PJC 302.2 **Question and Instruction on Unr~~R~~easonable Use of Surface Estate**

QUESTION _____

Did *Larry Lessee* use more of the [*surface estate*] than was reasonably necessary?

Larry Lessee had the right to use the surface of the land in a manner reasonably necessary for exploration, extraction, or production of minerals.

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 302.2 can be used in cases of alleged excessive, unreasonable, or negligent use of the surface estate by the ~~lessee.~~party with the right to develop the minerals. The practitioner may also wish to use PJC 302.4, the simple trespass question, with an appropriate instruction on the mineral owner's right to use of the surface estate. *See Brown v. Lundell*, 344 S.W.2d 863, 866 (Tex. 1961). This question may also be modified for use in cases in which the ~~lessee~~party with the right to develop minerals seeks damages because the lessor or surface owner has interfered with ~~the lessee's~~ ~~their~~that right ~~to use the surface estate to develop minerals~~. *See Ball v. Dillard*, 602 S.W.2d 521, 523 (Tex. 1980); *Brown*, 344 S.W.2d at 866. The owner of rights in groundwater conveyed separately from the remainder of the surface estate may also make reasonable use of the surface in the valid exercise of such rights. *Coyote Lake Ranch, LLC v. City of Lubbock*, 498 S.W.3d 53, 64 (Tex. 2016).

Source of question and instruction. PJC 302.2 is derived from *Merriman v. XTO Energy, Inc.*, 407 S.W.3d 244, 249 (Tex. 2013); *Moser v. U.S. Steel Corp.*, 676 S.W.2d 99, 103 (Tex. 1984); *Sun Oil Co. v. Whitaker*, 483 S.W.2d 808, 810–11 (Tex. 1972); *Getty Oil Co. v. Jones*, 470 S.W.2d 618, 621–23, 627–28 (Tex. 1971); and *Brown*, 344 S.W.2d at 866.

Defining surface estate. Depending on the facts and circumstances of the case, the parties may need to include an appropriate definition of the surface estate. *See Lightning Oil Co. v. Anadarko E&P Onshore, LLC*, 520 S.W.3d 39 (Tex. 2017); *Coyote Lake Ranch, LLC*, 498 S.W.3d at 64; *Moser*, 676 S.W.2d at 102; *Getty Oil Co.*, 470 S.W.2d at 621–23.

Negligent use of surface estate. A claim may be based on negligent use of the surface, rather than unreasonable use of the surface. *Brown*, 344 S.W.23d at 865, 866 ("[I]f the lessee negligently and unnecessarily damages the lessor's land, either surface or subsurface, his liability to the lessor is no different from what it would be under the same circumstances to an adjoining landowner."); *see also Crosstex North Texas Pipeline, L.P. v. Gardiner*, 505 S.W.3d 580, 614 (Tex. 2016) (duty owed is "duty to do what a person of ordinary prudence in the same or similar circumstances would have done"); *Humble Oil & Refining Co. v. Williams*, 420 S.W.2d 133, 134 (Tex. 1967) ("A person who seeks to recover from the lessee for damages to the surface has the burden of alleging and proving either specific acts of negligence or that more of the land was used by the lessee than was reasonably necessary."). For basic negligence questions, see State Bar of Texas, *Texas Pattern Jury Charges—General Negligence, Intentional Personal Torts & Workers' Compensation*, ch.apter 4.

PJC 302.3 **Question and Instruction on Accommodation Doctrine**

QUESTION _____

Did *Larry Lessee* fail to accommodate *Suzie Surface Owner*'s existing use of the surface of the land in question?

Larry Lessee failed to accommodate an existing use of the surface if—

1. *Larry Lessee*'s use of the surface completely precluded or substantially impaired *Suzie Surface Owner*'s existing use; and

2. there was no reasonable alternative method available to *Suzie Surface Owner* on the land in question by which the existing use could be continued; and

3. there were alternative reasonable, customary, and industry-accepted methods available to *Larry Lessee* on the land in question that would have allowed recovery of the minerals and also allowed *Suzie Surface Owner* to continue the existing use.

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 302.3 should be used when a ~~claim is made that~~surface owner claims that the ~~lessee (or party with the right to develop minerals)~~ has failed to accommodate an existing use of the surface subject to the lease of the land in question. This question should be used when "'~~existing use~~"' is not a disputed fact. In cases in which "'~~existing use~~"' is in dispute, a predicate question may be needed.

Source of question and instruction. PJC 302.3 is derived from *Merriman v. XTO Energy, Inc.*, 407 S.W.3d 244, 249 (Tex. 2013); *see also Coyote Lake Ranch, LLC v. City of Lubbock*, 498 S.W.3d 53, 64–65 (Tex. 2016) (applying doctrine to severed groundwater estate); *Tarrant County Water Control & Improvement District No. One v. Haupt, Inc.*, 854

S.W.2d 909, 911 (Tex. 1993); *Sun Oil Co. v. Whitaker*, 483 S.W.2d 808 (Tex. 1972); and *Getty Oil Co. v. Jones*, 470 S.W.2d 618, 622–23 (Tex. 1971).

Alternative submission. In *Getty Oil Co.*, the Texas Supreme Court recognized that a "single or a multiple issue submission may be in order depending on the facts and circumstances in a given situation." *Getty Oil Co.*, 470 S.W.2d at 628 (recognizing the evidence and circumstances were such that an initial inquiry was proper regarding element 2 above); *see also Merriman*, 407 S.W.3d at 249 (holding that if surface owner carries burden on first two elements, he must "further prove" third element). Thus, this question may be submitted as a single question or as multiple questions, depending on the facts and circumstances of the case.

Severed groundwater estate. In *Coyote Lake Ranch*, the Texas Supreme Court applied the three-element accommodation doctrine to a severed groundwater estate. 498 S.W.3d at 64–65. PJC 302.3 should be modified as necessary to submit the doctrine as applied to severed groundwater estates. *See, e.g.*, *Coyote Lake Ranch, LLC*, 498 S.W.3d at 64–65 (groundwater owner must show in element 3 "methods to access and produce the water").

PJC 302.11 Question and Instruction on Statutory Waste

QUESTION _____

Did [*Don Davis*] commit waste of [*oil/gas*] [*on/from/of*] *Paul Payne*~~laintiff~~'s [*property/production*]?

Waste includes the following:

_____ [*Insert applicable forms of waste in dispute.*]

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 302.11 should be used when the plaintiff seeks a remedy for statutory waste.

Source of question and instruction. PJC 302.11 is based on Tex. Nat. Res. Code §§ 85.045—.046, 85.321—.322. "

> A party who owns an interest in property or production that may be damaged by another party violating the provisions of this chapter that were formerly part of Chapter 26, Acts of the 42nd Legislature…as amended, or another law of this state prohibiting waste or a valid rule or order of the commission may sue for and recover damages and any other relief to which he may be entitled at law or in equity."

Tex. Nat. Res. Code § 85.321. Section 85.321 creates a private cause of action for waste under c~~C~~hapter 85 or other laws and for violations of valid rules and orders of the Railroad Commission. *Exxon Corp. v. Emerald Oil & Gas Co.*, 331 S.W.3d 419, 422~~–~~23 (Tex. 2010). The cause of action does not extend to subsequent lessees against prior lessees. *Emerald Oil & Gas Co.*, 331 S.W.3d at 424~~–~~25. ~~This~~ PJC 302.11 addresses statutory waste.

Statutory definition. The Natural Resources Code provides that waste includes, among other things, the following:

(1) operation of any oil well or wells with an inefficient gas-oil ratio and the commission may determine and prescribe by order the permitted gas-oil ratio for the operation of oil wells;

(2) drowning with water a stratum or part of a stratum that is capable of producing oil or gas or both in paying quantities;

(3) underground waste or loss, however caused and whether or not the cause of the underground waste or loss is defined in this section;

(4) permitting any natural gas well to burn wastefully;

(5) creation of unnecessary fire hazards;

(6) physical waste or loss incident to or resulting from drilling, equipping, locating, spacing, or operating a well or wells in a manner that reduces or tends to reduce the total ultimate recovery of oil or gas from any pool;

(7) waste or loss incident to or resulting from the unnecessary, inefficient, excessive, or improper use of the reservoir energy, including the gas energy or water drive, in any well or pool; however, it is not the intent of this section or the provisions of this chapter that were formerly a part of Chapter 26, Acts of the 42nd Legislature, 1st Called Session, 1931, as amended, to –require repressuring of an oil pool or to require that the separately owned properties in any pool be unitized under one management, control, or ownership;

(8) surface waste or surface loss, including the temporary or permanent storage of oil or the placing of any product of oil in open pits or earthen storage, and other forms of surface waste or surface loss including unnecessary or excessive surface losses, or destruction without beneficial use, either of oil or gas;

(9) escape of gas into the open air in excess of the amount necessary in the efficient drilling or operation of the well from a well producing both oil and gas;

(10) production of oil in excess of transportation or market facilities or reasonable market demand, and the commission may determine when excess production exists or is imminent and ascertain the reasonable market demand; or

(11) surface or subsurface waste of hydrocarbons, including the physical or economic waste or loss of hydrocarbons in the creation, operation, maintenance, or abandonment of an underground hydrocarbon storage facility.

Tex. Nat. Res. Code § 85.046. This list may not be exclusive. *See Exxon Corp. v. Miesch*, 180 S.W.3d 299, 3218–19 (Tex. App.—Corpus Christi–Edinburg 2005), *aff'd in part, rev'd in part on other grounds*, 348 S.W.3d 194 (Tex. 2011) (noting *R.R. Comm'n* citing *Railroad Commission v. Shell Oil Co.*, 206 S.W.2d 235, 240 (Tex. 1947), and noting that it discussed similar language in precursor statute regarding production, storage, or transportation as "'sweeping language . . . by which all waste in the handling of oil and gas was declared unlawful"); *see also R.R. Comm'n Railroad Commission v. Shell Oil Co.*, 206 S.W.2d 235, 240 at 294 (Tex. 1947) (noting "among other things" precludes a narrowing of the statutory list and thus the term "waste" has an ordinarily and generally accepted meaning: "Whatever the dictates of reason, fairness, and good judgment under all the facts would lead one to conclude is a wasteful practice in the production, storage or transportation of oil and gas, must be held to have been denounced by the legislature as unlawful."). "[T]he code prohibits all waste of oil or gas." *Miesch*, 180 S.W.3d at 319 (rejecting argument that "the natural resources code only prohibits waste in the 'production, storage, or transportation' of oil or gas" and holding complaint of waste in plugging prohibited by statute).

The question and instruction should be modified based on the facts of the case to include the forms of waste that are at issue and in dispute.

Statutory defense. In any cause of action brought under section 85.321 or otherwise "alleging waste to have been caused by an act or omission of a lease owner or operator, it shall be a defense that the lease owner or operator was acting as a reasonably prudent operator would act under the same or similar facts and circumstances." Tex. Nat. Res. Code § 85.321; *see also Emerald Oil & Gas Co.*, 331 S.W.3d at 422. See PJC 302.12 for a question and instruction on reasonably prudent operator.

Negligent waste or destruction. In addition to statutory waste, an operator owes "due care to avoid the negligent waste or destruction of the minerals imbedded in [the] oil and gas-bearing strata." *Elliff v. Texon Drilling Co.*, 210 S.W.2d 558, 563 (Tex. 1948). A royalty or mineral owner is entitled to damages that will reasonably compensate the injured party for negligent waste or production, including damage to a reservoir underlying an oil and gas lease. *See Elliff*, 210 S.W.2d at 563; *see also Coastal Oil & Gas Corp. v. Garza Energy Trust*, 268 S.W.3d 1, 37 (Tex. 2008) (Willett, J., concurring) (recognizing longstanding claim for negligent damage to a common reservoir that reduces recoveries or constitutes waste); *HECI Exploration~~.~~ Co. v. Neel*, 982 S.W.2d 881, 890 (Tex. 1999). "A royalty owner may sue for its own damages without the joinder or permission of the lessee." *HECI Exploration Co.*, 982 S.W.2d at 890. Section 85.321 does not exclude common law rights for the same harms. *See Forest Oil Corp. v. El Rucio Land ~~and~~& Cattle Co.~~ Inc.~~*, 518 S.W.3d~~D~~ 422, 429 (Tex. 2017).

Common--law waste of reversioner's or remainderman's interest. In addition to statutory waste and negligent waste or destruction, an action exists for common--law waste of a reversioner's or remainderman's interest. The general rule is that "royalties and bonuses…are corpus which is to be preserved for the remaindermen." *Clyde v. Hamilton*, 414

S.W.2d 434, 439 (Tex. 1967). "Ordinarily a life tenant who dissipates the corpus of an estate is liable to the remaindermen for waste. Waste is defined as 'permanent harm to real property committed by tenants for life or for years, not justified as a reasonable exercise of ownership and enjoyment by the possessory tenant and resulting in a reduction in value of the interest of the reversioner or remainderman.'" *Moore v. Vines*, 474 S.W.2d 437, 439 (Tex. 1971) (citing American Law of Property, Vol. I, 2.16e); *see also McGill v. Johnson*, 799 S.W.2d 673, 676--77 (Tex. 1990); *Clyde*, 414 S.W.2d at 439. A claim of waste may include unauthorized destruction or severance of minerals on or from the land or injury resulting from a failure to exercise reasonable care in preserving the property. *See, e.g., Moore*, 474 S.W.-2d at 572-73440 (involving oil and gas lease executed after death of testator); *Erickson v. Rocco*, 433 S.W.2d 746, 751 (Tex. Civ. App.—Houston [14th Dist.] 1968, writ ref'd n.r.e.) (analyzing claim of waste for injury to reversionary deed of trust interest allegedly resulting from a failure to exercise reasonable care in preserving property). Exceptions to the general waste rule exist, e.g., the open mines doctrine and a will or other contract that authorizes the opening of, or receipt of proceeds on, leases executed after the testator's death. *See, e.g., Phillips v. Ivy*, 160 S.W.3d 91, 94 (Tex. App.—Waco 2004, pet. denied); *Singleton v. Donalson*, 117 S.W.3d 516, 518 (Tex. App.—Beaumont 2003, pet. denied).

Damages. For statutory waste, the measure of damages may differ by the form of waste at issue. For unrecovered minerals from a plaintiff's land, the measure for a removal done in good faith is "the fair market value of the minerals less the defendant's cost of bringing them to the surface." *Miesch*, 180 S.W.3d at 324. If a bad--faith removal, the measure is the minerals' enhanced value. *Miesch*, 180 S.W.3d at 324; *see also Karrell v. West*, 616 S.W.2dD 692,

697 (Tex. ~~Civ.~~App.—~~–~~Fort Worth 1981), *writ ref'd n.r.e.*, 628 S.W.~~–~~2d 48 (Tex. 1982) (per curiam) (measures of damage for bad~~–~~faith removal is the "enhanced value of the product when and where it is finally converted, without any deductions of expenses incurred, or for any value he might have added to the minerals by his labor") (quoting *Dahlstrom Corp. v. Martin*, 582 S.W.2d 159, 161 (Tex. ~~Civ.~~ App.—~~–~~Houston [1st Dist.] 1979, writ ref'd n.r.e.). "[I]f a destroyed well can be reproduced and the reproduction costs do not exceed the value of the well, the plaintiff can recover damages for the cost of reproducing and equipping the well." *Miesch*, 180 S.W.3d at 325 (involving plugged wells). Other measures may exist as well. *Miesch*, 180 S.W.3d at 326 (affirming lost bonus payment); *see also HECI Exploration Co.*, 982 S.W.2d at 890 ("[A]~~a~~ royalty interest has a reasonable market value that can be adversely affected by the loss of otherwise recoverable reserves that are burdened with royalty obligations."); *Elliff*, 210 S.W.2d at 560, 563 (affirming recovery for negligent damage to surface and wasted minerals from and under land).

PJC 302.12 Question and Instruction on Reasonably Prudent Operator Defense to Statutory Waste Claim

If you answered "Yes" to Question ____ [*302.11*] then answer the following question. Otherwise, do not answer the followingis question.

Question _____

Did [*Don Davis*] act as a reasonably prudent operator with respect to the conduct described in Question _____ [*302.11*]?

A "reasonably prudent operator" means an operator of ordinary prudence acting with ordinary diligence under the same or similar circumstances, having due regard for the interests of both *Don Davis* and *Paul Payne*.

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 302.12 should be used as a defense to a cause of action brought under Tex.as Nat.ural Res.ource Code §section 85.321 if the lease owner or operator claims to have been acting as a reasonably prudent operator. See PJC 302.11.

Source of question and instruction. This question is derived from *Amoco Production Co. v. Alexander*, 622 S.W.2d 563, 567—68 (Tex. 1981); *Cabot v. Brown*, 754 S.W.2d 104 (Tex. 1987), and *Hurd Enterprise, Ltd. v. Bruni*, 828 S.W.2d 101, 109 (Tex. App.—San Antonio 1992, writ denied).

PJC 312.3 Defenses—Instruction on Anticipatory Repudiation

Failure to comply by *Don Davis* is excused by *Paul Payne*'s prior repudiation of the same agreement.

A party repudiates an agreement when he indicates, by his words or actions, that he is not going to perform his obligations under the agreement in the future, showing a fixed intention to abandon, renounce, and refuse to perform the agreement. The repudiation must be absolute and unconditional.

COMMENT

When to use. PJC 312.3 submits the doctrine of anticipatory repudiation as a defensive measure. It may also be appropriate, in slightly different form, as an element of the plaintiff's cause of action. Upon a party's repudiation of a contract, the nonrepudiating party may treat the repudiation as a breach or may continue to perform under the contract and await the time of the agreed-upon performance. *Ingersoll-Rand Co. v. Valero Energy Corp.*, 997 S.W.2d 203, 211 (Tex. 1999); *Pagosa Oil & Gas, L.L.C. v. Marrs & Smith Partnership*, 323 S.W.3d 203, 216 (Tex. App.—El Paso 2010, pet. denied).

Source of instruction. The elements in the instruction are adapted from the discussion of the doctrine in *Universal Life & Accident Insurance Co. v. Sanders*, 102 S.W.2d 405, 406–07 (Tex. 1937), *Moore v. Jenkins*, 211 S.W. 975, 976 (Tex. 1919), *Pollack v. Pollack*, 39 S.W.2d 853, 856–57 (Tex. Comm'n App. 1931, holding approved), and *Group Life & Health Insurance Co. v. Turner*, 620 S.W.2d 670, 672–73 (Tex. ~~Civ.~~ App.—Dallas 1981, no writ).

"Without just excuse." To excuse a failure to comply, the repudiation must have been "without just excuse." *Group Life & Health Insurance Co.*, 620 S.W.2d at 673 (quoting ~~*Universal Life & Accident Insurance Co. v.*~~ *Sanders*, 102 S.W.2d at 407); *Parkway Dental Associates, P.A. v. Ho & Huang Properties, L.P.*, 391 S.W.3d 596, 606 (Tex. App.—Houston [14th Dist.] 2012, no pet.); *see Pollack*, 39 S.W.2d at 855.~~5 (Tex. 1937)).~~

UCC cases. In cases involving the sale of goods, the instruction defining anticipatory repudiation may need to be revised. *See* Tex. Bus. & Com. Code § 2.610 (Tex. UCC).