

State Legal and Regulatory Updates on Pore Space Policy

Legal and Regulatory Affairs Committee

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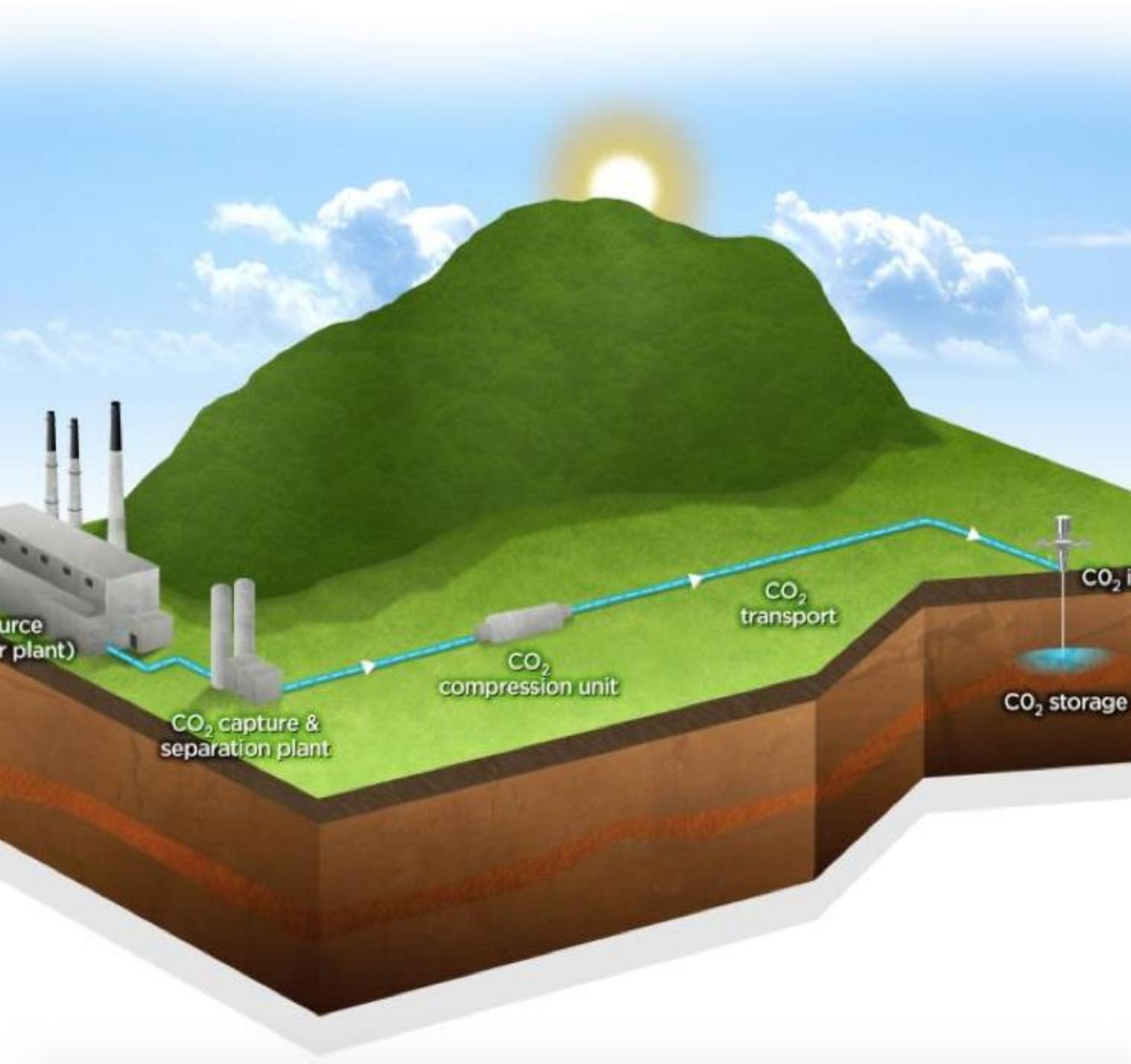
IOGCC Legal and Regulatory Guide

September 25, 2007

- Basic principals:
 1. It is in the public interest to promote geologic storage of CO₂ in order to reduce CO₂ emissions
 2. Pore space should be managed as a resource and not a waste
 3. Storage rights are a matter of state law
 4. Eminent domain and unitization should be available for site acquisition
 5. Post-closure finds
 6. Based on case law survey surface owners should be declared owners of pore space
 7. Protect other stakeholders from damage

Lessons learned?

1. Pore space ownership options: surface owners, mineral owners or public usage.
2. Consistency among the states/provinces in determining who owns the pore space.
3. Implications of court decisions and CCS legislation.
4. Implications on pore space ownership of (a) Sequestered CO₂ having sufficient value to justify its extraction and (b) liability of sequestered CO₂ being imposed on the owner of the pore space.
5. Implications on pore space ownership options of the development of Hydrogen Hubs across the county and the need for related CO₂ sequestration / utilization.
6. Assessment of agreements among states related to CCUS projects that impact on multiple jurisdictions that may have different pore space ownership.



Moderator: Dave Flannery, Steptoe & Johnson PLLC

Panelists:

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Review of States With Statutory Law Addressing Both Pore Space Ownership and Unitization

California

- In September 2022, California enacted legislation on both ownership and unitization
- Cal. Pub. Res. Code D.34, Pt. 8
 - § 71461(a)(2) creates a 75% unitization requirement
 - § 71462(a) grants ownership of any geologic storage reservoir to the surface owner, unless that estate has been severed and separately conveyed out
 - § 71462(b) states that “[t]he ownership of a geologic storage reservoir may be conveyed in the manner provided by law for the transfer of mineral interests in real property. No agreement or instrument conveying a mineral or other interest underlying the surface shall act to convey ownership of a geologic storage reservoir unless the agreement explicitly conveys that ownership interest.”
- No case law discussing pore space ownership

Kentucky

- In 2011, Kentucky enacted legislation on both ownership and unitization
 - KRS § 353.800(8) grants pore space to surface owners
 - KRS § 353.806(2) creates a 51% unitization requirement
- No case law discussing pore space ownership; case law appears limited to natural gas storage and extraction

Montana

- Montana enacted legislation on both ownership and unitization in 2009,
 - § 82-11-112 allows for cooperative agreements with other state governments if a project were to cross state boundaries
 - § 82-11-180(3) states “if the ownership of the geologic storage reservoir cannot be determined from the deeds or severance documents related to the property by reviewing statutory or common law, it is presumed that the surface owner owns the geologic storage reservoir”
 - § 82-11-204 creates a 60% unitization requirement
- The Montana Supreme Court held in 2011 that pore space belongs to surface owners
 - *Burlington Res. Oil & Gas Co., LP v. Lang & Sons Inc.*, 259 P.3d 766,770 (Mont. 2011) (finding that an oil and gas operator was entitled to dispose of wastewater produced in unit operations in the pore space belonging to a surface owner with an interest in the unit and that the surface owner failed to prove damages)

North Dakota

- North Dakota enacted legislation on both ownership and unitization in 2009
 - N.D.C.C § 47-31-03 grants title to pore space to the owner of the surface estate
 - N.D.C.C § 47-31-05 prohibits the severance of the pore space from the surface estate
 - N.D.C.C § 38-22-08 creates a 60% unitization requirement
- In 2022, the North Dakota Supreme Court found portions of a law allowing use of pore space for saltwater disposal unconstitutional. Northwest Landowners v North Dakota, Case No 2022 ND 150, N.D. Sup Ct.

West Virginia

- In May 2022, West Virginia enacted legislation on both ownership and unitization
 - § 22-11B-4 also creates a 75% unitization requirement
 - § 22-11B-10 also allows for cooperative agreements with other state governments if a project were to cross state boundaries
 - § 22-11B-18 grants ownership of the pore space to the surface owners, and also creates a rebuttable presumption that “prior to the effective date of this article, that the pore space remains vested with the surface owner” where there is not a clear and unambiguous transaction that indicates otherwise
- No cases specifically pertaining to pore space

Wyoming

- In 2008 Wyoming enacted legislation on pore space ownership. W.S. § 34-1-152 grants pore space ownership to the surface owner and allows it to be severed from the surface and separately conveyed.
- In 2009 W.S. § 35-11-316 created an 80% unitization requirement.
- No case law related to pore space ownership or unitization.

States With Statutory Law On Ownership
But Not Unitization

Indiana

- In July 2022, Indiana enacted legislation that addressed pore space ownership
 - Ind. Code § 14-39-2-3 grants pore space to surface owners
 - Legislation does not address pooling
- 2019 legislation related to a pilot project authorized eminent domain to acquire pore space rights. IC 14-39-7
- No case law discussing pore space ownership

Utah

- In May 2022, Utah enacted legislation that addressed pore space ownership
 - Utah Code § 40-6-20.5 grants pore space to surface owners
 - Legislation does not address pooling
- No case law discussing pore space ownership

States With Law On Unitization But Not
Pore Space ownership

Mississippi

- Undecided as to pore space ownership
- No legislation granting pore space ownership
- 2022: MS Code § 53-11-9 does create a 51% unitization requirement
- No case law discussing pore space ownership

Nebraska

- No legislation, proposed or enacted, granting pore space ownership
- 2021: Neb. Rev. Stat. § 57-1610(13) does create a 60% unitization requirement
- No case law discussing pore space ownership

States With Proposed Legislation

Illinois

- Undecided as to pore space ownership
- HB4370 introduced in 2020 but did not pass
 - would have given pore space to the surface owners, and
 - allow for 50% unitization
- No case law discussing pore space ownership

Pennsylvania

- Undecided as to pore space ownership
- Pennsylvania Senator Gene Yaw plans to introduce the Pennsylvania Geologic Storage of Carbon Dioxide Act
 - Proposed legislation would give pore space to surface owners
 - Proposed legislation would create a 60% unitization requirement
- No cases specifically pertaining to pore space; cases limited to gas storage issues

South Dakota

- Undecided as to pore space ownership
- SB63 (2020) did not pass
 - would have given pore space to the surface owners,
 - would prohibit severing surface ownership from pore space
 - would allow leasing of pore space
- No case law discussing pore space ownership

States With Indirect Case Law

Alaska

- Undecided as to pore space ownership
- No legislation granting pore space ownership
- Case law regarding pore space is built around statutory interpretation
 - *City of Kenai v. CINGSA*, 373 P.3d 473 (Alaska 2016) (where the court interprets the term “minerals” used in the Alaska Land Act to include “pore space” and hold that “subsurface pore space and attendant storage rights were reserved to the state”)

Louisiana

- Case law indicates that in Louisiana, pore space belongs to the surface owner
 - *S. Natural Gas Co. v. Sutton*, 406 So. 2d 669, 671 (La. Ct. App. 1981) (holding that pore space storage rights belong to the owner of the surface estate)
 - *Miss. River Transmission Corp v. Tabor*, 757 F.2d 662 (5th Cir. 1985) (holding that surface owners owns the right to subsurface storage)
- No legislation granting pore space ownership
- LA Rev Stat Section 30:1104.C(1) no reservoir capable of producing minerals in paying quantity may be used unless all owners agree.

Michigan

- Case law indicates that the pore space belongs to the surface owner
 - *Department of Transportation v. Goike*, 560 N.W. 2d 365 (MichApp. 1996) (holding that once underground storage space has been cleared of minerals and gas being stored there by the mineral right holder awaiting extraction, the space then belongs to the surface estate owner)
- No legislation granting pore space ownership

New Mexico

- Undecided as to pore space ownership
- No legislation granting pore space ownership
- Case law is limited to the mineral estate holder's right to extract the mineral, and the bounds of an injection permit as to the movement of salt water between tracts
 - *Jones-Noland Drilling Co. v. Bixby*, 282 P. 382,383 (N.M. 1929) (holding that a mineral lessee only has the right to use the soil for mineral extraction purposes)
 - *Synder Ranches, Inc. v. Oil Conservation Comm'n of State of N.M.*, 798 P.2d 587,590 (holding that a license to inject salt water into a disposal well does not authorize trespass, or other tortious conduct, by a licensee)

Ohio

- Undecided as to pore space ownership
- No legislation granting pore space ownership
- No case law discussing pore space ownership
- Case law is limited to analysis of deeds
 - *Chartiers Oil Co. v. Curtiss*, 24 Ohio C.D. 106 (1911) (finding that right of storage should not exceed what “may be incidental to the immediate production and marketing of oil”)
 - *Moore v. Indian Camp Coal Co.*, 80 N.E. 6, 8 (Ohio 1907) (“the mine owner has the right to use how he may choose, but without injury to the owner of the soil, the space left by the extraction of the mineral, so long as it remains a mine”)

Texas

- Undecided as to pore space ownership
- No legislation granting pore space ownership
- 2009: Subtitle D, Title 3, Chapter 120.002: stored CO2 is the property of the storage operator
- Case law is limited to mineral ownership
 - *Lightning Oil v. Anadarko E&P Onshore*, 530 S.W.3d 39 (Tex. 2017) (holding that although “the surface owner owns and controls the mass of earth undergirding the surface, those rights do not necessarily mean it is entitled to make physical intrusions into formations where minerals are located and remove some of the minerals”)

States Without Guidance

Alabama

- Ala. Admin. Code r. 335-6-8-.27(6) states that a Class VI Well Permit does not grant any property rights or privileges
 - There is no language that clarifies pore space ownership or unitization

Arizona

- Ariz. Admin. Code § 18-9-J656 sets “criteria and standards for underground injection control programs to regulate any Class VI carbon dioxide geologic sequestration injection wells”
- There is no language that clarifies pore space ownership or unitization

Colorado

- Undecided as to pore space ownership
- No legislation granting to pore space ownership
- No case law discussing pore space ownership
- An interagency taskforce has been created to focus on issues related to carbon capture and storage

Idaho

- In 2002, created a Carbon Sequestration Advisory Committee. I.C. §§ 22-5201 et seq. Also created a Carbon Sequestration Assessment Fund I.C. § 22-5206.
- No language addressing pore space ownership or unitization

Oklahoma

- Okla. Stat. tit. 27A, § 3-5-101, also known as the Oklahoma Carbon Capture and Geologic Sequestration Act does not address ownership of pore space or unitization

Nevada

- Nevada is part of the West Coast Regional Carbon Sequestration Partnership (WESTCARB) led by the California Energy Commission
 - This organization's mission is to “validate the feasibility, safety, and efficacy of carbon storage”
- There is no legislation, enacted or proposed, that explores pore space ownership or unitization

Other IOGCC States

Remaining IOGCC States

- Arkansas
- Florida
- Kansas
- New York
- Virginia

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Questions and Discussion