

PECOS BILL'S TURBINES IN THE TUMBLEWEEDS: EXTENDING THE TEXAS PROPERTY CODE TO PERMIT SEVERANCE OF WIND RIGHTS THROUGH TESTATE AND INTESTATE SUCCESSION

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ABSTRACT

Wind development in Texas remains a generally unregulated area of law. Wind severance in the Lone Star State also remains unregulated; however, landowners are moving forward with reserving an interest in the wind from the surface ownership. While some states have explicitly prohibited severance, Texas remains undecided on the issue and has no case law considering wind severance. With a steep increase in development, more landowners want to reserve the rights to the wind estate, similar to the reservation of the mineral estate.

Because there is no guidance in Texas, the Texas legislature should consider implementing an extension to the Texas Property Code that defines the scope of wind severance, methods a landowner can use to sever the wind estate, and implications of severance through testate and intestate succession. This proposed extension should be included in Title 6 of the Texas Property Code and will become Chapter 79 on Texas wind rights. It should include multiple sections that identify wind as a private property interest, a purpose statement, definitions of terms, provisions allowing severance by testate, distribution of the wind estate by intestacy, and language estate planners may use to devise a wind interest. Legislating severance in this manner will lift the burden off of Texas courts to create law on the issue and will provide Texas estate planners with guidance on how to devise a wind interest for their clients.

Although Texas wind developers generally disfavor wind legislation, especially regarding severance, this proposed extension should not be so restrictive that it is the only method to allow severance. Until more legislation is provided in this area of law, allowing severance by conveyance,

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reservation, intestacy, and testate succession allows landowners to sever the wind from the surface and guides who may sever the wind and the legal ramifications.

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I. INTRODUCTION

Pecos Bill certainly was ahead of his time when he conquered a wild tornado and tamed it into a domestic breeze.¹ This well-loved western tall

1. See WYATT BLASSINGAME, *PECOS BILL RIDES A TORNADO* (Garrard Publ'g Co. 1973).

tale depicts cowboy Bill who could ride anything and tame any creature, from a vicious rattlesnake to the wild horse named Widow-Maker.² But one of the greatest feats he managed was roping a ferocious tornado and riding it until it became an obedient little breeze.³ He fought and wrestled that tornado until he could tame it like he tamed the wild Widow-Maker.⁴ In doing so, Pecos Bill became the greatest cowboy to ever live, and he kept his little breeze on his property to use for his community's benefit.⁵

Like Pecos Bill, many landowners in Texas and other states are interested in taming the wind, perhaps not through the use of a lasso and riding a tornado, but instead through wind turbines.⁶ Imagine a couple in Texas—Bill and Sue—who own hundreds of acres of land.⁷ It is a very windy area of Texas, crossed by a large transmission line making their land ripe for development.⁸ The royalties sound good, but the couple is apprehensive about entering a wind lease right now because they want to sell their property.⁹ Is there a way for Bill and Sue to sell the land yet still receive income from wind farm development on their property?¹⁰ One method they could pursue is to reserve a wind interest in that property and sever the wind from the surface in the contract of sale and the deed.¹¹ Another method could be to devise a percentage of wind farm royalties through a valid will.¹² Either way, this couple faces a question many states, including Texas, wrestle with: may landowners sever the wind (or, moreover, the right to receive income from wind energy generation) from their surface ownership?¹³

Severance may be defined as “separating all or some of the ‘wind rights’ . . . or income stream from the ownership of the underlying land.”¹⁴ Importantly, “‘severing wind rights’ refers to conveying an interest to the surface of property to an individual that does not own the fee simple interest

2. *See id.*

3. *Id.*

4. *See id.*

5. *See id.*

6. *See id.*

7. Author's original hypothetical.

8. Author's original hypothetical.

9. Author's original hypothetical.

10. Author's original hypothetical.

11. *See* Lisa Chavarria, *The Severance of Wind Rights in Texas*, STAHL, BERNAL & DAVIES 1, 5 [https://www.sbaustinlaw.com/library-papers/Chavarria-The_Severance_of_Wind_Rights%20\(Final\).pdf](https://www.sbaustinlaw.com/library-papers/Chavarria-The_Severance_of_Wind_Rights%20(Final).pdf) (last visited Mar. 21, 2022) [<https://perma.cc/645Q-KW6U>].

12. *See id.* at 10.

13. *See* Christianson Hartman, *Is the Wind Mine to Give Away? Guidance for Testators Wishing to Transfer a Wind Interest*, 1 EST. PLAN. COMM. PROP. L. J. 399, 407 (2009); Thomas Boyd, *Who Owns the Texas Sky? An Analysis of Wind Rights in Texas*, 45 ENV'T L. REP. *10426, *10427 (May 2015) (identifying issues concerning whether landowners in Texas may sever a wind estate).

14. Eugene A. Frassetto, Ramona L. Monroe, & Sarah Johnson Phillips, *Wind Energy Lease Agreements*, L. WIND: GUIDE BUS. & LEGAL ISSUES 1, 9 (2018), <https://files.stoel.com/files/books/LawofWind.PDF> [<https://perma.cc/5ZZ8-544Z>].

in the surface estate.”¹⁵ This means the holder of the wind estate does not own the wind rights separate from the surface; rather, the holder “acquire[s] a specific right to use the surface and wind that flows across that surface.”¹⁶ Typically, severance is a reservation of wind rights, which a landowner may reserve worth up to one-half of the following wind lease agreement compensation schemes: royalty payments, payments made in due of the lease, any bonuses (such as signing bonuses), development payments, option fees, minimum rents, and minimum royalties.¹⁷ The minimum royalty may be determined as the greater amount of the following methods: (1) actual royalty; (2) a per megawatt amount; or (3) the acreage fee.¹⁸ While a landowner may be interested in reserving one-half or another percentage of these fees and payments, the reserving landowner (the one reserving an interest in the wind rights) will not be entitled to compensating items such as surface damages.¹⁹ This occurs because the reservation is only for the payments and fees related to the capture of the wind and the generation and sale of wind power—not any payments for damages to the surface in which the reserving landowner no longer has an ownership interest.²⁰

Across the country, multiple states have enacted restrictive legislation on severance, while at least one state, California, has recognized that landowners may sever the wind from the land surface.²¹ Other states, including Kansas, North Dakota, and South Dakota, have enacted strict statutory limitations or outright prohibitions against severance.²² Wind development in Texas is generally unregulated, with landowners entering into wind leases and related proceedings to sever or sell their wind rights without any Texas law on point allowing such severance.²³ Because some states in the United States have adopted legislation generally or explicitly prohibiting wind severance, Texas should consider both the costs and benefits of severance to create legislation inclusive of testate and intestate methods of succession.²⁴ This approach will encourage landowners to utilize their property for wind development and provide guidance on devising a wind right and what will happen to the wind estate once the holder passes

15. Chavarria, *supra* note 11, at 3.

16. *Id.*

17. See ERNEST E. SMITH, RODERICK E. WETSEL, BECKY H. DIFFEN, & MELISSA POWERS, WIND AND SOLAR LAW § 4.03 (2022) [hereinafter SMITH, *Wind Law*].

18. See *id.* (explaining that the acreage fee is typically the smaller out of these three methods and is often provided when there are no turbines built on the property yet).

19. See *id.*

20. See *id.*

21. See Chavarria, *supra* note 11, at 5.

22. See Frassetto, Monroe, & Phillips, *supra* note 14, at 11.

23. Alan J. Alexander, *The Texas Wind Estate: Wind as a Natural Resource and a Severable Property Interest*, 44 U. MICH. J.L. REFORM 429, 440–41 (2011).

24. See *infra* Sections V.A–C; see generally *id.* (explaining the importance of future wind development and that it should have authority to regulate wind as a natural resource in Texas).

away for future landowners who buy property with a severed wind estate or a reserved wind royalty interest.²⁵

There are many reasons why landowners may want to sever the wind estate from the surface or to reserve a royalty interest.²⁶ Like Bill and Sue, some landowners may want to sell their property but still would like to share in any energy income produced on the land in the future.²⁷ Other landowners may simply want to transfer a wind royalty interest to someone else and sell the land that hosts the actual wind farm.²⁸ Overall, it is natural for landowners to want to maximize the profitability and value of their property, and land hosting a wind farm becomes an immense asset landowners would not have had otherwise that should be included in their estate plans.²⁹

While wind developers may favor legislation restricting severance, the Texas legislature should consider a less restrictive approach to encourage wind development in Texas and protect landowners' interests in this asset.³⁰ The legislation specifically addressing estate planning and the division of community property issues with wind development in Texas stands to formalize Texas landowners' current practices and provide guidance to estate planners and courts when these issues come up in practice.³¹ Eventually, Texas courts will face this issue in litigation through challenges to the validity of a reservation by a deed, will, or trust, and will need to decide whether an individual may reserve a wind interest for future development or transfer a percentage of wind royalties to be divided among beneficiaries.³² Allowing freedom to contract and upholding the validity of wind leases with severed estates better prepares Texas courts and other lawmakers to consider these issues and determine the precedent for other potential severance of above-surface rights such as solar production.³³

To better prepare courts for this issue, the Texas legislature should consider taking steps to codify wind development and severance of wind rights.³⁴ One proposed step is to extend the Texas Property Code to include a chapter covering wind rights.³⁵ Sections within this new chapter will address when and how landowners may sever the wind estate from the surface land through testate and intestate succession.³⁶ Such legislation will

25. See *infra* Sections V.A–C.

26. See *infra* Part I.

27. See *infra* notes 28–45.

28. See *infra* Part IV.

29. See *infra* notes 30–45.

30. See *infra* Sections V.A–B.

31. See *infra* Sections V.A–B.

32. See *infra* Sections V.A–B.

33. See *infra* Sections V.A–B.

34. See Warigia M. Bowman, *Dust in the Wind: Regulation as an Essential Component of a Sustainable and Robust Wind Program*, 69 U. KAN. L. REV. 45, 86 (2020).

35. See *infra* Sections V.A–C.

36. See *infra* Sections V.A–C.

help protect a wind farm asset and clarify how courts should handle intestate distribution of wind farm financial gains.³⁷ This new chapter should formally address severance in relation to estate planning and the methodology by which a landowner's wind rights, royalties, estate, or interest distributes upon the landowner's death.³⁸

This Comment generally proposes that the Texas legislature consider drafting laws inclusive of testate and intestate methods of succession for division of the wind estate and wind rights upon a holder's death.³⁹ Specifically, it asserts that Texas lawmakers should recognize the wind estate as a private ownership interest severable from the surface and proposes language allowing holders of wind rights to use methods of succession to distribute their wind estate upon death.⁴⁰ Also, it explores what should happen to the wind estate when the holder passes away intestate.⁴¹ Part II discusses the increased wind development in the United States and Texas.⁴² Part III explains the rising issue of severance and how other states approach the issue, then addresses Texas's general lack of legislation.⁴³ Part IV proposes that Texas approach wind severance similarly to mineral and groundwater severance and proposes theories of severance used in other states.⁴⁴ Finally, Part V provides proposed legislative language for addressing wind severance in the estate planning context and the results of adopting such legislation.⁴⁵

II. WIND DEVELOPMENT OPPORTUNITIES IN THE UNITED STATES AND TEXAS

The following sections describe how wind energy production in the United States and Texas became a viable renewable energy source and the legal implications developed due to this resource alternative.⁴⁶ First, highlighting wind energy development in the United States is necessary to understand how the legal disputes around severance emerged and why legislation offers a solution for resolving conflicts involving severance.⁴⁷ Second, because Texas is a crucial state for onshore wind development, due to the amount of land available for farm construction and production,

37. See *infra* Sections V.A–C.

38. Author's original proposal.

39. See discussion *supra* notes 1–38.

40. See discussion *supra* notes 1–39.

41. See discussion *supra* notes 1–40.

42. See discussion *infra* Part II.

43. See discussion *infra* Part III.

44. See discussion *infra* Part IV.

45. See discussion *infra* Part V.

46. See discussion *infra* Sections II.A–B.

47. See discussion *infra* Section II.A.

severance in Texas will likely draw from existing, well-recognized real property ownership principles, such as in oil and gas areas of law and limited areas of water law, primarily concerning private groundwater ownership.⁴⁸

A. Why Is Wind So Big in the United States?

Humans have harnessed the wind throughout history.⁴⁹ From sailing along the Nile River around 5,000 B.C.E. to implementing the use of simple water pumps in China and windmills in Persia and the Middle East by 200 B.C.E., people gave wind an important role in historical development.⁵⁰ Now, modern-day wind energy production mimics this historical use, and it is not a breakthrough idea for landowners throughout windy parts of the world to desire to use the wind to generate electricity.⁵¹ In the United States, wind energy is an attractive source of renewable energy because of its minimal impact on the environment and the fact that turbines do not release carbon dioxide or greenhouse emissions during use.⁵² One particular legal concern with this major development boom in Texas is the lack of legislation, which allows wind development companies to freely do business with very few restrictions, presenting the courts with complex and novel issues to decide on a fact-specific basis.⁵³

Plans for renewable energy in the United States began before environmentalists brought up discussions on climate change, and serious plans for renewables started with the international oil and gas crises.⁵⁴ In the 1970s, Americans witnessed a rising consumption of oil through gasoline and other oil products.⁵⁵ By 1973, an oil embargo placed by the Arab members of the Organization of Petroleum Exporting Countries led to fuel shortages in the United States and thus significantly higher prices on oil throughout

48. See discussion *infra* Section II.B.

49. See *Wind Explained: History of Wind Power*, EIA, <https://www.eia.gov/energyexplained/wind/history-of-wind-power.php> (Mar. 17, 2021) [<https://perma.cc/Q7HY-7G4M>].

50. See *id.*

51. See *id.*

52. *Wind Explained: Wind Is an Emissions-Free Source of Energy*, U.S. ENERGY INFO. ADMIN., <https://www.eia.gov/energyexplained/wind/wind-energy-and-the-environment.php> (Dec. 17, 2021) [<https://perma.cc/48GJ-KDX2>].

53. See Troy A. Rule, *Wind Rights Under Property Law: Answers Still Blowing in the Wind*, SCH. L. UNIV. MO. (2012), <https://deliverypdf.ssrn.com/delivery.php?ID=753074071124064069014125107115088006010045004048003005075122095087088070095001092029126119017036023013055086067071029066076093045045047076049100094100067088022029088069014094120006068069071070029101000119094007090029020091001112006095106000071003084&EXT=pdf&INDEX=TRUE> [<https://perma.cc/2LU8-H2JC>] [hereinafter Rule, *Wind Rights Under Property Law*].

54. See Robert D. Lifset, *A New Understanding of the American Energy Crisis of the 1970s*, JSTOR (2014), <https://www.jstor.org/stable/pdf/24145526.pdf?refreqid=excelsior%3A59bb72932f2979788be4820e560bd01> [<https://perma.cc/R7WB-VKWL>].

55. See *id.*

most of the decade.⁵⁶ In response to this crisis, Congress created the Strategic Petroleum Reserve, and environmental scientists considered investing in renewable sources of energy.⁵⁷ One of the earliest policies in the United States in response to the energy crisis is the National Energy Act of 1978 (NEA).⁵⁸ This Act established energy goals to reduce the United States' dependency on oil and gas sources, with two of the seven goals focusing on energy conservation through home insulation and increased use in solar energy production.⁵⁹ Since passing the NEA, Congress has passed other federal acts to help counter the consequences of the energy crisis, including multiple incentives to develop renewable sources, as later discussed in this Section.⁶⁰

From the energy crisis of the 1970s to the current "Green New Deal" (GND), the federal government has stated an interest in pursuing renewable energy as a marketable source to power the modern United States.⁶¹ The GND Resolution introduced by New York Representative Alexandria Ocasio-Cortez and Senator Ed Markey draws from President Franklin D. Roosevelt's 1930s "New Deal," which expanded the federal government's role by incorporating large-scale programs to encourage economic flow.⁶² While the fundamental goal of shifting completely to renewable clean energy is not a novel concept, nor does such a goal feasibly establish complete and total reliance on renewables, the GND Resolution proposes five major goals for making such aspirations more attainable:

[(1)] to achieve net-zero greenhouse gas emissions through a fair and just transition for all communities and workers; [(2)] to create millions of good, high-wage jobs and ensure prosperity and economic security for all people of the United States; [(3)] to invest in the infrastructure and industry of the United States to sustainably meet the challenges of the 21st century; [(4)] to secure for all people of the United States for generations to come [(a)] clean air and water, [(b)] climate and community resiliency, [(c)] healthy food,

56. *See id.*

57. *See* James A. Duffield & Keith Collins, *Evolution of Renewable Energy Policy*, JSTOR (2006), <https://www.jstor.org/stable/pdf/choices.21.1.0009.pdf?refreqid=excelsior%3Ad428604f5388b0a0a4def79576816302> [<https://perma.cc/FJ96-D2DD>].

58. *See* Julia Richardson & Robert Nordhaus, *The National Energy Act of 1978*, JSTOR (1996), <https://www.jstor.org/stable/pdf/40923435.pdf?refreqid=excelsior%3A7d94e9b964296cc88a02813f79a85b69> [<https://perma.cc/9KE6-YGZV>].

59. *See id.*

60. *See infra* notes 61–75.

61. *See* Bowman, *supra* note 34, at 50.

62. Sophie White, *The Art of the Green New Deal*, GEO. L. (Mar. 6, 2019), <https://www.law.georgetown.edu/environmental-law-review/blog/the-art-of-the-green-new-deal/> [<https://perma.cc/37VS-BE7V>].

[(d)] access to nature, and [(e)] a sustainable environment; and [(5)] to promote justice and equity.⁶³

The federal government has also expanded its interest in pursuing renewable energy by creating incentives for wind development companies.⁶⁴ The United States Department of Energy's Wind Energy Technologies Office planned an updated federal "Wind Vision" goal from 2008 of having 20% wind energy by 2030.⁶⁵ In 2009, President Barrack Obama signed the American Recovery and Reinvestment Act to counter the 2008–2009 recession, which extended the federal production tax credit (PTC) until December of 2012.⁶⁶ There have been multiple extensions of the PTC, and in December 2020, Congress extended the incentive for another year.⁶⁷ This PTC was set to expire on December 31, 2021, and presently in 2022, Congress has not moved to extend or renew this incentive.⁶⁸ The PTC provided a one to two cents per kilowatt-hour tax credit for the first ten years of power production for utility-scale wind.⁶⁹ Without this PTC, wind development in Texas and other states would not have developed as quickly as it has, and there will likely be many challenges moving forward in creating incentives for large-scale wind farm development and production.⁷⁰

On the state government level, motivations for renewable energy expansion involve the mass potential for economic development and environmental sustainability policies.⁷¹ Wind energy contributes to forty-six state economies and provides benefits for rural communities involving new sources of revenue and an increased local tax base for these areas.⁷² Generally, states motivated by renewable energy production and purchase face challenges, primarily through the regulatory lag of utility rate structures, lack of interconnection standards, restrictive environmental permitting, and lack of power transmission.⁷³ Some states have created renewable portfolio

63. H.R. Res. 109, 116th Cong. (2019–2020).

64. See Rod E. Wetsel & Lisa Chavarria, *Anatomy of a Wind Energy Lease*, ST. BAR TEX. 21ST ANN. ADVANCED OIL, GAS & ENERGY RES. L. COURSE (October 16–17, 2003), <https://www.wetsel-carmichael.com/wp-content/uploads/sites/1200651/2019/12/2003-10-16-Article-2.pdf> [<https://perma.cc/265X-JAMT>].

65. See *20% Wind Energy by 2030: Increasing Wind Energy's Contribution to U.S. Electric Supply*, U.S. DEPT. ENERGY, <https://www.energy.gov/eere/wind/20-wind-energy-2030-increasing-wind-energys-contribution-us-electricity-supply> (last visited Mar. 21, 2022) [<https://perma.cc/XP2K-J96W>].

66. See SMITH, *Wind Law*, *supra* note 17, § 1.01(2).

67. See *id.*

68. See *id.*

69. See *id.*

70. See *id.*

71. See *Wind Energy for Rural Economies*, U.S. DEP'T ENERGY, <https://www.nrel.gov/docs/fy04osti/33590.pdf> (Aug. 2004) [<https://perma.cc/C7T6-P9K3>].

72. See *id.*

73. See *State Renewable Energy Resources*, U.S. EPA, <https://www.epa.gov/statelocalenergy/state-renewable-energy-resources> (last visited Mar. 21, 2022) [<https://perma.cc/NGT3-2GM9>].

standards (RPS), which “require that a specified percentage of the electricity utilities sell comes from renewable resources.”⁷⁴ Texas titles this as the Renewable Generation Requirement and has a goal that the state reach 10,000 megawatts by 2025, but as of 2021, this goal has already been achieved.⁷⁵

B. Opportunities in Texas

Wind energy development is expanding throughout Texas, from potential offshore project proposals in the Gulf of Mexico to wind farm production in El Paso.⁷⁶ Currently, offshore wind development projections indicate that these projects could support most of the United States’ projected 2050 electricity goal.⁷⁷ However, a primary reason wind production thrives in Texas is the state’s lack of legislation that allows wind developers to freely contract and deal with landowners with minimal interference at the state government level.⁷⁸

Wind production in Texas benefits the state through developments such as creating jobs, generating revenue, bringing business to smaller communities, and helping facilitate renewable energy resources to reduce emissions.⁷⁹ Yet, with these increased benefits, a plethora of legal issues arise within this new area of law, especially concerning the identification of wind as a property right.⁸⁰ One such controversial issue is the debate concerning whether landowners may sever the wind from the land surface for purposes of wind farm development.⁸¹ Regardless of the lack of legal instruction on this issue, landowners in Texas have already begun to reserve wind rights for themselves during the sale of severed property.⁸²

Because issues of wind severance have not been decided or legislated, Texas should consider creating legislation to guide landowners, wind developers, lawyers, and courts on the issue.⁸³ Wind developers and landowners already implement many of the would-be required provisions within the wind lease (mainly out of common sense and self-preservation),

74. *State Renewable Portfolio Standards and Goals*, NCSL (Aug. 13, 2021), <https://www.ncsl.org/research/energy/renewable-portfolio-standards.aspx> [<https://perma.cc/8XCT-S4PB>].

75. *See id.*; TEX. UTIL. CODE ANN. § 39.904.

76. *See* Adrijana Buljan, *Offshore Wind Could Meet 166% of Texas’s Electricity Demand*, OFFSHORE WIND (Mar. 23, 2021), <https://www.offshorewind.biz/2021/03/23/offshore-wind-could-meet-166-of-texas-electricity-demand/> [<https://perma.cc/BQZ3-4WG9>]; *City of El Paso*, V-AIR (Sept. 2014), <http://www.visionairwind.com/city-of-el-paso/> [<https://perma.cc/YJ4D-VUMG>].

77. *See* Buljan, *supra* note 76.

78. *See* SMITH, *Wind Law*, *supra* note 17, § 2.09.

79. *The Economic Impact of Texas Renewable Energy*, POWERING TEX., <https://poweringtexas.com/#creating-jobs> (last visited Mar. 21, 2022) [<https://perma.cc/EBG4-X3PG>].

80. *See* Rule, *Wind Rights Under Property Law*, *supra* note 53.

81. *See id.* at 4–7.

82. *See* Chavarria, *supra* note 11, at 5.

83. *See infra* Section IV.A.

so legislation requiring similar aspects within a wind lease would formalize these practices already in place.⁸⁴ Requiring certain specific clauses in a wind lease allows for a streamlined and standardized contract (much like the residential sales agreements implemented by the Texas Association of Realtors and allowed by the Texas Real Estate Commission).⁸⁵ These provisions include clauses going beyond estate planning and community property, such as indemnity clauses, most favored nations clauses, confidentiality provisions, and more.⁸⁶ Finally, if Texas creates legislation for wind farms, the state can create favorable statutory policies and laws that benefit landowners by allowing them to broaden the use of their property and provide them with more opportunities to monetize the ownership of their land.⁸⁷

III. HOW DID WIND SEVERANCE BECOME AN ISSUE IN THE UNITED STATES?

Importantly, to understand why Texas should permit severance, this part will analyze how severance became an issue in other wind-producing states.⁸⁸ This part will begin by analyzing states that allow wind severance, followed by those states that do not permit wind severance.⁸⁹ Next, since Texas does not have any current authority recognizing or prohibiting wind severance, it is essential to understand the legal implications of separating the wind estate from the surface without any law on the issue.⁹⁰ Finally, because this Comment argues in favor of severance of wind rights through testate and intestate succession methods, this part examines possible beneficial and adverse consequences of enacting legislation allowing severance and potential methods to reconcile those consequences with the need for legislation in this area of law.⁹¹

A. States with Severance

California and New Mexico are two states that treat wind severance favorably in the relevant case law.⁹² In *Contra Costa Water District v. Vaquero Farms, Inc.*, Vaquero owned land with a thirty-year-long wind lease

84. See Robert Montgomery, *Water to Wind: The Path Texas Groundwater Provides to Sever the Wind Estate and Prioritize Mutually Dominant Estates*, 50 TEX. ENV'T'L L. J. 107, 108–10 (2020).

85. See *id.*

86. See SMITH, *Wind Law*, *supra* note 17, §§ 2.01–.24.

87. See *infra* Sections V.A–C.

88. See discussion *infra* Sections III.A–E.

89. See discussion *infra* Sections III.A–B.

90. See discussion *infra* Section III.C.

91. See discussion *infra* Sections III.D–E.

92. See Frassetto, Monroe, & Phillips, *supra* note 14, at 9.

and 260 wind turbines installed on its property.⁹³ The Contra Costa Water District sought to sever the wind rights from the surface and condemn only the land and not the wind lease, effectively “reserving” the wind rights to Vaquero and taking the remainder of the surface.⁹⁴ Vaquero challenged this reservation and argued that the wind rights could not be separated from the surface.⁹⁵ In an eminent domain proceeding, the California Court of Appeals for the First District explored the idea that because wind rights can be bought and sold in the market, a wind lease severing wind rights ought to be held as valid.⁹⁶ The court held that similar to other rights that can be severed from the underlying land (such as mineral rights), wind power rights are substantial rights capable of being bought and sold in the marketplace, and like subsurface mineral rights, wind power rights are severable from the fee interest in the land.⁹⁷

In *Romero v. Bernell*, a New Mexico proceeding, the Federal District Court rejected the argument that land could not be partitioned because of the wind rights.⁹⁸ In this case, the Romero brothers sued for partitioning a tract of land, and Bernell argued that the land could not be partitioned because the wind rights—like mineral rights—are a distinct and valuable property right unable to be equitably divided in kind.⁹⁹ Instead, the court found that wind is more similar to flowing water or wild animals in that it is never embedded in the real estate.¹⁰⁰ The court held that “[t]he right to ‘harvest’ wind energy is, then, an inchoate right which does not become ‘vested’ until reduced to ‘possession’ by employing it for a useful purpose.”¹⁰¹ Thus, it becomes “owned” once it is harvested by the wind turbines and reduced to electricity, and after it has been reduced to possession, may the wind be severed.¹⁰²

Although these two cases are persuasive authority in Texas, the California and New Mexico courts held that the right to use wind to generate energy is a severable property interest.¹⁰³ Texas should look to the important policy reasons in favor of allowing severance, involving both landowner and wind developer interests.¹⁰⁴ Practical concerns include freedom to contract,

93. See *Contra Costa Water Dist. v. Vaquero Farms, Inc.*, 58 Cal. App. 4th 883, 888 (Cal. Ct. App. 1997).

94. See *id.* at 890.

95. See *id.* at 889.

96. See *id.* at 893.

97. See *id.* at 893–94.

98. *Romero v. Bernell*, 603 F. Supp. 2d 1333, 1335 (D. N.M. 2009).

99. See *id.* at 1334.

100. *Id.* at 1334–35.

101. *Id.* at 1335.

102. *Id.*

103. See *id.*; *Contra Costa Water Dist. v. Vaquero Farms, Inc.*, 58 Cal. App. 4th 883, 888 (Cal. Ct. App. 1997).

104. See generally Michael J. Stephan, *Wind Severance*, 40 TEX. ENV'T L.J. 73, 77–82 (2009) (detailing multiple policy reasons in support and opposition of wind severance).

investments in alternative renewable energy sources, avoiding unnecessary sales of entire estates, and avoiding surges in litigation with landowners possessing severed estates.¹⁰⁵ Texas generally favors freedom to contract and freedom of choice, and by allowing landowners to sever the wind, legislation would reinforce this concept by increasing the landowner's power of choice and power to contract the landowner's property.¹⁰⁶ Texas also generally tends to favor investments in alternative energy sources; however, wind development requires the space to build wind turbines and transmission lines and that space primarily comes from landowners' willingness to use parts of their land for an additional source of income.¹⁰⁷

B. States Restricting Severance

In the current setting, states that have passed legislation restricting or prohibiting wind severance include Colorado, Nebraska, Oklahoma, Montana, Kansas, South Dakota, and Wyoming.¹⁰⁸ Possible policy reasons in opposition of wind severance stem from avoiding litigation that may come with severance; if a landowner elects to sever the wind from the surface ownership, there is a risk that litigation might ensue with a greater presence of interested parties, such as wind developers, the wind estate holder, and the surface owner.¹⁰⁹ Other reasons may involve avoiding conflicts to determine which estate is dominant between the mineral estate and the wind estate.¹¹⁰ If the wind estate is severed from the surface ownership, then the potential for litigation among the separated estates can lead to courts burdened with resolving convoluted issues.¹¹¹ Finally, some states may be concerned about wealth distribution disparities among those who own the land and can afford to build wind farms on their property and those who do not own land for these projects.¹¹²

105. *See id.* at 81–82.

106. *See id.* at 77–78.

107. *See id.*

108. *See* COLO. REV. STAT. § 38-30.7-103 (2012); NEB. REV. STAT. § 76-3004 (2012); OKLA. STAT. tit. 60 § 820.1 (2011); MONT. CODE ANN. § 70-17-404 (2011); N.D. CENT. CODE, § 17-04-04 (2007); KAN. STAT. ANN. § 58-2272 (2011) (stating 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.”); S.D. CODIFIED LAWS § 43-13-19 (2017) (prohibiting severance and restricting the term of a wind lease to not more than fifty years and provides that any such lease is void if no development has occurred within five years); WYO. STAT. ANN. § 34-27-103 (2011) (prohibiting severance from a surface estate, except that wind energy may be developed pursuant to a wind energy agreement, and stating that wind energy becomes personal property at point of conversion into electricity).

109. *See* Stephan, *supra* note 104, at 81.

110. *See id.*

111. *See id.*

112. *See id.* at 82–83.

Wyoming is an example of a state that uses legislation to discourage wind development through statute rather than incentivizing this renewable energy scheme.¹¹³ Under the state's Wind Energy Rights Act (WERA), wind cannot be severed from the surface estate, and the wind property definition in the Act limits wind to "a property right in the development of wind powered energy generation."¹¹⁴ This sets Wyoming apart from the other states in that it does recognize wind as a private property interest but limits the interest to development alone rather than an interest that can be reserved for future use.¹¹⁵ Due to the restrictive and complex provisions of Wyoming's wind legislation, the state falls behind other states in wind energy development and growth of renewables as a source of energy.¹¹⁶

Others states that directly decided the issue of wind as a severable property interest include Kansas, North Dakota, and South Dakota.¹¹⁷ These states enacted statutory prohibitions on severing wind as well as other strict requirements for developing land and executing a wind lease.¹¹⁸ Kansas imposes restrictive limitations and prohibitions on wind rights, arguing that the state's interest in protecting property owners' quality of life outweigh wind development benefits.¹¹⁹ Senate Bill 279, if enacted into legislation, would restrict wind development by placing limitations on wind turbine construction (such as the number of turbines, distance of turbines from property lines, etc.).¹²⁰ Proponents of restrictive wind legislation argue that such law aims to "protect the health, safety, economic viability and property rights of rural Kansans."¹²¹

C. Where Does Texas Land?

Texas currently has no case law or legislation on point that expressly or impliedly allows the severance of wind rights from the surface.¹²² Therefore, landowners should sever the wind estate with caution because there is no

113. See Bowman, *supra* note 34, at 90.

114. Ben N. Reiter, *Blowing It: Why Wyoming Is Failing to Develop Wind Energy Projects?*, 19 WYO. L. REV. 45, 61 (2019).

115. See *id.* at 84.

116. *Id.* at 62.

117. See Frassetto, Monroe, & Phillips, *supra* note 14, at 9.

118. *Id.* at 11.

119. See Titus Wu, *Proposed, Controversial Restrictions on Wind Turbines Pop Up Against in Kansas*, TOPEKA CAP.-J. (Mar. 23, 2021), <https://www.cjonline.com/story/news/politics/state/2021/03/23/controversial-restrictions-wind-turbines-pop-up-again-kansas-renewable-energy-setback-politics/6956380002/> [https://perma.cc/C6TF-G3KY].

120. S.B. 279, 2021 Leg., Reg. Sess. (Kan. 2021).

121. Mike Thompson, *Senator Says the Wind Industry Is Running Amok in Kansas. He Believes His Bill Will Protect Rural Residents*, TOPEKA CAP.-J. (Apr. 2, 2021), <https://www.cjonline.com/story/opinion/2021/04/02/author-bill-restrict-wind-energy-kansas-defends-legislation/4851901001/> [https://perma.cc/E3XB-UVTL].

122. See Chavarria, *supra* note 11, at 1.

guarantee that such severance will be upheld in Texas courts.¹²³ Although landowners already sever wind rights or reserve royalty interests on a regular basis in practice, other options for landowners who want to keep an interest in their wind farms exist.¹²⁴ These options include reservation in a warranty deed, reserved interests in royalties, use of a devise in a will, or reliance on Texas's intestate distribution laws.¹²⁵

Renewable energy, natural resources, and environment and commercial real estate practitioner Lisa Chavarria suggests a broad grant including a description of rights that include, at a minimum:

[(a)] The exclusive right to use, convert, maintain and capture the flow of wind currents and wind resources over and across the property.

[(b)] An exclusive easement and right to determine the feasibility of wind energy conversion and power generation in connection with the wind energy projects, including, but not limited to, conducting environmental studies, soil tests and studies of wind speed, wind direction and collecting other meteorological data.

[(c)] An exclusive easement and right to develop, construct, install, replace, repair, relocate, remove, maintain, operate and use utility scale wind turbines, underground and above-ground electrical transmission and communications lines related to the operation of turbines, electric transformers, telecommunications equipment, roads, meteorological towers and other wind measurement equipment, control buildings, maintenance yards, and related facilities and equipment necessary and/or convenient for the operation and maintenance of one or more wind energy projects.

[(d)] A non-obstruct easement that prohibits the surface owner from placing improvements on the property or adjacent property that may interfere with the free flow of wind across the property or adjacent properties.

[(e)] A non-exclusive easement over and across the property for the passage, intrusion or impact of any audio, visual, view, light, flicker, noise, vibration, electromagnetic, electrical, and radio frequency.

[(f)] An exclusive easement to permit rotors of a turbine located on adjacent properties to overhang onto the property.¹²⁶

123. *Id.* at 2.

124. *See id.*

125. *See* discussion *infra* Part V.

126. Chavarria, *supra* note 11, at 6.

Including these details protects the wind estate holder's interest and the surface owner's interest in maintaining the land.¹²⁷ It is also important to include these provisions if a legal dispute arises, so a Texas court is more inclined to uphold the agreement even though severance remains undecided.¹²⁸ Such inclusion strengthens the validity of the grant and a broad scope of reservation, as well as having multiple options to devise a wind right, which gives landowners broad options for utilizing their property.¹²⁹

Another reason severance can be controversial is that different states have different temperaments on whether wind may be treated as a property right similar to the mineral estate or groundwater.¹³⁰ Also, whether wind should be considered a property right has long been argued by academic and professional commentators.¹³¹ Some commentators argue for wind to be formally recognized in Texas as a natural resource, effectively changing the ownership characterization of wind and thus limiting a landowner's property interest in the wind.¹³² Current legal practitioner Alan Alexander comments that the discussion of wind as a protected property interest concerns three points of issue: (1) whether wind is a natural resource like groundwater and oil; (2) whether wind may be subject to ownership in Texas (and other states); and (3) whether the landowner's wind interest is severable from the surface estate.¹³³ Alexander explains that wind is similar to other natural resources defined in the Texas Constitution and may be preserved and conserved by the State.¹³⁴ Under Texas law, natural resources include "[o]il and [g]as, [m]ines and [m]ining, [g]eothermal [e]nergy . . . , [t]imber, [h]eritage, caves, and [w]etlands."¹³⁵ Currently, wind has not been declared a natural resource under the Texas Natural Resources Code definition.¹³⁶ A significant issue with declaring wind a natural resource is that it cannot be privately owned, which would lead to serious opposition by Texas landowners who want to be able to sever their wind rights to receive the income benefits from wind development.¹³⁷ Thus, because wind has not been declared a natural resource

127. *See id.*

128. *See id.*

129. *See id.*

130. *See generally* Ernest E. Smith, *Wind, Water, Oil, Gas and Whitetails: A Comparison of Property Rights and Theories*, UT CLE, 5–6 (Feb. 3–4, 2010) (available at Ernest E. Smith, *Wind, Water, Oil, Gas and Whitetails: A Comparison of Property Rights and Theories (Video)*, TEX. L. (Apr. 2013), <https://utcle.org/ecourses/OC4271> [<https://perma.cc/7WPX-LKG6>]) (explaining that Texas lawmakers will turn to legislation in other jurisdictions and already existing sources of law in Texas for detailing future wind legislation) [hereinafter Smith, *Wind, Water, Oil, Gas and Whitetails*].

131. *See* Alexander, *supra* note 23, at 429.

132. *See id.*

133. *See id.* at 432–34.

134. *See id.*

135. *See id.*; TEX. NAT. RES. CODE ANN. §§ 1.001–123.005, 201.001–201.042, 221.001–221.048.

136. *See* Alexander, *supra* note 23, at 1.

137. *See* Smith, *Wind, Water, Oil, Gas and Whitetails*, *supra* note 130, at 8–10. Additionally, declaring wind as a natural resource may open opportunities for increased eminent domain cases if wind

and landowners have a consequential interest in the potential development of their property, the legislature should consider creating inclusive legislation that allows landowners to protect their interests by methods of succession and inheritance.¹³⁸ However, if the legislature does declare wind a natural resource subject to regulation under Article XIV Section 59 of the Texas Constitution, Alexander suggests that lawmakers should consider passing legislation clarifying that landowners still have protected ownership and investment interest when wind is reduced to possession.¹³⁹

If the Texas legislature does consider new legislation allowing severance, lawmakers need to look to policy reasons against it.¹⁴⁰ However, the risk of litigation increases when the state passes new laws, and the mere avoidance of that risk should not alone deter the legislature from enacting beneficial law, especially because this risk was not enough to prevent severance of mineral estates or groundwater rights.¹⁴¹ Also, while conflicts between mineral estate holders and wind estate holders are susceptible to litigation, conflicts over which estate is dominant are deterred by the use of accommodation agreements between the two.¹⁴² An accommodation agreement acts preemptively to delegate how the two estates interact and allows the respective owners of each estate to know their rights, thus mitigating the risk of litigation over who can exercise which right.¹⁴³ Texas follows the dominant estate doctrine, which protects the subsurface property rights by declaring mineral interests are superior to surface interests.¹⁴⁴ However, in *Coyote Lake Ranch L.L.C. v. City of Lubbock*, the Texas Supreme Court recognized the importance of a new doctrine applied to groundwater estates: the accommodation doctrine.¹⁴⁵ This doctrine establishes:

The mineral and surface estates must exercise their respective rights with due regard for the other's Where there is an existing use by the surface owner which would otherwise be precluded or impaired, and where under

development in the future expands on a large enough scale for mass commercial production in use. *See* TEX. NAT. RES. CODE ANN. § 111.019. However, until wind energy production expands in the future, it is difficult to predict the future of private ownership without further clarification from the State Legislature. *See id.*

138. *See infra* Part V.

139. *See* Alexander, *supra* note 23, at 441.

140. *See* Stephan, *supra* note 104, at 81.

141. *See id.*

142. *See generally* *Coyote Lake Ranch, L.L.C. v. City of Lubbock*, 498 S.W.3d 53, 62–63 (Tex. 2016) (recognizing that an accommodation agreement between wind and mineral estates balances “the rights of surface and mineral owners to use their respective estates while recognizing and respecting the dominant nature of the mineral estate”).

143. *See* SMITH, *Wind Law*, *supra* note 17, § 2.05[4][b].

144. *See* *Coyote Lake Ranch L.L.C.*, 498 S.W.3d at 60.

145. *Id.* at 62–63; Meredith Wegener, *Balancing Rights in a New Energy Era: Will the Mineral Estate's Dominance Continue?* 57 HOUS. L. REV. 1037, 1040 (2020).

the established practices in the industry there are alternatives available to the lessee whereby the minerals can be recovered, the rules of reasonable usage of the surface may require the adoption of an alternative by the lessee.¹⁴⁶

Under this doctrine, wind developers, mineral estate holders, and groundwater rights holders can accommodate one another and contract to minimize the risk of litigation and other conflicts between them.¹⁴⁷ Finally, the state legislature need not burden itself with concerns about wealth disparity in determining whether to pass legislation on severance.¹⁴⁸ As with the risk of litigation, Texas allows severance of the mineral estate without concern that the landowners will profit excessively from leasing their property.¹⁴⁹ Considering the arguments and theories described in favor of wind severance, the next area of this Comment examines the benefits and consequences of legislating wind severance.¹⁵⁰

D. The Effect of Legislating Wind Severance

1. Benefits

Creating legislation regarding wind severance in Texas would formalize procedures already used to protect parties and impose a minimal intrusion on the existing steps—such as leasing from all owners with an interest in the surface estate—wind developers perform to construct a wind farm.¹⁵¹ Landowners in the state already use the warranty deed to reserve wind rights or royalties upon the sale of the land, and legislation would work in favor of this process, creating less uncertainty about the validity of such a reservation.¹⁵²

Legislation, in general, may also help the wind market, include guidance for division upon death and divorce in Texas, and encourage development because legislation would offer more security for landowners' estate plans.¹⁵³ Legislation can also encourage landowners to pursue wind development on their properties because it can provide a streamlined and less contentious process to access the additional source of income this development

146. *Coyote Lake Ranch, L.L.C.*, 498 S.W.3d at 60–61 (quoting *Getty Oil Co. v. Jones*, 470 S.W.2d 618, 622 (Tex. 1971)).

147. See Wegener, *supra* note 145.

148. See *id.* at 1049.

149. See *id.* at 1045.

150. See discussion *infra* Section III.D.

151. See *infra* Section III.D.1.

152. See Montgomery, *supra* note 84, at 120.

153. See generally Boyd, *supra* note 13, at *10427 (explaining wind rights recognition would provide economic benefits and guidance on this issue and area of law).

provides.¹⁵⁴ Additionally, enacting legislation on the subject would mean the state defines the limits of legislation rather than the federal government imposing limitations on severance if the opportunity ever arises.¹⁵⁵

Regarding current lawmaking of wind-related legal issues, courts already apply analogies from other areas of law when these issues come up, and it is unlikely a Texas court would invalidate a wind lease or legal document severing the wind rights from the surface land.¹⁵⁶ Hundreds of Texas landowners already sever the wind estate from the surface of the land through the wind lease to allow wind companies to utilize the wind to generate electricity.¹⁵⁷ Because Texas does not have authoritative case law addressing estate planning and community property issues with wind development, courts should refer to existing areas of law regarding issues of division of wind royalties or severance of wind rights upon divorce or death.¹⁵⁸ These areas include mineral rights and groundwater rights, with some analysis relating wind law to principles of wild animal law and flowing water.¹⁵⁹ Academic commentators already suggest that courts will need to view the wind lease as a valid contract, meaning that Texas courts will be tasked with ensuring the validity of the instrument.¹⁶⁰ Also, it seems unlikely that a Texas court will prohibit severance of wind rights due to public policy because a significant number of landowners have already severed the rights through a valid execution of a wind lease.¹⁶¹

Beyond severance, legislating wind development will bring immense benefits to the local, small-town communities.¹⁶² These benefits include an increased tax base for rural Texas communities, new job creation, reduction of harmful pollution, healthcare savings, water savings, and lower wholesale power costs.¹⁶³ However, while the benefits may be advantageous to Texans and the Texas economy, some possible consequences may cast doubt on whether such legislation will provide the desired results.¹⁶⁴

154. *See id.*

155. *See generally* Montgomery, *supra* note 84, at 123–24 (discussing general situations in which the federal government took part in New Mexico water law development by entering a treaty with Mexico for Rio Grande waters).

156. *See* Chavarria, *supra* note 11, at 2.

157. *See id.*

158. *See id.*

159. *See* Smith, *Wind, Water, Oil, Gas and Whitetails*, *supra* note 130, at 2.

160. *See* Cameron K. Rivers, *Change in the Wind: Severance of the Wind Estate in Texas*, 14 TEX. J. OIL GAS & ENERGY L. 91, 101 (2019) [hereinafter Rivers, *Change in the Wind*].

161. *Id.*

162. *See The Economic Impact of Texas Renewable Energy*, *supra* note 79.

163. *See* John Hall, *Texas' Clean Energy Economy: Prioritizing Jobs, Investments, and Economic Growth*, EDF (Feb. 2017), <https://www.edf.org/sites/default/files/texas-report-to-legislators.pdf> [<https://perma.cc/ELG6-5Y8V>].

164. *See* discussion *infra* Section III.D.2.

2. Consequences

While legislation can provide a series of benefits for landowners and developers within the state, it is important to recognize the consequences of severance that cannot be ignored.¹⁶⁵ Jeff Phelps, a real estate consulting specialist, provides a brief look into the opposition of severing wind rights, including a short explanation of conflict of dominant estates.¹⁶⁶ If the wind is severed from the land, priority needs to be established to avoid conflict with the mineral estate.¹⁶⁷ Phelps also asks whether the landowner may build on and use the land (because the landowner retained the surface rights) and how limited the landowner's surface rights are.¹⁶⁸ A third supposition is a lower market price for the property with severed wind rights, and wind developers may avoid developing areas of the property where the wind rights are severed to avoid conflicts with the landowner.¹⁶⁹ Finally, there is no guarantee that the state will allow severance due to the lack of legal authority.¹⁷⁰

However, creating state legislation, in general, may slow down actual development and may discourage development to a small extent.¹⁷¹ Older landowners interested in development may not want to sever the wind rights from the surface or be interested in reserving a wind estate for their heirs, who also may not have an interest in the production.¹⁷² However, this Comment's proposed legislation would provide the option of severance, not establish it as a requirement.¹⁷³

Finally, major proponents of oil and gas may oppose such legislation because it could discourage or inhibit oil and gas production, which is a favored method of energy production in Texas.¹⁷⁴ Other proponents of oil and gas may also argue for increased wind legislation as is done with oil and gas development.¹⁷⁵ However, the state legislature should look to the trials and

165. See discussion *supra* Section III.B.

166. Jeff Phelps, *Pitfalls of Severing Wind Rights*, LAND.COM (Sept. 22, 2015), <https://www.land.com/selling/wind-rights-2/> [<https://perma.cc/4VDY-KJHR>].

167. See *id.*

168. See *id.*

169. See *id.*

170. See *id.*

171. See generally Montgomery, *supra* note 84, at 134 (describing slower wind development in California due to enacted legislation).

172. See generally Rivers, *Change in the Wind*, *supra* note 160, at 98 (describing various situations where a landowner may or may not want to retain the land or wind estate upon severance).

173. See *infra* Part V.

174. See Alexander, *supra* note 23, at 429. However, Texas and the United States rely on oil and gas for almost every part of day-to-day functioning. See *id.* Wind and solar production in total only provide a small percentage of the country's total energy consumption, so such arguments are more attenuated considering the bigger picture of renewable and nonrenewable energy usage. *Id.*

175. See generally *id.* at 432 (arguing lack of legislation or regulation of the wind industry may lead to wasteful energy practices).

errors in governing oil and gas law to better govern wind and the unique issues that arise in legislating production.¹⁷⁶

3. *Reconciling the Benefits and Consequences of Legislation*

While wind remains a relatively new area of law, the fact that there is little legal authority in Texas means that very little guidance as to the treatment of general wind-related issues exists for attorneys and judges to invoke.¹⁷⁷ If Texas lawmakers respond positively to extending the Property Code as proposed, arguments can be made to create a new code designed specifically for wind law as a whole.¹⁷⁸ While this Comment focuses on severance through testate succession and intestacy, it does not mean severance should only be conducted through testate succession in the future; it can also be accomplished through intestacy.¹⁷⁹ Because the issue of severance is contingent upon the state recognizing wind as a property interest, a Texas Wind Code would also address recognition, severance, safety measures, incentives, valuation, and other contentious areas in wind law.¹⁸⁰ Until Texas reaches this point, legislative guidance on inheritance and succession for landowners allows an opportunity for the legislature to protect ownership interests for landowners and developers.¹⁸¹ While this Comment explores legislation as a whole, inclusive legal guidance on severance and what happens when the wind rights holder passes away will help reduce litigation issues among heirs and developers.¹⁸² Importantly, it will also limit and reduce issues among heirs who receive ownership of a wind estate or wind royalty interest and other surface estate holders.¹⁸³

IV. NEED FOR LEGISLATION ALLOWING WIND SEVERANCE IN TEXAS

A. *General Need in Texas*

Texas needs legislation on wind severance because landowners are already reserving for themselves a wind interest from the sale of real property.¹⁸⁴ As scholars and commentators point out, the need for legislation stems from areas of uncertainty and the need of guidance for lawmakers, courts, and attorneys working closely with clients owning and contracting

176. *See id.* at 456.

177. *See* Chavarria, *supra* note 11, at 5.

178. Author's original proposal.

179. Author's original proposal.

180. Author's original proposal.

181. Author's original proposal; *see infra* Sections V.A–C.

182. *See infra* Sections V.A–C.

183. *See id.*

184. *See* Smith, *Wind, Water, Oil, Gas and Whitetails*, *supra* note 130.

with wind farms.¹⁸⁵ Other reasons include clarifying the scope of wind rights, dominant estates between wind and minerals, and potential conflicts with takings laws.¹⁸⁶ Importantly, wind in Texas is a burgeoning source of renewable energy.¹⁸⁷ Without legislation and more incentives to produce this renewable resource, production and development may diminish to the point where the cost of development is much higher than needed, and the economic benefits to the state's electricity market no longer outweigh the cost.¹⁸⁸

Academic scholars also recognize the need for legislation in Texas for reasons other than recognition as a property interest.¹⁸⁹ This encompasses safety legislation, turbine construction legislation, taxation, and wind rights contracts.¹⁹⁰ Dr. Warigia Bowman, a professor at the University of Tulsa Law School, explains that “[s]tates can enact legislation that optimizes production while creating a regulatory floor that reduces the negative externalities caused by wind energy.”¹⁹¹ Texas can use this rationale to enact legislation accomplishing multiple purposes, including the question of severance and what happens to the wind estate when the holder passes away.¹⁹² One major reason for having clear legislation within this area of wind law is that legislation may greatly reduce the number of complaints filed in opposition to wind farm development.¹⁹³

As the United States' leading producer of wind energy, Texas is particularly susceptible to the pitfalls of unregulated wind development.¹⁹⁴ Future issues in courtroom litigation or in front of state agencies (such as the Texas Public Utility Commission) may create expenses of time, money, and other resources, which can be prevented with guidance from the state legislature.¹⁹⁵ The legislature can directly address the issues instead of court cases taking a “piecemeal” approach based on specific facts.¹⁹⁶

185. See Rule, *Wind Rights Under Property Law*, *supra* note 53.

186. See Troy A. Rule, *Property Rights and Modern Energy*, 20 GEORGE MASON L. REV. 803, 809 (2013) [hereinafter Rule, *Property Rights*].

187. See 20% Wind Energy by 2030: *Increasing Wind Energy's Contribution to U.S. Electric Supply*, *supra* note 65.

188. See Rule, *Wind Rights Under Property Law*, *supra* note 53.

189. See Rule, *Property Rights*, *supra* note 186.

190. See *id.*

191. Bowman, *supra* note 34, at 86.

192. See *id.*

193. See generally Montgomery, *supra* note 84, at 112 (arguing that legislation will “clarify property interests in wind and determine where the wind estate falls in comparison to other property estates,” which make up portions of property owner complaints).

194. See Bowman, *supra* note 34, at 86.

195. See Frassetto, Monroe, & Phillips, *supra* note 14, at 9.

196. See Jake Lederle, *Texas Wind Severance: The Practical Consequences of Severing Wind Rights*, SSRN (Feb. 14, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3327532 [<https://perma.cc/TBR3-QYLX>].

Resolving the general need for legislation on wind severance in Texas serves multiple purposes.¹⁹⁷ It will provide courts and estate planners with the necessary guidance, but it will also relieve the burden on Texas courts for creating law and precedent, which could be inconsistently applied in future cases.¹⁹⁸ If the issue is not addressed prospectively, it will be eventually left up to the courts to decide on very fact-specific terms for handling severance issues.¹⁹⁹ Also, general legislation avoids a patchwork approach to creating authority, which can create confusing, inequitable, and unfavorable results in some cases.²⁰⁰ With an issue like severance, the majority of the states in the United States with authority on the issue have passed rigid legislation restricting landowners' property rights and interests.²⁰¹ Policies in Texas do not typically take such a restrictive approach unless the state interest serves to benefit Texans as a whole.²⁰²

Texas recognizes severance for other aspects of real property, including the mineral estate and groundwater discussed in the following sections.²⁰³ This recognition is important for determining whether a wind estate may be severed through testate succession because it is well established in Texas case law and codified law that landowners may do so.²⁰⁴ While wind is more similar to the mineral estate and groundwater, similar justifications for allowing landowners to sever the mineral estate or sever groundwater rights can be applied to wind.²⁰⁵

B. Severing the Mineral Estate

Since Spindletop in 1901 and throughout the last 120 years of the oil business, Texas has long recognized severance of the mineral estate in its legal history.²⁰⁶ Texas law allows landowners to effectively sever the mineral interest from the surface and sell that interest to developers or large companies (or other private individuals).²⁰⁷ In *Acker v. Guinn*, the Texas Supreme Court recognized that “[a] grant or reservation of minerals by the

197. See *infra* Section V.C.

198. See Lederle, *supra* note 196.

199. See *id.*

200. See *id.*

201. See Frassetto, Monroe, & Phillips, *supra* note 14, at 9.

202. See Montgomery, *supra* note 84, at 116–17.

203. See *id.*

204. See *id.* at 116–19.

205. See *infra* Section IV.B.

206. See Mark J. Herrin, David D. Welsh, & Greg Crow, *Oil & Gas in Trust: A Primer*, HOUS. TR. CO. (May 2019), https://houstrust.com/wp-content/uploads/19HTC153_Viewpoints_8_WEB.pdf [<https://perma.cc/E8XN-M3QN>].

207. *Acker v. Guinn*, 464 S.W.2d 348, 343 (Tex. 1971).

fee owner affects a horizontal severance and the creation of two separate and distinct estates: an estate in the surface and an estate in the minerals.”²⁰⁸

Land ownership in Texas identifies two types of rights regarding mineral ownership.²⁰⁹ These two estates are known as the “mineral estate” and the “surface estate.”²¹⁰ In the context of severance, imagine a single landowner owns the land containing both the mineral and the surface estates.²¹¹ That landowner may continue to own both estates or can choose to sever the mineral estate and retain the mineral rights when the landowner sells the surface or land.²¹² However, unless that landowner unambiguously reserves ownership of the mineral estate, the mineral estate is otherwise included in the sale.²¹³

Because Texas has a history of allowing severance of the mineral estate, principles of oil and gas law should apply to wind.²¹⁴ As with severing the mineral estate, the surface estate does not yet need to be used by the wind developers, and the wind estate currently does not have to produce electricity to allow for its separation.²¹⁵ Additionally, the landowner may reserve a current income stream so that when the lease is renewed or extended, the landowner receives half of those renewed or extended benefits.²¹⁶ A landowner may also keep a specified amount of a wind royalty from a future wind lease, but this requires careful drafting of the deed and careful review of the future wind lease to prevent any provisions from prohibiting such a reservation.²¹⁷ However, public policy demands that the wind estate holder not reserve all of the future benefits of wind development and production—there should be enough of an interest in the severed wind estate for the future landowner who will purchase the severed surface estate.²¹⁸ Also, because wind royalties in South Texas are typically higher and thus more of an interest for these landowners, severing the wind estate would benefit both the wind rights holder and the purchasing landowner.²¹⁹ Finally, if the selling landowner desires to sever the mineral estate in hopes of future development,

208. *See id.* at 352.

209. *See Exploration and Surface Ownership*, R.R. COMM’N TEXAS, <https://www.rrc.texas.gov/about-us/faqs/oil-gas-faqs/oil-gas-exploration-and-surface-ownership/> (last visited Mar. 21, 2022) [<https://perma.cc/2F4M-JSNS>].

210. *See id.*

211. Author’s original hypothetical.

212. *See Exploration and Surface Ownership*, *supra* note 209.

213. *See id.*

214. *See infra* notes 215–21; Montgomery, *supra* note 84, at 108–10.

215. *See* Montgomery, *supra* note 84, at 108–10.

216. *See id.*

217. *See* SMITH, *Wind Law*, *supra* note 17, § 4.03.

218. *See generally* Montgomery, *supra* note 84 (explaining that when a property owner severs an estate such as the mineral or wind estate, “the owner divides their bundle of sticks and breaks one in half, and the new owner gains a bundle of sticks”).

219. *See* SMITH, *Wind Law*, *supra* note 17, § 2.03(6).

it is perfectly fine for them to do so.²²⁰ Likewise, if the landowner wants to sever both the mineral and the wind estates, Texas should affirmatively allow this.²²¹

C. Severing Groundwater Rights

Water law in Texas is another recognized property right that landowners may reserve an interest in, thus severing the interest from the surface, although ownership rights vary depending on whether it is surface water or groundwater.²²² Surface water in Texas generally belongs to the state, and there is no landowner right to sever or reserve a surface water interest for personal use.²²³ The Texas Water Code states that “[t]he waters of the state are held in trust for the public Maintaining the biological soundness of the state’s rivers, lakes, bays, and estuaries is of great importance to the public’s economic health and general well-being.”²²⁴ However, groundwater is recognized as belonging to the landowner, and thus landowners have a vested interest.²²⁵ The legislature states that it “recognizes that a landowner owns the groundwater below the surface of the landowner’s land as real property.”²²⁶ The Code defines groundwater as “water percolating below the surface of the earth.”²²⁷ Generally, landowners own the surface and the water beneath the surface on their property, and because of this general interest, landowners also have the right to sever the groundwater from the surface and either keep that interest for their own use or convey that interest to another.²²⁸ A water right in Texas is a property interest that can be conveyed, transferred, or reserved.²²⁹ The Texas legislature recognizes private ownership of groundwater as part of the real property.²³⁰ Considering these legal principles, the Texas Supreme Court in *Edwards Aquifer Auth. v. Day* held that subterranean water is owned by the owner of the surface estate but subject to the rule of capture.²³¹

220. See Chavarria, *supra* note 11, at 3.

221. See generally Montgomery, *supra* note 84, at 121 (comparing severing both mineral and groundwater estates to severing a wind estate).

222. See TEX. WATER CODE ANN. §§ 11.0235, 36.002.

223. See *id.*

224. See *id.* § 11.0235.

225. *Id.* § 36.002(a).

226. *Id.*

227. *Id.* § 35.002(5); see Tiffany Dowell Lashmet, *Basics of Texas Water Law*, TEX. A&M AGRILIFE EXTENSION, <https://agrillifeextension.tamu.edu/library/agricultural-law/basics-of-texas-water-law/> (last visited Mar. 21, 2022) [<https://perma.cc/7RUH-U6HR>].

228. See Lashmet, *supra* note 227.

229. Tony Malley, *Understanding Water Ownership and Water Rights in Texas*, LAND.COM (May 28, 2015), <https://www.land.com/owning/water/texas-water-rights-ownership/> [<https://perma.cc/R7R5-G5L8>].

230. WATER § 36.002.

231. *Edwards Aquifer Auth. v. Day*, 369 S.W.3d 814, 832 (Tex. 2012).

In *City of Del Rio v. Clayton Sam Colt Hamilton Trust*, the fourth court of appeals held that a landowner may reserve groundwater rights regardless of whether the groundwater had been reduced to possession.²³² The court also held that reservation of groundwater rights does not require a point of access to make the reservation valid, particularly if adjoining parcels of land allow access to the groundwater.²³³ However, while this decision states that the court will recognize a valid reservation of groundwater, the decision implicates other issues regarding this kind of reservation.²³⁴ Reserving groundwater rights as the parties did, in this case, means that the instrument of reservation (a deed) must clearly state all of the rights held by the seller.²³⁵ Other important notes include the fact that the seller must consider how the seller will access the seller's reserved groundwater and also consider that a reservation may depreciate the property value of the surface land.²³⁶

Applying these principles to the wind estate, groundwater flows beneath the surface similarly to how wind blows above the surface.²³⁷ While a Texas court may not readily declare that a landowner owns the wind that blows above the landowner's land, the court should apply groundwater principles to uphold the validity of severance of wind rights through a deed or by means of a valid will.²³⁸

V. TEXAS SHOULD EXTEND THE PROPERTY CODE TO ADDRESS WIND RIGHTS AND SEVERANCE

A. Proposed Methods of Severance

Wind severance methods may appear different depending on whether a landowner elects to retain an interest in the development and the wind estate and how that landowner chooses to pursue severance.²³⁹ The following subsections argue for legislation that addresses severance through testate succession, discuss assigning wind rights to a trust, explain the implications of a wind rights holder passing away intestate, and finally describe how to reserve a royalty interest by deed.²⁴⁰ While each of these methods require particular drafting to avoid confusion or ambiguity, the best method to ensure

232. *City of Del Rio v. Clayton Sam Colt Hamilton Tr.*, 269 S.W.3d 613, 618 (Tex. App.—San Antonio 2008, pet. denied).

233. *Id.*

234. See Tiffany Dowell, *Reserving Groundwater Rights*, TEX. AGRIC. L. BLOG (Oct. 19, 2015), <https://agrilife.org/texasaglaw/2015/10/19/2889/> [<https://perma.cc/68NY-5HHK>].

235. *See id.*

236. *Id.*

237. See Smith, *Wind, Water, Oil, Gas and Whitetails*, *supra* note 130, at 7.

238. *See id.*

239. See SMITH, *Wind Law*, *supra* note 17, § 3.01(3).

240. *See infra* Sections V.A.1–3.

clear severance of the wind estate from the surface ownership is by reservation in a deed.²⁴¹ After the reservation is declared, the holder should include the holder's interest in the estate plan to avoid intestate distribution and risking distribution adverse to a decedent's intent.²⁴² However, if the holder passes away intestate, then the wind estate should be distributed similarly to that of the mineral estate and in accordance with distribution set forth in the Texas Estates Code.²⁴³

1. Severance Through Testate Succession

Landowners must consider the implications of signing a wind energy lease and the consequences for heirs, especially in cases of partible inheritance.²⁴⁴ Because some land rights will be relinquished when landowners sign the wind lease, landowners should reevaluate their estate plans to incorporate their new wind farm rights and compensation, and estate planners should accommodate their clients' desire accordingly to the best of their ability with the necessary care required.²⁴⁵ However, this option should be within the discretion of the landowner and not prohibited by the provisions of a wind lease because the wind lease is freely assignable and there remains the possibility that a wind developer will want to continue the farm on that particular property.²⁴⁶ The landowners should have the option to decide with whom the wind developer continues once they pass away.²⁴⁷

The Texas Estates Code generally sets forth the scope and special rules for testate and intestate succession in Texas.²⁴⁸ Chapter 358 contains specific provisions legislating the mineral estate.²⁴⁹ While oil and gas laws are not a perfect analogy for severance of wind rights, it is well-established law in Texas and the United States for the same concept of dividing the surface from the mineral—or in this case—the wind interest.²⁵⁰ If such established law cannot be used to justify wind severance, the common law *profit a prendre*

241. See *infra* Section V.A.3.

242. See TEX. EST. CODE ANN. ch. 201.

243. See *Mineral Interests*, TEX. PROB. LITIG. SANDERS, MOTLEY, YOUNG, & GALLARDO, <https://www.txprobatelitigation.com/mineral-interests> (last visited Mar. 21, 2022) [<https://perma.cc/CTH3-H8XP>].

244. See Curt Emanuel & Chad Martin, *A Landowner's Guide to Commercial Wind Energy Contracts*, PURDUE UNIV., <https://www.extension.purdue.edu/extmedia/ABE/RE-5-W.pdf> (last visited Mar. 21, 2022) [<https://perma.cc/372E-GJA3>].

245. See *id.*

246. See Chavarria, *supra* note 11, at 2–3.

247. See *generally id.* (explaining that there is a “possibility that a surface owner may place greater value on not converting wind into electricity and may elect to forego developing a wind project on his property”).

248. See TEX. EST. CODE ANN. ch. 31.

249. *Id.* ch. 358.

250. See *generally* Wegener, *supra* note 145, (describing Texas's long history of recognizing mineral estates as dominant to surface and mineral severance in light of wind development).

concept states that the recipient of an easement in gross has the exclusive right to explore, drill, and develop the minerals, or wind, on the recipient's property.²⁵¹ As such, a testator may gift a royalty interest freely and with little legal ramifications.²⁵²

Texas also allows landowners to reserve a mineral estate for their children through tools of testate succession.²⁵³ If the above landowner has a valid will, that instrument controls who receives the severed property interest.²⁵⁴ Litigation attorney and oil and gas practitioner Cameron Rivers explains that without recognizing wind severance as valid, landowners would be unable to pursue the full benefits of their wind rights.²⁵⁵ His hypothetical shows how the distribution of a landowner parent's estate may be divided among three children; the first child may be left the land, the second left the mineral estate, and the third left the wind estate.²⁵⁶ In today's world, the wind interest may become more valuable than both the surface and mineral estates of the land, further justifying the need for guidance on what happens to the wind estate when the holder passes away.²⁵⁷

While estate planners need to take care when drafting this language to convey a wind royalty interest or a severed wind estate, legislation on the requirements for this reservation or conveyance would not further complicate this already complex drafting process.²⁵⁸ Many estate planners recognize the importance of drafting unambiguous language for their clients, but while a valid will containing this devise and ultimate severance can be construed as enforceable, there remains the chance that Texas will disallow such provisions.²⁵⁹ Such a devise should include at least assurance of the right to develop the surface land, the specific rights being devised, and a description of the payments the holder of the wind interest and the landowner are entitled to receive.²⁶⁰ On the other hand, if a landowner dies intestate or fails to include the wind farm and royalties in the landowner's will, there is still a prevalent chance of litigation among the individuals subject to intestate distribution in Texas.²⁶¹

251. See SMITH, *Wind Law*, *supra* note 17, § 4.02.

252. See *id.*

253. See *Mineral Interests*, *supra* note 243.

254. See *id.*

255. See Rivers, *Change in the Wind*, *supra* note 160, at 95.

256. See *id.*

257. See Montgomery, *supra* note 84, at 149 (noting the current value of wind rights in West Texas).

258. See Chavarria, *supra* note 11, at 5.

259. See *id.*

260. See Hartman, *supra* note 13, at 411.

261. See Montgomery, *supra* note 84, at 148.

a. Devising the Wind Estate in a Will

A primary reason property owners seek to sever the wind estate is the same reason as severing the mineral estate for purposes of separately transferring the wind and the land.²⁶² Focusing on severance and reservation with testate succession, special language must be used to devise a wind interest to a beneficiary.²⁶³ Using specific and unambiguous language ensures that the landowner fully reserves the wind interest for the landowner's use and does not unintentionally sell that interest with the surface.²⁶⁴ Such language that may be used includes the following:

I give [beneficiary] all [or an undivided interest] of the right, title, and interest to the surface estate necessary to use all of the wind resources on, over, above, and along the property including, without limitation, the exclusive and complete right and privilege to use any or all of the property for utility scale wind energy development, including converting wind energy into electrical energy, collecting and transmitting electrical energy, and all related activities.²⁶⁵

This language may be different if a landowner chooses not to sever the wind from the surface estate but instead transfers a percentage of wind royalties to the landowner's beneficiaries.²⁶⁶ Possible language to devise a wind royalty interest may be similar to language devising oil and gas royalties.²⁶⁷ Another option is to include a devise that is just the wind royalty, thus reserving an interest in the royalty based on electricity generation and consumption, rather than a complete severance of the surface and wind estates.²⁶⁸

b. Assigning Wind Rights to a Trust

Like groundwater and oil and gas rights, the holder of the wind estate should be allowed an option to assign the rights to a trust at such holder's discretion, but landowners may not want to execute the option of assigning

262. See Rivers, *Change in the Wind*, *supra* note 160, at 103.

263. See Gerry W. Beyer & Christianson Hartman, *What Texas Estate Planners Need to Know About Transferring a Wind Interest*, EST. PLAN. DEV. TEX. PRO. 1, 2 (Oct. 2009), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1482229 [<https://perma.cc/44CD-NENJ>].

264. See *id.*

265. See *id.*

266. See *id.*

267. *Id.*

268. See SMITH, *Wind Law*, *supra* note 17, app. 7.

wind rights to a trust.²⁶⁹ There is a significant difference between mineral rights and royalties assignment to a trust and groundwater rights, as groundwater ownership must be distinguished from surface ownership and characterized as groundwater to be assignable as a private right.²⁷⁰ The State of Texas has a significant interest in surface and groundwater usage and preservation, whereas holders of mineral titles have more of a private ownership interest in producing the subsurface minerals.²⁷¹ This distinction is important for comparisons to severed wind rights, as the benefits of wind production, such as royalties, should be treated similarly to mineral rights assigned to private trusts for a beneficiary.²⁷²

2. Severance and Intestate Succession

When an individual dies intestate, the Texas Estates Code establishes the distribution of the individual's estate.²⁷³ A person can pass away completely intestate, meaning "intestate as to the person," which denotes that person died without any valid will.²⁷⁴ If a person passes away with a will, but that will fails to dispose completely of the person's property, the person is said to die "intestate as to that property."²⁷⁵ The basic scheme for intestate estate distribution is divided into three categories: (1) individual property distribution, or unmarried intestate; (2) distribution of community property of married intestate; and (3) distribution of separate property of married estate.²⁷⁶ Distribution may differ depending on which category an intestate person's estate is assigned and how the state determines what is separate and

269. See Megan C. Sanders, *It's Tea Time—"Texas Tea" Time: Advising Donors and Managing Gifts of Oil, Gas and Mineral Interests*, 7 EST. PLAN. COMM. PROP. L.J. 237, 241–44 (2014) (describing generally gifting mineral royalty interests).

270. See Herrin, Welsh, & Crow, *supra* note 206; Cal Dunagan, *Preserving Groundwater Rights for Your Beneficiaries in the Face of the Texas Water Crisis with the Private Water Trust*, 12 EST. PLAN. & COMM. PROP. L. J. 309, 332–33 (2020) (discussing private versus public water trust assignment and State of Texas interests in surface water preservation).

271. See Dunagan, *supra* note 270, at 332.

272. See *id.* While discussion on wind rights assignment to a trust is important for understanding multiple ways the wind estate can be severed through testate succession, the purpose of this Comment does not delve into details about how the mechanics of assignment should function. Rather, this section provides that the relationship between the wind estate and benefits of wind production should be treated in a similar manner to mineral rights assignment. Discussion on the mechanics of assigning wind rights to a trust and the consequence of doing so is likely ripe for a separate article related to this Comment's subject matter and primary issue of severance.

273. See TEX. EST. CODE ANN. ch. 201.

274. See Gerry Beyer, *The Basics of Texas Intestate Succession Law*, TEX. TECH UNIV. SCH. LAW 1, 4, <http://uploads.documents.cimpress.io/v1/uploads/b262e582-3163-4360-a724-7ce78e77ec07~110/original?tenant=vbu-digital> (last visited Mar. 22, 2022) [<https://perma.cc/97CQ-CKY4>].

275. See *id.*

276. See Gerry Beyer, *Intestate Succession: What Every Texas Estate Planner Needs to Know*, SSRN, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1711484 (Feb. 23, 2018) [<https://perma.cc/Y5CK-7LXP>].

what is community property.²⁷⁷ According to Texas intestacy statutes, wind rights and royalties will vest immediately upon death if the holder passes without a valid will.²⁷⁸

The mineral estate is also subject to the state's rules of intestate distribution.²⁷⁹ If the mineral lease is characterized as separate real property and the holder passes with children and a surviving spouse, then that lease is distributed to the children, subject to a one-third life estate to the spouse.²⁸⁰ If the holder passes with a spouse surviving them, but no children, one-half of the mineral estate will go to the surviving spouse and one-half will go to the decedent's parents or descendants of the parents such as brothers, sisters, nephews, or nieces of the decedent.²⁸¹ If the holder passes with a surviving spouse but no parents or siblings, all of the mineral estate will be distributed to the surviving spouse.²⁸²

3. Severance by Reservation in a Deed

Severance by reservation in a deed provides additional choices to landowners.²⁸³ One option is "to draft an instrument that does not wholly sever the wind estate from the surface, but conveys the limited right to enjoy in a percentage of royalties."²⁸⁴ This effectively creates a contractual right to payment, and that instrument notifies parties of their obligations.²⁸⁵ Another option is using a warranty deed "with a conveyance or reservation of wind rights [to] be used to achieve the grant."²⁸⁶ This method should include three things: (1) provide a broad grant of rights to give the holder the exclusive right to develop the wind; (2) allocate and describe the types of payments to be made; and (3) identify who has the right to execute a wind lease.²⁸⁷ If a fee simple owner wants to go forward with severance through these methods, the instrument used needs to be as detailed as possible to allow minimal margin for confusion or error.²⁸⁸ Severance by reservation in a deed in South Texas may look like the following:

277. *See id.*

278. *See generally* EST. ch. 201 (governing intestate distribution in Texas).

279. Jack Wilhelm, *Daddy Died. Who's Got the Will? Texas Succession and Probate Law. Rules and Traps for the Petroleum Land Professional*, NHAPL 1, 8 (Dec. 14, 2017), <https://nhapl.org/resources/Documents/Publications/Presentations/NHAPL%20Paper%20on%20Probate%20and%20%20Successions.pdf> [<https://perma.cc/FT6M-95YG>].

280. *See id.*

281. *Id.*

282. *Id.* For further reference to the general intestacy distribution schemes in the state, *see* TEX. EST. CODE §§ 201.001–.003.

283. *See supra* Section V.A.1.b.

284. *See* Chavarria, *supra* note 11, at 10.

285. *See id.* at 5.

286. *See id.*

287. *See id.*

288. *See id.*

There is RESERVED unto the Grantors a non-executive wind rights royalty in and equal to an undivided one-half ($\frac{1}{2}$) 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 Sweetwater, Texas; (iii) any sums payable under this reservation shall be payable in [county name] County, Texas to or for the benefit of the Grantors . . . (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.²⁸⁹

To summarize, wind severance by reservation in a deed typically reserves to the grantor up to a one-half interest in the royalty payments that come with wind development, such as non-compensatory payments including minimum rent, minimum royalty payments, or other methods of royalty allocations.²⁹⁰ However, compensatory payments, including surface damages, turbine installation fees, and similar damage fees, are excluded from the reservation, as it would not be fair to the surface owner since the grantor no longer has an interest in the surface use of the land.²⁹¹

B. Legislative Proposal for Wind Severance

Reserving a wind royalty interest through will, trust, or reservation in a deed will allow the owner of the wind rights the "exclusive right to enter a wind lease, while reserving or granting a percentage of the income payments to other beneficiaries."²⁹² The legislative draft for wind severance should

289. SMITH, *Wind Law*, *supra* note 17, app. 7.

290. *See id.*

291. *See id.*

292. *See Hartman*, *supra* note 13, at 415.

include proper language, allowing severance through methods of succession in Texas.²⁹³ Below are proposed statutory provisions to create a new Property Code chapter containing language for allowing severance in Texas.²⁹⁴

1. Recognizing Wind as a Property Right in Texas

Just as Title 6 of the Texas Property Code includes Chapter 75 on Mineral Rights, the new chapter on wind rights will fall under Title 6.²⁹⁵ This location in the Property Code is logical because academic and legal scholars provide a consensus that if wind were to be a property right, then it must first be reduced to possession (via a wind turbine, for example) before it can be claimed.²⁹⁶ In the Property Code, wind rights will become Chapter 79 with Subchapter A, which will include four sections that serve different purposes.²⁹⁷ Section 79.001 will provide general definitions for the terms used throughout Chapter 79.²⁹⁸ Section 79.002 will provide general recognition of wind as a property interest for landowners with land viable for wind development.²⁹⁹ Section 79.003 will limit severance of that wind right to a reservation through testate succession.³⁰⁰ Section 79.004 will give specific provisions and requirements for devising a wind interest in a will.³⁰¹ Section 79.005 will address existing severed wind estates and the result of this new law, including whether the new law applies to such existing estates.³⁰² Of course, Texas legislators can, and likely will, create laws regarding other areas of wind law (such as construction legislation of building wind farms, explicit language excluding visual aesthetics as a nuisance, and the required permits and local legislation needed before construction in the Texas Utility Code).³⁰³ This legislation can be included in other subchapters specifically addressing permits, construction, accommodation, etc., within this new chapter on Texas wind rights.³⁰⁴ However, until more authority is created for this area, implementing small pieces for an issue as broad as severance in the Property Code provides a starting point for Texas wind law legislation.³⁰⁵

293. *See id.*

294. *See infra* Section V.B.2.

295. *See* TEX. PROP. CODE ANN. tit. 6.

296. Author's original proposal.

297. *Id.*

298. *Id.*

299. *Id.*

300. *Id.*

301. *Id.*

302. *Id.*

303. Author's original proposal. Another proposal includes legislation that would simultaneously modify the Property and Utility codes.

304. *Id.*

305. *See supra* Section V.A, *infra* Section V.C.

2. Proposed Language for Wind Severance in the Property Code

While it is foreseeable that Texas could create a separate code for wind, severance is a newer issue that will require the initial recognition of wind as a property right of the landowner.³⁰⁶ Such recognition is most suited in the Texas Property Code because the state legislature can create a chapter that (1) recognizes the property interest and (2) lays out the mechanics of severance.³⁰⁷ A third provision will limit wind severance to testate succession, partially resolving the Texas issue of severance.³⁰⁸ Initially, controlling severance in this manner will limit opposition to full-on severance and compromises with wind developers who want to keep their business interests with the landowners who originally contracted with these development companies.³⁰⁹ Existing wind leases at the time of enactment should be grandfathered into this legislation with the effect of having future wind leases alone required to abide by this new law.³¹⁰ This would provide regulator certainty, as well as prevent disorder and confusion, which could otherwise result from new laws on pre-existing wind leases.³¹¹

The Texas Property Code is not the only code in existing legislation with room for the addition of wind severance.³¹² Other areas of potential inclusion are the Texas Estates Code, the Texas Natural Resources Code, the Texas Parks and Wildlife Code, and more.³¹³ For purposes of this Comment, the Texas Property Code is the primary focus for extending legislation.³¹⁴ The Property Code is one of the many direct methods that could be used to recognize a landowner's interest in wind as a property right and then, using methods of testate and intestate succession laid out in the Estates Code legislate how wind severance works through the use of a will.³¹⁵

The following section proposes legislation language for recognizing wind as a private property interest, definitions for terms in this chapter, the inclusion of severance in testate and intestate succession, and finally, an example of devising a wind right in a will.³¹⁶ The language in this Comment will allow Texas landowners to devise a wind right through a will, allowing

306. See *supra* Section V.B.1.

307. See *generally* TEX. PROP. CODE ANN. tit. 6 (referencing generally where this Comment's proposed legislation may be located).

308. See *supra* Section V.A.

309. See *infra* Section V.C.

310. Author's original proposal.

311. Author's original proposal.

312. See *generally* TEX. EST. CODE ANN.; TEX. NAT. RES. CODE ANN.; TEX. PARKS & WILD. CODE ANN. (indicating other potential areas in Texas legislation that could address law on wind).

313. See *generally* EST.; NAT. RES.; PARKS & WILD. (codes which could potentially contain an addition of wind severance provisions).

314. See *supra* Section V.B.1.

315. See EST. chs. 201, 251.

316. See *supra* Section V.B.1.

them to sever the wind estate from the surface.³¹⁷ Estate planners and wind law proponents should lobby the Texas legislature to create Chapter 79 in the Texas Property Code and include the following:

79.001 Purpose: The purpose of this Chapter is to recognize wind as a property interest including wind farm development by allowing landowners to devise a wind interest through instruments of testate succession.³¹⁸

79.002 Definitions: The following definitions should be used for purposes of this Chapter:

- a.) Wind development refers to the phases of wind energy generation from the signing of the wind lease by the landowner, surveying the land, conducting wind studies, and obtaining the proper permits from local, state, and federal authorities to actual construction of wind turbines and generation of electricity from captured wind;
- b.) A wind farm refers to the wind development project that involves constructing wind turbines, converting and storing the wind power, and transmission of that power to the market;
- c.) Severance refers to the process of separating the wind estate from the surface estate through methods of testate and intestate succession or by reservation in a deed;
- d.) Testate succession is defined as under the Texas Estates Code Title 1 Chapter 22 Definitions;
- e.) A landowner is the person or persons holding title to the real property upon which a wind farm is to be developed;
- f.) The wind lease refers to the binding, legal contract between the landowner and wind developer for purposes of leasing the property for use of a wind farm and compensation provisions;
- g.) Wind developer refers to the private or public company engaged in the business of planning, constructing, and operating the wind farm; and
- h.) The wind estate refers to the aerial flow above the real property surface that can be captured and reduced to possession through use of wind turbines and technology.³¹⁹

79.003 Devising the Wind Estate Through Testate Succession: Severance of the wind estate from the surface ownership may be conducted through the following methods of testate succession:

- a.) Reservation broad grant in a warranty deed;

317. See *supra* Section V.B.1.

318. Author's original proposal.

319. Author's original proposal.

- b.) Devise within a valid will under the Estates Code;
- c.) Assignment to a trust; or
- d.) Other valid reservations or grants for inheritance purposes.³²⁰

79.004: The Wind Estate and Intestacy: Upon the death of a wind estate holder, without a will or instrument of testate succession, the wind estate will then be subject to the methods of intestate distribution provided in Texas Estates Code Chapter 201.³²¹

79.005: Existing Wind Leases: Leases executed and operating before [date of enactment] are exempt from this legislation (or other qualifiers).³²²

To summarize, the proposed legislative language in this Comment, while not exact or final, lays a foundation for Texas to recognize wind severance through methods of testate and intestate succession.³²³

C. Result of Legislating Severance

Imagine Bill and Sue decide to sell the property and sever the wind estate by including the suggested legislated language from Section 79.004.³²⁴ Because Texas does not impose a state inheritance tax, devising wind rights in a will should not cause issues in this area.³²⁵ However, if a landowner allows wind development on the land, the property value increases for tax purposes, and the expiration of the PTC means that heirs will need to be aware of the implications of wind asset inheritance.³²⁶

Wind leases and royalty payments are freely assignable and transferable, but there is an argument for wind developers wanting to limit their business with the original landowners.³²⁷ First, wind developers invest a tremendous number of resources in building a wind farm.³²⁸ This involves immense financial, legal, transactional, and sometimes emotional expenditures for a single project.³²⁹ Second, developers may want to prevent or avoid future legal problems with people (or entities) and may believe some

320. Author's original proposal.

321. See TEX. EST. CODE ANN. ch. 201.

322. Author's original proposal.

323. See discussion *supra* Sections V.A–B.2.

324. See *supra* Parts I, IV.

325. See Ben Geier, *Texas Estate Tax*, SMARTASSET (Jan. 13, 2022), <https://smartasset.com/estate-planning/texas-estate-tax> [perma.cc/BBZ4-F6LW]. However, estate planners should be mindful of possible federal estate tax implications, which go beyond the scope of this Comment.

326. See *supra* discussion Section II.A.

327. See SMITH, *Wind Law*, *supra* note 17, § 2.10.

328. See *id.*

329. See *Community Wind Toolbox: Chapter 8 Costs*, WINDUSTRY, https://www.windustry.org/community_wind_toolbox_8_costs (last visited Mar. 22, 2022) [https://perma.cc/W2MY-GE33].

of these problems could have been avoided by not allowing severance.³³⁰ For example, if landowners sever or reserve a wind interest and then sell that land, the future buyer of the real property will need to rely on equitable solutions (such as having a fifty percent wind royalty interest as a minimum standard) to resolve these issues.³³¹ If the legislature adopts favorable legislation for landowners, the possibility exists that more landowners will pursue wind farm development on their properties and thus jump-start law regarding mass production issues such as placement, transmission, and marketability.³³²

However, legislative solutions may not be favorable for the buyer or landowner because they were not the party that entered into the wind lease agreement and are legally expected to follow through with the agreement for only half of the promised payments.³³³ Including wind severance in estate plans and clarifying what happens to the wind estate when a landowner dies will avoid this issue of assigning a wind lease to a future buyer or an heir who may have no desire to construct a wind farm on the land.³³⁴ It may also deflect issues with those who would avoid purchase altogether due to viewing that land as burdened by future development.³³⁵ Avoiding purchase may also be due to a receipt of royalty payments that have been reduced by someone who no longer has a legal right to the real property surface estate.³³⁶

D. Alternative Theories Against Wind Severance

There are different reasons for opposition to recognition of wind severance.³³⁷ Wind development is an area-specific project, with multiple factors (such as scientific evaluations of wind flow) impacting whether a farm can be developed in a particular area.³³⁸ Not all landowners in Texas have land suitable for wind development, either due to terrain or low wind flow through the property.³³⁹ As such, prospective lessors may be disinclined to ever lease their property for other forms of production if their land is not viable or cannot generate enough revenue.³⁴⁰ However, opposition to any

330. See Chavarria, *supra* note 11, at 5.

331. See SMITH, *Wind Law*, *supra* note 17, § 4.03.

332. Author's original thought.

333. See SMITH, *Wind Law*, *supra* note 17, § 4.03.

334. See generally Chavarria, *supra* note 11, at 5 (explaining the possibility that landowners may not desire to sever their wind or construct a wind farm on their property).

335. See Jordan Veurnik, *Benefits Blown Away: Farmers and Ranchers, Wind Energy Leases, and the Estate Tax*, 1 TEX. A&M J. PROP. L. 171, 177–78 (2012) (Veurnik describes both tangible and intangible burdens placed on a property subject to a wind lease and wind farm development.).

336. See *id.*

337. See discussion *infra* notes 338–61.

338. See SMITH, *Wind Law*, *supra* note 17, § 1.03.

339. See *id.*

340. See *id.*

form of legislation for wind severance primarily stems from the wind developer companies.³⁴¹ The reason is primarily due to the large success of wind development in Texas, and opening the door to legislation even for recognizing severance could slow down or inhibit wind development.³⁴² One interest wind developers may want to reduce by preventing severance is restricting the transfer of royalty rights.³⁴³ Some wind developers may want to retain business only with the landowners they have contracted with and may want to prevent these landowners from assigning their leases to others.³⁴⁴

However, while wind developers may oppose legislation on development for business reasons, opposition to wind severance likely stems from consequences experienced within oil and gas law.³⁴⁵ If Bill and Sue decide that they want to enter an oil and gas lease, does the wind lease or oil and gas lease come first?³⁴⁶ Because Texas follows the dominant estate doctrine, one answer would conclude that the mineral estate for the oil and gas lease is dominant to the wind lease because “it receives the benefit of the implied right of use of the surface estate.”³⁴⁷ Another, more equitable option is for the oil company and wind developer to enter into an accommodation agreement to establish terms that allow both to use the surface jointly.³⁴⁸ In *Getty Oil Co. v. Jones*, the Texas Supreme Court held:

Where there is an existing use by the surface owner which would otherwise be precluded or impaired, and where under the established practices in the industry there are alternatives available to the lessee whereby the minerals can be recovered, the rules of reasonable usage of the surface may require the adoption of an alternative by the lessee.³⁴⁹

Depending on whether the wind lease and wind developers actually used the land or possessed a pre-existing use of the land before the oil and gas lease, Texas courts may hold that the oil and gas lease must accommodate the wind lease.³⁵⁰ Legislation on severance could expand Texas’s recognized dominant estate doctrine if a landowner devises a wind right through the landowner’s will and specifies in the wind lease that if the wind rights are first in time, then the mineral estate may accommodate the pre-existing wind use.³⁵¹ Based on the accommodation doctrine, a devised wind right can take

341. See K.K. DuVivier, *Sins of the Father*, 1 TEX. A&J. REAL PROP. L. 391, 417 (2012).

342. See Montgomery, *supra* note 84, at n. 231.

343. See Chavarria, *supra* note 11, at 5.

344. See Lederle, *supra* note 196.

345. See Chavarria, *supra* note 11, at 5; Montgomery, *supra* note 84.

346. Author’s original hypothetical.

347. *Coyote Lake Ranch L.L.C. v. City of Lubbock*, 498 S.W.3d 53, 60 (Tex. 2016).

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

349. *Id.* at 622.

350. See *id.* at 623.

351. See SMITH, *Wind Law*, *supra* note 17, § 2.05[3].

the form of a pre-existing use of the surface contingent on the future landowner's execution of a wind lease.³⁵² However, this approach would only work if the wind farm is already in the development or construction phase.³⁵³ While these accommodation agreements may resolve disputes among wind developers and mineral rights holders, the issue rests on another area of law in Texas for which no existing authority appears.³⁵⁴

Another potential reason for developer opposition includes avoiding unnecessary disputes or litigation with future landowners.³⁵⁵ This situation could come up in the context of landowner A reserving a wind interest for landowner A's children while selling the surface to landowner B.³⁵⁶ If landowner B challenges A's reservation for royalties or development rights, the wind company is in a complicated position to indemnify landowner A's rights against B as per any wind lease agreement.³⁵⁷ Also, A's interest is contingent on B's agreement with the wind developer to place wind turbines on the surface of the property, and if B decides to transact with the developer, A's interest and severance would then be legally futile.³⁵⁸

Finally, an opposition may exist to installing and maintaining long-distance transmission lines and substations for sending and storing electric power from wind generation.³⁵⁹ The principal issue with implementing wind energy into the main power grid is not storage or cost but rather the technology, permits, and approvals for long-distance transmission.³⁶⁰ Transmission lines must be built to send the electricity to the market, but the problem arises when landowners contest the placement of these lines on their property.³⁶¹

VI. CONCLUSION

The Texas legislature should create legislation that recognizes wind as a private property interest and allows landowners to sever the wind estate from surface ownership, including testate and intestate succession methods.³⁶² Texas remains at the forefront of wind energy development in the United States and should encourage landowners to work harmoniously

352. *See id.*, § 3.02(2)(b).

353. *See Coyote Lake Ranch L.L.C.*, 498 S.W.3d at 55.

354. *See generally* Chavarria, *supra* note 11, at 1 (Texas does not have a law regarding whether the right to develop wind can be severed from the surface estate.).

355. *See id.*

356. Author's original hypothetical.

357. Author's original hypothetical.

358. Author's original hypothetical.

359. *See* SMITH, *Wind Law*, *supra* note 17, § 7.02.

360. *See id.*

361. *See id.*

362. *See* discussion *supra* Section IV.A.

with wind developers in building wind farms on Texas land.³⁶³ Without these landowners, there would be little room to build wind farms.³⁶⁴ The legislature should recognize personal benefits and assets to be obtained by allowing landowners to reserve a future interest in their wind estate.³⁶⁵

Legislation on wind severance is necessary for Texas because so many other states in the country outright prohibit or severely restrict severance in a way that limits landowners' rights to use their property for wind development.³⁶⁶ With legislation, landowners in Texas will be able to secure this property interest and pass down the benefits and assets gained from wind development through methods of succession.³⁶⁷ Legislation will also relieve the anticipated burden on state courts to piecemeal the law on severance, which may lead to undesired, unintentional, or inequitable results.³⁶⁸ Estate planners will also be able to reference the suggested statutory language to devise a wind right for their clients, as drafting in a will is an important part of the devise that can result in confusion if not drafted properly.³⁶⁹ Finally, legislation on severance will pave the way for legislation in other areas of wind law development, including permitting, taxation, construction, and more.³⁷⁰

By drawing on existing areas of oil and gas law and principles pertaining to groundwater, private rights and ownership of wind estates should not be restricted to a point that burdens on wind energy development.³⁷¹ Although lawmakers should recognize that oil and gas and groundwater rights are not the perfect analogy for wind, principles from these areas should apply to new legislation regarding wind severance.³⁷² Such application will help transition wind law-related issues into a more established area of law in the state with landowner-centered protections.³⁷³

The current setting for wind severance is both inadequate and unfavorable for Texas landowners, and the state has an opportunity to enact provisions that will benefit and protect these landowners' interests.³⁷⁴ The rest of the country remains split on the issue, with the minority (California and New Mexico) recognizing some fact-specific instances where severance is recognized.³⁷⁵ Wind development in Texas will continue growing, and the

363. See discussion *supra* Section II.B.

364. See discussion *supra* Section II.B.

365. See discussion *supra* Sections IV.A–D.

366. See discussion *supra* Section III.A.

367. See discussion *supra* Section IV.D.

368. See discussion *supra* Sections IV.A–C.

369. See discussion *supra* Section IV.D.

370. See discussion *supra* Section IV.A.

371. See discussion *supra* Section IV.A.

372. See discussion *supra* Part IV.

373. See discussion *supra* Section V.C.

374. See discussion *supra* Sections III.A–C.

375. See discussion *supra* Section III.A.

state should act proactively and prospectively to enact the proposed legislation so that estate planners can better serve their landowner clients and courts are not forced to resolve conflicts through misguided and misapplied precedent.³⁷⁶

376. See discussion *supra* Sections IV.A–E.