EARTH, WIND, *and* SOLAR

What are renewable energy rights?

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For more than a century, fossil fuels have powered the world, fueled by oil and gas production in states like Texas. More recently, pressure to transition from fossil fuels to renewable energy has increased. As wind and solar energy production becomes an integral part of our power grid, defining the status of wind and solar becomes important to create certainty.

THE STATE WE ARE IN: OUR REAL PROPERTY FOUNDATION

Property can exist as either real or personal property. We tend to classify real property rights into two categories: either non-possessory rights such as easements and profits a prendre, or possessory rights such as surface leases and oil and gas leases (the right to possess the mineral estate). Personalty may take several forms, for instance, minerals and groundwater after extraction became personalty.

The question of what are renewable energy rights requires an answer. Neither the Supreme Court of Texas nor the Texas Legislature has defined wind or solar rights. Are they real property interests? Are they personalty? Are they profits a prendre? Are they easements? Can they be severed? What are they?

Nevertheless, renewable energy transactions continue unencumbered by the fact that these rights have never been legally defined. Therefore, lawyers have treated them as being "all of the above," so that whatever the courts or the Legislature decide renewable rights to be, these transactions will be enforceable.

We must look to the law in other jurisdictions *and* to decisions regarding the analogous treatment of other types of real and personal property to anticipate how the Supreme Court of Texas or the Texas Legislature might treat wind and solar rights.

For instance, North and South Dakota have avoided the issue by prohibiting severance from the surface estate *except* by means of a lease.[1] The act also states that when a wind lease terminates, the rights revert to the surface owner if there is no development within five years from the date of the lease.

California court recognizes severance

In California, a water district sought to condemn approximately 3,500 acres of a 6,000-acre farm for a reservoir. A windfarm had been built upon 2,000 acres of the tract. The district did not need to condemn the wind rights and did not offer compensation for the wind rights.[2] The landowner sued, challenging the validity of the severance of the wind rights from the surface acreage to be condemned, arguing that future wind turbine operations would be significantly hampered as a result of the condemnation of the acreage. The California court ruled that the condemnation district could reserve the wind rights in favor of the surface owner, thereby effectuating a severance.

New Mexico court recognizes severance only upon capture

In *Romero v. Bernell,*[3] the land was partitioned between tenants-in-common. One co-tenant argued that the acreage was not susceptible to partitioning. The primary value lay in the wind rights and the partitioned wind rights could not be effectively monetized. The court analogized the ownership of the wind-to-surface water rights, holding that in the absence of capture for a useful purpose (i.e., the creation of wind energy), the wind rights are incorporeal interests that do not become vested. No infrastructure existed on the property to harvest wind energy, therefore, no wind rights had become vested.

GUIDING LIGHTS:[4] WHAT MIGHT TEXAS COURTS OR THE LEGISLATURE DO?

Wind travels across many tracts as a result of the uneven heating and cooling of the surface of the earth and is not itself "captured," but is rather harvested through the creation of electricity that is provided to the end user. Likewise, solar energy is sunshine that exists throughout the planet during the day (absent cloud cover) and is not attributable to any particular tract. It does not become valuable until "harvested" through the conversion of sunlight into electricity. It is difficult to imagine that a Texas court would characterize wind and sunshine as natural resources that are "owned in place."

Treating renewables like oil and gas?

It has been the law in Texas that minerals in place are realty, subject to ownership, severance, and sale.[5] An oil and gas lease is the common real property instrument severing oil and gas rights, thereby conveying determinably the severed mineral estate to a lessee in exchange for a royalty interest and leaving the lessor with the possibility of reverter. Oil and gas responds to subsurface pressure differentials and can be captured through a wellbore. The hydrocarbons which had been considered realty in place under the ground, become the personal property of the lessee, regardless of the previous location of the hydrocarbons under the earth. This is the essence of the rule of capture and has been upheld in Texas for generations.[6]

Treating renewables like groundwater?

Groundwater is also a fugacious substance that travels beneath the surface of the earth subject to pressure differentials. The Supreme Court of Texas has held that groundwater is a real property right, being an attribute of the surface estate, and may be severed from it.[7] The court has also applied the rule of capture to groundwater. Once produced, the water becomes

personalty and the property of the owner of the well.

Treating renewables like wild animals?

We can also draw certain deductions from the law concerning native animals, or ferae naturae.[8] Native animals, particularly whitetail deer, are big business in Texas, and they migrate across land boundaries. The animals themselves are the property of the state of Texas, both at common law under the doctrine of ferae naturae and under the Texas Parks & Wildlife Code Section 1.01(a). Having harvested the animal in compliance with the law, the hunter is considered to have reduced the animal to his or her possession and the animal then belongs to that person. Courts have affirmed that until harvested by lawful means, a landowner has no ownership interest in the wild animal.[9] Courts have further protected the right to harvest wild animals by holding that intentionally interfering with the lawful hunting on a neighbor's land is prohibited.[10]

By analogy, sunlight and wind are only valuable once harvested and reduced to possession through the production of energy.

Treating renewables as easements or profits a prendre?

Easements and profits a prendre are similar real property interests. A profit a prendre authorizes the holder to take a part of the soil or produce from the land of another.[11] It is considered an interest *in* the land of another and distinguishable from an easement, which is the real property right to *use* the land of another.[12] These rights are also "non-possessory." It is in the nature of an incorporeal hereditament and subject to the statute of frauds. A profit a prendre, however, is not subject to the rule against perpetuities.[13] An example of this type of interest is a timber lease.

Wind and sunshine travel across the surface of the land. They are natural resources located above the soil and are fugacious. Although timber is not fugacious, like wind and sunshine, its value is not recognized until harvested.

IN THE STONE:[14] WHAT HAS TEXAS DONE?

In a case involving an embankment that impeded the flow of wind to the neighbor's windmill, the court allowed evidence to be introduced regarding the damages caused to the plaintiff as a result of the reduced wind flow through his windmill. However, it did not establish a protected right to access the wind.

In a recent case, the court applied the application of the accommodation doctrine to solar operations.[15] In that case, an owner of an undivided mineral interest sued the surface owner for having leased 315 acres for a solar farm. The solar farm as constructed left only about 97 acres in two separate tracts available for oil and gas drilling. Surface waivers were not acquired from all of the mineral owners. The court ruled that since there was no mineral activity on the property, the mineral owner had no right to complain. The solar farm located on the surface did not interfere with mineral exploitation because there was nothing to accommodate *at that time.*

The Supreme Court of Texas has also held that the regulatory power of natural resources under the Texas Constitution is within the sole jurisdiction of the Texas Legislature.[16] Effective June 18, 2023, geothermal energy is defined as being part of the surface estate.[17]

KEEP YOUR HEAD TO THE SKY:[18] CONCLUSION

No direct Texas authority exists regarding the classification, ownership, or possession of wind and solar rights. We look to the law of other jurisdictions to analogous theories.

In recent years, the Supreme Court of Texas has been friendly to the development of economic rights, particularly energy rights. In preparing documents appurtenant to these rights, the scrivener would be wise to remember to incorporate the various legal attributes discussed in this article. In this way, whatever the Supreme Court of Texas or the Texas Legislature determines wind and solar rights to be, the terms of the documents would effectuate the intention of the parties to the transaction. **TBJ**

Notes

1. North Dakota Cent. Code Ann. § 17-04-04 (2020); *see also* S.D. Codified Laws § 43-13-17 (2020).
2. *Contra Costa Water Dist. v. Vaquero Farms, Inc.,* 58 Cal. App. 4th 883 (Ct. at Cal., 1st Dist., Div. Two 1997).
3. *Romero v. Bernell,* 603 F. Supp. 2nd 1333, USDO, CP. (D.N.M. 2009).
4. Earth, Wind & Fire, *Guiding Lights,* on Now, Then & Forever (Sony Music/Legacy 2013).
5. *The Texas Company v. Davis,* 254 S.W. 304 (1923).
6. *Coastal Oil & Gas Corp. v. Garza Energy Trust,* 268 S.W.3d 1 (Tex. 2008).
7. *Edwards Underground Aquifer Auth. v. Day,* 369 S.W.3rd 814 (Tex. 2012).
8. Ernest E. Smith, *Wind, Water, Oil, Gas and Whitetails: A Comparison of Property Rights and Theories,* 2010 Wind, Solar and Renewables, U.T. Law School C.L.E., Austin, Tex. (Feb. 4, 2010).
9. *Hollywood Park Humane Soc'y v. Town of Hollywood Park,* 261 S.W.3d 135 (Tex. App.—San Antonio 2008, no pet.).
10. *Haley v. State of Texas,* 797 S.W.2d 281 (Tex. App.—Corpus Christi 1991).
11. *Evans v. Ropte,* 96 S.W.2d 973 (1936).
12. *Evans v. Ropte,* 128 Tex. 75, 96 S.W.2d 973 (1936).
13. *Anderson v. Gipson,* 144 S.W. 2d 948, 950 (Tex. Civ. App. Galveston 1940, no writ).
14. Earth, Wind & Fire, *In the Stone,* Released Single (Columbia Records 1979).
15. *Lyle v. Midway Solar, LLC,* 2020 Tex. App. LEXIS 10385; 2020 WL 7769632; *see also* Court of Appeals of Texas 8th District, El Paso, Dec. 30, 2020 (No. 08-19-00216-CV).
16. *Sipriano v. Great Springs Water of America, Inc.,* 1 S.W.3rd 75 (Tex. 1999).
17. Texas Natural Resources Code Section 141.004 (2023).
18. Earth, Wind & Fire, *Keep Your Head to the Sky,* on Head to the Sky (Columbia Records 1973).

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