

***The Other Side of the Fence:
Considerations when Resolving and
Litigating Surface Disputes and
Managing Landowner Relations***

Marty Truss
Eli Kiefaber



September 27, 2023

Presenters



Marty Truss

711 Broadway, Suite 220
San Antonio, TX 78215
(210) 953-1797

Marty.Truss@steptoe-johnson.com



Eli Kiefaber

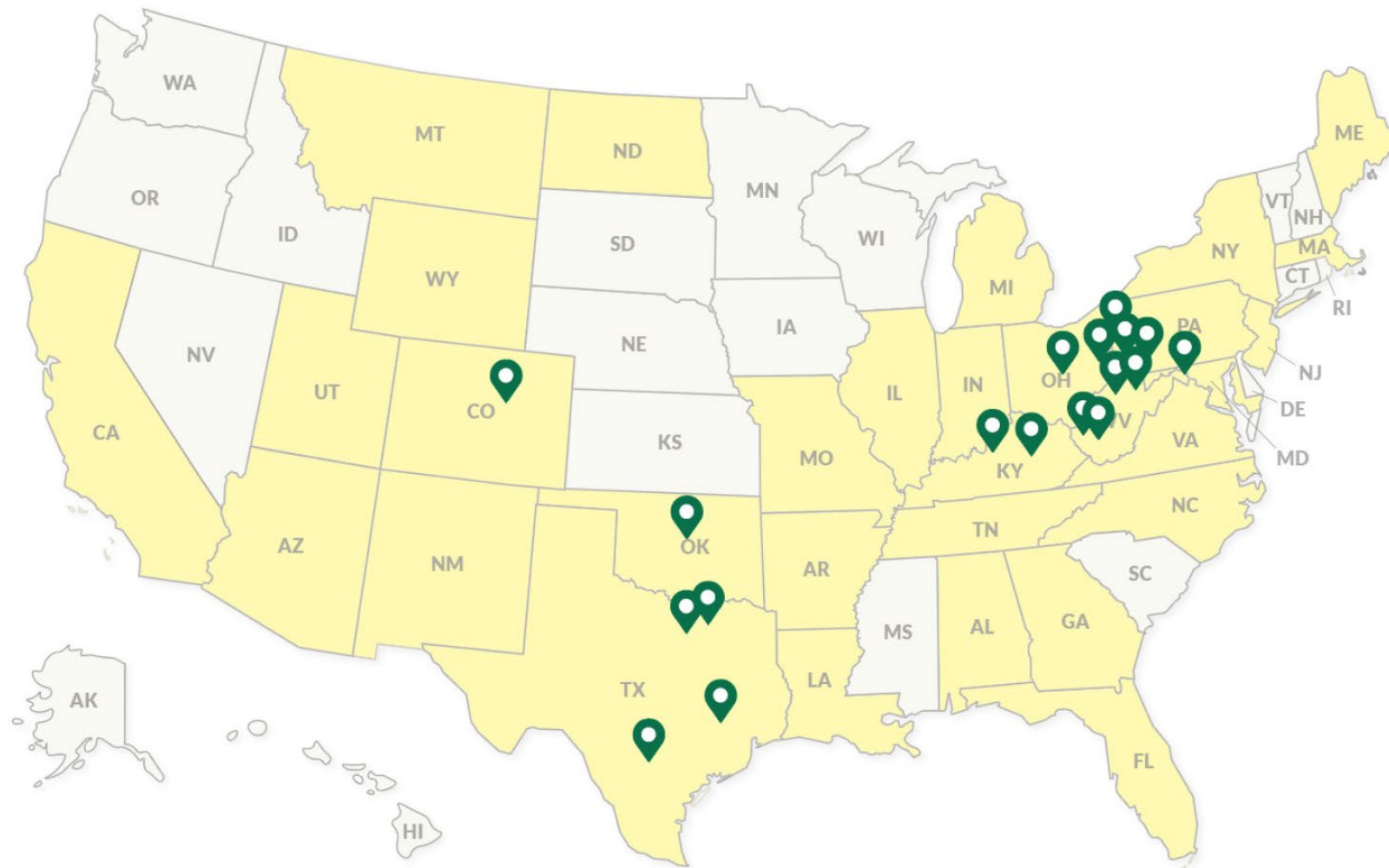
1780 Hughes Landing Blvd., Suite 750
The Woodlands, TX 77380
(281) 203-5720

Eli.Kiefaber@steptoe-johnson.com

Our Energy Practice

- Nationally recognized energy team
- Strategic locations covering all the major U.S. shale plays, including Permian, Eagle Ford, Niobrara, Marcellus, and Utica
- More than 100 years of experience in energy law
- Expertise in oil & gas, mining, renewables, CCUS, geothermal, and rare earth metals
- Transactions, operations, regulatory, environmental, litigation, and tax
- More than 50 attorneys cross-trained to understand title in multiple states and basins
- \$20B+ in recent complex energy transactions

Office Locations & Attorney Licensure



Office Locations

- Bridgeport, WV
- Charleston, WV
- Collin County, TX
- Columbus, OH
- Dallas, TX
- Denver, CO
- Huntington, WV
- Lexington, KY
- Louisville, KY
- Martinsburg, WV
- Meadville, PA
- Morgantown, WV
- Oklahoma City, OK
- Pittsburgh, PA
- San Antonio, TX
- Southpointe, PA
- The Woodlands, TX
- Wheeling, WV

 Attorney Licensure

Overview

- Surface use agreements
- The Accommodation Doctrine
- Trespass claims

Surface Use Agreements

Considerations for Surface Use Agreements

- Consequences of the absence of an SUA or Surface Use Provisions in the Lease
- The Dominant Estate – How Dominant?
- Reasonable Use / Due Regard
- Balancing Surface Use and Mineral Development

SUA Considerations Cont . . .

- Surface Owners - with or w/o mineral ownership
- Key Provisions
 - Notice provisions
 - Damages
 - Limitations on access - hunting
 - Dispute resolution

Davenport v. EOG Resources, Inc., 2023 WL 5068556 (Tex. App. – San Antonio Aug. 9, 2023)

- The Davenports and EOG negotiated a water purchase agreement, which included the following language:
 - “[the Davenports] hereby grant [to EOG] . . . the right of ingress and egress on designated roads for the purpose of producing, operating, and obtaining water from Grantor’s Frac Pond . . . or designated water wells on the [ranch].”
 - EOG established each element necessary to support a temporary injunction:
 - Cause of action
 - Probable right to recover
 - Irreparable injury

Negotiating Surface Use Agreements

- Incorporate in the lease or separate document?
- Opportunity for give and take
- Eliminate as many surprises as possible

Oklahoma – Surface Damage Act: OK ST T. 52 § 318.2 et seq.

- Act applies to the drilling operator and owners of the surface
 - Tenants have no standing to participate in negotiations or collect compensation
- Only covers damages caused by oil or gas drilling operations and preparation for drilling
- The Act specifies that surface owners should be paid the difference between the property's fair market value before and after drilling operations.

New Mexico – Surface Owner’s Protection Act: NM ST § 70-12-1 et seq.

- Applies to private and state lands (application to federal lands is unclear)
- Notice requirements vary depending on the surface activity
- Post bond if surface use agreement not obtained
- Requires restoration of surface to substantially same condition as existed prior to operations
- Damages

Federal Lands

- The “Gold Book”
- Rights granted under a federal lease are “subject to applicable laws”
- Bond required for lease operations
- Surface access rights only extend to the leased premises or lands unitized with the leased premises.
- When the minerals and surface are severed, the lessee under a federal lease must contact the surface owner and make a good faith effort to obtain a surface use agreement.
 - If no surface use agreement can be negotiated, then a bond is required.

Pore Space Ownership

- Texas – Surface owner may own the subsurface pore space
 - *Myers-Woodward, LLC v. Underground Services Markham, LLC*, No. 13-20-00172-CV, 2022 WL 2163857 (Tex. App. June 16, 2022) (concluding that the surface owner owned the subsurface including subsurface caverns).
- Oklahoma – Surface owner owns the subsurface pore space
 - 60 Okl. St. Ann. § 6

Litigation Concerns

- Managing no-mineral or otherwise hostile surface owners
- Delay and Expense
- Humpty Dumpty Effect

The Texas Accommodation Doctrine

Texas Accommodation Doctrine

- Moderating the Dominant Estate
- The mineral owner may be required to accommodate the surface owner when:
 - There is an existing use of the surface
 - The mineral owner's use of the surface precludes or impairs the existing use of the surface, and
 - Under established industry practices, there are alternatives available to recover the minerals.

Getty Oil Co. v. Jones, 470 S.W.2d 618 (Tex. 1971)

- Surface owner utilized a circular, pivot irrigation system
- The operator's pumping units interfered with the irrigation system
- The Court held that Getty had reasonable, low-cost alternatives to the pump jack.



Sun Oil v. Whitaker, 483 S.W.2d 808 (Tex. 1972)

- The Court limited the scope of the accommodation doctrine and concluded that only alternatives available to the mineral owner or lessee on the leased premises could be considered.
- The Court also reaffirmed that a mineral owner has the implied right to use water from the surface estate as reasonably necessary to develop the mineral estate.

Merriman v. XTO Energy, Inc., 407 S.W.3d 244 (Tex. 2013)



- The surface owner was required to show that he had no reasonable alternatives to conducting his cattle operations, not that he had no reasonable alternatives to general agricultural uses.
- The surface owner lost because he only offered conclusory statements regarding the inconvenience and cost to him due to XTO's development.

Other Accommodation Doctrine Decisions

- *VirTex Operating Co., Inc. v. Bauerle*, No. 04-16-00549-CV, 2017 WL 5162546 (Tex. App. – San Antonio Nov. 8, 2017, pet. denied)
 - Expanded the notion of a preexisting use of the surface to encompass the airspace immediately above the surface.
- *Coyote Lake Ranch, LLC v. City of Lubbock*, 498 S.W.3d 53 (Tex. 2016)
 - The accommodation doctrine applies to any severed right from the surface

Emerging Issues: Accommodation Doctrine and Alternative Energy

- Wind and Solar Uses

Lyle v. Midway Solar, LLC: 618 S.W.3d 857

- A renewable company constructed a solar facility, which covered 70% of the 315-acre surface estate
- Court determined that Midways owe no duty to the Lyles regarding the surface usage



Accommodation Doctrine Outside of Texas

- Many states have a variation of the accommodation doctrine that requires reasonable accommodation or due regard be given the surface owner
- Other states, such as Oklahoma and New Mexico, have surface damage statutes

Litigating the Accommodation Doctrine

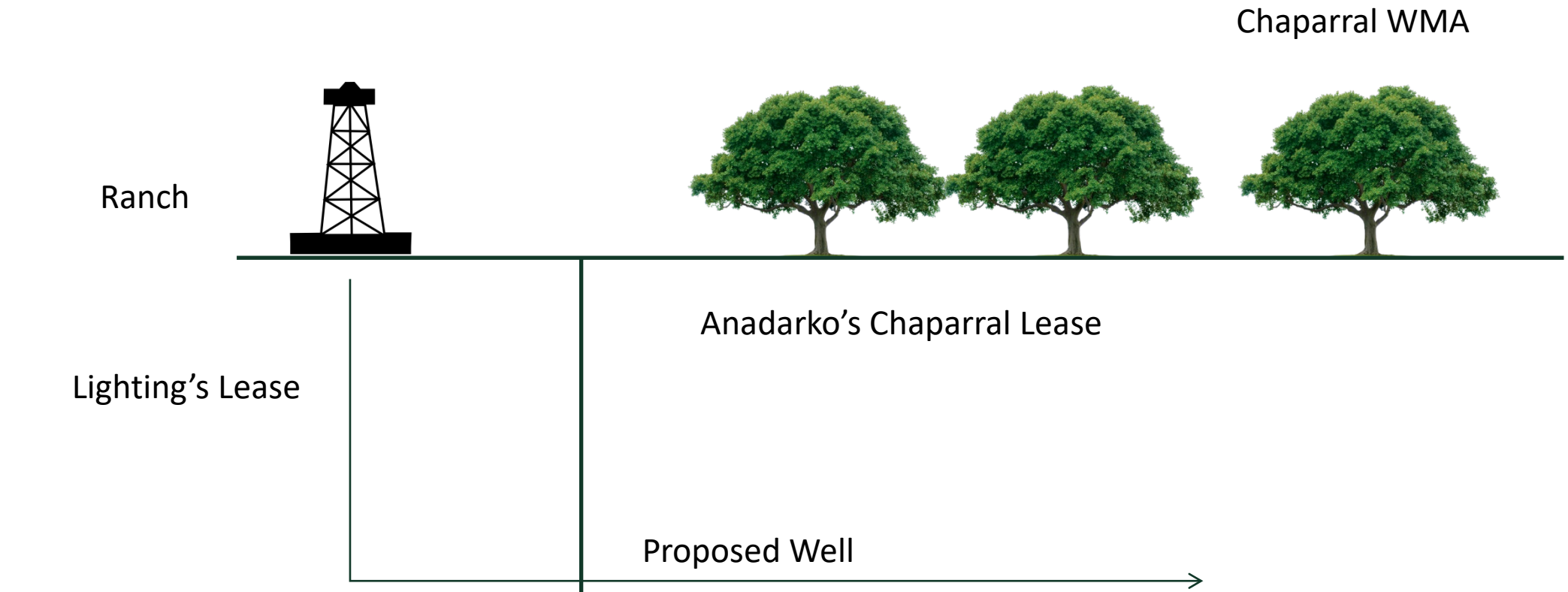
- What is Reasonable Use?
- Expert Witnesses

Trespass Disputes

Elements of a Trespass Claim

1. Entry
2. Onto the property of another
3. Without the property owner's consent or authorization

Lightning Oil Co. v. Anadarko E&P Onshore LLC, 520 S.W.3d 39 (Tex. 2017)



Lightning Oil, cont.

- A mineral lessee does not have the right to exclude other operations because a lessee does not exclusively control the earth surrounding the oil and gas subject to the lease
- “[A]n unauthorized interference with the *place* where the minerals are located constitutes a trespass as to the mineral estate only if the interference infringes on the mineral lessee’s ability to exercise its rights.”

Questions?



Marty Truss

711 Broadway, Suite 220
San Antonio, TX 78215
(210) 953-1797

Marty.Truss@steptoe-johnson.com



Eli Kiefaber

1780 Hughes Landing Blvd., Suite 750
The Woodlands, TX 77380
(281) 203-5720

Eli.Kiefaber@steptoe-johnson.com

Disclaimer

These materials are public information and have been prepared solely for educational purposes. These materials reflect only the personal views of the authors and are not individualized legal advice. It is understood that each case and/or matter is fact-specific, and that the appropriate solution in any case and/or matter will vary. Therefore, these materials may or may not be relevant to any particular situation. Thus, the presenters and Steptoe & Johnson PLLC cannot be bound either philosophically or as representatives of their various present and future clients to the comments expressed in these materials. The presentation of these materials does not establish any form of attorney-client relationship with the authors or Steptoe & Johnson PLLC. While every attempt was made to ensure that these materials are accurate, errors or omissions may be contained therein, for which any liability is disclaimed.



S STEPTOE
& JOHNSON
P L L C