

Mineral Issues' Impact on Solar Energy Development in Texas and Other States



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1. Introduction

Solar energy project developers typically own or lease several hundred acres of land for commercial scale solar energy projects. Solar facilities are located within the surface estate, but developers (and their lenders) must ensure that project facilities are not required to relocate if mineral estate owners or lessees want to explore for oil, gas, or other minerals within the project footprint. Solar project developers can eliminate the risk of disturbance from mineral estate owners or lessees by acquiring the mineral estate rights or by obtaining agreements from mineral estate owners to either not disturb the solar project facilities or waive their rights to use the surface. In the absence of such agreements, mineral estate disturbance risk is less if developers reserve drill sites and access routes within the project area. In the right circumstances, reserving drill sites in conjunction with the accommodation doctrine can force mineral estate owners to locate their oil and gas facilities away from the solar project facilities. Further, with sufficient facts, designated drill sites, and access routes, solar project developers should be able to obtain title insurance endorsements to provide coverage against future relocation issues caused by mineral estate owners or lessees.

2. Mineral Estate vs. Surface Estate. Texas has two distinct types of property rights with respect to land areas -- the mineral estate and the surface estate. Solar energy project developers face obstacles because of certain attributes of mineral estates in Texas. Challenges arise because of how Texas law defines the mineral estate and surface estate.

Mineral Estate Rights in Texas. Mineral parties have the right to use as much of the surface, subsurface, and adjacent airspace of the land as reasonably necessary to enjoy the mineral estate, but this right must be exercised with “due regard” to the rights of the surface parties.¹ This right over the surface estate has been described by the Texas Supreme Court as an “appurtenance” and a “mineral easement” over the surface of the land.² If a surface party does not explicitly grant the mineral easement to the mineral party, then the grant of the mineral easement is implied.³ Without the mineral easement, Texas courts have noted that the rights in the mineral estate would be “wholly worthless.”⁴ Surface parties and mineral parties may alter, restrict, or eliminate the legal

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1. *Getty Oil v. Jones*, 470 S.W.2d at 621 (Tex. 1971); *Humble Oil v. Williams*, 420 S.W.2d at 134 (Tex. 1967).

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

3. *Id.*

4. *Harris*, 176 S.W.2d at 305.

rights granted under the mineral easement by written agreement.⁵ Because the mineral estate includes rights to use the surface, surface estate owners and lessees such as solar energy project developers must determine whether mineral estate uses may negatively affect the subject solar energy project's surface uses.

Rights of Surface Estate in Texas. Although the mineral estate is dominant, surface parties may still use the surface of the land. Surface owners and their lessees have identical rights with regard to the mineral estate, except as such rights are limited in the surface lease.⁶ 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.”⁷ 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.⁸ A surface party is not prohibited from an activity merely because it might diminish the value of the minerals under the land.⁹ 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 time, the use interferes with the reasonable exercise of its rights.¹⁰

The mineral easement is not an unfettered right to the use of the surface. Mineral parties may only use the surface to the extent that it is reasonable necessary and must exercise due regard toward the surface parties. Apart from claims for breach of a written agreement, Texas courts have 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 of the land than was reasonably necessary.¹¹ Despite some of these limitations on the mineral estate, surface estate parties are left with some degree of uncertainty because the mineral estate is the dominant estate. An election by a mineral estate holder to use the surface of the estate has significant and potentially very costly implications to a planned or developed solar project. In doing its feasibility on a site, a solar energy project developer must evaluate who owns the mineral estate, what risks are involved, and if there is a way to reduce those risks or insure against them. The remainder of this paper explores how owners or lessees of surface rights can reduce the uncertainty resulting from mineral estate rights.

3. Determining ownership of Mineral Estate. Issues arising from mineral estate rights can be simply resolved if the owner of the surface rights also owns the mineral rights. In the case where the project developer will purchase the real estate, if the purchase includes the

5. *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).

6. *Robinson Drilling Co. v. Moses*, 256 S.W.2d 650, 650 (Tex. Civ. App.—Eastland 1953, no writ).

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

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

9. *Id.*

10. *Id.*

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

mineral rights (and such rights are not already subject to a mineral lease) the buyer's ownership and control of all mineral rights alleviates concerns about the mineral estate. In lease transactions, the solar tenant's concerns can be resolved by the landlord agreeing in the lease not to use, convey, or lease the mineral rights in any way that would hinder the tenant's surface lease rights. Because a seller or landlord can easily alleviate a developer's concerns about the mineral estate if such person owns the mineral rights, determining mineral ownership is a very important initial step in conducting due diligence on the proposed real estate area for a particular solar energy development project. Mineral estate ownership is typically determined by a title company, a landman, or an attorney title opinion.

A. Title Search. Mineral Estate ownership is determined by searching the real property records in the county in which the property is located. 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 copies of Division Orders filed with the Texas Railroad Commission regarding the property.¹² If the title company is unwilling or unable to provide information regarding mineral estate ownership, 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.¹³ Landmen are hired by oil companies traditionally to determine ownership of the mineral estate and then to work with those owners in negotiating leases.¹⁴ This type of professional can also be hired by solar developers to determine the appropriate mineral estate owners. If necessary, the findings of a landman can then be submitted to an attorney who issues an opinion on who owns the different rights that comprise the mineral estate. This opinion may be necessary for lenders or tax equity investors in a project or for the title company.

B. Spectrum of Mineral Estate Rights

When reviewing the title history of the mineral estate, it is important to understand the various types of mineral estate rights that a party may own.

i. Owner.

12. See Tex. NR. Code Ann. §§ 91.402(c) - (i); see also www.rrc.state.tx.us/about/faqs/royaltiesleases.php (last visited January 11, 2011).

13. See www.landman.org (last visited December 27, 2010); see also, *What is a Landman*, available at [http:// industrial-marketing.bestmanagementarticles.com/a-30814-what-is-an-oil-and-gas-landman.aspx](http://industrial-marketing.bestmanagementarticles.com/a-30814-what-is-an-oil-and-gas-landman.aspx).

14. *Id.*

The "Owner" of the mineral estate rights can be the owner of the surface estate or can simply be the owner of the severed mineral estate. 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.¹⁵

ii. Lessee

A lessee-lessor relationship arises when an executive tenant enters into an oil and gas lease. The lease provides a leasehold interest with the right to explore, develop, produce, and market oil and gas; the rights under the lease instrument are also known as "working interests" or "operating interests".¹⁶ 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 is more precisely a determinable fee interest in land.¹⁷ Such contracts are determinable fees since the rights created terminate and return to the grantor on the occurrence of certain events.

iii. Executive Lease Rights

An executive tenant has the executive right to lease and manage the mineral estate. The executive tenant or "executive right" is an interest in real property, incident and part of the mineral estate.¹⁸ A mineral owner can convey out 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.¹⁹ Similarly, when mineral interests are conveyed, the executive right incident to that interest passes to the grantee unless specifically reserved.²⁰

iv. Royalty Owner

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. It is a real property interest in Texas. A royalty interest may be created by grant, reservation, or exception, similar to a mineral interest.²¹

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

16. See *Williams and Meyers*, Oil and Gas Law, § 202.1 (2010).

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

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

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

20. *Schlitter v. Smith*, 128 Tex. 628, 630-21, 101 S.W.2d 543, 544 (1937).

21. See *Williams and Meyers*, Oil and Gas Law, § 202.1(2010).

There are several different types of royalty interest:

a. **Landowners Royalty:** This type of interest is typically created when the owner of the mineral estate grants the right to a lessee (oil and gas company) to produce the minerals. In exchange for this grant, the mineral owner holds a royalty or the fractional share of production (usually 1/8 but can be higher).

b. **Overriding Royalty:** This type of interest is carved out of the lessee's interest. The lessee can assign a portion of its royalty to third parties or the lessee can assign the lease in full and reserve for itself an overriding royalty. This interest stems only from the proceeds of the sale of the minerals and is not a possessory interest in the minerals themselves. This type of royalty ends when the lease terminates.

c. **Nonparticipating Royalty:** A royalty can also be created separate and apart from a lease. 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 concurrent 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.

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

Prior to initiating negotiations with the existing mineral interest holders, the solar developer should determine whether there are any regulations that would prohibit mineral infrastructure, in particular drill sites, to be located on the property. The Texas Railroad Commission (the Commission) serves as the State of Texas' lead agency in regulating oil and gas.²² The Texas Administrative Code sets out certain spacing requirements between wells, and if there is activity on or near the property, these spacing requirements may indicate that wells may not be permitted on the portions of the property being used for solar infrastructure.²³ 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 even 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.²⁴ Defining the

22. See, R.R. Comm'n of Texas, An Informal History, available at <http://www.rrc.state.tx.us/about/history/centennial/centennial05.php> (last visited December 28, 2010).

23. 16 TEX. ADMIN. CODE § 3.37 (2000).

24. 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. denied) (upholding a conviction for an owner who drilled on his property without a permit from the city as required by city ordinance).

scope of this police power and determining when a municipality may cross into the realm of a taking of private property has not been challenged. If regulatory or permitting issues do not adequately protect the solar project from disturbance by mineral owners, then the project developer may need to negotiate an agreement with the mineral owners.

5. Waiver of Surface Rights Agreement

Once the mineral estate owners have been identified and it is determined that the solar project is not protected by regulatory or permitting issues, a solar energy project developer may eliminate any risk of surface disruption from mineral exploration through a "waiver of surface rights" where the owner of the mineral estate rights waives the right to use the surface of the land. 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. Waivers of surface rights must be recorded in the real property records to bind sublessees, successors, and future grantees.²⁵

A developer of a solar energy facility should review title records to determine if surface rights have been previously waived. If there is an existing waiver of surface rights, solar energy developers will want to ensure that the waiver adequately waived the surface rights and was signed by all required parties; both of these issues are discussed below. If surface rights have not been previously waived, the developer may want to approach the requisite parties to obtain waivers.

(See Appendix A for an example of a Waiver of Surface Rights form).

B. Components of Waivers of Surface Rights

When reviewing waivers of surface rights, solar energy developers should ensure the waivers are complete. A surface rights waiver should waive all rights to use the surface of the property—including for exploration, testing, and general access—and not just for production. In addition, a surface rights waiver should waive the right to use the surface of the property to access any mineral or

25. See Tex. Prop. Code § 13.001 (Vernon 2010); *Ehler v. B.T. Suppenas, Ltd.*, 74 S.W.3d 515, 521 (Tex. App.--Amarillo 202, 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).

subsurface material, not just oil and gas. Texas courts have been called upon in the past to address the issue of whether particular material is part of the mineral estate.²⁶ To be conservative, a solar developer will want to make sure that the surface rights waiver is broad in scope. The ultimate goal of the surface rights waiver is to waive every type of surface use for the development of every type of subsurface material.

C. Signatories to Waivers of Surface Rights

Solar energy developers relying on surface rights waivers must ensure the waivers are signed by all mineral estate owners and lessees. The goal is to make sure that every mineral interest is subject to the waiver of surface rights. For example, a waiver of surface rights clause contained in a recorded oil and gas lease will be binding on the lessee signing the lease and any successor or sublessee of the initial lessee's interest; however, the waiver will not be binding on the owner of the mineral estate that executed the lease as the lessor. This mineral estate owner could later execute another lease that did not contain waiver of surface rights, in which case a surface installation like a solar energy facility could be at risk for disturbance. For this reason, the developer should make sure that waivers are signed by every mineral tenant, owner, and executive leasing rights owner.

Developers do not need to obtain waivers of surface rights from royalty interest owners. An owner of a royalty interest in real property is deemed to own part of the mineral estate under Texas law, but the interest permits the holder to merely 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.²⁷ 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.²⁸ These principles of Texas law make obtaining a surface rights waiver from a royalty owner unnecessary.

Determining whether a mineral estate interest is subject to a waiver of surface rights can be difficult. In areas of the state that have historically produced significant amounts of oil and gas, mineral estate ownership is often divided among several owners. If a solar energy developer is intending to rely on waivers of surface rights to eliminate the risk of disturbances by mineral rights owners, it

26. See, e.g., *Storm Assoc., Inc. v. Texaco, Inc.*, 645 S.W.2d 579 (Tex. App.—San Antonio 1982), *aff'd*, *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).

27. See *Glover v. Union Pac. R.R. Co.*, 187 S.W.3d 201, 211 (Tex. App.—Texarkana 2006, no pet.); *Martin v. Schneider*, 622 S.W.2d 620 (Tex. App.—Corpus Christi 1981, writ ref'd n.r.e.).

28. See *In re Estate of Slaughter*, 305 S.W.3d 804, 809, 811 (Tex. App.—Texarkana 2010, no pet. h.); *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).

will need to retain legal counsel to prepare a mineral title opinion that will identify all of the mineral estate owners and current lessees. Each fractional owner of the mineral estate, plus every lessee, will need to execute an adequate surface rights waiver in order for the developer's legal strategy to succeed. Solar energy developers should expect to pay some consideration to these parties for waiving their common law right to use the surface of the property.

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.²⁹ 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.³⁰ This right pertains to both surface interests and mineral interests.³¹ 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. Consequently, the solar energy developer will want each mineral owner to execute a waiver of surface rights.

6. Accommodation Agreements/Non-Interference Agreements

If a solar energy developer is unsuccessful in its attempts to obtain surface rights waivers from every mineral owner and lessee, another route that may prove more palatable to mineral rights holders is the execution of accommodation agreements (also sometimes referred as “non-interference agreements”). Where a waiver of surface rights requires the mineral rights holder to waive all of its rights to use the surface of the property, an accommodation agreement merely agrees in advance on what surface uses would be permitted, and perhaps where they would be permitted, if the property is developed.

An accommodation agreement can be drafted to fit a particular solar project by limiting surface uses to particular areas or permitting only certain types of activities on the surface. As with waivers of surface rights, mineral rights holders may require consideration for limiting their common law rights. Because of the Texas case law discussed above with respect to surface rights waivers, solar energy developers will want to make sure that every owner of the mineral estate executes an accommodation agreement.

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 quitclaiming their leases of the remaining areas, deeding the mineral estate

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

30. 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).

31. *Id.*

of the remaining areas to the developer, or agreeing to waive surface rights on the remaining areas. In this case, the accommodation agreement acts like a form of development agreement among the solar energy developer, existing mineral lessees, and the owners of the mineral estate. This type of accommodation agreement preserves the right to access the mineral estate for the mineral estate holders while also protecting the solar developer's facility from future disturbance.

Solar energy developers may practically discover that it will take a combination of surface rights waivers and accommodation agreements in order to insulate their projects from disturbances by mineral rights holders. 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—every mineral estate interest must be subject to an adequate waiver of surface rights or accommodation agreement in order for the developer to successfully contract around the risk of surface disruption.

7. Issues if all Mineral Estate Owners do not agree to the waiver of surface rights or accommodation agreement or cannot be located

If all of the mineral estate owners cannot be located or do not agree to a waiver of surface rights or an accommodation agreement, there are doctrines and other avenues that may be pursued for risk reduction of surface disruption by the mineral estate.

A. Accommodation Doctrine

In some cases, Texas courts provide special protection for surface uses that pre-exist mineral uses under the accommodation doctrine. In *Getty Oil Company v. Jones* in 1971, the Texas Supreme Court interpreted the “with due regard” language of the mineral easement as adopting the accommodation doctrine.³² Under the accommodation doctrine, where there is an existing use by a surface party that would be impaired or precluded by a mineral party's activities, and where there is an industry-established alternative practice reasonably available to the mineral party that would not impair or preclude the existing surface activity, the mineral party may be required to use the alternative practice.³³ This is true even if the mineral party's rights predated the rights of the surface party (i.e., the doctrine focuses on the timing of the uses and not when the parties obtained their rights). The surface party carries the burden of proving both: (i) the impairment or preclusion of its existing use and (ii) the availability of a reasonable alternative to the mineral party.³⁴ If the surface party is unable to prove both facts, the

32. See also *Tarrant County Water Control and Improvement District Number One v. Haupt, Inc.*, 854 S.W.2d 909, 910-11 (Tex. 1993) (holding that the right of accommodation applies to government-owned land).

33. *Getty Oil v. Jones*, 470 S.W.2d at 622.

34. *Id.* at 623.

accommodation doctrine will not apply and the mineral party will be able to use as much of the surface as reasonably necessary even if a surface party's preexisting use is precluded or impaired.

In *Getty Oil v. Jones*, Jones owned the fee simple title to certain land, and Getty Oil was an oil and gas lessee on the land. Getty Oil's lease predated Jones' purchase of the fee simple surface estate. At the time of Jones' purchase in 1955, Getty Oil had already drilled some wells on the land. In 1963, Jones installed a self-propelled circular irrigation system to irrigate his cotton crops. In 1967, Getty Oil drilled two additional wells that produced but needed pumps to create flow. Getty Oil began installing two beam pumps that were each at least thirteen feet tall. The pumps would have restricted the movement of Jones' irrigation system because it maintained only a seven-foot clearance. Jones sued for damages and an injunction to prevent Getty Oil from installing the pumps.

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. Jones also had 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. 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. The hydraulic pumps would cost less than \$5000 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. 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.³⁵

Recent Texas case law has even made it clear that directional drilling can be a reasonable, industry-established alternative requiring the mineral estate holder to accommodate a surface use.³⁶

The mineral estate is the dominant estate in land in Texas, and parties with mineral rights benefit from an easement over the surface of the land. Activities of the mineral parties that interfere with surface activities can be limited by a written agreement or by proving that the mineral party is negligently or intentionally injuring the surface party or is using more of the surface than is reasonably

35. *Id.*

36. *See Tex. Genco, LP v. Valence Operating Co.*, 187 S.W.3d 118 (Tex. App.--Waco 2006, no pet. h.) (the *Genco* case involved an existing ash disposal landfill; the mineral operator was required to directionally drill from an area adjacent to the landfill in order to avoid making portions of the existing landfill unusable for ash waste disposal).

necessary. Surface uses that pre-exist mineral uses have a right of accommodation if the surface use would be impaired or precluded by the mineral use and the mineral party has reasonable alternatives to its use.

B. Accommodation Doctrine Application Outside of Texas

Many states use a variation of the accommodation doctrine. States employing an accommodation doctrine hem in the dominance of the mineral estate by applying case law language requiring "reasonable accommodation" or "due regard" be given to the surface owner. These states include Arkansas, Colorado, North Dakota, Utah, and West Virginia. In these states, courts generally decide that where separate ownership of mineral rights and the surface exist, the mineral estate remains dominant, but each owner should have the right to use and enjoy his interest in the property to the highest degree possible without interfering with the rights of the other.³⁷ Colorado has taken the accommodation doctrine one step further by codifying it in House Bill 1252. Under the statute, an operator must "minimize intrusion upon and damage to the surface of the land."³⁸ In order to do so, the operator must "select alternative means of operation that prevent, reduce, or mitigate the impacts of the oil and gas operations on the surface, where such alternatives are technologically sound, economically practicable, and reasonably available to the operator."³⁹ In the Colorado case of *Zeiler Farms v. Anadarko & Unioil*, the court held that HB 1252 expressly provides that the statute is not to be construed to prevent the operator from entering upon and using the surface of the land in a manner that is reasonable and necessary to develop and produce oil and gas.⁴⁰ In other words, the mineral estate remains dominant, subject to the requirements of the statute. The court also made it clear that the statute should not be applied to abrogate or impair a contract or contractual provision that expressly provides for the use of the surface for the conduct of oil and gas operators.⁴¹

While California does not apply a traditional accommodation doctrine, the courts do look to a standard similar to that used in Texas to resolve disagreements regarding the use of the surface of the land by mineral rights holders. In Texas, courts often express the mineral owner's right to use of the surface as the right to use as much of the surface as is reasonably necessary to exercise their rights under a lease. One California case mirrors this common rule with only slight variation by holding that oil and gas lessees have the right to such possession of the surface as is necessary and convenient for the exercise of their profit.⁴²

37. See *Flying Diamond Corp. v. Rust*, 551 P.2d 509 (Utah 1976); see also *Buffalo Mining Co. v. Martin*, 267 S.E. 2d 721 (W. Va 1980).

38. Colorado Revised Statute 34-60-127 (2010).

39. Colorado Revised Statute 34-60-127 (2010).

40. *Zeiler Farms v. Anadarko & Unioil*, No. 07-CV-01985.

41. *Id.*

42. *California Callahan v. Martin*, 43 P.2d 788 (Cal. 1935).

C. State Surface Damages Acts

Surface damages acts require oil and gas operators to pay surface owners for damages resulting from their operations.⁴³ A number of states that do not apply a common law accommodation doctrine have adopted a surface damages act. These states include Arkansas, Illinois, Indiana, Kentucky, Montana, New Mexico, North Dakota, Oklahoma, South Dakota, Tennessee, West Virginia, and Wyoming. Most state surface damages acts require the mineral owner to provide notice to the surface owner prior to commencing drilling or other surface operations. Upon notice, both sides must enter into good faith negotiations on the issue of surface damages. Upon the execution of a contractual agreement, the operator may then begin operations.⁴⁴

The Oklahoma statute serves as an example of how most surface damages acts operate. The Oklahoma act applies to mineral owners or lessees and to the surface owner of record.⁴⁵ The act requires the mineral developer to send written notice to the surface owner of its intent to drill; the notice must identify the drilling location and provide the approximate date operations will begin. Within five days of this notice, the statute creates a duty on both sides to enter into good faith negotiations on the issue of surface damages. Once the negotiations are complete and a contract is executed, the operator may begin operations. However, if an agreement is not reached, the operator must petition the court to appoint appraisers to make recommendations concerning the proper amount of damages owed. In determining the proper amount of damages owed to the surface owner due to the diminution in value caused by the surface operations, a court will apply a variety of factors, including location or site of drilling operations, quality of the land used or disturbed by the drilling operations that may affect convenient use and further enjoyment, the inconvenience suffered during actual use of the land by the operator, and whether the damages are temporary or permanent in nature.⁴⁶

D. Designating Well Drill Sites

In addition to reliance on the accommodation doctrine, in planning the development of the solar project, the developer may proactively designate certain areas restricted from development so that the site is reserved as a future potential drill site. Such pro-active measures would help support an accommodation argument later if the mineral parties attempt to locate mineral infrastructure where there are existing surface uses. Designating drill sites in advance would likely require the involvement of a petroleum geologist and/or a petroleum engineer

43. See Williams & Meyers Manual of Oil and Gas Terms 14th Edition (2009).

44. See, e.g. N.D. Cent. Code §§ 38-1.1-01; Okla. Stat. § 318.2; 765 Ill. Comp. Stat. § 530/4.

45. 52 Okla. Stat. §318.2 (2010).

46. See *Ward Petroleum v. State*, 64 P.3d 113 (OK 2003).

who can obtain the relevant data regarding the geologic formations and spacing requirements from surrounding wells. If the developer is aware of existing lessees, the developer could take this process a bit farther by designating drill sites with the Commission as detailed below. This potential step contemplates that the lessee has explored the property well enough to be in a position of designating adequate sites.

(see Appendix A for an example of a drill site reservation clause)

E. Texas Railroad Commission Rules

Prior to obtaining a drilling permit, an operator must file a P-5 with the Commission, which requires the operator's organizational report and posting of financial security.⁴⁷ The operator must submit an application to drill with a plat to scale showing that the relevant administrative code requirements have been met.⁴⁸ The process of permitting for a drill site is administrative unless the operator is requesting certain exceptions to the rules, including the exception to the spacing requirement.⁴⁹ If an exception is sought, a public hearing would take place. It is possible for a solar developer to work with any oil and gas lessee's to collectively designate where a well will be drilled. Even if the developer does not have a waiver of surface rights or accommodation agreement, it may be able to strategically place the drill sites in a manner that does not interfere with the operations of the solar farm.

8. Factors in States with Growing Commercial Scale Solar Energy Development

A. Data on Leading Solar Energy Development States

California leads the U.S. in current installations of commercial scale solar energy projects; New Jersey, Arizona and Florida have the next most installations.⁵⁰ For 2011, California, Arizona and New Jersey are forecasted to lead the U.S. growth in solar energy installations.⁵¹

B. State Incentives as a Growth Driver

At the beginning of the process to write this paper, the authors wondered whether state laws and rules on the mineral estate might be a factor in solar energy project

47. 16 TEX. ADMIN. CODE § 3.1 and § 3.78 (2000).

48. 6 TEX. ADMIN. CODE § 3.5 (2000).

49. See R.R. Comm'n of Texas, *Barnet Shale Information*, available at <http://www.rrc.state.tx.us/barnettshale/index.php> (last visited December 30, 2010).

50. *Outlook brighter for U.S. solar capacity*, Heather Clancy (October 14, 2010), available at, <http://www.zdnet.com/blog/green/outlook-brighter-for-us-solar-capacity/14567>.

51. *2011: All the Makings of an "Interesting" Year in Solar PV*, RenewableEnergyWorld.com, February 9, 2011 (available at www.renewableenergyworld.com/rea/news/article/2011/02/2011-all-the-makings-of-an-interesting-year).

development. The authors did not find a correlation, however, between mineral estate laws and states' growth rates for solar energy projects. Instead, state mandates and incentives seem to be the main driving force in whether a particular state experiences meaningful growth of its commercial scale solar energy industry. Below are a few examples of recent state rules in leading solar energy development states.

i. RPS Requirements. Many states have implemented Renewable Portfolio Standard(s) (RPS) or Renewable Energy Standard(s) (RES) requiring their respective public utilities to provide minimum proportions of their energy from renewable sources. California has one of the most aggressive RPS requirements in United States.⁵² Governor Schwarzenegger added to the standard through a November 2008 executive order setting a renewable energy target of 33% by 2020.⁵³

The New Jersey RPS mandates 22.5% of the electricity from renewable sources by 2021.⁵⁴ Solar energy project development is active in New Jersey because of the general RPS and also because the RPS rules have a specific requirement for solar -- 2,164 gigawatt-hours (GWh) of the overall RPS requirement must come from in-state solar electric generation during the year 2020; similarly, 5,316 GWh must come from solar in 2026 and each year going forward.⁵⁵

ii. Other State Incentives. Some states provide state tax incentives to attract solar energy project development. Last year Arizona passed a law providing for state tax credits for each kilowatt hour (kWh) of electricity produced from a qualified solar energy facilities; the credit applies to systems installed between December 31, 2010 and January 1, 2021. Once installed, the solar energy system is entitled to a state tax credit for 10 years, beginning at \$0.04 per kWh in year one, with such rate gradually reducing to \$0.01 per kWh by year 10 of the project.⁵⁶

9. Title Insurance Products. Appendix B, C, and D contain the promulgated forms, procedural rules and rate rules for issuance of available endorsement coverage for mineral issues in Texas. 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

52. Tom Cheyney, Gov. Schwarzenegger Signs Executive Order Raising California RPS to 33%—Highest in U.S., PV-TECH.ORG, Sept. 16, 2009 (available at http://www.pv-tech.org/news/_a/gov._schwarzenegger_signs_executive_order_raising_california_rps_to_33--hig/?utm_source=Feeds&utm_).

53. Cal. Exec. Order No. S-14-08 (Nov. 17, 2008). The California Governor added to the 2008 Executive Order with another recent executive order. Cal. Exec. Order No. S-21-09 (Sept. 15, 2009).

54 N.J.A.C. 14:8-2.3 (a) (2010).

55. *Solar Energy Advancement and Fair Competition Act*, P.L. 2009, c. 289 (Jan. 17, 2010).

56 A.R.S. §41-1510.01 (2010).

under Texas Title Insurance Procedural Rule 5.1, but when including the mineral exclusion title companies are in turn required to make the T-19 endorsements available under Rule P-50.1:

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 title 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 **must** 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 attached as Appendix B, C and D are available to address the risks that surface estate improvements may be 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. While this title insurance coverage is helpful, solar developers should 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. The only way to eliminate all risks of mineral estate disturbance is through owning or controlling the mineral estate or securing a properly executed waiver of surface rights or accommodation agreement.

10. Conclusion

Because commercial scale solar energy projects must utilize hundreds of acres of contiguous land, developers must carefully determine that 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.

APPENDIX A
Waiver of Surface Rights
Reservation of Drill Site Clause

Texas State Bar Form Examples

Mineral Estate—Waiver of Surface Rights Clause

Grantor waives and conveys to Grantee the right of ingress and egress to and from the surface of the Property relating to the portion of the mineral estate owned by Grantor.

Nothing herein, however, restricts or prohibits the pooling or unitization of the portion of the mineral estate owned by Grantor with land other than the Property; or the exploration or production of the oil, gas, and other minerals by means of wells that are drilled or mines that open on land other than the Property but enter or bottom under the Property, provided that these operations in no manner interfere with the surface or subsurface support of any improvements constructed or to be constructed on the Property.

Mineral Estate—Waiver of Surface Rights; Reservation of Drill Site Clause

Drill Site: [_____]

Access Routes: [_____]

For Grantor and Grantor's heirs, successors, and assigns forever, a reservation of a perpetual, exclusive easement in and to the free and uninterrupted use of the Drill Site to explore and produce the oil, gas, and other minerals in and under and that may be produced from the Property, together with access to and from the Drill Site over the Access Routes. Grantor waives the right to explore and develop from the surface of the Property the portion of the mineral estate owned by Grantor, other than on or from the Drill Site.

APPENDIX B
Title Insurance Endorsements for Mineral Issues Coverage

Form T-19 - Restrictions, Encroachments, Minerals Endorsement

ENDORSEMENT
Attached to Policy No.
Issued by
BLANK TITLE INSURANCE COMPANY

The Company insures the owner of the Indebtedness secured by the Insured Mortgage against loss or damage sustained by reason of:

1. The existence at Date of Policy of any of the following:
 - a. Covenants, conditions, or restrictions under which the lien of the Insured Mortgage can be divested, subordinated, or extinguished or its validity, priority, or enforceability impaired.
 - b. Unless expressly excepted in Schedule B
 - i. Present violations on the Land of any enforceable covenants, conditions, or restrictions, or existing improvements on the Land that violate any building setback lines shown on a plat of subdivision recorded or filed in the Public Records.
 - ii. Any instrument referred to in Schedule B as containing covenants, conditions, or restrictions on the Land that, in addition, (A) establishes an easement on the Land, (B) provides a lien for liquidated damages, (C) provides for a private charge or assessment, (D) provides for an option to purchase, a right of first refusal, or the prior approval of a future purchaser or occupant.
 - iii. Any encroachment of existing improvements located on the Land onto adjoining land or any encroachment onto the Land of existing improvements located on adjoining land.
 - iv. Any encroachment of existing improvements located on the Land onto that portion of the Land subject to any easement excepted in Schedule B.
 - v. Any notices of violation of covenants, conditions, or restrictions relating to environmental protection recorded or filed in the Public Records.
2. Any future violation on the Land of any existing covenants, conditions, or restrictions occurring prior ;to the acquisition of Title by the Insured, provided the violation results in: invalidity, loss of priority, or unenforceability of the lien of the Insured Mortgage; or
 - b. loss of Title if the Insured shall acquire Title in satisfaction of the Indebtedness.
3. Damage to existing improvements, including lawns, shrubbery, or trees, located or encroaching on that portion of the Land subject to any easement excepted in Schedule B, which damage results from the exercise of the right to maintain the easement for the purpose for which it was granted or reserved.
4. Damage to improvements, including lawns, shrubbery, or trees, located on the Land on or after Date of Policy resulting from the future exercise of any right to use the surface of the Land for the extraction or development of minerals excepted from the description of the Land or excepted in Schedule B.
5. Any final court order or judgment requiring the removal from any land adjoining the Land of any encroachment excepted in Schedule B.
6. Any final court order or judgment denying the right to maintain any existing improvements

on the Land because of any violation of covenants, conditions, or restrictions, or building setback lines shown on a plat of subdivision recorded or filed in the Public Records.

Wherever in this endorsement the words "covenants, conditions, or restrictions" appear, they do not include the terms, covenants, conditions, or limitations contained in an instrument creating a lease.

As used in paragraphs 1.b.i. and 6, the words "covenants, conditions, or restrictions" do not include any covenants, conditions, or restrictions (a) relating to obligations of any type to perform maintenance, repair, or remediation on the Land, or (b) pertaining to environmental protection of any kind or nature, including hazardous or toxic matters, conditions, or substances, except to the extent that a notice of a violation or alleged violation affecting the Land has been recorded or filed in the Public Records at Date of Policy and is not excepted in Schedule B. This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

[Witness clause optional]

BLANK TITLE INSURANCE COMPANY

By: _____
Authorized Signatory

Form T-19.1: Restrictions, Encroachments, Minerals Endorsement - Owner Policy

**ENDORSEMENT
Attached to Policy No.**

**Issued by
*BLANK TITLE INSURANCE COMPANY***

The Company insures against loss or damage sustained by the Insured by reason of:

1. The existence, at Date of Policy, of any of the following unless expressly excepted in Schedule B:
 - a. Present violations on the Land of any enforceable covenants, conditions, or restrictions, or any existing improvements on the Land that violate any building setback lines shown on a plat of subdivision recorded or filed ;in the Public Records.
 - b. Any instrument referred to in Schedule B as containing covenants, conditions, or restrictions on the Land that, in addition, (i) establishes an easement on the Land, (ii) provides for an ;option to purchase, a right of first refusal, or the prior approval of a future purchaser or ;occupant, or (iii) provides a right of reentry, possibility of reverter, or right of forfeiture because of violations on the Land of any enforceable covenants, conditions, or restrictions.
 - c. Any encroachment of existing improvements located on the Land onto adjoining land, or any encroachment onto the Land of existing improvements located on adjoining land.
 - d. Any encroachment of existing improvements located on the Land onto that portion of the Land subject to any easement excepted in Schedule B.
 - e. Any notices of violation of covenants, conditions, or restrictions relating to environmental protection recorded or filed in the Public Records.
2. Damage to existing buildings that are located on or encroach upon that portion of the Land subject to any easement excepted in Schedule B, which damage results from the exercise of the right to maintain the easement for the purpose for which it was granted or reserved.
3. Damage to improvements (excluding lawns, shrubbery, or trees) located on the Land on or after Date of Policy resulting from the future exercise of any right existing at Date of Policy to use the surface of the Land for the extraction or development of minerals excepted from the description of the Land or excepted in Schedule B.
4. Any final court order or judgment requiring the removal from any land adjoining the Land of any encroachment, other than fences, landscaping, or driveways, excepted in Schedule B.
5. Any final court order or judgment denying the right to maintain any existing building on the Land because of any violation of covenants, conditions, or restrictions, or building setback lines shown on a plat of subdivision recorded or filed in the Public Records.

Wherever in this endorsement the words "covenants, conditions, or restrictions" appear, they do not include the terms, covenants, conditions, or limitations contained in an instrument creating a lease.

As used in paragraphs 1.a. and 5, the words "covenants, conditions, or restrictions" do not include any covenants, conditions, or restrictions (a) relating to obligations of any type to perform maintenance, repair, or remediation on the Land, or (b) pertaining to environmental protection of any kind or nature, including hazardous or toxic matters, conditions, or substances, except to the extent that a notice of a violation or alleged violation affecting the Land has been recorded or filed in the Public Records at Date of Policy and is not excepted in Schedule B.

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

[Witness clause optional]

BLANK TITLE INSURANCE COMPANY

By: _____

Authorized Signatory

Form T-19.2: Minerals and Surface Damage Endorsement (T-19.2)

Attached to Policy No. _____ ; Applies to Parcel(s) _____

Issued by: _____ TITLE INSURANCE COMPANY

Herein called the Company

The Company insures the insured against loss which the insured shall sustain by reason of damage to improvements (excluding lawns shrubbery, or trees) located on the Land on or after Date of Policy resulting from the future exercise of any right existing at Date of Policy to use the surface of the Land for the extraction or development of coal, lignite, oil, gas or other minerals excepted or excluded on Schedule A, Item 2 or excepted in Schedule B. This endorsement does not insure against loss resulting from subsidence.

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

[Witness clause optional]

_____ TITLE INSURANCE COMPANY

By: _____

Authorized signatory

Form T-19.3 Minerals and Surface Damage Endorsement (T-19.3)

Attached to Policy No. _____; Applies to Parcel(s) _____

Issued by: _____ TITLE INSURANCE COMPANY

Herein called the Company

The Company insures the insured against loss which the insured shall sustain by reason of damage to permanent buildings located on the Land on or after Date of Policy resulting from the future exercise of any right existing at Date of Policy to use the surface of the Land for the extraction or development of coal, lignite, oil, gas or other minerals excepted or excluded on Schedule A, Item 2 or excepted in Schedule B. This endorsement does not insure against loss resulting from subsidence.

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

[Witness clause optional]

_____ TITLE INSURANCE COMPANY

By: _____

Authorized signatory

APPENDIX C
Procedural Rules for Mineral Endorsements

P-50. Restrictions, Encroachments, Minerals Endorsement (T-19) and, Restrictions, Encroachments, Minerals Endorsement - Owner Policy (T-19.1),

- A. Any insured matter covered in the Restrictions, Encroachments, Minerals Endorsement [T-19](#) or [T-19.1](#) may be insured only by the use of these endorsements, except that coverage regarding minerals may be insured by the use of the [T-19.2](#) or [T-19.3](#) endorsements as provided in [P-50.1](#).
- B. A Company may issue its Restrictions, Encroachments, Minerals Endorsement ([T-19](#)) to a Loan Policy ([T-2](#)), if its underwriting requirements are met. The Company shall delete any insuring provision if it does not consider that risk acceptable.
- C. A Company may issue its Restrictions, Encroachments, Minerals Endorsement - Owner Policy ([T-19.1](#)) to an Owner Policy if its underwriting requirements are met. The Company shall delete any insuring provision if it does not consider that risk acceptable.

P-50.1. Minerals and Surface Damage Endorsement (T-19.2), and Minerals and Surface Damage Endorsement (T-19.3)

Any insured matter covered in the Minerals and Surface Damage Endorsement [T-19.2](#) or [T-19.3](#) may be insured only by the use of these endorsements, except that coverage regarding minerals may be insured by the use of the [T-19](#) or [T-19.1](#) endorsements as provided in [P-50](#). When the policy includes an exclusion or an exception regarding minerals as provided in Procedural Rule [P-5.1](#):

1. As to real property of one acre or less improved or intended to be improved for one-to-four family residential use, the Company upon request by the insured **must** issue its Minerals and Surface Damage Endorsement ([T-19.2](#)) to an Owner or Loan Policy.
2. As to real property improved or intended to be improved for office, industrial, retail, mixed use retail/residential, or multifamily purposes, the Company upon request by the insured **must** issue its Minerals and Surface Damage Endorsement ([T-19.2](#)) to an Owner or Loan Policy.
3. As to other real property, the Company upon request by the insured **must** issue its Minerals and Surface Damage Endorsement ([T-19.3](#)) to an Owner or Loan Policy.
4. As to an Owner or Loan Policy covering multiple parcels of real property that consist of a combination of real property described in paragraphs **1 or 2**, and 3, the Company upon request by the insured **must** issue for each parcel the applicable Minerals and Surface Damage Endorsement ([T-19.2](#) or [T-19.3](#)) to the Owner or Loan Policy.

APPENDIX D
Rate Rules for Mineral Endorsements

R-29. Premium for Restrictions, Encroachments, Minerals Endorsement (T-19) and Restrictions, Encroachments, Minerals Endorsement - Owner Policy (T-19.1)

A. When the Restrictions, Encroachments, Minerals Endorsement ([T-19](#)) is issued on residential real property in accordance with [Rule P-50](#), the premium shall be 5% of the Basic Rate for a single issue policy provided that the minimum premium shall be not less than \$50.00.

B. When the Restrictions, Encroachments, Minerals Endorsement ([T-19](#)) is issued on land which is not residential real property, in accordance with [Rule P-50](#), the premium shall be 10% of the Basic Rate for a single issue policy provided that the minimum premium shall be not less than \$50.00.

C. When the Restrictions, Encroachments, Minerals Endorsement - Owner Policy ([T-19.1](#)) is issued on residential real property in accordance with [Rule P-50](#), the premium shall be:

1. 10% of the Basic Rate for a single issue policy; or
2. 5% of the Basic Rate for a single issue policy if an amendment of the exception to area and boundaries is also purchased in accordance with [Rate Rule R-16](#).

In either event, the minimum premium shall not be less than \$50.00

D. When the Restrictions, Encroachments, Minerals Endorsement - Owner Policy ([T-19.1](#)) is issued on land which is not residential property, in accordance with [Rule P-50](#), the premium shall be:

1. 15% of the Basic Rate for a single issue policy; or
2. 10% of the Basic Rate for a single issue policy if an amendment of the exception to area and boundaries is also purchased in accordance with [Rate Rule R-16](#).

In either event, the minimum premium shall be not less than \$50.00

R.29.1. Premium for Minerals and Surface Damage Endorsement (T-19.2), and Minerals and Surface Damage Endorsement (T-19.3)

A. When the Minerals and Surface Damage Endorsement ([T-19.2](#)) is issued in accordance with [Rule P-50.1](#), the premium shall be \$50.00.

B. When the Minerals and Surface Damage Endorsement ([T-19.3](#)) is issued in accordance with [Rule P-50.1](#), the premium shall be \$50.00.