

Legal Considerations for Mid-Continent Renewable Energy Projects

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Permian & Mid-Con Energy Series: Upcoming Sessions

- Managing & Responding to Emergencies in the Energy Industry (August 23, 2023)
- The Other Side of the Fence: Litigating Surface Disputes & Managing Landowner Relations (September 27, 2023)

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Overview

- Severed Estates and the Accommodation Doctrine
- Wind and Solar Development
- Carbon Capture and Storage

Severed Estates and the Accommodation Doctrine

Severed Estates, generally

- Ownership rights in a tract of land may be split between the surface and mineral estate
- An owner of the surface or mineral estate may convey a fractional interest in their respective estate
- Dominant Estate
 - When a mineral estate is severed from the surface estate, the mineral estate is considered the dominant estate and the surface estate is considered servient

Texas Accommodation Doctrine

- 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
- Operator's pumping units interfered with the irrigation system
- 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.
- *Tarrant County Water Control and Imp. Dist. No. 1 v. Haupt, Inc.*, 854 S.W.2d 909 (Tex. 1993)
 - Concluded that the water district's condemnation of the surface to create a reservoir constituted an inverse condemnation of the mineral estate to the extent the mineral owners were deprived of all reasonable methods of recovery.

Accommodation Doctrine Outside of Texas

- Other 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, utilize a surface damage act and have not explicitly adopted the Texas common law accommodation doctrine.
 - 52 Okla. Stat. § 318.2, et seq.

The title 'Renewable Energy Projects' is centered on the left side of the slide. The text is in a white, bold, italicized serif font. The background is a dark blue field with a network of glowing blue lines and nodes, suggesting a digital or energy network.

***Renewable Energy
Projects***

Wind Leases – Common Terms

- Granting Clause
- Additional Easements
- Term
- Compensation
- Reserved Uses
- Restoration Requirements
- Mineral Issues



Solar Leases – Common Terms



- Granting Clause
- Additional Easements
- Term
- Compensation
- Reserved Uses
- Restoration Requirements
- Mineral Issues

Nuisance and Wind and Solar Projects

- *Rankin v. FPL Energy, LLC*, 266 S.W.3d 506 (Tex. App. – Eastland 2008, pet. denied)
 - Landowners brought suit in response to FPL’s proposal to build a wind farm consisting of 421 wind turbines over 47,000 acres in Taylor and Nolan Counties alleging that the wind farm would constitute both a public and private nuisance.
 - The jury rejected plaintiffs’ arguments that the wind farm would be unreasonably noisy and reduce property values.
 - The Court of Appeals addressed the issues of an aesthetic nuisance and concluded that the landowners’ emotional response to the wind farm was insufficient to support a nuisance claim.

Lyle v. Midway Solar, LLC, 618 S.W.3d 857 (Tex. App. – El Paso 2020, pet. denied)

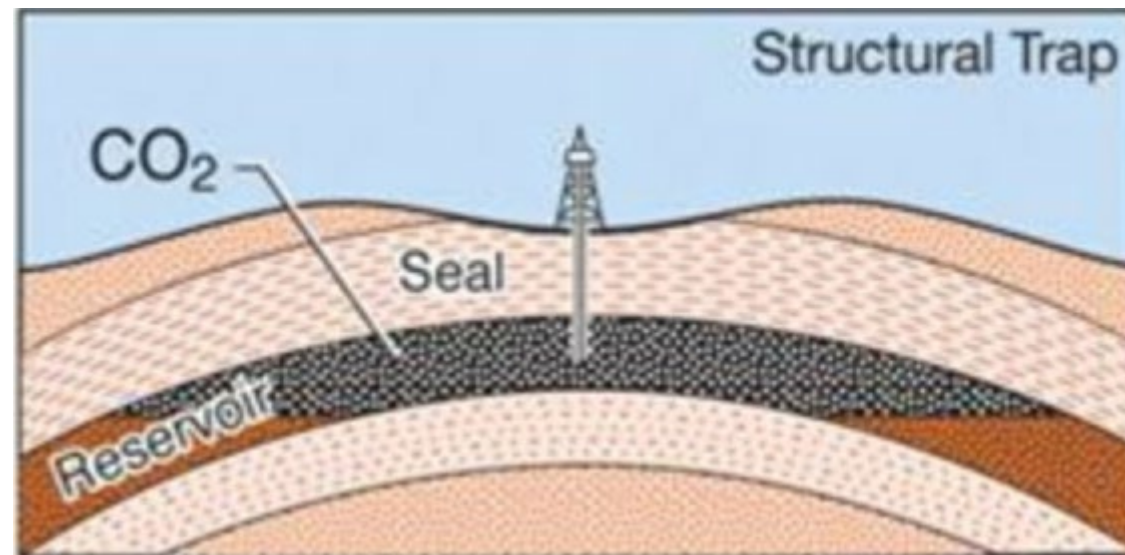
- A renewable company constructed a solar facility, which covered 70% of the 315-acre surface estate.
- The Court determined that Midway had not breached its duty to the Lyles regarding the surface usage because the Lyles had not sought to utilize any of the surface for mineral development.



Carbon Capture and Storage

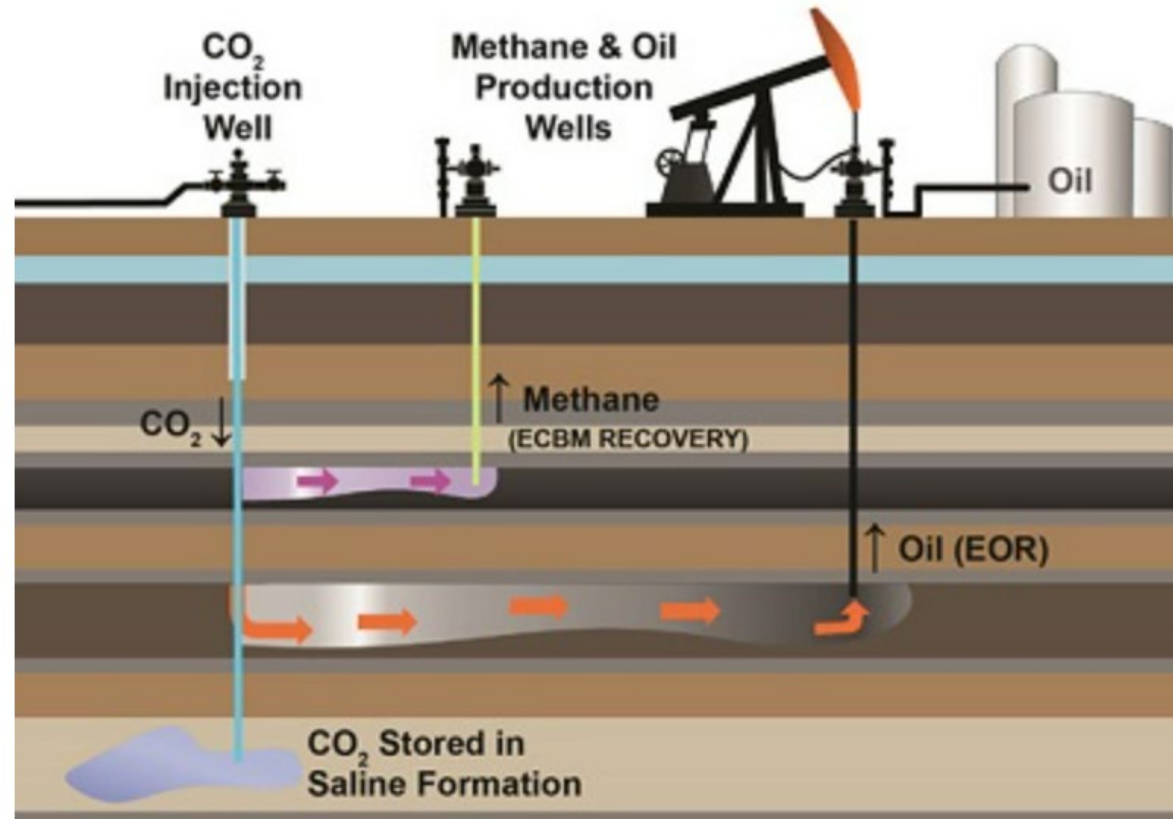
Carbon Capture and Storage

- Carbon Capture and Storage (“CCS”) is a process that can help eliminate carbon emissions created when burning fossil fuels.



Source: <https://www.netl.doe.gov/carbon-management/carbon-storage/faqs>

Storing CO₂



Source: <https://www.netl.doe.gov/carbon-management/carbon-storage/faqs>

Pore Space Ownership

- Texas – Surface owner owns the subsurface pore space
 - Myers-Woodward, LLC v. Underground Services Markham, LLC, No. 13-20-00172-CV, 2022 WL 2163857 (Tex. App. – Corpus Christi-Edinburg June 16, 2022, pet. filed) reh’g denied (Sept. 6, 2022) (concluding that the surface owner owned the subsurface including subsurface caverns).
- Oklahoma – Surface owner owns the subsurface pore space
 - 60 Okla. Stat. § 6



Questions?

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