

A Reprint from *Tierra Grande*

# AGAINST THE WIND

BY JUDON FAMBROUGH

**N**ot everyone favors the wholesale conversion of wind energy into electricity. Controversies and obstacles surround the development of wind energy in Texas. This article examines a few of these issues.

## Environmental Concerns

Perhaps the most vocal opposition to wind energy comes from environmentalists, who object to the destruction caused when birds and bats collide with the spinning wind turbine blades.

A Jan. 2, 2008, *Houston Chronicle* headline read, "Texas Coast Wind Farms May Put Birds at Risk." The article focused on two wind power projects under construction on the Kenedy Ranch in Kenedy County. The projects, scheduled to be in operation by late 2008, will generate about 388 megawatts — enough electricity to power 90,000 homes.

A report issued by EDM International Inc. using methodologies developed by the U.S. Fish and Wildlife Service, concluded that the projects could result in the largest and most significant avian mortality event in the history of wind energy.

The Coastal Habitat Alliance Inc., formed in June 2007 to protect the Texas Gulf Coast, filed federal and state lawsuits in December 2007 seeking to halt construction of the two wind farms. The suit alleges that state officials and developers violated the Federal Coastal Zone Management Act by building the farms without an environmental review or permit.

Loss of scenic beauty and possible harm to the bat population resulted in a moratorium on wind development in Gillespie County. Edwards County, with its significant bat population in the Devil's Cave, may follow suit.

## Nuisance Problems

Several lawsuits were filed against landowners and wind farms in the Sweetwater-Abilene area alleging they constituted an unreasonable interference with the use and enjoyment of nearby property. Loss of view and noise were two of the primary complaints.

At the trial level, the lawsuits proved unsuccessful. Texas case law supports the free use of property in a legal, non-nuisance manner. The Center's publication entitled *Obstruction of View, Light or Air* (online at <http://recenter.tamu.edu/pdf/1092.pdf>) summarizes the pertinent case law.

**T**he Texas courts have repeatedly ruled that the owner of real estate may, in the absence of restrictions or other regulations, erect a building, wall, fence or other structure on the premises, even if it obstructs a neighbor's vision, light or air and even if it depreciates the value of a neighbor's land.

The court dismissed the issue of the wind farm's visual degradation by granting the defendants summary judgment. This was appealed.

Michael Carmichael, one of the attorneys representing defendants said the noise issue was abruptly silenced. The

trial basically ended when a landowner near the wind farm testified that noise from jet engines at Dyess Air Force Base about 20 miles away drowned out any noise from nearby wind turbines.

In August 2008, the 11<sup>th</sup> Court of Civil Appeals upheld the trial court's decision to grant the defendants summary judgment regarding wind farm's visual impact. Ruling on case precedents, the court said, "Matters that annoy by being disagreeable, unsightly, and undesirable are not nuisances simply because they may to some extent affect the value of property" (*Rankin v. FPL Energy, LLC*, 2008 WL 3864829).

## Property Tax Abatements

A looming question for Texas wind-farm developers is whether property tax abatements, typically granted by the local county commissioners, will be available.

Four conditions are critical for wind-farm development. First, the federal 1.9-cent income tax credit for each kilowatt hour of electricity generated must be in place. The credit is good for ten years if one kilowatt of electricity is generated by a tower before Dec. 31, 2008, the date the credit expires. Congress has not renewed or extended the credit at this time.

Second, there must be sufficient wind to generate the electricity. Texas has six classes of wind power potential. A region needs to rank class three or higher for wind development. Most of the favorable regions are located in West Texas. (See [http://www.seco.cpa.state.tx.us/zzz\\_re/re\\_study1995.pdf](http://www.seco.cpa.state.tx.us/zzz_re/re_study1995.pdf), p. 7).

Third, there must be sufficient transmission lines to move the electricity to population centers. And finally, wind developers need to receive property tax abatements from local officials.

In March 2008, the Texas Attorney General (AG) rendered an opinion calling into question wind farms' eligibility for tax abatements. The opinion focuses on ownership of the land and of the wind-producing equipment located on it.

The Texas Tax Code (TC) authorizes counties to grant tax abatements to owners of taxable real property. The TC defines *real property* to include land as well as fixtures and improvements. However, in wind-leasing arrangements, fixtures and improvements are owned by the developer, not the landowner.

Under Texas case law, when fixtures and improvements are not owned by the property owner, but by a lessee (in this case, the wind company), they are classified as personal property, not real property. Personal property is not eligible for tax abatements under the TC.

A month after the AG rendered the opinion, two opponents of wind farms filed a lawsuit against the Taylor County Commissioners Court. The suit alleges tax abatements for the wind farms in that county are illegal because of the personal property classification.

The AG opinion and ensuing lawsuit create uncertainty with respect to past and future property tax incentives deemed vital for wind development in this state. The Texas Legislature may address the issue in 2009.

Tax abatements, if granted, are good for a maximum of ten years.

## 'Stranded' Electricity

Construction time for wind farms is out of sync with construction time for transmission lines needed to transport the electricity. It takes about a year to build a wind farm, but about five years to construct transmission lines to send power to cities. Presently, the capacity to generate electricity in the favorable wind regions exceeds the capacity to move it, resulting in "stranded" electricity.

To alleviate the problem, the 2005 Texas Legislature implemented Section 39.904(g) of the Texas Utilities Code. It directs the Public Utility Commission (PUC), after consulting with appropriate organizations including the Electric Reliability Council of Texas (better known as ERCOT) to:

- designate Competitive Renewable Energy Zones (better known as CREZs) and
- develop a plan to construct transmission capacity necessary to deliver electricity, in the most beneficial and cost-effective manner, to customers from each CREZ.

The code further specifies that ERCOT, the Texas power-grid operator, study the need for increased transmission and generation capacity throughout the state and file a report with the legislature no later than Dec. 31 of each even-numbered year. The results of the studies are intended to provide guidelines for placement of future transmission lines.

The installation of the transmission lines will have a tremendous impact on wind development in the regions where the lines are located.

On July 17, 2008, the PUC announced preliminary approval for construction of a massive grid to transmit wind power from

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West Texas and the Panhandle. The action opens the door for a far-reaching web of transmission lines that, when completed, will create the capacity to transmit an additional 18,456 megawatts.

The PUC will name the transmission providers authorized to build the lines and select the exact routes at a later date. The estimated \$5 billion project will take four to five years to complete and will add five dollars monthly to Texas residential consumers' utility bills.

## Regulating Wind Development

One of the items on the agenda for the 2009 Texas Legislature is the possible regulation of wind development. Hearings are already underway. Presently, wind development is unregulated in this state.

One question the legislators must answer before imposing any regulations is whether wind is a natural resource. The Texas Constitution mandates that the Legislature pass laws for the *conservation and development* as well as the *preservation and conservation* of all natural resources in the state (Article 16, Section 59[a]). However, the constitution does not define the term *natural resources*.

**OPPOSITION TO WIND FARMS** takes different forms, including concerns about avian mortality caused when birds collide with the huge turbine blades, noise and loss of scenic views. Legal ambiguity is creating questions, too, such as whether wind farmers are eligible for property tax abatements. To complicate things further, before the legislature can regulate wind development, it must decide if wind is a "natural resource" according to the constitution.



The Texas Natural Resources Code is of no help. It states that "the conservation and development of all the natural resources of this state are declared to be a public right and duty," and "the protection of water and land of the state against pollution or the escape of oil or gas is in the public interest" (Section 89.001). But again, *natural resources* is not defined.

The only mention of wind in the Texas Constitution deems it more or less a nuisance. The legislature has created *wind erosion districts* under Article 16, Section 59(b), which grants the power to create conservation and reclamation districts.

Finally, the constitutional language needs some legal interpretation. Do the two words in the constitutional phrase *conserve and develop* apply separately or together? The wording does not say *conserve and/or develop* but *conserve and develop*. While regulating the development of wind sounds reasonable, the conservation of it may not, especially to residents of West Texas.

## Federal Estate Tax Complications

Landowners face the loss of special-use valuation when leasing their land for wind farms. The Internal Revenue Code permits farms and ranches to be valued for federal gift and estate taxes purposes based on their present use, not their highest and best use (or fair market value) (Section 2032A). To qualify, several requirements must be met.

For one, the deceased must materially participate in the farm or ranch operation for the five years prior to death. In addition, the "qualified heirs" must continue to materially participate in operations for an additional ten years after the deceased's death. Material participation requires active involvement in

management and an assumption of the associated financial risks. Cash leasing of the land is prohibited, but crop-sharing is permitted.

When an estate elects to use the special-use valuation, the IRS imposes a tax lien on the property for ten years (Section 6166). The lien secures repayment of the deferred taxes in the event the deceased's heirs fail to materially participate. If this occurs, a recapture of the tax savings is triggered with a possible foreclosure on the tax lien.

The federal tax lien makes it difficult, if not impossible, for farms and ranches to obtain third-party financing unless the IRS agrees to subordinate the lien.

In a recent San Angelo case, a property was subject to the tax lien imposed by Section 6166. The heirs entered a wind lease. The lease required the landowners to get all pre-existing liens released or subordinated. When the landowner asked the IRS for a subordination agreement, the IRS not only refused but viewed the wind lease as a disqualifying *cash lease* that triggered the recapture of the tax savings under Section 2032A.

The prohibited "cash leases" are generally viewed as leases connected with farm or ranch operations and not for wind development. If the IRS continues to take this position, it will have a chilling effect on wind energy development.

When negotiating a wind lease, consultation with knowledgeable legal and tax professionals is recommended.

For more information, see Center publication no. 1856, "Wind Rights and Wrongs" at [recenter.tamu.edu/pdf/1856.pdf](http://recenter.tamu.edu/pdf/1856.pdf). 🇺🇸

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## THE TAKEAWAY

Wind power is drawing interest as an alternate energy source, but several obstacles could slow wind-farm development. Texas' tax code may not allow developers to receive tax abatements. Transmission lines to transport the electricity produced will take time to install, and environmentalists are concerned about birds and bats colliding with the turbine blades.



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