

# **Defining Wind Rights in Wyoming: A Practical Solution**

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## **Executive Summary**

This report was designed to provide the Wyoming state legislature, through the Wind Energy Task Force, with an analysis of the different challenges facing the state with respect to the rapid increase in wind energy conversion systems. Initially, this report examines the fundamental nature of the wind right, including answering the question of who owns the right to develop the wind energy resource. The report discusses Wyoming statutes and case law addressing surface estate ownership and airspace rights, and concludes that the wind right belongs to the surface estate owner. Such an assertion raises a special problem regarding estate dominance in Wyoming, which is raised and discussed briefly in the context of the wind right.

Once ownership of the right to develop wind energy resources is established in the surface estate owner, the report turns to two different legal frameworks under Wyoming law for more specific guidance and to add definition to the rights. The first area explored is relevant water law principles, including statutory and common law treatment of diffused surface water, as well as principles of prior appropriation and riparian water law. The water analogy is particularly relevant to wind energy, given the nature and challenges posed by the wind right. However, the water rights analogy is difficult to apply to wind energy, particularly based on state ownership of the water in Wyoming.

The second area explored is the similarities between existing resource law governing oil, gas, and other minerals and wind energy. The report examines the nature of the rights granted by a mineral lease and how those rights could apply to the wind right. In addition, the report discusses whether wind is similar to minerals in place and therefore capable of being severed (in the sense of being extracted) from the real property. While significant challenges exist in applying principles of mineral law to wind energy, the comparisons are useful in attempting to add greater definition to the underlying wind right. Wyoming has a rich history in both water and mineral law, and the state's experience with those natural resources is invaluable in evaluating the impacts and challenges of a new energy source.

The report also addresses the concept of severability of the wind rights from the surface estate to create a new "wind estate" separate from the surface. There are several potential conflicts between both the surface estate owners and the subsurface estate owners (both the mineral estate and pore space estate) with the new wind estate owner. These conflicts are amplified by the lack of clear guidance regarding which estates are dominant and what rights are conveyed to the new wind estate. The report also discusses the impact of restrictive covenants that are thought to be present in wind energy leases on the ability of the surface estate owner or mineral owner to develop minerals underlying an area with leased wind resources. The severability section concludes with discussions on how severability affects both the policy of alienable property and regulatory certainty.

Finally, the report examines possible taxation schemes that could apply to wind energy, including a tax scheme based on principles of mineral law and a “generation tax” which would be imposed on all electrical generators in the state. The report reviews both statutes and case law to highlight the challenges associated with both tax schemes and includes a specific reference to an attempt by New Mexico to impose a “generation tax” and the results of the legal challenges brought against such a tax. A few states have been successful in implementing and defending a “generation tax” and are discussed briefly by the report.

The conclusions of the report center on the need for legislative action to address some minimum aspects of the wind right, including a statutory definition and necessary aspects of ownership. While the wind right is not capable of absolute definition and not all circumstances can be addressed in legislation, the report concludes that legislative action is necessary soon to provide all interested parties with an understanding of their respective rights and responsibilities. In conjunction with a statutory definition, the report concludes that the legislature should address the issue of severability and follow the states that have statutorily restricted the right of surface estate owners to sever the wind rights from the surface estate. In the alternative, the report recommends at least a statement by the legislature to preserve the hierarchy of estates and maintain the common law dominance of the mineral estate. Finally, the report makes no firm recommendation regarding applicability of different tax schemes, but does highlight how the statutory definition of the wind right will affect which types of tax structures are available and the challenges associated with different tax proposals.