

Legalities of Leasing: An Overview of Wind Energy Lease Agreements

A Presentation to
The Michigan Wind Energy Conference

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Agenda

- The Wind Project
- Why Lease?
- The Lease Agreement
- Easements
- Top 10 Tips

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 lease?

- ❑ 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 Leasing

- 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

Top 10 Tips

10. Record the agreement
9. Address the problem of default
8. Be flexible
7. Clearly define terms and conditions
6. Remember that all terms are negotiable

Top 10 Tips

5. Be clear about your goals
4. Talk with the neighbors
3. Know the other party
2. Do your homework
1. Consult an attorney

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?

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