

Storage Wars: Ownership of Subsurface Salt Cavern Storage Rights

Update

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Underground salt caverns are commonly used for the storage of liquids including liquefied hydrocarbons. These caverns are created by solution mining of salt from inside underground salt formations and could play a pivotal role in the growth and development of a variety of energy transition and energy storage developments, including carbon sequestration and hydrogen projects.

Case law has long been unsettled regarding ownership of the storage rights associated with these underground salt caverns. In fact, for the last 30 years, the only legal authority in Texas directly addressing the issue was *Mapco, Inc. v. Carter*, which held that the storage rights associated with underground salt caverns belonged to the mineral owner. 808 S.W.2d 262, 264 (Tex. App.—Beaumont 1991, *rev'd on other grounds*, 817 S.W.2d 686 (Tex. 1991)). But on June 16, 2022, the Corpus Christi Court of Appeals found directly to the contrary, holding that *the surface owner owns the subsurface of the property*—including subsurface caverns created by salt mining activities. *Myers-Woodward, LLC v. Underground Servs. Markham, LLC, et al.*, 2022 WL 2163857, at *11 (Tex. App.—Corpus Christi June 16, 2022).

As with most mineral disputes, the *Myers-Woodward* lawsuit arose out of a royalty dispute over the amount of royalties the mineral owner—Underground Services Markham, LLC (“USM”)—owed to the surface owner—Myers-Woodward, LLC (“Myers”)—on its 1/8 non-participating royalty interest in the salt under a 160-acre tract near Clemville, Texas in Matagorda County. The dispute took on greater significance when USM sought a declaration that it “owns...the exclusive and sole right to store oil, gas and other gases or liquids in cavern space created by it through brine production from the salt mass under the [s]ubject [p]roperty....” *Id.* at 2.

Largely relying on the Beaumont Court of Appeals’ decision in *Mapco*, the trial court held that the mineral rights owner owned the subsurface caverns it

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creates and, as such, USM was the owner of the underground caverns created by its mining activities. On appeal, however, the Corpus Christi Court of Appeals reversed, concluding that as a matter of law Myers (the surface owner) owned the subsurface of the property—including the caverns created by USM's salt mining activities.

The *Myers-Woodward* court recognized that “[m]ost authority in Texas...requires a conclusion that the surface estate owner owns the subsurface, and further found that under Texas law “the surface overlying a leased mineral estate is the surface owner’s property, and those ownership rights include the geological structures beneath the surface;” that the “surface owner, not the mineral owner, owns all non-mineral molecules of the land, i.e., the mass that undergirds the surface estate;” and that, in general, “conveyance of mineral right ownership does not convey the entirety of the subsurface.” *Id.* at 11. In declining to follow *Mapco*, the *Myers-Woodward* court noted that *Mapco*’s holding was “[w]ithout citation to any authority.” *Id.*

A petition for review by the Supreme Court of Texas was filed on January 20, 2023, although many practitioners have viewed *Mapco* as an outlier given numerous authorities defining the scope of the surface estate’s ownership of the subsurface. See e.g., *Dunn–McCampbell Royalty Interest, Inc. v. Nat’l Park Serv.*, 630 F.3d 431, 441 (5th Cir. 2011) (apply Texas law); see also *Humble Oil & Ref. Co. v. West*, 508 S.W.2d 812, 815 (Tex. 1974) (characterizing the surface owner’s interest as ownership of the “reservoir storage space”); *Lightning Oil Co. v. Anadarko E&P Onshore, LLC*, 520 S.W.3d 39, 47 (Tex. 2017); *Regency Field Servs., LLC v. Swift Energy Operating, LLC*, 622 S.W.3d 807, 820 (Tex. 2021) (“[T]he surface owner, and not the mineral lessee, owns the possessory rights to the space under the property’s surface....”); *Springer Ranch, Ltd. v. Jones*, 421 S.W.3d 273, 283 (Tex. App.—San Antonio 2013, no pet.) (“[T]he surface estate owner controls the earth beneath the surface estate.”). If not overturned by the Texas Supreme Court, *Myers-Woodward* may resolve the issue of underground storage in favor of the surface estate once and for all.

Although issues related to subsurface ownership of any given parcel of land in Texas will always be conveyance specific and require an analysis of the underlying instruments of title, until the Texas Supreme Court takes a position, uncertainty will continue to exist regarding the ownership of the vacant salt caverns in Texas due to the conflict between the holdings in *Myers-Woodward* and *Mapco*. This conflict, in turn, will likely lead to an array of related legal issues for surface owners, mineral owners, salt cavern storage operators, and their customers, such as trespass, adverse possession, breach of contract, and indemnity, among many others. Let the storage wars begin.