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Landfill Gas: Real Property or Personal Property?

Why Does It Matter and What Can You
Do About It?

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Today's Discussion

- Is landfill gas real or personal property?
- Why does it matter?
- What can you do about it?

Landfill Gas: Real or Personal Property

- Confusion on this topic because of the similarities between landfill gas and natural gas.
- Different legal theories about whether natural gas is real property or personal property - real theoretical property law professor stuff.

Ownership-in-Place Theory

- Landowner owns all substances, including natural gas which underlies the land.
- But gas moves around!
- Law of Capture.
- Correlative Rights.

Non-Ownership Theory

- Landowner does not own the natural gas in the ground but has the right to search for it and take it out of the ground.
- Many different interesting and exciting legal theories to describe the exact nature of the landowner's rights with respect to natural gas in the non-ownership jurisdictions.

Why Landfill Gas is Different

- Little case law - The In re Resource Technology Corporation bankruptcy case.
- Not a "native" gas, never part of the "mineral estate."
- Consider analogy to re-injected natural gas stored in a depleted natural gas reservoir.

Landfill Gas and Collection Rights

- Distinction between nature of landfill gas and agreements regarding rights to collect it.
- Even if landfill gas is not real property, the landfill gas company can create rights in real property.

Why Does it Matter?

- Tax issues
- Financing issues
- Bankruptcy issues
- Miscellaneous - odd issues

Tax Issues

- Real property taxes
- Recordation and transfer taxes

Financing Issues

- Collateral is personal property and security interests are created, perfected and enforced under the UCC.
- Collateral is real property and security interests are created, perfected and enforced under local real estate law.

Bankruptcy Issues

- Differences between real estate rights and contract rights in the bankruptcy of the landfill gas company.
- Differences between real estate rights and contract rights in the bankruptcy of the landfill owner.

Miscellaneous Issues

- Real Estate Brokerage Acts
- Statute of Frauds and Other Real Property Law Concepts
- Reversion to the Landfill Owner

What Can You Do About It?

- What can you do about creating a real property interest or contractual rights in personal property?
 - Creating a real property lease
 - Avoiding the creation of a real property lease

Questions?



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