



# WIND POWER

## PROSPECTIVE ISSUES



**BY LISA CHAVARRIA**

ILLUSTRATION BY RYAN DAY



**WITH THE RAPID GROWTH OF THE TEXAS WIND INDUSTRY,** courts and practitioners are certain to see legal questions arise. Although oil and gas practitioners can draw on their experiences from oil and gas law, wind power presents unique questions of law.

Well-defined state policies are crucial to the continued growth of the industry, but with the exception of the Texas Renewable Portfolio Standard, Texas has no law or case law on the subject of wind power and has yet to formulate policies concerning the nature of the estate created by a wind lease.

### Background

The similarities between the beginnings of the oil and gas industry and the wind industry are striking. Like the discovery of oil in the early 1900s, wind farms have changed the Texas landscape as wind turbines have been erected throughout West Texas. The wind industry is also giving rural economies a new and substantial source of revenue.

### Renewable Portfolio Standard

McCamey, the self-proclaimed “Wind Capital of Texas,” is a case study in what wind power can do for a small community. In the 1920s, McCamey became an oil boomtown and reached a population of 10,000 residents. Oil production declined during the 1930s and 1940s, along with the town’s inhabitants. Today, McCamey has a population of 2,000.

In 1999, McCamey was transformed again when Texas enacted legislation requiring increased usage of renewable energy. The Texas Renewables Portfolio Standard (RPS) requires that electric retail suppliers gradually increase the portion of electricity they provide from renewable resources. In August 2005, S.B. 20 amended the Texas RPS to give Texas the second-highest renewable energy standard in the nation.<sup>1</sup> The bill adds 3,000 megawatts (MW) to the previous goal of adding 2,880 MW of new renewable energy by 2009 and extends the deadline to 2015.

The Texas RPS is a minimum-content requirement that grows over time and allows the market to choose which renew-

able energy technologies are the most cost-effective. Eligible technologies include wind, solar, geothermal, wave or tidal energy, biomass and methane gas from landfills, and hydropower. S.B. 20 specifically requires that 500 MW come from non-wind renewable sources.<sup>2</sup>

To add flexibility and reduce the cost of meeting the requirement, tradable renewable energy certificates (REC) are used to track and verify compliance.<sup>3</sup> An REC is a tradable instrument that represents all of the renewable attributes associated with one megawatt hour (MWh) of production from a certified renewable generator.<sup>4</sup> A company’s initial REC requirement is determined by dividing the company’s total retail energy sales in Texas by the total retail sales in Texas of all competitive retailers and multiplying that percentage by the total state REC requirement for that compliance period.<sup>5</sup> The Energy Reliability Council of Texas (ERCOT) is the administrator of the REC trading program.

Electricity retailers who serve competitive markets (utilities and cooperatives) are required to meet their portion of the renewable energy requirement by presenting RECs to the Public Utility Commission (PUC) annually.<sup>6</sup> Participants can meet their REC requirements by generating the required portion of the electricity by renewable energy technology; purchasing capacity using such technology; or purchasing sufficient energy credits to satisfy its requirements.<sup>7</sup> Failure to meet the designated requirement results in an enforcement penalty. To

ensure compliance, the penalties for non-compliance exceed the estimated compliance costs.

Of the renewable sources of energy eligible under the RPS, wind power is the least expensive.<sup>8</sup> As of May 2004, wind power made up approximately 88 percent of the renewable energy facilities in Texas.<sup>9</sup> The RPS has stimulated the renewable energy market in Texas. By 2025, the state will obtain 10 percent of its total power from renewable energy resources.<sup>10</sup>

Given that Texas is ranked second in the nation in wind potential<sup>11</sup> (the Department of Energy estimated that if Texas developed all of its wind potential, it could deliver more than 114 percent of the entire state’s electricity consumption<sup>12</sup>), it is not surprising that Texas is set to meet its 2,880 MW goal before the 2009 deadline.

California, which is ranked 17th in the nation for its wind potential,<sup>13</sup> has set a goal of 20 percent by the year 2019<sup>14</sup> and currently obtains 12 percent of its electricity from renewable energy.<sup>15</sup> In Europe, Germany and Spain depend on wind turbines for upward of 20 percent of electric supplies in certain grids.<sup>16</sup> Texas’ goal of 10 percent by 2015 is a modest one given its renewable resources.

As the windiest part of the state, McCamey became the center of wind development in Texas after the RPS was passed. By December 2001, the King Ranch Wind Farm, the largest in Texas, was generating 279 MW, or enough energy for 100,000 households per year.<sup>17</sup>

By 2001, Texas had enough wind power to run 300,000 homes per year. McCamey accounted for 850 of the 1,100 MW.<sup>18</sup> Landowners in the McCamey area have earned \$3,200 per year per 750-kilowatt turbine.<sup>19</sup> By 2003, the McCamey area had 800 turbines in service with potential for additional growth.<sup>20</sup>

### Production Tax Credit

The future growth of the wind industry in McCamey and other areas hinges on the continuation of the federal wind



energy Production Tax Credit (PTC).<sup>21</sup> The PTC, which originated in the Energy Policy Act of 1992, allows qualified owners of wind power projects to claim a tax credit on their corporate income tax returns.<sup>22</sup> Experts estimate that wind power projects in Texas can deliver power to the grid for about 4.5 cents per KWh.<sup>23</sup> Once the PTC (which is currently worth about 1.9 cents per KWh) is factored in, the cost to deliver wind energy to the power grid is less than 3 cents per KWh. The PTC has been credited for rapid growth in the industry and is widely considered to be an essential part of the success of wind power.<sup>24</sup>

Congress has consistently allowed the PTC to expire, only to renew it, causing boom and bust cycles in the wind industry. In August 2005, as part of a larger energy package, Congress extended the PTC through December 2007. It was the first time that the PTC was extended before it expired.

### Transmission Constraints

Transmission constraints have been an impediment to the efficient development of the wind industry in Texas. The largest concentrations of wind farms are in rural areas, but urban areas consume the most electricity. In the McCamey area, payments to wind generators to curtail output for lack of transmission totaled \$11.5 million between January 2002 and February 2004.<sup>25</sup> (McCamey is upgrading its export capacity to about 1,000 MW.<sup>26</sup>)

S.B. 20 amends portions of the Utility Code to address the transmission constraint problem and gives the PUC the authority to require an electric utility or a transmission and distribution utility to construct or enlarge transmission or transmission-related facilities for the purpose of transporting new renewable energy.

The bill also creates competitive renewable energy zones.<sup>27</sup> Renewable energy zones are areas identified by the PUC, ERCOT, and related organizations as the areas most suitable for the development of renewable energy generating capacity and transmission.<sup>28</sup>

These measures should allow trans-

mission to catch up to, and keep pace with, the needs of the market. Whereas the lead-time for the construction of a wind farm is about one year, the lead-time for the construction of major transmission lines is about five years.

Despite the on-again, off-again nature of the PTC and transmission constraints, the wind industry has been enormously profitable for Texas. According to *The Wall Street Journal*, companies such as American Electric Power Co. and FPL Group Inc. had invested \$1 billion in ranches in West Texas for the development of wind power by 2002.<sup>29</sup> In 2001, wind projects created 2,500 direct jobs with a payroll of \$75 million and \$2.5 million in payments to landowners.<sup>30</sup>

Private landowners are not the only ones profiting from wind leases. According to the General Land Office, the Delaware Mountain project will earn the Permanent School Fund \$3 million dollars over its 25-year lifespan.<sup>31</sup> Wind farms generate local revenue in the form of property and sales taxes and construction and maintenance jobs for counties and school districts in rural areas. In 2002, Upton County received \$3.6 million in tax revenue; Pecos County brought in \$4.7 million.<sup>32</sup>

The projects installed in West Texas during 2001 are projected to create \$13.3 million in tax revenue.<sup>33</sup> Over the last five years, wind capacity in the United States has expanded at an average rate of 28 percent annually. Growth in 2003 was 36 percent, with 1,700 MW added — enough energy to serve 425,000 homes.<sup>34</sup>

### Prospective Legal Issues

#### Wind Ownership

The primary legal instrument used in the creation of a wind farm is a wind lease.<sup>35</sup> An average wind farm spans several hundred acres and is usually comprised of wind leases taken from multiple surface owners. Wind power has created previously unforeseen aspects to surface ownership.

As landowners realize the benefits of wind leases, legal practitioners will be faced with new legal questions: Who owns the wind? Is wind ownership a dis-

tinct right severable from surface ownership? What types of rights and protections should be enjoyed by holders of the wind estate?

In formulating solutions to the legal questions raised by the new industry, no available analogies fit wind and its characteristics. Texas practitioners and their contemporaries in other windy states are forced to combine existing legal concepts and create new ones to make sense of wind ownership.

The concept of wind ownership is difficult to comprehend because one cannot capture or possess the wind to the exclusion of all others. Wind is but the movement of air across property. How can one “possess” or own the movement of air?

Texas subscribes to the unified fee theory of ownership, which holds that a landowner owns from the center of the earth to the sky and all that lies between.<sup>36</sup> With the prevalence of air travel, the common law principle that “ownership of the land extended to the periphery of the universe is no longer valid,”<sup>37</sup> and a landowner’s exclusive dominion over his or her adjacent airspace is usually considered to extend only to the altitude of the owner’s existing and effective reasonable use of the land.<sup>38</sup> The right to use the airspace adjacent to a piece of property resides with the surface owner.

An abundance of wind flowing over one’s property does not automatically make the land more valuable. Nature, technology, and consumer must be brought together to give wind tangible value. As Terry Hogwood points out in his excellent and insightful article, “Against the Wind”:

Strictly speaking, the ownership of wind is a misnomer. Wind in and of itself does not appear to be susceptible of any ownership. It is not like oil and gas in place ... which can be reduced to possession by one or more mineral owners. ... Wind itself is more akin to a wild animal or percolating waters which must first be reduced to possession before they have



value. To reduce wind to “possession” appears to require that it be focused on driving the fins of a wind [turbine] which turn a generator and ultimately generates electricity. Then and only then can wind a) be reduced to possession and b) have value.<sup>39</sup>

For our purposes, “possession” refers to the process by which wind is transformed into electricity in large quantities and delivered to an electric grid for use by consumers.

The analogy of wind to percolating waters and wild animals raises the question of whether the state owns the wind prior to it being reduced to possession. In Texas, an individual does not own a wild animal so long as the animal remains wild and unconfined.<sup>40</sup> Until the animal is captured and confined, ownership of the animal remains with the state.<sup>41</sup>

Under Texas law, absent malice or waste, a surface owner has the right to take all of the percolating water he or she can capture from beneath the land.<sup>42</sup> In contrast to a wild animal, percolating waters are at all times owned by the surface owner, but are classified as a natural resource, thereby allowing its regulation by the Texas Legislature.<sup>43</sup>

If wind were classified as a natural resource, the Legislature would be authorized to pass laws regulating its use. The Legislature could promulgate regulations to ensure the proper and orderly development of wind power and perhaps maximize the amount of energy generated in the windiest parts of our state. Thus far, the state has not designated wind as a natural resource; wind ownership resides with the surface owner at all times.

The right to use the land to establish the necessary equipment to build a wind farm and the right to use the airspace adjacent to that land both reside with the surface estate. Accordingly, it must be concluded that the right to possess the wind belongs to the surface estate. This is the presumption on which wind development in Texas has proceeded. The more difficult — and still unanswered — question is whether wind rights, like

mineral rights, can be severed and conveyed separate from the surface estate.

### *Wind as a Severable Right*

If wind has a separate and distinct value like minerals, are wind rights a severable interest? Is wind ownership another “stick” in a property owner’s bundle of rights? Texas courts have not answered this question yet. As practitioners, we have the opportunity to consider what rule of law would best serve wind developers and land owners. A good starting point is to examine how other jurisdictions have dealt with this issue.

**California** — Of the states involved in wind power development, California has the longest history, having built the country’s first wind farm in the 1980s.<sup>44</sup> California is the only jurisdiction to have produced a case addressing the severability of wind power rights. In *Contra Costa Water Dist. v. Vaquero Farms, Inc.*, the California Court of Appeals held that wind power rights are a distinct and severable right from the fee simple estate in California.<sup>45</sup> *Contra Costa* involved the condemnation of property owned by Vaquero Farms, Inc.

In 1984, Vaquero leased a large portion of the property for wind power development and a wind farm was later built on the property. In 1993, the Contra Costa Water District initiated condemnation proceedings to acquire a fee simple interest in a little over half of all of Vaquero’s property.

Although the water district acquired the fee interest in Vaquero’s property, it severed the wind power rights and wind power leasehold interest and reserved them to Vaquero.<sup>46</sup> Vaquero argued that, as a matter of law, the wind power rights could not be severed from the fee simple estate and that it should instead be compensated for the value of its lost wind power rights.

The California court disagreed, holding that “one may have a right to use windpower rights without owning any interest in the land.”<sup>47</sup> An important strand to the court’s reasoning was that wind power rights are “substantial rights”

capable of being bought and sold in the marketplace.<sup>48</sup> The court noted that even after condemnation, Vaquero could still enjoy its wind power rights to the fullest extent as it would have “an easement for ingress and egress and such other access rights as may be required for the maintenance and development of these wind power rights.”<sup>49</sup>

The court compared wind power rights to mineral development, adopting *Contra Costa*’s briefing statement:

[T]he right to generate electricity from windmills harnessing wind, and the right to sell the power so generated, is no different, either in law or common sense, from the right to pump and sell subsurface oil, or subsurface gas by means of wells and pumps ... the argument that harvesting wind power somehow requires greater usage of the surface than harvesting oil and resources defies com-



*“Court surety service no other agent can match”*

**CIVIL COURT BONDS  
BY PHONE . . .  
BY TOMORROW**

PROBATE ♦ INJUNCTION ♦ DISTRESS  
APPEAL ♦ CURATORS ♦ ATTACHMENT  
SEQUESTRATION ♦ CONSERVATORS  
GARNISHMENT ♦ REPLEVIN  
ALL OTHER STATE and FEDERAL  
CIVIL COURT BONDS

**1.800.274.2663**

**FAX: 1.800.587.4726**

EMAIL: BONDINFO@JURISCO.COM  
WWW.JURISCO.COM



mon sense to anyone who has seen a field of oil derricks.<sup>50</sup>

*Contra Costa* appears to expressly allow the severance of wind rights from the surface estate, but has yet to be cited for this legal proposition.

**South Dakota** — South Dakota has promulgated legislation that defines terms associated with wind power and the process for protecting the free flow of wind across real property:

For purposes of Sections 43-13-17 to 43-13-19, inclusive, the term, wind easement means a right, whether or not stated in the form of a restriction, easement, covenant, or condition, in any deed, will, or other instrument executed by or on behalf of any owner of land or air space for the purposes of ensuring adequate exposure of a wind power system to the winds.<sup>51</sup>

South Dakota also passed legislation concerning the treatment and classifica-

tion of wind easements. Section 43-13-17 states:

Any property owner may grant a wind easement in the same manner and with the same effect as a conveyance of an interest in real property. The easement shall be created in writing and shall be filed, duly recorded, and indexed in the office of the register of deeds of the county in which the easement is granted. Any such easement runs with the land or lands benefited and burdened and terminates upon the conditions stated in the easement, except that the term of any such easement may not exceed fifty years. Any such easement is void if no development of the potential to produce energy from wind power associated with the easement has occurred within five years after the easement began. Any payments associated with the granting or continuance of any such easement shall be made on an annual basis to the owner of record of the real property at the time the payment is made.<sup>52</sup>

South Dakota defined a wind collector system<sup>53</sup> and requires that certain terms and provisions be included in a conveyance of a wind easement.<sup>54</sup> Likewise, Minnesota adopted legislation that defines a “wind easement”<sup>55</sup> and prescribes the method for creation and recordation of the same.<sup>56</sup>

A wind easement usually takes the form of a negative easement in that it generally prohibits a landowner from erecting a structure or engaging in any activity that might obstruct the free flow of wind. It is unclear why South Dakota and Minnesota found it necessary to supply definitions for wind easements since it is hard to imagine a structure that could block the kind of wind used by a wind turbine, which can stand 200 feet high.<sup>57</sup>

The most interesting piece of legislation concerning wind rights in South Dakota is Section 43-13-19, “Severance of Wind Energy Rights Limited.” The section deals with the leasing of wind power rights and expressly prohibits the severance of those rights from the surface

estate for more than 50 years. Section 43-13-19 provides:

No interest in any resource located on a tract of land and associated with the production or potential production of energy from wind power on the tract of land may be severed from the surface estate as defined in Section 45-5A-3<sup>58</sup> 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 wind power has occurred on the land within five years after the lease began. The payment of any such lease shall be on an annual basis.

South Dakota’s approach imposes arbitrary guidelines and restrictions on a private transaction that should be governed by the requirements of the landowner and developer. A statutory imposition of a five-year development deadline for a wind project is unnecessary, as wind leases generally include a development deadline of between two and five years.

The imposition of a 50-year maximum lease term is problematic for a number of reasons and serves no readily apparent purpose. The language in the statute does not specify whether the same lessee is permitted to obtain consecutive 50-year leases for property or if he or she is limited to a one-time, 50-year lease. Limiting a developer to a one-time, 50-year lease would discourage development.

Although the average lifespan of a wind turbine is 25 years, wind development on a specific piece of property can span several decades.<sup>59</sup> As with any project where the largest expenditures are made at the outset, developers are more likely to invest in property that will provide the best opportunity for long-term revenue.

Over time, wind turbines are re-tooled or replaced as necessary, but other expenses associated with the development of a wind farm are one-time investments (finding and acquiring the optimum location for a wind farm, constructing the electrical infrastructure, and obtaining adequate transmission capacity). Those investments would be lost to a developer who is limited to a one-time,

## TRADEMARK & COPYRIGHT SEARCHES

**TRADEMARK** - Supply word and/or design plus goods or services.

### SEARCH FEES:

COMBINED SEARCH - \$315  
(U.S., State, Expanded Common Law and Internet)  
TRADEMARK OFFICE - \$135  
STATE TRADEMARK - \$140  
EXPANDED COMMON LAW - \$165  
DESIGNS - \$210 per International class  
COPYRIGHT - \$180  
PATENT SEARCH - \$450 (minimum)

### INTERNATIONAL SEARCHING

#### DOCUMENT PREPARATION

(for attorneys only - applications, Section 8 & 15, Assignments, renewals.)

**RESEARCH**-(SEC - 10K’s, ICC, FCC, COURT RECORDS, CONGRESS.)

**APPROVED** - Our services meet standards set for us by a D.C. Court of Appeals Committee.

*Over 100 years total staff experience—not connected with the Federal Government.*

**GOVERNMENT LIAISON SERVICES, INC.**

200 North Glebe Rd., Suite 321  
Arlington, VA 22203  
Phone: (703) 524-8200  
FAX: (703) 525-8451

*Major credit cards accepted.*

**TOLL FREE: 1-800-642-6564**

**WWW.TRADEMARKINFO.COM**

Since 1957



50-year lease. The limitation may have been created to protect landowners, but it discourages wind development on property. A landowner should be allowed to arrange for payment on whatever terms are most desirable and not be confined to an annual basis structure.

A review of the varying approaches to wind rights by California and South Dakota provides practitioners with good ideas and potential pitfalls. Of the two approaches, California's treatment of wind rights as a severable interest provides the landowner and the wind developer with the most flexibility. Treatment of wind as a separate interest that can be freely conveyed provides a landowner with a readily marketable commodity. Furthermore, if wind rights can be severed from the surface estate, the development of wind power will be encouraged. Yet providing property owners with the ability to sever the wind rights is not enough. Wind rights, like mineral rights, are useless unless the holder is allowed to use as much of the surface as is reasonably necessary to develop wind power.

### *Suggested Rights and Powers for the Wind Estate*

If we accept that wind rights can be severed from the surface estate and conveyed or reserved, then we should also consider which rights the wind estate must carry with it in order to be fully developed. Following the reasoning of *Contra Costa*, holders must have rights and privileges similar to those held by mineral estate holders in order to develop the wind estate.

The mineral estate is the dominant estate and carries with it a bundle of interests that may be separated, conveyed, or reserved on any terms by the owner.<sup>60</sup> A severed mineral estate carries with it five essential attributes: (1) the right to develop; (2) the right to lease; (3) the right to receive royalty payments; (4) the right to receive bonus payments; and (5) the right to receive delay rentals.<sup>61</sup>

Arguably, the mineral estate's right to develop is the most important attribute because it allows the holder to use so

much of the surface as may be reasonably necessary to enjoy the estate and enforce the rights of its owner.<sup>62</sup> Without this right, a grant or reservation of minerals would be worthless because the grantee could not enter upon the land to develop the minerals.<sup>63</sup> The implied grant of reasonable use extends to the right to use water from the leased premises in such amounts as may be reasonably necessary to carry out oil and gas operations and the right to lay pipe to transport gas from a well located on the lessor's property or on property included in a production unit with which the lessor's property has been unitized.

The rights and privileges held by the mineral estate are extensive and include all things necessary to maximize the production of oil and gas, regardless of the cost to the surface estate. The justification for this broad grant is that it benefits the public at large which has a common

interest in policies that protect and foster the development of energy sources.<sup>64</sup> Since wind power, oil, and gas have the same ultimate function, each should have the same protections.

In the event Texas allows the severance of wind rights from the surface estate, a wind grant would be useless without an appurtenant right to use so much of the surface estate as necessary to develop and enjoy the wind rights. As the *Contra Costa* court noted, the development of wind power uses no more of the surface estate than oil and gas development.

Furthermore, the development of wind power, like mineral development, benefits the public as a whole by providing it with an energy source. In the event that wind is classified as a natural resource, Texas would have an obligation to maximize its development and formulate rules of law that are consistent with the public policy of developing all of the



## TCS-LibertyLegal.com

Producing Quality Corporate Kits & Supplies For Over 25 Years



Easy Online Ordering

Same Day Service\*

Accurate

Reliable

We also offer:  
Will Supplies  
Notary Supplies  
Tabbies  
Stamps



Contact Our friendly sales staff at:  
Ph 713-946-0141 or 800-392-3720  
Fx 713-946-2789 or 800-441-7134  
Email: sales@tcs-libertylegal.com

\*orders received by 1pm cst

PO Box 12695, Houston, TX 77217 or 602 State Street, So Houston, TX 77587



state's natural resources,<sup>65</sup> particularly those which provide its citizens with a valuable source of energy. Why couldn't the wind estate be granted the rights and benefits enjoyed by the mineral estate?

An issue that needs resolution is the competing rights of the wind and mineral estate. Between the two, which would be the dominant estate? Should there be a dominant estate, or should there be a balance that encourages development of the estate that will produce the greatest amount of energy? Under Texas law, an oil and gas operator, as the dominant estate holder, can legally block a wind project that could generate a substantial amount of electricity. Is this the best use of our state's resources?

These issues must be addressed in the event Texas allows for a wind estate. As an early and substantial producer of oil and gas, Texas became synonymous with energy. Texas is again a pioneer in an emerging energy market as wind power gives our state the opportunity to evolve into a new kind of energy powerhouse.

### Notes

1. The previous goal required the state to obtain 3 percent of the state's total electricity by 2009. 16 Texas Administrative Code §25.173(h)(1).
2. *Id.*
3. Ryan Wisner and Ole Langness, Lawrence Berkeley National Laboratory, "The Renewables Portfolio Standard in Texas: An Early Assessment," November 13, 2001, at 1.
4. ERCOT Protocols Section 14: Renewable Energy Credit Trading Program.
5. 16 Texas Administrative Code §25.173(h)(2)(A).
6. *Wisner supra* note 5 at 1.
7. Ernest E. Smith, *Wind Energy Leases: Prospects and Issues* (Advanced Real Estate Law Course, State Bar of Texas 2002), p.19.
8. Brad Heavner, Robert Pregulman and Travis Madsen, WashPIRG Foundation, *Energy for Washington's Economy, Economic Development from Energy Efficient and Wind Power in Washington*, June 2003, at 29.
9. Renewable Energy Development in Texas, Senate Committee on Business and Commerce, May 11, 2004 at 7.
10. Senate Comm. on Business & Commerce, Bill Analysis, Tex. S.B. 20, 79th Leg., 1st C.S. (2005).
11. *Wind Energy: An Untapped Resource* (visited on July 22, 2004, updated on January 13, 2004) [http://www.awea.org/pubs/factsheets/top20/pdf\('Untapped Resource'\)](http://www.awea.org/pubs/factsheets/top20/pdf('Untapped Resource')).
12. Department of Energy; Texas Wind Resources

- (visited on Aug. 11, 2004) [www.eere.energy.gov/state\\_energy/tech\\_wind.cfm?state=tx](http://www.eere.energy.gov/state_energy/tech_wind.cfm?state=tx).
13. *Untapped Resource*, *supra* note 10.
14. *Renewables Portfolio Standard Progresses in States and Congress* (visited on August 12, 2004) <http://www.awea.org/pubs/factsheets/RPSfactsheet> StateRPSAugust2003.pdf.
15. *Id.*
16. S. Michael S. Gray, *Can State Regulation of Renewable Electricity Achieve Discriminatory Effects on Interstate Trade Without Triggering the Dormant Commerce Clause?* 44 South Tex. L. Rev. 783, 798 (Summer 2003).
17. Completed projects page [www.cielowindpower.com](http://www.cielowindpower.com)
18. Thaddeus Herrick, *Oil Patch Turns to Turbines, As Ranchers Sell Wind Rights; A New Type of Prospector*, The Wall Street Journal, September 23, 2002.
19. Doreen Leggett, *Westerly Wind What California, Texas and Midwest Can Teach the Cape*, The Cape Codder, June 27, 2003.
20. *Id.*
21. 45 U.S.C.A. §§38, 45.
22. Texas SEED Coalition and Public Citizen, *Renewable Resources: The New Texas Energy Powerhouse*, September 2002, at 19 (*hereinafter* "New Texas Energy") <http://www.seedcoalition.org>.
23. *Wisner supra* note 5 at 4.
24. Christine Real de Azua, *Texas — Leading the US Wind Power Surge*, Renewable Energy World January/February 2001.
25. Renewable Energy Development in Texas, Senate Committee on Business and Commerce May 11, 2004, p. 18, [http://www.puc.state.tx.us/about/commissioners/parsley/present/epp/sbc\\_renew051104.pdf](http://www.puc.state.tx.us/about/commissioners/parsley/present/epp/sbc_renew051104.pdf)
26. *Id.* at p. 19.
27. Tex. S.B. 20, 79th Leg., 1st C.S. (2005).
28. *Id.*
29. Herrick, *supra* note 21; Heavner, *supra* note 11 at 29; *New Texas Energy*, *supra* note 25 at 19.
30. Heavner, *supra* note 11 at 29.
31. Jerry Patterson & Adan Martinez, Texas General Land Office Presentation at the Wind Workshop for State Lands, National Wind Technology Center, Boulder, Colorado (April 29, 2003).
32. Leslie Kaas Pollock and Troy Gagliano, "Tax and Landowner Revenue from Wind Owners," National Conference of State Legislatures, January 2004 Briefing Paper, Vol. 12, No. 5.
33. Heavner, *supra* note 11 at 29.
34. *Boom: 2003 Close to Best Year Ever for New Wind Installations Bust: Expiration of Key Incentive Lowers Hopes for 2004*, AWEA Press Release January 22, 2004, [www.awea.org/news/index/html](http://www.awea.org/news/index/html).
35. For an excellent discussion of issues concerning the drafting of a wind lease, including a form lease, see "Emerging Issues in Texas Wind Energy Law: Leases, Tax Abatements, and Ownership of Wind Rights," by Roderick E. Wetsel, H. Alan

- Carmichael, and Lisa Chavarria, Oil, Gas and Energy Resources Section Report, Vol 28, Number 3, March 2004.
36. *Broughton v. Humble Oil & Refining Co.* 105 S.W.2d 480, (Tex.Civ.App. — El Paso, 1937, writ ref'd).
37. *United States v. Causby* 328 U.S. 256, 260-61, 66 S.Ct. 1062, 90 L.Ed.1206 (1946).
38. *Shronk v. Gilliam*, 380 S.W.2d 743 (Tex. Civ.App. — Waco 1964, no writ); Hotchkiss, Aviation Law, Sec. 22; American Law Inst., Restatement, torts, secs. 159, 195; *Causby*, *supra* note 40.
39. Terry E. Hogwood, "Against the Wind" Oil, Gas and Energy Resources Law Section Report Vol. 26, Number 2 December 2001, page 6.
40. *Jones v. State*, 119 Tex.Crim. 126, 45 S.W.2d 612, 613-14 (1931).
41. *State v. Bartree*, 894 S.W.2d 34, 41 (Tex.App.-San Antonio 1994, no pet.).
42. *Sipriano v. Great Spring Water of America, Inc.*, 1 S.W.3d 75 (Tex.1999).
43. Tex. Const., art. XVI § 59.
44. See *Wind Energy Teacher's Guide* [www.awea.org](http://www.awea.org).
45. 58 Cal.App. 4th 883, 68 Cal Rptr. 2d 272 (1997).
46. The Water District did acquire the wind power rights on portions of the property where it was determined that Vaquero's use of the wind power rights would be inconsistent with the Water District's use of the property. *Contra Costa supra* note 48 at 895.
47. *Id.* at 893.
48. *Id.* at 893-94.
49. *Id.* at 894.
50. *Id.* at 895.
51. S.D. Codified Laws §43-13-16.
52. S.D. Codified Laws §43-13-17 Creating and granting wind easements — Filing written agreement — Maximum term-Development of energy potential required.
53. S.D. Codified Laws §49-32-3.2 Wind Collector System: As used in §§49-32-3.1 and 49-32-3.2, the term, wind collector system, means all power lines and associated equipment located between the first substation and the wind turbines that collect electricity and transmit it from the wind turbines to the first substation.
54. S.D. Codified Laws §43-13-18. Required terms and provisions of wind easements. Any deed, will, or other instrument that creates a wind easement shall include: (1) A description of the real property subject to the easement and a description of the real property benefiting from the wind easement; (2) A description of the vertical and horizontal angles, expressed in degrees, and distances from the site of the wind power system in which an obstruction to the wind is prohibited or limited; (3) Any terms or conditions under which the easement is granted or may be terminated; (4) Any provisions for compensation of the owner of the real property benefiting from the easement in the event



of interference with the enjoyment of the easement, or compensation of the owner of the real property subject to the easement for maintaining the easement; and (5) Any other provisions necessary or desirable to execute the instrument.

55. Minn. Stat. §500.30, Subd. 1a. *Wind easement.* "Wind easement" means a right, whether or not stated in the form of a restriction, easement, covenant, or condition, in any deed, will, or other instrument executed by or on behalf of any owner of land or air space for the purpose of ensuring adequate exposure of a wind power system to the winds.

56. Minn. Stat. §500.30, Subd.2 *Like any conveyance.* Any property owner may grant a solar or wind easement in the same manner and with the same effect as a conveyance of an interest in real property. The easements shall be created in writing and shall be filed, duly recorded, and indexed in the office of the recorder of the county in which the easement is granted. No duly recorded easement shall be unenforceable on account of lack of privity of estate or privity of contract; such easements shall run with the land or lands benefited and burdened and shall constitute a perpetual easement, except that an easement may terminate upon the conditions stated therein or

pursuant to the provisions of section 500.20. Subd. 3. *Required contents.* Any deed, will, or other instrument that creates a solar or wind easement shall include, but the contents are not limited to: (a) a description of the real property subject to the easement and a description of the real property benefiting from the solar or wind easement; and (b) for solar easements, a description of the vertical and horizontal angles, expressed in degrees and measured from the site of the solar energy system, at which the solar easement extends over the real property subject to the easement, or any other description which defines the three dimensional space, or the place and times of day in which an obstruction to direct sunlight is prohibited or limited; (c) a description of the vertical and horizontal angles, expressed in degrees, and distances from the site of the wind power system in which an obstruction to the winds is prohibited or limited;

57. Ernest E. Smith, "Wind Energy Lease: Prospects and Issues," (2002 Advanced Real Estate Law Course) July 12, 2002.

58. S.D. Codified Laws § 45-5A-3 (6) defines the surface estate as "an estate in or ownership of the surface of a particular tract of land."

59. As noted above, the first wind farms in the

United States are located in California just outside of Palm Springs and have been there since the 1980s.

60. *Elick v. Champlin Petroleum Co.*, 697 S.W.2d 1, 3-4 (Tex.App. — Houston [14th Dist.] writ ref'd n.r.e.).

61. *Altman v. Blake*, 712 S.W.2d 117, 118 (Tex.1986).

62. *Sun Oil v. Whitaker*, 483 S.W.3d 808, 811 (Tex.1972).

63. *Harris v. Currie*, 142 Tex. 93, 99, 176 S.W.2d 302, 305 (1943).

64. *Railroad Commission v. Manziel*, 361 S.W.2d 560 (Tex.1962).

65. Tex. Const. art. XVI §59.

**LISA CHAVARRIA**

is an associate with McElroy, Sullivan & Miller, L.L.P. in Austin. Her practice areas include commercial litigation, wind power, renewable energy, land use, natural resources, and administrative law.

*This article is adapted from a presentation prepared for TexasBarCLE's 22nd annual Advanced Oil, Gas, and Energy Resources Law Course. To view other presentations from the course, which was co-sponsored by the Oil, Gas, and Energy Resources Law Section, visit [www.texasbarcle.com](http://www.texasbarcle.com).*



# TASA: The Best Source For Your Next Expert

Since 1961, TASA has been the leading source for Testifying and Consulting Experts for Accident, Computer, Construction, Insurance, Intellectual Property, Machinery, Medical Device, Oil and Gas cases – and much more.

- More than 10,000 categories, including 900 Medical specialties from TASAmEd
- Local and national experts who match your criteria
- Prompt customized referrals, resumes, and your initial phone interviews with experts



**800-523-2319**

**[experts@tasanet.com](mailto:experts@tasanet.com) • [www.tasanet.com](http://www.tasanet.com)**

Amarillo 806-372-7945 • Austin 512-473-2406  
Dallas/Fort Worth 214-742-8178 • El Paso 915-533-9934  
Houston 713-227-5056 • San Antonio 210-225-2462

**MORE EXPERTS • MORE OPTIONS • MORE PERSONAL SERVICE**