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ENERGY LAW UPDATE

Asserting Dominance: Do Renewable Developers Have to Accommodate Oil & Gas Surface Use?

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In Lyle v. Midway Solar, LLC, the El Paso Court of Appeals considered whether to apply the accommodation doctrine in a case involving a solar facility that was constructed by defendants on a 315-acre tract of land in Pecos County. The dispute arose when plaintiffs, who owned an interest in the mineral estate below the tract, claimed that their ability to develop the minerals had been impaired by the facility, which covered 70-percent of the surface land above the mineral estate. After acknowledging that the mineral estate is dominant in Texas and that the accommodation doctrine might apply in the future, the Court ultimately held that the doctrine could not apply "until the mineral owners actually seek to develop their minerals." [1]

[1] Lyle v. Midway Solar, LLC, No. 08-19-00216-CV, 2020 Tex. App. LEXIS 10385 (Tex. App.—El Paso Dec. 30, 2020) at [*2].

The Court began by recognizing that, in Texas, the mineral and surface estates are severable, meaning that the estates can be conveyed separately to different grantees. After the estates have been severed, the mineral estate is generally considered to be the "dominant estate." In other words, the owner of the mineral estate has the right to use the surface to extract minerals, in addition to any other incidental rights that are reasonably necessary to extract the minerals. Conversely, the surface estate is known as the "servient estate" because the mineral/dominant estate enjoys the right to use the surface. In this case, the Lyles gained an interest in the mineral estate through a 1948 Deed (the "Deed"), which severed the mineral estate from the surface estate. The surface estate is owned in its entirety by defendant Drgac and was leased to defendant Midway Solar in 2015 for the purpose of constructing the solar facility at issue.

While the theory of the dominant mineral estate is widely accepted in Texas, it is not absolute and can be limited by the accommodation doctrine, which "requires the surface owners and mineral owners to reasonably accommodate each other in utilizing the surface for their competing estates."[2] The doctrine aims to protect preexisting uses of the surface and could require the mineral owner to pursue an alternative method of extraction if the alternative is reasonable and industry-accepted; however, if the evidence establishes that there is only one way to use the surface to produce the minerals, the mineral owner is likely to prevail and will be able to use the surface despite any preexisting surface uses, and despite any damage to the surface that might occur during the extraction process.

After identifying the accommodation doctrine as a potential limit on the dominance of the mineral estate, the Court next considered whether the doctrine should apply in this case. First, the Court noted that Texas courts favor freedom of contract, meaning that parties to a contract are entitled to negotiate for contractual terms as they see fit. Accordingly, when parties have agreed to certain express terms in writing, Texas courts generally will not supplant those terms with the accommodation doctrine, so long as the terms are sufficiently specific and unambiguous.

To determine whether the accommodation doctrine should apply in the Lyle case, the Court first analyzed the language of the 1948 Deed to determine whether it sufficiently defined the rights of the mineral estate. In particular, the Court considered language from the Deed stating that the mineral owners reserve "the right to such use of the surface estate…as may be usual, necessary, or convenient in the use and enjoyment of the oil, gas, and general mineral estate…"[3] Plaintiffs argued that inclusion of the term "usual" was evidence of plaintiffs' intent to reserve "the right to use vertical drilling, which was the 'usual' method of drilling at the time the deed was signed."[4] However, the Court was not convinced and pointed to several prior cases which held that terms like "necessary" and "convenient" do not describe the rights of the parties with sufficient precision and leave too much room for disagreement. The Court determined that the use of the term "usual" in the Lyles' Deed was similarly imprecise. Further, the Court reasoned that if the parties intended to prescribe a particular method of drilling, they easily could have done so. As such, the Court concluded that the 1948 Deed did not define the rights of the parties in a manner that would "preclude the application of the accommodation doctrine."[5]

After finding that the Deed itself did not preclude the application of the accommodation doctrine, the Court next considered whether the Lyles had a valid basis for maintaining their claims under the doctrine. The Lyles argued, in essence, that they should be able to prevent any surface use that might someday interfere with the extraction of their minerals; however, the Lyles also admitted that they had no current or future plans to actually extract the minerals. On the other hand, Midway Solar argued that "its solar field might only potentially interfere with the Lyles's mineral interest at some point in the future, but until

[2] Id. at [*10].
[3] Id. at [*21].
[4] Id. at [*22].
[5] Id. at [*25-26].

it actually does so, the Lyles cannot have the unilateral right to dictate the use of the surface." In resolving the question of whether Midway must accommodate the Lyles' potential surface use, the court reasoned that "if the Lyles are not exercising their right [to use the surface], there is nothing to be accommodated. Stated otherwise, until the Lyles seek to develop their minerals, Midway owes no duty to the Lyles respecting the surface usage."[6] Thus, the Court concluded that Midway's solar field did not presently need to accommodate the Lyles' potential extraction activities, but left open the question of whether it may be required to do so in the future.

Though the "dominant estate theory" is broadly accepted by Texas courts, the Lyle case makes clear that this rule is not absolute. If the mineral owners have no present plans to extract the minerals, the mineral owners cannot demand accommodation by the surface owners for potential, unplanned extraction operations. However, the Court also made clear that the mineral owners could have a valid claim under the accommodation doctrine in future if they actually seek to extract the minerals.

Of note in the Lyle case is the fact that Midway did not obtain surface use agreements or surface waivers from the relevant mineral owners even though they had done so on adjacent lands.[7] Drgac and Midway did, however, identify certain 80-acre "Designated Drill Site Tracts" for potential future oil and gas operations that were free of solar facilities.[8] Despite this concession, expert witnesses for the mineral owners asserted that the solar facility "severely" affected an operator's ability to develop the minerals, did not allow reasonable access to the mineral estate, and impeded future development on the site.[9] Further, the designated drilling areas were not the most "attractive drilling prospects" for surface operations.[10]

The mineral owners were clearly setting the stage to argue that under the accommodation doctrine the only way to produce the minerals was to remove all or a portion of the solar facility or to pay damages commiserate with the lost opportunity to develop. Such a dispute can create a potentially catastrophic conflict of interest between a renewable energy developer and the owners of mineral rights and lead to losses well outside the scope of most title insurance policies. At the very least it can lead to protracted and expensive litigation, laden with fact-intensive expert testimony, as in this case. As such, companies with plans to use the surface of lands in oil-rich areas of Texas (and elsewhere) should be mindful that their surface use might someday be required to accommodate oil and gas drilling operations. Where there has been a mineral severance, surface owners or renewable lessees should identify all mineral owners and other working interest owners and should obtain explicit surface waiver agreements in advance. Additionally, surface owners should attempt to anticipate future oil and gas operations and, ideally, should plan their surface use in a manner that reasonably accommodate future extraction processes.

[6] Id. at [*32].
[7] Id. at [*6-*7].
[8] Id. at [*5].
[9] Id. at [*12].
[10] Id.

CONTACT

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