

Vinson&Elkins

## Seventh Annual Conference on Carbon Capture & Sequestration

### A Legal Analysis of Subsurface Property Rights in Texas

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May 5 – 8, 2008 • Sheraton Station Square • Pittsburgh, Pennsylvania

## Overview

- The law in Texas is unsettled, but the surface owner probably has superior rights to the subsurface pore space.
- This paper draws from three related areas of conflict:
  - Oil and gas production;
  - Natural gas storage; and
  - Hazardous waste storage.
- The scope of the paper is limited to carbon sequestration and does not address EOR operations.

2

### The Owner of an Unsevered Tract Owns Everything from the Earth's Core to the Sky

Center of Earth

3

## Severance Deed

- A typical severance deed conveys "oil, gas and other minerals."

*Moser v. United States Steel Corp.*,  
676 S.W.2d 99 (Tex. 1984)

- A right not expressly conveyed is retained.

*Duhig v. Peavy-Moore Lumber Co.*,  
144 S.W.2d 878, 880 (Tex. 1940)

4

### A Party Cannot Obtain Storage Rights by Implication

*Makar Production Company v. Anderson*

- The landowner sought a declaration that the lessee could not permissively use the surface and subsurface to inject salt water produced off-site for secondary recovery operations.
- The court enjoined the lessee from using the surface or subsurface pore space to dispose of any form of oilfield waste, salt water, or other byproduct that was not initially produced from the leasehold.

*Makar Production Company v. Anderson*,  
No. 07-99-0050, 1999 WL 1260015  
(Tex. App. – Amarillo Dec. 15, 1999, no pet.)

5

### Texas Cases Supporting the Surface Estate's Ownership in the Subsurface Pore Space

*Humble Oil & Refining Co. v. West*

- Only Texas Supreme Court case referencing subsurface ownership in a subsurface storage cavern.
- Ownership of the reservoir was not at issue because Humble owned both the surface estate and the mineral estate, and West, as the royalty owner, did not challenge Humble's ownership of the storage cavern.
- But the Court cited *Emeny* with seeming approval for the proposition that the surface estate, not the mineral estate, owned rights to the subsurface pore space.

*Humble Oil & Refining Co. v. West*,  
508 S.W.2d 812 (Tex. 1974)

6

## Texas Cases Supporting the Surface Estate's Ownership in the Subsurface Pore Space



### *Emery v. United States*

- The parties disputed whether the right to use the underground storage cavern belonged to the surface estate or mineral estate.
- "The *surface* of the leased lands remaining as the property of the respective landowners *included the geological structures beneath the surface*, together with any such structure that might be suitable for the underground storage of extraneous gas produced elsewhere."
- The court concluded that rights to the underground storage space vested in the surface owners.

*Emery v. United States*,  
412 F.2d 1319 (Ct. Cl. 1969)

7

## Texas Cases Supporting the Surface Estate's Ownership in the Subsurface Pore Space



### *Brown v. Lundell*

"If the lessee negligently and unnecessarily damages the lessor's land, *either surface or subsurface*, his liability to the lessor is no different from what it would be under the same circumstances to an adjoining landowner."

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

### *Getty Oil Co. v. Jones*

"It has long been recognized that ownership of real property includes not only the surface but also that which lies beneath and above the surface."

*Getty Oil Co. v. Jones*,  
470 S.W.2d 618, 621 (Tex. 1971)

8

## Texas Cases Supporting the Surface Estate's Ownership in the Subsurface Pore Space



### *Sun Oil Co. v. Whitaker*

Subsurface water is part of the surface estate.

*Sun Oil Co. v. Whitaker*,  
483 S.W.2d 808, 810 (Tex. 1972)

### *Matagorda County Appraisal District v. Coastal Liquids Partners, L.P.*

Since a huge storage facility constructed aboveground to hold millions of barrels of hydrocarbons would be taxable as an "improvement," the court found "no logical reason to assess such facilities differently when it is more practical to build them below."

*Matagorda County Appraisal District v. Coastal Liquids Partners, L.P.*,  
165 S.W.3d 329 (Tex. 2005)

9

## Texas Cases Supporting the Mineral Estate's Ownership in the Subsurface Pore Space



### *Mapco, Inc. v. Carter*

- Held that the subsurface cavern belonged to the mineral estate.
- Although it is the only Texas case expressly deciding ownership rights in a subsurface cavern, it may not be a reliable holding:
  - First, the court did not address the difference between owning a mineral and owning the space in which the mineral is found.
  - Second, the court did not cite or address *Humble Oil*.
  - Further, although the court says that other jurisdictions "virtually uniformly" hold that the subsurface belongs to the mineral estate, there is quite a divide among jurisdictions on this point, with many (if not most) holding that once the minerals are extracted, the right to the storage space belongs to the surface estate.

*Mapco, Inc. v. Carter*,  
808 S.W.2d 262 (Tex. App. – Beaumont 1991),  
*rev'd on other grounds*, 817 S.W.2d 686 (Tex. 1991)

10

## Texas Cases Supporting the Mineral Estate's Ownership in the Subsurface Pore Space



### Natural Gas Storage Act

- While the Act does not define who owns subsurface property rights, it suggests that ownership may vest in both the mineral and surface estates.
- The Act suggests that a storage operator must acquire all the mineral rights in the field.

Underground Natural Gas Storage and Conservation Act of 1977,  
Tex. Nat. Resources Code § 91.179

11

## Other States



- *Ellis v. Arkansas Louisiana Gas Co.*, 450 F. Supp. 412, 420-421 (E.D., Ok. 1978): Discussing the conflicting opinions among jurisdictions and commentators and holding that the surface estate holds the subsurface storage rights because the grants to the mineral estate of "oil, gas and other minerals 'that may be produced'" from the land does not include injection, storage, or occupation rights.
- *See also United States v. 43.42 Acres of Land*, 520 F. Supp. 1042, 1046 (W.D. La. 1981): "[O]wners of a mineral servitude[] have no right to claim compensation for the value of the cavern to be created by removal of the salt. They should be compensated only for the value of the right to explore for and reduce to possession the minerals on the land in question."
- *Dept. of Transportation v. Goike*, 560 N.W.2d 365, 366 (Mich. Ct. App. 1996): "[W]e conclude that a surface owner possess the right to the storage space created after the evacuation of underground minerals or gas. . . . Only the surface owner, in this case plaintiff, possess the right to use the cavern for storage of foreign minerals or gas, and then only after defendants have extracted the native gas from the cavern."

12

## Legislative Action



### Wyoming HB 89 (signed into law)

- Declares that ownership of pore spaces is “vested” in the surface owner.
- “Pore space” is defined as “subsurface space which can be used for carbon dioxide or other substances.”
- No instrument is to be construed as severing the pore space from surface ownership unless done “explicitly.”
- Mineral estate remains dominant (common law not altered) – prior rights to “use” subsurface pore space are preserved.
- Prior conveyances are to be construed in accord with the Act unless the person claiming a contrary interest establishes pore space ownership by a preponderance of evidence.

13

## Conclusion



The law in Texas is unsettled. Although the surface estate probably has superior rights, it would be wise for a CCS operator to acquire rights from both the surface and mineral estates.

14