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## Special Report

### How Wind, Oil and Gas Leases Differ

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Landowners and developers of wind power have operated under lease and easement instruments in Texas for more than two decades. In light of the well-developed oil and gas industry here, landowners and their counsel have attempted to incorporate features of traditional mineral leases into wind leases. Unfortunately, their efforts are hampering wind lease negotiations due to the differences between mineral and surface ownership in Texas.

First, it helps to have a little background on wind project development. Many early developers acquired easements rather than leases from landowners. Although both easements and leases are acceptable and financeable methods to develop wind projects, in recent years there has been a decided tilt in favor of leases. This is largely due to the fact that landowners understand the landlord/tenant lease relationship better than the grantor/grantee easement relationship.

Today, landowners are testing the boundaries of permissible actions under wind leases, and wind developers are encountering surface-conflict issues with mineral owners. Three examples of such issues follow.

- *Severing wind rights:*

Many landowners, analogizing to mineral rights, seek to sever the wind rights from the ownership of the surface estate. The effort often results from a desire to sell the surface estate while retaining the wind rights and the royalty payments, as is common with minerals.

However, under Texas law it is unclear whether the severance of wind rights is enforceable. From the developer's perspective, a wind lease, unlike a mineral lease, requires the continuing involvement of the surface owner.

Severance of a mineral interest from the surface estate works for a mineral developer/operator



because the mineral estate is the dominant estate; thus, the mineral operator can conduct its business successfully without the surface owner's participation.

Conversely, wind leases require the surface owner's involvement in four respects: estoppel certificates to obtain financing; input on operations affecting the surface, such as turbine and transmission line locations; input on expansion efforts; and noninterference with wind flow.

As such, developers and lenders require that the surface owner keep some skin in the game as an incentive to cooperate. Several

states have addressed this issue by enacting statutes prohibiting the severance of wind rights from the surface estate.

- *Redirection of payments:* Recently, lawyers have sought to apply mineral lease payment concepts to wind leases. Landowners often desire to direct their royalty payments to third parties, such as family members or a family limited partnership. Developers often accommodate these payment directions so long as the developer can continue to look to the landowner for decisions under the lease.

Unfortunately, some landowners mistakenly regard the redirection of payments to third parties as an assignment of income tax liability. Developers, however, continue to send 1099 tax forms to the landowner because income tax liability for royalty and other payments under the wind lease remains with the landowner notwithstanding the assignment.

- *Surface conflict:* Finally, wind developers often encounter a potential conflict between wind generation and mineral interest exploration. As mentioned above, the mineral interest owners possess the dominant estate, affording them the right to use the surface to access the minerals. A mineral interest owner's use of the surface may disrupt wind generation operations or pose safety issues for employees and equipment (such as ice throw from turbine blades in northern regions).

Fortunately, wind developers and mineral operators have an important geophysical characteristic working in their favor. In most instances, wind developers locate turbines at the apex of geological formations to capture the best wind, whereas oil and gas operators drill at the low point in any given geological formation to save drilling costs.


Additionally, the accommodation doctrine, as established in 1971 by the Texas Supreme Court in *Getty Oil Co. v. Jones*, bolsters the position of wind developers. The doctrine requires mineral interest owners reasonably to accommodate the surface owner's uses when accessing the minerals. When the wind farm is completed before mineral development occurs, wind developers and lenders are comfortable relying on the accommodation doctrine to protect against the possibility of the mineral operator's exploration activities forcing the relocation of generating facilities and other improvements.

Alternatively, if a wind developer seeks to develop in an area already under active mineral development, the wind developer should approach the mineral operator and negotiate a contractual accommodation agreement.

The cases and statutes governing wind power, as a relatively recent source of electric energy, are an emerging area of Texas law. Due to the well-developed state of oil and gas leasing in Texas, landowners and their

counsel often look to familiar oil and gas leasing concepts when negotiating wind leases.

While mineral and wind leases have some similarities, efforts by landowners and their counsel to apply mineral-leasing concepts to the wind lease are creating challenges. Lawyers for landowners and wind developers should consider the selected issues described above, as well as others, when negotiating a wind lease.

As the wind industry matures in Texas, wind leases, Texas cases and statutes hopefully will evolve to address and appropriately distinguish between wind and mineral leases. 



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