may remove it.

Rufus S. Scott

Refusal To Settle Claim Below Policy Limits — Insurer's Excess Liability — Damages for Mental Suffering

An elderly widow owned an apartment building with general liability insurance coverage of $10,000. One of her tenants suffered physical injuries and developed a severe psychosis after a stairway tread gave way causing the tenant to fall through the opening up to her waist. A suit for

[48] There is a possibility that this need may be even more acute on leases being executed today than it was on older ones. Modern lease forms attempt to make express provision for all surface uses which the lessee knows about. If a case like *Whitaker* should arise in connection with some use not expressly permitted in one of these more modern forms, the court might fall back on the concept of *expressio unis est exclusio alterius*: that all surface uses not expressly granted are excluded by implication.