

Obama's Push for Renewable Energies: How to Negotiate a Wind Energy Lease Agreement on Behalf of Private Landowners

Wind energy is currently one of the fastest growing forms of electricity generation in the United States. In light of the recent economic stimulus plan, the American Recovery and Reinvestment Act ("ARRA"), and the Obama Administration's push for green jobs and renewable energies, landowners from coast-to-coast, especially farmers and ranchers, are tempted to lease their private properties to a wind energy company. Attorneys can play an instrumental role in this process—from organizing landowners to negotiating terms in the wind lease.

Getting Started: Location, Location, Location

The first question that every landowner should ask is whether the property is suitable for a wind farm. Naturally, wind speed is one of the most relevant factors when assessing a property's potential for wind development. Wind speed data is available through the National Renewable Energy Laboratory.¹ However, wind speed is just one factor in determining whether your land is marketable to wind developers. For example, albeit windy, land with a rocky, mountainous terrain is typically not ideal, while protected forests and parks or densely populated areas serve as geographical constraints. Proximity to transmission lines can make a property more marketable.

Moreover, location also determines the federal, state, and local legal framework that would regulate the wind farm. Some localities have zoning regulations that are not conducive for wind development. Furthermore, tax incentives can play a

significant role in the economic feasibility of the project. In fact, only 26 states currently offer property tax incentives for wind projects.² Therefore, regulations and economic incentives in a particular region can affect the marketability of a piece of property.

Collective Bargaining

Once an area is determined to be suitable for wind development, neighboring landowners should form associations with one another to increase their collective bargaining power with wind companies. The larger the parcel of the property, the more potentially lucrative the project may become for both the landowner and the developer. Word of mouth and farm radio can serve as helpful ways to form landowner groups. However, since over 34 states have Wind Working Groups, that group should first be contacted to help organize landowners.³

Landowners engaged in collective bargaining may own greater leverage to obtain higher compensation and better terms from a wind developer. Such arrangements may be beneficial to the wind developer as well: fewer landowners with whom to negotiate, less time spent in negotiations, reduced attorneys' fees, and increased uniformity in wind lease terms across thousands of acres.

Importantly, while a single landowner may not be able to afford to retain counsel to thoroughly negotiate wind lease terms, attorneys' fees are more affordable when spread across a group of landowners. Finally, cooperation among

several landowners helps improve transparency ensuring all landowners get the best possible terms in their lease.

Four Major Stages of Wind Development

Wind developers typically seek access to the land by means of either a lease or an easement. Wind developers generally seek to negotiate for short-term rights for an initial exploration of the feasibility of their project while preserving the right to enter into more long-term arrangements later. When negotiating a wind lease agreement, there are typically four major stages of wind development: (i) development period, (ii) construction period, (iii) operational period, and (iv) termination period. The duration of each of the stages should be narrowly defined in the lease.

Development Period. The development period is the initial stage of wind development. In this initial stage, the wind company evaluates the property for its potential by completing the following activities—wind assessments, environmental review, economic modeling, permitting, and securing financing. During this stage, other than installing a meteorological tower on the property to measure the wind, the wind developer typically makes little use of the property itself.

Construction Period. As the name implies, during the construction period wind turbine generators, steel towers, foundations, concrete pads, anchors, fences, and other fixtures will be installed on the property. If construction does not commence within the specified time, the lease should terminate automatically. Otherwise, the wind developer may tie-up the land for forty or more years without constructing a wind farm.

Operational Period. During the operational period, wind energy is being generated on the property, transmitted to available markets, and sold for profit. The operational period may last up to sixty years with possible extensions.

Termination Period. Finally, during the termination period, the wind developer wind production has terminated, and the developer is obligated to remove its equipment from the landowners' property (commonly referred to as "decommissioning"). Decommissioning may be limited to a few months, while remediation may take several years to adequately complete.

Commercial Terms

This is arguably the most acrimonious, yet most important, section of the wind lease agreement. Landowners are not advised to tie up their land for forty or more years unless adequate compensation is received. The Department of Energy suggests that landowners may earn approximately \$2,000 to \$5,000 per wind turbine that is constructed on their property.⁴ However, compensation is usually not this straightforward.

Compensation is relative to a landowner's particular market in terms of geographic location, total acreage, wind speed, terrain, proximity to transmission lines, and economic incentives in that particular region, state, or county. Due to this inherent complexity, it is difficult to understand fair market value in any one geographical location. Because of the unknowns in the market and the possibility that a wind developer may not develop a property, the landowner should try to secure as much money as possible up front.

There are several types of financial compensation for the landowner. They include the following terms:

Annual Minimum Rent. Property owners should ideally negotiate for an annual minimum rental payment that periodically increases each year during the development period. This ensures a guaranteed amount of money each year for the landowner, regardless of fluctuations in the market for renewable sources of electricity, fluctuations in the amount of wind in any given year, or failure of the turbines to function properly or become damaged for whatever reason.

Construction Bonus. Once construction begins, landowners can expect to receive the annual rental payment and a "construction bonus" for each wind turbine installed on the property.

Royalties. After the wind turbines become operational and generate electricity for sale by the wind developer, the landowner can expect to receive an annual royalty—typically a percentage of the gross revenues received by the wind developer for the sale of the electricity. The royalty should periodically increase as well and include a percentage of any money received by the wind developer in lieu of the sale of electricity.

Legal fees. Landowners should ask for payment or partial payment of attorneys' fees required during the negotiation phase and litigation expenses that should arise from the lease.

Termination fee. The landowner should receive a "termination fee" if the

wind developer terminates the lease prior to construction.

Finally, landowners should negotiate payment for the following: roads, transmission lines, substations, meteorological towers, and payments for access to in-holdings if the land includes a large amount of federal or state land within its boundaries.

Legal Terms

After fair compensation is determined, there are several legal issues that should be considered. They include the following:

Reservation of Property Rights. The lease agreement should not only identify the uses for the wind developer, but it should also reserve all other uses to the landowner. For example, the agreement should reserve all rights to mineral exploration and development to the landowner, as well as all water, hunting, and fishing rights. Furthermore, the landowner may wish to protect part of the property from development, such as the riparian areas, irrigation ditches, or boulder formations.

Liability. It is not uncommon for most lease agreements to include an indemnification provision requiring both parties to defend and hold each other harmless from claims for any future loss or damage arising from the various uses of the property. While such a provision may appear reasonable, it could present significant concerns and should be carefully addressed. Any loss to the landowner arising from the wind developer's use and occupation of the land may total in the

thousands of dollars, or perhaps tens of thousands of dollars while any loss to the wind developer arising from the landowner's use and occupation of his own land may total in the millions of dollars, or perhaps tens of millions of dollars. Thus, landowners should limit their potential liability as much as possible—for example, to the receipt of insurance proceeds, or some other specified amount.

Taxes and Utilities. Wind farm development should inherently increase the property value of the land. The lease agreement should consider assignment of any increase in property taxes to the wind developer. Otherwise, any increase in property taxes may be the responsibility of the landowner. In addition, any utilities necessary for the construction or operation of the wind farm should be the responsibility of the wind developer.

Assignment of Rights. The lease agreement will undoubtedly specify whether the landowner and the wind developer may assign the contractual rights and obligations to third parties. Wind developers will almost always seek broad rights to sublease, assign, and mortgage their rights, without the consent of the landowner. Such broad rights may be necessary for the wind developer to obtain financing; however, landowners should demand to be notified of every such transfer in order to keep track of who is ultimately responsible for any default of the lease agreement.

Liens. Importantly, the lease agreement must require the wind developer to keep the land free and clear of all liens related to the wind farm. It should be the responsibility of the wind developer, not the landowner, to contract and make payment for all labor and materials related to the

construction of the wind farm. Additionally, the landowner should not be held responsible in the event the wind developer cannot fulfill his obligations to pay for labor and materials.

Default and Termination. One of the most important provisions of any contract is the default and termination clause. While the wind developer will likely request the ability to terminate the project at any time and for any reason, the landowner may only be permitted to terminate the agreement under very limited circumstances. To help rectify this, the landowner should attempt to negotiate the ability to terminate the lease if the wind developer fails to pay rent, fails to maintain adequate insurance, commits abandonment, fails to pay taxes, goes bankrupt, or fails or neglects to perform any obligation set forth under the contract.

Decommissioning. In the event of default, or termination of the lease, the landowner should specify how much time the wind developer is permitted to remove the wind turbines from the land and how much the landowner will be paid. To prevent the wind developer from simply "walking away" from the project, the landowner must demand a "decommissioning security," to be established as soon as the wind turbines become operational.

Reclamation. Designating proper reclamation provisions is a key aspect of the wind lease agreement. Reclamation is necessary during construction, operation, repairs, and after the project has been removed from the land. Reclamation measures should identify the means to keep track of the original condition of the property, either through photographs or an assessment prepared by a range professional. Moreover, other reclamation measures

should discuss the following issues: (i) identification of improvements that should be removed, (ii) instructions on depth of soil removal, (iii) description of stockpiling of topsoil and storage during construction, (iv) decompaction of the soil, (v) reclamation of roads, (vi) revegetation, (vii) erosion, (viii) seeding, (ix) protection of revegetation, (x) noxious weeds, (xi) dust control, and (xii) trash removal.

Miscellaneous Provisions. There are several other issues that a wind lease should address including, but not limited, to compliance with applicable law, a forum selection clause, arbitration clause, condemnation, and what happens to land included in a conservation reserve program or any other governmental program. Each of these topics should be discussed on a case-by-case basis.

Final Thoughts

The Obama Administration's push for renewable energy and green jobs has sparked excitement for wind energy development in the United States. Many landowners all over the country would like to take advantage of the economic incentives in the recent stimulus package and negotiate a wind lease on their property. If a landowner's property is suitable for wind development, collective bargaining eliminates the need for a middleman broker and can help ensure that more attractive commercial and legal terms can be negotiated. Attorneys can play a key role in facilitating these transactions and in helping to ensure that the landowner receives a fair handshake by ensuring that the above wind lease issues are properly considered to protect both the landowner and his or her generations to come.

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1. Some landowners choose to hire an environmental consultant. In a recent article published in a livestock trade publication, a rancher in Colorado hired a Certified Environmental Professional ("CEP") to measure the ranch's electricity usages and costs over a multiyear period while looking at the wind speed data based on the National Renewable Energy Laboratory. See Phillip Bring, *Harvesting the Wind*, ANGUS JOURNAL (April 2009).
 2. See National Conference of State Legislators, *Property Tax Incentives*, www.ncsl.org/programs/energy/propertytaxFS.htm (last visited April 19, 2009); see Database of State Incentives for Renewable Energy ("DSIRE"), *Federal Incentives*, www.dsireusa.org (last visited April 19, 2009).
 3. See Tom Doran, *Wind power ensures sustainable energy future*, AGRINEWS ONLINE (Saturday, April 11, 2009), <http://www.agrinews-pubs.com/articles/news/latest-news> (last visited April 11, 2009).
 4. See U.S. Department of Energy, Energy Efficiency and Renewable Energy, *Wind Energy Development and the Agriculture Community*, available at www.windpoweringamerica.gov (last visited April 12, 2009).

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