

RIDE LIKE THE WIND:[†] SELECTED ISSUES IN MULTI-PARTY WIND LEASE NEGOTIATIONS

By Rod E. Wetsel and Steven K. DeWolf[‡]

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I. INTRODUCTION

“And yet, I say again, and swear it now, that there’s something all glorious and gracious in the wind.”
–Herman Melville¹

The large-scale wind industry arrived in Texas in the early years of the twenty-first century with the intensity of a spring tornado. It was a welcome relief to farmers and ranchers beset by years of no rain and falling prices, and they lined up in droves to hear about and sign new wind leases. It was a new dawn for energy lawyers too. Gone were the days of one-on-one representation in the leasing of land. The new era required landowner attorneys to represent dozens or perhaps hundreds of people at a time. This is the story of the issues and challenges brought by the concurrent rise of wind development and multi-party wind lease negotiations in Texas.

II. HISTORY OF WIND DEVELOPMENT IN TEXAS

As far back as 1995, wind developers targeted the McCamey area of far West Texas for the location of several early pilot wind projects, including King Mountain, which upon its completion in 2001 included 280 Megawatts (“MW”), making it the largest wind farm in the world at the time.² However, transmission of the electricity from these projects to the metropolitan load centers of Dallas and Fort Worth (over 400 miles) proved to be a vexing problem, and by the end of the 1990s, developers sought to move east.³ They selected the small town of Sweetwater, the county seat of Nolan County, which was located on Interstate 20—only two hundred miles from Dallas—as their site for the construction of several new “mega-wind” projects.⁴

Sweetwater presented many advantages. Not only was it much closer to the metroplex than the other areas of far West Texas, it also had good wind⁵ and a large 345 kilovolt line which stretched all the

1. HERMAN MELVILLE, *MOBY-DICK OR, THE WHALE* 565 (1st Paperback ed., Univ. of Cal. Press 1983) (1851).

2. ERNEST E. SMITH, STEVEN K. DEWOLF, RODERICK E. WETSEL & BECKY H. DIFFEN, *TEXAS WIND LAW* § 1.02 (2011); KATE GALBRAITH & ASHER PRICE, *THE GREAT TEXAS WIND RUSH* 145 (2013).

3. GALBRAITH & PRICE, *supra* note 2, at 144.

4. SMITH ET AL., *supra* note 2, § 1.02; GALBRAITH & PRICE, *supra* note 2, at 140.

5. SMITH ET AL., *supra* note 2, § 1.04. The Sweetwater area proved to have a wind capacity of 38–42%, which is considered very good in the industry. *Id.* “Wind capacity” or the “capacity factor” is the estimated actual energy production of a wind farm compared to the amount of annual energy production if the wind farm had operated at maximum output 365 days a year, twenty-four hours a day. *Id.* It is reached by calculating the gross wind speed and then reducing that number using various assumptions to arrive at a net capacity factor. *Id.* These assumptions include reductions for array loss and turbine availability. *Id.*

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way to Dallas with plenty of capacity.⁶ It was also only sparsely populated and contained a varying topography of rolling plains and wide open spaces perfect for giant wind turbines. Seeking to overcome the town's dubious distinction of being the "Home of the World's Largest Rattlesnake Roundup," and as being one of the most rapidly declining economic areas in the state, the people of Sweetwater were very supportive and friendly.⁷ They "rolled out the welcome mat" with generous county and school tax abatements. To "Sweetwaterites," the new wind industry was as exciting as Friday night football, and it brought the chance for everyone to make money.⁸

American Electric Power was the first developer to take the lead by constructing the Trent Mesa Wind Farm across a ridge of hills in eastern Nolan County in 2001.⁹ By the standards of what was to come, it was a modest beginning, with a total of 150 MW produced by approximately 100 wind turbines at a cost of \$160 million.¹⁰ Soon thereafter, however, the boom began. DKRW Wind, LLC of Houston, Texas ("DKRW"),¹¹ SeaWest Windpower of San Diego, California ("SeaWest"),¹² and Florida Power & Light of Juno Beach, Florida

6. *Id.* § 1.02.

7. *Id.*

8. GALBRAITH & PRICE, *supra* note 2, at 141.

9. *Id.*

10. *Id.*

11. The four principals of the company, Jon C. Doyle, Robert Kelly, H. David Ramm, and Thomas E. White were former employees of Enron Corporation and each had interesting backgrounds. Doyle received his B.B.A. from the University of North Carolina at Chapel Hill, and obtained an MBA from the American Graduate School of International Management in Arizona. Before joining Enron, he set up and managed a chemical manufacturing company in China and spoke fluent Chinese. Kelly, Ramm, and White were West Point graduates. Kelly was an economics instructor at the United States Military Academy. He held a B.S. in Nuclear Engineering from West Point and an MPA and Ph.D. in economics from Harvard University. Ramm held a B.S. in Mechanical Engineering from West Point, an M.S. in Management from the Massachusetts Institute of Technology and an MBA from Long Island University. White held a B.S. in engineering from West Point. He attained the rank of Brigadier General of the United States Army and served as the Secretary of the Army under President George W. Bush. Telephone interview with Dan King, former Vice President-Wind of DKRW Wind Energy, LLC, Houston, Texas (Feb. 7, 2014). Bloomberg Businessweek, *Independent Power Producers and Energy Traders: Company Overview of DKRW Energy LLC*, BLOOMBERG BUSINESSWEEK, <http://investing.businessweek.com/research/stocks/private/snapshot.asp?privcapId=10360732> (last visited Feb. 7, 2014). University of Houston, *Profile of H. David Ramm*, UNIV. HOUSTON ENERGY ADVISORY BOARD, <http://www.uh.edu/uh-energy/advisory-board/david-ramm/> (last visited Feb. 7, 2014). BrightSource, *BrightSource Energy, Inc., Names David Ramm New CEO*, BRIGHTSOURCE LIMITLESS PRESS RELEASE, <http://www.brightsourceenergy.com/ramm-new-ceo#.UvZhC8KYY7Y> (last visited Feb. 7, 2014). Dustin Bleizeffer, *Long-Delayed DKRW Coal Conversion Plant Still Lacks Complete Financing*, WYOFIELD (Mar. 31, 2013), <http://wyofile.com/dustin/long-delayed-dkrw-coal-conversion-plant-still-lacks-complete-financing>.

12. Now AES SeaWest, Inc.—Buffalo Gap Project. Rose Snow, *SeaWest Holdings, Inc. Announces it is Being Acquired by AES Corporation*, EWIRE, <http://www.ewire>

(“FPL”)¹³ each moved into their respective areas of interest in the southeastern part of the county and began construction of massive projects.¹⁴ They were followed by an Irish company, Airtricity, Inc. (“Airtricity”)¹⁵ who, at the encouragement of local farmers, settled on the large expanse of cotton farmlands in northwestern Nolan County near the town of Roscoe. Three of these four projects would become some of the world’s largest. Airtricity’s Roscoe Wind Project held first place with 627 wind turbines and a total capacity of 781.5 MW, FPL’s Horse Hollow Project came in second with 421 turbines and 735.5 MW, and DKRW’s Sweetwater Wind Project was third with 585 MW.¹⁶ Thus, by 2008, Nolan County, a place slightly smaller than Rhode Island, was home to over 1,600 wind turbines and 2,500 MW of wind power and produced more electricity from wind than all of the State of California and many foreign countries.¹⁷

But the show was not yet over. In 2008, Wind Tex Energy, LLC¹⁸ partnered with Chicago-based Invenergy, LLC (“Invenergy”) to build the Turkey Track wind farm in southern Nolan County, which totaled 113 wind turbines with a capacity of 169.5 MW.¹⁹ The West Texas Ranch for Christ, which planned to use the new income for missionary work in third-world countries, was a major landowner in the project. The Turkey Track project was a fitting finale to a boom, which cat-

.com/news-releases/seawest-holdings-inc-announces-it-is-being-acquired-by-aes-corporation (last updated 2014).

13. Now NextEra Energy, Inc. Randy Clerihue, *FPL Group Shareholders Vote to Change Name of Company to NextEra Energy, Inc.; Board Declares Quarterly Dividend*, NEXTERA ENERGY (May 21, 2010), <http://www.nexteraenergy.com/news/contents/2010/052110.shtml>.

14. SMITH ET AL., *supra* note 2, § 1.02.

15. Now E.On Climate & Renewables North America, Incorporated. Bloomberg Businessweek, *Independent Power Producers and Energy Traders: Company Overview of E.ON Climate & Renewables North America, LLC*, BLOOMBERG BUSINESSWEEK, <http://investing.businessweek.com/research/stocks/private/snapshot.asp?privcapId=26608626> (last visited Jan. 20, 2014).

16. SMITH ET AL., *supra* note 2, § 1.02.

17. GALBRAITH & PRICE, *supra* note 2, at 144. Nolan County is a transitional zone of the Osage Plains that lies between the mesas and buttes of Taylor County to the east and the high plains of the Llano Estacado to the north and west. E.L. YEATS & HOOPER SHELTON, *HISTORY OF NOLAN COUNTY* 13 (1975). It occupies a total area of 921 square miles, has a total population of about 15,000, and its elevation ranges from less than 2,000 feet to a high of 2,700 feet. *Id.* The prevailing wind direction is from the southwest averaging 18–22 miles per hour, but the strongest winds come from the north and result from the passage of cold fronts or “northers.” *Id.* Created in 1876, the county is named after Phillip Nolan, who in late eighteenth century Texas, was known as a “filibustero,” or an American insurgent against the Spanish Crown. T.R. FEHRENBACH, *LONE STAR: A HISTORY OF TEXAS AND THE TEXANS* 116–117 (1968). His business was “mustanging”—gathering wild horses in Texas and selling them in the United States. *Id.* In 1800, while conducting a mustang raid, he was shot and killed by the Spanish cavalry. *Id.* As a result, the Sweetwater High School athletic teams are known as the Mustangs.

18. Owned by Author Steven K. DeWolf.

19. SMITH ET AL., *supra* note 2, § 1.02.

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apulted Sweetwater from obscurity into being “The Wind Energy Capital of the World.”²⁰

In the same decade of the twenty-first century, as went Sweetwater, so went the rest of Texas. Sweetwater was first in wind in Texas, and Texas was first in wind in the United States. Big wind farms sprang up like jackrabbits in previously unheard-of places in West Texas; such as McAdoo in Dickens County,²¹ Stanton in Martin County,²² Camp Springs in Scurry County,²³ and Muenster in Montague and Cooke Counties.²⁴ Developers also ventured into South Texas in the latter part of the decade to build wind farms inland from the Gulf of Mexico, taking advantage of the peak use afternoon breezes.²⁵

20. *Id.*

21. *Invenergy completes equity financing with GE Energy Financial Services and MetLife for two wind sites*, INVENERGY (Dec. 10, 2008), http://www.invenergyllc.com/Portals/0/docs/Invenergy_Financing_Closes_12_10_08.pdf. Invenergy, LLC’s McAdoo Wind Project has a capacity of 150 MW and was built in 2008. *Id.*

22. *See Stanton Wind Project*, WIND TEX ENERGY, <http://www.windtexenergy.com/operational-projects/stanton-wind-project/> (last visited Jan. 20, 2014). Stanton Energy Center, constructed in 2008, has a capacity of 120 MW. *Id.*

23. WKN/Wind Tex Energy’s “Project Snyder” wind farm was constructed in 2007 with a capacity of 63 MW and Invenergy/Wind Tex Energy’s Camp Springs I and Camp Springs II projects were constructed in 2007 and 2008, respectively. Wind Tex Energy, LP, *Operational Projects*, WIND TEX ENERGY, <http://www.windtexenergy.com/operational-projects> (last visited Jan. 29, 2014). Camp Springs I’s capacity was 130.5 MW and Camp Springs II’s was 120 MW. *Id.*

24. Florida Power and Light (now Nextera Energy Resources) constructed the “Wolf Ridge Prospect” project in Muenster in 2008 consisting of seventy-five 1.5 MW turbines. *See* Andy Hogue, *Wind Generation Farm Getting Closer to Reality*, Gainesville (Texas) Daily Register, Apr. 14, 2008, and Lindsay Lorenz, *Wind Farm Revenue Lets Muenster ISD Drop Tax Rate*, Gainesville (Texas) Daily Register, July 14, 2010.

25. E.On Climate and Renewables North America’s Papalote Wind Farm in Nueces County consisted of Papalote Creek I, with 109 1.65 MW turbines and a total of 179.85 MW (constructed in 2009) and Papalote Creek II, with eighty-seven Siemens 2.3 MW turbines and total of 200.1 MW (constructed in 2010). E.On Climate & Renewables, N.A., *Papalote Creek Wind Farm*, E.ON, <http://www.eoncrna.com/contentProjectsPapalote.html> (last updated 2014). DKRW Wind Energy’s Cedro Hill Wind Farm in Webb County consisted of 100 turbines with a total of 150 MW (constructed in 2010). DKRW Wind Energy, *Cedro Hill Wind*, DKRW WIND, <http://www.dkrwind.com/Projects/Completed-Projects/Cedro-Hill-636.html> (last updated 2014). Duke Energy Renewables’ “Los Vientos I” and “Los Vientos II” wind projects in Willacy County in 2012 contained eighty-seven and eighty-four turbines each for a combined total of 402 MW. Duke Energy Renewables, *Los Vientos I Windpower*, DUKE ENERGY, http://www.duke-energy.com/commercial-renewables/los_vientos_1.asp (last visited Jan. 28, 2014); Duke Energy Renewables, *Los Vientos II Windpower*, DUKE ENERGY, http://www.duke-energy.com/commercial-renewables/los_vientos_1.asp (last visited Jan. 28, 2014). E.On’s Magic Valley Wind Farm in Willacy County and Anacacho Wind Farm in Kinney County in 2012 contained 112 Vestas 1.8 MW turbines and fifty-five Vestas 1.8 MW turbines with capacities of 203.28 MW and 100 MW, respectively. E.On Climate & Renewables, N.A., *Magic Valley Wind Farm*, E.ON, <http://www.eoncrna.com/contentProjectsMagicValley.html> (last updated 2014); E.On Climate & Renewables, N.A., *Anacacho Wind Farm*, E.ON, <http://www.eoncrna.com/contentProjectsAnacacho.html> (last updated 2014). Finally, Whitetail Wind Energy’s “Whitetail Wind Project” in Webb County, constructed in 2012, consisted of fifty-seven turbines with a capacity of 92 MW. Exelon Corporation, *Texas Wind*

By the fourth quarter of 2013, Texas remained the number one wind state in the United States with 12,355 installed Megawatts and 9.9% of its electric power produced by wind. It set two new records for wind generated electrical output on February 9 and April 21, 2013, when wind accounted for 28% and 35.05%, respectively, of all electricity in the state.²⁶

III. THE TEXAS WIND LEASE

A. *Origins and Evolution*

Wind developers prepared the first wind leases in Texas. In this respect, they were comparable with the traditional Texas printed form “Producers 88” oil and gas leases in use throughout the twentieth century. These early leases were, and to some extent remain, pro-developer forms designed to protect the lessee’s future investment in the property. As opposed to the early single-page, fine-print oil and gas lease, the typical early wind lease was thirty to forty pages in length, exclusive of the land description. It was a long-term lease of the surface of the land only, or a tenancy for years, as opposed to the conveyance of a fee simple determinable typically found in an oil and gas lease.²⁷

The fact that wind farms are capital-intensive projects, often involving hundreds of millions of dollars and typically financed by third-party lenders, attributed to the increased length of the wind lease. Additionally, the wind lease contained many other provisions often found in long-term surface leases but rarely seen in oil and gas leases.²⁸

From the beginning, landowners and their counsel had to look at the leases used in other wind-producing states such as California, Oregon, and Minnesota, as well as to the modern Texas oil and gas rider, for additional provisions designed to preserve and protect the land and their right to use the same for competing uses, such as farming, ranching, oil and gas exploration, hunting, and recreation. Likewise, over the years, they steadily sought to increase the various means of

Projects, EXELON, http://www.exeloncorp.com/assets/energy/powerplants/docs/Wind/fact_wind_texas.pdf (last visited Jan. 28, 2014).

26. AWEA: American Wind Energy Association, *AWEA U.S. Wind Industry Fourth Quarter 2013 Market Report*, AWEA (Jan. 30, 2014), http://awea.files.cms-plus.com/FileDownloads/pdfs/AWEA%20Q2013%20Wind%20Energy%20Industry%20Market%20Report_Public%20Version.pdf. Into the Wind, the AWEA Blog, *Wind Power Sets New Generation, Penetration Records on Texas Utility System*, Tom Gray, (May 5, 2013), http://www.aweablog.org/blog/post/wind-power-sets-new-generation-penetration-records-on-texas-utility-system_1. Greentech Media, *In Texas, Wind Nears 10 Percent of Electricity Generation*, Peter Danko (Jan. 27, 2014), <http://www.greentechmedia.com/articles/read/In-Texas-Wind-Nears-10-Percent-of-Electricity-Generation>. SMITH ET AL., *supra* note 2, § 1.03.

27. *Id.* § 1.05.

28. *Id.*

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compensation paid under the terms of the wind lease. As a result, landowner compensation in wind leases peaked in 2008 but has declined slightly since that time. Overall, however, current wind lease forms have become much more landowner-friendly than in the past.²⁹

B. Major Elements

The wind lease is a complex but predictable document. Regardless of the company or wind farm location, it contains the same major elements. For example, every wind lease has an option or development term and an operations or extended term. The option or development term is a period of three to seven years in which the developer conducts studies to determine the feasibility of the project; the operations or extended term is a term of thirty to fifty years or more in which the wind farm is constructed and put into production.³⁰

Compensation terms may vary from project to project and landowner to landowner, but always consist of development fees, minimum royalty (a guaranteed annual payment regardless of electricity produced), royalty (a set percentage of the gross revenues generated by the lease), surface damages, payments for use of water and caliche, and reimbursement for lost hunting revenues.³¹ Many leases also contain surface protection provisions,³² a removal bond clause of some sort for cleanup of the lease at the end of the operations term, and extensive financial provisions for the protection of wind company lenders.³³ Common miscellaneous clauses in the wind lease address dispute resolution (i.e. venue or arbitration), confidentiality, and force majeure.³⁴

A final provision, which often figures large in the negotiation process, is the Most Favored Nations Clause. Typically, it provides that all landowners in a project will receive the same basic compensation, regardless of the number of acres in their lease or when it is signed.³⁵

IV. MULTI-PARTY WIND LEASE NEGOTIATIONS

Wind farms cover thousands of acres of land. Even the smallest wind farms in Nolan County, Trent Mesa, and Turkey Track, cover about 15,000 to 20,000 acres each, whereas the larger ones, E.On's Roscoe Project, FPL's Horse Hollow, and DKRW's Sweetwater Wind cover over 100,000 acres; 47,000 acres; and 60,000 acres, respectively.³⁶

29. *Id.*

30. *Id.* §§ 2.01–.02. Construction of the wind farm may occur in either phase depending on the lease.

31. *Id.* § 2.03.

32. *Id.* §§ 2.05–.06.

33. *Id.* § 2.12.

34. *Id.* §§ 2.16–.18.

35. *Id.* § 2.20.

36. *Id.* § 1.02.

The huge size of these areas dictated multiple surface owners, both large and small. In such wind farm areas, a developer might find a large ranch or two (exceeding four to five sections),³⁷ small ranches (one or two sections each), small farms (320 to 640 acres) and rural homesteads (200 acres or less). Since many of the lands were often owned by families for many generations, a large number of people—parents, adult children, grandparents, aunts, uncles, and cousins—were usually involved. The E.On Roscoe Project, for example, consisted of over 300 landowners, many of whom were related either by blood or marriage. Of necessity, therefore, from the beginning, wind developers had to devise a strategy in which they could meet and greet all of the landowners in their project area and obtain leases from them in the quickest way possible.

A. *The Town Hall Meeting Concept*

Upon their arrival in West Texas, wind developers figured out that the best way to lease a project area was to have a barbecue and invite all of the landowners. These were company promotional events designed to convince uninitiated rural folk of the money and other benefits they might receive from installation of the new wind turbines. The meal was catered by a local restaurant or group of barbecue enthusiasts complete with potato salad, beans, cornbread, a sweet dessert, and iced tea. Afterward, company personnel would unfold maps of the project area and often hand out educational material on wind energy while addressing the crowd regarding the financial blessings to come. Wisely, most “wind men” (and women), as they were called, eschewed dress clothing and suits for blue jeans, cowboy boots, and western wear to fit in with the locals. They answered questions at the end of their presentation and took every opportunity to “sell” the idea of a wind farm to landowners who had never even seen a wind turbine larger than a water windmill. When the meeting was over, a team of landmen sat near the door, eager to assist willing landowners in signing leases. This group meeting technique proved very effective and many early wind leases were obtained by this method—without the involvement of any landowner attorneys.

In order to reap the benefits of this new industry, the locals utilized the town hall meeting concept too. County land conservation officials set up meetings and invited wind attorneys as speakers to educate landowners about wind energy and the perils of signing a lease without obtaining legal advice.³⁸ Additionally, proactive landowners in both project and non-project areas formed wind associations and selected “steering committees” to hire attorneys to attract wind devel-

37. A section in West Texas is typically 640 acres.

38. ROD WETSEL & FRANK HORAK, WIND FACTS: A LANDOWNERS GUIDE (2006); Kevin Welch, *Lawyer Gives Tips for Getting the Best Wind Deal*, AMARILLO GLOBE-NEWS, Apr. 22, 2007, at C1.

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opers and negotiate wind leases. Likewise, some county governments held countywide group meetings and invited interested wind companies to discuss attractive ad valorem tax abatements for new county projects. Moreover, in 2003, the mayor of Sweetwater formed the West Texas Wind Energy Consortium to coordinate and sponsor seminars and public meetings to educate landowners and organize political support on the local and state levels for wind development in West Texas.³⁹

This use of the town hall meeting concept by both developers and landowners soon came to symbolize the wind boom in West Texas. From now on, energy leases would be negotiated and signed en masse. The time for multi-party representation had come.

B. *Some Wind Groups and their Creators: Signing Parties*

The following are but a few examples of some Texas landowner groups formed during the wind boom and a description of the interesting “wind pioneers” that created them. Signing parties were an essential component of these group projects and will also be discussed in this Section.

1. Roscoe Wind Project

In the early days of the West Texas wind boom, all of the wind farms in Nolan County (including two of the world’s largest) were located along “the Divide.” Aptly named, this ancient outcrop of land is a significant shift of terrain and elevation between the rocky mesas in the southern part of the county and the flat cultivated farmland to the north that runs in an east to west direction south of Interstate 20.⁴⁰ At that time, the cotton farmland located north of the Interstate was deemed unfit for wind farms. Such was the case until 2004, when a local Roscoe farmer by the name of Cliff Etheredge organized a small group of farmers owning about 7,500 acres to try to find a wind developer. His early attempts to attract the other major developers in the county, such as FPL, DKRW, and SeaWest, failed. Finally, after a great deal of persuasion, officials with Airtricity agreed to place anemometer towers on the farmlands to measure the wind capacity. Within only a few months, the results were convincing and Airtricity asked Etheredge to find more land. Ultimately, Etheredge and Airtricity were to preside over a group of more than 300 landowners owning over 100,000 acres. Construction began in 2007 and when the last phase was completed in 2009, the Roscoe Wind Farm became the largest in the world with more than 600 installed wind turbines capable of

39. SMITH ET AL., *supra* note 2, § 1.02.

40. See YEATS & SHELTON, *supra* note 17, at 13. It is actually a strip of weathered limestone from the Cretaceous Period called the Callahan Divide and represents the westernmost extension of the Edwards Plateau. *Id.* Interestingly, FPL’s wind farm adjacent to Horse Hollow in Taylor County is named “Callahan Divide.”

generating 781.5 MW. Ironically, but for the advocacy and persistence of Etheredge and his local group of farmers, the project never would have existed.

2. Wind Tex Energy: Project Snyder, Camp Springs I and II, Stanton and Turkey Track

As the first wind leases were being handed out in Sweetwater, Author Steve DeWolf read an article in *Progressive Farmer Magazine* about wind farms and decided to get into the wind business. He was (and remains) a well-known trial lawyer in Dallas, but wanted to try something new. He formed Wind Tex Energy, LLC with the motto “not just hot air.”

After an unsuccessful foray into the Red River area, he set his sights on the Camp Springs area in Scurry County, about forty miles north of Sweetwater. There he met and organized a key group of landowners (who, in turn, chose Author Rod Wetsel as their attorney) and partnered with WKN USA, LLC (“WKN”), a German wind company,⁴¹ to build Project Snyder during the years from 2003 to 2007. This project consisted of sixty-three gigantic three-Megawatt turbines, which were the tallest land-based turbines installed in the United States at that time.⁴²

Upon completion of Project Snyder, building upon his landowner contacts and recent success in Scurry County, DeWolf moved to adjoining areas of the county and organized landowner groups for the construction of wind farms known as Camp Springs I and II. He partnered with Chicago-based Invenergy, Inc. on both projects, which totaled 250.5 MW and were completed in 2007 and 2008, respectively.

In the ensuing years, DeWolf moved west to Martin County, just east of Midland, and formed several wind groups there. The landowners had heard much about the wind farms being built in Sweetwater and were eager to participate. After only a short period of time, construction began on the Stanton Energy Center, which consisted of 120 MW.

Finally, DeWolf returned to the Nolan County area and partnered again with Invenergy to construct the Turkey Track wind farm, which

41. WKN USA, LLC is now BayWa r.e. Wind, LLC. Shortly after construction, WKN sold this project to Enel North America, Inc. *BayWa continues to expand its international operations by entering the US wind power business*, BayWa r.e. Wind, LLC (Aug. 29, 2011), <http://www.baywa-re.us/news-wkn.html#23> (last visited Feb. 5, 2014). *WKN Windkraft Nord sells its first US project to Italy's Enel-Acquisition Marks Entry for Germany's leading Developer*, Renewable Industry.com Press Release (Oct. 19, 2006), http://www.renewable-energy-industry.com/press-releases/press-releases_detail.php?changeLang=en_GB&newsid=2319 (last visited Feb. 5, 2014).

42. *Enel, GE Soar to New Heights at Texas Wind Farm with Tallest Turbine Towers in US, Also Partner on Kansas Wind Project*, Reuters Press Release (Jan. 10, 2008), <http://www.reuters.com/article/2008/01/10/idUS189059+10-Jan-2008+BW20080110> (last visited Feb. 5, 2014).

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was located in the southernmost part of the county.⁴³ This project was completed at the end of 2009 and consisted of 169.5 MW.⁴⁴

3. Payne Mountain

In 2006, William Osborn attended the first annual University of Texas Wind Conference held in Sweetwater. It featured not only the top speakers in the field at the time, but also bus tours of the new wind farms and a barbecue and beer bust in an old airplane hangar at the Double Heart Ranch (which was home to thirty-three turbines⁴⁵ of the Sweetwater Wind Farm).⁴⁶ Osborn was (and still is) a successful Railroad Commission lawyer and owns his own firm in Austin. One of his oil and gas clients wanted to get in the wind business and had asked Osborn to pick a place for a new wind farm. Over a plate of steaming brisket, he told Author Rod Wetsel of his plan to locate a project on Payne Mountain in Mills County, some ninety miles northwest of Austin. His grandmother was from the nearby small town of Evant in Coryell County, and he still knew many of the landowners living there. By bringing wind power to the area, Osborn figured he could give something back to the place his family called home.

In January 2007, Osborn held his first landowner meeting in Mills County over a roaring fire in a hunting lodge on the Pig Foot Ranch.⁴⁷ He would come back again and again to Mills County in the coming

43. The wind farm was named for the Turkey Track Ranch in southern Nolan County. It is located along both sides of Farm-to-Market Road 153. A drive down that road today offers a magnificent view of hundreds of wind turbines in several different wind farms.

44. Wind Tex Energy, *Turkey Track Energy Center*, WIND TEX ENERGY, <http://www.windtexenergy.com/operational-projects/turkey-track-energy-center> (last visited Jan. 28, 2014). Wind Tex Energy also developed the Petronilla Project in Nueces County on the Texas Gulf Coast and the Bor-Lynn Wind Farm in Borden and Lynn Counties northwest of Sweetwater. Wind Tex Energy, *Project in Development*, WIND TEX ENERGY, <http://www.windtexenergy.com/project-in-developme> (last visited Jan. 20, 2014). Construction of both projects began in late 2013. *Id.*

45. These turbines consisted of twenty-nine General Electric 1.5 MW and four Mitsubishi 1 MW towers. Telephone interview with Steve Oatman, current owner of Double Heart Ranch, Nolan County, Texas, in Sweetwater, Texas by Rod Wetsel (Feb. 6, 2014).

46. The owners of the Double Heart Ranch, W.A. and Audrea Oatman, were members of the first landowner group in Sweetwater and signed one of the first wind leases. During the early negotiations, the Oatmans told their attorney, Author Rod Wetsel, "Be as hard on them as you can, just don't kill the deal."

47. In a letter to a leading member of his landowner group on Nov. 1, 2006, Osborn wrote: "It seems to me it would be most efficient if there could be some agreement about group representation. I am determined to treat everybody alike if I can, insofar as royalty percentage and lease terms, so that there are no hard feelings that might arise from perception of preferential treatment. There is the potential for conflict of interest in group representation, but with about 15 affected landowners, they will be hard-pressed to each find different experienced counsel because the field is so new that there are few lawyers in Texas who are well-versed in the subject." Electronic interview with William Osborn in Austin, Texas, by Rod Wetsel (Dec. 11, 2013).

months to hold additional meetings in various places, including the home of one of the landowners and the local fire station in Star, Texas. All of the leases for the project were signed in 2007 and then renewed by the landowners in 2012. Over the years, Osborn maintained close contact and excellent relations with all of his landowners by e-mailing them monthly reports summarizing the wind data collected from two meteorological towers on the project and by being the first developer in Texas to implement a “royalty prepayment program.”⁴⁸ As of the close of 2013 and into the new year, Osborn and his clients hope to make his dream a reality by beginning construction on Payne Mountain.

4. Horse Hollow

Terry Phillips was a “jack of all trades.” At different times in his life, he had been a funeral director, a jeweler, a satellite and office equipment salesman, and finally, a landman. He worked for Hilliard Energy, who was hired by FPL to lease the Horse Hollow Project in Nolan County. As a landman, Phillips was a natural. Hailing from Big Spring, only sixty miles from Sweetwater, and having grown up on a ranch, he fit in well with the people in rural Nolan County. He lived in a local hotel and visited the landowners in their homes, ate lunch and dinner with many of them on a regular basis, and went to their churches. Moreover, he organized and held group meetings with the project landowners and their attorney, (Author) Rod Wetsel, and made daily visits to the lawyer’s office, where in one day they signed over seventeen leases. In less than six months, he almost single-handedly negotiated and obtained leases from all of the landowners in the project. As the last leases were being signed, FPL began construction of the Horse Hollow wind farm, which is now the world’s second largest. Phillips’ “country boy” group model would be emulated and repeated again and again in other areas throughout the wind boom.

5. The Signing Party

The culmination of all successful wind group meetings was the signing party. It was a festive occasion. At that gathering, the negotiations were over and jokes and laughter would replace the more somber mood of earlier meetings. This time, the meal might feature T-bone steaks or fried catfish with cherry cobbler for dessert. Other than visiting and eating, all the landowners had left to do was sign the leases. Best of all, the company landmen brought checks to pay the option or development fees. It was the contractual beginning of a

48. *Id.*

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long and, hopefully, blissful relationship between the landowner and the wind developer.⁴⁹

C. *Ethics, Professional Responsibility and Conflicts of Interest:
Whose Side Are You On?*

Representation of a group in a wind project presents a gauntlet of ethical challenges for the attorney. Among the immediate ethical issues for the attorney are:

- (a) how to represent a large group of people;
- (b) how to effectively communicate with each group member;
- (c) how to protect confidentiality within a large group of people;
- (d) how to allocate fees, and if the wind company reimburses legal fees, how to comply with one's duty of loyalty to the landowner; and
- (e) what happens if some of the clients do not get along or the attorney discovers a conflict.

The rules for answering each of these questions are found in the Disciplinary Rules set out in the Texas Disciplinary Rules of Professional Conduct.⁵⁰

Among the relevant rules to consider are Rule 1.02 (Scope and Objectives of Representation), Rule 1.03 (Communication), Rule 1.04 (Fees), Rule 1.05 (Confidentiality of Information), Rule 1.06 (Conflicts of Interest), and Rule 1.15 (Declining or Terminating Representation). Briefly these rules provide as follows:

- (a) Rule 1.02: "A lawyer shall abide by a client's decision concerning the objectives and general methods of representation."⁵¹
- (b) Rule 1.03: "A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information" and "shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."⁵²
- (c) Rule 1.04: "A lawyer shall not enter into an arrangement for, charge, or collect an illegal fee or unconscionable fee."⁵³

49. Among the most perplexing problems faced by developers at the signing party were obtaining sufficient legal descriptions of the land leased and proper signatures from the landowners. The consequences of not doing so are vividly shown in a recent case involving an oil and gas lease signing party. *See Wade v. XTO Energy, Inc.*, No. 02-12-00007-CV, 2013 Tex. App. LEXIS 676 (Tex. App.—Fort Worth Jan. 24, 2013, no. pet. h.).

50. Tex. Disciplinary Rules Prof'l Conduct, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A-1 (West 2013).

51. Tex. Disciplinary Rules Prof'l Conduct R. 1.02(a)(1).

52. *Id.* R. 1.03.

53. *Id.* R. 1.04(a).

- (d) Rule 1.05: “A lawyer shall not knowingly . . . [r]eveal confidential information of a client to . . . anyone else, other than the client, the client’s representatives, or the members . . . of the lawyer’s law firm.”⁵⁴
- (e) Rule 1.06:
“A lawyer shall not represent a person if the representation of that person involves a substantially related matter in which that person’s interests are materially and directly adverse to the interests of another client of the lawyer or the lawyer’s firm,” but may do so if “the lawyer reasonably believes the representation of each client will not be materially affected and each affected or potentially affected client consents to such representation after full disclosure of the existence, nature, implications, and possible adverse consequences of the common representation and the advantages involved, if any. . . . If multiple representation . . . becomes improper . . . the lawyer shall promptly withdraw”⁵⁵
- (f) Rule 1.08: “A lawyer shall not accept compensation for representing a client from one other than the client unless the client consents, there is no interference with the lawyer’s independence of professional judgment or with the client-lawyer relationship,” and confidential information “is protected.”⁵⁶
- (g) Rule 1.15: “A lawyer shall decline to represent a client or, where representation has commenced, shall withdraw . . . if the representation will result in violation of . . . other applicable rules of professional conduct.”⁵⁷

Successful representation of a landowner group in a wind project and compliance with the relevant disciplinary rules begins at the initial meeting. This meeting allows open discussion with the entire group concerning the scope and objectives of the representation (i.e. what has to be done to obtain the most favorable wind lease terms), the ethical obligations involved (i.e. the advantages and disadvantages of multiple representation), and the fee arrangement (i.e. who will pay and an estimate of how much). It is also the time for the attorney to present each landowner with a separate engagement agreement in which all of the above issues are disclosed in writing. The attorney reviews the agreement with the group as a whole and answers questions. Each landowner must approve and execute the engagement agreement in order to continue as a member of the group.⁵⁸ If fees

54. *Id.* R. 1.05(b)(1)(ii).

55. *Id.* R. 1.06(b)(1), (c)(1)–(2).

56. *Id.* R. 1.08(e).

57. *Id.* R. 1.15(a)(1).

58. Shannon L. Ferrell, *The Technical and Ethical Challenges for Lawyers in Evaluating Wind Energy Development Agreements*, 17 *DRAKE J. AGRIC. L.* 55, 79 (Spring 2012).

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are to be reimbursed or paid by the wind company, the company may also be required to sign an agreement regarding that obligation and stating that the company is not the client of the attorney.⁵⁹

In successive meetings, the attorney must monitor attendance and dissemination of information to prevent any breaches of confidentiality and should carefully discern whether any conflicts of interest have arisen between any members of the group. If violations or conflicts are discovered, they must be thoroughly reviewed and discussed with the group before continuing. Additionally, the entry of any new members into the group should be disclosed.⁶⁰

Finally, with regard to fees once the leases are signed, the attorney is probably best advised to simply bill the client for the agreed fee but defer collection until he or she receives reimbursement from the developer.⁶¹

D. *The Pros and the Cons of Multi-Party Negotiation of Wind Leases: The Good, the Bad, and the Ugly*

1. The Good

On the positive side, multi-party negotiation of wind leases has many advantages for the wind developer and landowner alike. For the developer, it promotes efficiency by allowing the developer to deal with a single law firm (rather than multiple firms) with a much faster negotiating period and at lower cost. The landowner, on the other hand (particularly if he or she owns a small tract of land), gains bargaining power by joining with his or her neighbors at less or no cost (if fees are reimbursed), and benefits from the insight and questions raised by the other members of the group.⁶² Additionally, both sides are able to disseminate information and resolve lease issues faster with more “transparency” and fewer disputes, since the developer is offering and the landowner is receiving the “best deal.”⁶³ Thus, a project is likely to be developed more quickly than it otherwise would be.

59. *Id.* at 79. The letter should also state that the obligation to reimburse or pay fees shall not be conditioned on the landowner signing a lease.

60. *Id.* at 78. In the words of one authority on the subject, the mantra for attorneys is “disclose, disclose, disclose.” *Id.*

61. *Id.* at 79.

62. Added benefits are that the landowner does not have to travel to see the attorney and that he or she is able to enjoy the small town aspect of sharing a meal in an informal atmosphere to discuss his or her lease.

63. The wind group meeting also allows the landowner and developer attorneys to see new places, wildlife and geology (such as historic sites, previously unknown barbecue joints, buffalo herds and Palo Duro Canyon), meet interesting people (one landowner had a hangar full of World War II planes and another was the curator of a museum of the Indian Wars), and hold gatherings in unusual venues (such as a hay barn, church, community center or restored movie theater).

2. The Bad

On the negative side, group wind negotiations require travel by both landowners' attorneys and developers to far-off and out of the way places,⁶⁴ with few or no lodgings in which to spend the night. Both parties must also experience the stress of dealing with multiple questions and demands and the task of resolving prickly issues.⁶⁵ Lastly, the ever present fear that the "deal" will be upset by family feuds or disputes between neighbors persists.⁶⁶

3. The Ugly

On the ugly side of group wind negotiations are: dissenters, "hold outs," and "moles."

a. Dissenters

Sadly to say, not all people love wind energy. From time to time, opponents of wind farms have included disaffected landowners,⁶⁷ medical professionals,⁶⁸ wildlife groups,⁶⁹ the King Ranch,⁷⁰ and even a whole town.⁷¹ But perhaps the greatest dissenter of them all was Dale Rankin.

64. Places such as Nolan, Buffalo Gap, Miami (pronounced "Miami-uh"), Highland, Gail, Lenorah, Star, and Mobeetie, Texas, to name a few.

65. For example, one landowner did not want any wind turbines near a secluded place where he and his wife liked to sit and watch the sun set.

66. For example, a wind lease was once challenged in a will contest as being signed only by the proponents of the will and not by the contestants.

67. Often known locally as "againers," i.e. eccentric folk who are against anything supported by the majority in a rural area.

68. See, e.g., NINA PIERPONT, WIND TURBINE SYSTEM: A REPORT ON A NATURAL EXPERIMENT (2009), for a clinical report that concludes wind turbine generated infrasound and low frequency noise are responsible for a constellation of symptoms including nausea, headaches, drowsiness, and sleep deprivation; see also Nina Pierpont, MD, Ph.D., *The Medically Irresponsible Siting of Wind Turbines is a Global Problem*, SAINT JO (TEXAS) TRIBUNE, June 23, 2006.

69. Wildlife groups often oppose wind farms on behalf of birds and bats. E.g., *W. Watersheds Project v. BLM*, 443 F. App'x 278 (9th Cir. 2011); see also *Animal Welfare Inst. v. Beech Ridge Energy*, 675 F. Supp. 2d 540, 581 (D. Md. 2009).

70. Highly concerned about the proposed location of two large wind farms in the South Texas coastal area, several chapters of the Texas Audubon Society joined the King Ranch in filing suit to prevent the farms from being built. See *Coastal Habitat Alliance v. Patterson*, 601 F. Supp. 2d 868 (W.D. Tex. 2008); see also SMITH ET AL., *supra* note 2, § 6.03; GALBRAITH & PRICE, *supra* note 2, at 158.

71. In 2007, the town of Saint Jo in North Central Texas held a public forum to discuss resistance to the building of the nearby FPL Wolf Ridge wind farm in Cooke County. To thunderous applause and then a standing ovation, speakers at the meeting denounced wind turbines as "un-American," wind developers as "snake oil salesmen," and the wind group attorneys as "Carpetbaggers." Interview with H. Alan Carmichael, Partner, Wetsel & Carmichael, LLP, in Sweetwater, Texas, by Rod Wetsel (Feb. 8, 2014); see also Andy Hogue and Delania Trigg, *Not a Fan: Many Montague Western Cooke County Residents Alarmed About Giant Wind Farm Proposal*, SAINT JO (Texas) Tribune, June 23, 2006; *Should Saint Jo Allow Extra-Territorial City Limits to Become Part of a Wind Farm? Discussion June 26th*, SAINT JO (TEXAS) TRIBUNE,

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In the late 1990s, Rankin built his dream home complete with a horse arena and polo field in the scenic countryside near the town of Buffalo Gap in eastern Taylor County, Texas. Later, in 2005, FPL moved into the area and began construction of its Horse Hollow wind farm. Rankin organized a group of similarly situated neighboring landowners and filed suit against FPL in the District Court of Taylor County for an injunction to stop construction of the wind farm and seeking damages for nuisance.⁷² As a further expression of their rage and frustration, the group also sued their neighbors who had granted leases to FPL as well as the biologists and landmen involved in the project.⁷³ After an emotionally charged trial,⁷⁴ the jury found against the plaintiffs. On appeal, the Texas Court of Appeals in Eastland held that the emotional response of Rankin and his group due to their loss of a scenic view was insufficient to establish a cause of action for nuisance. In short, it found that there is no “sight based” nuisance in Texas.⁷⁵

Although Rankin lost, he was not the last opponent of wind farms. Others have continued to follow in his footsteps.⁷⁶ Wind energy is still not for everyone.

b. “Hold Outs”

In every wind group there is always at least one person who thinks he or she can get more favorable lease terms or concessions (*i.e.* more money) by holding out until the last minute before signing a lease. These “hold outs” often make unreasonable demands and—if they own enough strategically placed land to do so—threaten to block the whole project. To combat such persons, wind companies in recent

June 23, 2006; *What's Being Proposed for Your Backyard?* (advertisement), SAINT JO (TEXAS) TRIBUNE, June 23, 2006; Barbara Green, *Blowing In: Construction Begins on Wind Turbine Project in Cooke County*, TIMES RECORD NEWS, Wichita Falls, Texas, Feb. 3, 2008.

72. Rankin v. FPL Energy, 266 S.W.3d 506 (Tex. App.—Eastland 2008, pet. den.). The plaintiffs claimed that their ruined viewshed and resulting loss of property value were both part of the package of problems caused by turbines in Horse Hollow, including red blinking lights on top of the turbines, potential shadow and flicker effects, and noise. *Id.*; see also Rankin v. FPL Energy, LLC, No. 46138-A (42d Dist. Ct., Taylor County, Tex. 2008).

73. Rankin, 266 S.W.3d at 508. The plaintiffs dismissed their claims against the landowner wind group immediately prior to the start of the trial. *Id.*

74. *Id.* at 511. One plaintiff characterized the presence of the wind farm as “the death of hope.” *Id.*

75. *Id.* at 513.

76. Similar nuisance cases were filed by other plaintiffs regarding wind farms in Cooke and Jack Counties. Both also failed. See O'Dell v. FPL Energy, No. 06-502, (235th Dist. Ct., Cooke County, Tex. 2007); Black v. Gamesa Wind U.S., No. 06-0129 (271st Dist. Ct., Jack County, Tex. 2006). Later, a suit almost identical on its facts to Rankin was filed in Erath County and the Rankin decision was again reaffirmed. See Ladd v. Silver Star I Power Partners, No. 11-11-00188-CV, 2013 Tex. App. LEXIS 6065 (Tex. App.—Eastland 2013, pet. filed).

years have adopted an “all or nothing” approach that requires all landowners to agree to and sign leases by a certain date or the project is cancelled.⁷⁷

c. “Moles”

Due to the fact that large groups of people are difficult to manage and landmen are not bound by the same confidentiality rules as the lawyers, competing wind companies in the same area often would send scouts or “moles” to attend their competition’s meetings. In order to stop the practice, developers and attorneys sometimes used sign-in sheets and gate guards or hired local people to identify any “strangers” in the group. Finding a “mole” was not always easy because, on occasion, the “mole” was a landowner seeking to pit competing companies against each other in order to receive more favorable lease terms.

V. CURRENT STATE OF MULTI-PARTY WIND
NEGOTIATIONS IN TEXAS

Multi-party wind lease negotiations are less frequent today than in the “boom” years, but are still popular with both wind developers and landowners. Typically, the wind group format remains a “win-win situation” for both sides.

By the end of 2013, however, with the expiration of the Federal Production Tax Credit for wind farms and the uncertainty of an extension or future incentives, the slogan for last minute meetings was: “Get on board, the train is leaving the station.” Hopefully, 2014 will bring renewed life to the industry and will see the genesis of new wind groups in yet undeveloped areas of Texas.

VI. CONCLUSION

The arrival of the large-scale wind industry in Texas in the early part of the twenty-first century was reminiscent of the coming of the great railroads and the industrial revolution of the nineteenth century. Like the railroads, the new wind energy technology required great swaths of open land. But whereas the railroads primarily had to deal only with the State of Texas, wind companies had to obtain rights to use the land from hundreds of people. Speed and efficiency of construction in the emerging boom made one-on-one lease negotiation impractical. Thus, the age of multi-party wind lease negotiations was born.

77. An example is the Payne Mountain project in Mills County. Electronic interview with William Osborne in Austin, Texas, by Rod Wetsel (Dec. 11, 2013).