

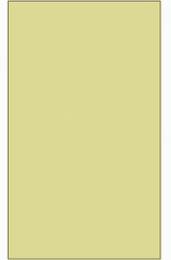


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Update on Surface Use Agreements and Disputes

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UHL, FITZSIMONS, JEWETT,
BURTON & WOLFF, PLLC

45TH ANNUAL ERNEST E. SMITH OIL, GAS AND MINERAL LAW CONFERENCE

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Reasonable Use of the Surface Estate

- Because of its status as the dominant estate, the mineral estate holds an implied easement to use as much of the surface as reasonably necessary for the development of the mineral estate.
- “This right includes the legal privilege to use the surface in a way that interferes with the surface owner’s use of the land and that significantly damages the surface, without the legal obligation to make any compensation whatsoever.”

– Ernest E. Smith



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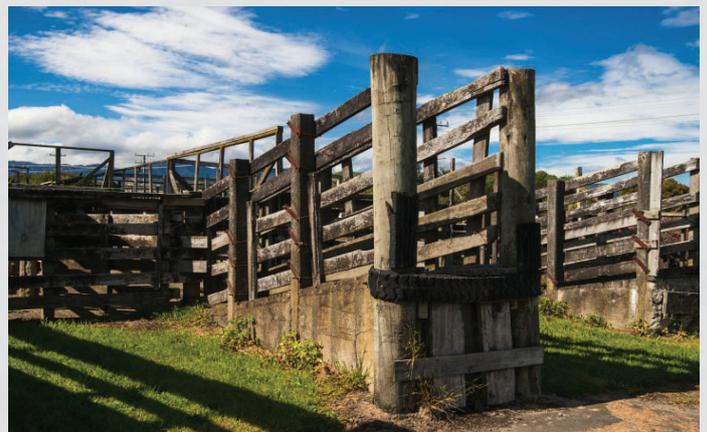
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Accommodation Doctrine Basics

- Courts require application of the accommodation doctrine when the surface owner proves “there is an existing use by the surface owner which would otherwise be precluded or impaired, and where under the established practices in the industry there are [reasonable] alternatives available to the lessee whereby the minerals can be recovered.”

Refinement of the Doctrine

- Courts further require that the Surface Owner prove “there is no reasonable alternative method available to the surface owner by which the [surface owner’s] existing use can be continued.”



Other Accommodation Considerations

- The reasonable alternative available to the lessee must be located on the same property.
- Likewise, the reasonable alternative available to the surface owner must be located on the same property.
- The surface owner's protected "existing use" can include a planned future use in certain circumstances.

What Counts as an Existing Use?

- In *Texas Genco v. Valence Operating* the Waco Court of Appeals found that future cells within a "deed-recorded and state-registered" landfill counted as an existing use, even though the planned use would not occur for several years.
 - What degree of documentation and planning is required to meet this threshold?
 - Is the "investment-backed expectations" analysis of the *Penn Central* takings case appropriate in this situation?

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