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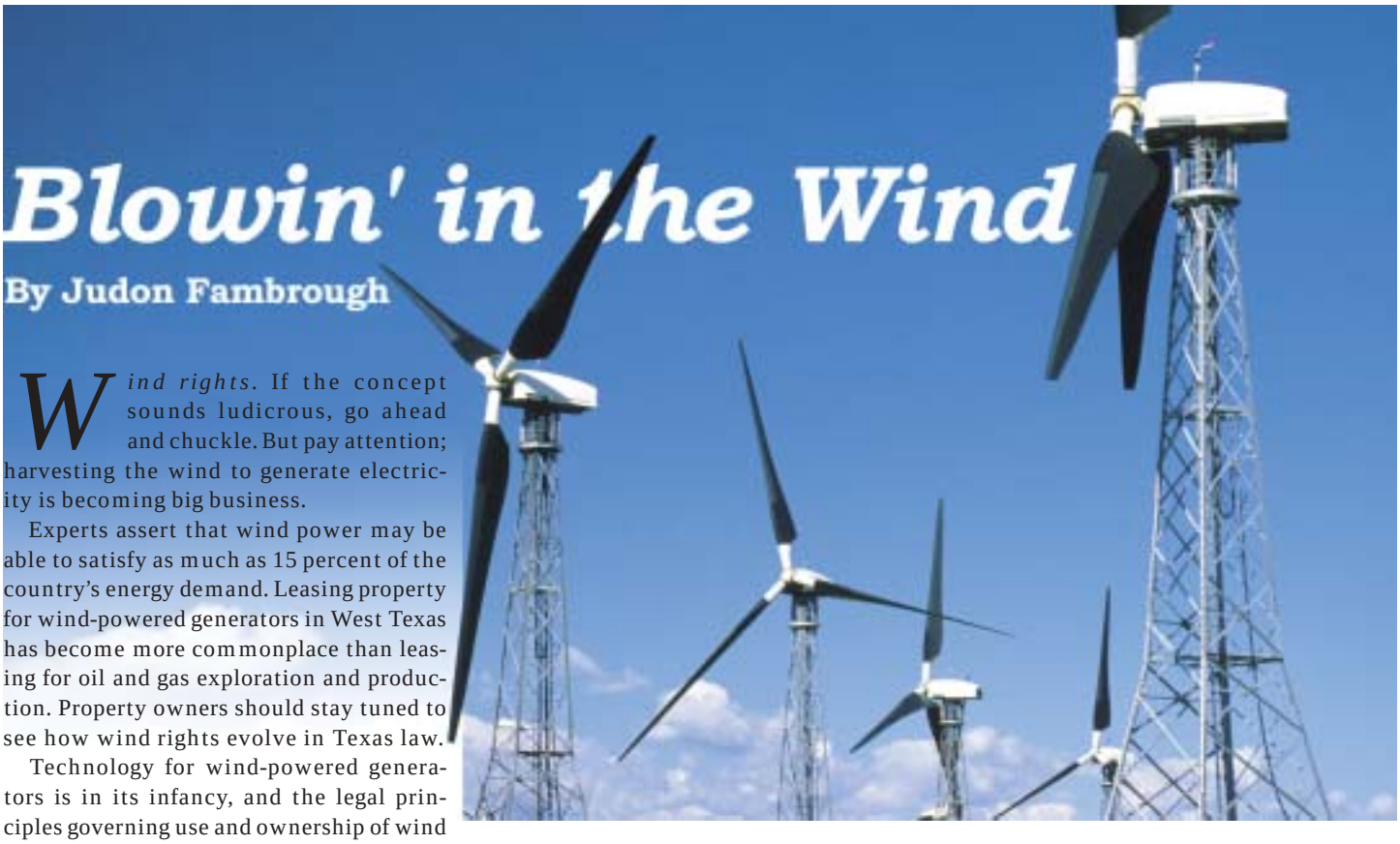

Blowin' in the Wind

By Judon Fambrough

Wind rights. If the concept sounds ludicrous, go ahead and chuckle. But pay attention; harvesting the wind to generate electricity is becoming big business.

Experts assert that wind power may be able to satisfy as much as 15 percent of the country's energy demand. Leasing property for wind-powered generators in West Texas has become more commonplace than leasing for oil and gas exploration and production. Property owners should stay tuned to see how wind rights evolve in Texas law.

Technology for wind-powered generators is in its infancy, and the legal principles governing use and ownership of wind are even less developed. Terry E. Hogwood, a Houston attorney, raised some interesting questions in an article published in the State Bar of Texas' *Oil, Gas and Energy Resources Law Section Report*.

Wind is simply the movement of air. Can it be owned in the traditional sense? It has no physical manifestation equivalent to oil or gas deposits or any substance on which to stake a claim. However, Hogwood suggests that three legal theories in Texas support ownership of wind.

Unified Fee Ownership Theory

The unified fee ownership theory holds that a landowner owns from the center of the earth to the sky and all that lies between *(Broughton v. Humble Oil & Refining Co., 105 SW2d 480.)* Texas courts have ruled in support of the theory, stating that landowners are entitled to natural rainfall coming from clouds over their property. The court ruled further that any interference by cloud seeding is subject to an injunction if not authorized by statute *(Southwest Weather Research, Inc. v. Rounsaville, 320 SW2d 211.)*

Planes have the right to fly over land as long as they do not interfere with the landowner's property rights. The theory does not apply to water or to wild animals roaming the surface. With these exceptions, landowners own all rights necessary for full and complete enjoyment of their property.

Hogwood suggests that wind must be captured for ownership to be possible. To capture wind, air movement must be concentrated on the vanes of a windmill used to generate electricity. "Capture," in this context, refers to the right to or the actual conversion of wind to energy.

Wild Animal Theory

Assuming that wind can be captured, what laws permit private ownership? Hogwood proposes that the courts could apply either the wild animal theory, better known as the free in nature theory, or the rules regarding percolating water to reach essentially the same conclusions.

The wild animal theory, as it originated in the common law, holds that no individual owns indigenous wild animals as long as they remain wild and unconfined in a natural setting *(Jones v. State, 45 SW2d 612).* If a person legally captures a wild animal, he or she gains ownership. Otherwise, ownership remains with the state *(State v. Bartee, 894 SW2d 34).*

According to this theory, the state owns wind until it is captured. For the wind to be privately owned, a landowner must capture it legally, according to state law. Landowners lose claim to the wind by failing to capture it while it passes across their property.

Percolating Water Rules

Basically, Texas recognizes two types of underground water. First, there is water in an underground stream or lake that belongs to the state. A permit is needed to use this water. Second, there is water oozing or slowly moving through the soil not in any underground stream or lake. This water is better known as percolating groundwater. It is subject to the rule of capture with one important difference from the wild animal theory. The water is privately owned prior to capture, not owned by the state.

Absent malice or willful waste, landowners have the right to take all the percolating water they can capture from under their land. According to the Texas Supreme Court, landowners are not liable to their neighbors even if they drain their neighbors' water supply *(Sipriano v. Great Spring Waters of America, Inc., 1 SW3rd 75).* Center publication 1377, "Who Owns Groundwater?" describes the case in detail.

The Texas Constitution declares natural resources to be a public right and permits

the Texas Legislature to pass appropriate laws for their conservation and preservation. In the *Sipriano* case cited previously, the high court placed the duty to preserve Texas' natural resources on the state, not the courts. Because percolating groundwater is a natural resource, the state has the right to regulate its capture.

If wind, like water, is considered a natural resource, the legislature may eventually pass laws to regulate its capture and usage, perhaps including spacing requirements and production limits. In 1999, the legislature passed Senate Bill 1, which permits the creation of groundwater conservation districts that have the power to regulate the pumping of groundwater and the spacing of wells.

Supposing that percolating water principles are applied to wind, landowners would have the right to capture as much of the wind crossing their property as they want. There would be no liability to neighbors as long as usage is not malicious or wasteful, even if it prevents the wind from crossing adjacent property.

So could a landowner, without liability, build a wall on his or her property and block or divert the flow of air across adjacent property? Probably so, according to Texas case law.

The Texas Supreme Court has ruled consistently that adjoining landowners have the sole and exclusive right to build on the boundaries of their land, subject to zoning and deed restrictions *(Boys Town, Inc. v. Garrett, 283 SW2d 416).* If a legal structure, such as a wall or billboard, blocks the wind or view from another's property, there is no liability. (See Center report 1092, "Property Rights: Obstruction of View, Light or Air.") By the same token, Texas landowners may block natural sunlight from reaching neighboring land without liability *(Ft. Worth & D. C. Ry. Co. v. Ayers, 149 SW2d 1068).*

Is a landowner liable if the diverted wind damages a neighbor's property? The answer is *yes* if the Texas court applies the same rules to wind as it does to water. According to Section 11.086 of the Texas Water Code, a landowner is liable for diverting the natural flow of surface water in such a way that it causes damage to neighboring property. (For more details, see Center publication 804, "Brief Shower Creates Storm").

Separate Wind Rights?

If wind can be privately owned, is this a separate and distinct property right, like water rights or mineral rights, that can be owned apart from other property interests?

According to Hogwood's research, only one case in the United States — a California case — addresses the issue. In 1997, a condemnation case established that wind rights are distinct property rights that can be severed from other interests and owned separately *(Contra Costa Water Dist. v. Vanquero Farms Inc., 68 Cal Rptr. 2d 272).* Of course, because this is not a Texas case the ruling is not binding on Texas courts. However, Texas courts look to other jurisdictions when cases involving new issues arise. If Texas courts rule similarly, a four-tier system of property ownership could develop. One person could own the surface, a second the minerals, a third the water and a fourth the wind.

It will be interesting to see if West Texas ranchers attempt to reserve wind rights when they sell all or a part of a ranch. If all the wind rights are not reserved, sellers may try to negotiate a part of royalties from future wind-generated power.

Energy Demand vs. Property Rights

Finally, can wind-generating devices be erected on a property in violation of existing deed restrictions, zoning ordinances or conservation easements on the basis that the public need for energy outweighs private property rights? Hogwood feels the answer is "no" based on a Connecticut zoning case *(Shippee v. Zoning Bd. of Appeals of the Town of Old Lyme, 466 A. 2d 328).* However, Texas case law has long held that general principles of property rights may fail when confronted with society's need for energy.

For example, Texas oil and gas law has long asserted that a mineral estate is dominant over a surface estate. Under this general rule, the mineral lessee has a right to use as much of the premises as is reasonably necessary to produce and remove minerals without getting permission from the surface owner and without having to pay damages. This rule is based on the state's public policy for developing natural resources *(Humber Oil & Refining Co. v. West, 508 SW2d 812.)*

Legal precedents exist in Texas for finding that society's need for energy outweighs any interests served by enforcing land-use controls. According to oil and gas law litigation, the only remedy for violating land-use controls is damages, not an injunction to cease operations *(Railroad Commission v. Manziel, 361 SW2d 560).* Damages may be the only remedy in a wind-related case rather than an injunction requiring removal of the windmill.

Right now, the answers to most legal questions related to wind harvesting are indeed blowing in the wind. As this renewable natural resource becomes increasingly valuable, however, necessity will dictate case law and possibly legislation that specifically address pertinent wind-related issues.

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