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Wind Turbine Lease Considerations for Landowners

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Legal, binding contracts between landowners and wind energy development companies are a necessary part of any wind farm development project. The tendency may be to streamline the development process to move the project ahead faster. Landowners may be told the contracts they are being asked to sign are standard contracts for wind projects and the terms of the contract are fixed and the same for everyone. However, until a contract is signed, any and all of the contract provisions are negotiable.

Once signed, all parties involved have given written approval of the provisions of that contract and are legally bound to fulfill their part. Therefore, if you don't like something about a contract, negotiate a change before signing. The difficult part is knowing to what degree the various components of the contract can be changed. Talking with other people involved in the project is helpful and, ***most importantly, seek competent legal advice before signing.***

Before you sign on the dotted line, these are some questions you should ask:

How much of my land will be tied up and for how long?
How much will I be paid and how will I receive payments?
Are the proposed payments adequate now and will they be adequate in the future?
Have all liability issues been considered?
Have I considered all contract specifications?
Are there any other considerations?

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How much of my land will be tied up and for how long?

Duration of contract

Leases to landowners for wind farm development have two components. One component is a contract to lease the wind development rights for some fixed length of time (wind option agreement). This lease gives the company the right to develop the wind power over the contracted acreage and excludes any other company from developing the wind resource during the length of the lease. This lease should be of limited duration. Typically these leases would run from three to five years, possibly with an option to renew for a specified number of years. These leases typically will provide for an annual payment to the landowner of $2 to $10 per acre for the area covered in the lease. If no development has taken place before the end of the lease period, the landowner then would be free to negotiate a lease with another developer should the opportunity arise. (See N.D.C.C. Chapter 17-04)

The second component is the contract for the actual tower and related development, such as access roads. This lease is longer by necessity to give the wind developer an opportunity to recover the investment cost and earn a market rate of return on the investment. Recovering the cost of investment typically will take 15 to 20 years. Therefore, wind tower leases usually will cover 20 to 25 years, with an option to extend the contract an additional period of time. (See N.D.C.C. Chapter 17-04)

Having both components in the same contract is common, but landowners should be cautious in signing a combined contract. The payment for the right to develop the wind resource may look like quick and easy money, but the majority of the income will come from the right to build the wind tower. Being sure landowners are receiving fair compensation for the wind tower development is important as well.

Renewable period

Contracts covering the lease of the wind development rights and wind turbine construction typically specify an option to extend or renew the contract for a specified number of years. Check to see if the contract specifies the option to renegotiate the terms of the lease at the time of renewal. Since these contracts cover an extended period of time, considerable changes may have occurred in the marketplace during that period of time.

Tower removal responsibilities and specifications

What happens to the wind tower when it becomes obsolete or otherwise uneconomical to operate? If the tower is no longer generating income for the landowner, it becomes a nuisance for normal farming and ranching operations and should be removed. Does the contract specify how soon the tower and other structures, including access roads, will be removed and who is responsible for the cost? The removal cost will be substantial. Is the owner/operator of the facility responsible for removal?

The North Dakota Public Service Commission recently made an administrative ruling dealing with

Construction of the underground base for a wind turbine.
(Photo by Ron Beneda, Cavalier County Extension Agent)

decommissioning of wind turbines. Effective Oct. 1, 2008, the owner or operator of the commercial wind energy conversion facility is responsible for removing the wind turbines and related facilities when no longer useful. They must remove the turbines and facilities within three years of the end of electricity generation unless a new plan is proposed to reuse the turbines. The commission may order a bond or other financial assurances, but only after the 10th year of operation of the facility. (See N.D. Admin. Code Chapter 69-09-09 referenced below.)

Placement of access roads

Each tower requires an access road for maintenance and repair. A roadway across an annually cropped field will result in loss of efficiency of field operations. However, the loss of efficiency can be minimized if the roadway runs the same direction as field operations are conducted. Contracts should allow for landowner input regarding access roads.

Construction period

During construction of a wind tower, considerable land will be impacted in excess of acreage needed for the tower and access road. The contract should include provisions for paying for all crop damage that occurs during the construction phase.

Responsibility for roads, fences and gates

The contract should cover who is responsible for maintenance of access roads. It also should specify who is responsible for snow removal. Piling up snow to clear access can seriously delay spring field work, which usually results in lower yields.

Fences, gates and cattle guards become an issue when a wind tower is on grazing land. The contract should specify who is responsible for construction and maintenance of any necessary fencing, gates and cattle guards. These costs should be the responsibility of the wind energy developer.

How much will I be paid and how will I receive payments?

Payments per tower or megawatt

Payment to the landowner may be per tower, per megawatt produced, a percent of the gross revenue produced or a combination of these methods. *Towers vary in capacity from less than 1 megawatt to at least 3 megawatts.* As the technology improves, turbines with greater output capacity can be expected. Consequently, rates per tower vary considerably.

Anecdotal reports indicate most companies are paying $4,000 to $6,000 annually per megawatt of tower capacity for fixed-compensation packages. For royalty-compensation packages, 3 percent to 5 percent of gross revenue from electricity sales is common, including renewable certificates. Landowners should negotiate for inclusion of renewable, pollution and environmental credits in addition to the sale of electricity.

Types of compensation packages

Fixed payments – preferably includes an escalator (see below). Advantage: Stable income for landowners, low risk.

Royalty or percentage of revenue – Need to have access to relevant information about power sales. Advantage: Landowner has a vested interest in the success of the project.

Combinations – Fixed payment plus a percentage of revenue; greater of fixed payment or a percentage of revenue.

Equity partnership – Income is in relation to the percent ownership of the project.

Transparency of wind company financial records

If landowners are to receive a percent of gross revenue as part or all of the lease payment, they must have some way of verifying the revenue generated by the wind energy project. How will the contract holders have access to the company's financial records to verify the revenues produced by the wind farm?

Are the proposed payments adequate now and will they be adequate in the future?

Inflation and escalator clauses

Wind tower contracts are usually 20 years or more in length, with an option to extend the contract for another similar length of time. This necessitates including an escalator clause that will adjust the payment for inflation. A common escalator is the Consumer Price Index (CPI), which is used to adjust Social Security payments for inflation. The CPI would be a suitable escalator for wind payments as well. If a landowner signed a 25-year lease that paid $5,000 per tower with no escalator clause and inflation continued as it has the past 25 years, the landowner's $5,000 lease payment would have the purchasing power of only $2,380 at the end of the lease.

Lease payments that are based on a percentage of the gross revenue generated by the wind tower may have some inflation built in; however, negotiating an escalator clause for these payments would benefit the landowner as well.

Pulleys are attached to transmission poles to string lines. *(Photo by Ron Beneda, Cavalier County Extension Agent)*

Property tax

In North Dakota, agricultural real estate is valued based on productivity value, and buildings and improvements are exempt. Wind tower development is considered commercial property and would be taxed according to commercial property rules. Landowners need to be sure the contract specifies that the landowner is not responsible for any property tax assessment due to wind tower development.

Income tax

Income from leases or easements, as well as annual payments for turbines, is considered rental or royalty income and not subject to self-employment tax.

Energy credits

Two types of energy credits are associated with wind energy development. They are production tax credits and tradable renewable energy credits. A federal income tax credit of 2.1 cents per kilowatt-hour is available for wind projects that are producing power before Dec. 31, 2009. This credit is part of the revenue generated by a wind project. The developer will use this credit to reduce corporate income tax obligations. Without this tax credit, many wind projects would not be feasible. Nonetheless, if a landowner's compensation includes a percent of the revenue generated by the project, this tax credit should be included in the revenue calculations.

Renewable energy credits (RECs) represent a right to market characteristics associated with environmentally friendly power generation. RECs are tied to the amount of electrical energy generated from the project. When RECs are traded, the entity purchasing the RECs gains the right to claim environmental benefits. The market value of RECs represents revenue generated by the wind project and should be included in the gross revenue generated by the project. Currently the market value of RECs is minimal but may increase in value in the future.

Have all liability issues been considered?

Landowners need to be concerned about their exposure to liability that may result from the placement of wind turbines and related structures and equipment on their property. Personal and farm liability policies likely will not cover incidents that occur related to construction and operation of a wind energy project. *Examine the contract to determine if the project developer or any other company to which your lease may be assigned will be responsible for any financial obligations you may incur because of noise, visual pollution, vandalism and construction activities. Have your insurance agent review the agreement.*

Noise - Wind turbines cause a steady, low-decibel sound that can be heard within a short distance.

Visual pollution - Visual pollution refers to the unwanted obstruction or intrusion into someone's view of the landscape.

Vandalism - Wind towers or related equipment may be damaged by vandals on landowner property.

Access roads - Access roads are a necessary component of a wind development project. Making sure the natural flow of water is not impeded by road construction is important.

Construction period - Construction activity could include damage to overhead and underground power lines and communication cables, tile lines, natural drains, road surfaces and neighboring property.

Ice shedding - Ice falling from tower or blades may be a hazard to humans or animals and may cause damage to structures or vehicles below.

Blade drop/throw - Blades may become damaged because of structural failure or imbalance. Blades or parts of blades may fall and cause damage below.

Shadow flicker - The shadow effect of moving turbine blades may cause health issues.

Fire - A fire or electrical short could occur in the generator, transformer or lines. Fire could cause damage to cropland, grassing land or dwellings.

Stray voltage - Stray voltage may be a concern for humans and animals.

Electromagnetic fields - Electromagnetic fields may cause interference with electrical devices. These fields may have long-term health effects to humans or animals.

Lightening strikes - High towers are of concern because they may attract lightning. Lightning strikes could affect humans, farm animals, wildlife and man-made structures. They also could create a risk of crop or prairie fires.

Communications - Turbines may generate electromagnetic noise or physically obstruct signals.

Microwave and radar stations - Towers may obstruct point-to-point signals of telecommunications and weather transmissions.

TV and radio signals - Interference may occur with TV and radio signals.

Police/fire/ambulance radio signals - Public safety signals could be disrupted.

Bird kill - Bird and bat casualties are a reality of wind tower development. The Endangered Species Act, Migratory Bird Treaty Act and Bald and Golden Eagle Protection Act may be factors in tower placement.

Water - Water pollution is a consideration during the construction phase.

Air - Air pollution may occur during construction excavation by producing air-borne elements. This situation is usually temporary.

(Photo by Ron Beneda, Cavalier County Extension Agent)

Have I considered all contract specifications?

Confidentiality clauses in the contract - Some contracts include a confidentiality clause to prevent parties being offered a contract from discussing the terms of the contract with other parties being offered a contract. This leaves the landowners at a disadvantage relative to the wind energy company in negotiating terms.

How will contract disputes be handled?

Is the contract clear on what land use will be limited around the turbines?

Negligence - Does the turbine owner have sufficient liability insurance to cover possible claims?

Have nuisance issues been addressed? A nuisance arises when the wind turbine substantially and unreasonably interferes with the rights of a person or the general public.

Have safety and maintenance issues been addressed? Large physical structures and electricity pose inherent dangers. Damage to landowner property during and after construction is a possibility.

Have personal injury issues been addressed during and after construction? Contractors or third parties, along with the general public, have the potential to be injured.

Will contract specifications limit agricultural land use?

Will contract specifications limit hunting and recreational use?

Will aerial crop spraying be impacted in the area and should this be a consideration in the agricultural impact to the land?

Are there any other considerations?

U.S. Department of Agriculture's Farm Service Agency mortgage restrictions

Any land with a FSA mortgage needs an extensive approval process. The approval process is extensive enough that the wind developer may not want to deal with it.

U.S. Department of Agriculture programs

Approval may be needed from the U.S. Department of Agriculture if the land or landowner is involved in any of these federal programs:

- Wetlands
- Conservation Reserve Program (CRP)
- Commodity program payments
- Swampbuster provisions
- Conservation Security Program (CSP)
- Environmental Quality Incentives Program (EQUIP)
- Wildlife Habitat Incentives Program (WHIP)
- Farmland Protection Program (FPP)
- Grassland Reserve Program (GRP)
- Wetlands Reserve Program (WRP)

North Dakota State Government

These agencies cannot provide legal advice regarding private wind turbine leases but can provide information about other aspects of wind energy:

Public Service Commission (PSC)

The PSC is responsible for siting wind farms above 100 megawatts. The commission coordinates recommendations and requirements from local, state and federal organizations when siting wind farms. These include environmental, cultural and social issues connected with the project. (N.D.C.C. Chapter 49-22).

The Office of the Attorney General

The Office of the Secretary of State

This office keeps records of all companies that meet requirements to do business in the state of North Dakota.

The Department of Commerce

This agency works with local officials to encourage wind development in the state.

The Tax Department

This office can provide information on tax incentives that are available to renewable energy projects in the state.

Applicable North Dakota law and rules

North Dakota Century Code Chapter 17-04:
Wind energy property rights

The sections of law in this chapter discuss wind option agreements, provide a definition of wind easement and provide that a lease for wind energy is void and terminates if development to produce energy from wind power has not occurred on the leasehold within five years after the lease commences.

North Dakota Century Code Section 47-05-17 (effective through July 31, 2009): Severance of the right of access for hunting prohibited

This section only relates to wind turbine easements signed after Aug. 1, 2007, and is in effect only until July 31, 2009. It protects the right to hunt on land covered by a wind turbine easement.

North Dakota Century Code Section 49-02-27: Power of the commission to establish rules to decommission wind energy conversion facilities

This section of law states what may be addressed in rules to decommission wind energy conversion facilities.

North Dakota Administrative Code Chapter 69-09-09

These rules define a commercial wind energy conversion facility and put responsibility for decommissioning on the owner or operator of a commercial wind energy conversion facility. They also cover the useful life of a facility, decommissioning period, decommissioning requirements, decommissioning plan, financial assurance and what happens if the owner or operator fails to decommission the commercial wind energy conversion facility.

Sources

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Lynn Hamilton, Michigan State University and Cal Poly

Agricultural Marketing Resource Center, Iowa State University

Elizabeth Williams, DTN

Useful Web sites

www.calt.iastate.edu/
web1.msue.msu.edu/
www.flaginc.org/
www.energy.iastate.edu/
www.windaction.org/
www.windustry.org/
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