

Negotiating Wind Energy Property Agreements

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I. Introduction

For anyone seeking to develop a wind energy project, securing access both to land and an unobstructed wind resource is of primary concern. Generally, developers look for places with significant average wind speeds, close proximity to available transmission lines, good access roads for bringing in heavy equipment, and favorable local construction and operation costs.

For larger wind projects, most wind developers will need to develop a project site that affects many landowners and many parcels of land. On flat and open terrain, an average commercial-scale wind project would require about 60 acres of land for each megawatt (MW) of installed generation capacity. However, importantly, most of this land constitutes a buffer zone, and only a small percentage of it (roughly three acres) will actually be occupied by turbines, access roads, and related equipment. The rest can usually re-

main free and available for farming, ranching, and other compatible uses.¹

In addition to the land required for the project site itself, the developer may need to secure the right to cross over adjacent properties to get access to the turbines or to run power lines to transport generated electricity from the project to the power grid. The developer may also need agreements from neighboring landowners to ensure they do not put up obstacles that would obstruct the project's open access to the wind.

These materials provide a general overview of land- and wind-related property agreements and summarize some important issues to consider when negotiating them. These agreements affect significant property rights and can last far into the future. They should always be carefully detailed in writing, and it is imperative that both sides of the negotiations have the advice of qualified legal counsel.

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Note:

These materials are intended for general educational information only. Negotiating a wind energy property agreement raises many legal, financial, and tax issues. Farmers should consult an expert who can provide up-to-date, individualized assistance when executing such an agreement.

The information in these materials is not legal advice and cannot substitute for a knowledgeable attorney who can review the details of particular agreements and consider the impact of relevant federal, state, and local laws. In addition, these agreements can have significant impact on the parties' tax obligations; therefore, a tax expert should be consulted.

II. Property Rights in Land and Wind

Generally, a landowner owns the right to both the land and the airspace, including the wind, immediately above it.

A landowner's right to use and build on the surface of the land is fairly clear. In most cases, these rights are subject only to state or local zoning and property laws and the claims of any persons who share an ownership interest in the property.²

The landowner's right to possess the wind flowing immediately above the surface of the land is also fairly clear, although this is a less tested area of property law. Many states have recently passed statutes to clarify that landowners do have a distinct property right in the wind directly over their property.³

The issue of who owns the wind is sometimes complicated because the wind is a resource that literally "flows" over the surface of the land, and the construction of something like a tall building on one person's property could obstruct the flow of wind over neighbors' properties.⁴ Similarly, a wind turbine creates a wake of still air in the area behind it, and if this *wind shadow* extends onto neighbors' properties, it could prevent those neighbors from later developing wind projects of their own.⁵

The law continues to develop in response to these characteristics of the wind as a resource. In many cases, the issue is dealt with by setback requirements in wind energy zoning laws, and developers

frequently seek further agreements from neighbors in which the neighbors agree not to obstruct the flow of wind to the nearby turbines into the future. These agreements, called *wind easements*, are discussed in more detail below.

State laws also vary on whether wind rights can be permanently "severed" from the surface rights on the land.⁶ In California, a state court has held that wind rights can be severed from the land. In South Dakota, there is a state statute that prohibits such severing.⁷ In most other states, the law is unclear; however, as long as the wind rights are only transferred to a third party temporarily, this uncertainty should not be problematic. When rights to the wind above the land are permanently transferred to a different party, it can create difficulties of coordination between the separate surface and wind owners.

III. Types of Legal Agreements

There are a variety of types of legal agreements through which landowners can give developers access to their land and wind resources. This section describes generally what some of these are.

Farmers should keep in mind that in most cases some combination of legal agreements will be needed. For example, a developer might want to negotiate for short-term rights for an initial exploration of the feasibility of the project while preserving the right to enter into more long-term arrangements later. If development actually occurs, most projects include both a land lease for the project site itself and several wind and other easements over the surrounding properties.

All agreements that affect property rights should be in writing and reviewed by a qualified attorney. The descriptions in this section describe general legal concepts, but the provisions in any specific agreement may differ from what is described here. The final written agreement will control the actual rights and obligations of the parties.

Moreover, farmers should be aware that the requirements for land- and wind-related property agreements vary from state to state. For example, most states require the legal agreement itself, or some summary of that agreement, to be filed or “recorded” and made part of the official public record. The procedures for recording these documents, and the requirements for what these documents specifically contain, vary greatly depending on the locality. For this reason, before signing any agreement, a farmer should consult an attorney about local and state-specific legal requirements.

A. Option to Purchase or Lease

Initially, a developer may want to buy an option to purchase or lease the land from the landowner. An option gives the developer the right to purchase or lease the land at an agreed-upon price, subject to agreed-upon terms. An option essentially removes property from the market while a developer determines whether to proceed with the project. The terms of the final purchase or lease are negotiated and set forth in the option agreement.

With an option, the developer gets to decide whether he or she will actually purchase or lease the land at any point during the term of the option, but the developer is not obligated to do so. At the end of the option period, the developer must decide whether to purchase or lease the property at the price and terms agreed to in the option agreement, or to give up all interest in the land. The option right is forfeited if not exercised by the stated date.

If a better offer from someone else comes along while the option is in place, the landowner cannot accept it. The landowner can only sell or lease the land to the developer who holds the option, according to the terms and price already negotiated in the option agreement.

The price of the option should compensate the landowner for keeping the property off the market. The value depends on the length of the option period and the value of the land and wind resources being selected. Usually, the landowner is paid a lump sum equivalent to a small percentage of the property value. If more than one developer wants to purchase the option, it should become more valuable.⁸

State Law Limits on Length of Wind Options

Many states are debating or have already imposed mandatory time limits on the duration of wind-related option agreements to prevent developers from stockpiling wind rights or manipulating markets and demand for green energy. For example, a wind option agreement in North Dakota terminates if wind development has not occurred within five years after the agreement commences. N.D. Cent. Code § 9-01-22 (2005). The same is true for wind easements in South Dakota. S.D. Codified Laws § 43-13-17 (2006). Minnesota also recently passed legislation that requires that wind option agreements will terminate if the anticipated wind project does not begin commercial operation within seven years. Next Generation Energy Act, 2007 Minn. Laws (Chap. 136, art. IV, § 15) (to be codified at Minn. Stat. § 500.30, subd. 2).

Most likely, the developer will also want to acquire some rights to access and even use the land during the option period in order to test the wind resource or otherwise investigate the feasibility of a wind project on the site. This will probably be in the form of a separate short-term lease or license agreement to allow the developer to use and access the land for specific purposes during a specific time.

For example, a developer who is serious about exploring the feasibility of a wind project on a landowner’s property is likely to seek to install an *anemometer* on the property to monitor and measure the average wind speed. A *meteorological tower agreement* (also called a “MET tower agreement”) allows the developer to erect a tower on the land to hold the anemometer. It may be a separate contract or incorporated into the wind option, lease, or easement.

Some farmers also negotiate for the right to access and use the wind information gathered about their land.

B. Right of First Refusal

Instead of selling an option to an interested developer, a landowner could instead sell the developer a right of first refusal over the land. This right of first refusal gives the developer the right to match the terms of any proposed sale or lease to a third party in the future. Unlike an option, a right of first refusal does not set the price or other terms of an anticipated future sale or lease. Instead, the holder of a right of first refusal merely gets the right to match any other offer to buy or lease the property. If a developer with a right of first refusal agrees to match an offer received for the land, then the right of first refusal is exercised and the developer gets to buy or lease the property.

The holder of a right of first refusal can also elect not to match the offer. In that case, the third party making the offer can acquire the property from the landowner.

When a landowner has given a right of refusal to a developer, that landowner is required to communicate to the developer any offers to purchase or lease the property to the developer. Other terms of the right of first refusal can be negotiated. For example, the right of first refusal can be made not to apply to certain offers by family members.

A right of first refusal is beneficial to a landowner because it does not take the property entirely out of the wind development market. However, other developers may be unwilling to make the effort to attempt to acquire property that is subject to a right of first refusal.⁹

C. Sale

A sale of property typically conveys to the buyer all of the seller's interests in, and rights to, a piece of property. The seller is paid in full at the time of the exchange, and the buyer is then free to use the property for any legal purpose.

The sale price should reflect the market value of the property, including the value of the wind resource, if any. If a wind developer wants to pay the sale price over time, the landowner should consult an attorney about setting up some kind of security arrangement to ensure future payment.¹⁰ This kind of arrangement can also have important tax consequences.

D. Lease

A lease transfers the right to possess specific property, for a specific period of time and under certain conditions, from the landowner (landlord) to another party (tenant). Unlike a sale, a lease transfers only the right to possess the property and only for a discrete period of time.¹¹

In most wind developments, the developer will seek a long-term land lease of the land on which the project will be built to secure access to the installa-

State Law Limits on Wind Easements

Many states are now enacting specific statutes defining and regulating wind easements. Minnesota law, for example, provides that a wind easement must be in writing and filed in the county recorder's office. In addition, Minnesota law requires several specific provisions be explicitly described in the written easement, such as the angles of wind obstruction prohibited, and maintains that a duly filed wind easement will be presumed to be perpetual unless otherwise provided by the terms of the agreement or by operation of other Minnesota laws. Minn. Stat. § 500.30 (2006). However, in 2007, the Minnesota Legislature added that, like wind options in the state, any wind easement, easement to install wind turbines, or lease of wind rights will also terminate if the intended wind project is not in commercial operation within seven years. Next Generation Energy Act, 2007 Minn. Laws (Chap. 136, art. 4, § 15) (to be codified at Minn. Stat. § 500.30, subd. 2). South Dakota, by way of another example, has passed a law requiring that no wind easement can exceed a term of 50 years. S.D. Codified Laws § 43-13-17 (2006).

tion site. These leases are typically for a period of many years.

If the farmer wants to maintain any control over the use or development of the land being leased, those details must be written into the lease agreement. Unless the farmer expressly reserves certain rights in the lease agreement, leases are usually presumed to give the tenant an exclusive right to possess the leased property.

E. Easement

An easement conveys limited rights to use a portion of a landowner's property rights, either on the land or in the air. As a default rule, most easements are created "in perpetuity," which means they attach to the land forever. However, a written easement agreement can provide a cutoff point and last for only a specified period of time.¹²

The most common type of easement is the right to travel over another person's land, also known as a right-of-way. Other common examples of easements include the right to construct and maintain a roadway across the property, the right to construct a pipeline under the land, and the right to build and maintain a power line over the land.

A farmer who allows his or her property to be subject to a developer's easement is said to be "burdened," because he or she is not allowed to interfere with the developer's use of the easement.

Easements are also often referred to as either affirmative or negative. In an *affirmative easement*, the farmer grants the developer the right to do something on the property, such as granting cross the property to install and repair testing devices or

turbines, or to erect and maintain transmission lines. Another example of an affirmative easement is an overhang or encroachment easement in which a landowner permits the overhang of something like the rotors of a neighbor's wind turbine onto his or her property.¹³

In a *negative easement*, the farmer agrees not to do something on his or her land in order to benefit the neighboring land. For example, a farmer may grant a developer a wind easement on his property by agreeing not to build anything that would block a neighboring turbine's access to the wind. A farmer may also grant a noise easement, thereby agreeing not to object to any noise created by neighboring wind turbines.

Easements are commonly used in wind development to ensure wind access. Developers might purchase or lease only sufficient land to install actual turbines, but not enough to assure the turbines have access to the required wind. Instead, these developers may seek wind easements from neighboring farmers, as well as the farmer with the turbine

on his or her property, to restrict vegetation, structures, or other obstacles that would impair or obstruct the required wind flow.

F. Covenants

A covenant is typically a restriction on an owner's right to use his or her property in a specified way. A common example of a covenant is a provision in the title to a residential condominium agreeing to be subject to the homeowners' association requirements. Covenants are also sometimes used in a wind development. For example, if a farmer sells only a portion of a large parcel of land to a wind developer, the farmer may agree that, if the remainder of the parcel is sold, the

Difference Between Leases and Easements

Although they may appear at the outset to be practically similar, leases and easements are legally distinct agreements. They secure different types of property rights, and they impose different default terms and obligations. Nonetheless, in the reality of the wind development industry, the words "lease" and "easement" tend to be used somewhat interchangeably and without much precision. This can create significant confusion. The substance of all legal documents should be reviewed carefully to ensure they are in fact what they claim to be.

deed will contain a restrictive covenant preventing the new owner from obstructing the developer's wind access.

Properly recorded covenants bind later purchasers of land, whether those purchasers are burdened or benefited by the covenants. However, some states have laws limiting how long these restrictions can have effect. For example, Minnesota law provides that many restrictive covenants cease to be valid 30 years after the date of the deed or document creating them, unless certain exceptions, specified in the law, are met.¹⁴

G. Permit or License

A farmer may grant a developer a permit or license to use the land or airspace for a specified time or purpose. Permits or licenses are typically short-term permissions granted for specific land uses, and these agreements can usually be terminated at any time.

H. Other Wind-Related Contracts

In addition to the property-related agreements discussed in these materials, any wind project will ultimately include many other legal contracts. For example, as discussed in more detail in FLAG's *Farmers' Guide to Wind Energy: Legal Issues in Farming the Wind*, wind developers must negotiate a power purchase agreement with an energy purchaser and interconnection and transmission agreements to transport the generated energy to that purchaser across the electric grid. In addition, there will be a turbine purchase agreement, contracts with various professional partners (including attorneys and other wind consultants), and a contract for operating and maintaining the project. The details of these agreements are beyond the scope of these materials.

IV. Effect of Agreements on Landowner's Other Relationships

While negotiating with a developer, the landowner should be aware that any property agreement reached could affect, or be affected by, the landowner's dealings and relationships with other parties.

A. Secured Creditors

If the property selected for potential wind development is subject to a mortgage or other secured creditor claim, the farmer should consider the impact of any wind-related negotiations on the terms of that security agreement.

For example, the farmer should know whether it will be a default of an agreement with a secured creditor to grant the developer an interest in the property without prior permission of the secured creditor. In most cases, when there is a mortgage on the land, the terms of the landowner's security agreement with the lender will require that that lender be involved in the negotiations with the developer. At a minimum, the lender will likely need to give a formal consent to the transaction.

The farmer should also be concerned whether the agreement with the developer will affect the overall property value in such a way that a secured creditor could claim the debt is under-secured and seek immediate payment, whether any creditors have a security interest or mortgage that would allow them to claim an interest in the payments due the farmer under the wind agreement, and how the agreement with the developer could affect the farmer's ability to obtain new farm financing in the future.¹⁵

In addition, many developers will seek a *subordination and non-disturbance agreement* from the landowner's lender. The developer uses this agreement to ensure the landowner's lender will not interfere with the developer's use of the land for the wind

project. In addition, the subordination portion of the agreement will require the landowner's lender to give the developer's own creditors a first claim over any shared interest in the property.¹⁶

Farmers should consult a knowledgeable attorney who can review all existing mortgages and security agreements, in conjunction with any proposed wind-related agreement, to give specific advice on these matters.

B. Federal Farm Programs

Wind development on farmland may also impact the farmer's participation in government farm programs, including the farmer's eligibility for commodity payment programs or for enrollment in various conservation programs. Farmers should consult the particular rules of the programs at issue, any existing program agreements, program officials, and, if necessary, an attorney knowledgeable in these matters.

More detailed information about the effect of a wind energy project on participation in a variety of federal farm programs can be found in Chapters 4 (Siting) and 5 (Liability) of FLAG's *Farmers' Guide to Wind Energy: Legal Issues in Farming the Wind*.

In some instances, farmers may negotiate to have the developer compensate the farmer for any lost income from farm programs or any penalties that are imposed under the programs as a result of the wind development.

C. Income Tax

Different types of wind agreements, and payment arrangements, may have different income tax consequences. For example, receiving one or a few large payments may result in higher income tax liability than receiving several smaller payments over an extended time. In addition, depending on the nature of any agreement, there may be a depreciation in the property value that affects income tax. The farmer should get expert tax advice during the

negotiation process and before signing any agreement.

D. Property Tax

Several states have specific property tax laws that apply only to wind developments, frequently with some tax exemptions for wind energy production. Minnesota, for example, provides an exemption from property tax that would be owed on wind energy equipment.¹⁷ Other states, like Iowa, specifically state that wind energy installations do not increase the actual, assessed, and taxable values of the underlying real estate for a period of five assessment years, unless an alternative taxing scheme, as described in the statute, is adopted by the local taxing authority.¹⁸

These laws are discussed in more detail in Chapter 13 (Tax Benefits and Obligations) of FLAG's *Farmers' Guide to Wind Energy: Legal Issues in Farming the Wind*.

However, any state-specific property tax exemption is likely subject to exceptions and may be changed with subsequent legislation. Accordingly, wind agreements should be negotiated with terms providing for who will be responsible for any subsequent increase in the property tax due. If the developer is hesitant to take on this uncertain future liability, farmers should be aware of this risk when negotiating the terms of the agreement.

V. Negotiation Issues for Farmers

Farmers should be as informed as possible about the issues likely to arise and should be represented by qualified legal counsel. Farmers should carefully negotiate these agreements to ensure that all possible concerns are addressed in detail in the written language of the agreement. For example, for each right or obligation set out in the wind agreement, the parties should specify whether it applies to the landowner, the developer, or both. A thoughtfully negotiated and well-written agreement can help prevent disputes and even lawsuits in the future.

In the early stages of a new wind project, developers are driven to secure an exclusive and reliable right to develop windy sites. They often want to secure early access to multiple tracts of land in order to test and gather wind data. Developers may have an incentive to obtain future development rights from more landowners and in more areas than they will ultimately actually use. This enables developers to comfortably explore multiple locations before selecting the best scenario; and, in some cases, it may enable developers to exclude other competitors from the local market.

As with any business relationship, selecting which individual or entity to contract with in the first place is a critical decision. Landowners have the right to investigate the developer's history. Landowners should ask about prior projects and may consider the risks of dealing with a first-time developer or a developer who is merely "collecting" wind or land rights. It is critical for landowners to be as informed as possible before entering into negotiations with a wind developer.

A. Duration of Agreement

Each agreement should specify its term, meaning how long the agreement will be in effect. A typical wind project lease has a term of 20 to 30 years, but it may be significantly longer. Option periods are typically shorter, in the range of three to five years, to avoid the landowner having his or her development rights tied up for too long.¹⁹

Agreements should also address the conditions for renewal. The number and operation of the renewal periods is frequently a subject for focused negotiation. Most wind project leases will have one or two renewal terms, typically at the

developer's option. These renewal periods may last for five or ten years, and may be at an increased rental rate to reflect inflation and/or expected price increases. If the renewal periods are not automatic, the landowner and developer will need to agree to the terms of any future continuation at the time of the desired renewal.

On a related note, the landowner and developer should negotiate whether, and under what conditions, the developer will have the right to re-power the project. Generally, re-powering requires replacing existing wind generating equipment with new and more advanced technologies.

B. Compensation

There are many ways in which a landowner's compensation for wind agreements can be structured.

Possibilities include an upfront, lump-sum payment; annual rental payments on a per turbine, per megawatt (MW), or per acre basis; and royalty payments based on a percentage of the gross revenues of the project. Various combinations of these approaches can also be used.²⁰

Some general compensation guidelines for annual payments for large-scale wind projects are \$2,500 to \$5,000 per turbine, \$3,000 to \$4,000 per MW of generating capacity, or two to four percent of the project's gross revenues.²¹ However, in practice, the exact amount of compensation varies greatly depending on a variety of factors, including the size of the project and turbines being installed and the value of the land

for other uses.²² Additional factors include the perceived potential for profits from the wind project, the degree of competition for wind development in the area, and the negotiating skills of the landowner

The Consequences of Confidentiality Clauses

Historically, many wind developers have required broad confidentiality clauses in their property agreements with landowners, seeing confidentiality as part of their competitive advantage for securing the best windy sites. These clauses make it difficult, if not impossible, to get good data on existing compensation patterns. For more information on this and other compensation issues, Windustry has prepared a study of compensation packages for wind energy easements and leases. It is available online at http://www.windustry.org/easements/Compensation_Sept2005.pdf.

and his or her representatives.²³ Before entering these negotiations, farmers should attempt to learn the investment and cash flow projections for the planned wind project. This can affect the amount of compensation the farmer should expect for the transaction.

If royalty payments are contemplated, the landowner should be careful to ensure that the base amount for the royalty calculation (usually gross revenues) is clearly identified and defined in the contract. For example, gross revenues may or may not include other financial benefits the developer receives for operating the project, such as tax credits, other government subsidies, or revenue from selling the environmental attributes of the wind energy separate from the electricity itself (also called *renewable energy certificates (RECs)* or *green tags*). Including or excluding these other sources of income in the base amount would significantly affect the landowner's royalty payment.

Landowners agreeing to a royalty payment scheme should also seek the right to verify with the purchasing utility any data used to calculate the payments. Alternatively, landowners should seek the right to independently audit the developer's books at specified intervals to verify payment computations.

In addition to the amount of compensation, the terms of payment must be carefully and thoroughly defined. The agreement should specify whether there will be one payment or a series of payments,

when each payment will be made, what each payment is for, how the payments are to be calculated, whether there are minimum guaranteed payments,

whether the minimum payments are in addition to or subtracted from other payments, and how and to whom the payments are to be made. For example, landowners should be sure a written option agreement clearly addresses whether any option payment will be credited against any subsequent purchase, lease, or easement payments owed by the developer if the option is exercised.

Finally, in some instances, developers will offer additional payments to landowners for the right to build improvements other than turbines on the property (such as substations or roads). These agreements can be confusing, because the additional payments are usually made in these cases only if the improvements are actually built, something typically left to the developer's discretion.²⁴

C. Scope of Land Subject to Agreement

When land agreements are negotiated early in the development process, before all of the relevant wind data has been accumulated, developers will want to maximize the amount of property subject to the agreement. This preserves for the

developer the maximum flexibility in the ultimate project layout and design once sufficient data has been collected. In addition, the developer will want to control—and prevent—any obstruction in the area that could interfere with the average speed and flow of the wind over the turbines.²⁵

Effect of State Corporate Farm Laws

Several states have laws limiting corporate ownership of farmland and corporate farming activities. These laws generally prohibit non-family-owned business entities from acquiring an interest in farmland. If a farmer in one of these states grants an easement or enters into a lease with a developer or utility, there is a possibility that the agreement could be invalid under the state's corporate farming law. However, these laws typically have exceptions that would apply to leases or easements for wind energy projects. The most common of these exceptions allows a business entity to obtain an interest in farmland for immediate or potential use for non-farming purposes. *See, e.g., Iowa Code § 9H.4(4) (2006); Minn. Stat. § 500.24, subd. 2(u) (2006).* Minnesota's law also has several exceptions that could apply to wind energy projects, including exceptions for interests held by "utility corporations," an exception for interests in land of 40 acres or less ("de minimis" holdings), and procedures to apply for an exception to the law from the Commissioner of Agriculture. *See Minn. Stat. § 500.24, subd. 2(t), 2(bb), 3(b) (2006).*

Landowners, on the other hand, are typically motivated to limit the amount of property affected by wind agreements. This not only provides maximum control over non-wind-related uses of the land, such as farming, but it also preserves the landowner's ability to lease the excluded land for other purposes. Therefore, the amount of land subject to the agreements should be considered early in the process and be carefully negotiated.

D. Uses of the Land

To be functional, land agreements must describe in as much detail as possible how both parties can use the land. Developers will likely want to collect wind data, conduct environmental testing, construct the wind farm, create access roads where needed, install connecting electric lines, and have the ability to do all other activities necessary to the generation, collection, and transmission of electricity on the site.

Conversely, landowners should be sure to clarify their remaining rights to use the land. Activities that are typically of particular interest include planting, cultivating, and harvesting crops; grazing livestock; developing subsurface mineral, gas, or oil resources; cutting timber; hunting; and entering upon and inspecting the property.

One issue that frequently comes up is what approval rights, if any, the landowner maintains over the final siting of both the wind turbines and any access roads. Farmers, for example, will likely want to ensure access roads are built so that disturbance of any ongoing farming operations is minimal. Similarly, the agreement should carefully spell out who maintains those roads and who may use them.

E. Taxes

The agreement should clearly identify the parties' obligations regarding payment of real property taxes, personal property taxes, and taxes on the generation or sale of electricity.

Unless otherwise specified, property taxes will likely be assessed against the landowner. Some agreements require the developer to pay all increases in taxes due because of improvements made or the changed use of the property resulting from the wind power development.

The agreement should also address whether a party has a right to be notified of taxes to be paid by the other party, and whether a party has the right to pay taxes owed by the other party to avoid placement of tax liens on the property or tax foreclosure.²⁶

F. Allocation of Liabilities

Generally, landowners require a clause in the agreement requiring the developer to defend and hold the landowner harmless from claims for any future loss or damage to persons or property arising from the developer's use and occupation of the land. Similarly, the developer will likely seek a promise of indemnity from the landowner for any losses he or she causes to the wind operation. These indemnification clauses may also include a requirement that the party at fault pay the other party's reasonable attorney fees should any dispute arise.

Frequently, the landowner insists that the developer buy insurance to protect against damages arising from the wind development. Possible risks to insure against include damage to real property, structures, equipment, livestock, and crops owned by either party; personal injury or property damage suffered by third parties; environmental impacts; and business interruption.²⁷

The agreement should also identify the amount of insurance coverage to be obtained by the developer and who must be listed as insured parties. Many landowners also seek the right to notice of any default under the insurance policy by the developer and the opportunity to pay premiums not paid by the developer in order to maintain coverage.

As for environmental liability, the landowner will likely be required to warrant that there are no hazardous materials or contamination on the land at the time of the agreement. If this kind of environmental issue does exist, the parties should negotiate remediation requirements. The landowner should ensure that the developer bears responsibility for any future environmental liability the developer creates.

More information about the various liability issues that may arise in the context of a wind development project is available in Chapter 5 (Liability) of FLAG's *Farmers' Guide to Wind Energy: Legal Issues in Farming the Wind*.

G. Assignment of Contract Rights by Developer

The agreement should also specify whether the landowner and developer may allow other parties to exercise their contractual rights. Developers almost always seek broad rights to sublease, assign, and/or mortgage their rights under a wind agreement, usually without the landowner's consent.²⁸ This may be done to obtain financing for the project, for tax or liability purposes, to allow another developer to complete the project if the original developer is unable to do so, and for other reasons.

The landowner may try to negotiate to receive more information about the developer's plans for assignment. For example, the landowner might seek a list of circumstances under which the landowner's written permission must be obtained before an assignment can be made so that the landowner can investigate the qualifications of the assignee. The landowner could also negotiate for some guarantees that the original developer will remain responsible for all contractual obligations if the subsequent assignee fails to meet its obligations.

In most cases, the developer will also seek to transfer some rights to the developer's lender. This may be required to finance the project. For example, the

developer's lender is likely to require notice of any default by the developer under the agreement, and the developer's lender will also likely require an opportunity to cure that default before the agreement is terminated. This could go so far as, in the event of foreclosure, requiring the landowner to recognize the lender as the new project owner and operator. This is designed to ensure continued operation of the wind power project and, ultimately, repayment of the developer's loan.²⁹

H. Covenants of Title

In most cases, before finalizing a wind agreement a developer will want a title report prepared by a title insurance company or an attorney to determine for certain whether any other party has an interest in the land. This investigation should identify any outstanding recorded or unrecorded liens or encumbrances. The agreement should specify whether the landowner is obligated to remove any liens or encumbrances on the land or whether the developer's interest will be subject to any such claims. Many developers will also require a physical survey of the property.

In many cases, the developer will seek a representation or warranty from the landowner that there are no other liens, encumbrances, or leases affecting the land other than those specified in the agreement. In addition, as discussed above, a developer will often require the landowner to obtain a subordination and non-disturbance agreement from any existing or future lenders.

Some developers have had difficulty obtaining title insurance policies that would compensate for any losses to the value of wind turbines as a result of any title defect. This results from some legal uncertainty as to whether installed wind turbines constitute real or personal property. This legal issue is beyond the scope of these materials; however, farmer should note that, to address this uncertainty, some states permit special title insurance endorsements that specifically cover wind turbines.³⁰

I. Liens and Encumbrances

It is very important that the agreement specifically address the parties' rights and obligations regarding payment of debts secured by the land and placement of new liens or encumbrances on the property.

In some deals, both sides pay off any existing liens when the agreement is executed, and then both parties are prohibited from incurring any additional liens during the contract period. However, this is not always practical. Some farmers, in particular, are concerned about limitations that restrict their rights to use their land to secure future farm credit.³¹

If future liens and encumbrances are permitted, the agreement should address whether the developer can make payments on the landowner's mortgage debt and receive credit against future payments the developer would owe the landowner, and what other actions the parties can take to prevent the sale of the land to satisfy any liens or other encumbrances. Both sides may seek the right to review the other's security agreements to ensure that they are reasonable and a right to be notified in the case of any default.³²

J. Termination of the Agreement

Any wind agreement should describe the conditions under which termination of the contract by either party is permissible, and what may be required to avoid termination. Developers will frequently seek the right to voluntarily terminate a lease or easement at the developers' option, often in their complete discretion without the requirement of any good cause. Other developers will agree to terminate only with cause, or if certain conditions or required milestones—such as obtaining the needed wind easements from neighbors—cannot be met.

Although objected to by most developers, some landowners also consider whether they themselves

want the right to terminate the agreement under certain circumstances before the intended end of the project. This may be difficult to achieve given the amount of time and money developers are required to invest to get a project going.

If termination by one or both parties is permitted only with good cause, the events that are sufficient to constitute *material default*—and therefore are so-called *triggering events* giving good cause to terminate the agreement—must be specifically detailed in the agreement. Some typical triggering events for termination are:

- Failure to make payments required by the agreement.
- Failure to develop the project or meet certain development milestones within a specified period, such as acquiring siting permits, signing power purchase agreements, or initiating construction.
- Failure to maintain adequate insurance.
- Abandonment or non-operation of turbines.
- Bankruptcy or insolvency.
- Non-payment of taxes.
- Failure to make reasonable efforts or use due diligence in carrying out the terms of the agreement.³³

The parties should also negotiate the process for termination of the agreement. Typically, the agreement will require that some formal notice be given of a default under the agreement and/or the intent to terminate. In addition, the defaulting party should have an opportunity to correct the problems. The agreement should spell out the time period for and method of these notices, as well as the time period for and method of evaluating the sufficiency of any correction.

If early termination by the developer is permitted under the agreement, the landowner may want to negotiate to receive some kind of early termination payment.³⁴

K. End of Project and Site Remediation

The agreement should address what happens to any remaining wind structures at the end of the agreement term or in the event of an early termination. Specific timelines for compliance should also be included.

At the end of a wind project, the turbines themselves typically retain some scrap metal value that the developer or project owner will not want to abandon. However, the agreement should also spell out what must be done, if anything, to remediate or remove remaining access roads, underground cables, and the cement foundations for various aspects of the project. The wind turbine itself may have a foundation as deep as 30 feet below ground. For agricultural lands, a common practice is to remove all visible traces of the project (except usable roads) and only so much of the underground installations as would be required to return the land to farming—being sure to return at least three feet of top soil.³⁵

The agreement may also detail bonding or escrow requirements for the developer from the outset, requiring him or her to guarantee there will be funds available for this decommissioning process at the end of the project. In many places, these requirements are incorporated into state and local permitting laws as well.

Another issue to be addressed regarding the end of the project is removing from the official property records of the county any filed leases or easements that are no longer valid. This may require the cooperation of the developer or project owner.³⁶

L. Dispute Resolution

A wind agreement will impose significant obligations on both the landowner and the developer. To minimize disputes during the life of the contract, the agreement should describe how the parties will determine whether specified obligations have been met satisfactorily (for example, land remediation at

the end of the contract) and what the consequences will be or failure to meet any contractual obligations.

To deal with potential disputes that cannot be resolved between the parties, the agreement should set out in detail what dispute resolution processes the parties will use. This may include forms of mediation, arbitration, or court action. Some of these processes can be expensive, and a farmer should consult an attorney before including them in an agreement.

M. Other Rights and Obligations

There are several other rights and obligations of the parties that should be covered in detail in a wind agreement. Other matters to consider when negotiating the agreement include:

- Installing or using power or telephone lines and payment of utility bills.
- Installing and maintaining signs.
- Permitting the developer to give tours of the project site.
- Taking steps to control noise.
- Providing notice of construction or improvements.
- Employing licensed architects, engineers, and other contractors.
- Installing, marking, and enclosing guy wires around wind turbines.
- Installing security devices.
- Distributing proceeds in the case of condemnation.
- Complying with and obtaining necessary siting and permit conditions.³⁷

The agreement should include provisions setting out the process for making modifications to it. Other standard contract terms should be discussed with an attorney.

N. Landowner Purchase Option

In some instances, it may be appropriate for a landowner to negotiate for a right to purchase the entire wind facility from the developer after certain milestones are met. This concept is discussed in more detail in Chapters 8 (Financing) and 10 (Business Structures) of FLAG's *Farmers' Guide to Wind Energy: Legal Issues in Farming the Wind*.

VI. Eminent Domain

Eminent domain, also known as condemnation, is the government's power to take private property for public purposes, with or without the owner's consent, by paying the owner just compensation and by complying with certain procedures set forth in state or federal law.³⁸ Eminent domain proceedings may involve a taking of the full use and control of one's property, or they may involve only the occupation of a limited portion of or interest in that property, such as an easement.

Any farmer faced with impending eminent domain proceedings is advised to consult an attorney; however, this section provides some general information on the subject.

To take land by eminent domain, a public authority must intend to use the land for a public purpose. The courts, both state and federal, have adopted a broad interpretation of "public purpose" and largely defer to the public authority's determination that the land is necessary to further its public purpose.³⁹

Both the federal and state governments determine which public authorities may exercise the power of eminent domain. Generally, state legislatures give this power to all levels of local government and public service corporations, which often include electric utility companies. But each state's treatment of its eminent domain authority may differ slightly.

In Minnesota, for example, "public service corporations," including electric utilities, enjoy an express

delegation of the state's eminent domain power. The utilities still have to abide by the same rules as the state itself.⁴⁰ Under the broad definition of public purpose, electric utilities in Minnesota can use eminent domain authority to take land for new transmission lines; it is also conceivable they would assert the authority to take other property rights needed to construct a new wind energy project.⁴¹

The generally accepted definition of "just compensation" is the fair market value of the land. That is, what a willing buyer would pay a willing seller for the land or for the easement. In the case of eminent domain for a power line easement, for example, the fair market value might be measured by the difference in the value of the land before and after the taking, which would account for any decreased desirability of the land to a buyer because of the easement and utility lines.

Damage to the rest of the landowner's property not subject to the taking is typically included in calculating the just compensation.⁴² Construction of a power line across agricultural land will cause crop damage, compaction of the land used, and potentially other damage to farming operations that must be factored into the compensation.

Landowners should be aware that there is frequently room to negotiate the value of property subject to eminent domain, and that the public authority's first offer need not always be taken. Each state has its own process that must be carefully followed for condemnation, and agreements may be able to be reached without litigation or other adverse proceedings or appeals. ♦

Additional Resources for More Information

Windustry's *Wind Energy Leases and Easements: Information for Landowners and Good Practices for Developers* (2005). This package of materials includes lease and easement agreement guidelines, a study on compensation packages for landowners hosting wind turbines, recommended best practices and public policies related to wind property agreements, and a bibliography of resources. Available at <http://www.windustry.org/opportunities/lease.htm> (last visited June 5, 2007).

New York State Energy Research and Development Authority's *Wind Energy Toolkit* (2005). This resource consists of multiple documents including a legal guidebook for landowners, reports on lease agreements and wind project site selection issues, and a sample annotated lease agreement. Available at <http://www.powernaturally.org/Programs/Wind/toolkit.asp> (last visited June 5, 2007).

Izaak Walton League's *Landowner's Guide to Wind Energy in the Upper Midwest* (2001). The guide discusses how landowners can evaluate their land for wind energy, the economics of wind projects, and issues to consider when approached by a wind developer. Copies may be ordered from the Izaak Walton League of America's Midwest Office. The office phone number is (651) 649-1446, and the office e-mail address is midwestoffice@iwla.org.

Endnotes:

¹ See American Wind Energy Association, *Wind Web Tutorial: Wind Energy and the Environment*, http://www.awea.org/faq/wwt_environment.html (click on "How much land is needed for a utility-scale wind plant?") (last visited June 5, 2007).

² See 28 Am. Jur. (Second) Estates § 13 (2007)

³ E.g., Minn. Stat. § 500.30 (2006) (amended by Next Generation Energy Act, 2007 Minn. Laws (Ch. 136, art. 4, § 15)); Or. Rev. Stat. Ann. § 105.900 (2005); N.D. Cent. Code. § 47-05-14 (2005).

⁴ See Iowa Energy Center, *Wind Energy Manual: Wind and Wind Power*, http://www.energy.iastate.edu/renewable/wind/wem/wem-08_power.html (last visited June 5, 2007).

⁵ See The Minnesota Project, *Companion Document to the Minnesota Model Wind Energy Conversion Ordinance—2005*, 14 (2005), available at www.cleanenergyresourceteams.org/pdf/FINAL%20WIND%20ORD%20COMP%20DOC.pdf (last visited June 5, 2007) (defining the "wind shadow" as equal to ten times the diameter of the rotor).

⁶ *Contra Costa Water District v. Vaquero Farms, Inc.*, 68 Cal. Rptr. 2d 272 (Cal. Ct. App. 1997).

⁷ S.D. Codified Laws § 43-13-19 (2006).

⁸ Nancy Lang and William Grant, *Landowner's Guide to Wind Energy in the Upper Midwest* 41 (Izaak Walton League of America, 2nd prtg. 2001).

⁹ Nancy Lang and William Grant, *Landowner's Guide to Wind Energy in the Upper Midwest* 41 (Izaak Walton League of America, 2nd prtg. 2001).

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- ¹⁰ Nancy Lang and William Grant, *Landowner's Guide to Wind Energy in the Upper Midwest* 40 (Izaak Walton League of America, 2nd prtg. 2001).
- ¹¹ See generally Fred Zalzman, *Harvesting the Wind: A Legal Guidebook for Landowners* 2 (NYS Energy Research & Dev. Auth. May 2005), available at http://www.powernaturally.org/Programs/Wind/toolkit/12_harvestingthewind.pdf (last visited June 5, 2007).
- ¹² See generally Fred Zalzman, *Harvesting the Wind: A Legal Guidebook for Landowners* 2-3 (NYS Energy Research & Dev. Auth. May 2005), available at http://www.powernaturally.org/Programs/Wind/toolkit/12_harvestingthewind.pdf (last visited June 5, 2007).
- ¹³ Robert R. Nardi and John H. Daniels, Jr., *Wind Energy Easement and Lease Agreements* 3 (Windustry Sept. 2005), available at http://www.windustry.com/easements/GuidelinesOutline_Sept2005.pdf (last visited June 5, 2007).
- ¹⁴ See Minn. Stat. § 500.20, subd. 2 (2006).
- ¹⁵ Nancy Lang and William Grant, *Landowner's Guide to Wind Energy in the Upper Midwest* 39 (Izaak Walton League of America, 2nd prtg. 2001).
- ¹⁶ Cindy Wenig, "Real Estate Issues in US Wind Deals," 47 from *Project Finance NewsWire* (Chadbourne & Parke LLP Aug. 2005), available at <http://www.chadbourne.com/publications> (click on "Newsletters," then click on "Project Finance NewsWire, August 2005") (last visited June 5, 2007).
- ¹⁷ Minn. Stat. § 272.02, subd. 22 (2006). In lieu of property tax, Minnesota imposes a wind energy production tax with rates tiered according to the size of the project. Minn. Stat. § 272.029 (2006).
- ¹⁸ See, e.g., Iowa Code. §§ 441.21(8)(b)-(c), 427B.26 (2006).
- ¹⁹ See generally Global Energy Concepts, *Lease Agreements* 6-7 (NYS Energy Research & Dev. Auth. Oct. 2005), available at http://www.powernaturally.org/Programs/Wind/toolkit/14a_LeaseAgreements.pdf (last visited June 5, 2007).
- ²⁰ Montana Department of Environmental Quality, *A Landowner's (Informal) Guide to Negotiating for a Wind Farm* (Aug. 15, 2003), available at <http://www.deq.state.mt.us/Energy/Renewable/LandownersGuiToWind.pdf> (last visited June 5, 2007). Moreover, farmers and developers should be careful to observe state laws in this regard. Some states may require that payments to landowners be made at least annually. Cindy Wenig, "Real Estate Issues in US Wind Deals," 48 from *Project Finance NewsWire* (Chadbourne & Parke LLP August 2005), available at <http://www.chadbourne.com/publications> (click on "Newsletters," then click on "Project Finance NewsWire, August 2005") (last visited June 5, 2007).
- ²¹ See Windustry, *What Does a Farmer Need to Know About Wind Energy?*, <http://www.windustry.org/opportunities/farmer.htm> (last visited June 5, 2007).
- ²² Windustry, *Wind Energy Easements and Leases: Compensation Packages* (Sept. 2005), available at http://www.windustry.org/easements/Compensation_Sept2005.pdf (last visited June 5, 2007).
- ²³ See generally Kathleen J. Doll, "Wind Energy Lease Agreements," 1-5 from *The Law of Wind* (Stoel Rives, LLP, 3d ed. 2006), available at http://www.stoel.com/webfiles/LawOfWind_WEB_02_07.pdf (last visited June 5, 2007).
- ²⁴ Cindy Wenig, "Real Estate Issues in US Wind Deals," 48 from *Project Finance NewsWire* (Chadbourne & Parke LLP August 2005), available at <http://www.chadbourne.com/publications> (click on "Newsletters," then click on "Project Finance NewsWire, August 2005") (last visited June 5, 2007).
- ²⁵ See generally Kathleen J. Doll, "Wind Energy Lease Agreements," 1-1 to 1-2 from *The Law of Wind* (Stoel Rives, LLP, 3d ed. 2006), available at http://www.stoel.com/webfiles/LawOfWind_WEB_02_07.pdf (last visited June 5, 2007).
- ²⁶ Nancy Lang and William Grant, *Landowner's Guide to Wind Energy in the Upper Midwest* 44 (Izaak Walton League of America, 2nd prtg. 2001).

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- ²⁷ Nancy Lang and William Grant, *Landowner's Guide to Wind Energy in the Upper Midwest* 45 (Izaak Walton League of America, 2nd prtg. 2001).
- ²⁸ See, e.g., Global Energy Concepts, *Sample Annotated Land Lease Agreement* 17 (NYS Energy Research & Dev. Auth. Oct. 2005), available at http://www.powernaturally.org/Programs/Wind/toolkit/14b_windenergyleaseagreement.pdf (last visited June 5, 2007).
- ²⁹ See, e.g., Global Energy Concepts, *Sample Annotated Land Lease Agreement* 18-21 (NYS Energy Research & Dev. Auth. Oct. 2005), available at http://www.powernaturally.org/Programs/Wind/toolkit/14b_windenergyleaseagreement.pdf (last visited June 5, 2007).
- ³⁰ See Cindy Wenig, "Real Estate Issues in US Wind Deals," 50 from *Project Finance NewsWire* (Chadbourne & Parke LLP Aug. 2005), available at <http://www.chadbourne.com/publications> (click on "Newsletters," then click on "Project Finance NewsWire, August 2005") (last visited June 5, 2007).
- ³¹ Robert R. Nardi and John H. Daniels, Jr., *Wind Energy Easement and Lease Agreements* 10 (Windustry Sept. 2005), available at http://www.windustry.com/easements/GuidelinesOutline_Sept2005.pdf (last visited June 5, 2007).
- ³² Nancy Lang and William Grant, *Landowner's Guide to Wind Energy in the Upper Midwest* 44 (Izaak Walton League of America, 2nd prtg. 2001).
- ³³ See also Nancy Lang and William Grant, *Landowner's Guide to Wind Energy in the Upper Midwest* 42 (Izaak Walton League of America, 2nd prtg. 2001).
- ³⁴ Robert R. Nardi and John H. Daniels, Jr., *Wind Energy Easement and Lease Agreements* 3 (Windustry Sept. 2005), available at http://www.windustry.com/easements/GuidelinesOutline_Sept2005.pdf (last visited June 5, 2007).
- ³⁵ Global Energy Concepts, *Frequently Asked Questions for Large-Scale Wind Energy Projects* 14 (NYS Energy Research & Dev. Auth. Oct. 2005), available at http://www.powernaturally.org/Programs/Wind/toolkit/23_frequentlyaskedquestions.pdf (last visited June 5, 2007).
- ³⁶ Robert R. Nardi and John H. Daniels, Jr., *Wind Energy Easement and Lease Agreements* 2, 11 (Windustry Sept. 2005), available at http://www.windustry.com/easements/GuidelinesOutline_Sept2005.pdf (last visited June 5, 2007).
- ³⁷ See also Nancy Lang and William Grant, *Landowner's Guide to Wind Energy in the Upper Midwest* 43-45 (Izaak Walton League of America, 2nd prtg. 2001).
- ³⁸ See, e.g., U.S. Const. amend. V.; Minn. Const. art. I, § 13.
- ³⁹ See, e.g., *Kelo v. City of New London*, 545 U.S. 469 (2005).
- ⁴⁰ Minn. Stat. §§ 216E.12, 301B.02 (2006).
- ⁴¹ Minn. Stat. § 216E.12 (2006). In 2006, Minnesota passed several changes to its eminent domain laws; however, utilities were exempted from most of the reforms. See 2006 Minn. Laws (Ch. 214, § 14) (codified at Minn. Stat. § 117.189). Farmers and their attorneys should monitor any future legislative developments in this area.
- ⁴² See, e.g., *Alexandria Lake Area Serv. Region v. Johnson*, 295 N.W.2d 588, 590 (Minn. 1980).

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