

THE SEVERANCE OF WIND RIGHTS IN TEXAS¹

**By: Lisa Chavarria
Stahl, Bernal & Davies, LLP
7320 N. MoPac, Suite 211
Austin, Texas 78731
lisa@sbaustinlaw.com
(512) 652-2947**

Although it is well established under Texas law that the fee simple owner of property can sever the surface from the minerals thereby creating two separate estates,² Texas law is silent on whether the right to develop (or not develop) the wind that flows across property may be severed from the surface estate. With the widespread development of utility scale wind energy projects wind has proven that it, like minerals, can have a distinct value. But do wind rights retain their classification as property if “severed” from the surface? Can you ever really sever wind rights from the surface or are rights to the wind just another type of interest in the surface? This paper will explore wind as a property right and discuss whether wind is capable of severance from the surface estate. As a part of that discussion the risks of severing wind rights will be identified and suggestions regarding the type of duties and rights that should be included in a wind deed are made. Finally, as an alternative to a complete severance of wind rights, a conveyance of a royalty interest in the wind estate is explored.

Wind as a Property Right

A preliminary question is whether wind is property. As we all know, property can include concepts and methods not just objects that can be physically possessed. For example, through patent law, procedures and methods can be property rights, capable of purchase and sale in the marketplace. In this author’s view something is classified as property once the marketplace assigns value to that thing or concept and the law in turn endorses that classification. In *Theories of Legislation*, Jeremy Bentham wrote, “Property is nothing but a basis of expectation; the expectation of deriving certain advantages from a thing which we are said to possess, in consequence of the relation to which we stand towards it.”³ The advent of utility scale wind turbines and the need for new energy sources has given individuals who own windy property the expectation of profit.

That the surface owner holds the right to the wind that flows across it is supported by Texas common law - *Cujus est solum, ejus est usque ad coelum et ad inferos* – to whomsoever the soil belongs, it is theirs up to the sky and down to the depths.⁴ Although at common law Texas subscribed to this unified theory of property ownership, it has since been qualified to

¹ An earlier version of this paper first appeared as Lisa Chavarria, *Undertaking the Severance of Wind Rights*, Oil Gas & Energy Resources Law Section Report, Vol. 32 No.2 December 2007. What follows is substantially the same paper with additions to the “Classifying Wind Rights” and “The Wind Deed” sections.

² *Bagby v. Bredthauer*, 627 S.W.2d 190, 194 (Tex.App.—Austin 1981, no writ).

³ BENTHAM, *supra* note 1 at 111.

⁴ See 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 18 (William Draper Lewis ed., 1902) (discussing the *cujus est solum* doctrine).

recognize a landowner's use of his airspace may not interfere with air travel.⁵ Thus, the right to use the land to establish the necessary equipment to build a wind farm and the right to use the airspace appurtenant to land both reside with the surface owner. Accordingly, it must be concluded that the owner of the surface estate holds the right to develop (or not develop) the wind that flows across the property.

The wind lease is widely used as the legal instrument through which a landowner leases to a wind company, for a defined number of years, the right to develop a wind project. Although the wind industry and wind leases in Texas are relatively new, the Texas wind lease has quickly become standardized in several respects. The nature of the interest conveyed is a leasehold interest, the language describing the rights reserved by the wind company and a landowner's right to receive the greater of minimum rent and a royalty payment are all prevailing standards in Texas wind leases.

As of the date of this paper, there is no Texas litigation challenging the legal validity of the rights conveyed by a wind lease. Although there will certainly be disputes over the interpretation of certain lease clauses, that a Texas court would not uphold a wind lease as a valid conveyance of the rights contained therein is hard to imagine. The wind lease provides a landowner, who may be without the necessary capital and expertise to develop a wind project, with the ability to convey a leasehold interest to the party who can. In this respect, a wind lease is not conceptually different from an agricultural lease given by one who owns fertile property but who is not a capable farmer. Significantly, an invalidation of wind leases would put the legal rights to billions of dollars of investment in jeopardy and most certainly put an end to any future investment in the Texas wind industry. In short, it is unlikely Texas courts would not endorse the ability of a landowner to grant, and a wind company to lease, the surface estate for the development of a wind project. Hence the marketplace has assigned value to wind rights and it is unlikely the law will not uphold a surface owner's right to convey a leasehold interest in wind rights.

An analysis of wind rights should not be limited to a discussion of wind's value upon conversion into electricity. In a previous paper, I limited the discussion of severing wind rights to how one comes to "possess" the wind.⁶ Such an analysis ignores the possibility that a surface owner may place greater value on *not* converting wind into electricity and may elect to forego developing a wind project on his property. A surface owner may also place great value on his neighbor not building a wind project on his property and seek to purchase his neighbor's wind rights or airspace. The concept of imposing limitations or affirmative obligations designed to preserve the natural character of property is not new and is already embodied by the Texas

⁵ *United States v. Causby*, 328 U.S. 256, 66 S.Ct. 1062, 90 L.Ed. 1206. See also, *Schronk v. Gilliam* 380 SW2d 743, 744 (Tex. Civ.App –Waco 1964, no writ), citing Hotchkiss, Aviation Law, Sec. 22; American Law Inst., RESTATEMENT, TORTS, SECS. 159, 194; *United States v. Causby*, 328 U.S. 256, 66 S.Ct. 1062, 90 L.Ed. 1206; 2 C.J.S. Aerial Navigation § 5, p. 903; 8 Am.Jur.2d Sec. 5, p. 621. See generally, 99 A.L.R. 176 and supp.; 3 JOURNAL AIR LAW, 329, 531; *Wherry & Condon*, 6 Air Law Rev. 113; Anderson, Airspace Trespass, 27 Journal Air Law 341 (1960); Harper, Torts, Sec. 37, p. 74; Prosser, Torts (1955) Sec. 13, p. 60; Harper & James, Torts, Sec. 1.15; 78 Pa.L.Rev. 902; 6 Cornell L. Q. 271; Calkins, Landowner and Aircraft, 25 Journal Air Law 373 (1958).

⁶ See : Lisa Chavarria, *Wind Power: Prospective Issues*, 68 TEX. B.J. 832 (2005) (discussing the possession of wind as the process by which wind is transformed into electricity in large quantities and delivered to an electric grid for use by consumers).

Uniform Conservation Easement Act.⁷ The Act allows a governmental or charitable body to create easements to preserve scenic views or the historical aspects of property.⁸ One can easily envision a transaction wherein a landowner purchases his neighbor's wind rights or imposes a negative easement prohibiting any development which interferes with his view of the surrounding landscape or changes the natural character of the property.

Allowing a single person or entity to purchase wind rights for the sole purpose of prohibiting the generation of electricity raises policy questions. Wind is an energy source to be used by consumers along with gas, coal, hydropower and nuclear energy. As such, use of wind to generate electricity benefits the public as a whole. It is, therefore, arguably in our state's best interest to encourage the maximum use of natural resources rather than enable their control by a few. If, however, wind generated electricity remains a profitable venture market forces will encourage the development of a wind project without the need for state regulation. There are several issues yet to be explored regarding development versus non-development and a balance between preserving open spaces and maximizing the state's wind resources must be struck. What is clear is developed and undeveloped, wind rights and airspace have value and one need not convert wind into electricity in order to obtain a benefit from that ownership.

Classifying Wind Rights

If we accept wind is a property right held by a surface owner we must consider whether wind loses that classification if it is "severed" from the surface. For purposes of this paper, "severing wind rights" refers to conveying an interest to the surface of property to an individual that does not own the fee simple interest in the surface estate. The interest conveyed is limited to using the surface for the specific purpose of developing the wind rights. In other words, although the term "severance" suggests a separation of two interests, a wind rights holder does not own the wind rights separate from the surface; he or she acquires a specific right to use the surface and the wind that flows across that surface.

As noted throughout this paper, there are no cases or statutes specifically validating a wind estate, however, analogies can be drawn to other areas of the law. Just as the owner of the minerals retains the right to use so much of the surface as is reasonably necessary to enjoy that estate⁹ the holder of wind rights would retain the right to use the surface to develop a wind project. California, which has a more mature wind industry, has already seen one case wherein the court upheld the severance of surface ownership from wind rights.¹⁰ The *Contra Costa* case involved the condemnation of property owned by Vaquero Farms, Inc. ("Vaquero"). In 1984, Vaquero leased a large portion of the property for wind power development and a wind farm was

⁷ TEX.NAT.RES.CODE ANN. §183.001 *et seq.*

⁸ Specifically a statutory easement may be created to:

- (a) retain or protect natural, scenic, or open-space aspects of real property;
- (b) ensure the availability of real property for recreational, educational, or open-space use;
- (c) protect natural resources;
- (d) maintain or enhance air and water quality; and
- (e) preserve the historical, architectural, archaeological, or cultural aspects of real property.

TEX.NAT.RES.CODE ANN. §183.001(1).

⁹ *Sun Oil v. Whitaker*, 483 S.W.3d 808, 811 (Tex.1972).

¹⁰ See *Contra Costa Water Dist. v. Vaquero Farms, Inc.*, 68 Cal. Rptr. 2d 272.

later built on the property. In 1993 the Contra Costa Water District (the “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. 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 with Vaquero holding that “one may have a right to use windpower rights without owning any interest in the land.”¹¹ 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.¹² Significantly, 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 windpower rights.”¹³ The *Contra Costa* opinion appears to expressly endorse the severance of wind rights from the surface estate.

Case law discussing the sale of airspace is instructive in an analysis of law dealing with the prohibition of wind development on neighboring lands. As urban areas expand, open spaces become a scarce commodity and property law has evolved to treat airspace as yet another property right that may be sold or conveyed to another. For example, in New York airspace appurtenant to property is already treated as a distinct right.¹⁴ Likewise, Texas law has seen litigation involving the purchase and sale of airspace for use by aircraft or to preserve a view.¹⁵ Although these cases are useful in considering the value of airspace, the types of uses contemplated do not involve any surface use and are therefore more analogous to a prohibition on wind development.

Importantly, conveyance of wind rights to individuals or entities who do not own the surface estate has become a common undertaking by Texas landowners.¹⁶ Consequently, in Texas we have the first part of the property equation: the marketplace has assigned value to severed wind rights. We do not, however, have the second part of the equation - the endorsement of the law and with it assurances that a severance will be upheld.

Sever With Caution

Because Texas presently has no case law or statute¹⁷ which can provide guidance on the severance of wind rights, anyone who undertakes a severance does so with no assurances that the

¹¹ *Id.* at 893.

¹² *Id.* at 893-94.

¹³ *Id.* at 894.

¹⁴ See FRANK SCHNIDMAN & CAMERON ROBERTS, MUNICIPAL AIR RIGHTS: NEW YORK CITY’S PROPOSAL TO SELL AIR RIGHTS OVER PUBLIC BUILDINGS AND PUBLIC SPACES, 15 Urb.Law 347 (1983) (Concluding that in New York rights in airspace may be severed from ownership in the surface.)

¹⁵ *City of Austin v. Teague*, 570 S.W.2d 389 (Tex. 1978).

¹⁶ This statement is based on the author’s own experience in this field and conversations with other lawyers who have encountered deeds severing wind rights from surface rights.

¹⁷ Several other states including North Dakota, South Dakota and Minnesota have enacted legislation limiting the severance of wind rights to a certain number of years. Lisa Chavarria, *Windpower: Prospective Issues*, Texas Bar Journal, Vol. 68, No. 9 (October 2005).

severance will be upheld if challenged. Given this uncertainty, wind companies and their lenders generally prefer that landowners not separate wind rights from surface rights. Therefore, at the outset of any discussion regarding the severance of wind rights a landowner considering severance should be aware of the risks involved in severing wind rights. A cursory understanding of the financing structure used by most wind developments is necessary to appreciate the potential risks involved with a severance.

The typical approach to developing a project is for Wind Company X to secure financing for the construction of its project. Prior to loaning any funds, a lender engages in due diligence that includes ensuring Wind Company X has secured all the real estate rights necessary to develop the project. A primary concern is the possibility that a party who conveyed their wind rights (or their heirs) would later challenge the conveyance and seek payment of royalties or otherwise challenge the validity of the wind lease. In either circumstance both a lender and wind company are understandably concerned about the potential complications a severance creates. A solution some lenders have found acceptable is to require that both the surface owner and the wind rights holder sign the wind lease.¹⁸ Execution by both parties of the wind lease creates a contractual arrangement regarding how payments under the wind lease will be allocated¹⁹ and serves as an acknowledgement by all parties of their respective rights and duties. While the execution of a wind lease by the surface and wind rights owner settles who should receive payments as to that lease, if the wind deed is not correctly drafted once the lease expires, complications created by an incorrectly drafted wind deed will resurface.

The Wind Deed

If, after acknowledging the risks, a fee simple owner still wishes to sever wind rights the author suggests a warranty deed with a conveyance or reservation of wind rights be used to achieve the grant. Several practitioners throughout the state have asked for a paragraph that can be dropped into a warranty deed in order to achieve a wind severance. Since Texas law presently provides no guidance on how to properly achieve a severance, a comprehensive approach that goes beyond a paragraph is the better course of action. In order to be useful a wind deed must ensure the wind estate carries with it all the rights necessary to ensure its full enjoyment. The deed should, at a minimum, do two three things. First, the deed should provide a broad grant of rights that ensures the holder has the exclusive right to develop the wind. This grant of rights should provide a description of the type of rights conveyed and those rights should match the types of permitted uses typically found in a wind lease. Second, the deed should describe the types of payments the holder of the wind rights is entitled to and the payments, if any, the surface owner is entitled to. Third, the deed should specify who has the right to execute a wind lease. An additional suggestion is to provide that the wind estate is the dominant estate. When and if severed wind rights become common place, a shortened version of the recommendations made here will evolve. Until that time, the cautious approach of a comprehensive instrument is recommended.

¹⁸ *Brent Stahl*, *Wind Development: Key Title and Survey Issues 2007* The University of Texas School of Law Wind Energy Institute p. 7.

¹⁹ *Id.*

A Broad Grant Accompanied by a Detailed Description of the Rights Conveyed

In achieving the first objective, the author suggests a conveyance of the surface estate that includes all of the right, title, and interest to the surface estate necessary to use all of the wind resources on, over, above, adjacent to and along the property including, without limitation, the exclusive and complete right, title, interest and privilege to use any or all of the property for wind energy purposes, including converting wind energy into electrical energy, collecting and transmitting electrical energy, and all related activities. In addition to the broad grant, a wind deed should include a detailed description of the type of surface uses contemplated by a wind development. The detailed description of rights granted could include:

- The exclusive right to use, convert, maintain and capture the flow of wind currents and wind resources over and across the property.
- An exclusive easement and right to determine the feasibility of wind energy conversion and power generation in connection with the wind energy projects, including, but not limited to, conducting environmental studies, soil tests and studies of wind speed, wind direction and collecting other meteorological data.
- An exclusive easement and right to develop, construct, install, replace, repair, relocate, remove, maintain, operate and use utility scale wind turbines, underground and above-ground electrical transmission and communications lines related to the operation of turbines, electric transformers, telecommunications equipment, roads, meteorological towers and other wind measurement equipment, control buildings, maintenance yards, and related facilities and equipment necessary and/or convenient for the operation and maintenance of one or more wind energy projects.
- A non-obstruct easement that prohibits the surface owner from placing improvements on the property or adjacent property that may interfere with the free flow of wind across the property or adjacent properties.
- A non-exclusive easement over and across the property for the passage, intrusion or impact of any audio, visual, view, light, flicker, noise, vibration, electromagnetic, electrical, and radio frequency.
- An exclusive easement to permit rotors of a turbine located on adjacent properties to overhang onto the property.

This detailed description is by no means exhaustive and is not intended to limit the broad grant of wind rights and accompanying surface use but is intended to put the surface owner on notice of the type of surface uses involved in the development of a wind project. The purpose of the detailed description is twofold. First, it would aid in a challenge to the validity of the conveyance as it would be difficult for the grantor who gave an unambiguous grant to engage in the specific surface uses contemplated by a wind project to later claim the severance went beyond the scope of the rights conveyed. Second, the detailed description would provide the surface owner with an opportunity to except out certain types of surface uses associated with a

wind project in order to minimize the disruption of his own uses. For example, the surface owner may request that a substation²⁰ not be placed on the property or that any overhead transmission lines be located along the perimeter of the property. The items that a surface owner specifically excludes from the deed could render the grant of wind rights useless, therefore special attention should be paid to any specific items withheld from the grant.

Allocation of Payments

A wind deed should also discuss which payments will be enjoyed by the parties in the event a wind lease is given to a third party or a wind project is otherwise developed on the property. The parties to a severance may decide any and all payments pursuant to a wind lease should go to the holder of the wind rights or take a more measured approach and allow each party to receive the payments that reflect the grantor and grantee's respective interests in the property. For example, the holder of the surface rights may be allocated payments received as compensation for disruptions to surface use and the holder of the wind rights would receive all income generated by the conversion of wind into electricity. In any event, a working knowledge of the type of payments found in a wind lease is necessary.

A wind lease *may* provide the following types of payments or categories of compensation:²¹

Category A

- **Royalty Payment** – An annual or quarterly payment based on the royalty percentage specified in the lease multiplied by Gross Revenues. The term “Gross Revenues” is typically defined as the amounts collected by the sale of the electricity generated by the wind turbines located on the property and the associated renewable energy credits.
- **Minimum Rent**– An annual or quarterly payment made only to the extent it exceeds the Royalty Payment.
- **Annual Rent** – If no turbines are placed on the property the wind company may pay annual rent to keep the property under lease.
- **Option Period Payment** – Typically a per acre payment provided during the option or assessment period of the lease or option agreement. There may be a payment for the installation of a meteorological tower. Wind and other site data is collected and assessed with minimum impact to surface use. In the event a wind company does not develop a project it may agree to provide a copy of the wind data collected on the property.

²⁰ A broad definition of a substation is “a collection of equipment for the purpose of raising, lowering and regulating the voltage of electricity.” See Rocky Mountain Power Glossary at: <http://www.rockymtnpower.net/Navigation/Navigation4150.html>.

²¹ The types of compensation provided in a wind lease varies based on several factors and this list is not intended to suggest that every wind lease will include all categories shown below or that there are not other categories available.

Category B

- Surface Disturbance Fees:

- **Installation Fees** - An amount paid as compensation for the installation of wind turbines on the property.
- **Transmission Lines/Roads** - A per rod or per foot payment for the installation of above ground transmission lines and roads.
- **Facility Fees** - A per acre or per facility payment for the placement of a substation or operations and maintenance building.
- **Lay Down Areas** – A payment for the use of an area for the temporary storage of large equipment or for equipment assembly.

- Reimbursements/Replacement Costs:

- **Hunting, Grazing, Farming** - Reimbursement for losses sustained as a result of a disruption to hunting, grazing or farming during project construction.
- **Fences, Cattle Guards etc.** - Replacement or repair of damaged fences, cattle guards or other improvements on the property caused by the wind company's activities.
- **Livestock** - Reimbursement for the loss of livestock directly attributable to the wind company.
- **CRP** - Reimbursement for penalties incurred for the removal of all or portion of the property from the Conservation Reserve Program.²²

Category C

- Miscellaneous Provisions

This category is comprised of items that do not necessarily take the form of monetary payments but are assurances given by the wind company to ensure a happy co-existence between the wind project and surface owner.

- **Removal Bond and Restoration of the Property** – Upon termination, most wind leases require all equipment installed by the wind company be removed and the surface restored to its original condition. A bond or other form of security is typically posted to ensure the wind company's performance of its removal obligations. If the wind company fails to fulfill its removal and restoration obligations within a certain

²² Administered by the U.S. Department of Agriculture pursuant to 7 C.F.R. Part 1410, *et seq.*

number of days following the termination of the lease the landowner may draw on the bond or other security and have the equipment removed and the property restored.

- **Site Plan Review and Input** – A wind company may review the proposed layout for the project with a landowner and may re-locate certain equipment based on landowner input.
- **Notices** – The landowner and wind company may provide mutual notices prior to engaging in certain types of activities. For example, the wind company may give the landowner a 60 day notice prior to starting construction²³ and the landowner will provide prior notice of hunting activity.
- **Sale of Water/Water Wells** - A landowner will often agree to sell water to the wind company at an agreed to price or for the fair market value of the water. The landowner may also agree to allow the wind company to drill new water wells and allow the wind company to use water from the well so long as the landowner owns the water well.
- **Caliche** – A payment for the fair market value for use of caliche located on the property.

The “measured approach” to payment allocation is strongly encouraged. That is, the items that impact or interfere with the surface owner’s use should be paid to the surface owner. Therefore, all of the items listed in “Category B” would go to the surface owner. Likewise, the Category C items impact or require the input of the surface owner, the surface owner should therefore retain the benefit of these items. The “Category A” items are payments that result directly from or burden the wind resource present on the property, and the holder of the wind rights should be the sole beneficiary of those payments. The distribution of payments may appear lopsided; however, the Royalty Payments and Minimum Rent are typically of greater value over the long term. Furthermore, the Category A items reflect the nature of the wind rights holder’s interest in the property.

Right to Execute the Lease

A final consideration is who retains the right to negotiate and execute the lease. This determination should depend on which party retains the right to certain payments. If the surface owner retains the rights to surface damages the drafter should consider the implications of allowing the surface owner to participate in lease negotiations. If the surface owner is allowed to participate it could result in a number of complications including the inability to finalize a wind lease simply because a surface damage amount is not acceptable to the surface owner. To avoid complications, the parties should consider agreeing to set surface damage amounts in the event a project is developed on the property. This arrangement incentivizes the wind rights holder to negotiate for certain minimum surface damages as a part of his wind lease. In the event the

²³ This type of notice is typically seen when the landowner has a large cattle operation and may need time to move cattle to a pasture outside of the construction area.

surface owner retains the right to all surface payments and a percentage of the royalties he or she will likely also want to retain the right to negotiate the lease.

Conveyance of a Royalty Interest

Another option is to draft an instrument that does not wholly sever the wind estate from the surface but conveys the limited right to enjoy in a percentage of royalties derived from wind generated electricity. Such a conveyance should allow the grantor to retain the exclusive right to enter a wind lease or develop a wind project himself. This approach is similar to that of a non-participating royalty interest found in oil and gas law (“NPRI”). In oil and gas law a NPRI is a non-possessory interest which:

...may be defined as an interest in the gross production of oil, gas and other minerals carved out of the mineral fee estate as a free royalty, which does not carry with it the right to participate in the execution of, the bonus payable for, or the delay rentals to accrue under, oil, gas, and mineral leases executed by the owner of the mineral fee estate.²⁴

Likewise, a wind NPRI should not carry with it the right to execute a wind lease and should be restricted to allowing the holder to receive a percentage of the Royalty and Minimum Payments only. A conveyance of a royalty interest with no lease negotiation rights avoids many the potential complications of a complete severance. At the same time it allows one who wishes to profit from the development of any future wind project with the ability to do so.

Two important notes on the NPRI approach. First, carving out a royalty interest in wind has not been upheld by any Texas court and therefore suffers from the same uncertainties as the above-discussed severance approach. Second, carving out a royalty interest should not be confused with the assignment of a right to receive payments under an existing wind lease. An assignment of payment rights in an existing lease is effective only as to the specific wind lease and would not govern any rights beyond the termination of the lease.

Conclusion

In Texas, surface owners have already severed wind rights from the surface estate. We therefore know that even severed from the surface, wind rights have value in the marketplace. The question of whether a wind severance will be upheld remains unanswered. Property law teaches us that the transferability of a property right is generally accepted as an important means of ensuring that resources are fully utilized.²⁵ Texas law has a long tradition of protecting

²⁴ *Plainsman Trading Co. v. Crews*, 898 S.W.2d 786, 790, (Tex. 1995), citing *Jones, Non-Participating Royalty*, 26 TEX. L. REV. 569, 569 (1948); *Benge v. Scharbauer*, 259 S.W.2d 166, 167-68 (Tex. 1953); *Arnold v. v. Ashbel Smith Land Co.*, 307 S.W.2d 818, 825 (Tex. Civ. App.--Houston 1957, writ ref'd n.r.e.); See also, Shade, *Primer On the Texas Law of Oil and Gas*, 14 (2nd ed. 1998).

²⁵ *Cribbet, Johnson, Findley & Smith*, *Property and Case Materials*, 8th Edition p. 12.

private property rights and encouraging the development of the state's natural resources.²⁶ For these reasons, in the author's view it is unlikely Texas courts will not uphold the severance of wind rights from the surface. A decision by the courts or the legislature to do otherwise could only arise if, for policy reasons, the severance of wind rights is found to significantly retard the development of the state's wind resources or if severances result in grave inequities to surface owners. For these reasons, early severances that are undertaken should be executed with an eye toward achieving equitable results for all.

²⁶ *Humble Oil & Refining Co. v. West*, 508 SW2d 812 (Tex. 1974).