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for the Transactional Real Estate Lawyer****Gregory S. Friend**

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Renewable Energy Leases for the Transactional Real Estate Lawyer

“Texas, the historical domestic leader in the development of fossil fuel resources, especially oil and natural gas, now has an opportunity to build upon its new found leadership in another energy source – wind. The steps I propose we take today will further position Texas as the epicenter of land-based wind energy development in North America, if not the world.”

--Former Public Utility Commission of Texas Chairman Barry T. Smitherman, July 17, 2008.¹

This quote from the former Chairman summed up the Public Utility Commission’s feeling regarding the order it was about to issue that would delineate Competitive Renewable Energy Zones in the state and mandate the installation of new transmission lines with over 18,000 megawatts of capacity. The significance of this order cannot be overstated, as it may very well have reignited interest in wind energy in the state, as well as throughout the country. Since the issuance of this order other states and regions of the United States have followed Texas’ lead in attempting to resolve the problem of sufficient transmission infrastructure.

Leading up to the time of the CREZ order, and to a smaller extent since then as wind power developers await the arrival of additional transmission capacity, wind power development in Texas has churned along. In fact, nearly 3,000 MW of wind energy capacity was installed between the end of 2008 and the end of 2010.² It is anticipated that wind power will have a second “boom,” which will reveal itself in the legal world in the form of leasing negotiations and conveyances to support development. The solar picture is not so rosy, despite the significant solar power resources the state has to offer. The Texas Legislature has twice refused to enact any legislation that would encourage solar development.³ Despite this fact, however, solar developers are beginning to prospect for and develop sites for solar power generation, which will also reveal itself in the form of landowners seeking representation in their endeavors to permit such development on their properties. In sum, there is work to be done.

This paper will examine some of the basic issues related to the representation of landowners in the context of a wind lease in Texas. Throughout the document, the author will present some of the key issues, discuss each topic’s effect on the entirety of the lease, and provide an example of at least one form of language that can be implemented in attempting to achieve a workable lease. Several caveats are necessary at the outset. First, this paper does not address each and every provision of a wind lease. That task is more appropriate for a treatise, and perhaps more importantly, while the concepts contained in a lease are generally common

¹ Chairman Smitherman Memo, P.U.C. Docket No. 33672, dated July 17, 2008, p. 1. http://interchange.puc.state.tx.us/WebApp/Interchange/Documents/33672_1402_589965.PDF.

² U.S. Department of Energy/National Renewable Energy Laboratory, http://www.windpoweringamerica.gov/wind_installed_capacity.asp#current, last visited September 1, 2011.

³ *Legislature Turns Down Lights on Solar Incentives, as Austin Energy Project Moves Forward*, Austin American-Statesman, June 25, 2011, <http://www.statesman.com/business/legislature-turns-down-lights-on-solar-incentives-as-1562326.html>.

throughout the industry, developers have created and circulated different forms. An analysis of each of the different forms would prove untenable. The details of each leasing document should be reviewed and assessed on their own merit. Secondly, the paper is written from the perspective of a landowner. It should be obvious that which provisions are “key” and the recommended language that should be utilized in the lease differ for the developer of the project. However, in the interests of not over-complicating this piece, those issues are not addressed here. Third, the paper contains appendices that provide *suggested* language to utilize in various portions of a leasing instrument. As stated, each lease and each situation is different, so the language should serve as a starting point to address the specific issues that face the specific client. They are *not* one-size-fits-all solutions.

Finally, the paper also attempts to identify instances where a leasing situation for a solar project may differ from a wind lease. These instances will be indicated by a “solar flare” heading and additional discussion. For the most part, solar leases look strikingly similar to wind leases, so in many cases the discussions and examples provided in this paper as they relate to a wind project are applicable to a solar lease. This fact is being pointed out now, rather than reiterating it throughout the paper.

I. THE GRANTING CLAUSE

Like any contract, assignment, or other type of conveyance document, the scope and extent of the rights granted in the typical wind lease are first in line and significant. In this portion of a lease, the developer is attempting to spell out the rights granted and the scope of its authority to utilize the surface of the property. A developer will effort to ensure that the maximum amount of rights are provided in order that its use is not interrupted or disturbed by the sticks in the bundle retained by the landowner. Alternatively, the landowner must recognize that he is able to establish reasonably specified rights that are to be granted to the developer, but not at the cost of losing the ability to utilize the remaining land or accidentally relinquishing rights that are not necessary to provide in order to successfully operate a wind project on the subject property.

Specifically, unless the landowner is in the rare position of being requested to draft the initial wind leasing document, the granting clause section of the draft lease will contain relatively generalized provisions giving the developer any rights that may be related to the construction and operation of a wind project on the property. For instance, the granting clause may state that the grantor is providing to the grantee the right to “test, construct, and operate a project and all facilities related to the generation of electricity by way of wind-powered turbines.” Pursuant to this language, the developer has prepared a conveyance of essentially any and all rights that could be contemplated in putting together and running a project, without regard to the various sticks in the bundle possessed by the landowner. The landowner could counter with the language found in Appendix 1, “Granting Clause.” Utilizing this language (or a similar form) provides the developer with wide latitude to test for and develop the property to achieve its goal of successful installation and operation of a wind project, but reserves to the landowner the right to use the surface for any other purpose so long as those activities to not unreasonably interfere with the project.

It should also be noted that although the developer routinely requests that the rights granted to it be “exclusive,” the lessor should be careful not to provide an exclusive right to something that need not restrict all other possible applications of that right. This is more aptly addressed in Section III of this paper in the context of the rights granted to the lessee during the development term of a lease. The landowner must be cognizant of this issue throughout the lease, including in the granting clause.

While not commonly found in this specific portion of the lease, it is imperative that a landowner that possesses mineral rights to the property expressly and specifically reserve those rights within the language of the lease. In nearly all cases there exists no nefarious ulterior motive on the part of the developer to “swindle” the mineral rights from the landowner via presentation of a wind lease. However, unless such a reservation is specifically within the four corners of the document, it is at the very least an invitation to a declaratory judgment action to determine whether the mineral estate was also conveyed along with the surface. An improperly drafted lease that fails to address this issue can be considered to do just that. Under Texas law, a conveyance is construed to confer upon the grantee the greatest estate that the terms of the instrument will permit.⁴ The conveyance will pass whatever interest the grantor has in the land, unless it contains language showing an intention to grant a lesser estate.⁵ Thus, a specific provision in the lease is clearly advisable. The language proposed in Appendix 1, “Reservation Clause” is one form that can be implemented to achieve this goal.

Solar Flare!

As will be discussed further in the Existing Uses section below, a solar lease utilizes nearly all of the property that is subject to a solar array installation, and may create the desire for a different type of grant than that provided for in a wind lease. Generally, a true lease is the typical option for a wind project: an agreement for a term of years for the use of the subject property. This is a reasonable option because the use of the land is not total and leaves the landowner with the ability to continue using the property for other purposes. However, because the use of the surface is nearly complete for a solar project, another consideration (by either the lessee or lessor) may be a land sale.

Obviously, this alters the negotiating position of both parties and requires additional research. On one hand, the upfront difficulty of a land sale may be viewed as quickly outweighed by the long-term surety of (1) no longer owning the property on the part of the landowner, and (2) no real time table to meet to get the project operational for the developer. On the other hand, the landowner may lose a long-term regular income stream if a sale is all that is performed. Of course, the landowner can attempt to draft and execute a “solar severance” or some other sort of retaining of the rights to receive royalties generated from any solar project installed on the property. However, this is a risky proposition, since Texas has yet to recognize a wind or solar severance, meaning the landowners’ work may be for naught. Additionally, a developer may not be willing to accept such a severance, and likely would become concerned not only with the legality and effect of such a proposition, but also that it will not be able to get the requisite title insurance and/or financing because of this attempted reservation by the landowner.

⁴ *Lott v. Lott*, 370 S.W.2d 463, 465 (Tex. 1963).

⁵ *Sharp v. Fowler*, 151 Tex. 490, 252 S.W.2d 153, 154 (1952).

Moreover, a straight land sale may also be unpalatable for the parties due to the tax implications of such a sale. Federal taxes are due from the sale of a piece of land, and no exception for renewable energy developments exist. While it is true that tax implications on the sale are not also taxed on a state basis in Texas, this may not be enough to satisfy the parties to move forward on a land sale. After all, the property remains subject to ad valorem taxes. In a typical lease arrangement, the developer is generally responsible for the difference between the taxes on the increased value of the land due to the improvements installed on the property as a result of the solar project, if any. A land sale leaves the entirety of the ad valorem tax liability in the hands of the developer, which may affect the bottom line and may create uncertainties with financing. Nonetheless, the potential pitfalls may all be trumped by the ease of administration that results from owning the subject property rather than leasing it.

II. EXISTING AND FUTURE USES

Due to the nature of land holdings in rural areas of Texas, where much of the wind development in the state is concentrated, many of the properties that are the subject of proposals for wind projects are already used for one activity or another, including ranching, farming, hunting, and oil and gas activities (or a combination of some or all). While true that wind projects cover a wide area, the project's equipment is generally not densely installed, and thus additional use of the property is feasible. The landowner must recognize this continued right to her surface use, and ensure that the lease addresses these rights. Additionally, despite the implications to the contrary in the granting clause, the exclusivity of the developer's rights should be limited to the exclusive right to develop and operate a wind project on the subject property, *not* the exclusive use of the surface. If the granting clause fails to properly address this distinction, problems may lie ahead for the lessor.

This portion of the paper is broken down into two categories: oil and gas uses, and all the others. "All the others" are capable of being reviewed and drafted in a relatively similar manner, whereas oil, gas, and mineral development uses are additionally complicated. For ease of reference, "all the others" are addressed first.

A. Farming/ranching/grazing.

Many landowners involved in wind leasing agreements currently engage in one of these types of surface usages, or at the very least lease out the land for such uses. The primary goal for the grantor here must be to retain the right to continue the use. A developer generally has no objection to such a reservation, so long as it does not interfere with the rights granted to it. These activities should be plainly and carefully specified in the granting clause, so that it remains clear that the rights of the developer are solely related to the activities that are reasonably necessary to successfully construct, operate, and manage the wind project. Consequently, a phrase or sentence in this portion of the lease proclaiming that the landowner continues to have the right to utilize the surface insofar as the activities do not unreasonably interfere with the developer's rights granted under the lease is imperative. For a more specific example, see Appendix 2, "Existing Uses: Farming/Ranching/Grazing."

In the event that the grantor currently leases to a third-party the rights to farm/ranch/graze upon the subject property, an additional provision should be considered and inserted that addresses this fact and lays out the procedure for interactions between the two lessees. It should

be noted that in many cases there is no written document between the lessor and the third-party lessee describing the relationship between the parties or the rights that the third-party lessee possesses. While this may seem unnerving to attorneys and developers alike, this practice has been ongoing in the state for many years, and in the author's experience, is the rule rather than the exception. This situation (negotiation of the wind lease) provides a perfect opportunity to impliedly delineate (at least in part) those third-party lessee rights by addressing this matter in the wind lease. In particular, it is advisable that, at the very least, the wind lease call for the developer and the third-party lessee enter into an agreement (and provide a form as an exhibit) that explains that the third-party's rights to farm/ranch/graze on the land continue in force, but that they, again, may not unreasonably interfere with the developer's right to install and operate a wind project. Following this logic can serve the landowner well by avoiding conflict between the developer and the lessor (at least as it relates to the third-party's usage of the surface).

An additional issue should be considered in this portion of the lease. Many farmers have entered into a contract with the U.S. Department of Agriculture within the parameters of the CRP program. In sum, the CRP program is a commitment on the part of the landowner to *not* farm or otherwise utilize certain sections of his property in exchange for a payment from the agency. There is some concern among landowners that allowing a wind project to be installed upon the property will void or cancel the contract under the CRP Program. Therefore, the landowner ought to request the insertion of a provision that acknowledges that "x" acres of the subject property are CRP lands, and that the developer will undertake the necessary actions to avoid voiding the landowner's participation in the CRP Program, including having the developer co-sign the contract and become responsible for following the requirements of the program. This usually satisfies the agency and the developer.

B. Oil and gas.

While wind and solar developers hope this reality ultimately changes, in Texas oil and gas is king. A large portion of the lands that renewable energy outfits are eager to develop are subject to an existing oil and gas lease, or of more concern to the developer, an unleased severed mineral estate. In the wind context (more on solar later), the bark is much worse than the bite. A few drafting considerations must be made, but in the end the wind and oil and gas crews do not often find themselves at loggerheads regarding lands both have an interest in utilizing.

As a general proposition, in an instance where the mineral estate is severed from the surface estate of a tract of land, the mineral estate is dominant to the interests of the surface, and the dominant estate is entitled to utilize as much of the surface as is reasonably necessary to exploit the minerals.⁶ Thus, use of the surface where an existing oil and gas or other mineral lease is in effect is clearly subject to those existing facilities. In an instance where a mineral lease is in effect, but no use of the surface is currently ongoing, it is imperative that the renewable project lessee and lessor are aware of the existence of the mineral lease and understand that any surface lease entered into is subject to the rights of the mineral estate to use the surface as is reasonably necessary.

⁶ *Getty Oil Co. v. Jones*, 470 S.W.2d 618, 621 (Tex. 1971); *Humble Oil & Refining Co. v. Williams*, 420 S.W.2d 133, 134 (Tex. 1967).

The situation is further complicated by an instance where the development project has already utilized a portion of the surface for project facilities, and the mineral lessee desires to begin exploitation of the minerals below. The accommodation doctrine then comes into effect. In its simplest terms, the accommodation doctrine declares that while the mineral lessee retains the dominant estate and is entitled to utilize the surface as is reasonably necessary, the mineral lessee in some instances must accommodate existing surface uses where reasonable alternatives are available. The Texas Supreme Court stated:

The due regard concept defines more fully what is to be considered in the determination of whether a surface use by the lessee is reasonably necessary. There may be only one manner of use of the surface whereby the minerals can be produced. The lessee has the right to pursue this use, regardless of surface damage. [Kenny v. Texas Gulf Sulphur Co., 351 S.W.2d 612 \(Tex.Civ.App.-Waco 1961, writ ref'd\)](#). And there may be necessitous temporary use governed by the same principle. But under the circumstances indicated here; i.e., where there is an existing use by the surface owner which would otherwise be precluded or impaired, and where under the established practices in the industry there are alternatives available to the lessee whereby the minerals can be recovered, the rules of reasonable usage of the surface may require the adoption of an alternative by the lessee.⁷

In this context, a surface owner must demonstrate that the mineral owner has available other reasonable means of production that will not interfere with the surface owner's existing use, and that any alternative uses of the surface, other than the existing use, are impracticable and unreasonable under all circumstances.⁸ Part of this analysis can involve the technical and economic feasibility of the alternate use. As a practical matter, directional drilling is usually the main alternative suggested to accommodate an existing surface use. A directional drill can add a significant amount of cost to the bottom line of a drilling plan, so economics are an important factor. Directional drilling is a relatively common (and therefore reasonable) manner in which to drill that is utilized by mineral developers even in instances where attempting to avoid surface uses is unnecessary (i.e., surface location problems, cost considerations, etc.).

As a result, renewable energy developers have two potential conflicts with the mineral estate. First, if the surface that is the site of the wind farm development is subject to an existing oil and gas lease, the wind company must be cognizant of the fact that additional development on the property by the exploration company may include disturbance to the normal operations of the wind project. However, this problem is unlikely to arise due to the technological advances of the oil and gas industry and the dispersed nature of the wind project infrastructure. In practice, representatives from the two energy developers meet to discuss the respective locations of the equipment installed or proposed on the property and devise a common plan for development that either negates or minimizes interference between operations.

Second, if the lessor owns an interest in both the surface estate and the mineral estate, but the mineral estate is unleased at the time the surface is proposed to be leased for wind

⁷ *Getty Oil Co.* at 622.

⁸ *Id.*, *Haupt, Inc. v. Tarrant County Water Control and Imp. Dist. No. One*, 870 S.W.2d 350, 353 (Tex. App. – Waco 1994 (no writ)).

development, wind developers often plug into their form leases provisions addressing any future leasing of a mineral estate. The language occasionally requires a landowner to include language in any future oil and gas lease that subordinates the rights of the exploration company to those of the wind developer for utilization of the subject property, or requires approval by the developer prior to any execution of a mineral lease by the landowner. Clearly, neither is advantageous, or actually even viable, to the landowner, and such clauses must either be stricken or rewritten. The developer and landowner may not “contract around” the dominance of the mineral estate without putting the landowner in a precarious position in which he will almost certain breach some contract, whether with the exploration outfit or the wind energy company. Therefore, assuming that the wind lessee absolutely requires some sort of provision in the lease addressing the topic, more reasonable language must be drafted. The best course of action for the landowner to take is to include language stating that she will utilize “best efforts” or “good faith” to work with the developer on a going-forward basis to restrict, or perhaps lessen, the impact of any future mineral exploration on the wind project’s footprint. See Appendix 2, “Oil and Gas - Wind,” for suggested language to plug in to address this situation.

Solar Flare!

As seen, a wind project can potentially be impacted by mineral development, but the interaction between the mineral estate and the surface estate specific to a solar project is of greater concern and complexity. For a wind lease, most existing uses can continue due to the fact that the project installations are spread out over a significant amount of acreage (anywhere from 20,000 to 150,000 acres, for instance). A solar lease is a much more compact and dense project development. As a general matter, a solar lease utilizes approximately one acre per megawatt generated. Since a typical utility-scale solar project can range from 25 to 150 MW installed capacity, total land usage could utilize no more than 150 acres. (This is applicable to those parcels that have the solar array installed upon them. For those parcels that house only easements for roadways or collection/transmission facilities, treatment is much like that for a wind project, with temporary and permanent reimbursements available for disruption in existing uses). Moreover, because of the density with which a solar project is constructed, with the majority of each acre utilized save a few strips of unused land to serve as access points to the panel array, existing uses are all but precluded as a practical matter. Obviously, grazing and hunting are out of the question on those parcels. There are some low-light crops that can be planted and harvested underneath the solar array in some instances, but the type of solar technology will determine whether such a plan is reasonable. For solar arrays that sit higher above the ground, such farming activities will not unreasonably interfere with the project, but this will have to be determined on a case-by-case basis. Since the utilization of the land is more complete, temporary reimbursement is not an option unless the payment is related to a laydown area or construction of an easement for roadways or transmission systems.

Thus, finding a nearby alternative location is most difficult, if not impossible. The accommodation doctrine, which at least provides a “fighting chance” to an existing surface land use, may be of little assistance depending on the proposed location for the drilling activity. In other words, where an oil and gas operator may have to shift a manner of feet in order to find a reasonable location to spud a directional well in order to accommodate an existing wind turbine, an oil and gas operator would be forced to possibly shift nearly 40 *acres* in order to find a location that is not currently utilized by part of a solar project. The questions of technical

feasibility and economic affect on the oil and gas operator represent a greater hurdle for a surface user in its attempt to protect itself pursuant to the accommodation doctrine. The consequence of this situation is obvious: a solar developer may be loathe to plan a project in an area where oil and gas development is ongoing, pending, or even possible in the future because of the relative unhelpfulness of the accommodation doctrine, despite having great solar resources.

There exists the possibility that the two sides (surface and mineral owners/lessees) could come to an agreement to make any discussion under the accommodation doctrine moot, but this situation is generally untenable (or at the very least much more difficult) as relates to future drilling activities by a mineral lessee prior to related exploration activities. Without knowing where the next productive reservoir lies, much less where technology will take the industry and unlock the next mineral resource that we are not capable of comprehending or producing today (think the Barnett Shale 20 years ago), a solar developer is rightly concerned with its development plans.

For more on the topic, one should review *Mineral Issues' Impact on Solar Energy Development in Texas and Other States*, by Alison Gardner, David Sewell, and Brent Stahl, presented at the 2011 Wind, Solar and Renewables Institute, sponsored by the University of Texas at Austin, February 23, 2011. That paper suggests that one way to resolve this dilemma is to voluntarily set aside surface acreage for use by future oil and gas exploration companies in exploiting the mineral estate. In addition, although a full discussion is outside the scope of this paper, it may also be suggested that a landowner propose to mimic the procedures and goal of Chapter 92 of the Texas Natural Resources Code and Statewide Rule 76 under the rules applicable to the Texas Railroad Commission.⁹ In short, certain projects that interact with oil and gas development can apply for approval from the county and the Commission of a qualified subdivision in order to plan for a surface use on the same property as an active (or planned) oil and gas operation. The standards related to this rule apply (at present) to certain counties, but nonetheless provides a pattern for statewide planning for solar lease interaction with oil and gas operations. In this process, the surface user delineates a plan for the proposed surface use, and as a practical matter reserves, in general, two out of every 80 acres of the surface for oil and gas operations. The oil and gas operator receives a copy of the plan and has the opportunity to negotiate with the surface user to arrive at an agreement, or has the opportunity for a hearing before the Railroad Commission. Although the applicability of the rule to a solar development project has not been determined, it is likely a wise choice for the parties to a solar lease to reserve such amounts of the surface for future oil and gas development, as well as approaching the operator and giving notice of the proposed plans. A proposed lease provision addressing this issue is found in Appendix 2, "Existing Uses: Oil and Gas – Solar."

Texans pride themselves on land ownership, and famously make great use of their lands. While this may cause additional complication when two uses are competing for the right to plan, construct and operate respective projects, more often than not the drafting of the proper language, and the "on-the-ground" work of the two competitors, will avoid major conflict.

⁹ 16 Tex. Admin. Code § 3.76.

Solar Flare (Part 2)!

An additional factor not generally addressed in a wind lease is water. It is the rare case that a wind developer has any real interest in securing the right from the landowner to utilize any water found running on top of or percolating below the surface. However, for some solar projects in particular, securing water rights is imperative. Concentrated Solar Power (“CSP”) projects’ processes require water, generally in an amount similar to or less than the amounts needed for irrigated agriculture.¹⁰ Therefore, the lease document must sufficiently address securing the right to water access.

In particular, where the subject property has surface water rights to a stream, lake, or other body of water on the property, the lease document must address:

- (1) the specific right of the solar developer to access and divert the water for use in the project;
- (2) whether the developer may divert the water to another parcel under the landowner’s control or another landowners’ property in the event the second landowner has no water availability or rights; and
- (3) how much water will be available for use on the project (all or a specified quantity measured in acre/feet/year or some other standard).

For properties without surface water, but with access to underground water, the lease gets a little more complicated. If the landowner is already producing groundwater from existing wells on the property, some relevant aspects to address in the lease, in addition to those general areas delineated above that relate to surface water usage, are:

- (1) whether the developer may utilize existing wells on the property;
- (2) what ramifications exist for detrimental effects on the well as a result of the developer’s additional use;
- (3) if the well goes dry, who will be responsible (or in what portions) for replacing the well; and
- (4) if the well is part of an underground water conservation district or area, must the additional use by the developer of the solar project be registered at the district, or do the district’s rules prevent such a use for the groundwater.

Where the landowner is not currently producing and utilizing groundwater, but groundwater exists beneath the subject property, the lease should further address:

- (1) what steps the developer must take in the event they are interested in drilling water wells, including the permitting responsibilities and liability for usage;
- (2) whether there is a set number of wells or acre/feet/year that the developer may apply for; and
- (3) what rights the landowner will have to access that water and use it for personal or other non-project related activities.

All of the foregoing should be considered and addressed in a solar lease, where such considerations are generally an afterthought in a wind leasing context. This water issue may also

¹⁰ *Texas Solar Power*, http://www.seco.cpa.state.tx.us/re_solar.htm (last visited February 20, 2011).

be a deciding factor in whether the developer wishes to lease the property, or to simply purchase the fee simple estate, which would include the existing and future water rights for the property.

III. TERM

In general, a typical wind lease consists of three main periods:

1. A development period, during which the wind company has the right to enter the subject property and conduct assessments, surveys, and limited construction in order to gather data to support a “go or no go” decision on the project;
2. A construction period, during which the project is constructed, and which lasts from the end of the development period until, generally, the day that the electricity generated from the project is sold to a third party (commercial operation date); and
3. An operations period, during which the project operates by generating electricity and selling that electricity to a third party; this lasts from the commercial operation date until the termination date (either by contracted date or cessation of generation).

Each of these periods contains its own nuances as it relates to negotiation and drafting of a lease. The main point common among all is the need to properly and specifically define not only the duration of the period, but the parameters of each period as well.

A. Development Period

Whether a developer decides to move forward with initiating construction and attempting to operate a wind project is largely determined during this period. The developer uses this period to conduct surveys, as well as environmental, transmission, and wind resource assessments. While the first three types of assessments generally require access rights only, the final assessment usually requires access and the installation of wind and meteorological equipment to gather data. With this in mind, the landowner ought to give due consideration to these three important issues.

First, the length of the development period can vary in different parts of the state and throughout the nation. Generally, the development period begins upon the effective date of the instrument, and lasts until (1) electricity is generated from the project, or (2) a date specified. As a practical matter, the landowner should attempt to limit this period in order to incent the developer to make a go/no go decision as soon as possible and begin construction. Although the landowner is paid during this period (more on this later), the larger sums of money received from the project result from the generation and sale of electricity. While at one point in the history of wind development in Texas some development periods were as little as three years, most current leases will specify anywhere between five and seven years.

Second, the form language from the wind developer will likely request exclusive rights to do the related assessments. However, similar to the discussion above regarding the granting clause, a landowner (in particular one with any reasonably anticipated development or other surface work expected to be conducted during the development period) should consider granting

only exclusive use or rights to those aspects of the work proposed that are specifically related to the development of a wind power project on the property. The language of the lease should not provide the wind company with the exclusive right to conduct an environmental assessment or survey, as other types of development or actions on the property may require such activities as well. Conversely, it is likely that an exclusive right may be granted in order to conduct wind resource data gathering and transmission assessments (unless, of course, the landowner anticipates solar or other electrical generation development). The salient point is to ensure that the language of the lease reflects the anticipated use of the property over the development period so that conflicts do not arise that would prevent further opportunities for the landowner.

Finally, the landowner should require that any reports, data, or other form of information that result from the assessments are provided to the lessor. Generally, a wind developer is not particularly interested in handing this data over since it is proprietary in nature, especially when the project is going forward to its next phase. However, the lessor is well within his rights to request that in the event the development is a “no go,” that such information and data is provided to the landowner so that he (and likely his neighbors) are able to shop their properties around to other developers in the hope that one will decide that the resource is sufficient enough for a “go.” See Appendix 3, “Development Period” for an example of some language to expect or use for this subject.

B. Construction Period

The language in most leases addressing this period are standardized and not particularly tricky or varying. When this period ends is perhaps the most important part of this entire section. Again, the construction period lasts from the end of the development period until the date of commercial operations begins, but variations can exist to defining when the operations period begins, and ultimately, when royalty payments commence. The developer may have no preference regarding the particular time that this occurs, but may prefer to defer this date until the entire project is operational. For the landowner, because of the increase in potential revenues, the desire is for this period to begin as soon as possible, and not be restricted to entire project operation. Since the construction period is not usually split out into its own section in a lease, the effective language to address these issues is in Appendix 3, “Development Period.” Certainly variations on this language can be equally as effective, so long as it remains clear to both parties that the intent of this provision is to specifically identify a date upon which one period flows into another.

In Section II above, this paper discussed existing uses and the considerations that must be addressed by a landowner to protect the existing uses of the property on a going-forward basis. One existing use that was not discussed there, but that is a significant existing right held by the lessor, is hunting activities. That topic is best left to this section because the construction period is the time when a lessor’s hunting rights are generally most affected. Developers usually include in their form leases provisions addressing hunting during times when their employees or contractors are present on the property. Typically, and obviously, a developer’s main concern is the safety of its agents and employees, and consequently the developer’s lease will provide not only for standards related to the hunting activities themselves (i.e., distance restrictions related to hunting near construction sites or types of firearms allowed), but may also require that hunters with access to the property sign a waiver placing responsibility on the hunter and indemnifying the developer and landowner against hunting-related liabilities. The landowner, while keeping in

mind the aforementioned safety goals, should ensure that these provisions are not so restrictive as to completely deny the right to hunt, and in the event that they do, proper compensation should be provided to make the landowner whole for this lost revenue. Provision should be made for a reimbursement of lost hunting income by allowing proof of such loss, either in the form of a written lease, a deposit slip, or an affidavit, and should account for the amounts typically received for hunting on the property. An example is found in Appendix 2, “Existing Uses: Hunting.”

C. Operations Period

Following the commercial operation date, the lease enters its longest and, hopefully, its most productive period. While the author has reviewed leases that contain operations periods varying from 30 years to 110 years total, the most typical length of a wind project is between 40 and 50 years. Generally these long cumulative terms are parsed into an initial or main period (10 to 15 years) with the option to continue the lease into extended or additional time periods (an additional 10 to 15 years each). The point of emphasis for the drafter is to identify the relevant provisions for transition from one period to another.

There exist ultimately two options for provisions within a lease that will determine how and when the first operations period flows into the second (or second to third, as the case may be). Both options provide the authority to the developer to give notice to the lessor of the developer’s intention to extend the term of the lease into the next period. The differences in the options revolve around how long in advance of the termination of the original period such notice should be provided, and how the parties will move forward regarding payments due pursuant to the lease.

The first option permits a developer to send written notice of its intention to extend the operations term into an extended period at any time, so long as it is no later than a set number of days (generally between 30 and 90) prior to the expiration of the original term. In this scenario, the lease language contains provisions providing that the payments due (royalties, installation, etc.) are already set in stone and/or are increased with reference to the Consumer Price Index. This form is likely preferred by the wind developer because it provides stability and consistency throughout the possible life of the project without any concerns regarding re-approaching the landowner after execution of the instrument (unless an amendment is necessary). The developer’s financing partners also prefer this form for the same reasons, as predictability is an asset to a financier.

The second option is a more landowner-friendly version. Here, the lease specifies that the developer must provide written notice of its intention to extend the term of the lease at anytime, but no later than nine months to a year prior to the expiration of the original operations period. The additional time needed for issuing notice is in order to set aside enough time for the parties to re-negotiate the financial payment terms of the lease that will apply during the extended period. Such provisions include a restriction against any extended period payment decreases from those received in the initial operations period, and furthermore provide, in the event that the lessee and lessor are unable to agree on terms, for the utilization of a third-party to assess the current market value for similarly-situated projects in relative proximity to the project. As one might expect, this uncertainty and the fear that a lessor will “hold a project hostage” by

demanding too much of an increase in rates makes developers uneasy, but in some cases they may agree to alterations to this proposal. For an example of a starting point on this option, see “Appendix 4: Operations Period.”

D. Transmission/Roadway Easements

An additional aspect of the wind project development is the need for the developer to secure rights to utilize existing roadways or easements to access the various portions of the subject property, or the right to construct new roads for this same purpose. Likewise, the developer will need to install collection and transmission lines in order to get the power out to the grid for sale. A landowner must be cognizant of the terms of these easements. Oftentimes, the road and transmission easements are designed to outlast the other operating features of the project, so that even if the project no longer operates, the easements remain active in perpetuity.

If a landowner is willing to permit such a permanent easement, it is recommended that such a right be transferred in a separate document from the leasing instrument. This way (1) the dates of effect and termination (if any) remain separate from the main document, and (2) the proper amount of compensation for this perpetual commitment is provided. If the landowner is unwilling to allow such an extended right, then she must ensure that the lease provides that the easements required and created pursuant to the installation and operation of the wind project are coterminous with the term of that project, i.e. it terminates when the base lease expires, whether due to lack of generation or the running of the lease time period.

IV. PAYMENTS

The payments a landowner can expect from participating in a wind project vary from period to period and lease to lease. This provides several options for a landowner to shape the payments that will be received. Every possible scenario is certainly outside the scope of this paper, but the main options the author has reviewed and/or negotiated are included.

A. Development Period

Payments to the landowner during the development period are primarily on a per-acre basis, with a simple calculation of a set value multiplied by the number of acres contributed by the landowner into the project area resulting in the amount due. Some developers pay a one-time or yearly flat rate for the right to tie up the subject property for that period, but this has not been particularly well received by the landowner community. In particular, the larger landowners that anchor the project would likely contend that they should be receiving a different (and obviously larger) amount for restricting usage of their lands than for a smaller landowner. Additionally, the installation of a meteorological (MET) tower or a LIDAR system also often results in a payment (one-time or yearly) to the landowner of the parcel upon which the equipment is installed.

If the subject land is particularly untouched, the lease should also address the usage of existing roadways or the creation of new roadways. Most landowners prefer to have the amount of roadways limited, so it is advisable for the lessor to attempt to incent the developer to minimize these easements by requiring smaller per rod payments to the landowner for using and/or improving existing roadways.

B. Construction Period

While the per acre payments specified in the development period remain applicable during the construction period, additional significant payments become due at this time for the installation of any of the equipment necessary to operate the project, including turbines, roads, transmission lines, substations, operations and maintenance (“O&M”) buildings. The initial key issues related to this period relate to incentives for roadways/transmission lines, and hunting reimbursement. The topic of hunting reimbursement was covered previously in Section III, and therefore will not be revisited here. Moreover, while the concept related to incentives for roadways was also previously addressed in the preceding paragraph, the same concepts generally apply to transmission lines. If possible, the lessor should attempt to incent the developer to place collection and transmission lines within or near the roadways that either exist on the property or will be constructed. Additionally, an incentive may be presented for the cables to be laid underground so as to further minimize the amount of equipment visible on the surface. These incentives can usually be drafted in such a way that a lower cost to the landowner is exchanged for the placement of lines within existing easements and/or underground. An example of all of these points is found in Appendix 5: “Payments: Development/Construction Period.”

Another consideration of note is the construction and operation of substations. Where a landowner chooses not to request that the transmission lines (and related equipment, which would include the substation) be coterminous with the term of the lease, or the developer refuses to agree to such a provision, the lessor must alter the terms related to the substation accordingly. A substation generally utilizes between one and three acres of land. If the land will be utilized by the developer (or the assignee of the property that will continue to operate the transmission facilities following the termination of the wind lease) in perpetuity, the more prudent move would be an outright sale of the property to the wind company. If the landowner would prefer to leave open the possibility that the allegedly permanent transmission line and its facilities are abandoned or no longer needed, then leaving the arrangement as one to be addressed in a leasing form may be preferable. Either way, the lease (and additional documentation) must consider this fact and all of the moving parts of the arrangement between the parties must be coordinated.

Finally, the landowner will often find language in the developer’s form lease that provides the right to the lessee to release any lands it no longer wishes to commit to the project. In some instances, however, such an issue is not addressed. More often than not, a developer will retain the acreage despite the fact that no actual equipment is located thereon, primarily because the developer wishes to have a “buffer” between its project and possibly that of a competitor “upwind.” Turbines can and do experience decreased efficiencies if they are placed too close to other structures of significant height, or even other turbines. Therefore, additional land control that serves as nothing more than a buffer may be particularly appealing to the developer so as to ensure that wake from next-door neighboring structures are not a direct concern. The provisions of the lease should include a time period before which the developer must decide whether to release any acreage. If acreage is released, the instrument must provide for a proper procedure to be followed, including notice to the landowner of the release, proportionate payments for the period the property remained part of the lease, and the drafting and recording (at the developer’s expense) of a release document.

C. Operations Period

The largest drafting challenge related to payments in a wind lease relates to the provision for royalties. In most leasing instruments, the landowner is provided a share of the overall

revenue created by the project in the form of a royalty.¹¹ Generally, a lease instrument will define the royalty as a certain percentage of “gross revenues.” It is the definition of this phrase that has the potential to considerably shape the income due to the landowner as well as the viability of the project. In sum, the landowner and developer must create the proper provision so that both parties are benefitted.

While there is no standard language across the industry, gross revenues are generally defined as the proceeds received by the developer for (1) the sale of electricity generated on the land, and (2) the sale of credits related to the production of energy on the property. These credits can include renewable energy credits, greenhouse credits, or pollution credits, but usually do not include revenues from the federal production tax credits or investment tax credits. Additionally, the landowner must ensure that *any* funds attributable to agreements, contracts, or other arrangements related to the sale of electricity produced on the property are accounted to the landowner. For example, payments received by the operator from a purchaser in lieu of continuing on under the terms of a PPA should be distributed to the landowners, since had the contract not been cancelled or bought out, production from the land would have continued and earned additional revenues pursuant to the lease. Additionally, any funds received as a result of actions by the developer/operator against a purchaser (including failure to pay for power delivered) should also be distributed to the landowners. An example of a clause addressing royalties is found in Appendix 6, “Payments: Operations Period.”

As stated, gross revenues are utilized to calculate the royalty paid to landowners. The negotiation surrounding the values for royalties is largely based on the market value of the time, the area, and the amount of land involved. One important point, however, is that a lease commonly provides for an incremental increase in the royalty value as the term continues, i.e. a certain percentage for the first ten years, an increased percentage for the next ten, etc. The incremental increases should be applied to any recurring or continuing payment the landowner is eligible for, including the per acre payments, the per megawatt installed amounts, per turbine amounts, annual dues from locating substations and/or O&M buildings, and others. At the *very* least, the landowner should insist on an increase matching the Consumer Price Index. Landowners whose payments do not increase over time are landowners that lose potential income.

The lease will also likely contain a minimum royalty provision, which provides for a certain floor amount that a landowner will receive on an annual basis. A minimum royalty is generally reflective of a certain payment per megawatt installed on the property, or the total number of towers on the site, or a per acre payment, or even the highest of these values compared to each other. The minimum royalty payment is usually calculated by totaling the amount of royalties a landowner received over the course of a year (or shorter period if the developer so desires), and in the event the total is less than the amount specified in the lease as the minimum royalty, the operator agrees to pay the difference. Developers vary on how a minimum royalty is constructed, with some companies providing a minimum royalty only to landowners that have turbines installed on the property, while others provide a per acre payment

¹¹ It should be noted that in other states, royalties were never intended to be as commonplace within the terms of a lease. However, the author has anecdotal evidence of wind developers in other states that were offering solely a per-acre payment during the operations period “until those damn people from Texas showed up and ruined it.”

that serves as the minimum payment to be received for any landowner regardless of the presence of turbines.

A landowner should specify that the minimum royalty should increase on a regular basis so as to adjust for inflationary increases, but also increases in the price for which power generated on the property is sold. As a practical matter, the minimum royalty or payment is what the landowner must be comfortable with in order to enter into the lease. Most landowners would be happy with the royalty payments in the event electricity prices are high, the wind is blowing often, and disruptions are at a minimum. However, the chances are at least even that a landowner will receive the minimum royalty at some point over the life of the lease. Since the payments to the landowner will go no lower than the minimum royalty, if he or she remain satisfied with accepting the minimum royalty in exchange for allowing the developer to utilize the property to generate electricity, the remaining monetary terms are relatively less complex to discuss and negotiate. An example of minimum royalty provisions can be found in Appendix 6, "Payments: Operations Period."

As a practical matter, landowners that are not satisfied with receiving "just" the minimum royalty, or simply want to have turbines on their property, may provide some resistance about entering into a lease with a developer. Often this resistance manifests itself in demands by the landowner to guarantee the installation of turbines on the property or she will not participate in the project. In the event this particular landowner holds a large amount of land, the developer may consider such a request. Where the landowner controls a significantly smaller portion of land, the developer often informs the owner that the project can and will be built around the objecting property. However, another solution for the small landowner is becoming more common: the community royalty.

The community royalty, or a pooling provision present in the wind lease, while not particularly prevalent in Texas, is becoming more widely implemented in agreements in other parts of the country. At its core, the community royalty provides a royalty to all landowners that are a part of the project regardless of whether a turbine is installed on the property, albeit at different rates than those with turbines present on their lands. This sort of provision has a long history in the oil and gas world, where landowners that enter into an oil and gas lease, but which do not have an interest in the property where the well is located, are compensated on the production of the minerals based on the proportion of their acreage to the whole area in the proration unit. Conceptually, this exists because a proration unit encompasses the land area that a well will drain, and if an owner's land is within that perimeter, their minerals are being produced, and therefore they should be entitled to their pro rata share of the proceeds from the sale of that hydrocarbon.

In the wind arena, as explained previously, the lands adjacent to and within a certain distance of the project's turbines are important because their rights to perform activities that could interfere with the flow of wind across their property towards the turbine are restricted. Therefore, similar to the mineral lease, these "buffer" properties assist in the production of electricity by the turbine located nearby, and the landowners should be compensated accordingly. Similar to the oil and gas lease, the lessor on a wind lease should be paid based on his proportion of land to the total land area encompassing the project. For example, the applicable provision

could provide that a percentage of the Gross Revenues (as discussed previously) produced by the entire project would be multiplied by the ratio of acres contributed by the landowner as compared to the total project area. The royalty percentage of gross revenues involved in this calculation is generally one or two percent.

In practice, the interest level on the part of a landowner to this type of provision will ultimately depend on the amount of acreage owned. Community royalty provisions are well received by smaller landowners with a slim chance to get a turbine installed on their land, where large landowners may not be particularly eager to share royalty revenues that would otherwise be theirs. An additional benefit of the community royalty is that it may assist a developer in cultivating relationships within the project boundary as well as in the overall area.

V. CONFIDENTIALITY

Wind developers are a paranoid bunch. Consequently, they are overly protective of the terms (the financial ones, in particular) they provide to their lessors. Therefore, a form lease will usually contain a confidentiality clause to prevent the sharing of information with people not included in the project, and sometimes even among those within the project area. The former group is restricted so that competitors are unable to make determinations about costs or market values for the area, while the latter group is restricted most times to prevent neighbor envy and perhaps disenchantment with the developer. Make no mistake; developers understand that neighbors talk at the coffee shop or the grocery store, and that completely restricting all reference or discussion of the project is nearly impossible. Enforcing such a provision would be difficult, at best, but the clauses still usually appear in the lease.

As a result, the form confidentiality clause disallows all communications or disclosures containing information regarding any payments, site plans, or further development intentions, with limited exceptions. The landowner is unlikely to be able to strike this provision from the lease, but may be able to soften it a bit. See an example of a more landowner friendly confidentiality clause in Appendix 7, "Confidentiality Clause." This form specifically lists the numerous parties to which the information may be disclosed, but reassures the developer that confidential information will be guarded by the landowner as it pertains to the remainder of the planet.

The confidentiality clause may also serve an additional purpose for the developer. Many landowners request what is referred to as a most favored nations clause. A most favored nations clause in a lease specifies that if payment (and possibly other) terms of the lease for one landowner are exceeded by the developer's lease with another landowner within the project boundary or some other areal determination, that the original landowner's terms will be increased to match those of the new lessee. On its face, a most favored nations clause is attractive to a landowner because it provides a "second chance" to one who has perhaps not agreed to the best terms she could obtain. However, a problem arises when one inquires how this clause is triggered.

In short, how would a landowner in a project know that his neighbor has received better terms if he is restricted from discussing the particulars of his lease with this person? Without modifications to the confidentiality clause and/or the most favored nations clause, the only party

that knows the terms of these two leases is the developer, who may not be eager to disclose that it owes more money on a regular basis. In order to resolve this issue, the lessor may want to propose that the confidentiality agreement be altered to permit landowners within the same project to inform each other of the terms of their agreements. Of course, one person may not always be willing to disclose their personal finances, despite the fact that disclosing the information will ultimately do them no harm. Thus, even if the lease is amended to address this issue, the ability of a landowner to have access to the information that would disclose greater terms for a neighbor is limited.

VI. ASSIGNMENT

Generally, a lease will provide that a developer may transfer its leasehold rights to another party without any prior approval on the part of the lessor. For obvious reasons, this provision makes landowners nervous, and they often provide substantial pushback as a result. This pushback is met with the response described below, namely that without this unfettered right to transfer the property, the project will not be eligible for any meaningful financing. However, some middle ground should be suggested by the landowner and floated to the developer for consideration. In particular, provisions can be drafted that reflect certain standards that any potential assignee of the property must meet, from credit ratings to net worth. While this sometimes proves to be a wasted exercise, in some instances the developer will relent and agree to a project-wide revision. For an example of an assignment clause, see Appendix 8, “Assignment.”

The most common reason for rebuffing landowner’s attempts to alter the draft lease provided by the developer is that such a change will prevent the project from being financeable. The clear majority of renewable energy developers rely on third-party financing, in one form or another, to construct a project. As a result of this reality, most leases will contain provisions providing the right to the developer to finance or mortgage the property as a portion of the project, and delineates the rights of the financier as it relates to the project. The provisions further address, *inter alia*, the ability of the mortgagee to step into the shoes of the developer or operator in the event that the latter defaults pursuant to the terms of the lease or is otherwise unable to continue running the plant. This serves as the backdrop for one of the most contested aspects of a lease: the ability of the developer to assign its rights to another party.

VII. TERMINATION

Pursuant to its terms, whether by default, release, or the expiration of the term, at some point a lease will expire. It remains imperative that the landowner recognize this fact at the outset of negotiations and ensure that satisfactory provisions addressing the end of the relationship are included in the document. Two key issues are of import to the lessor here: removal standards and a removal bond. Properly drafting these documents can provide piece of mind to the landowner that things will be returned to normal as much as possible following the utilization of the property in the project.

Most form leases will contain language that broadly states that the subject property will be returned to the condition in which it stood at the effective date of the lease, or as close thereto as possible. The intent here is good, but the landowner is wise to specify the standards that

should be met by the developer in removing the equipment. Thus, the lease should contain a clause addressing the timing and standards of removal. A removal standards clause may cover the depth of removal of underground equipment (turbine foundations, roadways, and underground power lines), grading requirements, reseeding, options to remove roadways, and other items.

Additionally, the removal language should provide a time period during which the removal must be completed, and create a deadline for when the developer is considered to have abandoned the property. The provision should be clear that a failure to remove the property by the deadline creates either ownership of the items in the landowner or a right for the lessor to hire a third-party to salvage the property, returning some of the value to the landowner instead of the developer. For an example of the delineation of these standards, see Appendix 9, “Removal Standards.”

But what if the developer simply walks away from the project and leaves the equipment intact on the subject property? At the time the lease is negotiated, both parties wholly expect that following the end of the term, the developer will have the wherewithal and the resources to remove the improvements and, as addressed above, return the property to a certain condition. The most common manner of addressing this issue is to include in the lease a provision for the issuance of a removal bond. The removal bond serves the purpose of providing money for the removal of the equipment utilized for the operation of the wind project (turbines, substations, O&M buildings, roadways, electricity lines and other cables) in the event that the operator encounters financial problems and is unable to fund removal. While the specifics of the removal bond are negotiable, the landowner should ensure that (1) the bond is sufficiently funded to be able to pay for the removal of all equipment and (2) the amount of the bond is either reassessed every few years or, in the event the clause provides a fixed amount, increased on a regular basis to reflect the current costs of removal. Appendix 10, “Removal Bond,” provides a common example of such a provision.

So long as the landowner can rely upon these provisions, there should exist no concern regarding what will occur 40 to 50 years from the effective date. Lessors will not have to fear what they or their heirs and assigns will be faced with following the life of the project.

VIII. CONCLUSION

Renewable energy development is certainly trending upwards, and subject to the market, transmission construction activities, and related policies of the federal and state governments, such development is expected to significantly increase over the next several years. Due to its relaxed regulatory environment, increased transmission capacity, and robust demand for renewable sources of energy (despite having already exceeded its Renewable Portfolio Standard), Texas will continue growth in this sector for years to come. Consequently, more landowners will be called upon to consider entry into development agreements. With able representation, landowners may be able to experience the financial and social benefits of such participation.

APPENDIX 1 - Granting Clause

In consideration of Ten and No/100 Dollars (\$10.00) and other good and valuable consideration in hand paid, the receipt of which is hereby acknowledged and the timely and proper payment of the royalties provided in this Lease, and Lessee's covenants, agreements and obligations set forth in this Lease, and upon the conditions and with the limitations hereinafter set forth, Lessor hereby GRANTS, LEASES and LETS the Premises unto Lessee for the Permitted Use, but no other purpose, for the Lease Term, subject to earlier termination as set forth in this Lease.

"Permitted Use": (1) Installing, operating, assessing and collecting data from the Subject Property (which may contain meteorological stations and anemometers), and includes avian and biological assessments, soil and preconstruction analysis for purposes of evaluating the wind resources of the Subject Property; (2) constructing, installing, operating, accessing, relocating, reconstructing, removing, and maintaining Turbines on the Subject Property for the conversion of wind resources to electricity, and including replacing Turbines for purposes of repowering for conversion of wind resources to electricity on the Subject Property; (3) Constructing, installing, operating, accessing, removing, relocating, reconstructing, and maintaining (including when necessary, replacing) all related Improvements (a) necessary or convenient in conjunction with Turbines on the Subject Property; or (b) for the use by Lessee in collecting, transmitting or otherwise making electricity from the Turbines on the Subject Property marketable and available for sale, including, but not limited to, overhead and underground electrical lines for collection, transmission, and communications, electrical substations, and telecommunications equipment; (c) for the use by Lessee for access to and from the Turbines on the Subject Property, including, but not limited to, roads, maintenance yards, and operations and maintenance buildings; or (d) performing any other activities necessary or appropriate to achieve the purposes listed herein; and for no other purpose. All references in this Lease to electricity or the production of electricity shall mean and include any forms of energy generated from renewable natural resources, such as sunlight and wind, that might be developed, provided nothing contained herein gives Lessee the right to erect structures other than Turbines or to develop renewable natural resources other than wind without the mutual written agreement of Lessor regarding the manner in which such other resources may be developed and considerations due Lessor therefor.

APPENDIX 1 - Reservation Clause

Lessor and Lessee understand and agree that it is the collective intention of the Parties hereto that the rights granted by Lessor to Lessee as described in this Agreement apply only to the Lessor's interests in the surface estate of the Subject Lands, and that Lessor specifically reserves and excepts from its grant of rights in this Agreement any interest Lessor owns or possesses in the mineral rights in, beneath, and attributable to the Subject Lands.

APPENDIX 2 - Existing Uses

Farming/Ranching/Grazing

Lessor reserves the right to use the Subject Property for any purpose (including, but not limited to, farming, grazing, ranching, hunting, and oil and gas development); provided, however, that (a) no such use shall be inconsistent with or unreasonably interfere with Lessee's Permitted Uses, the Project's activities, or any other rights granted Lessee pursuant to this Agreement; and (b) such uses shall exclude all wind energy development or use of any facilities related to the development or generation of wind energy. Lessor additionally reserves the right to utilize roadways, existing or constructed by Lessee, and other related easements without cost to Lessor.

Hunting

Lessor shall have the ongoing right to personally use and lease out the Subject Property for hunting purposes. Lessor shall not allow any hunting other than bird hunting on the Subject Property during the construction of the Project. Lessor may use the Subject Property for bird hunting only during Lessee's construction of the project so long as Lessee shall require all third parties allowed to do so on the Subject Property to execute and deliver to Lessee an indemnity and waiver of liability form (in a form reasonably acceptable to Lessee). [Generally, a draft form can be supplied laying out the responsibilities of the hunters and the lack of liability for any problems that occur on the landowner's property during that period. If the developer is hesitant to agree, further standards can be applied, as exemplified here:]

- (a) Hunting during the Construction Period shall be limited as follows:
 - (i) Lessor shall not allow any hunting within one-quarter (1/4) mile of any of Lessee's construction activities, whether such construction activities are occurring on the Subject Property or on adjacent property;
 - (ii) Lessor shall reasonably attempt to notify Lessee via telephone at least twelve (12) hours prior to any such hunting on the Subject Property; and,
 - (iii) Hunting shall be limited to the use of shotguns, of the type that are generally used for Hunting.
- (b) At all times other than during the Construction Period, Lessor shall have the right to hunt on the Subject Property, *provided that*, Lessor shall require all third parties allowed to so hunt on the Subject Property to execute and deliver to Lessee an indemnity and waiver of liability form; and
- (c) Lessor and Lessee agree to cooperate with each other in a manner that will allow Lessor to use the land for hunting and all other recreational purposes in a manner that does not unreasonably interfere with Lessee's operations. In the event construction of the Project occurs during any hunting season, Lessee shall pay Lessor for the loss or partial loss of hunting revenue, based on the actual loss to Lessor as demonstrated by a written lease, affidavit, deposit slip, or other written evidence.

Oil and Gas - Wind

It is further agreed that, during the term of this Lease, Lessor agrees to provide Lessee with current information concerning the status and location of all oil and gas exploration and production activities on the Subject Property. Owner shall attempt in good faith to ensure that any new proposed leases or renewals and or extensions of existing leases, options to lease, or any other agreement made by Lessor with a third party oil and gas exploration company shall not be inconsistent with or unreasonably interfere with Lessee's Permitted Uses. Notwithstanding anything in this section to the contrary, the Parties agree and acknowledge that the mineral estate is the dominant estate of the Subject Property, and that despite Lessor's best efforts, securing reasonable accommodation for the activities of Lessee in constructing and operating the Project may be unsuccessful, and that any such result shall not negatively impact Lessor's interest in the Lease.

Oil and Gas - Solar

It is further agreed that, during the term of this Lease, Lessor agrees to provide Lessee with current information concerning the status and location of all oil and gas exploration and production activities on the Subject Property. Owner shall attempt in good faith to ensure that any new proposed leases or renewals and or extensions of existing leases, options to lease, or any other agreement made by Lessor with a third party oil and gas exploration company shall not be inconsistent with or unreasonably interfere with Lessee's Permitted Uses. Additionally, Lessee agrees to propose and present a site plan to Lessor regarding the reservation of certain acreage within the Project boundaries for oil and gas exploration. Lessee shall set aside two acres out of every eighty (80) acres of the Subject Property that shall be designated for oil and gas operations. Lessee shall give due consideration to Lessor's stated preferences regarding the location of the set-asides. Notwithstanding anything in this section to the contrary, the Parties agree and acknowledge that the mineral estate is the dominant estate of the Subject Property, and that despite Lessor's best efforts, securing from the oil and gas exploration company reasonable accommodation for the activities of Lessee in constructing and operating the Project may be unsuccessful, and that any such result shall not negatively impact Lessor's interest in the Lease.

APPENDIX 3 – Development Period

This Agreement shall be for a term (the “**Development Term**”) commencing on the Effective Date and continuing until the earlier to occur of (a) the date on which Lessee begins selling electrical energy generated by Turbines located on the Project to an unaffiliated third party power purchaser (the “**Commercial Operation Date**”), and (b) the fifth (5th) anniversary of the Effective Date. In the event that Lessee does not begin to sell electrical energy generated by all of the Turbines to be included in the Project to an unaffiliated third party power purchaser by the fifth anniversary of the Effective Date, then Lessee shall (1) release the Subject Property back to Lessor in the manner described herein, and (2) provide to Lessor all results from any surveys, assessments, analyses, or any other operations conducted to gather data from the Subject Property conducted by Lessee in preparation for developing the Subject Property.

APPENDIX 4 - Operations Period

This Operations Period shall be for a term which shall commence on the Commercial Operation Date and shall end on the Expiration Date, which shall be the fifteenth (15th) anniversary of the Commercial Operation Date. The Lease may be extended for two successive 10-year periods (“Extended Term”) on mutually agreeable terms. Any such extensions will be included in any reference in this Lease to the “Term” of the agreement between Lessee and Lessor. Any agreement to extend this Lease shall be in writing. If either party wishes to propose an Extended Term, it must provide written notice to the other party no later than nine (9) months prior to the Expiration Date. Within thirty (30) days of the date such written notice is provided, the Parties shall meet and negotiate in good faith the amounts of the following payments to be paid during the Extended Term: Royalty, Minimum Royalty, installation fees and annual rentals for Substations and/or O&M Buildings, Turbine Installations, and Repowering payments. In the event Lessor and Lessee are unable to agree upon a fair market value for the payments, then such values shall be determined by an independent consultant reasonably acceptable to both parties. The independent consultant shall have at least five (5) years experience in wind power projects constructed in Texas, not have any financial interest in or derived from the project, and shall not have been a prior employee or consultant for either party. The consultant shall have no more than thirty (30) days to complete his or her determination of the fair market value, and the consultant’s findings shall be accepted by both parties as a basis for the payments into the Extended Lease Term. It is acknowledged by the Parties and agreed that the payments to be determined, whether by mutual agreement or the result of an independent consultation, shall not result in payments lower than those received by Lessor prior to the expiration of the original term.

APPENDIX 5 - Payments: Development/Construction Period

Turbines. Lessee shall have the right to construct and install certain improvements to the Subject Property in furtherance of the Permitted Uses. Accordingly, within thirty (30) days of installation of a Turbine, Lessee shall pay Lessor a sum equal to the product of \$_____ multiplied by the total number of Turbines then present and installed on the Subject Property. In the event additional turbines are installed at a later date on the Subject Property, Lessee shall, within forty-five (45) days following completion of the installation of the additional Turbine, pay Lessor \$_____ per additional Turbine installed. Prior to commencement of construction of any Turbine, Lessee will provide Lessor a map indicating the location of such Turbines. Lessor may suggest minor modifications to the location of any Turbine so long as such modifications do not materially affect the Project as determined in Lessee's reasonable discretion.

Substations. Lessee shall have the right to construct an electric substation and transmission facilities ("Substation") on the Subject Property covering no more than ___ acres of land. Lessee shall pay to Lessor an annual rental payable in advance in an amount equal to \$_____ per Substation, adjusted for inflation as provided elsewhere in this Lease. In the event more than ___ acres is needed for the Substation footprint, Lessee shall increase the annual payment by \$_____ for each additional acre necessary. To the extent necessary, Lessor shall also grant appropriate easements, on such terms as are usual and customary for similar easements in the area and as are reasonably required by such utility provider and consistent with such provider's standard practices, for road and power transmission facilities to permit connection to existing transmission lines.

O&M Buildings. Lessee shall have the right to construct an operations and maintenance facility on the Subject Property with storage facilities and parking areas ("O&M Building") covering no more than ___ acres of land. Lessee shall pay annual rental in advance equal to \$_____ per O&M Building, adjusted for inflation as provided elsewhere in this Lease. In the event more than ___ acres is needed for the O&M Building footprint, Lessee shall increase the annual payment by \$_____ for each additional acre necessary.

Transmission Lines. Lessee shall pay to Lessor either (a) an amount of the product of _____ Dollars (\$_____) and the number of rods of Lessee installed overhead transmission lines on the Subject Property ("Overhead Transmission Line Fee"), or (b) an amount of the product of _____ Dollars (\$_____) and the number of rods of Lessee installed underground transmission lines on the Subject Property ("Underground Transmission Line Fee"). If due, Lessee shall pay to Lessor the transmission lines fees addressed in this section within thirty (30) days of installation.

Roads. Lessee shall pay to Lessor either (a) an amount of the product of _____ Dollars (\$_____) and the number of rods of Lessee installed roadways on the Subject Property ("New Roadway Fee"), or (b) an amount of the product of _____ Dollars (\$_____) and the number of rods of Lessee improved roadways on the Subject Property ("Improved Roadway Fee"). If due, Lessee shall pay to Lessor the roadway fees addressed in this section within thirty (30) days of installation.

Additional Equipment. Lessee shall construct and install all electric gathering lines, conduit, fiber optics and cables for the collection of electricity from the Turbines of the Project, if underground, buried to a depth of _____ (__) inches, to the point of connection with the

Substation. Prior to commencement of construction of any Substation and/or O&M Building on the Subject Property, Lessee shall deliver to Lessor a map or plat of the planned site and location of the Substation and the O&M Building for Lessor's approval, which shall not be unreasonably withheld. Within ____ () days following the pouring of the foundation for a Turbine, Lessee shall pay Lessor the amount of \$_____ for each such Substation and \$_____ for the O&M Building, limited in each instance to ____ () acres per location, together with an additional \$_____ per acre utilized in excess of ____ () acres for each O&M Building or Utility Substation.

APPENDIX 6 - Payments: Operations Period

Lessee covenants to pay to Lessor, commencing on the Commercial Operation Date and continuing throughout the remainder of the Term of this Lease, a royalty percentage of ___% of Gross Revenues (defined below). During the Operations Period, Lessor shall receive payment on an annual basis of no less than the equivalent of \$____ per megawatt installed on the Subject Property [or the equivalent of \$____ per Turbine installed or a set amount] (“Minimum Royalty”) at the end of the year. For the purposes of the Minimum Royalty, the time period of a year shall be each anniversary of the Commercial Operations Date.

“Gross Revenues” as used in this Lease shall mean the aggregate total revenue actually received by Lessee during the applicable period of time, from the sale to an unaffiliated purchaser of electricity, of electrical energy generated and sold from the Project then located on the Subject Property, inclusive of the cash settlement (whether positive or negative to Lessee) arising from any transaction entered into by Lessee hedging the market price of electricity associated with the operation of the Project on the Subject Property.

"Gross Revenues" shall also include any payments received: (i) from renewable energy credits or pollution credits that directly result from the operation of the Project on the Subject Property (except for without limitation production tax credits, other tax benefits and credits, or any reimbursement thereof), inclusive of the cash settlement (whether positive or negative to Lessee) arising from any transaction entered into by Lessee hedging the market price of renewable energy credits or pollution credits associated with the operation of the Project on the Subject Property; or, (ii) pursuant to a business interruption insurance policy or from the manufacturer of any wind energy equipment under the provisions of its warranty therefore, in each case if made specifically in lieu of revenues from the normal operation of such wind energy equipment.

Each power purchase agreement that results in Gross Revenues, and each agreement for the sale of renewable energy credits or pollution credits (but not production tax credits or other tax benefits or credits) that directly results from the operation of the Project on the Subject Property and that creates Gross Revenues, shall be the product of arms-length negotiations.

APPENDIX 7 - Confidentiality Clause

Lessee and Lessor agree that the terms and conditions of this Lease and any documentation or information provided by Lessee to Lessor in connection with all information pertaining to the financial terms of or payments under this Agreement or Lessee's site or product design are confidential, whether disclosed by Lessee or discovered by Lessor, unless such information either (i) is in the public domain by reason of prior publication through no act or omission of Lessor, or (ii) was already known to Lessor at the time of disclosure and which Lessor is free to use or disclose without breach of any obligation to any person or entity. Subject to state or federal laws that require disclosure or reporting of any of the foregoing documentation or information, Lessor shall not disclose or publish any information pertaining to the terms and conditions of this Lease to others not a party to the Lease, nor utilize the information for Lessor's own benefit or to the detriment of Lessee. Lessee shall not make copies of this Lease other than as are necessary in the ordinary course of its business. Notwithstanding the foregoing, Lessor may disclose such information to any of Lessor's family members, lenders, attorneys, accountants and other personal advisors; any prospective purchaser or lessee of the Subject Property; or pursuant to lawful process, subpoena or court order; provided Lessor agrees to require any third party which it allows to review the Lease to maintain its confidentiality and proprietary nature.

APPENDIX 8 - Assignment

Lessee shall have the right, with notice but without obtaining the consent of Lessor, to do any of the following with respect to all or any portion of the Subject Property: finance Facilities; grant co-easements, separate easements, sub-easements, licenses or similar rights (however denominated) to one or more persons but only if related directly to Lessee's construction and operation of the project (an "Assignee"); or sell, convey, lease, assign, mortgage, encumber or transfer to one or more Assignees the leasehold estate granted hereunder, or any or all right or interest in the leasehold estate, or any or all right or interest of Lessee in the Subject Property or in any or all of the Project Facilities that Lessee or any Assignee party may now or hereafter install on the Subject Property. Any such sale, assignment, sublease, transfer, encumbrance or conveyance shall not release Lessee of its obligations under this Lease, unless Lessee assigns its entire rights and interest under this Lease, in which event Lessee shall have no continuing liability with respect to matters occurring following the effective date of the assignment.

Lessee shall notify Lessor in writing of any such assignment, and any such Assignee shall assume in writing the obligations of Grantee under this Lease with respect to the Subject Property assigned. Failure of Lessee to give prior notice of any such assignment shall solely have the effect of not binding the Lessor to the Assignee. To the extent provided for in each conveyance document, an Assignee shall have all of the rights and benefits of Lessee under and pursuant to this Lease. Lessee shall be relieved of all of its obligations under this Agreement only if Lessor in its sole discretion determines the successor owner is adequately experienced, solvent and creditworthy.

Furthermore, Lessor may at all times devise, convey, gift, assign, transfer and/or sell all or any part of Lessor's interest in the Subject Property and/or this Lease provided, however, that any and all such assignments shall be made expressly subject to all of the terms, covenants and conditions of this Lease. Lessor shall notify Lessee of any such devise, conveyance, gift, assignment, transfer or sale.

APPENDIX 9 - Removal Standards

On the last day of the term of this Lease, or on the earlier termination thereof, Lessee shall peaceably and quietly leave, surrender and deliver the Subject Property to Lessor, clean and shall remove all of the Improvements and any other alterations, changes, additions and improvements which may have been made upon the Subject Property, at Lessee's sole cost and expense. This shall include, but not be limited to, the removal from the Subject Property of any and all deleterious material and substances that might cause injury to persons, crops, water supply sources, native vegetation or livestock, including junk material, pieces of iron, pipes, steel, concrete or other debris and foreign materials, leveling of all mounds, filling all pits, ruts and other excavations, restoring the surface of the Subject Property used by Lessee to as near its original condition as is reasonably practicable after the completion of the operation or other activity conducted under this Lease in question, and (d) root plowing, discing and seeding of such areas with ten (10) pounds per acre of grass seed of Lessor's selection and fertilizing the affected areas. In addition, Lessee shall remove all of its personal property from the Subject Property and any property not so removed shall be deemed to have been abandoned and may be appropriated, sold, stored, destroyed or otherwise disposed of by Lessor without notice to Lessee and without obligations to account therefor.

APPENDIX 10 - Removal Bond

No later than the fifth (5th) anniversary date of the Commercial Operations Date, Lessee shall provide a bond, or other security reasonably satisfactory to Lessor, which secures Lessee's obligation to remove the Improvements from the Subject Property at the end of the Term or earlier termination of this Lease. Such bond or other security ("Removal Bond") shall be in an amount equal to one hundred ten percent (110%) of Lessee's reasonable estimate of removal and restoration costs, less the reasonable salvage value of the Project, that will be incurred in complying with the terms of this Lease. The Removal Bond shall be assessed and the value accordingly adjusted if necessary due to an increase in the cost of performance under this Lease, at least once every five (5) years. If Lessee and Lessor are unable to agree to the proper amount of the Removal Bond, Lessee and Lessor shall mutually agree to a disinterested unaffiliated third party to determine said amount. The disinterested third party's determination shall be final for the purposes of assigning a value to the Removal Bond. The Removal Bond shall be released to Lessee upon Lessor's reasonable satisfaction that removal and restoration operations pursuant to this Lease have been complied with. The bond or other security shall extend for a reasonable period of time beyond the Term of this Lease and the form of bond (or other security) shall be reasonably satisfactory to the Parties. The provision of such bond or other security is not intended to limit the obligations of Lessee to comply fully with its obligations set forth in this section and to the extent the costs of compliance exceed the amount of the bond or other security, Lessee shall be responsible for such excess costs.