



Where Old Meets New: Energy Transition Projects Collide with Oil, Gas Law

Modern laws created to deal with the energy transition balance on the line between historical oil and gas law principles and new territory.

Meghan McElvy, Contributor Thu, 10/12/2023 - 05:00 PM



Modern laws created to deal with the energy transition balance on the line between historical oil and gas law principles and new territory. (Source: Shutterstock)



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Over the course of a century of oil and gas development in the U.S., a robust body of law developed, covering virtually every aspect of E&P and interpreting every provision in oil and gas leases, joint operating agreements and innumerable

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industry contracts. But with the rise of the energy transition, a new set of rules are needed to deal with unprecedented policy, new technology and different priorities.

For decades, oil and gas case law and contracts were based on vertical drilling as the primary method of extraction. With that came certain notions of drainage from drilling on adjacent tracts and subsurface trespass that assumed oil and gas migrated freely beneath the surface and, whomever owned the soil, owned it down to the center of the earth.

Just as skyscrapers and airplanes forced a modernization (and moderation) of the notion that landowners owned the soil up to the heavens—such that high altitude travel and blockage of sunlight generally are not trespasses—so too did the rise of horizontal drilling and hydraulic fracturing. The tight shale formations led courts to reconsider whether there is actually drainage from fracked horizontal wellbores and whether injection wells, which may allow waste fluid or CO₂ to migrate deep beneath the surface and even beneath producing formations, actually violate property rights (and, if so, whose?).

Similarly, today, the transition from fossil fuels to lower carbon sources of energy is causing many companies in the oil and gas sector to undergo even greater and more complex changes. For starters, energy resources are now being pursued above and below ground. The International Energy Agency predicted in its [World Energy Outlook](#) that emissions from oil, gas and solid fuel production will peak sometime in the next decade, while more renewable resources such as wind and solar come online.

Adding to that growing complexity is the fact that new technologies are emerging (either as an energy resource or as a means to remove/reduce CO₂ emissions), including LNG, geothermal wells, biofuels, hydrogen, carbon capture utilization and sequestration (CCUS) and battery storage technologies, each with their own unique clean energy and commercialization profiles.

Finally, recent policy responses to climate change—the Inflation Reduction Act in the U.S. being a prime example—mean that producers engaging in energy transition projects will not only need to comply with environmental regulations, but also ensure compliance with requirements for federal or state tax credits, which can be critical to their commercial viability.

All of these factors raise the question of how historical oil and gas law principles may be applied to energy transition developments and where new ground may need to be tread.

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There already are several cases decided or currently percolating through U.S. courts that address examples of where traditional oil and gas law concepts are applicable to energy transition projects.

For solar, one Texas appellate court in 2020 resolved the competing interests of a large-scale solar facility against the owners of the mineral interests on the land where the solar array was located.

The mineral owners claimed the existing solar panels impaired their ability to drill for any oil and gas—an alleged violation of Texas' accommodation doctrine, which requires surface owners and mineral owners to reasonably accommodate each other in utilizing the surface for their competing estates. Relying on the fact that the mineral owners had no current plans to develop the minerals, the court held that the solar facility had not sufficiently encroached on the mineral owners' right to access the minerals to require an accommodation. Although the solar facility won this particular case, it leaves open the possibility for liability where the mineral estate owner has taken steps toward mineral development that have been hindered or blocked by development on the surface for renewable energy purposes.

With regard to CCUS projects, applications for which are rising as a result of the federal [45Q tax credits](#), some states, such as Wyoming and North Dakota, have passed laws dictating that the surface owner owns the "pore space" in all strata beneath the surface, including where injected CO₂ may be stored.

Other states, however, have grappled with the question of pore space ownership through the courts. In Texas, courts have not definitively decided the issue, although a majority of decisions appear to recognize that the surface owner owns the subsurface, including geological structures beneath the surface such as salt domes, which may be attractive for CO₂ injection and storage.

Given that CCUS injection wells are more efficient and beneficial when located near heavy CO₂ emitting sources (thus minimizing transportation costs and risks), conflict may arise when CCUS wells interfere with existing wells or formations.

Even cryptocurrency mining impacts oil and gas. A lawsuit recently filed in Colorado questions whether cryptomining activities can carry an oil and gas lease past its primary term—something that usually requires production in paying (or commercial) quantities.

While these are just a few examples of how traditional oil and gas law concepts may be grafted onto disputes involving new technologies, there are undoubtedly issues that will remain the same.

Whether the energy resource is “old” (oil, gas or coal) or “new” (wind, solar or geothermal), leases between owners of the surface or mineral estates and the energy producer will remain a necessary part of how development is accomplished on both public and private lands.

While renewable leases have some key differences (e.g., strict protections around the operator’s ability to enter into and comply with power purchase or other connection agreements with grid operators), many provisions are essentially the same: a signing bonus; a term, royalties or some other measure of payment; and reclamation obligations once development has concluded. With those will come age-old disputes over termination, the proper deduction (or not) of post-production costs from royalties and liability for the plugging (or removal) and abandonment of production facilities.

One of the benefits of the reasonably prudent operator standard is its flexibility and adaptability to a variety of production activities, which should give it lasting impact even when applied to renewable energy projects.

Most courts construe oil and gas agreements according to their terms, without adding language that the parties themselves did not include. Whether the agreements concern fossil fuel or renewable energy resources should not in theory alter the manner in which commercial disputes are decided.

It is impossible to imagine every new scenario, but existing oil and gas law and contractual interpretation principles seem flexible enough to accommodate cleaner energy technologies, and still carry the oil and gas sector into the future.



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