IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

IN RE:

ALICE SUE MCCULLOUGH — **CASE NO. 04-02006 JEE**
AND DAVIS DARRELL MCCULLOUGH — **CHAPTER 11**
Debtor

ALICE SUE MCCULLOUGH AND
D.D. MCCULLOUGH
Plaintiffs

v. — **ADV. PROC. 05-00053 ERG**

DENBURY ONSHORE, LLC
Defendant

OPINION

The matter before the court is the Motion for Summary Judgment filed by the defendant in this matter, Denbury Onshore, LLC ("Denbury"), in which the court is requested to determine that Denbury cannot be liable to the plaintiffs, Alice Sue McCullough and D.D. McCullough, for trespass. Having considered the pleadings, briefs and supporting documentation, the court concludes that the Motion for Summary Judgment should be granted as follows.

I. FINDINGS OF FACT

1. A petition for relief under Chapter 13 of Title 11 of the United States Code was filed by Davis Darrell McCullough and Alice Sue McCullough, the Debtors herein, on April 16, 2004. The case was subsequently converted to Chapter 11.

2. The Debtors filed an adversary complaint against Denbury Onshore, LLC in March of 2005 alleging intentional and negligence trespass and seeking damages. Denbury is operator of the West Mallalieu Field Unit and lessee of the mineral estate underlying the surface estate owned by the McCulloughs. The McCulloughs allege that Denbury placed an unwanted and

unauthorized pipeline on their property, without permission, regardless of other pipelines legally on the plaintiffs' property. The plaintiffs request in their complaint that Denbury be required to remove the pipelines, compensate the plaintiffs for damages and fees, and further request punitive damages.

3. The defendant, Denbury, filed its Motion for Summary Judgment requesting that the court determine that it acted within its rights in constructing the pipeline and that it cannot be liable for trespass.

4. The plaintiffs do not dispute the factual background presented in the Motion for Summary Judgment. In 1995, the McCulloughs purchased land in Lincoln County, Mississippi, as joint tenants from Margaret Aleen Bowman. Prior to the purchase, the minerals underlying the land were leased. Denbury is the successor-in-interest to the mineral leases. In May of 1981, the working interest owners in the Unit entered into the Unit Agreement and the Unit Operating Agreement, under which the Unit operator has the exclusive right to conduct Unit operations. In March of 1982, the Mississippi State Oil and Gas Board established the Unit in an Order stating that unitization was reasonable and necessary in order to recover effectively the maximum amount of oil and gas from the unit and to prevent waste. On April 22, 1982, Shell Oil Company, the operator of the Unit at the time, filed a Certificate of Effectiveness with the Chancery Court of Lincoln County, Mississippi, establishing the effective date of the Unit to be April 30, 1982.

5. A right-of-way and easement were obtained by Shell Oil Company from Clifford Bowman and Margaret Aleen Bowman. Shell laid a pipeline within the right-of-way. The right-of-way grant contains a provision that the agreement "shall be binding upon the heirs, executors,

administrators, successors, and assigns of the parties hereto; and the rights and easements herein granted may be leased or assigned, together or separately and in whole or in part."

6. Paragraph (2) of the Right of Way Grant provides the right to lay additional pipelines in the right-of way as follows:

> (2) The right at any time or times to lay, construct, operate, inspect, maintain, repair, renew, substitute, change the size of and remove additional pipelines and appurtenances on the land upon payment of the same consideration for each such additional line as paid for the first pipeline. Each such additional line shall be laid subject to the same rights and conditions as apply to the first line.

Right of Way Grant, paragraph (2).

7. Denbury was named operator of the Unit on or about April 1, 2001, and became bound to the Unit Agreement and Operating Agreement, as well as the Leases and existing right-of ways.

8. Paragraph 10.1 of the Unit Agreement contains the following provision:

> Grant of Easements. Working Interest Owners shall have the right to use as much of the surface of the land within the Unit Area as may be reasonably necessary for Unit Operations and the removal of Unitized Substances from the Unit Area . . . .

Unit Agreement West Mallalieu Field Unit Lincoln County, Mississippi, Article 10, section 10.1.

9. The Leases involved in the Unit contain the following provision specifically in regard to pipelines:

> Lessor . . . does hereby grant, lease and let unto lessee the land covered hereby for the purposes and with the exclusive right of exploring, drilling, mining and operating for, producing and owning oil, gas (including carbon dioxide), sulphur and all other minerals (whether or not similar to those mentioned), together with the right to make surveys on said land, lay pipe lines, establish and utilize facilities for surface or subsurface disposal of salt water, construct roads and bridges, dig canals, build tanks, power stations, power lines, telephone lines, employee houses and other structures on said land, necessary or useful in lessee's operations in exploring, drilling for, producing, treating, storing and transporting

> minerals produced from the land covered hereby or any other land adjacent thereto.

Oil, Gas and Mineral Lease at paragraph 1.

10. According to the Affidavit of Dalton Case, a landman for Denbury Onshore, LLC, Denbury approached Plaintiff D.D. McCullough in January of 2003, regarding the need to place a pipeline on the existing right-of way. Case indicated in his affidavit that it is common practice to negotiate Damage Release and Easements with surface owners but that the agreements are not required since Denbury has the right under the oil and gas leases to use as much of the surface as is reasonably necessary. Case further stated that McCullough did not want to sign the agreement and indicated he had hired an attorney and planned to file suit against Denbury over an oil and gas leak on his property and would add damages for laying the subject pipeline to that lawsuit. Case stated that Denbury has the right to lay pipeline without surface owner approval. Case stated that Denbury constructed and buried the pipeline parallel to an existing pipeline approximately 150 to 200 feet on McCullough's property, and indicated that the pipeline is wholly contained within an existing thirty foot right-of way that was obtained by Shell Oil Company. The pipeline is used to carry CO_2.

11. In its Motion for Summary Judgment, Denbury claims that:

> As operator and mineral lessee of the Unit, Denbury is granted the right through mineral leases to explore, drill, mine and operate for oil and gas together with the right to lay pipelines over the servient surface estate. There is no requirement that Denbury secure any permission or additional agreement from the surface owner prior to constructing a pipeline. There is no obligation on the part of Denbury to compensate the Plaintiffs for the construction of a pipeline upon their surface estate. Further, Denbury laid the pipeline within a pre-existing right-of-way.
>
> The Plaintiffs' Complaint is limited to allegations of trespass . . . The Plaintiffs do not make the claim that by constructing and laying the subject pipeline, Denbury used more of the surface than was reasonable and necessary.

> As a result, Denbury acted completely within its rights and cannot be liable for trespass.

Denbury Onshore, LLC's Motion for Summary Judgment at 5-6.

12. In the McCulloughs response to the Motion for Summary Judgment, the Plaintiffs deny that Denbury had the absolute right to lay the pipeline claiming that no compensation was given to the Plaintiffs for the right to lay the additional pipe pursuant to the Right of Way Grant. The Plaintiffs allege that consideration was paid by Shell Oil Company, the predecessor-in-interest of Denbury, to the Bowmans, the Plaintiffs' predecessor-in-interest, in the sum of $835.00, on July 17, 1979. The plaintiffs assert that the defendant should be estopped from claiming it acted in accordance with the Lease and Right of Way due to the failure to pay or offer $835.00 as consideration for laying additional pipeline.

II. CONCLUSIONS OF LAW

The court has jurisdiction over the parties and subject matter pursuant to 28 U.S.C. § 1334 and § 157. Although the court does not consider the matter to be a core proceeding, the court has jurisdiction to determine this issue pursuant to 28 U.S.C. § 157(c)(2) given the district court's denial of the Plaintiff's Motion to Withdraw Reference and of the Motion for Reconsideration.

The two count Complaint filed by the McCulloughs against Denbury alleges intentional trespass and negligent trespass by Denbury claiming that the subject pipeline was placed upon the plaintiffs' property without authorization. As argued by the Defendant, however, Denbury's right to lay the subject pipeline in the existing right-of-way on the land owned by the McCulloughs is established by the agreements entered between the predecessors-in-interest to the

parties before the court, including the Oil, Gas and Mineral Leases, the Unit Agreement and Operating Agreement, and the Right of Way Grant, and portions of those agreements cited above.

Denbury requests summary judgment pursuant to Federal Rule of Bankruptcy Procedure 7056 urging the court that it cannot be liable to the plaintiffs for trespass. The court agrees with the principles set out in cases cited by Denbury that establish the right of a mineral owner or lessee to use as much of the surface as is reasonably necessary to exercise its right to recover minerals without liability or payment of compensation for surface damage unless there is wanton or negligent destruction of land or use of more land than is reasonably necessary. *EOG v. Resources, Inc. v. Turner,* 908 So. 2d 848, 854 (Miss. App. 2005); *Reynolds v. Amerada Hess Corp.,* 778 So. 2d 759, 762 (Miss. 2000); *Placid Oil Co. v. Byrd,* 217 So. 2d 17, 18 (Miss. 1969)(mineral owner and operator committed no trespass in entering upon lands); *Miller v. Crown Central Petroleum Corp.,* 309 S.W. 2d 876 (Tex. App. 1958); *Charles F. Hayes & Associates., Inc. v. Blue,* 233 So. 2d 127, 128 (Miss. 1970); *Lewis v. Ada Oil C.,* 279 So. 2d 622 (Miss. 1973); *Roye Realty & Developing, Inc. v. Watson,* 791 P. 2d 821 (Okla. App. 1990).

However, the plaintiffs distinguish the cases cited by the Defendant by arguing that unlike the case here, in those cases there were no specific agreements requiring compensation. The McCulloughs argue that Denbury has a legal obligation to pay compensation pursuant to paragraph (2) of the Right of Way Grant, that provides, as stated above:

> (2) The right at any time or times to lay, construct, operate, inspect, maintain, repair, renew, substitute, change the size of and remove additional pipelines and appurtenances on the land upon payment of the same consideration for each such additional line as paid for the first pipeline. Each such additional line shall be laid subject to the same rights and conditions as apply to the first line.

Right of Way Grant, paragraph (2) (emphasis added). Additionally, the court notes Denbury's

citation to *Hobgood v. Koch Pipeline Southeast, Inc.,* 769 So. 2d 838 (Miss. 2000). In that case the court stated that, "In construing the language of an easement, the rules for the interpretation of deeds and other written instruments apply . . . An instrument that is clear, definite, explicit, harmonious in all its provisions and free from ambiguity must be given effect." *Id.* at 843.

The McCulloughs assert that consideration of $835.00 was initially paid to their predecessor-in-interest for laying the initial pipeline. In its responsive brief, Denbury made the following offer.

> Plaintiffs fail to inform the Court that Denbury attempted on numerous occasions to pay Plaintiffs **more than $835.00** in consideration for the construction and laying of the Subject Pipelines. The Plaintiffs refused to accept the consideration and preferred to settle its dispute by filing this litigation.
>
> Because Plaintiffs' only defense against summary judgment is that $835.00 was never actually received by the Plaintiffs, Denbury will gladly tender that amount to eradicate any further defense the Plaintiffs may have.

Denbury Onshore, LLC's Reply Brief in Support of Motion for Summary Judgment at 2-3.

Based on the parties' agreements and upon case law, the court concludes that Denbury had the right to lay the pipeline upon the McCulloughs' property and did not commit an intentional or negligent trespass by exercising its rights thereto. Denbury appears to take the position based upon case law cited that there is no requirement to compensate the surface owner. The court would consider the matter of whether Denbury was obligated to pay compensation pursuant to the requirement in the Right of Way Grant to be a separate issue from whether or not Denbury was guilty of trespass. However, in light of Denbury's assertion that it would tender $835.00 to the McCulloughs in response to the defense raised, the court is not inclined at this point to make a specific legal determination as to whether Denbury is obligated under the agreements to make the payment.

The court concludes that Denbury is not liable to the McCulloughs for trespass pursuant to clear language in the agreements between the parties and upon case law, and that Denbury's Motion for Summary Judgment should be granted as a matter of law. The court does not consider it necessary to make a determination upon the separate issue of whether consideration should be paid to the McCulloughs for the pipeline for purposes of this decision. Furthermore, the court would consider the matter completely resolved in the event the payment of $835.00 is made by Denbury to the McCulloughs as offered.

An order will be entered consistent with these findings and conclusions pursuant to Federal Rule of Bankruptcy Procedure 9021 and Federal Rule of Civil Procedure 58. This opinion shall constitute findings and conclusions pursuant to Federal Rule of Bankruptcy Procedure 7052 and Federal Rule of Civil Procedure 52.

DATED this the 26th day of September, 2007.

/s/ Edward R. Gaines
EDWARD R. GAINES
UNITED STATES BANKRUPTCY COURT

ATTORNEY FOR PLAINTIFFS ALICE SUE MCCULLOUGH AND D.D. MCCULLOUGH:
Al Shiyou
Shiyou Law Firm
P.O. Box 310
Hattiesburg, MS 39403

ATTORNEY FOR DEFENDANT DENBURY ONSHORE, LLC
William F. Blair
Troy Farrell Odom
Blair & Bondurant, P.A.
P. O. Box 321423
Jackson, MS 39232