

Memorandum
On
Defining Wind Rights in Wyoming

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Defining Wind Rights in Wyoming: A Practical Solution

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TABLE OF CONTENTS

I. INTRODUCTION

II. THE WIND RIGHT

- A. Surface Estate Ownership*
- B. Airspace*
- C. Wind Right belongs to the Surface Estate Owner*
- D. A Special Note on Estate Dominance*

III. RELEVANT WATER LAW PRINCIPLES

- A. Diffused Water Law*
- B. Water Law Principles*

IV. RELEVANT MINERAL LAW PRINCIPLES

- A. Defining the Rights Granted by a Mineral Lease*
- B. Application of Mineral Leasing Concepts to the Wind Right*
- C. The Realty-Personalty Distinction in Mineral Law*
- D. Application of the Realty-Personalty Distinction in Mineral Law to the Wind Right*

V. SEVERABILITY OF WIND RIGHTS FROM THE SURFACE ESTATE

- A. Potential Conflicts between Surface Estate Owner(s) and Wind Estate Owner(s)*
- B. Potential Conflicts between Wind Estate Owner(s) and Subsurface Estate Owner(s)*
- C. Special Note on the Presence of Restrictive Covenants in Wind Energy Leases*
- D. Severability and the Policy of Alienable Property*
- E. Severability and Regulatory Certainty*

VI. TAXATION OF WIND ENERGY SYSTEMS

- A. Taxation Based on Mineral Law Principles*
- B. The Concept of a Generation Tax and its Application*

VII. CONCLUSIONS

I. Introduction

The rapid development of wind energy projects in Wyoming is going to require a new framework for the analysis of an infinite, renewable energy resource. Wind energy presents unique challenges to the traditional understanding of energy law based on oil, natural gas, and other minerals. Wyoming Governor Dave Fruedenthal, speaking at a wind energy symposium in Laramie this past August, said: “There will be a time when future generations look back at the challenges we are addressing today regarding the development of our wind resources. They will compare our actions to those of our predecessors who dealt with the coal boom of the 1970s, and numerous other development peaks in our state's history.”¹ Wyoming has lagged behind other states in addressing wind energy issues², but the state’s rich history in dealing with natural resource issues will provide some guidance for the future and will allow the responsible development of wind energy.

Wind development provides Wyoming with an opportunity to further strengthen its economy and growth while solidifying its position in the nation as a primary exporter of energy in both traditional and renewable energy resources. Wyoming’s unique position as a major producer in traditional energy resources and its potential for wind development demands that the state define wind rights in a way that accommodates all energy development while protecting the rights of property owners to develop their land. These challenges can be met by defining the wind right and creating an interest that is transferrable but not severable. Ensuring that the surface owner maintains ownership of the rights to develop wind mitigates potential conflicts while allowing for development. Laying the proper foundation for wind development begins

¹ Governor Dave Fruedenthal, What Wyo. wants from wind energy, Casper Star-Tribune, Perspectives, August 23, 2009.

² See e.g. ME. REV. STAT. ANN. TIT. 35-A, §3401, et. seq. (2009); MINN. STAT. ANN. § 500.30 (2009); S.D. CODIFIED LAWS § 43-13-19 (2009).

with defining the right so that it may be utilized and developed for the benefit of the landowners, the wind developers, and the state.

Wyoming's position as an energy exporter and its prime location for wind development also creates important considerations that must be addressed. Tantamount among these considerations is how wind energy development may affect other resource development in the state. Therefore, when determining a legal framework for wind development it becomes a balancing act between key interests. Among those are respecting the right of a property owner to develop the land, the state's interests in developing wind as a resource, and third party interests in developing other resources within the state. Any legal framework that defines the wind right and the scope of that right must seek to balance all of these interests if wind development is to contribute to Wyoming's vast energy potential both in traditional energy resources and alternative energy resources.

In determining the proper legal framework for wind development in the State of Wyoming it is simply not enough to identify an existing legal framework and attempt to merely substitute wind in its place. This does not suggest that concepts from existing legal structures should not be adopted and applied to wind. In order to create a practical and effective legal framework, existing legal principles will have to be utilized but adapted to the unique characteristics of wind. While it might be tempting to identify wind with existing resources and simply apply the law in place this would not result in an effective legal framework. Wind is its own unique source of energy and should be treated as such.

Many other states have defined wind rights in their states. Some have taken the approach of defining the wind as an easement while others have looked at defining wind as a natural

resource similar or in line with oil and gas rights.³ While these states provide reference and considerations to be utilized in assisting defining the wind right in Wyoming, our state's unique position will demand more to define wind in way that provides a practical solution and benefits all interested parties.

The State of Wyoming has not addressed the issue of wind rights in the state. Currently, practitioners are defining wind rights utilizing contracts and lease agreements without guidance from the legislature. Given the diverse opinions on how the right should be defined in other states, it is likely that within the state of Wyoming there is equally a diverse cross-section on how the right should be defined and how it is being defined through wind leases and contracts. This increases and necessitates a resolution be developed by the legislature. While there is an urgency to develop wind and the associated wind rights in the state, any approach that refuses to account for Wyoming's unique position will not be a practical solution.

II. The Wind Right

A. Surface Estate Ownership

The Wyoming Supreme Court has defined the surface owner right in *Belle Fourche Pipeline Co. v. State*.⁴ The definition was derived from a composite of sources, but entitles a surface owner to the “exterior or outside of the earth”, and vests a right to enjoy or dispose of the surface to the extent permitted by law.⁵ The court continued that a “surface landowner” or a “surface owner” is the owner in fee of the surface estate.⁶ The surface owner has the right to

³ *Contra Costa Water District v. Vaquero Farms, Inc.*, 58 Cal.App.4th 883, 894, 68 Cal.Rptr.2d 272, 278 (Cal. 1997) (Court stated that the right to generate electricity by harnessing the power of wind is no different from the right to develop oil or gas); Other states have adopted specific legislation that defines the wind right as an easement, S.D.C.L. § 43-13-19 (2009).

⁴ 766 P.2d 537, 543 (Wyo. 1988).

⁵ *Id.*

⁶ *Id.*

enjoy or dispose of the surface to the extent permitted by law, which would include the right to utilize the surface in a manner which would allow development of wind energy.⁷

Wind conditions at a particular site vary widely, making the potential for wind development unique to the condition of the surface estate.⁸ A wind power project considers the overall wind resource at a particular site, including the topography of the site and wind data.⁹ However, a further feasibility study is necessary for additional factors such as local siting regulations, political calculations of successful permitting, grid connections to export produced electricity, and other considerations that are necessary to determine the ultimate success of the project.¹⁰ The success or failure of a wind energy project, then, depends to a great extent on the conditions present on and above the surface estate.¹¹

B. Aeronautics

Wyoming's statute explicitly grants the ownership of the space above land and water to the surface owner below.¹² However, such ownership is subject to the right of public passage through the navigable airspace, subject to statutory conditions.¹³ The statute also declares that sovereignty in the airspace rests with the state of Wyoming, except where assumed by federal law.¹⁴ The statute was enacted as part of Wyoming's Uniform State Law for Aeronautics in 1931.¹⁵ The stated purpose of the law is to make state laws uniform to each other and to the federal laws on aeronautics.¹⁶ While the statute may appear to affect only airspace as affected by

⁷ See *Id.*

⁸ See TORE WIZELIUS, *DEVELOPING WIND POWER PROJECTS: THEORY & PRACTICE* 221-226 (2007).

⁹ *Id.* at 221-222.

¹⁰ *Id.* at 222-226.

¹¹ *Id.*

¹² WYO. STAT. ANN. § 10-4-302 (2009).

¹³ *Id.*

¹⁴ WYO. STAT. ANN. § 10-4-301 (2009).

¹⁵ *Cheyenne Airport Board v. Rogers*, 707 P.2d 717 (Wyo. 1985)

¹⁶ WYO. STAT. ANN. § 10-4-304 (2009).

air travel, there is no such qualification in the statute.¹⁷ In addition, the fact that airspace ownership was addressed in the context of an aeronautics law does not discount the conclusion that the legislature intended to vest the airspace rights in the surface landowner.¹⁸ Rather, the clear and unambiguous language used by the legislature left no doubt that the title to the airspace above a surface estate was vested in the surface estate owner.¹⁹

The only Wyoming Supreme Court case interpreting this section of Wyoming statute is *Cheyenne Airport Board v. Rogers*,²⁰ decided in 1985. The case presented the question of whether a City of Cheyenne zoning ordinance establishing a height limitation in a particular approach zone to the Cheyenne municipal airport was constitutional.²¹ The Wyoming Supreme Court found that the zoning ordinance was a constitutional exercise of the police power of the municipal government and ordered the obstruction in question to be modified to meet the requirements.²² With respect to the aeronautics statute, the court affirmed the principle of the ownership of the airspace as resting with the surface owners, though such an affirmation was made in the context of an airport zoning ordinance.²³ The court also commented that the declaration and limitations outlined in the aeronautics statute were designed to harmonize regulations on airspace with the federal government.²⁴ Finally, the court noted that the origin of the ownership of the airspace above property and the right of free public passage through

¹⁷ See WYO. STAT. ANN. §10-4-301, et. seq. (2009).

¹⁸ See *Cheyenne Airport Board v. Rogers*, 707 P.2d 717, 722 (Wyo. 1985) (discussing the federal origins of the Uniform State Law on Aeronautics)

¹⁹ WYO. STAT. ANN. § 10-4-302 (2009).

²⁰ 707 P.2d 717 (Wyo. 1985).

²¹ Id. at 721.

²² Id. at 732.

²³ Id. at 722.

²⁴ Id.

navigable airspace were both federal and state in nature, but that the means of enforcement are left to municipal zoning regulations by Wyoming statute.²⁵

C. The Wind Right Belongs to the Surface Estate Owner

The ownership of the surface estate and the airspace above are intimately connected under Wyoming statute and case law, and combining the analysis of those interests simplifies the ultimate definition of the wind right.²⁶ Under the *Belle Fourche Pipeline* case mentioned above, the surface owner has the bundle of rights necessary to utilize the surface estate in a manner which allows the development of wind energy.²⁷ The airspace above the surface estate, where the wind resource is located, is also vested in the surface estate owner.²⁸ The use and development of wind is included as an incident of ownership of the airspace above the land. Further, the Wyoming legislature has codified the common law unified fee theory of ownership.²⁹ In common law, the unified fee theory of ownership gave the landowner ownership rights to all above and below the property.³⁰ Since the landowner owns the airspace above the property any incident of ownership of that airspace is vested with the owner of the property.³¹

It is possible, based on the clear language expressed in the statutes, to conclude that the initial right to develop the wind energy resource is vested in the owner of the surface estate. Such a conclusion appears to be foregone, as evidenced by the practice of signing wind energy development contracts or leases between developers and the surface owners, but the legal

²⁵ Id. The case referred to WYO. STAT. ANN. § 10-5-301, which specifically authorizes municipalities to zone the approaches to airport runways.

²⁶ *Belle Fourche Pipeline Co. v. State*, 766 P.2d 537, 543 (Wyo. 1988); WYO. STAT. ANN. § 10-4-302 (2009).

²⁷ See *Belle Fourche Pipeline Co.*, 766 P.2d at 543.

²⁸ WYO. STAT. ANN. § 10-4-302 (2009).

²⁹ WYO. STAT. ANN. § 10-4-302 (2009) (“The ownership of the space above the lands... is declared to be vested in the several owners of the surface beneath..”); WYO. STAT. ANN. § 10-4-303 (2009) (flight of aircraft over lands is lawful unless it interferes with existing use to which the land or the space over the land is put by the owners).

³⁰ *Ross v. Trustees of University of Wyoming*, 31 Wyo. 464, 228 P. 642, 650 (Wyo. 1924); See, *Davis v. Consolidated Oil & Gas, Inc.*, 802 P.2d 840, 844 (Wyo. 1990) (ownership of lands extends under the surface to the center of the earth).

³¹ See WYO. STAT. ANN § 10-4-302 (2009);

foundations and consequences of ownership are significant for determining the rights and responsibilities that come with wind energy development. Taken together, the owner of the surface estate owns the surface and airspace rights necessary for wind energy development. However, the conclusion that the right to develop wind energy is vested in the surface owner does not conclude the analysis of the wind right. Other areas of natural resource law are important in analyzing more specific issues related to wind energy development.

D. A Special Note on Estate Dominance

One of the most significant issues facing wind development in Wyoming is the concept of severability, or the theory that the wind right is a property interest unto itself, capable of being purchased and sold independently from the surface estate by the surface estate owner. The advantages and disadvantages of such a practice are discussed in a later section of this report, but the creation of a “wind estate” raises a challenge to the continued dominance of the mineral estate under Wyoming law.

The dominance of the mineral estate in Wyoming has been repeatedly upheld by the Wyoming Supreme Court and has been explicitly referred to in statutes passed by the Wyoming legislature. The Wyoming Supreme Court recognized the dominance of the mineral estate in a series of cases, most recently in *Mingo Oil Producers v. Kamp Cattle Co.*³² The Wyoming legislature has explicitly spoken to the dominance of the mineral estate when it addressed the issue of pore space ownership.³³ The language in the statute could be particularly relevant for a statutory definition of a wind right.

³² 776 P.2d 736, 741 (Wyo. 1989). See also *Sanford v. Arjay Oil Co.*, 686 P.2d 566 (Wyo. 1984); *Holbrook v. Continental Oil Co.*, 278 P.2d 798 (Wyo. 1955).

³³ WYO. STAT. ANN. § 34-1-152(e) (2009).

The statute reads: “(e) Nothing in this section shall be construed to change or alter the common law as of July 1, 2008, as it relates to the rights belonging to, or the dominance of, the mineral estate. For the purposes of determining the priority of subsurface uses between a severed mineral estate and pore space as defined in

One potential solution to the challenge of estate dominance presented by a new “wind estate” is for the legislature to make the same statement in regards to wind as it did with respect to pore space. Rather than expressly forbidding severability of wind rights from the surface estate, the legislature could define the wind right as belonging to the surface estate owner and provide that the recognition of a “wind estate” does not alter the common law dominance of the subsurface minerals. The legislature could even go so far as to specifically address the situations of conflict between the mineral estate and wind estate, providing that the mineral estate should be dominant in all circumstances to the wind estate. More specific issues regarding severability are addressed in a separate section, but the need to preserve the mineral estate as the dominant estate is a major component of any recognition of an additional estate in land in Wyoming.

III. Relevant Water Law Principles

A. Diffused Water

In the State of Wyoming surface water or diffused surface water is defined as “water on the surface of the ground the source of which is so temporary or limited as not to be able to maintain for any considerable time a stream or body of water having a well defined channel and substantial existence.”³⁴ Diffused surface water is formed from rainfall, melting snow or from the natural drainage from the upper lands.³⁵ Diffused surface waters belong exclusively to the owner of the land on which they are found.³⁶ These waters may be captured and impounded by

subsection (d) of this section, the severed mineral estate is dominant regardless of whether ownership of the pore space is vested in the several owners of the surface or is owned separately from the surface.”

³⁴ *Riggs Oil Co. v. Gray*, 30 P.2d 145, 147 (Wyo. 1934).

³⁵ *Id.*; *State v. Hiber*, 44 P.2d 1005, 1008 (Wyo. 1935)(surface water is water that is diffused over the surface of the ground and is derived from rains and melting snow).

³⁶ *State v. Hiber*, 44 P.2d 1005, 1008 (Wyo. 1935); *Riggs Oil Co. v. Gray*, 30 P.2d 145, 147 (Wyo. 1934) (Court stated that once diffused waters have been captured and impounded they become the exclusive property of the landowner).

the landowner whose land they have flowed.³⁷ The owner of land on which the diffused surface waters fall not only has the absolute right to those waters but may do with it as he wishes.³⁸ This gives the landowner the right to appropriate diffused surface water for his own use or the right to expel the water from the land.³⁹

Viewing ownership of wind similar to that of diffused surface water is not only based on similar characteristics and policies shared between the two resources but also is in line with existing Wyoming law. The Wyoming legislature has codified the common law unified fee theory of ownership.⁴⁰ In common law the unified fee theory of ownership gave the landowner ownership rights to all above and below the property.⁴¹ Since the landowner owns the airspace above the property any incident of ownership of that airspace is vested with the owner of the property.⁴² The use and development of wind is included as an incident of ownership of the airspace above the land. However, the premise for diffused water relies in part on the temporary nature of the resource.⁴³ While wind is a more reliable resource than rainfall, wind is still temporary in character. The temporary character of wind lends itself to diffused water ownership principles.

³⁷ *Id.*; *Riggs Oil Co. v. Gray*, 30 P.2d 145, 147 (Wyo. 1934).

³⁸ *Riggs Oil Co.*, 30 P.2d at 147.

³⁹ *Id.* (Stating the accepted common law view in multiple states which included: England, Massachusetts, Maine, Vermont, New York, New Hampshire, Rhode Island, New Jersey, Michigan, Minnesota, Wisconsin, Washington, New Mexico, Texas, etc.).

⁴⁰ WYO. STAT. ANN. § 10-4-302 (2009) (“The ownership of the space above the lands... is declared to be vested in the several owners of the surface beneath..”); WYO. STAT. ANN. § 10-4-303 (2009) (flight of aircraft over lands is lawful unless it interferes with existing use to which the land or the space over the land is put by the owners).

⁴¹ *Ross v. Trustees of University of Wyoming*, 228 P. 642, 650 (Wyo. 1924); *See, Davis v. Consolidated Oil & Gas, Inc.*, 802 P.2d 840, 844 (Wyo. 1990)(ownership of lands extends under the surface to the center of the earth).

⁴² *See, WYO. STAT. ANN § 10-4-302 (2009);*

⁴³ *Riggs Oil Co.*, 30 P.2d at 147.

The contrary position taken by other states and suggested by other law commentators is that wind rights are analogous to mineral rights in oil and gas.⁴⁴ However, this position arguably fails to account for both the nature and characteristics of wind and its unique position as an energy resource. As one commentator observed “[t]he concept of wind ownership is difficult to comprehend because one cannot capture or possess the wind to the exclusion of all others. Wind is but movement of air across property. How can one ‘possess’ or own the movement of air?”⁴⁵ “Ownership of wind is a misnomer” because in order to possess wind one must utilize the properties of wind and its kinetic energy to generate electricity.⁴⁶ Once this has been accomplished only then has wind been reduced to possession giving it value.⁴⁷ Given these considerations the best solution is not to try and reduce wind to a mere analogy to oil and gas rights.

Under existing law in Wyoming, property owner rights extend to all below the property and all above.⁴⁸ This establishes ownership of the airspace above the land but does not establish ownership of its movement, that is an incident of ownership. The principles and law established in Wyoming regarding diffused surface waters establish to whom or who may exercise the right of developing wind. Diffused surface water principles establish that there is no actual ownership of the rain or melting snow waters until they are captured and impounded and put to use by the

⁴⁴ *Contra Costa Water District v. Vaquero Farms, Inc.*, 58 Cal.App.4th 883, 894, 68 Cal.Rptr.2d 272, 278 (Cal. 1997) (Court stated that the right to generate electricity by harnessing the power of wind is no different from the right to develop oil or gas);

⁴⁵ Lisa Chavarria, *Wind Power: Prospective Issues*, 68 Tex. B.J. 832, 834 (2005).

⁴⁶ Terry E. Hogwood, *Against the Wind*, Oil, Gas and Energy Resources Law Section Report Vol. 26 Num. 2 Dec. 2001, at 6.

⁴⁷ *Id.*

⁴⁸ WYO. STAT. ANN. § 10-4-302 (2009) (“The ownership of the space above the lands... is declared to be vested in the several owners of the surface beneath..”); WYO. STAT. ANN. § 10-4-303 (2009) (flight of aircraft over lands is lawful unless it interferes with existing use to which the land or the space over the land is put by the owners).

⁴⁸ *Ross v. Trustees of University of Wyoming*, 228 P. 642, 650 (Wyo. 1924); *See, Davis v. Consolidated Oil & Gas, Inc.*, 802 P.2d 840, 844 (Wyo. 1990)(ownership of lands extends under the surface to the center of the earth).

owner of the land or the waters reach a definite channel or body of water.⁴⁹ Ownership of diffused surface water is contingent on ownership of the land and its capture.⁵⁰ Once captured and put to use, the owner achieves the potential value of the diffused surface water.

Wind presents many similarities to that of diffused surface waters. These similarities, the underlying policies, and the general theory of fee ownership provide a supportable legal framework for defining the wind right in the state. Defining the general scope of the wind right in a manner similar to diffused surface water outlines only the basic premises on how the right should be viewed within the state. The goal given Wyoming's diverse energy portfolio is to define the property rights associated with wind in a manner that allows for growth in wind energy development while creating a forum that accommodate traditional energy developers to continue utilizing those resources in the state.

B. Water Law Principles

Wind ownership has been analyzed utilizing traditional appropriation water principles in other jurisdictions. In *Romero v. Bernell*, the United States District Court in New Mexico addressed wind rights in the context of a partition hearing.⁵¹ In *Romero*, the court explicitly rejected the argument that wind was analogous to minerals *in situ*.⁵² While acknowledging the lack of New Mexico authority on the subject, the court disagreed with the comparison, stating wind was more analogous to water or a wild animal on the surface which had no value until it was reduced to possession.⁵³ The court found that “[T]he right to ‘harvest’ wind energy is, then, an inchoate interest in the land which does not become ‘vested’ until reduced to ‘possession’ by

⁴⁹ *Riggs Oil Co.*, 30 P.2d at 147.

⁵⁰ *See, Id.*

⁵¹ *Romero v. Bernell*, 603 F.Supp.2d 1333 (D. N.M. 2009).

⁵² *Id.* at 1334-1335.

⁵³ *Id.* at 1335.

employing it for a useful purpose.”⁵⁴ The court concluded by analogizing wind energy to water, citing several New Mexico cases adopting the concept of beneficial use in the context of New Mexico’s prior appropriation system.⁵⁵ This concept of utilizing prior appropriation principles has both its benefits and its downfalls. Under appropriation principles wind is an interest in the land.⁵⁶ However, water in the state of Wyoming belongs to the state not the land owner.⁵⁷

Water rights in Wyoming have been clearly defined by the legislature. Under Wyoming state statute, a water right is defined as a right to use the water of the state for a beneficial use, which is the basis of the water right.⁵⁸ The constitution of the state of Wyoming declares that all water in the state is the property of the state of Wyoming.⁵⁹ Because water is the property of the state, water rights attach to the land for the beneficial use described in the application.⁶⁰ Priority of appropriation in Wyoming for a beneficial use gives the better water right.⁶¹ Finally, the Wyoming Constitution creates a board of control for water adjudication, headed by the state engineer, which receives applications and makes decisions for the state regarding water allocation.⁶²

The most significant challenge to using water principles to develop and define wind ownership in the state of Wyoming is that while ownership of water is vested with the state, wind is not. Additionally, the policy behind state ownership and control of the water is essential to

⁵⁴ Id.

⁵⁵ Id.

⁵⁶ Id.

⁵⁷ WYO. CONST. ART. VIII, §1

⁵⁸ WYO. STAT. ANN. § 41-3-101 (2009).

⁵⁹ WYO. CONST. ART. VII, § 1; *also see e.g. Northside Canal Co. v. State Board of Equalization*, 8 F.2d 739 (D. Wyo. 1925), reversed 17 F.2d 55 (8th Cir. 1926), cert. denied 274 U.S. 740; *Hunziker v. Knowlton*, 322 P.2d 141 (Wyo. 1958), rehearing denied 324 P.2d 266.

⁶⁰ WYO. STAT. ANN. § 41-3-101 (West 2009).

⁶¹ WYO. CONST. ART. VIII, § 3.

⁶² WYO. CONST. ART. VIII, § 2.

industry prosperity and is limited in the amount available.⁶³ While this policy provides the basis for state ownership and control of water it does not support state ownership of wind. Under Wyo. Stat. § 10-4-302 and common law, wind belongs to the surface estate as part of the airspace above the surface.⁶⁴ This provides the basis for the argument that the surface estate owns the wind rights associated with the property. However, for the state to regulate wind on the basis of appropriation principles there is an implied necessity that the state own the rights to wind. Legislation that claims ownership of wind has the potential to create the legal basis for surface estate owners to challenge such legislation and provides the basis for a takings claim.

It has been suggested that instead of using prior appropriation principles to define wind ownership, riparian principles should be utilized for defining the wind right. Generally, under the modified riparian doctrine the owner of land that is contiguous to a watercourse has the right to the reasonable and beneficial use of water on the land.⁶⁵ Under riparian principles “land ownership is the basis of the right.”⁶⁶ Additionally, use of the water is not required in order to maintain the right.⁶⁷ Generally, because riparian rights are based on land ownership riparian rights are not severable, alienable, divisible or assignable.⁶⁸ The major problem with defining wind rights under riparian principles is the restriction placed on the ability to transfer the right. While the infrastructure required to develop wind is depended upon the land on which it is found wind development is a capital intensive industry. If the ability to transfer wind rights is

⁶³ WYO. CONST. ART. I, § 31

⁶⁴ WYO. STAT. ANN. § 10-4-302 (2009)(“The ownership of the space above the lands... is declared to be vested in the several owners of the surface beneath.”); WYO. STAT. ANN. § 10-4-303 (2009)(flight of aircraft over lands is lawful unless it interferes with existing use to which the land or the space over the land is put by the owners); *Ross v. Trustees of University of Wyoming*, 228 P. 642, 650 (Wyo. 1924); *See, Davis v. Consolidated Oil & Gas, Inc.*, 802 P.2d 840, 844 (Wyo. 1990)(ownership of lands extends under the surface to the center of the earth).

⁶⁵ *People v. Shirokow*, 605 P.2d 859, 864 (Cal. 1980).

⁶⁶ *In re General Adjudication of All Rights to Use Water in Big Horn River System*, 48 P.3d 1040, 1046 (Wyo. 2002).

⁶⁷ *Board of County Com'rs of County of Arapahoe v. Collard*, 827 P.2d 546, 550 (Colo. 1992).

⁶⁸ *Thompson v. Enz*, 154 N.W.2d 473, 483 (Mich. 1967).

completely restricted it would restrict or even prevent future wind development. However, there is a common theme among diffused water, riparian and appropriation principles that being the right to use the resource is based on ownership of the land. This is a reoccurring theme that should be applied to wind ownership.

IV. Relevant Mineral Law Principles

A. Defining the Rights Granted by a Mineral Lease

The development of the law relating to wind energy will take a different course than the law of oil and gas due to the differing nature of the resource. However, examining the development of natural resource law in Wyoming can provide some useful insight into possible issues and solutions to problems posed by wind development, and also add detail to the rights and responsibilities of the owner of the wind right. There are also substantial similarities between the extraction of substances such as oil and gas or coal, and the harvesting of wind energy that allows the cases and laws designed for the former to be applied to the latter.

One important principle in oil and gas law is the determination of what type of property right a lease conveys to the lessee. In *Boatman v. Andre*,⁶⁹ the Wyoming Supreme Court was asked to determine whether the rights under an oil and gas lease could be lost by abandonment.⁷⁰ The Wyoming Supreme Court held that the right created by an oil and gas lease “is merely to search for oil and gas, and, if either is found, to remove it from the land leased.”⁷¹ The court held that such a right was consistent with a profit a prendre, and thus an incorporeal hereditament, and could be lost by abandonment.⁷² The Wyoming Supreme Court also found that abandonment

⁶⁹ 12 P.2d 370 (Wyo. 1932).

⁷⁰ Id. at 371.

⁷¹ Id. at 373.

⁷² Id.

would be found more often in the cases of oil and gas leases in order to prevent the lessee from failing to develop the lease and holding the land for speculative purposes.⁷³ Despite the court's concerns regarding the potential for speculation, the *Boatman* case is the only example of a Wyoming court finding that the interest in a mineral lease has been abandoned.⁷⁴ However, the fact that the case remains the only example should not be exaggerated. Developments in oil and gas lease language and the implied covenant to develop the lease both contribute to the lack of need for an abandonment doctrine for oil and gas leases.⁷⁵

B. Application of Mineral Leasing Concepts to the Wind Right

The concept of an incorporeal hereditament, or profit a prendre, is one readily applicable to the wind right. As discussed previously, the quality of the wind resource is unique to the location and condition of the surface estate, and is only ascertained through careful study and scientific measurement.⁷⁶ A wind energy lease could be considered to be similar to an oil and gas lease in that the right conveyed to the lessee is to search for an economical wind resource and then to harvest it from the land leased. Under the *Boatman* case, if wind is an incorporeal hereditament, it would be possible to lose wind rights through abandonment. Such a result is unlikely, however, because lease provisions would likely operate to terminate the rights under the lease prior to abandonment proceedings.

More importantly, classifying the wind right as an incorporeal hereditament suggest that the multitude of forms a wind energy development contract can take still confer the same basic right, or bundle of rights. In a recent article in the Wyoming Lawyer, attorney Douglas Moench

⁷³ Id. at 374.

⁷⁴ See Gifford, 17 Land & Water L. Rev. 401, 406.

⁷⁵ *Sonat Exploration Co. v. Superior Oil Co.*, 710 P.2d 221, 225 (Wyo. 1985). In this case, the Wyoming Supreme Court held that a lessee must act with reasonable diligence in developing the minerals under the lease and, to that end, must be held to an implied covenant to develop.

⁷⁶ See TORE WIZELIUS, DEVELOPING WIND POWER PROJECTS: THEORY & PRACTICE 221-222 (2007).

referenced contracts such as a land lease, an easement (or wind energy easement), and an option contract for wind development.⁷⁷ Under the theory of an incorporeal hereditament, or a profit a prendre, the actual name given to such contracts for wind energy development would be less important than the intent of the parties and the nature of the rights conferred. In Wyoming, an oil and gas lease is a contract and the purpose of interpreting a contract is to ascertain the true intent of the parties.⁷⁸ Holding to the analogy then, a wind energy lease (if compared to an oil and gas lease) would also be considered a contract and its interpretation would be guided by the intent of the parties, regardless of the title given to the document.

C. The Realty-Personalty Distinction in Mineral Law

The Wyoming Supreme Court affirmed and expanded upon its determination that the right to take oil and gas from the land as an incorporeal hereditament in *Denver Joint Stock Land Bank of Denver v. Dixon*.⁷⁹ In that case, the plaintiff had foreclosed on a mortgage which included an interest in oil and gas made to the defendant prior to the foreclosure. The defendant argued that the interest was personalty and not realty and should not be included in the foreclosure. The court, after reviewing recent decisions, held that a permanent royalty interest is real and not personal property.⁸⁰ The court concluded that the royalty interest was realty and included in the foreclosed estate.⁸¹ The *Denver Joint Stock Land Bank of Denver v. Dixon* proposition that oil and gas interests in land are real property was upheld nine years later in *Hageman & Pond, Inc. v. Clark*.⁸² The *Denver Joint Stock Land Bank of Denver* case provides a

⁷⁷ See Douglas J. Moench, *Wyoming Wind*, Wyoming Lawyer; October 2006, p. 15.

⁷⁸ E.g. *State v. Pennzoil Co.*, 752 P.2d 975, 978 (Wyo. 1988).

⁷⁹ 122 P.2d 842 (Wyo. 1942).

⁸⁰ Id. at 848.

⁸¹ Id.

⁸² 238 P.2d 919 (Wyo. 1951).

good transition between the type of right granted to an oil and gas lessee, and the nature of the right as either realty or personalty.

The Wyoming Supreme Court has determined that oil and gas in place are real estate.⁸³ The Wyoming Supreme Court has been quite forceful on the point, stating: “This must be clear. Oil and gas, while in situ, are part of the realty; part of the corpus of the land. When a portion of it is taken away, the proceeds necessarily arise out of the corpus, and it is humanly impossible to change that simple, plain, physical fact.”⁸⁴ However, the Wyoming Supreme Court has further determined that oil and gas become personal property once they have been severed from the real estate.⁸⁵ The ability for a resource initially classified as a part of the real estate to become personal property following extraction is a possible approach to analyzing and formulating a wind right.

D. Application of the Realty-Personalty Distinction in Mineral Law to the Wind Right

The realty versus personalty distinction, as described in *Denver Joint Stock Land Bank of Denver*, is more difficult to conceptualize with a wind right.⁸⁶ Extracted minerals such as coal, oil, and uranium are tangible and it is easy to visualize the distinction between real property and personal property. Gas is less tangible, but is easily quantifiable through measuring instruments and the fact that it is trapped in the ground and extractable. The proposition that oil and gas in place are real property advanced by the Wyoming Supreme Court makes practical sense because such substances are in a tangible and quantifiable form prior to extraction. Further, the process of extraction entails the physical removal of a substance from the ground and the sale of such

⁸³ *Oregon Basin Oil & Gas Co. v. Ohio Oil Co.*, 248 P.2d 198, 201 (Wyo. 1952).

⁸⁴ *Oregon Basin Oil & Gas Co. v. Ohio Oil Co.*, 248 P.2d 198, 201 (Wyo. 1952) quoting *State v. Snyder*, 212 P. 758.

⁸⁵ *E.g. State v. Snyder*, 212 P. 758, 766 (Wyo. 1923); *Denver Joint Stock Land Bank of Denver v. Dixon*, 122 P.2d at 845.

⁸⁶ *See Denver Joint Stock Board of Denver*, 122 P.2d 842 (Wyo. 1942).

substances to produce revenue. Wind is not confined under the ground in the same way as oil, gas, or other minerals, making the distinction between realty and personalty more challenging.

Despite the different nature of the resources, the similarity between wind and oil and gas is sufficient to allow the application of even the realty-personalty distinction. If one were to conceptualize a wind resource as an oil reservoir or gas pocket above the surface rather than below, the idea that an untapped wind resource is part of the land becomes less difficult to understand. Once the wind resource has been extracted, in this case by producing electricity, one could conclude that the wind has been reduced to personal property. Gas, to a greater extent than oil, is more capable of comparison to the wind resource. Similar to wind, gas is not capable of being held in one's hands, but is quantifiable and measurable through scientific instruments and study. The wind resource and development potential is studied through the placement of anemometers, which measure wind direction, frequency, and speeds.⁸⁷ Based on such a limited comparison, wind resources share many of the qualities of other, more familiar natural resources and make the limited application of laws governing more traditional resources appropriate.

Such a comparison is susceptible to criticism based on the notion that once oil and gas are severed from the earth, the product obtained is still oil and gas. More theoretically, the substance does not change form upon extraction, meaning that the producer is still selling a raw material that has independent economic value. Wind energy resources are harvested by placing wind turbines in areas with conditions that cause the turbines to spin and produce electricity. Rather than extracting wind from the air and inserting it into a pipeline for the production of energy at an offsite location, wind energy is converted to electricity in the generator housed in the nacelle.

The method of harvesting wind energy means that the raw material of wind is converted into a finished, usable commodity some 300 feet off the ground. Such a situation would be akin

⁸⁷ TORE WIZELIUS, *DEVELOPING WIND POWER PROJECTS: THEORY & PRACTICE* 51 (2007).

to constructing a gas fired power plant directly on top of a gas well and using the gas produced from the well to generate electricity immediately. In the latter situation, it would be difficult to argue that because the gas was being used immediately, the nature of the underlying rights was somehow substantially altered. Finding the point at which a wind resource is converted from real property to personal property is difficult based on the design of wind energy conversion systems, but is not impossible.

The most likely point at which one could argue that the wind resource is “severed” from the realty is when the moving air is captured by the turbine blades, but prior to its conversion to electricity. It is at this point that the wind resource has been reduced to personal property, but has not yet been converted into either electricity or mechanical work. If the oil and gas analogy is applied, the point of severance is when the raw oil or gas is removed from the earth and reduced to personal property of the lessee. In the case of wind, the resource is not removed from the earth, but the wind energy potential is captured by the blades of the turbine and transferred to the nacelle for conversion into electricity or mechanical work.

V. Severability of Wind Rights from the Surface Estate

Whether or not wind ownership is a severable right from the surface estate is an important consideration. It is important to distinguish the discussion of the wind right as a “severable” right from the previous discussion of the wind right under principles of mineral law. The discussion above focused on the potential to view wind as a natural resource, similar to oil, gas, or coal, that could be extracted or taken from the land. In this section, the concept of severability refers to the ability of a surface estate owner to split his estate into a surface estate and a new “wind estate,” which would then be separate from the surface estate in the same way

that minerals and pore space can be owned by separate individuals independent of the surface estate and surface estate owner.

The key consideration is not whether the right can or cannot be severed, but is whether the right should or should not be severed. The answer to this question will be based in large part on policy considerations, which will differ from state to state depending on the legislature's position, the state's resources and existing law regarding those resources. The ultimate determination of severability should take in to consideration the competing policies both for severability and against. This approach would provide a cost benefit analysis that weighs the competing interest and policies underlying the issue of severability. In discussing severability there are four primary interests that should be considered: surface conflicts, subsurface conflicts, alienability of property, and regulatory certainty.

A. Potential Conflicts between Surface Estate Owner(s) and Wind Estate Owner(s)

The first issue that should be considered is the potential conflicts between the surface owner and the owner of wind rights if these rights are severed. In order to fully understand the potential conflict it is important to understand that currently in the state there is the potential for three separate estates: the surface estate, the mineral state, and the pore space estate.⁸⁸ Both the mineral estate and the pore space estate require significant use of the surface estate.⁸⁹ The development of wind also requires a significant use of the surface in order to properly develop the resource.⁹⁰ The addition of wind as a fourth estate could create an additional burden on the surface estate. There is potential within the state to subject a surface estate to multiple burdens

⁸⁸ WYO. STAT. ANN. § 34-1-152 (2009) (statute declares that ownership of pore space belongs to the surface owner and is a severable right); WYO. STAT. ANN. § 30-5-401 et seq. (2009) (Split Estates Act).

⁸⁹ See, WYO. STAT. ANN. § 34-1-152(2009); WYO. STAT. ANN. § 40-5-402 (2009) (gives oil and gas operators the right to use the surface as is reasonable and necessary for the development of the minerals).

⁹⁰ Patricia E. Salkin, *Types of Zoning Regulation: Use Restrictions*, 1 Am. Law. Zoning § 9:51 (5th ed. 2009) (“wind energy projects require a significant amount of land to best obtain good wind exposure while minimizing inefficiencies.”).

requiring extensive use of the surface without any benefit to the surface owner. Multiple estate holders would be able to retain all the valuable assets of property for individual benefit while subjecting future surface estate owners to substantial burdens. However, if the right to develop wind or ownership of the wind is retained by the surface estate as an incident of ownership then the holder of the surface estate can mitigate potential conflicts while retaining any benefits derived from wind development. This puts the surface estate holder in a self-help position to mitigate any burdens or receive compensation for burdens imposed that cannot be mitigated.

B. Potential Conflicts between Wind Estate Owner(s) and Subsurface Estate Owner(s)

The second issue to be considered is the potential conflicts between the wind estate and subsurface estates, more specifically the mineral estate. The case law and legislation clearly establish that the mineral estate is the dominant estate in Wyoming.⁹¹ While it is clearly established that the mineral estate is dominant, currently, should wind become a fourth estate it will be an important practical and legal step to determine a hierarchy of estates. Establishing which estate is dominant carries with it important legal rights and obligations that may restrict or prevent the development of the servient estate.

In addition to the need of establishing a hierarchy of estates, it has been suggested that there is a potential for one industry, either the wind developer or the mineral developer, being prevented from developing the resource.⁹² Other commentators have suggested that the footprint

⁹¹ *Mingo Oil Producers v. Kamp Cattle Co.*, 776 P.2d 736, 741 (Wyo. 1989). See also, *Sanford v. Arjay Oil Co.*, 686 P.2d 566 (Wyo. 1984); *Holbrook v. Continental Oil Co.*, 278 P.2d 798 (Wyo. 1955); WYO. STAT. ANN. § 34-1-152(e) (2009).

The statute reads: “(e) Nothing in this section shall be construed to change or alter the common law as of July 1, 2008, as it relates to the rights belonging to, or the dominance of, the mineral estate. For the purposes of determining the priority of subsurface uses between a severed mineral estate and pore space as defined in subsection (d) of this section, the severed mineral estate is dominant regardless of whether ownership of the pore space is vested in the several owners of the surface or is owned separately from the surface.”

⁹² Becky H. Diffen, *Energy From Above and Below Who Wins When a Wind Farm and Oil and Gas Operation Conflict?*, 3 Tex. J. Oil Gas & Energy L. 240, 244-245 (2008)(oil and gas lessee may not be able to drill or place pumping equipment where a wind farm is located or oil and gas operations may interfere with wind flow on project).

of wind equipment is small, meaning that oil and gas operators can simply move the location of wind development infrastructure without impacting production.⁹³ Similarly, it has been suggested that if the wind project has not been developed, the project's infrastructure could be relocated slightly to avoid interfering with ongoing oil and gas operations.⁹⁴ However, this falls to account for regulatory restrictions placed on both industries in the form of either setbacks or spacing requirements and it falls to account for the nature of each individual resource.

Both wind developers and oil and gas developers have to meet their respective regulatory requirements. For wind developers in the state, the counties currently establish the minimum setback requirements through zoning resolutions.⁹⁵ These county setback requirements, range anywhere from 1.10 the tower height to ¼ mile.⁹⁶ These setback requirements place restrictions on the location of wind infrastructure and equipment.⁹⁷ Similarly, oil and gas operations must meet spacing requirements established by the Wyoming Oil and Gas Conservation Commission.⁹⁸ Again, this places restriction on where drilling units can be located.⁹⁹ Given that both industries both have regulatory requirements in order to develop there is a potential for conflict that may restrict or prevent development in meeting setback or spacing requirements.

“[W]ind energy projects require a significant amount of land to best obtain good wind exposure while minimizing inefficiencies.”¹⁰⁰ The required acreage for a single megawatt of installed capacity can range from fifteen to thirty acres despite the fact that the total footprint of

⁹³ Id. at 244.

⁹⁴ Id. at 244-245.

⁹⁵ See, Natrona County, Wyo., Zoning Resolution, Ch. VIII. (2009)(*Natrona County Meteorological Tower and Wind Energy Conversion Systems Regulation*).

⁹⁶ Id.; Albany County, Wyo., Zoning Resolution § 8 (2009)(*Albany County Wind Energy Siting Regulations*, Section VIII, Albany County Zoning Resolutions).

⁹⁷ Id.

⁹⁸ See, WYO. STAT. ANN. § 30-5-101 (2009); WYO. STAT. ANN. § 30-5-104 (2009); WYO. STAT. ANN. § 30-5-109 (2009); *Wyoming Oil and Gas Conservation Commission, Chapter 3 Section 2, Location of Wells/Drilling and Spacing Units*; See also *Chapter 3 Section 8, Application for Permit to Drill or Deepen a Well*.

⁹⁹ Id.

¹⁰⁰ Patricia E. Salkin, *Types of Zoning Regulation: Use Restrictions*, 1 Am. Law Zoning § 9:51 (5th ed. 2009).

the installed wind turbines only occupies three to five percent of the acreage.¹⁰¹ “An average wind farm spans several hundred acres and is usually comprised of wind leases taken from multiple surface owners.”¹⁰² The actual wind towers only comprise a portion of the wind farm’s final footprint; roads, buildings, and transmission lines are all needed as part of the infrastructure for wind farms to produce electricity. All of these will be part of the larger regulatory scheme in determining setbacks, thereby increasing the amount of acreage needed to develop wind and decreasing the amount of acreage available to other industries for developing their perspective resources. Likewise, oil and gas operations must meet established regulatory requirements, which may increase the amount acreage utilized by oil and gas operations and decrease the amount of acreage available to wind developers if they are to meet their minimum setbacks.

Simply relocating wind towers or oil and gas infrastructure fails to account to for the nature of both resources. Oil and gas operations are not only limited by regulation requirements, but also by the geological formations that contain the mineral deposits. The oil and gas developers are also required to conduct operations in a manner that reduces waste.¹⁰³ While in some circumstances oil and gas operators may be able to relocate and economically develop the resource while meeting the regulatory requirements, there is potentially situations in which relocating the oil and gas operations would preclude the development of the resource. The same is true of wind. The ability to economically develop wind is largely depended on the location of the towers. If the wind developer is forced to move the location of the towers to meet regulatory requirements without interfering with oil and gas operations it may be forced into a position in which it is no longer economically feasible to develop the resource.

¹⁰¹ Id.

¹⁰² Lisa Chavarria, *Wind Power: Prospective Issues*, 68 Tex. B.J. 832, 834 (2005).

¹⁰³ WYO. STAT. ANN. § 30-5-102 (2009).

Establishing wind rights as part of the surface estate avoids land use disputes by relying on the principle that the mineral estate is the dominant estate.¹⁰⁴ This is particularly relevant in the planning stages of a wind energy project. There are several factors that wind developers must examine before making the decision to construct a wind energy facility on a certain tract of land. Given the dominance of the mineral estate in Wyoming, wind developers who ignore the importance of a comprehensive title examination and a determination of the potential risks associated with mineral development under a tract considered for a wind farm do so at their peril. In addition, if the surface estate maintains wind ownership the surface owner has an interest in developing the resource but doing so in a manner that is compatible both with the interest of the surface estate and the interests of the mineral estate.

C. Special Note on the Presence of Restrictive Covenants in Wind Energy Leases

The potential for conflict between the use of the surface estate for wind energy development and the use of the subsurface estate for mineral development has resulted in wind energy lease agreements containing provisions attempting to address the simultaneous development of wind energy conversion systems and mineral resources.¹⁰⁵ As many leases and agreements to develop wind energy contain confidentiality provisions, the sample lease provided by the William D. Ruckelshaus Institute of Environment and Natural Resources at the University of Wyoming provides a sufficient example for the purposes of discussion. The lease agreement outlined in that publication makes clear that the lease agreement is subject to existing uses on the property and that wind energy development cannot occur on the property if mineral development

¹⁰⁴ *Belle Fourche Pipeline Co. v. State*, 766 P.2d 537, 544 (1988).

¹⁰⁵ See PARADY, K., J. LOVATO, J. WOLF, D. HULME, I. BURKE, COMMERCIAL WIND ENERGY DEVELOPMENT IN WYOMING: A GUIDE FOR LANDOWNERS Appedix C: Wind Energy Lease Agreement Template 1-C—37-C (The William D. Ruckelshaus Institute of Environment and Natural Resources, University of Wyoming – Laramie, 2009). This publication provides a template for a wind energy lease and discusses possible issues for consideration by landowners when preparing a wind energy lease.

is occurring or may occur on the property.¹⁰⁶ In addition, the lease contains two restrictions that the contracting landowner must insert into new mineral leases or sales or exchanges of the minerals under the property made after the wind energy lease is signed. The first states that any party granted a mineral lease must reasonably accommodate and avoid impairment of the pre-existing wind lease.¹⁰⁷ The second restricts the mineral lessee from drilling, mining or undertaking other extraction activity within five hundred feet from any wind turbine generator or proposed wind turbine generator on the property.¹⁰⁸ Further, the wind energy lessee and surface estate owner commit to work cooperatively to accommodate mineral resource extraction, provided that such activity does not interfere with the wind energy development on the property.¹⁰⁹

These restrictive covenants have the potential to inhibit a substantial amount of oil, gas, or other mineral development on property leased for wind energy development. As discussed above, oil and gas operators are particularly constrained by the shape, size, and other aspects of the reservoir, as well as the spacing and development requirements imposed by the Conservation Commission. By limiting development of the mineral resources to only those areas five hundred or more feet from a wind facility, as well as requiring development of mineral resources in a manner that does not interfere with the wind energy systems, a potentially huge area of land is removed from mineral development for the duration of the wind energy lease. While these restrictive covenants may not be in the public interest and may interfere with the long stated common law doctrine that the mineral estate is the dominant estate under all circumstances, Wyoming courts have enforced restrictive covenants in the past.

¹⁰⁶ Id. at 29-C.

¹⁰⁷ Id.

¹⁰⁸ Id.

¹⁰⁹ Id. at 30-C.

The Wyoming Supreme Court has referred to restrictive covenants as contractual in nature and has interpreted such covenants in accordance with principles of contract law.¹¹⁰ The Wyoming Supreme Court has also refused to invalidate a contract entered into freely by competent parties on the basis of public policy unless that policy is well settled, unambiguous and not in conflict with another public policy equally or more compelling.¹¹¹ While the restrictive covenants in wind energy development leases have not been tested in Wyoming courts, their presence in the leases highlights an important consideration for policymakers in Wyoming. If restrictive covenants such as those described above will successfully operate to preclude new development of mineral resources in the state, and if the courts refuse to invalidate such covenants on the basis of public policy, what recourse remains for landowners or mineral owners deprived of their right to develop mineral resources based on a pre-existing lease with a wind developer? A reassertion of the dominance of the mineral estate in the face of all competing estates, particularly in reference to the potential “wind estate” is therefore essential in ensuring that the oil, gas, and other minerals present in Wyoming are not withheld from development for the next two decades, or perhaps indefinitely, by the presence of wind energy development.

D. Severability and the Policy of Alienable Property

The third issue that should be considered in the context of whether wind should be a severable right is the policy of alienable property. The law favors free alienability of property interests.¹¹² In general, property interests are alienable; however, if a particular interest is not alienable this is normally due to some policy against the alienability of that interest.¹¹³ There is concern that the legislature should not be restricting a property owner’s ability to sever wind

¹¹⁰ *Goglio v. Star Valley Ranch Ass’n*, 2002 WY 94, ¶ 23 (Wyo. 2002).

¹¹¹ *Id.* at ¶ 18.

¹¹² *Box L Corp. v. Teton County, Wyoming*, 92 P.3d 811, 815 (Wyo. 2004).

¹¹³ *Id.*

creating two distinct estates. However, if the property owner's right to sever the wind from the surface estate is restricted there are other avenues for transferring the rights to develop wind without severing these rights from the surface estate. Restricting the right to sever wind will restrict the alienability of the property interest but it will not prevent it. Wind rights could still be developed under leasing agreements. This would allow for wind development while also giving the surface owner more bargaining power and an ability to use this position to mitigate other conflicts.

E. Severability and Regulatory Certainty

Finally, the last issue that should be considered is the benefits of regulatory certainty to both development of wind within the state and judicial compliance. Regulatory certainty for wind would establish the legal relationships between all parties involved in wind development projects. Regulatory certainty would also provide the framework to protect the correlative rights of property owners and estate owners.¹¹⁴ Similar to the creation of the Oil and Gas Conservation Act which granted correlative rights in order to prevent waste, wind regulations on ownership and severability would create regulatory certainty limited by the state's interest in developing all of its resources.¹¹⁵ Establishing the legal relationships through legislation would not only benefit parties interested in wind development but would prevent continued transactions or judicial construction from determining the nature and associated rights of wind ownership.

The issue of severability has polarized parties dealing with wind development. The practical significance of this is that without regulatory certainty, parties will dictate individually how wind is treated in the state. The risk is that, without legislation, wind development in the

¹¹⁴ See, *Anshutz Corp. v. Wyoming Oil and Gas Conservation Com'n*, 923 P.2d 751 (Wyo. 1996)(court stated that Oil and Gas Conservation Act purpose was to regulatory program that prevents waste and protects correlative rights). This demonstrates the legislature's ability to design legislation that protects competing interest while allowing for development.

¹¹⁵ Id. at 755; WYO. STAT. ANN. § 30-5-102 (2009); WYO. STAT. ANN. § 30-5-109 (2009).

state may proceed to a point in which legislation would be futile. This would make the determination of wind rights depended on a case by case evaluation of the circumstances and the legal instruments creating an individual's wind right. A lack of legislation on wind ownership would leave the determination and construction of wind ownership in the state up to the courts to determine through litigation.

Severability is an important issue in the wind ownership discussion. The concerns about surface conflicts, subsurface conflicts, alienability and regulatory certainty are important issues that will eventually have to be resolved either legislatively or through the courts. Addressing the issue legislatively is of course an option that would prevent or reduce the need to litigate many of these issues. However, if these issues are not addressed legislatively it is still possible to reduce litigation or provide guidance for the courts without addressing the issue of severability. Similar to pore space legislation, a legislative declaration of estate dominance could reduce future litigation and create some certainty for wind developers. A declaration of mineral estate dominance would establish a baseline hierarchy of estates while shifting the burden on wind developers to conduct prudent operations in order to avoid conflicts. Additionally, a declaration of who is vested with the rights of ownership to wind would further reduce future conflicts.

VI. Taxation

A. Taxation Based on Mineral Law Principles

The cross-application of the realty-personalty distinction from mineral law has another significant impact on the development of the wind right in Wyoming: taxation. Creating a point of severance allows Wyoming case law regarding mineral taxation to be applied (to a greater or lesser extent) to the wind resource. Without a point of severance, the state of Wyoming would be

limited to taxing the profits of the wind energy developers or the electricity produced on the wind farm, both of which could present difficult issues for the state government. However, if a point of severance is created, even artificially, the state of Wyoming could develop a system of taxing the wind resource according to its classification and potential, prior to its conversion into electricity.

One of the most informative discussions in Wyoming case law regarding the taxation of oil and gas resources can be found in *Oregon Basin Oil & Gas Co. v. Ohio Oil Co.*¹¹⁶ In that case, the plaintiff brought suit to recover nearly \$12,000 deducted from the plaintiff's royalty interest in an oil production venture to cover the taxes on the plaintiff's share of production.¹¹⁷ After an extensive discussion of relevant case law, the Wyoming Supreme Court found that the matter of taxation of mines and mineral claims was heavily debated during the Wyoming Constitutional Convention and that it was "finally decided that Section 3, Art. 15¹¹⁸ should provide for a tax on the 'gross product thereof, as may be prescribed by law', instead of a tax upon the real estate."¹¹⁹ In affirming the trial court, the Wyoming Supreme Court found that the deduction of the tax from the royalty interest of the plaintiff was properly based on personal property and the plaintiff's failure to make an earlier objection to the deduction amounted to an acceptance of the provisions of the contract calling for the deduction.¹²⁰

¹¹⁶ 248 P.2d 198 (Wyo. 1952).

¹¹⁷ *Id.*

¹¹⁸ The Wyoming State Constitution, Article 15, Section 3 reads:

"All mines and mining claims from which gold, silver and other precious metals, soda, saline, coal, mineral oil or other valuable deposit, is or may be produced shall be taxed in addition to the surface improvements, and in lieu of taxes on the lands, on the gross products thereof, as may be prescribed by law; provided, that the product of all mines shall be taxed in proportion to the value thereof."

¹¹⁹ *Oregon Basin Oil & Gas Co.*, 248 P.2d at 203.

¹²⁰ *Id.* at 205-206.

In reaching their conclusion, the Wyoming Supreme Court also cited *First National Bank of Chicago v. Central Coal & Coke Co.*¹²¹ That case surrounded a mortgage and foreclosure proceeding and a determination of taxes owed on the land. The federal judge discussed the appropriate relation between severed minerals as personal property and taxation: “Be the foregoing I am inclined to the belief that the [Wyoming] Supreme Court leans toward the doctrine announced by so many other courts, that mineral when severed from the land becomes personal property and is taxable as such.”¹²² These decisions, and the provisions in the Wyoming Constitution, establish the basis for the taxation of minerals, which seems to be their reduction to personal property after severance from the earth.

The implications of this taxation system are significant if wind resources are accorded the same statutory treatment as other minerals. While it is unlikely the Wyoming Constitution would apply to wind in the same way as the minerals and substances specifically listed, the model provides a good basis for the taxation of wind energy. However, the model only works as long as the analogy between wind energy and oil and gas is maintained, including the concept (be it legal fiction or not) of a point where the wind resource is reduced to personal possession prior to its conversion into electricity. If the same treatment is applied, it would be possible to apply the same market principles to wind energy that are applied to an oil and gas resource. The wind resource overlying a surface estate would carry a certain value based on the scientific evaluation and market demand for the wind energy produced at a specific site. The state of Wyoming could then assess a “severance tax” based on the utilization of a native natural resource in the same way taxes are assessed against coal, oil, gas, and other minerals. The intricacies and application

¹²¹ 3 F.Supp. 433 (D.C.Wyo. 1933).

¹²² Id. at 436.

of such a concept are beyond the scope of this report, but the fundamental concept is a critical consideration when attempting to add definition to the nature of the wind right in Wyoming.

While the concept of the mineral severance tax has not been applied to wind energy, mineral severance taxes were upheld by the United States Supreme Court in *Commonwealth Edison Co. v. Montana*.¹²³ In that case, several Montana coal producers and out-of-state utilities challenged severance taxes imposed by the state of Montana on coal mined in the state, alleging violations of the Commerce Clause and Supremacy Clause of the United States Constitution.¹²⁴ In upholding the severance tax, the court held that the Montana tax must be evaluated under *Complete Auto Transit's* four part test.¹²⁵ The Court found that the tax met the first two prongs of the test; the only nexus of the severance of coal is in Montana and that no other state can tax the severance, meaning a fair apportionment.¹²⁶ With respect to the third prong, that the tax discriminates unfairly against out-of-state customers, the Court held that state borders are ordinarily considered irrelevant and that the Commerce Clause does not bestow the right of residents of one state to control “the terms of resource development and depletion in a sister State.”¹²⁷ Finally, the court dismissed the challenge under the fourth prong of the test, that the tax is not fairly related to the services provided by the State, or that the tax is excessive. After a lengthy discussion regarding the application of the fourth prong of the test, the Court concluded that the Montana tax was properly the jurisdiction of the Montana state legislature and that the tax was reasonably related to the “substantial privilege of mining coal” in Montana.¹²⁸

¹²³ 453 U.S. 609 (1981).

¹²⁴ *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 612 (1981).

¹²⁵ According to the Court, “[U]nder that test, a state tax does not offend the *Commerce Clause* if it ‘is applied to an activity with a substantial nexus with the taxing state, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to services provided by the State.’” *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977).

¹²⁶ *Commonwealth Edison*, 453 U.S. at 617.

¹²⁷ *Id.* at 618.

¹²⁸ *Id.* at 628-629.

In addition to upholding the tax on Commerce Clause grounds, the Court also upheld the tax against a challenge based on the Supremacy Clause and the application of the Mineral Lands Leasing Act. The Court found that the Mineral Lands Leasing Act expressly authorized the imposition of severance taxes on federal lessees, without limitation on the amount.¹²⁹ Based on the language and legislative history of the Mineral Lands Leasing Act, the Court held that the Montana tax was consistent, and therefore did not violate the Supremacy Clause.

While the concept of a severance tax in the mineral sense has not been applied to wind, it is possible that, as long as any such tax meets the factors of the *Complete Auto Transit* case cited in *Commonwealth Edison*, it has a good chance of surviving judicial scrutiny. Indeed, applying the language used in *Commonwealth Edison*, it could be argued that a severance tax on wind meets the same burdens as Montana’s severance tax on coal, including the “substantial privilege” of developing the wind resources in Wyoming. However, the ability to apply such a tax bears directly on the statutory definition of the wind right in Wyoming and how the legislature decides to view the nature of the wind resource.

B. The Concept of a Generation Tax and its Application

The other major tax possibility for wind energy is the concept of a “generation tax” to be applied to all electrical generators in the state of Wyoming. While such a regime would avoid the problems associated with a tax based on the existing mineral severance taxes, it is not without complications of its own. A few states have imposed such taxes, with varying levels of success.¹³⁰ One of the most significant examples of the difficulties of application of a “generation tax” is the case of *Arizona Public Service Company v. Snead*.¹³¹

¹²⁹ Id. at 631.

¹³⁰ See PA.STAT.ANN., TIT. 72 § 8101 (WEST 1978-79); WASH.REV.CODE §§ 82.16.020, 82.16.050 (1976); W.VA.CODE §§ 11-13-2D, 11-13-2M (SUPP. 1978).

¹³¹ 441 U.S. 141 (1979).

In that case, the Supreme Court was asked to decide whether a New Mexico tax imposed on the generation of electricity within the state's borders conflicted with either statutory or constitutional federal law.¹³² The New Mexico tax was enacted in 1975 as part of the Electrical Energy Tax Act and imposed a four-tenths of one mill tax on each net kilowatt hour of electricity generated in New Mexico for "the privilege of generating electricity" in the state.¹³³ The Act included an offset for electricity generated and consumed within the state, allowing a credit against the gross receipts tax due to the state.¹³⁴ However, if electricity is sold at retail outside the state, there is no gross receipts tax liability against which to offset the energy tax on the generating company.¹³⁵ Five public utility companies brought a challenge to the tax, arguing the tax violated federal statute and was, therefore, unconstitutional under the supremacy clause and other provisions of the constitution.¹³⁶ The federal statute in question, the Tax Reform Act of 1976, included a section regarding state taxes on electricity. The Act provides:

"No State, or political subdivision thereof, may impose or assess a tax on or with respect to the generation or transmission of electricity which discriminates against out-of-State manufacturers, producers, wholesalers, retailers, or consumers of that electricity. For the purposes of this section, a tax is discriminatory if it results, either directly or indirectly, in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce."¹³⁷

After discussing the legislative history associated with the passage of the federal statute, the court found that the tax-credit provisions of the New Mexico Act relieve tax liability for locally consumed electricity while subjecting electricity sold outside the state to the tax.¹³⁸ The Court concluded that the energy tax "indirectly but necessarily discriminates against electricity sold

¹³² *Arizona Public Service Company v. Snead*, 441 U.S. 141, 142 (1979).

¹³³ *Id.* at 143.

¹³⁴ *Id.*

¹³⁵ *Id.* at 145.

¹³⁶ *Id.* at 146.

¹³⁷ 15 U.S.C. § 391 (2009).

¹³⁸ *Arizona Public Service Company*, 441 U.S. at 149.

outside New Mexico, it violates the federal statute.”¹³⁹ Qualifying its holding, the Court mentioned in a footnote that similar statutes in Pennsylvania, Washington, and West Virginia, referred to in *amici*, were not exactly the same as the scheme used in New Mexico and refused to examine the validity of those particular state tax laws.¹⁴⁰

The *Snead* case is important to the consideration of a “generation tax” because it outlines both the relevant statutes and contemplated tax structures, and shows the consequences if such a scheme is deemed by the courts to burden interstate commerce. Applying the lessons of *Snead* to the consideration of a generation tax in Wyoming, the scheme will have to be careful to avoid both a challenge based on interstate commerce and a challenge based on the federal law cited in *Snead*. However, not all constructions of a “generation tax” have been found to be unconstitutional. In *Duquesne Light Co. v. State Tax Dept.*,¹⁴¹ the West Virginia Supreme Court of Appeals upheld West Virginia’s generation tax scheme in the face of challenges based on both *Snead* and the provisions of 15 U.S.C. § 391.¹⁴² In addition, the state of Washington was successful in defending its “generation tax” scheme against constitutional challenges similar to *Snead* and *Duquesne Light Co.*¹⁴³ Ultimately, the state statutes and court challenges provide some guidance for policymakers regarding the final construction of a “generation tax” which would be imposed on electricity produced in Wyoming, whether by wind energy conversion systems or other, more conventional, generation facilities.

¹³⁹ *Id.* at 150.

¹⁴⁰ *Id.*

¹⁴¹ 327 S.E.2d 683 (W.Va. 1984).

¹⁴² *Duquesne Light Co. v. State Tax Dept.*, 327 S.E.2d 683, 688 (1984). The West Virginia Supreme Court of Appeals discussed the application of the *Snead* case to the taxation scheme adopted by the state of West Virginia and found that it did not apply. In part, the court found that West Virginia had not singled out and taxed only the manufacturing of electricity that was transmitted out of state, and had included electricity taxed within the state within a single tax structure.

¹⁴³ See *Public Util. Dist. No. 2 v. State*, 510 P.2d 206 (Wash. 1973).

VII. Conclusions

The emergence of wind in the state as a valuable resource creates significant issues, concerns and possibilities. There is a need to ensure that wind development in the state progresses while maintaining a balance between Wyoming's other resources. Devising a system or classification of ownership would assist in the further development of wind. Defining the nature of the wind and limitations on wind rights would assist in creating regulatory certainty. There are certainly many issues that continually evolve as the development of wind evolves. The issues and conflicts surrounding wind cannot all be answered through legislation. However, there are issues that can be addressed legislatively that would provide the foundation on which wind development will progress.

Without legislation, uncertainty and lack of uniformity will pervade wind development. This has the potential to lead to litigation to resolve the uncertainty and create uniformity. There is not a need for sweeping legislation on wind energy but there is a need to establish some basic principles to establish at least a baseline so others may determine legal rights and obligations. Crucial to establishing a baseline is the need for a determination of which estate wind rights are a part of. There are multiple theories under which wind rights may be viewed, but the current status of the law suggests that wind rights belong to the surface estate. In addition, there are arguments on both sides of the severability issue. If this issue is not resolved it is important to address the issue of estate dominance. This will provide a foundation from which other issues can be resolved. Declaring estate dominance establishes the basic relations to other estates which can guide the development of legal principles shaping the nature of wind rights. Providing at a minimum baseline principles will facilitate wind development in the state while providing for the continued development of the state's other resources.