

THE LAW OF WIND
—Wind Energy Lease Agreements—

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At the core of a wind energy project's overall value is the security, flexibility, cost-effectiveness, and stability of the project's land rights. The tool for capturing this value is a wind energy lease agreement or easement agreement that protects a developer's investment and provides reliable income to the landowner, while offering both parties the flexibility and security necessary to transfer all or portions of the project over its lifetime.

Like an agreement for the use of retail or industrial space, a real property lease for developing a wind project site and its accompanying wind resource easement (generally, together, a "Wind Energy Land Agreement") contains provisions setting out the term, the purpose for which the developer may use the property, the amount and method of payment for the leasehold or easement interest, the allocation of insurance costs between the parties, and default and cure provisions. However, Wind Energy Land Agreements are unique in their treatment of the scope and use of the property, and when well-crafted, should anticipate changes in the project's ownership and uses of the property. The critical provisions and potential pitfalls are the subject of this chapter.

I. The Scope of the Property Subject to the Wind Energy Land Agreement. Frequently, the most contentious issue during negotiations between landowners and project developers is the total amount of the landowner's property that will be subject to a Wind Energy Land Agreement. A natural tension exists between a developer's desire to include in the agreement as much of the real property as possible and a landowner's concern that its activities and rights will be limited by a Wind Energy Land Agreement that extends beyond the particular amount of land needed for the construction, maintenance, and operation of the wind energy facility on the property.

A. The Interests at Issue. Developers frequently seek to maximize the amount of property subject to a Wind Energy Land Agreement for several reasons. First, in today's competitive wind energy project environment, developers often acquire real property rights before they have sufficient wind data and information about the property's topography, the location of existing title encumbrances, access to transmission facilities, and environmental attributes to determine the most productive and cost-effective layout for the wind energy facilities on the property. Consequently, the developer will seek to lease all or most of the landowner's property—or obtain a wind easement over the entire property—to ensure its rights are broad enough to respond to ongoing siting and other due diligence investigations, changing conditions, permitting requirements, or new data.

In addition, economies of scale play a role. By maximizing the amount of property subject to the agreement, the developer can maximize the size and efficiency of the wind energy project on the property and benefit from economies of scale in reducing development costs and increasing productivity.

Second, the effective generation of wind energy from wind turbines is largely dependent on the annual average wind speed over the property. Any obstruction (*e.g.*, a tall building or silo) that interferes with the flow and speed of the wind over the property can have a dramatic, negative impact on the ability of the wind turbines on the property to generate energy. A developer will want control over the size and kind of structures that can be constructed on the property by the landowner and third parties during the term of the Wind Energy Land Agreement. An effective way to gain this control is to encumber as much of the property as possible and have noninterference covenants in the Wind Energy Land Agreement that limit the landowner's right to interfere with the wind flow over the property.

On the other hand, the landowner may be motivated to limit the amount of its land subject to the Wind Energy Land Agreement. It may seek to limit the land under lease because it wants to limit the impact of the wind energy project on the landowner's other activities on the property (especially when the landowner is a farmer or

rancher and plans to continue using the property in this manner while the wind energy project is operating on the property). Alternatively, the landowner may want to preserve the opportunity to lease the excluded land for other purposes (e.g., cell towers), or it may simply be reticent to give up a measure of control over too much of the property.

B. Potential Resolutions. Several devices may help resolve the possible conflict between the landowner and the developer regarding the amount of property to be included in the Wind Energy Land Agreement. Such devices may include:

- Tying a portion of the payments required under the Wind Energy Land Agreement to the total number of acres to be encumbered.
- Consulting with the landowner during the planning stage regarding the location of the proposed wind power facilities on the property. This may reassure the landowner and also provide the developer with useful information about the property.
- Offering a phased approach under which the landowner agrees to lease or grant easements over all or most of the property to the developer through the construction phase of the wind energy project (or some other fixed date). After construction has been completed, the developer releases to the landowner the developer's interest in the portions of the property that are not part of the wind energy project (taking into account any "phased" development that the developer may intend for the project), minus a reasonably large buffer around the wind power facilities to allow ample room for operation and maintenance activities and possible future repowering of the wind turbines. In such an arrangement, the Wind Energy Land Agreement and the documents effecting the release of property from Wind Energy Land Agreement should include and preserve terms clarifying that the landowner's commitment not to interfere with the wind speed and flow over the property also applies to any released property for the term of the agreement. Further, a developer may consider adding a provision to the Wind Energy Land Agreement by which it has a right of first refusal for the released property, so that the landowner may not re-lease or otherwise encumber the released property for a purpose that might interfere with the wind project. Before taking this approach, however, the parties should make sure that this arrangement will not violate applicable permitting requirements or other local land use laws, and should also be aware that such provisions increase the ongoing time and expense of administering the Wind Energy Land Agreement.

II. Purpose of Agreement and Use of Property. Another contentious issue involves the purpose of the Wind Energy Land Agreement and the uses the developer may make of the property to accomplish this purpose. Of course the obvious purpose of a Wind Energy Land Agreement is the construction and operation of a wind energy project. However, the developer and landowner may disagree about the scope and extent of the rights in the property that the developer needs to accomplish this goal.

Typically, developers will want the right to take any action on, and make any use of, the property that the developer believes is necessary to accomplish the goal of constructing and operating a wind energy project on the property. For its part, the landowner may wish to see these rights limited to only those clearly delineated activities and facilities necessary to construct and operate the wind energy project on the landowner's property.

A. What Facilities Go on Whose Land? For most large wind energy projects, a developer must control the properties of numerous neighboring landowners to aggregate the large number of acres it takes to fully site the project. Few landowners own enough windy land (with access to transmission capacity) to have a wind energy project located completely within the boundaries of their properties. Inevitably, once the developer has conducted its wind, transmission, environmental, permitting, and construction studies on each property, some will stand out above the others as better candidates for locating wind turbines, while others may be more suitable for transmission lines, roads, and other facilities that serve the wind turbines. No landowner wants to have plenty of transmission lines and roads that serve wind turbines on a neighbor's property, while having few or no wind turbines on its property. A landowner may try to avoid this scenario by conditioning the developer's right to extend the term of the agreement beyond the initial evaluation and development phases on the developer's installation and operation of a fixed number of wind turbines on the landowner's property. Alternatively, the landowner may negotiate to receive special minimum payments under the agreement if its property is used primarily for transmission lines and roads or project purposes other than turbines. Generally, the landowner will want such minimum payments to be large enough to compensate for not receiving payments based on the sale of electricity from wind turbines on the property.

A landowner may also require that the developer pay additional compensation for the right to place certain special facilities on its property. For example, when the developer wants to place on one landowner's property a substation or an operations and maintenance facility that will serve the entire wind energy project, the landowner may believe it is entitled to additional compensation for the added burden and loss of usable property caused by construction of such a facility on its property. In many cases, a developer will agree to pay such compensation if the landowner is not otherwise adequately compensated as a result of turbines being located on the landowner's property.

Finally, in some circumstances (such as when the project permits impose setback requirements or to protect the free flow of wind to the project turbines), the developer may need to include a landowner's property in the project's "footprint" and encumber it with a Wind Energy Land Agreement. Such arrangements typically provide for a fixed periodic payment to the landowner.

B. Landowner's Continued Use of the Property. A unique and attractive feature of wind energy projects is that, in most cases, even after the project is built and operating, the landowner may continue to use a great majority of the subject property as it had used the property before entering into the Wind Energy Land Agreement because only a small portion of the subject property is used for wind turbines, roads, transmission lines, and related facilities. The remaining property suffers little or no impact from the wind energy project. Consequently, most Wind Energy Land Agreements provide that the landowner may continue to conduct its farming, ranching, or timber harvesting activities on the property throughout the life of the project on the property, provided that such activities do not and will not interfere with the construction and operation of the wind energy project.

III. Term. A Wind Energy Land Agreement usually provides for an initial term of three to 10 years to give the developer time to study the feasibility of wind energy conversion on the property. During this initial term, the developer collects wind data from anemometer towers installed on the property; performs geotechnical, environmental, and other studies on the property; assesses the condition of title to the property; and (assuming that the wind data and other studies demonstrate that the property is suitable for development) obtains necessary siting permits and constructs the wind energy project on the property.

The Wind Energy Land Agreement typically provides that the developer has an automatic right to extend the agreement for an extended term ranging from 30 to 50 years (or even longer, subject to applicable state law restrictions) if the developer (1) agrees to pay the landowner a periodic minimum payment during the extended term, (2) pays the landowner a one-time lump-sum payment upon commencement of the extended term, or (3) installs a certain number of wind turbines on the property that generate electricity during the initial term of the agreement (the parties may disagree on the number of wind turbines that the developer should be required to install on the property to trigger the automatic right to an extended term, with the landowner pushing for a high number and the developer arguing for a low number).

The developer may also reserve the right to further extend the term for a renewal period ranging from 20 to 30 years if the developer “repowers” at some point during the extended term by replacing all or a significant portion of the wind turbines on the property, by installing additional wind turbines on the property, or both. The net result of these successive terms is an agreement that has the potential to run for more than 70 years (again, subject to applicable state law restrictions). The unusual length of the Wind Energy Land Agreement may be troubling to a landowner, especially when the property is a family farm or ranch that the landowner envisions conveying to successors or heirs. A landowner may be reluctant to sign an agreement that may continue encumbering the property long after the landowner envisions transferring control of the property to successors or heirs. Further, the length of the agreement may create concerns about the landowner’s ability to sell the property at some later date or give rise to questions about the long-term viability of the developer; that is, the landowner will want some assurance that the developer or its successors will have the financial means to operate the project for the term of the agreement and to restore the property at termination.

IV. Payments. In general, Wind Energy Land Agreements provide that the developer will pay the landowner either a lump-sum payment or periodic payments for the rights granted in the agreement. Periodic payments based on energy generation are by far more common in today’s agreements.

A. Lump-Sum Payment. Occasionally a developer will offer the landowner a one-time lump-sum payment as consideration for the rights granted in the Wind Energy Land Agreement. This lump-sum payment will be paid upon mutual execution of the agreement and, with a few minor exceptions, is the only payment the landowner will receive under the agreement. A lump-sum payment may be attractive to a landowner because it provides the landowner with a large amount of money up front, without concerns about the developer’s ongoing financial health and ability to make annual payments. However, attempting to calculate the time value of the lump-sum payment against future annual payments can be difficult and time-consuming. Further, such payments can have undesirable tax consequences for a landowner.

B. Periodic Payments. Periodic payments from the developer to the landowner are by far the most common payment structure for Wind Energy Land Agreements. Frequently, the payments are structured as follows:

1. Initial Payment or Signing Bonus. The developer will pay the landowner an up-front payment for signing the agreement. The amount of this signing bonus varies widely, depending on factors such as the property’s perceived potential for wind power generation, the degree of competition between developers for use of the property, and the negotiating skills of the parties and their advisors.

2. Pre-Operation Rental Payments. The developer then pays the landowner annual or monthly rental payments for the initial period of time during which the developer measures the wind flow over the property, performs studies, obtains siting permits to construct the wind energy project, and actually

constructs the project. Again, the payment amount depends on several factors. The parties may agree that the payments will be calculated by multiplying the number of acres of property subject to the agreement by an agreed dollar figure. A landowner may prefer to be paid on a monthly basis, but developers typically prefer to pay annually to decrease the chance of missing a payment and risking defaulting under the agreement. In most cases, these annual or monthly rental payments cease once the wind energy project is operating and the landowner begins receiving payments based on the sale of electricity generated by the wind turbines on the property.

3. **Installation Fees.** Some Wind Energy Land Agreements provide that the developer will pay the landowner a one-time installation fee for each wind turbine installed on the property by the developer. Landowners often insist that the installation fee is calculated using the total megawatts of installed capacity of wind turbines or other power-generation facilities constructed on the property, rather than on a per-turbine basis. This is because the manufacturer's "nameplate" megawatt rating for the type of turbines that the developer installs on the property varies, and thus tying the payment simply to the number of turbines can result in a significant reduction in the amount of the installation payment to the landowner.

4. **Operating Fees.** The operating fees paid to the landowner by the developer following construction of the project are usually the most lucrative aspect of the Wind Energy Land Agreement for the landowner, and, for that reason, the operating fee provisions are often the most heavily negotiated provision in the agreement. If and when wind turbines are installed on the property and begin delivering electricity on a commercial basis to a purchasing utility or other purchaser pursuant to a power purchase agreement or similar document, the developer will begin paying the landowner operating fees based in some respect on the output of those wind turbines. These operating fees may be: (1) a percentage of the gross revenues received by the developer from the sale of the electricity generated by wind turbines on the property; (2) a millage rate per kilowatt-hour of electricity generated by wind turbines on the property, with the millage rate being determined by the capacity factor of the wind turbines on the property; or (3) a per-turbine or per-acre annual lump-sum payment that has no strict relationship to the amount of electricity generated by wind turbines on the property. In addition, a Wind Energy Lease Agreement may provide for the payment of some minimum amount to the landowner during the operations phase of the agreement, based on the number of turbines installed on the property, the amount of acreage subject to the agreement, or other factors.

V. **Additional Considerations.** In recent years, new legal issues have emerged in the area of Wind Energy Land Agreements. Two of these new issues are: (1) attempts by landowners to convey all or portions of the property subject to the agreement while reserving "wind rights" to the conveyed property and (2) restrictions or reporting requirements relating to foreign ownership of certain types of land.

A landowner that conveys its property in fee may reserve certain rights to that property. Historically, such rights may typically include easement rights for access or a right to explore for and develop oil and gas or other minerals. The law in the United States is, for the most part, well-developed in connection with such reservations, but reservations of "wind rights" have not (as of the date of publication) yet been scrutinized by the courts. Unfortunately, transferring landowners have begun to attempt to reserve rights with respect to existing or future wind projects on the property they are transferring with conveyance instruments that are far from clear. If a landowner seeks simply to retain the rights to revenue from wind energy facilities on property to be transferred, the landowner should work closely with counsel to ensure that the documentation reserving these rights clearly states that revenue will be paid to the prior owner and protects the developer in paying that revenue to the prior owner. If the goal is to retain a wind easement for the unrestricted flow of wind and/or reserve some right to the prior owner to have some say in future development of the property for wind purposes, such rights would also need to be set out in the conveyance instrument with clarity and in detail. Vaguely drafted language in these

conveyance instruments benefits no one and is likely to cause confusion for (and result in disputes among) the landowners, the wind developer, and third parties seeking to deal with the property in some manner.

Finally, the federal government and some states may impose reporting requirements and/or restrictions on some types of interests (such as restrictions on corporate ownership or ownership by foreign entities) in certain types of land. Developers and landowners should consult with counsel to determine if such laws may apply to their interests and Wind Energy Land Agreements.

VI. Conclusion. Although critical to every Wind Energy Land Agreement, the matters discussed above are by no means the only issues the parties to the agreement must consider. For example, issues related to indemnities, assignments, financing, crop damages, and security for removal of the wind project equipment at the end of the term are key components of a Wind Energy Land Agreement that are frequently the subject of intense negotiation. Crafting a Wind Energy Land Agreement that provides a developer with the necessary flexibility and security to develop a wind energy project requires skill, experience, and creativity.