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BEST PRACTICES FOR SOLAR DEVELOPMENT IN RESOLVING MINERAL ESTATE ISSUES

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TABLE OF CONTENTS

BEST PRACTICES FOR SOLAR DEVELOPMENT IN RESOLVING MINERAL ESTATE ISSUES

I. RELEVANT MINERAL LAW

A. WHAT IS A MINERAL? 1
B. WHAT IS PORE SPACE? 2
C. WHAT ARE GEOTHERMAL RIGHTS? 2
D. RADIOACTIVE MINERAL SUBSTANCES 3
E. SURFACE PROTECTION LAWS 4

II. CASES IMPOSING DOCTRINE OF ACCOMMODATION OR DUE REGARD

A. ACCOMMODATION DOCTRINE/RULE 6
B. SELECTED CASES ON ACCOMMODATION DOCTRINE/RULE IN TEXAS 7
C. CASES ON ACCOMMODATION DOCTRINE/RULE IN CALIFORNIA, COLORADO, AND NEW MEXICO 26

III. TITLE INSURANCE

A. TITLE INSURANCE COVERAGE 27
B. POSSIBLE REQUIREMENTS FOR ISSUANCE OF TITLE ENDORSEMENT 35

BEST PRACTICES FOR SOLAR DEVELOPMENT IN RESOLVING MINERAL ESTATE ISSUES

I. RELEVANT MINERAL LAW

A. WHAT IS A MINERAL?

Severed or outstanding, separately owned mineral rights have been significant considerations in analysis of the location of an energy project and determination of the requirements that should be considered to establish a viable project. Mineral ownership, which is a real property interest, may be severed from the remaining real property rights in numerous ways. In some cases, federal or state laws may address the retention of mineral interests and in some cases the conveyance from the sovereign may expressly retain those rights, while in other cases the applicable law may control, regardless of whether the conveyance or patent, if any, further evidences that retention. Frequently, where there is perceived or known mineral development or potential, the owner of title to land that includes ownership of mineral rights may convey or reserve some or all mineral rights.

The term "minerals" has different meanings, depending on state interpretations, wording of particular documents, and method of production.[1]

> **The most common type of background for the kind of litigation considered herein is the existence of a deed, usually an old one, containing a reservation or grant of "minerals," "mineral," "mineral rights," or the like, not mentioning oil or gas although frequently enumerating one or more other specific minerals, coupled with a claim by virtue of such deed to the oil, gas, or both, in the land in question; the general pattern is that oil or gas was subsequently discovered, and it is a fair common-sense inference that, in most cases, they were not specifically in the minds of the parties to the deed. The paramount rule, of course, is that, considering the language of the whole instrument, the intention of the parties as thereby indicated must control….. With this caveat in mind, the general rule relating to the present subject may be stated to be that the term "minerals," as used in real property instruments, includes oil and gas, unless a contrary intention or an ambiguity is manifested by the language of the instruments as a whole.**[2]

In Texas, for example, water, sand, gravel, and clay are not considered minerals, while oil, gas, gold, and similar substances are, and coal and lignite may be, minerals.[3]

In *Sukut Construction, Inc. v. Rimrock CA LLC,*[4] the California appellate court held that gravel is not a mineral but stated that:

> **…[I]n the context of a different statute, the 1916 Stock-Raising Homestead Act (Act; 43 U.S.C. § 291 et seq.), the United States Supreme Court classified gravel as mineral in *Watt v. Western Nuclear, Inc.* (1983) 462 U.S. 36, 44 [76 L. Ed. 2d 400, 103 S. Ct. 2218] *(Watt).* The court first concluded that when Congress reserved to the United States title to all the coal and other minerals in lands patented under the Act, "The legal understanding of the term 'minerals' prevailing in 1916 does not indicate whether Congress intended the mineral reservation in the [Act] to encompass gravel." (*Watt, supra,* at p. 44.) The court therefore relied on the Act's purpose and concluded that the mineral reservation in the Act includes "substances that are mineral in character (*i.e.*, that are inorganic), that can be removed from the soil, that can be used for commercial purposes, and that there is no reason to suppose were intended to be included in the surface estate." (*Watt, supra,* at p. 53.) The court emphasized, "Insofar as the purposes of the [Act] are concerned, it is irrelevant that gravel is not metalliferous and does not have a definite chemical composition. What is significant is that gravel can be taken from the soil and used for commercial purposes." (*Watt, supra,* at p. 55.)… The court's conclusion in *Watt* is not applicable to this case, which is not governed by the Act, and does not involve a land grant or sovereign rights.**

In *Bogle Farms, Inc. v. Baca,*[5] the court ruled that the determination of whether sand and gravel are included within a general mineral reservation should be decided on a case-by-case basis.

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1 *See* 6 Thompson on Real Property, Thomas Editions § 48.02.
2 "Oil and gas as "minerals" within deed, lease, or license," 37 A.L.R.2d 1440.
3 *See* Dysegard Land Pshp. v. Hoover, 39 S.W.3d 300 (Tex. App.–Ft. Worth 2001, *no pet.*).
4 Sukut Construction, Inc. v. Rimrock CA LLC, 199 Cal. App. 4th 817 (2011).
5 Bogle Farms, Inc. v. Baca, 122 N.M. 422, 1996-NMSC-051, 925 P.2d 1184 (1996).

The case of *Champlin Petroleum Co. v. Lyman*[6] holds that caliche is a mineral reserved by the United States under the Stock-Raising Homestead Act of 1916, 39 N.M. Stat. 862 (1916) (SRHA), and 43 U.S.C. § 299 (1982) of the SRHA Act.

The Colorado case of *Keith v. Kinney*[7] concluded that minerals is a general word that may be subjected to different meaning, and that the courts must consider extraneous evidence to determine the parties' intent. Generally, gravel and common sand are not minerals as used in conveyances granting or reserving a mineral interest.

B. WHAT IS PORE SPACE?

Pore space is more typically owned by the owner of the surface, to the extent the law is developed, but it must be concluded that this area of the law is not well developed.[8] For example the right to use a gas reservoir to store helium gas produced from other land was owned by the owner of the surface estate, not the mineral owners.[9] Similarly, the owner of the surface estate could grant rights to an oil and gas lessee of other land to directionally drill on the surface estate's owner, even though the minerals of the surface estate owner's land were owned by other parties, unless the surface owner (or grantor under an existing lease) had granted exclusive rights for drilling on its land.[10]

C. WHAT ARE GEOTHERMAL RIGHTS?

Geothermal rights are often considered to be mineral rights but partake of surface rights, mineral rights, and water rights. Several states (including Alaska, Colorado, and Utah) often treat such rights as water; in a few states (such as Montana, Nevada, and Oregon), these rights are surface rights; several other states (such as California and Texas) suggest that these rights may be mineral rights; and a few states (such as Idaho) indicate they are neither water, nor minerals.[11]

Geothermal resources are varied and include dry steam systems that are primarily vapor, hot (above boiling temperature) water systems, geothermal brines, low-temperature (below boiling point) water systems, and hot dry rock.[12] "Geothermal rights" are defined differently in various jurisdictions, and the difference may impact recognition of such rights in a particular state. For example, the following are examples of some statutory definitions:

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6 Champlin Petroleum Co. v. Lyman, 103 N.M. 407, 1985-NMSC-093, 708 P.2d 319 (1985).

7 Keith v. Kinney, 140 P.3d 141 (Colo. Ct. App. 2005).

8 Owen L. Anderson, *Geologic CO2 Sequestration: Who Owns the Pore Space?*, 9 Wyo. L. Rev. 97; Humble Oil & Refining Co. v. West, 508 S.W.2d 812 (Tex. 1974) (the surface owner retains geological structures beneath the surface); United States v. 43.42 Acres of Land, 520 F. Supp. 1042 (W.D. La. 1981) (no right of mineral owner to compensation for value of salt cavern created by removal of salt, but right to compensation for value of right to explore for and develop the minerals only); Miss. River Transmission Corp. v. Tabor, 757 F.2d 662, 672 (5th Cir. La. 1985) ("The surface owner owns the right to use the surface lands and the reservoir underlying the land for storage purposes and must be compensated for the expropriation of these rights."); and Tate v. United Fuel Gas Co., 137 W. Va. 272, 71 S.E.2d 65 (W. Va. 1952) (the surface owner owns space vacated by mineral production but so long as there are recoverable minerals that may be mined in good faith, the space may be used by the mineral owner). *Contra* Mapco, Inc. v. Carter, 808 S.W.2d 262 (Tex. App. 1991), *reversed by, in part on other grounds*, 817 S.W.2d 686 (Tex. 1991).

9 Emeny v. United States, 188 Ct. Cl. 1024, 412 F.2d 1319 (U.S. 1969).

10 Lightning Oil Co. v. Anadarko E&P Onshore LLC, 480 S.W.3d 628 (Tex. App. 2015), *petition for review granted by* 2017 Tex. LEXIS 65 (Tex. Jan. 20, 2017), *affirmed by* 2017 Tex. LEXIS 463 (Tex. May 19, 2017).

11 Wright & Wilson, *Development of Geothermal Resources: The Heat Is On* (citing United States v. Union Oil Co., 549 F.2d 1271 (9th Cir. Cal. 1977), *writ of certiorari denied sub nom.* Ottoboni v. United States, 434 U.S. 930, 98 S. Ct. 418, 54 L. Ed. 2d 291 (1977) (geothermal resources are mineral interests under the Federal Geothermal Steam Act of 1970, 30 U.S.C. §§ 1001–1025), *rehearing denied by* 435 U.S. 911, 98 S. Ct. 1462, 55 L. Ed. 2d 502 (1978); Rosette Inc. v. United States, 277 F.3d 1222 (10th Cir. N.M. 2002) (geothermal resources are mineral rights under Stock Raising Homestead Act of 1916, 43 U.S.C. § 299, which provides for reservation of "coal and other minerals," and the rights of the mineral owner include a duty not to injure, damage or destroy the permanent improvements), *writ of certiorari denied*, 537 U.S. 878, 123 S. Ct. 77, 154 L. Ed. 2d 133 (2002), *related proceeding at* 2007-NMCA-136, 142 N.M. 717, 169 P.3d 704 (N.M. Ct. App. 2007), *writ of certiorari granted*, 141 N.M. 401, 156 P.3d 39 (N.M. 2007); 30 U.S.C. § 81 (the reservation by the United States of coal of land classified, claimed, or reported as valuable for coal but no entry without consent or security); 30 U.S.C. § 121 (the reservation by the United States of phosphate, nitrate, potash, oil, or gas, where classified as valuable for such deposit); CASE NOTE, *Rosette Inc. v. United States: Is the United States Full of Hot Air When It Comes to Reservation of Geothermal Resources as a "Mineral"?*, 8 Great Plains Nat. Resources J. 44 (2003); United States v. Union Oil Co., 549 F.2d 1271 (9th Cir. Cal. 1977) (geothermal rights are minerals), *writ of certiorari denied sub nom.* Ottoboni v. United States, 434 U.S. 930, 98 S. Ct. 418, 54 L. Ed. 2d 291 (1977), *rehearing denied by* 435 U.S. 911, 98 S. Ct. 1462, 55 L. Ed. 2d 502 (1978); Colo. Rev. Stat. Ann. § 37-90.5-104; Utah Code §§ 73-22-1, *et seq.*; Burlington Res. Oil & Gas Co., LP v. Lang & Sons Inc., 2011 MT 199, 361 Mont. 407, 259 P.3d 766 (Mont. 2011); Nev. Rev. Stat. Ann. § 534A.050; Or. Rev. Stat. § 522.035; Pariani v. State of Cal., 105 Cal. App. 3d 923, 164 Cal. Rptr. 683 (Cal. App. 1st Dist. 1980); Geothermal Kinetics, Inc. v. Union Oil Co., 75 Cal. App. 3d 56, 141 Cal. Rptr. 879 (Cal. App. 1st Dist. 1977); Tex. Nat. Res. Code § 141.002(4); and Idaho Code § 47-1602).

12 Kochan & Grant, *In the Heat of the Law, It's Not Just Steam: Geothermal Resources and the Impacts on Thermophile Biodiversity*, 13 Hastings W.-Nw. J. Envtl. L. & Pol'y 35 (2007).

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