

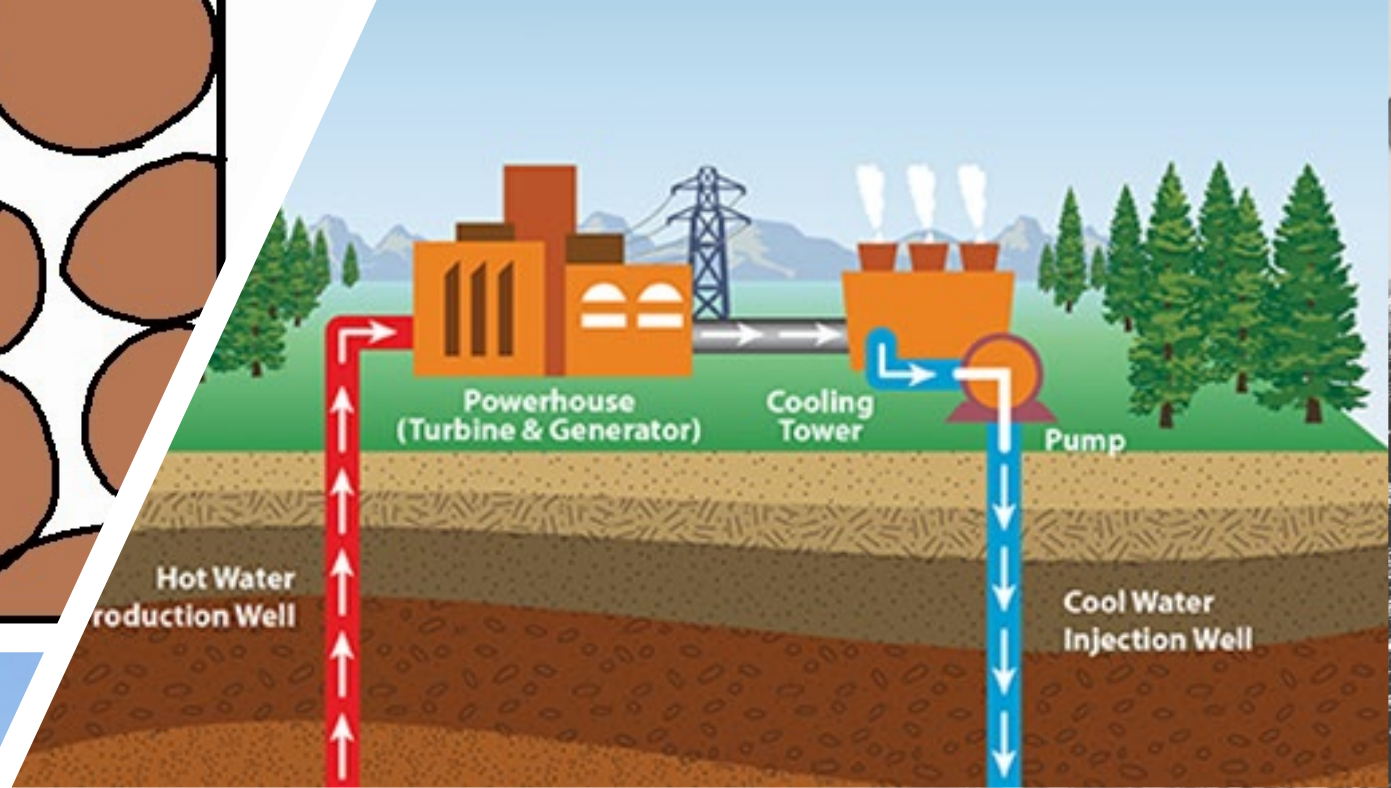
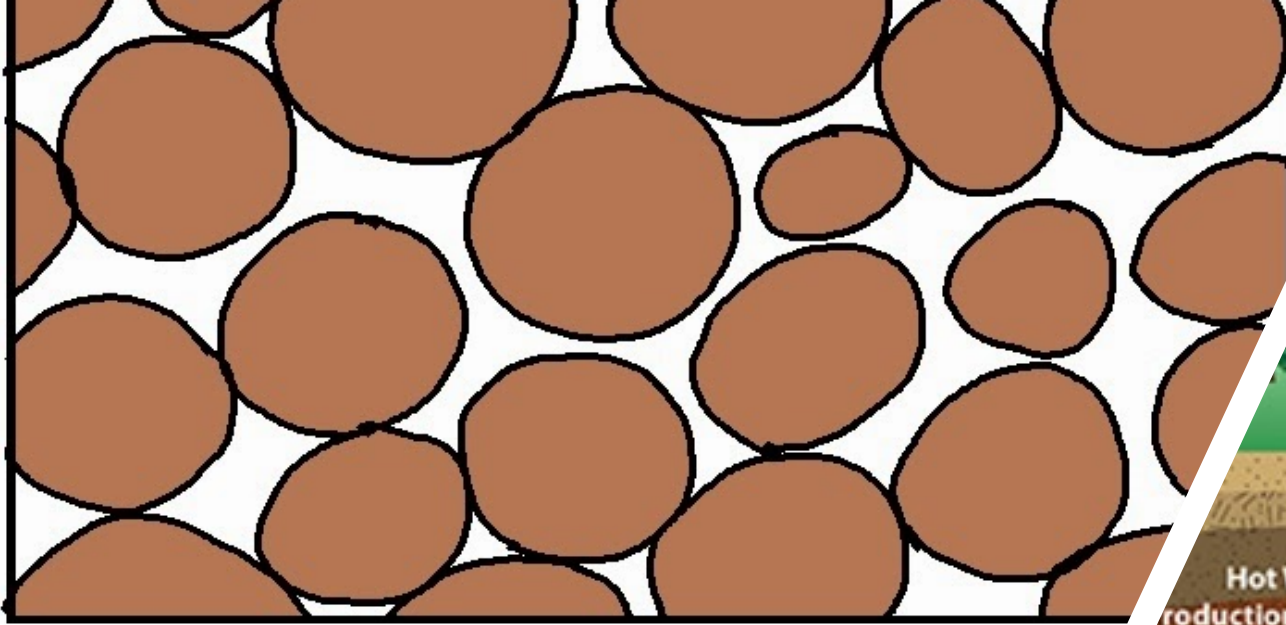
Severed Estates in Natural Resources



Prof. Joseph A. Schremmer
University of Oklahoma College of Law



When Does Property Law Recognize Novel Estates in Natural Resources?



Looking Back to Oil and Gas



Birth of the Severed Oil and Gas Estate



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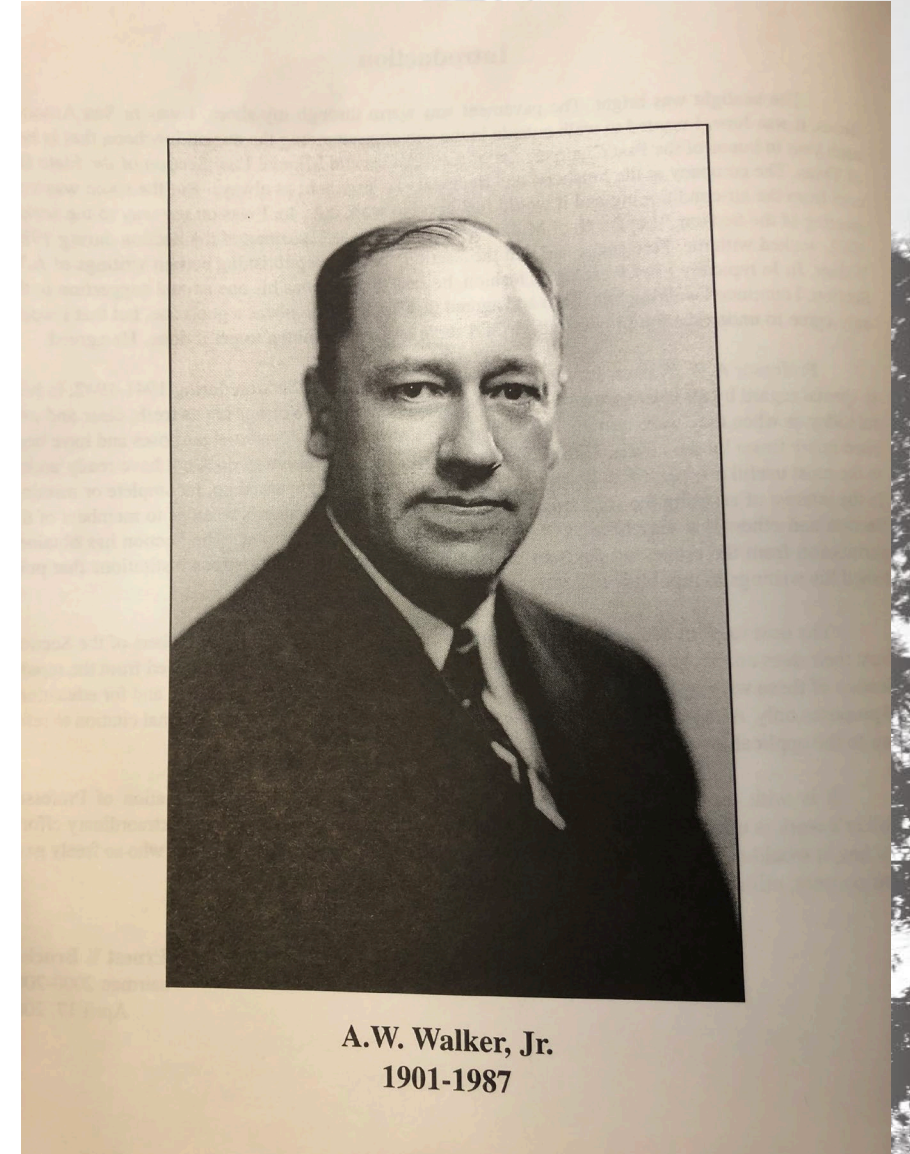
- “In mineral lands the surface or soil, as adapted to cultivation, may be separated from the mineral right or the right to dig under the surface for ore, and one person may own one of these rights and another person the other.”
 - Bryan, *The Law of Petroleum and Natural Gas*, Sec. 29 (1893).

Birth of the Severed Oil and Gas Estate

- “[I]t is now established beyond any question that oil or petroleum and natural gas are minerals, and judicially must be so treated.”
 - Thornton, *Oil & Gas*, Sec. 18 (1st ed. 1904)
 - See *also* Kulp, *Cases on Oil & Gas*, p. 1 (1924) (“The learned master says gas is a mineral.”) (quoting *Westmoreland & Cambria Nat. Gas Co. v. De Witt* (Pa. 1889)).

Follow-On Issues

- Distinguishing mineral deeds from leases
- Classifying severed mineral interests
 - Fees (ownership in place)
 - Profits (exclusive right to take)
- Classifying oil and gas lease interests
 - Fees
 - Profits
 - Real vs. personal property
 - Relevance of granting language



Follow-On Issues

- Surface Use
 - Surface Damages Acts
- Multiple-Mineral Development
- Title Fragmentation
 - Dormant Mineral/Mineral Lapse Acts
 - Marketable Record Title Acts
 - Compulsory Pooling Statutes
- “Measuring Costs”
 - Title examination costs
 - Uncertainty over the scope of a “mineral” interest



But See Louisiana's Mineral Servitude

- **Civil code** does not recognize forms of ownership not expressly authorized in the code.
 - *Numerus Clausus*
- Conveyance of the oil and gas in and under land may create only a servitude in the minerals.
 - Frost-Johnson Lumber Co. v. Salling's Heirs (La. 1920-1922).
- Under the code, all servitudes immutably lapse by prescription after 10 years of nonuse.
- Therefore, only a determinable interest is possible in oil and gas.

But See Louisiana's Mineral Servitude

- Frost-Johnson Lumber Co. v. Salling's Heirs (La. 1920-1922) (O'Neill, J.):
 - “I cannot see how it imposes any hardship upon the owner of a right to extract the mineral oil or gas from the land of another to require that he shall exercise his right within 10 years or allow it to go back into commerce . . . **If the law should be changed . . . it would . . . tend to paralyze the oil and gas industry of this state; for it would recognize a species of perpetual incumbrance upon real estate which has never yet found an abiding place in our civil law system.**”

Looking Forward

Here We Go Again?



Birth of the Severed Pore Space Estate?



Birth of the Severed Pore Space Estate?

- *Darkhorse Water, LP v. Birch Operations, Inc.* (Tex. App. 2023, pet. granted) (recognizing determinable interest in reservoir storage space).
- *Bushey v. Seven Lakes Reservoir Co.* (Colo. Ct. App. 1975) (“[U]se of the subsurface, in our view, constitutes a severance of the subsurface estate from the surface similar to severance of the mineral estate by actual mining.”).

Birth of the Severed Pore Space Estate?

- Darkhorse Water, LP v. Birch Operations, Inc. (Tex. App. 2023, pet. granted)
 - “Parties are free to draft novel contractual terms that produce results some may consider odd; a court’s duty is to give effect to the parties’ intent as expressed in the contract’s language.”

Birth of the Severed Pore Space Estate?

- Darkhorse Water, LP v. Birch Operations, Inc. (Tex. App. 2023, pet. granted)
 - “In the Darkhorse Agreement, the subject matter of the agreement and thus the thing conveyed is reservoir storage space, an attribute of the surface estate that is capable of being consumed and depleted by the disposal of saltwater just like oil, gas, sand, gravel, coal, and lignite may be extracted from the property.”

Birth of the Severed Wind Estate?



Birth of the Severed Wind Estate?

- *Contra Cost Water Dist. v. Vaquero Farms, Inc.* (Cal. Ct. App. 1997) (holding that wind power rights are severable from land for condemnation purposes).
- *Romero v. Bernell* (D.N.M. 2009) (noting that water or wild animals, not oil and gas, would be the “appropriate commodity to create a legal paradigm to analyze wind power”).

Birth of the Severed Wind Estate?

- Contra Cost Water Dist. v. Vaquero Farms, Inc. (Cal. Ct. App. 1997)
 - “The right to general electricity from windmills harnessing the wind, and the right to sell the power so generated, is no different, either in law or common sense, from the right to pump and sell subsurface oil, or subsurface natural gas by means of wells and pumps.”

Birth of the Severed Wind Estate?

- Contra Cost Water Dist. v. Vaquero Farms, Inc. (Cal. Ct. App. 1997)
 - “[I]t is not our policy to resolve abstract disputes” that may arise over surface use and multiple-resource development.

Alternatives?



Alternatives?

- Legislation

- Pore Space

- Severable: Wyo. Stat. Ann. 34-1-152(b); 60 Okla. Stat. 6(B)(2)
 - Not Severable: N.D. Cent Code 47-31-05

- Wind

- Not severable: Colo. Rev. Stat. 38-30.7-103; Neb. Rev. Stat. Ann. 66-912.02; N.D. Cent. Code 17-04-03; S.D. Cod. Laws 43-13-19 & -16; Mont. Code Ann. 70-17-404; Kan. Stat. Ann. 58-2272; 60 Okla. Stat. Ann. 820.1; Wyo. Stat. Ann. 34-27-103

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- Judicial policymaking?

Looking Further Back



Mines and Mineral Severance

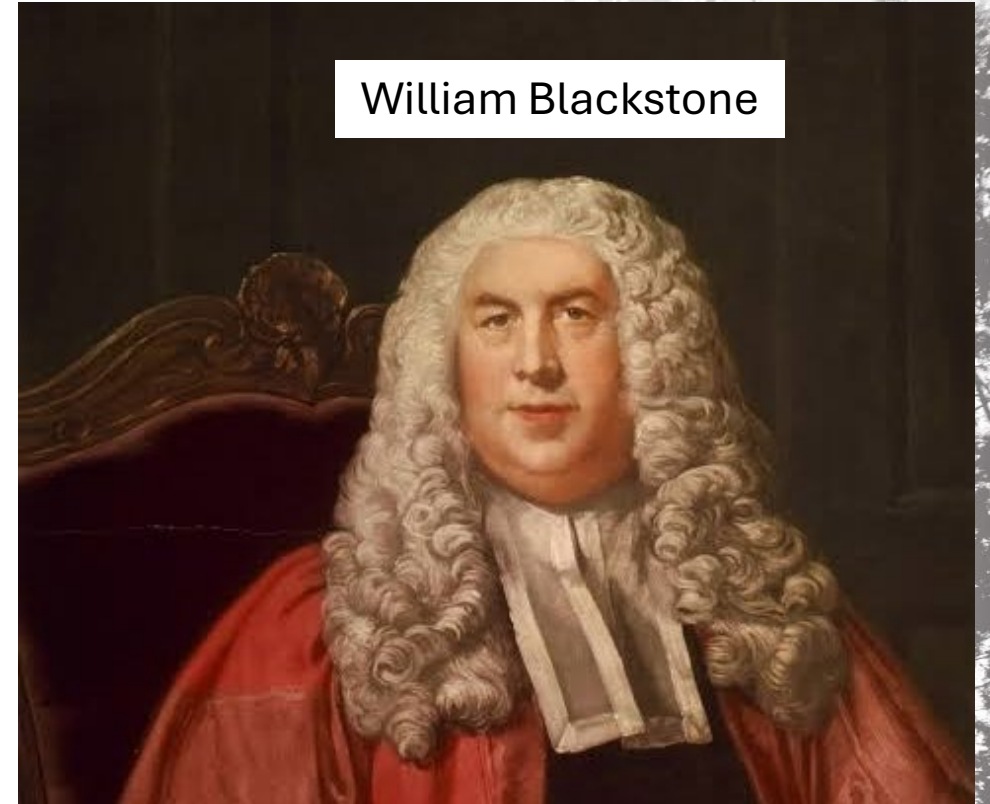


Mines and Mineral Severance

- Certain mineral severance customs recognized in **Magna Carta (1215)**.
 - Bastard v. Smith [1837] (citing Charter of King John, Anno. Reg. 3).
- Case of Mines [1568] (gold and silver in place belong to the crown; all other minerals to the landowner, *ratione soli*)
- Lord Mountjoy's Case [1583] (considering divisibility of profit a prendre in right to dig for minerals)

Mines and Mineral Severance

- Rogers v. Brenton [Q.B.1847]
- Held: Property interest in “tin bound” obtained through local custom could not extend beyond period of continual working of the bound.
- Reasoning
 - Tin bounding custom was a “direct interference with the common law rights of property.”
 - To give an enforceable property right, the custom must be proven to be compulsory, certain, universal, immemorial in age, and “reasonable.”



William Blackstone

Mines and Mineral Severance

- Rogers v. Brenton [Q.B.1847]
 - Tin bounding custom was unreasonable because its perpetual duration
 - “may be made the means of keeping [tin] locked up within [the land].”
 - “positively prevented” payment of any “tin toll” to the landowner.
 - “prevent[ed] any improvements on the surface” and encumbered the surface “with the machinery, buildings, and refuse stuff” of mining.
 - could enable speculators to control the supply of tin.
 - could cause interference with copper mining.

Water and Water Rights



Riparian Rights

- Stockport Water Works Co. v. Potter [1864]
 - Held: Conveyance of riparian right to take water from flowing stream to a nonriparian grantee unenforceable against upstream riparian accused of polluting the stream.
 - Reasoning
 - “[A] person cannot create by grant new rights of property so as to give the grantee a right of suing in his own name for an interruption of the right by a third party.”
 - Could threaten open-ended liability for other riparians.

Riparian Rights

- Nuttall v. Bracewell [Ex. 1866]
 - Held: a grant of riparian rights to grantee to convey water through a “goit” to operate a mill, which returned water to the stream, is enforceable against other riparian owners.
 - Reasoning
 - “[T]he burthen of one man’s land being subject to the right of another to have a flow of water through it to work his mill, **is as old as the law itself**, and, in my opinion, is the subject of property and of grant, and not merely of license.”

Prior Appropriation Rights

- Irwin v. Phillips (Cal.1855)
 - Held: mining-camp custom of appropriating water from flowing streams to beneficial use gives legally enforceable property interest in such water against competing claimants.
 - Reasoning
 - The appropriation custom was widespread and “so fully recognized” as to be known and acquiesced in by state and federal governments.
 - Custom was supported by a “universal sense of necessity” in developing the mineral regions of the USA

Prior Appropriation Rights

- Coffin v. Left Hand Ditch Co. (Colo. 1882)
 - Held: prior appropriation custom permits severance of water from flowing streams for beneficial use anywhere, giving property interest against even riparian claimants.
 - Reasoning
 - “Absolute necessity” compelled recognition of customary appropriation rights instead of the common law doctrine.
 - Agriculture would be impossible otherwise.
 - Water would go to “waste” serving only the sandy and barren riparian land otherwise.

Prior Appropriation Rights

- Judicial Gloss
 - Priority of rights is based on time.
 - From the maxim *qui prior est in tempore, potior est in jure* (first in time is first in right).
 - The measure and duration of the right is based on application to beneficial use.
 - Prohibits wasteful uses of water.
 - May not be exercised “so as to deprive a whole neighborhood or community.”
 - Avoids monopolies, “speciation,” or speculation in water rights.

What Does It All Mean?



Compare:

The Classical Approach

- Property law is a closed system:
 - No “incidents of a novel kind”
 - No new estates of ownership
- Courts may enforce customary rights if:
 - Compulsory, certain, ancient, and universally followed
 - Reasonable
- Courts may shape customs to be reasonable.

The Modern Approach

- Landowners are free to contract to sever constituent parts of the land
- At least if the parts severed are analogous to other resources previously held to be severable.

“Note a diversity . . .”

Interests Recognized Under Classical Approach

- License in riparian rights
- Determinable interest in tin bounds
- Use-it-or-lose it appropriative right in water
- Mineral servitude*
- Perpetual estate in the right to improve submerged lands
 - Hanford v. St. Paul & D.R. Co. (Minn. 1890)

Interests Recognized Under the Modern Approach

- Perpetual estate in oil and gas
- Perpetual estate in pore space?
- Perpetual estate in wind power rights?

*Civil law approach

Thank You

Joseph A. Schremmer
Associate Professor of Law
University of Oklahoma College of Law
Schremmer@ou.edu
o. 405-325-3823