

Alert | Energy & Natural Resources



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The Severability of Wind Rights from a Surface Estate

A Texas state district court in Hale County, Texas recently issued a verdict under Texas state law and determined that wind rights are a severable property interest in the surface estate and therefore, a trespass claim can be brought in violation of these rights. The judge granted the plaintiff's motion for partial summary judgment but left the damages award to a jury. In a turning point decision, the jury delivered a verdict for plaintiff Ridge Renewables ("Ridge"), granting a damage award exceeding \$1 million for the alleged bad faith trespass violations.

The property at issue was approximately 256 acres, owned in fee simple absolute by Glendale King ("King"), and located in Hale County, Texas (the "Property"). King originally acquired the Property in 1989 and entered a Wind Easement Lease in 2010 that expressly terminated on Aug. 24, 2017, unless electrical energy was being generated and sold (the "2010 Lease").

In 2018, several years after King had sold the Property but reserved the "wind rights," and also after the termination date, Southwestern Public Service Company ("SPSC") executed a purported lease with the new owners, entered the Property, and developed two wind turbines. The wind turbines generated energy and provided SPSC with revenue through sales. On Sept. 22, 2020, King conveyed to Ridge all rights, titles, and interests in the Property, specifically conveying the right to develop and lease wind rights, as well as the right to pursue all causes of actions regarding and/or related to wind rights.

Ridge filed suit on Dec. 30, 2020, against SPSC, seeking a declaratory judgment regarding its trespass claims and asserting trespass-to-try title claims to determine the rightful owner of the wind rights. District Judge Danah Zirpoli granted Ridge's motion for partial summary judgment, finding that Ridge alone owned the wind rights and SPSC trespassed in bad faith.

This is the first time a Texas state court has found that wind rights, or the ability to capture wind energy for profitable sale, are severable from a surface estate generating a precedent that may be potentially disruptive for renewable energy investors and businesses.

The case, however, seems to create more questions than answers:

- The court provided no guidance regarding what exactly is included within wind rights.
- Is this a recordable interest?
- How can developers and financing parties determine whether the owner/lessor owns all of the wind rights and has not otherwise transferred or encumbered them?
- What other reservations would impact a wind estate?
- Will the ability to sever wind rights from a surface estate have any effect on a severed mineral estate?
- What is the full impact of severing wind rights?
- What steps should current or future wind estate owners take to protect their estates?

Notwithstanding that many of these questions currently have no definitive answers, the district court's decision confirms for the first time that under Texas state law, wind rights are a severable property interest from a surface estate. While there has been no released statement regarding whether an appeal will occur, this is an unexplored area of the law with little to no precedent and it is reasonable to expect an appeal from the defendants.

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