

THE LAW OF WIND
—Title Insurance and Survey Matters—

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Before a wind energy project can be developed, interests in land must be acquired. Typically, a lease or an easement is the chosen form. If the title to the lands on which a wind energy project will be sited were to fail during or after construction of the project (or after the wind developer became obligated to third parties with respect to project development or operation), losses and defense costs to the developer could be significant. For these reasons, the savvy developer conducts a thorough search and examination of the title to the project lands and purchases a policy of title insurance representing the amount of its investment in the project. A survey of the project lands showing easements and encumbrances that are either of record or apparent on the ground, improvements, setbacks, and physical features important to the siting, construction, and operation of the project (and the proposed site plan for pending projects) is also advisable. These principles apply equally to an acquisition or financing of an existing wind energy facility.

This chapter will briefly outline and explain the recurring points a wind energy developer, purchaser, or financing party must address to minimize the risk of loss arising out of a failure of or defect in title to land, and to manage effectively the expense of doing so.

I. Selecting a Title Company.

A. **Relevant Factors to Consider.** There are many title companies doing business throughout the country. It is important to understand what role a particular company plays in the industry before deciding whether and how to do business with that company. Also, not all states offer the same coverages. Commercial title insurance as we know it is not even offered in Iowa, which has a state-sponsored title program available, unless the developer makes arrangements with a title company outside of the state to provide coverage under a more typical American Land Title Association (“ALTA”) commercial policy. (ALTA policies are discussed briefly below.)

Title policies are issued by or on behalf of underwriters. The underwriter is usually a large corporation doing business in many states and perhaps even in a number of countries. Title policies for wind energy projects are often written in amounts reaching into the hundreds of millions of dollars; consequently, to understand the financial ability of the company to cover claims made under the policy, it is important to know the financial condition of the underwriter standing behind a policy before deciding on the company to issue to policy. To evaluate this information, it is advisable to review annual reports, ratings of the company by rating agencies, and the underwriter’s own internal limitations.

The annual reports reveal the company’s shareholder surplus and claim reserves. Shareholder surplus represents how much money the company has available after all actual and contingent liabilities have been satisfied. Rating agencies, similar to bond and other insurance company evaluation tools, provide both grades (*e.g.*, “A” or “B”) and dollar ratings (*e.g.*, single-capacity limits for policy amounts, which tell how large a title policy a company may issue without threatening the stability of the company in the event of a major loss). Most companies also have internal guides and limits for how large a policy they should issue. Knowing and understanding how these factors work, both independently and collectively, will permit the wind energy developer to select a title underwriter that can issue a policy that will adequately protect its substantial wind project asset. It will also suggest when reinsurance (requiring other insurers to participate in the policy risk) may be advisable or required.

Throughout the United States, underwriters issue title insurance policies through agents. Title agents are title companies authorized by title underwriters to issue their policies, although title agents do not provide the financial backing for the policies issued. Rather, local title agents perform a search of the local land title records (located in the auditor’s, clerk’s, or recorder’s office for the applicable county). Depending on whether the county

records are collected in a title plant (which is a replica of the county records that is assembled by the local agent) or are maintained in a public facility, the local agent physically searches and examines these public records.

It is important to know whether you are dealing directly with an underwriter or with a local agent because the availability, pricing, and timing for the services and products are driven by the resources available to that company. For example, wind energy projects often span county and even state lines, and the ability of a local agent may be limited to providing a search and examination of only local records, whereas an underwriter may have the ability to engage multiple agents in two or more counties and/or in two or more states.

Moreover, local agents typically do not have the ability to issue title insurance policies without the authorization of an underwriter, so it is important to know which underwriter supports a particular agent to anticipate what is or is not insurable. Further, if using a local agent to close a project transaction, one should consider obtaining a closing protection letter from the issuing title insurer. The purpose of a closing protection letter is to document the responsibility of the insuring title company regarding escrow closings conducted by its agents, which typically have substantially less financial strength than the underwriting insurer. The typical closing protection letter provides the developer assurances from the issuer against loss by reason of acts by the agent contrary to the written closing instructions for the transaction relating to the status of title, the obtaining and recording of documents, and the collection and payment of funds.

B. Pricing and Response Time. The wind industry presents significant challenges to the title insurance industry, particularly in pricing services and products and anticipating delivery dates, because there are usually numerous properties involved. Not all title underwriters and their agents are alike in their ability to price their services and products and to deliver them in an efficient and timely manner. Although more title companies in rural “wind country” are gaining more and more experience in wind transactions, it is not uncommon for a county to have only a single agent or only a few agents, and many of these agents may not have the staff or experience to keep up with the pace and technical demands of one or more large commercial wind project transactions. This situation is aggravated in circumstances in which multiple large projects are overlapping or competing for the time and resources of the local title or escrow officer. Sometimes these delays are unavoidable, but in any case they can be real constraints on the timing of reviewing and dealing with title issues and often are beyond the control of the issuing title company, developer, or anyone else.

To begin to determine pricing, it is necessary to know whether the project is located in a state that has promulgated, filed, or negotiable rate structures. These are controlled by state law, usually under the authority of that state’s insurance commissioner. A state with promulgated rates will not permit an underwriter or its agents to adjust rates. In a state with filed rates, the underwriter and its agents must set and follow regulated rates, but those rates can be subject to variations and interpretations. In a state without regulatory oversight, the pricing is driven by the market. Knowing the regulatory environments in each state and having good contacts with title companies is essential in navigating the issues encountered in insuring a wind energy project.

II. Negotiating Title Policy and Endorsement Premiums.

A. Obtain Written Proposals. The title industry is not controlled by a single underwriter or a group of agents. There are several large title underwriters and thousands of affiliated and independent agents. Just looking in the phone book and calling a local agent to request title searches or commitments does not provide the most competitive pricing (in states where competitive pricing is available). Rather, a concerted and balanced process of requesting, evaluating, selecting, and monitoring written bids or proposals is preferable. This process can be formal or informal, extended or expedited, and exclusive or inclusive. Regardless, the point is to obtain the necessary information from the companies doing business in the area, and to

consider which company can provide the best price (when it is able to do so under the applicable state's regulatory framework) and the most competitive service in a particular geographic area. Some companies will do better in the western states and some in the eastern states. Some are particularly strong in the midwestern states. And some are able to accommodate special requests only in certain areas or of certain types. It is often instructive to consider the title company's resources and pricing in the area where the project will be located. The title industry is extremely competitive, and thus it is important to establish a relationship with the title company that will provide the most cost- and time-effective service before any title work is ordered.

B. Working with National Title Services. Although wind development is local, title underwriter and agent resources are available nationwide. Knowing how to select the right agent or affiliate is key. The title industry has addressed this niche by establishing national title service offices in all regions of the country. A number of national offices are available to handle wind projects, which are typically sizeable and complex. The difficult part is knowing which office to contact for which project.

III. Reviewing the Preliminary Commitments and Reports.

A. Reviews of Title. A typical wind energy project includes many parcels of land and often covers thousands of acres. The search and examination process produces many preliminary "commitments" or preliminary reports. It is always necessary to obtain all documents recorded in the public records that are referenced in those commitments and reports to (1) determine the person or entity vested in title, (2) determine whether the title is subject to liens or mortgages that create unacceptable risks to the wind project, and (3) discover all defects or other encumbrances, such as easements for utilities, road rights-of-way, mineral and timber rights, or other interests held by persons or entities other than the landowner, that might interfere or even prevent development, construction, and ongoing operation of the project as planned. The developer should also obtain and review copies of all "off-record" leases, contracts, and other agreements relating to the subject property from the landowner. These off-record agreements are very common on wind sites, from manure-spreading agreements, to farm leases, to hunting leases or entry rights, to conservation reserve program contracts and a full range of various other rights and interests that the developer must review, evaluate, and determine how to address going forward. It is vitally important to obtain the title information as soon as possible and review it thoroughly to make certain that all interests of record and off-record affecting the site are discovered, disclosed, and analyzed carefully. Understanding what it all means and how it will impact a particular project can make the difference between successful execution of a plan and lingering problems or inability to develop, construct, and operate the project as planned.

B. Determining Whether to Undertake Curative Measures. Once all of the information contained in the preliminary commitments or reports for title insurance has been reviewed, it is necessary to cull those title issues that must be corrected or cured from those that may be permitted to remain on the title, *i.e.*, those that will not adversely impact the project. If a leasehold or easement interest is obtained from someone claiming to own the land, when in fact fee simple title of record is vested in another, the title company will require correction of the title before a policy can be issued. Most often mortgages must be addressed in some manner that will permit the lender's interest to co-exist with the project. Likewise with farm leases and other prior rights that can co-exist with the wind farm. Easements or rights-of-way can also be problematic—some must be adjusted to allow construction of the proposed project; others may not create a risk to the project at all. Knowing where the project facilities will be located (from access and crane roads, to collector, transmission, and other lines, to topographic features (what appears flat on the map may be a cliff or a ravine), met-tower, turbine, and operation and maintenance facilities, substation sites, etc.), as well as where existing improvements, setbacks and easements, wetlands, protected bird and wildlife habitat, and other such factors are located, will be crucial in

being able to do a thorough title review and to determine what curative measures need be taken. Understanding the network of these interests and how they interconnect and potentially impact the project is imperative to a successful wind project.

IV. Survey Maps.

A. Uses. Surveys are used for different purposes. Sometimes the need is to know the property corners and boundaries and where encumbrances such as easements are located, so the developer can attempt to locate its wind facilities in a manner that can co-exist with the encumbrance or whether some curative measure needs to be taken. Other times topography information is needed. Lenders often have survey requirements, as do permitting authorities. In some cases a survey may not be necessary, though a survey will often reveal details that may otherwise be overlooked. Title companies will sometimes require a survey map before agreeing to issue certain kinds of title coverage, such as extended coverage owner's and lender's policies of title insurance. Before ordering a survey map, it is important to know the intended use for the final product. It is also important to know whether the title company requires a survey for the particular form of title insurance coverage needed for the project. More often than not, a wind energy project will require an extended coverage owner's policy of title insurance, which often necessitates a certain form of survey map, certified to the title company and to the wind developer.

B. Forms. Two forms of survey maps are generally produced by professional land surveyors. An ALTA/ACSM survey is one certified by the surveyor to meet certain minimum detail requirements established by the American Land Title Association in conjunction with the American Congress on Surveying and Mapping. These types of survey are the gold standards of the respective industries and are the most useful in reviewing and evaluating the configuration and layout of a site, its physical features, the location of improvements and easements, and observable signs of third-party use and other matters, depending on the scope of work called for from the surveyor. The standards have been revised as of 2005. Surveyors frequently use a vernacular all their own, and understanding their forms and practices is essential to purchasing the right product and services for a particular project. The other form of survey is a boundary survey, which is much less expensive, much quicker to perform, and much less reliable, especially for an area of land that has not been platted and probably has not been surveyed since the federal government established patents and granted lands during the 19th century. The 2005 ALTA/ACSM standards require the ALTA survey to meet local "boundary survey" requirements where local law imposes stricter requirements than do the basic ALTA/ACSM standards. Generally, unless the site is relatively small and simple and there are no easements or encumbrances of record affecting a site (or they are easily locatable by reference to the property boundary), a boundary survey will not give one enough information to do a thorough and prudent title review and analysis, especially someone who has not been onsite and walked the entire property with a trained eye for detail, encroachments, and signs of third-party use. Do you need a survey? Must it be an ALTA/ACSM survey or a boundary survey? How do you order each form in the most cost-efficient and timely manner? How will survey timing fit with your overall project planning, title review contingency period, and overall due diligence period? These are relevant and recurring questions that must be carefully considered.

C. Pricing. Survey pricing is not standardized and will depend in part on the scope of work required and the timing of the survey. Surveyors, like many other vendors, are often willing to negotiate. They may provide discounts or other incentives to commercial customers for volume business, or to compete aggressively against other local businesses. On the other hand, a relatively inexpensive proposal may be illusory. Will the surveyor be able to complete the survey project as planned, on time, and in a comprehensive, accurate manner? The negotiation dance on pricing is full of traps for the unwary. Although no negotiations will guarantee that everything comes in on budget and on time, it is extremely important to have these negotiations

early on in the process, and in a manner that will promote reliable work from the surveyor and still keep the project on budget.

V. Drafting Title Requirements into Wind Energy Agreements.

A. Reviewing Proposed Terms. Title requirements contained in a Wind Energy Land Agreement or a wind energy facility purchase and sale agreement can appear to be boilerplate. On the other hand, a wind developer that has experienced the sorts of difficulties that can arise because the cost of a title policy is much greater than anticipated, because the options for disclosing, curing, or allocating risks associated with title defects, liens, encumbrances, or other matters were unknown, or because the developer was unfamiliar with the range of title insurance coverages or endorsements that may be available to address the particular issues, knows the importance of negotiating the terms concerning title and survey matters up front to the extent the need and scope of such matters are known, though unanticipated issues almost certainly will arise during the review and due diligence process due to the particular issues of the site discovered during that process.

B. Negotiating Terms Effectively. Often it is necessary to work with the title insurance underwriter to obtain advice and assurances concerning the title company's resources and willingness to make commitments. The guesswork can be eliminated or reduced significantly by procuring a title company's confirmation as to what it will—and will not—do in a particular transaction. It is better to have a feel for when to make concessions in a particular transaction or to make greater efforts to obtain appropriate curative agreements with the parties to the title matter at issue rather than argue needlessly with the insurer. Knowing when to do this is the key. Who pays for the search and examination process? Who pays for the preliminary commitments? How much will the title company charge for its premium? Will endorsements be necessary, or will there be added or contingent charges? And how do you find the answers to these and other questions?

VI. Curing Title Defects.

A. Document Preparation. The best start to the curative process requires the selection, preparation, and completion of the most appropriate documents. For mortgages and prior leases, it is necessary to evaluate whether a subordination agreement is required, or if a nondisturbance and attornment agreement will suffice and whether the prior lender or lessee will agree to provide any such comfort to the wind developer. A common issue for farm lessees that are asked to subordinate or agree to honor a subsequent wind lease or easement is the extent to which the wind lease or easement will interfere with the farmer's operations or damage the farmer's crops or other facilities. These are matters that must be worked out on a case-by-case basis, depending on the nature of the underlying agreements affecting title to the project lands. For existing easements encumbering the project lands, the developer needs to evaluate whether a consent and crossing agreement is necessary, or if a modification of an existing easement will suffice (and be available). Sometimes a curative document may not be needed at all, depending on the intended locations of the wind project facilities and whether or not they "intersect" with existing easements. Although some developers rely on pre-prepared forms in this case, customized legal agreements are usually necessary. It is awkward and slow to draft curative documents from scratch. The preferred approach is to draw on prior work, while at the same time know when and how to tailor specific sections in a form document for your needs.

B. Negotiations with Third Parties. A utility, a lender, another landowner, or some other person or business holding an interest in the title to the property intended for use as part of the wind project is not always interested in helping to solve the wind developer's title issues. Third parties would just as soon not return a call and may avoid dealing with the matter entirely. How do you get their attention? How can solutions be proposed in the most nonthreatening manner possible? You must be able to negotiate with people in an

effective manner. Generally, a title underwriter will likely not provide title coverage over a particular item while problems with that item remain outstanding. Frequently, problems can be solved with help from a knowledgeable title underwriting counsel. It is important to understand the issues around third parties and how best to navigate them.

VII. Weathering the Title Insurance Underwriting Process. Usually the person from whom the title developer orders title work is not the same as the underwriting counsel, who decides whether to accept a defect, issue an endorsement, approve a policy provision, or provide other consideration in insuring title to a wind project. The route to a final policy is often tortuous, and the motivation, ability, and authority of the title underwriter can vary greatly on any given transaction. The developer must know (1) which title services and products are available and which to order, (2) how to evaluate critically the preliminary commitment or report and the exceptions and requirements it contains, (3) whether, when, and how to request revisions or amendments to the commitments or reports, (4) what endorsements are available, and (5) what underwriting criteria will be applied to each. These criteria can and do vary from site to site and from state to state. The reward is more assurance of a successful wind project. The consequences of not understanding and effectively dealing with the title underwriting process can be devastating. The problem is exacerbated by the timing of the discovery of various title and survey issues, which often do not arise until the late phases of a project, and usually when there is insufficient time to review and discuss all possible options in the ordinary course. Is an indemnity advisable or even available? Can and will an endorsement be acceptable? Must a curative measure be undertaken? What precisely are the options and how will each play out in a particular scenario? If the developer accepts a risk on title, how will that fare if and when the developer seeks third-party financing or investment or goes to sell the project?

VIII. Financing: Anticipating Lender Requirements. Institutional lenders, Wall Street investors, and private financing parties have different requirements for title insurance, survey maps, and other title matters. But that does not mean that the developer or borrower is without options concerning these matters. Which title company to select, the terms for the search and examination, the premium, and the underwriting process are all subject to considerable negotiations and variation. It is extremely helpful to have useful advice on lender title requirements and to be able to employ the title process in closing a financing transaction. Letting the lender control the process, on the other hand, can be more expensive and perhaps more difficult for the wind project owner or purchaser.

IX. The Acquisition Closing Process. Many questions arise during the closing process. The range of questions varies greatly from project to project. Some projects do not require an escrow closing, other projects need only a modified closing process, and some projects require a table (in-person) closing. Which is which, and when is one more appropriate than the other? The costs associated with a table closing can be significant. Making sure that the process is on track and able to close efficiently, before the closing is scheduled, is crucial. At the closing table, many complex decisions are made. Understanding the closing process and the title process and how they interact can be invaluable. Many decisions require the developer, owner, or borrower to accept risks, pay money, or make concessions. Knowing which is appropriate and risks that can be avoided and how to properly document any agreed upon arrangements is essential.

X. Maintaining Title Insurance Coverages over Time.

A. Corporate Reorganizations and Transfers of Interest. A title insurance policy provides indemnification for the insured in the event of a covered loss only so long as the insured interest remains. When a corporate reorganization occurs, *e.g.*, limited liability company interests are adjusted or transferred,

property is deeded or conveyed, or other interests are created, assigned, or released, the coverage under a very expensive title policy can be lost entirely. In many cases it is possible to avoid policy termination in connection with certain corporate and entity changes or reorganizations by knowing when and how to work with a title insurer and its policy to purchase endorsements that will prevent termination. Coverage may be extended or amended or other action may be taken to avoid the unintended consequences of what otherwise should have been a simple corporate reorganization or restructuring of assets. Before any changes are made, however, it may be necessary to evaluate existing coverages and determine whether simple and inexpensive options are available. The consequences of not doing so may be termination of coverage and the unintended risk of not having title coverage, or the cost of purchasing a new title policy at significantly greater expense.

B. Sufficient Liability Limits. When a wind energy project is developed, the interest in the land, lease, or easement may have a market value significantly lower than the finished project. And, over time, the value of this interest may increase. Typically, the amount of insurance needed is based on the cost to acquire the land and develop the project—the sum of all “hard” and “soft” costs. But will that amount be sufficient in five years? In 10 years or more? The value of the project may not be static. If the dollar value of the asset increases, it may be advisable to increase the amount of title coverage. Sometimes this can be accomplished by purchasing endorsements to an existing policy. Other times a new title policy may be necessary. The point to keep in mind is that the title insurance covering the owner of the project should be evaluated regularly, and the risks associated with a partial or complete failure of title should not be left unattended. A good time to consider purchasing a new policy is at the time of a significant secured financing transaction, when the developer would purchase its own “upgraded” policy at full price, but be entitled to a much lower, often nominal, premium for a simultaneous issue lender’s policy for its lender.

C. Subsequent Financings or Equity Participations. When lenders accept a security interest in a wind energy project, they customarily require a mortgagee’s policy of title insurance. The wind energy project owner and borrower typically pay the premium for this form of policy. The liability insurance for this lender’s title policy is the amount of the loan secured by the asset. But it is important to understand that the title policy insures the lender, not the owner. The title coverage purchased will not provide any coverage to the owner in the event of a failure of or other defect in title. This is true no matter how many times the project is financed. So it is important for the owner to maintain title coverage independent of the lender’s coverage. Further, it is often helpful to be aware that when a lender’s policy is purchased, simultaneous coverage may be available at significantly reduced premiums, as described above. It is much less expensive to insure the title twice at the same time than it is to insure it once for the lender and then again later for the owner, or vice versa.

XI. Conclusion. The more experience the wind developer gains over time, the more it becomes readily apparent that title to the project lands really does matter and can affect the bottom line enormously.

XII. These matters can be made easier to understand and address with the help of an experienced professional who is knowledgeable in the title and survey industries.