

## WIND EASEMENT AND WIND ENERGY LEASE PROVISIONS - BACKGROUND MEMORANDUM

Section 2 of House Bill No. 1509 (attached as [Appendix A](#)) directs the Legislative Management to study wind easements and wind energy leases. The study must include:

1. Consideration of confidentiality clauses.
2. The liability of each party for damages and taxes.
3. Instrument provisions relating to insurance and the need for insurance.
4. The concerns of property owners and wind developers.

A confidentiality clause is a section of a contract that requires secrecy as to other provisions of the contract. Liability for damages is determined by fault without other agreement. Usually, a person is liable or responsible for that person's negligent acts that cause damages. A person may manage that risk by entering a contract for another person to pay for the person's negligent acts or third-party acts in return for some consideration. This is done on a regular basis through insurance. In addition, a person may manage the risk in a contract with another party in the same way the person manages other expenses, for example, taxes.

To understand the provisions of law in this memorandum relating to damages and insurances, a definition of terms may be helpful.

- Indemnity is the duty to make good on any loss, damage, or liability incurred by another, and an indemnity provision is a contractual obligation to make the other party whole in certain situations described by the contract. The purpose of insurance is to contractually obligate an insurance company to indemnify the customer from loss.
- Subrogation is the substitution of one party for another whose debt the party pays. This gives the paying party the rights and remedies that would otherwise belong to the debtor. An insurance company that pays its customer for damage caused by another generally has the right of subrogation against that other person to collect the amount paid to the customer.

Without a waiver of subrogation, a negligent landowner may have to reimburse an insurance company that paid damages to the wind facility. Another solution to manage risk for a landowner is for the landowner to be named an additional insured on the contract for insurance between the wind facility and the insurance company. In this case, the insurance company would have the duty to indemnify the landowner as well as the wind facility.

Section 1 of House Bill No. 1509, codified as North Dakota Century Code Section 17-04-06, provides for

provisions in wind easements and wind energy leases. These provisions include:

1. A general warning as to the importance of the easement or lease.
2. Prohibiting execution for at least 10 days.
3. Prohibiting confidentiality unless in the final document.
4. Preserving the right of the property owner to continue conducting business operations as currently conducted and for the property owner to accommodate the wind energy facility.
5. Prohibiting making the property owner liable for property taxes associated with the wind energy facility.
6. Prohibiting making the property owner liable for damages caused by the wind energy facility.
7. Prohibiting making the property owner liable for violations of law by the developer, owner, or operator of a wind energy facility.
8. Allowing 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.
9. Requiring a clear statement on when payments may be withheld from the property owner.
10. Requiring that the owner of the wind energy facility to carry general liability insurance and allowing the wind energy facility to add the property owner as an additional insured.

In addition, Section 17-04-06 allows a court to reform the easement or lease in accordance with the previous requirements, void the easement or lease, or order any relief allowed by law if the terms of the easement or lease are not in accordance with the previous requirements.

### LEGISLATIVE HISTORY

As introduced, House Bill No. 1509 would have required the Public Service Commission to adopt rules establishing a code of conduct for wind lessees. The bill allowed a lessee to either follow or not follow the code of conduct. However, the lessee was required to notify in writing any person with whom the lessee discussed the lease of whether the lessee follows the code of conduct. If the lessee stated the lessee follows the code of conduct and did not follow the code of conduct, that would be a misrepresentation of material fact in a subsequent lease.

### House Version

The House amended the bill and created requirements for wind easements and wind energy leases, much like the final version. As compared to the final version, the House version provisions that were different include:

1. Requiring the easement or lease to be written in a clear or coherent manner using words of common and everyday meanings, to be appropriately divided and captioned, and to be in at least 14-point type.
2. Prohibiting execution for at least five days.
3. Prohibiting all confidentiality clauses.
4. Requiring a clear description of the development activities that will take place within five years to avoid termination.
5. Requiring mutual indemnity obligations.
6. Requiring the owner of the wind energy facility to include the property owner as an additional insured and waive subrogation action against the property owner, in addition to the requirement of general liability insurance.
7. Allowing the lessee to be exempt from the provisions in the bill if the lessee provided up to \$5,000 reimbursement for actual attorney's fees for the property owner.
8. Requiring that the court provide reasonable attorney's fees to the property owner in a successful action to enforce violations of the provisions in the bill.

The House version did not include the exception to termination for not operating for a period of at least three years of paying normal minimum lease payments.

### Senate Version

The Senate version of House Bill No. 1509 modified these provisions of the House version:

1. In addition, to requiring the lessee to allow the property owner to continue current business operations, requiring the property owner to make accommodations to the lessee to allow the construction and operation of the wind energy facility.
2. With respect to the termination of the agreement if the facility has not operated for a period of at least three years, adding an exception of paying normal minimum lease payments during that time.

The Senate version did not include:

1. The requirement that the easement or lease be written in a clear or coherent manner using words of common and everyday meanings, be appropriately divided and captioned, and be in at least 14-point type.
2. The requirement of a waiver of subrogation actions against the property owner.

The Senate version, like the House version, prohibited all confidentiality clauses, required a clear description of development activities that must take place within five years to avoid termination, required

mutual indemnity obligations, required the property owner to be listed as an additional insured, and required reasonable attorney's fees to the property owner in a successful action.

The final adopted version resulted from a conference committee. The changes from the Senate version to the final version included:

1. Adding this study.
2. Changing the previous confidentiality clause prohibition to prohibit confidentiality in 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.
3. Adding definitions for "normal minimum lease payments" for the purposes of the exception to termination for not operating for three years by making normal minimum lease payments.
4. Removing the mutual indemnity obligations.
5. Making the requirement of having the property owner as an additional insured discretionary.

According to the testimony, wind easements and leases are long documents, for example, 44 pages. Consequently, review of these documents requires significant expertise in the area of wind to know what the market is as it relates to the particular terms.

According to the testimony, the main focus was on the confidentiality clause. The concern was that property owners need time to decide and need information to negotiate terms of an easement or lease. Developers, however, generally do not want to release trade secrets contained in easements or leases.

A clause not addressed in the bill but addressed in the testimony is the Act of God clause. Generally, this clause states that if an overwhelming and unpreventable event caused exclusively by forces of nature prevents a party from performing under a contract, the failure to perform is excused. In a contract used in North Dakota, the Act of God clause includes changes in law or regulation. Consequently, the wind facility would be excused from performing a duty owed the landowner if changes in the law prevented the wind facility from performing its duty.

## LEGISLATION AND STATUTORY PROVISIONS

The law relating to wind easements had remained the same since before statehood until 2005. Senate Bill No. 2239 (2005) defined wind option agreement and wind easement. The bill voided a wind option agreement, wind easement, or wind energy lease if development produced energy from wind power had not occurred within five years. House Bill No. 1462 (2007) moved all law particular to wind energy rights into the energy title--Title 17. In particular, Chapter 17-04 contains all law particular to wind energy rights through easements and leases. In addition, House Bill No. 1231 (2007) clarified that nothing prohibits or limits the right of a seller of real

estate to retain any payments associated with an existing wind energy product even though an interest in the production of wind energy may not be severed from the surface estate. Last legislative session, Senate Bill No. 2245 (2009) changed the time at which a wind option agreement, wind easement, or wind energy lease terminates due to inactivity from not any development within five years to if within five years a certificate of site compatibility or conditional use permit has not been issued, if required, and if within five years a transmission interconnection request is in process and not under suspension.

### **SUGGESTED STUDY APPROACH**

This study came from a bill that addressed the concerns contained in the study. The committee may wish to monitor the effectiveness of the law before making any changes. This law became effective August 1, 2009. In addition, research does not reveal any similar law in any other state. The law is relatively novel as well.

In monitoring the law, the committee may wish to receive testimony from landowners aggrieved by the contracting process with wind developers. The committee may wish to review *Landowner Guidelines for Evaluating Wind Energy Production Contracts*. This document was prepared by the Department of Agricultural, Food and Resource Economics, Michigan State University, and is attached as [Appendix B](#). The document was last revised in July 2008. The document displays the complexity of an agreement and how a successful agreement is dependent on the type of landowner and present and future uses of the land. In addition, by reviewing the document, areas that rise to the height of legislative concern may or may not be revealed and whether the concern is of general applicability or limited to a type of landowner or present or future use of the property.

ATTACH:2