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Wind energy bill would require wind energy agreements

As development of wind farms has grown in Colorado, questions have arisen concerning the legal nature of the wind flowing above the ground. The proper characterization of wind rights has become increasingly relevant as property owners look for additional sources of revenue from their holdings. If the "wind estate" is severable from the surface estate, then the wind estate owner and the surface estate owner would have competing interests for the beneficial use of the surface that may often be in conflict.

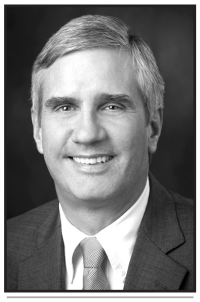
This is a circumstance that already is prevalent in Colorado with respect to mineral estates. Under Colorado law, mineral rights may be severed from the surface estate, and mineral owners and surface owners must reasonably accommodate their respective interests in the use of the surface (i.e., the "reasonable accommodation doctrine"). In many instances, mineral rights are reserved or conveyed by deed without elaboration on the rights of the parties to make use of the surface. Since the proper application of the reasonable accommodation doctrine in any particular situation is about as clear as mud (or oil), severed mineral interests often expose surface owners to frustrating, time-consuming and expensive negotiations with mineral holders. Imagine the cumulative effect if a wholly severed wind estate also is thrown into the mix; three different estates would be vying for the benefits of surface use, without clear legal guidelines for establishing relative priorities.

The Colorado General Assembly moved in 2012 to control these complexities through the

Amy K. Hansen
Director, Otten Johnson Robinson Neff + Ragonetti PC, Denver

enactment of House Bill 12-1105. HB 12-1105 provides that a "wind energy right is not severable from the surface estate." However, the bill also allows that wind energy may be developed pursuant to a "wind energy agreement," which is defined as a "lease, license, easement or other agreement, whether by grant or reservation, to develop or participate in the income from or the development of wind-power energy generation." Under this new law, if wind energy is not actually developed within 15 years after the wind energy agreement is executed, then all rights granted in the wind energy agreement revert back to the surface estate owner. Likewise, if wind energy production under a wind energy agreement ceases for a continuous period of 15 years, then the rights revert back to the surface estate owner. These time frames, however, can be varied in the actual wind energy agreement.

In essence, HB 12-1105 allows for third-party development of wind energy facilities, and thereby endeavors to support energy production policies, but does so in a way that ensures the surface estate owner will be involved in determining the details of allocating surface rights between wind energy production and other surface uses and development. The surface owner is statutorily given



Bob Fisher, LEED AP
Director, Otten Johnson Robinson Neff + Ragonetti PC, Denver

a "seat at the table" whenever new wind energy development is to be initiated. This mandated opportunity to work out the specifics of surface use in advance of granting wind energy rights should help the parties alleviate conflicts between the competing uses of the surface of the land. While the bill establishes parameters for the duration of wind energy agreements, it also preserves freedom of contract by allowing the parties to agree otherwise.

Under HB 12-1105, any wind energy agreement, or a memorandum of such an agreement containing specified content, must be recorded in the real property records. If the deadlines for production are varied by contract, it is important to include those varied terms in the recorded document. HB 12-1105 further requires that the wind energy developer record an affidavit when the generation of electricity by a turbine has commenced, evidencing such fact. While the bill clearly intends to employ the real property records for establishing wind energy agreements, it is not clear about the impact of a failure to make the required recordings, and whether a subsequent owner of the property would be obligated to honor any unrecorded arrangements, especially when wind production facilities already are evident on the ground.

The intended effect of the production affidavit is particularly perplexing, since the statute provides that, in the absence of a recorded affidavit, (i) the wind energy agreement "expires by its own terms," and (ii) if no terms are specified, the wind energy agreement will have "no more than" a 15-year life. This gives rise to two questions: Even if an affidavit is recorded, shouldn't the wind energy agreement still expire by its own terms? And if terms are not specified, what are the intended circumstances under which a wind energy agreement will expire before the 15-year mark?

There may be other unintended consequences of the new legislation. While a wind energy right is not severable from the surface estate under the new law, HB 12-1105 expressly provides that the "right to wind energy is an interest in real property." This could be fodder for a whole new set of legal questions and claims concerning duties of adjoining owners and other third parties to avoid interfering with or impairing this statutorily declared right.

Recognizing that there already are agreements regarding wind rights in place, and perhaps in some instances actual severances and conveyances of wind rights, the bill provides that it does not invalidate or alter any agreements or conveyances made prior to July 1, 2012, so long as notice of the agreement, conveyance or reservation is recorded prior to Sept. 1, 2012. Pre-existing deals are essentially grandfathered except for the record notice requirement.

HB 12-1105 currently is awaiting signature by Gov. Hickenlooper.▲