SHARING THE ROAD: SURFACE PROJECT DEVELOPMENT AND SEVERED ESTATES

Gregory S. Friend
Stahl, Bernal, Davies, Sewell &
Chavarria, LLP
Austin, Texas
www.sbaustinlaw.com

1. Introduction[1]

Texas is no stranger to renewable energy. The State continues to lead the way in installed generation capacity and the total quantities of electricity generated by wind energy in the United States, in a somewhat astonishing manner. As of the third quarter of 2016, over 18,500 MW of wind power generation facilities were installed within its borders; which not only makes it the leader in such terms, but equals the installed capacities of the next three largest wind installed capacity states *combined*.[2] If Texas were its own country, it would rank sixth in the world in installed wind generation.

Texas does not find itself atop the leaderboard for equivalent solar development. Texas ranks in the top ten in currently installed solar generation capacity (PV), finding itself behind traditionally "sunny" states (California, Arizona, and Nevada) as well as those not generally perceived to be solar power stalwarts (i.e., North Carolina, New Jersey and Massachusetts).[3] However, a large push towards the development of utility scale solar projects is under way in Texas, and the state is expected to climb those rankings in the near future. It is within this push period context that solar developers and oil and gas companies have discovered an increase in perceived conflicts related to alleged competing use of real property in areas of dual interest. Consequently, a need to determine ways in which the two can coexist and mutually benefit from the respective market demands for both hydrocarbons and renewables-sourced electricity is also present.

As such, this article operates as a primer of sorts for developers of solar and other land-intensive electricity generating facilities to present them with an understanding of an issue of primary

1 This article relies on a prior article, in various states of update published over the years, entitled *Mineral Issues' Impacts on Solar Energy Development in Texas and other States*, authored by the author of this article as well as his partners Brent G. Stahl, David J. Sewell, and other former and current attorneys at Stahl, Bernal, Davies, Sewell & Chavarria, LLP. The author wishes to recognize the work and efforts of those authors in this article, as well as Lisa Chavarria for her review, and her invaluable insight and perspective in discussions with the author on the subject over the years (and most likely into the future).

2 American Wind Energy Association, *U.S. Wind Industry Third Quarter 2016 Market Report* (Oct. 20, 2016), http://awea.files.cmsplus.com/FileDownloads/pdfs/3Q2016%20AWEA%20Market%20Report%20Public%20Version.pdf (last visited November 7, 2016).

3 Cumulative Solar PV Capacity through Q2 2016, Solar Energy Industries Association, http://www.seia.org/research-resources/solar-industry-data (last visited October 16, 2016).

importance in such development (the mineral estate), and likewise provides some insight to oil and gas operators and mineral owners regarding the developer's perspective on utilization of the surface of a potential project site. Following a discussion of the background of such property interactions and the legal and practical arena in which they occur, this article intends to address possible pathways to coexistence between surface and mineral players and the resultant maximization of property usage by those parties.

2. Basics

A typical wind project in Texas has between 10,000 and 15,000 acres of property at its disposal for development purposes (via lease, easement or other land control document), but generally only actually "uses" two to three percent (2-3%) of that property for the placement of project-related infrastructure (including turbines, roads, collection and transmission lines, operations buildings, switching stations, etc.). Consequently, 97-98% of the land remains open for continued or future uses of the property under control of the wind project, subject to certain interference-related terms in the governing document. It is this small footprint and sparsity of use that prevents very many conflicts between the surface estate and mineral estate where wind development is occurring.

On the other end of the spectrum, the development of a viable utility-scale commercial solar project requires the ownership by the developer of the fee or leasehold estate of several hundred acres of land, depending on the desired capacity of the proposed project.[4] Although the amount of land subject to the solar project's land control document(s) is smaller than for a wind development, the use of the property in this context is much more intense, with the solar project's infrastructure (panels, trackers, inverters, roads, collection lines, switching station, etc.) taking up much if not all of the subject real estate. The footprint in this scenario is relatively significant, and in light of the rights of the mineral estate to utilize a portion of the surface (as discussed further below), may lead to land usage requirements between the respective estates. As such, solar developers (and their financing partners, as applicable) must give due and serious consideration to existing and potential mineral estate interests when considering the placement and use of project facilities.

3. Mineral Estate vs. Surface Estate.

As an initial step, a solar developer must understand the underlying tenets of this concept in order to determine the best path forward. Texas has two distinct types of property rights with respect to land areas -- the mineral estate and the surface estate. Both of the aforementioned estates (among others) are held by the owner of a parcel of land pursuant to a Blackstonian view of property ownership (i.e. that the possessor of real estate owns the land from the center of the earth to the "top of the sky."[5]), as what legal scholars

4 The analysis in this article will generally refer to solar development, but it is applicable to any land-intensive electric generating facilities, including gas-fired, biomass, coal and nuclear facilities.

5 Please see definition of *ad coelom*, Black's Law

sometimes refer to as "sticks in the bundle." The owner of the parcel also possesses the right to transfer those sticks individually, or in the specific case of conveying the rights to the parcel's mineral estate, has the right to "sever" the mineral estate from the fee. In such severed estate situations, Texas courts have recognized the mineral estate to be dominant over the surface estate. The owner of the severed mineral estate has a right to utilize as much of the surface estate as is reasonably necessary to "exploit" or produce and remove the minerals below.[6] That right arose out of the understanding that without the right to enter upon the surface to explore for and extract the minerals below, any grant conveying such rights would be "wholly worthless."[7] The right has also been described as an "appurtenance" and a "mineral easement" over the surface of the land.[8]

Moreover, while the surface easement right ***may*** specifically be granted in the underlying mineral deed or conveyance reservation, the severed mineral owner does not ***need*** to receive an express grant of the "easement" rights to the surface, as the easement is implied with the grant of the mineral estate.[9] As noted in *Coyote Lake Ranch*, "…the mineral estate is called 'dominant' and the surface estate 'servient,' not because the mineral estate is in some sense superior, but because it receives the benefit of the implied right of use of the surface estate."[10] Notwithstanding, surface owners and mineral owners may elect to alter, restrict, or eliminate the legal rights granted under the mineral easement by written agreement.[11]

Although the mineral estate is dominant, the mineral owner does not have an unfettered right to utilize the surface. 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."[12] 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.[13] A surface party is not prohibited from an activity merely because it might diminish the value of the minerals under the land.[14] 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.[15] Moreover, apart from claims for breach of a written agreement, Texas courts have

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Dictionary 1628 (7th ed. 1999).

6 *Coyote Lake Ranch, LLC v. City of Lubbock*, 2016 Tex. LEXIS 415 (Tex. 2016)(citing *Plainsman Trading Co. v. Crews*, 898 S.W.2d 786, 788 (Tex. 1995); *Acker v. Guinn*, 464 S.W.2d. 348, 352 (Tex. 1971); *Humble Oil & Refining Co. v. Williams*, 420 S.W.2d 133, 134 (Tex. 1967)).

7 *Harris v. Currie*, 176 S.W.2d 302, 305 (Tex. 1943).

8 *Id*.; *Empire Gas & Fuel Co. v. Texas*, 47 S.W.2d 265, 268 (Tex. 1932) (defining the "mineral easement" to be "the necessary right to use the surface of the earth in the enjoyment of the mineral estate").

9 *Id.*

10 *Coyote Lake Ranch*, at *18-*19 (citing Restatement (Third) of Prop.: Servitudes §1.1(1)).

11 *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).

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

13 *Atlantic Refining*, 321 S.W.2d at 169.

14 *Id.*

15 *Id.*

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 than was reasonably necessary.[16]

In light of the current state of the law (without even considering the application of the accommodation doctrine which is discussed in more detail later), surface estate parties, and in particular project developers, are left with uncertainty with respect to plans to use the surface. This uncertainty should lead the developer to take certain actions in support of its planned activities. In particular, during the work on the site to determine the feasibility of constructing, owning and/or operating a project, a solar project developer must evaluate who owns the mineral estate, what risks are involved in its surface use, and if there is a way to reduce those risks or insure against them. The remainder of this article explores how owners or lessees of surface rights can reduce the uncertainty resulting from mineral estate rights.

4. Determining Ownership of Mineral Estate.

Issues arising from mineral estate rights can be more easily resolved if the owner of the surface rights also owns the mineral rights. In an instance where the project developer establishes land control by purchasing the property (which is sometimes the case with respect to energy development) and the purchase includes the subject tract's mineral rights (and such rights are not already subject to a mineral lease), the purchaser's ownership and control of such mineral rights generally alleviates concerns about the mineral estate. In the event the land control transaction between the landowner and developer takes the form of a lease, the solar tenant's concerns can be mitigated by an agreement from the landlord to NOT use, convey, or lease the mineral rights in any way that would hinder the tenant's surface lease rights. In contrast, if it is determined that the landowner does not own any of the mineral rights, or owns only a portion of the mineral rights, or possesses only the executive rights, the path forward for the surface developer can quickly become more complex. Thus, determining mineral ownership is a very important initial step in conducting due diligence on a proposed project site.

A. Title Search.

The ownership of the mineral estate beneath a particular area can be determined in multiple ways. 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. If the title company is unwilling or unable to provide information regarding mineral estate ownership (in most cases the title company will NOT perform such a search

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

itself), 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.[17] The role of the landman in an oil and gas development scenario has traditionally been to determine ownership of the mineral estate and then to work with those mineral owners in the negotiation of leases. Landmen can serve the comparable role in the context of surface project development, in particular serving solar project developers by determining who the mineral estate owners are and, as applicable, assisting in the negotiation of surface waivers or accommodation agreements. While not typical in solar project scenarios, if necessary the findings of a landman can be provided to an attorney who issues an opinion on the ownership of the rights that comprise the mineral estate at issue.

5. Determining Ability of Mineral Interest Holders to Use the Land

Prior to initiating negotiations with the existing mineral interest holders as determined in one of the fashions described above, the solar developer should examine whether any regulations exist that would prohibit mineral infrastructure, in particular drill sites, to be located on the property. In short, the developer may want to consult the field rules and other appropriate Railroad Commission regulations to provide development context. Additionally, local rules should be analyzed to determine how they affect mineral development. If a solar project is located within the jurisdiction of a municipality, it is likely that any mineral development will have permitting requirements for the drill sites and the pipelines. A municipality may have a prohibition for drilling or more stringent setbacks than those required by the Commission. Since the 1930s, Texas courts have recognized the concurrent authority of municipalities to regulate oil and gas activities alongside the Texas Railroad Commission.[18] As such, if regulatory or permitting issues do not provide comfort to a developer that the surface project will not be disturbed by mineral owner activity (actual or potential), then the project developer may need to work out an arrangement with the mineral owner(s).

6. Waiver of Surface Rights

Once the mineral estate owner(s) has been identified and it is determined that the solar project is not otherwise affected by regulatory or permitting issues, a solar energy project developer can assess ways in which it may eliminate risk of surface disruption from mineral exploration. One such way, although useful and practical for various reasons in only limited

[17] *See What is a Landman, available at* http://www.tapl.org/what-is-a-landman/ (last visited November 7, 2016).

[18] *See, e.g., Tysco Oil Co. v. R.R. Comm'n of Texas*, 12 F. Supp. 202, 203 (S.D. Tex. 1935) (upholding a municipal regulation governing the spacing of wells within the city limits). *See also Unger vs. State*, 629 S.W.2d 811, 812 (Tex. App.—Fort Worth 1982) (pet. ref'd.) (upholding a conviction for an owner who drilled on his property without a permit from the city as required by city ordinance). While outside the scope of this article, it is uncertain whether recent legislative enactments respecting local regulations would restrict the setbacks or other local pronouncements.

circumstances, can be achieved through a waiver of surface rights from the owner of the mineral estate. When properly obtained, a complete surface rights waiver will benefit a solar energy developer by preventing any future owner or lessee of the mineral estate under the project site from disturbing the project while accessing minerals or oil and gas.

A. Form of Waivers of Surface Rights

A waiver of surface rights may take the form of a clause inserted into either a deed conveying the mineral estate, a warranty deed reserving the ownership of the mineral estate to the grantor, or a recorded oil and gas lease. A waiver of surface rights may also take the form of a standalone agreement, which is the most prevalent method used for solar project development. Waivers of surface rights must be recorded in the real property records to bind sublessees, successors, and future grantees.[19]

A developer of a solar energy facility should initially review title records to determine if surface rights have been previously waived. If there is an existing waiver of surface rights, surface developers will want to ensure that the waiver adequately waived the surface rights, determine the scope of the waiver, and confirm that all required parties executed the document; both of these issues are discussed in more detail below.

[19] *See* Tex. Prop. Code § 13.001 (Vernon 2010); *Ehler v. B.T. Suppenas, Ltd*., 74 S.W.3d 515, 521 (Tex. App.—Amarillo 2002, pet. denied) (concerning the enforceability of restrictive covenants against future property owners); *McClure v. Atterbury*, 20 S.W.3d 722, 730 (Tex. App.—Amarillo 1999, no pet.) (concerning the enforceability of easements against future property owners).

If surface rights have not been previously waived, the developer may want to approach the requisite parties to discuss an arrangement that may include obtaining such waivers. As noted above, seeking a waiver may be useful in certain situations, including one in which the footprint of the solar project is such that a mineral owner has adequate room to develop the minerals from an area adjacent to the solar project. If the project footprint would preclude access to the minerals then the approach discussed in Section 6 below may be preferable.

B. Components of Waivers of Surface Rights

Generally, any surface rights waiver should be complete, meaning that it should waive **all** rights of the mineral owner to use the surface of the property—including for exploration, testing, and general access—and not just for production. In addition, such a waiver should encompass the right to use the surface tract to access **any** mineral or subsurface material, not just oil and gas. Texas courts have been called upon in the past to address the issue of whether a particular material is part of the mineral estate.[20] A solar developer should require that the surface rights waiver is broad enough to cover all contingencies that could disrupt the proposed development.

[20] *See, e.g, Storm Assoc., Inc. v. Texaco, Inc.*, 645 S.W.2d 579 (Tex. App.—San Antonio 1982), *aff'd sub nom, Friedman v. Texaco, Inc.*, 691 S.W.2d 586 (Tex. 1985) (holding that uranium is part of the mineral estate); *Ambassador Oil Corp. v. Robertson*, 384 S.W.2d 752 (Tex. Civ. App.—Austin 1964, writ ref'd n.r.e.) (holding that subsurface salt water is part of the mineral estate); *Watkins v. Certain-Teed Products Corp.*, 231 S.W.2d 981 (Tex. Civ. App.—Amarillo 1950, no writ) (holding that sand and gravel are not part of the mineral estate).

In addition, the goal for the developer should be to make sure that every outstanding mineral interest owner has executed and is therefore subject to a waiver of surface rights. The spectrum of interests that are a part of a severed mineral estate that are of particular interest in this context are the (1) owner, (2) leasehold interest, (3) executive interest, and (4) royalty interest.

The owner of the mineral estate has the right to enter and drill, lease, receive the bonus, receive delay rentals, and receive royalties. The mineral estate holder can convey out these rights separately.[21]

The leasehold interest arises when an owner of the mineral estate enters into an oil and gas lease. The lease could be granted to the oil and gas lessee by either the owner (as described above) or the owner of the executive rights (as described below). The lease entails a leasehold interest with the right to explore, develop, produce, and market oil and gas from the subject property. While the term "lease" typically describes the relationship between the owner of the mineral interest and the person granted the rights to explore, develop, produce and market the minerals, the legal arrangement for an oil and gas lease is more precisely a determinable fee interest in land.[22] During the term of the oil and gas lease, the lessee owns the minerals and generally holds them until the lease terminates, at which point the mineral interests can return to the grantor on the occurrence of certain events.

An executive interest owner has the executive right to lease and manage the mineral estate. The executive right is an interest in real property, incident and part of the mineral estate.[23] A mineral owner can convey part or all of the mineral estate and retain certain portions or all of the executive rights to lease the property. When a mineral interest is reserved or excepted in a deed, the corresponding executive right is also retained unless specifically conveyed.[24] Similarly, when mineral interests are conveyed, the executive right incident to that interest passes to the grantee unless specifically reserved.[25]

The royalty owner owns a non-possessory, cost-free right to a share of the gross production or a share of the proceeds from the sale thereof. The royalty interest is a real property interest in Texas.[26] A royalty interest may be created by grant, reservation, or exception, similar to a mineral interest.[27] A landowner, for example, prior to or subsequent to leasing the land, may convey a royalty interest in the land. Such conveyance is a nonparticipating royalty and can expire concurrently with the expiration of a lease or after a date certain. The owner of a nonparticipating royalty interest does not share in the lease bonus and delay rental benefits.

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[21] *See Altman v. Blake*, 712 S.W.2d 117, 118 (Tex. 1986).

[22] *See Stephens County v. Mid-Kansas Oil & Gas Co.*, 254 S.W. 290 (Tex. 1923).

[23] *Day & Co. v. Texland Petroleum, Inc.*, 786 S.W.2d 667 at 669 (Tex. 1990).

[24] *Martin v. Snuggs*, 302 S.W.2d 676, 678 (Tex. Civ. App.—Fort Worth 1957, writ ref'd n.r.e.).

[25] *Schlitter v. Smith*, 128 Tex. 628, 630-21, 101 S.W.2d 543, 544 (Comm'n App. 1937).

[26] "It is well-settled that a royalty interest in an oil and gas lease is an interest in real property, held to have the same attributes as real property." *Kelly Oil Co. v. Svetlik*, 975 S.W.2d 762, 764 (Tex. App.—Corpus Christi 1998, pet. denied) (citing *Garza v. De Montalvo*, 217 S.W.2d 988, 992 (Tex. 1949)).

[27] *See* Williams and Meyers, *Oil and Gas Law*, § 202.1(2010).

It is important for the surface developer to understand the interests described above in order to determine from whom to obtain a surface waiver. Where the mineral estate is severed but there is not an existing lease in place affecting said severed estate, the solar developer should obtain a waiver from all mineral estate owners and executive rights owners, as applicable. In the event a lease is in place at the time that the surface waiver is sought, the developer should seek a waiver from the lessee **and** all mineral estate owners and executive rights owners (as applicable). For example, a waiver of surface rights with the lessee will be binding on a lessee and any successor or sublessee of the initial lessee's interest, but the waiver will not be binding on the owner of the mineral estate or executive rights that executed the oil and gas lease as the lessor. Since this mineral estate owner retains the possibility of reverter following the termination or expiration of an oil and gas lease, the owner would not be precluded from granting another lease since that owner would not be subject to a surface rights waiver. This scenario definitely creates uncertainty for development of a surface development, and therefore should be avoided.

Whether developers need to obtain waivers of surface rights from royalty interest owners depends on the facts surrounding the proposed subject property.[28] While a royalty interest owner is deemed to own part of the mineral estate under Texas law, such an interest permits the holder to only share in the profits of the mineral estate without actually owning the minerals in place or having the right to lease or otherwise develop the mineral estate.[29] A royalty interest owner does not have the right to participate in the execution of oil, gas, and mineral leases, and does not (without a specific grant) have the right to use the surface of the property for exploring or developing the mineral estate.[30] Consequently, these principles of Texas law generally lead to the conclusion that obtaining a surface rights waiver from a royalty owner unnecessary.

In very limited circumstances, there may be some concern related to whether the full waiver of the surface by an executive rights owner, which would preclude the exploration and production of the mineral estate from the subject property, without the concurrence of any royalty owners, would violate the executive rights owner's duty to the "non-executive" rights owner (i.e. non-participating royalty interest owner). While a full discussion of the relationship between the executive and non-executive interests in a mineral estate is well outside the scope of this particular article, it should be noted that under Texas law the executive rights holder owes a duty of utmost good faith and fair dealing to the non-executive interest owner.[31] While there is no bright-line test on the subject, and the guiding factors in these types of analyses

[28] To be clear, this is applicable to those who own *only* a royalty interest, not an owner of another of the various interests in an oil and gas leasing situation that also possesses a royalty interest.

[29] *See Glover v. Union Pac. R. Co.*, 187 S.W.3d 201, 211 (Tex. App.—Texarkana 2006, pet. denied); *Hysaw v. Dawkins*, 483 S.W.3d 1, 9 (Tex. 2016).

[30] *See In re Estate of Slaughter*, 305 S.W.3d 804, 809, 811 (Tex. App.—Texarkana 2010, no pet.); *Hamilton v. Morris Resources, Ltd.*, 225 S.W.3d 336, 344 (Tex. App.—San Antonio 2007, pet. denied); *Neel v. Alpar Resources, Inc*., 797 S.W.2d 361, 365 (Tex. App.—Amarillo 1990, no writ).

[31] *KCM Fin. LLC* v. *Bradshaw*, 457 S.W.3d 70, 80-82 (Tex. 2015).

typically center on evidence (or lack thereof) of "self-dealing," the executive's duty is ultimately to secure every benefit for the non-executive that the executive secures for itself with respect to the mineral estate.[32] Therefore, in a scenario where the owner of the executive right in a particular piece of property has, pursuant to a request from a solar developer, waived the right to utilize the surface for mineral exploration and production activities in exchange for other consideration that is not shared with the non-participating royalty owners, the non-participating royalty owners may have a reasonable basis for complaint. While this particular scenario is generally unlikely to occur (in most instances other avenues of production are available or reserved), surface developers must keep it in mind in their efforts to obtain surface waivers from the appropriate mineral owner parties.

Although it may seem unreasonable to require every mineral estate owner—even owners of minute fractional interests—to execute a waiver of surface rights, this level of diligence is required for an effective surface waiver. Under Texas law, every mineral rights owner who owns a fraction of the mineral estate is treated as a tenant-in-common of the mineral estate.[33] Any tenant-in-common of a real estate interest is entitled to lease the real estate interest for value without the consent of the other tenants-in-common.[34] This right pertains to both surface interests and mineral interests.[35] As a result, any single mineral owner, no matter how small his or her percentage interest, possesses the right to use (or lease the use of) the surface of the property to access minerals or oil and gas.[36] Consequently, the solar energy developer should seek a waiver of surface rights from each mineral owner.

7. Accommodation Agreements/Non-Interference Agreements

Another route (and in the author's experience a more common one) that typically is more palatable to mineral rights holders is the execution of accommodation agreements (also sometimes referred as “non-interference agreements”). Whereas a waiver of surface rights requires the mineral rights holder to waive all of its rights to use the surface, an accommodation agreement includes agreements between the parties on what surface uses will be permitted, where they will be permitted, and contains other agreements designed to allow the parties to share the use of the surface estate. For example, a typical accommodation agreement for a solar energy site may require the developer to designate certain reserved areas for mineral activities in consideration for the mineral rights holders relinquishing their rights (express or implied) to the remaining areas. In this case, the accommodation agreement acts like a form of development agreement among

32 *Id*. at 81-82.

33 *See Way v. Venus*, 35 S.W.2d 467 (Tex. Civ. App.—El Paso 1931, no writ).

34 *See Myers v. Crenshaw*, 116 S.W.2d 1125 (Tex. Civ. App.—Texarkana 1938), *aff'd*, 137 S.W.2d 7 (Tex. 1940); *Hamman v. Ritchie*, 547 S.W.2d 698, 706-07 (Tex. App.—Fort Worth 1977, writ ref’d n.r.e).

35 *Id.*

36 It should be noted, however, that while leasing out small interests is legally permitted, the willingness of an operator to drill a well on such a small interest is generally low due to the requirement to treat the unleased mineral interest owners as cotenants.

the solar energy developer, existing mineral lessees, and the owners of the mineral estate. The accommodation agreement would preserve the right to access the mineral estate for the mineral estate holders while also protecting the surface developer's facility from future disturbance.

As such, the arrangement is not a total waiver of surface rights, but rather provides for a waiver of rights subject to the areas the solar developer has set aside for mineral development use, and for cooperative sharing of the access roads. This type of form specifically contemplates that the two separate estates can function alongside each other, but do not have the right to interfere with each other. As with waivers of surface rights, the developer should seek such an agreement with all applicable mineral estate interest owners (owners, executive rights, lessees, etc., each as applicable), and should expect mineral rights holders to require consideration for limiting their common law rights.

Surface developers may practically discover that a combination of surface rights waivers and accommodation agreements is necessary in order to insulate their projects from conflicts with mineral rights holders. Depending on the layout of the solar project or surface development, some parties may be unwilling to waive their surface rights and may instead be more open to negotiating an accommodation agreement. Alternatively, mineral estate owners may be willing to waive surface rights for adequate consideration, but current lessees might not be open to a complete waiver. No matter what combination is used, the goal remains the same—the relevant parties should work together to generate certainty of development to maximize surface use and to achieve the cooperation that is generally expected by Texas common law as discussed in more detail below.

8. Issues If All Mineral Estate Owners Do Not Agree to the Waiver of Surface Rights or Accommodation Agreement or Cannot Be Located

In the event that the contractual arrangements described above are not available or feasible, then the surface developer may need to rely on other doctrines and/or tacks in order to provide itself (and its title insurer and financing parties) comfort with respect to the surface development. In short, any analysis that must be done in this context starts and ends with reference to the accommodation doctrine.

A. Accommodation Doctrine

In the event of conflicts between surface owners and mineral owners related to their respective surface uses (in an instance where the respective surface usages of the parties are not otherwise expressly addressed), Texas courts may resort to the common law doctrine referred to as the accommodation doctrine. The accommodation doctrine comes into play primarily in instances where the severed mineral estate owner interferes with a pre-existing surface use. As noted above, although the severed mineral estate is dominant over the surface estate, the two parties "must exercise their respective rights with due regard for the other's."[37] The original case addressing the matter is *Getty Oil*

37 *Coyote Lake Ranch* at *20.

Co. v. Jones.[38]

In *Getty Oil Co.*, Jones owned the fee simple title to certain land, and Getty Oil was an oil and gas lessee thereon.[39] Getty Oil's lease predated Jones' purchase of the fee simple surface estate.[40] In 1963, Jones installed a self-propelled circular irrigation system to irrigate his cotton crops.[41] In 1967, Getty Oil drilled two additional wells that produced but needed pumps to create flow.[42] Getty Oil began installing two beam pumps that were each at least thirteen feet tall.[43] The pumps would have restricted the movement of Jones' irrigation system because it maintained only a seven-foot clearance.[44] Jones sued for damages and an injunction to prevent Getty Oil from installing the pumps.[45]

At trial, Jones had the burden of proving his existing use of the surface to grow cotton would be impaired/precluded by Getty Oil's pumps, as well as the burden of proving that Getty Oil had other reasonable alternatives to the beam pumps. Jones proved to the satisfaction of the jury and the Court that the self-propelled irrigation system represented the only reasonable method by which he could profitably grow cotton on the land.[46] Jones also introduced evidence that Getty Oil had two alternatives to the beam pumps it intended to install—Getty Oil could use hydraulic pumps that were much shorter and would not impede the irrigation system, or Getty could dig cellars into the ground so that beam pumps would not extend more than seven feet above the surface.[47] The hydraulic pumps would cost less than $5,000 more than the beam pumps; installing the beam pumps in cellars would have cost less than $12,000 more than installing the pumps on the surface.[48] The Court held that the doctrine of accommodation applied because these two alternatives were reasonable alternatives despite their added expense, the use of the beam pumps was not reasonably necessary to the extraction of oil, and the use of the beam pumps violated Getty Oil's obligations to exercise its rights with due regard to the surface owner.[49]

Following *Getty Oil Co.*, additional cases were decided by the Court which noted the "broad application" of the accommodation doctrine,[50] as well as providing further insight into the underlying intent and process of the Court in such cases to lead the way in (a) "working out accommodations which preserve unto the severed mineral owner or lessee a reasonable dominant easement for the production of … minerals while at the same time preserving a viable servient estate"[51] and (b) "conciliating conflicts between owners of the surface and of the mineral rights, and in requiring reasonable accommodation between them."[52]

38 470 S.W.2d 618 (Tex. 1971).
39 *Id*. at 619-20.
40 *Id*.
41 *Id*. at 620.
42 *Id*.
43 *Id*.
44 *Id*.
45 *Id*. at 619.
46 *Id*. at 619-20.
47 *Id*. at 622.
48 *Id*.
49 *Id.*
50 *Coyote Lake Ranch* at *22.
51 *Sun Oil Co. v. Whitaker*, 483 S.W.2d 808, 817 (Tex. 1972).
52 *Humble Oil & Refining Co. v. West*, 508 S.W.2d 812, 815 (Tex. 1974).

With that intent in mind, the Court has held that the elements of a claim that a mineral lessee or other mineral owner has failed to recognize and accommodate an existing use of the surface:
"the surface owner has the burden to prove that (1) the lessee's use completely precludes or substantially impairs the existing use, and (2) there is no reasonable alternative method available to the surface owner by which the existing use can be continued. If the surface owner carried that burden, he must further prove that given the particular circumstances, there are alternative reasonable, customary, and industry-accepted methods available to the lessee which will allow recovery of the minerals and also allow the surface owner to continue the existing use."[53]

The foregoing places the burden of establishing the existing use squarely on the surface owner, and includes a requirement on the surface owner to demonstrate a lack of alternatives. While these elements were recently cited by the Supreme Court of Texas,[54] commentators note that several of the progeny of *Getty Oil* have not required the surface owner to show lack of alternatives, and moreover contend that the Court has created a "further imbalance in the relationship between surface owners and mineral owners, thereby negating the original purpose of the accommodation doctrine - to level the playing field between the parties to a severed estate."[55] It is likely that this assertion will be made in future cases with respect to the doctrine, but in the meantime surface developers and mineral owners should operate under existing pronouncements and instructions from the Court.

A relatively significant holding with respect to pre-existing use analysis came in *Texas Genco, LP v. Valence Operating Co.*, announced by the Waco Court of Appeals in 2006.[56] In that case, Genco, the surface owner, was the owner and operator of a power plant and had set aside certain lands for use as an industrial ash landfill.[57] Genco had divided the landfill into discrete blocks or "cells," some of which had already contained ash at the time of the conflict.[58] Valence desired to drill a well within one of the "unused" cells and obtained a permit from the Railroad Commission to do so.[59] The main argument between Genco and Valence, and the point of reference here, related to whether the *planned* use of the particular cell Valence desired to drill into would preclude, under an accommodation doctrine argument, Valence from drilling in that location. The Waco Court determined that such planned use is a pre-existing use covered under the accommodation doctrine.[60] Moreover, the court held that directional drilling can be a reasonable, industry-established alternative requiring the mineral estate holder to accommodate a surface use.[61]

The significance of the foregoing discussion in this section to a surface developer can be summarized into a few

53 *Merriman v. XTO Energy, Inc.*, 407 S.W.3d 244, 249 (Tex. 2013) (citations omitted).
54 *Coyote Lake Ranch*, at *23-*24.
55 Courtney R. Potter, *The Accommodation Doctrine Revisited: Implications in Law and in Policy*, 46 St. Mary's L.J. 75, 84-85, 89 (2014).
56 187 S.W.3d 118 (Tex. App.—Waco 2006, pet denied).
57 *Id*. at 120.
58 *Id*. at 120-21.
59 *Id*. at 121.
60 *Id*. at 124.
61 *Id*.

points. First, there is no bright-line test in the application of the accommodation doctrine to a particular scenario, but rather any presiding judge or court will conduct an *ad hoc* analysis of the facts and circumstances surrounding the conflict. There is somewhat sufficient guidance from the line of cases explaining the accommodation doctrine, including direction with respect to what constitutes a "pre-existing use", who has the burden of proof, and what is considered to be a reasonable alternative, but the overall process continues to contain uncertainty of outcome. Second, the accommodation doctrine only applies in instances where there is no existing agreement between the surface and mineral owners, and further buttresses the stated goal of reconciling differences between the potential conflicting parties. Finally, as technology improves (for both mineral and surface endeavors) and additional perceived conflicts arise, it is possible that this common law doctrine will continue to evolve, perhaps shifting burdens between the surface and mineral parties or declaring additional points of clarity in the process, but total reliance on the doctrine is not an efficient plan for either side. There are alternatives or supplements that should be strongly considered.

B. Reserving Well Drill Sites

Again assuming that the surface developer has not been able to obtain surface waivers, accommodation agreements, or other arrangements with mineral owners (for whatever reason), it may be advisable for the developer to voluntarily and proactively reserve certain areas restricted from surface development so that the land is withheld as a future potential drill site. This process (along with the underlying processes involved in negotiating accommodation agreements) should be undertaken with regard to the existing Railroad Commission field rules, geologic reports, and other relevant information. The expertise of a petroleum engineer may also be worthwhile depending on the experience level of the developer and/or the complexity of the situation on the ground, since such professionals often have greater access to the relevant geologic data, surrounding mineral development and activity, and regulatory requirements. These types of proactive reservations have the potential to avoid conflict in the future as well as to provide a baseline for any analysis under the accommodation doctrine that could arise later. Although this process is not typical, and contains inherent risk, it is an alternative that a developer may consider.

C. Texas Railroad Commission Rules

In addition, if the surface developer intends to develop a project in certain counties in Texas, it may be possible for a said developer to initiate a process at the Railroad Commission pursuant to Statewide Rule 76 (16 Tex. Admin. Code § 3.76 (West 2009)) to designate certain lands as qualified subdivisions, also known as a "drillsite designation." In 1983, the Texas Legislature enacted Chapter 92 of the Texas Natural Resources Code. Chapter 92 provides authority to surface owners of certain tracts to apply for the creation of a qualified subdivision that limits the "possessory mineral interest" holder to explore and produce the tract's associated minerals from specified "operation

sites."[62] The terms of the statute and the rule specify that a qualified subdivision may not exceed 640 acres in size, and may only be granted in (1) counties with a population exceeding 400,000, and (2) counties with a population exceeding 140,000 so long as that county is adjacent to a county with a population exceeding 400,000 or located on a barrier island.[63] In order to satisfy the statute, the qualified subdivision must contain "an operations site for each separate 80 acres within the 640-acre tract and provisions for road and pipeline easements to allow use of the operations site."[64] The operations sites are must be two acres or greater,[65] although research of hearing dockets indicates a tendency to offer (and for the Commission to accept) anywhere from 2- to 6-acre sites. Finally, the qualified subdivision must be a tract that has been subdivided in a manner authorized by law by the surface owner for residential, commercial, or industrial use.[66]

Procedurally, the applicant must submit an application to the Railroad Commission, which in turn sends notice to all possessory mineral interest holders of the application and hearing date.[67] Often, the applicant and mineral interest holders will negotiate an accommodation-type of agreement in order to avoid the costs and efforts involved in a Railroad Commission hearing. In the event the parties do not arrive at such an agreement, a hearing will be held, at which the applicant and the interest holders provide evidence to support the approval, denial, or amendment of the application. The Commission's decision is reached after consideration of "the adequacy of the number and location of operations sites and road and pipeline easements" for each application.[68] If an application is granted, the surface owner must commence actual construction of roads or utilities within the newly qualified subdivision, and must sell a lot within the subdivision to a third party within three years of the order granting the application.[69]

While the contents of Chapter 92 and Rule 76 have existed for nearly 20 years, the process was used sparingly until recently. An uptick in applications has occurred in the last few years, but the provisions of the rule have remained either largely anonymous, or largely avoided. In 2010, the Austin Court of Appeals heard arguments in the case of *SWEPI, LP v. Railroad Commission of Texas*,[70] wherein the mineral interest holder (SWEPI) challenged the Railroad Commission's approval of a qualified subdivision under Rule 76. SWEPI was the operator of the mineral estate underlying two contiguous 640-acre tracts for which the surface owner (Eyhorn) and Hidalgo County (who possessed a purchase option) filed plats and requested the designation of drill sites upon pursuant to the rule. Eyhorn and Hidalgo County planned to construct and operate a landfill on the subject lands. After the hearings and legal wrangling, the Commission granted both applications. In affirming the Commission's approval, the court held

[62] Tex. Nat. Res. Code Ann. §§ 92.002(1), 92.002(2) (West 2011).
[63] *Id.*
[64] *Id*.
[65] *Id.*
[66] *Id*.
[67] *Id*., § 92.004.
[68] *Id*., §92.004(b).
[69] *Id*., §92.005(c).
[70] 317 S .W.3d 253 (Tex. App.—Austin 2010, pet. denied).

that an owner of greater than 640 acres of land is entitled to a qualified subdivision for *every* 640 acres, thereby extending what appears from the statute to be a requirement that landowners are limited to a single 640-acre qualified subdivision.[71] In addition, the court upheld the Commission's decision that use of the surface for a landfill satisfied Section 92.002(3)(B), largely basing its decision on the facts that the legislative history of the statute is silent regarding what constitutes "industrial use," and the common meaning of "industrial" from Webster's dictionary is "of or belonging to industry."[72]

In addition to the location of the subject property, the applicability of Rule 76 may also depend on the technology used in the surface development. To date, no solar developer has applied for and received a qualified subdivision pursuant to Rule 76. However, the process does provide an avenue for solar developers (and arguably mineral interest owners and developers) to achieve more certainty in the utilization of surface areas within specified counties that overlie a severed mineral estate. Moreover, understanding the parameters of Rule 76 and the administrative decisions issued thereunder can provide critical information that can be utilized by surface and mineral estate parties alike (and act as a blueprint) in the negotiations of accommodation agreements and the reservation of drill sites as discussed above.

[71] *Id*. at 261.
[72] *Id*. at 266.

9. Title Insurance Products

The processes and avenues discussed to this point in the article are intended, as noted, to create certainty with respect to surface and mineral development. This certainty applies to the developer itself and to the financing parties of any surface (or mineral) project. A typical step in the development process is the issuance of a title insurance policy in favor of the project. Title insurance provides a backstop to the title work that the developer performed on the site, and is expected by all financing parties to a transaction. In this particular context, title insurance can also provide coverage related to mineral rights and potential conflicts among the respective estate owners.

Texas has four different types of promulgated title insurance endorsements to address mineral issues that arise in the context of surface real estate rights: Forms T-19, T-19.1, T-19.2 and T-19.3. These endorsements are available when a title insurance company issues its title policy with an exception or exclusion for mineral estate coverage. Title companies may include such mineral exceptions or exclusions under Texas Title Insurance Procedural Rule 5.1, and when including the mineral exclusion title companies may also make the T-19 endorsements available under Rule P-50.1, as described below:

P-5.1. Exception or Exclusion Regarding Minerals

A. As used by this rule, minerals means coal, lignite, oil, gas, and other minerals in, under, and that may be produced from the land, together with all rights, privileges, and immunities

relating thereto. The Policy is not an abstract of title nor does a Company have an obligation to determine the ownership of any mineral interest. A Company may insert into a policy or any other title insuring form an exception or an exclusion for minerals as provided below:

1. On Schedule A, Item 2:
"subject to, and the Company does not insure title to, and excepts from the description of the Land, coal, lignite, oil, gas and other minerals in, under and that may be produced from the Land, together with all rights, privileges, and immunities relating thereto."; or

2. On Schedule B:
"All leases, grants, exceptions or reservations of coal, lignite, oil, gas and other minerals, together with all rights, privileges, and immunities relating thereto, appearing in the Public Records whether listed in Schedule B or not. There may be leases, grants, exceptions or reservations of mineral interest that are not listed."

B. When the language described in either A.1 or A.2 above is inserted, the Company upon request by the insured and if it meets the Company's underwriting standards may issue one or more of the applicable endorsements as provided in Procedural rule P-50.1.

Because of the language in section B of Rule P-5.1, the endorsements noted above are available to address the risks that surface estate improvements may be forced to be removed or disturbed by mineral estate activities. These endorsements help alleviate some of the concerns about mineral rights faced by solar energy project operators because the endorsements allow claims to be filed under the title policy if mineral estate activities force the solar project operator to relocate its facilities. Just like the accommodation doctrine, however, the coverage discussed above is not without exception, and surface developers must be aware of the limitations of Texas title insurance policies and endorsements. Such policies insure only the value of the underlying real estate rights and improvements, and only up to the amount of coverage purchased in the policy. If a solar project's operating revenues and profits exceed the value of the underlying real estate rights and improvements, such excess is not covered by the title insurance policy, and such coverage may also not account for project downtime or other business-related aspects of the project.

10. Conclusion

Since commercial scale solar energy projects or other surface developments generally utilize relatively large swaths of contiguous land, developers must carefully assess the likelihood of whether potential project facilities will not be subject to disturbance by the dominant mineral estate. Solar energy project owners can mitigate disturbance risks in several ways: (a) acquiring and controlling the mineral estate, (b) obtaining waivers of surface rights from mineral estate owners and lessees, (c) obtaining accommodation agreements from mineral estate owners and lessees, (d) designating well drill sites, and (e) obtaining title insurance mineral endorsements.

As a consequence, both surface developers and mineral owners can minimize the risk of conflict by reaching agreement and maximizing utilization of the surface to each other's (and the underlying landowner's) benefit.