

EARTH, WIND and FIRE (and WATER)

Presented by
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Insurable Rights in Real Property

- Surface Estate
- Minerals
- Water
- Wind (?)

Mineral Estate

- The treatment of mineral interests by title insurance policies in Texas is a very complex issue.
- In order to insure "minerals" one must define what this includes relative to the mineral estate

The Mineral Estate

- Subject to the same rights of ownership, possession, and alienation as any other land.
- A conveyance of land without any exception or reservation of the minerals thereon carries with it the minerals as well as the surface of the land.

What constitutes "minerals"?

- In Texas, the rule is that things found within 200 feet of the surface or mining of which destroys the surface are NOT minerals.
- Metallic ores, jewels, hydrocarbons (e.g. coal), asphaltum and petroleum, shale, granite, limestone and marble are just a few examples of what can constitute minerals.

...not minerals

- Clay, sand, gravel, soil and water are generally not considered to be "minerals".

Conveyance of Minerals

- Any instrument granting or conveying mineral rights is subject to the same principles and requirements as other conveyances of interests in land.
- An instrument may:
 - convey the minerals in place
 - Merely grant the right to extract them
 - Simply be a lease of the land that includes the right to take minerals

Operating Rights

- A transfer of minerals is always deemed to have granted all operating rights necessary for a mineral transferee to enjoy the mineral conveyance or lease, such as:
 - Right of access (ingress and egress)
 - Rights for the construction, maintenance, and removal of roadways, railroads, buildings, machinery and equipment, pipelines, ditches and drains, storage reservoirs, fences, etc.
 - Right to the use of the subject property (subsurface) and the surface estate to mine, process, transport, and store minerals from other land.
 - Right to use the water located on the property.

Insuring Severed Mineral Interests

- Search requirements:
 - Sovereignty title search done by a licensed Texas title insurance agent for STG from its abstract plant; and
 - A courthouse search done by a landman approved by the title examiner.

Insuring Minerals

- A copy of the run sheets and all documents must be provided to an experienced attorney for an opinion
- The opinion must certify that the attorney conducting the examination has examined a sufficient abstract of title or title search to allow an unqualified opinion as to the ownership of the mineral interests being insured, subject to requirements and that the search of title commenced with the sovereignty of the soil.

Insuring Minerals

- The attorney conducting the examination must:
 - Have been licensed by the State Bar of Texas for a minimum of 10 years; and
 - devote a minimum of 35% of his/her practice to oil and gas matters.
- If the attorney is Board Certified Oil and Gas Attorney, these requirements are waived.

Attorney requirements (continued)

- If the attorney is a member of a firm, the firm must have authorized the attorney to produce such opinions as the opinion of the firm, so that the firm's errors and omissions insurance will apply to the opinion.

Insuring Minerals

- STG will not issue on severed mineral rights unless the minimum policy amount is at least \$500,000.
- The policy must be directly issued by state counsel or national legal.
- The agent prepares the policy and forwards it to state counsel or national legal counsel for countersignature along with the underwriting premium.

Valuation of Mineral Interests

- STG will accept a valuation by a landman, bank appraiser, or appraiser certified by the American Society of Appraisers (or its equivalent) in oil and gas to determine the value of the interest to be insured.

Insuring Water Rights

Water is a real property right

- Water is part of that bundle of sticks that makes up fee simple title
 - Fee simple is every right pertaining to land that a person needs to exercise complete dominion over his property.
 - Thus, it is real property and can be insured by a Texas Title Insurance Policy.

2 kinds of water

- No, not fresh and salt and not good and bad!
- Ground and surface.
- Ground water should be mostly reasonably called underground water since that's where it is found.
- Surface water is generally water contained in streams and rivers.

Law of Capture

- Goes back to Roman Law. Basic concept is that whatever you capture on your land is yours.
- "Thus every one may, as a general rule, on his own land,... capture any wild animal, and acquire a qualified ownership in it by confining it, or absolute ownership by killing it." (Black's Law Dictionary)
- Animals, blackberries, water or oil. If it is on you land, it is yours.

Houston & Texas Central Railway Co. v. East (Tex. 1904)

- Adopted the common-law rule of capture
- Absent malice or willful waste, landowners have the right to take all the water they can capture under their land and do with it what they please, and they will not be liable to neighbors even if in so doing they deprive their neighbors of the water's use.

Law of Capture in Texas

- Texas law has historically recognized the law of capture in almost every situation.
- Droughts of 1910 and 1917 prompted Texas voters to amend the constitution (Art. XVI, § 59) which placed the duty to preserve Texas' natural resources on the State
- Responsibility for regulation of natural resources, including groundwater, now "rests in the hands of the Legislature"

Groundwater Conservation Districts

- First exercised in 1949
- Gives authority to locally controlled districts for establishing requirements for groundwater withdrawal permits and for regulating water transferred outside the district
- Does not mean the rule of capture has been abandoned in Texas

The Catfish Farm and what it meant

Ron Pucek brought many of the region's water issues to a head when he opened his Living Waters Artesian Springs catfish farm in southern Bexar county in March of 1991. Because the "right of capture" prevailed, he was free to take as much water from the Aquifer as he could put to a beneficial use. Many eyebrows were raised when news reports indicated he was using enough water to support about 250,000 people, as much water as one fourth of the people of San Antonio!

(a somewhat) Brief Catfish Farm History

■ 1991

- Living Waters Artesian Springs Ltd. begins catfish farm operations, although the actual drilling of wells started in late 1988 and early 1989.
- Passage of legislation placing a two (2) year moratorium on the drilling of free-flowing artesian wells of 5,000 gpm or greater, and removing aquaculture from the portion of the Water Code stating the water used cannot be considered a waste.

Litigation

- **November 1991** – Living Waters Catfish Farm stops operations due to suits filed by from EUWD and TWC.
- **1992** - Courts enjoin Living Waters Catfish Farm from resuming operations.
- **April 1992** – TWC declares Edward Aquifer to be an underground river
- **1992** - The Texas Attorney General issues a clarification to a prior Nov. 1991 ruling, stating that ground water regulation is constitutional but that 28.011 of the Texas Water Code is not sufficient authority on its own to regulate.

... and then...

- **Sept. 1992** - Judge Bunton sets a special court date for November 16, 1992 to hear the Endangered Species lawsuit.
- **Sept. 11, 1992** - State court invalidates TWC's declaration of "underground river" and voids Edwards Rules

...legislation is enacted...

- **May 29, 1995** -The 74th Legislature passed H.B. 3189, amending S.B. 1477 of the 73rd Legislature, establishing a 15-member elected board for the Edwards Aquifer Authority.
- **May 31, 1995** – HB 3189 is signed into law creating the Edwards Aquifer Authority.

...court intervention...

- **August 23, 1995** - With a mere five days until the Edwards Aquifer Authority was to be created, State Judge Mickey R. Pennington granted a temporary restraining order prohibiting creation of the Authority in response to a lawsuit filed by the Medina Underground Water District.

...the Texas Supreme Court weighs in...

- **June 1996** -Texas Supreme Court rules unanimously that SB-1477 is constitutional, reversing Medina District Court finding - allows immediate implementation of EAA Act.
- **Oct. 29, 1996** - EAA passes rules for filing applications for permits for Edwards use.

...additional legislation and another lawsuit...

- **June 1997** - SB1, enacted by the 75th Legislature, sets the foundation for Statewide regional water planning.
- **Jan. 1998** - EAA rules take effect beginning interim pumpage authorization for Edwards Aquifer 1998 users
- **May 6, 1999** - *Ozarka* case decided by Texas Supreme Court, which allowed the "Right of Free Capture" to stand, but warned the Legislature that the law needs to be overhauled. (this has yet to happen to occur)

... the final chapter?

- **Nov. 9, 2000**
 - EAA proposes permit decisions on all applications

Edwards is a good example

- The Edwards Aquifer is the primary source of water for Central Texas. It stretches for over 8,000 sq. miles only 500 feet below the surface and supplies over 1.3 million people with high-quality drinking water. That's why it's so important to increase our efforts in protecting and conserving San Antonio's number one natural resource.

More on the catfish farm

- Mr. Pucek and his supporters spent over \$1 million to drill the world's largest water well and build raceways for this aquiculture project. The well is massive . . . 30" in diameter and capable of producing 40 thousand gallons per minute!
- On December 5, 2000 the San Antonio Water System board of trustees agreed to buy Ronnie Pucek's catfish farm and most of his water rights for \$9 million. The sale included 10,000 acre-feet of additional pumping rights for the city, Pucek's 85 acre farm, the right to lease Pucek's remaining 7,724 acre-feet for \$25 an acre-foot for five years, and the right to match after that any offer Pucek might receive to buy or lease the rights

Stewart Water

- In 1997, Stewart formed a Joint Venture called Stewart Water.(SWI)
- SWI began to research and insure water rights in Colorado and Utah.
- In 2000, after water rights legislation was passed in Texas, SWI and Stewart Title Guaranty began to assess the market for water rights insurance in Texas.

Insuring Water Rights

- Since water rights are clearly real property rights in Texas, it became obvious to Stewart that the current promulgated insuring forms were adequate to use.
- Special exceptions and requirements have been added.
- The rate is the promulgated Texas rate.

Premium for Insuring Water Rights

- Although in several states, water rights are considered to be extra-hazardous risks, and additional premium charged and paid to SWI, in Texas we felt that the Texas premium would be sufficient.

Why are other records checked?

- The various districts maintain permit records without which water rights cannot be exercised. These records must be searched.
- Each permit is attached to a specific tract of real estate and the 2 must be reconciled.

How does a water policy get issued?

- The process for issuing a standard Texas title insuring form insuring water rights requires a few extra steps.
 - 1. Order placed with title agent
 - 2. Title agent researches the land contained in the order.
 - 3. Title agent must send a copy of commitment to Stewart Water attn: Joe Knox (jknox@stewart.com) phone 970-349-1449; fax 970-349-9616 for addition of requirements and exceptions
 - 4. SWI will usually send an operating agreement to the agent outlining the steps and additional premium if any.

What is covered?

- Schedule A: covers water rights as set out in permit number so and so or under court order such and such.
- Schedule B: will show the standard exceptions and any matters that apply to the land or the water rights.
- Schedule B: will also include special exceptions regarding the water.

The special exceptions

- a) The terms and conditions of the [deed, lease, easement, bill of sale, or assignment, etc.] conveyancing or transfer instrument recorded in Volume ____, Page ____, Real Property Records, _____ County, Texas.
- b) The terms and conditions of the permit shown on Schedule A.
- c) The availability, existence, source, quality, quantity, condition, potability, chemistry or other characteristics of water, if any, lying on, under or over the land or lands to which the groundwater withdrawal permit is or may be associated or the water that may be produced or used pursuant to the groundwater withdrawal permit;
- d) The physical ability to recover or use any water from the land or as a result of ownership of the groundwater withdrawal permit;

Special Exceptions p.2

- e) Lack of a market for, or marketability or merchantability of, such water or the permit or permits to be issued, as applicable.
- f) Any claim or assertion that challenges the authority of the groundwater district in which the land or lands are located, the State of Texas or any other governmental entity to issue groundwater withdrawal and/or use permits generally or to issue such permits with the terms and conditions specifically included in the Permit referred to on Schedule A, as it may be amended from time to time.
- g) The enabling act or acts of the groundwater district, and the rules and regulations of the groundwater district as they may be amended from time to time.
- h) Modifications of the right to withdraw and to use groundwater pursuant the Permit referred to on Schedule A that may be made by state or federal legislation or judicial rulings.

Special Exceptions p. 3

- i) Any consequence of the failure of (a) the insured to have any interest in land referenced in the Permit; or (b) any assignments or other conveyances of interests to be recorded or filed.
- j) Matters that would be revealed by an examination of title, including but not limited to a failure of title, of the property identified as the place of use or point of withdrawal when other than a tract described on Schedule A. (May be modified or deleted if such examination is performed)

Why some particular exceptions?

- c. The kind, condition or amount of water
 - This exception is needed because the title insurer cannot physically insure if there is any water, or if it is any good or if the water will be there
- d. The ability to actually get the water out of the ground.
 - This one speaks for itself.

More on exceptions

- Failure to record the permit
 - Again this is not our responsibility
- Failure to have a title search done
 - This is removed if a search is done and the policy issued (commitment only)

Next steps

- Once the commitment has been approved and issued, the file will proceed along as normal
 - Land questions answered by agent
 - Water questions answered by SWI
- When the title issues are finally resolved, there will be a closing
 - Usually done at the local level

More next steps

- The agent will create the final policy and send to SWI for approval
- When the approval has been given, agent will issue the policy to the insured and remit the premium to STG.
 - Any additional amount for water consulting will be handled by STG and SWI

Main legal issues

- Are water rights real property in Texas?
 - Yes.
- Can they be insured?
 - Yes

Title Insurance Issues

- What form is used?
 - T-1 with water exceptions
 - T-2 with water exceptions
- What rate is charged?
 - Basic promulgated rate for the size transaction

Why are the extra exceptions needed?

- We never want to mislead an insured as to the coverage provided by our title insurance product.
- The exceptions are intended to show what is coverage by excluding the things that we can have no control over.



Title Insurance and Wind



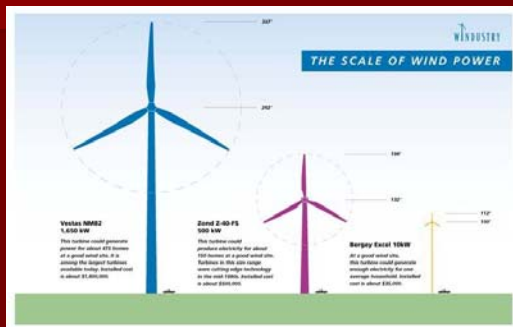
Wind Energy

- Renewable, clean energy sources, including wind energy, are a growing concern in meeting current and future energy needs.
- Texas has added more than 7,000 megawatts of wind power generating capacity in the last decade.
- Wind power now produces about 4% of Texas' electricity.

Wind Energy Factoids

- Renewable source of energy
- Harnessed by wind turbines
- Wind projects require planning
 - Determine how the wind power is to be used
 - Personal use or production of energy for sale to utility company
 - Determine how much wind blows across the subject property and when
 - Analyzing wind to determine viability of project

Graphic from Windustry.org



Texas Leading the Nation in Wind Power



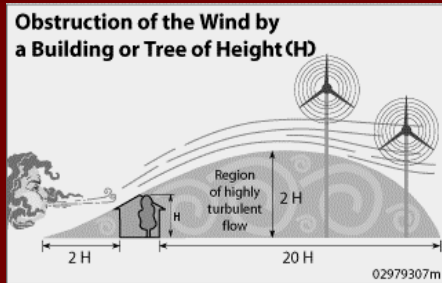
Factors to Consider – Wind

- Wind Speed
- Wind Speed Distribution
- Daily and Seasonal Wind Cycles
- Wind Direction
- Wind Shear
- Air Pressure and Temperature
- Obstacles

Factors to Consider - Land

- Connecting to the Grid
- Zoning and Permitting
- Environmental Concerns
- The Land
- Neighbors
- Location of Turbines
 - Away from buildings or structures
 - Site should be away from boundary lines and setback lines

Obstruction graphic from the U.S. Department of Energy



Considerations relating to Wind

- Land needs to be able to support the turbine (weight, size, etc.)
- Open space is needed.
- Local zoning laws may come into play
- Distance from Boundary Lines

Wind Rights?

- Unsettled issue in Texas.
- At this time, Texas does not specifically recognize "wind rights" as a severable interest in real property.
- Title Insurance can insure leasehold and/or easement estates in real property to allow for the construction of infrastructure to harness and transmit wind power.

Insuring Issues in relation to Wind Power Development

- Lease of Land
 - Developer may lease land for life of the turbines (e.g. 30 years)
 - Ownership of the land is retained
- Wind Easements
 - Easement to land and/or air space that ensures developer adequate exposure to the wind
 - Easements may also involve access for transmission to the power grid

Insuring Forms and Rates

- Since the interests insure are either leasehold or easement estates, the current promulgated insuring forms are used.
- The rate is the promulgated Texas rate.

THANK YOU!

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- Attorneys email bar card number to Ken Wrider for CLE credit
- Next Texas TIPS Online September 17, 2009, "Legislative Update" by John Rothermel & Randy Lee
- Questions/Comments? Email fred.schraub@stewart.com
- Visit www.stewarttexas.com for presentation materials within 5 business days of the webinar
