

Can the Landowner Ride the Wind?

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There are a lot of reasons that western landowners love to hate the wind --- it's relentless, constant, never ceasing, apparently infinite and now income producing. Although it has long been used to pull water from the ground for thirsty livestock and wildlife, it can now be used to keep livestock on the land.

Wind energy is one of the fastest growing forms of electricity generation in the Nation. The development of a "wind farm," or a wind energy project consisting of numerous wind turbines -- - not unlike a standard windmill, only much, much larger --- creates two significant questions: First, who owns the wind? Second, how can a landowner profit from it?

Generally speaking, a landowner owns both the land and the airspace immediately above it -- including the right to use the wind. A landowner's right to use and build on the surface of his property is well established and subject only to state or local zoning and property laws. Although the use of the wind blowing over the land should also belong to the surface owner, it can be complicated by the fact that wind doesn't sit still --- it "flows" across the surface of the land. Consequently, the construction of a barn, or other large structure, could obstruct the flow of the wind across your neighbor's land. Nevertheless, the right to use or benefit from the wind that blows across your land may well be considered an incident of land ownership, similar to the right to extract oil and gas.

Ownership of the surface estate of land may include the right to not only reserve the wind, but to also lease, sell, devise, inherit, partition, and hold the wind in various forms. Under certain circumstances, a landowner may wish to reserve wind rights, devise them to his children, or sever the wind rights from the underlying fee simple altogether.

State laws vary on whether wind rights can be permanently severed or split apart from the surface rights of the land. In California, a state court held that wind rights can be severed from the land. In South Dakota, there is a state statute that prohibits such severing. Like in many other states, the issue has not been addressed by either the Wyoming courts, or the Wyoming Legislature. However, until the State says otherwise, either through the courts or the Legislature, the right to own and possess the wind lies with the surface estate.

Profiting from the wind depends not only on who owns the wind to begin with, but who owns access to the underlying surface land. Since the wind is technically "free," controlling access to the underlying land provides landowners an opportunity to supplement their incomes. Wind developers typically seek access to the land --- in order to construct a wind farm including one or more wind turbines --- 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 wind project

while preserving the right to enter into more long-term arrangements if studies show a wind farm to be feasible and profitable.

Since wind leases generally range from as few as five years, to as many as fifty years or more, landowners are well advised to put these agreements in writing and have them reviewed by an attorney prior to signing them. Among the various issues that should be discussed, are the following:

Duration of the lease agreement. The agreement should specifically define the amount of time allocated for the wind developer to inspect and study the land for its feasibility for a wind farm. If the wind developer fails to begin construction of a wind farm within this amount of time, then the lease agreement should terminate automatically. Otherwise, the wind developer may tie up the land indefinitely with no prospect of ever constructing a wind farm.

Similarly, the agreement should specifically define the amount of time allocated for an operational wind farm, once any wind turbines have been constructed and begin to generate electricity. Care should be taken to limit the duration of the lease and extensions sought by the wind developer.

Financial compensation. Compensation comes in many forms and in exchange for many different uses. Nobody can guarantee that a wind farm will actually be developed on the property, consequently the only certainty that a landowner can have is to secure as much money as possible in the early stages of the lease agreement.

We recommend that landowners should negotiate for an *annual* rental payment which periodically increases during the development period (the period used by the wind developer to inspect and study the feasibility of a wind farm on the land). Once construction begins, landowners should receive the annual rental payment and a “construction bonus” for each turbine installed on the property. After construction, when the turbines become operational and generate electricity for sale by the wind developer, the landowner should expect to receive an annual royalty --- often a percentage of the gross revenues received by the wind developer for the sale of the electricity. The royalty should periodically increase. Additionally royalties should include a percentage of any money received by the wind developer *in lieu of the sale of electricity*, such as warranty or insurance proceeds or lump-sum start up fees paid by a utility in exchange for a contract to purchase electricity from a particular developer.

Among the other uses for which a landowner can expect payment are: 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. Moreover, a landowner should request to receive a “termination fee” if the wind developer terminates the lease agreement prior to construction. The landowner should be reimbursed under these circumstances since he will lose revenue for the period of time necessary to renegotiate with another developer.

Importantly, since the value of the dollar is less today, than it will be tomorrow, each payment should be

periodically adjusted for inflation. Finally, the landowner must reserve the right to conduct an audit from time to time to verify he is receiving the amount of money guaranteed to him under the terms of the lease agreement.

Future use of the land. The lease agreement should specifically identify the uses for which the wind developer may use the land, and 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 hunting and fishing rights. It might be wise to reserve all the landowner's water rights just to be sure. It is important that the lease agreement recognizes and acknowledges that the landowner will continue using his land for ranching and farming purposes.

The landowner may also specify in the lease agreement any land features or characteristics that the landowner wishes to protect from the wind development. Such features may include: riparian areas, irrigation meadows, irrigation ditches, boulder formations, view sheds or any important or sensitive wildlife habitat.

Liability. It is not uncommon for most lease agreements to include a 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 seem reasonable, it couldn't be further from the truth under these circumstances. Any loss to the landowner arising from the wind developer's use and occupation of the land will be small compared to the potential loss to the wind developer. To

put it in perspective, the cost to replace a landowner's fence, barn, or even a good horse, is a fraction of the cost to replace a wind turbine or electrical substation. Typical landowners can not assume such risk, and even the smallest of wind farms are overly insured by the wind developer. Thus, landowners should limit their potential liability as much as possible --- say, to the receipt of insurance proceeds, or some other specified amount. Otherwise, a single accident may result in the landowner losing everything, including his land.

The lease agreement should also identify the amount of insurance coverage to be obtained by the wind developer and who shall be listed as insured parties.

Taxes and Utilities. The lease agreement should assign 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 by the wind developer. The lease agreement will specify whether the landowner and the wind developer may assign the contractual rights and obligations to third parties. Wind developers 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. 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 is the responsibility of the wind developer, not the landowner, to contract for, and make payment for, all labor and materials related to the construction of the wind farm. The landowner must take care to ensure that no liens are filed against the land which are the responsibility of the wind developer. The landowner must not be held responsible in the event the wind developer can't fulfill his obligations to pay for labor and materials.

Governmental approvals. The lease agreement should specify that it is the obligation of the wind developer to comply with all state, county and federal laws, regulations and ordinances pertaining to the construction of a wind farm.

Termination of the agreement. One of the most important provisions of any contract is the default and termination clause. While the wind developer will in all likelihood have the ability to terminate the project at any time and for any reason, the landowner, on the other hand, will only be permitted to terminate the lease agreement under very limited circumstances. The landowner should reserve the right to terminate the agreement 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.

In the event of default, the wind developer will demand the right to be notified of any default, and the opportunity to cure the default prior to termination of the lease agreement. The landowner must take care to identify which party or parties are to be notified in the event of a default and to prohibit any "partial" default of the lease.

Decommissioning and remediation of the wind farm. 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. Payment must also be established during this time period. The landowner must also specify any increased payment or obligations in the event the wind developer neglects to remove the wind turbines in the specified period of time.

In order to prevent the wind developer from simply "walking away" from the project, the landowner should demand a "decommissioning security," to be established as soon as the wind turbines become operational. This security is generally a specified amount of money which is put aside by the wind developer to ensure there is sufficient funding available for removal and reclamation at the end of the project.

Designating proper reclamation provisions is one of the most important aspects of the wind lease agreement. Reclamation is necessary during construction, operation, repairs, and after the project has been removed from the land. The landowner should not rely on the governmental authorities to protect the reclamation of his or her land, but should ensure that the land

will be reclaimed as he sees fit. Specifying reclamation is also essential if the land contains any unique features, characteristics, or even wildlife habitat.

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 include: which improvements must be removed, and how deep under the soil such removal should occur; how topsoil is to be stockpiled and stored during construction; decompaction of the soil; reclamation of roads; revegetation; erosion; seeding; protection of revegetation; noxious weeds; dust control; and trash removal.

Landowner Association. An average wind farm typically includes several thousand acres and is usually comprised of wind leases taken from multiple landowners. Landowners may want to consider forming cooperative agreements with their neighbors and adjacent landowners in order to amass significantly larger parcels of property in which to entice wind developers. The larger the parcel of the property, the more potentially lucrative the project may become for the wind developer.

Miscellaneous. Finally, the lease agreement should address other issues such as which laws apply, in which state may either party go to court to enforce the terms of the agreement, attorneys fees, what happens to land included in a conservation reserve program or any other governmental program, and condemnation.

Conclusion. The wind is quickly becoming a highly valuable natural resource to those who live and own property, thus landowners need to be aware of all the possible risks, as well as, benefits associated with entering into lease agreements for the development of wind farms on their property. As these lease agreements have the potential to last for fifty plus years, landowners need to take care to protect their property not only for themselves but the generations to come. While complex, these lease agreements represent a potential for landowners to supplement their income and are changing how many view the relentless, constant, and infinite resource that is the wind.