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THE UNIFORM ELECTRONIC TRANSACTION ACT: THE RISK OF BINDING OIL AND GAS INDUSTRY CONTRACTS

Jeffrey C. King[*]
Klayton Hiland[**]
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I. INTRODUCTION

Electronic mail—email—has revolutionized personal and business communications around the world. The conveniences and efficiencies created by email and other non-verbal communication methods lead many to ask—how did we ever get along without email and texting?

Alongside the conveniences and efficiencies, how people use email has also created new legal issues. People commonly email business associates or counterparts using language and grammar that they would not put in a letter or contract. As the Supreme Court of Texas recognized, "E-mail is a ubiquitous feature of modern life. It is used by nearly everyone for nearly every type of communication, from the flippantly inconsequential to the bindingly formal."[1] The Texas Legislature sought to address when electronic communications form a binding agreement through the Uniform Electronic Transactions Act (UETA).

Several Texas intermediate court of appeals decisions show that uncertainty persists regarding when early email negotiations or parties' course of dealing can (to a party's surprise) create binding agreements.[2] A trio of 2020 Supreme Court of Texas decisions attempted to clarify when parties create an enforceable contract. The cases—*Energy Transfer Partners, L.P. v. Enterprise Products Partners, L.P.*,[3] *Chalker Energy Partners III, LLC v. Le Norman Operating LLC*,[4] and *Copano Energy, LLC v. Bujnoch*[5]—each arise in the oil-and-gas industry, and each provides valuable insight into future transactions in Texas. Together, these cases establish that courts will avoid finding binding agreements on unsuspecting parties. These cases also provide practical guidance on avoiding inadvertent contracting, such as signing a preliminary agreement setting forth conditions precedent to a binding contract (*e.g.*, that no one is bound by the contract until all the parties sign a definitive agreement). However, these cases do not entirely untangle existing uncertainties regarding electronic communications in Texas, and prudent business operators should still take precautions when drafting contracts and engaging in negotiations via email.

This article first provides background on the UETA and Texas law regarding binding contracts. Second, it analyzes the three recent Supreme Court of Texas decisions on the topic of binding contracts. Finally, it examines what these cases mean for Texas oil, gas, and other commercial operations.

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[1] *Copano Energy, LLC v. Bujnoch*, 593 S.W.3d 721, 728 (Tex. 2020).
[2] *See, e.g., Khoury v. Tomlinson*, 518 S.W.3d 568, 577 (Tex. App.—Houston [1st Dist.] 2017, no pet.).
[3] 593 S.W.3d 732 (Tex. 2020).
[4] 595 S.W.3d 668 (Tex. 2020).
[5] 593 S.W.3d 721 (Tex. 2020).

II. BACKGROUND: TEXAS STATUTES AND CASES LEAVE THE DOOR OPEN FOR INADVERTENT CONTRACTING

A. History and Components of the Uniform Electronic Transactions Act

Beginning in the 1990s with the advent of the Internet, legal scholars in the United States began to work on a model act known as the UETA. The impetus for the UETA was threefold.

First, legal scholars felt that several traditional contract principles were ill-equipped to handle the lightning pace of an electronic transaction consummated on the Internet. For example, could an electronic affirmation of a signature on a website replace a handwritten signature on a piece of paper for the purpose of the statute of frauds? Second, the drafters of the model UETA wanted to promote less expensive, electronic methods of document retention. Third, because Internet commerce allowed consumers to purchase goods from any seller in the country, the drafters of the model UETA were concerned that, if left to the individual states, the law of e-commerce would be unacceptably inconsistent.

However, the model UETA drafters did not want to change existing contract law and instead chose a passive approach. Instead of re-writing substantive contract law, the drafters simply removed what they perceived to be impediments preventing electronic transactions from being treated equally under the law.

The national effort to adopt the model UETA culminated in 2000 when Congress passed the Electronic Signatures and Global and National Commerce Act.[6] The federal law provided that if each of the states did not adopt the UETA or an acceptable substitute, then the federal act would preempt any contrary state law. To compel the states to adopt the model UETA, the federal version provided more onerous consumer protections. To avoid federal preemption, all fifty states adopted the UETA or a substantially similar substitute.

The Texas Legislature passed the Texas Uniform Electronic Transactions Act in 2001.[7] The Texas UETA included several critical features, including: (1) requiring a threshold agreement among the parties to conduct business by electronic means (though conducting business electronically is some evidence of said agreement);[8] (2) an electronic record

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[6] 15 U.S.C. § 7001, *et seq*.

[7] UNIF. ELEC. TRANSACTIONS ACT, 77th Tex. Leg. § 6 (1999) (codified at TEX. BUS. & COM. CODE § 322.001).

[8] TEX. BUS. & COM. CODE § 322.005(b); *see Parks v. Seybold*, No. 05-13-00694-CV, 2015 WL 448179, at *1, 5 (Tex. App.—Dallas, July 23, 2015) (examining circumstances around parties' communications to determine that emails served as sufficient evidence to uphold an acknowledgment of a debt in the absence of an independent agreement to conduct business electronically).

is a valid record under the law;[9] (3) an electronic signature is a valid signature under the law;[10] (4) a contract may not be denied legal effect or enforceability solely because an electronic record or electronic signature was used in its formation;[11] (5) subject to certain safeguards, an electronic or automated transaction is valid under the law;[12] (6) electronic records can be retained in lieu of physical records;[13] and (7) electronic records are admissible in a court of law.[14] Notably, the UETA defines an "electronic signature" as "an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record."[15]

The UETA was intended to establish a simple, clear framework for digital transactions and to "eliminate barriers to electronic commerce and governmental transactions resulting from uncertainties relating to writing and signature requirements."[16] As discussed below, inherent ambiguities in the statute—and the often informal nature of email communications—have, however, resulted in a split of authority regarding how an email can bind an author to its contents.

B. Fort Worth Court of Appeals Holds that Email Signature Blocks Are Not "Electronic Signatures" Under the UETA

The UETA's application is key to negotiations in business and in litigation. In the litigation context, Rule 11 agreements under the Texas Rules of Civil Procedure require a writing signed by both parties or their representatives to be enforceable—raising questions as to what constitutes a "writing" or "signature" when parties make agreements via email.[17] In 2011, the intersection of Rule 11 agreements and email communications faced the Fort Worth Court of Appeals in *Cunningham v. Zurich Am. Ins. Co.*[18] The Fort Worth court held that an email exchange among counsel was not a binding Rule 11 agreement because counsel's email signature block was not an "electronic signature" under the UETA.[19] The court reasoned that because a signature block may be "generated automatically by [an] email client," the mere presence of a signature block was not evidence that the sender intended

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[9] TEX. BUS. & COM. CODE § 322.007(a).
[10] *Id.* § 322.007(d).
[11] *Id.* § 322.007(b).
[12] *Id.* § 322.014.
[13] *Id.* § 322.012.
[14] *Id.* § 322.007.
[15] *Id.* § 322.002(8).
[16] UNIF. ELEC. TRANSACTIONS ACT § 6 cmt. 1(b)-(c) (NAT'L CONF. OF COMM'RS ON UNIF. STATE LAWS 1999).
[17] TEX. R. CIV. P. 11.
[18] 352 S.W.3d 519 (Tex. App.—Fort Worth 2011, pet. denied).
[19] *Id.* at 529–30.

to "sign" the writing.[20] The court pointed out certain features (not found in the Cunningham email) that may evidence the sender's intent to sign, such as evidence that the sender manually typed his or her name to be his or her signature, or by providing a "symbol or mark that unequivocally indicates a signature," such as "an 's/' followed by [the sender's] typed name."[21] But, in the years after Cunningham, a split arose among Texas courts.

C. Houston's Fourteenth Court of Appeals Does Not Agree on How To Analyze Email Communications; Issues Split Decision

In 2013, Houston's Fourteenth District Court of Appeals considered whether emails created a binding contract between an oil-and-gas operator and a non-operator in *2001 Trinity Fund, LLC v. Carrizo Oil & Gas, Inc.*[22] Trinity and Carrizo had an existing working relationship via a written participation agreement, which expired naturally under its terms.[23] After the participation agreement expired, the parties exchanged emails discussing "amending" their original agreement.[24] After some back-and-forth, Trinity emailed that it "accept[ed] in principle but need[ed] to have this interest flow directly back to me."[25] Carrizo replied agreeing to a rebate direct to Trinity, and stated that if Trinity was "in agreement in principle, then [Carrizo] assum[ed] we can work out the mechanics."[26] Trinity's representative replied, "That will work," saying that he would call later that day to provide a time when payment would take place.[27] Three days later, Carrizo again emailed Trinity asking for a final answer on when payment will take place, and Trinity's representative stated, "Yes, has been my final answer. I will give you the final date ASAP."[28] When Trinity never paid, Carrizo sued Trinity for breaching a purported contract created by the emails.[29] The trial court initially entered a judgment on a jury verdict in Carrizo's favor after the jury found that the emails did bind Trinity.[30]

On appeal, the Houston Court of Appeals unanimously agreed that the emails did not constitute a binding contract, reversing the trial court's judgment. The court, however, split in their reasoning on contract formation and issued three opinions.[31] Judge Frost's plurality opinion held that the

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[20] *Id.* at 530.
[21] *Id.*
[22] 393 S.W.3d 442 (Tex. App.—Houston [14th Dist.] 2012, pet. denied).
[23] *Id.*
[24] *Id.* at 449–50.
[25] *Id.* at 450.
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *Id.* at 447.
[30] *Id.*
[31] *See generally, id.*

emails did not show "mutual understanding and assent . . . to a written agreement to continue [their previous] Participation Agreement without a termination date."[32] Judge Frost focused on the parties' failure to agree to a termination date for the new agreement, indicating that readopting the past agreement would have necessarily involved adopting the termination date that had already passed—creating a paradoxical situation in which the purported new agreement had necessarily also terminated.[33]

Judge Seymore's concurrence instead focused on the language of the emails, finding that there was no "'meeting of the minds' to use electronic communications" to amend the parties' previous participation agreement.[34] In other words, because the parties did not make it clear that the email communications were intended to be binding, they were not binding. Relying on *Cunningham*, Judge Seymore cautioned that "courts should be hesitant to imply or infer an agreement to transact business or negotiate contracts electronically merely because emails were exchanged."[35]

Judge Jamison's concurrence stated that Judge Frost's analysis went too far and that the issue could have been disposed of simply because the material terms of the contract at issue were not decided, and therefore the emails were not binding.[36] Ultimately, while *Carrizo* made clear that the email communications in that case were not binding, the split in analysis provided little guidance for analyzing future cases.

D. Houston's First Court of Appeals Disagrees with Cunningham, Holding Email Signature Block Can Bind Party

Expressly criticizing *Cunningham*, Houston's First Court of Appeals held that an email exchange between an oil trading company executive and potential investor created a binding contract in *Khoury v. Tomlinson*.[37] In *Khoury*, the executive, Tomlinson, met with the investor, Khoury, and provided him a detailed written business plan.[38] Khoury invested $400,000 in Tomlinson's company.[39] Over time, Khoury became dissatisfied with his investment, and he met with Tomlinson to discuss options.[40] At the meeting, Tomlinson agreed to repay Khoury his investment, and a week later, Khoury summarized the agreement in an email to Tomlinson.[41] Tomlinson emailed

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[32] *Id.* at 451.
[33] *Id.*
[34] *Id.* at 465 (Seymore, J. concurring).
[35] *Id.*
[36] *Id.* at 466–67.
[37] 518 S.W.3d at 577.
[38] *Id.* at 572.
[39] *Id.*
[40] *Id.* at 573.
[41] *Id.*

back that "[w]e are in agreement."[42] Tomlinson's email did not include a typed signature or a signature block other than "Sent from my iPhone."[43] When Tomlinson failed to repay the investment, Khoury sued.[44] Tomlinson argued in defense that the email exchange was unenforceable under the statute of frauds because it was not signed.[45]

The court applied the UETA to hold that, although Tomlinson did not type his name at the bottom of the email, the email stating that he was "in agreement" bound him because "the name or email address in a 'from' field functions as a signature in an email."[46] The court noted that the UETA allows for automated transactions to create binding contracts, so "[t]he fact that the name or email address to appear in a 'from' field was set up in advance of sending the email in question, then, does not preclude any legal effect of the name or email address."[47] The court recognized that this holding conflicted with *Cunningham* but disagreed and cited a federal court's criticism of *Cunningham* that there should be no legal difference between manually typing a signature at the end of an email and instructing a computer program to append the signature block automatically.[48] The *Khoury* court extrapolated from this principle that if an automatically appended signature block and manually typed signature were equally enforceable under the UETA, the "from" field in an email was binding under the UETA because it functioned similarly.[49] Further, although the emails between Tomlinson and Khoury left open the timeline for repayment (the parties had not agreed whether repayment would take place over four or five years), the court held that the emails were sufficiently certain to create a binding contract because the parties agreed that Tomlinson would "elect whether to pay over a four year period or a five year period."[50]

III. WITH THREE DECISIONS, THE SUPREME COURT OF TEXAS PROVIDES GUIDANCE ON HOW TO AVOID INADVERTENT BINDING CONTRACTS

Ambiguity in the UETA and the cases discussed above, along with other intermediate-court decisions regarding binding intent in emails and other (seemingly) preliminary communications, created uncertainty regarding how to avoid inadvertently binding communications. Three cases decided by the Supreme Court of Texas provide some guidance, but certain questions remain.

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[42] *Id.*
[43] *Id.* at 574.
[44] *Id.* at 573.
[45] *Id.*
[46] *Id.* at 577.
[47] *Id.*
[48] *Id.* at 578 (citing *Williamson v. Bank of New York Mellon*, 947 F. Supp. 2d 704, 710-11 (N.D. Tex. 2013)).
[49] *Id.*
[50] *Id.* at 570–80.

A. Energy Transfer Partners, L.P. v. Enterprise Products Partners, L.P.: Contractual Conditions Precedent Can Prevent Inadvertent Partnership Formation

1. Factual Background

In *Energy Transfer Partners, L.P. v. Enterprise Products Partners, L.P.*, the Supreme Court held that two parties working together toward a common goal did not owe a duty of loyalty to one another because several written, signed agreements between the parties created conditions precedent to partnership formation.[51] In *Enterprise*, the two parties, Energy Transfer Partners (ETP) and Enterprise Products Partners (Enterprise), planned a joint project to reverse the direction of a pipeline to transport gas south from Oklahoma.[52] As the parties explored the viability of the project, they signed three written agreements in which "they reiterated their intent that neither party be bound to proceed until each company's board of directors had approved the execution of a formal contract."[53] The agreements were as follows:

- First, a confidentiality agreement signed in March 2011, shortly after initial talks, in which the parties agreed:

  > …[U]nless and until a definitive agreement between the Parties with respect to the Potential Transaction has been executed and delivered, and then only to the extent of the specific terms of such definitive agreement, no Party hereto will be under any legal obligation of any kind whatsoever with respect to any transaction by virtue of this Agreement or any written or oral expression with respect to such a transaction….[54]

- Second, a letter agreement and "Non-Binding Term Sheet" signed in April 2011 that stated:

  > Neither this letter nor the JV Term Sheet create any binding or enforceable obligations between the Parties and, except for the Confidentiality agreement …, no binding or enforceable obligations shall exist between the parties with respect to the Transaction unless and until the Parties have received their respective board approvals and definitive agreements memorializing the terms and conditions of the Transaction have been negotiated, executed, and delivered by both of the parties. Unless and until such definitive agreements are executed and delivered by both of the Parties, either [Enterprise] or ETP, for any reason, may depart from or terminate the negotiations with respect to the transaction at any time without

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[51] 593 S.W.3d 732.
[52] *Id.* at 734.
[53] *Id.*
[54] *Id.* at 735.

> any liability or obligation to the other, whether arising in contract, tort, strict liability or otherwise.[55]

- And third, a reimbursement agreement signed in late April 2011, noting that the parties were still in progress on negotiating definitive agreements and that nothing would "be deemed to create or constitute a joint venture, a partnership, a corporation, or any entity taxable as a corporation, partnership or otherwise."[56]

Ultimately, Enterprise and ETP were unable to secure sufficient funding for their project, and the two parties ended their relationship in writing.[57] A month later, Enterprise partnered with another company to reverse the direction of a different pipeline from Oklahoma, resulting in a profitable venture.[58] ETP sued Enterprise arguing that despite the three written disclaimers in each of the parties' agreements, the two parties had nonetheless formed a partnership to market and pursue a pipeline by their conduct, and that, in turn, Enterprise's choice to engage in the same effort with a different partner breached a statutory duty of loyalty owed to ETP.[59] ETP argued that Texas employs a "totality-of-the-circumstances test" when determining whether parties have created a partnership, and that despite the written agreements disclaiming a partnership, the parties' conduct nonetheless evidenced the creation of a partnership.[60] A jury was persuaded by this argument, finding Enterprise liable to ETP for breach, but the court of appeals reversed and rendered judgment for Enterprise.[61]

2. In the Supreme Court of Texas

The Supreme Court of Texas affirmed the court of appeals' ruling in favor of Enterprise, holding that the parties' course of conduct did not bind Enterprise to a partnership with ETP.[62] The Court held that the parties' freedom to contract could override the statutory default test, recognizing that "Texas courts regularly enforce conditions precedent to contract formation and reject legal claims that are artfully pleaded to skirt unambiguous contract

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[55] *Id.*
[56] *Id.*
[57] *Id.* at 736.
[58] *Id*.
[59] *Id*.
[60] *Id.* The five nonexclusive factors indicating that persons have created a partnership "include the persons': (1) receipt or right to receive a share of profits of the business; (2) expression of an intent to be partners in the business; (3) participation or right to participate in control of the business; (4) agreement to share or sharing: (A) losses of the business; or (B) liability for claims by third parties against the business; and (5) agreement to contribute or contributing money or property to the business." TEX. BUS. ORG. CODE § 152.052.
[61] *Id*.
[62] *Id.* at 742.

language, especially when that language is the result of arm's-length negotiations between sophisticated business entities."[63]

The Court rejected ETP's assertion of a partnership, noting that by passing its nonexclusive list of factors, "the Legislature [did not] 'intend[] to spring surprise or accidental partnerships' on [parties].'"[64] The Court explained that one of the factors considered when establishing a partnership is the "expression of an intent to be partners in the business," and cautioned that courts should consider only evidence not specifically probative of other factors in determining such intent, "[o]therwise, all evidence could be an 'expression' of the parties' intent, making the intent factor a catch-all for evidence of any of the factors, and the separate 'expression of intent' inquiry would be eviscerated."[65]

The Court found the three agreements were particularly strong proof that the parties had not created a partnership. The Court explained that this would generally be the case where such agreements exist because "[a]n agreement not to be partners unless certain conditions are met will ordinarily be conclusive on the issue of partnership formation as between the parties."[66] The Court noted that parties may waive such conditions precedent by word or deed in some circumstances, but the parties must prove any such intent subject to an independent jury finding.[67] Because ETP did not receive a jury finding on the issue of waiver, ETP could not maintain the favorable judgement.

B. Chalker Energy Partners III, LLC v. Le Norman Operating LLC: Conditions Precedent to Contract Formation Can Prevent Inadvertent Contracts

1. Factual Background

In 2012, eighteen sellers of interests in oil-and-gas leases in the Texas Panhandle, represented by Chalker Energy Partners III, LLC (Chalker), sought bids for their assets.[68] Le Norman Operating LLC (Le Norman) expressed interest in submitting a bid.[69] Before Chalker would allow Le Norman to access the data room for the potential transaction, Le Norman had to sign a confidentiality agreement that read in part:

> *No Obligation*. The Parties hereto understand that unless and until a definitive agreement has been executed and delivered, no contract or

[63] *Id.* at 738.
[64] *Id.* (quoting *Ingram v. Deere*, 288 S.W.3d 886, 898 (Tex. 2009)).
[65] *Id.* at 741 (quoting *Ingram*, 288 S.W.3d at 900).
[66] *Id.*
[67] *Id.*
[68] *Chalker*, 595 S.W.3d at 670.
[69] *Id.*

> agreement providing for a transaction between the Parties shall be deemed to exist and neither Party will be under any legal obligation of any kind whatsoever with respect to such transaction by virtue of this or any written or oral expression thereof, except, in the case of this Agreement, for the matters specially agreed to herein. For purposes of this Agreement, the term "definitive agreement" does not include an executed letter of intent or any other preliminary written agreement or offer, unless specifically so designated in writing and executed by both Parties.[70]

Le Norman signed the agreement and submitted a bid for 100% of the sellers' assets.[71] The bid was made via email and stated that it was made subject to the execution of a mutually acceptable purchase-and-sale agreement (PSA).[72] The sellers counter-offered to sell 67% of their assets.[73]

On November 19, Le Norman emailed a "Counter Proposal" to Chalker's representative but did not refer to the bidding procedures.[74] The email contained seven terms:

1. $230 M for 67% of the 8/8ths RJ supplied database property set.
2. Eff date same at 9.1.12.
3. Execution of the PSA on or before 11.30.12, closing on or before 12.31.12.
4. Non-compete for ALL owners for one year with two mile halo around any unit being sold.
5. PSA similar to what we returned with the above caveats.
6. Our interest is not subject to the development agreement.
7. All parties staying in will execute JOA, it will be attached to the PSA.[75]

The email also stated that Le Norman "will not be modifying or accepting any changes to the base deal described above and don't want to be jerked around anymore. We will give you until 5:00 pm CST tomorrow to accept."[76]

The sellers voted to sell pursuant to Le Norman's offer. Also, before Le Norman's November 20 deadline, Chalker's representative sent an email that the sellers were "on board to deliver 67% subject to a mutually agreeable PSA. We were calling to discuss next steps and timing. Chalker et al. will be turning a PSA tonight to respond to your last draft."[77] Chalker did indeed send a draft PSA. However, on November 22, a competing bidder sent

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[70] *Id.*
[71] *Id.*
[72] *Id.*
[73] *Id.*
[74] *Id.* at 671.
[75] *Id.*
[76] *Id.*
[77] *Id.*

Chalker a new offer, prompting the sellers to "change horses" by accepting the competing bid.[78] On November 28, Chalker executed a PSA with the competing bidder, the same day that Le Norman transmitted a redlined draft of the previous PSA.[79] Upon discovering the deal, Le Norman sued, arguing that the agreement reached via email on November 19 and 20 was a binding contract to sell 67% of the sellers' assets.[80] The trial court granted summary judgment in the sellers' favor, finding that the parties did not intend to be bound by an agreement because a mutually acceptable PSA was a condition precedent to contract formation.[81] The court of appeals reversed, however, finding that the emails were binding.[82]

3. Supreme Court of Texas Opinion

The Supreme Court of Texas reversed, holding that the emails were not binding because Chalker and Le Norman never executed a definitive agreement as required under the parties' confidentiality agreement.[83] The Court cited its recent holding in *Enterprise* to underscore that Texas courts "enforce conditions precedent to contract formation."[84] The Court found the "No Obligation" clause agreed to by Chalker and Le Norman created an enforceable condition precedent to a contract formation, such that no binding agreement could occur until both parties executed a "definitive agreement."[85] The mere existence of this clause allowed the Court to decide the case on summary judgment and provided a key factor the Court used to distinguish *Chalker* from analogous cases in which a fact issue existed as to whether a binding contract existed.[86]

In turn, the Court found that the parties had not reached a "definitive agreement," which means that they had not met the condition precedent.[87] Although the "No Obligation" clause did not define "definitive agreement," the Court explained that the clause made clear that "definitive agreement" would "not include executed letter of intent or any other preliminary written agreement or offer, unless specifically so designated in writing and executed by both Parties."[88] The Court held that the emails between Chalker and Le Norman were "more akin to a preliminary agreement than a definitive agreement to sell the Assets, and the parties' dealings suggest that they

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[78] *Id.* at 672.
[79] *Id.*
[80] *Id.*
[81] *Id.*
[82] *Id.*
[83] *Id.* at 677–78.
[84] *Id.* at 673.
[85] *Id.* at 674.
[86] *Id.*
[87] *Id.*
[88] *Id.*

intended that a more formalized document, like a PSA, would satisfy the definitive-agreement requirement."[89]

Notably, the Court considered the email in the context of the overall type and complexity of the transaction, noting that "[i]n a $230 million deal, however, these emails . . . may leave much to the imagination," and that "there were still key agreements to be negotiated . . . before a definitive agreement would exist" such as escrow, non-compete, and joint operating agreements.[90] The Court did not find emails and "one-off musings" of several of the sellers congratulating Le Norman on winning the bid to be persuasive evidence that the emails were binding.[91] However, the Court limited its holding to the facts of the case, noting that such congratulatory comments did not overcome "the unambiguous No Obligation Clause agreed to by the parties."[92]

Finally, having found that the confidentiality agreement created an enforceable condition precedent to contract formation and that the parties had not satisfied the condition precedent, the Court addressed Le Norman's argument that the sellers nonetheless waived the condition precedent.[93] The Court paid particular attention to the overall terms of the Confidentiality Agreement, noting that it was not set to expire until long after the parties had completed negotiations for the sale of the assets and that Chalker "protected itself in the Confidentiality Agreement by affirming its right to 'conduct the process relating to a possible transaction in any manner it deems appropriate or change the procedure for conducting that process.'"[94] Thus, the Court found that the terms of the Confidentiality Agreement did not mandate waiver of the condition precedent.[95]

Next, the Court considered whether the sellers' conduct impliedly waived their right to a definitive agreement through their conduct.[96] Le Norman argued that the emails exchanged on November 19 and 20 deviated from the bidding procedures outlined in the Confidentiality Agreement.[97] The Court disagreed, stating that the parties' emails were "consistent with their right to a definitive agreement" because although the parties changed the format and deadline of the bid, both parties' emails still noted that the agreement would be subject to a mutually agreeable PSA.[98]

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[89] *Id.* at 675.
[90] *Id.*
[91] *Id.* at 675–76.
[92] *Id.* at 676.
[93] *Id.*
[94] *Id.*
[95] *Id.*
[96] *Id.* at 677.
[97] *Id.*
[98] *Id.*

C. Copano Energy LLC v. Bujnoch: Emails Did Not Constitute Written Agreement Sufficient to Fulfill Statute of Frauds

1. Factual Background

In 2011, a group of landowners granted easements to Copano Energy LLC (Copano) to construct a pipeline on their properties.[99] In December 2012, Copano approached the landowners to negotiate a second easement.[100] Over the next several months, various Copano representatives exchanged emails and letters with two different attorneys representing the landowners, the secretary of one of the attorneys, and the landowners themselves, but they never executed any formal agreement.[101] The record reflects a significant back-and-forth with Copano's various representatives proposing numerous offers, making it clear that there was internal confusion at Copano regarding the deal. When the transaction never came through, the landowners sued Copano for breach of contract, alleging that the emails constituted a binding contract sufficient to comply with the statute of frauds.[102]

On December 6 and 7, 2012, the landowners' attorney, Schwartz, and a Copano landman, Sanford, scheduled a meeting to take place December 11.[103] In preparation for that meeting, Schwartz's secretary, Bujnoch, exchanged emails with Sanford (without copying Schwartz) under the subject line "Meeting with Schwartz." The email exchange was as follows:

> Bujnoch: In preparation for the meeting on the 11th, Mr. Schwartz needs to know the size of the NGL line Copano is proposing to put in. He needs [it] for valuation and discussion with our clients.
>
> Sanford: It will be a 24 inch gas line. We will preserve the 2nd line right we purchased for condensate. I will be asking for an additional 20 feet of new right of way. We will be laying the line generally on the North side of the existing 24 inch line (temporary workspace side). I will be asking for an additional 20 feet of temporary workspace. James
>
> Bujnoch: Dry gas or liquid?
>
> Sanford: Rich gas.
>
> Bujnoch: By that do you mean NGL?

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[99] *Copano*, 593 S.W.3d at 724.
[100] *Id.*
[101] *Id.* at 724–27.
[102] *Id.* at 727.
[103] *Id.* at 724.

> Sanford: When we purchased the original easement for the 24 inch line we purchased the rights for a second 12 inch liquid line. We will be buying an additional 20 foot easement contiguous to the first easement for a 2nd 24 inch gas line. The rights to lay the 12 inch liquid line will be unchanged. James.[104]

The record was unclear as to whether the December 11, 2012 meeting ever occurred. But, on January 30, 2013, Sanford emailed Schwartz and another attorney representing the landowners, Bill Caraway, a summary of a discussed deal. Schwartz emailed back a purported acceptance of the offer:

> Sanford: Mark/Bill,
>
> > Pursuant to our conversation earlier, Copano agrees to pay your clients $70.00 per foot for the second 24 inch line it proposes to build. In addition to this amount Copano agrees to address and correct the damages to your client's property caused due to the construction of the first 24 inch line.
> >
> > Please confirm that Copano has access to your client's property for survey and environmental.
> >
> > Thanks,
> >
> > James
> > James Sanford,
> > Director, Right-of-Way Services
> > Copano Energy
>
> Schwartz: In reliance on this representation we accept your offer…."[105]

On February 1, 5, 6, and 11, five letters were sent to the landowners by a different landman acting on behalf of Copano, Thomas Goolsby. Goolsby's letters offered between $15 and $25 per foot, far less than the $70 per foot offered in Sanford's January 30 email.[106] Yet, on February 12, 2013, Sanford emailed one of the landowners, Transportation, Inc., offering $88 per foot.[107]

On February 13, 2013, Bujnoch emailed Sanford a revised amendment, stating that if they were satisfactory, "let us know and we will have our clients execute the amendments."[108] Sanford replied, "I am fine with these

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[104] *Id.* at 724–25.
[105] *Id.* at 725.
[106] *Id.*
[107] *Id.*
[108] *Id.* at 726.

changes."[109] But Copano reversed course again on February 22 when Goolsby sent a letter to Transportation, Inc. offering only $15 per foot.[110]

On March 14, 2013, yet another Copano representative, Brent Eubank, emailed Schwartz a "compensation proposal" to the landowners offering compensation of $20 to $40 per foot, and noting, "Although we realize that Mr. Sanford has had prior contact with you on this matter, in[] efforts to keep compensation as fair as possible we have provided the same letter to all attorneys representing landowners on this project."[111] Schwartz responded: "JAMES: THIS IS NOT OUR DEAL[.] WHAT IS GOING ON? PLEASE LET BILL AND ME KNOW."[112]

On March 18, 2013, Sanford replied apologizing for the confusion and admitting that he "kn[e]w that this [wa]s not our deal" but that "[o]ur deal still stands."[113] Sanford explained that:

> Copano does not want to go to court with any of your clients. The letter went out to all of the attorneys that represent landowners on the pipeline. I am not sure why Percheron chose to send you and Mark this letter. They know that we already had a deal for your clients.

Ultimately, no easements were paid for or obtained, and the landowners sued Copano for a breach of contract, alleging that the emails, taken together, constituted a binding contract.[114] A trial court granted summary judgment for Copano, finding that the statute of frauds barred the landowners' claims, but the court of appeals reversed, concluding that the emails, taken together, amounted to an enforceable contract that satisfied the statute of frauds.[115]

2. Supreme Court of Texas Opinion

The Supreme Court of Texas held that the emails did not constitute a binding contract, and that "[n]either those e-mails nor any other writing evidences the defendant's agreement to the particular terms stated in the e-mails."[116] The Court further held that the emails did not fulfill the statute of frauds because they did not constitute a written memorandum containing all of the essential elements of the agreement.[117]

The statute of frauds mandates that "certain agreements, including 'a contract for the sale of real estate,' are 'not enforceable unless the promise or

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[109] *Id.*
[110] *Id.*
[111] *Id.*
[112] *Id.*
[113] *Id.* at 726–27.
[114] *Id.* at 727.
[115] *Id.*
[116] *Id.* at 724.
[117] *Id.* at 731–32.

agreement, or a memorandum of it' is 'in writing' and 'signed by the person to be charged with the promise or agreement or by someone legally authorized to sign for him."[118] Also, courts have long recognized that the statute of frauds requires "a written memorandum which is complete within itself in every material detail, and which contains all of the essential elements of the agreement, so that the contract can be ascertained from the writings without resorting to oral testimony."[119] However, the memorandum "need not always be a single document[,]" and a court may find that multiple documents, taken together, fulfill the statute of frauds' requirements.[120]

In *Copano,* the landowners could not satisfy the statute of frauds with any particular email, instead alleging that the January 30 emails together with the December 7 emails made up the parties' agreement.[121] The Court rejected this argument, holding that the December 7 emails did not reflect an agreement to be bound to their terms, and no subsequent writing evidenced an agreement to be so bound.[122]Several facts supported this holding, including that the attorney, Schwartz, was not copied on the December 7 emails, the entire thread "anticipate[d] a future, in-person meeting at which the terms Sanford's emails describe might or might not actually be offered," and "[t]he future-tense phrasing of the December 7 e-mails further confirms the absence of an agreement to be bound by the terms stated therein."[123] The Court noted that writings "couched in futuristic language contemplating later negotiations do not satisfy the statute of frauds."[124]

Although the landowners argued that the January 30, 2013 emails evidenced an intent to be bound to the December 7 emails, the court rejected this argument because the January 30 emails did not reference the December 7 emails or adopt the terms therein.[125] The Court stated that the reference to the "conversation earlier" was not definite enough, explaining that there was "no way of knowing from the writings whether the parties agreed 'in our conversation earlier' . . . to the easement terms described in the December 7 e-mails."[126] The Court criticized the landowners' use of affidavit testimony to define "our conversation earlier," stating that the "need for witness testimony . . . demonstrates that the proffered writings do not 'contain the essential terms of the contract . . . without recourse to parol evidence to show the intention of the parties.'"[127] Writings exchanged between the parties after January 30, in which Copano continually changed the terms of their offer,

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[118] *Id.* at 727 (quoting TEX. BUS. & COM. CODE § 26.01(a), (b)(4)).
[119] *Id.* (quoting *Cohen v. McCutchin*, 565 S.W.2d 230, 232 (Tex. 1978)).
[120] *Id.*
[121] *Id.*
[122] *Id.*
[123] *Id.* at 729.
[124] *Id.*
[125] *Id.* at 730.
[126] *Id* at 731.
[127] *Id.* (quoting *Wilson v. Fisher*, 188 S.W.2d 150, 152 (Tex. 1945)).

further showed that no agreement had been reached, including the March 18 email stating that "[o]ur deal still stands, because it was unclear "what exactly the 'deal' was."[128]

Due to the lack of specificity in the January 30 email and the conflicting communications that followed, the Court held that there was "no way for a court, on this record, to piece together with certainty and clarity a collection of writings showing the essential terms of an easement contract and the parties' agreement to be bound."[129] Therefore, the Court held, the purported agreement between Copano and the landowners was not enforceable under the statute of frauds.[130]

Of note, the Supreme Court of Texas did not take the opportunity in *Copano* to address the split among courts of appeals on the issue of electronic email signatures or the application of the UETA. Although Copano argued in the court of appeals that the emails did not pass muster under the statute of frauds because they were not "signed," Copano did not make that argument before the Supreme Court.[131] So, while the Supreme Court noted that a "conflict among courts of appeal on the electronic 'signature' necessary for e-mails to satisfy the statute of frauds' requirement that the writing be 'signed by the person to be charged with the agreement," the Court declined to express an opinion on the issue.[132]

IV. CONCLUSION: HOW THESE CASES AFFECT BUSINESSES OPERATING IN TEXAS.

A. Agree to Conditions Precedent Early on in Negotiations.

These recent cases make clear that Texas courts will enforce valid agreements setting forth conditions precedent to contract formation. Therefore, prudent businesses operating in Texas should ensure that early on in negotiations, an agreement is agreed to and signed by both parties setting forth conditions precedent to a binding contract or relationship. As shown by *Enterprise*, such agreements are not limited to preventing a single transaction from binding parties but can also prevent inadvertent partnerships and duties from forming.

However, parties should draft clauses setting forth conditions precedent with care so that one party does not inadvertently waive the condition. A few useful tips to keep in mind when drafting conditions precedent to contract formation:

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[128] *Id.*
[129] *Id.* at 731–32.
[130] *Id.* at 732.
[131] *Id.* at 728 n.6.
[132] *Id.*

- **Be Specific.** What do the parties need for a binding agreement? Board approval? A formal contract bearing certain language?
- **Use Specific Terminology.** Merely requiring a writing signed by all parties may not be sufficient to prevent litigation because courts are still split as to whether email signatures can bind a party under the UETA or the statute of frauds.[133] The *Chalker* condition precedent required a "definitive agreement," which the court interpreted to mean a "more formalized document" than an email.[134]
- **Consider Expiration Dates.** Ensure that the preliminary agreement covers the entire negotiation period. This can provide evidence that the parties intended the agreement to prevent inadvertent entry into agreements, regardless of whether other aspects of the agreement are adhered to. For example, the court in *Chalker* held that because the confidentiality agreement would only terminate after the parties entered into a further written agreement covering confidentiality, "the parties made clear that the Confidentiality Agreement would govern negotiations," and applied the agreement even though the emails did not otherwise comply with the bidding procedures in the confidentiality agreement.[135]
- **Address Waiver.** Determine how parties may waive the condition. After finding an enforceable condition precedent, the court in both *Chalker* and *Enterprise* addressed whether the parties had nonetheless waived the conditions precedent through conduct or written communications.[136] Though the court did not find evidence of waiver in either case, it may be worthwhile to set forth how the parties may properly waive the condition to prevent an unnecessary fact question in potential litigation.

These considerations apply equally to business transactions and preliminary settlement discussions in litigation. Therefore, carefully drafted conditions precedent should be a feature of every preliminary agreement between parties in litigation, whether reached at mediation, via an emailed Rule 11 agreement, or otherwise. In Texas, it is "established precedent [that] the fact that the parties intend for an informal agreement to be reduced to a more formal writing will not necessarily prevent present, binding obligations from arising."[137]

Thus, any such agreement should explicitly state no party owes any duty to any other party unless and until the parties execute a formal, definitive agreement, and that such definitive agreement is a condition precedent. Otherwise, the parties may in turn be forced to litigate whether a Rule 11

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[133] *See Copano*, 593 S.W.3d at 728 n.6.
[134] *Chalker*, 595 S.W.3d at 675.
[135] *Id.* at 676.
[136] *Id.* at 677; *Enterprise*, 593 S.W.3d at 741.
[137] *Border Gateway, L.L.C. v. Gomez*, No. 14-10-01266-CV, 2011 WL 4361485, at *3 (Tex. App.—Houston [14th Dist.] Sept. 20, 2011, no pet.).

agreement is an unenforceable "agreement to agree" or a binding contract in its own right.[138]

Nonetheless, even if the parties set a condition precedent, they should take care when communicating or negotiating with another party before a formal agreement. Courts have not decided how to interpret signatures over email, and courts have recognized that parties may waive conditions precedent via course of conduct. Therefore, hasty drafting may still result in otherwise avoidable litigation.

Finally, if you wish to avoid the pitfall of entering into an agreement via email when you did not intend to do so, either expressly disclaim the UETA in an email footer or simply add a footer to all emails that "unless otherwise stated, this email is not an agreement to conduct business electronically and nothing contained herein shall constitute my signature." Parties to a contract must intend to have entered into an agreement. Setting the ground rules for when parties form a contract in the electronic age can avoid unintended consequences.

[138] *See, e.g.*, *General Metal Fabricating Corp. v. Stergiou*, 438 S.W.3d 737, 749 (Tex. App.—Houston [1st Dist.] 2014, no pet.) (Rule 11 agreement contemplating the execution of additional documentation was enforceable in part because the "agreement does not include any language indicating that the parties had engaged only in preliminary negotiations or that their agreement was contingent on agreement as to the terms of the additional documents.").

TO SEVER, OR NOT TO SEVER, THAT IS THE QUESTION. WIND RIGHTS IN TEXAS

Jacob R. Lederle[*]

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I. INTRODUCTION

Not long ago, those venturing out to West Texas left with an indelible impression—a bleak, expansive terrain, parched earth, and a culture formed from generations of hardscrabble living. By-passed by the interstates, the rural communities that formed the backbone of the Big Country were forgotten in time[1]—weeds overtook the railroads, storefronts were boarded up, jobs left (followed by the youth), and then the Dairy Queens began to close.[2] But reprieve was on the horizon. In 1995 the first commercial wind

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[1] *See* John Burnett, *Winds of Change Blow into Roscoe, Texas*, NPR, Nov. 27 2007, www.npr.org/templates/story/story.php?storyId=16658695 (interviewing Cliff Etheredge on the effects of the wind industry in Roscoe, Texas.)

[2] *Id.* (According to Etheredge when the Dairy Queens leave "your town is really in trouble.")

turbine appeared in West Texas,[3] and with the force of a spring dust devil the Texas Wind Industry was born—businesses reopened (and expanded), jobs returned, and landowners besieged by years of drought began a deep sigh of relief.

Nearly thirty years have passed since developers first targeted McCamey,[4] and the wind industry has spread from the far reaches of West Texas to the Piney Woods of East Texas to the Panhandle, and down to Brownsville. While the wind industry has taken hold in Texas, the laws governing it have not. Indeed, it has proven to be the proverbial wild west of Texas jurisprudence. This is especially true of a landowner's ability to sever the rights to the wind blowing across his or her land, where attorneys are forced to temper their client's expectations by telling them, "this may or may not work."[5] And although it has become somewhat of a vogue topic in academia, the underlying issue has invariably been the same—should there be a severable wind estate. Yet, even the most ardent opponents of wind severances openly admit that in Texas it is extremely unlikely that landowners will be told that they cannot sever their wind rights. Thus, instead of trudging down the same well-written path, this paper seeks to put a different shade on the topic. As a result, such philosophical questions as, "is wind property," and "what body of law is most analogous to wind," will not be addressed.[6] It will be assumed throughout this paper that wind is, in fact, property and that oil and gas law is best suited for addressing wind

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[3] ERNEST E. SMITH ET AL., TEXAS WIND LAW § 1.02 (4th ed. 2014) [hereinafter *Texas Wind Law*].

[4] McCamey is a rural community in far West Texas that is generally considered the home of the first commercial wind turbine. *See Texas Wind Law*, *supra* note 3 at § 1.02.

[5] *See* Lisa Chavarria, *The Severance of Wind Rights in Texas*, STAHL, BERNAL, & DAVIS, LLP, at 4-5 (2009) available at: http://sbaustinlaw.com/library-papers/Chavarria-The_Severance_of_Wind_Rights%20(Final).pdf (advising landowners and attorneys to "sever with caution.")

[6] For the more philosophically inclined reader I suggest Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, (1967) (discussing the emergence of new property rights); Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577 (1988) (discussing how the realities of human interaction tend to change strict property rules—a mudding of the crystals); Troy A. Rule, *Property Rights and Modern Energy*, 20 GEO. MASON L. REV. 803 (Spring 2012) (discussing how traditional property regimes can be adjusted for new energy sources); Troy A. Rule, *Airspace in a Green Economy*, 59 UCLA L. REV. 270 (2011) (discussing the evolution of airspace as property); Gerald Torres, *Who Owns the Sky*, 18 PACE ENVTL. L. REV. 227 (Summer 2001) (suggesting a communal framework for the ownership of the sky); *Compare* William Blackstone, Commentaries on the Laws of England, Book 2 *18 (generally regarded as formulating the modern interpretation of the ad coelom doctrine—whomever owns the soil, owns everything up to the heaven and down to the depths of hell), *with* People's Gas Co. v. Tyner, 31 N.E. 59 (Ind. 1892) (one of the earliest cases departing from the strict application of the ad coelom doctrine), *and* United States v. Causby, 328 U.S. 256, 261 (U.S. 1946) ("ad coelom . . . has no place in the modern world"), for the answer to the former, and Ernest E. Smith, *Wind, Water, Oil, Gas and Whitetails: A Comparison of Property Rights and Theories*, the University of Texas School of Law 5 (Wind, Solar and Renewables Institute 2010) [hereinafter *Whitetails*], *and* Ernest E. Smith and Becky Diffen, *Winds of Change: The Creation of Wind Law*, 5 Tex. J. Oil Gas & Energy L. 165, 176-181 (Spring 2010), for the answer to the latter.

severances. In light of those assumptions, this paper seeks to unveil the consequences resulting from a severable wind estate.

II. DEFINING WIND OWNERSHIP

Before moving forward, it will be useful to define severance (or a severance of wind rights). One well-respected scholar has stated that the granting of an easement or covenant to "preserve the wind flow from land adjacent to a potential wind farm"[7] is a severance. While technically accurate, this is not the traditional usage of the term. In fact, this type of "severance" is no different from a common law easement or covenant and accordingly there is little doubt that a landowner could grant such an easement or enter into such a covenant.[8] More importantly, in the context of wind development, these easements or covenants are standard fare in wind leases. Therefore, for the purpose of this article, severance will be used in its traditional sense—the conveyance (or reservation) of an interest in the wind resources blowing over and across land[9] whether by deed or will, and whether in the form of a fee-transfer or *profit-a-prendre*, in the rights to the development of wind separate from the ownership of the surface estate.[10]

A. Incidents of Wind Ownership

Regardless of whether severance is allowed in a manner similar to mineral severances or in a more limited manner, as discussed later in this article, one question that must be addressed is: What rights, if any, does the owner of a wind estate have? In the context of oil and gas, there are five basic incidents of mineral ownership that, if not expressly granted, are implied as a matter of right. They are "(1) the right to develop (the right of ingress and egress), (2) the right to lease (the executive right), (3) the right to receive bonus payments, (4) the right to receive delay rentals, [and] (5) the right to receive royalty payments."[11] Will similar rights be implied (if not granted in the granting instrument) unto the owner of the wind estate, or its lessee? It

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[7] *Texas Wind Law*, *supra* note 3, at § 4 Scope.

[8] *See id.* at § 4.1[1].

[9] In traditional parlance, severance is distinct from a lease. That is, a landowner can lease his or her property for just about any legal purpose, e.g., hunting, agriculture, mineral exploration etc. However, the rights for which the surface is being leased have not been severed from the ownership of the surface, i.e., they are still appurtenant to the surface. A severance, on the other hand, is a complete (or partial) division of the two, such that one person owns the surface and another owns the rights to the severed property. Thus, although, the legal contours of the Texas wind lease are similarly undefined, there is no serious dispute that a landowner can execute a wind lease. Yet some have erroneously superimposed the ability to sever with the right to lease, concluding that a ban on the former would necessarily effectuate a ban on the latter. *E.g.* Michael J. Stephan, *Wind Severance*, 40 TEX. ENVTL. L.J. 73, 80 to 81 (Fall 2009). This obviously does not follow.

[10] *Texas Wind Law*, *supra* note 3, at § 4.02.

[11] Altman v. Blake, 712 S.W.2d 117, 118 (Tex. 1986).

seems axiomatic that a right to lease and a right to the relevant financial considerations would be implied. Thus, the real question seems to be whether a court would imply broad rights of surface use. One prominent scholar finds this unlikely.[12]

As that scholar rightly points out, the extensive rights implied onto the owner of the mineral estate were implied due to necessity.[13] That is, they were implied because the breadth of rights needed to carry out the purpose of the grant—development of minerals—was unforeseeable during the early stages of the Texas oil and gas industry.[14] Hence, they were implied to ensure that development was not hindered; thereby rendering the minerals worthless. It seems reasonably clear that the same type of analysis would apply in the context of the wind estate. However, according to that scholar, two independent reasons "suggest that the broad array of rights implied in the oil and gas context will not be implied in a wind context."[15]

The first reason involves the relative statuses of the mineral, surface, and wind estates. It hardly needs to be said that the mineral estate is dominant to the surface estate and that as a result, broad rights of surface use are implied; otherwise, the minerals would not be produced. Thus, the argument appears to be that because the "wind estate and the wind lease are unquestionably not carved from the mineral estate, but from the surface estate" there would be no basis for implying similar rights.[16] While this certainly may be true, it seems to overlook the relationship of the wind estate to the surface estate. Just as the mineral estate is dominant to the surface estate in order to extract the minerals, it would seem to follow that the wind estate would be dominant to the surface estate to harvest the wind. Therefore, if broad surface rights were not implied, the wind estate would be just as worthless as the mineral estate would be without access to the surface.

The second reason, according to this scholar, involves the contrast between express language and implied terms. As the Texas Supreme Court has made clear, "a [right] will not be implied unless it appears from the express terms of the contract that it was so clearly within the contemplation of the parties that they deemed it unnecessary to express it . . . [or] it is necessary to . . . to effectuate the full purpose of the contract."[17] Because the courts do not lightly imply rights, and since express provisions trump implied

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[12] *See* Ernest E. Smith, *Wind Energy: Siting Controversies and Rights In Wind*, 1 ENVT'L & ENERGY L. & POL'Y J. 281, 307 (Spring 2007) [hereinafter *Siting Controversies*] ("Grantees of the mineral estate and lessees of that estate were given extensive implied rights to use the surface and subsurface in all ways that were reasonably necessary for conducting operations contemplated . . . Will equivalent rights be implied in favor of grantees and lessees of the wind estate? . . . [T]he [most] probable answer seems to be "no.").

[13] *Id*.

[14] *Id*.

[15] *Id*. at 308.

[16] *Id*.

[17] HECI Exploration Co. v. Neel, 982 S.W.2d 881, 888-89 (Tex. 1998).

terms, it would be unlikely that a court would imply broad rights to the surface in favor of the wind estate.[18] However, express provisions have no bearing on whether an implied right will be found. Rather, when present they serve to negate the existence of the implied term. But when no such express provision exists, there is no reason to assume that an implied right cannot be found to bridge the gap.

Moreover, the Texas Supreme Court's language directly contradicts this assertion. Specifically, the Court said, "a [right] will not be implied unless it appears from the express terms of the contract that it was *so clearly within the contemplation of the parties that they deemed it unnecessary to express it*."[19] The right to use the surface to produce wind energy seems so clearly within the contemplation of the parties, that if neither party felt the need to address it, a court certainly would. In that regard, it seems reasonably clear that in the absence of language granting surface access, the owner of the wind estate (or its lessee) would benefit from a broad grant of implied surface use.

In light of the above, applying principles of oil and gas law, it would seem to follow that the wind estate would have the following basic incidents of ownership: (1) the right to access and use the underlying surface estate in any manner reasonably necessary for the development and harvesting of the wind resources (the "Surface Right"); (2) the right to authorize all actions necessary for the development of the wind estate and the production of energy from the wind resources (the "Executive Right"); and (3) the right to any monies, revenues, or lease benefits related to the production and sale of energy produced from the wind resources (the "Financial Right").

B. Classification of Wind Ownership

Having determined the basic rights associated with owning wind rights; next, attention needs to be given to the classification of the wind estate after it is severed from the surface (e.g., fee ownership versus royalty ownership.) Again, the treatment of oil and gas in Texas guides this analysis.

The mineral estate (i.e., the oil, gas, and other minerals lying beneath a tract of land) can be owned and possessed in a variety of means, but broadly speaking there are three basic categories: (1) an "Intact Mineral Interest," (2) a "Non-executive Mineral Interest," or (3) a "Royalty Interest." An Intact Mineral Interest simply means that the grantee of the severance (or reservation) owns all or a portion of the minerals together with all the incidents of mineral ownership. A Non-executive Mineral Interest, on the other hand, generally is interpreted to mean that all or a portion of the minerals are owned outright but without the executive right (i.e., the right to

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[18] *Siting Controversies*, *supra* note 13 at 308.
[19] *HECI Exploration*, 982 S.W.2d, 888-89.

lease the minerals). This most often occurs when the surface owner sells all or part of the minerals but reserves the executive right in order to ensure participation in the oil lease. Finally, a Royalty Interest is generally interpreted as a non-participating interest that entitles its owner to a percentage of the proceeds of production without bestowing any rights to participate in the execution of a lease or in development. It is worth noting that, somewhat illogically, the executive right can be severed and disposed of separate from ownership of the mineral estate[20] (i.e., one can own the executive right without owning any interest in the mineral estate or the surface estate).[21] To be fair, this appears to be an exception rather than the rule, because as Professor Ernest Smith has pointed out "[t]he most common situation in which a mineral interest is severed from the executive right is through the creation of a nonparticipating royalty."[22]

If one assumes that the same basic rights of ownership applicable to oil and gas would also be found for wind rights, then it should be equally safe to assume that classification of wind ownership would follow the same basic pattern: (1) an "Intact Wind Estate" with all the rights of ownership, (2) a "Non-executive Wind Estate" without the right to lease, and (3) a "Wind Royalty." The advisability of allowing the executive right, in the wind context, to be severed will be addressed in a later section of this article.

It is important to remember that the severance of the wind estate or reservation of a wind royalty is not the same as the assignment of lease benefits. It is a basic element of Texas law that, absent a contrary provision in the contract, that contract rights may be freely assigned. For example, let's assume the surface owner also owns all the wind rights. If the landowner enters into a wind lease, unless the wind lease says otherwise, the landowner should be able to assign all or a part of the lease revenue to a third-party without conveying that third-party any interest in the land itself. Occasionally, a wind lease will attempt to restrict a landowner's ability to assign the lease rights and/or restrict the landowner's ability to sever the wind estate. As a result, special consideration should be given to assignment clauses when negotiating a wind lease on behalf of a landowner to avoid this result.

C. Duty to Accommodate

It is well settled in Texas that the mineral estate is in a position of dominance to the surface estate and as such, may use "as much of the

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[20] Christopher S. Kulander, *Big Money vs. Grand Designs: Revisiting the Executive Right to Lease Oil & Gas Interests*, 42 TEX. TECH L. REV. 33, 37 (Fall2009).

[21] To be clear, the severability of the executive right itself is not illogical; merely the fact that it can be owned separate from ownership of the mineral estate is illogical.

[22] *Texas Oil & Gas, supra* note 121 at § 2.6; *See id*. (pointing out that although Texas has not addressed a naked executive right it is "doubtful" it would be held invalid).

premises as is reasonably necessary to produce and remove the minerals."[23] During the 1970's, the Texas Supreme Court, recognizing the harsh impacts of the literal application of this doctrine, sought to soften those impacts by adopting what has become known as the accommodation doctrine (or less frequently, the alternative means doctrine). Under this doctrine, an oil lessee may be required to accommodate an existing surface use (if that use would be precluded or impaired), when there is no reasonable alternative for continuing the existing surface use, and the oil lessee has reasonable (industry accepted) alternatives available.[24]

If wind rights are severed, such that a separate wind estate is created, it seems logical that it would be in a position of dominance towards the surface estate. Moreover, if my opinion that broad surface rights would be implied holds true, and as a result, the wind estate is granted so much use of the surface as is reasonably necessary to produce wind energy, then conflicts between wind lessees and the owner of the surface estate are sure to arise. As a practical matter, many such conflicts are expressly addressed via the wind lease.[25] However, if not addressed by the wind lease, it seems unlikely that the lessor or the surface owner would benefit from the accommodation doctrine—absent statutory action. Consider, *City of Lubbock v. Coyote Lake Ranch*.[26] There the court was faced with a similar question—whether the accommodation applied to govern the relationship between the owner of a severed ground water estate and the surface estate. The Texas Court of Appeals expressly declined to extend the doctrine.[27] Assuming a court would be equally unwilling to extend the accommodation doctrine to govern the relationship between wind lessees and lessors, it would have to be statutorily codified.

III. DEALING WITH THE CONSEQUENCES OF A SEVERED WIND ESTATE

Having, in the preceding section, defined wind severance as well as the rights associated with the wind estate and types of ownership resulting from a wind severance, this section will address the two major issues that may result from allowing wind rights to be established: (1) the Competing Landowner Conundrum; and (2) the Administrative Hassle. To be clear, neither of these issues, individually nor collectively, are true justifications for

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[23] *Getty Oil Co. v. Jones*, 470 S.W.2d 618, 621 (Tex. 1971).

[24] *Id*. at 622; *See also* Sun Oil v. Whittaker, 483 S.W.3d 808 (Tex. 1972); Merriman v. XTO Energy, 407 S.W.3d 244 (Tex. 2013); Davis v. Devon Energy Production Co., L.P., 136 S.S.3d 419 (Tex.App. – Amarillo 2004); and Texas Genco, LP. v. Valance Operating Co., (Tex.App. – Waco 2006).

[25] For example, most wind leases expressly reserve a surface owner's use of the surface for ranching farming, hunting, and other recreational activities. *See Texas Wind Law, supra* note 3, at § 2.05.

[26] 440 S.W.3d 267, (Tex.App—Amarillo [Seventh Dist.]—2014).

[27] *Id*. at 273, 275; *See also Siting Controversies, supra* note 148 at 316 ("It seems doubtful that the accommodation doctrine would apply to conflicts between the wind lessor and the wind lessee.").

banning a severance of wind rights. In fact, proactive legislation could mitigate the results of both (this will be addressed in a later section).

A. The Competing Landowner Conundrum

There is no way to avoid it. The biggest consequence of a separate wind estate is conflicting surface usage or simply the competing landowner conundrum. On one end of the spectrum, is the landowner looking to maximize profits by severing his or her wind rights; on the other end, is the landowner affected by the severance. Although divergent via their relationship to the severance, their fundamental argument is the same—control over their own property.

From the perspective of the landowner seeking to execute a severance, the ability to do so might be legally phrased, as one commentator has, as a freedom of contract argument.[28] However, it can be more forcefully phrased (as one landowner has), as "no one is going to tell me what I can and can't do with my property."[29] Even more telling is that landowner's response to the question of banning severance: "it would affect whether or not I decided to sell my property."[30]

The freedom to dispose of private property is so fundamental to American property ownership, especially in Texas; however, it is often overlooked. [31] Banning a landowner's ability to sever his or her wind rights would be in direct conflict with that fundamental concept; it benefits the subsequent landowner at the cost of the prior landowner. However, allowing severance to continue unchecked does the same thing; it benefits the prior landowner at the cost of the subsequent landowner—hence the competing landowner conundrum.

This conundrum would be most prevalent when the prior surface owner has completely severed the wind rights and the subsequent surface owner does not own any of those rights. In the oil and gas industry, a landowner faced with a similar situation has little control over mineral development. Yes, a landowner may be able to rely on the accommodation doctrine or may be able to argue unreasonable use of the surface; however, for all intents and purposes, the landowner has no control over the use of his or her property for mineral development. This is so, because the mineral estate is dominant to the surface estate, and as such may make reasonable use of the surface for purposes of exploring and developing the mineral estate. The same is true if

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[28] Stephan, *supra* note 8 at 77-8.

[29] Telephone Interview with Johnny Ussery, Texas landowner, (Mar. 11, 2015).

[30] *Id*.

[31] *See* Vanhorne's Lessee v. Dorrance, 2 U.S. 304, 310-11 (1795) (""the right of acquiring and possessing property . . . is one of the natural, inherent, and unalienable rights of man [and] . . . divesting one citizen of his freehold . . . is inconsistent with the principles of reason, justice, and moral rectitude"); *See also* Buchanan v. Warley, 245 U.S. 60, 74 (1917) ("Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use, and dispose of it.").

a separate wind estate is created. The wind estate would be dominant to the surface estate for purposes of developing the wind estate for wind-energy production. Thus, a wind company would be under no obligation to take a lease from such a landowner, thereby removing him or her from the negotiating table and significantly hindering the landowner's ability to control his or her property. Keep in mind, as discussed earlier in this article, that it seems unlikely that a common law application of the accommodation doctrine would apply in the context of wind versus surface.

Consider the implication of this. Commercial wind farms have a much larger surface footprint as compared to mineral development. After completion there may be several wind turbines (with significant buffer zones),[32] as well as underground and overhead power lines, and possibly substations spread across the entire surface of the property. Conversely, with oil and gas development most of the infrastructure is much more consolidated, relatively speaking. Therefore, a much larger burden is placed on landowners facing wind-energy development than is placed on landowners facing mineral development, as it relates to surface usage. Yes, landowners facing wind-energy development are paid surface damages (e.g., payments for the construction of roads, installation of turbines and power lines, etc.) during construction for this increased burden while landowners in a mineral context are typically not. However, it is unclear how a landowner could negotiate these surface damages without being a party to a lease.[33] It is equally unclear what incentive an owner of wind rights would have in negotiating such damages.[34]

Is there an equitable solution to this conundrum? Yes. However, it is quite clear that completely banning severance or leaving it completely unchecked is not that solution.

1. Adopting a Measured Approach

A working understanding of a typical wind lease is warranted before moving forward. Unlike the oil and gas industry, there is no uniform wind lease. Each lease is drafted by the wind company's attorney and is roughly thirty to fifty pages in length—addressing a litany of issues specific to wind farm development. At its basic level, a wind lease can be broken down into two terms: a development term and an operations term.[35] During the

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[32] As the name implies, a buffer zone (e.g., 500 feet) is the area surrounding any turbine and within which the landowner's rights are severely restricted. For example, a typical wind lease might specify that a landowner cannot plant trees or construct buildings taller than thirty feet within such a zone.

[33] *See Animal, Vegetable, Mineral – Wind*, *supra* note 14 at 84-6 (discussing several other implications of a completely severed wind estate).

[34] In fact, quite illogically, some landowners have attempted to sever the right to surface damages prior to selling their property.

[35] Occasionally a wind lease will contain a separate construction term.

development term (also known as the option period, the feasibility period, the initial period, or the due diligence period), the wind company has limited rights to the land to determine the feasibility of building the proposed wind farm. This is akin to an option in a real estate contract. During the development term, the landowner is typically paid $5.00 to $10.00 an acre annually. During the operations term, the wind company will construct the project and begin generating electricity for sale. During the operations term, a landowner will generally be paid the greater of (1) a royalty, (2) minimum rent, or (3) a per acre payment.[36] A royalty in a wind lease is the same concept as a royalty in an oil lease; however, the percentage is much different (typically 4% to 7% of gross revenue versus 1/4 of production). The minimum rent, on the other hand, is a guaranteed minimum payment (typically $3,500.00 to $7,500.00 per megawatt of installed nameplate capacity on the land) that a landowner receives if there are wind turbines on the land and only to the extent that it exceeds the royalty. A per-acre payment is an amount paid for each acre of land leased (e.g., $15.00 per acre leased) to the extent it exceeds the royalty or the minimum rent (typically the per acre payment is only relevant when no turbines are installed but the land hosts other infrastructure).[37] Most wind leases will also provide for the payment of surface damages and installation fees, e.g., roads, underground collection lines, overhead transmission lines, wind turbine installation fees, fees for substations and operation and maintenance buildings, meteorological towers, laydown yards, crop damages, injury to livestock, etc.

a. Nonparticipating Royalty

Keeping the above paragraph in mind, one solution, which has been suggested in the past, is to limit any severance to something akin to an oil and gas nonparticipating royalty.[38] As discussed above, a nonparticipating royalty is an interest that entitles its owner to a percentage of the proceeds of production without bestowing any rights to participate in the execution of a lease or in development.[39] In this scenario, the wind estate would remain appurtenant to the surface with the surface owner retaining all the incidents of wind ownership other than the financial rights discussed earlier. In this context, it would be on par with an unsevered mineral estate. Thus, a severance would merely be severing one of the incidents of wind ownership—the right to receive a portion of the profits obtained from selling wind energy—rather than the actual wind rights. In that regard, for example, a prior landowner could reserve 100% of the financial rights associated with wind rights, and the subsequent landowner would remain in control over

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[36] Chavarria *supra* note 6 at 7; See also *Texas Wind Law*, *supra* note 3, at § 2.03.
[37] Chavarria *supra* note 6 at 7; See also *Texas Wind Law*, *supra* note 3, at § 2.03.
[38] *See* Chavarria *supra* note 6 at 10.
[39] Lee Jones, Jr., *Non-Participating Royalty*, 26 TEX. L. REV. 569, 570 (May 1948).

development, including the negotiations of his or her surface damages and surface restoration.

Thus, the first step is to make expressly clear what financial benefits the holder of a nonparticipating royalty is entitled to. It should be abundantly clear that the nonparticipating royalty owner would be entitled to the stated percentage of the royalty. The nonparticipating royalty holder should also be entitled to any minimum rent, as minimum rent is paid in lieu of a royalty when, for example, energy prices are declining, or the turbines are not operational. Thus, they are meant to compensate the landowner in the same way as a royalty. It is equally clear that the holder of a nonparticipating royalty would not be entitled to a percentage of any surface damage fees, reimbursement or restoration fees, or any miscellaneous fees—such as for the sale of caliche or water.[40] Likewise, just as a mineral NPRI owner is not entitled to any bonus consideration or delay rentals, a wind nonparticipating royalty holder should not be entitled to any development term fees, construction term fees, or installation fees.[41]

Next, the scope of the executive right and the accompanying executive duty must be determined. Like most legal issues surrounding wind energy, it is unclear how a court would define and interpret the executive right and the accompanying duties. But, as stated at the beginning, it seems more likely than not that a court would start with oil and gas law, adjusting as needed. Therefore, practitioners advising their clients would be well advised to understand the case law that a court would most likely consult in deciding certain issues. In that regard, the executive right (a separate incident of mineral ownership),[42] is viewed as "the right to take or authorize all actions that affect the exploration and development of the mineral estate,"[43] or more often and more narrowly as the right to execute a lease.[44] As discussed earlier, the executive right can be severed and disposed of separate from the ownership of the mineral estate or the surface estate.[45]

The effectiveness of limiting wind severances to a nonparticipating-royalty hinges on the landowner maintaining the ability to control wind

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[40] See Chavarria *supra* note 6 at 7-9 for a good discussion of the most prevalent fees provided for in a wind lease.

[41] Development and construction term fees are generally annual per-acre payments (e.g., $5.00 per acre and $15.00 per acre respectively) paid during each year of the term to keep the lease in effect while specific tasks are completed. An installation fee, on the other hand, generally, depending on the skill of the negotiator, may be a lump sum (e.g., $25,000) meant to compensate the landowner for all surface damages (i.e., installation of roads, turbines, power lines, substations, etc.) or a lump sum purely for the installation of turbines (e.g., $4,500.00 x 10MW). In the latter, the installation fee would be separate from any additional surface damages paid for the construction of roads, substations, or the like.

[42] *See generally* Altman v. Blake, 712 S.W.2d 117, 118 (Tex. 1986).

[43] 1 ERNEST E. SMITH AND JACQUELINE LANG WEAVER, TEXAS LAW OF OIL AND GAS § 2.6 (2014) [hereinafter *Texas Oil & Gas*].

[44] *Id*. *See also* Lesley v. Veterans Land Board, 352 S.W.3d. 479, 487 (Tex. 2011).

[45] *Texas Oil & Gas, supra* note 121 at § 2.6; *See id*. (pointing out that although Texas has not addressed a naked executive right it is "doubtful" it would be held invalid).

development. Thus, the better approach would be to continue to treat the executive right as a basic incident of wind ownership, but, unlike oil and gas, to treat it as running with the wind estate, i.e., not severable. Otherwise, the surface owner (who in this scenario still owns all the wind rights) could be placed in the position of a nonexecutive, with no ability to control development, which would frustrate the purpose and hinder the effectiveness of creating a nonparticipating royalty system for wind rights.

With the alienability of the executive right restricted, the next question is what duty the landowner would owe to the nonparticipating royalty owner. In general, the reason for applying a duty of care when there are outstanding nonparticipating interests is that, by virtue of their interest being non-participatory, the only way the interest can be realized is through the executive exercising the executive right.[46] Thus, the duty of care is meant to protect the nonexecutives from unreasonable or arbitrary behavior on behalf of the executive as it relates to the non-executory interest. In that regard, there is not a discernable difference in the relationship existing between executive and nonexecutive mineral owners and the relationship existing between executive and nonexecutive wind owners.[47]

Unfortunately, the duty that an executive owes to a nonexecutive is a murky area of Texas jurisprudence and determining that duty has proved elusive for the courts. Despite that, although there has been a juxtaposition of terminology,[48] it appears that Texas, in most circumstances, has adopted a duty of utmost good faith and fair dealings that requires the executive to obtain for the nonexecutive every benefit that he obtains for himself, and which prohibits the executive from engaging in acts of self-dealing that unfairly diminish the value of the nonexecutive interest. The problem with this test, as the Texas Supreme Court articulated, is that the executive is required to obtain for the nonexecutive every benefit that he obtains for himself.[49] This prong of the test is better suited for measuring the duty owed to a nonexecutive fee interest owner (which share many of the same benefits as the executive), than it is for measuring the duty owed to a mere royalty owner, whose only shared benefit is the royalty. To be clear, this would be more problematic when the royalty owner has reserved a floating (or

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[46] *Id*.

[47] *See* WILLIAMS & MEYERS, *supra* note 19 at § 339.2 (noting that the executive "duty that arises . . . from the existence of the relationship between an executive and a non-executive").

[48] In *Manges v, Guerra*, the Texas Supreme Court articulated the executive duty as one of utmost good faith that is fiduciary in nature. 673 S.W.2d 180, 182-84 (Tex. 1984). However, a careful reading of the cases following *Manges* shows a reluctance by the courts to interpret *Manges* as imposing a strict fiduciary duty that would require the executive to subvert his or hers interests in favor of the nonexecutive. *See e.g.*, HECI Exploration Co. v. Neel, 982 S.W.2d 881, (Tex. 1998); In re Bass, 113 S.W.3d 735 (Tex. 2003); and Lesley v. Veterans Land Bd., 352 S.W.3d 479, 490 (Tex. 2011) ("we did not suggest in Andretta, HECI, or Manges that this requirement was part of the executive's duty").

[49] *KCM Financial v. Bradshaw*, 457 S.W.3d 70, 80-82 (Tex. 2015).

"fraction of") royalty rather than a fixed (or fractional) royalty.[50] That is to say, that a fixed royalty entitles its holder to the stated fraction or percentage regardless of the size of the landowner's royalty (e.g., 1/40th of gross production); whereas, a floating royalty entitles its holder to the stated fraction or percentage of the landowner's royalty (e.g., ½ of 4.5%).[51] Thus, since the value of a floating royalty is determined by the size of the landowner's royalty, and since the executive negotiates the landowner's royalty, the duty owed to the nonexecutive becomes much more important. Nevertheless, the duty, as articulated, provides the executive with considerable discretion in negotiating the terms of a lease.[52] In fact, as the court in *Bradshaw* pointed out, when the courts have failed to find a breach of the executive duty they "have generally observed the absence of self-dealing."[53] Therefore, in the absence of some act by the executive that unfairly diminishes the value of the nonexecutive's royalty, the executive has satisfied his or her duty. For example, as the court in *Bradshaw* also pointed out, the executive would not be required to obtain the highest royalty possible, nor would the executive satisfy his duty by merely "obtaining the same royalty in a lease."[54] Thus, what the court has created is a balancing test.

Therefore, a landowner when negotiating a wind lease could conceivably negotiate for higher surface damage fees, or development term fees in return for a less than market rate royalty; provided, however, that the landowner could show that given the circumstances this trade-off was reasonable. In fact, it appears that the landowner would only breach his duty if by negotiating for the lower royalty he or she did so with the intent to diminish the nonparticipating wind royalty owner's interest.

The more problematic issue is when the duty arises and whether there is a duty to lease. For purposes of explanation, and by way of analogy, a mineral fee interest is a possessory fee simple interest with title to all the minerals within the respective mineral estate, which carries with it all the incidents of mineral ownership; it becomes nonparticipating when the executive right has been severed or was not conveyed; however, its owner still retains title to the actual minerals. A nonparticipating mineral royalty, on the other hand, does not confer ownership to or title over the minerals.[55] Rather, it merely entitles its holder to a stated fraction of the lessor's royalty, i.e., a percentage of the mineral-fee-interest owner's profits for selling the minerals.[56] Thus, the

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[50] *Texas Oil & Gas, supra* note 121 at § 2.6 (4)(b).
[51] *See Moore v. Noble Energy, Inc*., 374 S.W.3d 644, 647–48 (Tex.App.—Amarillo 2012) (discussing the difference between fixed and floating royalties).
[52] *Bradshaw*, 457 S.W.3d 70, 82–84 (noting that an executive is not required to obtain the highest royalty).
[53] *Id*. at 81.
[54] *Id*. at 82–84.
[55] Lee Jones, Jr., *supra* note 115 at 573 n.17 (1948) (quoting A.W. Walker, Jr., Paper Presented to the Wichita County Bar Association (Dec. 14, 1946) (listing eight attributes of an NPRI)).
[56] *Id*.

holder of a nonparticipating royalty "has no power to lease [not because he gave authority to lease to someone else, but] because he does not own a leasable property interest."[57] Therefore, logically the duty that an executive owes to the nonexecutive should vary depending on the relationship the nonexecutive has towards the executive. Hence, it should follow that an executive's duty towards a nonparticipating fee interest owner would arise the moment the interest is created. This is so because a nonparticipating fee interest owner still owns the minerals (or the wind) and as such is beholden to the executive to properly manage and lease his or her proportionate share. Put another way, had the nonexecutive retained the executive right he or she would be able to execute a lease; therefore, by giving that right to someone else a duty of care should arise regardless of whether there is a lease. Conversely, the duty owed to a mere royalty owner should not arise until the executive has entered into a lease. That is to say, since the holder of a mere royalty does not own or have title to the actual minerals, there is nothing for the executive to manage, or lease, i.e., a nonparticipating royalty is equivalent "to the right to receive future rents on real property."[58] Thus, if there is nothing to manage or lease, then a duty of care does not arise until there is a lease; therefore, if there is not a duty until a lease is executed, a royalty owner should not be able to challenge an executive's failure to lease because no duty has been breached.

Although it has not been interpreted in this manner, it is arguable that that is what the Court in *In re Bass*[59] was trying to articulate;[60] not, as other courts have held,[61] that an executive does not exercise the executive right until a lease is executed, but rather that since an executive does not owe a royalty owner a duty until there is a lease, the royalty owner has no grounds to challenge a failure to lease because the duty of care owed to him or her has yet to be breached. In that regard, it could be argued that *Lesley v. Veterans Land Board*[62] merely clarified the misapplication of *Bass*. Indeed, what the *Lesley* court held was simply that an executive could exercise the executive right without executing a lease.[63] Thus, *Bass* and *Lesley* are in harmony.

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[57] *Id*.
[58] *Id*.
[59] 113 S.W.3d 735 (Tex. 2003).
[60] Yes, the Court does say: "Bass has not leased his land . . . [thus] Bass has yet to exercise his rights as the executive." *Id*. at 745. But if you read the opinion, especially against the backdrop of nonparticipating fee interest versus nonparticipating royalty, it seems clear that what the Court intended to articulate was: Since a royalty owner has no right to lease, the executive does not owe him or her a duty until there is a lease, and as a result there can be no breach.
[61] *See e.g., Hlavinka v. Hancock*, 116 S.W.3d 412, 419-20 (Tex. App.—Corpus Christi 2003); *Aurora Petroleum, Inc., v. Newton*, 287 S.W.3d 373, 377 (Tex. App.—Amarillo 2009); *Veterans Land Bd. v. Lesley*, 281 S.W.3d 602, 618 (Tex. App.—Eastland 2009).
[62] 352 S.W.3d 479 (Tex. 2011).
[63] *Id*. at 491–92 ("[W]e need not decide here whether as a general rule an executive is liable to a non-executive for refusing to lease minerals…Bluegreen did not simply refuse to lease the minerals in the

For example, the executive in *Lesley* violated its duty because it placed restrictive covenants on the surface prohibiting oil and gas development. Note, however, that the nonexecutive owned a nonexecutive mineral fee interest. Now, consider, as stated above, that because a nonexecutive fee interest owner has conveyed (or failed to reserve) the right to lease, the nonexecutive becomes beholden onto the executive to act with due regard towards his or her fee interest. Therefore, the executive's duty arises the moment the executive receives the executive right, and therefore can be breached regardless of the presence of a lease. In fact, *Bass* held this by way of negative implication—if, as interpreted above, an executive does not owe a royalty owner a duty until there is a lease (because the royalty owner does not have a leasable property interest that the executive is charged with managing), then the executive must, therefore, owe a nonexecutive fee interest owner a duty prior to a lease because the nonexecutive does have a leasable property that the executive is charged with managing. Thus, the executive in *Lesley*, as the court noted, violated his duty not because he refused to lease, but because he took steps that were detrimental to the nonexecutive's fee interest, such as the executive failed to properly manage the nonexecutive's minerals.[64] Under the proper interpretation of *Bass*, this would still be a breach. However, if the nonexecutive in *Lesley* was merely the holder of a nonparticipating royalty, rather than a nonparticipating fee interest, the executive would still exercise the executive right by placing restrictive covenants on the surface, but there would not be a breach because the executive's duty towards the royalty owner has not yet arisen, i.e., it only arises in conjunction with a lease. Hence, *Lesley* makes explicit what *Bass* held implicitly.

In that regard, *Bass* and *Lesley* work in conjunction to establish the following:

> The executive duty varies depending on the nature of the nonexecutive interest. If the nonexecutive interest is a fee interest, then the executive owes the nonexecutive a duty of utmost good faith and fair dealing the moment the fee interest becomes nonparticipatory. Therefore, if the executive refuses to lease and the refusal is arbitrary or motivated by self-interest then the executive may have breached his duty. However, if the nonexecutive interest is merely a nonparticipating royalty, then the executive's duty of utmost good faith and fair dealings does not arise until the executive executes a lease. Therefore, there can be no breach for failure to lease.

If the severance of wind rights is limited to a mere nonparticipating royalty interest, then the purpose of limiting severance in this way is

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4,100 acres; it exercised its executive right to limit future leasing by imposing restrictive covenants on the subdivision. This was no less an exercise of the executive right than Manges's execution of a deed of trust covering Guerra's mineral interest.").

64 *Id*. at 491.

frustrated, because only the subsequent landowner benefits. Put another way, if the purpose of a wind-based nonparticipating royalty system is to allow a prior landowner to profit from his or her wind rights, while at the same time allowing a subsequent landowner to retain a modicum of control over development, then only the latter is fulfilled because the royalty owner lacks a remedy against the executive for failure to lease.

If, however, *Lesley* stands for the proposition that a royalty owner can also challenge a refusal to lease, then the duty owed to a nonparticipating wind royalty holder becomes even murkier. For example, if the landowner entered into a solar lease agreement where a substantial part of the surface subsequently became covered with arrays, a breach has likely occurred. Entering into the solar lease agreement is an exercise of the executive right (just as placing restrictive covenants on the land was an exercise in *Lesley*), and entirely or substantially covering the surface unfairly diminishes the value of the nonexecutive interest. However, what about a simple refusal to lease? According to the court in *Lesley*, a refusal to lease is only a breach if the refusal was arbitrary or motivated by self-interest.[65] Would it be arbitrary for a landowner to refuse to lease if the prior landowner reserved one hundred percent of any royalty received? In this scenario, the subsequent landowner is merely entitled to nominal surface damages and must suffer the considerable surface disturbance that comes along with a commercial wind farm. It certainly does not seem arbitrary to refuse to lease in this scenario. Would the refusal be motivated by self-interest? This begs the question, what amount of self-interest is too much? If as the courts have held, an executive is not required to subvert his or her interest in favor of the nonexecutive, then in the preceding scenario how this could be considered too much self-interest is unclear. Although limiting severance of wind to a nonparticipating royalty sounds good in theory, it does not completely solve the competing landowner conundrum and may indeed have unintended consequences.

a. Limiting the Size of the Severed Wind Estate

Another solution would be to simply limit how much of the wind estate can be severed, i.e., subject the prior landowner to an upper limit (e.g., fifty percent of the wind estate may be severed). In fact, this strikes a nice balance between allowing a prior landowner to profit from his or her wind rights and allowing a subsequent landowner to control development. Moreover, their interests are aligned. As stated above, one of the downfalls of a nonparticipating royalty model is that if the prior landowner severed one hundred percent of any future royalty, his interest is not aligned with the subsequent landowner who is merely entitled to surface damages. Hence, if both parties own an executive wind interest, there is no misalignment.

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[65] *Id.*

b. Regulating the Negotiations

In lieu of limiting the severance of wind rights to a non-participating royalty or limiting the size of the severed estate, a final alternative would be to allow a full severance but require that the owner of the surface estate be allowed to participate in lease negotiations regardless of whether there has been a complete or a partial severance. Thus, if there has been a complete severance, the wind company would be required to take a surface lease from the surface owner for the purposes of negotiating surface damages and for negotiating the placement of infrastructure. Likewise, if there has been a partial severance and the surface owner's wind interest is nonexecutory, the surface owner would be allowed to join in the lease for the same purposes. The attractiveness of this approach is, conceivably, that it would lead to cooperation among the owners of mere wind rights and the surface owner, in turn leading to a more balanced lease. In other words, the surface owner should not be negotiating benefits for an interest that he or she does not have an interest in. Similarly, the owner of mere wind rights should not be negotiating for benefits that belong to the surface owner—if the surface owner owns both an interest in the wind and the executive right, so much the better.

Like a nonparticipating royalty scheme, the first step in effectively implementing this approach is to require the owner of the executive right to also own an interest in the wind estate. However, here, unlike with a nonparticipating royalty, the concern is not that the surface owner loses control over development—this is remedied by requiring the wind company to take a surface lease—but rather that the wind interest owners will be affected because their interests are not aligned with a naked executive.

The most obvious problem with this approach, however, is that if the surface owner attempts to obtain commercially unreasonable surface damages or attempts to severely restrict surface use then the wind company may have no other option but to walk away; thereby hindering development. In that scenario one option may be to simply give the surface owner the opportunity to negotiate a surface lease, but if he or she chooses not to or is unreasonable then the project can still go forward without the surface lease. Another option may be to appoint an independent expert or a panel of experts to set the surface damages (this approach is often used when the wind company and the landowner cannot agree on the cost of a surety bond to secure the decommission of the project and cleanup of the land).

In the end, allowing severance of wind rights will inevitably lead to competing interests between the owner of the wind rights and the surface owner, especially in light of a complete severance. Unfortunately, no solution perfectly balances these competing interests. However, options do exist for striking a somewhat more equitable balance than is currently employed in the oil and gas industry. No solution is without drawbacks, and the appropriate

remedy will require a balancing test between promoting robust wind energy development and the respective interests of the relevant parties.

B. Administrative Hassle

Aside from the competing landowner conundrum, the most frequently cited reason for banning the severance of wind rights is the administrative hassle created by the fractionalization of the wind estate and locating multiple and/or missing co-tenants of the wind estate. However, the administrative hassle to the wind company should hardly be used as justification for banning the severance of wind rights. The oil and gas industry has grappled with these exact same issues for over a century and despite this Texas is still the leading oil and gas producing state in the United States.

1. Fractionalization

A rather obvious problem of creating a separately severable estate (wind or otherwise) is fractionalization—the splintering of the estate into smaller and smaller interests, generally because of generational transfer. While seemingly benign, the effect of fractionalization on mineral development, particularly, leasing, has prompted at least one wind scholar to suggest banning the practice entirely to avoid fractional wind interests.[66] To the extent that maximum wind energy development is desirable, hindrances to achieving that goal should be avoided. However, the added burden of locating multiple mineral owners and obtaining their consent to develop has not had a discernible impact on recent mineral development. Yes, it has made leasing difficult, but Texas and most other major oil and gas producing states gradually adopted remedies to mitigate the effects of fractionalization. Most of these remedies, as will be shown, can easily be adapted for wind, thereby negating the burdensome effects of fractional wind interests and the need to completely ban the practice (a result that would rob landowners of a valuable commodity).

Undoubtedly, the biggest problem wind developers will face because of fractionalization is multiple co-tenants, one of whom may refuse to lease or otherwise cooperate with development. It is fundamental in property law that when two or more persons own an interest in property, they are said to have concurrent interests, and unless there is evidence to the contrary, they have a common interest and proportional right to the enjoyment of the whole.[67] In that regard, whether a developer must obtain unanimous consent among the cotenants is sure to arise. As one would expect, oil and gas developers were

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[66] *Sins of the Father*, *supra* note 14, at 418–20.

[67] *See Byrom v. Pendley*, 717 S.W.2d 602, 605 (Tex. 1986) (there is a "distinctive legal relationship existing between cotenants; that is, [that] each cotenant has a right to enter upon the common estate and a corollary right to possession.").

faced with the same question and the courts in the major oil producing states responded by announcing two rules: the minority rule and the majority rule.

Under the minority rule, unanimous consent is required.[68] Thus, even a cotenant with a very small interest can enjoin development of the entire project.[69] Apparently, the overarching rationale, although there are slight variations, is based on the law of waste—a change by a cotenant in the character of the real property that destroys or damages the property's value is illegal. As one early court put it, if a cotenant cannot legally harm the property himself why should that cotenant be allowed to authorize a lessee to do what he cannot.[70] Conversely, under the majority rule, to which Texas subscribes, one owner can develop without the consent (and over the objection) of his or hers cotenant(s), subject only to the requirement that they account to the non-consenting cotenant(s) for their proportional share.[71] As one well-respected and authoritative treatise on the subject notes, the rationale behind the majority rule is centered on the recognition that the law of waste, which applies to tenants for years and tenants for life, is not applicable for tenants with a fee interest; but, more importantly, is a recognition that although cotenants are entitled to exclusive possession, minerals cannot be enjoyed, nor can they become valuable, until they are extracted. [72] However, as oil and gas developers and practitioners are acutely aware, the second prong of the majority rule—that you must account to the nonconsenting cotenant for their proportional share—has caused considerable consternation for the oil and gas industry; relegating the rule to a rule of last resort, invoked only when dealing with very small interests.[73]

In the context of wind (or for that matter minerals), there is a certain allure to the notion that a cotenant should be able to demand that their proportionate share of the wind not be harvested without their consent; however, much like oil and gas, wind has little, if any, value until it has been developed and used to generate electricity. If fact if you ask just about any farmer, they will be sure to tell you that the wind itself is more of a nuisance and one of its only redeeming attributes is that they can make a profit from executing a wind lease. Nevertheless, accepting the majority rule or even a modified version of it is not without its own drawbacks. Specifically, by

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[68] *See generally* Law v. Heck Oil Co., 145 S.E. 601 (W. Va.1928).

[69] *See e.g*., Heck Oil Co., 145 S.E. 601 (the owner of an undivided 1/768 interest can prevented development of the entire tract).

[70] Murray v. Haverty, 70 Ill. 318, 320 (Ill. 1873).

[71] EUGENE KUNTZ, A TREATISE ON THE LAW OF OIL AND GAS § 5.3 (2014).

[72] *Id*.; *See also* Prairie Oil and Gas Co. v. Allen, 2 F.2d 566 (8th Cir.Okl. 1924) (rejecting a cotenants argument that development without her consent constituted a trespass, because cotenants have the right to extract minerals from concurrently owned property as the minerals can only be enjoyed by developing them).

[73] Ernest E. Smith, *Methods for Facilitating the Development of Oil and Gas Lands Burdened with Outstanding Mineral Interests*, 43 Tex. L. Rev. 129, 131, (December 1964) [hereinafter *Methods for Facilitating Development*].

adopting the rule, if a wind company chooses to carry a non-developing cotenant's interest, then the wind company would be obligated to account to the non-developing cotenant(s). And as the oil and gas industry can attest, that can become quite burdensome. But is that requirement enough to abandon the majority rule in favor of the minority rule? I would submit that it is not and doing so would needlessly hinder wind-energy production, although there are certainly arguments to the contrary.

a. Partition

Without a compulsory pooling statute, the only other effective means of circumventing a non-consenter's obstinateness is a partition.[74] In Texas, partition is a matter of legal right; thus, since wind is unequivocally an interest in real property, the developing cotenant should be able to petition the court for a partition in-kind or by sale.[75] As a matter of explanation, a partition in-kind is the subdivision of each party's proportionate interest in the whole to an interest in severalty; whereas, a partition by sale is the forced sale of the entire estate through a public auction, followed by a proportionate division of the proceeds.[76] Generally speaking, because a partition in-kind results in less ownership disruption—i.e., no one is completely divested of his or her interest—it is favored over a partition by sale, where everyone is completely divested. Yet, as the oil and gas industry found out, an equitable in-kind partition of minerals is generally unattainable because "it is [nearly] impossible to determine the amount . . . of oil and gas underlying a tract, . . . [which] could result in . . . tracts of greatly unequal value" if partitioned in-kind.[77] Therefore, in most circumstances, the default for partitioning oil and gas minerals is a partition by sale.

At first glance, this would seem less problematic in the context of wind. For example, several factors—reservoir size, drive type, where the reservoir bottoms, where it up-dips, etc.—combine to make an equitable partition in-kind nearly impossible in the context of minerals. However, if one assumes that wind blows equally across the entire surface, the fear of creating estates of unequal value does not seem particularly relevant. Even if the wind does not blow with equal force—because of a natural or manmade impediment (or because of a particularly large tract)—these impediments should be readily apparent and easily accounted for when executing a partition. Moreover, there are genuine methods by which to measure the characteristics of wind

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[74] *See id*. at 136 ("The most obvious solution to the problem of a tract rendered unleasable by inability of its co-owners to agree upon a plan of development is, of course, partition in kind.").

[75] *See* TEX. PROP. CODE §23.001 ("A joint owner or claimant of real property . . . may compel a partition of the interest or the property among the joint owners or claimants.").

[76] OWEN L. ANDERSON ET AL, HEMINGWAY OIL AND GAS LAW AND TAXATION, 131 (4th Ed. 2004) [hereinafter *Hemingway*].

[77] *Id*.

over a tract of land (e.g., meteorological towers). In fact, generally as a precursor to obtaining financing to build a wind farm the wind company must show 18 months to 2 years' worth of data from meteorological towers and similar equipment.[78] On that basis, a partition of wind-rights in-kind seems somewhat more attainable than a partition in-kind of oil and gas minerals.

However, in practice, a partition in-kind of wind may still prove to be the least preferred method. Specifically, since wind farms require considerable use of the surface,[79] a partition in-kind could lead to several unintended consequences. For example, if the new "tract" is too small to support a turbine, then the newly partitioned owner would have been better off financially prior to the partition. That is to say, assuming the newly partitioned owner did not own an interest in the surface (e.g., they were conveyed an undivided 1-acre interest in the wind), prior to the partition he or she would have been entitled to a proportionate share of the production of wind energy on the entire tract, but once the tract is partitioned, if the owner does not get a turbine then he or she likely would not get paid a royalty. Even assuming the newly partitioned owner does own an interest in the surface, without a turbine he or she is likely relegated to nominal surface damages in this scenario. Correspondingly, if the newly partitioned owner decides not to lease or is not offered a lease, and the proposed wind farm is constructed around that owner's tract, depending on the size of the tract and the surrounding geography, they may be effectively precluded from subsequently leasing their interest in the wind resources—i.e., there is not enough surface acreage available to build roads, install transmission lines, or otherwise support the surface footprint of a commercial wind farm; not to mention transmission capacity and congestions concerns that may arise.

Accordingly, without an equitable means of partitioning wind rights in-kind, courts by default would be forced to order a partition by sale at a public auction. Despite the fact, however, that a partition by sale is disfavored from an ownership disruption standpoint, from the standpoint of maximum wind-energy production, it may be better suited for partitioning wind rights (or for that matter mineral rights). Even assuming that a court was able to equitably order a partition in-kind, the result would still be several smaller tracts (or interests) that the wind company would have to lease, but in reality, several small tracts that the company would have to build around—hence the need for a partition in the first place. However, with a partition by sale the entire wind estate would be reunited and auctioned off to the highest bidder (in all probability the surface owner or the wind company). That is to say that the highest bidder is purchasing the entire wind estate rather than multiple bidders purchasing fractional interests. Thus, the wind company would only have to lease from one entity thereby solving one of the practical

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[78] *Texas Wind Law*, *supra* note 3 § 2.01.
[79] *Texas Wind Law*, *supra* note 3 § 2.01.

consequences of fractionalization—executing multiple wind leases for the same property.

In lieu of ordering a partition by sale, an interesting twist for a court to consider when ordering a partition is a partition by allotment (or the buyout remedy). Essentially, this is a partition through private sale. With a partition by allotment, instead of ordering the sale of the entire wind estate via a public auction, the court sets a specified sum for the interest being partitioned and allows one or more cotenants to directly purchase that interest.[80] To the author's knowledge, this type of partition is only available in a few states, and is generally used to partition personal property that cannot be partitioned in-kind (e.g., a vacation house), or whose only real value is sentimental value (e.g., grandfather's hunting rifle). However, in the context of wind rights, a partition by allotment arguably achieves a better result than a traditional partition by sale.

Although conceptually more in line with a partition by sale, in practice, it would seem to be more in line with a partition in-kind. Specifically, instead of completely divesting all the cotenants of their wind rights, only the nonconsenting cotenant(s) is divested of his or her interest, i.e., there is less ownership disruption, which is one of the main reasons partitions in-kind are favored. More importantly, it accomplishes essentially the same thing as a partition by sale but with better results from the perspective of the developing cotenant(s). First, as alluded to above, courts can avoid completely divesting every cotenant of their interest (some of whom, all things being equal, may have preferred to keep their interest) because of one or more cotenants who simply refused to lease. Second, although one or more cotenants would still be divested of their interest, they nonetheless would have lost their interest with a partition by sale. That is to say, that regardless of whether the court was to order a partition by sale or a partition by allotment, those cotenants would still have lost their interest. But the result of a partition by allotment, as opposed to a forced sale at a public auction, is that the divested cotenant would likely receive higher compensation for their interest, i.e., the court could charge the developing cotenants a premium to purchase the non-developing cotenant's interest. Finally, although the wind company would lose the benefit of only having to deal with one owner, this would seem to be a fair tradeoff as the cotenants with whom it would have to deal are in fact the cotenants who want to lease the property to the wind company in the first place.

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[80] *See generally* Thomas Mitchell, *Reforming Property Law to Address Devastating Land Loss*, 66 ALA. L. REV. 1, 13 (2014).

b. Carrying the Recalcitrant Cotenant

If a wind developer is unable to circumvent the majority rule, then much like their cousins in the oil and gas industry, their only option would be to carry the non-developing cotenant's interest (a result that would force the wind company to account to the non-developing cotenant for his or her proportional share of the proceeds of wind-energy production). Although, this may sound simple enough on its face, if the analogous duty in oil and gas development can teach wind developers anything, it is that it is far from simple. Consider the following: an oil company who chooses to carry an interest must account to the owner of that interest for his or her "proportionate share of the proceeds of development less a proportionate share of the reasonable and necessary costs of development and production."[81] However, those costs can only be deducted from the proceeds of development.[82] Thus, if the oil company drills a dry hole it will be unable to recoup the non-developing cotenants share of the costs and expenses of drilling the well.[83] However, the burden of this accounting requirement becomes more apparent after the oil company has achieved production, and must then decide which of its costs and expenses were sufficiently reasonable and necessary enough to warrant a deduction from the carried interest.[84] Unfortunately, "reasonable and necessary" has proven to be quite elusive, with considerable gray area for disagreement.

As the above synopsis illustrates, carrying a non-developing cotenant's interest is far from simple and is precisely why it is avoided when possible. If a wind company is forced to carry a non-developing wind owner, it is sure to prove itself equally as burdensome. Unfortunately, for wind companies, the issue of accounting to non-developing-wind-interest owners has not been addressed, and accordingly they are left with little guidance if they are forced to do so. Moreover, it cannot fully be addressed with a statute. That is to say, that a statute that lists what costs can and cannot be deducted may prove to be more of a hindrance than a benefit as it would require constant revision as the wind industry continues to mature. But that is not to say, however, that

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[81] Harold R. Williams, *The Effect of Concurrent Interests on Oil and Gas Transactions*, 34 TEX. L. REV. 519, 523 (April 1956); *See also* Prairie Oil & Gas Co. v. Allen, 2 F.2d 566, 574 (8th Cir. Okla. 1924). However, once payout has been achieved—when the costs of development and production have been recouped—the non-developing cotenant is then entitled to the net proceeds of production. *See* Marla E. Mansfield, *A Tale of Two Owners: Real Property Co-Ownership and Mineral Development*, 43 ROCKY MTN. MIN. L. INST. § 20.05 (1997).

[82] Williams, *supra* note 67 at 523.

[83] *Id*.

[84] See Mansfield, *supra* note 69 at § 20.05 for a more in-depth discussion on the intricacies of accounting to non-developing mineral owners, however it is sufficient for the purposes of this paper that generally speaking an oil and gas developer can deduct the reasonable and necessary costs of drilling for, producing, and marketing oil and gas minerals. *But see also* White v. Smyth, 214 S.W.2d 967 (Tex. 1948) (challenging crew and equipment costs as excessive).

the legislature should pass on the issue entirely. Instead, the legislature should create a test by which the costs can be measured.

Any such test should accomplish two things. First: draw as bright of a line as possible. Second: create an equitable result. In that regard, a test that measures the deductibility of certain costs and expenses as those that will directly benefit the non-developing cotenant's interest, and that are commercially reasonable achieves both.

However, for this test to work, "directly benefits" needs to be carefully defined; otherwise, it fails for the same reason as the reasonable and necessary test (i.e., it is ambiguous). Fortunately, defining "directly benefits" would not lead to the same problems created by listing what costs can and cannot be deducted—a direct benefit to an interest is relatively constant, whereas reasonable and necessary costs may fluctuate over time. For instance, "directly benefits" could be defined as follows:

> A cost or expense directly benefits a non-developing cotenant's interest if the non-developing cotenant would have had to incur a similar cost or expense had he or she independently developed their interest.

Thus, by applying this test, a wind company would know with reasonable certainty that if the non-developing cotenant would have incurred a similar cost or expense, then it could be deducted (i.e., a bright line); provided, however, that it incurred those costs or expenses in a commercially reasonable manner. For example, it should allow a wind company to easily deduct the costs of installing and maintaining meteorological towers and conducting other feasibility studies (e.g., transmission access studies, and cultural and environmental-impact studies) because each directly benefits the non-developing cotenant's interest. Indeed, a wind farm would likely never be built without the data provided by these towers, and the results provided by these studies.[85] The same analysis should apply with equal force to most construction and maintenance costs as well, e.g., installing and maintaining power lines, substations, and turbines.

While it may be that very little would not fall under the "directly benefits" test, a less encompassing test would be blatantly unfair to the wind company. That is to say, that by executing a wind lease in exchange for a royalty, the cotenant is shifting the risk of developing their interest onto the wind company. Thus, a cotenant who does not lease their interest in exchange for a royalty, but instead takes his or her proportional share of the proceeds of development, should be liable for their proportional share of the risks involved in developing the property.

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[85] However, if MET towers were installed, or the feasibility studies were performed prior to the wind company taking a wind lease, e.g., pursuant to an option agreement, then the result is less clear but more than likely are more attuned to the costs of doing business.

2. Title Uncertainty & Missing Cotenants

As the foregoing illustrates, recalcitrant cotenants are problematic to say the least. Unfortunately, the second problem created by fractionalized wind interests, or as one wind developer phrased it: the administrative hassle of allowing severance, has the potential to be just as problematic if left unchecked. Specifically, increased fractionalization of the wind estate will affect the title of the severed wind estate in two significant ways.

First, as the wind industry continues to mature and wind estates continue to splinter into smaller and smaller interests, which will slow development as it will force wind companies to expend increasing amounts of time perfecting titles. For example, the oil and gas industry is currently experiencing this problem (although it is quite lucrative for title attorneys), as often times a mineral estate will have splintered to such a point that there are countless fractional owners living in all corners of the world, who nonetheless must be accounted for and properly leased. Although this may sound harmless, failures to properly lease have had disastrous effects on oil companies (e.g., lawsuits, cancelation of leases, etc.). And often the effects of failing to account for mineral interest ownership correctly can create a cloud of uncertainty surrounding the estate's title.

Second and closely related, but potentially even more sinister, are those interests that companies have discovered but whose owners cannot be located to execute a lease. Presumably, a wind company faced with this situation would have no other option but to carry the interest—undesirable—or simply not lease the property—even more undesirable. Thus, without adequate alternatives, it is safe to assume that eventually, the wind industry will reach a point where it is no longer economic to develop properties subject to prior severances.

Furthermore, the industry must draft any remedy that it adopts with an eye towards fully promoting wind-energy production. To that end, the industry should give preference to remedies that avoid judicial adjudication. That is to say, any remedies that hinge on a court order or proceeding are just as undesirable as simply carrying the interest, i.e., the expense and time involved outweigh the benefit. By way of example, a major barrier to adopting aggressive remedies in Texas for dealing with dormant mineral interests and missing mineral interest owners is that the practice of severing mineral rights has gone unchecked for over a century, making it nearly impossible to address them retroactively. Fortunately, with the wind industry still in its infancy, Texas can take the opposite approach with severed wind interests and proactively address the title impacts of fractional wind interests, thereby setting the stage for other wind-energy producing states.

a. Recording

With that in mind, the first step (and likely one of the least invasive) is to enact strict statutory recording requirements for severed wind interests. One option, which would exponentially aid the process, is to require each county clerk to create and maintain separate tract indices for all wind-related instruments, e.g., leases, severances of wind rights, etc. However, since parties have been severing wind rights for several years, instead of grandfathering prior recorded instruments the better approach would be to provide a grace period. That is to say, that at the end of the grace period any instrument not rerecorded would be treated as unrecorded; otherwise, the effectiveness of the tract index is nullified. Another option to consider is to require anyone presenting an instrument for recordation that purports to sever or otherwise transfer wind rights, to record alongside the instrument a memorandum or notice evidencing their claim. For example, requiring that any such memorandum or notice contain the following information would significantly aid in locating wind interest owners:

> (1) The name of the current surface owner, (2) the name of the grantor (if different from the current surface owner), (3) a property description sufficient to satisfy the statute of frauds, (4) the name, telephone number, and address of the grantee, (5) the book, volume, and page number where the granting instrument is recorded, and (6) language describing the granting instrument, including the percentage of the wind estate conveyed.

However, to ensure the proper effect, a failure to record the memorandum or failure to comply with the criteria, as set out above, should be treated as nullifying the recording of the granting instrument and the memorandum—i.e., the granting instrument would be treated as an unrecorded instrument, and a defective memorandum could not be used to impute notice.

Taken together, these two tweaks would go a long way in curing the title impacts of fractionalized wind interests. However, they only address part of the problem. Specifically, while they should dramatically reduce title uncertainty, the problem of missing wind interest owners remains.

b. Missing Interest Owners

Of the states, Texas excluded, that have addressed the similar problem in oil and gas, the two remedies most frequently used have been marketable

record title acts[86] and dormant mineral interest acts.[87] Texas, on the other hand employs a receivership mechanism.[88] And although they each reach a similar result, the means with which they reach the result are different. Specifically, marketable title acts and dormant mineral acts extinguish an unsaved interest after a specified statutory period, e.g., twenty to fifty years; whereas a receivership merely allows an oil company to take a lease on the interest. The following discussion will explore the effectiveness of each as applied to dormant wind interests and missing wind interest owners.

i. Marketable Title Acts

Unlike dormant mineral interest acts, discussed below, marketable title acts[89] are a general recordation remedy aimed at enhancing marketability[90] by extinguishing all interests that conflict with a record chain of title.[91] That is to say, they are not enacted specifically to deal with dormant mineral (or wind) interests; rather, that has been an indirect result. In fact, at least four states expressly exempt mineral interests.[92]

In any event, simplifying somewhat, once a title examiner has determined the root of title—the transaction creating the interest claimed—any interest not appearing of record within a statutorily set period prior to the root of title is extinguished, unless saved by filing a notice of intent to preserve. Put another way, the title examiner must examine the chain of title from the present to the date the root of title was created, and then continue into the past for the statutory period; any interest not appearing (either by rerecording or filing a notice of intent to preserve) during this search is extinguished. The obvious benefit to this approach is that it automatically terminates unsaved interests, which negates the need for separate judicial adjudication.

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[86] In 1993, Texas Representative Tom Uher proposed a marketable record title act. However, it was eventually defeated. *See* H.B. 1537 (1993), available at http://www.legis.state.tx.us/tlodocs/73r/billtext/html/hb01537i.htm.

[87] *See generally Methods for Facilitating Development*, *supra* note 60 at 149-55.

[88] *See generally* TEX. CIV. PRAC. & REM. §64.091.

[89] *See generally* HOVENKAMP, *supra* note 22 at 532.

[90] Marketability implies that a title "is reasonably free from doubtful questions of law or fact." HOVENKAMP, *supra* note 22 at 529.

[91] Chain of title (or record chain of title), on the other hand, represents the regular series of recorded instruments from the original patent or former state sovereignty HOVENKAMP, *supra* note 22 at 618.

[92] *See e.g.*, UTAH CODE ANN. § 57-9-6 (5) ("This chapter may not be applied to . . . extinguish any right, title, estate, or interest in and to minerals."); KAN. STAT, ANN. § 58-3408 (d) ("This act shall not be applied to bar or extinguish . . . any mineral interest which has been severed."); OKLA. STAT. ANN. TIT. 16 § 76 (A) ("shall not be applied to bar any . . . mineral or royalty interest which has been severed."); N.C. GEN. STAT. ANN. § 47B-3 (5) ("Such marketable record title shall not affect or extinguish . . . [r]ights of any owners of mineralrights."); *But see* MICH COMP. LAWS ANN. § 565.101 ("Any person, having the legal capacity to own land in this state, who has an unbroken chain of title of record to any interest in land for 20 years for mineral interests . . . shall . . . have a marketable record title to that interest.").

A similar framework could prove very beneficial to wind companies and the industry, especially if applied in tandem with the recording requirements discussed above. Specifically, it would significantly reduce the prevalence of missing cotenants. It does this, first, by extinguishing ancient unsaved claims, which are the most common source of missing interest owners, and second, through the notices of intent to preserve, which theoretically should provide developers with relatively recent information regarding the interest owner, and their whereabouts. In fact, this result could be strengthened by requiring the notice of intent to comply with the same criteria as the recording memorandums, discussed above. Thus, a marketable title act or provision, if drafted carefully, could effectively address both title issues created by fractionalization of the wind estate.

Factors to consider when drafting such a provision,[93] include what interests are extinguished, where the interests revert once extinguished, and the effect of references to an interest. One of the early problems with marketable title acts, as applied to dormant mineral interests, was often the language of the act was worded in such a way that it was unclear whether royalty interests were subject to the act.[94] If they were not, for example, then, even though mineral fee interests would be extinguished, the examiner was still required to trace the title past the statutory period, undercutting the act. Thus, in the context of wind it must be made expressly clear that any interest in a severed wind estate (fee or otherwise) is subject to the provision. Likewise, it should be made expressly clear that if an interest is extinguished it reverts to the surface estate. It is quite clear that if the interest was directly carved from the surface estate, then that is where it should revert; however, what if the interest was carved from a preexisting severed interest. It is conceivable that, absent express language to the contrary, this may become an issue. But consider the implications if the individual who conveyed that interest, for example, died intestate. Now consider that reuniting extinguished claims with the surface alleviates the hardship placed on landowners who do not own any of the wind estate. He or she must suffer the disruption to his or her land, with only nominal surface damages to compensate for the disruption. Finally, it must be made expressly clear that a mere reference to an interest is insufficient to save it; otherwise, the indirect benefit of the notice-of-intent-to-preserve is nullified.

ii. Dormant Interest Acts

Another option to consider would be a provision fashioned after the dormant mineral interest acts adopted by several oil and gas producing states.

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[93] To be clear, although Texas may in fact benefit from a generally applicable act, that is far beyond the scope of this paper. For an excellent discussion, however, see Sue Ortman, Uslta: Marketable Record Title Act—A New Title Theory and Its Effect on Texas Law, 12 ST. MARY'S L.J. 462 (1980).

[94] *See Methods for Facilitating Development*, *supra* note 60 at 149-55.

Essentially, these acts serve to extinguish any interest not "used" for a statutorily defined period.[95] In fact, these acts are nothing more than a common law variant on Louisiana's Liberative Prescription model, which terminates mineral servitudes after ten years if it has not been "used."[96] The flaw with this option should be readily apparent—extinguished for nonuse, a fact issue that would at a minimum require a quiet title action before the interest would be freed.[97] Hence, it is at odds with a goal of effectively, and expediently clearing title to allow wind-energy production to proceed. However, it would provide wind-interest owners with greater protection.

Nevertheless, there are two main variants: self-executing,[98] and notice;[99] however, both are misnomers and turn on a very subtle distinction. In the former, an interest terminates for nonuse if a notice of claim is not filed, regardless of whether the interest owner was given notice that the interest had terminated and vests with the surface owner upon conclusion of a successful quite title action. In the latter, an interest only terminates after there has been nonuse, followed by a failure to file a notice of claim (after being provided with notice of the lapse) and again, upon conclusion of a quiet title action the interest vests with the surface owner. As the above should show, either variant arguably goes beyond simply protecting interest owners, and again places an onerous duty upon developers.

iii. Receiverships

Irrespective of any other remedy that may or may not be adopted in the future for severed wind rights, any statute that does not allow for a receivership is critically flawed. In fact, this is Texas's sole remedy for dealing with missing mineral owners, and one forward thinking scholar has argued for a similar statute for wind rights.[100] Simply stated, a receivership is a judicial remedy in which, upon petition to the district court, a receiver (generally the county judge) is appointed to execute a lease on behalf of an interest-owner who cannot be located, with any proceeds due to that owner being held in the court's registry.[101]

In the context of wind, the benefits that a receivership statute or provision would provide are too numerous to list. First, of all the remedies

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[95] Timothy C. Dowd, *Clearing Title of Long-Lost Mineral Owners*, 54 ROCKY MTN. MIN. L. INST. 30-1, at § 30.03(3) (2008).

[96] JOHN S. LOWE ET AL., CASES AND MATERIALS ON OIL AND GAS LAW, 165 (6th Ed. 2013) [hereinafter *Cases and Materials*]; *See generally* LA. REV. STAT. ANN. §§ 31.28 through 31.104.

[97] *See e.g.*, Texaco, Inc., v. Short, 454 U.S. 516, 553-54 (1982) (noting that for a dormant interest to conclusively revert and vest with the surface owner a subsequent quiet title action would be necessary to determine if there had in fact been 20 years of nonuse).

[98] *E.g.*, IND. CODE. ANN. §§ 32-23-10-1 through 32-23-10-8.

[99] *E.g.*, KAN. ANN. STAT. §§ 55-1601 through 55-1605.

[100] *See* Roderick E. Wetsel, *Mineral Receiverships and Beyond*, STATE BAR OF TEXAS 17-19 (2011).

[101] *See e.g.*, TEX. CIV. PRAC. & REM. §64.091.

discussed, a receivership is undoubtedly the easiest to adopt. Texas's mineral receivership statute has proven to be very effective for leasing a lost-interest owner's interest (and there is no reason to think that it would not do the same for wind interests); thus, the entire statute can be applied to severed wind interest merely by expanding the statute's scope, and making a few cosmetic changes.[102] Second, it would work in tandem with a marketable title provision to conclusively cure the missing cotenant problem. Specifically, whereas a marketable title provision solves this problem by terminating ancient claims, a receivership statute solves it by allowing interests to be leased that do not qualify for termination under the marketable title provision. In that regard, the two are in harmony. Finally, although it requires judicial intervention, and can be time consuming and expensive, many of the expenses can be recouped from any proceeds owed to the missing owner.[103]

Although it is beyond the scope of this paper to discuss the intricacies of obtaining a receivership,[104] a brief synopsis of the main steps should prove to be instructive as they would be the same steps required for obtaining a wind receivership. In that regard, the first step, prior to petitioning the court, (and one that must be pleaded) is, that "a diligent but unsuccessful effort to locate the defendant . . . [was made, and that] substantial damage or injury" will result unless a receiver is appointed.[105] This showing is accomplished, at a minimum, by searching the county and district clerks' indices and registers books, telephone directories, voter registration records, probate records, and internet searches.[106] After completing this search and pleading to the district court that development will be hindered, the next step is to serve the defendant (i.e., the missing interest owner) with notice of the receivership proceedings, generally by newspaper publication.[107] Finally, following the return of service,[108] an attorney *ad litem* is appointed to represent the defendant's interest (if not already so appointed) and a hearing is held, upon the conclusion of which a receiver is appointed (who executes a lease) and any monies owed to the defendant are placed in the court's registry.[109]

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[102] For example, Section 64.091 and Section 64.093 require that the missing interest owner, among other things, not have paid taxes on the interest for the five preceding years—wind interests are currently not taxed; thus, they should be excepted from this requirement.

[103] Wetsel, *supra* note 90, at 14 (explaining that the costs of publishing notice of an intent to take a receivership, as well as the filing fees, and attorney-ad-litem fees are generally recoverable); *See also* TEX. CIV. PRAC. & REM. § 64.091 (h).

[104] For an excellent discussion of such, see Wetsel, *supra* note 90.

[105] TEX. CIV. PRAC. & REM. §64.091 (c)(1)-(2).

[106] Wetsel, *supra* note 90 at 9.

[107] *Id*.

[108] Note that publication must be made once a week for four consecutive weeks and that the return of service must be dated at least twenty-eight days after the date of first publication. *See id*. at 10.

[109] *Id*. at 10-14.

iv. Federal Land Policy & Management Act?

Finally, a somewhat more radical alternative that could be considered would be a variation of the federal recording system for unpatented-mining claims on federal lands.[110] Under the Federal Land Policy & Management Act (FLPMA), the owner of an unpatented lode or placer mining claim, in order to preserve the claim, is required to file either a "notice of intention to hold the mining claim . . . [or] an affidavit of assessment work performed thereon" with the Bureau of Land Management once per year.[111] Moreover, a failure to timely file a notice or an affidavit is treated as conclusive evidence of an intent to abandon the claim.[112]

A brief glimpse into the history of the FLPMA shows some remarkable corollaries to an unchecked severed wind estate. Under the federal mining laws, "[a]ll valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are . . . free and open to exploration and purchase" by any U.S. citizen and become possessory interests upon the meeting of certain requirements.[113] As a result, prior to the enactment of the FLPMA, due to the vast number of federal mining claims (which were recorded in the state in which they were located), any transaction involving federal lands were frustrated because of the time involved in conducting a title search, and if a dormant claim was found in conducting a formal administrative hearing.[114] In response, Congress enacted the FLPMA, which as the U.S. Supreme Court put it, was "designed both to rid federal lands of stale mining claims and to provide federal land managers with up-to-date information that [would allow] them to make informed land management decisions."[115] That is about as close of an analogy to the results of fractionalized wind interests as there is. However, due to the difficulty of implementing such a system further discussion will be reserved for another day.[116] It is sufficient for the purposes here that a similar system would be very effective in removing title uncertainty and curing the problem of missing interest owners.

Unfortunately, one of the major drawbacks of allowing wind rights to be severed is fractionalization of the wind estate. In that regard, the call by some wind scholars to ban the practice entirely is certainly not unfounded.

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[110] *See generally* 43 U.S.C § 1744.

[111] *Id*. at (a)(1).

[112] *Id*. at (c); *See also* U.S. v. Locke, 471 U.S. 84 (1985) (upholding a ruling that a claim had been abandoned by filing the notice of intention to hold claim one day late).

[113] 30 U. S. C. § 22.

[114] U.S. v. Locke, 471 U.S. 84, 87 (1985).

[115] *Id*.

[116] For example, the success of the FLPMA's recording system is due in large part to the Bureau of Land Management, who is charged with carrying out the system. Without a similar regulatory body for wind energy, then presumably the burden of carrying out this type of system would fall on county clerks, who all things being equal are often short staffed and underfunded.

However, doing so would needlessly rob landowners of a valuable commodity. But fortunately, by taking the appropriate steps now, before the effects of fractionalization get out of hand, those effects can be mitigated.

As the preceding discussion illustrates, the first step in mitigating those effects is to enact a carefully drafted statute. In doing so the legislature can do no worse than to look to how oil and gas producing states have dealt with those effects. That will necessitate that cotenants are given the ability to partition (including by allotment), as well as creating a carefully tailored test for accounting to non-developing cotenants that turns on the benefit to the non-developing interest. It will also necessitate the enactment of additional remedies for dealing with the title impacts of fractionalized wind interests. In that regard, a combination of strict recording requirements and marketable title provisions would achieve the appropriate balance of protecting wind interest owners and promoting robust wind-energy production. Finally, it is worth reiterating that the adverse effects that fractionalization has had on the oil and gas industry were exacerbated, in large part, by a failure to take proactive steps.

IV. LEGISLATIVE ACTION RATHER THAN JUDICIAL ADJUDICATION

This article was written against the backdrop that Texas, as the national leader in both oil and gas production and wind energy production, should proactively address the issue of wind severance by taking legislative action rather than taking a wait and see approach.

First, whether warranted or not, there is a growing concern that wind-energy development is being hindered, as developers cannot secure financing for projects subject to prior severances because lenders are hesitant to invest.[117] In the abstract, this hesitance by investors is logical—they are leery of the unknown (the absence of legal authority) and fear losing their investment.[118] As a result, developers are being forced to obtain and record a memorandum from the surface owner, recognizing the validity of the severed wind rights.[119] Currently, with the wind industry (in Texas) and the severance of wind rights still in their infancy, this is only a minor roadblock, i.e., the surface owner and the wind owner are generally the original parties to the severance. However, as both mature and the surface estate transfers (e.g., by will) such agreements will likely become much more burdensome. That is to say, that the subsequent surface owner may simply refuse to sign the

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[117] *See e.g*. Chavarria, *supra* note 6 at 4-5; K.K. DuVivier, *Animal, Vegetable, Mineral - Wind? The Severed Wind Power Rights Conundrum*, 49 WASHBURN L.J.69, 86 (Fall 2009) [hereinafter *Animal, Vegetable, Mineral – Wind*]; *and* K.K. DuVivier, *Sins of the Father*, 1 TEX. A&M REAL PROP L. J. 301, 417 (2014) [hereinafter *Sins of the Father*].

[118] One developer, who naturally is opposed to wind-severances because of this, hedged his opposition to severance as an opposition to waiting for the courts to decide the issue.

[119] *Texas Wind Law*, *supra* note 3 at § 4.02.

memorandum, and instead decide to challenge the validity of the prior severance—hence, the need for a statute to placate investors and lessen the burden on developers.[120]

Perhaps more importantly, landowners and practitioners are in dire need of guidance concerning the scope of wind severance, e.g., what can and cannot be severed; what is and what is not a severance of wind rights. And although this lack of guidance has not deterred landowners and practitioners from severing wind rights, the results have been scatter shot. For example, it is common to see a deed or other instrument purporting to sever the right to surface-damages (e.g., fees for the construction of roads, or installation of overhead power lines) when the severing party no longer owns an interest in the surface estate. The logical inconsistency of this type of transaction stands on its own.[121] Moreover, it is equally as common to see vaguely drafted language such as, "I hereby sever all the wind rights." What exactly this reserves is entirely unclear.

Contributing to the confusion is a similar misunderstanding concerning wind severances in many of the academic articles written on the subject. For example, some commentators have erroneously superimposed wind leases with wind severances concluding that a ban on the latter would lead to a ban on the former.[122] Others have conflated negative conservation easements with a traditional severance of wind rights.[123] While another commentator has made an outrageously absurd assertion that because "[w]ind power development is occurring primarily in flat and sparsely populated areas such

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[120] *Id.*

[121] Although much of the current "law" surrounding wind-energy production was fashioned after the equivalent in mineral law, the two are distinct, and a failure to appreciate this distinction is sure to lead to problems. For example, at common law there is no obligation for an oil and gas developer to pay surface damages or otherwise restore the surface. *See* WILLIAMS & MEYERS: OIL AND GAS LAW, § 218 (Patrick H. Martin et al. eds.,2014). This, however, is not the case with wind development, where fees for the construction of roads and installation of overhead power lines are fiercy negoatiated. These fees are meant to compensate the surface owner for the damage to his or her surface estate, and allowing a party to sever those rights without that party also owning an interest in the surface is sure to lead to litigation.

[122] *E.g.* Stephan, *supra* note 8 and accompanying text.

[123] One commentator has stated that Minnesota "allows the owner of a fee to convey the wind right separate from the estate." Emily L. Wasserman, *I'll Huff and I'll Puff and I'll Blow Your House Down: The Argument For The Ability To Purchase Your Neighbor's Wind*, 84 U. COLO. L. REV. 861, 888 (Spring 2013); MINN. ANN. STAT. § 500.30 (2012). A careful reading of the statute, however, does not appear to support this conclusion. First, while the statute provides for the granting of a wind easement, the scope of this easement is subsequently limited to "ensuring adequate exposure of a wind power system to the winds." *Id*. The statute further states, that the easement runs with the land. *Id*. Thus, rather than allowing for the severance of a separate estate or a profit, the statute instead creates a negative conservation easement, generally conveyed to a wind developer. An easement in its traditional sense is the right to use another's property for a defined purpose, e.g., to preserve wind flow, whereas a profit (or an easement in gross) is the right to enter upon another's land and take some part of it for a profit, e.g., wind development. *See generally*, HERBERT HOVENKAMP AND SHELDON F. KURTZ, PRINCIPLES OF PROPERTY LAW 328 (6th. Ed. 2005). Although one scholar has termed the former as a severance, it is distinct from a traditional severance of wind rights. *See* note 9 *supra* and accompanying text.

as west Texas . . . there is little-to-no competing [mineral] development."[124] With this type of misinformation, it is easy to see why the results of severing wind rights have been scatter shot and is precisely why the Texas legislature needs to proactively address the issue before it gets further out of hand.

Despite the clear benefits that a statute would provide, there is a fair amount of support for taking a wait-and-see approach, i.e., allowing the courts to decide the issue. According to the proponents of this approach, the wind industry is still in its infancy and preemptive legislative action may have unintended consequences.[125] While this may be true of some issues (e.g., nuisance), it is unclear what, if any, benefit there is in allowing courts to decide this issue, and in fact, according to one developer, is precisely what developers fear. Keeping that in mind, consider the two most frequently cited justifications for banning the practice entirely: fractionalization and surface conflicts. Although both are problems—that must be dealt with—as discussed above neither is specific to wind and were equally as problematic for the oil and gas industry. Now consider that the same wait and see approach, being advocated for wind, was taken with the severance of minerals and that the problems created by fractionalization and surface conflicts were exacerbated by allowing the courts to decide the issues on an ad hoc basis.[126] If history is allowed to repeat itself, the same will undoubtedly occur to the wind industry.

That aside, several significant and practical reasons exist for foregoing this wait-and-see approach. First, judicial decisions tend to be very fact-specific, and often create precedential problems. For example, *Contra Costa Water Dist. v. Vaquero Farms,*[127] the first known case to address the issue of wind severance, is frequently pigeon-holed as having little, if any, precedential value (even in California where it was decided), because it involved condemnation proceedings.[128] In *Contra Costa*, the local water district condemned Vaquero Farm's surface estate and then severed the wind rights to avoid paying additional condemnation money.[129] Although the parties framed the issue as whether wind-energy production was dependent upon control of the surface estate,[130] the court chose to decide the issue by

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[124] Thomas Boyd, *Who Owns the Texas Sky? An Analysis of Wind Rights in Texas*, 45 ELR 10426, 10432 (May 2015).

[125] *See e.g.* Blaire D. Parker, *Capturing the Wind: the Challenges of a New Energy Source in Texas*, H. RESEARCH ORG. TEX. H.R., FOCUS REP. NO. 80-9, at 18 (2008) ("Opponents of legislative action on wind . . . say that at this early stage in [its] development . . . preemptive legislation . . . would further obscure an already cloudy issue"); Lisa Chavarria, *Wind Severance Presentation*, the University of Texas School of Law, (Mar. 4, 2015) (advocating judicial rather than legislative action).

[126] The author is not oblivious to the fact that the law of oil and gas was by necessity left to the courts to decide, as an analogous body of law did not exist. Thus, a wait-and-see approach was necessary as most issues were beyond contemplation. Fortunately, the law of wind is not in such a predicament.

[127] 58 Cal. App. 4th 883, 888 (Cal. App. 1st Dist. 1997).

[128] *Id.*

[129] *Id.*

[130] *Id.* at 894.

applying "well-established California eminent domain law;"[131] in fact, the only other court to address the severance of wind rights merely adverted to the *Contra Costa* court's decision before brushing it aside.[132]

In the same vein, a court may simply avoid the issue of severance entirely and decide the case on other grounds. Consider three recent cases. In the first case, the Texas Supreme Court was asked to decide whether the "incursion of hydraulic fracturing fluid and proppants into another's land two miles below the surface constitute[d] a trespass."[133] There, an oil company drilled a horizontal well and hydraulically fractured it.[134] However, the fractures extended beyond the oil companies tract and into an adjacent landowners subsurface.[135] According to the Court, the rule of capture and the state's overall policy favoring hydraulic fracturing outweighed the potential trespass.[136] The next case, *Environmental Processing Systems v. FPL Farming*[137] addressed a similar issue—whether deep subsurface wastewater migration could constitute a trespass.[138] Here, a landowner sued an adjacent wastewater disposal facility due to an alleged migration of wastewater into his briny water causing contamination.[139] Again, the Texas Supreme Court passed on the issue of subsurface trespass. Concluding instead, that because the original jury charge was not erroneous, they were not obligated "to address . . . whether deep subsurface wastewater migration [was] actionable as a common law trespass."[140] In the final case, a Texas Appellate Court was asked to decide whether the accommodation doctrine applied to a severed groundwater estate.[141] Under the facts of that case, the City of Lubbock acquired a landowner's water rights via a 1953 severance.[142] However, when the City sought to develop those rights, the surface owner (Coyote Lake Ranch) sought an injunction stating that the city failed to accommodate their

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[131] *Id.* at 892.
[132] *See* Romero v. Bernell, 603 F. Supp. 2d 1333 (D.N.M. 2009).
[133] Coastal Oil & Gas Corp. v. Garza Energy Trust, 268 S.W.3d 1, 9 (Tex. 2008).
[134] *Id*. at 6-7.
[135] *Id*.
[136] *Id*. at. 16; *See id*. at 27 (Willett, J, concurring) ("At a time of insatiable appetite for energy and harder-to-reach deposits . . . Texas common law should not give traction to an action rooted in abstraction. . . . The Court today averts an improvident decision that, in terms of its real-world impact, would have been a legal dry hole, juris-imprudence that turned booms into busts and torrents into trickles. Scarcity exists, but above-ground supply obstacles also exist, and this Court shouldn't be one of them."); *See contra* Stone v. Chesapeake Appalachia, 2013 WL 2097397 *6 (chastising the Texas Supreme Court for passing on a straight forward trespass and for effectively telling "companies [that they] may tell a small landowner that either they sign a lease on the company's terms or the company will just hydraulically fracture under the property and take the oil and gas without compensation" because in Texas that does not constitute a trespass.)
[137] 2015 WL 496336 (Tex. 2015).
[138] *Id*.
[139] *Id*. at *2.
[140] *Id*. at *1.
[141] City of Lubbock v. Coyote Lake Ranch, 440 S.W.3d 267, 273 (Tex.App-Amarillo [Seventh Dist.] 2014).
[142] *Id*. at 269.

existing surface use.[143] The City answered, arguing that since the accommodation doctrine was a doctrine of mineral law it did not apply to groundwater.[144] Instead of addressing the central issue in dispute—whether the accommodation doctrine applied to severed groundwater estates—the court chose to avoid it entirely holding instead, that "*changes in the law should be left to the . . . Texas Legislature*."[145]

While these cases highlight a disturbing trend by Texas courts, when faced with significant legal questions, they illustrate a final reason for foregoing the wait-and-see approach—namely, the time involved in reaching a decision. Consider, again, *Environmental Processing Systems v. FPL Farming*.[146] There, the original dispute first arose in 1999, which resulted in a ruling by an administrative law judge whose decision, the district court affirmed, and the court of appeals likewise affirmed.[147] Several years later another round of litigation ensued, this time resulting in a jury verdict. Again, the court of appeals affirmed, however, the Texas Supreme Court reversed and remanded.[148] On remand, the Court of Appeals vacated the jury verdict, and again the parties appealed, resulting in another decision by the Texas Supreme Court, again, reversing, and remanding.[149] All told, the litigation surrounding this case lasted 16 years and the issue of subsurface trespass is still unsettled. This is precisely the result that wind developers fear—years upon years of litigation and thousands of dollars spent only to arrive at the place where they started prior to the litigation.

V. CONCLUSION

As Professor Ernest Smith pointed out in 2010, "Texas wind law . . . is where Texas oil and gas law was . . . when the first gusher at Spindletop erupted."[150] Twelve years have passed and very little has changed. Nevertheless, although the trend in some states has been to ban the practice of severing wind rights entirely,[151] it seems unlikely, given the significance that Texans place on private property ownership, that Texas will follow suit. In that regard, it has been the goal of this paper to address the issues most likely to arise by allowing wind rights to be severed and to offer solutions for

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[143] *Id*. at 271-72.
[144] *Id*. at 272.
[145] *Id*. at 274 (*emphasis added*).
[146] 2015 WL 496336 (Tex. 2015).
[147] *Id*. at *1.
[148] *Id*. at *2
[149] *Id*. at *1-2.
[150] *Whitetails*, *supra* note 8 at 1.
[151] *See e.g.*, COLO. REV. STAT. ANN. § 38-30.7-103 (1) (West, 2012) (banning severance); NEB. REV. STAT. ANN. § 76-3004 (West, 2009) (same); N.D. CODE ANN. § 17-04-04 (West, 2005) (same); KAN. STAT. ANN. § 58-2272 (b) (West, 2011) (same); MON. CODE ANN. § 70-17-404 (1) (same); OKLA. STAT. ANN. § 820.1 (2011) (same); S.D. COD. LAWS § 43-13-19 (same); WYO. STAT. ANN. § 34-27-103 (b) (same).

mitigating any adverse impacts, as well as to suggest a model statute for Texas (*see Appendix A*). In the end, only time will tell whether wind succeeds in establishing itself as a true alternative to fossil fuels. But the Texas Legislature and the courts should not serve as an impediment to wind obtaining this goal.

VI. APPENDIX

Severance of Wind Rights: A Model Statute

Section I. Purpose.
(1) Wind is a valuable natural resource, and it is the public policy of this State to promote, to the greatest extent possible, the robust development of wind energy. As such, this act must be liberally construed to effectuate that purpose.

Commentary

> *This provision would accomplish two things. First, declaring wind a natural resource places it within the scope of Article XVI of the Texas Constitution; thereby, allowing the legislature to regulate it.*[152] *Second, requiring a liberal construction of the statute ensures that any subsequent interpretation of the statute or the severance of wind rights, in general, will be liberally construed in favor of promoting wind-energy development.*

Section II. Severance.
(1) The wind located on or blowing over a parcel of land is an interest in real property. As such, rights to those wind resources may be severed by the owner of the underlying surface fee and conveyed or devised in any manner, subject only to the limitations in Section III and the requirements of Section IV.

Section III. Limitations.
(1) Any person who severs or reserves wind rights, but who does not have an ownership interest in the underlying surface estate may not sever, reserve, or retain any lease benefit that compensates the owner of the surface estate for surface damages, disruption, or restoration.
(2) If the owner of the underlying surface estate owns a nonexecutory interest in the wind estate, then that owner shall be joined to any lease for the sole purpose of negotiating surface damages, restoration fees, and for negotiating the placement of infrastructure.
(3) If the entire wind estate has been severed, and the surface owner does not own an interest in the wind estate, then the wind company or wind developer is required to obtain a surface lease from the owner of the underlying surface estate for the sole purpose of negotiating surface damages, restoration fees, and for negotiating the placement of infrastructure.

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[152] TEX. CONST. ART. XVI, § 59 ("The conservation and development of all of the natural resources of this State . . . [are] hereby declared public rights and duties; and the Legislature shall pass all such laws as may be appropriate thereto"); *See also Siting Controversies, supra* note 148 at 301 ("The question is whether wind/wind energy is a natural resource of this State as contemplated by Article XVI, Provision 59 of the Texas Constitution.").

(A) If the owner of the underlying surface estate and the wind developer or wind company cannot reach an agreement on the surface damages, fees for surface restoration, or on the placement of infrastructure, within 90 days of their first attempt to do so then they may mutually select at least one independent and disinterested real property owner whose duty it will be to determine the appropriate surface damages, the appropriate fees for surface restoration, and the appropriate placement of infrastructure; provided, however, if the parties cannot agree on the independent and disinterested real property owner then one may be appointed by a court with competent jurisdiction in the county in which the land is located.

(B) If the surface owner refuses to sign a surface lease, then upon 45 days advance notice the wind developer may petition the District Court to appoint an independent and disinterested receiver whose duty it will be to determine the appropriate surface damages, the appropriate fees for surface restoration, and the appropriate placement of infrastructure.

Section IV. Requirements.

(1) Any instrument severing wind rights, along with any subsequent conveyance of a severed wind right must be recorded in the office of the county clerk in the county where the underlying surface estate is located. If the underlying surface estate is located in more than one county, then the instrument must be recorded in each additional county.

(2) Every county clerk shall create, maintain, and provide access to a tract index in which all wind related instruments, including, but not limited to, wind leases, memorandum of wind leases, option agreements, severances, memorandums of severances, and notices of intent-to-preserve shall be index according to the underlying surface estate.

(3) Any person presenting for recordation an instrument that purports to sever wind rights, convey severed wind rights, or otherwise transfer severed wind rights must also file a memorandum or notice that provides the following information:

(A) the name of the current surface owner;

(B) the name of the grantor (if different from the current surface owner);

(C) a property description sufficient to satisfy the statute of frauds;

(D) the name, telephone number, and address of the grantee;

(E) the book, volume, and page number where the granting instrument is recorded; and

(F) language describing the granting instrument, including the percentage of the wind estate conveyed.

Failure to record such a memorandum or notice will nullify the recording of the granting instrument and said instrument will be treated as unrecorded until such a memorandum or notice is recorded. A memorandum or notice

that does not comply with sub-subsections (A) through (F) shall nullify the recording of the granting instrument and said instrument will be treated as unrecorded until a memorandum or notice that is in compliance with sub-subsections (A) through (F) is recorded. A defective memorandum or notice cannot be used to impute notice.

(4) A party seeking to develop the wind rights overlaying a surface estate may establish marketability by conducting a title search expanding 20 years prior to the recording of the root of title. Any severed wind right not appearing during that period is extinguished and reverts to the owner of the underlying surface estate. An interest appearing before the 20-year period may be preserved by filing a notice of intent-to-preserve the interest in the county or counties in which the underlying surface estate is located. A general reference to the interest is not sufficient to maintain the interest.

(A) A notice of intent to preserve must include the following:

(i) the name of the current surface owner;

(ii) the name of the grantor (if different from the current surface owner);

(iii) a property description sufficient to satisfy the statute of frauds;

(iv) the name, telephone number, and address of the grantee;

(v) the book, volume, and page number where the granting instrument is recorded; and

(vi) language describing the granting instrument, including the percentage of the wind estate conveyed.

(B) All severed wind interests (including royalties) are subject to this subsection.

(5) An individual or party developing the wind estate must accommodate any preexisting, or preexisting planned surface use, if that use would be substantially impaired or precluded by the developing party's actions, and the developing party has a reasonable, industry accepted alternative for carrying out the adverse action.

(A) This includes uses of the surface estate by the surface owner (or any lessee), or uses of the surface estate by the owner of the mineral estate (or any mineral lessee).

Section V. Remedies.

(1) Tenants in common and their lessees may develop their proportionate share of the wind rights without the consent and over the objection of any other cotenant. However, the developing cotenant (or its lessee) must account to the non-developing cotenant for that cotenant's proportionate share of the net proceeds of development.

(A) A developing cotenant(s) (or its lessee) may deduct the non-developing cotenant's proportionate share of the costs of development and production; provided those costs or expenses directly benefit the non-developing cotenants interest and are commercially reasonable.

(2) Tenants in common, may voluntarily partition their respective interest. If a voluntary partition is unattainable, any person (other than the owner of a royalty) owning an interest in the wind rights may petition the district court for a judicial partition. Upon such petition (if equitable), the court shall partition the wind estate in-kind. If unequitable, the district court shall assign a value to the interest of the non-developing cotenant(s) and shall allow the developing cotenant(s) to purchase jointly or individually the non-developing cotenant(s)'s interest. If no party chooses to purchase the non-developing cotenants interest, the court shall order the public sale of the entire wind estate and upon sale divide the proceeds in accordance with each cotenant's proportionate interest.
(3) Upon petition to the district court, a cotenant (or its lessee) may ask the court to appoint a receiver to execute a wind lease for an absent cotenant or missing cotenant, in accordance with TEX. CIV. PRAC. & REM. §§ 64.091 – 64.093.
(4) Nothing in this subsection shall foreclose any other judicial or statutory remedy that may be available.

Section VI. Incidents of Wind Ownership.
(1) Surface Access: The owner(s) of the wind estate or its lessee(s) shall have the express right to access and use the underlying surface estate in any manner reasonably necessary for the development and harvesting of the wind.
(2) Executive Right: The owner of the executive right has the right to authorize all actions necessary for the development of the wind estate and the production of energy from the wind resources. However, this right cannot be owned separately from an ownership interest in the wind estate.
(3) Financial Benefits: The owner of the wind estate or anyone owning an interest therein, is entitled to any lease benefits directly related to the production and sale of wind for wind energy. However, the owner of a royalty is only entitled to the stated fraction or stated percentage of any landowner's royalty. Any such financial benefit may be severed and conveyed or otherwise transferred; provide such conveyance or transfer is not inconsistent with this act. Financial Benefits does not include any sum meant to compensate the surface estate for surface damage, or restoration.
Section VII. Severability.
(1) If any section, subsection, or sub-subsection of this act is found unconstitutional, then such section, subsection, or sub-subsection shall be stricken and the remaining sections, subsections, or sub-subsections shall remain in full force.

Section VIII. Definitions.
As used in Sections I through VIII the following terms shall mean:

(1) Directly Benefits - A cost or expense directly benefits a non-developing cotenants interest if the non-developing cotenant would have had to incur a similar cost or expense had he or she independently developed their interest.
(2) Marketability (or Marketable Title) - is a title "reasonably free from doubtful questions of law or fact."[153]
(3) Root of Title - "means a conveyance or other title transaction . . . in the record chain of title of a person, purporting to create or containing language sufficient to transfer the interest claimed by that person, upon which that person relies as a basis for marketability of title."[154]
(4) Severance - is the conveyance or reservation of undeveloped wind rights in fee simple.
(5) Surface Damages - includes all costs for the replacement or repair of damaged improvements, damaged or lost livestock, as well as costs for the reimbursement of losses sustained "as a result of a disruption to hunting, grazing or framing."[155] Surface damages shall also include any sums paid for the construction of roads, installation of power lines, substations or turbines, or any other similar activity.
(6) Surface Restoration Fees - includes any costs paid for the removal of equipment or for the restoration of the surface to its original condition.

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[153] HOVENKAMP, *supra* note 22 at 529.
[154] National Conference of Commissioners on Uniform State Laws, *Uniform Marketable Title Act*, Annual Conference 3 (1990) available at http://www.uniformlaws.org/shared/docs/marketable%20title/umta_final_90.pdf.
[155] Chavarria, *supra* note 6 at 8.

RAIDERS OF THE LOST GRANT

RODERICK E. WETSEL[*]
DANA M. DINKENS[**]

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I. SCOPE OF ARTICLE

In the summer of 2021, the attorneys for a major gas pipeline company seeking to build a high-pressure gas pipeline from the Permian Basin to the Texas Gulf Coast faced a dilemma in Callahan County.[1] They sought to rely on a 1913 pipeline easement allegedly granted to a predecessor of their company, but a problem arose as to a fourteen-year gap in title from 1913 to 1927.[2] Moreover, a different company unconnected by the record, held the later title.[3] What could they possibly do to cure this fatal title defect? After all, millions of dollars, not to mention construction deadlines, were at stake. Wisely, the big city attorneys hired one of the few older title attorneys still practicing in the area as an expert witness to resolve their title break under the "Lost Grant Theory."[4] The title attorney, acting as an expert, testified that he frequently used this legal doctrine to cure breaks in early land titles such as this one.[5] The affected landowners fought back with an equally experienced attorney and expert witness who argued that the Theory did not apply to easements in general, and pipeline easements such as this one.

So it was that an ancient doctrine, often referred to interchangeably as the Lost Grant Theory, or more accurately as the "Presumption of Deed Doctrine," came to life again. The battle of the title experts in this rural county led experienced title examiners familiar with the case to refer to the gas company and their attorneys as "Raiders of the Lost Grant." Arguably, the gas company litigators had to dig deep into the history of title law to revive this ancient presumption of deed theory. But what is this doctrine? Where did it come from? Is it still viable? Indeed, title examiners seldom use the Theory today, and others do not even know it exists. Likewise, some scholars now refer to it as only a "historical curiosity."[6] As we shall see, the Theory constitutes an old rule of law that should not be forgotten and discarded into the trash bin of history.

As Texas case law will show, the courts designed the Lost Grant Theory for the specific purpose of curing early gaps in land titles when the titles could not otherwise be salvaged after the passage of many generations. Facing similar issues, other states followed suit. Almost as old as property law itself, the origin and use of the Theory is certainly a tale worth telling to today's title examiners.

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[1] *Atmos Energy Corp., v. Half Acre Holdings, LLC*, No. 22152 (42nd Dist. Sept. 10, 2021).

[2] *Id.*

[3] *Id.*

[4] Connally Dep. 11:22–25, Sept. 2, 2021, No. 22152.

[5] *Id.* at 24: 14–17.

[6] Jerome J. Curtis, Jr., *Reviving the Lost Grant*, 23 Real Prop., Prob. & Tr. J. 535, 536 (1988) (note that the article states that some property textbooks go as far as to say that except for historical purposes, all discussions of the Lost Grant Theory should be removed from legal literature).

II. HISTORY

In the examination of land and mineral titles in Texas from the Sovereignty of the Soil to the present—insofar as the same are reflected by a "stand-up" review of the records in the county courthouses, or through the examination of copies associated with runsheets or abstracts of title covering such lands—one commonly finds gaps in the fee title or the absence of connecting transfer deeds. For the most part, these title gaps are due to the difficulties imposed upon the early-day settlers of this State in maintaining legal infrastructure, or by the destruction of courthouses in some Texas counties during and after the American Civil War. Title examination in Texas proves uniquely difficult as the State's present land mass changed hands among different governing sovereigns before December 29, 1845, when Texas became the 28th state in the United States. The title examiner must maneuver the land grant periods of the 18th century where the Spanish crown and Mexican government granted areas of East, Central, and South Texas, as well as the period of the 19th century where the Republic of Texas existed as a sovereign entity. Conveyance documents from these eras frequently come up missing because of war, revolution, natural disasters, or fires.[7] Likewise, the conditions existing during such times often contributed to the failure of the preservation of original deeds. For example, in the 1880s, settlers came to West Texas along with the building of the railroads. The State of Texas granted the railroads thousands of sections of land which the railroads in turn sold to settlers. Likewise, the State initiated land grant programs and sold land to pioneers at very cheap prices. Many of these settlers had no idea how difficult it would be to endure the harsh climate and living conditions in West Texas. As a result, scholars suspect that the lack of some of the written land transfers are due to the fact that a significant number of unhappy early settlers simply walked or rode away from their lands in flight from the hardships and privations of the frontier.[8]

For these reasons, courts will presume that title transfer documents exist even in the absence of testimony from an heir or a party to the title, so long as there is no contradicting evidence. As the Texas Supreme Court once said, "time should heal and not destroy titles, and that, therefore, much weight should be accorded ancient instruments which have not been attacked over a long period of time."[9] Without the Lost Grant Theory, courts would not be

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[7] 3A Fred A. Lange & Aloysius A. Leopold, *Land Titles and Title Examination* § 435 n. 162 (Tex. Prac. 2d. ed. 1992); Personal Interview with Peter Hosey by author Roderick E. Wetsel on April 29, 2022 (according to Peter Hosey, Adjunct Professor of Texas Mineral Titles at St. Mary's School of Law, who has revised this Lange and Leopold series, early editions of the treatise contained a list of the Texas courthouses burned in the years following the Civil War, many of which appear to have been destroyed under suspicious circumstances).

[8] *Id.*

[9] Lobley v. Gilbert, 149 Tex. 493, 496 (1951).

able to uphold thousands of valid land titles destroyed throughout the long history of Texas. As stated above, this article seeks to describe what the Theory is, where it originated, why it exists, and how and why it is important to Texas title examiners today.

In contemplating these issues, title examiners should keep in mind that the Lost Grant Theory is one of the oldest doctrines in the English Common Law. During the medieval period, whoever was in possession of land from and after September 3, 1189, often described as the time of legal memory, had a prescriptive right to the land based on his own grant or one from his predecessors. By the 17th century, English courts added to this presumption: mere proof of use within living memory raised a presumption of use before 1189. In turn, a rival claimant could rebut the presumption by proof that, at any time since 1189, the occupying party had not exercised his right of use. In later years, the courts formulated a new doctrine which simply stated: "long enjoyment of an incorporeal right raises a presumption that the claimant had been granted the right."[10] In fact, this Theory later changed into ownership by a presumed grant arising from over twenty (20) years of uninterrupted use—similar to adverse possession statutes.

Scholars often compare the Lost Grant Theory to the legal claim of adverse possession. In April of 1903, the Harvard Law Review published the article titled "Doctrine of the Lost Grant," which remains one of the few early articles about the Theory. The editor of the Harvard Law Review explained that "all easements are supposed to arise in a grant, but if the easement has been used for the period required by the statute of limitations to gain title to lands by adverse possession, then the use is presumed to have commenced under a valid grant which has since been lost."[11] In its conclusion, the article mentions how many courts have abandoned the Doctrine of Lost Grant and instead held that rights by prescription are acquired strictly through the applicable statute of limitations, or adverse possession.[12] However, over a century after the article's publication, practitioners still utilize the Lost Grant Theory along with adverse possession as one of the two legal theories to establish ownership of land in the absence of legal title. As such, each doctrine has quite different elements and uses. To establish ownership under adverse possession, a claimant must prove: (1) actual possession of the disputed property, (2) possession is open and notorious, (3) possession is peaceable, (4) possession is under a claim of right, and (5) possession is consistently and continuously adverse or hostile to the claim of another person for the duration of the relevant statutory period.[13] Conversely, to establish title through a presumed or lost grant, a claimant must prove: (1) a

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[10] Curtis, Jr., *supra* note 6, at 538.
[11] *Doctrine of Lost Grant*, 16 Harv. L. Rev. 438 (1903).
[12] *Id.* at 439.
[13] *Hardaway v. Nixon*, 544 S.W.3d 402, 408 (Tex. App.—San Antonio 2017, pet. denied).

long asserted and open claim, adverse to the apparent owner; (2) nonclaim of the apparent owner; and (3) acquiescence by the apparent owner in the adverse claim.[14] Where adverse possession is based on a non-owner taking property that is not otherwise being used, the Lost Grant Theory restores title to reflect legal ownership. Thus, one could argue that adverse possession exists for trespassers, and the Lost Grant Theory, for rightful owners.[15] Likewise, it often appears that litigators unfamiliar with title examination attempt to use the Lost Grant Theory to prove up a fictitious title which never existed. As indicated previously, such attorneys are referred to as "Raiders of the Lost Grant."

Early Texas case law shows that such "Raiders" have been around for a long time. In 1863, the Texas Supreme Court ruled in *Yancey v. Norris* that a land grant situated within the border leagues, which required the consent of the Federal Executive of Mexico, would not be presumed because the Political Chief of the Department of Texas in 1824 had no authority to grant title to land.[16]

Similarly, in 1870, in the case of *Galan v. Goliad*, the Court held that a land title grant from the government may be presumed only if the facts align.[17] In the case, the Court held that a grant from the Mexican government might be presumed, and such grant would be protected as the defendant proved that "the [S]tate…granted the same land to others of its citizens, and possession was acquired by them and held adversely under such grant for a period of more than three [(3)] years before institution of this suit, the statute of limitations will protect their possession."[18]

Later, in 1873, the Texas Supreme Court decided in *Paschal v. Dangerfield* that possession under an inchoate grant of lands for five (5) years, followed by temporary and broken possession on the part of the grantee and her heirs for twenty (20) years, was insufficient to support the presumption of a grant.[19] The Court held that an unrecognized former government could not grant title to land which would support a cause of action.[20]

In 1875, the Court in *Sulphen v. Norris* declined to find the presumption of a grant from the government due to legal impossibility.[21] The plaintiff attempted to rely on the presumption of a grant from before 1824 but failed

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[14] IV. UNDERPINNINGS OF THE THEORY., 2020 TXCLE-OGDC 14-IV.

[15] *See* Curtis, Jr., *supra* note 6 (opposite argument made where author states "the Lost Grant Theory supplies a rule of evidence that can bolster, or indeed establish, the claims of trespassers").

[16] 27 Tex. 40 (1863).

[17] 32 Tex. 776 (1870).

[18] *Id.* at 788.

[19] 37 Tex. 273 (1873).

[20] *Id.*

[21] 44 Tex. 204 (1875).

to show he was a citizen of Spain at the time, allowing him to receive the grant.[22]

III. ELEMENTS OF THE LOST GRANT THEORY

a. Long asserted, continued, and open claim, adverse to the apparent owner

In order to prove the existence and viability of the Lost Grant Theory, the evidence must show that the alleged previous title owner had knowledge of—and acquiesced in—the purported owner's asserted title that the presumed grant is replacing. Possession, however, is not a requirement for the Lost Grant Theory in Texas as well as some other states. In this regard, in 1895, the Texas Supreme Court decided in *Baldwin v. Goldfrank* that though possession is the most indisputable act of ownership, in a country where much of the land is unoccupied, it is reasonable to hold that possession is not a necessary requisite to the presumption.[23] While the presumption does not require possession, it is still essential for the claim of title to be tangible, so anyone adverse to the claim is on notice. Thus, public records other than the missing grant—such as tax documents—are admissible to show ownership.[24]

b. Non-claim by the apparent owner of record title

The Lost Grant Theory requires no contest by the apparent owner of record title and a lack of showing that anyone else ever claimed the land during the period in question.[25] In 2019, the San Antonio Court of Appeals in *San Miguel v. PlainsCapital Bank* refused to apply the Theory where a filed affidavit stated that the apparent owner had previously used and erected fences on the disputed property.[26] Similarly, in the 1903 Virginia case of *Reed v. Garnett*, the defendant successfully rebutted the presumption of a grant for a right-of-way over the defendant's land by showing the defendant continually protested the plaintiff's use.[27]

c. Acquiescence by the apparent owner of the adverse claim

Just as there is a requirement for evidence of a long-asserted and open claim for the first element, it follows that an apparent owner must not

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[22] *Id.*
[23] 88 Tex. 249 (1895).
[24] *Howland v. Hough*, 570 S.W.2d 876, 879 (1978).
[25] *Purnell*, 339 S.W2.d at 92.
[26] No. 04-18-00450-CV, 2019 WL 2996975, at *6 (Tex. App.—San Antonio July 10, 2019, no pet.).
[27] 101 Va. 47 (1903).

acquiesce in an unfounded adverse claim.[28] In 1920, the Texas Supreme Court remarked in *Magee v. Paul* that it is inconsistent with human nature for one with a claim of title to refrain from asserting his claim when others openly declare the land belongs to them.[29] Without proof of knowledge and acquiescence of the adverse claim, no presumption of a conveyance exists. However, the case law remains unclear as to whether only the heirs of the alleged grantor will satisfy the knowledge and acquiescence requirement, or if such evidence must come from the alleged grantor himself.[30]

IV. HOW THE DOCTRINE HAS BEEN MISAPPLIED OR MISCONSTRUED IN TEXAS: "RAIDERS OF THE LOST GRANT"

As shown above, in the recent state district court case, *Atmos Energy Corp. v. Half Acre Holdings, LLC*, a gas pipeline company sought to enforce a 1913 pipeline easement against the current landowner for the installation of a gas pipeline in which there was a gap in the title to the easement for a period extending from 1913 to 1927.[31] Title was in doubt because ownership of the easement was missing after 1913, and then reappeared in 1927 in a party other than the original grantee.[32] The utilities company brought suit against the landowner, seeking to show that the Lost Grant Theory should apply to cure its defective title. In support of its case, the utility company cited the 1950 decision of the Texas Supreme Court in *Miller v. Fleming*.[33] The company also relied upon the testimony of a local title attorney who testified that he routinely relied upon the Theory to cure gaps in old land titles.[34] Despite the fact that *Miller* applied to a mineral deed (i.e., a transfer of title) and not an easement—and another title expert attorney rebutted the testifying attorney arguing that the Theory did not apply to easements[35]—the district court determined that the Lost Grant Theory did apply, rendering the title valid.[36] Although no Texas court has yet applied the Theory to easements, the case failed to move forward on appeal due to voluntary dismissal, leaving application of the Theory to easements undecided.[37]

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[28] *Bay Area Council Boy Scouts of Am. v. Myers*, No. 03-04-00653-CV, 2009 WL 790197, at *4 (Tex. App.—Austin Mar. 27, 2009, no pet.).

[29] 110 Tex. 470, 478 (1920).

[30] Tom McLeroy, *Real Property—Presumption of Grant—Knowledge and Acquiescence of Remote Grantor*, 20 Tex. L. Rev. 634 (1942).

[31] *Supra* note 1.

[32] *Id.*

[33] 149 Tex. 368 (1950).

[34] *Supra* note 2.

[35] This expert was co-author, Roderick Wetsel.

[36] *Miller*, 149 Tex. at 370; *supra* note 1.

[37] *Half Acre Holdings, LLC, v. Atmos Energy Corp.,* No. 11-21-00230-CV, 2021 WL 6140037 (Tex. App.—Eastland Dec. 30, 2021, no pet.).

In another recent case in Martin County, *Van Dyke v. Navigator Group*, the Eastland Court of Appeals was presented with an even more bizarre application of the Lost Grant Theory in oil and gas litigation concerning whether a reserved royalty interest was "fixed" or "floating."[38] Interestingly, the facts of the case show there was no gap in the title; rather, the claimant argued that consistent mineral ownership over a long period of years required the presumption of a conveyance to clarify a mistaken interpretation of an unambiguous 1924 deed.[39] Perhaps not surprisingly, the Eastland Court of Appeals outright rejected this unwarranted extension of the Lost Grant Theory.[40]

As stated above, we find no Texas cases which apply the Theory to easements or other non-possessory conveyances, as opposed to direct transfers of fee title. Instead, Texas courts appear to hold to the contrary. For example, in the 1927 case of *Alexander v. Schleicher County*, the Austin Court of Civil Appeals refused to extend the Lost Grant Theory to a road easement.[41] In that case, the landowner granted an easement across the North half of a section, and the plaintiff accidentally built and maintained a road on the South half.[42] Upon the facts presented, the court found that adverse possession, not a presumed grant, established the easement.[43]

Additionally, in 1932 in *Brundrett v. Tarpley*, the Waco Court of Civil Appeals—in dealing with a lost grant—held that the right to an easement by prescription rests upon the presumption that the owner of the land had granted the easement.[44] However, it did not extend the presumption to the case at hand where the plaintiff had used the roadway continuously and uninterrupted for the full ten (10) year period with permission, and thus failed to show his claim was adverse to the landowner.[45]

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[38] Van Dyke v. Navigator Group, No. 11-18-00050-CV, 2020 WL 7863330 (Tex. App.—Eastland Dec. 31, 2020, pet. granted) (on Petition for Review to the Texas Supreme Court, the Texas Land and Mineral Owners Association in an Amicus Brief filed on April 22, 2022, continued the "Raider" position by arguing that contrary to the opinion of the Eastland Court of Appeals, "the presumed grant doctrine has never required a 'gap' in the chain of title." Instead, it stated "what is relevant is whether there is evidence that Petitioners and their predecessors openly asserted ownership to one-half the mineral estate for a long period of time and that Respondents and their predecessors acquiesced to Petitioners claim." It concludes that the Eastland Court thus "severely limited the doctrine's applicability").

[39] *Id.*

[40] *Id.* at 6.

[41] 291 S.W. 263 (Tex. Civ. App.—Austin 1927), writ granted, (Mar. 23, 1927) and aff'd, 3 S.W.2d 75 (Tex. Comm'n App. 1928).

[42] *Id.*

[43] *Id.* at 264–65.

[44] 50 S.W.2d 401 (Tex. Civ. App.—Waco 1932, no writ).

[45] *Id.*

V. WHEN TEXAS COURTS HAVE APPLIED THE LOST GRANT THEORY

Texas courts apply the Lost Grant Theory only to those cases where claimants can show a defect in the chain of title that is solely due to a missing deed or transfer of title.[46] Stated differently, if all elements for the Theory are present, but there is not a gap or missing link in the chain of title, courts will avoid its application and use.[47]

In 1963, the Houston Court of Civil Appeals in *Seddon v. Harrison* refused to presume the existence of a proper and different deed where the party seeking to rely upon the Lost Grant Theory showed a clean chain of title from Sovereignty of the Soil to himself.[48] Likewise, in the 1863 case of *Taylor v. Watkins,* where all evidence pointed to the non-existence of a grant, the Texas Supreme Court did not apply the Theory to cure the chain of title.[49]

While the Lost Grant Theory cannot be based on a string of presumptions, circumstantial evidence may be used to justify its use if the probative force of the evidence is sufficient to constitute the basis for legal inference, rather than mere surmise or suspicion as to the existence of a fact.[50] As the presumption of title is one of fact rather than law, it is subject to rebuttal.[51] However, in *Howland v. Hough,* the Texas Supreme Court decided in 1978 that though the application of the Lost Grant Theory is usually an issue of fact, it can be established as a matter of law where the evidence is undisputed and the deeds are ancient.[52] The facts of the case show that the plaintiff's chain of title was intact save for the period of 1845 to 1878, where an alleged conveyance from one party to another was missing.[53] Although the plaintiff could not produce direct evidence of possession during such time, the defendant could not provide any evidence that an heir of the alleged grantor claimed the land either.[54] Ultimately, the Court held that the plaintiffs were entitled to recover the disputed tract of land and presumed that a grant did then occur.[55]

In yet another early application of the Theory, the United States Supreme Court in the 1887 case of *Fletcher v. Fuller* reversed a trial court's ruling for refusing to provide a jury charge detailing the presumption of a grant.[56] The Court reasoned that "the law…by reasonable

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[46] *Humphries v. Tex. Gulf Sulphur Co.*, 393 F.2d 69, 72–73 (5th Cir. 1968).
[47] *Id.*
[48] 367 S.W.2d 888 (Tex. Civ. App.—Houston 1963, writ refused n.r.e.).
[49] 26 Tex. 688 (1863).
[50] *Duke v. Houston Oil Co. of Tex.*, 128 S.W.2d 480, 486 (Tex. Civ. App.—Beaumont 1939).
[51] *Id.* at 485.
[52] 570 S.W.2d 876, 879–80 (1978).
[53] *Id.*
[54] *Id.*
[55] *Id.* at 883.
[56] *Fletcher v. Fuller*, 120 U.S. 534 (1887).

presumptions…affords the necessary protection against the possible failure to obtain or to preserve the proper muniments of title."[57] While the Court determined that presumption of a deed may be rebutted by proof of facts inconsistent with its supposed existence, if no such facts are shown with regard to the property in controversy, the jury may be instructed that it is their duty to presume such a conveyance and thus quiet the possession.[58]

Further, in 1895 in *United States v. Chaves*, the United States Supreme Court declared that it is a general rule of law that a grant will be presumed upon proof of an adverse, exclusive, and uninterrupted possession of twenty (20) years, and that such rule "will be applied as a *preumptio juris et de jure*, whenever, by possibility, a right may be acquired in any manner known to the law."[59] The case concerned an 1833 land grant from the Republic of Mexico and the governor of the territory of New Mexico to multiple grantees.[60] The grantees proved, through a number of witnesses, that Mexican land grants of this time period were largely misplaced or fragmented; that these documents were deposited into the territorial library, sold as wastepaper by the librarian, and scattered throughout the country.[61] Based on the facts, the Court found that circumstantial evidence of an original grant, a loss of original documents, and nearly sixty (60) years of undisturbed possession and enjoyment of the land—when taken together—warranted the presumption of a grant.[62]

In the previously-mentioned 1920 case of *Magee v. Paul*—often cited when discussing the Lost Grant Theory—the facts are relatively unique compared to the common scenario of misplaced or destroyed ancient deeds.[63] In *Magee*, the document in question was a duplicate of a State-issued land certificate that was stolen from a messenger of the Texas Express Company by masked and armed men in 1878.[64] Notice was published in a local newspaper informing the public of the loss of the document in question, providing that if not recovered or found within sixty (60) days, a duplicate would be issued.[65] Thereafter, the State issued a duplicate certificate which was involved in subsequent conveyances.[66] Plaintiffs argued that there was a regular chain of title, duly recorded, to the land under a 1905 deed.[67] The Texas Supreme Court affirmed the trial court's finding for the plaintiff,

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[57] *Id.* at 546.
[58] *Id.* at 550.
[59] 159 U.S. 452, 464 (1895).
[60] *Id.* at 453.
[61] *Id.* at 462.
[62] *Id.* at 464.
[63] *Supra* note 29
[64] *Id.*at 476–77.
[65] Id. at 477.
[66] *Id.*
[67] Id. at 476.

ultimately determining that actual possession of the land is not essential to the establishment by circumstantial evidence of the alleged missing link or links in the title.[68]

In the 1950 case of *Miller v. Fleming*, referred to above, the Texas Supreme Court remanded the case back to the district court for a new trial based on the concept that the evidence for the Lost Grant Theory only needs to lead the fact finder to the conclusion that the grant was probably executed, not remove all reasonable doubt.[69] Furthermore, the Court held if it is more reasonable to believe in the existence of the document than not, the jury is at liberty to presume and find that it existed.[70]

Likewise, in 1967, the Houston Court of Civil Appeals held in *Page v. Pan American Petroleum Corporation* that an unrecorded conveyance could be presumed as a matter of law where the apparent owners acquiesced to the claim for over one hundred (100) years.[71] The apparent owners, who were the Page heirs, had constructive notice of an adverse claim as evidenced by a long-asserted and open claim to the tract.[72] The court found that absent evidence of any assertion of ownership by the Page heirs, the evidence was sufficient to sustain the finding of fact that the conveyance could be presumed.[73] The opinion quoted the 1905 case of *Simmons v. Hewitt*, which held: "the idea is that there must be a distinct assertion of ownership under the alleged deed, to show that the party asserting its existence acted under it in a substantial and open way, and one which, if unauthorized would, in the nature of things, have provoked a protest from the owner."[74]

Much later, in 2011, the Beaumont Court of Appeals held in *Conley v. Comstock Oil & Gas, LP* that landowners and well operators had established their title to mineral interests by a presumed grant.[75] The trial court concluded that because of a lack of evidence, the grant did not exist.[76] It was undisputed by both parties that since 1835, the only efforts to assert ownership of title by the plaintiff's predecessors was to the neighboring land, not the land in question.[77] Following *Howland*, the Court of Appeals disagreed with the trial court and found the presumption of a grant was established as a matter of law since the deed was ancient and the evidence was undisputed.[78]

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[68] *Id.* at 479.
[69] 149 Tex. 368 (1950).
[70] *Id.*
[71] 412 S.W.2d 797 (Tex. Civ. App.—Houston 1967, writ ref'd n.r.e.).
[72] *Id.*
[73] *Id.*
[74] *Id.* at 799–800; 87 S.W. 188, 189–190 (Tex. Civ. App. 1905, writ ref'd).
[75] 356 S.W.3d 755 (Tex. App.—Beaumont 2011, no pet.).
[76] *Id.*
[77] *Id.*
[78] *Id.* at 765–76.

VI. WHEN TEXAS DOES NOT APPLY THE THEORY

As perhaps expected, there are several cases in which Texas courts discussed but declined to find the presumption of a lost grant. Though such cases are in the minority, the Lost Grant Theory clearly does not extend to every case with an ancient title issue. A quick review of some of these cases illustrates this fact.

In 1941, the Texas Supreme Court decided *Love v. Eastham*, in which the Court reversed and remanded a decision back to the district court for a new trial after the trial and appellate court found for the plaintiffs.[79] The opinion discussed coverture, the common law rule that a woman was part of her husband's property and could not make any legal dealings without him, explaining the plaintiffs could not presume a conveyance of community property solely from a married woman.[80] Additionally, the Court held that the plaintiffs could not recover under the Lost Grant Theory where there was no evidence that the apparent owner ever had actual or imputed knowledge of an adverse claim to the land during and after the time of the presumed grant.[81]

In 1999 in *Garza v. Maddux*, the Corpus Christi-Edinburg Court of Appeals held that the claimants did not acquire an interest in the disputed tract by a presumptive grant in a boundary dispute.[82] The court declined to apply the Theory as grants concerning the properties were recorded but lacked metes and bounds descriptions describing the specific boundaries in question.[83] Further, both parties offered evidence of various conveyances from their predecessors in title though the deeds did not address the small, disputed tract specifically, and there was no evidence that a deed concerning that tract was missing.[84]

In 2009 in *Bay Area Council Boy Scouts of America v. Myers*, the Austin Court of Appeals declined to find a presumption of a grant where the plaintiffs presented no evidence that their predecessors in interest made any long-standing or open claim to the property in dispute or established a general reputation of ownership.[85] Instead, the plaintiffs relied solely on the language of a recorded deed that purported to convey an entire section, which, by itself, was not evidence of a long-standing and open claim of ownership adverse to the record owner.[86] Additionally, another recorded deed claimed the predecessor in interest only owned five hundred and forty eight (548) acres,

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[79] 137 Tex. 462 (1941).
[80] *Id.*
[81] *Id.* at 466–67.
[82] 988 S.W.2d 280 (Tex. App.—Corpus Christi 1999, writ denied).
[83] *Id.* at 290.
[84] *Id.*
[85] *Supra* note 28, at 1.
[86] *Id.*

not the additional one hundred and eleven (111) acres that were the subject of this suit, and the one hundred and eleven (111) acres were actually fenced off as not part of the plaintiff's property.[87]

Lastly, in 2014 the Tyler Court of Appeals held in *Fair v. Arp Club Lake, Inc.* that the occupiers failed to establish ownership rights based on the Lost Grant Doctrine.[88] The case was different from other Texas cases that involved disputes over title to real property, since this case concerned only the disputed *possession* of real property. In 1936, landowners leased their land to three (3) named individuals for ninety-nine (99) years.[89] Later, a corporation claimed to have been operating as lessee of the property since 1945, though no written assignment from the original lessees to the corporation was provided.[90] The corporation asked the court to apply the Lost Grant Theory to presume that the original lessees had assigned their leasing rights to them.[91] The following documents were submitted on behalf of the corporation to prove exclusive possession of the land since 1945: the original lease, a joint pre-trial order with admissions of fact, an affidavit of the company's president, a copy of an undated map of the lake on the property, and a copy of a 1964 sheriff's deed.[92] However, none of the exhibits evidenced exclusive possession or described the length of said possession.[93] Additionally, the corporation failed to prove acquiescence by the original lessees as no evidence existed that the original lessees had knowledge of the alleged possession.[94] The court acknowledged that regardless of whether there was existing case law applying the Theory to a lease, the corporation still failed to prove its case for application of the Theory.[95]

VII. OTHER STATES THAT FOLLOW THE LOST GRANT THEORY

Some other states that apply the Lost Grant Theory are: South Carolina, Massachusetts, Louisiana, New Mexico, Mississippi, Arkansas, Pennsylvania, and Hawaii. It is important to note that South Carolina, Massachusetts, and Pennsylvania were among the original thirteen (13) British colonies in America, and all of the listed states except Hawaii were engaged in the American Civil War. Hawaii, on the other hand, did not become a state until 1959. Thus, from these facts, one can easily speculate

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[87] *Id.* at 3.

[88] 437 S.W.3d 619 (Tex. App.—Tyler 2014, no pet.)

[89] *Id.*

[90] *Id.* at 626.

[91] *Id.*

[92] *Id.* at 627.

[93] *Id.*

[94] *Id.*

[95] Id. at 627–28.

that like Texas, each of these states had similar difficultly in maintaining legal infrastructure or preserving early land titles. As shown below, these states generally follow the Texas model for application of the Lost Grant Theory.

South Carolina

South Carolina common law follows the "Presumptive Grant Theory," or Lost Grant Theory. State courts follow a ten (10) year time period for adverse possession and a twenty (20) year time period for presumption of a grant, where possession may be tacked by ancestors, heirs, and between parties in privity.[96] To establish a claim for a presumptive grant, the claimant must prove the same elements for adverse possession in addition to an inconsistency of title in another, under a claim or right or title.[97] In multiple cases, the South Carolina Supreme Court has held that "continuous adverse possession of land for twenty years by different persons and at different times is sufficient to raise the presumption of a grant."[98]

Massachusetts

Like South Carolina, Massachusetts also follows the Lost Grant Theory. Early on, the Massachusetts Supreme Court held that "twenty [(20)] year's adverse possession warrants a presumption that the possessor had a deed to the property and that all acts necessary to give the deed effect have been done."[99] The Supreme Judicial Court of Massachusetts held in 1926 in *Bucella v. Agrippino* that the presumptive grant theory supported a title acquired by long continued adverse use and granted by public policy, not to prove the existence of an actual deed that does not grant or transfer property.[100]

Louisiana

In the 1964 case of *Lincoln Parish School Board v. Ruston College*, the Second Circuit Court of Appeals of Louisiana found that the plaintiff, the Lincoln Parish School Board, was the rightful owner of a tract of land.[101] The Court focused on title by prescription and clarified that it can be proved in one of two ways: possession for a certain number of years, or the assumption that the title of the deed of acquisition of the present possessor or one of his

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[96] *Getsinger v. Midlands Orthopedic Profit Sharing Plan*, 327 S.C. 424, 430 (Ct. App. 1997).
[97] *Id.*
[98] *May v. Jeter*, 245 S.C. 529, 539 (S.C. 1965).
[99] § 59.60. Adverse possession—Presumption of grant, 17B Mass. Prac., Prima Facie Case § 59.60 (5th ed.).
[100] 257 Mass. 483 (1926).
[101] 162 So.2d 419 (La. Ct. App. 1964).

predecessors has been lost.[102] The facts of the case showed that in 1887, the owner of the property conveyed the property to Ruston College.[103] Ruston College closed its doors in 1895 and thereafter, the Lincoln Parish School used the land for a public school.[104] Until 1902, the original owner, Robert Russ, was living and active in the area.[105] In 1910, one of the original buildings of Ruston College burned down and the taxpayers of the school district petitioned to rebuild the public school.[106] During the proceedings the taxpayers required the school board to vest the title to the building in the public.[107] The plaintiffs built the only improvements to the land, where no one had challenged the title to the land in over sixty (60) years.[108] As a result, the court held it was most probable that the school board had title to the property though the original deed was lost.[109]

New Mexico

In 1994, the New Mexico Supreme Court decided *El Paso Production Co. v. PWG Partnership*, in which it relied on the 1887 United States Supreme Court case, *Fletcher v. Fuller*, as the seminal case in applying the doctrine of presumed grant.[110] The Court stated that though New Mexico Rule of Evidence 301 would not make the logical presumption of a grant mandatory, "the presumption of a grant arguably is mandatory as a matter of public policy if unrebutted."[111] The New Mexico Court distinguished *Fiest v. Steere,* a Kansas Supreme Court case, which argued the doctrine of adverse possession and prescriptive right replaced the need for a presumed grant.[112] The Court was not convinced of that proposition, declaring that "a presumption of grant may be found from evidence supporting the inference of a lost or neglected grant followed by long-term, open, active, exclusive possession of property under claim of right and acquiescence or no resistance by interested parties to that possession or claim of right."[113]

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[102] *Id.* at 423.
[103] *Id.* at 422.
[104] *Id.*
[105] *Id.*
[106] *Id.*
[107] *Id.*
[108] *Id.*
[109] Id. at 424–25.
[110] 116 N.M. 583 (1993); *Supra* note 56.
[111] *Id.*
[112] 175 Kan. 1 (1953).
[113] *Supra* note 110, at 590–91.

Mississippi

In 1988, the Mississippi Supreme Court found a presumption of a grant in *Board of Trustees of Monroe County Board of Education v. Rye*.[114] While the Mississippi Court discussed the difference between adverse possession and the presumption of a lost grant throughout its opinion, it found the greatest difference was that the presumptive grant allows assertions of claims against the sovereign, despite statutes barring adverse possession against the State.[115] In this case, the Ryes and their predecessors in title showed that they had occupied the land for ninety-three (93) years and paid taxes, along with other incidents of ownership.[116] The Court discussed the existence of an 1887 statute which established an agency to deal with lost and destroyed records.[117] The statute authorized the State Commissioner of Swamp Lands to sell and dispose of unsold swamp land retained by the State which was potentially affected by the imperfect condition of records.[118] Ultimately, on this basis, the Court found "the evidence was sufficient to raise a presumption that at some time there was a grant by sovereign which divested itself of title and perfected title in occupants and their predecessors."[119]

Arkansas

Arkansas courts have also long recognized the Lost Grant Theory. In 1921, the Arkansas Supreme Court found in *Carter v. Stewart* that the payment of taxes to the State creates a presumption that there exists a legal basis upon which to pay the taxes, and thus a strong reason the Court should infer a grant from the State.[120] However, Arkansas does require the person who paid the taxes have uninterrupted, continued possession of the land to find a presumed grant from the State.[121] The later cases of *Townsend v. Bonner*, decided in 1943,[122] and *Koonce v. Woods*, decided in 1947,[123] proved similarly, where the Court likewise found a presumption of grant. The Arkansas Court of Appeals followed suit, finding a presumption of grant present in the 1986 case, *Baker v. Certain Lands in Independence County.*[124]

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[114] 521 So.2d 900 (1988).
[115] *Id.* at 906.
[116] *Id.* at 907.
[117] *Id.* at 905–6.
[118] *Id.*
[119] *Id.* at 908.
[120] 149 Ark. 189 (1921).
[121] *Id.*
[122] 205 Ark. 172 (1943).
[123] 211 Ark. 440 (1947).
[124] 19 Ark. App. 253 (Ark. App. 1986).

Pennsylvania

According to the 1983 case, *Weidner v. LeTort Regional Authority*, Pennsylvania law recognizes three (3) types of presumptions that can arise under the Lost Grant Theory: (1) a grant which operates as a conclusive and irrebuttable presumption (which would more accurately be called a rule of law than a mere presumption); (2) a common law doctrine that operates on true presumptions and inferences which are not conclusive but can be rebutted; and (3) the doctrine of prescription relating to the grant of easements.[125]

Hawaii

In 1987, the Hawaii Supreme Court held that the Lost Grant Theory is a valid and continuing means to establish title.[126] In *Kohala Corp. v. State*, the plaintiff sued the State of Hawaii, among others, to quiet title to land on the Island of Hawaii.[127] Similar to Arkansas law, the Hawaii Court found that payment of property taxes was evidence of intent—or at least acquiescence—on the part of the government to grant title to the claimant.[128]

VIII. WHY THE LOST GRANT THEORY IS IMPORTANT TO TEXAS TITLE EXAMINERS

Extremely old gaps in the transfer of land titles in Texas are often difficult, if not impossible, to cure after the passage of many decades or even hundreds of years. Understandably, when confronted with the fact that all persons or heirs related to the early title have long-since passed, and no living witnesses with personal knowledge of those persons or heirs remain, the title examiner must turn to the Lost Grant Theory to complete a chain of title to a tract of land which would otherwise be fatally defective.

In such situations, it is no longer feasible, or even possible, to draft an affidavit of heirship, or to bring a suit for declaration of heirship. Likewise, searching for the lost records themselves would undoubtedly be time-consuming and perhaps a lost cause. Thus, the lawyer must dust off his or her copy of *Land Titles and Title Examination* and review the elements of proving up title under the Lost Grant Theory.[129] In doing so, the title attorney should keep in mind that the Theory is not the cure for all early gaps or defects in the chain of title and, at least in Texas, does not apply to defects in

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[125] 26 Pa. D. & C.3d 726, 728–30 (C.P. 1983).

[126] 69 Haw. 54 (1987).

[127] *Id.*

[128] *Id.*; *Supra* note 120.

[129] Lange and Leopold, *supra* note 7.

the title to easements, leases, or other instruments that are not direct conveyances or transfers of fee title.

IX. CONCLUSION

In contrast to the "win-at-all-costs" mentality adopted by some legal professionals, early court decisions creating the Lost Grant Theory did so for the useful and noble purpose of validating the orderly transfer of land titles through periods of extreme adversity in Texas history where revolution, war, fires, and even abandonment of land, led to the destruction or loss of land and mineral titles. No lawyer at such time could have thought, or even dreamed, that later litigators would utilize the Lost Grant Theory to justify a fatal gap in the title of an easement, or to clarify a claimant's interpretation of a fixed or floating royalty deed.[130] It is no surprise, then, that such lawyers who attempt to extend the original purpose of the Theory for their own ends are referred to euphemistically as "Raiders of the Lost Grant."

In this article, the authors have sought to show that even after the passage of centuries, the Lost Grant Theory is still a viable doctrine for curing early gaps in fee title arising due to defaced, lost, or destroyed deeds. Truly, in seeking to apply this ancient doctrine, "there is nothing new under the sun."[131] The Theory, as created, is still a valuable, though rarely utilized, concept of American title law, which lawyers should follow for the reason and purpose the courts intended.

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[130] *See supra* note 1; *supra* note 38.

[131] *Ecclesiastes* 1:9 (NIV).

TEXAS WIND SEVERANCE: THE MISSING PRIVATE PROPERTY RIGHT

Quentin Wetsel[*]

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I. INTRODUCTION

Founded in the English common law, the *Ad Coelum* doctrine states: "*Cujus est solum ejus est usque ad coelum et ad inferos"* – "to whomsoever the soil belongs, it is theirs up to the sky and down to the depths."[1] Arising out of this doctrine, Texas property law has historically allowed the severance of the mineral estate from the surface estate, but the Lone Star State (which is notably the wind capital of the United States) is silent on the right for a surface owner to sever the wind estate from the surface estate.[2] These rights

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[1] Blackstone, William. *Commentaries on the Law of England 18* (William Draper Lewis ed., 1902) (discussing the cujus est solum doctrine). [hereinafter Blackstone].

[2] Lewis, Michelle. *How Texas Became No. 1 in the US in Wind Power*. *Electrek*, 28 Apr. 2020, electrek.co/2020/04/28/david-byrne-explores-how-texas-become-no-1-in-the-us-in-wind-power/. Accessed 18 Sept. 2020.; Chavarria, Lisa. *The Severance of Wind Rights in Texas* (Sept. 11, 2008). http://www.sbaustinlaw.com/library-papers/Chavarria-The_Severance_of_Wind_Rights%20(Final).pdf. [hereinafter Chavarria].

can be analogous to that of mineral rights, and even water rights, although severing wind rights would involve severing the rights to the property above the surface estate and perhaps recognizing wind as a part of the surface estate. Furthermore, these rights stem from a landowner's 'right to alienate' his property, which is connected to the basic freedom of contract. A proposal to the Texas Legislature to allow severance of wind rights should address this issue by recognizing wind as a property right in real estate that can be severed from the surface estate by the surface owner, in which he or she will have the power to sell, assign, or convey his or her wind rights to whoever he or she may choose. When denying this right to sever the wind estate, the Legislature would be acting contrary to Texas public policy by limiting the freedom of contract, which the Supreme Court of Texas has recognized as a "fundamental matter" which "shall be held sacred."[3]

Clearly all states recognize the right to lease the surface of the land for the generation of wind energy, such as Kansas, which recognizes that "no person, other than the surface owner, shall have the right to use land for the production of wind or solar energy unless granted such right by the lawful owner of the surface estate by lease or easement for a definite period."[4] However, the majority of states which have addressed the issue of severance have prohibited the severance of the wind estate from the surface estate.[5] These states include Colorado, Nebraska, Oklahoma, Montana, South Dakota, and North Dakota. Although Montana and North Dakota prohibit wind severance, these two states allow a seller to retain a right to payment derived from an existing wind lease (which is somewhat similar to a term royalty interest).[6] Wind scholars point out that many of these named states face unintended consequences from prohibiting wind severance rights, and Texas may also encounter some of the same if it follows suit.[7]

Overall, the main objective of this article is to provide the basis for a proposal to the Texas Legislature to break the silence on wind severance in Texas, thereby supporting the growing wind industry by extending the freedom of contract and giving surface owners the power to sever their wind rights and to further monetize their ownership of land in Texas. This endeavor will also necessarily include determining what legal theory will work best for the wind severance concept in order to "own" wind as a property right. Accordingly, this article will begin by providing a framework for analysis of the legislation, and then lead into a discussion of the arguments supporting and opposing wind severance, Texas public policy and the

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[3] Rivers, Cameron K. *Change in the Wind: Severance of the Wind Estate in Texas*. 14 Texas Journal of Oil, Gas, & Energy Law 1, 91, 13 (2019). [hereinafter Rivers] – citing *Nafta Traders, Inc.v. Quinn*, 339 S.W.3d 84, 95-96 (Tex. 2011).

[4] K.S.A. § 58-2272 (2011).

[5] DuVivier, KK. *Sins of the Father*. 1 Tex A&M Real Prop L.J. 301 (2014). [hereinafter DuVivier].

[6] *Id.*

[7] Rivers at 15-16.

freedom of contract, the political reality surrounding this proposal, the structure/language of the model wind severance statute, and the best solution for the Texas Legislature regarding this issue.

II. FRAMEWORK & ANALYSIS

A. Framework

The objective for the Legislature is to break the silence on wind severance rights in Texas, and most importantly, to accept the proposal by concurrently enforcing the freedom of contract and affording Texas landowners the right to sell or reserve their wind rights. Furthermore, in support of that objective, it is important to see both sides—the supporting and opposing arguments—regarding not only wind severance rights, but also how closely related wind is to other private property rights and showing how allowing wind severance rights closely aligns with Texas public policy by supporting the freedom of contract. Therefore, while supporting Texas public policy, it would be in the best interest of the Legislature to achieve this objective because it would not limit the freedom of contract by interfering with Texas private property rights. Additionally, it would save the Texas courts a substantial amount of potential litigation concerning wind rights that have already been sold or reserved in past years by many Texas landowners.

B. Analysis

In conducting the analysis in this paper, it is important to be informed of the competing arguments that surround wind severance rights. The wind energy industry has established a dominant role in the renewables sector in the United States and many states have profited greatly from it. Therefore, this monetary incentive has caused those states (such as Texas, Oklahoma and New Mexico) to address the many legal issues that have appeared due to wind ownership rights. As mentioned before, Texas is the wind capital of the United States "with a total installed capacity of 24,899MW, which is enough to power over six million homes" as of July 2020.[8] Furthermore, the Roscoe wind farm (located only 5 miles west of Sweetwater, Texas) is one of the largest onshore wind farms in the world, taking up over 100,000 acres of land leased by dryland cotton farmers.[9] Therefore, due to the sheer amount of private property devoted to wind energy, Texas should be very interested in arriving at a legislative decision regarding what rights landowners have when contracting to sell or reserve their wind rights.

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[8] Unwin, Jack. "Top Ten US States by Wind Energy Capacity." *Power-Technology*, GlobalData, 15 Apr. 2019 (updated July 28, 2020), www.power-technology.com/features/us-wind-energy-by-state/. [hereinafter Unwin].

[9] *Id.*

When addressing the supporting arguments for this issue, it is clear that Texas favors the sale and reservation of many private property rights that are arguably similar to wind rights, such as underground water, sand and gravel, granite, and caliche.[10] Furthermore, the opposing arguments address somewhat similar issues that Texas has dealt with in the past regarding other private property rights, such as contracting to sell or reserve mineral rights. Accordingly, this position leads into Texas' stance on the ability for parties to form contracts without government restrictions, namely the "freedom of contract."[11] The Texas courts have expressed a strong intention to keep the freedom of contract a well-defined right within the state.[12] Furthermore, this concept blends into the political environment surrounding this issue because the nine justices sitting on the Supreme Court of Texas have all identified with the Republican Party, and as such, they clearly should support private property rights.[13] Additionally, legislation pertaining to the wind energy industry will likely be favored by those who are affiliated with the Democratic Party. This unusual event could very likely mean that the political environment will be bi-partisan when concerning this issue, although as with any political issue, there will likely be those who oppose this proposal, especially since several states have rejected this concept already. Lastly, this analysis will walk through a discussion of the language of a drafted model statute prepared for wind severance in Texas. This effort will include dissecting the model statute and including the necessary improvements, as needed, to prepare the statute to be more efficient and precise when proposing it to the Texas Legislature.

In conclusion, this proposal for wind severance supports the ownership of wind rights as well as the landowner's ability to sever those rights and the wind industry in general. Also, it contributes to the long-standing idea that Texans should have the ability to contract and monetize their property as they see fit and maintain the freedom of Texas private property rights from governmental interference. Therefore, we will frame the debate in such a way that those who oppose wind severance will be faced with the issue of limiting the freedom of contract by subjecting private property rights to limitations that threaten to extend to the endeavors of future landowners. In other words, if wind severance rights are prohibited, what other private property rights will

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[10] See *City of Del Rio v. Clayton Sam Colt Hamilton Trust*, 269 S.W.3d 613 (Tex. App. – San Antonio 2008); *Edwards Aquifer Authority v. Day*, 369 S.W.3d 814 (Tex. 2012); Smith, Ernest E. *Wind, Water, Oil, Gas and Whitetails: A Comparison of Property Rights and Theories*. The University of Texas School of Law (2010) at 5-7. [hereinafter Smith].

[11] Freedom of Contract. *Cornell Law Legal Information Institute* (1992). [hereinafter Cornell].

[12] Polzer, John, et al. "The Supreme Court of Texas Affirms the Freedom of Contract." *Law*, Texas Lawyer, 6 Apr. 2020, www.law.com/texaslawyer/2020/04/06/the-supreme-court-of-texas-affirms-the-freedom-of-contract/?slreturn=20200816131748. Accessed 18 Sept. 2020. [hereinafter Polzer, et al.]

[13] *Ballotpedia*, "Texas Supreme Court," updated November 7, 2020. https://ballotpedia.org/Texas_Supreme_Court. [hereinafter BallotPedia].

be limited in the future? The Texas Legislature, and private property owners, as a whole, have an interest to refrain from opening that dark door.

III. ARGUMENTS SUPPORTING/OPPOSING WIND SEVERANCE

A. Supporting Arguments

The arguments for wind severance include the legal analogies applied to that of game animals, water rights, and most notably, mineral rights in Texas.[14] It is often said that native game animals are similar to wind in that they often move across property lines and have the potential to produce a productive income from hunting leases, just like wind leases.[15] However, a landowner has no recognizable property interest in a wild animal until it is "reduced to possession."[16] This concept is analogous to the fact that the holder of a wind easement "owns" the electricity produced by wind turbines and would have a cause of action against adjacent landowners who would attempt to block wind flow on the property.[17] Furthermore, regarding water rights, the first classification is subterranean water, which is owned by the surface estate and subject to the rule of capture, and a Texas court has recognized that a surface owner has the right to sever his rights in groundwater. [18] Therefore, the grantor can reserve all groundwater rights when he conveys the remainder of the fee.[19] The second classification is flowing water—water flowing in its natural course—which is deemed to be owned by the State, and the Texas Supreme Court has also recognized that agreements or grants to extract and use flowing water are valid.[20]

Lastly, and arguably the most important comparison for wind, is mineral ownership. Hydrocarbons, like wind, traverse property lines in their own respective ways due to "pressure differentials."[21] Accordingly, the ability to sever the mineral estate from the surface estate has been historically upheld by Texas courts and there is a strong body of case law which could also be applied to interpreting wind reservations. However, the likelihood of the Texas Supreme Court ever adopting a legal theory that wind, by itself, can be owned in place like oil and gas is highly unlikely.[22] Therefore, one of the most prominent wind scholars in the United States, Ernest E. Smith, argues that the best analogy for wind severance in Texas is the law of oil and gas in states like Louisiana, Oklahoma, and California which apply the concept of

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[14] Smith at 3.
[15] *Id*. at 1-2.
[16] See *Pierson v. Post*, 3 Caines 175 (N.Y. Sup. 1805).
[17] Smith at 4.
[18] *Id*. at 5-7; See *Clayton*, 269 S.W.3d at 617.
[19] *Id*.
[20] *Id*.; See *Texas Co. v. Burkett*, 296 S.W. 273 (Tex. 1927).
[21] *Id*. at 8-9.
[22] Smith at 8-9.

"profit a prendre," where a landowner reserving wind rights obtains a license to develop and therefore wind can essentially be "owned" when it is reduced to possession.[23] One of the lone authorities to discuss this concept is the United States District Court for the District of New Mexico in *Romero v. Bernell*, which involved a dispute over whether wind power rights were capable of being partitioned. The court held that, unlike minerals, "wind is never embedded in the real estate; rather, it is more like water or wild animals which traverse the surface, and which do not belong to the fee owner until reduced to possession."[24]

B. Opposing Arguments

The arguments against wind severance include the rationale that the traditional mineral severance causes minimal surface damages, whereas wind ties up much of the surface with a spider web of roads, turbines, substations, and transmission lines.[25] Furthermore, because wind is a non-depletable resource, it could cause a perpetual surface use unlike oil and gas development which eventually ceases. Additionally, there is the argument that severing wind rights will discourage wind development by removing the surface owner from the negotiation table either fully or partially.[26] This event would cause wind developers to be hesitant to work with landowners who have severed their wind rights because of the trouble of having to go through a different party to obtain a lease.[27] Lastly, the rule of capture, as applied to wind, could lead to wasteful development as it did in the early decades of oil and gas development.[28]

C. Arguments Conclusion

In prohibiting wind severance rights, a state could create unintended consequences for many states. Accordingly, some states (like Wyoming) have assumed that non-severed wind rights should revert to the status of the surface estate and be automatically subservient to severed oil and gas or other minerals.[29] Accordingly, in that situation, oil and gas is given an uncontested dominance over wind, which decreases the incentive to negotiate accommodation agreements. Furthermore, this approach could lead many to believe that oil and gas is more valuable than wind and should remain totally dominant without accommodation. Lastly, if they prohibit wind severance,

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[23] *Id.*
[24] See *Romero v. Bernell*, 603 F. Supp. 2d 1333, 1335–1337 (D.N.M. 2009).
[25] DuVivier at 416-18.
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *Id.* at 420-21.

some states (such as Texas) will likely be forced to "grandfather in" many deeds and reservations that have already severed the wind estate due to legislatures and courts being silent on the issue.[30] This unexpected scenario will be discussed in further detail below, but it could lead to a flood of litigation and cost landowners, as well as wind developers, hundreds of thousands of dollars.[31] Hopefully, supporters of severance can rely on the fact that the Texas legislature and courts have historically supported the policy of promoting the development of natural resources, which favors the right to sever different property rights and supports the freedom of contract for landowners.

IV. TEXAS PUBLIC POLICY & FREEDOM OF CONTRACT

Although Texas jurisprudence is silent on the issue of wind-severance rights, it is not silent on the freedom of contract.[32] As stated in Texas Jurisprudence: "Texas law recognizes and protects a broad freedom of contract, which must be upheld absent strong public policy reasons for holding otherwise."[33] Additionally, the Supreme Court of Texas as recently as April 2020, published two decisions that directly focus on the freedom of contract. One of these opinions stated: "Perhaps no principle of law is as deeply ingrained in Texas jurisprudence…as the freedom of contract."[34] Although these cases deal primarily with issues of partnership and transactional agreements, the Supreme Court has reassured Texans that Texas public policy favors the freedom of contract.[35] These holdings should not fall far from the issue of wind severance rights, as the right to alienate property rights falls directly within the freedom of contract. In *Sonny Arnold Inc.*, the Texas Supreme Court stated that Texans have the "right to contract with regard to their property as they see fit…"[36] Therefore, it is undisputed that Texas courts favor the freedom of contract, and most importantly, the idea that landowners should have the utmost power over their property with minimal government intervention. This stance is heightened by the fact that the main issue for the Texas Legislature lies within the fact that thousands of landowners have already signed deeds reserving wind rights and these deeds rest on an uncertain legal foundation.[37] Furthermore, it is inevitable that litigation will arise concerning this issue, and if the legislature fails to address the issue, then the decision will be left up to the courts to decide, which will

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[30] Rivers at 15-16.
[31] *Id.*
[32] Rivers at 13.
[33] 14 Tex. Jur. 3d Contracts § 1.
[34] Polzer, et al. at 1.
[35] *Id.*
[36] See *Sonny Arnold, Inc. v. Sentry Sav. Ass'n*, 633 S.W.2d 811, 815 (Tex. 1982).
[37] Rivers at 14.

likely lead to upholding the severance but perhaps in a narrower way.[38] Additionally, the court will then need to consider "whether the severance is against public policy, and if so, whether public policy against severance is so strong as to overcome the fundamental public policy supporting the freedom of contract."[39] In terms of public policy, Texas has historically permitted the severance of water and mineral estates via contract, and in accordance with this view, there should be no finding that the severance of the wind estate could be contrary to public policy.[40] Although if the Texas Legislature were to enact a statute preventing wind severance, as several other state legislatures have, the thousands of severances that have already taken place would need to be grandfathered in to prevent legal chaos.[41] This danger is due to the fact that in Texas, the validity of a contract is examined at the time the contract was executed.[42] Therefore, if there is an absence of compelling public policy at the time of the signing of the contract, courts would be compelled to give effect to all severances prior to the Legislature's enactment.[43] This development would then cause a flood of confusing litigation concerning who owns what interests and how the contracts will be constructed now that they are essentially prohibited, and furthermore it would potentially cause landowners, and wind developers, large financial losses.[44] Thus, if the Texas Legislature chooses to recognize wind severance by statute, then Texas courts will merely analyze which rights were conveyed to what parties, giving a simple solution to any disputes concerning severance, which would be very similar to how disputes are handled with mineral estates.[45]

It is important to note how Texas views the freedom of contract and how that goes hand-in-hand with Texas public policy because it sets the stage for the Texas Legislature to come to a different outcome on the issue of wind severance from other states. As stated previously, Texas is notably known as the wind capital of the United States with an installed capacity of 24,899MW as of July 2020.[46] The next closest state is Iowa with 8,422MW, then Oklahoma with 8,072MW and Kansas with 5,653MW.[47] Texas surpasses these states with an average of 17,000MW, which is double the amount that the next closest state has even installed. These facts alone make it evident

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[38] *Id*. at 14-15.
[39] *Id*.
[40] *Id*.
[41] *Id*.
[42] See *Hunt's Heirs v. Robertson's Heirs*, 1 Tex. 748, 761-62 (Tex. 1847); *Lancaster v. Wheeler*, 266 S.W. 795, 796 (Tex. Civ. App. 1924).
[43] Rivers at 16-17.
[44] *Id*.
[45] *Id*.; Lederle, Jacob R. *Texas Wind Severance: The Practical Consequences of Severing Wind Rights*. The University of Texas School of Law (2016). [hereinafter Lederle].
[46] Unwin at 1.
[47] *Id*.

that Texas has devoted much of its private property and resources to make wind an established energy source throughout the state, and therefore Texas is in a drastically different situation from states, such as Oklahoma and Kansas, who have rejected the issue of wind severance already. This position makes applying the freedom of contract to wind severance much more persuasive to Texas as a whole. In conclusion, this circumstance alone should make applying the freedom of contract to wind severance much more persuasive to the state of Texas.

V. POLITICAL CONCERNS

The political reality of this proposal may turn out to be quite different from what one might think, although it likely depends on the way that a legislator frames the debate. At first glance, this looks like an issue entirely focused on those who support renewable energy sources versus those who do not. Although it is a much different situation, it is very important for the public policy analysis of wind severance to gain support separately from both political parties.

As stated several times throughout this paper, Texas holds the freedom of contract to be a fundamental right of its citizens and the concept is recognized by the Supreme Court of Texas, which is wholly composed of Republican justices. The Republican Party has high regard for the freedom of contract, because it has traditionally supported limited government involvement in economic decisions.[48] This concept is viewed as a "pro-business" approach, in which the Republican Party favors laws that put business interests or transactions ahead of other types of policies.[49] An example would be the favorable policies for oil and gas, for which the Republican Party and the courts in Texas, favor specific statutes and caselaw that encourage the development of oil and gas properties. Furthermore, this position further limits the power of local governments to interfere with the oil and gas industry by assigning the regulatory power to the Texas Railroad Commission. Therefore, Republicans are likely to favor policies that encourage "pro-business" opportunities for private landowners and their freedom to contract. To limit these rights would open a door to governmental interference that the Republican Party has traditionally avoided for years. Furthermore, due to the Democratic Party's dedication to the renewable energy industry, this proposal should resonate with them most and there should be no problem with obtaining their support regarding wind severance. The Democratic Party has traditionally favored policies that encourage regulating carbon emissions, and the boom in the wind industry has given

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[48] Fuhrmann, Ryan. *Republican and Democratic Approaches to Regulating the Economy*. 23 Oct. 2020, www.investopedia.com/ask/answers/regulating-economy.asp. [hereinafter Fuhrmann].

[49] Unwin at 1.

them a reliable renewable energy source to support.[50] Although the Democratic Party is more willing to allow governmental interference, and somewhat limit the freedom of contract, it should be willing to support an issue that will further encourage the development of wind.[51] In other words, Democrats should support the idea that wind rights will be recognized within the private property context and that private property owners, with those wind rights, will be afforded the same opportunities of those that own oil and gas, and other property rights. Additionally, even given the uncertain political climate at the time of writing this article, it is still likely that this issue will receive support from both Republicans and Democrats because it supports political concepts that both parties are in favor of, such as the freedom of contract (ultimately favored by the Republicans) and the alleged "Green New Deal" (favored by the Democrats).

Therefore, even though this issue should be largely bi-partisan, a legislator supporting wind severance with this type of political reality will need to frame the debate in such a way that Republicans will view it as supporting the freedom of contract and not entirely supporting just the wind industry or renewables as a whole.

A. Discussion of the Model Statute

The model statute (Appendix A) is one suggestion for how the Texas Legislature should approach the establishment of wind severance for Texas landowners. The proposed changes will make the severance of the wind estate equivalent to that of a non-participating royalty interest (NPRI) in oil and gas law and will be subject to the same legalities of that interest, which can be either a fixed term or perpetual royalty interest. Additionally, the statute will cover royalty, minimum royalty, and development fees, but it will not cover surface damages, lost hunting, crops, or anything that would be included in that concept. Therefore, the owner of the wind estate will not be able to execute his own lease with a wind developer and will be dependent on the wind developer to contact the surface owner to negotiate a surface lease for wind development. Furthermore, the surface owner could also negotiate a lease with the wind developer, but the wind royalty owner (who has no executive rights) cannot. Any issues concerning the surface owner, also the holder of the "wind estate" executive right, not wanting to lease his surface to a wind developer will be subject to the same mandate applied to oil and gas—the duty of "good faith and utmost fair dealing."[52] Therefore, the wind royalty owner (non-executive owner) will be dependent on the

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[50] Fuhrmann at 1.
[51] *Id.*
[52] See *Lesley v. Veterans Land Bd. of State*, 352 S.W.3d 479, 481 (Tex. 2011).

surface owner to lease the wind estate, otherwise the wind royalty owner will not be able to realize any value from his/her interest.

The *Lederle* model statute[53] seriously errs by attempting to declare wind as a natural resource, which could have potential disastrous results. If wind is a natural resource, it would be subject to state control, regulation, and administration—none of which are necessary to achieve the objective of this statute. Instead, the severance of wind royalty from the surface estate should be free from governmental regulation. Moreover, clearly the severance of wind royalty is an interest in real property, but this should be described in the form of a "profit a prendre" (discussed below), unlike oil and gas in Texas. Lastly, the procedure outlined in Section III (3)(A)(i)–(v) is vastly too complicated and unnecessary to the implementation of this statute and should be deleted in its entirety. Likewise, the conditions about recording the memorandum for validity in Section IV (3), dormancy reversion in (4), as well as (B)(A)(6), and lastly Section V(1)(A) and (2) should be deleted. These sections, or parts of sections, are unnecessary to the objective that the statute is designed to achieve—severance of the wind estate or wind royalty. Additionally, these concepts, such as "dormant mineral acts" and reversion of reservation clauses, have been routinely rejected when efforts have been made to apply them to oil and gas cases in Texas, therefore it would draw unnecessary criticism to wind severance.[54] By including these sections, the statute has been made largely too complicated and difficult to understand; thus deleting them will make the statute easier to implement and hopefully to defend in the case that there are any legal issues. As such, the statute should be revised to state simply that a grantor may reserve a non-executive wind royalty in specific wind lease compensation in future leases similar to the proposed clause set out in "Appendix 7: Reservation of Wind Royalty" in *Wind Law*.[55] This *Reservation Clause* specifically excludes the owner of the wind royalty (or wind estate) from any negotiations involving the surface estate, therefore the wind developer is required to negotiate with the surface owner[56]—although it is rather important to note that this situation leaves the owner of the wind royalty (or wind estate) with the power to negotiate a wind royalty with the wind developer, assuming that the surface owner executes a wind lease.[57]

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[53] See Appendix A; *Lederle* at 34.

[54] *Rogers v. Ricane Enterprises*, 772 S.W.2d 70, 80 (Tex. 1989) – holding that "title to real property interests acquired under an oil and gas lease may not be abandoned."; Fenner, Terrell. *A Problem Lurking Just Below the Surface: The Need in Texas for Dormant Mineral Legislation*. 2 Tex. A&M L. Rev. 501 (2015). [hereinafter Fenner].

[55] Smith, Ernest E, et al. *Wind Law*. LexisNexis Mathew Bender, 2011–2019 Ed. Appendix 7: Reservation of Wind Royalty (attached for reference in Appendix B of this article).

[56] *Id.*

[57] *Id.*

VI. HOW THE TEXAS LEGISLATURE CAN SOLVE THE ISSUE

The Texas Legislature can address this issue by passing a bill allowing landowners to sever only a wind royalty from their property, rather than prohibiting this right. This approach would necessarily involve applying the oil and gas concept of non-ownership to wind, which is set forth by states such as Oklahoma and Louisiana.[58] As noted by Professor Smith: "Wind itself is more akin to a wild animal or percolating waters which must first be reduced to possession before they have value."[59] Additionally, in *Romero v. Bernell*, the New Mexico federal court noted "the right to harvest wind energy is, then, an inchoate interest in the land which does not become "vested" until reduced to possession by employing it for a useful purpose."[60] Therefore, it is clear that this non-ownership principle deems oil and gas unowned while in the ground but susceptible to ownership only after being "reduced to possession."[61] The recipient of the rights to the oil and gas in the ground receives an exclusive right to explore for, drill, and produce the hydrocarbons in the form of an easement in gross or in the common law concept of a "profit a prendre."[62] In the case for wind, the Texas Legislature would need to take this non-ownership theory and apply it in the same way, as Oklahoma and Louisiana do for oil and gas rights, for wind rights in Texas. Additionally, the federal court in *Romero* also presented a perfect example of how the Texas courts should apply this concept to wind, in which both Texas and New Mexico adhere to the "ownership in place" theory. In his opinion, Federal Judge Black notes that even though there was no precedent on the issue at the time, minerals in the ground are not the "appropriate commodity to create a legal paradigm to analyze wind power."[63] Wind is never embedded in the real estate, which necessarily requires it to be reduced to possession in order for the landowner to be able to "own it."[64] Therefore, except for the ownership theory applied to wind, Texas could still apply its legal methods of interpretation, used in oil and gas law, for clauses and all other aspects governing the transactions for wind rights.

In conclusion, since it is highly unlikely that Texas will recognize ownership to wind as property "in and of itself" (i.e., owned in place), an alternative solution for the Legislature would be to follow the lead of Professor Ernest E. Smith, as stated above, who is a legendary oil and gas scholar in Texas. His alternative solution is to allow landowners to sever a

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[58] Smith at 9.
[59] *Id.* at 8.
[60] See *Romero*, 603 F.Supp.2d at 1335–1337.
[61] Smith at 9.
[62] *Id.*
[63] See *Romero*, 603 F.Supp.2d at 1335–1337.
[64] *Id.* at 1335-1336.

wind royalty interest, akin to a profit a prendre as seen in Oklahoma and Louisiana.[65]

VII. CONCLUSION

In conclusion, it is clear that the Texas Legislature should come to a decision concerning wind severance in Texas. Currently, Texas can distinguish itself from other states who have rejected wind severance because it has committed to establishing wind energy as a reliable source of energy across the state. In doing so, Texas has devoted much of its private property and resources to achieve wind development. So far, there are an abundance of private property rights that Texas provides for its citizens, although wind severance is not one of them. This right should be upheld for Texas private property owners through the concept of freedom of contract, which is a fundamental principle of Texas law, as it has been upheld for resources such as oil and gas, groundwater, gravel, and caliche. Although the Texas Legislature will be required to apply a different ownership theory to wind, this will break the silence on wind severance and potentially prevent a flood of litigation concerning deeds that have already been executed. Additionally, this proposed law is made simple for the Texas Legislature because the statute does not have to be anything more than the severance and reservation of a wind royalty that is subject to the same laws applied to oil and gas royalty ownership. Overall, the Texas Legislature should consider that the state will benefit greatly from upholding wind severance for its citizens. This statute will not only support the consistently growing wind industry within the state, but it will uphold fundamental principles for private property owners for years to come. As stated in an early case by the Supreme Court of Texas: "the rule is well established that it is not the policy of the law of this state to favor restraints upon alienation of property."[66]

VIII. APPENDIX A

SEVERANCE OF WIND RIGHTS: A MODEL STATUTE[67]

Section I. Purpose.

(1) Wind is a valuable natural resource, and it is the public policy of this State to promote, to the greatest extent possible, the robust

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[65] Smith, 7-9.
[66] *Lemar v. Garner*, 50 S.W.2d 769, 773 (Tex. 1932).
[67] Lederle at 33.

development of wind energy. As such, this act must be liberally construed to effectuate that purpose.

Commentary

This provision would accomplish two things. First, declaring wind a natural resource places it within the scope of Article XVI of the Texas Constitution; thereby, allowing the legislature to regulate it. Second, requiring a liberal construction of the statute ensures that any subsequent interpretation of the statute or the severance of wind rights, in general, will be liberally construed in favor of promoting wind-energy development.

Section II. Severance.

(1) The wind located on or blowing over a parcel of land is an interest in real property. As such, rights to that wind may be severed by the owner of the underlying surface fee and conveyed or devised in any manner, subject only to the limitations in Section III and the requirements of Section IV.

Section III. Limitations.

(1) Any person who severs or reserves wind rights, but who does not have an ownership interest in the underlying surface estate may not sever, reserve, or retain any lease benefit that compensates the owner of the surface estate for surface damages, disruption, or restoration.

(2) If the owner of the underlying surface estate owns a nonexecutory interest in the wind estate, then that owner shall be joined to any lease for the sole purpose of negotiating surface damages, restoration fees, and for negotiating the placement of infrastructure.

(3) If the entire wind estate has been severed, and the surface owner does not own an interest in the wind estate, then the wind company or wind developer is required to obtain a surface lease from the owner of the underlying surface estate for the sole purpose of negotiating surface damages, restoration fees, and for negotiating the placement of infrastructure.

(A) If the owner of the underlying surface estate and the wind developer or wind company cannot reach an agreement on the surface damages, fees for surface restoration, or on the placement of infrastructure, then they may petition the district court to appoint three special commissioners who will then determine the appropriate surface

damages, the appropriate fees for surface restoration, and the appropriate placement of infrastructure.

(i) The petition shall be filed in the district court of the county in which the property is located; however, if the property resides in more than one county then the petition shall be filed in the county in which the surface owner resides.

(ii) The special commissioners must be residents of the county in which the court resides and must swear to carry out their duties fairly, impartially, and according to the law.

(iii) Each side may strike one special commissioner. If either side elects to strike a commissioner, they must do so within 30 days of the commissioner's appointment. Once the commissioner has been stricken, the judge will assign a replacement.

(iv) By mutual agreement of the surface owner and the wind developer or wind company, two additional special commissioners may be stricken. If, by mutual agreement, both sides elect to strike a special commissioner, they must do so within 30 days of the commissioner's appointment. Once the commissioner has been stricken, the judge will assign a replacement.

(v) All fees incurred must be divided equally between the surface owner and the wind developer or wind company.

Section IV. Requirements.

(1) Any instrument severing wind rights, along with any subsequent conveyance of a severed wind right must be recorded in the office of the county clerk in the county where the underlying surface estate is located. If the underlying surface estate is located in more than one county, then the instrument must be recorded in each additional county.

(2) Every county clerk shall create, maintain, and provide access to a tract indices in which all wind related instruments, including, but without limitations, wind leases, memorandum of wind leases, option agreements, severances, memorandums of severances, and notices of intent-to-preserve shall be index according to the underlying surface estate.

(3) Any person presenting for recordation an instrument that purports to sever wind rights, convey severed wind rights, or otherwise transfer severed

wind rights must also file a memorandum or notice that provides the following:

(A) the name of the current surface owner;
(B) the name of the grantor (if different from the current surface owner);
(C) a property description sufficient to satisfy the statute of frauds;
(D) the name, telephone number, and address of the grantee;
(E) the book, volume, and page number where the granting instrument is recorded; and
(F) language describing the granting instrument, including the percentage of the wind estate conveyed.

Failure to record such a memorandum or notice will nullify the recording of the granting instrument and said instrument will be treated as unrecorded until such a memorandum or notice is recorded. A memorandum or notice that does not comply with sub-subsections (A) through (F) shall nullify the recording of the granting instrument and said instrument will be treated as unrecorded until a memorandum or notice that is in compliance with sub-subsections (A) through (F) is recorded. A defective memorandum or notice cannot be used to impute notice.

(1) A party seeking to develop the wind rights overlaying a surface estate may establish marketability by conducting a title search expanding 20 years prior to the recording of the root of title. Any severed wind right not appearing during that period is extinguished and reverts to the owner of the underlying surface estate. An interest appearing before the 20-year period may be preserved by filing a notice of intent-to-preserve the interest in the county or counties in which the underlying surface estate is located. A general reference to the interest is not sufficient to maintain the interest.

(A) A notice of intent to preserve must include the following:

(i) the name of the current surface owner;
(ii) the name of the grantor (if different from the current surface owner);
(iii) a property description sufficient to satisfy the statute of frauds;
(iv) the name, telephone number, and address of the grantee;
(v) the book, volume, and page number where the granting instrument is recorded; and

(vi) language describing the granting instrument, including the percentage of the wind estate conveyed.

(B) All severed wind interests (including royalties) are subject to this subsection.

(2) An individual or party developing the wind estate must accommodate any existing or preexisting planned surface use, if that use would be substantially impaired or precluded by the developing party's actions, and the developing party has a reasonable, industry accepted alternative for carrying out the adverse action.

(A) This includes uses of the surface estate by the surface owner (or any lessee), or uses of the surface estate by the owner of the mineral estate (or any mineral lessee).

A severed wind estate is dominant to the surface estate and equal in legal capacity to the mineral estate. Therefore, regardless of which is first in time, any wind developers and oil and gas developers that burden the same surface estate must sign and record a Surface Use Agreement.

Commentary

Subsection (5) is self-evident and is a codification of the accommodation doctrine. However, it is written broadly to avoid the recent Supreme Court decision in *Merriman* and, more importantly, to allow courts discretion in defining the contours of the doctrine as applied to wind. Subsection (6) is meant to establish mutual dominance between the wind and mineral estates towards the surface estate. Although the dominant estate doctrine is a doctrine of mineral law, the underlying rationale for the adoption of this doctrine applies with equal force to wind. Specifically, the doctrine was established to ensure that the mineral estate had access to the surface estate to extract the minerals. Without such access, the minerals would not be extracted, and thus the purpose of owning the mineral estate would be frustrated. The same applies to wind. Without access to the surface, wind energy could not be developed, thereby, frustrating the purpose of the wind estate. However, by placing the two estates on equal legal footing the potential for conflicts between the two is increased. Hence, the requirement that regardless of first in time, the two sides must enter into and record a surface-use agreement.

Section V. Remedies.

(1) Tenants in common and their lessees may develop their proportionate share of the wind rights without the consent and over the objection of any other cotenant. However, the developing cotenant (or its lessee) must account to the non-developing cotenant for that cotenant' s proportionate share of the net proceeds of development.

(A) A developing cotenant(s) (or its lessee) may deduct the non-developing cotenant's proportionate share of the costs of development and production; provided those costs or expenses directly benefit the non-developing cotenants interest and are commercially reasonable.

(2) Tenants in common may voluntarily partition their respective interest. If a voluntary partition is unattainable, any person (other than the owner of a royalty) owning an interest in the wind rights may petition the district court for a judicial partition. Upon such petition (if equitable), the court shall partition the wind estate in-kind. If unequitable, the district court shall assign a value to the interest of the non-developing cotenant(s) and shall allow the developing cotenant(s) to purchase jointly or individually the non-developing cotenant(s)'s interest. If no party chooses to purchase the non-developing cotenant’s interest, the court shall order the public sale of the entire wind estate and upon sale divide the proceeds in accordance with each cotenant' s proportionate interest.

(3) Upon petition to the district court, a cotenant (or its lessee) may ask the court to appoint a receiver to execute a wind lease for an absent cotenant or missing cotenant, in accordance with TEX. CIV. PRAC. & REM.§§ 64.091 - 64.093.

(4) Nothing in this subsection shall foreclose any other judicial or statutory remedy that may be available.

Section VI. Incidents of Wind Ownership.

(1) Surface Access: The owner(s) of the wind estate or its lessee(s) shall have the express right to access and use the underlying surface estate in any manner reasonably necessary for the development and harvesting of the wind.

(2) Executive Right: The owner of the executive right has the exclusive ability to authorize all actions necessary to the development of the

wind estate. However, this right cannot be owned separately from an ownership interest in the wind estate.

(3) Financial Benefits: Commensurate with Section III (1) the owner of the wind estate or anyone owning an interest therein, is entitled to any lease benefits directly related to the production and sale of wind for wind energy. However, the owner of a royalty is only entitled to the stated fraction or stated percentage of any landowner's royalty. Any such financial benefit may be severed and conveyed or otherwise transferred; provided such conveyance or transfer is not inconsistent with this act. Financial Benefits does not include any sum meant to compensate the surface estate owner for surface damage, or restoration.

Section VII. Severability.

(1) If any section, subsection, or sub-subsection of this act is found unconstitutional, then such section, subsection, or sub-subsection shall be stricken and the remaining sections, subsections, or sub-subsections shall remain in full force.

Section VIII. Definitions.

As used in Sections I through VIII the following terms shall mean:

(1) Directly Benefits - A cost or expense directly benefits a non-developing cotenant's interest if the non-developing cotenant would have incurred a similar cost or expense had he or she independently developed their interest.

(2) Marketability (or Marketable Title) - is a title "reasonably free from doubtful questions of law or fact."

(3) Root of Title - "means a conveyance or other title transaction ... in the record chain of title of a person, purporting to create or containing language sufficient to transfer the interest claimed by that person, upon which that person relies as a basis for marketability of title."

(4) Severance - is the conveyance or reservation of undeveloped wind rights in fee simple.

(5) Surface Damages - includes all costs for the replacement or repair of damaged improvements, damaged or lost livestock, as well as costs for the reimbursement of losses sustained "as a result of a disruption

to hunting, grazing or farming." Surface damages shall also include any sums paid for the construction of roads, installation of power lines, substations or turbines, or any other similar activity.

(6) Surface Restoration Fees - includes any costs paid for the removal of equipment or for the restoration of the surface to its original condition.

IX. APPENDIX B

RESERVATION OF WIND ROYALTY[68]

Reservation Clause

There is RESERVED unto the Grantors a non-executive wind rights royalty in and equal to an undivided one-half (1⁄2) of the proceeds or value of any and all royalties, payments in lieu of royalty, bonuses, development period payments, option fees, operating fees, rents, minimum rents, alternative rents, and all other benefits directly or indirectly paid or accrued to the Grantee for, or in anticipation of, or in connection with, the generation on the Land of electricity from wind power; provided, that (i) the terms "Grantors" and "Grantee" as used in this deed shall include the respective heirs, successors and assigns of both Grantors and Grantee; (ii) if Grantee should elect to generate electricity from wind power for its own account without entering into a lease or other agreement, then the royalty made the basis of this reservation shall be calculated by reference to the highest royalty then agreed to or being paid upon the generation of electricity by wind power in those Texas counties within a 100-mile radius of (name of town/city), Texas; (iii) any sums payable under this reservation shall be payable in (name of county), Texas to or for the benefit of the Grantors; (iv) in the preparation of this deed, both Grantors and Grantee have been represented by attorneys of their own selection, and no presumption or rule of construction against either party will be used in the interpretation or construction hereof; (v) there is EXCLUDED from this reservation any sums paid to or received by the Grantee in good faith for surface damages to the Land in connection with the generation of electricity by wind power, including, but not limited to: construction damages, turbine installation fees, transmission and access easement fees, meteorological tower fees, substation and/or operations and maintenance building fees, crop or grassland damage payments, penalties assessed by any governmental agency for removal of any of the Land from any governmental program, and indemnity payments of any physical damages to the Land; (vi) this reservation shall not apply to any electricity generated by wind power upon the Land for domestic or other non-commercial uses on the Land; (vii) it shall not be necessary for the Grantors to join in the execution of any wind power lease which may be granted or created by Grantee covering the Land, or any part thereof during the terms of this reservation; and (viii) the Grantors shall not have any right of ingress and egress on the Land with regard to this reservation for any purpose.

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[68] Smith, Ernest E, et al. *Wind Law*. LexisNexis Mathew Bender, 2011–2019 Ed. Appendix 7: Reservation of Wind Royalty.

ESTATE MISCONCEPTION THEORY AND PRESUMED GRANT DOCTRINE FAIL TO SECURE REINTERPRETATION OF DEED RESERVATION

Michael Heidari[*]

Van Dyke v. Navigator Group, [Tex. App.—Eastland, 2020][1]

In *Van Dyke v. Navigator Group*, assignees dispute a double-fraction "minerals and mineral rights" reservation in a 1924 deed.[2] The reservation at issue states that "[i]t is understood and agreed that one-half of one-eighth of all minerals and mineral rights in said land are reserved in grantors … and are not conveyed herein."[3] The contending assignees (the "Mulkey assignees") claim the reservation grants them ownership of one-half of the minerals and mineral rights. The opposing assignees (the "White assignees") disagree with this interpretation of the reservation. Instead, the White assignees claim that the reservation only grants the Mulkey assignees a one-sixteenth ownership interest of the minerals and mineral rights. In addition, the White assignees argue that they own the remaining fifteen-sixteenths of the minerals and mineral rights. The trial court held in the White assignees' favor, stating that the 1924 deed was unambiguous and that the White assignees' interpretation correctly stated the respective ownership interests. This appeal to the Texas Eleventh Court of Appeals followed.

The court of appeals reviewed the Mulkey assignees' claims in *Van Dyke v. Navigator Grp.*, No. 11-18-00050. First, the court determined whether the Mulkey assignees' argument regarding the applicability of the estate misconception theory was persuasive. The court held that the Mulkey assignees incorrectly relied on the estate misconception theory. The estate misconception theory describes a common and incorrect assumption, in which some believed that the standard one-eighth lease royalty was based on the lessor's retention of one-eighth of the mineral estate in fee, while having conveyed the other seven-eighths in fee simple determinable to the lessee. In addition, the court explained that the Mulkey assignees could not have been operating under the estate misconception theory when the grantor executed

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[1] *Van Dyke v. Navigator Grp.*, No. 11-18-00050, 2020 WL 7863330 (Tex. App.—Eastland December 31, 2020, no pet.) (mem. op.).
[2] *Id.* at 1.
[3] *Id.*

the deed because Mulkey owned the mineral estate in fee simple at the time. This left no room for a misconception to occur. Therefore, the Eastland Court of Appeals saw no ambiguities in the deed in need of harmonization. It held that the plain language reserved a one-sixteenth interest for the Mulkey assignees, with the remaining fifteen-sixteenths interest owned by the White assignees.[4]

The court then turned its attention to the Mulkey assignees' argument regarding the applicability of the presumed grant doctrine. The court held that the facts of the case prevented the application of the presumed grant doctrine. The court stated that the presumed grant doctrine is only used in situations where there is a gap in the chain of title and operates as a form of adverse possession to establish title by circumstantial evidence. Here, there was no gap in title. The Mulkey assignees argued that their interpretation, nevertheless, should be accepted because both sides had operated according to that interpretation for decades. But the court noted that a party cannot use the presumed grant doctrine to reinterpret unambiguous terms in a deed, as the Mulkey assignees attempted to establish their quantum of ownership interest.[5]

There was no gap in title, no ambiguity, and, therefore, no need to invoke the presumed grant doctrine.[6]

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[4] *Id.*
[5] *Id.*
[6] *Id.*

LYLE V. MIDWAY SOLAR AND THE ACCOMMODATION DOCTRINE

Quentin E. Wetsel[*]

Lyle v. Midway Solar, LLC., [Tex. App.—El Paso, 2020][1]

The accommodation doctrine is a judicially-created doctrine arising from the Texas Supreme Court case known by oil and gas practitioners as *Getty Oil.*[2] Texas courts consider the accommodation doctrine to be implicit in all oil and gas leases with the objective of protecting a surface owner from a mineral owner's or lessee's interference with the surface.[3] The doctrine balances the rights of the surface owner and the mineral owner with regard to the use of the surface while recognizing the dominant nature of the mineral estate.[4] Thus, a mineral owner is only permitted to use as much of the surface as is reasonably necessary for the production of oil and gas while acting with due regard for the rights of the surface owner.[5] In applying the doctrine, courts must assess: (1) whether the lessee's use completely precludes or substantially impairs the surface owner's existing use of the surface; (2) whether there is any reasonable alternative method available to the surface owner, in which his/her existing use could be continued; and (3) whether the mineral owner has access to a reasonable, customary, and industry-accepted method to access and produce the minerals while also allowing the continuation of the surface owner's existing use.[6] This is a highly factual assessment that places the burden of proof on the surface owner.[7] It creates a relatively high bar for the surface owner because a court will not enforce an accommodation for a surface owner out of mere inconvenience.[8] Over time, the doctrine has evolved, and parties have argued about its application in cases involving interference with many surface activities such as farming, ranching, and the use of surface resources. Alongside the emergence of Texas

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[1] *Lyle v. Midway Solar, LLC*, No. 08-19-00216-CV, 2020 WL 7769632 (Tex. App.—El Paso Dec. 30, 2020, pet. denied)

[2] *See Getty Oil v. Jones*, 470 S.W.2d 618 (Tex. 1971).

[3] *Id*.

[4] *Coyote Lake Ranch, LLC* v. *City of Lubbock*, 498 S.W.3d 53, 62–63 (Tex. 2016).

[5] *Id*.

[6] *Coyote Lake Ranch*, 498 S.W.3d at 64–65.

[7] *Getty Oil*, 470 S.W.2d at 621-22.

[8] *See Merriman* v. *XTO Energy*, 407 S.W.3d 244 (Tex. 2013).

as a leader in the renewable energy sector, mineral owners argued against the doctrine's application in a case involving the potential interference with the construction of a solar energy farm.[9] Accordingly, *Lyle* serves as an early indicator of what the judicial outcome might be when solar leases collide with mineral ownership and oil and gas leases.

In *Lyle*, the Lyle family owned 27.5% of the mineral rights in an undeveloped mineral estate located on a 315-acre tract of land in Pecos County. The family inherited the mineral interest from a deed executed in 1948 ("1948 Deed") in which the original owners of the tract transferred ownership of the 315-acre surface estate to a third party while reserving the entire mineral interest for themselves. As mineral owners, the Lyle family had never leased the interest to any oil and gas operators to develop the minerals, nor did they have any plans to do so. The issue in this case arose when Gary Drgac, the successor owner of the surface estate, executed a 55-year lease with Midway Solar to build a solar energy facility on the south half of Section 14. The lease permitted Midway to use 215 acres of the 315-acre tract. The lease also created "designated drill site tracts," covering the remaining 100 acres for future oil and gas exploration. However, the Lyle family was not allowed any input on where the "designated drill site tracts" would be located.[10] Thus, when Midway constructed the solar facility on the property, the Lyle family sued Midway and Drgac. The Lyles alleged that Drgac and Midway denied them reasonable access to their minerals by covering 70% of the surface with solar panels and transmission lines. Furthermore, while requesting a mandatory permanent injunction, the Lyle family argued that Midway was trespassing on their mineral estate and that they were entitled to damages because construction of the solar facility had "destroyed and/or greatly diminished the value" of their mineral estate.[11] In response, Midway, joined by Drgac, argued that the accommodation doctrine controlled surface and mineral owners' use of the surface estate. Midway asserted that they were neither trespassing nor making excessive use of the surface because the Lyle family had not developed their mineral estate and had no plans to do so. The Lyle family attempted to rebut this argument by asserting that the 1948 Deed expressly described the respective rights of the parties, which had the effect of preempting the applicability of the accommodation doctrine.

The trial court ruled in favor of Midway, and the El Paso Court of Appeals affirmed the trial court's decision. The court of appeals stated that the accommodation doctrine will apply to determine the rights between a mineral owner and a surface owner "absent an agreement to the contrary."[12]

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[9] *See Lyle* v. *Midway Solar, LLC*, 618 S.W.3d 857 (Tex. App.—El Paso 2020).
[10] *Id.* at 863.
[11] *Id.* at 865.
[12] *Id.* at 869.

The court explained that Texas public policy strongly favors the freedom of contract in which parties have the right to set their own contractual terms as they see fit, provided that the terms do not violate Texas law. Thus, parties can write the accommodation doctrine out of leases. However, when the contract is silent or unclear as to the parties' respective rights, or there is substantial disagreement regarding the parties' intent, then courts will apply the accommodation doctrine to the lease. Here, the 1948 Deed stated that the mineral owners had the right to use the surface as may be "usual, necessary, or convenient."[13] The Lyle family argued that this language granted them the express right to use traditional vertical drilling, rather than having to accommodate the surface owners by utilizing directional or horizontal drilling. The court determined that this provision left room for substantial disagreement as to the intent of the original parties; therefore, the accommodation doctrine would apply to the deed and the Lyle family's mineral estate. The court further explained that Midway owed no potential duty to the Lyle family regarding surface usage—specifically regarding the Lyles' claim of excessive surface usage due to the solar panels—until the Lyle family sought to develop their mineral interest. The court noted: "There is simply no logic in allowing trespass damages today for a mineral estate that might never be developed."[14] Therefore, if the Lyle family were to exercise their right to develop the minerals, then Midway would be required to yield to the degree mandated by the accommodation doctrine. Absent such action, any claim for trespass or breach of contract against Midway is premature until the Lyle family seeks to develop their mineral interest and create an actual need for the surface.

[13] *Id.* at 870.
[14] *Id.* at 874.