

CHAPTER 17-04 WIND ENERGY PROPERTY RIGHTS

17-04-01. Wind option agreement - Definition - Termination.

1. A wind option agreement is a contract in which the owner of property gives another the right to produce energy from wind power on that property at a fixed price within a time period not to exceed five years on agreed terms.
2. A wind option agreement is void and terminates if the following have not occurred with respect to the property that is the subject of the wind option agreement within five years after the wind option agreement commences:
 - a. A certificate of site compatibility or conditional use permit has been issued, if required; and
 - b. A transmission interconnection request is in process and not under suspension.
3. If the requirements of subsection 2 are not met by the owner of the wind option agreement, the owner of the energy rights may provide to the owner of the wind option agreement a notice of termination, by certified mail or other personal delivery, and file the notice with the county recorder in the county in which the real property is located. Termination of the wind option agreement is effective five years after the wind option commences.

17-04-02. Wind easement - Definition.

For purposes of sections 17-04-03 and 17-04-04, the term wind easement means a right, whether stated in the form of a restriction, easement, covenant, or condition, in a deed, will, or other instrument executed by or on behalf of an owner of land or airspace for the purpose of ensuring adequate exposure of a wind power system to the winds.

17-04-03. Wind easements - Creation - Term - Development required.

1. A property owner may grant a wind easement in the same manner and with the same effect as the conveyance of an interest in real property.
2. The easement runs with the land benefited and burdened and terminates upon the conditions stated in the easement, however:
 - a. The easement is void if the following have not occurred with respect to the property that is the subject of the easement within five years after the easement commences:
 - (1) A certificate of site compatibility or conditional use permit has been issued, if required; and
 - (2) A transmission interconnection request is in process and not under suspension.
 - b. A wind easement is presumed to be abandoned if a period of thirty-six consecutive months has passed with no construction or operation of the wind farm facility. If the operator of the wind farm facility does not file a plan with the public service commission outlining the steps and schedule for continuing construction or operation of the facility within the thirty-six month period, the owner of the energy rights may provide, by certified mail or other personal delivery to the owner of the wind easement, a sixty-day written notice of the intent to terminate the easement. If, within sixty days of the receipt of the notice of the intent to terminate, the owner of the easement fails to provide a written objection to the notice by certified mail or other personal delivery, the owner of the energy rights may file a notice of termination with the county recorder in the county in which the real property is located. Termination of the easement becomes effective when the notice of termination is filed and recorded with the county recorder.

17-04-04. Severance of wind energy rights limited.

Except for a wind easement created under section 17-04-03 and as otherwise provided in this section, an interest in a resource located on a tract of land and associated with the

production of energy for wind power on the tract of land may not be severed from the surface estate. However, nothing in this section may be construed to prohibit or limit the right of a seller of real estate to retain any payments associated with an existing wind energy project.

17-04-05. Wind energy leases - Termination.

1. A lease for wind energy purposes is void and terminates if the following have not occurred with respect to the property that is the subject of the lease within five years after the lease commences:
 - a. A certificate of site compatibility or conditional use permit has been issued, if required; and
 - b. A transmission interconnection request is in process and not under suspension.
2. A wind lease is presumed to be abandoned if a period of thirty-six consecutive months has passed with no construction or operation of the wind farm facility. If the operator of the wind farm facility does not file a plan with the public service commission outlining the steps and schedule for continuing construction or operation of the facility within the thirty-six month period, the owner of the energy rights may provide, by certified mail or other personal delivery to the owner of the wind easement, a sixty-day written notice of the intent to terminate the lease. If, within sixty days of the receipt of the notice of the intent to terminate, the owner of the lease fails to provide a written objection to the notice by certified mail or other personal delivery, the owner of the energy rights may file a notice of termination with the county recorder in the county in which the real property is located. Termination of the easement becomes effective when the notice of termination is filed and recorded with the county recorder.

17-04-06. Requirements for wind easements and wind energy leases.

1. In a wind easement and a wind energy lease, the easement and lease:
 - a. Must be delivered to the property owner with a cover page containing the following paragraph with the correct term of years in the blank and in at least sixteen-point type:

Special message to property owners
This is an important agreement our lawyers have drafted that will bind you and your land for up to _____ years. We will give you enough time to study and thoroughly understand it. We strongly encourage you to hire a lawyer to explain this agreement to you. You may talk with your neighbors about the wind project and find out if they also received a proposed contract. You and your neighbors may choose to hire the same attorney to review the agreement and negotiate changes on your behalf.
 - b. May not be executed by the parties until at least ten business days after the first proposed easement or lease has been delivered to the property owner.
 - c. May not require either party to maintain the confidentiality of any negotiations or the terms of any proposed lease or easement except that the parties may agree to a mutual confidentiality agreement in the final executed lease or easement.
 - d. Must preserve the right of the property owner to continue conducting business operations as currently conducted for the term of the agreement. When a wind energy facility is being constructed and when it is completed, the property owner must make accommodations to the developer, owner, or operator of the facility for the facility's business operations to allow the construction and operation of the wind energy facility.
 - e. May not make the property owner liable for any property tax associated with the wind energy facility or other equipment related to wind energy generation.
 - f. May not make the property owner liable for any damages caused by the wind energy facility and equipment or the operation of the generating facility and equipment, including liability or damage to the property owner or to third parties.
 - g. Must obligate the developer, owner, and operator of the wind energy facility to comply with federal, state, and local laws and regulations and may not make the property owner liable in the case of a violation.

- h. Must allow the property owner to terminate the agreement if the wind energy facility has not operated for a period of at least three years unless the property owner receives the normal minimum lease payments that would have occurred if the wind energy facility had been operating during that time. For the purposes of this subdivision, the term "normal minimum lease payments" means a payment in the lease or easement called a "base amount" or "minimum payment", or similar language, or if this language is not provided for in the lease or easement, payments at least equal to the periodic payments received by the property owner in the last calendar year that the wind energy facility was in full operation.
 - i. Must state clearly any circumstances that will allow the developer, owner, and operator of the wind energy facility to withhold payments from the property owner.
- 2. The owner of the wind energy facility shall carry general liability insurance relating to claims for property damage or bodily injury arising out of the construction or operation of the wind energy facility project site and may include the property owner as an additional insured on the policy.
- 3. If the terms of the wind easement or wind energy lease are not in accordance with this section, the court may reform the easement or lease in accordance with this section, void the easement or lease, or order any relief allowed by law.

17-04-07. Wind energy facility liens.

For any wind turbine and associated facilities that are part of an electric energy conversion facility designed for or capable of generation by wind energy conversion exceeding one-half megawatt of electricity and for which a lien is provided under chapter 35-27, the lien is upon only the improvement and not upon the land.