

# INSTITUTE FOR TRANSNATIONAL LAW

**"How to Negotiate & Draft a Wind  
Energy Lease with a Look at New  
Developments in Wind Law"**

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# Professor Rod E. Wetsel

[wetsel@wetsel-carmichael.com](mailto:wetsel@wetsel-carmichael.com)

325-236-1776 (text messages)

# Wind Energy Lease in Texas

## In the Beginning . . .

- 1999: First leases in Central West Texas, primarily in Nolan, Taylor and Scurry Counties: Trent Mesa, Sweetwater Wind (DKRW), and Project Snyder
- 2000-2003: First wind projects under construction: Sweetwater Wind, Horse Hollow, Buffalo Gap, Camp Springs
- 2003-2010: “Wind Boom”: Wolf Ridge, Stanton; Turkey Track, Roscoe
- 2010: Recession
- 2011-2013: Increased construction; new life in South Texas
- 2014: Leasing of “FPTC qualified” projects, e.g. NextEra’s Red Raider project in Hockley County and Javelina Wind Farm in Webb County; December extension of PTC to December 31, 2014.
- 2015: Building of “qualified” projects (e.g. Lincoln Clean Energy’s Electra Project in Wilbarger County; Sendero Project in Jim Hogg County); August 2015 President Obama proposal for 32% cut in nationwide carbon dioxide emissions for all states by 2022; December 18, 2015, Congress extended the PTC for 5 years giving industry “new life”. Remains at current level (2.3¢ per KW hour) through 2016; decreases 20% per year until expires in 2020.

# Wind Energy Lease in Texas

- 2016: “Second Wind Boom” begins. Rush to “qualify” projects for full PTC before year end. Developers have option to either “scrape dirt” or invest 5% of the capital cost of a project on or before December 31, 2016.
- 2017: Wind boom continues with a decrease in the PTC to 80% of the original 30% credit. Areas to watch are south Texas along the Rio Grande and the Staked Plains project in Garza and Lynn counties south of Lubbock (already qualified in 2016 for three phases totaling approximately 750 MW with two additional phases planned).
- 2018: Thanks to Senators from Iowa and South Dakota on December 15, 2017 the FPTC reduction is deleted at the last minute from U.S. Congress Tax Bill and wind begins to boom even more in 2018 with new projects like Mesquite Star in Fisher County (400 MW; 3.45 MW turbines).

# The Town Hall Meeting Concept

- Large landowner group meets with wind developer to discuss proposed wind project and negotiate lease terms

- \* Efficient

- allows developer to deal with a single voice for large tracts of land
    - faster negotiating period allowing testing and studies to commence more quickly
    - information is disseminated to all landowners at once allowing each landowner to benefit from the insight and questions of his/her neighbors
    - increased bargaining power for landowners with small tracts
    - lower costs – attorneys fees are reduced for both sides; developer often reimburses fees to landowners
    - transparency – diminishes strife as each landowner knows he/she is getting “the best deal”
  - Perfected by Wind-Tex Energy in its Snyder, Camp Springs, Turkey Tract, Stephens and Bor-Lynn Projects as well as by other developers
  - Envisioned by Boone Pickens as launching pad for a national wind plan



# Multi-Party Wind Leases

- Each individual landowner signs a separate lease
  - ▣ Same compensation
  - ▣ Different surface use provisions
    - E.g. – grazing land will contain different protection provisions than irrigated farm land.
- Wind leases are executed generally at group “signing party” or done individually through the mail

# The Signing Party

- *Wade v. XTO Energy, Inc.* 2013 Tex. App. LEXIS 676 (Tex. App. – Fort Worth Jan. 24, 2013).
  - The court refused to look to the bonus check stub, previous offer letters, or other extrinsic documents not referenced in the lease to supply the necessary legal description.
  - Formalities are often an afterthought.
  - Plaintiffs “signed a lease which they did not accept and allegedly accepted a lease, without a property description, that they did not sign.” (*Wade* at \*11).



# Ethical Considerations

- Professional Responsibility
  - Wind lease negotiations present a unique set of circumstances wherein the practitioner is often required to represent multiple parties with common yet diverging interests.
  - Relevant Rules to Consider:
    - Rule 1.02 – Scope and Objection of Representation
    - Rule 1.03 - Communication
    - Rule 1.04 – Fees
    - Rule 1.05 – Confidential Information
    - Rule 1.06 – Conflicts of Interest
    - Rule 1.15 – Declining or Terminating Representation

\* Concerns about breach of fiduciary duty: *Burrow v. Arce*, 997 S.W.2d 229 (Tex. 1999)



# The Engagement Letter



Rule 1.02 provides, generally, that a lawyer shall abide by a client's decisions concerning the objectives and general methods of representation but may limit the scope, objectives and general methods of the representation if the client consents after consultation.

- The Engagement Letter provides the practitioner the opportunity to disclose the nature of the multiple representation and clearly state the expectations of the parties.
- Presented to landowner group at initial meeting, allows for open discussion with the entire group

# Conflict of Interest in Wind Leases

- Wind groups generally do not “pool” their land but instead individually grant a lease which has been negotiated as a group
- Important to disclose multiple representation in writing;
  - State the ethical obligations
  - State the fee arrangement – Fees in wind projects customarily reimbursed by the wind farm developer
  - Discuss the engagement letter, be open about the relationship

# Contingent Fee Clause in a 2015 Wind Lease

Contingent Fee to  
Attorneys at Law  
“Dewey Cheatham &  
Howe”

In consideration of DC&Hs efforts in assisting Landowner, Landowner agrees to pay a contingent fee and/or success fee arrangement of ten percent (10%) of any and all amounts received by Landowner relating in any way to this Lease, including but not limited to development fees, installation fees, surface damages, minimum royalty, and royalty.

Any and all amounts owed to DC&H, Attorneys-at-Law, will be paid to DC&H by Landowner within thirty (30) days of receipt of funds by Landowner. Landowner also hereby authorizes the Developer and any assignee of Developer to pay directly to DC&H any amounts owed under the terms of this Lease.

# Wind Energy Lease in Texas

## Overview:

- Option Phases
- Lease Term
- Compensation
- Gross Revenues
- Conflicting Uses
- Surface Protection



# Option/Development Phase



- Initial Phase of wind lease during which time Developer seeks to ascertain whether or not the property subject to the lease is suitable for construction of wind farm.

Provides easements for:

- Limited right of ingress & egress
  - Meteorological testing equipment
  - Developer's right to conduct necessary studies
- May be structured as a “true” option or as a separate phase of the Lease Term
  - Length contingent upon site location and qualification for the PTC, range from 18 months to 7 years.

# Lease Term

- Period of time that the wind farm is in commercial operation; typically most development activities have occurred prior to the lease term
  - Generally between 30 and 50 years
  - May be divided into multiple phases
  
- Construction Phase: lease should specify whether construction is to occur during Development or Lease Term, or during a separate phase (Construction time approximately 18 months).



# Compensation Terms: Installation Fees

- Purpose: to compensate landowners not only for the location damage but also for the long-term loss of the use of surface of their property.
- Installation Fees are defined in two ways:
  1. Payment owing to landowner as compensation solely for wind turbine sites
    - This definition contemplates a separate payment for roads, collection lines, and transmission lines, generally referred to as “Surface Damages”
  2. Payment for all of the damage caused to the surface of the property caused by the installation of the wind farm.
- Generally paid within 60 days of the commencement of construction, but often bifurcated with a payment due upon the commencement of construction and a second payment due upon completion.

# Compensation Terms: Facility Payments

- Purpose: to compensate an individual landowner for the location of a facility on his or her property which will be utilized for the benefit of the entire project.
- Payment Structure – Generally one time payment, made per acre utilized, though often, in lieu of a larger up front payment, annual payments are made for Substation and O&M Facility.
  - Substations – permanent power station in a system for the generation, transmission, and distribution of electricity where voltage is powered up or down by transforms. Generally 5 acres.
  - O&M Facilities – small office building installed at or near a project which houses a computer bank and other electronic equipment required by employees who will oversee the day to day operation of the wind farm.
  - Lay Down Yards – temporary storage area for turbine segments, building materials, and equipment during the construction of wind farm. Generally 10 to 25 acres.



# Compensation Terms: Surface Damages

- Purpose: to compensate landowners for newly constructed or improved roads, buried collection & distribution lines, and overhead transmission lines.
- Payment Structure: Generally a one time payment made at commencement of construction calculated based upon the length of the road or line (typically a dollar amount per rod (16.5') or per foot)
- Roads required to access each turbine and can be as large as 60' wide during construction to accommodate cranes and other equipment
- Collection/Distribution Lines –under ground lines connecting each turbine

# Compensation Terms: Minimum Royalty

- Purpose: to provide landowner an annual guaranteed income payment regardless of the production of electricity or the operation of wind turbines on the property.
- The greater each year of three separate types of minimum rent payments:
  1. Amount paid per megawatt of installed nameplate capacity; or
  2. Amount paid per acre of land held by the lease;
  3. Actual amount of royalty paid during the year.
- Generally include an escalation provision over the life of the lease (e.g. \$500 per MW, \$5.00 per acre, and 1/2% royalty increase every 5 years).

# Compensation Terms: Royalty

- Purpose: a percentage of gross revenues paid to the landowner as “rent” (may result from a power purchase agreement, merchant plant arrangement, or combination of both).
- General Formula:  $[(\text{Turbine Size} * \text{Capacity Factor} * 8760) * \text{Price of Electricity}] * \text{Royalty Percentage}$
- Generally includes an escalator over the life of the lease.
- Royalty percentages are considerably lower than that found in oil and gas leases (e.g. 1.5 MW turbine at 4-4.5% royalty typically generates income of \$8,000-\$12,000 per year per turbine).



# Gross Revenues

- General Definition: income generated by the wind farm prior to the deduction of expenses.
- “Gross Revenues” are specifically defined by each wind lease for the purpose of calculating lease Royalty:
  - Should include all payments from the sale of electricity from the lease, including payments for renewable energy credits and other “green” reimbursements. Also may include payments made pursuant to claims under an insurance policy with a business interruption clause.
  - Generally does not include: payments for Federal Production Tax credits, reimbursement for wheeling costs, nor revenues received from the modification or termination of a power purchase agreement.
- Typically calculated based upon the total amount of electricity produced by each turbine or from all turbines as measured at the interconnection point between the wind farm and the electrical grid.
- Trend today by landowners to seek a “cost free” royalty.

# Landowner Retained Surface Uses

- Farming
  - ▣ Protection of irrigations systems (e.g. relocation of pivot or drip irrigations systems)
  - ▣ Reimbursement for crops damaged by Developers operations
- Ranching
  - ▣ Protection of Livestock including reimbursement for injury or death to animals
  - ▣ Repair and replacement of fences, gates and cattle guards
- Hunting
  - ▣ Reimbursement for lost hunting revenues
  - ▣ Hunter's indemnities and waivers of liability
- Site Rules (address speed limits, smoking, firearms, animals, artifacts, fossils, staying on roads, no photographs, etc.)

# Landowner Retained Uses - Minerals

- Overview
  - ▣ Accommodation Doctrine
  - ▣ First in time
  - ▣ Concurrent development



# Minerals: Accommodation Doctrine

- Multidimensional approach to some degree balancing surface and mineral interests
- Judicial, non-statutory concept requiring the mineral owner to act with prudence and “due regard” for existing surface uses.
- Focuses only on the method of the mineral owner’s operations—not a limitation on mineral owner’s right whether or not to extract
- Parties are at the mercy of a judge’s discretion to weigh the factors

# Minerals: If Wind Rights are First in Time

- ❑ Grantor owns all of the surface and mineral estate and there is no current lease of the minerals
- ❑ Wind lessee includes provisions in the lease which restrict oil, gas and mining activities on the surface as well as future leases and conveyances of minerals
- ❑ Wind lessee may attempt to reverse the dominant estate doctrine
- ❑ Wind lessee requires future oil and gas lessees to enter into an accommodation agreement
- ❑ Future oil and gas leases must reference the wind lease
- ❑ The wind lease includes a broad “no interference” clause



## Minerals: If Wind Rights are First in Time, Duties of the Executive

- *Lesley v. Veterans Land Bd.*, 2011 Tex. LEXIS 635 (Tex. 2011)
  - ▣ Held that: It may be that an executive cannot be liable to the non-executive for failing to lease minerals when never requested to do so, but an executive's refusal to lease must be examined more carefully. If the refusal is arbitrary or motivated by self-interest to the non-executive's detriment, the executive may have breached his duty.
  - ▣ Overruled *Aurora Petroleum, Inc., et al. v. Newton*, 287 S.W.3d 373 (Tex. App. – Amarillo, 2009)

□ *KCM Fin. LLC v. Bradshaw*, 457 S.W.3d 70 (Tex. 2015)

- Facts: Bradshaw inherited an NPRI, reserved by her parents in the 60's, which stipulated that any royalty could not be less than  $1/2$  of  $1/8$  (i.e.,  $1/16$  of gross production). The NPRI was in 1,700 acres (out of a 2,000 acre ranch). Through a series of transactions, KCM Financial (Steadfast) became the owner of the entire 2,000 acre ranch (surface and mineral estate). There was evidence that KCM Financial was informed of Bradshaw's interest and was advised to take a  $1/4$  royalty to avoid possible litigation. KCM's attorney also informed KCM that as a non-executive Bradshaw was not entitled to any bonus money. KCM later leased the ranch to Range Resources for a  $1/8$  royalty and a bonus of over \$7,500.00 an acre (i.e., a total bonus consideration of over 13 million). KCM then immediately assigned the majority of its  $1/2$  interest in the  $1/8$  royalty to a series of people responsible for setting up the deal. Bradshaw brought suit arguing that by 2005 a  $1/4$  royalty had become customary and that as a result of KCM accepting a  $1/8$  royalty in return for an exorbitant bonus consideration it had violated its executive duty to her by diminishing the value of her NPRI.

□ *KCM Fin. LLC v. Bradshaw*, 457 S.W.3d 70 (Tex. 2015)

- Holding: “An executive owes a non-executive a duty that prohibits self-dealing but does not require the executive to subjugate its interests to those of the non-executive. Thus, in ascertaining whether the executive breached its duty to the non-executive, the controlling inquiry is whether the executive engaged in acts of self-dealing that unfairly diminished the value of the non-executive interest.” *Id.* at 82. Thus, “the failure to obtain a market-rate royalty does not, in and of itself, constitute a breach of that duty.” *Id.* at 89. “Rather, the subject transaction must be viewed as a whole in determining whether the terms of a mineral lease, including the negotiated royalty, reflect the executive's utmost good faith and fair dealing vis-à-vis the non-executive.” *Id.* at 84.
- Result: Affirmed the Court of Appeals, who had reversed the Trial Courts summary judgment in favor of KCM (i.e., that KCM had not violated its executive duty to Bradshaw).

- Texas Outfitters v. Nicholson, 2017 WL 2124494 (Tex. App. San Antonio 2017)
  - ▣ Holdings: [1]-In a suit brought by non-executive mineral interest owners against the executive owner, the trial court's findings and conclusions supported its judgment in favor of the non-executive owners for breach of the executive's duty of utmost fair dealing to the non-executive owners by failing to enter into an oil and gas lease that was offered; [2]-The executive's refusal to lease was motivated by self-interest to the non-executives detriment because its owner expressed that he did not want to lease the mineral interest because it would interfere with his surface interest on which he conducted a hunting operation; [3]-Resulted in a loss to the non-executive owners, who held 45.84 percent of the interest, of \$867,654.

# Minerals: If Mineral Rights are First in Time

- Severance of the mineral estate prior to wind lease and development
- Wind lessee attempts to obtain surface waivers and non-interference agreements from non-executive mineral owners
- Common law advantage of dominant estate ownership has caused some mineral owners to refuse to accommodate servient surface use by the wind lessee

# Surface Protection Clauses

- Crop Dusting
  - ▣ Because of the height and placement of turbines crop dusting may be severely limited; however, the issue may be dealt with by liability assumption/waiver
- CRP
  - ▣ Clause provides that if any portion of the premises is removed from CRP due to development, the Developer will be responsible for penalties and reimbursement of payments
- Water & Caliche
  - ▣ Use limited through agreement between landowner and wind company
- Blasting
  - ▣ Provision requires setbacks from residences, barns, corrals, and other improvements including oil and water wells.

# Wind Energy Lease in Texas

- Overview:

- Location of Facilities
- Maintenance
- Taxes
- Liens
- Assignment
- Termination
- Restoration & Bond
- Indemnity
- Default & Remedies
- Financial Provisions



# Location of Wind Power Facilities

- Wind leases commonly contain provisions which either limit or dictate the location of wind power facilities on the property. Conflict exists between the landowner's desire to restrict the location of turbines, overhead lines, and other facilities and the developer's desire to achieve the highest economic benefit.



## **Common Construction Restrictions include:**

1. 1000' set back from residences
2. Set backs from barns or corrals
3. Turbines restricted to corners of each section to avoid pivot irrigation
4. "Restricted Area" addendum to lease prohibiting construction in specified areas
5. "Site Plan" requiring landowner's approval

CAVEAT: Many construction restrictions are subject to the developer's reasonable commercial discretion as to location



# Maintenance of Wind Power Facilities

- Wind leases in Texas have evolved to include “good housekeeping” clauses which require that the developer:
  - Maintain and repair buildings, roads, fences and gates
  - Keep the property free of debris
  - Use existing roads when possible
  - Mark all wind power facilities (particularly those which are buried)
  - Treatment, control and eradication of weeds



# Ad Valorem Taxes

- Largest line item for expenses incurred after construction of a wind energy project is for payment of property or ad valorem taxes.
- In Texas ad valorem taxes are assessed by counties, independent school districts, hospital districts, colleges and other governmental entities.
- Landowners are often concerned about the loss of agricultural exemptions and increased taxes based upon the wind farm's location
  - For these reasons, wind leases usually include a clause providing that the wind lessee shall be responsible for any annual increase (not attributable to the existing underlying value of the property) in the landowner's ad valorem taxes.

# Insurance

- Insurance: All wind leases provide that the lessee shall, at its expense, maintain a broad-form comprehensive policy of general commercial liability insurance as well as worker's compensation, automobile, and other coverage.
- Provision often includes requirements that the developer provide certificates of insurance upon demand and include the landowner as additional insured.



# Construction Liens

- Wind leases typically contain a provision which requires the developer to keep the property free and clear of all mechanic and materialmen's liens.



# Assignment



- As a general rule in Texas, absent an explicit provision to the contrary, contractual obligations and rights are freely assignable
  - Developers require the ability to freely assign the lease in order to work with its lenders or investors
  - Other developers intend to assign the lease to a larger company for the purpose of construction
- It is common for landowners to request restrictions upon assignment including restrictions that the lease may only be assigned to a subsidiary or “financially responsible” entity that is at least as credit worthy as developer

# Termination



- Lessee has the unilateral right to terminate at any time.
- Landowner generally has no right to terminate a wind lease absent an event of default or a specific provision which allows for termination in the event of non-construction.
  - Often if there is a Landowner termination right, it includes a provision which provides the developer with continuing easements for ingress and egress.
- Landowners often require a “Termination Fee” to be paid in the event of termination

# Surface Restoration & Removal Bond

- Most wind leases require that the developer remove the wind power facilities and restore the land upon lease termination.
  - Restoration includes: removal of foundations, clearing of roads (on request), removing turbines, cleaning any chemical spills, reseeded disturbed areas.
- Removal Bond: Bond posted on or after 10 to 15 years from the beginning of lease term. May be posed in the form of a traditional bond, letter of credit, corporate surety. The amount of the bond is generally equal to the cost of removal less the salvage value of the improvements. Trend in 2017 is for land owners to seek a higher bond in the amount of the net removal cost only without salvage.



# Indemnity and Suits Against Neighboring Landowners

- Unlike oil and gas leases in Texas, almost all wind leases currently in use contain an indemnity clause:
  - Many leases are reciprocal with both the landowner and developer having mutual obligations and protections
- Neighboring Landowners
  - Issues that often arise with regard to wind leases: include claims for nuisance, trespass, interference as well as health issues such as “Wind Turbine Syndrome”
  - See *Rankin v. FPL Energy, LLC*, 266 S.W.3d 506 (Tex. App. - Eastland 2008, pet. denied); *Ladd v. Silver Star I Power Partners, LLC*, 2013 Tex. App. LEXIS 6065 (Tex. App - Eastland 2013, aff’d); *Sowers v. Forest Hills Subdivision*, 294 P. 3d 437 (Nev. 2013)



# Default and Remedies

- Events of default are generally broken into two categories:
  - “Non-Monetary” – defined as any breach of the lease that does not involve money (e.g. – failure to close gates, failing to perform weed wash)
    - Often have 60 day or longer cure periods and allow only for monetary damages
  - “Monetary” – includes default as to payment of construction damages, rent, royalty or other amounts due.
    - Often have a shorter cure period than non-monetary defaults
    - Contain the additional remedy of lease termination.



# Financial Provisions: Overview

- Wind farms are capital intensive projects often involving hundreds of millions of dollars; therefore, the Lessee likely plans to finance its development and operations



# Right to Mortgage



- The lessee may, upon notice to the landowner, but without the landowner's consent or approval, mortgage, collaterally assign, or otherwise encumber and grant security interests in all or any part of its interest in the lease, easement, and improvements.

# Notice of Default and Opportunity to Cure

- As a precondition to exercising any rights or remedies related to any alleged default, the landowner must give written notice of the default to each mortgagee at the same time it delivers notice of default to lessee.
- Mortgagee has time, in addition to developer's time, to cure default
- If the default cannot be cured within the prescribed period using reasonable diligence, then the mortgagee has an additional or extended period of time in which to cure.

# Mortgagee Liability



- Any mortgagee that does not directly hold an interest in the lease or improvements, or whose interest is held solely for security purposes, has no obligation or liability under the lease prior to the time that the mortgagee succeeds to absolute title to the lessee's interest.

# Estoppel Certificates

- Landowner is required to execute estoppel certificates certifying that no default exists under the lease, as well as consents to assignment, subordination and non-disturbance agreements, and other such agreements as the lessee or mortgagee may reasonably request from time to time.



# Mortgagee's Right to Enforce Mortgage and Assign Its Lien

- A mortgagee has the absolute right:
  1. To assign its mortgage
  2. To enforce its lien and acquire title to all or any portion of the lease or improvements by any lawful means
  3. To take possession of and operate all or any portion of the lease, or cause a receiver to be appointed to do so,
  4. To acquire all or any portion of the lease or improvements by foreclosure

# Wind Energy Lease in Texas

## • Overview:

- Mortgagee's Right to Obtain New Lease
- Mortgagee's Consent
- Dispute Resolution
- Confidentiality
- Force Majeure
- Subordinated Lien
- Most Favored Nations
- Build-Out Clause
- Audit Rights & Separate Meter Requests
- Overhang Provision
- Retained Acreage
- Wind Leases in Other States
- Top Six Worst Wind Lease Clauses in History





# Mortgagee's Right to Obtain New Lease

- If a foreclosure occurs, or if the lease is rejected or disaffirmed in a bankruptcy or other proceeding, and the mortgagee has arranged for all payments to be brought current, then the landowner, upon the request of the mortgagee is required to execute and deliver to the mortgagee, or its assigns, a new lease under substantially the same terms as the original.



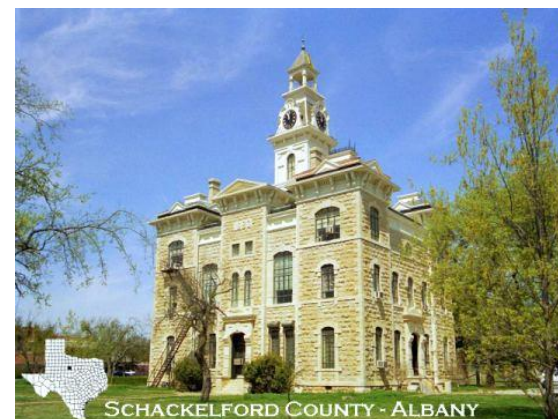
# Mortgagee's Consent to Amendment, Termination or Surrender of the Lease

- Parties generally agree that so long as there exists an unpaid mortgagee, the lease may not be modified or amended, and the landowner may not accept a surrender, cancellation, or release of all or any part of the lease from the lessee, prior to the expiration of its term without the prior written consent of mortgagee.



# Dispute Resolution

- Common Features:
  - Specify that Texas law applies
  - Venue Selection Clause – State courts in the county where land is located
  - Often seek waiver of jury trial – Texas law does not have a presumption against conspicuous waiver of jury trial
- Alternative Dispute Resolution
  - Generally broad arbitration clause
    - Often specifies location, number of arbitrators, arbitration rules to follow
  - Some leases include mediation



# Confidentiality

- Most wind leases include a provision which requires the landowner to agree not to provide copies of the lease or to disclose the terms of the lease to any unauthorized person or entity.
  - Generally includes right to seek injunction and attorney's fees for violation.
  - Includes caveat for landowner to seek counsel from accountants, attorneys, family members, et cetera.
  - Wind leases recorded in the form of memorandum



# Force Majeure

- As in oil leases, wind lease contains a broad force majeure clause.
  - Clause excuses performance (other than payment of monetary obligations) if party's performance of such obligation is impeded by a force majeure event
  - Generally includes: fire, earthquake, flood, strikes, war, civil strife, et cetera.



# Subordinated Lien

- Though generally disfavored by Developers, and often removed by subsequent lease amendments, this clause grants a lien to the landowner on the improvements for the purpose securing the removal and restoration of the premises upon lease termination.
  - Landowner agrees to subordinate the lien to all other lien holders regardless of order of attachment





# Most Favored Nations

- Aka: “No Worse Treatment”
- States that landowner’s lease will be modified to contain terms equal to the best terms granted by the developer in the wind farm.
  - Generally only includes economic terms
  - Best practice is to specify which terms will be modified
  - Provision generally includes restrictions as to geographic location and length of time during which the modification will be granted
  - Most common in Texas leases
  - Unresolved issue is how to enforce in light of confidentiality clause.



# Build-Out Clause

- Provision included in some wind leases which requires the developer to place a specific number of turbines or megawatts on a landowner's property
  - Preferable to include a specified number of megawatts as opposed to turbines
  - May also be presented as a "good faith" build-out with no specific number of megawatts
- Most common consequence for failure to build is requirement that the developer pay the landowner minimum rent based on the guaranteed number as a "phantom payment."



# Audit Rights and Separate Meter Request

- Audit Clause provides that the lessee shall keep true, accurate and complete books, records, accounts, contracts and data sufficient to support and verify royalties and other compensation
- Landowner, through a CPA of its choice, is allowed to investigate books to verify accurate payment
  - Generally audits are limited to once every year or less
- Landowner, at times, may request a separate meter be placed on each turbine and have the information provided.



# Overhang Provision

- Landowner grants the lessee an irrevocable, non-exclusive easement, appurtenant to the lease, or set back waiver for the right and privilege to permit the rotors of any wind turbine located on adjacent tracts of land to overhang the landowner's land. Most land owners disfavor such clauses unless there is a royalty sharing formula.



# Retained Acreage

- Wind farms only utilize between three and five percent of the land initially leased
- Developer may wish to release land to diminish the minimum royalty obligation and satisfy the landowner's desires to have as little of its property encumbered as possible
- Retained acreage clause provides formula for the release of unused acreage
  - ▣ Most provisions provide that the developer must give three to six months advance notice before release
  - ▣ May also require a survey
  - ▣ Often includes continuation of necessary easements as well as "Restricted Zones" which perpetuate the developer's Non-Interference Easement

# Wind Leases in Other States

- ❑ New Mexico
- ❑ Oklahoma
- ❑ Kansas
- ❑ Missouri
- ❑ Indiana
- ❑ Illinois
- ❑ Wyoming
- ❑ Colorado
- ❑ Montana
- ❑ Nebraska
- ❑ South Dakota
- ❑ Louisiana
- ❑ California
- ❑ Iowa

Limon Wind Project, Colorado



# 6 Worst Wind Lease Clauses

#1 “[I]f a title search shows that the holders of fee simple title . . . are different from the persons who signed this Agreement . . . [then] **Owner SHALL IMMEDIATELY CAUSE all of the holders of fee simple title to the Property to execute an amendment to this Agreement** pursuant to which all of such holders of fee simple title to the Property agree to and ratify this Agreement, all at no cost to Grantee.”

#2 “If Wind Company reasonably suspects that [Landowners] proposed activity might threaten [Wind Company’s operations], then Landowner **SHALL PROVIDE to Wind Company, AT NO COST OR EXPENSE TO WIND COMPANY, A WRITTEN REPORT AND OPINION FROM A LICENSED PROFESSIONAL ENGINEER** acceptable to Wind Company, that the proposed activity will have no adverse impact on the Wind Power Facilities or other improvements.”

#3 **99-year lease** (50 year Initial Lease Term, and seven 7-year extension lease periods - 49 years).

#4 “Landowner **SHALL NOT ASSIGN OR OTHERWISE TRANSFER** an interest in the wind energy rights . . . separate from fee title . . . **WITHOUT GRANTEE’S CONSENT** which Grantee may withhold in its sole discretion.”

## 6 Worst Wind Lease Clauses (cont.)

#5 Reversal of Dominant Estate Doctrine: “From and after the date of execution of this lease, Landowner agrees that regarding any interest he or she owns in both the surface and mineral estate of the property covered by this lease, that the surface estate shall be considered to be dominant to the mineral estate. Landowner agreed that all of Landowner’s future transactions regarding the mineral estate in and under said lands shall be subject and inferior to the terms of this lease and all future uses of the surface of said lands by Lessee.

#6 “Gross revenues” shall mean all cash revenues actually received by Grantee during the applicable year of the Term for the following: (i) electricity sold..., (ii) the sale of carbon credits, renewable energy credit certificates, credits for greenhouse gas reduction or the generation of renewable or alternative energy on the Property, (iii) the proceeds of a business interruption insurance policy or payments from the manufacturer of any wind turbine on the Property under provisions of its warranty therefor, in each case if and to the extent made specifically in lieu of revenues... (iv) any proceeds from any lump sum payment or payments to cancel or modify any obligation under any energy electricity or capacity purchase contract related to the Project for wind turbines on the Property or payment of liquidated or other damages under any energy or

## 6 Worst Wind Lease Clauses (cont.)

### *#6 continued*

electricity or capacity purchase contract related to the Project for wind turbines on the Property.

Production Payments. Notwithstanding the foregoing clause (1) of this Section, if and when wind turbines are installed on the Property and begin generating electricity and in the event that (A) the U.S. Production Tax Credits under Section 45 of the Internal Revenue Code available on the Commercial Operation Date for wind turbines installed on the Property are less than the full amount of the U.S. Production Tax Credits in effect on December 31, 2015 (as adjusted for inflation under said Section 45), or (B) Grantee is an electric utility or does not sell electricity generated by wind turbines installed on the Property under a power purchase agreement or similar contract, or (C) Grantee sells electricity generated by wind turbines installed on the property under a power purchase agreement or similar contract to a purchaser that is affiliated with Grantee, then instead of payments of the Applicable Percentage described in clause (1) of this Section, “gross revenues” shall be deemed to be equal to \$27.00 per megawatt-hour of electricity generated by Windpower Facilities located on the Property and delivered to the point

## 6 Worst Wind Lease Clauses (cont.)

### *#6 continued*

of interconnection to the utility grid, net of costs of wheeling and/or transmission service, integration, imbalance, transmission losses, compliance with grid or regulatory requirements, congestion and/or similar charges (if any) paid by Grantee to an entity that is not affiliated with Grantee, and any sales taxes and similar amounts payable by Grantee to any governmental taxing authority (“Production Payment”). Production Payments shall be made quarterly within forty-five (45) days of the end of each calendar quarter following the Commercial Operation Date, and each payment shall be accompanied by a statement that shows how the payment was calculated.”



# Texas Senate Bill 277 (SB277)

- “[A]n owner or lessee ... located wholly or partly in a reinvestment zone **may not receive ... a tax abatement agreement [or a limitation on appraised value]** ... **if, on or after September 1, 2017, a wind-powered energy device is installed or constructed ... within 25 nautical miles of the boundaries of a military aviation facility** .... The prohibition provided by this section applies regardless of whether the wind-powered energy device is installed or constructed at a location that is in the reinvestment zone.” Passed and went in to effect September 1, 2017.

## Other 2017 Bills that were Aimed at Tax Advantages Available for Renewable Energy

- **Texas Senate Bill 600 (SB600)** – Attempted to repeal the Chapter 313 program (limitations on appraised property values).
- **Texas Senate Bill 1027 (SB1027)** – Attempted to repeal the right of school districts to waive the new jobs creation requirement for the purpose of eligibility for a limitation on the appraised value of property for school district maintenance and operations ad valorem tax purposes under Chapter 313.
- **Texas Senate Bill 1627 (SB1627)** – Attempted to change limitation amounts, limits local communities' ability to tailor agreements to their local needs.

# "How to Negotiate & Draft a Wind Energy Lease with a Look at New Developments in Wind Law"

Questions?

