EXHIBIT(s) FOR ORDER NO(s).

1 - 149

_____ - _____

_____ - _____

_____ - _____

BEFORE THE OIL AND GAS CONSERVATION COMMISSION OF THE STATE OF COLORADO

IN THE MATTER OF THE PROMULGATION AND ESTABLISHMENT OF FIELD RULES TO GOVERN OPERATIONS IN THE JOHNSON'S CORNER FIELD, LARIMER COUNTY, COLORADO	)	**CAUSE NO. 1**
	)	**DOCKET NO. 1003-GA-06**

MAGPIE'S EXHIBIT LIST ORIGINAL

EXHIBITS

A. State Patent with Oil and Gas Reservation

B. On-ground photos from November 30, 2009 survey

C. Outline Development Plat for the SE/4SW/4 of Section 36

D. Redacted Surface Use Agreement between Magpie Operating, Inc. and Evelyn Betz Trust covering the E/2SE/4 of Section 36.

E. Colorado Reasonable Accommodation Statute: COLO. REV. STAT. 34-60-127 (2009)

F. *Gerrity Oil & Gas Corporation v. Magness*, 946 P.2d 913 (Colo. 1997)

G. *Amoco Production Company v. Thunderhead Investments, Inc.*, 235 F.Supp. 1163 (D. Colo. 2002)

H. *Zeiler Farms, Inc. v. Anadarko E&P Company, LP*, 2009 WL 890716 (D. Colo. 2009)

I. Deposition excerpts from Laura "Wendy" Chase

J. Magpie's March 12, 2010 Position Statement

K. Magpie's March 17, 2010 Letter in Response to Mr. Barber, Ms. Chase, and Mr. Sutak's March 17, 2010 Letter

A

STATE OF COLORADO

Patent No. 3104

To all unto whom these Presents shall come Greeting:

WHEREAS, W. S. Redabaugh of the County of Larimer and State of Colorado, in accordance with the provisions of the acts of the General Assembly of the State of Colorado, approved and in force at the time of the purchase of the land herein designated and described, and at the time of the execution of this conveyance, has made full payment as appears from the records of the State Board of Land Commissioners, of and for the following described real estate, lying and situate in the County of Larimer and State of Colorado, to-wit:

The South-east quarter (SE¼) of Section Thirty six (36) Township Five (5) North, Range Sixty Eight (68) West of the Sixth (6th) Principal Meridian, containing One Hundred Sixty (160) acres, more or less, according to United States survey

Excepting, however, to the State of Colorado, all rights to any and all minerals, ores and metals of every kind and character, and all coal, asphaltum, oil or other like substance in or under said land and the right of ingress and egress for the purpose of mining together with enough of the surface for such as may be necessary for the proper and convenient working of such minerals and substances.

Subject to any and all easements or rights heretofore legally obtained and now in full force and effect, if any there be.

which said described tract of School land has been purchased by the said W. S. Redabaugh for the sum of Nine Thousand One Hundred Sixty and no/100 ($9160.00) DOLLARS,

Now Know Ye, That the State of Colorado in consideration of the premises, and in conformity with the Act of the General Assembly, in such case provided, has sold and granted, and by these presents does sell and grant unto the said W. S. Redabaugh and to his heirs and assigns, the said tract above described: TO HAVE AND TO HOLD the same as above specified, together with all the rights, privileges, immunities and appurtenances of whatsoever nature hereunto belonging, unto the said W. S. Redabaugh and to his heirs and assigns forever.

(Seal of the State of Colorado)

(Seal of the Board of State Land Commissioners)

Issued without application and sold February 21, 1916

In Testimony Whereof, I, George A. Carlson, Governor of the State of Colorado, have caused these letters to be made Patent, and the Great Seal of the State of Colorado to be hereunto attached.

Given under my hand at the City of Denver, the 21st day of February A. D. 1916

George A. Carlson Governor.

Attest: John C. Rauer Secretary of State of the State of Colorado.

John F. Lucking Register State Board of Land Commissioners.

Filed for record this 26th day of February A. D. 1916 at o'clock M.

Register

Magpie A

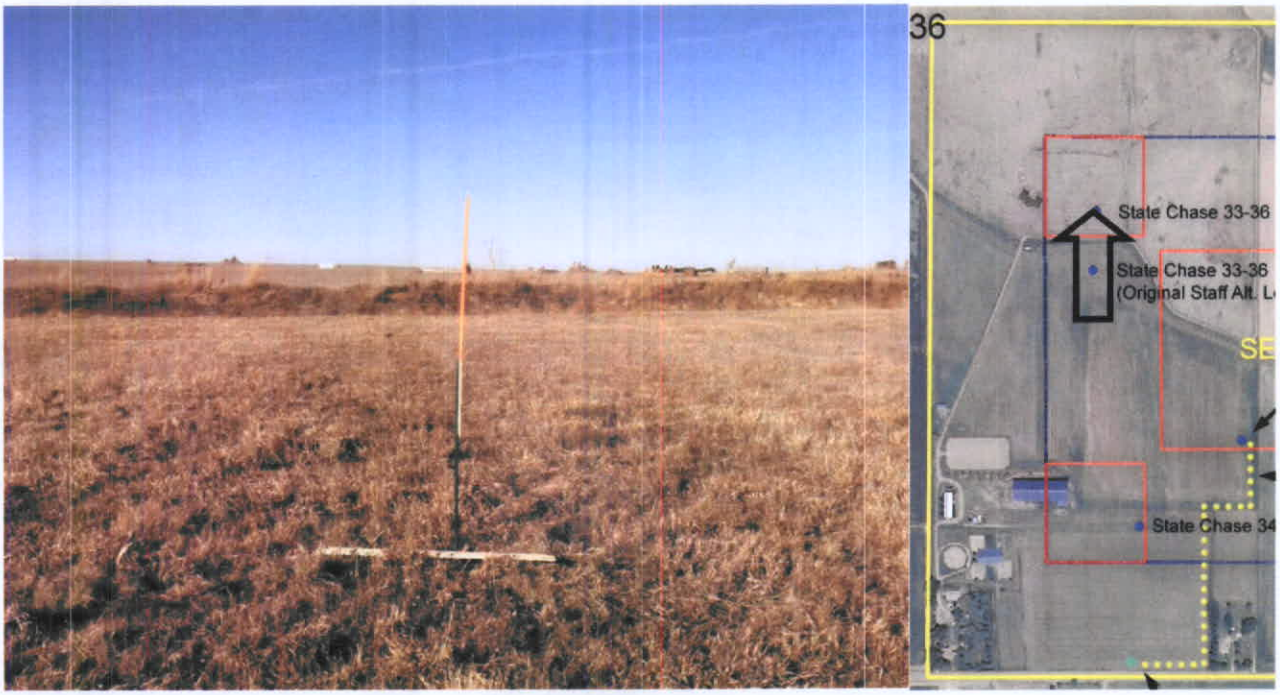
B

All on-ground photos taken on November 30, 2009

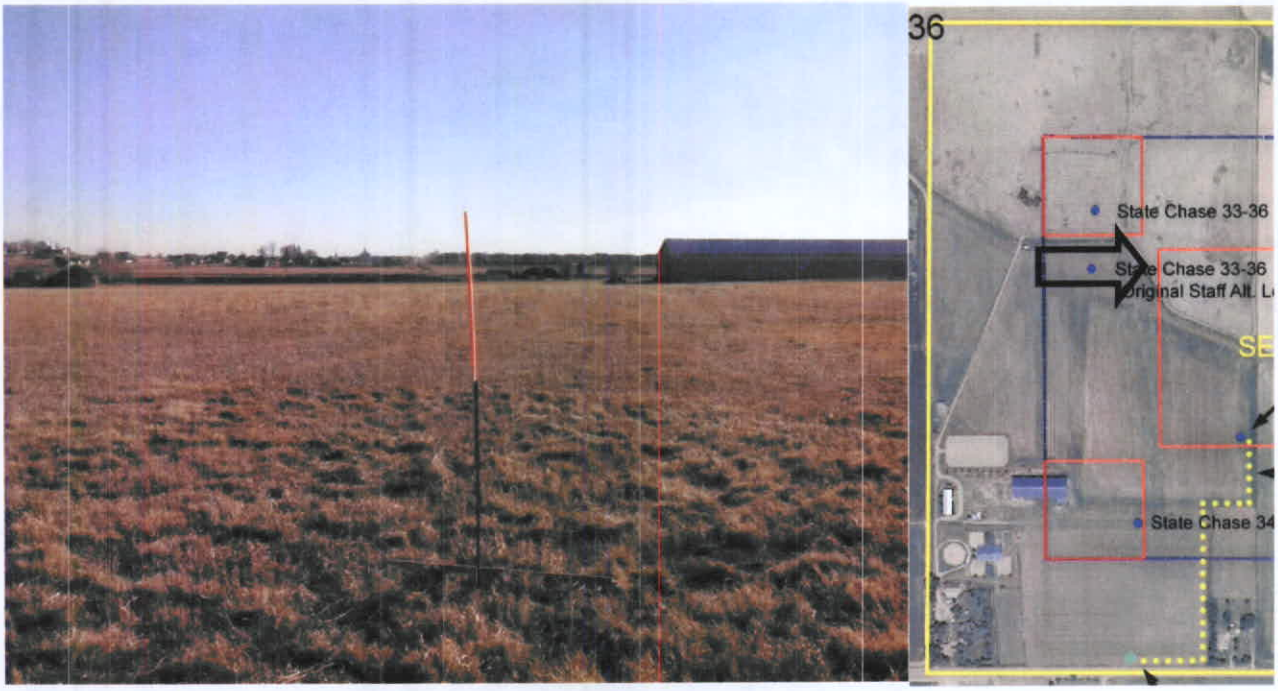
State Chase 33-36

Original Staff Alternate Proposed Location
South of the irrigation ditch

Looking North

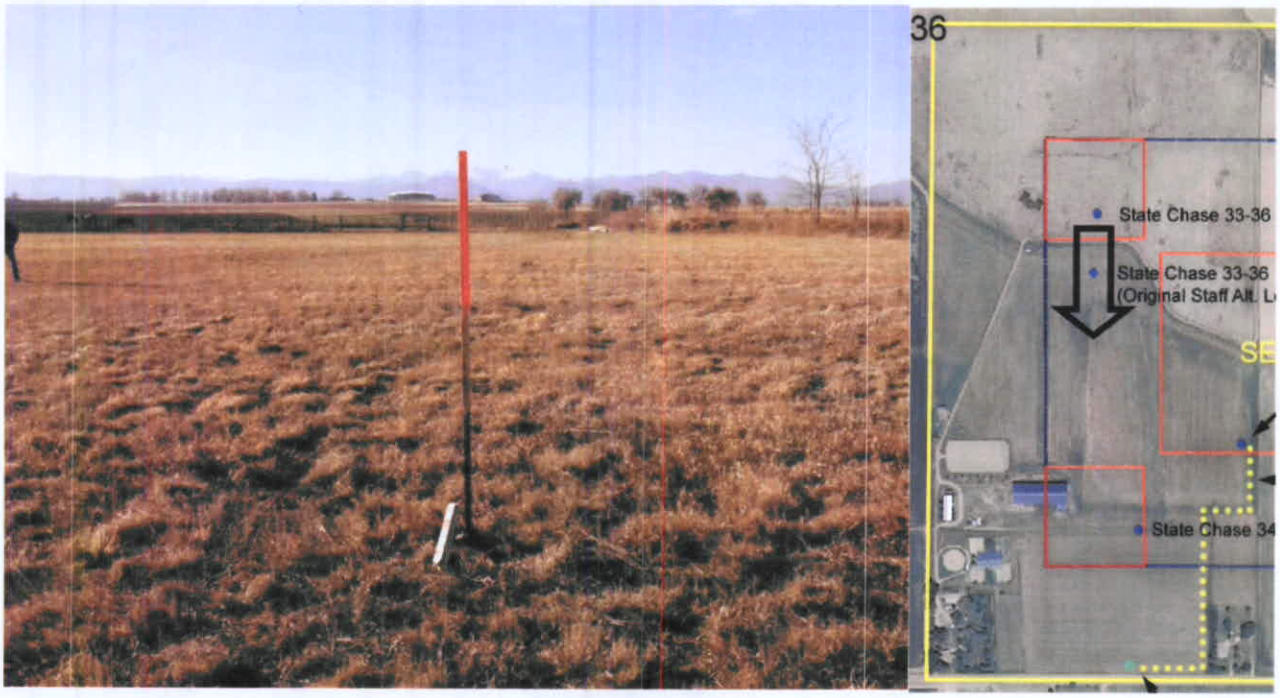


Looking East

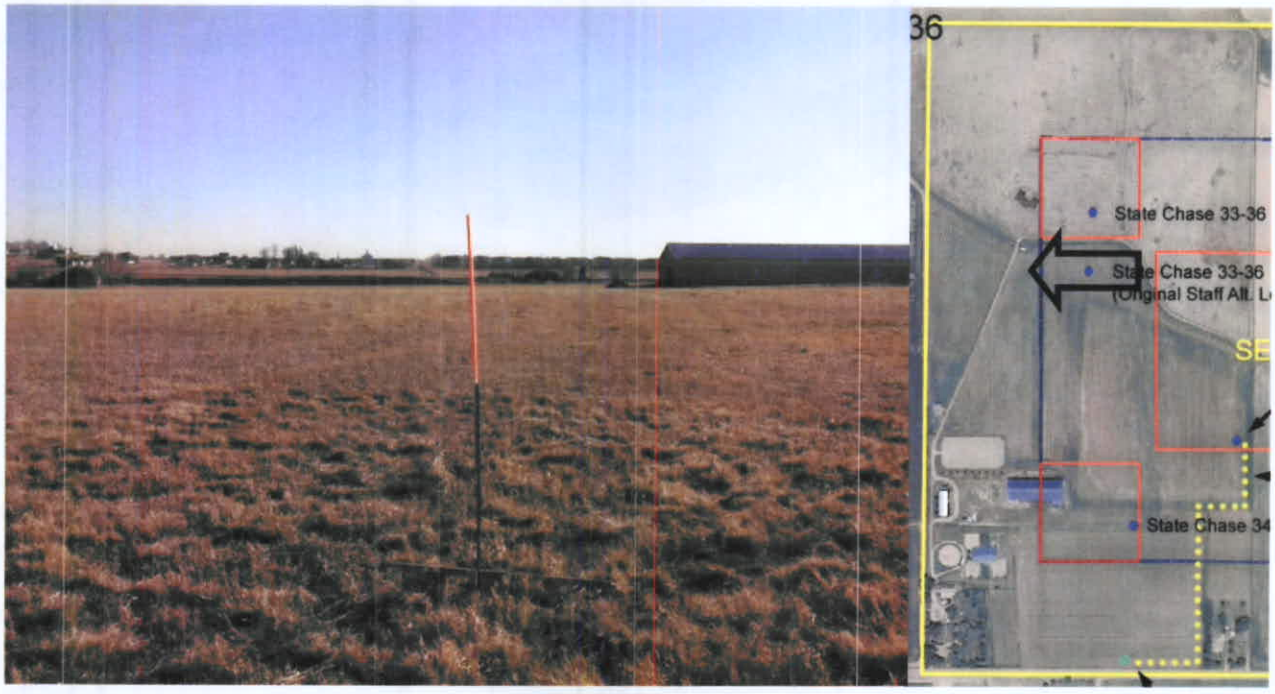


All on-ground photos taken on November 30, 2009

Looking South



Looking West

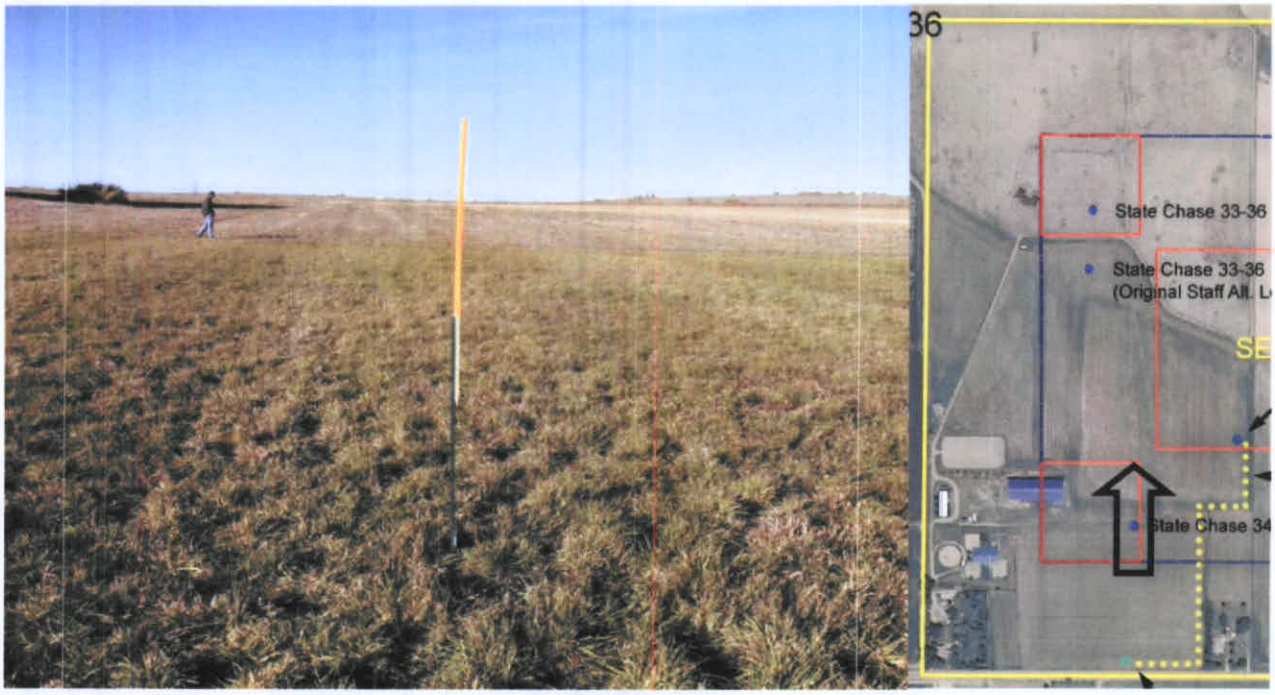


All on-ground photos taken on November 30, 2009

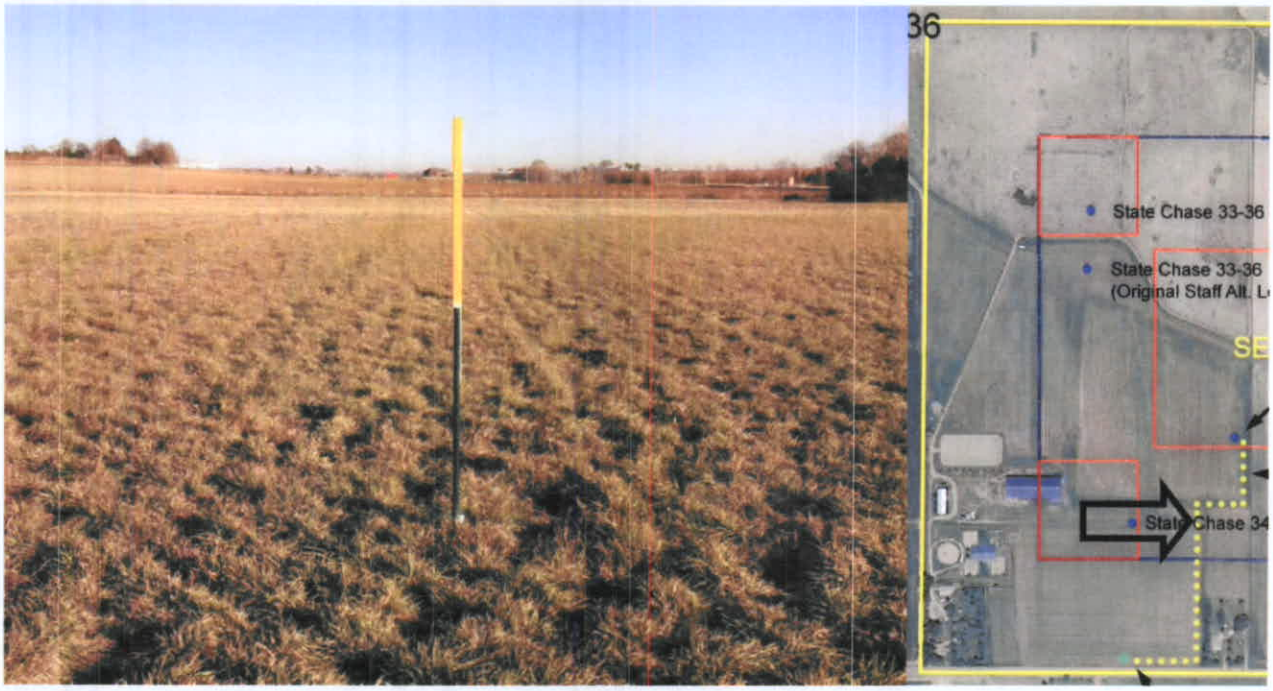
State Chase 34-36

Magpie's original proposal

Looking North

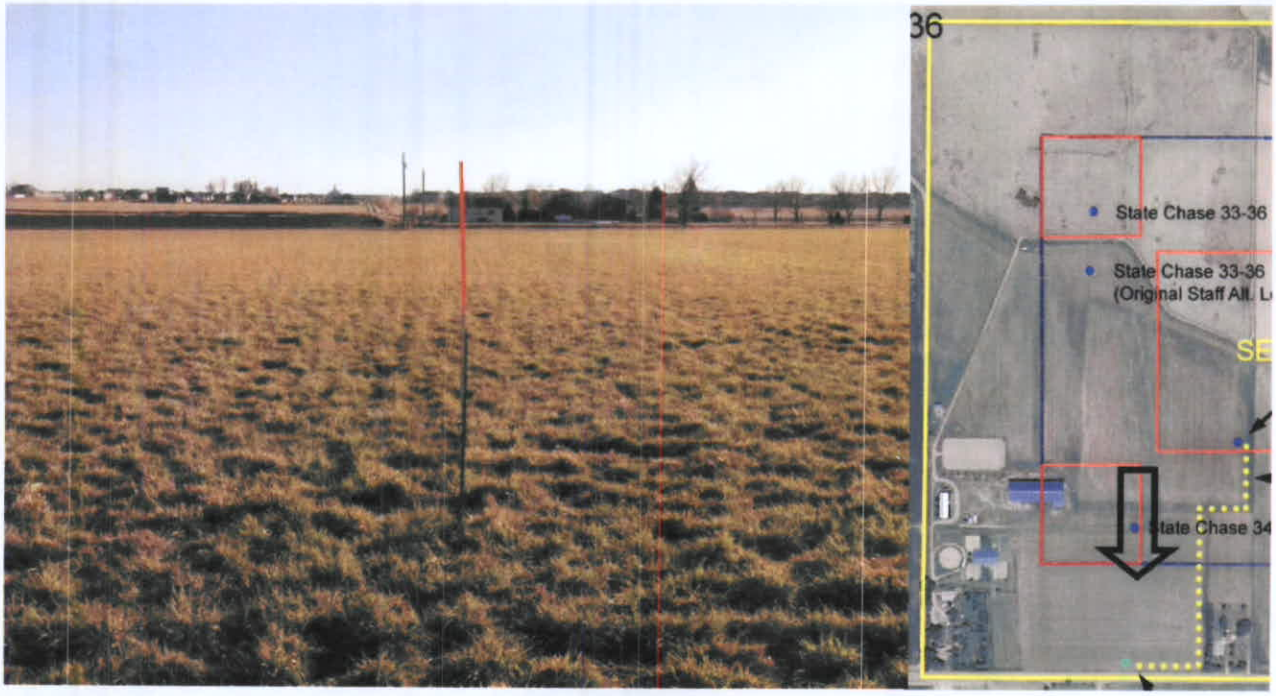


Looking East



All on-ground photos taken on November 30, 2009

Looking South



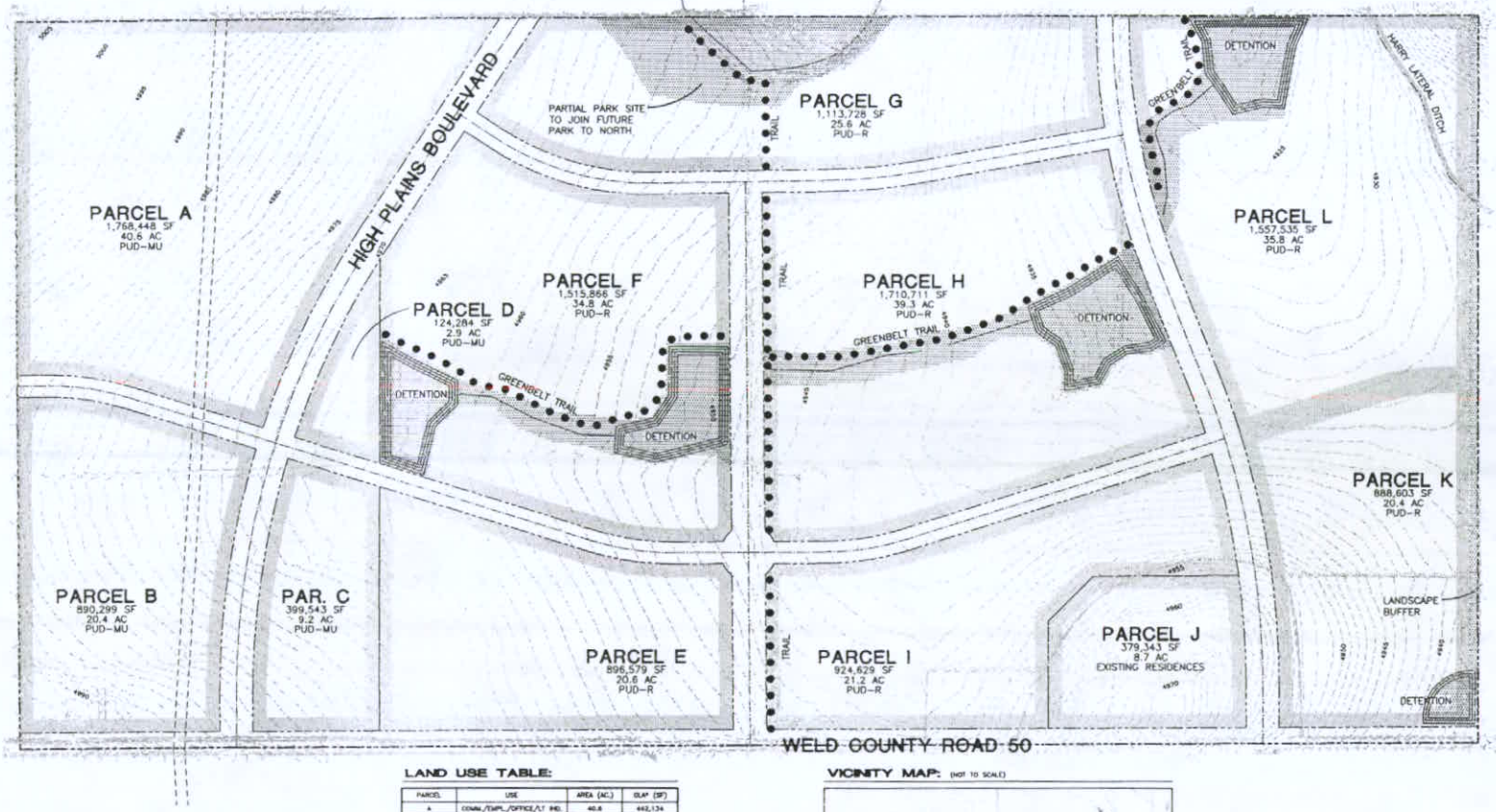
Looking West

C

OUTLINE DEVELOPMENT PLAN FOR

GBH ANNEXATION

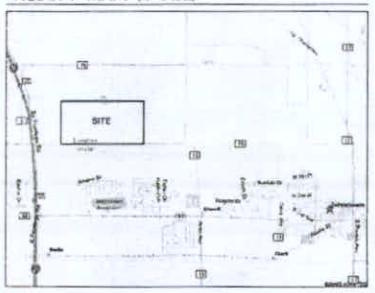
BEING A PART OF THE SOUTHEAST QUARTER SECTION 35 AND THE SOUTHWEST QUARTER SECTION 36, TOWNSHIP 5 NORTH, RANGE 68 WEST OF THE 6TH P.M., CITY OF LOVELAND, COUNTY OF LARIMER, STATE OF COLORADO

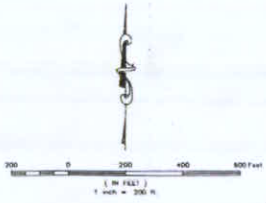


LAND USE TABLE:

PARCEL	USE	AREA (AC.)	GLA* (SF)
A	COMM./EMPL./OFFICE/LT IND.	40.6	442,134
B	COMM./EMPL./OFFICE/LT IND.	20.4	222,156
C	COMM./EMPL./OFFICE/LT IND.	9.2	100,188
D	COMM./EMPL./OFFICE/LT IND.	2.9	31,581
SUBTOTAL		73.1	752,172
PARCEL	USE	AREA (AC.)	DENSITY
E	RESIDENTIAL	20.6	8
F	RESIDENTIAL	34.8	5
G	RESIDENTIAL	25.6	3
H	RESIDENTIAL	39.3	5
I	RESIDENTIAL	21.2	8
K	RESIDENTIAL	20.4	5
L	RESIDENTIAL	35.8	5
SUBTOTAL		197.7	
PARCEL	USE	AREA (AC.)	
J	CURRENT RESIDENCES	8.7	
ROADS	ROADS	41.5	
SUBTOTAL		50.2	
TOTAL	ALL USES	321.0	

VICINITY MAP: (NOT TO SCALE)





GBH PROPERTIES
OVERALL DEVELOPMENT PLAN
OUTLINE DEVELOPMENT PLAN

DM CIVIL ENGINEERS

1 Sheet / 1 Sheets

Magpie C

D

SURFACE USE AGREEMENT

This Surface Use Agreement ("**Agreement**") is made and entered into this 15th day of October 2008, by and between Evelyn H. Betz, Margaret L. Vetter, and Steven M. Betz, Trustees of The Evelyn H. Betz Trust, whose address is: 6835 Weld County Road 52¼, Johnstown, Colorado 80534 ("**Owner**"), and Magpie Operating Inc., (MAGPIE) whose address is 2707 South County Road 11, Loveland, Colorado 80537 ("**Operator**"); sometimes referred to each as a "**Party**," or collectively as the "**Parties**."

WITNESSETH:

For and in consideration of the covenants and agreements contained herein, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

OWNERSHIP. Owner is the surface Owner of certain lands located in Larimer County, Colorado as more specifically described as follows ("**Lands**"):

Township 5 North, Range 68 West of 6th P.M.
Section 36: East Half of the Southeast Quarter (E2SE4)
Located in Larimer County, Colorado.

Operator (and/or its affiliates) owns a working interest in valid leases taken in its name covering all of the Lands and lands pooled or included in a spacing unit therewith (each a "**Lease**," collectively, the "**Leases**").

OPERATOR'S OIL AND GAS OPERATIONS ON THE LANDS. Operator intends to drill or cause to be drilled oil and/or gas well(s) on the Lands, as depicted approximately on Exhibit "A" attached hereto ("**Well(s)**"). In order for Operator to drill, construct, complete, produce, maintain, and operate the Well(s) and all facilities associated therewith, including, but not limited to, access roads ("**Access Roads**"), pipelines, flow lines, separators, tank batteries, electric lines and any other facilities or property necessary for Operator to conduct operations on the Well (each a "**Facility**," collectively, the "**Facilities**"), it is necessary that Operator enter and utilize a portion of the surface of the Lands.

The Parties enter into this Agreement to evidence their entire agreement regarding the payment of surface damages, entry, surface use, and any other matters relating to Operator's use of the Lands.

1. **LOCATION.** The approximate location of the Well(s), the Access Roads and Flowlines to the Well site(s) and certain other Facilities to be constructed on the Lands are depicted on Exhibit "A." Any material changes to the Well(s), Access Roads and Facilities locations may be made by Operator with the Owner's written consent, which will not be unreasonably withheld, but will not unduly interfere with Owner's existing use of the surface estate. Operator agrees not to use any more of the surface of the Lands than is reasonably necessary to conduct its operations.

2. **RIGHT-OF-WAY.** That in order for Operator to enter, drill, complete, produce and operate injection, oil and/or gas well(s) and facilities on Said Land, it is necessary that it cross and use

Magpie D

certain property of Surface Owner, as provided for under the terms of several oil and gas leases to which Surface Owner may not be a party, and the parties do hereby agree as to the damages, the right of entry and surface use thereof. For and in consideration of the hereinafter specified amounts, Surface Owner hereby grants to Operator a private right for it, its agents, employees and contractors, and their agents and employees, to enter upon the surface of Said Land for the purpose of conducting oil and gas drilling, completion and production activities. Owner agrees to Operator's use of gathering pipelines and power lines across Lands for gathering of non-lease materials provided there is no additional impact to the lands, beyond that would be created for transport of lease materials.

3. **NOTIFICATION.** Operator agrees to notify Owner in advance of the location of all wells, pipelines, power lines, roads, and other production facilities prior to entry upon the Lands to construct or install any such wells, pipelines, power lines, roads, or other production facilities. Operator shall reasonably attempt to locate all wells, pipelines, roads, and other facilities so as to cause the least interference with Owner's operations on the Lands. Operator agrees to notify Owner upon the completion or plugging and abandonment of any well(s) drilled by Operator on the Lands.

4. **TERMINATION OF RIGHTS.** The rights granted by Owner to Operator shall terminate when upon Operator's written notification to Owner of Operator's intention to cease its operations. Operator will execute and deliver to Owner a good and sufficient recordable release and surrender of all of Operator's rights hereunder and will promptly remove all above-ground equipment and property used or placed by Operator on the Lands unless otherwise agreed by Owner in writing.

5. **NON-EXCLUSIVE RIGHTS.** The rights granted by Owner to Operator are nonexclusive, and Owner reserves the right to use all access roads and all surface and subsurface uses of the land affected by this Agreement, and the right to grant successive easements thereon or across on such terms and conditions as Owner deems necessary or advisable, so long as such use and grants do not unreasonably interfere with Operator's rights.

6. **CONDUCT OF OPERATIONS.** Operator's operations on the Lands will be conducted pursuant to the terms of the Leases, this Agreement, the rules and regulations of the Colorado Oil & Gas Conservation Commission ("**COGCC**"), and applicable Colorado statutes and case law.

7. **PAYMENTS.** As compensation and damages for Operator's utilization of the Lands hereunder for construction and operations, including well sites, roads, production facilities, compression sites, transportation facilities, power lines and pipelines, Operator shall pay Owner as set out below:

a. **Well Pads.** for each well pad on the Lands which should be limited to an area This amount shall be paid by Operator to Owner prior to the commencement of well pad construction as consideration for damages associated

with the construction, maintenance and use of the location for drilling, completion, and production activities. Operator shall have the right to install pumping units, power units, separators, compressors, electrical generators, gas flow lines, pipelines and any other necessary production or injection equipment for the production, re-injection and transportation of gas and water from Said Land, and any facilities necessary for the production, storage, disposal, transportation and marketing of oil and/or gas from under Said Land. Owner agrees to Operator's use of gathering pipelines and power lines across Lands for gathering and transport of non-lease materials provided there is no significantly different type of impact to the lands, beyond that which would be created for transport of lease materials. Where reasonably practical, production equipment and facilities shall be painted so as to minimize the visual impact of such facilities. Upon the termination of this Agreement, Operator agrees to remove all such facilities, reclaim and reseed the Lands in and around such facilities so as to return such Lands as near as practical to their original condition.

b. **Access.** For each new well pad, Operator shall pay to Owner an initial access fee of ____ for use of existing roads on the Lands not previously being used by Operator, and ____ for new roads constructed by Operator on the Lands.

c. **Power Lines and Pipelines.** Upon completion from any well drilled upon the property, should Operator propose to install a gas pipeline, water pipeline and/or power line and when any portion of the proposed route crosses land owned by the Owner, Operator shall pay to Owner the sum of ____ for the right-of-way and easement. This amount shall be paid by Operator to Owner prior to the commencement of construction as consideration for damages associated with the construction, maintenance, easement and use of the power lines and pipelines.

d. **Tank Batteries**: For each "central gathering facility" or "tank battery" constructed in the event a well is completed as a producing well, Operator shall pay Owner ____ Operator shall construct all tank batteries, field separators and related production equipment at a location that will, insofar as is reasonably possible, minimize interference with the operations of the surface Owner and/or the Owner's tenants. The location for each such central gathering facility or tank battery should be limited to ____ The location(s) of any tank Battery site(s) will be constructed in a mutually agreed upon location by both the Owner and Operator; and will not be constructed without the Owner's written consent, which will not be unreasonably withheld, but will not unduly interfere with Owner's existing use of the surface estate.

e. **No Compressor Stations:** No Compressor Station(s) are to be constructed on the Lands without the Owner's written consent, which will not be unreasonably withheld, but will not unduly interfere with Owner's existing use of the surface estate.

f. **Existing Well Pads, Pipelines, Power Lines and Facilities.**

The existing well pads, pipelines and power lines located on the subject Lands are itemized below:

Description	Size (acres) Length (rods)
NONE	NONE

g. **Additional Crop Loss.** If after the initial drilling completing and equipping to the wells, and facilities for production, operator commences subsequent operations, including, but not limited to, refracturing operations on the wells and such operations result in additional crop losses on the lands affected, operation will timely reimburse Owners for the net value of such crop loss.

e. **Timing of Operations.** The Operator Agrees to make reasonable efforts to avoid conducting the initial drilling, completing, and equipping the well(s), and facilities for production, during the _____ of any given year during the term of this lease.

8. **MAINTENANCE AND GENERAL OPERATIONS.** Operator shall at all times keep the well sites, road rights-of-way, facility locations, and other areas disturbed by Operator safe and in good order, free of noxious weeds, litter, and debris. Operator shall dispose of all litter, sewage, and debris off of Owner's property at an approved disposal site. Using reasonable efforts, Operator shall not allow or permit erosion to continue on any disturbed sites and shall promptly repair, reclaim and reseed all erosion sites. Operator shall not permit the release or discharge of any toxic or hazardous chemicals or wastes on the Lands. All cattle guards and fences installed by Operator shall be kept clean and in good repair.

9. **PRODUCED WATER.** All water produced and discharged from Operator's wells shall be produced and discharged in accordance with all applicable rules and regulations of the governmental authorities having jurisdiction over such matters. Produced water shall be discharged in a way so as to reasonably minimize the amount of surface disturbance and damage to the Lands. Operator may inject water produced from any of Operator's wells into state or federally permitted injection wells located on the Lands. Provided that Operator is not in breach of this Agreement, Owner will not oppose an application by Operator before any governmental authority to lawfully disperse or dispose of produced water.

10. **ROADS.** Any new roads shall be limited to _____ for the actually traveled roadbed, together with a reasonable width, and not to exceed _____ on either side of the centerline of the actually traveled roadbed for fills, shoulders and crossings. Operator shall, if requested by Owner, place signs on any roads designating them as private roads. Operator will maintain and keep in good repair all roads used by Operator on the Lands.

a. **No Adjacent Access.** All roads constructed will access Owner's property only.

b. **Non-Disturbance.** Except as otherwise provided on Exhibit "A", Operator and its employees and authorized agents shall not disturb, use or travel on any of the land of Owner not subject to this Agreement without Owner's prior consent.

11. **FENCES AND RECLAMATION.**

a. **Fencing/Site Preparation.** In accordance with COGCC (Rule 1002.a.), the Operator shall mark the boundaries of drillsites and access roads with berms, single strand fences, or other equivalent methods to minimize surface disturbance at the Owner's request.

b. **Fencing/Dangerous area.** Operator shall install fences around any dangerous area, including any pits, where Operator drills any new wells.

c. **Timing of Restoration.** Operator shall reclaim and restore all areas disturbed by Operator's operations as near as practical to their original condition.

12. **HUNTING AND DOGS.** None of Operator's employees or authorized agents or any other person under the direction or control of Operator shall not hunt or fish on the Lands and shall not trespass across the Lands for the purposes of hunting or fishing or recreational uses. No dogs will be permitted on the Lands at any time. Operator will notify all of its contractors, agents and employees that no dogs, firearms, weapons, hunting, fishing, or recreational activities will be allowed on the Lands.

13. **POWER LINES AND PIPELINES.** Operator shall back fill, compact, reseed, and re-contour the area disturbed by Operator's construction, installation, repair, or removal of any power line or pipeline. Upon termination of this Agreement, as set out in Paragraph 4, and upon request from Owner, Operator shall remove all above ground pipeline and power line facilities. To the extent that it does not unreasonably interfere with Operator's operations, Operator shall allow Owner to have reasonable access and use to any power lines installed upon Owner's property upon agreement between Owner and power company for purchase of power provided it does not interfere with Operator's operation. Upon cessation of operations by Operator, Owner may at its election keep said power lines in place.

14. **IMPROVEMENTS.** Operator agrees to notify and consult with Owner prior to cutting or damaging any fences, cattle guards, or other improvements of Owner. All areas disturbed by Operator's activities will be reseeded unless otherwise agreed to by Owner. All cattle guards and fences installed by Operator or on roads used by Operator shall be kept clean and in good repair by Operator during the term of this Agreement.

15. **FENCING OF ACCESS ROADS.** Operator will not fence any access roads without the prior written consent of Owner.

16. **PAYMENTS**. The compensation provided herein to be paid by Operator to Surface Owner shall release and discharge Operator, its agents, and employees, (except for damages or losses which are caused by a breach of the provisions of this Agreement, or the gross negligence or wanton recklessness of Operator, its agents or employees), from all claims, losses, demands, and causes of action for damage to land, loss of and damage to crops, and use of land, as a result of Operator's drilling, producing and marketing operations on Said Land. The parties agree that Operator is in full compliance with the terms and conditions of this Agreement insofar as Operator's operations and its existing facilities, if any, as of the effective date of this Agreement. Operator will compensate the Owner for any unusual damages caused by oil, or salt-water spills, and loss of livestock on Surface Owner's property as a result of operations by Operator, its agents, or employees.

17. **NON-DISTURBANCE**. Operator and its employees and authorized agents shall not disturb, use, or travel upon any of the land of Owner not subject to this Agreement.

18. **NO LIVING QUARTERS**. Operator shall not cause to be constructed any living quarters on the well site or on any of the Lands, except for temporary trailers used during drilling, completion or production operations. Such temporary trailers may not to be used by rig crews for sleeping between shifts.

19. **MINIMIZE VISUAL IMPACT**. Operator will attempt to minimize visual impact on the Lands by:

a. Burial of gas and water pipelines lines.

b. Where reasonably practical, keeping all structures as small and few as possible and using earth tone or beige color on the exterior thereof.

c. Using existing roads for access to wells and use of automation where feasible and practical to minimize the need to check wells and production facilities frequently. Use of four wheelers or snow machines is permitted when muddy or snow conditions allow no practical alternatives as long as no recreation is involved.

20. **ENVIRONMENTAL RESPONSIBILITY**. The duty to conform to environmental laws and to abate the environmental damages resulting from activities of Operator, both present and future, is the responsibility of the Operator. Operator will defend, indemnify and hold harmless the Owner from any and all violations of environmental law including, but not limited to, hazardous waste, solid waste disposal, clean air, clean water and endangered species caused by Operator's operations.

21. **OTHER MATTERS REQUIRE SEPARATE AGREEMENT**. Any facilities and items not covered by this Agreement shall be negotiated under a separate agreement.

22. **ROADS AND SIGNS.** Operator agrees, if requested by Owner, to place appropriate signs on main access roads designating such roads as a "private road", and to assist Owner in the control of the use of the road by unauthorized personnel. If unauthorized use of the road right-of-way is deemed a nuisance by Owner, Owner may require the installation of steel swing locked gates along the access road. Owner's livestock, vehicles and personnel shall have the right of way at all times. A speed limit of thirty (30) mph is to be observed by all Operator's personnel, contractors and subcontractors at all times. Violators may be reported by Owner to Operator, and Operator will use reasonable efforts to control such violations. Barrow pits on newly constructed roads shall be sloped so that reseeding can be accomplished by a tractor and drill, where practical. Operator agrees to reseed barrow pits of any access road used for production that it constructs. Operator agrees to keep sites and right-of-ways in good order and free of litter and debris. Operator agrees to control noxious weeds on its well sites, its facility sites, along its rights-of-way and along water discharge drainages it utilizes to prevent spreading of noxious weeds. All roads shall be limited to twenty (20) feet in width and shall not occupy more than ten (10) feet from the centerline of such access road for fill, shoulder, and crossing, unless agreed to in writing by Owner and Operator.

23. **GATES AND CATTLE GUARDS.** In those instances where access roads cross fence lines, now in existence or installed by Owner during the term of this Agreement, steel gates (or equivalent materials) or cattle guards (auto gates) shall be installed at the sole cost and expense of Operator. The steel gates shall not be less than sixteen (16) feet wide by four (4) feet high constructed and mounted so as to prevent the passing through or under of adult and young livestock. The gates shall be hinged and mounted so as to permit the gates to swing to a position parallel to and adjacent to the fence. The cattle guards shall not be less than sixteen (16) feet wide by eight (8) feet across and shall be set on concrete sills not less than twenty-four (24) inches high by sixteen (16) inches wide. Fence braces shall be installed on each side of the gates or cattle guards. The fence braces shall be constructed of like quality material and installed in a like style and form as the fence braces currently being constructed on the Lands. The maintenance of said gates and cattle guards shall be the responsibility of Operator. Operator shall keep gates utilized in good repair to prevent the passing through of livestock. Operator shall keep cattle guards utilized in good repair and cleaned to prevent crossing of livestock. Any gate opened for access shall be closed immediately following such access. No gates shall be left open and unattended. Operator shall be liable for any and all costs, losses and damages resulting from a gate being left open by Operator or its employees or agents.

24. **ROAD REPAIR AND MAINTENANCE.** Operator agrees to maintain and repair, at Operator's expense, any damage caused by Operator to existing roads used for Operator's access. Operator agrees to provide reasonable maintenance for the access roads it uses. Operator agrees to provide snow removal on roads it uses for operational purposes.

25. **TOP SOIL.** Operator agrees to remove, separately stockpile and replace all topsoil on drill pits. Operator agrees to install approved fences around pits to protect Owner's livestock and to prevent spreading of litter and debris.

26. **ABANDONMENT OF ROADS.** At such time as Operator no longer desires to utilize any portion of any access road, which Operator constructed on the Lands, Operator shall notify Owner of its desire to cease use of the access road. Owner, in its sole discretion, may choose to either allow the access road to remain or may require the Operator to reclaim the access road corridor. If the Owner elects to have the access road corridor reclaimed, Operator shall reclaim the access road corridor to its approximate original contour and shall reseed the access road corridor with a seed mixture appropriate for the area and acceptable to Owner. If Owner elects to allow the access road to remain, Operator shall be released from any and all further responsibility or liability for maintaining, reclaiming the access road corridor.

27. **INDEMNIFICATION.** Operator shall hold Owner, and if applicable, Owner's officers, directors, employees, agents, heirs, and successors, harmless and free from liability from all claims, liabilities, demands, suits, losses, damages, and costs caused by Operator's negligent operations on the Lands. Any contributory negligence, gross negligence, wanton recklessness, or strict liability on the part of the Owner shall mitigate and/or relieve Operator of this indemnity.

28. **COMPLIANCE WITH LAW.** Operator shall conduct operations and activities in accordance with existing local, state and federal laws, rules and regulations.

29. **RELEASE.** Operator releases, waives and discharges Owner, and if applicable, Owner's officers, directors, employees, agents, heirs, and successors, from any and all liabilities for personal injury, death, property damage, or otherwise arising out of Operator's negligent operations under this Agreement or use of the Lands.

30. **WAIVER OF 30-DAY NOTICE.** Owner hereby waives the minimum 30-day written notice requirement for operations to begin and any other notice or consultation requirements of the COGCC. Operator agrees it will provide an initial notice to Owner after it has submitted a request for permit to drill from the COGCC.

31. **NOTICE FOR ADDITIONAL OPERATIONS.** Operator will comply with COGCC rules and regulations requiring that advance notice be provided to Owner for subsequent operations on the Wells, including, but not limited to, reworking operations thereto.

32. **NOTICE.** Notice may be given by either party to this Agreement to the other by depositing the same when deposited in the United State mail, postage pre-paid, certified with return receipt requested, or registered mail, and duly addressed to the other party at the address set forth herein below. Such notice shall be deemed delivered when the return receipt of such notice as

set forth herein has been received. Nothing herein shall prevent one party from changing its address for purposes of notice by informing the other party in writing of such change no less than ten (10) days prior to the effective date of such change of address.

Magpie Operating, Inc., (MAGPIE)

Contact: Ryan Warner, Vice President

Address: 2707 South County Road 11
Loveland, Colorado 80537

Phone: (970) 669-6308
Fax: (970) 669-6396

OWNER: Evelyn H. Betz,
Margaret L. Vetter, and
Steven M. Betz as
Trustees of the Evelyn H. Betz Trust

Address: 6835 Weld County Road 52 ¼
Johnstown, Colorado 80534

Phone: (970-587-2124)

33. **GOVERNING LAW AND VENUE.** This Agreement will be governed by, construed and enforced in accordance with the laws of Colorado. Venue shall be deemed to be in Larimer County, Colorado.

34. **BINDING EFFECT.** The covenants and conditions herein contained and all of the provisions of this Agreement will inure to the benefit of and will be binding upon the Parties hereto, their respective heirs, representatives, successors or assigns. Owner agrees to contact any and all tenants of Lands or any other third parties utilizing the surface of the Lands that may be affected by Operator's activities on the Lands. It will be Owner's sole responsibility to advise such third parties of the existence of this Agreement and Operator's right to utilize the surface of the Lands pursuant to this Agreement for the payment of any consideration, if any, due such third party from Owners.

35. **CONFIDENTIALITY.** The Parties agree to keep the terms and conditions of this Agreement confidential and will not disclose such matters to any third party without the advance written consent of the other, or if ordered to do so in a legal proceeding. While the specific terms

hereof are to remain confidential between the Parties, Operator or Owner may record a memorandum of this Agreement in Weld County, Colorado.

36. **ENTIRE AGREEMENT.** This instrument contains the entire agreement between the Parties and may not be modified orally or in any other manner other than by agreement in writing signed by all Parties or their respective successors or assigns.

37. **NO PUBLIC BENEFIT OR DEDICATION INTENDED.** This Agreement is not intended and shall not be construed as conferring any benefit on the general public or to any party other than OWNER and OPERATOR and their respective successors and assigns. The parties do not hereby dedicate or offer for dedication to the public any real property or improvements whatsoever.

38. **ASSIGNMENT.** This Agreement shall be binding upon and shall be for the benefit of the parties hereto, their respective heirs, successors and assigns.

39. **SEVERABILITY.** If any provision of this Agreement is declared by any court of competent jurisdiction to be invalid, illegal or unenforceable in any respect, the remaining provisions shall not be affected thereby. Such remaining provisions shall be fully severable, and the remainder of this Agreement shall be fully enforceable, as if such invalid provisions never had been inserted in the Agreement.

40. **COUNTERPARTS.** This Agreement may be executed in two or more original counterparts, each of which shall be an original, but all of which together shall constitute one and the same instrument.

41. **REASONABLE ACCOMODATION**. Owner acknowledges the right to use of the surface estate of the Lands by Operator as herein described are expressly granted to Operator, its successor, and assigns; therefore Owner further acknowledges Operator's use of the surface estate of the Lands as granted herein to Operator shall construe "reasonable accommodation" by Operator, its successor, and assigns with respect to Colorado revised statute 34-60-127.

42. **ACKNOWLEDGMENTS.** Each Party acknowledges that the consideration it has given or received hereunder is fair and adequate consideration for the grants, covenants, undertakings, and promises contained herein; that this Agreement has been negotiated in good faith and at arms' length; that they or their undersigned representative have read and understand each and all of the provisions herein and are authorized to execute this Agreement in their or its behalf and to bind them or it to the terms hereof, and that they have consulted with their own legal counsel in executing this Agreement.

43. **ENTIRE AGREEMENT.** As of the effective date hereof, this instrument contains the entire Agreement of the Parties with respect to the subject matters hereof.

44. **AUTHORITY OF SIGNATORIES.** The signatories below declare, warrant and represent that they have the authority to enter into this Agreement on behalf of their respective Party.

45. **SUCCESSORS.** This Agreement constitutes a covenant running with the Lands and will be binding upon and inure to the benefit of, and be enforceable by the Parties and their respective successors, administrators, trustees, executors and assigns.

IN WITNESS WHEREOF, the Parties have set their hands, the day and year first written above.

MAGPIE OPERATING, INC., (MAGPIE)
2707 South County Road 11
Loveland, Colorado 80537

By:_____
Name: Ryan J. Warner
Title: Vice President

OWNER

Evelyn H. Betz Trust:

_____
Evelyn H. Betz,
Trustee of the Evelyn H. Betz Trust

_____
Margaret L. Vetter,
Trustee of the Evelyn H. Betz Trust

_____
Steven M. Betz,
Trustee of the Evelyn H. Betz Trust

STATE of Colorado

ACKNOWLEDGEMENT-INDIVIDUAL

COUNTY of _____

BEFORE ME, the undersigned, a Notary Public, in and for said County and State, on this _____ day of _____, 200 8,
personally appeared Evelyn H. Betz, Trustee of the Evelyn H. Betz Trust
_____, to me known to be the
identical person ___, described in and who executed the within and foregoing instrument of writing and acknowledged to me that S he ___ duly executed
same as Her free and voluntary act and deed for the uses and purposes therein set forth and in the capacity stated therein.
IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal the day and year last above written.

My Commission Expires: _____

_____
Notary Public:
Address:

STATE of Colorado

ACKNOWLEDGEMENT-INDIVIDUAL

COUNTY of _____

BEFORE ME, the undersigned, a Notary Public, in and for said County and State, on this _____ day of _____, 200 8,
personally appeared Margaret L. Vetter, Trustee of the Evelyn H. Betz Trust
_____, to me known to be the
identical person ___, described in and who executed the within and foregoing instrument of writing and acknowledged to me that S he ___ duly executed
same as Her free and voluntary act and deed for the uses and purposes therein set forth and in the capacity stated therein.
IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal the day and year last above written.

My Commission Expires: _____

_____
Notary Public:
Address:

STATE of Colorado

ACKNOWLEDGEMENT-INDIVIDUAL

COUNTY of _____

BEFORE ME, the undersigned, a Notary Public, in and for said County and State, on this _____ day of _____, 200 8,
personally appeared Steven M. Betz, Trustee of the Evelyn H. Betz Trust
_____, to me known to be the
identical person ___, described in and who executed the within and foregoing instrument of writing and acknowledged to me that ___ he ___ duly executed
same as His free and voluntary act and deed for the uses and purposes therein set forth and in the capacity stated therein.
IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal the day and year last above written.

My Commission Expires: _____

_____
Notary Public:
Address:

E

Colorado Revised Statutes

- Colorado Revised Statutes
- TITLE 34 MINERAL RESOURCES
- OIL AND NATURAL GAS
- ARTICLE 60 Oil and Gas Conservation

34-60-127. Reasonable accommodation.

(1)(a) An operator shall conduct oil and gas operations in a manner that accommodates the surface owner by minimizing intrusion upon and damage to the surface of the land.

(b) As used in this section, "minimizing intrusion upon and damage to the surface" means selecting alternative locations for wells, roads, pipelines, or production facilities, or employing alternative means of operation, that prevent, reduce, or mitigate the impacts of the oil and gas operations on the surface, where such alternatives are technologically sound, economically practicable, and reasonably available to the operator.

(c) The standard of conduct set forth in this section shall not be construed to prevent an operator from entering upon and using that amount of the surface as is reasonable and necessary to explore for, develop, and produce oil and gas.

(d) The standard of conduct set forth in this section shall not be construed to abrogate or impair a contractual provision binding on the parties that expressly provides for the use of the surface for the conduct of oil and gas operations or that releases the operator from liability for the use of the surface.

(2) An operator's failure to meet the requirements set forth in this section shall give rise to a cause of action by the surface owner. Upon a determination by the trier of fact that such failure has occurred, a surface owner may seek compensatory damages or such equitable relief as is consistent with subsection (1) of this section.

(3)(a) In any litigation or arbitration based upon this section, the surface owner shall present evidence that the operator's use of the surface materially interfered with the surface owner's use of the surface of the land. After such showing, the operator shall bear the burden of proof of showing that it met the standard set out in subsection (1) of this section. If an operator makes that showing, the surface owner may present rebuttal evidence.

(b) An operator may assert, as an affirmative defense, that it has conducted oil and gas operations in accordance with a regulatory requirement, contractual obligation, or land use plan provision, that is specifically applicable to the alleged intrusion or damage.

(4) Nothing in this section shall:

(a) Preclude or impair any person from obtaining any and all other remedies allowed by law;

Magpie E

(b) Prevent an operator and a surface owner from addressing the use of the surface for oil and gas operations in a lease, surface use agreement, or other written contract; or

(c) Establish, alter, impair, or negate the authority of local and county governments to regulate land use related to oil and gas operations.

Source: L. 2007: Entire section added, p. 1335, § 2, effective September 1.

Cross references: For the legislative declaration contained in the 2007 act enacting this section, see section 1 of chapter **314**, Session Laws of Colorado 2007.

F

946 P.2d 913, 138 Oil & Gas Rep. 1, 97 CJ C.A.R. 1939
(Cite as: 946 P.2d 913)

Supreme Court of Colorado,
En Banc.
GERRITY OIL & GAS CORPORATION, Petitioner,
v.
Bob MAGNESS, Respondent.
No. 96SC215.

Sept. 15, 1997.
As Modified on Denial of Rehearing Oct. 20, 1997. FN*

FN* Chief Justice Vollack would grant the Petition.

Justice Bender does not participate.

Oil and gas lease operator brought action against surface owner, seeking injunction to prevent owner from interfering with oil drilling efforts. After grant of preliminary injunction, operator moved to convert preliminary injunction into permanent injunction. Owner counterclaimed, alleging violations of oil and gas statutory and regulatory violations, negligence, and trespass, and seeking declaratory judgment. The District Court, Weld County, John J. Althoff, J., denied permanent injunction and denied relief on counterclaims. Owner appealed. The Court of Appeals, 923 P.2d 261, reversed and remanded with directions. Operator petitioned for writ of certiorari. After granting petition, the Supreme Court, Martinez, J., held that: (1) Oil and Gas Conservation Act section governing action for damages does not create private cause of action for violations of Act or of Oil and Gas Conservation Commission rules; (2) when a surface owner asserts claim of trespass based on oil and gas operator's alleged excessive surface use, trier of fact must consider whether operator's use of surface was reasonable and necessary; (3) expert testimony is not required for a surface owner to prevail on negligence claim against an oil and gas operator based on alleged violation of Commission rules when rules adopt standard of care within common knowledge and experience of ordinary persons, but expert testimony is required when rule adopts standard of care not within common knowledge and experience of ordinary persons; (4) violations of Commission rules are valid, but not conclusive, evidence that an oil and gas lessee breached duty as to surface use owed to a surface owner for negligence purposes; (5) owner was not required to present expert testimony to sustain his negligence claim alleging that operator violated Commission rules in its oil well site reclamation operations; (6) a surface owner is not required to present expert testimony to establish prima facie case of trespass alleging excessive surface use by an oil and gas operator; (7) basic fairness required new trial on negligence and trespass claims; (8) total lack of explanation for trial court's alternative determination that no damages resulted from operator's activities necessitated reversal of trial court's judgment on that issue; and (9) new trial was required on both liability and damages issues.

Judgment of Court of Appeals affirmed in part and reversed in part, and case returned to Court of Appeals with directions.

Vollack, C.J., concurred in part and dissented in part and filed opinion.

West Headnotes

[1] Mines and Minerals 260 ⇐125

260 Mines and Minerals
260III Operation of Mines, Quarries, and Wells
260III(C) Rights and Liabilities Incident to Working
260k120 Injuries to Property
260k125 k. Actions. Most Cited Cases
Determination of whether surface owner asserting claim against oil and gas operator, alleging excessive surface use, must present testimony of expert in

oil and gas industry requires trial court to first identify cause of action alleged by surface owner.

[2] Mines and Minerals 260 ⇐125

260 Mines and Minerals
260III Operation of Mines, Quarries, and Wells
260III(C) Rights and Liabilities Incident to Working
260k120 Injuries to Property
260k125 k. Actions. Most Cited Cases
For surface owner to prevail on negligence claim against oil and gas operator with respect to operator's surface use, expert testimony must be presented whenever applicable standard of care is outside common knowledge and experience of ordinary persons.

[3] Mines and Minerals 260 ⇐51(3)

260 Mines and Minerals
260II Title, Conveyances, and Contracts
260II(A) Rights and Remedies of Owners
260k51 Recovery for Trespass or Conversion
260k51(3) k. Pleading and Evidence. Most Cited Cases
Once surface owner establishes prima facie case of trespass for excessive surface use by presenting evidence that oil and gas operator's surface use materially interfered with surface uses, operator may then counter that evidence by showing of scope of its surface use privilege and showing that its operations were within that privilege.

[4] Mines and Minerals 260 ⇐122

260 Mines and Minerals
260III Operation of Mines, Quarries, and Wells
260III(C) Rights and Liabilities Incident to Working
260k120 Injuries to Property
260k122 k. Surface Soil. Most Cited Cases
Oil and Gas Conservation Act section governing action for damages does not create private cause of action for violations of Act or of Oil and Gas Conservation Commission rules. West's C.R.S.A. §§ 34-60-114, 34-60-115.

[5] Action 13 ⇐3

13 Action
13I Grounds and Conditions Precedent
13k3 k. Statutory Rights of Action. Most Cited Cases
Whenever claimant alleges that statute, ordinance, or regulation implicitly creates private right of action, critical question is whether legislature intended such a result.

[6] Action 13 ⇐3

13 Action
13I Grounds and Conditions Precedent
13k3 k. Statutory Rights of Action. Most Cited Cases
Supreme Court will not infer private right of action based on statutory violation unless Court discerns clear legislative intent to create such a cause of action.

[7] Action 13 ⇐3

13 Action
13I Grounds and Conditions Precedent
13k3 k. Statutory Rights of Action. Most Cited Cases
When statute does not expressly provide for private civil remedy, court must consider three factors in determining whether particular plaintiff has available a private cause of action based on violation of statute: whether plaintiff is within class of persons intended to be benefitted by legislative enactment; whether legislature intended to create, albeit implicitly, private right of action; and whether implied civil remedy would be consistent with purposes of legislative scheme.

[8] Mines and Minerals 260 ⇐92.13

260 Mines and Minerals
260III Operation of Mines, Quarries, and Wells

260III(A) Statutory and Official Regulations
260k92.12 Oil and Gas in General
260k92.13 k. In General. Most Cited Cases

Oil and Gas Conservation Act section governing action for damages preserves person's right to assert any cause of action for damages, including common-law action, that person might have against person who has violated Oil and Gas Conservation Commission rule or Act provision. West's C.R.S.A. § 34-60-114.

[9] Action 13 ⚿3

13 Action
13I Grounds and Conditions Precedent
13k3 k. Statutory Rights of Action. Most Cited Cases

When statutory language indicates that legislature considered issue of remedies for violations of statute or regulations issued thereunder and chose not to include private remedy in damages, Supreme Court will not infer such remedy.

[10] Mines and Minerals 260 ⚿92.16

260 Mines and Minerals
260III Operation of Mines, Quarries, and Wells
260III(A) Statutory and Official Regulations
260k92.15 Powers and Proceedings of Commissions and Officers in General
260k92.16 k. In General. Most Cited Cases

Legislature intended that Oil and Gas Conservation Commission have primary responsibility for enforcing provisions of Oil and Gas Conservation Act. West's C.R.S.A. §§ 34-60-109, 34-60-121(1, 4, 5).

[11] Mines and Minerals 260 ⚿92.13

260 Mines and Minerals
260III Operation of Mines, Quarries, and Wells
260III(A) Statutory and Official Regulations
260k92.12 Oil and Gas in General
260k92.13 k. In General. Most Cited Cases

Purposes of Oil and Gas Conservation Act are to encourage production of oil and gas in a manner that protects public health and safety and prevents waste. West's C.R.S.A. § 34-60-102(1).

[12] Negligence 272 ⚿201

272 Negligence
272I In General
272k201 k. Distinction Between Negligence and Intentional Conduct. Most Cited Cases
(Formerly 272k1)

Trespass 386 ⚿1

386 Trespass
386I Acts Constituting Trespass and Liability Therefor
386k1 k. Nature and Elements of Trespass in General. Most Cited Cases

Trespass and negligence are two separate and distinct causes of action.

[13] Mines and Minerals 260 ⚿51(1)

260 Mines and Minerals
260II Title, Conveyances, and Contracts
260II(A) Rights and Remedies of Owners
260k51 Recovery for Trespass or Conversion
260k51(1) k. In General. Most Cited Cases

When surface owner asserts claim of trespass based on oil and gas operator's alleged excessive surface use, trier of fact must consider whether operator's use of surface was reasonable and necessary. Restatement of Property § 450; Restatement (Second) of Torts § 214(2).

[14] Mines and Minerals 260 ⚿55(6)

260 Mines and Minerals
260II Title, Conveyances, and Contracts
260II(B) Conveyances in General
260k55 Grants and Reservations of Minerals and Mining Rights
260k55(6) k. Servitudes Granted, Re-

tained, or Reserved. Most Cited Cases
Owner of severed mineral estate or mineral lessee is privileged to access surface and use that portion of surface estate that is reasonably necessary to develop severed mineral interest.

[15] Mines and Minerals 260 ⚿55(6)

260 Mines and Minerals
260II Title, Conveyances, and Contracts
260II(B) Conveyances in General
260k55 Grants and Reservations of Minerals and Mining Rights
260k55(6) k. Servitudes Granted, Retained, or Reserved. Most Cited Cases
Right of severed mineral estate owner or mineral lessee to use surface as is reasonably necessary, known as "rule of reasonable surface use," does not include right to destroy, interfere with, or damage surface owner's correlative rights to surface.

[16] Mines and Minerals 260 ⚿51(1)

260 Mines and Minerals
260II Title, Conveyances, and Contracts
260II(A) Rights and Remedies of Owners
260k51 Recovery for Trespass or Conversion
260k51(1) k. In General. Most Cited Cases
In the absence of statutes, regulations, or lease provisions to the contrary, unless conduct of oil and gas operator in accessing, exploring, drilling, and using surface is reasonable and necessary to development of mineral interest, conduct is "trespass."

[17] Mines and Minerals 260 ⚿55(6)

260 Mines and Minerals
260II Title, Conveyances, and Contracts
260II(B) Conveyances in General
260k55 Grants and Reservations of Minerals and Mining Rights
260k55(6) k. Servitudes Granted, Retained, or Reserved. Most Cited Cases
Right of severed mineral estate owner or mineral lessee of access to mineral estate is in the nature of implied easement, since it entitles holder to limited right to use land to reach and extract minerals. Restatement of Property § 450.

[18] Mines and Minerals 260 ⚿55(6)

260 Mines and Minerals
260II Title, Conveyances, and Contracts
260II(B) Conveyances in General
260k55 Grants and Reservations of Minerals and Mining Rights
260k55(6) k. Servitudes Granted, Retained, or Reserved. Most Cited Cases
As owner of property subject to implied easement of severed mineral estate owner or mineral lessee for use of land to reach and extract minerals, surface owner continues to enjoy all rights and benefits of proprietorship consistent with burden of easement. Restatement of Property § 450.

[19] Mines and Minerals 260 ⚿55(6)

260 Mines and Minerals
260II Title, Conveyances, and Contracts
260II(B) Conveyances in General
260k55 Grants and Reservations of Minerals and Mining Rights
260k55(6) k. Servitudes Granted, Retained, or Reserved. Most Cited Cases
Surface owner continues to enjoy right to use entire surface of land as long as such use does not preclude exercise of mineral lessee's privilege to use land to reach and extract minerals.

[20] Mines and Minerals 260 ⚿55(6)

260 Mines and Minerals
260II Title, Conveyances, and Contracts
260II(B) Conveyances in General
260k55 Grants and Reservations of Minerals and Mining Rights
260k55(6) k. Servitudes Granted, Retained, or Reserved. Most Cited Cases
Surface owner and mineral rights holder must each have due regard for rights of the other in making

use of estate in question.

[21] Mines and Minerals 260 ⚿55(6)

260 Mines and Minerals
260II Title, Conveyances, and Contracts
260II(B) Conveyances in General
260k55 Grants and Reservations of Minerals and Mining Rights
260k55(6) k. Servitudes Granted, Retained, or Reserved. Most Cited Cases
Concept that surface owner and mineral rights holder must each have due regard for rights of the other requires mineral rights holders to accommodate surface owners to the fullest extent possible consistent with their right to develop mineral estate.

[22] Mines and Minerals 260 ⚿55(6)

260 Mines and Minerals
260II Title, Conveyances, and Contracts
260II(B) Conveyances in General
260k55 Grants and Reservations of Minerals and Mining Rights
260k55(6) k. Servitudes Granted, Retained, or Reserved. Most Cited Cases
Under concept that surface owner and mineral rights holder must each have due regard for rights of the other, how much accommodation of surface owner by mineral rights holder is necessary varies depending on surface uses and alternatives available to mineral rights holder for exploitation of underlying mineral estate.

[23] Mines and Minerals 260 ⚿55(6)

260 Mines and Minerals
260II Title, Conveyances, and Contracts
260II(B) Conveyances in General
260k55 Grants and Reservations of Minerals and Mining Rights
260k55(6) k. Servitudes Granted, Retained, or Reserved. Most Cited Cases
When operations of mineral lessee or other holder of mineral rights would preclude or impair uses by surface owner, and when reasonable alternatives are available to lessee, doctrine of reasonable surface use requires lessee to adopt alternative means.

[24] Mines and Minerals 260 ⚿51(1)

260 Mines and Minerals
260II Title, Conveyances, and Contracts
260II(A) Rights and Remedies of Owners
260k51 Recovery for Trespass or Conversion
260k51(1) k. In General. Most Cited Cases
Because mineral rights holder is legally privileged to make such use of surface as is reasonable and necessary to develop underlying minerals, "trespass" occurs at point when holder exceeds scope of that implied easement and thereby exceeds legal authorization permitting mineral development activities. Restatement of Property § 450; Restatement (Second) of Torts § 214(2).

[25] Easements 141 ⚿40

141 Easements
141II Extent of Right, Use, and Obstruction
141k39 Extent of Right
141k40 k. In General. Most Cited Cases
In determining whether scope of easement or privilege respecting real property has been exceeded, court must look to its nature and purpose.

[26] Mines and Minerals 260 ⚿51(1)

260 Mines and Minerals
260II Title, Conveyances, and Contracts
260II(A) Rights and Remedies of Owners
260k51 Recovery for Trespass or Conversion
260k51(1) k. In General. Most Cited Cases
Until it is found that mineral lessee's conduct was not reasonable and necessary for exploration or extraction of minerals, surface owner's cause of action against lessee for trespass must fail. Restatement (Second) of Torts § 214(2).

[27] Trespass 386 ⚿10

386 Trespass
386I Acts Constituting Trespass and Liability Therefor
386k9 Trespass to Real Property
386k10 k. In General. Most Cited Cases

If privilege to enter real property of another is defined in terms of reasonableness, trespass may only occur when holder of privilege acts unreasonably or unnecessarily.

[28] Mines and Minerals 260 ⚿51(1)

260 Mines and Minerals
260II Title, Conveyances, and Contracts
260II(A) Rights and Remedies of Owners
260k51 Recovery for Trespass or Conversion
260k51(1) k. In General. Most Cited Cases

In its necessary use of surface, mineral lessee has responsibility to exercise its privilege reasonably, in manner designed to minimize intrusion and surface damages; when it fails in such responsibility, it commits "trespass." Restatement of Property § 450; Restatement (Second) of Torts § 214(2).

[29] Mines and Minerals 260 ⚿125

260 Mines and Minerals
260III Operation of Mines, Quarries, and Wells
260III(C) Rights and Liabilities Incident to Working
260k120 Injuries to Property
260k125 k. Actions. Most Cited Cases

In action in which surface owner asserts negligence claim against oil and gas operator regarding operator's surface use, based on alleged violation of Oil and Gas Conservation Commission rules, expert testimony is not required for surface owner to prevail when rules adopt standard of care which is within common knowledge and experience of ordinary persons, but expert testimony is required when rule adopts standard of care which is not within common knowledge and experience of ordinary persons. West's C.R.S.A. § 34-60-114; 2 Colo.Code Regs. § 404-1; Restatement (Second) of Torts §§ 288B, 288B comment.

[30] Negligence 272 ⚿202

272 Negligence
272I In General
272k202 k. Elements in General. Most Cited Cases
(Formerly 272k1)

Prima facie case of negligence is established when plaintiff proves the following elements: existence of legal duty owed by defendant to plaintiff, breach of that duty, injury to plaintiff, and causal relationship between breach and injury.

[31] Negligence 272 ⚿230

272 Negligence
272III Standard of Care
272k230 k. In General. Most Cited Cases
(Formerly 272k1)

Because negligence requires proof of existence and breach of legal duty, negligence claim cannot be sustained without evidence of applicable standard of care and evidence that defendant's conduct did not conform to standard of care.

[32] Negligence 272 ⚿1657

272 Negligence
272XVIII Actions
272XVIII(C) Evidence
272XVIII(C)5 Weight and Sufficiency
272k1657 k. Necessity of Expert Testimony. Most Cited Cases
(Formerly 272k134(1))

Generally, expert testimony is required in negligence cases when defendant is held to standard of care that is outside common knowledge and experience of ordinary persons.

[33] Negligence 272 ⚿238

272 Negligence
272III Standard of Care
272k238 k. Standard Established by Statute or Regulation. Most Cited Cases

(Formerly 272k6)
Relevant legislative enactments and administrative regulations may, in some cases, establish applicable standard of care in negligence actions.

[34] Negligence 272 ⚿259

272 Negligence
272IV Breach of Duty
272k259 k. Violations of Statutes and Other Regulations. Most Cited Cases
(Formerly 272k6)
If legislative enactment or administrative regulation establishes standard of care in negligence action, effect of violation is to essentially make defendant strictly liable for violation regardless of whether defendant acted reasonably.

[35] Evidence 157 ⚿512

157 Evidence
157XII Opinion Evidence
157XII(B) Subjects of Expert Testimony
157k512 k. Due Care and Proper Conduct in General. Most Cited Cases
If legislative enactment or administrative regulation establishes duty owed by defendant for purposes of negligence action, expert testimony is irrelevant on that issue unless enactment or regulation itself includes standard of care outside common knowledge and experience of ordinary persons.

[36] Evidence 157 ⚿512

157 Evidence
157XII Opinion Evidence
157XII(B) Subjects of Expert Testimony
157k512 k. Due Care and Proper Conduct in General. Most Cited Cases
If statute or regulation is merely evidence of standard of care for purposes of negligence action, expert testimony is admissible as additional evidence of that standard.

[37] Negligence 272 ⚿238

272 Negligence
272III Standard of Care
272k238 k. Standard Established by Statute or Regulation. Most Cited Cases
(Formerly 272k6)
Relevant legislative enactment or administrative regulation may define standard of care owed by defendant if it was enacted for public's safety, it was intended to protect class of persons of which plaintiff is a member, and it was enacted to prevent type of harm suffered by plaintiff.

[38] Negligence 272 ⚿259

272 Negligence
272IV Breach of Duty
272k259 k. Violations of Statutes and Other Regulations. Most Cited Cases
(Formerly 272k6)
If legislative enactment or regulation defines legal duty owed by defendant, then proof of its violation establishes breach of that duty.

[39] Mines and Minerals 260 ⚿121

260 Mines and Minerals
260III Operation of Mines, Quarries, and Wells
260III(C) Rights and Liabilities Incident to Working
260k120 Injuries to Property
260k121 k. In General. Most Cited Cases
Absent contrary provision in severance instrument or mineral lease, compensable damage due a surface owner on owner's negligence claim against mineral lessee is damage caused by lessee's surface use that is negligent or not reasonably necessary to development of mineral estate. West's C.R.S.A. § 34-60-114.

[40] Mines and Minerals 260 ⚿92.13

260 Mines and Minerals
260III Operation of Mines, Quarries, and Wells
260III(A) Statutory and Official Regulations
260k92.12 Oil and Gas in General
260k92.13 k. In General. Most Cited

Cases
Oil and Gas Conservation Commission rules do not establish standard of care for oil and gas operators' use of surface for negligence purposes. West's C.R.S.A. § 34-60-114; 2 Colo.Code Regs. § 404-1.

[41] Negligence 272 ⚿1638

272 Negligence
272XVIII Actions
272XVIII(C) Evidence
272XVIII(C)4 Admissibility
272k1638 k. Violations of Statutes and Other Regulations in General. Most Cited Cases
(Formerly 272k124(2))
When legislative enactment or administrative regulation does not define applicable standard of care, it may nonetheless be relevant evidence bearing on issue of negligent conduct; this is particularly true in case of administrative regulations, whose violation courts commonly regard as evidence of applicable standard of care. Restatement (Second) of Torts §§ 288B, 288B comment.

[42] Mines and Minerals 260 ⚿125

260 Mines and Minerals
260III Operation of Mines, Quarries, and Wells
260III(C) Rights and Liabilities Incident to Working
260k120 Injuries to Property
260k125 k. Actions. Most Cited Cases
Violations of Oil and Gas Conservation Commission rules are valid, but not conclusive, evidence that oil and gas lessee breached duty as to surface use owed to surface owner for negligence purposes. West's C.R.S.A. § 34-60-114; 2 Colo.Code Regs. § 404-1; Restatement (Second) of Torts §§ 288B, 288B comment.

[43] Evidence 157 ⚿516

157 Evidence
157XII Opinion Evidence
157XII(B) Subjects of Expert Testimony
157k516 k. Custom or Usage. Most Cited Cases
Because Oil and Gas Conservation Commission rules are only evidence of applicable standard of care with respect to surface use that oil and gas lessee owes to surface owner for negligence purposes, expert testimony concerning standard industry customs and practices is relevant additional evidence of that standard if standard is not within common knowledge and experience of ordinary persons. West's C.R.S.A. § 34-60-114; 2 Colo.Code Regs. § 404-1; Restatement (Second) of Torts §§ 288B, 288B comment.

[44] Evidence 157 ⚿512

157 Evidence
157XII Opinion Evidence
157XII(B) Subjects of Expert Testimony
157k512 k. Due Care and Proper Conduct in General. Most Cited Cases
Determination as to whether standard of care is matter of common knowledge so as to preclude admission of expert testimony concerning standard industry customs and practices in negligence action is committed to sound discretion of trial court.

[45] Mines and Minerals 260 ⚿125

260 Mines and Minerals
260III Operation of Mines, Quarries, and Wells
260III(C) Rights and Liabilities Incident to Working
260k120 Injuries to Property
260k125 k. Actions. Most Cited Cases
If surface owner asserting negligence claim against oil and gas lessee as to lessee's surface use proves that lessee has violated Oil and Gas Conservation Commission rule, presentation of expert testimony is not sine qua non of liability; if violation is proximate cause of injury, trier of fact is permitted, but not required, to conclude that lessee's conduct was negligent. West's C.R.S.A. § 34-60-114; 2 Colo.Code Regs. § 404-1; Restatement (Second) of Torts §§ 288B, 288B comment.

[46] Mines and Minerals 260 ⚿125

260 Mines and Minerals
260III Operation of Mines, Quarries, and Wells
260III(C) Rights and Liabilities Incident to Working
260k120 Injuries to Property
260k125 k. Actions. Most Cited Cases
Surface owner was not required to present testimony of an expert in oil and gas operations to sustain owner's negligence claim against oil and gas operator alleging that operator violated Oil and Gas Conservation Commission rules in its oil well site reclamation operations by failing to remove waste, burying waste without owner's prior written consent, failing to give owner notice prior to commencing reclamation operations, and neglecting to consult with owner and state soil conservation service concerning proposed reclamation operations, as rules adopted standard of care that was within common knowledge and experience of ordinary persons. 2 Colo.Code Regs. § 404-1, Rule 315(q, r) (1994).

[47] Mines and Minerals 260 ⚿125

260 Mines and Minerals
260III Operation of Mines, Quarries, and Wells
260III(C) Rights and Liabilities Incident to Working
260k120 Injuries to Property
260k125 k. Actions. Most Cited Cases
For purposes of surface owner's negligence claim against oil and gas operator alleging failure to properly restore and remediate oil drill sites, expert testimony was required for owner to prove that operator violated Oil and Gas Conservation Commission rules requiring that drilling locations and well sites be reclaimed and restored as soon as conditions "reasonably permit" and that drilling sites be restored to their original condition "insofar as is practicable," as determination of whether rule provisions had been violated was not normally matter within common knowledge and experience of ordinary persons. 2 Colo.Code Regs. § 404-1, Rule 315(q, r) (1994).

[48] Mines and Minerals 260 ⚿51(3)

260 Mines and Minerals
260II Title, Conveyances, and Contracts
260II(A) Rights and Remedies of Owners
260k51 Recovery for Trespass or Conversion
260k51(3) k. Pleading and Evidence. Most Cited Cases
Surface owner is not required to present expert testimony to establish prima facie case of trespass alleging excessive surface use by oil and gas operator, as trespass claim does not require owner to present evidence of applicable standard of care, but rather, requires owner to present evidence that operator's conduct materially interfered with surface uses.

[49] Trespass 386 ⚿10

386 Trespass
386I Acts Constituting Trespass and Liability Therefor
386k9 Trespass to Real Property
386k10 k. In General. Most Cited Cases
Elements of tort of trespass consist of physical intrusion upon property of another without permission of person lawfully entitled to possession of the real estate.

[50] Mines and Minerals 260 ⚿51(3)

260 Mines and Minerals
260II Title, Conveyances, and Contracts
260II(A) Rights and Remedies of Owners
260k51 Recovery for Trespass or Conversion
260k51(3) k. Pleading and Evidence. Most Cited Cases
To establish prima facie case of trespass on ground of excessive surface use by oil and gas operator, surface owner's initial burden is to present evidence that operator's conduct materially interfered with surface uses; evidence that operator's conduct was merely inconvenient to owner is insufficient.

[51] Mines and Minerals 260 ⚿51(3)

260 Mines and Minerals
260II Title, Conveyances, and Contracts
260II(A) Rights and Remedies of Owners
260k51 Recovery for Trespass or Conversion
260k51(3) k. Pleading and Evidence. Most Cited Cases

In establishing prima facie case of trespass on ground of excessive surface use by oil and gas operator, surface owner may point to Oil and Gas Conservation Commission rules as evidence of type of operator conduct raising reasonable presumption that operator's surface use materially interfered with surface uses. 2 Colo.Code Regs. § 404-1.

[52] Mines and Minerals 260 ⇐51(1)

260 Mines and Minerals
260II Title, Conveyances, and Contracts
260II(A) Rights and Remedies of Owners
260k51 Recovery for Trespass or Conversion
260k51(1) k. In General. Most Cited Cases

For purposes of establishing prima facie case of trespass on ground of excessive surface use by oil and gas operator, "material interference with surface use" is interference which is not reasonable from perspective of surface owner and considering only the impact on surface use.

[53] Mines and Minerals 260 ⇐51(3)

260 Mines and Minerals
260II Title, Conveyances, and Contracts
260II(A) Rights and Remedies of Owners
260k51 Recovery for Trespass or Conversion
260k51(3) k. Pleading and Evidence. Most Cited Cases

To rebut surface owner's prima facie case of trespass for excessive surface use by oil and gas operator, operator must present evidence, by means of expert testimony or otherwise, that explains why its surface conduct was reasonable and necessary from perspective of operator.

[54] Mines and Minerals 260 ⇐51(3)

260 Mines and Minerals
260II Title, Conveyances, and Contracts
260II(A) Rights and Remedies of Owners
260k51 Recovery for Trespass or Conversion
260k51(3) k. Pleading and Evidence. Most Cited Cases

If oil and gas operator rebuts surface owner's prima facie case of trespass for excessive surface use by presenting evidence explaining why operator's surface conduct was reasonable and necessary, owner may present its own rebuttal evidence that reasonable alternatives were available to operator at time of alleged trespass.

[55] Mines and Minerals 260 ⇐51(4)

260 Mines and Minerals
260II Title, Conveyances, and Contracts
260II(A) Rights and Remedies of Owners
260k51 Recovery for Trespass or Conversion
260k51(4) k. Trial. Most Cited Cases

With respect to surface owner's trespass claim for excessive surface use by oil and gas operator, it is ultimately province of trier of fact to balance competing interests of operator and owner and objectively determine whether, under the circumstances, operator's surface use was both reasonable and necessary.

[56] Mines and Minerals 260 ⇐51(3)

260 Mines and Minerals
260II Title, Conveyances, and Contracts
260II(A) Rights and Remedies of Owners
260k51 Recovery for Trespass or Conversion
260k51(3) k. Pleading and Evidence. Most Cited Cases

If mineral rights holder rebuts surface owner's prima facie case of trespass for excessive surface use and owner fails to present evidence of reasonable alternatives available to operator at time of al-

leged trespass, trier of fact may consider owner's failure to present such evidence in determining whether holder's conduct was reasonable and necessary.

[57] Appeal and Error 30 ⇐1177(1)

30 Appeal and Error
30XVII Determination and Disposition of Cause
30XVII(D) Reversal
30k1177 Necessity of New Trial
30k1177(1) k. In General. Most Cited Cases

Basic fairness required new trial on surface owner's trespass claim against oil and gas operator alleging excessive surface use, after Supreme Court on review for the first time clarified that trespass and negligence arising from an operator's surface use were disparate causes of action implicating distinct evidentiary burdens on parties, in trespass and negligence action in which owner alleged that operator failed to properly and completely restore and remediate oil drill sites, where trial court failed to consider entire trespass claim because it mistakenly believed that owner was required to present expert testimony. 2 Colo.Code Regs. § 404-1, Rule 315(q, r) (1994).

[58] Appeal and Error 30 ⇐1177(1)

30 Appeal and Error
30XVII Determination and Disposition of Cause
30XVII(D) Reversal
30k1177 Necessity of New Trial
30k1177(1) k. In General. Most Cited Cases

Basic fairness required new trial on surface owner's negligence claim against oil and gas operator alleging excessive surface use, after Supreme Court on review for the first time clarified that trespass and negligence arising from an operator's surface use were disparate causes of action implicating distinct evidentiary burdens on parties, in trespass and negligence action in which owner alleged that operator failed to properly and completely restore and remediate oil drill sites, where trial court erroneously failed to consider portions of negligence claim for which Oil and Gas Conservation Commission rules evidenced standard of care, mistakenly believing that owner was required to present expert testimony. 2 Colo.Code Regs. § 404-1, Rule 315(q, r) (1994).

[59] Appeal and Error 30 ⇐1177(1)

30 Appeal and Error
30XVII Determination and Disposition of Cause
30XVII(D) Reversal
30k1177 Necessity of New Trial
30k1177(1) k. In General. Most Cited Cases

Basic fairness may require that new trial be granted on legal issue when appellate decision sets forth new standards for resolving that issue.

[60] New Trial 275 ⇐9

275 New Trial
275I Nature and Scope of Remedy
275k9 k. New Trial as to Part of Issues. Most Cited Cases

Whenever new trial must be held on one issue, new trial must also be held with respect to other issues unless issue to be retried is entirely distinct and separable from other issues involved in case and partial retrial can be had without injustice to any party. Rules Civ.Proc., Rule 59(c, d).

[61] New Trial 275 ⇐9

275 New Trial
275I Nature and Scope of Remedy
275k9 k. New Trial as to Part of Issues. Most Cited Cases

When ground exists for new trial, partial retrial may be held solely on issue of damages when liability has been clearly established. Rules Civ.Proc., Rule 59(c, d).

[62] New Trial 275 ⇐9

275 New Trial
275I Nature and Scope of Remedy

275k9 k. New Trial as to Part of Issues. Most Cited Cases
Whenever ground exists for new trial and question arises as to whether complete retrial is necessary, determinative considerations are factors relating to fairness; focus is on relationship between issues under the evidence and practical logistics of retrial. Rules Civ.Proc., Rule 59(c, d).

[63] Appeal and Error 30 ⇐1177(8)

30 Appeal and Error
30XVII Determination and Disposition of Cause
30XVII(D) Reversal
30k1177 Necessity of New Trial
30k1177(8) k. Insufficiency of Verdict or Findings. Most Cited Cases
Total lack of explanation for trial court's alternative determination that no damages resulted from oil and gas operator's activities frustrated Supreme Court's ability to consider issue on appeal, necessitating reversal of trial court's judgment on that issue in action in which surface owner asserted claims against operator for trespass and negligence, alleging that operator failed to properly and completely restore and remediate oil drill sites. 2 Colo.Code Regs. § 404-1, Rule 315(q, r) (1994).

[64] Appeal and Error 30 ⇐1177(1)

30 Appeal and Error
30XVII Determination and Disposition of Cause
30XVII(D) Reversal
30k1177 Necessity of New Trial
30k1177(1) k. In General. Most Cited Cases
Appellate determination that new trial was required on liability necessitated new trial on both liability and damages issues concerning surface owner's negligence and trespass claims against oil and gas operator, alleging that operator failed to properly and completely restore and remediate oil drill sites; issues of liability and damages were inextricably interwoven, and over three years would have elapsed between time of original trial and time of second trial. 2 Colo.Code Regs. § 404-1, Rule 315(q, r) (1994).

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Justice MARTINEZ delivered the Opinion of the Court.

We granted certiorari to review the court of appeals decision in *Gerrity Oil & Gas Corp. v. Magness,* 923 P.2d 261 (Colo.App.1995). The court of appeals reversed the judgment of the trial court, which had dismissed Magness's counterclaims, and remanded the case to the trial court for a new trial on issues of both liability and damages. *Gerrity,* 923 P.2d at 266. The court of appeals held that section 34-60-114, 14 C.R.S. (1995), creates a private cause of action for individuals injured by another's violation of the Oil and Gas Conservation Act (the Act), §§ 34-60-101 to 34-60-126, 14 C.R.S. (1995), or regulations (rules or commission rules) promulgated by the Oil and Gas Conservation Commission (commission). *Id.* at 263-64. The court of appeals also held that the trial court erred in construing Magness's trespass claim as requiring a showing that Gerrity acted unreasonably in conducting its operations. *Id.* at 266. The court of appeals further held that because the Act and commission rules defined "the relevant duty owed by Gerrity to Magness," the trial court erred in finding that Magness could not prevail in his counterclaims without presenting the testimony of an expert in the oil and gas industry. *Id.* at 264.

We determine that section 34-60-114 does not create a private cause of action for those damaged by another's violation of the Act or commission rule.

We further conclude that, although negligence and trespass are distinct and separate causes of action, the reasonableness of an operator's surface use must be considered in determining if the operator committed a trespass.

[1][2] We also hold that the determination of whether a surface owner must present testimony of an expert in the oil and gas industry requires the trial court to first identify the cause of action alleged by the surface owner. If the surface owner asserts a claim of negligence, expert testimony must be presented whenever the applicable standard of ***920** care is outside the common knowledge and experience of ordinary persons. If the surface owner relies on a statute or commission rule-which we conclude do not establish the standard of care but are evidence of that standard-expert testimony is still a requirement when the statute or rule itself includes a standard of care that is outside the common knowledge and experience of ordinary persons.

[3] If a surface owner brings a trespass claim for alleged excessive surface use, the surface owner need not present expert testimony in order to have the issue reach the trier of fact. Unlike a negligence cause of action, a prima facie case of trespass does not require evidence of an applicable standard of care, but requires evidence that the operator's surface use materially interfered with surface uses. Because such evidence may be presented by lay persons, expert testimony is not necessary to establish a prima facie case of trespass. Once a prima facie case is established, the mineral interest holder may then counter that evidence by a showing of the scope of its surface use privilege and a showing that its operations were within that privilege.

Because we have not previously clarified the distinction between trespass and negligence causes of action in the context of oil and gas operations, a new trial is necessary on the question of Gerrity's liability. In addition, we conclude that a new trial on the damages issue is necessary because the liability and damages issues in this case are not entirely distinct and separable. We therefore reverse in part and affirm in part the judgment of the court of appeals, and affirm the court of appeals grant of a new trial on all issues.

I.

In 1983, Bob Magness purchased a surface estate encompassing approximately 1,270 acres of land in Weld County, Colorado. Magness began using a portion of the land to raise Arabian horses and Limousin cattle. Magness also conducted farming operations to provide pasture land for the livestock. Magness acquired the surface estate in fee simple subject to a reservation of the underlying mineral estate. That estate had been severed prior to Magness's acquisition of the surface estate.

In 1970, the owners of the mineral estate, who are not parties to this litigation, executed an oil and gas lease naming T.S. Pace as lessee. Pace later assigned rights acquired under the lease to Pan American Petroleum Corporation, now doing business as Amoco Production Company (Amoco). On June 30, 1992, Amoco and Gerrity Oil and Gas Corporation (Gerrity) signed an agreement which made Gerrity the lessee of record under the lease.

In October, 1992, Gerrity notified Magness of its intent to drill four oil wells on the parcel. The parties commenced negotiations to determine locations of the wells that would minimize crop damage and disruption of livestock operations. In response to various concerns expressed by Magness's representatives, Gerrity agreed to move the drill sites from their initial proposed locations.

On November 11, 1992, the parties agreed on the location of one of the four wells, the "No. 6" well. The same day, Gerrity began work on this site. However, on November 18, 1992, after Gerrity had expressed a desire to begin work on a second well, the "2-D" well, an agent of Magness informed Gerrity that it did not have authority to commence operations on any additional wells.

By the end of November, negotiations between the

parties had broken down and Magness had not consented to Gerrity's entry of the property to drill additional wells. On November 27, 1992, Gerrity filed a motion for a temporary restraining order and preliminary injunction with the District Court of Weld County and requested that the court enjoin Magness from preventing access onto the 2-D well site and order Magness to remove equipment and other materials. The district court granted the motion.

Gerrity later filed a motion to convert the temporary restraining order and preliminary injunction into a permanent injunction.[FN1] In response to this motion, Magness asserted ***921** several counterclaims, including a request for a declaratory judgment. Magness claimed that Gerrity acted negligently

> FN1. By this time, Gerrity had completed all four wells on the Magness property.

by failing to properly and completely restore and remediate the drill sites to a condition as close as practical as existed before [Gerrity's] operation, by leaving drilling mud and other foreign substances in the excavated pits, by failing to timely restore and remediate the drill sites, by depositing hazardous and toxic substances on [Magness's] property, by contaminating the property with hazardous, toxic and controlled substances, and by contaminating [Magness's] property.

Magness also asserted a claim of trespass based on the same alleged acts.

At trial, both parties presented primarily anecdotal testimony from witnesses who observed or took part in the reclamation of the oil well sites. During the course of the trial, Magness alleged that Gerrity violated commission rules by failing to notify and consult with Magness before commencing reclamation operations, failing to reclaim and restore the well sites in a timely fashion following the completion of operations, failing to remove liquids, plastics, and other materials associated with drilling activity, and otherwise neglecting to restore the well sites to their original condition.

In response to these allegations, Gerrity's field operations manager, Thomas Majors, conceded that Gerrity did not notify or consult with Magness before commencing reclamation operations. However, Majors testified that any delay in restoring the well sites was caused by freezing weather conditions which made earlier restoration impossible, and that Gerrity personnel "took everything out that needed to be taken out" of the well sites.

Gerrity also presented the testimony of a heavy equipment operator, Gene Lawson, who performed most of the reclamation work. Lawson testified that he restored the pits on the Magness property according to the same procedure he had been using for forty years. Lawson conceded that it was possible some solid residue remained in the pits after reclamation, but opined that it is generally impossible to remove all residue.

Gerrity also presented the testimony of Cliff Roberts, a civil engineer hired by Gerrity to clean up oil stains adjacent to the No. 3 and No. 4 well sites. Roberts characterized these stains as "benign" and "shallow."

Witnesses for Magness disputed much of the testimony offered by Gerrity. According to these witnesses, Gerrity failed to remove fluids, drilling mud, and plastic liners from the pits, spilled hydrocarbons and other fluids around certain well sites, and generally failed to restore the sites to the condition in which they existed before Gerrity commenced operations. Wendel Geeslin, a ranch manager for Magness, testified that an excavation of one of the reclaimed pits revealed both plastic and drilling mud, and that, in his opinion, weather conditions permitted reclamation of the sites by March 1, 1993. Geeslin further testified that Magness lost one and one half tons of alfalfa near one well site because of delayed and inadequate reclamation, and was delayed in planting a grass crop and utilizing horse pastures due to Gerrity's alleged untimely reclamation efforts. A farm and ranch appraiser, Virgil Holtgrewe, also testified for Magness, and stated that, in his opinion, the Magness property

was reduced in value by $17,423 due to Gerrity's oil and gas operations. Holtgrewe arrived at this figure based on his estimation of the cost to restore the property to its previous condition, but conceded that his estimation of damages resulting from Gerrity's operations required him to exercise an unusual degree of personal judgment. Holtgrewe also conceded that the evidence suggested that the presence of the oil and gas wells did not affect the market value of the property.

At the conclusion of the trial, the trial court denied Gerrity's request for a permanent injunction, noting that Gerrity had been on the Magness property for over a year and that there had been "no problems between the parties regarding [Gerrity's] right to reasonable access to the property." The trial court also denied Magness's request for a declaratory judgment, finding that the dispute was essentially factual and not amenable to declaratory judgment.

***922** The trial court also declined to find Gerrity liable on Magness's counterclaims. Generally, the trial court found that Gerrity was "quite conciliatory and acquiesced in many of the suggestions made by [Magness] with respect to the location of the well sites." Addressing Magness's allegations of negligence, the trial court concluded that Magness failed to prove that Gerrity "acted unreasonably in the drilling, restoration, and the operation of the drill sites." In particular, the trial court found that Magness's evidence was insufficient because Magness failed to present expert testimony concerning oil well operations. The court stated:

> The drilling and operation and maintenance of oil wells is not a matter of common knowledge. This Court has next to no knowledge with respect to the drilling, operating of oil wells. There is no testimony of an expert regarding negligent operations of the wells. This is an area that people are not generally familiar with in these cases. For a plaintiff to prevail, a plaintiff must present evidence of a knowledgeable person as to what the practices are in that particular industry or endeavor.

The trial court noted that, although many of Magness's witnesses described what they observed,

> that's not very meaningful to the Court in a lawsuit involving a matter that we don't have, or the average person doesn't have much knowledge regarding. Some of the people involved in this, some of the agents of [Magness], evidenced little knowledge of the area. They describe what they observed, but while this might be somewhat shocking to a sensitive person, it doesn't rise to the level where a Court of law can make a finding that [Gerrity] conducted its operation in an unreasonable or negligent manner under all the facts and circumstances.

The trial court also found that Gerrity had not violated commission rules 315(q) and 315(r). *See* Rule 315(q)-(r), 2 C.C.R. 404-1 (1993).[FN2] The court found that Gerrity restored the pits in a reasonable length of time because, "under the circumstances, mainly that some of the material excavated from the pits was frozen [and] the pits themselves were frozen," Gerrity's delay was not unreasonable.

> FN2. The trial court referred to rule 315, although at the time Gerrity restored the sites the pertinent rules provisions were found in rule 317. Because the provisions contain identical language, and to avoid confusion, we refer to rule 315. The current regulations governing the closure requirements of pits and the reclamation of land affected by oil and gas operations are found at Rules 901-1004, 2 C.C.R. 404-1 (1995-1997).

The trial court also rejected the contention that Gerrity had violated commission rules by failing to restore the well sites to their original condition insofar as practicable. Specifically, the court noted that there was conflicting testimony as to how the pits were restored, and found that Lawson's testimony was "the most reliable and trustworthy." The court also found that, even if certain rules provisions had

been violated, Magness failed to adequately prove any resultant damages.

In resolving Magness's trespass claim, the trial court stated that it was "basically predicated upon the claim that the Plaintiff was unreasonable in its method of operations." Because Magness failed to present the expert testimony needed to show that Gerrity unreasonably operated and reclaimed the well sites, the court determined that Magness did not meet his burden of showing that Gerrity's unreasonable use of the surface constituted a trespass.

The court of appeals reversed the judgment of the trial court and remanded the case for a new trial. *See Gerrity Oil & Gas Corp. v. Magness*, 923 P.2d 261, 266 (Colo.App.1995). The court of appeals determined, first, that section 34-60-114, 14 C.R.S. (1995), "provides a private right of action for those injured as a result of the failure of another to comply with certain statutes and regulations relating to the oil and gas industry." *Id.* at 263. The court also held that the trial court erred in finding that expert testimony was necessary because "the [Oil and Gas Conservation] Act and the rules promulgated by the Commission define the relevant duty owed by Gerrity to Magness." *Id.* at 264.

***923** The court further held that the trial court erred in its interpretation of the requirements of relevant commission rules. *Id.* at 265-66. These rules, the court stated, "provide standards that an operator of an oil drilling site must meet both during and after the drilling process, and they define the scope of the operator's duty to the owner of the surface rights." *Id.* at 265.

The court of appeals also determined that the trial court "erred in its interpretation of the law pertaining to trespass," stating that "the reasonableness of Gerrity's conduct is irrelevant to this claim," and the trial court's reference to reasonableness reflected an erroneous belief that trespass sounds "primarily in negligence." *Id.* at 266. We granted Gerrity's petition for writ of certiorari to review the decision of the court of appeals. FN3

FN3. We granted certiorari to consider the following issues:

> 1. Did the court of appeals err in holding that the reasonableness of an oil and gas operator's conduct is not relevant to a determination of whether such operator's activities constitute a trespass?
>
> 2. Did the court of appeals err in holding that expert testimony is neither necessary nor appropriate in order to determine whether an oil and gas operator breached its duty of care owed to the owner of the surface estate when the standard of care set forth in the applicable administrative rule incorporates the concept of reasonableness?
>
> 3. Did the court of appeals err in holding that § 34-60-114, 14 C.R.S. (1995), creates a private right of action for an alleged violation of regulations adopted by the Colorado Oil and Gas Conservation Commission?
>
> 4. Did the court of appeals err in holding that the district court's conclusion that Magness had suffered no damages as a result of Gerrity's conduct was tainted by the district court's "erroneous" findings on liability?

II.

[4] We first consider whether section 34-60-114, 14 C.R.S. (1995), of the Act provides surface owners a private right of action for an oil and gas operator's violation of statutes or commission rules governing the operator's use of the surface. The court of appeals held that section 34-60-114 satisfied the test set forth in *Allstate Insurance Co. v. Parfrey*, 830 P.2d 905 (Colo.1992), and concluded that section 34-60-114 creates a private right of action despite the absence of express language conferring such a right. Although we agree that *Parfrey* sets forth the

appropriate test for determining whether section 34-60-114 creates a private right of action for violations of the Act or commission rules, we conclude that neither section 34-60-114 nor other provisions of the Act evince a legislative intent to create such a private cause of action. We therefore hold that section 34-60-114 does not create a private cause of action for violations of the Act or commission rules.

[5][6][7] Whenever a claimant alleges that a statute, ordinance, or regulation implicitly creates a private right of action, the critical question is whether the legislature intended such a result. For this reason, we will not infer a private right of action based on a statutory violation unless we discern a clear legislative intent to create such a cause of action. *See Quintano v. Industrial Comm'n,* 178 Colo. 131, 135-36, 495 P.2d 1137, 1139 (1972). When a statute does not expressly provide for a private civil remedy, a court must consider three factors in determining if a particular plaintiff has available a private cause of action based on a violation of the statute:

> whether the plaintiff is within the class of persons intended to be benefitted by the legislative enactment; whether the legislature intended to create, albeit implicitly, a private right of action; and whether an implied civil remedy would be consistent with the purposes of the legislative scheme.

Allstate Ins. Co. v. Parfrey, 830 P.2d 905, 911 (Colo.1992).

In *Parfrey,* we were asked to determine whether section 10-4-609(2), 4A C.R.S. (1987),[FN4] provided an insured under an automobile insurance policy a private cause of action against an insurer based on the insurer's failure to offer increased uninsured/underinsured***924** motorist coverage as statutorily required. Considering the factors outlined above, we concluded that, even though the legislature did not expressly provide for a private civil remedy in enacting section 10-4-609(2), the failure to infer such a private cause of action would thwart the purposes of the statute because it would leave an insured "without a private civil remedy to redress the injuries and damages caused by an insurer's failure to discharge its statutory responsibility." *Id.* at 911. A refusal to infer a private right of action for enforcing section 10-4-609(2) would have frustrated the statute's purposes because neither section 10-4-609(2) nor other relevant statutory provisions provided any "method for enforcing a violation" of the statute. *Id.* at 910 & n. 3. We acknowledged, however, that when the legislature decides to provide for administrative remedies to enforce a statute's provisions, this decision "is consistent with a legislative intent to preclude a private civil remedy for breach of the statutory duty." *Id.* at 910.

> FN4. That statute provided, in relevant part, that "[p]rior to the time the policy is issued or renewed, the insurer shall offer the named insured the right to obtain higher limits of uninsured motorist coverage...." § 10-4-609(2), 4A C.R.S. (1987); *see* 830 P.2d at 907.

In contrast with the statute in *Parfrey,* section 34-60-114 is not "totally silent on the matter of remedy." *Parfrey,* 830 P.2d at 910. Without deciding whether Magness falls within the class of persons intended to be protected by the statute, application of the other two factors set forth in *Parfrey* does not allow us to infer a private cause of action based on a violation of section 34-60-114. Neither the statutory scheme set forth in the Act, nor the language of section 34-60-114 itself, permits such an inference.

[8] Like the court of appeals below, Magness relies primarily on the language of section 34-60-114 to argue that the statute creates a private civil remedy. According to Magness, the first sentence of section 34-60-114 creates a private cause of action, while the second sentence merely refers to the type of damages available under the Act. We disagree.

The first two sentences of section 34-60-114 provide:

> Nothing in this article, and no suit by or against the commission, and no violation charged or asserted against any person under this article, shall impair, abridge, or delay any cause of action for damages which any person *may* have or assert against any person violating any provision of this article, or any rule, regulation, or order issued under this article. Any person so damaged by the violation may sue for and recover such damages as he *otherwise may be entitled to receive.*

§ 34-60-114, 14 C.R.S. (1995) (emphasis added). The plain meaning of the first sentence of this section thus preserves a person's right to assert any cause of action for damages the person might have against a person who has violated a commission rule or a provision of the Act. It does not thereby create a private cause of action. The use of the phrase, "any cause of action which a person *may* have or assert," permits no other conclusion. This phrase clearly indicates that a violation of the Act or commission rule does not, standing alone, give rise to a damages remedy. Rather, such a violation only leads to a possibility of a private action for damages.[FN5] The second sentence reaffirms this point. The use of the term, "otherwise," clarifies that a person may be entitled to receive damages when there is a violation of a commission rule, but that it is not the violation which gives rise to the entitlement. *See Regional Transp. Dist. v. Voss,* 890 P.2d 663, 667 (Colo.1995)("Courts must look primarily to the language of the statute and determine the legislative intent by giving effect to the commonly accepted meaning of the words appearing therein."). Thus, the sentence expressly preserves any preexisting common law remedies for damages a person may have against an operator who has violated***925** a provision of the Act or a commission rule.

> FN5. If the Act provided no remedies for an aggrieved surface owner to enforce its provisions, and the surface owner had no other remedy with which to seek damages, such as a common law action in negligence, trespass or nuisance, the fact that the legislature has expressly preserved a person's right to sue for damages may provide support for the argument that the legislature thereby implicitly intended to create a private cause of action. In a case such as this, however, where an aggrieved surface owner has both common law remedies and remedies under the Act to ensure enforcement of the Act's provisions, we are not persuaded that the legislature intended to create a private cause of action by stating that a plaintiff may "sue for and recover such damages as he *otherwise* may be entitled to receive." § 34-60-114, 14 C.R.S . (1995) (emphasis added).

[9][10] Magness's argument also fails because it interprets the first half of section 34-60-114 in isolation from the second half. *See Rodriguez v. Schutt,* 914 P.2d 921, 925 (Colo.1996) ("[W]e must read and consider the statute 'as a whole in order to give consistent, harmonious, and sensible effect to all of its parts.' ") (quoting *Thurman v. Tafoya,* 895 P.2d 1050, 1055 (Colo.1995)). The last two sentences of the statute provide:

> In the event the commission fails to bring suit to enjoin any actual or threatened violation of this article, or of any rule, regulation, or order made under this article, then any person or party in interest adversely affected and who has notified the commission in writing of such violation or threat thereof and has requested the commission to sue, may, to prevent any or further violation, bring suit for that purpose in the district court of any county in which the commission could have brought suit. If, in such suit, the court holds that injunctive relief should be granted, then the commission shall be made a party and shall be substituted for the person who brought the suit, and the injunction shall be issued as if the commission had at all times been the complaining party.

§ 34-60-114, 14 C.R.S. (1995). This language clearly permits a private party to seek injunctive relief, under certain conditions, against a defendant who has allegedly violated, or threatens to violate, provisions of the Act or commission rules. Unlike the statutory language in *Parfrey,* it demonstrates that the legislature considered whether to allow private causes of action in the Act, and chose to allow them only in the form of injunctive relief and only when the commission has received written notice of the violation and a request that it bring suit. *See Board of County Comm'rs v. Moreland,* 764 P.2d 812, 818-19 (Colo.1988) (where remedies other than private damages are specifically provided for in a statute, "[t]his reflects that the state legislature ... gave thought to the issue of civil liability but made no provision for imposition of such liability...."). When statutory language indicates that the legislature considered the issue of remedies for violations of the statute or regulations issued thereunder, and chose not to include a private remedy in damages, we will not infer such a remedy. *See id.* at 819.[FN6]

FN6. Inferring a private cause of action for damages every time a person violates the Act or rules issued thereunder would also be inconsistent with the clear legislative intent that the commission have primary responsibility for enforcing the Act's provisions. *See, e.g.,* § 34-60-121(1), 14 C.R.S. (1995) (authorizing commission to impose penalties on violators of Act after hearing); § 34-60-121(4), 14 C.R.S. (1995) (authorizing commission to order violator to take corrective action); § 34-60-121(5), 14 C.R.S. (1995) (authorizing commission to issue cease and desist orders, and conduct hearings in connection therewith); § 34-60-109, 14 C.R.S. (1995) (authorizing commission to seek injunctive relief in district court for ongoing or threatened violations).

[11] We recognize that the purposes of the Act are to encourage the production of oil and gas in a manner that protects public health and safety and prevents waste. *See* § 34-60-102(1), 14 C.R.S. (1995); *Gerrity,* 923 P.2d at 264. Our refusal to infer a private cause of action for violations of the Act does not frustrate these purposes. The legislature has enacted a panoply of remedies to insure that oil and gas production in Colorado does not occur at the expense of the environment or surface owners. *See, e.g.,* § 34-60-106(3.5), 14 C.R.S. (1995) (requiring oil and gas lessees to furnish reasonable security to protect surface owners from unreasonable crop losses or damage); § 34-60-109, 14 C.R.S. (1995) (empowering commission to seek injunctive relief against violators of the Act or rules who disregard cease and desist orders); § 34-60-121, 14 C.R.S. (1995) (providing for imposition of monetary penalties against violators and empowering commission to hold administrative hearings, issue cease and desist orders, and revoke and deny permits for the drilling of oil and gas); § 34-60-124, 14 C.R.S. (1995) (creating an oil and gas environmental response fund); *see also Voss v. Lundvall Bros., Inc.,* 830 P.2d 1061, 1065 (Colo.1992) ("The Oil and Gas Conservation Act ... vests the commission with the authority to enforce the provisions of the act, to make and enforce rules and orders pursuant***926** to the act, and to do whatever may reasonably be necessary to carry out the provisions of the act."). In addition, section 34-60-114 makes clear that an aggrieved surface owner may bring a common law action in tort against an operator who has used the surface in an unreasonable manner.[FN7] Given these express remedies, had the legislature intended to confer on surface owners the private right to sue for damages based on a violation of the Act or commission rule, it would have done so by clear expression. Since the legislature has not indicated such an intent, and has expressly preserved the right to bring a common law action, we decline to infer that the legislature intended to create a private right of action in enacting section 34-60-114. *See Moreland,* 764 P.2d at 818-19 (refusing to infer private cause of action for violations of building code because rel-

evant statute provided other means for their enforcement).

> FN7. Given that the Act permits both private individuals and the commission to institute actions and proceedings under certain specified conditions, the enactment of section 34-60-115, 14 C.R.S. (1995), does not persuade us that the legislature intended to create a private right of action in damages for violation of the Act or commission rules. Section 34-60-115 imposes a one year deadline for commencing an "action or other proceeding based upon a violation of this article or any other rule, regulation, or order of the commission." § 34-60-115, 14 C.R.S. (1995).
>
> Because the Act expressly provides for actions and proceedings that may be instituted by the commission and private parties for violations of the Act and commission rules, section 34-60-115 is not rendered meaningless by a failure to infer a private cause of action. It therefore lends no support to the argument that the legislature intended to create a private cause of action in damages for such violations.

We conclude that the creation of a private cause of action for violations of the Act or commission rules is inconsistent with both the plain language of section 34-60-114 and with other provisions of the Act. We hold that section 34-60-114 does not create a private remedy in damages for violations of the Act or commission rules.

III.

[12][13] We next consider whether the trial court erred when it found that Magness's trespass claim was "basically predicated upon the claim that [Gerrity] was unreasonable in its method of operations when drilling and reclaiming and operating the oil wells in question." The court of appeals held that the trial court's statement was "inconsistent with Colorado law, which separates the tort of trespass from that of negligence." *Gerrity*, 923 P.2d at 266. The court of appeals further held that "the reasonableness of Gerrity's conduct is irrelevant" to Magness's trespass claim. *Id.* We agree with the court of appeals that trespass and negligence are two separate and distinct causes of action. We do not agree that the reasonableness of Gerrity's use of the surface is irrelevant in resolving Magness's trespass claim. To the contrary, when a surface owner asserts a claim of trespass based on an operator's alleged excessive surface use, the trier of fact must consider whether the operator's use of the surface was reasonable and necessary.

[14][15] Severed mineral rights lack value unless they can be developed. For this reason, the owner of a severed mineral estate or lessee is privileged to access the surface and "use that portion of the surface estate that is reasonably necessary to develop the severed mineral interest." *Notch Mountain Corp. v. Elliott*, 898 P.2d 550, 556 (Colo.1995); *see also Rocky Mountain Fuel Co. v. Heflin*, 148 Colo. 415, 422, 366 P.2d 577, 580 (1961) (the severed mineral owner's right of access includes the "rights of ingress, egress, exploration, and surface usage as are reasonably necessary to the successful exploitation of [the mineral] interest."). The right to use the surface as is reasonably necessary, known as the rule of reasonable surface use, does not include the right to destroy, interfere with or damage the surface owner's correlative rights to the surface. *See Colorado Fuel & Iron Corp. v. Salardino*, 125 Colo. 516, 522, 245 P.2d 461, 464 (1952), *overruled on other grounds, Gladin v. Von Engeln*, 195 Colo. 88, 575 P.2d 418 (1978).

[16][17][18][19] In the absence of statutes, regulations, or lease provisions to the contrary, ***927** unless the conduct of an operator in accessing, exploring, drilling, and using the surface is reasonable and necessary to the development of the mineral interest, the conduct is a trespass. *See Frankfort Oil*

Co. v. Abrams, 159 Colo. 535, 545, 413 P.2d 190, 194 (1966). In this sense, the right of access to the mineral estate is in the nature of an implied easement, since it entitles the holder to a limited right to use the land in order to reach and extract the minerals. *See Restatement of Property* § 450 (1944) (defining easement); Howard R. Williams & Charles J. Meyers, *Oil and Gas Law* § 218 (1996) (In the absence of relevant lease provisions, "it has been held that such surface easements are implied as will permit the lessee or mineral owner to enjoy the interest conveyed."). As the owner of property subject to the easement, the surface owner " 'continues to enjoy all the rights and benefits of proprietorship *consistent with the burden of the easement.*' " *Bijou Irrigation Dist. v. Empire Club,* 804 P.2d 175, 183 (Colo.1991) (quoting *Barnard v. Gaumer,* 146 Colo. 409, 412, 361 P.2d 778, 780 (1961)). The surface owner thus continues to enjoy the right to use the entire surface of the land as long as such use does not preclude exercise of the lessee's privilege.[FN8]

> FN8. Although we have referred to the mineral estate as the dominant estate and the surface estate as the servient estate, our cases have consistently emphasized that both estates must exercise their rights in a manner consistent with the other. Hence, in a practical sense, both estates are mutually dominant and mutually servient because each is burdened with the rights of the other. *See* Eugene O. Kuntz, *The Law Relating to Oil and Gas in Wyoming,* 3 Wyo. L.J. 107, 113 (1949).

[20][21][22][23] The fact that neither the surface owner nor the severed mineral rights holder has any absolute right to exclude the other from the surface may create tension between competing surface uses. "The broad principle by which these tensions are to be resolved is that each owner must have due regard for the rights of the other in making use of the estate in question." *Grynberg v. City of Northglenn,* 739 P.2d 230, 234 (Colo.1987). This "due regard" concept requires mineral rights holders to accommodate surface owners to the fullest extent possible consistent with their right to develop the mineral estate. *See Getty Oil Co. v. Jones,* 470 S.W.2d 618, 622 (Tex.1971). How much accommodation is necessary will, of course, vary depending on surface uses and on the alternatives available to the mineral rights holder for exploitation of the underlying mineral estate. However, when the operations of a lessee or other holder of mineral rights would preclude or impair uses by the surface owner, and when reasonable alternatives are available to the lessee, the doctrine of reasonable surface use requires the lessee to adopt an alternative means. *See* 6 *American Law of Mining* § 200.02[1] [b][iii] (Rocky Mountain Mineral Law Foundation ed, 1996).

[24][25][26] Because a mineral rights holder is legally privileged to make such use of the surface as is reasonable and necessary to develop underlying minerals, a trespass occurs at the point when the holder exceeds the scope of that implied easement and thereby exceeds the legal authorization permitting mineral development activities. *See Visintainer Sheep Co. v. Centennial Gold Corp.,* 748 P.2d 358, 360 (Colo.App.1987) (because mineral claimant was legally authorized to enter land owned by another to prospect for minerals, its entry and staking of mining claims could not be a trespass); *Restatement (Second) of Torts* § 214(2) (1965) (stating that one privileged to enter land who thereafter commits a tort "is subject to liability only for such tortious act," and not for his original entry); *Thompson on Real Property* § 68.02(b) (David A. Thomas, ed., 1994) ("[O]ne who enters with license, authority, or consent, but who then exceeds the limits of that permission, may commit a trespass."); *see also* Richard J. Denny, Jeanmarie B. Tade & Cynthia J. Thomson, *Contamination from Oil and Gas Production: Who Pays for Cleanup?,* 36 Rocky Mtn. Min. L. Inst. 6-1 at 6-32 (1990) ("Any intentional use of another's real property without authorization *and without a privilege by law to do so* is actionable as a trespass without regard to harm.")

(emphasis added). In determining whether the scope of an easement or privilege has been exceeded, a court must look to its nature and purpose. *See Bijou,* 804 P.2d at 183. Because***928** the scope of a mineral rights holder's implied easement is defined in terms of reasonableness and necessity, the reasonableness of the holder's conduct is not only relevant, but is essential to any resolution of a trespass claim. Until it is found that the lessee's conduct was not reasonable and necessary for the exploration or extraction of the minerals, a cause of action for trespass must fail.[FN9]

> FN9. Although it is true that reasonableness is often irrelevant to a trespass claim, this is only because in the usual case the property rights of the one asserting the trespass claim are limited only by geographical boundaries. However, when a surface owner brings a claim of trespass against a mineral rights holder, the surface owner's right to exclude is limited not by the geographical boundaries of the property owned by the surface owner, but by the lessee's right to do what is reasonable and necessary for the development of the mineral rights. *See Salardino,* 125 Colo. at 522, 245 P.2d at 464 ("[N]either the owner of the surface nor the owner of the subjacent rights can lawfully destroy, interfere or damage the right of the other."). Therefore, a mineral owner or lessee that violates this rule of reasonable surface use commits a trespass.

[27][28] Given these principles, the trial court did not err in concluding that a claim of trespass against a lessee based on the lessee's alleged excessive surface use requires the court to consider the reasonableness, as well as the necessity, of the lessee's actions. If a privilege to enter the property of another is defined in terms of reasonableness, trespass may only occur when the holder of the privilege acts unreasonably or unnecessarily. *See Magliocco v. Olson,* 762 P.2d 681, 685 (Colo.App.1987) (where landlord-tenant lease permitted landlord to enter tenant's premises at reasonable times, no trespass could occur without showing that landlord's entry was unreasonable). Or, stated conversely, in its necessary use of the surface the lessee has a responsibility to exercise its privilege reasonably, in a manner designed to minimize intrusion and surface damages. When it fails in such responsibility, it commits a trespass.

Our precedent is consistent with this analysis. In *Grynberg,* we held that the City of Northglenn committed a geophysical trespass after it drilled test holes on land for the purpose of ascertaining whether the land contained commercial deposits of coal. 739 P.2d at 236-37. Although Northglenn had obtained permission from the severed surface owner to conduct the testing, it had failed to obtain permission from either the record owner of the mineral estate, the State of Colorado, or its lessee, Grynberg. *See id.* at 236 n. 5. We held that the permission actually obtained by Northglenn was ineffectual because its exploration activities constituted a trespass against the mineral estate, not the surface estate. *Id.* at 236-37. Consequently, Northglenn's testing was unauthorized because the surface owner could not validly consent to the invasion of a property interest which the surface owner did not hold. *See id.* at 234-35.

Our decision in *Grynberg* thus stands for the broad principle that unauthorized intrusions on the property interests of another may subject the intruder to liability for trespass. In the present case, the rule of reasonable surface use makes clear that Gerrity's conduct is "unauthorized" when it is not reasonable and necessary to the development of its mineral interest. Consequently, *Grynberg* lends no support to the argument that reasonableness is irrelevant in resolving Magness's trespass claim.

In *Walker v. City of Denver,* 720 P.2d 619 (Colo.App.1986), the plaintiff, Walker, filed trespass and conversion claims against Denver for alleged damage done to Walker's bar by city police officers executing a search warrant. According to

Walker, the officers "exceeded the boundaries and scope of the warrant" by destroying or removing various fixtures on the premises. *Id.* at 621. After concluding that the officers were neither authorized by statute nor by the search warrant to sever fixtures from the property, the court concluded that the officers were liable as trespassers. *See id.* at 623-24.

The court of appeals in *Walker* thus held that police officers could be liable in trespass at the point when they exceed the scope of the privilege justifying their entry. In *Walker,* the scope of that privilege was defined by statute and by the terms of the search warrant. In the present case, the scope of Gerrity's privilege to use the surface of the land is ***929** defined by the rule of reasonable and necessary surface use.

We conclude that an operator's use of the surface is limited to that which is reasonable and necessary to the development of the mineral estate. We therefore hold that the appropriate inquiry on a trespass claim based on an operator's excessive surface use is whether the operator's surface use exceeded that which was reasonable and necessary to access the mineral estate.

IV.

We next consider the role of expert testimony when a surface owner brings negligence and trespass claims. The trial court found that such claims require the claimant to "present evidence of a knowledgeable person as to what the practices are in that particular industry or endeavor." The trial court therefore refused to find Gerrity liable because Magness presented no expert testimony concerning oil and gas operations. The court of appeals reversed, holding that "the Act and the rules promulgated by the Commission define the relevant duty owed by Gerrity to Magness." *Gerrity,* 923 P.2d at 264. The court of appeals concluded that, because provisions of the Act and commission rules establish the standard of care in determining the reasonableness of an oil and gas operator's conduct, "expert testimony about the standard of care in the oil drilling industry was not necessary." *Id.* Like the trial court, the court of appeals made no distinction between trespass and negligence claims in its expert testimony analysis.

[29] A negligence claim requires proof of a standard of care. Commission rules evidence the standard of care applicable to oil and gas operators' surface use, but do not conclusively establish that standard. As evidence of the applicable standard of care, commission rules that adopt a standard of care which is within the common knowledge and experience of ordinary persons allow the trier of fact to determine the legal duty owed by the operator without the aid of expert testimony. If, however, a commission rule adopts a standard of care which is not within the common knowledge and experience of ordinary persons, expert testimony would be required.

Because some of the rules provisions allegedly violated by Gerrity included standards of care within the common knowledge and experience of ordinary persons, Magness was not required to present testimony of an expert in the oil and gas industry in order to present evidence of the duty owed by Gerrity. Hence, although the court of appeals incorrectly held that expert testimony was not required to prove negligence because the rules define the duty owed by an oil and gas operator, it correctly reversed the trial court judgment requiring Magness to present the testimony of an expert in the oil and gas industry.

A trespass claim does not require evidence of an applicable standard of care, but instead requires evidence, in establishing a prima facie case, that the operator's surface use materially interfered with the surface owner's use of the surface. Because this evidence may be presented by lay witnesses, expert testimony is not required for a surface owner to sustain a claim of trespass.

A.

[30][31] In Colorado, a prima facie case of negligence is established when the plaintiff proves the following elements: the existence of a legal duty owed by the defendant to the plaintiff, a breach of that duty, injury to the plaintiff, and a causal relationship between the breach and the injury. *See Connes v. Molalla Transp. Sys., Inc.,* 831 P.2d 1316, 1320 (Colo.1992). Because negligence requires proof of the existence and breach of a legal duty, a negligence claim cannot be sustained without evidence of an applicable standard of care and evidence that the defendant's conduct did not conform to the standard of care. *See United Blood Servs. v. Quintana,* 827 P.2d 509, 519 (Colo.1992).

[32] Generally, expert testimony is required in negligence cases when the defendant is held to a standard of care that is outside the common knowledge and experience of ordinary persons. *See Quintana,* 827 P.2d at 520. For example, expert testimony ***930** is normally required as evidence of the standard of care in medical malpractice cases because "[w]ithout expert opinion testimony in such cases, the trier of fact would be left with no standard at all against which to evaluate the defendant's conduct." *Id.*

[33][34][35][36] Relevant legislative enactments and administrative regulations may, in some cases, establish the applicable standard of care in negligence actions, while in other cases they may serve only as evidence of that standard.[FN10] If a legislative enactment or regulation establishes the duty owed by the defendant, expert testimony is irrelevant on that issue unless the enactment or regulation itself includes a standard of care outside the common knowledge and experience of ordinary persons. *See McNeil Pharm. v. Hawkins,* 686 A.2d 567, 583 (D.C.1996) (if statutes and regulations require "expert explication," expert testimony is necessary). If, however, a statute or regulation is merely evidence of the standard of care, expert testimony is admissible as additional evidence of that standard. In deciding if expert testimony is necessary or permissible where a negligence claim against an oil and gas operator is based on a violation of a commission rule, we must determine whether commission rules establish the standard of care applicable to oil and gas operators' surface conduct. If the rules do not establish the standard of care, we must then determine if they are at least evidence of that standard.

> FN10. If a legislative enactment or regulation establishes the standard of care, the effect of a violation is to essentially make a defendant strictly liable for the violation regardless of whether the defendant acted reasonably. *See State v. Moldovan,* 842 P.2d 220, 228 (Colo.1992) (if theory of negligence per se is applied to state's failure to properly maintain right-of-way fence, violation of statute "would conclusively establish negligence irrespective of the reasonableness of the state's conduct in attempting to carry out its statutory responsibility.").

[37][38] A relevant legislative enactment or regulation may define the standard of care owed by a defendant if (1) it was enacted for the public's safety, (2) it was intended to protect the class of persons of which the plaintiff is a member, and (3) it was enacted to prevent the type of harm suffered by the plaintiff. *See Canape v. Petersen,* 897 P.2d 762, 763-64 (Colo.1995). If the legislative enactment or regulation defines the legal duty owed by the defendant, then proof of its violation establishes a breach of that duty.

In *State v. Moldovan,* the plaintiff was injured after his motorcycle struck a cow that had wandered onto a federal aid highway after passing through an inadequately maintained fence. The plaintiff subsequently filed claims against the State of Colorado for negligence and negligence per se based on the state's alleged violation of a statute requiring it to maintain right-of-way fences adjacent to certain public highways.

Considering the plaintiff's negligence per se claim, we determined that there was "no question" that the fence statute was intended to protect the safety of highway users, that the plaintiff was within the class of persons the statute was intended to protect, and that his injury was the type of injury the statute was intended to prevent. *See* 842 P.2d at 229 n. 11. We concluded, however, that the negligence per se theory could not be utilized because the legislature had indicated through other legislative enactments that the state was not to be found liable unless the plaintiff proved the state acted unreasonably.[FN11] Thus, we held that proof of the violation of the fence statute was insufficient to establish negligence.

> FN11. Specifically, the legislature had provided that a public entity could not be liable for a dangerous condition on a public highway unless "the public entity reasonably knew or should have known of the dangerous condition." *Moldovan,* 842 P.2d at 229. Because the legislature clearly indicated that the state's conduct had to be unreasonable before it could be liable for failing to maintain the right-of-way fence, we held that the plaintiff's claim "must be resolved under general principles of negligence and not negligence per se." *Id.*

[39] In the present case, as in *Moldovan,* the legislature has clearly indicated that its creation of a regulatory scheme governing the conduct of oil and gas operators is not intended to abrogate the rule of reasonable surface use and substitute a strict liability standard for violations of the Act and rules issued thereunder. As noted previously, section 34-60-114, 14 C.R.S. (1995), expressly ***931** preserves a person's right to bring a common law action in damages against a person who has violated a provision of the Act or commission rule. It is well settled under our common law precedent that, absent a contrary provision in the severance instrument or lease, the compensable damage due a surface owner is damage caused by surface use that is negligent or not reasonably necessary to the development of the mineral estate. The legislature's express preservation of a person's right to seek a common law remedy in damages against an operator thus supports the conclusion that the Act was not intended to allow a surface owner to recover damages when an operator violates a commission rule but nevertheless acts in a way that is reasonable and necessary. *See People v. City of Thornton,* 775 P.2d 11, 19 n. 7 (Colo.1989) ("The General Assembly is presumed cognizant of the judicial precedent in a particular area when it enacts legislation in that area.").

[40] To hold that commission rules establish the standard of care for operators' use of the surface would, unless the rule itself incorporates a reasonableness standard, make an oil and gas operator strictly liable for a rules violation and effectively abolish the longstanding rule of reasonable surface use.[FN12] In the absence of clear indication that the legislature intended such a result, we decline to treat the Act as effecting "such a fundamental reallocation of the rights of the owners of [the surface and mineral] estates." *Grynberg,* 739 P.2d at 236; *see Canape,* 897 P.2d at 767 (refusing to apply negligence per se to violation of OSHA regulation because statute provided that regulations were not to enlarge, diminish, or affect common law rights, duties, and liabilities).

> FN12. We also note that application of the negligence per se theory to commission rules would be the functional equivalent of recognizing a private cause of action under section 34-60-114, 14 C.R.S. (1995). *See Ries v. National R.R. Passenger Corp.,* 960 F.2d 1156, 1164 (3d Cir.1992).

[41][42] When a legislative enactment or regulation does not define the applicable standard of care, it may nonetheless "be relevant evidence bearing on the issue of negligent conduct." *Restatement (Second) of Torts* § 288B (1965). This is particularly true in the case of administrative regulations, whose violation courts commonly regard as evid-

ence of the applicable standard of care. *See id.* cmt. d. We therefore conclude that violations of commission rules are valid, but not conclusive, evidence that a lessee breached a duty owed to the surface owner. *See Blueflame Gas, Inc. v. Van Hoose,* 679 P.2d 579, 591-92 (Colo.1984) (holding that, although compliance with administrative safety regulations did not establish due care, it was evidence of due care).

[43][44] Because commission rules are only evidence of the applicable standard of care, expert testimony concerning standard industry customs and practices is relevant additional evidence of that standard if the standard is not within the common knowledge and experience of ordinary persons. *See Yampa Valley Elec. Ass'n, Inc., v. Telecky,* 862 P.2d 252, 257 (Colo.1993). The determination as to whether the standard is a matter of common knowledge is committed to the sound discretion of the trial court. *See People v. Fasy,* 829 P.2d 1314, 1317-18 (Colo.1992).

[45] If a surface owner proves that a lessee has violated a commission rule, the presentation of expert testimony is not a *sine qua non* of liability, however. Because commission rules are evidence of the standard of care, the absence of expert testimony does not leave "the trier of fact ... with no standard at all against which to evaluate the defendant's conduct." *Quintana,* 827 P.2d at 520. If the violation is the proximate cause of injury, the trier of fact is therefore permitted-but not required-to conclude that the lessee's conduct was negligent.

B.

[46] With these principles in mind, we now consider whether the trial court correctly determined that Magness was required to present the testimony of an expert in oil and gas operations in order to sustain the negligence claim. We conclude that the trial court erred in finding that Magness's failure to present expert testimony was fatal to this claim.

***932** At trial, Magness alleged that Gerrity violated commission rules by failing to remove all plastic, bentonite, and other waste in the water and reserve pits, and by burying such material without Magness's prior, written consent. In addition, Magness alleged that Gerrity failed to give Magness notice before commencing reclamation operations, and neglected to consult with Magness and the local district of the state soil conservation service with respect to the proposed reclamation operations.

At the time Gerrity commenced reclamation operations, rule 315(q) provided, in pertinent part, that

> all the materials and equipment associated with the drilling, reentry or completion operations including but not limited to concrete, sack bentonite, and other drilling mud additives, sand, plastic, pipe, cable, and other waste materials shall be removed.... In addition, material may be burned or buried on the premises only with the prior written consent of the surface owner, and with prior written notice to the surface tenant.

Rule 315(r) provided, in pertinent part:

> The operator shall notify the surface owner and surface tenant not less than seven (7) days before any final site reclamation and restoration is to take place and when it is to occur.... The party responsible for such reclamation shall consult with the local district of the state soil conservation service, the surface owner and the surface tenant with respect to the proposed reclamation operations including any special aspects thereof.

2 C.C.R. 404-1 (1993).

[47] These provisions adopt a standard of care that is within the common knowledge and experience of ordinary persons. The question of whether an operator has notified and consulted with the surface owner concerning reclamation operations, and whether the operator has removed or buried materials associated with drilling activity, is not a technical matter requiring evidence of industry practice. Expert testimony was therefore not needed to de-

termine if these provisions were violated. Moreover, because the provisions were valid evidence of the standard of care, noncompliance would have permitted the trier of fact to conclude that Gerrity was negligent.[FN13]

> FN13. Although the trial court erred in finding that expert testimony was necessary to sustain Magness's negligence claim, the court correctly determined that Magness's failure to present expert testimony precluded the court from finding that Gerrity violated those rules provisions that included standards of care which were not within the common knowledge and experience of ordinary persons. For example, Magness asserted that Gerrity violated provisions of rules 315(q) and 315(r) which provided that drilling locations and well sites were to be reclaimed and restored as soon as conditions "reasonably permit." Because there was evidence that the pits at the drill sites were frozen for a considerable length of time following completion of drilling and other operations, the question of whether Gerrity restored the sites as soon as conditions reasonably permitted was not a matter within the common knowledge and experience of ordinary persons. Thus, the determination of whether Gerrity violated this rule provision required expert testimony on the applicable standard of care.
>
> Magness also alleged that Gerrity violated the provision of rule 315(r) which provided that drilling sites were to be restored to their original condition "insofar as is practicable." The determination of whether this provision has been violated is also not normally a matter within the common knowledge and experience of ordinary persons, who lack the technical knowledge needed to determine if an operator has restored a site to its original condition in a reasonable manner under the circumstances. *See Black's Law Dictionary* 1172 (6th ed. 1990) ("Practicable is ... that which is performable, feasible, possible ....") (citing *Frey v. Security Ins. Co. of Hartford,* 331 F.Supp. 140, 143 (W.D.Pa.1971) (" 'Practicable' means feasible in the circumstances. When a policy of insurance requires that notice be given 'as soon as practicable', the law requires that notice be given within a reasonable time ...."), *aff'd,* 473 F.2d 1031 (3d Cir.1973)). We do not approve of the trial court's statement that this provision was not to be interpreted "literally" and did not require "literal compliance." However, the trial court did not err in finding that Gerrity was required to present expert testimony to prove that this provision was violated.

Because some of the rules provisions that Gerrity allegedly violated included standards of care within the common knowledge and experience of ordinary persons, the trial court erred in failing to decide the question of Gerrity's alleged negligence. These provisions constituted valid evidence of the duty owed by Gerrity, and precluded the necessity ***933** of expert testimony on that issue. Magness is entitled to a new trial on the negligence claim. We therefore affirm, on different grounds, the court of appeals reversal of the trial court judgment that Magness was required to present expert testimony in support of the negligence claim.

C.

[48] We next consider whether Magness was required to present the testimony of an oil and gas expert in support of the trespass claim. We hold that a claim of trespass does not require the surface owner to present evidence of an applicable standard of care, but rather requires the surface owner to present evidence that the operator's conduct materially interfered with surface uses. Hence, expert

testimony is not necessary to the establishment of a prima facie case.

[49][50][51][52] The elements of the tort of trespass consist of a physical intrusion upon the property of another without the permission of the person lawfully entitled to the possession of the real estate. *See Burt v. Beautiful Savior Lutheran Church,* 809 P.2d 1064, 1067 (Colo.App.1990). Thus, unlike a negligence claim, a trespass claim does not require a plaintiff to prove the existence of a legal duty and present evidence of an applicable standard of care. When a surface owner claims that an operator trespassed by failing to act in a reasonable and necessary manner while developing mineral rights, the crux of such a claim is that the operator exceeded the scope of the implied easement of access and thereby infringed upon the surface owner's correlative rights to the surface. As a result, in order to establish a prima facie case of trespass, the surface owner's initial burden is to present evidence that the operator's conduct materially interfered with surface uses. FN14 Evidence that the operator's conduct was merely inconvenient to the surface owner is insufficient. A material interference with surface use, for the purpose of establishing a prima facie case, is an interference which is not reasonable from the perspective of the surface owner and considering only the impact on the surface use.

FN14. A surface owner may point to commission rules as evidence of the type of operator conduct raising a reasonable presumption that the operator's surface use materially interfered with surface uses. Under rule 315(q), for example, "[f]inal site reclamation and restoration shall take place as soon as conditions reasonably permit, following the completion of drilling and completion operations...." Clearly, this rule requires an operator to reclaim and restore well sites as soon as possible. Therefore, if the surface owner presents evidence that a substantial period of time elapsed between completion of operations and site restoration, and that the delay adversely affected existing surface uses, a prima facie case of trespass would be established. Once such evidence is introduced, the operator would then be charged with presenting evidence that circumstances made any delay both necessary and reasonable.

[53][54][55] To rebut the surface owner's prima facie case, the operator must present evidence, by means of expert testimony or otherwise, that explains why its surface conduct was reasonable and necessary from the perspective of the operator. This burden properly lies with the operator because the operator is in a much better position, from an evidentiary standpoint, to explain the necessity of its conduct and to present evidence that its operations conformed to standard customs and practices in the industry. Assuming the operator presents such evidence, the surface owner would then be permitted to present its own rebuttal evidence that reasonable alternatives were available to the operator at the time of the alleged trespass. FN15 Ultimately, it is the province of the trier of fact to balance the competing interests of the operator and surface owner and objectively determine whether, under the circumstances, ***934** the operator's surface use was both reasonable and necessary.

FN15. Undoubtedly, such evidence would often be presented in the form of expert testimony since it would focus on alternative methods available in the industry which could have been used by the operator and which would have resulted in less interference with the surface owner's existing uses. *See Getty Oil,* 470 S.W.2d at 622 (expert testimony utilized by surface owner to show that operator could have installed pumping units that would not have interfered with surface owner's existing automatic sprinkler system). It should be emphasized, however, that a surface owner is not required to present expert testimony

> in order to establish a prima facie case and submit the issue to the trier of fact. Consequently, a surface owner's failure to present expert testimony does not relieve the trier of fact of the responsibility of deciding the ultimate question of whether the operator's conduct was reasonable and necessary.

[56] Testimony by an expert in the oil and gas industry is not required in order to establish a prima facie case of trespass, since the focus is on the uses of the surface and the ways in which the operator is materially interfering with those uses. Of course, if the mineral rights holder rebuts the surface owner's prima facie case, and the surface owner fails to present evidence of reasonable alternatives, this is a factor the trier of fact may consider in determining if the holder's conduct was reasonable and necessary.

We conclude that the trial court erred in refusing to consider, based on Magness's failure to present expert testimony, whether Gerrity committed a trespass. Thus, Magness is entitled to a new trial on the trespass claim. Although the court of appeals also erred in holding that the tort of trespass does not require an assessment of the reasonableness of the operator's use of the surface, we nevertheless affirm the court's reversal of the trial court judgment.

D.

[57][58][59] We have not previously addressed the distinction, in the context of oil and gas operations, between a cause of action sounding in trespass as opposed to a cause of action sounding in negligence. Specifically, our precedent in this area has not made clear that trespass and negligence are disparate causes of action that implicate distinct evidentiary burdens on the parties. Basic fairness may require that a new trial be granted on a legal issue when an appellate decision sets forth new standards for resolving that issue. *See Public Serv. Co. v. Blue River Irrigation Co.*, 782 P.2d 792, 794 (Colo.1989). Here, the trial court failed to consider the entire trespass claim because it mistakenly believed that expert testimony was required. Moreover, the trial court failed to consider portions of the negligence claim for which commission rules evidenced the standard of care. Under these circumstances, basic fairness dictates that a new trial be granted. We therefore affirm the court of appeals judgment remanding the case for a new trial on the trespass and negligence claims.

V.

Finally, we consider whether the court of appeals correctly held that a new trial should be granted on the issue of alleged damages incurred by Magness. The court of appeals held that a new trial should be granted on all issues because the trial court relied on an erroneous legal basis for determining the liability issues and "[b]ecause the trial court's conclusions regarding damages were inextricably related to its findings on the issue of liability." *Gerrity*, 923 P.2d at 266. We affirm.

[60][61][62] C.R.C.P. 59 authorizes a court to "[o]rder a new trial of all or part of the issues" when a ground, such as error in law, exists for a new trial. *See* C.R.C.P. 59(c)-(d). Whenever a new trial must be held on one issue, a new trial must also be held with respect to other issues unless "the issue to be retried is entirely distinct and separable from the other issues involved in the case and ... a partial retrial can be had without injustice to any party." *Bassett v. O'Dell*, 178 Colo. 425, 427, 498 P.2d 1134, 1135 (1972). For example, a partial retrial may be held solely on the issue of damages when liability has been clearly established. *See Marks v. District Court*, 643 P.2d 741, 744 (Colo.1982). Whenever the question arises as to whether a complete retrial is necessary, " '[t]he determinative considerations are those factors relating to fairness. The focus is on the relationship between the issues under the evidence and the practical logistics of retrial.' " *Id.* (quoting *Kitto v. Gilbert*, 39 Colo.App. 374, 386, 570 P.2d 544, 553 (1977)).

[63] Although it found that Gerrity was not liable for negligence or trespass, the trial court found, in the alternative, that Magness incurred no damage due to the size of the pits, the delay in commencing restoration and reclamation activities, and any failure to restore drilling locations to their original condition insofar as practicable. The trial court offered no reasons for its determination that no damages resulted from Gerrity's activities, apparently because these findings were unnecessary to the final judgment. Nevertheless,***935** this total lack of explanation frustrates our ability to consider the issue on appeal. *See Weld County Bd. of County Comm'rs v. Slovek,* 723 P.2d 1309, 1316 (Colo.1986) (when considering alleged damage to real property, "the trial court must articulate the reasons for its decision so as to facilitate effective appellate review."). We therefore agree with the court of appeals that the trial court judgment on this issue must be reversed.

[64] We also agree with the court of appeals that, under the circumstances of the case, both the liability and the damages issues should be retried. Clearly, the issues of liability and damages are inextricably interwoven in the present case because evidence of "damage" to the surface may also constitute evidence of operator use that is inconsistent with the surface owner's correlative rights. Thus, the granting of a retrial on the trespass issue effectively allows the surface owner to present new evidence as to damages, regardless of whether the purpose of the new trial is to consider liability alone. It would make little sense to allow the trial court to consider such evidence with respect to liability, but prohibit it from considering such evidence on the question of damages. *See Bassett,* 178 Colo. at 428, 498 P.2d at 1135 (fact that many of the witnesses who testified as to liability also testified as to the injuries sustained militated in favor of retrying both liability and damages).

As a practical matter, we also note that if a partial retrial is held on liability alone, the trial court would be forced to rely on what has become a "cold" record for making its findings as to damages. Although this factor is not determinative, it becomes more important when the first and second trials are separated by a significant period of time. *See* 9 James W. Moore, *Moore's Federal Practice* § 52.12[1] (3d ed.1997) (analyzing federal version of C.R.C.P. 59). In the present case, over three years will have elapsed between the time of the original trial and the time of the second trial. Unquestionably, this length of time is significant, and argues in favor of retrying the damages issue.

Under these circumstances, we conclude that the trial court must retry both the liability and damages issues. We therefore affirm the court of appeals judgment granting a new trial on all issues.

VI.

We conclude that section 34-60-114 does not create a private cause of action for those damaged by another's violation of the Act or commission rule. In addition, we conclude that a trespass claim based on alleged excessive surface use requires the trier of fact to consider whether the operator's conduct was reasonable and necessary to the development of the mineral estate.

In determining if a surface owner must present the testimony of an expert in the oil and gas industry, we hold that a court must first identify the particular cause of action alleged by the surface owner. If the surface owner alleges that the operator committed negligent acts on the surface, the surface owner must present expert testimony when the applicable standard of care is outside the common knowledge and experience of ordinary persons. Thus, where a statute or commission rule-which we hold to constitute only evidence of the applicable standard of care-includes a standard of care outside the common knowledge and experience of ordinary persons, expert testimony is necessary, but not otherwise.

If a surface owner alleges that an operator commit-

ted a trespass by violating the rule of reasonable and necessary surface use, the surface owner is not required to present the testimony of an expert in the oil and gas industry in order to have the claim considered by the trier of fact. A prima facie case of trespass is established when the surface owner presents evidence that the operator's conduct materially interferes with surface uses. Therefore, expert testimony is not a prerequisite to operator liability for trespass.

Because we now clarify standards governing alleged surface injury in trespass and in negligence, we affirm, on different grounds, the court of appeals' grant of a new trial on the question of Gerrity's liability. We also determine that, under the circumstances, a new trial on the damages issue is also warranted. We therefore affirm in part and ***936** reverse in part, and return the case to the court of appeals with directions to remand the case to the trial court for a new trial, consistent with this opinion, on all issues.

VOLLACK, C.J., concurs in part and dissents in part.

BENDER, J., does not participate.Chief Justice VOLLACK concurring in part and dissenting in part:

I concur with the majority's holding that section 34-60-114, 14 C.R.S. (1995), does not authorize a private cause of action for the violation of a rule promulgated by the Oil and Gas Conservation Commission (Commission). The majority also sufficiently clarifies evidentiary burdens for surface estate owners asserting negligence or trespass claims against the developers of a mineral estate. However, I disagree with the majority that a new trial is warranted in the present case given the trial court's wholesale rejection of the surface owner's claims against the developer of the mineral estate. Accordingly, I dissent to that part of the majority opinion which grants the surface owner a new trial.

I.

This dispute arises out of the drilling of oil wells on property subject to a severed mineral estate. Gerrity Oil and Gas Corporation (Gerrity) owned a mineral estate, which gave it the right to enter a surface estate owned by Bob Magness (Magness) in order to develop its mineral interest. In October of 1992, Gerrity notified Magness that it intended to drill four wells on Magness' property. Negotiations between the parties led Gerrity to change the proposed locations of each of the four wells to accommodate Magness. After drilling one well, Gerrity received word from Magness that it could not develop additional drilling sites without Magness' express authorization.

As a result of Magness' communications, Gerrity was forced to seek the issuance of a temporary restraining order and a preliminary injunction in Weld County District Court (the trial court). The trial court granted Gerrity's motion and issued a preliminary injunction enjoining Magness from restricting Gerrity's access to the property. Gerrity subsequently filed a motion to convert the preliminary injunction into a permanent injunction. Magness counterclaimed, asserting negligence and trespass claims against Gerrity as well as a claim for declaratory relief.

At the trial, Gerrity presented evidence detailing its operations on the property. Magness, in support of his negligence and trespass claims, offered the testimony of witnesses who had little, if any, specialized knowledge of the proper manner in which oil drilling operations are conducted. Largely as a result of Magness' failure to present the testimony of someone knowledgeable in the field of oil and gas operations, the trial found that Magness presented insufficient evidence to establish that Gerrity was negligent in conducting its operations or had committed a trespass on Magness' property.

II.

When the trial court sits as the finder of fact, the credibility of the witnesses, the sufficiency, probat-

ive effect and weight of the evidence, and the inferences and conclusions to be drawn therefrom are all within the province of the trial court and will not be disturbed on review unless they are manifestly erroneous. *See Broncucia v. McGee*, 173 Colo. 22, 25, 475 P.2d 336, 337 (1970). The record in this case indicates that the trial court, sitting as the finder of fact, determined that Magness presented insufficient evidence to support his negligence and trespass claims. Although the trial court highlighted Magness' failure to present expert testimony as the major flaw in his case, its ruling demonstrates that it rejected Magness' claims after considering "all the facts and circumstances," including whether Gerrity "conducted its operation in an unreasonable or negligent manner."

Specifically, the trial court found that Gerrity "was quite conciliatory and acquiesced in many of the suggestions made by [Magness] with respect to the location of the well sites" despite the fact that Magness made unreasonable site demands and attempted to limit Gerrity's access to the property.***937** Furthermore, the trial court found in three instances that Magness failed to prove damages stemming from alleged violations of Commission rules. Finally, the trial court found that Gerrity's witnesses provided "the most reliable and trustworthy" testimony concerning Gerrity's reclamation work. These findings, in addition to Magness' failure to present expert testimony, support the trial court's conclusion that Magness failed to present sufficient evidence in support of his negligence and trespass claims. In my view, the conclusions drawn by the trial court in evaluating the sufficiency of the evidence before it were not manifestly erroneous and are entitled to substantial deference.

Nevertheless, the majority relies upon the absence of a trial court finding concerning Magness' claim that Gerrity violated certain provisions contained in Commission rules. *See* Rule 317(q)-(r), 2 C.C.R. 404-1 (1993). The majority characterizes these absent findings as errors which, in light of its clarification of the relative evidentiary burdens in negligence and trespass actions, warrant a new trial. While the trial court did not expressly address each provision within the rules, it did reject Magness' arguments that Gerrity violated other provisions within these same rules. In my view, the trial court's complete rejection of Magness' trespass and negligence claims and its refusal to find a violation of Commission rules made detailed findings on multiple provisions within the rules unnecessary.[FN1]

> FN1. Even assuming that the absence of such explicit findings was error, remand is the proper means for correcting such a minor oversight. Remand would ensure that the issues are determined on the facts as they were presented at trial. A new trial would then be warranted only if the trial court determined that these particular provisions were violated and that the violations had an effect on the overall strength of Magness' negligence and trespass claims.

The majority also concludes that a new trial is necessary because the trial court erred in rejecting Magness' trespass claim for his failure to present expert testimony. In my view, the trial court's conclusions regarding the lack of expert testimony should not be read in isolation. The trial court expressly determined that Gerrity's use of the surface estate was reasonable "under all the facts and circumstances." This finding mirrors the majority's statement that the ultimate question in evaluating trespass claims requires that the trier of fact "balance the competing interests of the operator and surface owner and determine whether, under the circumstances, the operator's surface use was reasonable and necessary." Maj. op. at 933. The record therefore indicates that the trial court applied the proper legal standard in rejecting Magness' trespass claim.

Contrary to the majority, I believe that "basic fairness" warrants against granting a new trial in this case. By clarifying the relative evidentiary burdens in negligence and trespass actions, the majority has

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(Cite as: 946 P.2d 913)

done nothing to alter or change the substantive law upon which Magness' claims are based. *See Public Serv. Co. v. Blue River Irrigation Co.*, 782 P.2d 792, 794 (Colo.1989). Rather, the contested issues in this case concern two areas of the law, negligence and trespass, that have been settled for some time. Without changing the playing field upon which litigants have previously relied, a new trial essentially punishes Gerrity for successfully pleading its case while forgiving Magness' failure to present sufficient evidence in support of his claims. Magness' general evidentiary burden in proving his negligence and trespass claims was clear from the outset. He should not be rewarded for failing to meet this burden merely because the majority has clarified it somewhat.

III.

The trial court's ruling that Magness presented insufficient evidence in support of his negligence and trespass claims should be accorded its proper deference. Although the trial court did not specifically address whether Gerrity violated certain provisions contained in Commission rules, these oversights do not affect the basic thrust of the trial court's ruling. Furthermore, the trial court applied the proper standard in rejecting Magness' trespass claim. Granting Magness a new trial, in effect, gives him a second chance at proving his case, complete with instructions on how to do so. Such a result is unfair to Gerrity and represents an inefficient***938** use of judicial resources. Accordingly, I dissent to that part of the majority opinion which grants Magness a new trial.

Colo.,1997.
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United States District Court,
D. Colorado.
AMOCO PRODUCTION COMPANY, a Delaware Corporation, Plaintiff,
v.
THUNDERHEAD INVESTMENTS, INC., a Colorado Corporation, Defendant.
No. CIV.A.01-B-354 (BNB).

Dec. 9, 2002.

Gas operator, which leased mineral estate, sought declaration that it, inter alia, was not required to request variances from state setback and safety regulations before building well, that it reasonably accommodated surface owner's use of estate, and that it was entitled to use and maintain access road it built on surface of estate to its well. Surface owner counterclaimed for declaration that operator trespassed due to actual, unreasonable surface use. Following bench trial, the District Court, Babcock, Chief Judge, held that: (1) gas operator's use of estate was not excessive and did not trespass on surface owner's use; (2) operator was not required to request state and/or county variances for setback and safety regulations; (3) operator's access road to well was reasonable and necessary; and (4) operator reasonably accommodated surface owner's present and speculative future surface use.

Ordered accordingly.

West Headnotes

[1] Mines and Minerals ⇐55(6)
260k55(6) Most Cited Cases

[1] Mines and Minerals ⇐62.1
260k62.1 Most Cited Cases

[1] Mines and Minerals ⇐73.1(6)
260k73.1(6) Most Cited Cases
Owner of severed mineral estate or lessee is privileged to access surface and use that portion of surface estate that is reasonably necessary to develop severed mineral interest.

[2] Mines and Minerals ⇐55(6)
260k55(6) Most Cited Cases
Mineral owner must have "due regard" for rights of a surface owner in making use of estate, and to make prima facie case for relief, surface owner must establish material interference with surface use; evidence that operator's conduct was merely inconvenient to surface owner is insufficient.

[3] Mines and Minerals ⇐55(6)
260k55(6) Most Cited Cases
Even if there is interference with surface uses of estate by mineral owner that is material, mineral owner may justify his conduct by showing that it was "reasonable and necessary".

[4] Mines and Minerals ⇐55(6)
260k55(6) Most Cited Cases
There is no requirement that mineral operator's use of estate must be limited by presence of any alternative requested by surface owner, rather mineral operator is only required to utilize alternative which is reasonable under all the circumstances.

[5] Mines and Minerals ⇐55(6)
260k55(6) Most Cited Cases
Mineral owner is not required to accommodate surface owner's reasonable requests with regards to mineral owner's use of estate, where there are contradictory regulatory requirements.

[6] Mines and Minerals ⇐73.1(6)
260k73.1(6) Most Cited Cases
Use of estate by gas operator, which leased mineral estate, was not excessive and did not constitute trespass on surface owner's use; operator's well and associated infrastructure complied with state and local regulations, permits, and lease, operator installed water and gas gathering lines in reasonable and necessary manner, operator's access road to well was reasonable and necessary,

and operator reasonably accommodated surface owner's present and speculative future surface use.

[7] **Mines and Minerals ⇐73.1(6)**
260k73.1(6) Most Cited Cases
and
Gas operator, which leased mineral estate, was not required to request state and/or county variances for setback and safety regulations to reasonably accommodate surface owner with regards to its well and associated infrastructure; variance requests would have been futile, since state would not vary setbacks without waiver from adjoining property owners, who refused to grant such waivers.
***1164** Thomas P. Dugan, Dugan & Associates, PC, Durango, CO, for Plaintiff.

George Robert Miller, McDaniel, Baty and Miller, Durango, CO, for Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER

BABCOCK, Chief Judge.

I. Background

Trial to the Court was held December 2nd and 3rd, 2002. Thunderhead Investments is a Colorado corporation that owns a 40-acre tract of land located in the SE1/4SW1/4 of Section 1, Township 34 North, Range 7 West, N.M.P.M., La Plata County, Colorado ("the Property"). The land is adjacent to the Town of Bayfield, Colorado. Amoco, a Delaware corporation, owns the oil-and-gas estate in the Property pursuant to an oil-and-gas lease ("the Lease") granted to it in 1988 by the owner of the surface and mineral estates at that time.

Scott Fleming, a principal in Thunderhead, purchased the surface estate in 1994 by a deed that granted title to the surface subject to all oil and gas leases of record. The deed specifically included and referenced the Lease. The deed excepted and reserved to the grantors all coal, oil, gas and other minerals. Title to the surface estate was transferred from Fleming to Fleming and his wife as joint tenants, and then to Thunderhead. It is not disputed ***1165** that Thunderhead owns only the surface rights to the Property.

Thunderhead's surface title is junior and expressly subject to the Lease. Other persons, including property owners to the east and northeast, hold easement rights in portions of the surface of the Property along its northern boundary, specifically a 60-foot easement. The Property is unimproved, and is currently used for hay production and horse grazing. The Property remains a part of the unincorporated territory of La Plata County. A public middle school is located on property immediately north of the Property. A private residence (the "McNew Residence") is situated on property immediately west of the Property.

Thunderhead applied twice to the Town of Bayfield for annexation and subdivision of the Property. Two preliminary plats were approved. However, the town has never annexed the Property or approved a final subdivision plat. Bayfield requires two access roads for any future subdivision on the Property. One likely would be a short southward extension of Cedar Drive on the north side of the Property. However, Thunderhead would have to create the southern access road. This is a major obstacle to final plat approval. Thunderhead would need easements from property owners south of the Property for the access road. It does not have such easements and none are pending. Thunderhead also must finance construction of the road and an interchange to connect it to Highway 160 to the south. This cost is estimated between $1 and $1.5 million. There is no evidence that plans are underway to construct the southern road.

Amoco and Thunderhead never reached a surface-use agreement regarding a well location or Amoco's access to the well. The Colorado Oil and Gas Conservation Commission (COGCC) requires setbacks for the well: 1) a minimum of 150 feet from the well to any surface property line (COGCC Rule 603a.2)); 2) at least 350 feet from the wellhead location to any building unit or educational facility (COGCC Rule 603b.2)); and 3) at least 350 feet

from the gas-production equipment to any building unit (COGCC Rule 603b.3)).

On or about December 15, 2000, Amoco filed with the COGCC an Application for Permit to Drill (APD) a Fruitland coal-bed methane well on the Property. The proposed well location in the APD complied with all state and local regulations. On March 2, 2001, Amoco received permits from the COGCC and from La Plata County to drill on the Property within the spacing unit approved by the COGCC. The COGCC amended its permit by a Sundry Notice modifying the surface location of the well from that listed on the drilling permit to a location designated by the COGCC described as 1180 feet from the south line (FSL) of the Section and 1515 feet from the west line (FWL) of the Section. This location is within a 23-acre drilling window designated by the COGCC.

Amoco drilled the well, Neva Dove Unit A # 2, in late November and early December, 2001. At approximately the same time, Amoco built a gravel access road to the well pad running east-northeast across the northern portion of the Property. Amoco also buried water-- and gas-gathering lines approximating but not exactly following the route of the road. The well as built meets all COGCC setbacks from the school, nearby residences, and property lines.

Claims

Plaintiff states one claim for declaratory judgment seeking four declarations. First, it contends under the present circumstances it was not required to request variances from state setback and safety regulations. Plaintiff argues it already moved its well site at Defendant's request. ***1166** It contends each of the other alternative sites Defendant suggests: a) is outside the drilling window prescribed by the COGCC, b) violates COGCC's set-back requirements, or c) is otherwise unreasonable.

Second, Plaintiff contends it has reasonably accommodated Defendant's surface use. Plaintiff contends it has accommodated present use of the land as a pasture. It argues it has also "in many ways and at great cost" accommodated possible future development of the Property. Third, Plaintiff asserts it is entitled to use and maintain the access road it built to its well. Plaintiff contends the road is required by state and local permits and is reasonable. Finally, Plaintiff contends its sound mitigation is sufficient. Plaintiff contends it has achieved sound levels lower than those allowed by state law through the use of electric motors at Thunderhead's request. Defendant no longer contests issues related to sound.

Defendant states a counterclaim for declaratory judgment. Defendant does not seek injunctive relief or damages. Defendant contends its counterclaim is for trespass due to actual, unreasonable surface use. Defendant requests the following declarations. First, it contends Amoco trespassed when it unreasonably located its gas- and water-gathering pipelines outside the purported easements Defendant unilaterally granted to Amoco. Second, Defendant contends Amoco trespassed and acted unreasonably when it denied Defendant the right to designate a reasonable well location, opposed Defendant's suggestions regarding reasonable well locations, and drilled in a location that unnecessarily adversely impacted Thunderhead's surface use.

Third, Defendant asserts Amoco's pumper will have reasonable access to Neva Dove Unit A # 2 on proposed subdivision roads and trails, and Amoco's work-over and drilling rigs will have reasonable access on subdivision trails. Defendant does not dispute issues related to sound, electric lines, or its ability to cross Plaintiff's gathering lines.

II. Findings of Fact

Colorado Revised Statute § 34-60-101, *et seq.* (2001), the "Oil and Gas Conservation Act," established the COGCC. The Act grants the COGCC authority to promulgate regulations in many areas, including the health, safety and welfare of the general public and any person at an oil-and-gas well. C.R.S. § 34-60-106(10) and (11) (2001). The COGCC also is authorized to establish drilling and production

units. *Id.* at (16). Finally, the COGCC is required to prevent waste and to protect the correlative rights of owners in every well field or pool. *Id.* at (17).

Amoco and other gas operators applied for and received generalized permission to drill optional or additional wells in the Fruitland coal formation underlying certain lands and spacing units within La Plata and Archuleta Counties in Colorado. COGCC Cause No. 112, Order No. 112-156 approved these "infill" wells. The order covers the Property. The COGCC entered the order because the commission found that the additional wells would result in the recovery of more of the state's natural resources as mandated by C.R.S. § 24-33-103.

Permission to drill an infill well in a spacing unit is a "general" permission in the sense that it does not authorize drilling any particular well. The order only provides that a second well may be drilled within the designated 23- acre drilling window for each 320-acre spacing unit. The drilling windows provide regional well setbacks so wells are spread out enough to cover and penetrate as much of the Fruitland coal bed as possible without overlapping well draining. In order to drill under the order, the gas operator must file ***1167** a well-specific APD with the COGCC. The operator may also be required to obtain permits from one or more additional regulatory agencies or governments (*e.g.,* county) depending on site-specific facts. At the time any APD is filed with the COGCC, the applicant must then present specific information regarding, and a proposed location for, the requested well.

Typically, the gas operator and surface owner come to terms regarding certain aspects of a proposed well. Of approximately 140-150 infill wells drilled by Amoco in La Plata County, Neva Dove Unit A # 2 is the only one without a Surface Use Agreement. In the absence of such an agreement, the COGCC mandates that an onsite inspection be conducted in order to identify any potential public health, safety, and welfare, or significant adverse environmental impacts. The COGCC's 23-acre drilling window for Neva Dove Unit A # 2 consists entirely of developed and improved land except for that part of Thunderhead's property which is located in the southeast part of the window. Because the subject well is located within 1,000 feet of an educational facility, the COGCC's high-density area rules apply pursuant to COGCC Rule 603.b.

The COGCC's Southwest Colorado Operations Manager, Morris Bell, conducted an onsite inspection of the Property on January 27, 2001 in the area in which Amoco proposed its well. The inspection was attended by nearby property owners and by representatives of Amoco, Thunderhead, School District 10 JTR, La Plata County, and Bayfield. The public middle school includes a school building, a bus stop and "turnaround area" close to its southern property line, as well as a playground with a baseball field and dugout. The school district did not waive the benefit of regulatory setbacks. The owners of the McNew Residence did not waive the benefit of regulatory setbacks. Moreover, none of the owners of other residences in the immediate area waived the benefit of regulatory setbacks.

At the on-sight meeting, Thunderhead's Scott Fleming proposed a well location much further to the north and west than Amoco had proposed. Safety setbacks prevented Morris Bell from considering a site as far north as Thunderhead requested. However, pursuant to Thunderhead's request, he directed Amoco to evaluate a well location further to the north and west from the site set forth in Amoco's APD. This location met setback requirements because at the on-site inspection La Plata County waived compliance with its 400-foot setback from the nearest residence to the well-site perimeter. Amoco did not know, and did not expect, that the county would make such a waiver. Amoco agreed to consider the location. The final location of Neva Dove Unit A # 2 was the result of Thunderhead's request that the well be moved northwest of the APD location.

As a result of the on-site inspection and requests made by Thunderhead, the COGCC attached conditions to Amoco's COGCC permit, including:

1) Use of electric motors on all production equipment;
2) Use of a low-profile pump shall be used first, if artificial lift is necessary and if such pump is effective;
3) Use of a horizontal or low-profile production separator;
4) Any water tank at the site is to be ten feet or less in height;
5) Reclamation of the well pad after completing the well, including reseeding;
6) After drilling, subsequent operations are to be conducted during daylight hours;
7) A provision for completing an "as built" survey;
***1168** 8) Gas and water lines shall be buried to 48 inches where practicable and located as close to the northern property boundary as practicable;
9) Minimal gravel areas at the wellsite.

The La Plata County permit for Neva Dove Unit A # 2 generally depicts the approved well location and layout of related facilities. It requires Amoco to offer money to adjacent property owners to pay for landscaping (visual mitigation) on their properties. Amoco paid the $10,000 in aggregate to the property owners. The county permit also requires that if the Property is developed in the future, Amoco will deposit $25,000 with the local government that has jurisdiction at that time to be used for landscaping at the wellsite.

On August 30, 2000, Scott Fleming responded to Plaintiff's notice of intent to drill by informing Plaintiff that the drill site is included in the preliminarily planned Los Pinos subdivision. Fleming provided Amoco with a copy of the Los Pinos Subdvision Preliminary Plat Plan. After meeting with Fleming on October 8, 2000, Scott Thompson, an Amoco Landman, wrote Fleming regarding the well. At that time, Thompson was aware of the Los Pinos subdivision and had been provided a proposed subdivision plat. On October 30, 2000, Thompson e-mailed Amoco personnel that:

> [t]here are now three possible locations [for the Neva Dove Well] any of which will work for Amoco: First proposed location staked in drilling window, second proposed location in green space as shown in his proposed development, third proposed location is a legal location that meets high density set-back requirements.

On November 17, 2000, Thompson described the second location as follows:

> [t]his location was selected to cause minimal impact to your desired surface activities. It is in an area you propose to set aside as open space and it should not physically impact any of your possible locations for surface development. This location is 1200' FSL, 1660' FWL, and the elevation is 7025'.... Amoco believes that Location No. 2 is the best location for the well from your perspective, based upon what you have told us. This is because it will minimize any impact to your potential surface development areas. The access road will be routed from the East so as to cause minimal impact, and [it] will not physically cross any of the areas you identified as possible residential sites.

Brian Stepanek, Amoco's Infill Project Drilling Coordinator, testified credibly as a fact and expert witness. He noted the second location (1200' FSL, 1660' FWL) was "probably the best location, but not in compliance with" COGCC and county setbacks. Amoco understood that in order to drill the second location, the state would have to grant it setback variances. When Amoco filed its application for a permit to drill its well, it staked the well at a location 975' FSL, 1665' FWL, in the center of one of Thunderhead's proposed largest pods of residential lots. Stepanek testified that any preference Amoco might have stated accounted primarily for COGCC and La Plata Regulations and secondarily for the preferences of Defendant or other neighboring property owners.

Thunderhead's Scott Fleming proposed alternative locations for the well many times before Amoco drilled the well. He suggested the well be located approximately 1260' FSL, 1660' FWL, in proposed

open space. The location would have required an exception to COGCC setback requirements, but would have alleviated the need for re-design, re-engineering, and re-consideration of the Los Pinos subdivision. Fleming proposed the well be located on open space south of the drilling ***1169** window designated by the COGCC. Defendant contends this location would not have required an exception to COGCC setback requirements if a deviated well (slant hole) were drilled. But if a straight hole were drilled, COGCC approval of an exception location would have been required. Fleming argued either way this also would have alleviated the need for re-design, re-engineering, and re-consideration of the Los Pinos subdivision. Defendant contends this was a reasonable alternative.

The COGCC in its order approving San Juan basin infill wells specifically noted:

> Directional drilling from common surface locations is not a cost-effective or technically feasible option to mitigate surface impacts on 160-acre Fruitland coal seams well density because of the shallow (approximately 2000') target top depths, the long (average 2640') displacements and the resulting complications for artificial lift.

Brian Stepanek testified credibly at length that this southern location was not reasonable. First, a vertical well would encroach on the rights of approximately 80 mineral owners to the south. Those mineral owners would have to waive their rights to the Fruitland gas before Amoco could drill. There is no reason to believe they would do so. Moreover, the coal is thicker to the north, and production is greater in Neva Dove Unit A # 1 to the north than in the well to the south.

Stepanek testified that directional drilling from the southern open-space surface location at an angle into the coal bed below the drilling window to the north would be problematic and ultimately not feasible. First, the coal bed depth is approximately 1,500 feet. A 46-degree slant would be necessary. The tested limit in La Plata County is 36 degrees. Second, the angle and distance to the coal bed would require a longer bore hole and additional equipment. It is difficult to steer the drill at such an angle for such a distance, especially through the boulder-rich substrate found in the area. Third, cement used to secure the well-pipe casing to the drill hole often settles unevenly, undermining the integrity of the hole. Fourth, directional drilling under the circumstances requires more water and gas pumping than normal, in part because the water tends to settle on the low side of the pipe. Pumps are usually powered by natural gas captured from the well itself. At Neva Dove Unit A # 2, electric motors are required, so pumping costs are much higher. Fifth, out of 140-150 infill wells in the San Juan Basin, only 10 are directional. Of those, all have significant problems.

On or before the on-site meeting, Fleming also suggested a well site 80 feet south of his northern property line. This requested location would have violated the safety setbacks calculated from property lines, buildings, public roads, the middle school, and the middle school baseball dugout. Fleming testified he thought Plaintiff should have requested a variance for some of these setbacks. The evidence showed that the COGCC likely would not grant variances for the safety setbacks.

Finally, Fleming suggested the gathering lines be routed directly north from the well and run eastward within ten feet of the northern Property boundary. The COGCC Permit reasonably accommodated his request: "[t]he gas and water flow lines shall be routed to the east of the location as close to the northern property boundary as practicable." Amoco routed its lines in an east-northeast orientation, "as close to the northern property boundary as practible."

Amoco's John Mummery testified credibly as a fact and expert witness. He testified that physical obstacles played a critical role in Amoco's location for its water and gas lines. It had to avoid a 60-***1170** foot access easement along the northern property line in favor of property owners to the east and northeast, and a ditch-company easement for an

irrigation canal. Amoco was forced to stay far enough away from the irrigation ditch running through the Property to prevent destabilizing the supportive ditch berm. Amoco bored a hole for the lines in one section to prevent the disruptive effects of trenching. It also had to negotiate a route around an oak tree stand on the northern edge of the property east of the well. Moreover, Amoco had to avoid irrigation pumping equipment and a power line running south from the northern boundary to that equipment. Where appropriate, the water and gas lines were buried 14 feet deep at a cost of $150,000, and five feet deep otherwise at a cost ten times less. Amoco used trenching and boring methods common in the oil-and-gas industry to bury these lines. Thunderhead's Scott Fleming testified that this was a "good" depth for him and that he could run his sewer, water, and other utility lines over the deeper pipes if and when his subdivision was approved and built.

Plaintiff did not include Thunderhead in discussions with the ditch company and the Southview Property owners to the east about possible gathering line and road locations. But the road and gathering lines cross the ditch at a perpendicular point required by the ditch company.

On January 26, 2001, the day before the on-site meeting, Scott Fleming proposed surface-use conditions for Neva Dove Unit A # 2. He informed Amoco that its gas-- and water-gathering lines should be located within 10 feet of the north boundary of Thunderhead's property, in order to avoid unnecessary interference with and re-design of the Los Pinos Subdivision. He told Amoco that no permanent road should be maintained to the well pad or production area. He suggested Amoco's pumper should "walk" to the Neva Dove well from Oak Drive or from a subdivision road. As a trial witness, Fleming testified that what he really meant was that Amoco's well and pump personnel should drive their vehicles and equipment slowly across the Property without a road. Fleming testified this was the meaning of "walk" in the construction industry. That may be so but I am unconvinced that was his meaning or intent at the time. Scott Thompson testified that Thunderbird's demands were unreasonable. During trial, Fleming testified that Amoco's access road, as it is now built, is "O.K."

Even after the on-site meeting, Thunderhead continually attempted to influence Amoco's logistical decisions. For example, on October 1, 2001, without consulting with Amoco or sharing preliminary drafts with Amoco, Thunderhead recorded a Grant of Right-of-Way and Easement that conveyed to Amoco a non-exclusive right-of-way for one water-- and one gas-gathering line to be located within 12 feet of Thunderhead's northern property line. Also on October 1, 2001, Thunderhead unilaterally recorded a Grant of Right-of-Way and Easement that conveyed to Amoco a non-exclusive right-of-way for an underground electric line to be located within 10 feet of the northern boundary of the Property.

On December 4, 2001, Plaintiff filed a Notice of Non-Acceptance of the granted easements. Amoco stated it did not accept the easements in part because under the Lease Amoco could place its gathering and electric lines without an express easement. After completing Neva Dove Unit A # 2 in December 2001, Plaintiff provided Thunderhead with an "as-built" survey of the gas-- and water-gathering lines, electric line, and access road.

III. LAW

Jurisdiction rests on diversity. I apply Colorado law.

1171** [1] **"The owner of a severed mineral estate or lessee is privileged to access the surface and use that portion of the surface estate that is reasonably necessary to develop the severed mineral interest."** ***Gerrity Oil & Gas Corp. v. Magness, **946 P.2d 913, 926 (Colo.1997).** *See also, Frankfort Oil Co. v. Abrams,* 159 Colo. 535, 413 P.2d 190, 194 (1966); *Rocky Mountain Fuel Co. v. Heflin,* 148 Colo. 415, 366 P.2d 577, 580 (1961) ("The owner of a mineral estate has rights of ingress,

egress, exploration, and surface usage as are reasonably necessary to the successful exploitation of his interest."). ***Gerrity*** is the leading case in Colorado on the subject of reasonable accommodation in the oil-and-gas context. Because the oil-and-gas industry is highly regulated, ***Gerrity*** must be read in the context of matters covered by statute, regulation, and lease terms. The essential disputes in this case are covered by statute, regulation, and lease terms. Therefore, state and county regulations and lease terms provide the major legal framework for this case. Critically, they address fundamental health, safety, and welfare concerns. C.R.S. 34-60-106(10) and (11) (2001).

[2][3][4] A mineral owner must have "due regard" for the rights of a surface owner. ***Gerrity,* 946 P.2d at 933**. To make a *prima facie* case for relief a surface owner must establish a material interference with surface use. ***Id.* "Evidence that the operator's conduct was merely inconvenient to the surface owner is insufficient."** ***Id.*** Even if there is an interference with surface uses that is material, the mineral owner may justify his conduct by showing that it was "reasonable and necessary." ***Id.*** However, there is no requirement that the mineral operator's use must be limited by the presence of any alternative requested by the surface owner. ***Id.*** The alternative must be a "reasonable alternative" under all the circumstances. ***Id.*** ***See*** *also, Smith v. Linmar Energy Corp.*, 790 P.2d 1222, 1224 (Utah Ct.App.1990) ("... [T]he lessee is not required to utilize any possible alternative, but only one that is both 'reasonable and practical under the circumstances.' ").

[5] The ***Gerrity*** court further stated:

> **[T]he operator must present evidence, by means of expert testimony or otherwise, that explains why its surface conduct was reasonable and necessary [from the perspective of the operator, and ...] present evidence that its operations conformed to standard customs and practices in the industry.**

***Gerrity*, 946 P.2d at 933**. Finally, the mineral owner is not required to accommodate a surface owner's reasonable requests where there are contradictory regulatory requirements. ***Id.* at 926.**

Thunderhead urges that RESTATEMENT (THIRD) OF PROPERTY, SERVITUDES § 4.8 (2000) be adopted here in the oil and gas context. Yet, the very first section of the RESTATEMENT is entitled "Servitude Defined: Scope of Restatement." It states:

> Servitudes are used in several specialized areas where the rules and considerations governing their operation are different from those ordinarily applied to the servitudes covered in this Restatement. Landlord-tenant law, real-property security law, *oil and gas law,* timber law, and the law governing extraction of other minerals *are such specialized areas. No attempt has been made in this Restatement to take account of the special rules and considerations governing servitudes used in those contexts.*

RESTATEMENT § 1.1 cmt. e (2000) (emphasis added). Application of this secondary authority would contradict the authors' clear intentions and run contrary to the Colorado Supreme Court's ruling in ***Gerrity.*** ***1172** The RESTATEMENT OF THE LAW OF PROPERTY, SERVITUDES does not apply to this case.

IV. Discussion and Conclusions of Law

[6] Thunderhead argues Amoco did not adopt the least-intrusive, reasonable alternative means of access to its minerals contrary to ***Gerrity.*** Therefore, it contends Amoco's use is excessive and constitutes a trespass. I disagree.

The first question is whether Amoco's well and associated infrastructure complies with state and local regulations, permits, and the Lease. Amoco complied with all the COGCC setbacks and other regulations that govern the well. Amoco complied with all applicable La Plata County regulations. It complied with the COGCC and La Plata County permits. Amoco also complied with the terms of the Lease.

The next question is whether Amoco, given its obligations to comply with those regulations and agreements, selected "reasonable alternatives" necessary under the circumstances. *See* ***Gerrity*****, 946 P.2d at 933**. Evidence that Amoco's surface use is merely inconvenient for Thunderhead is insufficient. ***Id***. For the following reasons, I conclude that Amoco's choices were reasonable and necessary in conformity with standard industry customs and practices.

Gathering Lines

Amoco installed its water-- and gas-gathering lines in a reasonable and necessary manner. Amoco installed the lines using methods common and acceptable to the industry. Their depth allows space for Defendants' future utilities. Their location was reasonable and necessary in light of physical considerations (the canal, trees, and pumping equipment). Their location respects the legal rights of various owners of interests in the surface estate (the 60-foot access easement, the ditch company's canal easement, the irrigation lines). Given these considerations, the lines were placed as far north as practicable.

Access Road

Mr. Fleming testified that the access road as it now stands is "O.K.," but has continually requested that Amoco use proposed subdivision roads for access to its well. Thunderhead requests that if the surface is developed for a future residential subdivision, Amoco utilize subdivision roads for partial access to the site and then have its workers walk to the wellsite. There is no certainty as to if and when residential development may occur, whether Bayfield will annex the Property, what the road locations and specifications would be, and whether Amoco's equipment would meet Bayfield load requirements. Beyond this general statement, I am unable to speculate about potential, future conflicts in the absence of a real, present controversy based on concrete evidence. Neither a subdivision nor its roads exist. Bayfield will not allow Defendant to build until it has been granted easements from southern property owners for, and financed, a southern access road. Amoco cannot be required to access its well site without a road. Subdivision roads are speculative at this point and subject to unknown future events.

Future work on the subject well can range from minor operations (albeit still involving tools and heavy equipment) to those requiring large rigs. Requesting that rigs and equipment be transported to the wellsite without a road is not a reasonable alternative method of operation. In Colorado, no judicial decision has directly addressed the question whether a road is a reasonable use of the surface by a mineral lessee. However, COGCC regulations require that a wellsite within 1,000 feet of a school have a road "constructed to accommodate local emergency vehicle access requirements" and that it be "maintained in ***1173** a reasonable condition." COGCC Rule 603.b.(14). ***Gerrity*** instructs that the rule of reasonable accommodation applies "**[i]n the absence of, statutes, regulations, or lease provisions to the contrary**...." *Gerrity*, **946 P.2d at 926**. The Lease grants the right to install a road. Amoco installed its road in a reasonable manner and at a location that was both reasonable and in compliance with the county and COGCC permits. The access road is reasonable and necessary.

Surface Use

Amoco requests a declaration that its operations accommodate Thunderhead's surface use. Pursuant to its oil-and-gas lease, and under the authority of the state and county permits issued in this case, Amoco was entitled to use the surface estate of the Property in the current manner. As stated in ***Gerrity*****, "[h]ow much accommodation is necessary will, of course, vary depending on surface uses and on the alternatives available**...." *Gerrity*, **946 P.2d at 927**. The evidence established that this is a highly mitigated well. The well and related equipment do not materially interfere with the current use of the surface estate as a pasture. The Texas Supreme Court limits the accommodation doctrine to existing uses, stating:

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

Getty Oil Co. v. Jones, 470 S.W.2d 618, 622 (Tex.1971) (emphasis added). This authority is persuasive and not in conflict with ***Gerrity.*** It is unreasonable to require Amoco to accommodate speculative future surface uses. As Plaintiff states in its trial brief, "[i]t is one thing to have a building permit in hand and the legal right to proceed with construction. It is quite another to have a tentative plan." Thunderhead may not construct the subdivision it asked Amoco to accommodate without overcoming major obstacles (the southern access road, receiving Bayfield final plat approval, and annexation). Further, Amoco mitigated to a reasonable extent potential effects on possible future uses. Amoco reasonably accommodated Thunderhead's requests regarding location of the well within the parameters of applicable regulations and permit conditions. Amoco's use of the surface was reasonable and necessary as measured by the usual, customary, and reasonable practices of the oil-and-gas industry and in light of applicable regulations.

Well Location

The as-built and approved location of the subject well reasonably accommodated Thunderhead's request that the well be moved to the north and west from the APD location. Thunderhead's requests for southern locations were not reasonable alternatives. First, Amoco would need a COGCC exception to drill vertically. If the well were drilled vertically, it would drain the gas owned by numerous interest holders in the spacing unit to the south. Waivers from those owners would be required. There is no reason to believe they would be granted.

[7] Drilling directionally from a southern site so as to "bottom" within the drilling window also is not a reasonable alternative. As Brian Stepanek testified, directional drilling at a 46-degree angle was not feasible. Given the regulatory and permit limits on Plaintiff's well location, combined with the adjacent land-owners' refusals to waive setback restrictions, Plaintiff's well location is reasonable and necessary. Thunderhead argues that Plaintiff should have at least ***1174** requested safety and/or property-line setback variances from the COGCC. A variance request would have been futile because the COGCC would not vary the setbacks without waivers, and the affected nearby property owners and the School District refused to grant waivers.

Amoco has reasonably accommodated Thunderhead. First, it changed its well location in the direction requested by Thunderhead at the on-site meeting. Second, the COGCC permit is laced with conditions requested by Thunderhead to minimize adverse impacts to future development. Third, Amoco assessed several well locations with a view toward minimizing interference with Defendant's planned subdivision. Fourth, Thunderhead's development of the Property into a subdivision is speculative and far from final approval. Under the present circumstances where there is no threat of imminent development, Amoco has reasonably accommodated the present use of the Property.

Accordingly, IT IS ORDERED THAT JUDGMENT ENTER DECLARING THAT:

1) PLAINTIFF is not and was not required to request state and/or county variances for setback and safety regulations;

2) PLAINTIFF has reasonably accommodated DEFENDANT'S present surface use and speculative future surface use;

3) PLAINTIFF may use and maintain its access road as it is built to access Neva Dove Unit A # 2; and

4) PLAINTIFF's sound mitigation issue is moot.

Further, IT IS ORDERED THAT:

5) DEFENDANT'S counter-claim for declaratory judgment is DISMISSED; and

6) PLAINTIFF is awarded its costs.

235 F.Supp.2d 1163, 157 Oil & Gas Rep. 207

END OF DOCUMENT

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Slip Copy, 2009 WL 890716 (D.Colo.)
(Cite as: 2009 WL 890716 (D.Colo.))

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Only the Westlaw citation is currently available.

United States District Court,
D. Colorado.
ZEILER FARMS, INC., Plaintiff,
v.
ANADARKO E & P COMPANY, LP, f/k/a RME Petroleum Company; Anadarko Land Company, f/k/a RME Land Corp.; and Unioil, Inc., Defendants.
Civil Action No. 07-cv-01985-WYD-MJW.

March 31, 2009.

West KeySummary
Mines and Minerals 260 ⚿121

260 Mines and Minerals
260III Operation of Mines, Quarries, and Wells
260III(C) Rights and Liabilities Incident to Working
260k120 Injuries to Property
260k121 k. In General. Most Cited Cases

A landowner failed to demonstrate that a petroleum company "unequivocally" manifested an intent not to perform its obligations under a surface owner's agreement where the company made representations in its motion for summary judgment that it would comply with the terms of the agreement. The company stated in the motion that it intended to restore the surface of the landowner's land after completing construction of its facilities, which would likely cause no damage to the land. The company also acknowledged that if there were surface damages as defined by the agreement, it would reimburse the landowner for those damages in accordance with the agreement. Therefore, the company was entitled to summary judgment as to the landowner's claim for anticipatory repudiation.

Thomas R. Rice, Astrella & Rice, P.C., Denver, CO, for Plaintiff.

Michael John Gallagher, Andrea Wang, Gail L. Wurtzler, Davis Graham & Stubbs, LLP, Osborne J. Dykes, III, Fulbright & Jaworski, LLP, Kenneth A. Wonstolen, Beatty & Wozniak, P.C., Denver, CO, for Defendants.

ORDER

WILEY Y. DANIEL, Chief Judge.

I. *INTRODUCTION*

***1** THIS MATTER comes before the Court on Defendant Unioil, Inc's Motion for Summary Judgment, filed March 13, 2008[# 30]. On March 31, 2008[# 32], Defendants Anadarko E & P Company LP f/k/a RME Petroleum Company and Anadarko Land Company f/k/a RME Land Corp. (collectively, the "Anadarko Defendants") filed a Joinder in the Motion for Summary Judgment, insofar as it addresses claims asserted against them in the First Amended Complaint. A Response to the Motion was filed by Plaintiff Zeiler Farms Inc. on April 10, 2008, and a Reply filed on April 25, 2008. For the reasons stated below, I find that the Motion for Summary Judgment should be granted as set forth herein.

II. *BACKGROUND*

Pursuant to the Final Pretrial Order [# 60], the parties have stipulated to several material facts. Plaintiff is the owner of a 147-acre tract of land located in Weld County, Colorado ("the Property"). The mineral estate below the surface of the Property is owned by the Anadarko Defendants subject to a Oil & Gas Lease between the Anadarko Defendants (as lessor) and Defendant Unioil as the mineral lessee (the "Oil & Gas Lease"). In addition, there is a Surface Owner's Agreement, dated September 23, 1983, between Plaintiff and Champlin Petroleum Company (the "Surface Owner's

Agreement"). The Anadarko Defendants are the successor to Champlin Petroleum Company with respect to the Surface Owner's Agreement. At this time, a single oil and gas well exists on the Property at the Colorado Oil and Gas Conservation Commission's ("COGCC") approved center drilling window. However, the COGCC has issued Defendant Unioil drilling permits to drill four additional vertical wells on the Property. The dispute in this case centers around the location of the wellheads for the four proposed wells.

Under COGCC rules, the wellheads may be located in one or more of five "drilling windows;" one in the center of each quarter section such that they would be configured like the spots on the 'five side' of a dice. Plaintiff contends that, if drilled vertically, the wells proposed by Unioil would use and occupy roughly 12 acres of land. According to Plaintiff, Colorado common law, Colorado statute, the Oil & Gas Lease and the Surface Owner's Agreement, all obligate Defendant Unioil to locate the wellheads in a cluster around the existing well in the center drilling window, which would require that the wells be drilled directionally. Plaintiff maintains that while directional drilling is more expensive than vertical drilling, it is technologically sound and a **reasonable** alternative to the vertical drilling Defendant Unioil proposes.

In its First Amended Complaint, Plaintiff asserts claims for Breach of Contract/Anticipatory Repudiation of the Surface Owner's Agreement; Breach of the Implied Duty of Good Faith and Fair Dealing; violation of the Accommodation Doctrine; and violation of C .R.S. § 34-60-127. In addition, Plaintiff seeks a Declaratory Judgment that (1) Plaintiff is a third party beneficiary of the Oil & Gas Lease; (2) the accommodation doctrine requires Unioil to **drill** wells **directionally** at Unioil's cost; (3) under the Oil & Gas Lease, Unioil is required to pay damages for the value of the Property it occupies; and (4) that absent payment by Unioil under the Oil & Gas Lease, the Anadarko Defendants are required to pay damages under the Surface Owner's Agreement for the value of the Property occupied for oil and gas operations.

***2** Defendant Unioil moves for summary judgment claiming that, as a matter of law, the accommodation doctrine is inapplicable to this dispute; that Plaintiff's claim for breach of the implied duty of good faith and fair dealing fails as a matter of law because the duty cannot override express contractual terms and there is no evidence of bad faith; and that Plaintiff's claim for anticipatory repudiation fails as a matter of law because there is no evidence if anticipatory repudiation.

III. *ANALYSIS*

A. *Summary Judgment Standard*

Summary judgment may be granted where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the ... moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56©.

The burden of showing that no genuine issue of material fact exists is borne by the moving party. *E.E.O.C. v. Horizon/ MS Healthcare Corp.*, 220 F.3d 1184, 1190 (10th Cir.2000). Once the moving party meets this burden, the burden shifts to the nonmoving party to demonstrate a genuine issue for trial on a material matter. *Concrete Works, Inc. v. City & County of Denver*, 36 F.3d 1513, 1517 (10th Cir.1994). The nonmoving party may not rest solely on the allegations in the pleadings, but must instead bring forward "specific facts showing that there is a genuine issue for trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

In reviewing a summary judgment motion, the court must view the evidence in the light most favorable to the nonmoving party. *Anaya v. Crossroads Managed Care Systems, Inc.*, 195 F.3d 584, 590 (10th Cir.1999). All doubts must be resolved in favor of the existence of triable issues of fact. *Boren v.*

Southwestern Bell Tel. Co., 933 F.2d 891, 892 (10th Cir.1991).

B. *Accommodation Doctrine*

Plaintiff's third claim for relief is for violation of the accommodation doctrine, and its fourth claim for relief is for violation of C.R.S. § 34-60-127. Plaintiff asserts that Defendant Unioil's proposal to drill four vertical wells constitutes excessive use of the surface estate and will decrease the value of the surface estate, and contends that both the accommodation doctrine and C.R.S. § 34-60-127 require Unioil to drill the proposed wells on a directional basis.

The Colorado Supreme Court first articulated the "accommodation doctrine" in *Gerrity v. Magness*, 946 P.2d 913 (Colo.1997), where the Court held that "[i]n the absence of statues, regulations, or lease provisions to the contrary, unless the conduct of an operator in accessing, exploring, drilling, and using the surface is ***reasonable*** *and necessary* to the development of the mineral interest, the conduct is a trespass." *Gerrity*, 946 P.2d at 926-27 (emphasis added). The Supreme Court noted that "[s]evered mineral rights lack value unless they can be developed. For this reason, the owner of a severed mineral estate or lessee is privileged to access the surface and 'use that portion of the surface estate that is reasonably necessary to develop the severed mineral interest.' " *Gerrity*, 946 P.2d at 926 (quoting *Notch Mountain Corp. v. Elliott*, 898 P.2d 550, 556 (Colo.1995)). In 2007, the Colorado General Assembly codified the holding in *Gerrity* in C.R.S. § 34-60-127, which provides that "[a]n operator shall conduct oil and gas operations in a manner that accommodates the surface owner by minimizing intrusion upon and damage to the surface of the land." C.R.S. § 34-60-127(1)(a). "Minimizing intrusion upon and damage to the surface" is defined to mean "selecting alternative locations for wells, roads, pipelines, or production facilities, or employing alternative means of operation, that prevent, reduce, or mitigate the impacts of the oil and gas operations on the surface, where such alternatives are technologically sound, economically practicable, and reasonably available to the operator." C.R.S. § 34-60-127(1)(b). The standard set forth in section 34-60-127 "shall not be construed to prevent an operator from entering upon and using that amount of the surface as is ***reasonable*** *and necessary* to explore for, develop, and produce oil and gas." C.R.S. § 34-60-127(1)(c)(emphasis added). The statute also provides that nothing therein should be construed to "prevent an operator and a surface owner from addressing the use of the surface for oil and gas operation in a lease, surface use agreement, or other written contract;...." C.R.S. § 34-60-127(4)(b). In addition, the statute "shall not be construed to abrogate or impair a contractual provision binding on the parties that *expressly provides for the use of the surface* for the conduct of oil and gas operations or that releases the operator from liability for use of the surface." C.R.S. § 34-60-127(1)(d) (emphasis added). Defendant Unioil contends that the accommodation doctrine does not apply in this case because scope of permissible surface use is clearly set forth in the Surface Owner's Agreement, and the accommodation doctrine cannot be used to abrogate or impair the terms of that agreement.

***3** Plaintiff and Champlin Petroleum Company entered into the Surface Owner's Agreement on September 23, 1983. As discussed above, the Anadarko Defendants are the successors to Champlin with respect to the Surface Owner's Agreement. A copy of the Surface Owner's Agreement is attached to Defendant Unioil's Motion for Summary Judgment as Exhibit 2 and provides in relevant part that:

> Besides confirming the surface uses expressly set forth below, this agreement is intended to avoid and resolve any and all disputes of whatever nature in connection with the ownership of oil, gas and associated liquid hydrocarbon substances in the described premises, including rights to extract, remove or market such materi-

> als, and including any such dispute that may arise hereafter...." Surface Owner's Agreement at 2.
>
> ...
>
> In consideration of the mutual benefits and of the sum of Ten Dollars ($10) paid by Champlin to Land Owner ... Land Owner hereby confirms, extends and grants ... the *easements and rights* to enter upon the described premises and to extract, remove, store, transport, and market for its or their account oil, gas, and associated liquid hydrocarbon substances, and *to drill, construct, maintain and use upon, within, and over said premises all oil wells, gas wells, derricks, machinery,* tanks, drips, boilers, engines, pipe, power and telephone lines, roadways, water wells, and without limitation by reason of the foregoing enumeration, any and all other structures, equipment, fixtures, appurtenances, or facilities (all the above being included under the term "facilities") *necessary or convenient* in prospecting and developing for, producing, storing, transporting, and marketing oil, gas, and associated liquid hydrocarbon substances *under or produced from any portion of the described premises....* Surface Owner's Agreement, Section 1, at 2-3 (emphasis added).
>
> ...
>
> [The owner of the mineral estate agrees] to pay or cause to be paid to the Land Owner in cash the value on the premises of two and one-half percent (2 1/2 %) of all the oil and gas and associated liquid hydrocarbons hereafter produced.... Surface Owner's Agreement, Section 2, at 3.
>
> ...
>
> [The owner of the mineral estate] ... shall be required: (a) to pay for all damage to Land Owner's lands, buildings, and growing crops caused by the erection or construction of facilities to be used in connection with oil or gas or associated liquid hydrocarbon operations.... Surface Owner's Agreement, Section 4, at 4.

Thus, the Surface Owner's Agreement grants an express easement to the owner of the mineral estate to "enter upon the described premise" and "construct and maintain and use" all "oil wells" or other facilities "necessary or convenient in ... producing ... oil, gas and associated liquid hydrocarbon substances." Surface Owner's Agreement, Section 1, at 2-3. In exchange for this use, the owner of the mineral estate agreed to pay Plaintiff "the value on the premises of two and one-half percent (2 1/2 %) of all the oil and gas and associated liquid hydrocarbons ... produced from ... or allocated to" the premises, and agreed to pay for "all damage to the Land Owner's lands, buildings and growing crops caused by the erection or construction of facilities to be used in connection with oil or gas or associated liquid hydrocarbon operations." Surface Owner's Agreement, Sections 2 and 4, at 3-4. Defendant Unioil notes that courts in other jurisdictions have held that the accommodation doctrine does not apply when the mineral owner relies on an explicit surface use easement. *See Landreth v. Melendez,* 948 S.W.2d 76, 81-82 (Tex.App.1997); *Texaco, Inc. v. R.W. Faris,* 413 S.W.2d 147, 149 (Tex.App.1967).

***4** In response, Plaintiff contends that Defendant Unioil's reliance on the Surface Owner's Agreement is misplaced because that agreement does not "expressly" provide for use of the surface estate. Plaintiff asserts that the "necessary or convenient" clause in the Surface Owner's Agreement has no relationship to either the drilling of wells or their location, but relates only to the construction of any "facilities" associated with the wells. Plaintiff further asserts that C.R.S. § 34-60-127(1)(b) relates almost exclusively to the location of wells. Plaintiff maintains that in order for the Surface Owner's Agreement to govern in lieu of the "**reasonable** and necessary" standard set forth in C.R.S. § 34-60-127, the Surface Owner's Agreement would have to set forth an agreed upon location for the wells or a

waiver of Plaintiff's right to accommodation. In addition, Plaintiff contends that Unioil's actions are inconsistent with various administrative rules promulgated by the COGCC and provisions in Oil and Gas Lease which provides that "no well shall be drilled upon or into and no facilities shall be installed upon any lands which [Anadarko] owns the mineral rights only, until the consents of [Plaintiff] have been obtained." Oil & Gas Lease at ¶ 16. Finally, Plaintiff contends that even if the term "necessary or convenient" relates directly to wells or their location, that language must be interpreted in the context of modern oil and gas operations.

I agree with Defendant Unioil that the terms of the Surface Owner's Agreement, rather than the accommodation doctrine codified in C.R.S. § 34-60-127, provide the standard for Defendant Unioil's use of the surface estate in connection with its proposed construction of four vertical drilling wells, and I reject Plaintiff's contention that Unioil's attempt to comply with the provisions in the Oil and Gas Lease and other administrative rules promulgated by the COGCC concerning consultation somehow compels application of the accommodation doctrine in this case. Contrary to Plaintiff's assertions, C.R.S. § 34-60-127(1)(d) provides that the "**reasonable** and necessary" standard set forth in section 127(c) "shall not be construed to abrogate or impair a contractual provision binding on the parties that expressly provides for the use of the surface for the conduct of oil and gas operations...." Here, the Surface Owner's Agreement clearly provides that the owner of the mineral estate has an express easement to enter the premises and "construct, maintain, and use ... all oil wells ... *necessary or convenient* in prospecting and developing ... oil." Surface Owner's Agreement at 2-3 (emphasis added). Construing the plain and ordinary meaning of the terms in the Surface Owner's Agreement, I find that the phrase "necessary or convenient" applies to the construction and location of oil wells on the Property. I further find that it would be contrary to Colorado Law to apply the "**reasonable** and necessary" standard found C.R.S. § 34-60-127 in lieu of the "necessary or convenient" standard the parties bargained for when they entered the Surface Owner's Agreement. *See Amoco Prod'n Co. v. Thunderhead,* 235 F.Supp.2d 1163, 1173 (D.Colo.2002) (the rule of **reasonable** accommodation applies in the absence of lease provisions to the contrary); *see also Landreth v. Melendez,* 948 S.W.2d 76, (Tex.App.1997) (accommodation doctrine did not apply where reservation of rights expressly included the right to employ "all usual, necessary and convenient means" to explore for, produce and remove minerals); *Texaco Inc. v. R.W. Faris,* 413 S.W.2d 147 (Tex .App.1967) (where express use of surface estate is set forth in an easement, the provisions of the easement control rather than any implied right to "reasonably necessary" use).

***5** Next, I turn to Plaintiff's contention that the "necessary or convenient" language of the Surface Owner's Agreement must be interpreted in the context of modern oil and gas operations. According to Plaintiff, the obligation to drill wells on a directional basis is not inconsistent with the right of an oil and gas lessee to enter upon the surface do what is "necessary or convenient" to operate the mineral estate. Plaintiff asserts that issues of fact remain concerning whether directional drilling is practical under the circumstances presented here, and whether Unioil's desire to drill wells vertically imposes an undue or unnecessary burden on Plaintiff. Plaintiff's arguments, while perhaps relevant to the proper interpretation of the phrase "necessary or convenient" in the Surface Owner's Agreement, have no bearing on Defendant Unioil's arguments with respect to the application of the accommodation doctrine or C.R.S. § 34-60-127. The only issue presented in Defendant Unioil's Motion for Summary Judgment is whether the accommodation doctrine and C.R.S. § 34-60-127 apply to the parties' dispute, and the parties have not requested resolution of any issues concerning the proper interpretation of the terms in the Surface Owner's Agreement, or whether Defendants' conduct has breached those terms.

Therefore, for the reasons set forth above, Defendants are entitled to summary judgment in their favor as to Plaintiff's third and fourth claims for relief for violation of the accommodation doctrine and violation of C.R.S. § 34-60-127.

C. *Duty of Good Faith and Fair Dealing*

Plaintiff's second claim for relief is for breach of the implied duty of good faith and fair dealing. Colorado law imposes a duty of good faith and fair dealing in every contract. *City of Golden v. Parker,* 138 P.3d 285, 292 (Colo.2006) (citing *Amoco Oil Co. v. Ervin,* 908 P.2d 493, 498 (Colo.1995)). "A violation of the duty of good faith and fair dealing gives rise to a claim for breach of contract." *City of Golden,* 138 P.3d at 292. "The good faith performance doctrine attaches to contracts 'to effectuate the intentions of the parties or to honor their **reasonable** expectations.' " *Id.* (quoting *Amoco Oil,* 908 P.2d at 498). "The duty of good faith and fair dealing may be relied upon 'when the manner of performance under a specific contract term allows for discretion on the part of either party.' " *Id.* (quoting *id.*) "Discretion in performance occurs 'when the parties, at formation, defer a decision regarding performance terms of the contract' leaving one party to set or control the terms of performance after formation.' " *Id.* However, the implied covenant of good faith and fair dealing may not be used to invalidate contractual terms that the parties negotiated and agreed on, including a right to terminate a contract. *See Grossman v. Columbine Medical Center,* 12 P.3d 269, 271 (Colo.2000) ("the termination clause expressly sets forth the right of both parties to terminate the contract for any reason. Hence the physician cannot rely on the implied duty of good faith *a* nd fair dealing to circumvent terms for which he expressly bargained"); *see also Salt Lake Tribune Publishing Co., LLC v. AT & T Corp.,* 320 F.3d 1081, 1103-04 (10th Cir.2003) ("[W]here the subject in dispute 'is expressly covered by the contract ... the implied duty to perform in good faith does not come into play.")

*6 Defendant Unioil contends that the good faith and fair dealing doctrine cannot be used to contradict the express grant of rights set forth in the Surface Owner's Agreement to enter the Property and construct oil wells as "necessary or convenient" for oil and gas operations, and that there is no evidence of bad faith. In response, Plaintiff notes that the Surface Owner's Agreement does not define either the number of wells to be drilled or their location, and that these concepts were left to the discretion of the lessee of the mineral estate under the common law concept of "due regard." As discussed in *Amoco Oil Co., supra,* the duty of good faith and fair dealing applies when one party has discretionary authority to determine certain terms of the contract, such as quantity, price or time. *See Amoco Oil Co.,* 908 P.2d at 498 ("[t]he covenant may be relied upon only when the manner of performance under a specific contract term allows for discretion on the part of either party."). "Thus, the implied covenant of good faith and fair dealing is breached when a party uses discretion conferred by the contract to act dishonestly or to act outside of accepted commercial practices to deprive the other party of the benefit of the contract." *ADT Security Servs., Inc. v. Premier Home Protection, Inc.,* 181 P.3d 288, 293 (Colo.App.2007). Here, the Surface Owner's Agreement does not grant Defendant Unioil discretionary surface use, but rather grants an easement to "drill, construct, maintain and use" the surface in a manner "necessary or convenient in prospecting and developing for, producing, storing, transporting, and marketing oil, gas and associated liquid hydrocarbon substances...." I find that the phrase "necessary or convenient," is not a discretionary term. Unlike terms for an undefined quantity, price, or time, which allow one party set or control the terms of performance, the phrase "necessary or convenient" can be interpreted under accepted principles of contract interpretation. *See Thompson v. Md. Cas. Co.,* 84 P.3d 496, 503 (Colo.2004) ("[t]he primary goal of contract interpretation is to determine and effectuate the intent and **reasonable** expectations of the parties."). Therefore, the implied duty of good faith does not apply to the term "necessary or conveni-

ent" contained in the Surface Owner's Agreement, and Defendants are entitled to summary judgment as to Plaintiff's Second Claim for Relief based on violation of the doctrine of good faith and fair dealing.

D. *Anticipatory Repudiation*

Finally, Defendant Unioil contends that Plaintiff first claim for relief for anticipatory repudiation fails as a mater of law because Plaintiff has no evidence of anticipatory repudiation. Defendant Unioil states in its Motion for Summary Judgment that it intends to restore the surface of the land after completing the erection or construction of its facilities, which will likely cause no damage to the land. Defendant Unioil acknowledges that if there are surface damages as defined by the Surface Owner's Agreement it will reimburse Plaintiff for those damages in accordance with the Surface Owner's Agreement.

*7 An anticipatory repudiation of contract may occur upon a party's "definite and unequivocal manifestation of its intention that it will not perform as required by the contract." *See Highlands Ranch University Park, LLC v. Uno of Highlands Ranch, Inc.*, 129 P.3d 1020, 1023 (Colo.App.2005). In this case, Plaintiff's evidence of an "unequivocal manifestation" is page 3 of the Scheduling Order where Defendant Unioil states that "no surface damages have occurred" and "there will in all probability never be any surface damage resulting from Unioil's operations." According to Plaintiff, both the Oil & Gas Lease and the Surface Owner's Agreement provide that Defendant Unioil shall pay for "all damage to the land" and that such damage "includes at least the value of the loss of the use of the land during Unioil's occupancy upon the premises."

In light of Defendant Unioil's representations in its Motion for Summary Judgment that it will comply with the terms of the Surface Owner's Agreement, I find that Plaintiff has failed to demonstrate that Defendant Unioil "unequivocally" manifested an intent not to perform its obligations under the contract. Here, the dispute is not whether Defendant Unioil has repudiated its obligation to pay for "damage to the land" under the Oil & Gas Lease and the Surface Owner's Agreement, but whether that phrase includes the damage Plaintiff may sustain through loss of the use of his land. Resolution of this issue requires interpretation of the damages provisions in the Oil & Gas Lease and the Surface Owner's Agreement. However, the parties have not requested interpretation of the agreements, and the only issue before the Court at this time is the validity of Plaintiff's claim under the doctrine of anticipatory repudiation. For the reasons stated herein, I find that Plaintiff has not met its burden of establishing a triable issue of fact with respect to its claim for anticipatory repudiation, and that summary judgment is appropriate with respect to that claim.

IV. *CONCLUSION*

In light of the foregoing, it is hereby

ORDERED that Defendant Unioil, Inc's Motion for Summary Judgment, filed March 13, 2008[# 30] is **GRANTED.** It is

FURTHER ORDERED that the portion of Plaintiff's First Claim for Relief based on Anticipatory Repudiation, and Plaintiff's Second, Third and Forth Claims for Relief are **DISMISSED WITH PREJUDICE.**

D.Colo.,2009.
Zeiler Farms, Inc. v. Anadarko E & P Co., LP
Slip Copy, 2009 WL 890716 (D.Colo.)

END OF DOCUMENT

00004

PROCEEDINGS

LAURA W. "WENDY" CHASE,

being first duly sworn in the above cause, was examined and testified as follows:

EXAMINATION

BY MR. JACUS:

Q Good afternoon.

A Good afternoon.

Q Please state your name and address for the record.

A Wendy Chase, or Laura W. Chase, 8445 East County Road 14, Loveland, 80537 -- 34. They changed it.

Q How long have you resided at that address?

A Since 1997.

Q Okay. And are you the owner of the property?

A Yes.

Q And from whom did you acquire the property?

A Somebody named Tom Ricord.

Q And were you aware at the time that you acquired the property that you did not acquire the mineral rights below the property?

00005

A I looked into it.

Q Is that a yes, then?

A Yes.

Q Thank you. Stepping back, have you been deposed before, Ms. Chase?

A No.

Q Yet, you were present when I spoke to Mr. Sutak about the deposition process and --

A Yes.

Q -- just reminded him of needing to verbalize his responses?

A Yes.

Q So you're clear with the process?

A Yes, sir.

Q Very good. And, of course, if you need to break, just let me know. But do try to let me complete my questions, and I'll try not to have any pregnant pauses in the middle, because that's when folks tend to begin their answer.

What sort of business or entity is Moqui Meadows?

A Moqui Meadows, it's a name for my farm.

Q Okay. Do you conduct any of your farm's activities under the auspices of a legal entity other than as an individual, a corporation,

00054

Q Are there certain specific requirements for distance on property for a nationally --

A For anyone, there is.

Q And what are those?

A Depending -- it depends on the level. It's an incremental thing. The higher the level, the greater the distance.

Q Meaning the higher the level of the jump?

A The higher the level of the competitor.

Q The competitor. Okay.

A The jump -- the level of difficulty increases, the height of the jump increases, the width of the jump increases, the distance increases, speed increases.

Q Okay. Going back to a question from the previous deposition, what year did you come into ownership of the property?

A 1997.

Q And that was purchased from Tom Ricord?

A Ricord.

Q Ricord. How do you spell that?

A I'm the world's worst speller. I think R-i-c-o-r-d.

Q And were you aware at the time of that

purchase that the mineral estate was owned separately?

A I looked into it, yes.

MS. WARREN: Do we have a copy of the deed from that in any of the information provided?

MR. BARBER: Not that I've produced, that I've seen.

Q (BY MS. WARREN) And how do you know, looking back at the last year, how many people were there on a given day and what they were there for?

A Well, I know why they were there. The numbers -- mostly, as I pointed out on this calendar, I put little marks when I thought there were more than 20. Mike kept much better records. I'm out there sitting on a horse. I -- I can count four groups of six, but I can't -- I'm not as accurate a counter. It's not where my attention needs to be.

Q Okay. Just a couple more things here. Is there any reason, as Mr. Sutak mentioned, that there was no record kept of visitors to the property prior to 2009?

MR. BARBER: Object to the form.

A I can't imagine why. I never -- why would I keep a record?

J

Davis Graham & Stubbs LLP

March 12, 2010

Via Electronic Mail

Mr. David Neslin
Executive Director
Colorado Oil and Gas Conservation Commission
1120 Lincoln Street, Suite 801
Denver, Colorado 80203

Re: State-Chase 33-36 and State-Chase 34-36 Applications for Permits to Drill of Magpie Operating, Inc.

Dear Mr. Neslin:

I am responding on behalf of our client Magpie Operating, Inc. ("Magpie") as per your request for a written position statement concerning Magpie's referenced, long-pending Applications for Permits to Drill ("APDs") to complete two vertical wells on surface property owned by Ms. Laura W. Chase (the "Property") pursuant to Magpie's lease with the Colorado State Land Board. Magpie appreciates the opportunity to submit this position statement and believes it has developed an alternative which will allow the Colorado Oil and Gas Conservation Commission ("Commission") to approve one of its APDs and, if approved, allow Magpie to withdraw the other pending APD, as described more specifically below. Magpie is particularly mindful of the Commissioners' concerns expressed at the conclusion of the recent hearing on Ms. Chase's and Mr. Sutak's application for designation as an outside activity area, and believes that the position described below, if approved, would satisfactorily resolve Magpie's long-standing dispute with Ms. Chase over access to the property for the lawful exercise of Magpie's lease rights to develop oil and gas for the benefit of the State of Colorado.

Summary of Magpie Position and Pending APDs

Magpie proposes the following resolution by action of the Commission and Magpie, of two long-pending APDs, State-Chase 33-36 and State-Chase 34-36:

1. In order to mitigate the impacts of Magpie's operations on the surface property owned by Ms. Chase, Magpie seeks an exception location for its State-Chase 33-36 APD that is located outside the GWA window for this location under Rule 318A, but inside the drilling window that is centered within the southeast quarter section of Section 36. See Magpie Exhibit A, attached. The granting of

John R. Jacus • 303 892 7305 • john.jacus@dgslaw.com

Magpie J

an exception location outside the 33-36 window, but inside the center-spot drilling window that extends onto the Property, would achieve the desired mitigation of impacts from drilling, completion, and operation of the well in that location for the surface owners, and would also enable Magpie to complete a vertical well, and thereby avoid the significant incremental additional expense of directional drilling to which it has objected in its negotiations with the surface owners.

2. Magpie would access this well by a road along the eastern boundary of the Property extending from County Road 14 north to a point on the eastern boundary of the Property, but inside the center-spot drilling window under Rule 318A. See Magpie Exhibit A, attached.

3. Magpie further proposes to locate a tank battery consisting on no more than two, low-profile, 300 BBL tanks to serve the well to be completed at the noted exception location on the southern boundary of the Property at a point approximately 400 feet to the west from the southeast corner of the Property, immediately adjacent to County Road 14. See Magpie Exhibit A. This location would provide convenient access to the tank battery for pumpers, and the location is conducive to unobstructed flow of three-phase production to the tank battery.

4. Magpie further agrees not to locate any compression or dehydration equipment at this proposed tank battery location as a condition of approval, provided the Commission approves Magpie's APD for State-Chase 33-36 at the noted exception location for a period of two years.

5. With these additional provisions as conditions of approval, Magpie agrees to withdraw/revoke its pending State-Chase 34-36 APD and leave open for future application and ruling the possibility of two additional wells to be drilled on the Property which will bottom hole in the GWA 33-36 window and the 34-36 window under Rule 318A.

Reasonable Accommodation

Ms. Chase, Mr. Sutak, their attorney and the Commissioners have all made reference to the doctrine of reasonable accommodation as recently codified by statute, but that standard does not apply in this instance, and even if it did, Magpie has met and exceeded the requirements of the doctrine as codified. As a lessee of the State Land Board, Magpie is entitled to "convenient" access to develop and produce the oil and gas minerals located beneath the Property. That standard should allow Magpie to place vertical wells into each of the three GWA windows located upon the Property, but Magpie has not insisted upon its right to do that; rather, Magpie

has attempted to accommodate the surface owners' use of the Property and is no longer seeking to place a vertical well in the 33-36 window. A vertical well in that window would interfere with the surface owners' use of the improved riding area that they have created over a period of years and that their guests use and enjoy for equestrian events, and that is not something with which Magpie wishes to interfere. This Commission should approve the proposed exception location on the eastern edge of the Property, but in the center drilling window of the southeast quarter of Section 36, south of the irrigation ditch running across the Property, as proposed on Magpie Exhibit A.

Fairness to Magpie

Magpie has been diligent in its efforts to obtain Commission approval of the long-pending APDs. It has attempted on numerous occasions to access the Property for surveying and has now participated in two site inspections involving COGCC's staff, the latter of which was occasioned by a visit from Channel 7 News, something which the surface owners knew about and failed to disclose to the staff or Magpie and its counsel. It seems the surface owner will do almost anything to prevent Magpie from exercising its valid and enforceable lease rights under Commission rules to explore for and produce oil and gas owned by the State of Colorado beneath the Property, and it seeks to have this Commission do its bidding in preventing this from happening. Magpie has been both patient and diligent in seeking approval of its long-pending APDs, and this should not be rewarded with a denial of both applications by this Commission. Magpie is entitled to and deserving of the approval of at least one well location where it can complete a vertical well so as not to incur the significant additional expense of directional drilling, an expense which this Commission cannot lawfully impose upon Magpie, and certainly not under these circumstances.

Future Wells

This position statement leaves open the issue of two future wells that might be drilled on the Property, and whether those would be drilled from the pad at the proposed exception location directionally, or vertically in the case of the State-Chase 34-36 window. As the Commission's staff directly observed themselves during the recent site inspection, there is nothing remarkable or significantly improved about the southern portion of the Property in and around the State-Chase 34-36 GWA window. It is a common irrigated hay meadow like any other across this portion of Larimer or nearby Weld Counties on which wells and associated equipment are located every single day in compliance with COGCC rules and in a manner that reasonably accommodates the surface owners' uses and activities. Magpie would be well within its rights to insist upon a ruling in its favor to immediately locate a vertical well in the 34-36 window, but seeks to resolve this dispute through Commission action expeditiously and as amicably as

possible by proposing the noted exception location along the eastern boundary of the Property within the center drilling window of the southeast quarter of Section 36. Commission approval of that exception location would be authorized under Rule 318A.h. which permits exception locations in the GWA comparable to those granted pursuant to Rule 318.c., *i.e.*, for environmental or topographic reasons or other "good cause shown." Magpie has requested the waiver of the State Land Board for this proposed exception location and expects that it will be granted, and also plans to survey the proposed exception location as soon as practicable, but had not completed such a survey at the time this position statement was expected by Executive Director Neslin.

Remaining Conditions of Approval

Magpie also agrees to the proposed conditions of approval recommended by staff in its January 4, 2010 "background and staff analysis" memorandum to Director Neslin. Those conditions of approval provide:

1. Drilling and completion activities shall occur between October 31 and March 31, outside of the irrigation season.

2. Interim reclamation shall commence immediately following well drilling and completion.

3. The operator shall implement all practicable measures to ensure the disruption to the surface owners' irrigation practices are minimized.

4. In addition to the required notice for site preparation, drilling, and completion, the operator shall provide 30 days' notice to the surface owner for any non-emergency workover or well treatment. If the surface owners fail to notify the operator of a scheduled event 14 days in advance of the scheduled work then the operation may proceed. Otherwise if there is a conflict then the operator shall work with the surface owner to avoid the work during the surface owners' scheduled equestrian events.

Contingent Revocation of State-Chase 34-36 APD

Contingent on Commission approval of the proposed exception location for the State-Chase 33-36 APD, as proposed above, Magpie would withdraw and revoke its pending State-Chase 34-36 APD, and leave open the possibility of a future application for wells with bottom hole locations in the two drilling windows located under the Chase Property.

Conclusion

Magpie Operating is a small business. It has invested a substantial amount of time, effort, and money in obtaining this Commission's approval of its long-pending APDs. It has diligently attempted to settle this matter so as to avoid a contested hearing on its APDs, without success. Accordingly, this Commission must act to either approve or deny Magpie's pending APDs, and the proposal contained in this position statement affords the Commission an opportunity to approve one vertical well location on the Property that greatly mitigates and accommodates, while still allowing Magpie to conduct its lawful business activities under its lease with the State of Colorado. Such a result avoids waste, promotes production, mitigates impacts, and resolve a long-standing disputed issue, thereby meeting this Commission's statutory obligations. Magpie strongly urges the Commission to approve the proposed exception location described above at its hearing on this matter, and appreciates the opportunity to submit this position statement.

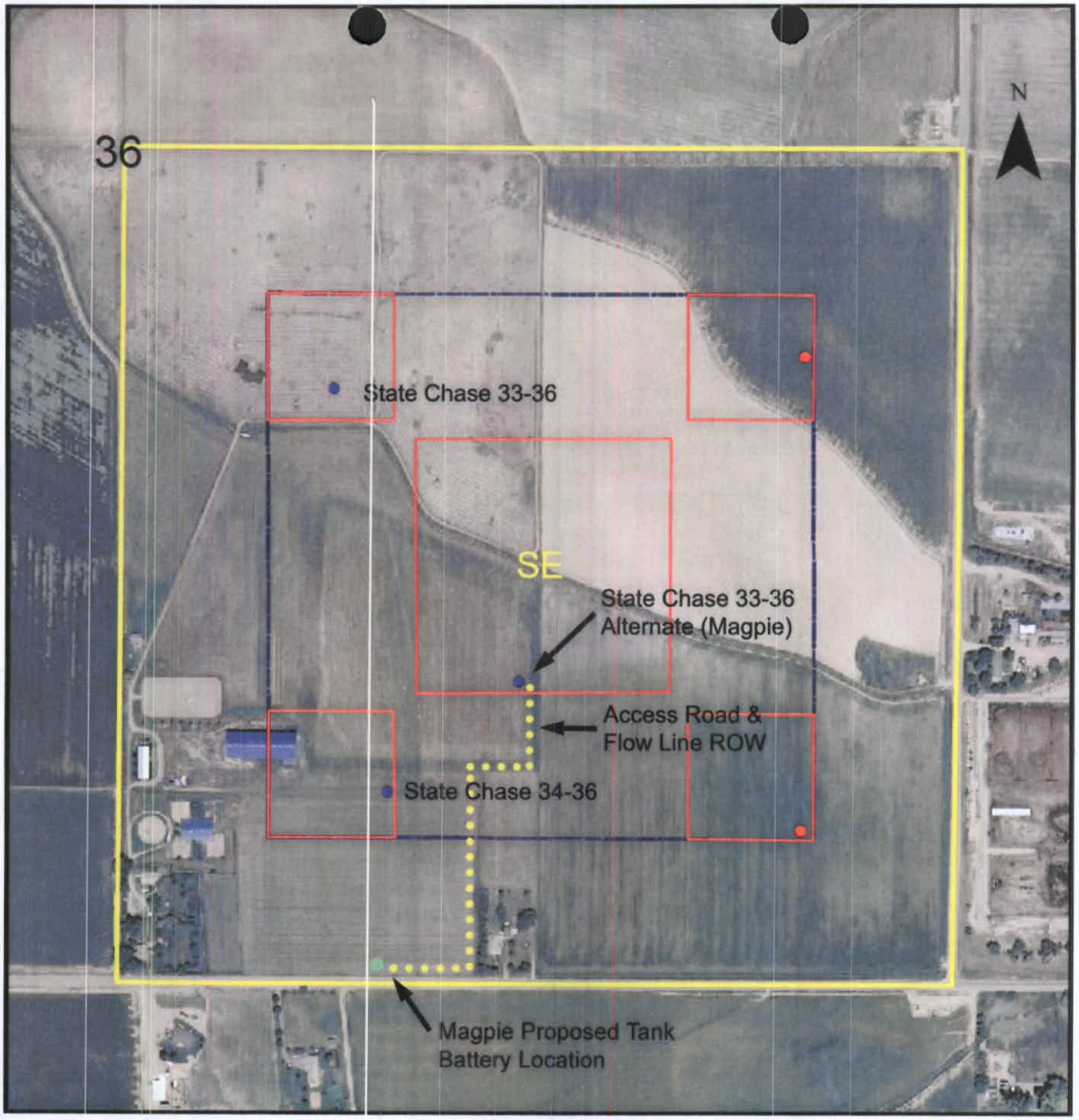
Respectfully submitted,

John R. Jacus and Sam Niebrugge
for
DAVIS GRAHAM & STUBBS LLP
ATTORNEYS FOR MAGPIE OPERATING, INC.

JRJ/cmt

Enclosures

cc: Carol Harmon, Hearing Officer
Matt Lepore, Esq., COGCC Counsel
Phillip Barber, Esq., Chase/Sutak Counsel
Heather Warren, Esq., State Land Board Counsel
Ryan Warner, Magpie Operating



Aerial Photo: NAIP, Summer 2009

0 330 660 990 1,320 Feet

Legend

- Proposed Location
- Permit Locations
- Proposed Battery Location
- Access Road & Flow Line ROW
- 318A Drilling Windows
- Setback Line
- Quarter Section Boundary

Proposed Magpie Operating State-Chase Surface Locations Section 36 T5N R68W, Larimer County, Colorado

COGCC, December 23, 2009

K

Davis Graham & Stubbs LLP

March 17, 2010

Via Hand-Delivery

David Neslin
Executive Director
Colorado Oil and Gas Conservation
Commission
1120 Lincoln Street, Suite 801
Denver, CO 80203

Re: March 17, 2010 letter from Phillip D. Barber, Wendy Chase, and Mike Sutak regarding State Chase 33-36 and State Chase 34-36 APDs

Dear Director Neslin,

Thank you for your consideration in reviewing this letter in response to Phillip D. Barber, Wendy Chase, and Mike Sutak's letters from earlier today (Ms. Chase and Mr. Sutak will be referred to in this letter as the "Surface Owners" even though Magpie is aware that Mr. Sutak does not own an interest in the surface). My client has reviewed the proposal by the Surface Owners, and Magpie cannot agree with the Surface Owner's proposal because it creates several unreasonable operational and technical limitations to production. Their proposal is not a reasonable accommodation; the only "reasonable" aspect of the Surface Owner's proposal is that it reasonably ensures that Magpie will not be financially capable of drilling wells on their property.

It is unfair to assert that the Surface Owners have the "best understanding of where wells might reasonably be located" on their property by virtue of their ownership of the surface estate. Magpie has submitted an application for permit-to-drill ("APD") that is based on substantial engineering and financial analysis as a result of its originally proposed State Chase 33-36 and State Chase 34-36 APDs. Yet, by virtue of owning an interest in the surface estate, the Surface Owners believe they are better able to manage and determine how Magpie should develop subsurface minerals owned by the State of Colorado. The Surface Owners wish, through their proposal, to impose an additional cost of nearly $70,000 to force Magpie to directionally drill a well into one of the 318A windows. Magpie would gladly agree to the alternative proposed location if the surface owners were willing to put forth money towards this expensive proposition, but so far the Surface Owners have not.

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Magpie's economic forecast for production from this well should be completely irrelevant in the Commission's deliberations. The Colorado Oil and Gas Act ("Act") and the Rules of this Commission do not allow for such considerations. Regardless, the Surface Owners place too much emphasis on an off-the-cuff guess at a return of investment for any wells on the property. Under pressure from questioning from the Commission, in a setting that can best be described as tense, Magpie guessed that it would see a five-times-return on investment for production from any wells on the property. Upon further consideration, Magpie has determined that its guess at the hearing was inaccurate. Additionally, Magpie does not accept that the incremental drilling costs associated with directionally drilling these wells will be twenty-thousand dollars. The Commission heard credible testimony from Mr. Mike Powers at the DOAA hearing that the incremental cost for each well would be nearly $70,000.

The Surface Owners, after repeatedly rejecting Magpie's overtures to settle this dispute, now wish to use this Commission to force a one-sided, *de facto* surface use agreement. Imposing such a one-sided restriction would be unprecedented for this Commission. It could lead to unintended consequences where the Commission would be asked to resolve a contract dispute between Magpie and the Surface Owners regarding the implementation of the Surface Owner's proposed conditions of approval. Further, the imposition would be outside the Commission's authority under the Act as amended by House Bills 1298 and 1341 and Commission Rules. While the terms of Magpie and the Surface Owners' settlement negotiations are confidential, Magpie has offered to undertake numerous operational concessions, but the Surface Owners would not agree. We are now before the Commission to discuss Magpie's APDs, not the terms of a surface use agreement; the two concepts should not be interchangeable. It would be arbitrary and capricious for the Commission to attach the technically infeasible and economically impracticable conditions of approval as set forth in the Surface Owner's response.

This Commission is expertly suited to ensure that Magpie's oil and gas operations comply with its rules. The Commission's 200-, 300-, 600-, 700-, 800-, 900-, 1000-, and 1200-Series of Rules provide the necessary safeguards so that oil and gas development on the Surface Owner's property does not interfere with their equestrian operations.

Sincerely,

Sam Niebrugge