

**CONFLICTS BETWEEN WIND LEASES AND OIL, GAS AND
MINERAL DEVELOPMENT**

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Speaker, Lone Star Solar Summit, Sweetwater, Texas, April 21, 2009, "Solar Energy–Toward a Unified Energy Land Lease"

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Speaker/Co-Author, 36th Annual NADOA Institute, Washington D.C., Wardman Park Marriott, September 23-25th 2009, "Current Issues In Wind Energy Law 2009"

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**JOUSTING AT WINDMILLS: WHEN WIND
POWER DEVELOPMENT COLLIDES WITH OIL,
GAS, AND MINERAL DEVELOPMENT**

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§ 9.03 Impact of Wind Energy on the Mineral Industry

The spread of the wind boom across mineral-producing states has set off an alarm among mineral owners because of the large swaths of land needed for wind development.⁴¹ The first concern is the enormous size of today's turbines, which have power ratings ranging from 250 watts to 5 MW.⁴² For example, the General Electric 1.5 MW turbine rises to a height of 80 meters (262 feet) at its hub and has a rotor radius of approximately 38 meters (125 feet).⁴³ Although the surface footprint for each turbine is

³⁸ Sheryl Gay Stolberg, "Obama Urges Passage of Energy Legislation," N.Y. Times, April 22, 2009 at A17, available at <http://www.nytimes.com/2009/04/23/us/politics/23obama.html>. On February 17, 2009, President Obama signed into law the American Recovery and Reinvestment Act of 2009, which extended through December 31, 2012 the federal production tax credit for the production of electricity from wind facilities, and provided that wind facilities are eligible for a 30% investment tax credit. It also provided for a federal grant program through the Department of Treasury that issues grants for up to 30% of the cost of a new wind energy facility. Pub. L. No. 111-5, 123 Stat. 115 (2009).

³⁹ See, e.g., Statement of Secretary Salazar, Senate Committee on Energy and Natural Resources, Energy Development on Public Lands and Outer Continental Shelf (March 17, 2009), available at <http://energy.senate.gov>; see also Hearing Schedule, Witness List.

⁴⁰ Steve Goldstein, "Vestas Upped to Overweight at Morgan Stanley" (June 15, 2009), available at <http://www.marketwatch.com/story/vestas-upped-to-overweight-atmorgan-stanley>; But c.f., FactCheck.org, "Hot Air on Wind Energy" (April 10, 2009), available at http://www.factcheck.org/politics/hot_air_on_wind_energy.html ("[C]onverting wind to enough electricity to replace all U.S. coal-fired plants would require building 3,540 offshore wind farms as big as the world's largest. . . . So far the U.S. has built exactly zero offshore wind farms.").

⁴¹ Becky H. Duffen, "Energy from Above and Below, Who Wins When a Wind Farm and Oil and Gas Operations Conflict?," 3 Tex. J. of Oil, Gas, & Energy L. 240, 241 (2008); Mark Z. Jacobson, "Review of Solutions to Global Warming, Air Pollution, and Energy Security," 2 Energy and Environmental Science 148 (2009).

⁴² Wind Energy Basics, available at http://www.awea.org/faq/wwt_basics.html.

⁴³ GE 1.5 MW Series Wind Turbines, available at http://www.gepower.com/prod_serv/products/wind_turbines/en/15mw/index.htm

relatively small in relation to its height,⁴⁴ wind development requires more extensive surface use than traditional oil and gas development because of additional factors: (1) turbine spacing, (2) buffer zones, (3) other surface uses such as for roads, substations, operations and maintenance facilities, and laydown yards, and (4) overhead and underground transmission, collection, and distribution lines.

First, and most obviously, land is needed for the placement of the turbines themselves. A variety of factors determine turbine spacing, including terrain, wind speed, wind direction, turbine size, and access to an electric grid.⁴⁵ As a general rule, the optimum location of turbines is in an east-to-west direction with north-to-south rows spaced approximately 1,000 feet between each turbine and 3,000 feet between each row. Although counties and local authorities increasingly are attempting to regulate the siting of wind turbines, no state had enacted spacing regulations as of the time this chapter was written.⁴⁶

Second, when putting together a wind farm, developers must include land not only for the placement of the turbines themselves, but also for buffer zones to prevent obstructions upwind. Many wind sites include leases or non-obstruction easements for land at least 10 rotor-lengths

⁴⁴ The pad is covered by caliche or rock and also houses a large transformer at its base. A 1.5 MW GE turbine normally uses a 50' x 50' x 8' pad while a Seimens 2.3 MW turbine uses a 20' to 25' round socket which is generally 25' to 30' feet deep. In contrast, an oil and gas drilling location is normally 200' x 200' through completion and 80' x 80' afterwards. Personal interview by co-author Roderick E. Wetsel, with R.L. Adkins, President, R.L. Adkins Corp., Oil and Gas Operators, Sweetwater, Texas (May 11, 2009) and personal interview by co-author Roderick E. Wetsel, with Terry Phillips, Vice President, Skyward Energy, at Midland, Texas (May 11, 2009).

⁴⁵ Factors Affecting Turbine Location, *available at* <http://www.wind-energy-the-facts.org/en/part-i-technology/chapter-4-wind-farm-design/factors-affecting-turbine-location>.

⁴⁶ See Wind Power Siting Regulations and Wildlife Guidelines in the United States (US Fish and Wildlife Service, April 2007) (stating there are no state siting requirements, but acknowledging that states rely on local agencies to permit wind energy systems). These local regulations, which include setbacks from roads, residences, and property boundaries have a significant impact on turbine layouts. See, e.g., regulations in Kit Carson County, Colorado, http://www.kitcarsoncounty.org/kcc_files/planning/KCCWindRegulations.pdf and in Natrona County, Wyoming, <http://www.natrona.net/development/documents/WECS%20Emergency%20Regulations.pdf>. See also Tex. S.B. 1226, 81st Leg., R.S. (2009) and "Gillespie County Drops Bid for Power to Regulate Wind Turbines There," Zeke MacCormack, May 1, 2009, *available at* http://www.mysanantonio.com/news/local_news/Gillespie_County_drops_bid_for_power_to_regulate_wind_turbines_there.html (last visited July 6, 2009) (Senator Troy Fraser filed legislation to authorize the Gillespie County Commissioners Court to regulate the construction of wind energy electric generating facilities and specifically allow county officials to prohibit or restrict the location of a facility. However, fearing an intense battle, the legislative effort was abandoned).

(approximately one-half to one mile) away from the turbines to avoid “waking” or wind disturbance to the nearby generators.⁴⁷ Depending upon the topography and number of turbines installed, a typical wind farm can cover anywhere from 3,000 to 150,000 acres, which may or may not include the additional acreage needed for buffer zones.⁴⁸

Third, wind companies must utilize significant portions of the surface for (1) roads, (2) O&M facilities⁴⁹ and substations, and (3) laydown yards. Wind farm roads are huge in comparison with oil field roads and may be as much as 60 feet wide prior to turbine construction in order to accommodate the large cranes needed to erect the turbines.⁵⁰ Service roads connect each of the turbines; access roads provide ingress and egress to and from public roads and adjoining properties. Each wind farm has one or more O&M facilities and substations. These facilities include power stations and company offices and are located on tracts of three to five acres each.⁵¹ Laydown yards—areas where repairs are made and parts are stored—are strategically placed in the vicinity of public roads for easy access of equipment and construction materials. They cover between five and 20 acres or more per site.⁵²

Fourth, and most significantly, the turbines are linked by a spiderweb of underground and overhead transmission, collection, and distribution lines.⁵³ Although these lines take up little surface space, the fact that

⁴⁷ Personal interview by co-author K.K. DuVivier with Mark Safty, Partner, Holland & Hart, Denver, CO (Apr. 29, 2009). *See also* Diffen, *supra* note 41, at 242.

⁴⁸ Wind Farm Area Calculator, National Renewable Energy Laboratory, *available at* http://www.nrel.gov/analysis/power_databook/calc_wind.php (a “footprint” for a wind farm is approximately 0.76 acres per turbine).

⁴⁹ “O&M” generally means “operations and maintenance.”

⁵⁰ After construction, the size of the service roads may be reduced to approximately 20 feet in width.

⁵¹ Personal interview by co-author Roderick E. Wetsel with Terry Phillips, Vice President, Skyward Energy, at Midland, TX (May 11, 2009).

⁵² *Id.*

⁵³ The underground lines are bound in a bundle less than a meter in diameter and buried at a depth of about three to four feet to avoid interfering with farming or other immediate surface activities. The layout of these transmission lines varies depending upon the location of the turbines. Wind developers will usually lay the underground lines parallel to the lines of the turbines to avoid unnecessary wiring or criss-crossing. Personal interview by co-author K.K. DuVivier with Heather Otten, Vice President, Development, Invenegy, Denver, CO (April 29, 2009). However, rows of turbines often need to be connected at diagonals, and the power generated from the wind farm also must be connected to overhead transmission lines that link to the electric power generation grid, creating additional potential obstructions. Personal interview with Mark Safty, *supra* note 47.

they must be crossed or avoided can interfere with concurrent use of the same land for oil, gas, and mineral exploration and development. Large overhead lines containing many strands of wires up and down the poles are of particular concern, as it is often difficult for drilling rigs to be moved underneath them.⁵⁴

This plethora of surface and subsurface activities required to develop wind power is made possible by a broad and extensive “purpose clause” in wind leases.⁵⁵ The broad powers granted to wind companies in some wind leases have raised tensions with oil, gas, and mineral developers. In recent years, disputes have arisen between mineral companies and wind companies about the conduct of seismic operations, location of drilling rigs and tank batteries, use of roads, and ingress and egress to properties. Although there has not yet been any reported litigation regarding these issues, the storm is on the horizon.

§ 9.04 Common Law Approach I—Dominant-Servient Estate and Accommodation

The Industrial Revolution made the search for and supply of fossil fuels and metals to feed factories a priority. When landowners severed estates to allow for development of these resources, the mineral estate earned nearly uncontested dominance over the surface.⁵⁶ Consequently, courts have upheld the principle that ownership of minerals includes an implied right to interfere with the surface owner’s activities and to use as much of the surface “as necessary” in accessing and extracting the minerals.⁵⁷ Thus, a dominant owner is liable to the servient owner only for damages inflicted negligently.⁵⁸

⁵⁴ Personal interview by co-author Roderick E. Wetsel with Terry Phillips, Vice President, Skyward Energy, at Midland, TX (May 11, 2009). *See also* Thomas J. Forestier & Katherine A. Willyard, “Conflicts Between Oil and Gas and Wind Energy Development,” at pages 12-13, 35th Ernest E. Smith Oil, Gas & Mineral Law Institute, Houston, TX (March 27, 2009).

⁵⁵ A sample “purpose clause” is available in § 9.08, Appendix I, and in Wetsel & Carmichael, *supra* note 20, at 54.

⁵⁶ *See* 6 Am. L. of Mining § 200.02[1][b] (2d ed. 2008). *But cf.* Tom C. Toner, The Arrogance of Dominance/The Reason for Split Estate Litigation, Presentation to the 2005 Wyoming State Bar Annual Meeting (“[T]his dominance principle has never been as absolute as oil and gas operators like to portray it. . .”). *See also* discussion of the accommodation doctrine *infra*.

⁵⁷ 6 Am. L. of Mining § 200.02[1][b] (2d ed. 2008) (citing a Texas case saying courts give deference to the mineral lessee’s view of reasonableness).

⁵⁸ *See, e.g., Moser v. U.S. Steel Corp.*, 676 S.W.2d 99, 103 (Tex. 1984); *General Crude Oil*

Co. v. Aiken, 344 S.W.2d 668, 669 (Tex. 1961).

The hardship the “unidimensional” dominant-servient estate doctrine imposed on surface owners has been mitigated in some situations by the “multidimensional” accommodation doctrine.⁵⁹ Under this doctrine, courts require the mineral owner to accommodate a surface owner’s use if the mineral owner has a reasonable alternative for accessing and extracting its minerals.⁶⁰ Yet, the accommodation doctrine does not restrict mineral development altogether.⁶¹

This section will examine both of these common law models: (1) the dominant-servient estate, and (2) the accommodation doctrine.

[1] The Dominant-Servient Estate Doctrine

Over 60 years ago, the Texas Supreme Court issued a landmark decision holding that “a grant or reservation of minerals would be wholly worthless if the [mineral owner] could not enter upon the land . . . to explore for and extract the minerals granted or reserved.”⁶² The majority of court opinions in other states have followed Texas and have come down in favor of the mineral estate owner.⁶³ These decisions have often led to harsh results for surface owners.⁶⁴

Over the years, mineral companies have come into conflict with surface owners and their lessees, such as farmers, ranchers, and hunters. This conflict is primarily due to the fact that many states have long allowed the severance of the surface estate from the mineral estate so that surface owners frequently do not own the minerals underneath their own lands.

⁵⁹ See Bruce M. Kramer, “The Legal Framework for Analyzing Multiple Surface Use Issues,” *Severed Minerals, Split Estates, Rights of Access, and Surface Use in Mineral Extraction Operations* 2-1, 2-20 to 2-30 (Rocky Mt. Min. L. Fdn. 2005). See also Donald N. Zimmerman, “The Common Law of Access and Surface Use in Oil, Gas, and Mining,” *Severed Minerals, Split Estates, Rights of Access, and Surface Use in Mineral Extraction Operations* 1-1 (Rocky Mt. Min. L. Fdn. 2005).

⁶⁰ See *Getty Oil Co. v. Jones*, 470 S.W.2d 618, 622 (Tex. 1971).

⁶¹ *Id.*

⁶² *Harris v. Currie*, 176 S.W.2d 302, 305 (Tex. 1943). See also Philip Wm. Lear, “Split Estates and Severed Minerals: Rights of Access and Surface Use After the Divorce (and Other Leasehold Access-Related Problems),” *Severed Minerals, Split Estates, Rights of Access, and Surface Use in Mineral Extraction Operations* 12-1, 12-7 (Rocky Mt. Min. L. Fdn. 2005) (citing *Davison v. Reynolds*, 103 S.E. 248, 250 (Ga. 1920) and *Harris*, 176 S.W.2d at 305); Rick D. Davis, Jr., “Private Lands—Surface Access and Use,” *Severed Minerals, Split Estates, Rights of Access, and Surface Use in Mineral Extraction Operations* 9A-1, 9A-9 (Rocky Mt. Min. L. Fdn. 2005).

⁶³ Davis, *supra* note 62, at 9A-2.

⁶⁴ David E. Jackson, "Surface Use: The Dominant Estate, Reasonable Use and Due Regard" 2 (State Bar of Texas 24th Annual Advanced Oil, Gas and Energy Resources Law Course 2006).

This severance has led to problems because uses by the surface owners and their tenants are often inconsistent with mineral exploration and production activities. One court articulated this inherent conflict between the surface estate and mineral estate this way:

From the viewpoint of the surface owner when mineral operations are conducted all across his land, interfering constantly with his ranching or farming, the mineral use becomes unreasonable. But the mineral operator who employs the usual and customary methods of the industry views the matter differently; it would be unreasonable for him to give way to grazing animals by not developing the underlying minerals, i.e., by not drilling wells and building roads and power lines and flow lines and tank batteries. The viewpoint of these parties on reasonableness is quite different. Sadly for the surface owner, Texas law, which governs in the present case, implies that a mineral lease gives a large measure of deference to the lessee's view of reasonableness.⁶⁵

In the 1919 case of *Grimes v. Goodman Drilling Co.*,⁶⁶ the Grimeses bought a home in the oil boom town of Burkburnett, Texas, which was on a lot subject to an existing oil and gas lease. After the Grimeses moved into the residence, Goodman Drilling erected a derrick on the lot and began drilling. It dug a slush pit along the side of the house and slush and grease spattered the doors and windows of the home. The noise from the rig was deafening, and the family could not sleep. The Grimeses sued and lost. The appellate court found that the Grimeses bought the lot burdened by an oil lease and had no grounds to complain about the drilling of the well.⁶⁷

Later, in 1954, the Texas Supreme Court held that an oil company "was under no duty to fence the well to prevent [the landowner's] cattle from entering upon the land near the well and drinking oil on the ground." ⁶⁸ The court held:

The petitioner [oil company] was lawfully in possession of the premises and being the owner of the dominant estate had the legal right to use so much of the leased premises as were reasonably necessary in its operation to the exclusion of respondent [the landowner], the owner of the servient estate.^{68.1}

Then, in the 1957 case of *Warren Petroleum Corporation v. Monzingo*, the Texas Supreme Court held that an oil company had no obligation to restore the surface of the land to its prior condition after drilling operations

⁶⁵ Vest v. Exxon Corp., 752 F.2d 959, 960-61 (5th Cir. 1985).

⁶⁶ *Grimes v. Goodman Drilling Co.*, 216 S.W. 202 (Tex. Civ. App. Fort Worth 1919, writ

dism'd).
67 *Id.* at 204.
68 *Warren Pet. Corp. v. Martin*, 271 S.W.2d 410, 412 (Tex. 1954).
68.1 *Id.*

if there was no express provision in the oil and gas lease requiring it to do so.⁶⁹ The rule of law reflected in these decisions became known as the “dominant-servient estate doctrine.” More than anything, it was a statement of policy that the public has a common interest in developing mineral resources for the benefit of society.⁷⁰ In one form or another, the doctrine has been followed in Arkansas,⁷¹ California,⁷² Colorado,⁷³ Illinois,⁷⁴ Kansas,⁷⁵ Kentucky,⁷⁶ Louisiana,⁷⁷ Mississippi,⁷⁸ Montana,⁷⁹ New Mexico,⁸⁰ North Dakota,⁸¹ Oklahoma,⁸² Oregon,⁸³ Texas, and Wyoming.⁸⁴

The dominant-servient doctrine, however, was not boundless. Over the years, courts have created at least two common law limitations to the mineral owner’s right of dominance over the surface estate: “(1) The mineral owner may only use so much of the surface as is reasonably necessary for the exploration and production of the minerals; [and]

⁶⁹ *Warren Pet. Corp. v. Monzingo*, 304 S.W.2d 362, 363 (Tex. 1957).

⁷⁰ *See id.*

⁷¹ *E.g.*, *Cranston v. Miller*, 208 Ark. 156, 185 S.W.2d 920 (1945).

⁷² *E.g.*, *California Callahan v. Martin*, 43 P.2d 788 (Cal. 1935).

⁷³ *E.g.*, *Gerrity Oil & Gas Corp. v. Magness*, 946 P.2d 913, 926 (Colo. 1997).

⁷⁴ *E.g.*, *In re Payment of Taxes*, 537 N.E.2d 358 (Ill. App. Ct. 1989).

⁷⁵ *E.g.*, *Powell v. Prosser*, 753 P.2d 310 (Kan. Ct. App. 1988).

⁷⁶ *E.g.*, *Lindsey v. Wilson*, 332 S.W.2d 641 (Ky. 1960).

⁷⁷ *E.g.*, *Rohner v. Austral Oil Exploration Co.*, 104 So.2d 253 (La. Ct. App. 1958).

⁷⁸ *E.g.*, *Sun Oil Co. v. Nunnery*, 170 So.2d 24 (Miss. 1964).

⁷⁹ *E.g.*, *Stokes v. Tutvet*, 328 P.2d 1096 (Mont. 1958).

⁸⁰ *E.g.*, *Amoco Oil Co. v. Carler Farms Co.*, 703 P.2d 894 (N.M. 1985) (reversed on other grounds).

⁸¹ *E.g.*, *Feland v. Placid Oil Co.*, 171 N.W.2d 829 (N.D. 1969).

⁸² *E.g.*, *Wellsville Oil Co. v. Carver*, 206 Okla. 181, 242 P.2d 151 (1952).

⁸³ *E.g.*, *Yaquina Bay Timber & Logging Co. v. Shiny Rock Mining Corp.*, 556 P.2d 672 (Or. 1976).

⁸⁴ *E.g.*, *Holbrook v. Cont'l Oil Co.*, 278 P.2d 798 (Wyo. 1955).

(2) The mineral owner must use the surface and conduct his exploration and production operations in a non-negligent manner.”⁸⁵

Texas courts often expressed the mineral owner’s authority as the right to use as much of the surface, and in such a manner, as is reasonably necessary to comply with the terms of the lease and to effectuate its purpose.⁸⁶ The “reasonably necessary” limitation is “simply a limit on the manner in which the mineral operation is done, and it does not limit the right of the lessee to develop and extract minerals in accordance with the lease.”⁸⁷ If, however, mineral interest owners or lessees use more of the land than is reasonably necessary for their operations, or if they engage in specific acts of negligence, they may be held accountable for damages.⁸⁸

The courts have held that “reasonably necessary surface use” includes the right of an oil company to enter upon the surface for the exploration and production of oil and gas;⁸⁹ the right to construct roads to drill sites;⁹⁰ the right to take a reasonable amount of water for operations;⁹¹ the right to house employees during operations;⁹² the right to mine caliche for use in constructing roads and pads for drill sites and tank batteries;⁹³ the right to construct production and storage facilities to produce, save, care for,

⁸⁵ Davis, Jr., *supra* note 62, at 9A-3. Another restriction is that the mineral owner must comply with statutory limitations. There are few statutory limitations regarding a mineral owner’s use of the surface, but in recent years, a growing number of states have adopted surface damage statutes. *Id.* at 9A-26 to 9A-29. Andrew M. Miller, “A Journey Through Mineral Estate Dominance, the Accommodation Doctrine, and Beyond: Why Texas is Ready to Take the Next Step With a Surface Damage Act,” 40 Hous. L. Rev. 46 (2003). Davis, Jr., *supra* note 62, at 9A-3, also addressed “due regard” for the surface owner’s rights, which will be discussed in § 9.04[2] of this chapter, *infra*.

⁸⁶ *E.g.*, *Monzingo*, 304 S.W.2d at 363.

⁸⁷ *Exxon*, 752 F.2d at 961 (citing *Humble Oil & Ref. Co. v. Williams*, 420 S.W.2d 133 (Tex. 1967)).

⁸⁸ *Ball v. Dillard*, 602 S.W.2d 521, 523 (Tex. 1980) (citing *Robinson v. Robbins Petroleum Corp., Inc.*, 501 S.W.2d 865 (Tex. 1973) and *Sun Oil Corp. v. Whitaker*, 483 S.W.2d 808 (Tex. 1972)).

⁸⁹ *Id.*

⁹⁰ *Humble Oil & Refining Co. v. Williams*, 420 S.W.2d 133, 135 (Tex. 1967).

⁹¹ *Stradley v. Magnolia Petroleum Co.*, 155 S.W.2d 649 (Tex. Civ. App.—Amarillo 1941, error *ref’d*).

⁹² *Joyner v. R.H. Dearing & Sons*, 134 S.W.2d 757, 760 (Tex. Civ. App.—El Paso 1939, error *dism’d* *judg. cor.*).

⁹³ *B.L. McFarland Drilling Contractor v. Connell*, 344 S.W.2d 493, 497 (Tex. Civ.

App.—El Paso 1961) (judgment set aside on other grounds, 347 S.W.2d 565 (1961)).

and dispose of oil and gas production;⁹⁴ the right to select drilling sites;⁹⁵ the right to select the timing of drilling operations;⁹⁶ the right to dispose of salt water produced on the lease;⁹⁷ the right to conduct geophysical exploration and seismic operations;⁹⁸ and the right to enter premises with growing crops.⁹⁹

The courts have found unreasonable surface use in certain limited situations where an excessive amount of the surface was used in operations;¹⁰⁰ where water was used for off-lease secondary recovery operations;¹⁰¹ and where there was excessive use of water from the premises.¹⁰² Courts of other states have imposed similar limitations.¹⁰³

The second important limitation upon the dominant-servient estate doctrine is that the mineral lessees have the duty to avoid committing negligent acts while conducting their operations on the surface. If they fail to do so, the surface owners may recover damages caused by the negligent activity. The courts have found instances of negligence on the part of a mineral lessee where a lessee negligently allowed salt water to escape from the disposal pit and pollute an underground stream;¹⁰⁴ where a lessee negligently allowed salt water to escape and pollute a spring, killing cattle and reducing the value of the land;¹⁰⁵ where a registered quarter horse died because of injuries received from a cattle guard that was negligently constructed and maintained by the mineral lessee;¹⁰⁶ and where damages

⁹⁴ *R.H. Dearing & Sons.*, 134 S.W.2d at 759.

⁹⁵ *Stephenson v. Glass*, 276 S.W. 1110, 1112 (Tex. Civ. App.—San Antonio 1925).

⁹⁶ *Robinson Drilling Co. v. Moses*, 256 S.W.2d 650, 651-652 (Tex. Civ. App.—Eastland 1953, no writ).

⁹⁷ *Brown v. Lundell*, 344 S.W.2d 863, 866-67 (Tex. 1961).

⁹⁸ *Wilson v. Texas Co.*, 237 S.W.2d 649, 650 (Tex. Civ App—Ft. Worth 1951, writ ref'd n.r.e.).

⁹⁹ *Moses*, 256 S.W.2d at 652.

¹⁰⁰ *Oryx Energy Co. v. Shelton*, 942 S.W.2d 637, 641 (Tex. App.—Tyler 1996, no writ).

¹⁰¹ *Robinson v. Robbins Petroleum Corp.*, 501 S.W.2d 865, 867 (Tex. 1973).

¹⁰² *Gulf Oil Corp. v. Whitaker*, 257 F.2d 157 (5th Cir. 1958).

¹⁰³ *E.g.*, *United Geophysical Corp. v. Culver*, 394 P.2d 393 (Alaska 1964) (cutting down 40% more trees than was reasonably necessary to conduct geophysical operations);

Lanahan v. Myers, 389 P.2d 92 (Okla. 1963) (using the land longer than necessary).
¹⁰⁴ Brown v. Lundell, 344 S.W. 2d 863 (Tex. 1961).
¹⁰⁵ Gen. Crude Oil Co. v. Aiken, 344 S.W. 2d 668, 671 (Tex. 1961).
¹⁰⁶ Texaco, Inc. v. Spires, 435 S.W.2d 550, 554 (Tex. Civ. App.—Eastland 1968, writ
ref'd n.r.e.).

were caused by a lessee negligently allowing oil to escape from a leaking pipeline.¹⁰⁷ Mineral lessees in other states have been found liable for similar instances of negligence.¹⁰⁸

[2] The Accommodation Doctrine

Originally the accommodation doctrine evolved as a limitation upon the disproportionate burdens that dominant mineral owners placed on servient surface estates. This doctrine has been defined as “a judicial, nonstatutory concept that requires the mineral owner to act with prudence and to have due regard for the interest of the surface owner in exercising his right to use the surface to produce the minerals.”¹⁰⁹

It is important to note that the accommodation doctrine focuses only on the method of the mineral owner’s operations.¹¹⁰ Thus, “due regard” for the surface owner’s rights was not intended to limit the mineral owner’s decision about whether or when to extract any minerals.¹¹¹ Also, the accommodation doctrine applies only to existing surface uses and does not require a mineral owner to consider a surface owner’s future uses.¹¹²

The Texas Supreme Court first applied the accommodation doctrine, also known as the “alternative means” doctrine, in a 1971 case, *Getty Oil Co. v. Jones*.¹¹³ In that case, Jones was a surface owner who purchased land subject to a prior mineral lease owned by Getty. Jones installed a self-propelled, circular irrigation system which could only clear surface

¹⁰⁷ Scurlock Oil Co. v. Harrell, 443 S.W.2d 334, 337 (Tex. Civ. App.—Austin 1969, writ ref'd n.r.e.).

¹⁰⁸ *E.g.*, Picou v. Fohs Oil Co., 64 So. 2d 434 (La. 1953) (damages awarded for 50 to 60 small trees cut down while conducting geophysical work); Union Producing Co. v. Pittman, 146 So. 2d 553 (Miss. 1962) (damages awarded for damage to timber and land caused by drilling an oil well).

¹⁰⁹ Diffen, *supra* note 41, at 247.

¹¹⁰ *Exxon*, 752 F.2d at 963.

¹¹¹ Despite “due regard” language (such as “the equal dignity of the estates and [resolution of] conflicts by balancing their conflicting interests”), some courts have emphasized that “due regard” for the surface owner’s rights does not limit the mineral owner’s decision about whether or not to extract any part of the minerals. 6 Am. L. of Mining § 200.02[1][b][iii] (2d ed. 2008) (citing *Moser v. U.S. Steel Corp.*, 676 S.W.2d 99 (Tex. 1984)).

¹¹² See Phillip Wm. Lear & J. Matthew Snow, “Conflicts with Development of Other Minerals,” 2 Law of Fed. Oil & Gas Leases § 23.04[1][c] (2008). See also Michael C. Sanders & David D. Livingston, “Surface Rights v. Mineral Rights Conflicts Are Bound to Increase,” *Houston B.J.* (Sept. 7, 2007), available at <http://houston.bizjournals.com/houston/stories/2007/09/10/focus4.html>.

¹¹³ 470 S.W.2d 618, 622 (Tex. 1971).

obstructions up to seven feet tall. Getty then drilled two oil wells and installed pumping units on the land that were as high as 34 feet. The pump jacks prevented Jones from using his irrigation system and decreased the value of his property.

Jones sued to enjoin Getty from utilizing the pumping units. He argued that other operators in the area placed their pumping units in cellars to prevent obstruction to the landowners’ irrigation systems. Relying on prior “due regard” cases, the Texas Supreme Court noted that:

[W]here there is an existing use by the surface owner which would otherwise be precluded or impaired, and where under the established practices in the industry there are alternatives available to the lessee whereby the minerals can be recovered, the rules of reasonable usage of the surface may require the adoption of an alternative by the lessee.¹¹⁴

The court found that if Jones could meet the dual burden of proving that his irrigation system was the only reasonable means of developing the surface and that Getty had a reasonable alternative in using subsurface pumping installations that were already an established practice in the area and would not interfere with Jones’ irrigation system, use of an “interfering method or manner of use” could be held to be unreasonable.^{114.1} The *Getty* court made it clear, however, that if there is only one means of surface use by which the oil and gas can be produced, the accommodation doctrine will not apply.¹¹⁵

In 2006, the Texas Supreme Court expanded the accommodation doctrine in its decision in *Texas Genco LP v. Valence Operating Co.*¹¹⁶ In that case, the surface owner of a landfill sought to enjoin an oil and gas lessee from drilling a gas well on a cell in the landfill even though waste was not currently being disposed of in that cell. The court found that although the cell was not yet being utilized for waste disposal, it was part of a system

that was in use, and drilling in that cell would cause the landowner to have to redesign other cells and lose the use of still others. The court

¹¹⁴ *Id.* at 622.

^{114.1} *Id.* at 628.

¹¹⁵ *Id.* (on motion for reh'g). The Texas Supreme Court revisited the subject and clarified that the holding in *Getty* "is limited to situations in which there are reasonable alternative methods that may be employed by the lessee. . . ." *Sun Oil Co. v. Whitaker*, 483 S.W.2d, 808, 812 (Tex. 1972). It ruled in favor of an oil and gas lessee who was allowed to use fresh water in order to produce oil without paying damages for the water used or crops destroyed because alternative water was not available elsewhere on the premises. *Id.* The Texas courts have also held that mere inconvenience to the surface owner is not sufficient to invoke rule of reasonable accommodation. *Ottis v. Haas*, 569 S.W.2d 508, 514 (Tex. Civ. App.—Corpus Christi 1978, writ denied).

¹¹⁶ 187 S.W.3d 118 (Tex. App.—Waco 2006, pet. denied).

also reasoned that directional drilling to the location in question was an economically viable alternative as well as an established industry practice. In this case, the court reasoned that the projected income from the oil and gas operation was sufficient to warrant directional drilling.¹¹⁷ Based on the reasoning in *Valence*, it appears that courts will apply the accommodation doctrine where directional drilling is a potential alternative so long as the additional costs of the alternative are reasonable based on the projected income from the oil and gas operation.¹¹⁸

To date, courts in other mineral producing states, including Arkansas,¹¹⁹ Colorado,¹²⁰ New Mexico,¹²¹ North Dakota,¹²² Utah,¹²³ and Wyoming,¹²⁴ have adopted some version of the accommodation doctrine. Factors these courts have considered include (1) potential injury to the land, (2) utility, (3) priority of date of operations, (4) terms of the severance deeds, (5) benefits to be derived, and (6) public interest.¹²⁵

If courts use common law models to resolve wind-mineral conflicts, the wind lessee may be relegated to the same status as other surface lessees.¹²⁶ Application of the dominant-servient estate doctrine would then put mineral lessees in the driver's seat with liability for damages only if they are negligent.

¹¹⁷ *Id.* at 125. In a companion case involving the same two parties and virtually identical facts, but a different well location, the same court in 2008 once again found that directional drilling was a reasonable accommodation to the surface owner. *Valence Operating Co. v. Texas Genco, LP*, 255 S.W.3d 210 (Tex. App.—Waco 2008).

¹¹⁸ The issue as to whether or not a court may require wells to be directionally drilled from a location under a separate lease is unresolved. *Diffen*, *supra* note 41, at 250.

¹¹⁹ *E.g.*, *Diamond Shamrock Corp. v. Phillips*, 511 S.W.2d 160 (Ark. 1974).

¹²⁰ *E.g.*, *Gerrity Oil & Gas Corp. v. Magness*, 946 P.2d 913 (Colo. 1997). See also Colo. Rev. Stat. § 34-60-127.

¹²¹ *E.g.*, *Amoco Prod. Co. v. Carter Farms Co.*, 703 P.2d 894, 896 (N.M. 1985) (citing *Jones*, 470 S.W.2d 618 (Tex. 1971) (explaining that mineral developer must exercise due regard for the rights of surface owners)) (abrogated on other grounds).

¹²² *E.g.*, *Hunt Oil v. Kerbaugh*, 283 N.W.2d 131 (N.D. 1979).

¹²³ *E.g.*, *Flying Diamond Corp. v. Rust*, 551 P.2d 509 (Utah 1976).

¹²⁴ *E.g.*, *Mingo Oil Producers v. Kamp Cattle Corp.*, 776 P.2d 736 (Wyo. 1989).

125 6 Am. L. of Mining § 200.02[1][b][iii] (2d ed. 2009); Phillip E. Norvell, "Developing Lands Characterized by Separate Ownership of Oil and Gas and Surface Movable Coal and Uranium—The Other Side of *Acker v. Guinn* and Its Progeny," 33 Oil & Gas Inst. 193, 218 (S.W. Legal Fdn. 1982).

126 Smith, *supra* note 37.

If the courts apply the accommodation doctrine instead, then wind developers may be able to force a mineral lessee to adjust its development plans to prevent interference with the wind development operations. Arguably, once a wind farm is constructed, it should constitute a reasonable use of the surface of the land. The ultimate question might be whether or not the oil and gas lessee has a reasonable alternative method of working around the wind farm to develop its interest.¹²⁷

It is a closer question as to whether or not courts will apply the accommodation doctrine to protect a proposed wind farm as opposed to an existing wind farm. Many wind leases today are given for an option term of five to 10 years, which can result in a long delay between execution of the lease and actual construction. During this period, the oil and gas lessee should be able to use the surface freely, even if wind development is planned. Furthermore, the *Valence* court found it to be highly relevant, in applying the accommodation doctrine to protect a future use by the surface owner, that the future use was a part of the design of an overall project that was already in operation.¹²⁸ A wind company might be able to rely upon this decision to protect the surface of a wind farm that is being built in phases where the first phase has already been constructed, especially if the first phase includes infrastructure that will also be used in subsequent phases. In this situation, the wind company could argue that, as in *Valence*, surface layouts for the subsequent phases are part of the entire project and should be entitled to the same protection as the existing phase.¹²⁹

From the perspective of a wind developer, the common law accommodation approach would be preferable to a strict dominant/mineral-servient/surface estate regime. Yet most wind developers are hesitant to leave resolution of any surface use conflicts to the discretion of

¹²⁷ The *Valence* case expands the reasonable alternative standard to include directional drilling so long as the location is on the same lease. Diffen, *supra* note 41, at 250.

¹²⁸ *Valence*, 187 S.W.3d at 124.

¹²⁹ *Id.* at 122–23.

a judge who may or may not adopt the accommodation doctrine and, if so, may or may not weigh the factors in the wind developer's favor.¹³⁰

§ 9.05 Altering Common Law Approaches Through Express Agreements

Wind developers, particularly those from Europe, have been surprised to learn that under U.S. law their wind interest might be servient to dominant mineral estates.¹³¹ They have been rightfully concerned about investing hundreds of millions of dollars in a wind project that could be subject to interference by the owners of the mineral estate. Before providing financing, some investors require a title search and a mineral endorsement. These are available, however, only if the title company finds that there is little or no likelihood of mineral development. When mineral leases currently exist on the property, or if there is any future potential for mineral development, most wind investors require a more proactive approach. Instead of relying on a judge's resolution of potential conflicts, they seek instead to alter the common law regimes through express agreements.

This section will address documents used when the wind lease is executed before a mineral lease, and the more common situation in which the mineral interest is executed before the wind lease. Finally, it will address the role of the grantors in both situations and the additional difficulties encountered when the grantor is not positioned to work with the parties to encourage compromise.

¹³⁰ The accommodation doctrine "creates uncertainty" because a judge may "'second-guess[]' the reasonableness of the operator's business judgment." Jan. G. Laitos, "Literature Review of Severed Minerals, Split Estates, Rights of Access, and Surface Use in Mineral Extraction Operations," *Severed Minerals, Split Estates, Rights of Access, and*

Surface Use in Mineral Extraction Operations, 1B-1, 1B-2 (Rocky Mt. Min. L. Fdn. 2005). If wind rights are simply part of the surface estate, that may create some preference for the mineral estate. Furthermore, even if the wind estate is considered of commercial value comparable to the mineral estate, its development is perpetual in contrast to the finite time it takes to deplete a mineral or oil and gas deposit, so one alternative might be deferring the wind development until exhaustion of the competing mineral right. See, e.g., deferring oil and gas development until depletion of the overlying potash deposit. 6 Am. L. of Mining 2d § 200.04[2][b].

¹³¹ The “financing of U.S. renewable energy projects is predominantly led by European banks like Dexia, Paribas, Nordbank, Credit Suisse etc.” because “European utilities like EDF (France), Iberdrola (Spain) and many others active in the U.S. simply are a decade ahead of U.S. companies in their experience with renewable technologies.” E-mail to coauthor K.K. DuVivier from Mark Safty, Partner, at Holland & Hart, LLC (April 22, 2009).

[1] If Wind Rights Are First In Time

If the wind rights grantor owns the surface and mineral estates, and has not previously sold or leased any part of the estate, then wind developers have been able to negotiate clauses in their leases that greatly restrict oil, gas, and mining activities on the surface.¹³² Some clauses in early wind leases even attempted to reverse the dominant estate doctrine and make the mineral estate servient to the wind estate.¹³³

Additionally, wind companies have mandated that all future oil and gas leases entered into by the surface owner contain provisions referencing the wind lease and requiring the oil and gas lessee to enter into a surface use or accommodation agreement with the wind lessee.¹³⁴ A surface accommodation agreement makes provision for any concurrent surface operations (including required distances from facilities), notice prior to the commencement of drilling or construction, use and maintenance of roads, indemnity for surface damages and personal injuries, and insurance. An accommodation agreement is now customary for an oil company which desires to drill on a wind farm.

As a further impediment, wind companies in their leases have sought to impose restrictions on surface use for oil and gas development. These clauses are very broadly written so as to prohibit the location of drilling rigs or other oil and gas facilities within a specified number of feet of any existing wind turbine, substation, or transmission line. Such clauses also provide that in any future oil and gas or mining lease, the surface owner must provide that the mineral company will not conduct any activities within the areas specified and will not otherwise unreasonably interfere with the wind company’s rights under its lease. The term “minerals” is

defined to include not only oil and gas but also other minerals such as coal, uranium, sand, gravel, and caliche.

Many wind leases also contain a broad “no-interference clause,” which provides that the surface owner and its lessees shall not currently or

¹³² An example of one such clause is in § 9.09, Appendix II of this chapter. Wetsel & Carmichael, L.L.P. archives.

¹³³ An early wind lease clause read as follows: “Any new oil and gas leases or renewals and/or extensions of existing oil and gas leases, options to lease, seismic permits, or any other agreements made by Landowner with a third party in search of oil, gas or other minerals shall be made subject to the terms and conditions of this Agreement and . . . be made inferior and subordinate to the rights created under this Agreement and this Agreement shall be dominant and superior to the mineral estate.” Wetsel & Carmichael, L.L.P. archives.

¹³⁴ A typical form of accommodation agreement is attached to this chapter as § 9.10, Appendix III.

prospectively disturb or interfere with the construction, installation, maintenance, or operation of the wind power facilities or the undertaking of any other activities permitted under the lease. As shown above, some wind companies have even gone so far as to provide in their leases that the surface estate of the property shall be dominant to the mineral estate. In this regard, there may be a serious issue as to whether the surface owner (who may or may not also own mineral rights) can affect the rights of non-executive mineral owners under the land with these provisions. If the surface owner also owns all of the mineral estate, it seems clear that he or she can reverse the doctrine. On the other hand, if there are non-executive mineral owners or non-participating royalty owners, it is unlikely that such a provision will be binding on those owners.

[2] If Mineral Rights Are First In Time

In conflict areas, it is more likely that the mineral estate has been severed and perhaps leased before a wind developer enters the scene. In these situations, wind developers first provide the mineral interest owner with notification.¹³⁵

Next, as a first line of defense when the mineral estate beneath a wind lease is severed from the surface, wind companies have sought to obtain a surface waiver or non-interference agreement from the mineral interest owners who did not also own the surface estate.¹³⁶ Such non-disturbance agreements may be part of the county permitting requirements.¹³⁷

These efforts have often proved futile. With the assumption that they

have the common law advantage of dominant estate ownership and have no obligation to accommodate the servient surface use of the wind lessee, some mineral owners have hindered development of wind projects by refusing to negotiate reasonable non-disturbance agreements or have requested exorbitant sums as compensation for them.¹³⁸

¹³⁵ Phone interview by co-author K.K. DuVivier with Elizabeth A. Mitchell, Partner, Holland & Hart, LLC, Denver, CO (April 30, 2009).

¹³⁶ See § 9.11, Appendix IV, Release of Surface Rights by Oil and Gas Lessee and Mineral Owner.

¹³⁷ See *e.g.*, Draft Yuma County Land Use Code § 4.04(13)(k) (pending revision Sept. 14, 2009).

¹³⁸ When these owners could be located, they tended to value their mineral ownership highly such that the negotiation of a surface waiver was typically “all about money.” Personal interview by co-author Roderick E. Wetsel with Terry Phillips, Vice President, Skyward Energy, at Midland, TX (May 11, 2009). Agreements purporting to override previously granted mineral rights will most likely be found null. See, *e.g.*, Shannon L. Ferrell, “Wind Energy Agreements in Oklahoma: Dealing with Energy’s New Frontier,” 80 Okla. B.J. 1015, 1023 (5/9/2009).

[3] The Role of the Grantor

Concurrent wind and mineral development is more likely when the grantor can act as referee between these separate interests. The grantor can try to negotiate clauses in the lease agreements that put pressure on lessees to work together. Also, even without express clauses, the intervention of the grantor may be enough to encourage open lines of communication.

However, the grantor can also be caught in the middle of battles between wind and mineral developers. For example, oil companies have fought back against wind development leases by requesting promises of their own from the grantors. Oil leases now frequently require that payment of the bonus consideration is contingent upon and subject to execution of an accommodation agreement by any wind lessee on the property. If the wind lessee does not agree to the accommodation agreement, the oil company may cancel the oil lease and has no obligation to pay the bonus consideration. Demands from wind lessees or mineral lessees that the grantor make their rights dominant can put the grantor in an untenable position, inviting litigation.

Furthermore, tensions between wind and mineral developers can be heightened if the grantor is not positioned to intervene. This occurs in at least two situations. First, the federal government’s standard form lease reserves the right to lease different resources to different parties

because the government believes that wind and mineral development are compatible. This leaves resolution of conflicts up to the various lessees.¹³⁹

Second, if a private grantor severed the mineral estate before executing the wind lease, a wind developer might be required to work with a mineral lessee who has interests that do not align with the wind grantor. The potential conflicts increase significantly with severance of the wind from the surface estate. When the wind rights are owned by one party and the mineral rights by another, there is little incentive for any of the parties to work together. The situation is further exacerbated if the

¹³⁹ One provision of the Multiple Mineral Development Act expressly recognizes the possibility of the concurrent development of the same lands under the mining laws and under the Mineral Lands Leasing Act and provides a procedure for resolution of development conflicts. 30 U.S.C. § 526 requires that when the same lands are being utilized for both mining operations and Leasing Act operations, they shall be conducted in so far as is reasonably practicable, in a manner compatible with multiple use. There is apparently no liability for damage to the minerals of the other operator if it is not reasonably practicable to avoid such damage. 6 Am. L. of Mining 2d § 200.05[2]. Note also that the latest BLM Memorandum on wind development suggests establishing “a partnership or cooperative agreement that establishes compatible use of the site among the applicants.” In the absence of such an agreement, the BLM will process the first complete application. IM No. 2009-43, “Wind Energy Development Policy,” available at <http://www.blm.gov>.

surface owner, who is most impacted by both wind and mineral surface operations, receives no royalty or other benefit from the development of either resource.¹⁴⁰

§ 9.06 Common Law Approach II—Multiple Mineral Development

There is a certain irony about disputes between wind and mineral interests, especially when the conflict is between oil and gas companies and wind companies. First, some of the large wind power developers are divisions of oil and gas companies, so one division may be fighting with another in the same company.¹⁴¹ Second, wind is considered intermittent power; it can produce electricity only when the wind is blowing. Consequently, our nation can develop wind as an alternative renewable power source only if there is a backup, usually from fossil fuel plants run with oil or, more often, with natural gas.¹⁴²

Although some have stated that a wind lease is “incontestably not a transfer of mineral rights,”¹⁴³ the first of only two courts in the United States that have addressed the severance of wind analogized wind rights to oil and gas interests.¹⁴⁴ That decision addressed wind severance in a backhanded way through condemnation, but other courts may use the rationale that the wind estate should be treated in the same way as a

¹⁴⁰ See DuVivier, *supra* note 11.

¹⁴¹ E.g., BP and Royal Dutch Shell are two large wind producers. See Windpower, available at <http://www.bp.com>; and Innovation, Alternate Energy, available at <http://www.shell.com>.

¹⁴² Backup sources are often called “peaker plants”—but sometimes oil or natural gas backup is not required if solar power backup or a large enough wind collection area are available. See, e.g., Lena Hansen, Jonah Levine, Bryan Palmintier, “Spatial and Temporal Interactions of Solar and Wind Resources in the Next Generation Utility,” p. 1, available at [http://www.rmi.org/images/PDFs/Palmintier_SolarandWindinNGU\(SOLAR2008\).pdf](http://www.rmi.org/images/PDFs/Palmintier_SolarandWindinNGU(SOLAR2008).pdf) (last accessed May 2, 2009).

¹⁴³ Ernest Smith, “Wind Energy: Siting Controversies and Rights in Wind,” 1 *Envtl. & Energy L. & Pol’y J.* 314 (2007).

¹⁴⁴ We agree with the Water District’s assertion that “[t]he right to generate electricity from windmills harnessing the wind, and the right to sell the power so generated, is no different, either in law or common sense, from the right to pump and sell subsurface oil, or subsurface natural gas by means of wells and pumps.” *Contra Costa Water Dist. v. Vaquero Farms, Inc.*, 68 Cal. Rptr. 2d 272, 278 (Cal. Ct. App. 1997).

¹⁴⁵ See also *Romero v. Bernell*, 603 F. Supp. 2d 1333, 1335 (D.N.M. 2009) (The second court to address the status of wind rights noted that wind should not be treated like minerals in place, but instead like “water or wild animals which traverse the surface and which do not belong to the fee owner until reduced to possession”).

Thus, the initial question in approaching conflicts between mineral lessees and wind lessees is the status of the wind estate.¹⁴⁶ Under the “ad coelum” doctrine, the owner of the soil, or surface, also has ownership rights in everything from the center of the earth to the skies.¹⁴⁷ Application of the ad coelum doctrine may justify characterizing wind flowing across a piece of land as a severable wind power estate.¹⁴⁸ If such a wind power estate is viewed as part of the surface estate, then traditional notions of the dominant-servient estate and accommodation doctrines may apply.¹⁴⁹

However, the development of wind is comparable to the development of other mineral commodities and, arguably, wind estates are closer to

¹⁴⁶ DuVivier, *supra* note 11.

¹⁴⁷ “Cujus est solum ejus est usque ad coelum et ad inferos.” (“To Whomsoever the soil belongs, he owns also to the sky and to the depths.”). *Shell Oil Co. v. Manley Oil Corp.*, 37 F. Supp. 289 (D.C. Ill. 1941). See, e.g., Edmund F. Trabue, “The Law of Aviation,” 58 *Am. L. Rev.* 65, 72 (1924). See also *Getty Oil Co. v. Jones*, 470 S.W.2d 618, 621 (Tex. 1971) (“It has long been recognized that ownership of real property includes not only the surface but also that which lies beneath and above the surface. The use of land extends to the use of the adjacent air.”).

¹⁴⁸ See DuVivier, *supra* note 11. See also Lisa Chavarria, “The Severance of Wind Rights in Texas,” University of Texas School of Law’s Wind Energy Institute at 2 (January 2009) [hereinafter Chavarria 2009]; Lisa Chavarria, “Undertaking the Severance of Wind Rights,” 32 *Oil Gas & Energy Res. L. Sec. Rep.* (No. 2, December 2007) [hereinafter Chavarria 2007]; Lisa Chavarria, “Wind Power: Prospective Issues,” 68 *Tex. B. J.*

832, 834-35 (Oct. 2005) [hereinafter Chavarria 2005] (Chavarria does not support or oppose the practice of severance but recognizes that it is common among Texas landowners); Ernest Smith, "Wind Energy: Siting Controversies and Rights in Wind," 1 *Env'tl & Energy L. & Pol'y J.* 281, 301 (2007) ("Wind does not share the physical characteristics of solid minerals or of water. It can hardly be deemed part of the fee simple or owned 'in place' by a landowner." Although Smith does not cite the "ad coelum" doctrine, he does cite Hogwood to say wind ownership may be comparable to the capture theory used for wild animals, or the law of percolating water and notes that states may alternatively "look to oil and gas law for an analogy.") *Id.*; Joseph O. Wilson, "The Answer, My Friends, Is in the Wind Rights Contract Act: Proposed Legislation Governing Wind Rights Contracts," 89 *Iowa L. Rev.* 1775, 1784 (2004); Terry E. Hogwood, "Against the Wind," 26 *No. 2 Oil, Gas & Energy Resources L. Sec. Rep.* 6, 7-8 (Dec. 2001). Other valuable articles addressing wind rights, without as much emphasis on the categorization of the right, include Helle Tegner Anker, Birgitte Egelund Olsen, & Anita Ronne, "Wind Energy and the Law: A Comparative Analysis," 27 *J. Energy & Nat'l Resources L.* 145 (2009); Elizabeth Burleson, "Wind Power, National Security, and Sound Energy Policy," 17 *Penn St. Envtl. L. Rev.* 137 (Winter 2009); Roderick E. Wetsel & H. Alan Carmichael, "Current Issues in Wind Energy Law 2009," 20th Annual Advanced Real Estate Drafting Course, Houston, Texas (2009); Bent Ole Gram Mortenson, "International Experiences of Wind Energy," 2 *Environmental & Energy Law & Policy J.* 179 (2008); K. Shawn Smallwood, "Wind Power Company Compliance with Mitigation Plans in the Altamont Pass Wind Resource Area," 2 *Environmental & Energy Law & Policy J.* 229 (2008).
149 See discussion *supra* § 9.04.

mineral rights.¹⁵⁰ If courts decide to treat wind as a "mineral," then the common law rules that apply to conflicts between mineral and surface lessees may not control. Instead, courts may prefer to look to alternative common law models, such as those controlling multiple mineral development, including (1) avoidance; (2) first in time, first in right; and (3) equal dignity.

Avoidance is one strategy employed in multiple mineral development contexts. For example, after concluding that joint development of potash and oil and gas was "unworkable," the United States and the State of Utah withdrew certain lands in the Cane Creek area from oil and gas leasing.¹⁵¹ Similarly, in New Mexico, oil and gas operations that conflict with potash development may be prohibited.¹⁵² Some investors are eyeing abandoned mine sites as potential locations for renewable energy development because they may receive incentives for making use of the site, and if a deposit is depleted, there should be no competition for use of the surface.

When avoidance is not an option, however, alternative methods for resolving conflicts must be addressed. Although there is no well-defined system for resolving conflicts, the traditional approach appears to be one of "first in time, first in right."¹⁵³ For example, in the Powder River Basin of Wyoming, the government had issued several leases before it considered

withdrawal from leasing to avoid conflict between coal and oil and gas development.¹⁵⁴ To address the problem there, some of the subsequent

¹⁵⁰ DuVivier, *supra* note 11.

¹⁵¹ “In Utah, the United States acted to avoid potential development conflicts by withdrawing from oil and gas leasing certain lands in the Cane Creek area of the state containing potash deposits.” 6 Am. L. of Mining § 200.04[2][b]. However, in the mid-1990s, Utah again issued oil and gas leases in this area. *See Lear, supra* note 112, at § 23.07[1][C], n.17.

¹⁵² New Mexico Oil Conservation Commission, Rules and Regulations Governing the Exploration of Oil and Gas in Certain Areas Known to Contain Potash Reserves (1980) Rule 111A-F (The Commission’s authority to exclude all oil or gas drilling to accommodate potash has not been tested in the courts.) *Cf.* Opinion of Attorney General of Utah State Land Board dated July 24, 1961 (cited in 6 Am. L. of Mining § 200.04[2][b] (2d ed. 2008)) (a prior oil and gas lease cannot be subordinated to a subsequent potash lease “in the absence of a strong public interest to the contrary”)

¹⁵³ 6 Am. L. of Mining § 200.04[2][d][i] (2d ed. 2008).

¹⁵⁴ *Id.* § 200.04[2][c][i].

leases include special stipulations prohibiting coal operations that might unreasonably interfere with preexisting oil and gas leases.¹⁵⁵

While first in time, first in right may be the current approach of the U.S. government in multiple mineral development contexts, it is better as a default procedure.¹⁵⁶ An alternative that is “consistent with the balancing mechanisms of multiple use philosophies” is an equal dignity of estates approach.¹⁵⁷ If mineral estates have equal dignity, a court may value interference with a competing mineral right more highly than it might value interference with use of the surface.¹⁵⁸ A coal mining case from the eastern United States can provide an example.

Although the rationales for upholding a right of access to develop underlying strata vary, a leading coal case on the topic is *Chartiers Block Coal Co. v. Mellon*.¹⁵⁹ In this case, a coal lessee sought to restrain oil and gas operations by a subsequent lessee, alleging that the drilling was a hazard to its coal mining operations.¹⁶⁰ The Pennsylvania Supreme Court denied the injunction. The landowner’s initial grant retained the underlying strata and a right of access to it; otherwise the reserved mineral estate *below* the coal would be inaccessible and valueless.¹⁶¹ The majority in *Chartiers* conditioned the oil and gas lessee’s right of access on

indemnification to the coal operator for damages.¹⁶²

The *Chartiers* decision included a concurring decision basing the right of access on a reciprocal servitude theory.¹⁶³ The reciprocal servitude theory did not rest on priority of possession or indemnification alone. Instead,

¹⁵⁵ *Id.* § 200.04[2][c][iii]. Note that “the first in time, first in right principle might be applied even though a subsequent lessee was the first party to initiate operations on the premises.” *Id.* § 200.04[2][d][i]. *Cf.*, *Carlin v. Cassriel*, 50 L.D. 383 (Apr. 21, 1924) (treating surface patentee with rights subsequent to mineral lessee differently from surface patentees senior to mineral lessees). *Id.* at note 62.

¹⁵⁶ Note also that the latest BLM Memorandum on wind development suggests establishing “a partnership or cooperative agreement that establishes compatible use of the site among the applicants.” In the absence of such an agreement, the BLM will process the first complete application. IM No. 2009-43, “Wind Energy Development Policy,” available at <http://www.blm.gov>. See also *Lear*, *supra* note 112, at § 23.24[1].

¹⁵⁷ *Lear*, *supra* note 112, at 23.24[1].

¹⁵⁸ 6 Am. L. of Mining § 200.04[1][a] (2d ed. 2008).

¹⁵⁹ 25 A. 597 (Pa. 1893).

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 599.

¹⁶² *Id.*

¹⁶³ *Id.* at 600.

the concurrence resolved the conflict through an approach similar to the accommodation doctrine: giving the trial court discretion to impose terms for the right of access, for the precautions each lessee must observe, and for compensation.¹⁶⁴ Ultimately, the concurrence urged the trial court to “exercise its equitable powers to adjust and balance the competing interests.”¹⁶⁵

From a landowner’s perspective, it might be more profitable to develop the traditional mineral estate instead of the wind estate.¹⁶⁶ However, a multiple mineral development framework based on equal dignity of the estates might at least provide indemnification for the wind developer without having to prove negligence on the part of the mineral lessee. Regardless of the common law model used, it seems preferable for both parties to participate in good faith negotiations for a joint use agreement instead of litigating and leaving their fate within a judge’s discretion.

¹⁶⁴ *Id.*

¹⁶⁵ 6 Am. L. of Mining § 200.04[1][c] (2d ed. 2008) (interpreting the *Chartiers* concurrence, 25 A. at 597).

¹⁶⁶ With a 1/8 royalty free of costs, it is possible to receive \$900,000 per year for an oil and gas well. In contrast, with a 3% to 7% royalty for wind, the return may only be \$100,000 (assuming 100MW wind farm x 8,750 hours per year x 30%-39% efficiency (because the wind is intermittent) and a price of \$50 per MW—not including tax credits).