

OG ENERGY EDUCATION SERIES



OLIVA  
GIBBS LLP

# SURFACE RIGHTS

GAME-CHANGING ISSUES SURFACE  
OWNERS MUST DEAL WITH

WEDNESDAY, JULY 12, 2023  
12:00 PM TO 1:00 PM CT



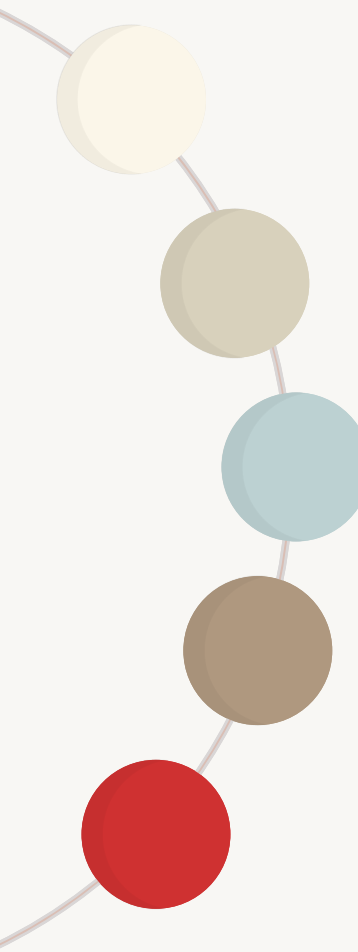
**Brad Gibbs**

Partner | Houston

[WWW.OGLAWYERS.COM](http://WWW.OGLAWYERS.COM)



# Overview

- 
- I. Dominant Estate Theory
  - II. Estate Owners' Rights
  - III. Accommodation Doctrine
  - IV. Surface Use Agreements
  - V. Ownership of the Pore Space and Underground Storage
  - VI. Water Rights

# Surface Use and Mineral Severances

- ❖ Ownership rights in a tract of land are often split between the surface estate and the mineral estate.
- ❖ An owner of both the surface estate and the mineral estate can sell, convey, or partially convey the rights to *either (or both)* the surface or the mineral estate.
- ❖ The new owners can then convey or partially convey their interests to new parties.
- ❖ In practice, multiple conveyances can create numerous fractional interests in a mineral estate.

# Ownership Rights – Bundles of Joy

Surface Estate Owner	Mineral Estate Owner	Executive Right Holder
<ul style="list-style-type: none"><li>❖ The right to use and enjoy the surface, except for any surface rights that belong to the mineral owner</li></ul>	<ul style="list-style-type: none"><li>❖ Royalty</li><li>❖ Bonus</li><li>❖ Delay rentals</li><li>❖ Executive Right</li><li>❖ Has the right to develop minerals (developmental right), including the right of ingress and egress</li></ul> 	<ul style="list-style-type: none"><li>❖ The right to lease</li><li>❖ Often considered “fused” with the developmental right (but not always)</li></ul>

# Dominant Estate Theory

- ❖ When a mineral estate is severed from the surface estate, the mineral estate is considered to be the **dominant estate**, and the surface estate is considered the **servient estate**.
  - Mineral estate owner may thus make **reasonable use** of the surface in order to develop their mineral acreage without being liable for trespass or infringe on surface owner's right to "quiet enjoyment".

# But What is Considered “Reasonable Use”?

- ❖ Reasonable use generally includes geophysical exploration, drilling, building roads, installing machinery and storage tanks, *etc.*
- ❖ But does it cover everything? Is the dominant estate all powerful?
  - Spoiler: It is not.



# A Few Broad Categories of Surface Rights

- ❖ Rights Created Under an Oil and Gas Lease
- ❖ Rights Created by the Accommodation Doctrine
- ❖ Rights Created by Statute
- ❖ Rights Under a Surface Use Agreement or Easement

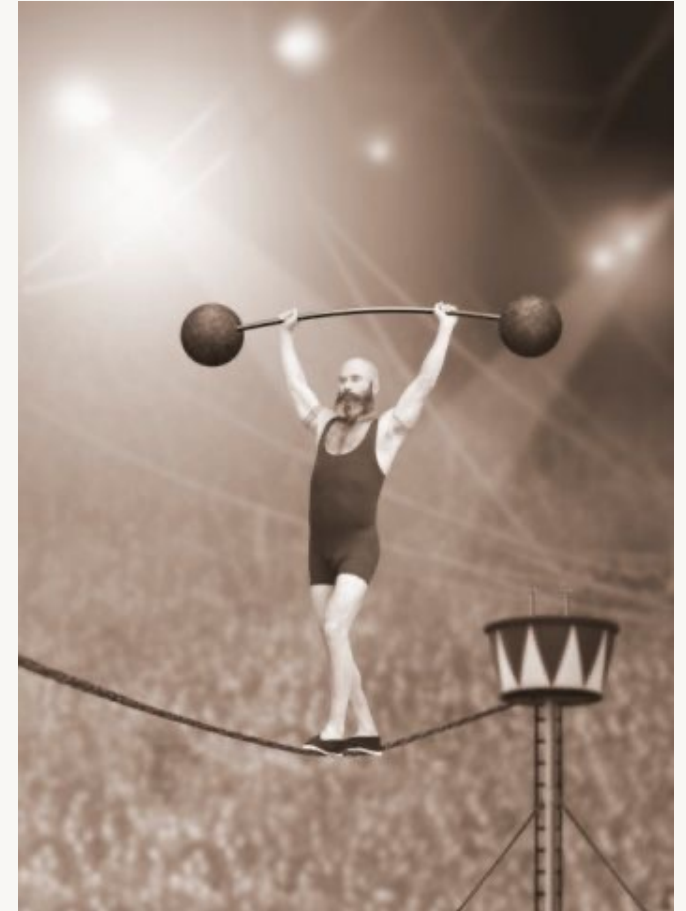


# Rights Under an Oil and Gas Lease

- ❖ The typical oil and gas lease grants the lessee the right to use as much of the surface as is reasonably necessary to conduct operations.
- ❖ This generally includes:
  - Exploring, prospecting, producing, drilling, mining, seismic
  - Laying pipelines, building roads, tanks, power stations, telephone lines, etc.
    - Pipelines will typically have to be below plow depths, and facilities at least ~200' away from existing structures.
    - What is reasonable may come into question. For example, how *many* pipelines are permitted? At one point do you have to negotiate a new easement or SUA for further consideration?
  - May include **MANY** additional custom provisions (see also federal leases).

# Accommodation Doctrine

- ❖ **Purpose**: Seeks to balance the competing interests of the surface owner's continued use of the surface with the necessity of ingress and egress for the mineral owner



## Accommodation Doctrine – *Getty Oil Co. v. Jones (1971)*

- ❖ **Facts:** Getty installed a pump jack to produce oil from the lessor's land. The pump jack, extending 17 feet high, interfered with Jones' irrigation operations.
- ❖ **Held:** The court found that Getty had reasonable, low-cost alternatives to the pump jack.
- ❖ **Getty Oil Rule:** If the proposed use of the surface by the mineral owner will substantially impair *existing* surface uses AND if the mineral owner has reasonable alternatives available, the mineral owner MAY have to accommodate the surface owner.



# Current Analysis of the Accommodation Doctrine in Texas

1. Surface owner has an existing use
2. The mineral owner's proposed use completely precludes or substantially impairs the surface owner's existing use.
3. The surface owner has no reasonable alternatives
4. The mineral owner has "alternative, reasonable, customary, and industry-accepted methods available" to develop the minerals.



**Note:** *The Accommodation Doctrine may strengthen over time or after a surface facility or use is in existence for a while.*

# *Lyle v. Midway Solar, LLC*

## Facts:

- ❖ A renewable energy company constructed a solar facility that covered 70% of the 315-acre surface estate.
- ❖ O&G had **never** been produced on this tract (Midway probably got lucky here).
- ❖ Plaintiffs sued based on breach of a 1948 mineral deed, trespass, the accommodation doctrine, and quiet title (adjacent surface waivers).
- ❖ Monetary damages and removal
- ❖ The plaintiffs claimed that their ability to develop the mineral estate had been impaired by the construction of the solar facility and that the Accommodation Doctrine should allow them to prevent any surface use that might one day interfere with the extraction of their minerals.

## *Lyle v. Midway Solar, LLC* (Continued)

- ❖ **Holding:** Until the Lyles **seek to develop their minerals**, Midway owes no duty to the Lyles respecting the surface usage.
  - The mineral owner cannot have the unilateral right to dictate the use of the surface.
  - The theory of the dominant estate is not absolute.
  - The Accommodation Doctrine applies.
  - What does “seek to develop” mean?



# Another Approach: TX Qualified Subdivision Statute (TNRC 92.001-007)

- ❖ The QSS is an exception to the common law Accommodation Doctrine.
  - It provides a procedure for surface estate owners to limit mineral owners' use of the surface based on the surface's future development, delegating administration to the RRC.
  - A QS is created by filing a plat for approval with the RRC and in the county.
  - The QSS states that (i) a single tract can't be greater than 640 acres, (ii) it has to be in a county of at least 400,000 residents or in an adjacent county of at least 140,000, (iii) it has to be for residential, commercial, or industrial use, and (iv) there has to be a designated 2-acre (at least) drill site for every 80 acres and allowances for road and pipeline easements.
  - The RRC will then have a hearing to consider “the adequacy of the operations sites and road and pipeline easements.”
  - Note that the 140,000-person population limits you to ~35 of the 255 counties in Texas.

# TX Qualified Subdivision Statute (Cont.)

- ❖ *SWEPI LP v. R.R. Comm'n of Tex. & Hidalgo County*
  - Case interpreting the QSS
  - SWEPI (i) took issue with the fact that the RRC had allowed two contiguous tracts to be developed for a landfill and (ii) argued that a landfill was not an "industrial" use within the meaning of the QSS.
  - SWEPI lost on both counts.
  - The court notes that the statute is intended to maximize both surface use and mineral use in population-dense areas.
  - It is not too much of a stretch to imagine a solar facility being an industrial use within the meaning of the statute. Otherwise, Texas has very little in the way of mineral "condemnation" outside the accommodation doctrine.

# Accommodation Doctrine – Different Jurisdictions

- ❖ Colorado– Statute (CRS § 34-60-127 Reasonable Accommodation)
  - An operator shall conduct oil and gas operations in a manner that accommodates the surface owner by minimizing incursion and damage to the surface of the land.
  - The standard of conduct set forth in the section shall not be construed to prevent an operator from entering upon and using that amount of the surface as is **reasonable and necessary** to explore for, develop, and produce oil and gas.

# Accommodation Doctrine – Different Jurisdictions

- ❖ New Mexico – Surface Owners’ Protection Act (NM Stat. § 70-12-4)
  - Under SOPA, an operator shall compensate the surface owner for damages sustained by the surface owner, as applicable, for loss of agricultural production and income, lost land value, lost use of and lost access to the surface owner’s land and lost value of improvements caused by oil and gas operations.
  - If the court finds that compensation is owed under SOPA, the court may also award the prevailing party with compensation defined under NM Stat. § 70-12-7.

# Surface Use Agreements

## ❖ Purpose

- Lay out the rights and obligations of the parties as to the use of the surface
- Allow parties to resolve competing interests and come to a voluntary agreement through negotiation, rather than confrontation and litigation



# Surface Use Agreements

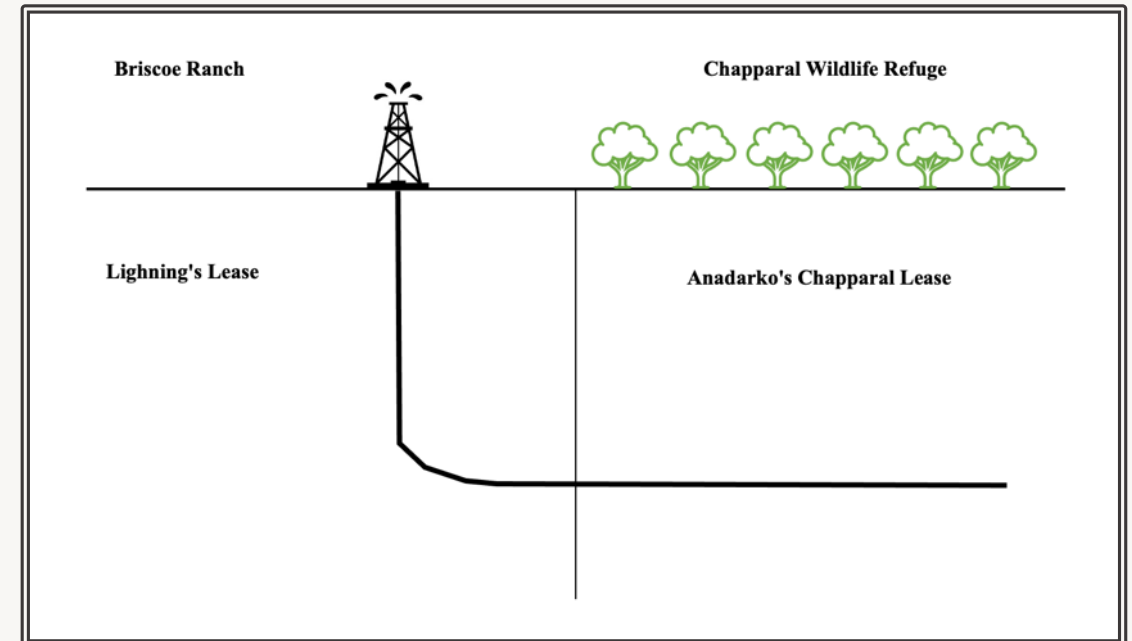
- ❖ No two are alike because it is a heavily negotiated instrument.
- ❖ Common Terms:
  - Location of wells and pipelines
  - Limitations on water use
  - Prohibited activities (ex. Hunting, fishing, etc.)
  - Prohibited locations
  - Notice of operations
  - Damages
  - Agreement term limit
  - Price per acre
  - Use of existing roads
  - Annual rentals
  - Frac pits, flowback pits, tanks, and holding tanks
  - Restoration and reseedling
  - Dust and noise abatement

# Surface Waivers & Accommodation Agreements

- ❖ A surface waiver is a broad voluntary agreement between the surface estate and the mineral estate that governs the relationship between the parties.
- ❖ An accommodation agreement is more tailored than a surface waiver
  - Accommodation agreements may include drill pad size and location, shared use of roads, notice of operation provisions, consent to assign, etc.
- ❖ Both can prevent mineral estate owners from interfering with surface operations.
- ❖ Will likely require a payment of some form to secure the agreement
- ❖ Operators are under **NO** obligation to sign one.

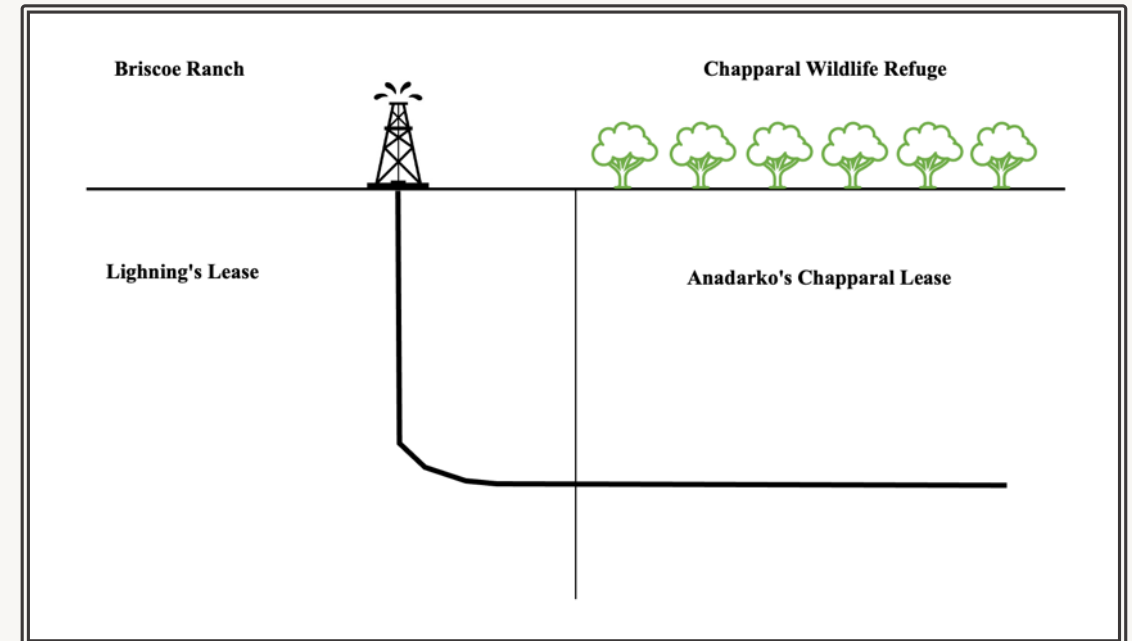
# Lightning Oil Co. v. Anadarko - How Broad is an SUA?

- ❖ **Issue:** To what extent does the surface owner have control over the “subsurface matrix” that “undergirds” the surface estate?
- ❖ In *Lightning*, the surface owner of Brisco Ranch authorized Anadarko vis SUA to drill through Lightning Oil’s existing mineral leasehold in order to extract minerals from the adjacent protected state tract.
- ❖ Lightning Oil sued to enjoin Anadarko’s drilling, arguing that such drilling constitutes a subsurface trespass because it would interfere with Lightning’s dominant mineral estate and its exclusive right to produce the minerals.



## Lightning (Continued)

- ❖ The Texas Supreme Court rejected Lightning Oil's arguments, holding that an unauthorized interference with the place where the minerals are located only constitutes a trespass if the interference substantially infringes on the mineral lessee's ability to exercise its rights.
  - Lightning was not able to prove that it had specific plans to use that specific portion of the surface/subsurface
  - Any interference was minimal.
- ❖ **Takeaway:** If no limits are placed on a surface owner, the surface owner may authorize drilling by multiple third parties, which could infringe on an operator's ability to produce their mineral estate.



## *Key Operating & Equipment, Inc. v. Hegar*

- ❖ This dispute arose from the use of a road across one tract of land to access the producing well within the pooled unit on another tract of land.
- ❖ **Holding:** A lessee in a pooled unit has the right to utilize the entire surface acreage of the pooled unit, regardless of where the well will be drilled or where the actual production occurs.
  - The primary legal consequence of pooling is that production and operations anywhere on the pooled unit are treated as if they have taken place on each tract within the unit
  - Because production from the pooled part of the contiguous tract was legally producing from the pooled part of the Hegar Tract, Key had the right to use the road to access the pooled part of the contiguous tract.

# Credit Info

- ❖ We will be sending a follow-up email with further credit information in the upcoming week(s).
- ❖ **Please download the AAPL Affidavit from the handouts section before signing off.**
  - We won't be sending the affidavit separately until we've sent our follow-up email.
- ❖ This program is eligible for 1 credit towards RL, RPL, or CPL recertification and 1 credit for Ethics recertification, totaling 1 credit.
  - AAPL component code: **OGLA71223**
- ❖ We've also applied for:
  - MCLE Credit in **Oklahoma, Texas, Ohio,** and **Louisiana**. Bar approval is pending.
  - NADOA for a **CDOA Core Credit** and NALTA for a **CPLTA credit**. Credit is pending.
- ❖ Complete the post-event survey after the program has ended.

# Pore Space and Underground Storage

- ❖ Tax incentives and carbon credits related to Carbon Capture and Storage/Sequestration have created renewed interest in underground storage and injection.
- ❖ But who owns the pore space?
  - **American Rule (Majority)**: The mineral estate does not include ownership of the geological formation or “matrix of earth” underlying the surface.
  - **English Rule (Minority)**: Allocates pore space ownership to the mineral owner.
- ❖ *Lightning Oil v. Anadarko* – Ownership of the surface includes the mass of earth undergirding the surface.
- ❖ *Humble Oil v. West* – Surface ownership includes the matrix of underlying earth (*i.e.*, the reservoir storage space).
- ❖ *Springer Ranch v. Jones* – Ownership of the hydrocarbons does not give the mineral owner ownership of the earth surrounding those substances.

# Salt Cavern Ownership

- ❖ Underground salt domes are commonly found on the TX gulf coast and Western LA.
  - Salt extraction creates caverns within these domes that are valuable for storage and CCS.
- ❖ *Mapco, Inc. v. Carter (1991)* – 9th Ct. of Appeals held that the **owner of a fee interest in salt** retains a property interest in the subsurface caverns created by mining activities.
- ❖ *Myers-Woodward v. Underground Services (2022)* – 13<sup>th</sup> Ct. of Appeals held that the subsurface caverns belong to the **surface owner** (even if created by salt mining operations).
  - The COA declines to follow *Mapco*, and treats caverns artificially created by salt mining efforts the same as naturally occurring pore space.
  - Pending before the Supreme Court. Stay tuned...

# Groundwater and the Accommodation Doctrine

- ❖ The Accommodation Doctrine applies to owners of a severed groundwater estate, not just to the mineral estate.
- ❖ *Coyote Lake Ranch, LLC v. City of Lubbock, 498 S.W.3d 53 (2016)*. **Facts:**
  - Coyote Lake Ranch deeded its groundwater to the City of Lubbock in 1953, reserving water for domestic use, ranching operations, oil and gas production, and agricultural irrigation.
  - The City of Lubbock announced plans in 2012 to expand water-extraction efforts and planned to drill 20 test wells, with an additional 60 to come.
  - The Ranch opposed these efforts, citing increased erosion and unnecessary injury to the surface estate.

# Water Rights and Hydraulic Fracturing

- ❖ Fracking is estimated to use between 70 billion and 140 billion gallons of water each year.
  - This is equivalent to the same amount of water annually consumed by Houston or Chicago.
- ❖ In some states, such as Texas, the landowner owns the groundwater in the place beneath his or her land.
- ❖ To access the groundwater needed, it is common for a water use provision to be in the mineral lease or in a surface agreement.
- ❖ There are limits to the landowner's ability to produce groundwater depending on the property location.
  - If the land is in a groundwater conservation district, the groundwater is subject to the applicable rules of that district; if not, then it is in a “white area” and common law is the only limitation on production from groundwater wells located on the property.

# *Coyote Lake Ranch, LLC v. City of Lubbock*

- ❖ Coyote Lake Ranch argued that the City had a duty to conduct its operations with due regard for the rights of the surface estate.
- ❖ The City contended it had full rights under its deed to pursue its plans and that the law imposes no duty to groundwater owners, as it does on mineral owners, to accommodate the surface owner.
- ❖ Analogizing groundwater to minerals in determining the applicability of the accommodation doctrine is no less valid than it is in determining ownership.
- ❖ The Court found that a groundwater owner and a mineral owner are essentially the same in regard for the surface estate's rights, and the accommodation doctrine, thus, applies to both.

# Harrison v. Rosetta Res. Operating, LP

- ❖ **Facts:** Rosetta was pumping water in from another tract, instead of purchasing from Harrison
- ❖ Harrison claimed Rosetta violated the Accommodation Doctrine by not purchasing the surface owner's water, essentially rendering the surface owners' well and frack pit useless and unnecessarily causing damage to his property
- ❖ **West Texas Rule:** customary that an oil and gas lessee would only purchase water from the surface owner of the tract it was operating and not pump in neighboring water unless necessary



## Harrison (Continued)

- ❖ **Held:** Rosetta Resources Operating did not violate the Accommodation Doctrine.
  - Under the Accommodation Doctrine, the surface owner must prove that (1) the lessee's use of the surface completely precludes or substantially impairs the existing use; and (2) the surface owner has no reasonable alternative method available to continue his existing use of the land.
  - Here, the surface owner did not prove the first element, so no violation of the Accommodation Doctrine. An advantageous business arrangement is not a "necessary use" of the surface estate.
  - *"While creative, categorizing a refusal to buy goods produced from the land as 'interference' with the land . . . would stretch the [accommodation] doctrine beyond recognition."*
- ❖ Since *Harrison*, surface owners now add language in surface use agreements requiring the use of their water.

**Continuing land and  
legal education at  
your fingertips.**

Scan the QR code to register  
for upcoming sessions of our  
OG Energy Education Series.



*[www.oglawyers.com/events](http://www.oglawyers.com/events)*



<https://oglawyers.com>



[@OlivaGibbsLLP](https://twitter.com/OlivaGibbsLLP)



[Oliva Gibbs LLP](https://www.linkedin.com/company/OlivaGibbsLLP)



[Oliva Gibbs LLP](https://www.youtube.com/OlivaGibbsLLP)