Mineral Issues' Impact on Solar Energy Development in Texas and Other States

(2013 Update)

STAHL, BERNAL & DAVIES
ATTORNEYS

7320 North MoPac, Suite 211
Austin, Texas 78731
(512) 346-5558

www.sbaustinlaw.com

Established 1993

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By: *Gregory S. Friend*[*]
David Sewell[**]
Brent Stahl[***]

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1. Introduction

Solar energy project developers typically own or lease several hundred acres of land for commercial scale solar energy projects. Solar facilities are located within the surface estate, but developers (and their lenders) must ensure that project facilities are not required to relocate if mineral estate owners or lessees want to explore for oil, gas, or other minerals within the project footprint. Solar project developers can eliminate the risk of disturbance from mineral estate owners or lessees by acquiring the mineral estate rights or by obtaining agreements from mineral estate owners to either not disturb the solar project facilities or waive their rights to use the surface. In the absence of such agreements, mineral estate disturbance risk is less if developers reserve drill sites and access routes within the project area. In the right circumstances, reserving drill sites in conjunction with the accommodation doctrine can force mineral estate owners to locate their oil and gas facilities away from the solar project facilities. The rules and procedures of the Railroad Commission may provide additional avenues that a solar project developer may utilize to reach peaceful and meaningful coexistence between itself and mineral development in the project area. Further, with sufficient facts, designated drill sites, and access routes, solar project developers should be able to obtain title insurance endorsements to provide coverage against future relocation issues caused by mineral estate owners or lessees.

2. Mineral Estate vs. Surface Estate. Texas has two distinct types of property rights with respect to land areas -- the mineral estate and the surface estate. Solar energy project developers face obstacles because of certain attributes of mineral estates in Texas. Challenges arise because of how Texas law defines the mineral estate and surface estate.

Mineral Estate Rights in Texas. Mineral parties have the right to use as much of the surface, subsurface, and adjacent airspace of the land as reasonably necessary to enjoy the mineral estate, but this right must be exercised with "due regard" to the rights of the surface parties.[1] This right over the surface estate has been described by the Texas Supreme Court as an "appurtenance" and a "mineral easement" over the surface of the land.[2] If a surface party does not explicitly grant the mineral easement to the mineral

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*__Gregory S. Friend__ is a senior attorney with Stahl, Bernal & Davies in Austin, Texas, where he practices Wind and Solar Energy Law, Commercial Real Estate Law, Environment and Natural Resources, Law, and State Tax Law. Mr. Friend has represented renewable energy companies on projects in multiple states, focusing on real estate and leasing issues. You can contact Mr. Friend at gfriend@sbaustinlaw.com or 512-652-2949.
**__David Sewell__ is a partner with Stahl, Bernal & Davies in Austin, Texas, where he practices Wind and Solar Energy Law, Commercial Real Estate Law, and State Tax Litigation and Consulting. Mr. Sewell has represented renewable energy companies for eleven years on projects throughout the United States, focusing on real estate issues and issues related to state taxation. You can contact Mr. Sewell at dsewell@sbaustinlaw.com or 512-652-2945.
***__Brent Stahl__ is a partner with Stahl, Bernal & Davies in Austin, Texas, where he practices Wind and Solar Energy Law and Commercial Real Estate Law. Mr. Stahl has represented renewable energy companies for eleven years on projects throughout the United States totaling more than 3,000 MW in generation capacity. He is licensed to practice law in Texas and Oklahoma. You can contact Mr. Stahl at bstahl@sbaustinlaw.com or 512-652-2946.
-The authors wish to acknowledge and thank Alison Gardner for her contributions as co-author to the original version of this paper.
[1] *Getty Oil v. Jones*, 470 S.W.2d at 621 (Tex. 1971); *Humble Oil v. Williams,* 420 S.W.2d at 134 (Tex. 1967).
[2] *Harris v. Currie*, 176 S.W.2d 302, 305 (Tex. 1943); *Empire Gas & Fuel Co. v. Texas*, 47 S.W.2d 265, 268 (Tex.

party, then the grant of the mineral easement is implied.[3] Without the mineral easement, Texas courts have noted that the rights in the mineral estate would be "wholly worthless."[4] Surface parties and mineral parties may alter, restrict, or eliminate the legal rights granted under the mineral easement by written agreement.[5] Because the mineral estate includes rights to use the surface, surface estate owners and lessees such as solar energy project developers must determine whether mineral estate uses may negatively affect the subject solar energy project's surface uses.

Rights of Surface Estate in Texas. Although the mineral estate is dominant, surface parties may still use the surface of the land. Surface owners and their lessees have identical rights with regard to the mineral estate, except as such rights are limited in the surface lease.[6] The rights of the surface party and the mineral party are "reciprocal and distinct," and if either party "exceeds [his] rights he becomes a trespasser."[7] Surface parties may continue to use the surface of the land in any manner that is consistent with the mineral party's use of its estate.[8] A surface party is not prohibited from an activity merely because it might diminish the value of the minerals under the land.[9] In order for a mineral party to prohibit a particular activity by a surface party, the mineral party must show that, at that specific moment in time, the use interferes with the reasonable exercise of its rights.[10]

The mineral easement is not an unfettered right to the use of the surface. Mineral parties may only use the surface to the extent that it is reasonable necessary and must exercise due regard toward the surface parties. Apart from claims for breach of a written agreement, Texas courts have created two causes of action by surface parties against mineral parties that may result in the award of damages or an injunction. Under these causes of action, the surface party must prove that either (1) the mineral party exercised its rights in a negligent or intentionally wrongful manner or (2) the mineral party used more of the surface of the land than was reasonably necessary.[11] Despite some of these limitations on the mineral estate, surface estate parties are left with some degree of uncertainty because the mineral estate is the dominant estate, due in no small part to the fact that the existing common law on the subject remains the result of *ad hoc* decisions. Without a bright-line test, sufficient certainty may be lacking. An election by a mineral estate holder to use the surface of the estate has significant and potentially very costly implications to a planned or developed solar project. In doing its feasibility on a site, a

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1932) (defining the "mineral easement" to be "the necessary right to use the surface of the earth in the enjoyment of the mineral estate").

[3] *Id.*

[4] *Harris*, 176 S.W.2d at 305.

[5] *Warren Petroleum Corp. v. Monzingo*, 304 S.W.2d 362, 363 (Tex. 1957); *Atlantic Refining Co. v. Bright & Schiff*, 321 S.W.2d 167, 168, 169 (Tex. Civ. App.—San Antonio 1959, writ ref'd n.r.e.) (this is the line of cases allowing benefits to be obtained from Waiver of Surface Rights Agreements or Non-interference Agreements).

[6] *Robinson Drilling Co. v. Moses,* 256 S.W.2d 650, 650 (Tex. Civ. App.—Eastland 1953, no writ).

[7] *Brown v. Lundell,* 344 S.W.2d 863, 866 (Tex. 1961).

[8] *Atlantic Refining,* 321 S.W.2d at 169.

[9] *Id.*

[10] *Id.*

[11] *Reading & Bates Offshore Drilling Co. v. Jergenson*, 453 S.W.2d 853, 855 (Tex. Civ. App.—Eastland 1970, writ ref'd n.r.e).

solar energy project developer must evaluate who owns the mineral estate, what risks are involved, and if there is a way to reduce those risks or insure against them. The remainder of this paper explores how owners or lessees of surface rights can reduce the uncertainty resulting from mineral estate rights.

3. Determining Ownership of Mineral Estate. Issues arising from mineral estate rights can be simply resolved if the owner of the surface rights also owns the mineral rights. In the case where the project developer will purchase the real estate, if the purchase includes the mineral rights (and such rights are not already subject to a mineral lease) the buyer's ownership and control of all mineral rights alleviates concerns about the mineral estate. In lease transactions, the solar tenant's concerns can be resolved by the landlord agreeing in the lease not to use, convey, or lease the mineral rights in any way that would hinder the tenant's surface lease rights. Because a seller or landlord can easily alleviate a developer's concerns about the mineral estate if such person owns the mineral rights, determining mineral ownership is a very important initial step in conducting due diligence on the proposed real estate area for a particular solar energy development project. Mineral estate ownership is typically determined by a title company, a landman, or an attorney title opinion.

   A. Title Search. Mineral Estate ownership is determined by searching the real property records in the county in which the property is located. Texas title companies are not required to, but may, provide mineral estate ownership information when they issue title insurance commitments on real estate (e.g., real estate for a pending purchase, loan, or lease transaction). If the land area in question has active oil and gas production, some mineral ownership information may be contained in the Railroad Commission's online database system and copies of Division Orders and other relevant information for older wells filed with the Texas Railroad Commission regarding the property.[12] If the title company is unwilling or unable to provide information regarding mineral estate ownership, a "landman" can be retained to search the real property records for mineral ownership. The American Association of Professional Landmen defines a landman as a professional who has been primarily engaged in negotiating for the acquisition or divestiture of mineral rights and/or negotiating agreements for exploring for and/or developing the mineral estate.[13] Landmen are hired by oil companies traditionally to determine ownership of the mineral estate and then to work with those owners in negotiating leases.[14] This type of professional can also be hired by solar developers to determine the appropriate mineral estate owners. If necessary, the findings of a landman can then be submitted to an attorney who issues an opinion on who owns the different rights that comprise the mineral estate. This opinion may be necessary for lenders or tax equity investors in a project or for the title company.

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[12] *See* Tex. Nat. Res. Code Ann. §§ 91.402(c) - (i); *see also* www.rrc.state.tx.us/about/faqs/royaltiesleases.php (last visited January 3, 2013).
[13] *See What is a Landman, available at* http://industrial-marketing.bestmanagementarticles.com/a-30814-what-is-an-oil-and-gas-landman.aspx (last visited January 3, 2013).
[14] *Id.*

Title search: Mineral Issues' Impact on Solar Energy Development in Texas and Other States (2013 Update)

Also available as part of the eCourse
Nuts and Bolts of Renewable Energy: Tax Considerations and Incentives; Surface Use Issues; Title Insurance Endorsements; and Wind Lease Issues and Severance of Wind Rights

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