# NO. _____

In The Supreme Court of Texas

**Wilford C. Senn & Wanda Joan Senn**

Petitioners,

v.

**Primrose Operating Company, Inc.**

Respondent.

## AMICUS CURIAE BRIEF IN SUPPORT OF PETITION FOR REVIEW

JOHN B. McFARLAND
State Bar No. 13598500
**GRAVES, DOUGHERTY HEARON & MOODY, P.C.**
401 Congress Avenue, Suite 2200
Austin, Texas 78701
Telephone:(512) 480-5618
Facsimile:(512) 480-5818

**ATTORNEYS FOR AMICUS CURIAE TEXAS LAND AND MINERAL OWNERS' ASSOCIATION**

August __, 2005

## IDENTITY OF PARTIES AND COUNSEL

| **Plaintiffs/Appellees/Petitioners:** | **Counsel for Petitioners:** |
|---|---|
| Wilford and Wanda Senn | Timothy F. Lee<br>Eileen O'Neill<br>Paul Smith<br>Ware, Jackson, Lee & Chambers, L.L.P.<br>America Tower, 424nd Floor<br>2929 Allen parkway<br>Houston, TX 77019<br>(713) 659-6400<br>(713) 659-6262 (fax)<br><br>Bill Robins, III<br>Heard, Robins, Cloud, Greenwood & Lubel, L.L.P.<br>300 Paseo de Peraita, Suite 200<br>Santa Fe, NM 87501<br>(505) 986-0684<br>(505) 986-0632 (Fax) |
| **Defendant/Appellant/Respondent:**<br><br>Primrose Operating Company, Inc. | Kathleen M. McCulloch<br>Shafer, Davis, Ashley, O'Leary & Stoker, P.C.<br>P. O. Drawer 1552<br>Odessa, TX 79760<br><br>Rick G. Strange<br>Cotton, Bledsoe, Tighe & Dawson<br>P. O. Box 2776<br>Midland, TX 79702<br>(915) 684-5782<br>(915) 682-3672 (fax) |

**Amicus Curiae:**

Texas Land and Mineral Owners' Association

John B. McFarland
Graves, Dougherty Hearing & Moody, P.C.
401 Congress Avenue, Suite 2200
Austin, Texas 78701
Telephone: (512) 480-5618
Facsimile: (512) 480-5818

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## STATEMENT OF THE CASE

This is a property damage claim brought by the Senns for damages caused by environmental pollution of their ranch in West Texas. The trial court granted judgment for plaintiffs on a jury verdict. The Eleventh District court of Appeals reversed and rendered judgment that the Senns take nothing.

## INTEREST OF AMICUS CURIAE

This brief is filed on behalf of Texas Land and Mineral Owners' Association ("TLMA"), an association of landowners and mineral owners in Texas founded to advocate for protection of Texas' land and water resources and to assure accuracy in the payment of oil and gas royalties. For more about the Association, see www.tlma.org. The fees of the undersigned attorneys for preparation of this brief will be paid by TLMA.

## ISSUES PRESENTED FOR REVIEW

TLMA agrees with the issues stated by Petitioners in their Petition for Review. In addtion, TLMA believes that this Court should consider the following issue: Should the Senns be entitled to a restitution measure of damages, measured by the benefit to the Defendant resulting from its contamination of the Senns' property?

TO THE HONORABLE SUPREME COURT OF TEXAS:

Texas Land and Mineral Owners' Association submits this brief as a friend of the court and would show as follows:

## SUMMARY OF ARGUMENT

This case raises issues concerning the proper measure of damages for oil field pollution that should be addressed by this Court. The case illustrates the inadequacy of current case law to address a growing problem in Texas caused by the increased number of oil fields in Texas in the latter stages of depletion prior to abandonment. Current Texas case law on measurement of damages for surface and subsurface contamination caused by oil field operators limits damages in most cases to the reduction in market value of the landowner's property caused by the contamination. That limitation rewards the wrongdoer by making it profitable to breach his duty, whether contractual or in tort, to the surface owner.

A new, alternate measure of damages for oil field contamination is needed to provide proper incentive for the operator to comply with his legal duties to the surface owner. An alternative measure of damages based on restitution should be considered where the cost of the operator's compliance with his legal duties is greater than the reduction in market value of the surface owner's property resulting from the contamination. Requiring the operator to respond in damages based on the operator's unjust enrichment resulting from his breach of duty would further the interests of protection of land and water resources without unduly providing a windfall to the surface owner.

## ARGUMENT

### I. The Result in this Case is Unjust.

Current case law on the measure of damages in oil field contamination cases has placed an impossible burden on the landowner. That burden is exemplified by the result reached by the court of appeals in this case. According to the recitation of facts in the Senns' petition, Primrose Operating Company was not just a negligent operator. Leaks and spills occurring while Primrose was operator of the Covered "S" Ranch wells were substantially higher than those occurring before or after its operation – 99 times higher than those of the succeeding operator. Rather than dealing responsibly with spills once they occurred, Primrose simply covered up the spills. Primrose sometimes intentionally drained salt water onto the property rather than properly disposing of it. The evidence shows, in short, that Primrose was at least consciously indifferent to its legal obligations to the surface owner, and in some cases intentionally violated its duties.

The evidence showed that it would cost over $2 million to properly remediate the damage caused by Primrose's misconduct. The facts also showed, however, that the Senns purchased the ranch for $3,164,000 in 1997, and that it was appraised for $4,275,000 in 2000. The court of appeals, after reviewing the evidence, clearly felt that an award of $2 million would be a windfall to the plaintiffs. It held that remediation would not be "economically feasible," and that damages were therefore limited to the lesser of the cost of remediation or the loss of market value resulting from the contamination. It held that the

plaintiffs' appraisal experts' testimony was "no evidence" of the reduction in market value, and as a result "the Senns have failed to produce any evidence that their ranch diminished in value because of Primrose's negligence." The Court reversed and rendered, resulting in a take-nothing judgment. As a result, Primrose has no liability even though it clearly violated a legal duty to the Senns, and even though their property was clearly harmed by those violations. Faced with the established law on the proper measure of damages in these cases, the court of appeals apparently felt itself obliged to either affirm a judgment it felt provided a windfall to the surface owner, or deny any recovery. The law of damages for injuries to land should not and need not be so rigid.

The TLMA agrees with the Senns' complaints concerning the court of appeals' errors in applying established law of damages to the facts in this case. TLMA believes that the court of appeals failed to justify its conclusion that the cost of remediation was not economically feasible in this case, and that it erred in holding that the cost of remediation was not evidence of diminution of market value of the Senns' ranch. Those issues are ably addressed in the Senns' Petition.

TLMA believes that, because of the court of appeals' errors, this case presents a broader opportunity for this Court to address the general issue of measure of damages for oil field contamination, and that this broader issue must be faced not only to adequately address the claims of the Senns and other surface owners similarly situated, but to adequately protect our State's lands and natural resources.

## II. Oil Field Pollution is a Growing Problem in Texas.

The oil and gas industry is a "maturing" industry in Texas. As a result, many fields discovered in the last century are near depletion and are kept alive only by secondary recovery techniques. Many of those techniques have a substantial impact on the surface estate of the lands within those fields. Such techniques often involve pumping salt water back into the formation, increasing the pressure in the reservoir. Especially with old wells and equipment, these activities often result in a substantial increase in salt water and oil spills and leaks.

Major oil companies who developed now-mature fields in Texas are not interested in producing those fields to depletion, because of their marginal economics. Many old fields have therefore been sold to smaller operators who are able to operate the fields with lower overhead costs. Some old fields have been transferred several times, each time to a smaller operator, as the production declines and the costs of operation increase. There is increasing pressure on these marginal operators to save costs by cutting corners. The end result is often an abandoned field, with no financially responsible operator to pay the costs of finally plugging the remaining wells in the field, leaving that responsibility to the Texas Railroad Commission's well plugging fund.

The increased incidents of oil field pollution, and the tendency of operators to "sell down" their depleted fields, has exacerbated problems landowners face when confronted with a bad operator. If a landowner's claim against a bad operator must in all instances be limited

to the reduction in market value of his property cause by the operator's malfeasance, regardless of the degree of culpability of the operator, then the operator has an economic incentive to pollute. This incentive is recognized and addressed by the remedy of restitution.

## III. The Law of Restitution and Unjust Enrichment Provides a Just and Reasonable Alternative Measure of Damages in this Case.

Restitution is a long-established measure of damages recognized in the common law. "The restitution claim ... is not aimed at compensating the plaintiff, but at forcing the defendant to disgorge benefits that it would be unjust for him to keep."[1] It is based on the concept of unjust enrichment. Restitution has roots in early English common law, but has more recently been the subject of substantial scholarly examination and analysis.[2] The topic has been examined thoroughly in the re-draft of the Restatement of the Law of Restitution and Unjust Enrichment now under consideration by the American Law Institute, currently in its 4th draft (the "Draft Restatement").

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[1]Dan B. Dobbs, Remedies (West Pub. Co. 1978).

[2]See, e.g., Daniel Friedmann, *Restitution of Benefits Obtained Through the Appropriation of Property Or The Commission of A Wrong*, 80 Colum. L. Rev. 504 (1980); Daniel Friedmann, *Restitution for Wrongs: The Basis of Liability, In Restitution: Past, Present and Future,* 133, 137 (W.R. Cornish et al. eds., 1998); Daniel Friedman, *Restitution for Wrongs: The Measure of Recovery*, 79 Tex.L.Rev. 1879 (June 2001); Dawson, *Restitution Without Enrichment*, 61 B.U.L.Rev. 563 (1981); Douglas Laycock, *The Scope and Significance of Restitution*, 67 Tex.L.Rev. 1277 (May 1989).

In order to illustrate the need for a better rule of compensatory damages in oil field pollution cases, consider the following hypothetical (drawn from, but not necessarily identical with, the actual facts of this case):

> Oil Company's operations result in substantial leaks and spills of salt water, oil and other oil field contaminants onto Landowners' lands. Oil Company's operations are not those of a prudent operator, and there is evidence that some of the contamination was deliberate. Oil Company fails to properly clean up spills and leaks when they occur, increasing the contamination and the cost of clean-up substantially beyond what would have been necessary if the spills had been dealt with on a timely and economical basis.
>
> The cost to clean up the contamination caused by Oil Company is $2 million. If Oil Company had properly maintained its equipment and dealt with spills and leaks as they occurred as a prudent operator, the cost of such maintenance and remediation would have been $100,000.
>
> Notwithstanding the damage caused to Landowner's property by Oil Company's operations, the market value of Landowner's property has increased since he bought the property, and after Oil Company commenced its operations. Evidence of comparable sales shows that the contamination of Landowner's property did not materially affect its market value.
>
> Finally, during the time Oil Company operated its wells on the property, it made a profit of $500,000.

Based on the above hypothetical facts, under the legal principles announced by the court of appeals in this case, Landowner would receive no damages, because it would not be economically feasible to remediate the contamination caused by his operations and Landowner cannot show an adverse effect on his property's market value.

Under the law of restitution or unjust enrichment, Landowner in the above hypothetical would have a right of recovery based on the profit made by Oil Company from

its wrongful conduct. Depending on the degree of culpability of the defendant and the rule adopted by this Court, the damages might be measured by the $100,000 saved by Oil Company's cutting corners, or by Oil Company's profit from operation of the lease. The damages would not be limited by the proven diminution in the value of Landowner's property resulting from Oil Company's operations.

The Draft Restatement explains why restitution is an appropriate measure of damages, even though in excess of the provable loss suffered by the plaintiff:

> Restitution by the rules of this Topic reflects the ancient aspiration that no one should profit by his own wrong, one of the cardinal elements of the law of unjust enrichment. ...[A] remedy limited to compensation does not vindicate the claimant's right to insist that the transaction at issue – typically, some use by the defendant of the claimant's property – take place by agreement with the claimant or not at all. If a conscious wrongdoer were able to make profitable, unauthorized use of the claimant's property, then pay only the objective value of the assets taken or the harm inflicted, the anomalous result would be to legitimate a kind of private eminent domain (in favor of a wrongdoer) and to subject the claimant to a forced exchange. The law of restitution responds to this anomaly by making the wrongdoer liable to disgorge profits wrongfully obtained, whenever such profits exceed recoverable damages.[3]

Depending on the situation, a landowner may have a breach of contract claim (for breach of his oil and gas lease), a conversion claim (for use of his property in excess of that reasonably necessary for operations), a negligence claim, or some combination of those three, for oil field contamination. The Draft Restatement recognizes a right to recover based on restitution both for breach of contract (Draft §39) and for trespass and conversion claims

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[3] American Law Institute, Restatement of the Law, Restitution and Unjust Enrichment, Draft No. 4 (April 8, 2005), Chapter 5, Introductory Note, paragraph 3 (pp. 40-41)

(Draft §40). As an illustration of the right to recover for breach of contract, the Draft Restatement gives the following illustration, derived from *Peevyhouse v. Garland Coal & Mining Co.*, 382 P.2d 109 (Okla. 1962), *Groves v. John Wunder Co.*, 205 Minn. 163, 286 N.W. 235 (1939), and *American Standard, Inc. v. Schectman*, 80 App.Div.2d 318, 438 N.Y.S.2d 529 (1981):

> Landowner and Mining Company enter a contract for strip-mining. The agreement authorizes Mining Company to remove coal from Blackacre in exchange for payment of a specified royalty per ton. A further provision of the agreement, included at Landowner's insistence, obliges Mining Company to restore the surface of Blackacre to its preexisting contours on the completion of mining operations. Mining Company removes the coal from Blackacre, pays the stipulated royalty, and repudiates its obligation to restore the land. In Landowner's action against Mining Company it is established that the cost of restoration would be $25,000, and that the diminution in the value of Blackacre if the restoration is not performed would be negligible. The contract is not affected by mistake or impracticability. The cost of restoration is in line with what Mining Company presumably anticipated, and the available comparisons suggest that Mining Company took this cost into account in calculating the contractual royalty. Landowner is entitled to recover $25,000 from Mining Company by the rule of this Section. It is not a condition to Landowner's recovery in restitution that the money be used to restore Blackacre.

The following illustration is from §40 of the Draft Restatement, to illustrate restitution as a measure of damages in a trespass claim. It is based on *Shell Petroleum v. Scully*, 71 F.2d 722 (5th Cir. 1934) and *Phillips Pet. Co. v. Cowden*, 241 F.2d 586 (5th Cir. 1957).

> Oil Company tries and fails to negotiate a license permitting exploration of Owner's swampland with an option to lease for later production. Company crews later enter the property and detonate explosions, obtaining information about underground mineral formations elsewhere. A license to do this much and no more might ordinarily have been obtained from Owner on payment of a "shooting fee" of $50. Information derived from its unauthorized testing

> leads company to acquire mineral leases from other landowners. In determining the measure of Company's liability to Owner in restitution, the court will assess the reasonable value of the privilege that Company took by trespassing, considering all the circumstances of the taking and its consequences. The extent of Company's unjust enrichment is not limited to the $50 fee that Company might have expected to pay in a bargain transaction. Nor is it appropriate to identify the benefit taken by trespass with subsequent profits from Company's mineral leases, because such profits are both remote from and disproportionate to the injury to Owner.

These two illustrations from the Draft Restatement are included here not to suggest that their facts are identical to the facts of this case, but to show that, in comparable circumstances, courts have recognized and applied a measure of damages not based on the loss suffered by the plaintiff, but on the enrichment enjoyed by the defendant as a result of his wrongful conduct.

The opinion of the court of appeals relates that there were two trials of this case. After the first trial, the trial court granted plaintiffs' motion for new trial after a verdict for the defendant, because the trial court "was convinced that the jury disregarded their oath even though the jury reached an arguably just result." The second trial resulted in a verdict and judgment for the Senns. The fact that two juries reached different results, the trial court's granting of a new trial, and the strained opinion of the court below all show that the jury, the trial court and the court of appeals have struggled with how to reach a just result based on difficult facts. The court of appeals' opinion attempted (but failed) to apply established damage law while seeking to avoid what it considered an unjust result. TLMA believes that one cause of all of this struggle is that the jury, the trial court and the court of appeals did not

find sufficient flexibility in the law of damages to allow them to reach a just result. That flexibility can be found in the law of restitution.

TLMA recognizes that Petitioners have not sought recovery based on a theory of restitution, and it can be argued that Petitioners have waived any claim to recovery on that basis. But this Court has discretion to examine the basis on which the case was tried, and to remand in the interest of justice if it concludes that the Senns have not had a fair opportunity to recover their damages, especially where the Court has altered the way a case should be submitted. *R.R. Street & Co. v. Pilgrim Enterprises, Inc.*, 2005 WL 136651 (Tex.Sup.Ct. June 10, 2005); *Torrington Co. v. Stutzman*, 46 S.W.3d 829, 840 (Tex.2000) ("we have remanded in the interest of justice when our decisions have altered or clarified the way in which a claim should be submitted to the jury"). TLMA believes that this case presents this Court with a unique opportunity to re-examine Texas law on compensatory damages in oil field pollution cases, in light of modern damage theory. If this Court grants the Senns' petition, this Court will undoubtedly receive assistance on this issue not only from the parties but also from many other interested persons who can provide resources and analysis of possible alternatives for damage recovery in these difficult cases.

## CONCLUSION AND PRAYER

The court of appeals erred in reversing the trial court's judgment, because it did not apply established case law in determining whether remediation of the damages caused by Primrose was "economically feasible," or in holding that costs of remediation are not relevant

to market value. This Court should grant the Senns' petition. If this Court believes that the trial court's judgment is improper, then this Court should reverse and remand this case in the interest of justice, allowing the Senns to present evidence of damages based on the equitable principles of restitution. TLMA respectfully prays that Petitioners' petition be granted.

Respectfully submitted,

JOHN B. McFARLAND
State Bar No. 13598500
**GRAVES, DOUGHERTY HEARING & MOODY, P.C.**
401 Congress Avenue, Suite 2200
Austin, Texas 78701
Telephone: (512) 480-5618
Facsimile: (512) 480-5818

ATTORNEYS FOR AMICUS CURIAE
TEXAS LAND AND MINERAL OWNERS' ASSOCIATION

## CERTIFICATE OF SERVICE

On _____, 2005, a true and correct copy of Amicus Curiae Brief was served by U. S. Mail, return receipt requested, on all counsel of record as listed below in compliance with Rule 9.5(e) of the Texas Rules of Appellate Procedure:

Timothy F. Lee
Eileen O'Neill
Paul Smith
Ware, Jackson, Lee & Chambers, L.L.P.
America Tower, 424nd Floor
2929 Allen parkway
Houston, TX 77019

Kathleen M. McCulloch
Shafer, Davis, Ashley, O'Leary & Stoker, P.C.
P. O. Drawer 1552
Odessa, TX 79760

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