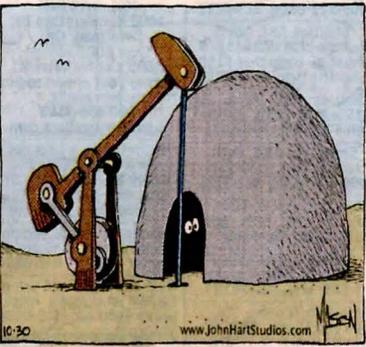
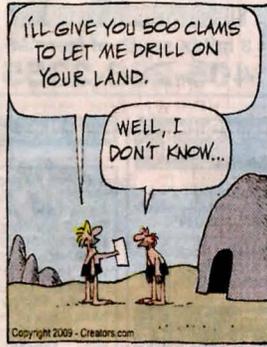


B.C.



WELL SITE SAFETY ZONE ACT:
NEW LIFE FOR ACT

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MAY 21, 2009

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1. BIOGRAPHY

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and Contributing Author;
Basye on Clearing Land Titles, Author : Pocket Part Update (1998 – 2000); Contributing
Author: Pocket Part Update (2001-2008)
Oklahoma Bar Review faculty: "Real Property" (1998 - 2003);
Chairman: OBA/OLTA Uniform Abstract Certif. Committee (1982);
In-House Counsel, LTOC & AGT (1979-1981);
Urban Planner, OCAP, DECA & ODOT (1974-1979).
- SELECTED PUBLICATIONS:
"A Status Report: On-Line Images of Land Documents in Oklahoma County" & "Where Are
We Going Next in Electronic Filing", 36 Briefcase (OCBA) 7 & 8 (July & August
2004)
"Real Estate Homesteads in Oklahoma: Conveying and Encumbering Such Interest", 75 The
Oklahoma Bar Journal 1357 (May 15, 2004)
"Have Judgment Lien Creditors Become 'Bona Fide Purchasers'?", 68 Oklahoma Bar
Journal 1071 (March 29, 1997)*; and
- SPECIAL HONORS: *Okla. Bar Assn. 1997 Maurice Merrill *Golden Quill Award*;
Okla. Bar Assn. 1990 Earl Sneed *Continuing Legal Education Award*;
Okla. Bar Assn. 1990 Golden Gavel Award: *Title Exam. Standards Committee.*;
Who's Who In: The World, America, The South & Southwest, American Law, American
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2. PAPER

Summary of Holding

On March 26, 2009, the Oklahoma Attorney General, in Opinion 09-5 (the “AG Opinion”), interpreted the impact of the 2006 legislative recodification of a 2003 Act (the “Well Site Safety Zone Act”).¹ The AG Opinion declared that the 2006 recodification clarified and confirmed that there was indeed a prohibition on the location of a habitable structure within 125 feet of an oil and gas wellbore, and within 50 feet of related surface equipment, “regardless of whether the structure is located on the surface land on which the oil and gas well is located or on adjacent lands”.²

The apparent public purpose for the creation and maintenance of a safety zone is for the convenience and safety of the oil and gas operator who must continually have access to the well site, and for the safety of the home occupants who will find themselves being neighbors with a pump jack, tank battery, and other oil field equipment.

This AG Opinion makes it clear that through the 2006 recodification the legislature had successfully overruled an earlier 2006 Oklahoma Supreme Court decision.³ The 2006 court holding had severely limited the impact of the Well Site Safety Zone Act by concluding that this safety zone was created only in the instance where the surface interest on which the house was about to be built was owned by the same person who held title to the surface on which the well site sat. Under this 5 to 4 Supreme Court ruling, if the surface land on which a house was to be built was owned by someone other than the owner of the land under the well site itself, the 125-foot safety zone limitation did not apply. Consequently, a subdivision developer could avoid this construction limitation by conveying the home construction site to a builder or other third party, thereby creating a difference in ownership of the two tracts. Making such conveyance is the standard practice, and its result helps achieve a developer’s primary goal which is to maximize the land available for residential development purposes.

Specifically, the AG Opinion held:

Because 52 O.S.Supp.2008, §320.1 is no longer part of the Oklahoma Surface Damages Act, it must be read as an independent statute, prohibiting a habitable structure from being located within 125 feet of an active oil and gas well, or within 50 feet of surface equipment necessary to the operating of an active oil and gas well, absent the written agreement of the surface owner and the operator otherwise. The prohibition of a habitable structure in Section 320.1 applies regardless of whether the structure is located on the surface lands on which the oil and gas well is located, or on adjacent lands.

Step-by-Step Summary of the Analysis

The sequence of events leading to the Attorney General’s conclusion is as follows:

1. The Surface Damages Act was enacted in 1982, providing for payment-- by the oil and gas operator to the owner of the title to the surface lands underlying the well site-- of compensation to offset the diminution in value of the surface, caused by the intrusion of a well site.⁴

2. The Well Site Safety Zone Act was enacted in 2003, providing for a prohibition against the location of a habitable structure (e.g., a house) within 125 feet of the wellbore.⁵
3. The Oklahoma Supreme Court issued an opinion in 2006 (the “YDF Case”) declaring that due to the section numbering the 2003 Well Site Safety Zone Act was part of the 1982 Surface Damages Act and, due to the definitions language of the Surface Damages Act, there would not be a safety zone created in the situation where the lot owner or builder who was seeking to construct a home on his own land within 125 feet of a wellbore did not also own the surface under the well site.⁶
4. Within days after the YDF Case decision was handed down, the Oklahoma Legislature began the drafting and enactment of legislation which had the sole function of recodifying (i.e., renumbering) the Well Site Safety Zone Act to move its location within the statutes away from its previous position adjacent to the Surface Damages Act. Specifically, the Surface Damages Act was initially codified at 52 O.S. §§318.2 to 318.9, and the Well Site Safety Zone Act was renumbered from 52 O.S. §318.10 to become §320.1.⁷
5. As of March 26, 2009, the impact of the 2006 recodification of the Well Site Safety Zone Act was examined and explained by this new AG Opinion. The Well Site Safety Zone Act, as of the date of its recodification in 2006, prohibits the construction or location of any habitable structure within 125 feet of the well bore, without regard to who owns the surface under the planned structure.⁸

Consequences of Attorney General Opinion

The state constitution establishes the Office of the Attorney General (“AG”), and the AG’s duties and responsibilities are prescribed by statute.⁹ The AG is the chief law officer of the state.¹⁰

As the state’s “chief law officer,” the AG has been entrusted with the duty of providing legal guidance to public officers and advising them on questions of law which relate to their official duties.¹¹

In analyzing the weight to be given to an AG’s Opinion, the opinions are “persuasive authority”, making them the equivalent of an opinion of the Court of Civil Appeals.¹²

An AG’s opinion is binding upon the state officials whom it affects. Public officers have the duty to follow those opinions until they are judicially relieved of compliance.¹³

It is the duty of local public officers, including county officers, to follow and not disregard, the advice of the AG.¹⁴

Hereafter, any and all state bodies, for example the Corporation Commission, and any and all counties and cities, including those approving subdivision plats and zoning applications

and issuing residential building and occupancy permits, are on notice that they must abide by this pronouncement.

A public officer's failure to heed the AG's advice to perform a duty required by law may result in civil penalties; while one who acts in conformity with the AG's advice is afforded the law's protection from civil liability, as well as from forfeiture of office.¹⁵ Whether this new AG Opinion will rise to the level of being "advice to perform a duty required by law" is as yet unclear, but it certainly breathes new life into the Well Site Safety Zone Act. Other unanswered questions also remain, such as what to do about violations arising between 2006 and the present, and who bears the liability for financial loss for the homeowner's diminution in value upon resale, or for the costs for relocation of the home or well.

This AG Opinion confirms that the Well Site Safety Zone Act acts as a sword in the hands of oil and gas operators attempting to beat back encroachments around their operating wells,¹⁶ and as a shield to subsequent challenge if the surface owner and operator reach a written agreement to allow development closer than 125 feet.¹⁷

¹ A copy of this Attorney General Opinion 09-5 may be found online at: <http://www.oag.state.ok.us/>, click on "Opinions", click on "Recent Attorney General Opinions", and click on Attorney General Opinion 09-5.

Legal research on this matter was provided to the Attorney General' office, through the requesting state representative, by this attorney author, Kraettli Q. Epperson, OKC. Mr. Epperson gratefully acknowledges receiving input in the development of such research from attorneys Doug Wilguess and Shawn Roberts, both of OKC, and University of Oklahoma law student Blaine Dyer.

² 52 O.S.Supp.2003 §318.10, recodified as 52 O.S.Supp.2006 §320.1, provides:

- A. After the effective date of this act, it shall be unlawful to locate any habitable structure within:
 - 1. A radius of one hundred twenty-five (125) feet from the wellbore of an active well; or
 - 2. A radius of fifty (50) feet from the center of any surface equipment or other equipment necessary for the operation of an active well, including, but not limited to, hydrocarbon and brine storage vessels, tanks, compressors, heaters, separators, dehydrators, or any other related equipment.
- B. Provided, however, the provisions of this section shall not prohibit an operator and surface owner from agreeing in writing to setback provisions with distances different from those set forth in this section.

³ YDF v. Schlumer, Inc., 2006 OK 32, 136 P.3d 656

⁴ The "Surface Damages Act," 52 O.S.Supp. 2001 and Supp.2008 §§318.2-318.9

⁵ The "Well Site Safety Zone Act," 52 O.S.Supp. 2003 §318.10

⁶ YDF, 2006 OK 32, 136 P.3d 656

⁷ 52 O.S.Supp. 2003 §318.10 and 52 O.S.Supp.2006 §320.1

⁸ OK AG Opin. 09-5; it should be noted that the Well Site Safety Zone Act includes language in part B allowing the oil and gas operator and the owner of the residential construction site to modify this 125-foot rule, presumably to allow the reconfiguration of the circular area into a rectangular zone which better fits the topography, the equipment layout, and the access needs of the parties.

⁹ OK Const. Art. VI, §1; 74 O.S. §18b(A)(5) and (A)7, and 75 O.S. §26.1

¹⁰ 74 O.S. §18

¹¹ Hendrick v. Walters, 1993 OK 162, ¶19, 865 P.2d 1232, 1243

¹² National Cowboy Hall of Fame and Western Heritage Center v. State of Oklahoma Ex Rel. The Oklahoma Human Rights Commission, 1978 OK 76, ¶11, 579 P.2d 1276, 1279

¹³ Hendrick v. Walters, 1993 OK 162, ¶20, 865 P.2d 1232, 1244

¹⁴ Rasure v. Sparks, 1919 OK 231 ¶¶0, 7, 183 P. 495, 496 and 498

¹⁵ Hendrick v. Walters, 1993 OK 162, ¶20, 865 P.2d 1232, 1244

¹⁶ 52 O.S.Supp.2006 §321.0(A)

¹⁷ 52 O.S.Supp. 2006 §321.0(B)

3. SURFACE DAMAGES ACT



Title 52. Oil and Gas

Oklahoma Statutes Citationized

Title 52. Oil and Gas

Chapter 4 - Regulation of Wells

Section 318.2 - Title 52. Oil and Gas

Cite as: O.S. §, __ __

For purposes of Sections 1 through 8 of this act:

- 1. "Operator" means a mineral owner or lessee who is engaged in drilling or preparing to drill for oil or gas; and
- 2. "Surface owner" means the owner or owners of record of the surface of the property on which the drilling operation is to occur.

Historical Data

Added by Laws 1982, c. 341, § 1, operative July 1, 1982.

Citationizer® Summary of Documents Citing This Document

Cite Name	Level
Oklahoma Attorney General's Opinions	
Cite	Name
2009 OK AG 5,	Question Submitted by: The Honorable Danny Morgan, State Representative, District 32
1982 OK AG 232,	Question Submitted by: The Honorable Gene C. Howard, Oklahoma State Senate
Oklahoma Court of Civil Appeals Cases	
Cite	Name
1990 OK CIV APP 21, 791 P.2d 821, 61 OBJ 1359,	Roye Realty & Developing, Inc. v. Watson
1990 OK CIV APP 99, 801 P.2d 745, 61 OBJ 3215,	Beasley Oil Co. v. Nance
2001 OK CIV APP 127, 33 P.3d 688, 72 OBJ 3301,	COMANCHE RESOURCES CO. v. TURNER
2002 OK CIV APP 13, 38 P.3d 236, 73 OBJ 425,	VASTAR RESOURCES, INC. v. HOWARD
2007 OK CIV APP 111, 172 P.3d 217,	BAYS EXPLORATION, INC. v. JONES
2008 OK CIV APP 61,	RANKEN ENERGY CORPORATION v. DKMT COMPANY

Oklahoma Supreme Court Cases

Cite	Name	Level
1987 OK 11, 734 P.2d 1290, 58 OBJ 287.	Anschutz Corp. v. Sanders	Discussed at Length
1988 OK 123, 764 P.2d 1340, 59 OBJ 2955.	Alpine Const. Corp. v. Fenton	Discussed
1989 OK 144, 782 P.2d 130, 60 OBJ 2813.	Turley v. Flag-Redfern Oil Co.	Discussed at Length
1993 OK 113, 868 P.2d 676, 4 OBJ 2845.	DuLaney v. Oklahoma State Dept. of Health	Cited
1993 OK 166, 867 P.2d 451, 65 OBJ 23.	Houck v. Hold Oil Corp.	Discussed at Length
1994 OK 117, 890 P.2d 847, 65 OBJ 3666.	Schneberger v. Apache Corp.	Cited
1995 OK 73, 898 P.2d 1275, 66 OBJ 2221.	Unit Petroleum Co. v. Oklahoma Water Resources Bd.	Cited
2003 OK 11, 64 P.3d 1113.	WARD PETROLEUM CORP. v. STEWART	Cited
2003 OK 48, 78 P.3d 921.	HOLLEYMAN v. HOLLEYMAN	Cited
2006 OK 32, 136 P.3d 656.	YDF, INC. v. SCHLUMAR, INC.	Discussed at Length
2006 OK 47, 139 P.3d 897.	LIERLY v. TIDEWATER PETROLEUM CORPORATION	Cited

Citationizer: Table of Authority

Cite Name Level
None Found.



Title 52. Oil and Gas

Oklahoma Statutes Citationized

Title 52. Oil and Gas

Chapter 4 - Regulation of Wells

Section 318.3 - Title 52. Oil and Gas

Cite as: O.S. §, __ __

Before entering upon a site for oil or gas drilling, except in instances where there are non-state resident surface owners, non-state resident surface tenants, unknown heirs, imperfect titles, surface owners, or surface tenants whose whereabouts cannot be ascertained with reasonable diligence, the operator shall give to the surface owner a written notice of his intent to drill containing a designation of the proposed location and the approximate date that the operator proposes to commence drilling.

Such notice shall be given in writing by certified mail to the surface owner. If the operator makes an affidavit that he has conducted a search with reasonable diligence and the whereabouts of the surface owner cannot be ascertained or such notice cannot be delivered, then constructive notice of the intent to drill may be given in the same manner as provided for the notice of proceedings to appoint appraisers.

Within five (5) days of the date of delivery or service of the notice of intent to drill, it shall be the duty of the operator and the surface owner to enter into good faith negotiations to determine the surface damages.

Historical Data

Added by Laws 1982, c. 341, § 2, operative July 1, 1982.

Citationizer® Summary of Documents Citing This Document

Cite Name	Level
Oklahoma Court of Civil Appeals Cases	
Cite	Name
1990 OK CIV APP 99, 801 P.2d 745, 61 OBJ 3215.	Beasley Oil Co. v. Nance
	Level
	Cited
Oklahoma Supreme Court Cases	
Cite	Name
1989 OK 127, 782 P.2d 1355, 60 OBJ 2371.	Tower Oil & Gas Co., Inc. v. Harmon
	Level
	Discussed
1993 OK 113, 868 P.2d 676, 4 OBJ	DuLaney v. Oklahoma State Dept. of Health
	Level
	Cited

Cite Name	Level
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[2845.](#)

Citationizer: Table of Authority

Cite	Name	Level
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None Found.

4. WELL SITE SAFETY ZONE ACT



Title 52. Oil and Gas

Oklahoma Statutes Citationized

Title 52. Oil and Gas

Chapter 4 - Regulation of Wells

Section 320.1 - Unlawful to Locate Habitable Structure Within Certain Radius

Cite as: 52 O.S. § 320.1 (OSCN 2009)

A. After the effective date of this act, it shall be unlawful to locate any habitable structure within:

- 1. A radius of one hundred twenty-five (125) feet from the wellbore of an active well; or
2. A radius of fifty (50) feet from the center of any surface equipment or other equipment necessary for the operation of an active well, including, but not limited to, hydrocarbon and brine storage vessels, tanks, compressors, heaters, separators, dehydrators, or any other related equipment.

B. Provided, however, the provisions of this section shall not prohibit an operator and surface owner from agreeing in writing to setback provisions with distances different from those set forth in this section.

Historical Data

Added by Laws 2003, HB 1569, c. 361, § 1, emerg. eff. July 1, 2003; Renumbered from 52 O.S. § 318.10 by Laws 2006, HB 2691, c. 309, § 1, emerg. eff. June 8, 2006.

Citationizer Summary of Documents Citing This Document

Table with 3 columns: Cite Name, Name, Level. Rows include Oklahoma Attorney General's Opinions (2009 OK AG 5) and Title 52. Oil and Gas (52 O.S. 318.10).

Citationizer: Table of Authority

Table with 2 columns: Cite, Name Level. Row: None Found.

5. YDF CASE

[Calendar](#)[Help](#)[Print Only](#)**Oklahoma Supreme Court Cases****YDF, INC. v. SCHLUMAR, INC.**

2006 OK 32

136 P.3d 656

Case Number: [102628](#)

Decided: 05/16/2006

THE SUPREME COURT OF THE STATE OF OKLAHOMA

Cite as: 2006 OK 32, 136 P.3d 656

YDF, INC., an Oklahoma corporation, Plaintiff/Petitioner,
v.
SCHLUMAR, INC, d/b/a SEMCO HOMES, Defendant/Respondent.

**ON WRIT OF CERTIORARI FROM CERTIFIED INTERLOCUTORY ORDER OF THE DISTRICT COURT
OF CANADIAN COUNTY****HONORABLE EDWARD C. CUNNINGHAM, DISTRICT JUDGE**

¶0 In 2004, Schlumar, a builder, purchased property adjacent to YDF's oil well. In November 2004, Schlumar began constructing a home (a habitable structure) on his property. This structure happens to be within 125 feet of YDF's oil well. In April of 2005, YDF informed Schlumar, by letter, that it was unlawful to erect a habitable structure within 125 feet of the oil well pursuant to [52 O.S. § 318.10](#), and that Schlumar was in violation of that statute. Trial court granted summary judgment in Schlumar's favor finding that Schlumar was not a surface owner under the Oklahoma Surface Damages Act.

**CERTIORARI PREVIOUSLY GRANTED;
ORDER OF THE TRIAL COURT AFFIRMED.**

Shawn J. Roberts, Craig E. Brown, BROWN AND ROBERTS, P.C., Oklahoma City, Oklahoma, for Plaintiff/Petitioner.

John A. Bass, Joseph P. Weaver, BASS LAW FIRM, El Reno, Oklahoma, for Defendant/Respondent.

HARGRAVE, J.

¶1 YDF, Inc., is the operator of an active oil and gas well. Schlumar, Inc., is the owner of property located in Canadian County, that is adjacent to the property on which YDF's oil and gas well is located. The subdivision in which Schlumar's property is located was platted in 2001 for residential development. Effective July 1, 2003, the legislature enacted [52 O.S. § 318.10](#). This statute provides that after the effective date of the act, it shall be unlawful to locate any habitable structure within a radius of 125 feet from the wellbore of an active well.

¶2 In 2004, Schlumar, a builder, purchased property adjacent to YDF's oil well. In November 2004, Schlumar began constructing a home (a habitable structure) on his property. This structure happens to be within 125 feet of YDF's oil well. In April of 2005, YDF informed Schlumar, by letter, that it was unlawful to erect a habitable structure within 125 feet of the oil well pursuant to [52 O.S. § 318.10](#), and that Schlumar was in violation of that statute.

¶3 YDF then commenced the present suit in District Court seeking a declaration that Schlumar was in violation of [52 O.S. § 318.10](#), an injunction against completion of the house, and damages for negligence and negligence per se. Schlumar counterclaimed, alleging slander of title. Schlumar then filed a motion for summary judgment on plaintiff's declaration theory, contending that, as a matter of law, [52 O.S. § 318.10](#) did not apply to him as an adjacent landowner, even if the house was constructed within 125 feet of the wellbore, as [52 O.S. § 318.10](#) is part of the Oklahoma Surface Damages act, [52 O.S. § 318.2](#) et seq., and thus applies only to surface owners and not to adjacent landowners.

¶4 On September 6, 2005, the trial judge signed and filed an order determining that [52 O.S. § 318.10](#) did not apply to this adjacent landowner and, thus, YDF was not entitled to a declaration in its favor. That order was certified for immediate review as a certified interlocutory order.

¶5 The issues presented by this matter are whether [52 O.S. § 318.10](#) applies to adjacent landowners and whether, if it does apply, it constitutes an unconstitutional taking of private property, prohibited by Art. 2 § 23 of the Oklahoma Constitution. We hold that [52 O.S. § 318.10](#) is in fact part of the Oklahoma Surface Damages Act, and as such, applies only to surface owners and not adjacent landowners. The standard of review is *de novo*. *Booth v. McKnight*, [2003 OK 49](#), [70 P.3d 855](#), 860.

¶6 The fundamental rule of statutory construction is to ascertain and give effect to legislative intent, and that intent is first sought in the language of the statute. *World Publishing Co. v. Miller*, [2001 OK 49](#) ¶ 79, [32 P.3d 829](#), 832. When legislative intent cannot be ascertained from the language of a statute, as in cases of ambiguity, we must apply rules of statutory construction. The test for ambiguity in a statute is whether the statutory language is susceptible to more than one reasonable interpretation. *In the Matter of J.L.M.*, [2005 OK 15](#) ¶5, [109 P.3d 336](#). Whether language is ambiguous is a question of law. *American Economy Ins. Co. V. Bogdahn*, [2004 OK 9](#) ¶ 11, [89 P.3d 1051](#), 1054. In construing ambiguous statutory language, we do not limit ourselves to the consideration of a single word or phrase. Rather, we look to the various provisions of the relevant legislative scheme to ascertain and give effect to the legislative intent and the public policy underlying that intent. *World Publishing Co. v. Miller*, [2001 OK 49](#) ¶ 79, [32 P.3d 829](#), 832.

¶7 In the present matter, the statute in question, [52 O.S. Supp. 2003 § 318.10](#) provides:

A. After the effective date of this act, it shall be unlawful to locate any habitable structure within:

1. A radius of one hundred twenty-five (125) feet from the wellbore of an active well; or
2. A radius of fifty (50) feet from the center of any surface equipment or other equipment necessary for the operation of an active well, including, but not limited to, hydrocarbon and brine storage vessels, tanks, compressors, heaters, separators, dehydrators, or any other related equipment.

B. Provided, however, the provisions of this section shall not prohibit an operator and surface owner from agreeing in writing to setback provisions with distances different from those set forth in this section.

¶8 The Oklahoma Surface Damages Act is codified at [52 O.S. § 318.1](#) et. seq. Title 52 § 318.2 sets forth the definitions to be used in the act. It provides:

For purposes of Section 1 through 8 of this act:

1. "Operator" means a mineral owner or lessee who is engaged in drilling or preparing to drill for oil or gas; and

2 "Surface owner" means the owner or owners of record of the surface of the property on which the drilling operation is to occur.

¶9 This statute was passed in 1982. The statute in question in the case at bar was passed in 2003 and was placed numerically with the Oklahoma Surface Damages Act. To interpret § 318.10 it is necessary to turn to the definition section of the Surface Damages Act to define "operator" and "surface owner." The addition of [52 O.S. Supp. 2003 § 318.10](#) appears to not have been by mere happenstance or coincidence as YDF alleges, but rather the intent of the legislature was to create an addendum to the Act.

¶10 The purpose of the Surface Damages Act is to promote the prompt payment of compensation of a surface owner whose land is taken for oil and gas exploration. The Oklahoma Legislature enacted the Surface Damages Act to provide a mechanism to balance the conflicting interests of the owners of two of our State's most important resources; the mineral interest owner and the surface owner. *Ward Petroleum Corp. v. Stewart*, [2003 OK 11 ¶ 5, 64 P.3d 1113](#), 1115. The Surface Damages Act states Oklahoma's policy regarding damage of land caused by oil and gas drilling operation while balancing the interests of oil and gas operators with those of surface owners. *Schneberger v. Apache Corp.* [1994 OK 117, 890 P.2d 847](#), 853.

¶11 In the present matter, Schlumar does not now and has never owned the separate tract of land on which the well is located. Schlumar is not the "surface owner" of the land on which the well sits and therefore the Surface Damages Act does not apply to his land. Having found that [52 O.S. Supp. 2003 § 318.10](#) is part of the Oklahoma Surface Damages Act, this Court has fully disposed of all pertinent questions at bar and we therefore find that the trial court's granting of summary judgment was correct and proper.

**CERTIORARI PREVIOUSLY GRANTED;
ORDER OF THE TRIAL COURT AFFIRMED.**

¶12 **CONCUR: WATT, C.J., LAVENDER, HARGRAVE, KAUGER, EDMONDSON, JJ.**

¶13 **DISSENT: WINCHESTER (JOINS TAYLOR, J.), V.C.J., OPALA (JOINS TAYLOR, J.), TAYLOR (BY SEPARATE WRITING), COLBERT (JOINS TAYLOR, J.), JJ.**

TAYLOR, J., with whom WINCHESTER, V.C.J., and OPALA and COLBERT, JJ., join, dissenting:

¶1 Today's opinion concludes that [52 O.S. Supp. 2003, § 318.10](#) is part of the Oklahoma Surface Damages Act, [52 O.S. 2001, §§ 318.2 - 318.9](#). These are two separate pieces of legislation that relate to different subjects and serve different purposes, and the Legislature has not expressed an intent that § 318.10 is to be treated as a part of the surface damages regime. Accordingly, I must respectfully dissent.

¶2 The Oklahoma Surface Damages Act, enacted in 1982,¹ attempted to guarantee that the development of the oil and gas industry did not become an expense of the land owner. *Davis Oil Co. v. Cloud*, [1986 OK 73, ¶16, 766 P.2d 1347](#), 1351. The Act modified the common law rule that the oil and gas operator is not liable for surface damage caused by reasonable use. *Id.* at ¶10, 766 P.2d at 1349. It prescribed a judicial procedure² for determining actual damages to the surface of the land without regard to the reasonableness of the use. *Id.* at ¶16, 766 P.2d at 1351. "The general purpose of the Act, as we

recognized in *Davis*, was an effort to balance the conflicting interests of the owners of two of our State's important natural resources; the mineral interest holder on the one hand and the land owner on the other." *Houck v. Hold Oil Corp.*, [1993 OK 166](#), ¶17, [867 P.2d 451](#), 457.

¶3 The statute in question, [52 O.S.Supp.2003, § 318.10](#),³ is not concerned with surface damages caused by drilling or operating an oil or gas well. It deals with the location of a habitable structure in relation to the location of an active oil or gas well and oil and gas field equipment. It prohibits the location of a habitable structure - a structure suitable to be occupied by a person - within 125 feet of the wellbore of an active oil or gas well and 50 feet of oil and gas field equipment. The obvious purpose of this prohibition is the **welfare and safety of the public**.

¶4 Here, a residential builder, Schlumar, Inc., is building a new residential structure on land adjacent to a parcel where an active oil well is located. The building site is less than 125 feet from the active oil well. The operator of the well filed this action alleging the builder is violating § 318.10. The parties dispute the meaning of "surface owner" in § 318.10. If § 318.10 is treated as a part of the Oklahoma Surface Damages Act, then the builder clearly does not fall within the Act's definition of "surface owner"⁴ and the operator is not entitled to relief.

¶5 A cardinal rule of statutory construction is to ascertain and give effect to the Legislature's intent and purpose as gleaned from the statute. *Strong v. Laubach*, [2004 OK 21](#), ¶9, [89 P.3d 1066](#), 1070. The majority opinion finds legislative intent to enact § 318.10 as an "addendum to the Act" from the fact that § 318.10 is "placed numerically with the Oklahoma Surface Damages Act." Until today, we have not turned to the section number selected for codification purposes to ascertain legislative intent. The section number for codification, which may be assigned by the publisher of our codified statutes,⁵ is not substantive law and it should not be used as a guide to implied legislative intent.

¶6 I do not view § 318.10 as an addition or amendment to the Oklahoma Surface Damages Act. The Oklahoma Surface Damages Act, as originally enacted, consisted of eight substantive sections codified at § 318.2 through § 318.9. The Legislature could have expressed its intent to add a new section of law to the Act. It did not. As the majority opinion recognizes, § 318.2 defines "operator" and "surface owner" expressly for purposes of sections 318.2 through 318.9. The Legislature could have easily referenced the definitions in § 318.2 in drafting § 318.10. It did not.

¶7 The Legislature enacted § 318.10 in a measure, H. B. 1569 of the First Regular Session of the Forty-Ninth Oklahoma Legislature,⁶ containing a single substantive section. That substantive section, codified at [52 O.S.Supp.2003, § 318.10](#), has nothing to do with surface damages and the common law. It concerns the location of habitable structures. It protects persons and families from potential harm that may be caused by active oil and gas wells in close proximity to their dwellings. It preserves the welfare and safety of the public where a builder has knowledge of the location of active well in relation to new residential dwelling but the buying public does not.

¶8 Were I writing for the Court, I would not utilize the section number of a codified statute as a tool of statutory construction. In the absence of any reference to the Oklahoma Surface Damages Act and in light of the different purposes of § 318.10 and the Act, § 318.10 should be construed and applied as a self-sufficient, free-standing statute **independent** of the surface damages regime. I would reverse the summary judgment and return this cause to the district court for further proceedings.

FOOTNOTES

¹ 1982 Okla. Sess. Laws, ch. 341, codified at [52 O.S.Supp.1982, §§ 318.2](#) - 318.9.

² Even though surface damages may be recovered through the Act's special proceedings, a surface owner may also recover damages in any related tort claims. *Ward Petroleum Corp. v. Stewart*, [2003 OK 11](#), ¶11, [64 P.3d 1113](#), 1116.

³ [52 O.S.Supp.2003, § 318.10](#) reads:

A. After the effective date of this act, it shall be unlawful to locate any habitable structure within:

1. A radius of one hundred twenty-five (125) feet from the wellbore of an active well; or
2. A radius of fifty (50) feet from the center of any surface equipment or other equipment necessary for the operation of an active well, including, but not limited to, hydrocarbon and brine storage vessels, tanks, compressors, heaters, separators, dehydrators, or any other related equipment.

B. Provided, however, the provisions of this section shall not prohibit an operator and surface owner from agreeing in writing to setback provisions with distances different from those set forth in this section.

⁴ [52 O.S.2001, § 318.2](#) defines "surface owner" as the record owner of the surface upon which the drilling operation is to occur.

⁵ For years the Legislature has authorized the publisher of our codified statutes to select any section number to avoid duplication. The standard language used by the Legislature in directing codification of § 318.10 is: "A new section of law to be codified in the Oklahoma Statutes at Section 318.10 of Title 52, unless there is created a duplication in numbering." 2003 Okla. Sess. Laws, ch. 361, §1.

⁶ 2003 Okla. Sess. Laws, ch. 361. The measure contained three sections: Section 1 added a new section to be codified as Section 318.10 of Title 52; Section 2 set forth July 1, 2003 as the effective date; and Section 3 declared an emergency.

Citationizer[®] Summary of Documents Citing This Document

Cite Name	Level
Oklahoma Attorney General's Opinions	
Cite	Name
2009 OK AG 5.	Question Submitted by: The Honorable Danny Morgan, State Representative, District 32
	Cited
Oklahoma Court of Civil Appeals Cases	
Cite	Name
2007 OK CIV APP 55, 164 P.3d 254.	CHESAPEAKE OPERATING, INC. v. LOOMIS
	Discussed
2007 OK CIV APP 79, 167 P.3d 446.	CHESAPEAKE ENERGY MARKETING, INC. v. STATE BOARD OF EQUALIZATION
	Discussed
Oklahoma Supreme Court Cases	
Cite	Name
2006 OK 63, 145 P.3d 1040.	IN THE MATTER OF M.B.
	Discussed

Citationizer: Table of Authority

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Oklahoma Supreme Court Cases	
Cite	Name
1986 OK 73, 766 P.2d 1347, 57 OBJ 2885.	Davis Oil Co. v. Cloud
	Discussed
1993 OK 166, 867 P.2d 451, 65 OBJ 23.	Houck v. Hold Oil Corp.
	Discussed
1994 OK 117, 890 P.2d 847, 65 OBJ 3666.	Schneberger v. Apache Corp.
	Discussed
2001 OK 49, 32 P.3d 829, 72 OBJ 1807.	WORLD PUBLISHING CO. v. MILLER
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Cite Name

[2003 OK 11, 64 P.3d 1113,](#)

[2003 OK 49, 70 P.3d 855,](#)

[2004 OK 9, 89 P.3d 1051,](#)

[2004 OK 21, 89 P.3d 1066,](#)

[2005 OK 15, 109 P.3d 336,](#)

Title 52. Oil and Gas

Cite

[52 O.S. 318.10,](#)

[52 O.S. 318.1,](#)

[52 O.S. 318.2,](#)

Level

[WARD PETROLEUM CORP. v. STEWART](#)

[BOOTH v. McKNIGHT](#)

[AMERICAN ECONOMY INSURANCE COMPANY v. BOGDAHN](#)

[STRONG v. LAUBACH](#)

[IN THE MATTER OF J.L.M.](#)

Discussed at Length

Discussed

Discussed

Discussed

Discussed

Name

[Renumbered as 52 O.S. § 320.1 by Laws 2006, HB 2691, c. 309, § 1, emerg. eff. June 8, 2006](#)

[Agreement to Drill, Operate, and Plug Wells](#)

[Definitions](#)

Level

Discussed at Length

Cited

Discussed at Length

6. WELL SITE SAFETY ZONE ACT RECODIFICATION

WELL SITE SAFETY ZONE (2006 RECODIFICATION)

TEXT:

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

SECTION 1 . RECODIFICATION Section 1, Chapter 361, O.S.L. 2003 (52 O.S. Supp. 2005, Section 318.10), shall be recodified as Section 320.1 of Title 52 of the Oklahoma Statutes, unless there is created a duplication in numbering.

SECTION 2 . It being immediately necessary for the preservation of the public peace, health and safety, an emergency is hereby declared to exist, by reason whereof this act shall take effect and be in full force from and after its passage and approval.

Passed the House of Representatives the 24th day of May, 2006 .

7. AG OPINION



W. A. DREW EDMONDSON
ATTORNEY GENERAL OF OKLAHOMA

ATTORNEY GENERAL OPINION
09-5

The Honorable Danny Morgan
State Representative, District 32
State Capitol, Room 548
Oklahoma City, Oklahoma 73105

March 26, 2009

Dear Representative Morgan:

This office has received your request for an official Attorney General Opinion in which you ask, in effect, the following questions:

1. **Did the legislative recodification of the statute previously numbered as 52 O.S.Supp.2003, § 318.10 (see 2003 Okla. Sess. Laws ch. 361, § 1), to 52 O.S. Supp.2008, § 320.1 (see 2006 Okla. Sess. Laws ch. 309, § 1), remove the statute from what is commonly referred to as the Oklahoma Surface Damages Act, 52 O.S.2001 & Supp.2008, §§ 318.2 – 318.9 (see 1982 Okla. Sess. Laws ch. 341, §§ 1-8)?**
2. **If so, do the restrictions on locating a habitable structure near an oil and gas well and related equipment in 52 O.S.Supp.2008, § 320.1, apply to adjacent surface owners, or just owners of the surface lands on which an oil and gas well and related surface equipment is located?**

Title 52 O.S.Supp.2003, § 318.10 (see 2003 Okla. Sess. Laws ch. 361, § 1(A)) was enacted in 2003 to prevent a habitable structure from being located within 125 feet of the wellbore of an active oil and gas well and within 50 feet of any related surface equipment, unless the surface owner and oil and gas operator agreed otherwise in writing. *Id.*¹

¹ Title 52 O.S.Supp.2003, § 318.10 provided:

- A. After the effective date of this act, it shall be unlawful to locate any habitable structure within:
 1. A radius of one hundred twenty-five (125) feet from the wellbore of an active well; or
 2. A radius of fifty (50) feet from the center of any surface equipment or other equipment necessary for the operation of an active well, including, but not limited to, hydrocarbon and

(continued...)

Section 318.10 was codified in the Oklahoma statutes following 52 O.S.2001 & Supp.2008, §§ 318.2 – 318.9, which were originally enacted in 1982 (*see* 1982 Okla. Sess. Laws ch. 341, §§ 1 – 8), and has been commonly referred to as the Oklahoma Surface Damages Act. *See, e.g. Lierly v. Tidewater Petroleum Corp.*, 139 P.3d 897, 903 (Okla. 2006); *Turley v. Flag-Redfern Oil Co.*, 782 P.2d 130, 132 (Okla. 1989). The purpose of the Oklahoma Surface Damages Act is to promote prompt payment of compensation to surface owners whose land will be used for oil and gas operations. *Tower Oil & Gas Co. v. Paulk*, 776 P.2d 1279, 1281 (Okla. 1989).

Recently, in a 5-4 decision, the Oklahoma Supreme Court found that Section 318.10 was part of the Oklahoma Surface Damages Act. *YDF, Inc. v. Schlumar, Inc.*, 136 P.3d 656, 659 (Okla. 2006). The numeric placement of Section 318.10, at the end of the Oklahoma Surface Damages Act, following Sections 318.2 – 318.9, was key to the court’s decision that the Legislature intended Section 318.10 to be part of the Oklahoma Surface Damages Act. *Id.* As a result of finding Section 318.10 was part of the Oklahoma Surface Damages Act, the court held the prohibition on the location of a habitable structure in Section 318.10 applied only to the owners of the surface lands on which an active oil and gas well was or would be located. The court found that because the purpose of the Oklahoma Surface Damages Act was to promote prompt compensation to surface owners whose land will be used for oil and gas operations, the prohibition against location of a habitable structure did not apply to adjacent surface owners. *Id.* Consequently, the court found a habitable structure could be constructed within 125 feet of an active oil well located on adjacent lands, despite the well operator’s objection. *Id.*

Within days following the court’s decision in *Schlumar*, the Legislature passed, and the Governor signed, legislation recodifying Section 318.10 to Section 320.1. *See* 2006 Okla. Sess. Laws ch. 309, § 1. Your questions seek to determine the effect of the recodification of 52 O.S.Supp.2003, § 318.10 as 52 O.S.Supp.2008, § 320.1.

In determining the effect of the recodification we must ascertain and give effect to legislative intent. *Bronson Trailers & Trucks v. Newman*, 139 P.3d 885, 890 (Okla. 2006). In recodifying the statute, the Legislature is presumed to be familiar with the judicial construction of the statute in the *Schlumar* case. *See Special Indem. Fund v. Figgins*, 831 P.2d 1379, 1382 (Okla. 1992).

As pointed out by the dissent in *Schlumar*, this case was the first time the Oklahoma Supreme Court turned to the section number selected for codification purposes to ascertain legislative intent.

¹(...continued)

brine storage vessels, tanks, compressors, heaters, separators, dehydrators, or any other related equipment.

- B. Provided, however, the provisions of this section shall not prohibit an operator and surface owner from agreeing in writing to setback provisions with distances different from those set forth in this section.

Id.

Schlumar, 136 P.3d at 660 (Taylor, J., dissenting). As a result, there are no guiding Oklahoma cases to determine the effect of a recodified statute following a judicial interpretation based on statutory numbering. The most analogous cases are those dealing with the Legislature's amendment of the language of a statute following judicial interpretation of the statute.

When amending a statute, the Legislature is generally considered to have intended to either clarify a doubtful statute or to change an existing law. *Johnson v. City of Woodward*, 38 P.3d 218, 223 (Okla. 2001) (citation omitted). The fact that almost immediately following the court's decision in *Schlumar* the Legislature recodified Section 318.10 to Section 320.1, so the statute would no longer be placed numerically adjacent to the Oklahoma Surface Damages Act, indicates the Legislature's intent to effect a change so that the statute would not be part of the Oklahoma Surface Damages Act. It cannot be presumed the Legislature did not have an intended purpose in changing the numbering of the statute, as the Legislature will never be presumed to have done a vain and useless act. *Curtis v. Bd. of Educ.*, 914 P.2d 656, 659 (Okla. 1995).

With the recodification of Section 318.10 to Section 320.1, there are now other statutes, unrelated to the Oklahoma Surface Damages Act, located between the Act and Section 320.1. These include 52 O.S.2001, §§ 318.21 – 318.23, entitled the Seismic Exploration Regulation Act, and 52 O.S.2001, § 320, defining "growing crops" for oil and gas operations purposes. Because Section 320.1 is no longer numerically adjacent to or a part of the Oklahoma Surface Damages Act, Section 320.1 must be interpreted on its own, as an independent statute. As such, Section 320.1 prohibits a habitable structure from being located within 125 feet of an active oil and gas well and within 50 feet of surface equipment necessary to the operation of an active oil and gas well, absent the written agreement of the operator and surface owner otherwise. The prohibition in Section 320.1 is no longer limited to owners of the surface lands on which an oil and gas well is located, but applies regardless of whether the habitable structure is located on the surface lands on which the oil and gas well is located, or on adjacent lands.

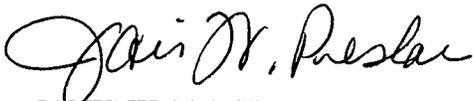
It is, therefore, the official Opinion of the Attorney General that:

- 1. The legislative recodification of the statute previously numbered as 52 O.S.Supp.2003, § 318.10 (see 2003 Okla. Sess. Laws ch. 361, § 1), to 52 O.S. Supp.2008, § 320.1 (see 2006 Okla. Sess. Laws ch. 309, § 1), removed the statute from what is commonly referred to as the Oklahoma Surface Damages Act, 52 O.S.2001 & Supp.2008, §§ 318.2 – 318.9 (see 1982 Okla. Sess. Laws ch. 341, §§ 1 – 8).**
- 2. Because 52 O.S.Supp.2008, § 320.1 is no longer part of the Oklahoma Surface Damages Act, it must be read as an independent statute, prohibiting a habitable structure from being located within 125 feet of an active oil and gas well, or within 50 feet of surface equipment necessary to the operation of an active oil and gas well, absent the written agreement of the surface owner and the operator otherwise. The**

prohibition of a habitable structure in Section 320.1 applies regardless of whether the structure is located on the surface lands on which the oil and gas well is located, or on adjacent lands.



W. A. DREW EDMONDSON
ATTORNEY GENERAL OF OKLAHOMA



JANIS W. PRESLAR
ASSISTANT ATTORNEY GENERAL

