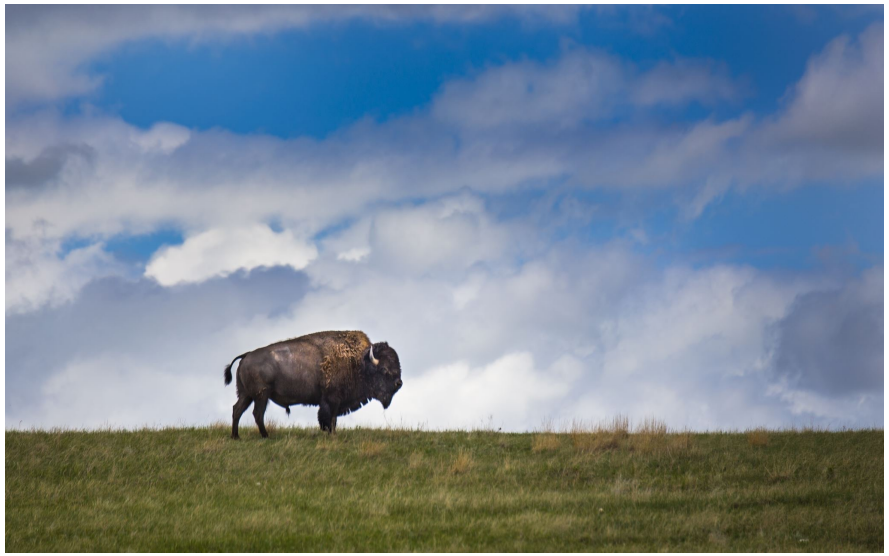
Reconciling Conflicts Between Renewable Energy Projects and Subsurface Mineral Development

Casey R. Terrell - Crowley Fleck, PLLP

2022 Landscape Discussion on Energy Law & Policy in the Rockies

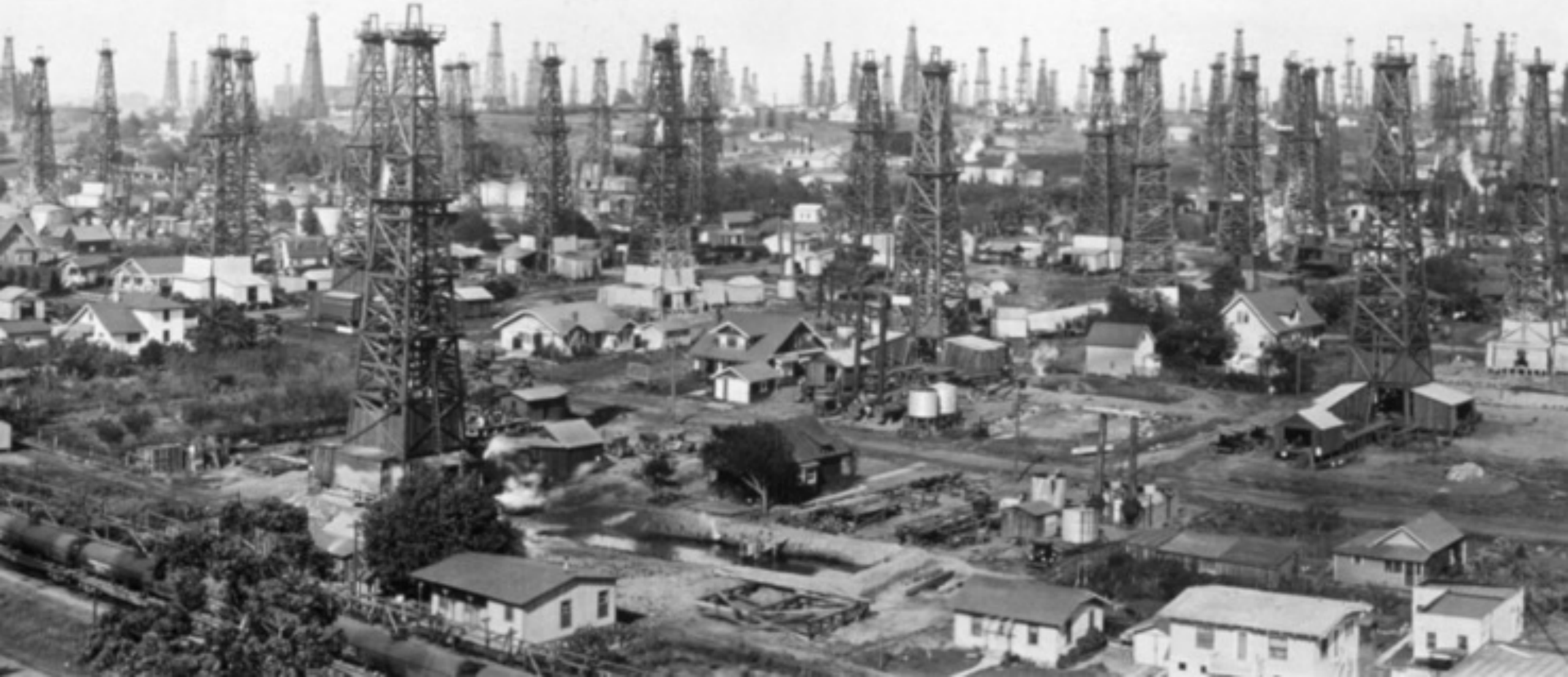
October 14, 2022 – Laramie, Wyoming

OVERVIEW

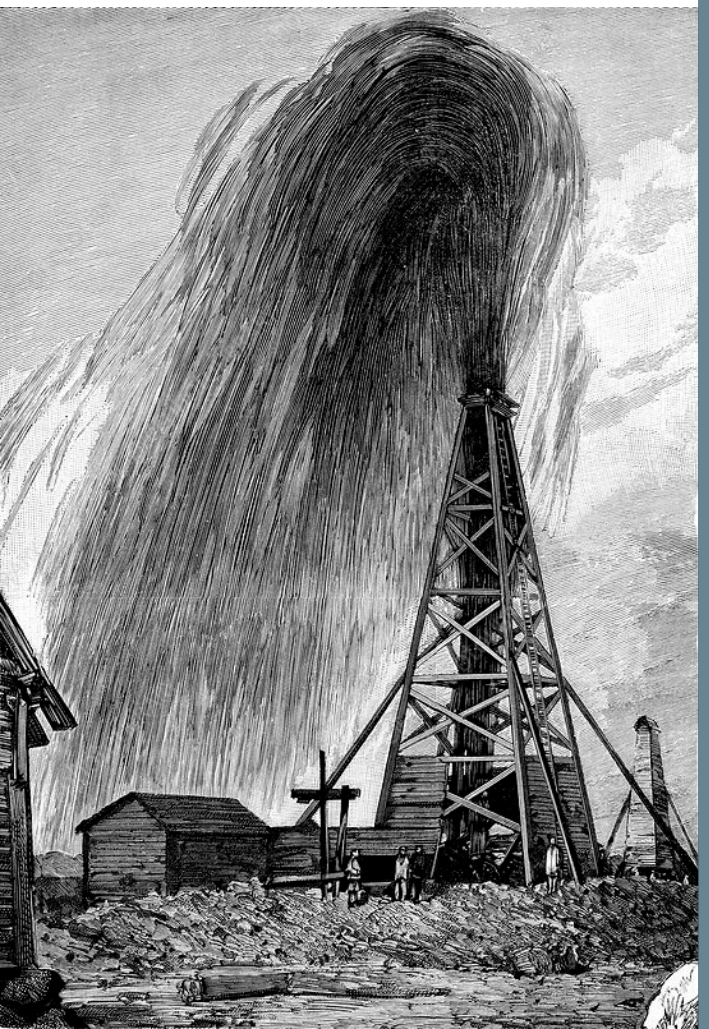


- ORIGINS OF THE ACCOMMODATION DOCTRINE
- *LYLE V. MIDWAY SOLAR, LLC*
- STATE SPECIFIC PERMITTING REGULATIONS
- FEDERAL POLICIES ON CO-DEVELOPMENT
- PRACTICAL TAKEAWAYS AND CO-DEVELOPMENT AGREEMENTS

SIGNAL HILL OIL FIELD - 1923
LOS ANGELES COUNTY, CA



COMMON LAW DOMINANT MINERAL ESTATE DOCTRINE

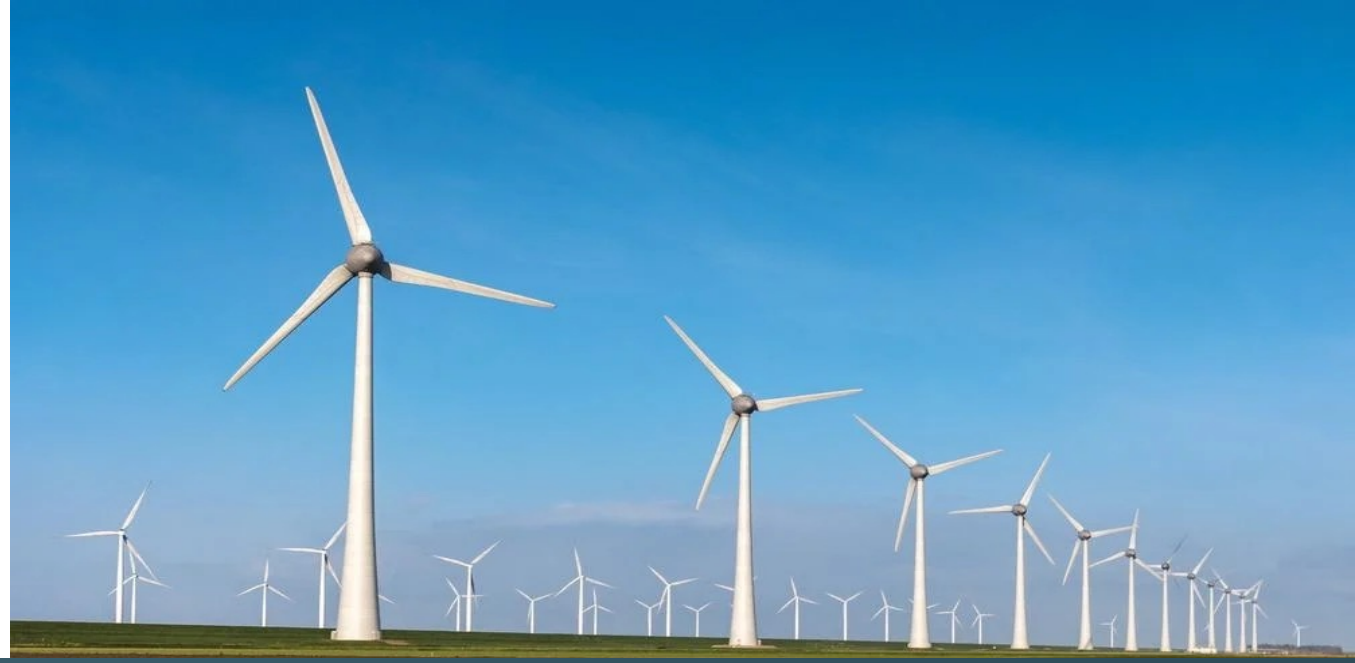


- "DOMINANT" MEANS BENEFITTED, NOT SUPERIOR
- RIGHTS MUST BE EXERCISED WITH "DUE REGARD"
- QUASI-PUBLIC NATURE OF MINERAL INTERESTS
- NO BALANCING TEST BETWEEN ESTATES
- COULD EVEN IMPAIR EXISTING USES OF SURFACE IF REASONABLY NECESSARY TO DEVELOP MINERALS
- ONLY LIABLE FOR NEGLIGENTLY INFLICTED DAMAGES TO SURFACE ESTATE

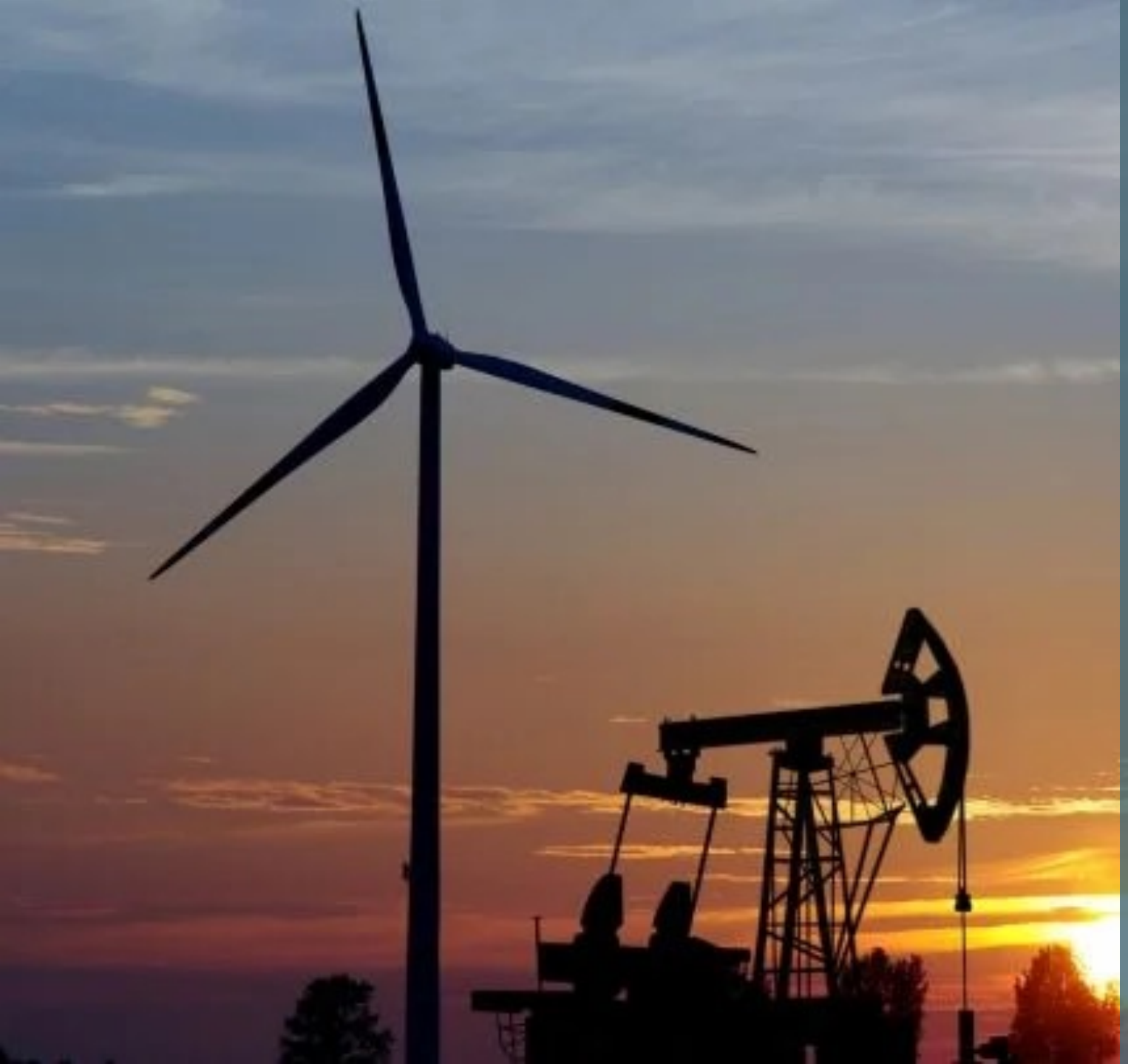
COMMON LAW DOMINANT MINERAL ESTATE DOCTRINE

- THE MINERAL DEVELOPER DOESN'T GET TO CHOOSE WHERE THE RESOURCE IS LOCATED
- WITHOUT ACCESS, THE RESOURCE IS WASTED
- PROMOTES ECONOMIC DEVELOPMENT
- PROVIDES AFFORDABLE ENERGY SUPPLY
- ENERGY INDEPENDENCE AND NATIONAL SECURITY

NEW FORMS OF DEVELOPMENT MAY REQUIRE NEW REGULATORY PARADIGMS

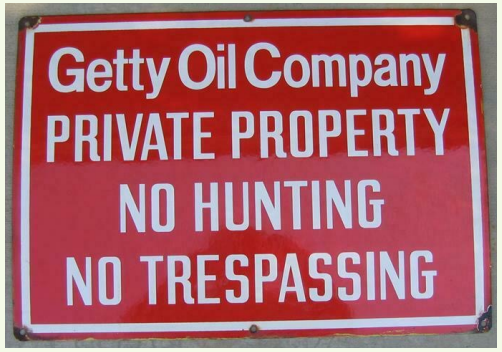


- THE **RENEWABLE** DEVELOPER DOESN'T GET TO CHOOSE WHERE THE RESOURCE IS LOCATED
- WITHOUT ACCESS, THE RESOURCE IS WASTED
- PROMOTES ECONOMIC DEVELOPMENT
- PROVIDES AFFORDABLE ENERGY SUPPLY
- ENERGY INDEPENDENCE AND NATIONAL SECURITY
- ALSO AVOIDS NEGATIVE EXTERNALITIES OF MINERAL DEVELOPMENT



THIS NEW DYNAMIC—THE FACT THAT NATURAL RESOURCE DEVELOPMENT OF THE SURFACE ESTATE SHARES MANY OF THE CHARACTERISTICS THAT PREVIOUSLY LED TO THE DOMINANCE OF THE SUBSURFACE MINERAL ESTATE—MAY SET THE STAGE FOR A SIGNIFICANT EVOLUTION OF THE LEGAL DOCTRINES THAT REGULATE THESE QUESTIONS OF PRIORITY.

ORIGINS OF THE ACCOMMODATION DOCTRINE



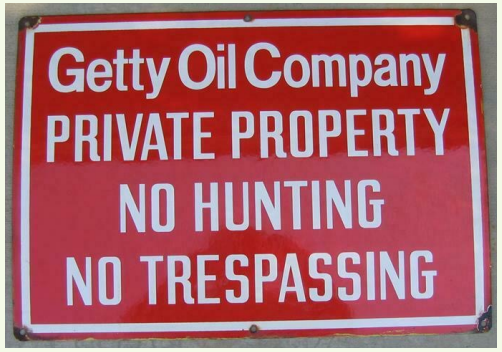
GETTY OIL CO. V. JONES

470 S.W.2D 618 (TEX. 1971)

Facts

- Already-existing center-pivot sprinkler system.
- Mineral owner proposed pump jacks that would interfere with the existing sprinkler system.
- Surface owner argued center pivot sprinkler was the only reasonable irrigation method due to labor shortages.
- Surface owner presented evidence that reasonable, but more expensive, alternatives were available to mineral owner such as burying the pump jacks or utilizing hydraulic pump jacks.

ORIGINS OF THE ACCOMMODATION DOCTRINE



GETTY OIL CO. V. JONES

470 S.W.2D 618 (TEX. 1971)

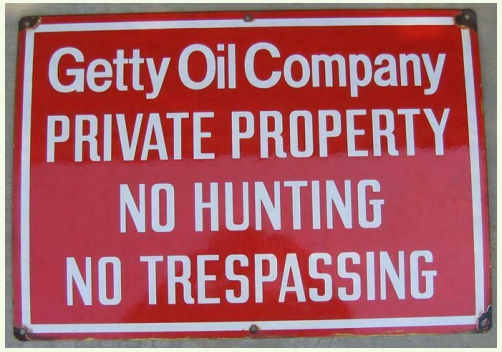
Analysis

- "Due Regard" requires balancing test—impact upon the existing surface use weighed against potential alternatives available to mineral owner.

- Fact issue. Surface owner has burden of proof to demonstrate inconvenience or financial burden of continuing existing use by alternative method is so great as to make the alternative method unreasonable.

- Mineral owner could proceed with development if there are no reasonable alternatives.

ORIGINS OF THE ACCOMMODATION DOCTRINE



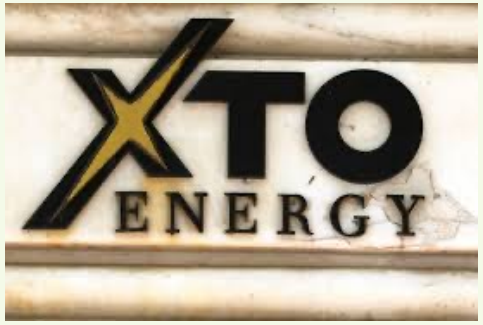
GETTY OIL CO. V. JONES

470 S.W.2D 618 (TEX. 1971)

Holding:

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

ORIGINS OF THE ACCOMMODATION DOCTRINE



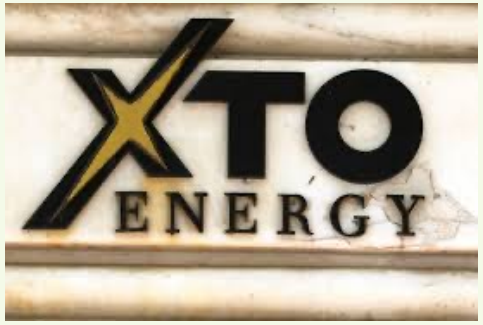
MERRIMAN V. XTO ENERGY, INC.

407 S.W.3D 244 (TEX. 2013)

Facts

- 40-acre tract containing home, barn, and livestock sorting corrals.
- Surface owner utilized the parcel for a livestock sorting facility.
- Argued XTO's proposed mineral development activities would interfere with existing use—cattle sorting.
- COA argument about whether alternative agricultural uses were sufficient to show accommodation.

ORIGINS OF THE ACCOMMODATION DOCTRINE



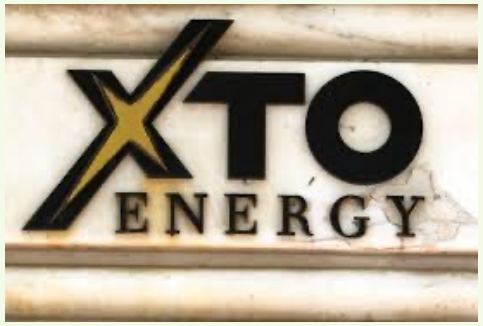
MERRIMAN V. XTO ENERGY, INC.

407 S.W.3D 244 (TEX. 2013)

Analysis

- Surface owner must demonstrate: "(1) the lessee's use completely precludes or substantially impairs the existing use, and (2) there is no reasonable alternative method available to the surface owner by which the existing use can be continued"
- If only one method for developing minerals, that method may be used regardless of its impact on the surface estate.
- If reasonable industry-accepted alternative is available for producing minerals that allows continued surface use, mineral owner ***must*** use that alternative.

ORIGINS OF THE ACCOMMODATION DOCTRINE



MERRIMAN V. XTO ENERGY, INC.

407 S.W.3D 244 (TEX. 2013)

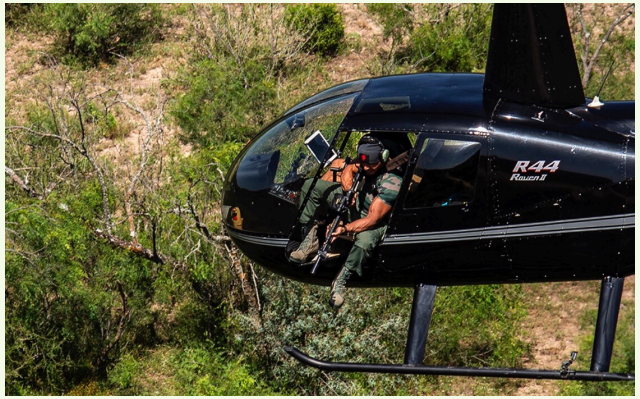
Holding:

- Court rejected XTO argument regarding surface owner's short-term leases as alternative location for cattle sorting.

- Court rejected COA finding that alternative agricultural uses may be available to surface owner.

- However, found that surface owner did not meet burden of proving he had no reasonable alternative means of maintaining his cattle operations on the 40–acre tract.

ORIGINS OF THE ACCOMMODATION DOCTRINE



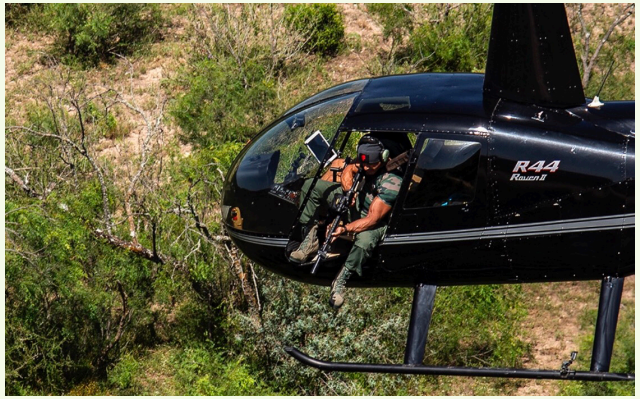
VIRTEX OPERATING CO., INC. V. BAUERLE

2017 WL 5162546 (TEX.APP.—SAN ANTONIO 2017)

Facts

- Surface owner regularly used helicopters for low-level hunting and game control operations on 8,500-acre ranch.
- Oil and gas operator attempted to install overhead power lines.
- Surface owner objected due to potential negative impact on helicopter operations.

ORIGINS OF THE ACCOMMODATION DOCTRINE



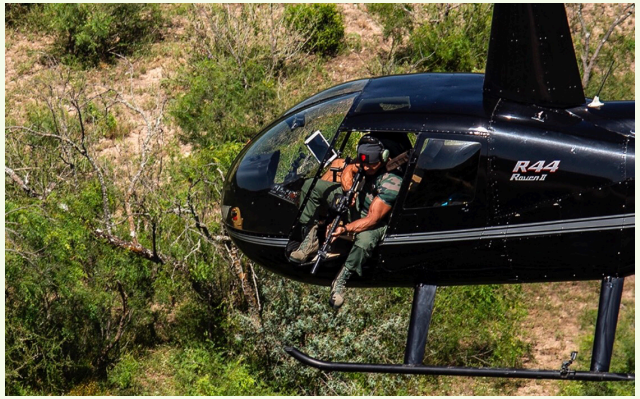
VIRTEX OPERATING CO., INC. V. BAUERLE

2017 WL 5162546 (TEX.APP.—SAN ANTONIO 2017)

Surface owner argued:

- Proposed power lines would completely preclude or substantially impair their existing hunting and cattle operations due to danger they posed.
- No reasonable alternative method available by which they could continue their existing hunting and cattle operations.
- Reasonable, customary, and industry-accepted alternative method available to mineral developer.

ORIGINS OF THE ACCOMMODATION DOCTRINE



VIRTEX OPERATING CO., INC. V. BAUERLE

2017 WL 5162546 (TEX.APP.—SAN ANTONIO 2017)

Holding:

- Installation of power lines posed sufficient danger that would substantially impair existing use of helicopters.
- Don't need to consider whether *all* the proposed power lines would be dangerous.
- The inconvenience and cost of other hunting methods made them unreasonable.
- Buried power lines or diesel/gas powered pump jacks were industry-accepted alternatives, despite the additional cost of $200-300 more per month per well.

LYLE V. MIDWAY SOLAR, LLC
618 S.W.3D 857 (TEX.APP.–EL PASO 2020)

Facts

- Surface owner owned a 315-acre parcel without any ownership of the underlying mineral rights.

- Surface owner entered into a solar lease with Midway Solar granting the right to "free and unobstructed use and development of solar energy resources" for up to 55 years.

- The solar lease acknowledged that surface owner had "no right to control" the underlying mineral owners' activities.

LYLE V. MIDWAY SOLAR, LLC
618 S.W.3D 857 (TEX.APP.–EL PASO 2020)

Facts

- Lease also contained "Designated Drill Site Tracts" without input from mineral owners.
- Designated drillsites were 80-acre tract at north end of parcel and 17-acre strip at south end of parcel.
- Ultimately, Midway covered 215 acres or roughly 70% of tract with solar panels
- Never obtained surface waivers from mineral owners under 315-acre parcel.

LYLE V. MIDWAY SOLAR, LLC
618 S.W.3D 857 (TEX.APP.–EL PASO 2020)

Lawsuit

- After the solar panels were installed, 27.5% mineral owners (Lyles) sued solar developer, alleging trespass and breach of contract.
- Lyles contended the solar facility had "destroyed and/or greatly diminished the value" of their mineral estate.
- Sought a mandatory permanent injunction to remove the solar panels and transmission lines.

LYLE V. MIDWAY SOLAR, LLC
618 S.W.3D 857 (TEX.APP.–EL PASO 2020)

Lyles had:

- never leased their minerals
- no plans to lease the minerals
- commissioned no geological studies
- entered into no drilling contracts
- received no requests to lease or purchase minerals.

- Lyles conceded "they had no plans for drilling any wells."

LYLE V. MIDWAY SOLAR, LLC
618 S.W.3D 857 (TEX.APP.–EL PASO 2020)

Holding:

"Midway has the right to use the surface...[t]he Lyles also have the right to use the surface, but only as an adjunct to their mineral estate...[i]f the Lyles exercise their right as part of developing the minerals, Midway must yield to the degree mandated by the application of the accommodation doctrine...[b]ut if the Lyles are not exercising their right, there is nothing to be accommodated."

LYLE V. MIDWAY SOLAR, LLC
618 S.W.3D 857 (TEX.APP.–EL PASO 2020)

Holding:

- "until the Lyles seek to develop their minerals, Midway owes no duty to the Lyles respecting the surface usage."

- Court acknowledged a party is not required to undertake a futile act but held insufficient evidence to support a claim for damages unless and until there was evidence of actual or planned development of the minerals.

STATE SPECIFIC PERMITTING (OR LACK THEREOF) AFFECTING COORDINATION OF SURFACE AND MINERAL DEVELOPMENT

COLORADO

Surface owner notification of development to identifiable mineral owners pursuant to Colorado Statute § 24-65.5-103

- "Not less than thirty days before the date scheduled for the initial public hearing by a local government on an application for development."

- Statutory penalties for failure to provide the required notice.

STATE SPECIFIC PERMITTING (OR LACK THEREOF) AFFECTING COORDINATION OF SURFACE AND MINERAL DEVELOPMENT

COLORADO

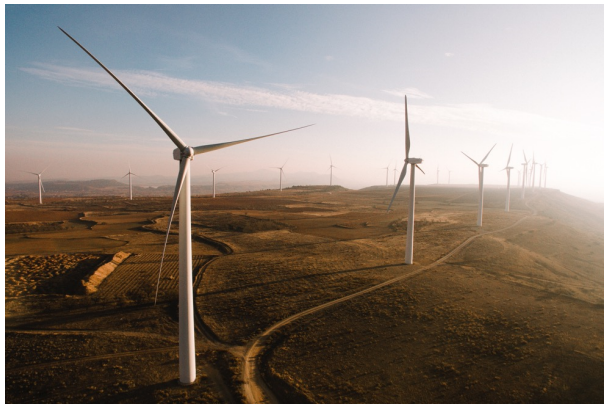
Colorado Oil and Gas Conservation Commission "Drilling Windows"

- Provide specific "windows" of land within each government section, based upon development areas or formations, where wells can be drilled and spaced for optimal recovery of natural resources.

-Impact on co-development

STATE SPECIFIC PERMITTING (OR LACK THEREOF) AFFECTING COORDINATION OF SURFACE AND MINERAL DEVELOPMENT

WYOMING

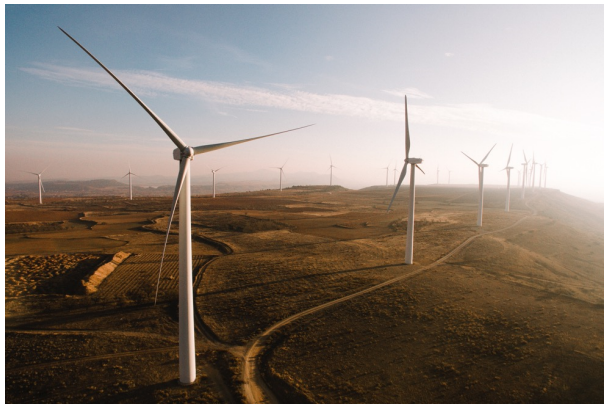


County Authority

- Under Wyoming Statute § 18-5-505, would-be owners or developers of wind energy facilities with an estimated cost of less than $253,878,000 must submit an application to the relevant Board of County Commissioners.

STATE SPECIFIC PERMITTING (OR LACK THEREOF) AFFECTING COORDINATION OF SURFACE AND MINERAL DEVELOPMENT

WYOMING



Industrial Siting Commission

- Primary jurisdiction for wind energy developments with 20 or more towers or an estimated cost of $253,878,000 or more.
- Wyoming Industrial Development Information and Siting Act governs applications, which have differing requirements from County Applications.

-Impact on co-development

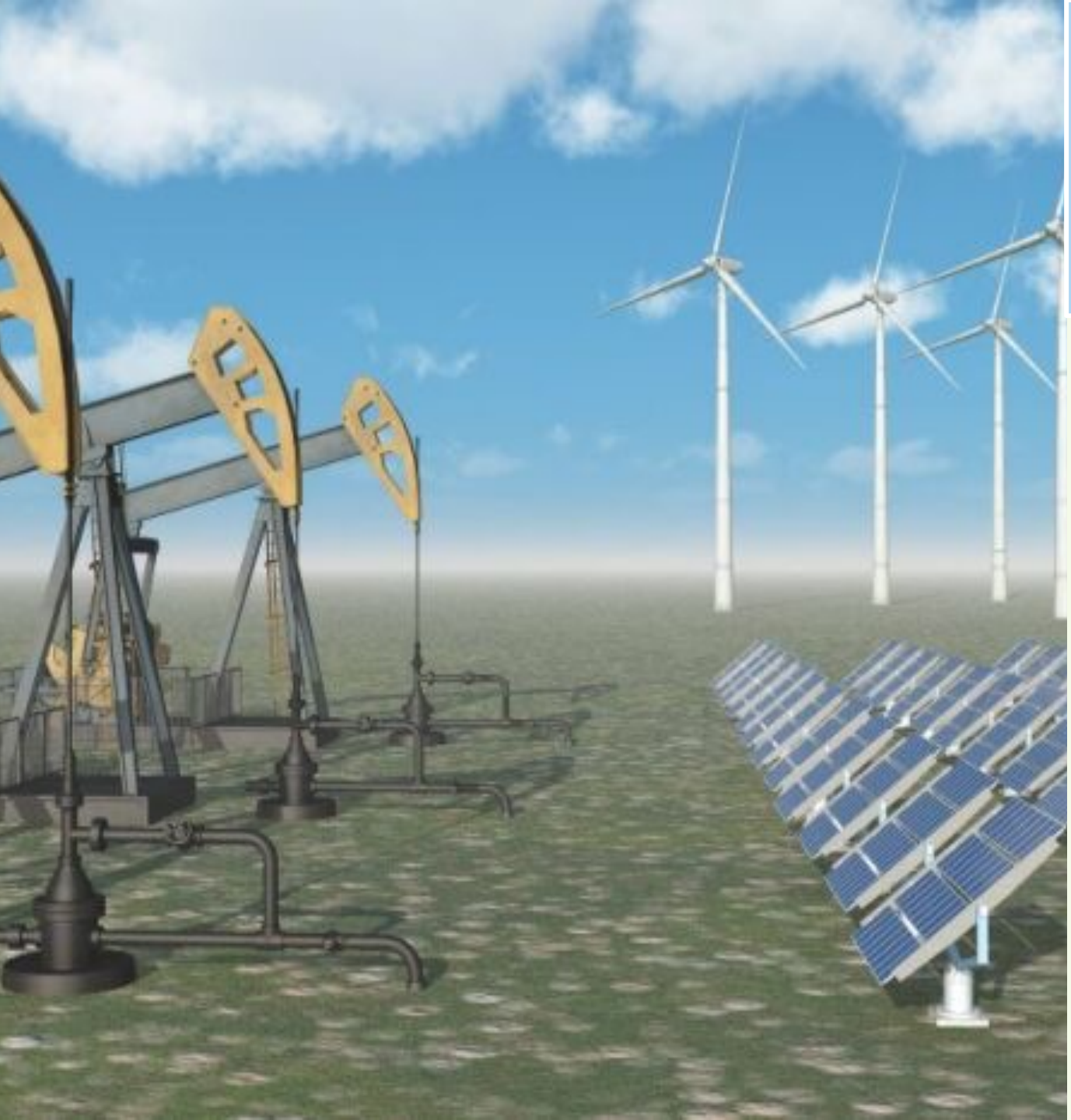
STATE SPECIFIC PERMITTING (OR LACK THEREOF) AFFECTING COORDINATION OF SURFACE AND MINERAL DEVELOPMENT

TEXAS

Texas Railroad Commission “Drillsite Designation”

- Pursuant to Statewide Rule 76 (16 Tex. Admin. Code § 3.76), certain surface owners can request the creation of a qualified subdivision.
- Limits mineral interest owners right to explore and produce to specified operation sites on tract.
- Qualified subdivision must contain “an operations site for each separate 80 acres within the 640-acre tract and provisions for road and pipeline easements to allow use of the operations site,” which must be at least two acres.

-Impact on co-development



FEDERAL POLICIES (OR LACK THEREOF) REGARDING CO-DEVELOPMENT

- BERENERGY CORP. v. PEABODY COAL
- NEW MEXICO POTASH
- BARLOW & HAUN, INC. v. UNITED STATES

BERENERGY CORP. V. BTU W. RES., INC.
2018 WY 2, 408 P.3D 396 (WYO. 2018)

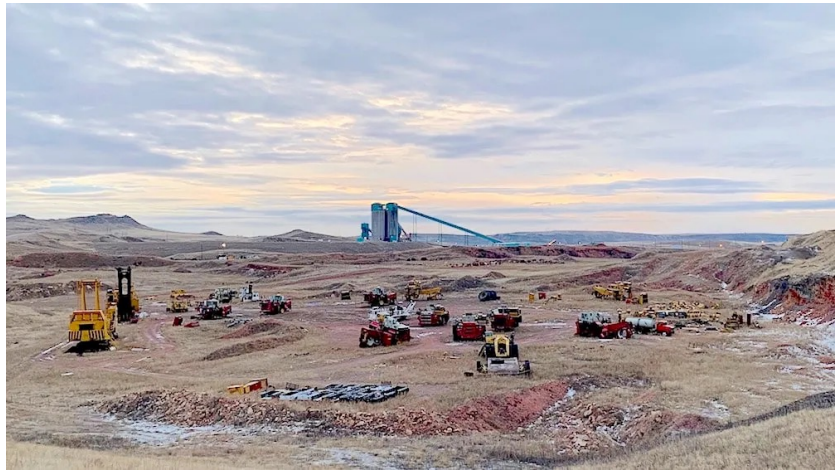
FEDERAL POLICIES
(OR LACK THEREOF)
REGARDING CO-DEVELOPMENT

Facts

- Federal O&G lessee in Wyoming's Powder River Basin sought declaration that its federal O&G lease was superior to the rights of federal coal lessee on the same parcel.

- BLM was lessor under both leases.

- Dispute involved State District Court, Federal District Court, remand to State District Court, WOGCC protest, BLM suspension request, Wyoming Supreme Court, remand to State District Court, second Wyoming Supreme Court decision.



BERENERGY CORP. V. BTU W. RES., INC.
2018 WY 2, 408 P.3D 396 (WYO. 2018)

FEDERAL POLICIES
(OR LACK THEREOF)
REGARDING CO-DEVELOPMENT

Holding:

- Held federal government was necessary party, saying the competing federal lease provisions "appear to place decision-making authority over the operations rights conveyed by leases to conflicting mineral rights squarely and solely in the hands of the Secretary of the Interior and his designees."

- Held it "will not offer advisory opinions, which appears to be what is sought in light of the Secretary's authority to disregard it and make a different decision."

-Takeaway

- The BLM refused to join the suit on remand, ultimately leading to dismissal of the litigation as to the federal leases.

NEW MEXICO POTASH

FEDERAL POLICIES (OR LACK THEREOF) REGARDING CO-DEVELOPMENT

Facts

- New Mexico's federal lands are home to both potash mining and oil and gas production in the Permian Basin.

- On December 3, 2012, the Secretary of the Interior issued Secretarial Order No. 3324.

- Addressed co-development of the two resources in the "Designated Potash Area" established in Eddy and Lea counties.

FEDERAL POLICIES (OR LACK THEREOF) REGARDING CO-DEVELOPMENT

Secretarial Order No. 3324

- Imposes stipulations on federal O&G leases in Designated Potash Area.
- Relies on horizontal drilling to minimize impacts and surface disruption to potash mining.
- Designates Buffer Zones where O&G development is not allowed.
- Designates a Development Area, allowing oil and gas Drilling Islands from which wells can be drilled to reduce the number of roads, power lines and other facilities that can impact potash resources.

FEDERAL POLICIES (OR LACK THEREOF) REGARDING CO-DEVELOPMENT

Takeaway

- Secretarial Order No. 3324 provides a potential model for co-development on federal lands, even if parties enter into similar parameters as a private agreement.

- If the BLM does issue an official policy in the future, it is likely to take a form substantially similar to Secretarial Order No. 3324

BARLOW & HAUN, INC. V. UNITED STATES

805 F.3D 1049, 1055 (FED. CIR. 2015)

FEDERAL POLICIES
(OR LACK THEREOF)
REGARDING CO-DEVELOPMENT

Facts

- Barlow & Haun acquired 26 federal O&G leases located in an area where the BLM had also approved a significant number of federal trona leases.

- The BLM issued the oil and gas leases, as well as the trona leases, prior to issuing a final Resource Management Plan, but ultimately suspended the oil and gas leases indefinitely leading to the lawsuit.

BARLOW & HAUN, INC. V. UNITED STATES
805 F.3D 1049, 1055 (FED. CIR. 2015)

FEDERAL POLICIES
(OR LACK THEREOF)
REGARDING CO-DEVELOPMENT

Holding:

- The Court held that the lawsuit was unripe because the indefinite suspension was not technically a taking.

- O&G lessee had never filed for, and been denied, APD.

-Takeaway

- Voluntary resolution of co-development conflicts is often a better option than leaving the decision entirely to agency discretion or judicial determination.

PRACTICAL TAKEAWAYS FOR PRACTITIONERS

The Legacy of *Midway Solar*

Mineral Owners

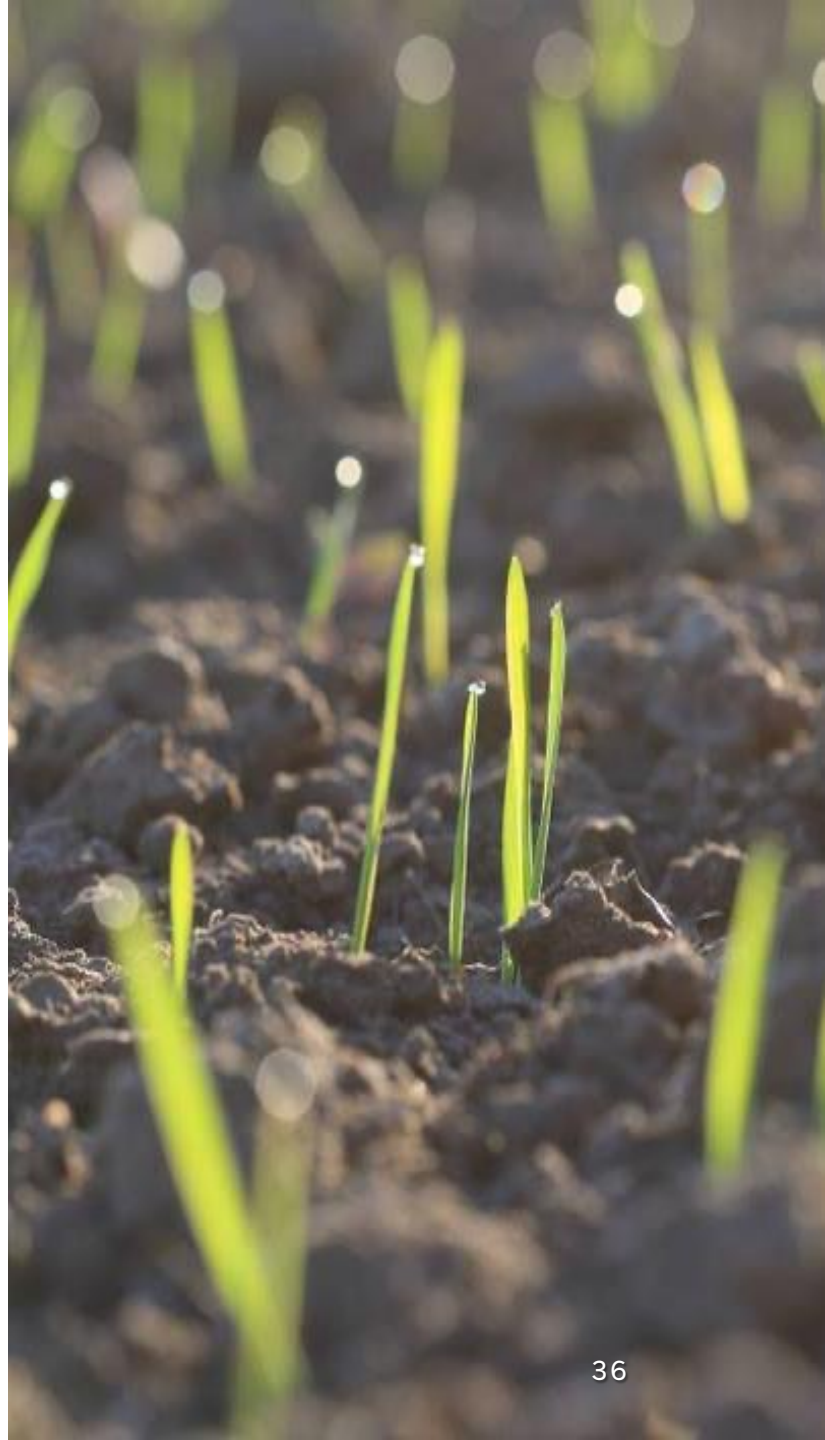
- Actual development of interests is pivotal to claim under the Accommodation Doctrine.

- If no other option for existing surface use, mineral owner may be required to adopt alternatives, even at greater cost.

Surface Owners

- If no industry-accepted alternative, mineral owner can still develop despite existing surface use.

- Failure to adequately coordinate with mineral owner can result in damages and possible injunctive removal of existing surface development.

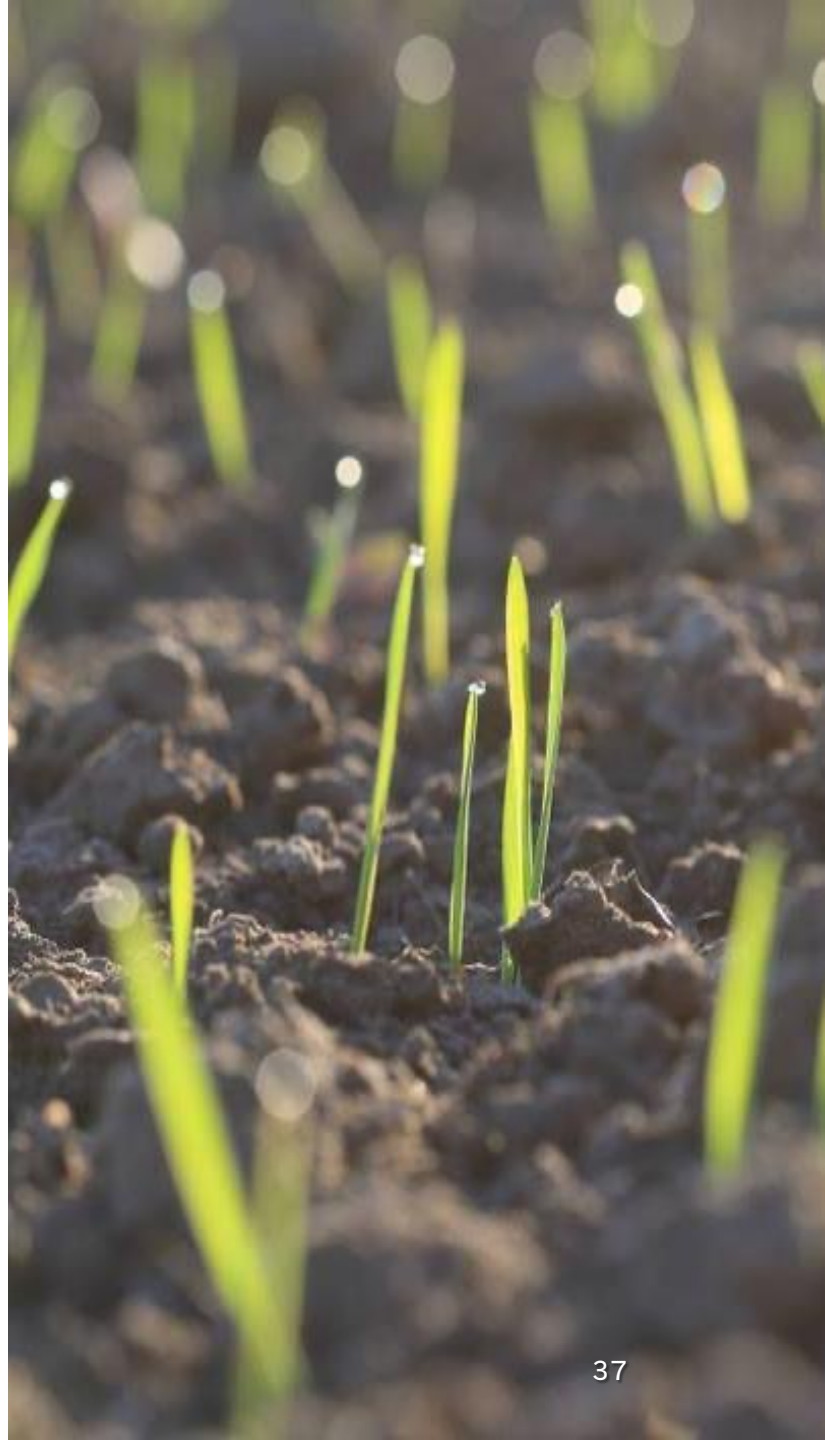


PRACTICAL TAKEAWAYS FOR PRACTITIONERS

The Legacy of *Midway Solar* (cont.)

Best Practices

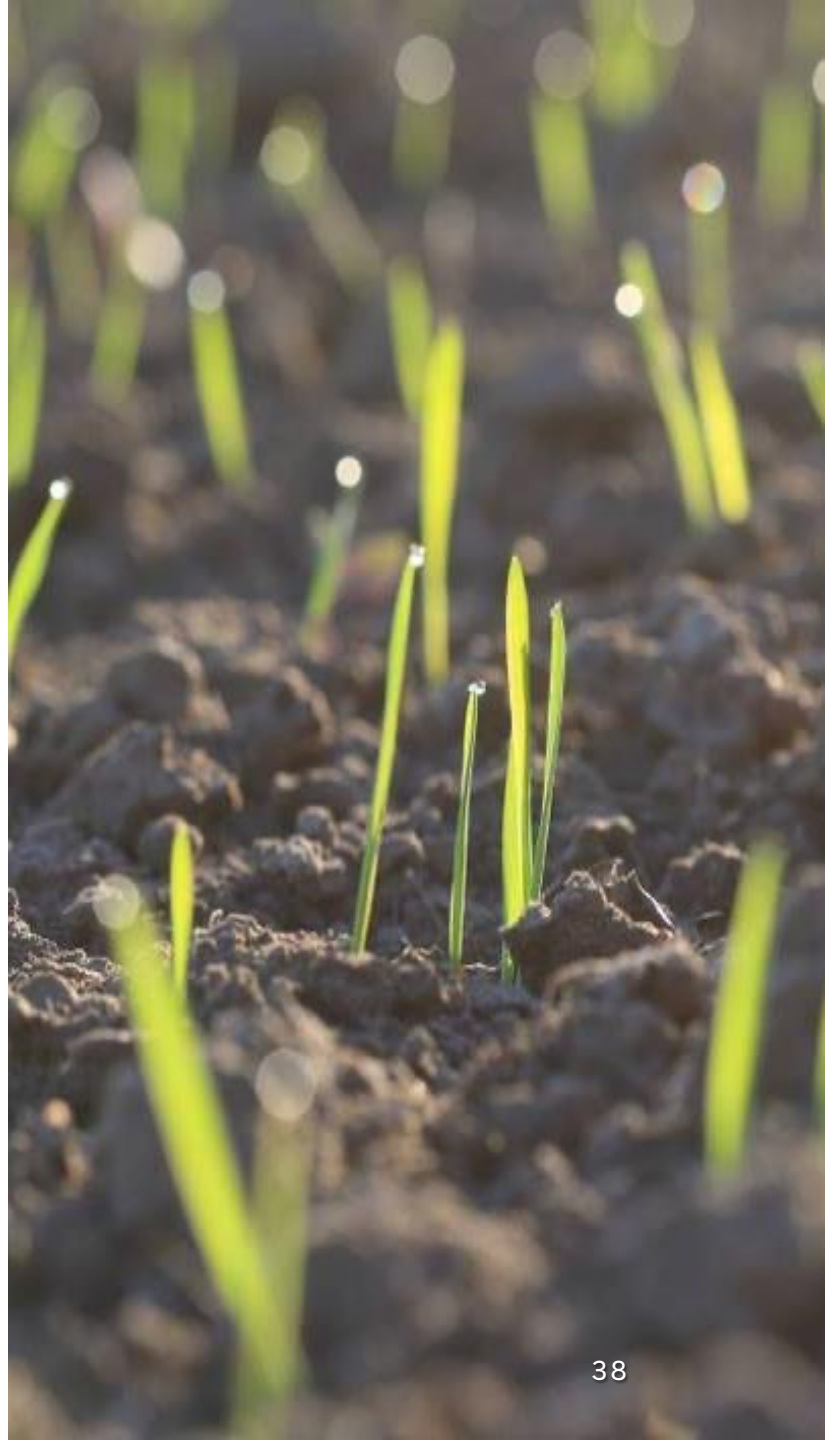
- Thorough title examination
- Carefully consider language in negotiated agreements
- Obtain valid surface waivers
- Consult with mineral owner regarding designated drillsites
- Consult with independent geologic experts



PRACTICAL TAKEAWAYS FOR PRACTITIONERS

Co-Development Agreements

- Include all relevant stakeholders
- Include payment to mineral owner in exchange for waiving right to occupy surface
- Consultation requirements between parties
- Technical committee or mutual agreement to independent experts
- Address all aspects of development (roads, pipelines, power lines, etc.)
- Address indemnities, termination/abandonment, development timeframes, etc.



This new dynamic—the fact that natural resource development of the surface estate shares many of the characteristics that previously led to the dominance of the subsurface mineral estate—may set the stage for a significant evolution of the legal doctrines that regulate these questions of priority.

APPLICATION OF THE ACCOMMODATION DOCTRINE IS FACT-INTENSIVE AND UNCERTAIN

CO-DEVELOPMENT AGREEMENTS HELP KEEP THE FATE OF YOUR PROJECT IN YOUR OWN HANDS

THANK YOU

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