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The Effect of Mineral Rights on Solar Power Project Development

By Sosi N. Biricik Klijian

Commercial-scale solar energy projects are on the rise, given the need for clean, renewable energy. Solar farms tend to be located in remote desert areas or on vast swaths of agricultural land where developers can get the acreage and the sunlight they need to make their projects viable on a commercial scale. One of the key components of developing a solar generating facility is securing necessary real estate through a long-term lease or an outright purchase of the property. However, before buying or leasing the land, a prudent developer will conduct a title search to determine if there are any prior rights, liens or encumbrances that might interfere with its project.

One potential type of "interference" is the existence of holders of mineral rights. In many remote areas, persons or entities hold mineral rights that provide an interest in the minerals that may exist below the surface of the property. These rights may include the right to utilize any surface space necessary to access and extract underground minerals. If so, mineral rights holders could interfere with a developer's plan to use the surface for its solar power project. This column addresses what steps a California developer might take when it has found an ideal parcel of land but the title search shows that mineral rights holders have recorded their rights in the land.

California Law Governing Mineral Rights and Surface Access

A grant, exception or reservation of mineral rights may expressly include or exclude the right to enter on the surface of the property to explore and drill for mineral deposits and to extract the minerals that are discovered. If the grant or reservation is silent and there is no express inclusion or exclusion of the entry right, the attendant easement for access is implied under California law. Therefore, mineral rights holders automatically have rights to the surface in order to access the property's minerals unless the right of entry is expressly excluded by the grantor of the right.

A mineral rights owner's surface rights are limited. For example, before the first entry on the property to mine for minerals, the owner of mineral rights must give written notice to the property owner stating the extent and location of mining and approximate times of entry and exit. If the mineral rights owner fails to do so, the property owner may petition a court to enjoin the mining until the notice requirement is satisfied. In addition, wrongful use of the surface by the mineral rights owner can give rise to an action for trespass. The mineral rights owner must also ensure that the surface of the land does not become subject to subsidence as a result of underground mining.

However, a mineral rights owner's right to surface access can become problematic for a developer who plans major improvements on the property. California courts have held that a grant or reservation of mineral rights implies the right to remove such minerals by usual or customary methods of mining even if the process destroys the utility of the surface ground. As a result, the developer may find it desirable to extinguish any mineral rights that relate to the property, either by judicial determination or by negotiation with the holder of the mineral rights.

Modifying or Extinguishing Mineral Rights

The fee owner of the mineral rights holds his right, a *profit à prendre* to extract minerals, in perpetuity. Under California law, however, the owner of a parcel of land may bring an action to terminate the mineral right if the mineral right is dormant.

A mineral right is considered "dormant" if three criteria are met. First, no mining activity related to the minerals, including exploration for minerals, may have occurred for 20 years prior to the action to terminate. Second, no separate property tax assessment may have been made for 20 years, or, if made, no taxes may have been paid on the assessment. Third,

no instrument creating, reserving, transferring or otherwise evidencing the mineral right may have been recorded for 20 years. Should these three criteria be met, the developer can bring an action to terminate the mineral right in the superior court of the county in which the property is located. The court may then terminate the mineral right, which will be conveyed to the owner of the property.

Nevertheless, the owner of the mineral right may at any time record a notice of intent to preserve the mineral right. If a notice of intent is filed, it acts as conclusive evidence of non-dormancy, and the burden of proving that the mineral right is dormant shifts. However, recordation of a notice of intent to preserve an interest in real property does not preclude a court from determining that an interest has been abandoned or is otherwise unenforceable.

If the owner of the mineral rights is unknown, a judicial determination of abandonment may relinquish the right. A judge may determine that the mineral *profit à prendre* has been abandoned if there has been nonuse of the mineral resource and if there is evidence of the mineral rights owner's intent to abandon the mineral right. The mineral rights owner's intent to abandon must be shown by acts or failures to act that are clear, unequivocal and decisive, such as actions that are incompatible with the nature or exercise of the *profit à prendre*.

If the holder of the mineral right is known, the *profit à prendre* may be modified or terminated by agreement of the parties. The developer and the mineral rights holder can negotiate for a release of the surface rights that may involve payment or consideration to the mineral rights owner. A release requires a formal written document and often takes the form of a quitclaim deed transferring the interest in the mineral right to the property owner. If the mineral rights owner will not agree to a release, the developer may wish to negotiate to modify the right of surface entry. For example, if neighboring land is available, the parties may agree that subsurface mineral rights can only be exercised without entering onto the surface of the developed property and require that the holder of the mineral rights exercise slant drilling to reach the minerals.

Finally, should a developer pursue the purchase of a parcel that may be affected by mineral rights, the developer may wish to discuss the matter with its title insurer. A developer may be able to negotiate the purchase of an endorsement adding coverage for physical damage to improvements arising out of an exercise of the right of surface entry. In most instances the title insurer will request to see the documentation creating the mineral right before issuing the endorsement, so an endorsement may not be an option when such documents are unavailable.

When the rights of mineral rights holders include the right to surface access, development on the surface of the land can be obstructed or hindered. Developers of commercial-scale solar energy projects should be attuned to the impacts of mineral rights existing on their properties. In California, developers can choose from a number of options to address the potential risks that arise from mineral rights holders, ranging from judicial decrees to negotiated deals to title insurance endorsements. A developer who understands the risks associated with mineral rights and the options to address those risks is in the best position to make an informed decision when securing its real estate for a solar energy project.

***Sosi N. Biricik Klijian** is counsel in the Project Finance and Development Group in the San Diego office of Latham & Watkins LLP.*