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### Permitting Scheme to Encourage Cooperation Between Owners of Surface Rights and Mineral Rights Did Not Violate Due Process or Equal Protection

A zoning ordinance providing for expedited oil and gas permitting where owners of the mineral estate cooperate with surface owners did not grant surface owners so much control as to offend the mineral owners' due process.



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the new permitting requirements, the County considered the potential for conflict between surface and mineral owners concerning new oil and gas operations. The owner of a mineral right generally has an implied easement burdening the surface estate and allowing the mineral owner to use the surface as reasonably required to access the minerals; a California statute, however, requires a mineral rights owner to provide the surface rights owner at least 30 days' notice before entering the property and performing surface-disturbing activities. Where oil and gas operations were the dominant surface land use, the County saw little need to encourage cooperation between the split owners in the permitting process. Applicants for oil and gas activities on agricultural or other lands, however, faced distinct permitting pathways under the new ordinance depending on the involvement of the surface owner in the permit application. Where the applicant obtained a surface owner's written consent to a site plan, the ordinance provided for an expedited seven-day permitting pathway. Without the surface owner's written consent, a more expensive 120-day pathway applied. Plaintiffs argued this permitting scheme violated (1) their due process rights by inappropriately delegating the County's permitting authority to the private owners of surface rights, who could arbitrarily withhold their signatures unless their demands were met and thereby exercise control over how mineral rights owners use and enjoyed their property rights; and (2) their equal protection rights by imposing, via distinct permitting pathways, disparate treatment on similarly situated permit

applicants. The court of appeal rejected both arguments. Concerning the due process claim, the court reviewed a longstanding line of U.S. Supreme Court cases as well as California cases to identify "[t]he most important factors in analyzing the constitutionality of an ordinance that transfers some authority to private property owners... (1) the amount and type of control transferred; (2) whether the private property owners' action or inaction produces results that are binding on the other property owner; and (3) the presence or absence of standards dictating how that control must be exercised." Ultimately, the court saw no due process violation because, under the permitting scheme, the surface owner lacked final control over how the mineral owner uses its rights. If the surface owner did not agree to a site plan, for instance, the details of how the oil and gas operator would conduct its operations on the land had not been determined. The binding decisions with respect to how the land was used rested with the County in its adjudication of the permit application. Nor was the 120-day pathway such an onerous burden as to offend due process by delegating too much power to the surface owner. Concerning the equal protection claim, plaintiffs contended the ordinance created two groups of split-estate mineral owners: those who had obtained their surface owner's signatures on permit applications, and those who had not. The court acknowledged that applicants who had obtained the surface owner's consent were treated more favorably. The County, however, had a rational basis for deciding that the availability of an expedited seven-day pathway would promote cooperation between split-estate owners and reduce conflicts. Reducing conflicts was a legitimate government purpose justifying the disparate treatment of split-estate mineral owners and did not amount to a violation of equal protection.

## **Authors**