

Legalities of Leasing:

An Overview of Wind Energy Lease and Easement Agreements

By
Jennifer Utter Heston

June 27, 2009

Fraser Trebilcock Davis & Dunlap, P.C.

- ❑ Full-service law firm with 40+ attorneys
- ❑ Offices in Lansing and Detroit
- ❑ Extensive experience in nearly every specialty
- ❑ Registered as Michigan Lobbyist-Agents
- ❑ Web site: www.fraserlawfirm.com

Alternative Energy Practice Group

- Dedicated to addressing the growing needs of renewable energy producers and consumers and alternative fuel providers.
- Group consists of six attorneys with more than 100 years of energy experience.
 - Michael S. Ashton
 - Jennifer U. Heston
 - Iris K. Linder
 - David E.S. Marvin
 - Robert B. Nelson
 - Thomas J. Waters
- Web page: www.fraseraltenergy.com

Agenda

- The Wind Project
- Why Contract?
- The Lease Agreement
- Easements
- 25 Tips for Landowners

The Wind Project

- Pre-Development
- Construction
- Operation
- Remediation/Decommissioning

Pre-Development

- ❑ Developers approach landowners about leasing property
- ❑ Developers need site access to assess viability – erect anemometers
- ❑ Option agreements – usually a fixed fee
- ❑ Typically, 3-5 year period

Construction

- ❑ Developers exercise options and enter into long-term lease agreements and easements
- ❑ Developer will typically pay landowner a fixed fee and possibly a commitment bonus
- ❑ Construction will typically take 6-9 months

Operation

- ❑ Turbines are installed and begin generating electricity
- ❑ Developer needs access to land to maintain equipment
- ❑ Operational life of a turbine is 15-25 years
- ❑ Lease agreement or easement governs relationship, including payments

Remediation/Contract Renewal

- At the end of the project, provide for removal of structures and site restoration
- Option to renew the lease may be exercised
- Opportunity to renegotiate terms

Why consider a wind energy land contract?

- ❑ Landowners have a valuable wind resource blowing across their property
- ❑ Developing a wind farm is an expensive and complex process
- ❑ Developers have the experience and financial backing to install and operate a wind farm

Benefits of Contracting

- Landowner
 - Increases and diversifies income
 - Maintains ownership of the land
- Developer
 - Less up-front costs
 - Potential for better cash flow - payments align with revenues

The Lease Agreement

- A legally binding contract between the landowner and the developer
- The developer rents a portion of the landowner's property for a term of years
- Governs the rights and duties of each party over the life of the wind project from inception to decommissioning

Lease Agreement Components

- Term - 20-50 years
- The Land and Approved Uses
- Payments
- Liability
- Duties
- Other Common Terms

The Land and Approved Uses

- ❑ Should precisely specify the land covered
- ❑ Access, including roads and maintenance
- ❑ Location of pads for transformers and substations
- ❑ Reservations – farming, grazing, mineral extraction, hunting, etc.
- ❑ Upwind blockage
- ❑ Buffer zones, e.g. noise

Payment Options

- Royalty Payments
- Royalties Plus a Guaranteed Minimum Payment
- Fixed Fee
- One-Time, Lump Sum

Royalty Payments

- 1-4% of revenue received from electric generation
 - Revenue - electricity, RECs, etc.
 - Pooled or by turbine
- Variable payments
 - Seasonal variations in the wind resource
 - Turbines' operating availability
 - Price of electricity
- Audits

Royalties Plus

- Percentage of revenues, with a guaranteed minimum payment
- Protects landowner against
 - Possible operations problems
 - Lower than expected wind resource

Fixed Fee

- Developer pays flat, fixed fee on a monthly or yearly basis
 - Per turbine
 - Per acre
 - Per MW
- Simple – no need for audit
- Certainty

Lump Sum

- ❑ Developer pays one large payment for use of the property for the lifetime of the project
- ❑ Immediate
- ❑ Simple
- ❑ Certainty
- ❑ May make property less valuable to subsequent owner

Liability

- Mutual indemnification for damages caused to each other, e.g. crop damage, damage to equipment, etc.
- Address responsibility for damages to third parties

Developer's Duties

- ❑ Make payments
- ❑ Avoid interference with landowner's use of the property
- ❑ Keep land free from any liens
- ❑ Comply with all federal, state, and local laws
- ❑ Obtain and comply with all necessary permits
- ❑ Not to dispose or release hazardous substances on the land

Landowner's Duties

- Allow access
- Not engage in activities that would impede the wind resource
- Assist and cooperate with the developer to obtain permits
- Cooperate with the developer to obtain any subordination agreements or approvals from existing lien holders

Other Common Terms

- ❑ Taxes
- ❑ Assignment
- ❑ Termination and default
- ❑ Dispute resolution
- ❑ Choice of law and venue
- ❑ Force majeure
- ❑ Ownership of installed property
- ❑ Recordation

Easements

- “Non-possessory” property interest
- Gives the developer a “right of use” over the landowner’s property
- Often used to ensure that neighbors do not do something that would be detrimental to the wind project

Sample uses for easements

- Right to lay cables connecting the turbines to the power grid
- Right to cross land for construction, operation, and maintenance of turbines and related equipment
- Right to prevent obstacles (buildings, trees) which might interfere with the free flow of wind across the turbines
- Right to produce noise, shadows, or other minor nuisances

25 Tips for Landowners

1. Consult an attorney
2. Know your developer
3. Consider negotiating for a copy of the site's wind and weather data
4. Make sure agreement covers only wind development rights, not water, mineral or other surface development rights

25 Tips for Landowners

5. Consider a “most favored nation clause” that requires landowner to be treated as favorably as neighbors executing similar agreement
6. Require the agreement to be recorded, not just a memorandum of the agreement
7. Have insurance agent review the agreement

25 Tips for Landowners

8. Remember that all terms are negotiable
9. Beware of confidentiality provisions
10. Make sure terms are clearly defined, e.g. whether “revenues” include the sale of RECs
11. If using a fixed fee, include an inflation or escalation provision

25 Tips for Landowners

12. Beware of automatic renewals; require notice, election and price adjustment terms
13. Secure access to audited records and approval of PPAs
14. Consider requiring a decommissioning bond or funds placed in escrow
15. Require developer to maintain commercial liability insurance; require proof

25 Tips for Landowners

16. Talk with your neighbors
17. Consider appearance terms – paint color, maintenance, etc.
18. Require construction to begin by a date certain
19. Beware of perpetual easements

25 Tips for Landowners

20. Consider a horizontal severance clause
21. Ensure that the developer is responsible for increased taxes due to the improvements
22. Ensure that payments cover the loss of income from other uses of your property
23. Require site to be restored to its original condition

25 Tips for Landowners

24. Require structures and roads to be located along parcel edges to minimize impact – approve site plan
25. Limit the amount of land subject to the lease/easement

Resources

- Great Lakes Renewable Energy Association – www.glrea.org
- American Wind Energy Association – www.awea.org
- Windustry - www.windustry.org
- Michigan State University Extension – <http://web1.msue.msu.edu/wind/>

Conclusion

Questions or Comments?

Fraser TrebilcockTM

LAWYERS

FRASER TREBILCOCK DAVIS & DUNLAP | PC

LANSING DETROIT

124 West Allegan Street

Suite 1000

Lansing, MI 48933

TELEPHONE: (517) 482-5800

FAX: (517) 482-0887

www.fraserlawfirm.com

One Woodward Avenue

Suite 1550

Detroit, MI 48226

TELEPHONE: (313) 237-7300

FAX: (313) 961-1651

www.fraserlawfirm.com