



LEGAL ISSUES IN WIND ENERGY PRODUCTION CONTRACTS: ISSUES AND ALTERNATIVES FOR LANDLORDS

David B. Schweikhardt, Ph.D., J.D.

Stephen Harsh, Ph.D.

Lynn Hamilton, Ph.D.

**Department of Agricultural, Food, & Resource Economics
Michigan State University**

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LEGAL ISSUES IN WIND ENERGY: ISSUES AND ALTERNATIVES

- Some objectives for today
- Background on wind energy production from a legal perspective and the need for legal counsel
- The Top 10 List of Legal Issues to Consider when Signing a Wind Contract
- Some final observations
- Conclusion



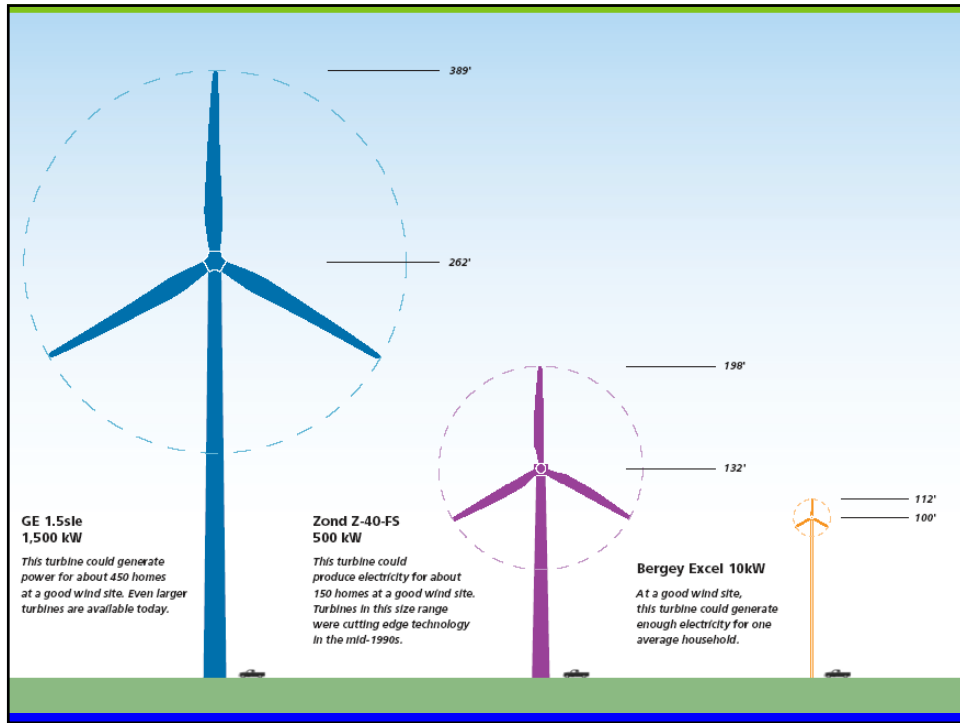
LEGAL ISSUES IN WIND ENERGY: THE NEED FOR LEGAL COUNSEL

- This is not your grandfather's windmill
- A wind contract, properly written and equitable to both parties, is a comprehensive legal document
- A wind contract is a long-term legal commitment



LEGAL ISSUES IN WIND ENERGY: THE NEED FOR LEGAL COUNSEL

- This is not your grandfather's windmill
 - 750 KW to 1.5MW
 - 1.5 MW turbine produces 5 million KW/yr (400/500 homes)
 - Tower heights from 170 to 320 feet
 - Blade diameter 75-100 feet with a weight of between 8,000 and 10,000 lbs.
 - Cost to install is \geq \$1 million per MW of installed capacity
 - 6-12 turbines on a section of land
 - Conclusion: Modern wind turbines are serious industrial equipment





LEGAL ISSUES IN WIND ENERGY: THE NEED FOR LEGAL COUNSEL

- This is *not* your grandfather's windmill
- A wind contract, properly written and equitable to *both* parties, is a comprehensive legal document
 - Shorter does not always mean better
 - Lawyers do not always "create complications." Complications exist, with or without attorneys
- A wind contract is a long-term legal commitment
 - A lease/easement contract transfers property/use rights between the parties
 - 25 to 30 years at minimum, maybe much longer depending on the terms of the contract





DO I REALLY NEED AN ATTORNEY TO SIGN A WIND ENERGY CONTRACT?

- You do not need to consult an attorney about a wind energy contract if you can answer "yes" to any of the following:
 1. *"My grandchildren are real brats and I look forward to haunting them from beyond the grave."*
 2. *"My business philosophy has always been 'Ignorance is bliss.'"*
 3. *"I love the smell of fresh court subpoenas in the morning."*



LEGAL ISSUES IN WIND ENERGY: ISSUES AND ALTERNATIVES

- Some background on wind energy production from a legal perspective
- The need for legal counsel
- The Top 10 List of Legal Issues to Consider in Signing a Wind Contract



LEGAL ISSUES IN WIND ENERGY: ISSUE 10 – THE BASICS

- Issue: Who, what, when, where and how is the contract being offered?
- Who: Is the firm/agent offering the contract:
 - An in-state or out-of-state firm?
 - An experienced wind energy development firm?
 - An agent seeking to assemble contracts for a block of land with the intent to sell the contracts to a wind energy firm?
 - A community/cooperative wind project?
- What: Is the contract offered for evaluation of the property, as an option to develop, for production of wind energy or all of the above?



LEGAL ISSUES IN WIND ENERGY: ISSUE 10 – THE BASICS

- Issue: Who, what, when, where and how is the contract being offered?
- Where: What is the exact description of the property that is subject to the contract?
- When: How long is the offer of the contract good for?
- How: Is the contract being offered subject to a confidentiality clause?



LEGAL ISSUES IN WIND ENERGY: ISSUE 9 – LENGTH OF THE CONTRACT

- Issue: What is the length of time the developer will have use of the land and for what purposes?
- Evaluation phase: Developer has access to property for evaluation of project viability.
 - Landowner usually prefers shorter period, developer prefers longer
 - Some states (SD) limit length of evaluation phase to 5-7 years
 - Does the contract include an extension clause? On what terms?
- Production phase: Developer has access to property for operation of turbine(s) for production of electricity
 - Usually 20-30 years (12-15 required for developer's investment)
 - Does the contract include an extension clause? On what terms?
 - Be aware of automatic extensions for evaluation/construction phases



LEGAL ISSUES IN WIND ENERGY: ISSUE 9 – LENGTH OF THE CONTRACT

- Issue: What is the length of time the developer will have use of the land and for what purposes?
- Landowner's total time commitment:
 - Evaluation phase: _____
 - + Evaluation extension: _____
 - + Production phase: _____
 - + Production extension: _____
 - = Total time commitment _____



LEGAL ISSUES IN WIND ENERGY: ISSUE 8 – COMPENSATION CLAUSE

- Issue: Does the landowner receive equitable compensation for the property/use rights transferred?
- Payments/method of payments vary by contract phase
- Evaluation phase: Usually a fixed, modest (\$5-10/acre) payment. Should not be the major focus of your decision.
- Production phase: Payments can be lump-sum, per turbine, percentage of electricity sales, or mixed.



LEGAL ISSUES IN WIND ENERGY: ISSUE 8 – COMPENSATION CLAUSE

- Issue: Does the landowner receive equitable compensation for the property/use rights transferred?
- Lump-sum: One payment at beginning. Be aware of–
 - Tax consequences, impact of inflation
 - Comparison to annual payments
- Fixed annual payment per turbine: Be aware of–
 - Turbine size to be installed
 - Developer bears all risk of electricity production



LEGAL ISSUES IN WIND ENERGY: ISSUE 8 – COMPENSATION CLAUSE

- Issue: Does the landowner receive equitable compensation for the property/use rights transferred?
- Percentage of electricity sales: Be aware of–
 - Electricity price received by developer
 - Quantity of electricity produced per turbine
 - Landowner's share of electricity sold
 - Means of sharing data to confirm electricity production
 - Landowner shares in risk of electricity produced
- Mixed: Usually a fixed annual payment plus a percentage of electricity sales.



COMPENSATION PACKAGES: EXAMPLES

Project	State	Year	Size	Turbine	Per turbine*	Per MW*
Lake Benton I	MN	1998	107 MW	750 kW	\$1,500	\$2,000
Storm Lake	IA	1999	193 MW	750 kW	\$2,000 (\$750 + 2 % rev)	\$2,667
Vancycle Ridge	OR	1999	25 MW	660 kW	\$1,500- \$2,000	\$1,200- \$2,400
Top of Iowa	IA	2002	80 MW	900 kW	\$2,400	\$2,667
Wood-ward	OK	2003	102 MW	1,500 kW	\$4,000	\$2,667
High Winds	CA	2003	162 MW	1,800 kW	\$9,500	\$5,185
Trimont	MN	2005	100 MW	1,500 kW	\$3,500- \$4,500	\$2,500- \$3,000
Crescent Ridge	IL	2005	55 MW	1,650 kW	\$5,000 (minimum)	\$3,030

*Several figures are based on estimates and averages. Payments to individual landowners may vary.



LEGAL ISSUES IN WIND ENERGY: ISSUE 8 – COMPENSATION CLAUSE

- Issue: Does the landowner receive equitable compensation for the property/use rights transferred?
- Other compensation issues
 - Does the contract include an inflation adjustment clause?
 - Does the contract include a “pooling” clause?
 - Does the contract include the sale of Renewable Electricity Credits (RECs)?
 - Does the contract include payment for other land used in the construction phase?
 - Does the contract include payment for other land used in the production phase?
 - Does the contract include a Force Majeure clause?



LEGAL ISSUES IN WIND ENERGY: ISSUE 7 – ASSIGNMENT CLAUSE

- Issue: Does the developer have the right to assign the contract to a third party?
- Assignment clause: Permits the developer to sell/transfer the contract rights to a third party. Thus, the landowner might eventually be involved with an unanticipated party.
 - What if the third party defaults or refuses to comply with the contract?
- Legal alternatives:
 - Clause holding original party liable if third party defaults
 - Higher compensation for risk of third party default



LEGAL ISSUES IN WIND ENERGY: ISSUE 6 – PROPERTY TAXES

- Issue: Will the landowner or the developer pay the property taxes associated with the turbines and associated improvements in the property?
- Property taxes: Turbines and associated structures might be considered improvements that would affect the taxable value of the property (Remember: Investment might be \geq than \$1 million per turbine).
- Legal alternatives:
 - Provision for developer's liability for property taxes
 - Higher landowner compensation if liable for property taxes



LEGAL ISSUES IN WIND ENERGY: ISSUE 5 – LIABILITY

- Issue: Is the landowner or the developer liable for damages/injuries associated with the wind turbine(s)?
- Liability scenarios:
 - Is the landowner liable to the developer for damages the landowner commits to the turbine(s)?
 - Is the landowner liable to the developer for damages a third party commits to the turbine(s)?
 - Is the developer liable to the landowner for damages the developer commits to the landowner's property?
 - Is the landowner or the developer liable to a third party who suffers damages as a result of the wind energy project?
 - Who pays then cost of litigation with a third party?



LEGAL ISSUES IN WIND ENERGY: ISSUE 5 – LIABILITY

- Issue: Is the landowner or the developer liable for damages/injuries associated with the wind turbine(s)?
- Legal alternatives:
 - Provision requiring insurance coverage by developer
 - Provisions specifying liability scenarios
 - Provision addressing “attractive nuisance” issues
 - Always have contract reviewed by landowner's insurance agent before signing



LEGAL ISSUES IN WIND ENERGY: ISSUE 4 – LAND USE RESTRICTIONS

- Issue: Does the contract contain restrictions on the landowner's use of other land? What are the legal consequences of the contract for other land uses?
- Land use scenarios:
 - Does the contract restrict the landowner's use of the land for other purposes (e.g., hunting)?
 - Who is liable for violations of land use regulations caused by the project (e.g., zoning violations)?
 - Does the project affect land enrolled in CRP?
 - Does the project affect land enrolled in USDA commodity programs?



LEGAL ISSUES IN WIND ENERGY: ISSUE 4 – LAND USE RESTRICTIONS

- Issue: Does the contract contain restrictions on the landowner's use of other land? What are the legal consequences of the contract for other land uses?
- Legal alternatives:
 - Some land use restrictions are necessary for the efficient operation of the turbine(s).
 - Any other restrictions on the landowner's use of land should be narrowly written.
 - Provisions requiring developer liability for violations of land use regulations
 - Always consult FSA/NRCS regarding consequences of contract for land enrolled in CRP and other USDA programs before signing contract



LEASE

LEGAL ISSUES IN WIND ENERGY: ISSUE 3 – CHOICE OF LAW/VENUE

- Issue: Does the contract contain a choice of law/venue clause?
- Choice of law clause: Requires that lawsuit between landowner and developer be heard under the law of the developer's state
 - Case *might* be heard by a Michigan court, but court *must* apply the law of the developer's state
- Choice of venue clause: Requires that lawsuit be heard by a court in the developer's state
 - Case *must* be heard by a court in the developer's state
- Legal alternatives:
 - Michigan venue clause or additional compensation



LEASE

LEGAL ISSUES IN WIND ENERGY: ISSUE 2 – TERMINATION CLAUSE

- Issue: Does the contract contain provisions regarding the termination of the contract by either party?
- Termination issues:
 - Does the contract specify events that permit the developer to terminate the contract? If so, is the developer liable for any remaining payments under the contract?
 - Does the contract specify the landowner's rights of termination? How does the landowner exercise these rights?
 - Who is liable for the cost of removing the turbine(s) and facilities at the conclusion/termination of the contract?
 - Does the contract specify that the land must be restored to original condition at conclusion/termination of the contract?
 - Who is liable for a defaulted or incomplete project?



LEGAL ISSUES IN WIND ENERGY: ISSUE 2 – TERMINATION CLAUSE

- Issue: Does the contract contain provisions regarding the termination of the contract by either party?
- Legal alternatives:
 - Provisions specifying the events/conditions permitting termination by each party
 - Provision defining time limits for removal of turbine(s) and other structures at the termination/conclusion
 - Provisions requiring the developer to hold the cost of removal/cleanup in escrow until the contract is concluded
 - Always contact local zoning officials regarding local requirements for removal of turbine(s) at conclusion



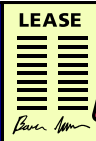
LEGAL ISSUES IN WIND ENERGY: ISSUE 1 – OTHER ISSUES

- Issue: What other issues might affect the landowner under the contract?
- Other issues: Far too numerous to mention, but some major issues–
 - Does the contract include the sale of other property rights (e.g., mineral rights)?
 - Does the contract create a “perpetual lease” or “permanent easement”? Could create a permanent transfer of rights – look at the terms of the entire contract, not the words “lease” or “easement” alone.
 - Does the contract include provisions dealing with the enforcement of trespassing laws and damages committed by trespassers?
 - Many, many others – once again, legal counsel is needed

"Yep, they make some noise, but it's the soothing sound of money being made."

— Louis Woodward, Texas Landowner

I would bet that Mr. Woodward has invested in negotiating a properly written, comprehensive contract that is equitable to both parties.



LEGAL ISSUES IN WIND ENERGY: CONCLUSION

- Electricity production from wind is probably a viable industry in some regions of Michigan
- Electricity production from wind can have benefits
 - Both monetary and non-monetary
- Electricity production from wind can have costs
 - Both monetary and non-monetary
- A landowner's benefit/cost ratio will depend, in part, on the contract negotiated



LEGAL ISSUES IN WIND ENERGY: CONCLUSION

- Landowner's contract will depend on
 - Geographic conditions beyond the landowner's control
 - Knowledge level beyond the landowner's control
 - Knowledge level within the landowner's control
 - Landowner's willingness to recognize *that complications exist, they are not created by attorneys*
 - Landowner's willingness to *invest* in the negotiation process
 - Landowner's willingness to form a *negotiation team* – legal, tax, insurance, FSA, NRCS, family, neighbors
 - Landowner's willingness to pursue *creative* negotiation strategies

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"You don't get what you deserve, you get what you negotiate."
Dr. Chester L. Karrass





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"...you fail to see the limits of the other fellow's power..."

**You don't get what you deserve, you
get what you negotiate**

