



TEXAS LAND & MINERAL OWNERS ASSOCIATION

OFFICIAL NEWSLETTER

Volume 21, Number 1

1st Quarter 2021

87TH LEGISLATIVE SESSION BEGINS

On January 12, 2021 the 87th Texas Legislature convened in Austin, Texas. For the second time in two sessions, a new speaker was elected. Similar to the previous session with many Representatives in the race, Dade Phelan (R-Beaumont) announced he had secured enough votes to win the Speaker race. On the opening day, he was elected by a vote of 143-2.

In what was expected to be a session of the unknown due to the global pandemic, one of the few things we knew was that our work and the regular functions of the Legislature would be much different than all previous sessions. The House and Senate passed rules addressing the many issues to protect those that work in the Capitol, and individual offices implemented rules that changed advocating and lobbying in Texas. Previously, if we needed to speak with a member or staff, we would walk into an office without any notice. Additionally, there are significantly fewer individuals lingering around the Capitol. While this might not sound like it has that much of an impact, the impact is truly huge. Much of the legislative work gets accomplished without any set meetings and you learn what others are working on by just being there and having conversations in the hall. These items also impacted how committees will hold hearings and take testimony.

The pandemic was also expected to impact the number of bills that would be passed. Because there were so many issues brought to light by the pandemic, ranging from rural healthcare to unemployment funding to alcohol to go, each industry's game plan for the session was centered around

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WHAT DOES A GROWING SOLAR INDUSTRY MEAN FOR LAND AND MINERAL OWNERS?

By Parks Brown, Uhl Fitzimons

The expansion of renewable energy resources is increasingly becoming a topic of interest on both the national and state level. Tax incentives, market forces and advances in technology are encouraging widespread leasing of land in Texas for solar development. Many landowners in Texas are facing difficult decisions regarding how to properly balance the development of solar, mineral and groundwater resources from the same property. In particular, the advent of utility-scale solar facilities that cover thousands of acres of contiguous land has forced mineral owners to reexamine legal avenues for protecting future access to the surface estate for drilling and development.

For mineral owners, this usually means entering into some variety of accommodation agreement with a solar developer that designates well pad sites and access corridors if a solar project is later constructed on the land. The agreement should also expressly recognize the right to develop the mineral estate beneath the

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TLMA BOARD OF DIRECTORS 2021-2022

At the 2020 Statewide Members' Meeting, the membership approved the following individuals to serve as the Board of Directors for the 2021-2022 term. Their term began on January 1, 2021 and will end on December 31, 2022. At the first quarter TLMA board meeting, the Directors approved the Officers of the Board.

Chairman Kimberly K. McTee, San Antonio
Chairman-Elect James C. "Jimmy" Broussard, Beaumont
Vice Chairman Tom Daniel, Austin
Treasurer, E.O "Trey" Scott, III, San Antonio
John Alexander, Jr., San Antonio
Carolyn Frost Keenan, Houston
Barry Coates Roberts, San Antonio
Lorin Runnels, San Antonio
James P. "Rick" Walker, Sr., Mirando City
R. Neal Wilkins, San Antonio

Jimmy Broussard will assume the Chairman position in January 2022 and serve until December 2023.

87TH LEGISLATIVE SESSION BEGINS CONTINUED

the impact from COVID-19. Money was expected to be short and the appetite for taking up issues not of critical importance was likely to be very light.

That all changed in February. With a record-breaking freeze that nearly sent much of the State into complete power grid failure, the list of priorities and emergency items for the legislature grew. Once this happened, the slow start to a session came to a screeching halt and the fury began. There were almost 1,000 bills filed on the last day of bill filing. The total number of bills filed for this session was 6,952 compared to 7,420 bills in 2019.

TLMA is excited to announce that Chairman Charlie Geren (R-Fort Worth) and Senator Chuy Hinojosa (D-McAllen) filed House Bill 3794 and Senate Bill 1468 that will protect royalty owners and producers in the event of a bankruptcy by the first purchaser. This bill is the result of multiple United States Fifth Circuit Court of Appeals rulings that stated the Texas law doesn't protect Texas royalty owners if the entity is domiciled outside of Texas. As a result of the pandemic, more bankruptcies in the oil and gas industry are expected and Texas must protect its royalty owners. TLMA is working with multiple stakeholder groups to ensure this bill is passed. Thank you to Chairman Geren and Senator Hinojosa for their leadership on this issue!

Senator Angela Paxton and Representative Ernest Bailes filed four royalty owner bills. The bills define an NPRI owner; require an as-drilled plat and allocation formula to be included on division orders; requires a payee to receive a copy of the document they are being asked to ratify within 14 days of the request; and, requires a royalty owner to receive notice, along with the reason, when payments are suspended. Additional royalty owner bills include awarding of attorney's fees and the prohibition of charging fees if you request a hard copy check and not ACH payment.

In regard to eminent domain reform, Representative Dewayne Burns filed H.B. 901 and 902, but are only two of the bills filed on this issue. Representative Rafael Anchia filed his four RRC bills that were not passed through the most recent RRC Sunset process in 2017.

During the 86th Legislative Session in 2019, TLMA successfully defeated a bill that would remove a royalty owner's right to sue an operator for withholding their payments due to a title dispute. This bill is the result of the ConocoPhillips v. Koopman Supreme Court case. This bill was filed again this session and we are actively working to resolve any issues that will negatively impact royalty and mineral owners.

On an environmental front, there are a significant number of bills that will increase the bonding requirements for operators to help reduce the number of unplugged and abandoned wells in Texas. Finally, the push to reduce flaring in Texas is seen through various ideas and bills filed – whether this is impacting taxes of the flared gas or even bringing the well back online.

If you have any questions about a particular bill or the legislative process, please email execdir@tlma.org.

BOARD OF DIRECTORS

Chairman Kimberley K. McTee

*Catharine C. Whittenburg Trusts; Turkey
Track Ranch*

Chairman-Elect James C. Broussard

*J.E. Broussard Heirs O&G, LP; LaBelle
Properties Ltd.*

Vice Chairman Tom Daniel

Six Mountain Partners LP

Treasurer E.O. "Trey" Scott, III

Trinity Mineral Management

John D. Alexander, Jr.

King Ranch, Inc.

Carolyn Frost Keenan

Keenan Family Interests

Barry Coates Roberts

Coates Energy Trust

Lorin Runnels

EIA Properties, Ltd. & Stag Holdings, Ltd

James P. "Rick" Walker

Huisache Cattle Co., Ltd.

R. Neal Wilkins

East Foundation

DISTRICT REPRESENTATIVES

Dr. John S. Baen—*University of North
Texas*

Clay C. Cash—*Triple C Properties LLC*

Leslie el-Effendi—*Catharine C.*

Whittenburg Trusts

Amy Smiley—*The Stieren Ranch*

ADVISORY DIRECTORS

Joseph B.C. Fitzsimons

John B. McFarland

Howard P. Newton

George J. Person

Dr. Kitty-Sue Quinn

HONORARY DIRECTORS

The Honorable Dolph Briscoe*

Jack Hunt

Roger Welder

J.A. Whittenburg, III*

The Honorable Cullen Looney

Doug Beveridge

Chaunce Thompson, Jr.

Morgan Dunn O'Connor

Lica Pinkston

Scott Petty, Jr.

George Tanner

EXECUTIVE DIRECTOR

Jennifer Bremer

TLMA BOARD OF DIRECTORS APPOINTS SLATE OF HONORARY AND ADVISORY DIRECTORS

In January at the first quarter TLMA Board of Directors meeting, the Board of Directors approved a slate of Honorary and Advisory Directors. Honorary Directors are previous Directors of TLMA. They serve a two-year term, but are not subject to term limits. The Honorary Directors for 2021-2022 are:

The Honorable Dolph Briscoe*

J.A. Whittenburg, III*

Jack Hunt

Roger Welder

The Honorable Cullen Looney

Doug Beveridge

Chaunce Thompson, Jr.

Morgan Dunn O'Connor

Scott Petty, Jr.

Lica Pinkston

George Tanner

The TLMA Board of Directors also approved the following individuals to be Advisory Directors:

Joseph B.C. Fitzsimons

John B. McFarland

Howard P. Newton

George J. Person

Dr. Kitty-Sue Quinn

These individuals contribute a wealth of knowledge in their areas of expertise that the success of TLMA's advocacy efforts can be attributed to. The Advisory Directors also serve a two-year term and are not subject to term limits.

If you see them around, please tell these individuals thank you for all of the time and expertise they give to TLMA.

TLMA DIRECTOR RETIRES AFTER 21 YEARS

After serving for 21 years on the TLMA Board of Directors, Mr. George Tanner has retired and was appointed as an Honorary Director.

Saying that Mr. Tanner was instrumental in the Association is an understatement. Mr. Tanner was one of the original 54 founding members of TLMA.

TLMA is extremely thankful for Mr. Tanner's support of, guidance of, and dedication to the association throughout the years. We wish him all the best in his endeavors and a very happy retirement.

The association engages in direct advocacy to achieve its mission of:

- *A business and legal environment that promotes a healthy oil and gas industry in Texas by ensuring that the rights of mineral and surface owners are protected;*
- *A reduction in litigation; and,*
- *The protection of our precious groundwater resources.*

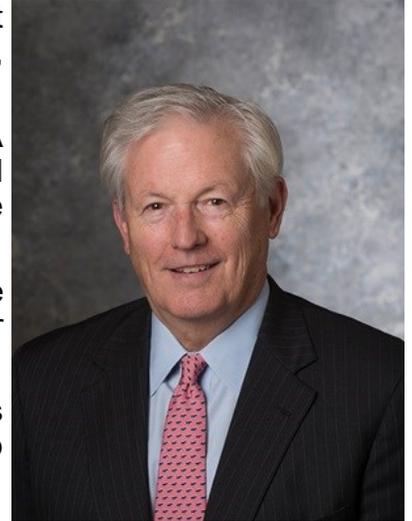
MEMBERSHIP RECRUITMENT AWARD RECIPIENT TUCKER BRIDWELL

The Texas Land & Mineral Owners Association is pleased to present the 2020 Membership Recruitment Award to Tucker Bridwell of Abilene, Texas. Mr. Bridwell has been a member since 2015.

The Membership Recruitment Award was created to honor a TLMA member who has taken an active role in introducing other land and mineral owners to TLMA and helping to bring new members to the association.

In addition to expanding TLMA's membership in Abilene and the surrounding areas, Tucker has been an avid contributor to our legislative efforts.

TLMA is fortunate to have Tucker as a member and we value his industry experience and assistance in expanding our membership throughout Abilene and West Texas.



OUTSTANDING SERVICE AWARD RECIPIENT GEORGE TANNER

TLMA's 2020 Outstanding Service Award is awarded to George Tanner. Mr. Tanner is a founding member and Director of TLMA and served in a leadership capacity all 21 years on the Board of Directors. From 2000-2005, Mr. Tanner served as the Association Chairman and a Director until 2021.

Throughout his involvement with TLMA, Mr. Tanner hosted meetings in the Corpus Christi area and was a gateway to many members in South Texas. Along with many others, Mr. Tanner was instrumental in establishing TLMA to ensure that the association was successful from the very beginning.

As mentioned earlier in the newsletter, Mr. Tanner is now retired from the TLMA Board. His contributions to the Association are extensive and we know without certain that TLMA would not be the successful association it is without him.

TLMA APPOINTS NEW DISTRICT REPRESENTATIVES

The TLMA Board of Directors appointed two new district representatives to serve alongside Dr. John S. Baen and Amy Stieren Smiley. Leslie el-Effendi and Clay Cash bring a wealth of knowledge and expertise to TLMA.

Leslie el-Effendi of Dallas serves as manager and partner in multiple family real estate investment companies that specialize in all types of lease negotiations. In addition to her family involvement, she serves in various volunteer capacities. Mrs. el-Effendi graduated from the University of Texas at Dallas with a Bachelor of Science in Neuroscience.

Clay C. Cash of Lubbock is president of Cash Family Investments, which are comprised of ranching operations, real estate holdings and oil and gas investments. He is also president of the Don-Kay-Cash Foundation. He currently serves on the board of directors of the Ranching Heritage Association, which supports the National Ranching Heritage Center at Texas Tech University and The Texas Tech Foundation Board. Mr. Cash graduated with a bachelor's degree in business management from Texas Tech University in 1997.

As district representatives, Leslie and Clay will help expand the TLMA membership in their respective areas of Texas.

WHAT DOES A GROWING SOLAR INDUSTRY MEAN FOR LAND AND MINERAL OWNERS? CONTINUED

solar project through directional and horizontal drilling methods. However, in some circumstances the solar developer and the mineral owner may fail to reach such an agreement. If the solar developer moves forward with its plans, what remedies are available to the severed mineral owner? Recent guidance from the El Paso Court of Appeals decision in *Lyle v. Midway Solar* provides an initial impression of how courts will approach this type of dispute.

Solar developers and mineral owners both feel they are operating in a gray area when it comes to assessing their competing rights to the surface estate. But as *Midway Solar* confirms, these rights will be judged according to the same accommodation doctrine rules that have governed similar disputes in Texas for several decades. The intent of the accommodation doctrine is to resolve disputes between competing uses of the surface estate. An important question is whether the mere ownership of minerals constitutes a competing use under the accommodation doctrine analysis. In *Lightning Oil v. Anadarko*, the Texas Supreme Court indicated that it did not. In *Midway Solar*, the El Paso Court of Appeals has essentially agreed with that position.

In *Midway Solar*, the solar developer obtained surface waiver agreements from several parties that it believed to be owners of severed mineral interest in the leased tract in Pecos County. It also put aside strips of land on either side of the solar facilities that were made available for future well sites for mineral development. However, it was soon discovered that few or none of the parties that executed surface waivers owned severed mineral interest in the lands in question. Some of the actual owners of severed mineral interest in the lands subsequently filed suit against the surface owner and the solar developer.

The severed mineral owners claimed that the faulty surface waivers constituted a cloud on their title to the mineral estate and that the surface owner had exceeded the scope of its right to use the surface as provided in the deed containing the mineral reservation. The plaintiffs also claimed that development of the solar farm constituted a trespass on the mineral estate and sought a permanent injunction against the placement of the solar facilities on the land.

The district court granted three separate motions for summary judgment filed by the defendant. The court agreed that the faulty surface waivers did not constitute a cloud on the mineral owner's title. Secondly, the court agreed that the accommodation doctrine would apply, meaning that the language in the initial reservation deed did not modify the common law rights of the parties. The court also granted the third motion, which argued that a lack of existing or planned mineral development negated the plaintiff's claims for trespass and breach of contract.

The appellate court issued its decision in December 2020 and agreed that the accommodation doctrine would properly apply to a dispute between a solar developer and a severed mineral owner, subject to modification within the language of the instrument that carves out the severed mineral interest from the surface estate. This was the case even though the deed at issue described the rights of the severed mineral owner as those "usual, necessary or convenient" to support mineral development activities. The court then turned to whether the lack of existing or planned mineral development on the property negated the claims for damages and injunctive relief.

The court found the fact pattern like that of *Haupt v. Tarrant County Water Control*, wherein the surface estate was inundated through creation of a reservoir that precluded further use of the surface for mineral exploration activity. In that case, the appellate court determined that the mineral owner would be entitled to monetary damages if it were demonstrated that horizontal drilling from outside locations would be an unreasonable alternative for development of the mineral estate beneath the submerged lands. However, the *Midway Solar* decision noted that in *Haupt*, the

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THE QUESTION OF PRODUCED WATER OWNERSHIP

By Nicholas Miller, Graves Dougherty Hearon & Moody

In recent years, a question has arisen as to who actually owns the water which is produced alongside oil and gas production. Traditionally, this “produced water” was treated as an oil and gas waste by-product and the operator which produced it had the responsibility to dispose of it in accordance with applicable disposal requirements. In fact, liability for produced water (described statutorily as fluid oil and gas waste) was placed on the operator by statute in 2013 (see Texas Nat. Res. Code § 122.002). The liability language added to the Texas Natural Resources Code in 2013 codified what was already understood in practice; an operator (or one who takes possession from an operator, such as a trucking company) has the duty to deal with fluids produced in conjunction with oil and gas production, most commonly by injecting such fluids into a disposal well.

In 2019, the Legislature revisited this section of the Texas Natural Resources Code by adding language which purportedly transferred the *ownership* of the produced water to the operator (or another party who subsequently possesses the produced water) as opposed to only the liability for such produced water. This change was made during a time of shifting economic opportunities with respect to produced water. More specifically, produced water could now be monetized by dedicating produced water output from given wells or locations to companies who dispose of or recycle and re-sell such water, or operators could recycle and re-sell such water on their own. This monetization brought about the question of who was entitled to proceeds from such a sale. An operator per the new statute and traditional oil and gas waste handling? Or a surface owner pursuant to its ownership rights in groundwater?

Following the enactment of that 2019 law, a court case was filed challenging an operator’s ownership and dedication of the produced water from its wells. In *COG Operating LLC v. Cactus Water Services, LLC*, which is currently pending in District Court in Reeves County, Cactus Water Services was granted a lease by a landowner for underground water in oil and gas producing strata. Per the terms of the lease, Cactus would pay the landowner a royalty for such water once it is monetized by Cactus. COG (who operates the wells on the landowner’s property) brought suit against Cactus following Cactus’ demand for payment from COG after COG received a substantial sum for the dedication of the produced water stream from COG’s wells to a third party. It is Cactus’ position that COG is profiting from the sale of produced water improperly because Cactus owns the rights to the produced water per the produced water lease with the landowner.

The crux of the case boils down to who actually owns the produced water? If produced water is considered groundwater that has been brought to the surface, then it would follow that the landowner owns the produced water since it is long established Texas law that groundwater is owned by the landowner. COG argues, however, that, definitionally in statute, produced water is not groundwater, but is ordinary oil and gas waste, and therefore the one in possession of the produced water has ownership and the duty to dispose of the produced water as it sees fit.

The outcome of the *Cactus* case would also impact the constitutionality of the statute cited above passed in 2019 which purportedly grants ownership to the operator once the fluids are produced. If the Courts decide that title to the produced water belongs to a landowner (or a lessee pursuant to a lease agreement with a landowner), then the law passed in 2019 will have to be narrowly construed to exclude produced water in order to avoid a takings challenge. Under the U.S. Constitution, the government cannot take title to something and give it to someone else without due compensation. Therefore, if produced water is included within the term “fluid oil and gas waste” as stated in the statute, and the Courts decide that produced water is actually groundwater owned by a landowner, then the statute would be unconstitutional and subject to a takings claim. Courts are instructed to construe statutes in a manner which conforms them to the Constitution. It therefore seems more likely that the statutory

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WHAT DOES A GROWING SOLAR INDUSTRY MEAN FOR LAND AND MINERAL OWNERS? CONTINUED

severed mineral estate was subject to existing and planned mineral development activities at the time in question.

The solar developer's argument in Midway Solar relied upon the Texas Supreme Court decision in *Lightning Oil v. Anadarko*, which found that subsurface drilling easements passing through a tract of land did not constitute an injury to the severed mineral estate owners until such time as mineral development activities are planned or are already underway on the subject lands. The court in Midway Solar ultimately determined that "[I]f the Lyles are not exercising their right, 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 acreage."

In scenarios where the land is subject to an oil and gas lease or there is active mineral production, the solar developer will have a more difficult time developing the solar facilities without obtaining accommodation agreements from the oil lessee and severed mineral owners. It is also possible that this case will be appealed to the Texas Supreme Court, so the law remains subject to further development.

THE QUESTION OF PRODUCED WATER OWNERSHIP CONTINUED

definition of fluid oil and gas waste is limited to exclude produced water to avoid a takings claim rather than a determination that the statute is unconstitutional.

There are many other legal arguments and potential ramifications to consider when analyzing the ownership of produced water which I do not have the space to address in this article. Rest assured, this will be a hotly debated issue over the next few years until either a legal resolution is achieved or the ability to monetize this asset disappears.

As for how this may affect you and what to do in the meantime, that depends on your leasing situation. If you have the opportunity to negotiate a new lease, you might consider adding some language to your lease that you have the right, but not the obligation, to take the produced water in kind for your own purposes. The statute has a carve-out to the ownership section that allows a contractual provision to override the statutory provision. If you are already under lease, the ongoing litigation should help determine your rights to the produced water pursuant to the lease and in law, so will be worth watching.

HELP US HELP YOU!

It's that time of year again! Being able to tell the legislature the true impact of our membership is extremely helpful. Please submit the information below to help us throughout the legislative session.

Thank you to each of you who submitted their surface and mineral acres. If you have not submitted yours, but would like to, please mail the form below or email info@tlma.org.

Mineral Acres Owned/Managed _____ Surface Acres Owned/Managed _____

Counties represented:



Texas Land & Mineral Owners Association
1005 Congress Avenue, Suite 360
Austin, TX 78701

TLMA Membership Information Form

I would like to join TLMA I am a member, please update my contact info

Please return to: TLMA, 1005 Congress Ave., Suite 360, Austin, TX 78701

Name _____

Organization/Ranch Name _____

Address _____

City _____ State _____ Zip _____

Telephone Number _____

Email Address _____

Referred by _____

Don't forget!

If there is a change in your contact information, update TLMA and avoid delays in receiving your newsletter, renewal, and other correspondence.

To update your member information, call Robbie at (512) 479-5000, mail in this form, or log in to your member account online at www.tlma.org.

Find more information, join TLMA, or renew your membership online at www.tlma.org