CURRENT ISSUES IN TEXAS WIND ENERGY LAW 2006: LEASES, TAX ABATEMENTS, OWNERSHIP OF WIND RIGHTS AND LITIGATION

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CHAPTER 2

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Author/Speaker, Texas and Southwest Cattle Raisers Association, Spring Meeting, 2006, "Wind Leases and Surface Protection"
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By Roderick E. Wetsel, H. Alan Carmichael and Lisa Chavarria

INTRODUCTION

The wind energy boom is here. It rivals other booms seen in the oil and gas industry in the 1950s and early 1980s and bring some measure of hope to Texas farmers and ranchers, who over the past ten years have been hard hit by severe drought and a generally depressed agricultural economy.

The boom is remarkable in that as recently as 1999, there were no wind turbines in West Central Texas, and many practitioners other than those in far West Texas had never seen a wind energy option or lease. However, with the dawn of the new millennium, the focus of the industry began to shift to Central West Texas and other areas of the state. Developers began to realize that this part of the state has an optimum wind capacity of 35% to 45%, and more importantly, proximity to existing high voltage transmission lines with ready access to available markets.

Texas ranks second in the nation for wind energy potential, and by 2006, Texas, and particularly West Texas, had become the primary area of concentration for wind development in the United States.

By the date of this writing, the boom has reached classic proportions. Farmers and ranchers who at first rejected the idea of wind development are now actively seeking turbines for their land. Local cafes and courthouses are buzzing with landowner stories of fortunes made overnight. One wind company, assisted by a determined team of Texas landmen, leased over 140,000 acres in Nolan County alone in the last few months of 2005. Landowners in Nolan and nearby counties have formed wind associations to attract developers. Promoters have moved into the area to find prospects, and attorneys and local business persons have created a consortium to organize political support for wind development in West Texas.

Despite all of this activity and excitement, wind energy law in Texas is still in its formative stages. As yet, there is little or no statutory regulation of the industry, nor are there any treatises or form books yet available. Although, as we shall see, there is some litigation pending, there is no case law on the books.

Given the current situation, this paper addresses four current issues in Texas wind energy law which should be of interest to Texas attorneys:

(1) The wind energy lease. Before a wind farm can be constructed, a wind lease and often a wind energy lease option must be obtained from the landowner. Chapter One describes the major elements commonly found in wind energy leases and, where possible, offers forms and suggested modifications;

(2) Ad valorem tax abatement agreements. The largest line item in the expense column in the construction and maintenance of a wind project concerns ad valorem taxes, which includes both county and school taxes. Wind companies seek abatements from the taxing authorities as an incentive for bringing a wind power project to the county. Chapter Two discusses the law regarding tax abatements for both counties and school districts, as well as the procedure for obtaining abatement agreements, and offers forms which may be helpful to the practitioner seeking to draft such agreements.

(3) Ownership of wind rights. The question, "Who owns the wind?" is a troubling one for many scholars. Chapter Three discusses the various theories projected for the ownership of wind rights, as well as the landowner's ability to reserve and/or convey such rights.

(4) Litigation. There is currently litigation in Taylor County between the owners of land adjacent to a wind farm, as plaintiffs, and the wind company and landowners with wind leases, as defendants. Chapter Four discusses the various claims made by the parties.

* * *

CHAPTER ONE

I. WIND ENERGY LEASE

There are currently numerous wind energy lease forms in use in Texas. Although there is some variation, these leases are identical in that their provisions are concerned with protecting the lessee's future investment in the property. In this respect, the wind leases in use today can be compared to the printed form oil and gas leases in use fifty years ago. As opposed to oil and gas leases now in use, wind energy leases may easily be 30 to 40 pages in length, exclusive of the land description. They contain many additional provisions, often ignored by parties to an oil and gas lease, which reflect the very different nature of the wind energy lease. It is a lease of the surface only of the land (i.e. a tenancy for years) as opposed to a conveyance of a fee simple determinable as in the case of an oil and gas lease. Of necessity, therefore, the wind energy lease contains provisions often found in other surface leases which focus on the type of estate received by the wind lessee.

A large part of the increased length of the wind lease may be attributed to the fact that wind farms are capital intensive projects involving tens and sometimes hundreds of millions of dollars. For this reason, every wind lease is drafted in recognition of the lessee's plans to finance its development and operation.[1] Concerns about lending requirements often cause the wind company to be very resistant to changes in the printed form of the lease. The landowner, on the other hand, may wish to change some provisions and add others in order to preserve and protect the land and his or her right to use the same for competing uses such as farming, ranching, oil and gas exploration, hunting and recreation. The farmer or rancher will seek to maximize his income from the land from all sources, in addition to wind lease payments. Wind farms may extend over a very large area and thus have a broad area of influence, but actually occupy only a small part of the land. The "footprint" or amount of land actually taken up by a turbine is generally very small and the remaining acreage can be used for other compatible land uses, such as grazing or farming.[2] As will be shown, however, hunting may

be a more difficult issue. These concerns and the accommodation of competing uses of the land often require extensive negotiation and compromise in order to reach an agreement satisfactory to both parties. See Appendix 1, Exhibit "B" for a sample lease form (hereinafter referred to as "the Lease").

A. The Wind Energy Lease Option

With few exceptions,[3] almost every wind lease in use in Texas today is predicated upon an exclusive option granted by the landowner for a given term ranging from two to five years, which may be extended (e.g. such as a two-year option with a two-year extension). The option may be contained within the terms of the wind lease or the subject of a separate agreement. See Appendix 1 for an example of a separate option agreement.

The purpose of the option is to allow the wind company time to conduct a wind study to determine whether the potential site is suitable for wind development. Typically, the option grants to the optionee/lessee the exclusive right of ingress and egress over and across the land for the purposes of (a) installing, maintaining, operating, inspecting and removing one or more wind monitoring devices (i.e. meteorological towers), including the performance of all tests and studies associated therewith; (b) surveying the land; and (c) performing such other tests and studies as the wind company may desire in connection with the option, including environmental, avian and cultural resource assessments, and geotechnical, foundation and soil tests.

The consideration for the option is usually a flat fee paid to the landowner at the time it is executed. The fee is often calculated on a price per acre basis for each acre of land covered by the option (e.g. $1.00 to $5.00 per acre). The amount of the consideration is quite nominal in light of the cost of development of a wind farm and is much lower than the amount typically received as bonus for an oil and gas lease. However, wind companies argue that such relatively low option fees are justified by the significant cost of the wind measurement, as well as other tests and studies conducted during the option term.[4] As well, they maintain that while the option is in effect there is only minimal disruption of surface use.

In addition to the term, consideration, and permitted activities, the option also includes provisions with regard to termination, assignment, notice, and the rights and responsibilities of the parties during the option term. The landowner may also wish to include provisions such as the following:

1. that the activities of the optionee be conducted with a minimum amount of notice to the landowner, with approval by the landowner of routes of access to and upon the property, as well as with minimum disruption of the surface estate;

2. that the optionee's activities on the property not unreasonably interfere with the landowner's farming and ranching activities;

3. that at no time shall the optionee or any authorized agent of optionee bring firearms onto the land; and

4. that the landowner be allowed to lease the land for hunting purposes during the option period, provided that reasonable and necessary precautions are taken by both parties for the protection of the optionee's personnel and property.

In almost every case, the exercise of the option by the wind company makes the lease effective and immediately binding upon the parties. As a result, it is necessary for the wind company and landowner to negotiate all of the terms and provisions of the wind energy lease in advance. Considering the many detailed provisions contained in the lease, this procedure can be very time consuming and expensive. Thus, if the option is not exercised, the attorney's fees and costs paid by each party for drafting the lease will be for naught. One exception is an option agreement which includes a "term sheet" that outlines the basic terms and conditions of the proposed wind energy lease and provides that, upon exercise of the option, the landowner and optionee "shall use commercially reasonable efforts to negotiate in good faith to agree upon a comprehensive Wind Energy Lease acceptable to each party and with the language typically required by optionee's lenders and title company, as well as language typically required by landowners, within one hundred twenty (120) days of the negotiations being initiated by optionee..." It provides that the wind energy lease shall contain the same economic terms and provisions as contained within the "term sheet."[5]

B. The Wind Farm

Rarely, if ever, will a wind lease on a given property contain enough acreage to constitute a wind farm. Instead, as will be seen, separate wind leases are taken from landowners owning contiguous tracts to form a wind project. Most wind farms in West Texas range from 2,000 acres to over 100,000 acres, depending upon the topography, number of turbines installed, and other such factors.[6]

Although there are many smaller turbines still in use, the size of the turbines installed today usually ranges from one megawatt to 3 megawatts. Until recently, in central West Texas, the most popular machine has been the 1.5 megawatt turbine manufactured by General Electric. This turbine rises to a height of 80 meters (264 feet) at its hub and has a rotor radius of approximately 38 meters (125 feet). In 2006, the Horse Hollow II Project in Nolan County plans to include between 75 and 90 Siemens-Bonus 2.3 MW turbines, which are even larger (80 meters to the hub with a rotor radius in excess of 40 meters).

Spacing of turbines is determined by a variety of factors, including terrain, wind speed, wind direction, turbine size and access to an electric grid. As a general rule, the optimum spacing of turbines is in an east to west direction and north to south rows with approximately 1,000 feet between each turbine and 3,000 feet between rows. There are, as yet, no spacing regulations for wind turbines.

The wind turbines actually occupy only a small part (between three to eight percent) of a wind farm. The wind company utilizes the remaining acreage for access roads, installation of underground (and sometimes above-ground) transmission lines, substations, and related facilities. The most attractive area for a wind farm is one which has a steady wind speed that averages at least 13 miles per hour and/or a wind capacity factor of 35 to 45 percent.[7]

Calculation of the landowner's income from each turbine is a highly useful number and is of great importance to landowners. The arithmetic needed to arrive at this number is not difficult if a few definitions are understood. First, turbine size is expressed in megawatts (MW), where 1000 watts is equal to one kilowatt (kW), and 1000 kW is equal to one MW. Electricity production is expressed as kW produced over time, or in kWh (kilowatt hours). Three calculations are required to arrive at landowner income (i.e., royalty. See, for example, www.windenergy.org/index.htm.):

(1) Total electricity produced in a year by one turbine: 1.5 MW (1500 kW) turbine x capacity factor (efficiency factor) of 40% (0.4) x 8760 (number of hours in a year) = 5,256,000 kWh of electricity per year.

(2) Total income per turbine in a year: If the electricity is sold for 3.5¢/kwh, then multiplication times the total electricity produced per year yields the income received per year by the wind power company: $0.035/kwh x 5,256,000 kwh of electricity = $183,960 total income received by the company on each 1.5 MW turbine.

(3) Royalty income per year to landowner at 4% royalty: $189,960 x 4% (0.04) royalty = $7,358 per 1.5 MW turbine per year. Income per MW is $7,358 divided by 1.5 MW is equal to $4906/MW.[8]

II MAJOR ELEMENTS OF THE WIND ENERGY LEASE

A. Purpose Clause

The clause or clauses describing the purpose or permitted uses of the surface in the wind energy lease generally allow the lessee to undertake any activity the lessee determines is necessary, helpful, appropriate or convenient in connection with, or incidental to, the accomplishment of the construction and maintenance of the wind farm. See Appendix 2. It is important to note that the permitted uses include not only the assembly and installation of wind turbines, but also of transmission and gathering lines, both overhead and underground, substations, energy storage facilities, telecommunication equipment, roads, pipelines, control, maintenance and administration buildings, utility installations, lay down areas, maintenance yards, water wells, fences, as well as other improvements, facilities, appliances, machinery and equipment in any way related to or associated with the permitted uses. Many of the above described uses are only engaged in during the building phase of the wind farm. Thereafter, surface use is generally limited to normal maintenance and upkeep of the project. The lease may also contain a clause that allows the lessee to conduct site tours for the public.

As will be seen, if the landowner wishes to restrict uses of the surface of the land by the lessee, additional provisions must be added to the lease. For example, if the landowner does not wish for a substation or for an "O and M building" (i.e., Operations and Maintenance building) to be placed upon the land, the landowner must delete these provisions from the permitted uses or add a provision prohibiting these uses without his or her consent. Since at the outset the lessee may not know whether substations and other facilities will be placed on the leased property, it may be very resistant to such changes.

B. Term

The term of a wind energy lease can range from 30 to 50 years, or more. The length of the term may be affected by:

1. the life of the wind turbines installed (i.e. 20 to 25 years); and/or

2. the minimum amount of time the lessee needs to recoup its investment and make a reasonable profit.

Although there are many variations, the term may be either:

1. a single term, such as thirty (30) years, commencing on the effective date and expiring on [__date__], or

2. an initial term which may be as short as one to two years (i.e. the construction period) or as long as fifteen to twenty years, with an extended term or terms of ten to fifteen years each.[9]

In negotiating the length of the lease term, the parties must balance their competing concerns:

1. that the landowner is negotiating a lease that may well extend beyond his or her lifetime and which will affect future uses of the land; and

2. that the wind company is seeking to recover its costs and maximize profits while taking advantage of future innovations in the industry.

Given these concerns, the average term of a wind energy lease is approximately 35 years, including the time required in construction of the project.

B. Rent/Royalty

The primary source of compensation to the landowner in a wind energy lease is found in the rental and/or royalty clause. However, most leases also provide for additional compensation by way of bonus payments before commencement of construction, installation payments, and minimum royalty. An analysis of these clauses in the order of their appearance in the lease form is as follows:

1. Bonus Payments Before Commencement of Construction

Bonus payments are usually either of the following:

a. monthly payments beginning on the effective date of the lease, prorated for partial months, until the commencement of construction (e.g. monthly rental payments of $2,000.00 paid in advance). See Appendix 3a.

b. an amount paid on the lease commencement date calculated by multiplying a dollar figure (e.g. $4,500.00) by the number of turbines to be located on the lease land, but not less than $_____, plus $_____ per rod, multiplied by the number of rods included in each access and transmission easement upon the premises. An additional amount may also be paid for the location of a substation or other facilities upon the land. See Appendix 3b. For a further discussion of substation payments, see paragraph D.4. below regarding surface damages.

2. Installation Fees

Installation fees (surface damages) may be payable in conjunction with bonus payments, or in lieu thereof. This clause provides that the lessee shall pay to the lessor a sum equal to $[_____] (e.g. $3,500.00) per megawatt of installed capacity upon the land in advance or, alternatively, in two equal installments, with the first installment being due and payable within sixty (60) days of the commencement of construction, and the remaining installment being due and payable within sixty (60) days of the first day of production of wind generated electric power on the premises.

The purpose of this clause is to compensate the landowner for all surface and other damages incurred during the construction phase of the project. It is based upon the assumption that the more megawatts of capacity (i.e. turbines) placed upon the land, the greater the surface damages. See Paragraph 3a of the Lease. Separate sums such as $15.00 per rod are usually also paid in the same manner for construction of roads and transmission lines.

3. Royalty

Royalty, which is also referred to as rent, operating fees and/or monthly production payments, is described as a percentage of the gross revenues, as that term is defined in the lease. It is usually paid quarterly. There is no standard definition of gross revenues, and the term is variously described from lease to lease as to the items which are to be included and excluded. A definition favorable to the landowner is found in Paragraph 3b of the Lease and in Appendix 3d.

Royalty may be paid on a semi-fixed basis, such as 4% of the gross revenues for the first 15 years and 5% thereafter, or on a graduated scale, such as 4% of the gross revenues for the first 10 years, 4.5% for years 10 through 15, 5% for years 16 through 20, 5.5% for years 21 through 25, and so on.

As in oil and gas leases, the amount of royalty in the lease will depend on the bargaining power of the lessor and the willingness of the wind company to increase its standard offer. Likewise, the amount of money a land-owner may expect to receive as royalty during any given year of the lease term depends on many additional factors such as:

a. the number of megawatts (i.e. turbines) installed on the property, which will be dictated by the size of the turbines used.
b. the wind capacity of the area, with 40 to 45 percent being considered to be the optimum range;

c. the hours of operation of the turbines on an annual basis;

d. the availability of a transmission line with sufficient capacity; and

e. the price, usually figured on a per kWh basis with one MW = 1,000 kW, as shown above.

4. Minimum Royalty

The Minimum Royalty clause in a wind lease is an annual guaranteed income payment whereby the landowner receives a minimum amount of money even if the turbines located on the property are temporarily not generating electricity or are generating very little electricity. Because Minimum Royalty payments are costly, in the event no turbines are located on the leased property, it is likely that the wind company will exercise its right to terminate the lease.

A Minimum Royalty clause is frequently drafted as the greater of: (a) $[____](e.g. $2,500) per megawatt per year installed on the land; or (b) $[_____] (an amount usually figured on a per acreage basis, e.g., $15.00 per acre); provided, that said sum is prorated for partial years and is due and payable only to the extent that the royalty payments do not exceed the minimum royalty during any calendar year.

Often language is added to this provision which provides that the minimum royalty shall escalate over time during the term and any extended term of the lease. A sample minimum royalty clause is set out in Paragraph 3ciii of the Lease.

D. Uses Reserved by the Landowner; Protection of the Surface

Due to the fact that the wind energy lease is given for such a long term, the landowner will often be concerned as to how his or her other uses of the land will be affected now and in the future. Normally, the wind lease simply states that the landowner expressly reserves the right to use the land for all other purposes not granted to the lessee under the lease so long as said uses do not interfere in any way with the lessee's operations. By way of elaboration, the attorney representing the landowner may wish to negotiate additional lease provisions which preserve specific landowner uses and expressly identify the rights and responsibilities of the lessee in the maintenance, protection and restoration of the surface.

1. Ranching and Agricultural Use

As in an oil and gas lease, the landowner whose ranch is covered by a wind lease will seek to include specific details regarding ingress and egress to the land, as well as provisions for maintenance of roads, locking of gates, fixing of fences, fencing of dangerous machinery, distance requirements from houses, barns, corrals and water tanks, and other such provisions in order to protect his or her livestock and property. The landowner/farmer will also wish to include provisions for the maintenance and replacement of terraces, avoidance of CRP (Crop Rotation Program) lands, placement of roads and overhead power lines, and similar terms so that his or her farming operations are not unduly

hindered by the wind operation.

2. Oil and Gas Exploration

A landowner who also owns all or an undivided interest in the mineral estate will wish to preserve his or her right to explore and develop the land for oil and gas. Given that the mineral estate is dominant to the surface, making the wind lease subservient to the surface rights of a mineral owner and his oil and gas lessee, the wind company will also be interested in protecting its operations from interference. If there is no outstanding oil and gas lease on the land and the lessor's involvement in a subsequent oil and gas lease is important to the future development of the property, express language that allows the landowner to lease the land for oil and gas exploration and development, but protects the location of the wind turbines and other installations from interference by the oil company and its assigns is essential. If the land is already subject to an oil and gas lease, drafting can be more difficult, but a wind lessee might at least expect to receive the benefit of the accommodation doctrine, which requires an oil and gas lessee to accommodate existing surface uses where such accommodation is reasonably possible, consistent with industry practice, and practicable within the confines of the premises. *Getty Oil Co. v. Jones*, 470 S.W.2d 618 (Tex. 1971); *Tarrant County Water Control and Improvement District No. 1 v. Haupt, Inc.*, 854 S.W.2d 909 (Tex. 1993); *Sun Oil Co. v. Whittaker*, 483 S.W.2d 808 (Tex. 1972).[10]

3. Hunting and Other Recreational Uses

As every rancher knows, hunting is big business in Texas. In many areas, hunting has supplanted cattle raising as the primary source of income from the land. A landowner with an existing hunting lease will want to structure the wind lease so that he or she can continue to receive income from hunting. The wind energy company, on the other hand, has grave concerns about liability issues, not only for its own employees and property, but also for those of its business invitees, independent contractors and others who must come on the land to build and maintain the project. In the past, these conflicting positions have frequently lead to serious disagreement between the parties. As a result, almost all wind leases include a "Hunter's Waiver and Release Agreement" as an exhibit to the lease. All persons hunting on any part of the land covered by the wind lease, or entering upon the land for recreational purposes, are required to execute the waiver and release prior to entry. Most companies insist that there be no hunting at all during the construction phase; however, they do customarily reimburse the landowner for his lost revenue up to an agreed amount. Additionally, some companies also require hunters not only to sign a release, but also to notify the wind company on entering and leaving the land.

In negotiating these clauses, it is important to remember that rifle hunting season exists only for about two months of the year (i.e., November and December), whereas shotgun hunting (i.e., bird hunting) exists from September until late Spring (i.e., dove, quail and turkey season). The most concern is really with rifle hunting, since a rifle bullet can travel as far as a mile or more, but a shotgun's effective range is not over 50 yards. As shown in Paragraph 5b of the Lease, common sense and reasonable precautions may be all that is necessary to protect each of the parties' interests. Some wind companies, however, take the position that this clause is non-negotiable. In such instances, the landowner will have to evaluate which activity will generate the most income.

4 Surface Damages, Maintenance, and Restoration

a. Surface Damages

Unlike most current oil and gas leases, the wind energy lease often does not contain provisions for the payment of specific surface damages. As shown in paragraph C.2. above, the wind company may take the position that the bonus payments and/or installation payments paid to the lessor at the beginning of the lease cover all surface damages incurred in the initial construction of the project. Substations are usually an exception to this rule. If a substation is to be located upon the lease, the lease usually provides for the payment to lessor of a flat fee (i.e. $5,000.00) at the time of construction or a stated dollar figure paid annually during the term of the lease (such as $1,500 per year), or both. Surface damages incurred after the initial construction phase are the subject of an "Additional Disturbance" clause. See Paragraph 6g of the Lease. Under this clause, surface damages are paid only if such damages are not in connection with the installation of any additional turbines on the land. The presumption is that the installation of additional turbines will increase the landowner's royalty, thereby compensating the landowner for any additional surface damages.

Some wind leases also contain provisions regarding the use of water and the excavation and use of caliche. The wind company may negotiate for use of water from surface tanks or existing water wells. If there are no existing water wells, the wind company may negotiate an option to drill a water well or may simply truck the water from another location. A wind facility generally uses little water, as the water is only needed to clean the turbine blades prior to installation.

As in modern oil and gas leases, the landowner will seek to negotiate the highest possible price for his or her water and caliche and will likely also seek to restrict the use of water by the lessee, as it is an extremely valuable resource.

b. Maintenance

The wind lease usually contains general terms regarding the obligation of the lessee to maintain the surface of the land. The landowner may wish to add provisions that specify in detail the lessee's responsibilities.

c. Restoration and Removal Bond

As in most current oil and gas leases, many wind energy leases contain a provision which provides that within a stated period of time after the termination or expiration of the lease, the lessee shall, upon the written request of the landowner, remove all of its improvements from the land, and restore the land to its approximate original condition as it existed before the lessee constructed its improvements, all at the lessee's sole cost and expense. Normally, the removal operation includes any subsurface improvements located within three to five feet of the surface of the land. The landowner will seek to add a provision to the lease requiring the lessee to post a bond or other security after a stated period of time in order to ensure that funds are available at the end of the lease term to remove the wind facilities and clean up the lease. Typically, such a clause requires this bond to be posted after 1-5 years of operation, at which time it may be assumed that the salvage value of the turbines will

be less than the cost of restoration. See Paragraph 18 of the Lease.

E. Taxes

The wind lease usually includes or should include a clause which provides that the lessee shall be responsible for any annual increase in the landowner's *ad valorem* taxes levied as a result of the wind energy project, thus making the landowner responsible only for ad valorem taxes attributable to his or her ownership of the land and any improvements he or she installs thereon.

F. Insurance and Construction Liens

The wind lease provides that the lessee shall, at its expense, maintain a broad form comprehensive coverage policy of general commercial liability insurance. Some forms also require the landowner to purchase a similar policy. Most wind leases require that the lessee keep the land free of mechanic's and materialman's liens for labor and materials provided to the project.

G. Assignment

Like the oil and gas lease, the wind lease may be assigned at the lessee's sole discretion.

H. Termination

As in oil and gas leases, the lessee in a wind lease has the right, at any time, to surrender or terminate all or any portion of its right, title and interest in the lease. The landowner, on the other hand, has no corresponding right to terminate the lease, except in the case of a payment default. See paragraph J below.

I. Indemnity

Indemnity clauses are standard in the wind energy lease and may be extremely broad. Like the service company in an oil field service contract, the landowner will need to pay careful attention to this clause and seek to modify the same in order to restrict his or her liability. Also, the landowner should seek indemnity from the wind company regarding suits by neighboring or area landowners involving the construction or operation of the wind project.

J. Default and Remedies

Provisions regarding default and remedies in the wind lease are similar to other surface leases. Typically, the only way the landowner can terminate the lease upon default by the lessee is for non-payment, and then only after the lessee has been notified of the same and given an opportunity to cure. The lessee's breach of any other term of the agreement only affords the landowner a "cause of action under applicable law."

Given the huge capital investment made by the lessee and its investors in a wind project, the landowner will probably find it extremely difficult, if not impossible, to include a provision in the lease

allowing the landowner to terminate the lease for anything other than a payment default.

K. Disputes; Venue and/or Arbitration

Due to the fact that wind leases are almost exclusively found in the rural areas of the state, the wind company may seek to include an arbitration clause or alternate venue site for the resolution of any disputes regarding the lease or its terms. Like other companies operating in rural areas, the wind company may be concerned about being "home-towned" by a local judge and/or jury. The landowner, on the other hand, may not wish to resolve his or her disputes under the lease by an unfamiliar process (like arbitration) in a far away city, such as Dallas or Houston, and will seek to establish venue in the county where the land is located. Consequently, the landowner and wind company have valid competing concerns over venue and the best method to resolve disputes.

L. Confidentiality

Every wind lease contains a confidentiality clause which provides that the terms of the lease are proprietary and must be kept confidential. As a result, the lease itself is never recorded. Instead, as in many oil and gas leases today, a Memorandum of Lease is executed by the parties and filed of record in the county where the land is located.

M. *Force Majeure*

The wind lease usually contains a broad *force majeure* clause similar to an oil and gas lease. The landowner should seek to modify this clause to provide that the lessee shall be required to fulfill all monetary obligations under the lease, including payment of the minimum rent, even if there is an event of *force majeure*.

N. Miscellaneous Provisions

There are numerous additional provisions in a wind energy lease including representations and warranties of the lessor and the lessee, title, mortgages, subordination, hazardous materials, condemnation, and non-obstruction easements, among others.. To address all of these clauses would be far beyond the scope of this article. Examples of many of these clauses are contained within the printed lease form in Appendix 1.

III. ADDITIONAL DRAFTING CONSIDERATIONS

A. Separate Leases or Unitization?

In almost all cases, a separate wind energy lease is prepared for each tract of land included in the wind power project, so that the landowner receives royalty only from the turbines located on his or her land. Some wind companies have suggested unitization as an alternative, but pooling of wind leases is rarely, if ever, seen.

For obvious reasons, unitization is not favored by the large landowners in a wind energy project, as

they desire to receive all of the royalty from the turbines located on their land. In the future, unitization might be utilized in the situation where a project involves multiple small acreage tracts, none of which can accommodate many turbines.

B. Overhang Provision

As with the drainage provisions in an oil and gas lease, the landowner in a wind lease may well be concerned about a turbine or turbines which either overhang or are located a short distance from his land. A sample overhang provision is found in Appendix 4. Under this provision, the landowner receives additional royalty for the "taking" of wind from his or her land. Wind companies, on the other hand, prefer not to deal with the revenue sharing required by an overhang provision. If necessary, the wind company would rather make a one-time payment (or perhaps annual payments) to the landowner as compensation for the "drainage," similar to compensatory royalty. Moreover, the wind company seeks to avoid this issue by including a setback waiver in the lease or by obtaining an overhang easement from the landowner. The setback waiver provision provides that if the landowner now or in the future owns or leases any land adjacent to the leased land and the lessee holds a lease on said adjacent property and has installed or constructed or desires to install or construct wind power facilities on said land near the common boundary between the two properties, the landowner waives any and all setbacks and setback requirements, whether imposed by applicable law or by any person or entity. The provision further provides that the landowner shall, without demanding additional consideration, execute any setback waiver, setback elimination or other document reasonably requested by the lessee in this regard. Likewise, the overhang easement, which is contained in a separate document, provides that the landowner grants unto the lessee an irrevocable, exclusive easement appurtenant to the land for the right and privilege to permit the wind facilities located on adjacent properties to overhang the landowner's land. See Appendix 5.

C. Retained Acreage/Continuous Development Clause

Wind leases, like oil and gas leases, at the outset of a project often cover far more land that will ultimately be used in the wind farm. Although the wind company, as a matter of practice, will probably release any unused acreage, this clause will insure that it will do so. A sample retained acreage clause is set out in Appendix 6. No form for a continuous development clause has yet been seen, which leaves the field open for a creative wind attorney to devise one.

IV EFFECT OF THE WIND ENERGY LEASE ON CONVEYANCING OR LEASING OF LAND

A. Conveying or Leasing Land Subject to a Wind Lease

Every wind lease provides that the lease shall burden and shall run with and against the land, and shall be binding upon and against the landowner, as well as his or her heirs, successors, grantees, assigns, permittees, licenses, lessees, employees and agents, and all persons claiming under them. The lease also often provides:

1. The landowner will not sell, transfer, assign or encumber the land or grant any license,

easement, lease or other right with respect to the land which could interfere with the wind lessee's operations;

2. The landowner must give notice to the wind lessee of any lease, grant or conveyance involving the land or any part thereof; and

3. The landowner must execute agreements subordinating any lease or grant of the land to the wind lease and must use his or her "best efforts" to have the tenant or grantee execute similar agreements within a short, specified period of time.

* * *

CHAPTER TWO

I. TAX ABATEMENTS

A. County Tax Abatements under the Property Redevelopment and Tax Abatement Act

1. Statutory Authority

The Property Redevelopment and Tax Abatement Act of the Texas Tax Code § 312.001, *et seq.*, contains the grant of authority for the governing body of a county or a municipality to enter into a tax abatement agreement. In order to be eligible, the taxing unit must have established guidelines and criteria which govern tax abatement agreements by the taxing unit and which provide for the availability of tax abatements for both new facilities and expansion or modernization of existing facilities.[11] Appendix 9 contains sample guidelines of taxing authorities for Nolan and Scurry Counties. By statute the guidelines adopted by the taxing unit are effective for two years from the date adopted and, during that period, may only be amended or repealed by a vote of three-fourths of the members of the governing body.[12] The guidelines may include a requirement that a reasonable application fee, not to exceed $1,000.00, accompany the tax abatement application. There is no statutorily prescribed form for a tax abatement application.

2. Establishment of a Reinvestment Zone

The wind farm improvements must be located within an area designated by the governing body as a "reinvestment zone" pursuant to Texas Tax Code § 312.201. The governing body may not adopt an ordinance designating an area as a reinvestment zone until it holds a public hearing and only after:

a. the publication of notice in a newspaper having general circulation in the municipality; and

b. delivery of notice of the hearing to the presiding officer of the governing body of each taxing unit that includes the proposed reinvestment zone within its boundaries.

The governing body must find that the improvements to be placed within the zone are feasible, practical, and would be of benefit to the land to be included in the zone after the expiration of the tax abatement agreement. It must also find that the area to be included in the reinvestment zone satisfies one of the requirements of Texas Tax Code §312.202 (as it applies to wind farms):

> "(6) Be reasonably likely as a result of the designation to contribute to the retention or expansion of primary employment, or to attract major investment in the zone that would be a benefit to the property and that would contribute to the economic development of the municipality."

Texas Tax Code § 312.202(6).

3. Procedure

At least seven days prior to entering into the abatement agreement, the governing body must give notice to all other taxing units within which the reinvestment zone is to be located that it intends to enter into the agreement. The notice must include a copy of the proposed agreement.

4 The Abatement Agreement

The abatement agreement may not exceed a term of ten years. Texas Tax Code § 312.402 and § 312.204. The statutory requirements regarding specific terms of abatement agreements are contained in Texas Tax Code § 312.205. Among other requirements, the agreement must, at a minimum:

a. list the kind, number and location of all proposed improvements;

b. provide access to and authorize inspection to insure that the improvements are made in accordance with the specifications and conditions of the agreement;

c. provide for recapturing property tax revenue lost as a result of the agreement if the owner of the property fails to make the improvements or repairs as provided by the agreement;

d. require the owner of the property to certify annually to the governing body of each taxing unit that the project is in compliance; and

e. provide the governing body the right of cancellation in the event of noncompliance with the agreement.

Other provisions commonly included in the abatement agreement are:

a. creation of local jobs;

b. purchase of local goods and services;

c. protection of roads and road maintenance; and

d. nonassignability of the agreement without prior approval by county authorities.

The all-important requirement imposed by most counties is local job creation. If such a provision is to be included, the agreement should state the total number of jobs to be created and of those, the number of employees who will be hired locally (provided they are equally qualified with other applicants) and the percentage of employees who will reside within the county.

The agreement may also require the wind farm to maximize its use of local businesses in the construction operation and maintenance of the project and to purchase local goods, provided the cost does not exceed some percentage (e.g. 105%) of the cost available elsewhere.

Unlike HB 1200 and its limited grant of school district tax relief discussed in the next section, counties are not restricted in the amount of tax relief which may be offered, except for the ten-year limit on the term of the abatement agreement.[13] Percentages awarded vary widely, e.g. 55% for years 1 through 5 and 50%, 40%, 30%, 20%, 10% over the next 5 years; 75% for years 1 through 5, 25% for years 6 through10; 60% for years 1 through 5, 40% for years 6 through 10; 75% for years 1 through 10; or 100% for years 1 through 10.

Although some counties initially resisted the thought of foregoing tax revenues in order to attract wind farm projects, that sentiment appears to be shifting. After discovering the substantial investment and benefit from these projects, competition is now developing between counties for these wind farm projects. Several counties have taken the initiative and preapproved very attractive abatement packages and are soliciting wind power companies. Landowner coalitions are also being formed in some West Texas counties to combine land into blocks suitable for wind development. Some of these groups have even constructed their own meteorological towers in order to gather wind data for sale to developers.

B. The School Tax Abatement (Appraised Value Limitation) under the Texas Economic Development Act

1. Statutory Authority

The Texas Economic Development Act, Texas Tax Code § 313.001, *et seq.*, commonly referred to as HB 1200, contains the statutory grant of authority for a school district (acting by and through its school board or other governing body) to enter into a tax abatement agreement. The tax relief afforded is in the limitation on appraised values for "qualified investments" in "qualified property" placed within the school district's boundaries. Renewable energy electric generation is one of the qualified investments which the tax abatements are designed to attract. School districts may offer wind companies a tax credit over the initial two years of the project (typically during the construction phase) and an eight-year limitation on the appraised value of the qualified property. In order to be eligible, the wind company must be a corporation or limited liability company.[14]

2. Guidelines and Criteria

The minimum investment required to qualify, as well as the limitation on the appraised value which can be offered the wind companies vary considerably, depending upon the school district's classification as established by the Texas Comptroller's office. A minimum "qualified investment" under Texas Tax Code § 313.0211 means tangible personal property placed in service on or after January 1, 2002, and described as Section 1245 property [defined as an integral part of production of electrical energy] by Internal Revenue Code 1245(a). 26 U.S.C. § 1245 (a)(3)(B)(i).

According to Texas Tax Code § 313.021(2) "qualified property" means land:

a. located in a designated reinvestment zone pursuant to Tax Chapters 311 or 312, or an enterprise zone pursuant to Government Code § 2303; and

b. on which is proposed new construction not in existence before the owner applies for limitation on appraised values; and

c. not already subject to a tax abatement agreement by a school district; and

d. on which the owner proposes to:

(i) make a minimum qualified investment; and

(ii) create at least 25 new jobs in non-rural districts or create at least 10 new jobs in rural districts.[15]

The process is initiated by an application filed by the property owner (i.e., the landowner and/or the wind company) with the school district on the form prescribed by the Texas Comptroller's office. See Appendix 10. A fee prescribed by the district must accompany the application.[16] This nonrefundable application fee is paid by the applicant. The fee may not exceed the estimated cost to the district of processing and acting on an application, including the cost of the economic impact evaluation required by Texas Tax Code §§ 313.025 and 313.026. Typical fees may be as high as $50,000.00, or a lesser amount coupled with a contractual agreement to reimburse the district for all costs, including attorney's fees and the cost of an economic impact evaluation.

If the district elects to consider an application (although it is not required to do so),[17] it must engage a third party to conduct an economic impact evaluation of the application on behalf of the district at the cost of the applicant. In determining whether to grant the application, the district is entitled to receive assistance from the Texas Comptroller, the Texas Department of Economic Development, the Texas Workforce Investment Council and the Texas Workforce Commission.[18] After receiving an application that the district elects to consider, one copy of the application is delivered to the Comptroller, who, within 60 days of receipt, using the criteria of Texas Tax Code § 313.026, submits a nonbinding recommendation to the governing body of the school district as to whether the application should be approved or disapproved.[19] Unless extended by agreement, the district must approve or disapprove an application before the 121st day after the date the application is filed.[20]

Before approving or disapproving an application that the governing body elects to consider, the governing body must make a written finding as to each requirement listed in Texas Tax Code § 313.026 and deliver a copy of those findings to the applicant. Among the criteria of 313.026(a) are:

> "3. the relative level of the applicant's investment per qualifying job to be created by the applicant;
> 4. the wages, salaries and benefits to be offered by the applicant to qualified job holders;
> 5. the ability of the applicant to locate or relocate in another state or another region of this state;
> 6. the impact the added infrastructure will have on the region, including
> (a) revenue gains that would be realized by the school district; and
> (b) subsequent economic effects on the local and regional tax bases."

Texas Tax Code § 313.026 (3)-(6).

The governing body may approve an application only after finding that:

a. the information in the application is true and correct; and

b. the applicant is eligible for the limitation on appraised value of the person's qualified property; and

c. granting the application is in the best interest of the school district and the state.[21]

Finally, in determining whether to grant an application, the governing body of the school district shall consider any recommendation made by the Texas Department of Economic Development or its successor.[22]

C. Amount of Tax Relief Available

The amount of the minimum investment required to qualify, as well as the minimum amount of the limitation on appraised value which can be offered to wind companies varies considerably, depending on the school district's classification, as established annually the Texas Comptroller's office.

1. Rural vs. Non-rural

The Comptroller categorizes school districts according to the taxable value of industrial property in the district for the preceding tax year. Rural districts are those containing territory in a strategic investment area, as defined by Texas Tax Code § 171.721, or, as defined in Texas Tax Code § 313.051(a), as a slowly growing, static or declining population of less than 50,000. In rural districts, the property owner is required to create at least 10 new jobs on the owner's qualified property. Texas Tax Code § 313.051(b).

Non-rural districts are basically all remaining districts[23] and in which the owner must create at least 25 jobs on qualified property.[24]

Five additional categories (I through V) exist within each rural and non-rural designation. The complicated scheme of HB 1200 is eased by the Texas Comptroller's office, which has removed all guesswork by publishing tables which allow the user to easily determine a particular school district's status under HB 1200.

The comptroller's web site is an essential tool for one seeking school district tax relief and may be accessed at http://www.wind.state.tax.us/taxinfo/proptax/hb1200/values.html. The Comptroller's staff is also extremely helpful and patient and may be reached at 512-305-9838.

2. Minimum Qualified Investment and Minimum Limitation on Appraised Value

The amount of investment required to meet the threshold qualification varies significantly, with the smallest of the rural districts requiring $1 million and the largest of the non-rural districts requiring $100 million invested by the wind company before relief under HB 1200 may be obtained.

The minimum amount of qualified investment for non-rural districts is established by Texas Tax Code § 313.023, as follows:

Category	Minimum Qualified Investment/Appraised Value Limitation
I	$100 Million
II	$ 80 Million
III	$ 60 Million
IV	$ 40 Million
V	$ 20 Million

The minimum qualified investment is also the lowest amount to which the appraisal value can be reduced by the district, thus the term "*minimum limitation on appraised value*." For rural school districts, the categories and their respective minimum qualified investment/appraised value limitations are established by Texas Tax Code § 313.053, as follows:

Category	Minimum Qualified Investment/Appraised Value Limitation
I	$ 30 Million
II	$ 20 Million
III	$ 10 Million
IV	$ 5 Million
V	$ 1 Million

By way of example, the school districts within Nolan County are Blackwell ISD, Roscoe ISD, Highland ISD and Sweetwater ISD. Each of these, according to the Comptroller's latest tables, are rural districts, Category III, with an appraised value/minimum qualified investment of $10 million. By contrast, Round Rock ISD is categorized Non-rural, Category I, with a $100 million appraised value/minimum qualified investment. Although wind company investments frequently exceed $100

million, clearly the greater tax relief will be available in rural and industrially disadvantaged regions.

3. Establishment of a Reinvestment Zone

The district may, but is not required, to use the county-designated reinvestment or enterprise zone. The school board may also designate an area that is entirely within the territory of the school district as a reinvestment zone under Texas Tax Code § 312.0025. The school board must find that designating and granting a limitation on appraised value under Chapter 313 for property located in the reinvestment zone is reasonably likely to:

a. contribute to the expansion of primary employment in the zone; or

b. attract major investment in the zone that would benefit property in the reinvestment zone and the school district and contribute to the economic development of the region of this State in which the school district is located.

The school board may also seek the recommendation of the county commissioners court and the governing body of each municipality that has territory in the school district before designating an area as a reinvestment zone.

4. The Agreement

The limitation on the appraised value of qualified property may extend for each of the first eight tax years after the application is approved.[25] In addition to the appraised value limitation, a tax credit is available during the first two tax years that begin after the date the application is approved,[26] the effect of which is to entitle the applicant for a tax credit from the district in an amount equal to the ad valorem taxes paid in excess of the limitation agreed to by the district. More simply put, during the two years' qualifying time in which the project is to be constructed, taxes are paid on the actual values. However, tax credits will be issued for payments in excess of the amount payable under the limitation agreed to by the district.

The form prescribed by the Texas comptroller's office for tax credit abatement is attached hereto in Appendix 11.

* * *

CHAPTER THREE

OWNERSHIP, RESERVATIONS AND CONVEYANCES OF "WIND RIGHTS"

The development of wind technology in Texas has created a new and profitable use for rural real property. As well, it has produced a previously unforeseen aspect of surface ownership. Landowners now recognize that "wind rights" are a valuable property right. However, legal scholars are troubled by the issue of wind ownership and by the fact that no legal canons regarding such ownership yet exist.

In a paper entitled "Wind Energy Leases, Prospects and Issues," delivered by Professor Ernest E. Smith of the University of Texas School of Law to the 2002 Advanced Real Estate Law Course, Professor Smith states:

> "At first blush, the issue of landowner rights in wind appears at best academic, at worst rather silly."[27]

However, Professor Smith goes on to point out that practitioners may look to the law governing wild animals and percolating waters for guidance. [For an excellent discussion of these two theories see Terry E. Hogwood "Against the Wind" Oil, Gas and Energy Law Section Report 6, 11 (Dec. 2001).] Like wild animals or percolating water, wind does not have a quantifiable value until it has been reduced to possession. *Id.* In Texas, an individual does not own a wild animal so long as the animal remains wild and unconfined. *Jones v. State*, 119 Tex.Crim. 126, 45 S.W.2d 612, 613-14 (1931). Until the animal is captured and confined, ownership of the animal remains with the State. *State v. Bartree*, 894 S.W.2d 34 Tex.App.-San Antonio 1994 no pet.). Under Texas law, absent malice or waste, a surface owner has the right to take all of the percolating water he can capture from beneath his land. Sipriano v. Great Spring Water of America, Inc., 1 S.W.3d 75 (Tex.1999). It should be noted that the significant difference between the two theories is that ownership of a wild animal resides with the State until capture, and percolating waters are at all times owned by the surface owner. The State has classified water as a natural resource, thereby allowing its regulation by the legislature. Likewise, if wind is classified as a natural resource, the legislature would be authorized to pass laws regulating its use.

Over the last several years, one of the most frequently asked questions has concerned the severance of wind rights. To date, there are no Texas cases that provide guidance on this issue. Indeed, according to the research conducted by Terry Hogwood for his paper, there is only one case in the United States that addresses the question. The 1997 California condemnation case of *Contra Costa Water Dist. V. Vaquero Farms, Inc.*, 68 Cal Rptr. 2d 272, held that wind rights are a distinct and severable right. There apparently are no other reported cases, but there is a proposed South Dakota statute that provides that:

> "No interest associated with the production or potential production of energy from wind power may be severed from the surface estate...except that such rights may be leased for a period not to exceed fifty years. Any such lease is void if no development

of the potential to produce energy from which wind power has occurred on the land within five years after the lease began."

[Proposed South Dakota Title Standards 9-06, Wind Energy Rights - Limitation on Severance]

Although there are no Texas cases directly on point, the authors suggest that once a wind farm is established on property, and thus the value of the wind is quantifiable, there should be no reason that a landowner/grantor cannot convey that right. Likewise, a landowner should be able to sever and reserve or convey an undivided interest in the "wind rights" and/or "wind royalty" in a future lease. A sample conveyance as well as a reservation clause are set out in Appendix 7 and Appendix 8.

* * *

CHAPTER FOUR

LITIGATION

Nearly all wind projects are constructed in rural settings, well outside the reach of zoning or building codes. As in any developing industry, it will not be long before breach of contract, lease interpretation and other contract claims find their way into Texas courts. Soon to follow will be contract and warranty claims brought by project owners against the manufacturers of the turbines and their component parts.

Potential areas of new litigation peculiar to the wind energy arena will involve overhang and setback disputes between neighbors or between project owners on adjoining lands. The first litigation involving neighbor vs. neighbor is now pending in Taylor County and pits homeowners against their neighbors and the project owners who have or are in the process of installing wind turbines on the neighbors' lands.[28]

The plaintiffs in the Taylor County litigation are seeking redress under the legal theories of nuisance, public nuisance and trespass on the grounds that nearby wind turbines are unsightly, create noise, have reduced property values and have ruined the aesthetic value of the land. The trial court denied preliminary injunctive relief to the plaintiffs in 2005, and the trial is expected to be completed by the end of 2006.

* * *

CONCLUSION

The wind energy industry in Texas has come of age. However, as in the past, there are still no form books for wind energy leases. Scholarly treatises on wind energy law have not yet appeared. Wind is not considered to be a natural resource and thus there is as yet no state regulation or legislation regarding its development. Although some lawsuits are now pending in Taylor County, there is still

no case law to act as precedent in guiding practitioners. Finally, there are no legal canons regarding wind ownership in Texas. The art of conveying and reserving wind rights remains to be developed.

Despite these constraints, it does appear that the wind energy boom will continue and that the industry is here to stay. To date, wind energy companies have invested hundreds of millions of dollars in Texas wind and have plans to make Texas the number one site for wind development in the United States. The rapid evolution of this new industry has created an exciting opportunity for energy lawyers to be on the cutting edge of a new era. It is hoped that this article will be helpful to those attorneys.

* * *

END NOTES

[1] Ernest E. Smith, Wind Energy in Texas (Advanced Oil, Gas and Mineral Law Course, State Bar of Texas, 2001), p. 14.

[2] AWEA, Wind Energy and Economic Development: Building Sustainable Jobs and Communities (undated), at 2, *available at* www.awea.org/pubs/factsheets/EconDev.pdf ("Farmers can grow crops or raise cattle next to the towers. Wind farms may extend over a large geographical area, but their actual 'footprint' covers only a very small portion of the land...")

[3] In 2005, parts of Taylor and Nolan Counties were leased without options to facilitate immediate construction of the initial phase of wind farms in that area.

[4]The cost of a MET tower is approximately $15,000-$25,000 (not including the amount paid for interpretation of the raw data). Additional sums are paid for an inter-connect study as well as environmental, avian (biological), and historical investigations. The total cost of all of these studies could easily exceed $100,000 for a typical wind farm.

[5] This option, which is the subject of a separate agreement, contains a paragraph which reads as follows:

> "Grant of Option to Optionee. Owner hereby grants to Optionee an option to lease all or portions of the Property in accordance with the terms and conditions of the term sheet ('Term Sheet'), which is attached hereto as Exhibit 'B,' and made a part hereof. Owner and Optionee agree that the Term terms and conditions relating to the lease and does not necessarily summarize all terms and conditions, covenants, and representations, warranties and other provisions which shall be contained in the definitive legal documentation for the lease contemplated by this Option Agreement (the 'Wind Energy Lease'). Owner and Optionee shall use commercially reasonable efforts to negotiate in good faith to agree upon a comprehensive Wind Energy Lease acceptable to each party and with the language typically required by Optionee's lenders and title company within one hundred twenty (120) days of the negotiations being initiated by Optionee, which negotiations may be initiated at Optionee's sole discretion. The Wind Energy Lease shall contain the same economic terms as described in Exhibit 'B.' Optionee shall have the right to exercise the Option Agreement at any time during the Term (as defined below) of the Option Agreement."

The dangers of this procedure are obvious. Despite commercially reasonable efforts by both parties, it may be that the parties will ultimately disagree as to the specific wording of the basic terms and conditions contained within the "Term Sheet," or will disagree on terms not included within the "Term Sheet." On the other hand, the landowner may wish to balance the chance of a problem occurring in later drafting the lease against the up-front cost (which can be substantial) of preparing the lease in advance.

[6] The Sweetwater Wind Power project in Nolan County covers over 35,000 acres and is planned to include over 400 MW, including both 1.0 MW and 1.5 MW turbines. The Horse Hollow II wind project constructed by Florida Power & Light is slated to be a 447 MW facility and covers over 100,000 acres in an east/west distance of approximately 38 miles in Taylor and Nolan Counties. It plans to utilize between 130 and 160 GE 1.5 MW turbines, and between 75 and 90 Siemens-Bonus 2.3 MW wind turbines. Both projects are under construction at this time. Additionally, AES SeaWest Wind Power plans to construct over 120 MW in Nolan County in 2006-2007.

[7] Ernest E. Smith, Wind Energy Leases: Prospects and Issues (Advanced Real Estate Law Course, State Bar of Texas, 2002), p. 4. The average wind speed in southern Nolan County is approximately 22 miles per hour.

[8] These calculations are credited to Dr. Jimmy Neill, PhD. (landowner and wind expert, as well as retired Distinguished Professor, University of Alabama).

[9] Ernest E. Smith, Wind Energy in Texas, supra, at p. 6.

[10] Ernest E. Smith, Wind Energy in Texas, supra, at p. 10.

[11] Tex. Tax Code Ann. §312.002(a).

[12] Tex. Tax Code Ann. § 312.002(c).

[13] Tex. Tax Code Ann. § 312.204.

[14] Tex. Tax Code Ann. §313.024(a).

[15] The requirement of creating at least 25 new jobs as to non-rural districts is found at Tax Code Ann § 313.021 (2)(iv)(b) in the definition of qualified property. The requirement of creating at least 10 new jobs as to rural districts is found at Tex. Tax Code Ann. § 313.051(b).

[16] Tex. Tax Code Ann.§ 313.025(a)(i).

[17] Tex. Tax Code Ann. § 313.025(b).

[18] Tex. Tax Code Ann. § 313.025(c)(1)-(4).

[19] Tex. Tax Code. Ann § 313.025(d).

[20] Tex. Tax Code Ann. § 313.025 (b).

[21] Tex. Tax Code Ann. § 313.025(f).

[22] Tex. Tax Code Ann. § 313.025(g).

[23] Tex. Tax Code Ann. § 313.022(b).

[24] Tex. Tax Code Ann. § 313.021(2)(A)(iv)(b).

[25] Tex. Tax Code Ann. § 313.027(a).

[26] Tex. Tax Code Ann. § 313.102(a).

[27] Ernest E. Smith, Wind Energy Leases: Prospects and Issues, *supra*, p. 5.

[28] *Dale Rankin, et al. vs. FPL Energy, et al.*, Cause No. 46,138-A in the 42nd Judicial District Court of Taylor County, Texas.

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