

Second Regular Session
Sixty-seventh General Assembly
STATE OF COLORADO

INTRODUCED

LLS NO. 10-0046.01 Thomas Morris

HOUSE BILL 10-1158

HOUSE SPONSORSHIP

Gardner C.,

SENATE SPONSORSHIP

Hodge,

House Committees

Agriculture, Livestock, & Natural Resources

Senate Committees

A BILL FOR AN ACT

101 CONCERNING CLARIFICATION OF THE RIGHT TO USE WIND RESOURCES.

Bill Summary

(Note: This summary applies to this bill as introduced and does not reflect any amendments that may be subsequently adopted. If this bill passes third reading in the house of introduction, a bill summary that applies to the reengrossed version of this bill will be available at <http://www.leg.state.co.us/billsummaries>.)

The bill clarifies the ownership of the right to use wind flowing across real property within this state, and specifies that, for purposes of determining the priority of uses between a severed mineral interest and a severed wind interest, the first interest severed is dominant.

1 *Be it enacted by the General Assembly of the State of Colorado:*

2 **SECTION 1.** 38-32-102, Colorado Revised Statutes, is amended
3 to read:

4 **38-32-102. Estates deemed estates in land.** Estates, rights, and
5 interests in ~~such~~ areas ABOVE THE SURFACE OF THE GROUND shall pass by
6 descent and distribution in the same manner as estates, rights, and
7 interests in land and, EXCEPT AS SPECIFIED IN SECTION 38-32-106, may be
8 held, enjoyed, possessed, alienated, conveyed, exchanged, transferred,
9 assigned, demised, released, charged, mortgaged, or otherwise
10 encumbered, devised, and bequeathed in the same manner, upon the same
11 conditions, and for the same uses and purposes as estates, rights, and
12 interests in land and shall be in all other respects dealt with and treated as
13 estates, rights, and interests in land.

14 **SECTION 2.** 38-32-105, Colorado Revised Statutes, is amended
15 to read:

16 **38-32-105. Estates affected.** ~~The provisions of~~ EXCEPT AS
17 SPECIFIED IN SECTION 38-32-106, this article ~~shall be applicable~~ APPLIES
18 to ~~such~~ estates, rights, and interests created in areas above the surface of
19 the ground, whether such estates, rights, and interests were created prior
20 to or after March 12, 1953.

21 **SECTION 3.** Article 32 of title 38, Colorado Revised Statutes, is
22 amended BY THE ADDITION OF A NEW SECTION to read:

23 **38-32-106. Wind rights - definition.** (1) **Legislative**
24 **declaration and applicability.** IT IS THE INTENT OF THE GENERAL
25 ASSEMBLY TO CLARIFY THE OWNERSHIP OF THE RIGHT TO USE WIND
26 FLOWING ACROSS REAL PROPERTY WITHIN THIS STATE. ALL CONVEYANCES
27 OF INTERESTS IN REAL PROPERTY AND LEASES MADE ON OR AFTER THE

1 EFFECTIVE DATE OF THIS SECTION ARE SUBJECT TO THIS SECTION. ALL
2 CONVEYANCES OF REAL PROPERTY AND LEASES MADE BEFORE THE
3 EFFECTIVE DATE OF THIS SECTION SHALL BE CONSTRUED IN ACCORDANCE
4 WITH THIS SECTION UNLESS A PERSON CLAIMING AN OWNERSHIP INTEREST
5 CONTRARY TO THIS SECTION ESTABLISHES SUCH OWNERSHIP BY A
6 PREPONDERANCE OF THE EVIDENCE IN AN ACTION TO ESTABLISH
7 OWNERSHIP OF SUCH INTEREST.

8 (2) **Ownership of the wind interest.** (a) OWNERSHIP OF THE
9 WIND INTEREST IS ORIGINALLY VESTED IN THE SEVERAL OWNERS OF THE
10 SURFACE, AND THE WIND INTEREST IS A PROPERTY RIGHT THAT CAN BE
11 SEVERED FROM THE SURFACE OWNERSHIP.

12 (b) A CONVEYANCE OF THE SURFACE OWNERSHIP OF REAL
13 PROPERTY IS A CONVEYANCE OF THE WIND INTEREST UNLESS OWNERSHIP
14 IN THE WIND INTEREST HAS PREVIOUSLY BEEN SEVERED FROM THE
15 SURFACE OWNERSHIP OR IS EXPLICITLY EXCLUDED OR RESERVED IN THE
16 CONVEYANCE. OWNERSHIP OF THE WIND INTEREST MAY BE CONVEYED IN
17 THE MANNER PROVIDED BY LAW FOR THE TRANSFER OF MINERAL
18 INTERESTS IN REAL PROPERTY. NO INSTRUMENT CONVEYING MINERALS OR
19 OTHER INTERESTS UNDERLYING THE SURFACE CONVEYS OWNERSHIP OF
20 THE WIND INTEREST UNLESS THE INSTRUMENT EXPLICITLY CONVEYS THAT
21 OWNERSHIP INTEREST.

22 (c) NO PROVISION OF LAW, INCLUDING A LAWFULLY ADOPTED
23 RULE, THAT REQUIRES NOTICE TO BE GIVEN TO A SURFACE OWNER, AN
24 OWNER OF THE MINERAL INTEREST, OR BOTH, REQUIRES NOTICE TO A
25 PERSON HOLDING A WIND INTEREST UNLESS THE LAW OR RULE SPECIFIES
26 THAT NOTICE TO SUCH A PERSON IS REQUIRED.

27 (d) AN INSTRUMENT THAT CONVEYS A WIND INTEREST SHALL

1 DESCRIBE THE SCOPE OF THE RIGHT TO USE THE SURFACE ESTATE.

2 (3) "WIND INTEREST" MEANS THE RIGHT TO USE, CONVERT,
3 MAINTAIN, AND CAPTURE THE FLOW OF WIND CURRENTS AND WIND
4 RESOURCES OVER AND ACROSS THE SURFACE OF LANDS AND WATERS.

5 (4) NOTHING IN THIS SECTION:

6 (a) CHANGES THE COMMON LAW AS OF THE EFFECTIVE DATE OF
7 THIS SECTION AS IT RELATES TO THE RIGHTS BELONGING TO, OR THE
8 DOMINANCE OF, THE MINERAL ESTATE; EXCEPT THAT, FOR PURPOSES OF
9 DETERMINING THE PRIORITY OF USES BETWEEN A SEVERED MINERAL
10 INTEREST AND A WIND INTEREST, THE FIRST INTEREST SEVERED IS
11 DOMINANT.

12 (b) ALTERS, AMENDS, DIMINISHES, OR INVALIDATES WIND
13 INTERESTS THAT WERE SEVERED OR ACQUIRED BY CONTRACT, LEASE,
14 EASEMENT, OR OTHER CONVEYANCE PRIOR TO THE EFFECTIVE DATE OF
15 THIS SECTION.

16 **SECTION 4. Act subject to petition - effective date.** This act
17 shall take effect at 12:01 a.m. on the day following the expiration of the
18 ninety-day period after final adjournment of the general assembly (August
19 11, 2010, if adjournment sine die is on May 12, 2010); except that, if a
20 referendum petition is filed pursuant to section 1 (3) of article V of the
21 state constitution against this act or an item, section, or part of this act
22 within such period, then the act, item, section, or part shall not take effect
23 unless approved by the people at the general election to be held in
24 November 2010 and shall take effect on the date of the official
25 declaration of the vote thereon by the governor.