

Harvesting Your Combine in the Sky

Getting the Most of a Wind Energy Agreement

Is a Wind Energy Agreement Right for You?

Wind farms tend to be located in large rural areas of reliable wind speeds near electric power lines. No wind flow obstruction is necessary as well as enough space to lower a 70 to 100 foot tower. Easements or leases are used by developing companies to assign wind rights to property landowners.

Did You Know?

- According to the Wind Energy Production: Legal Issues and Related Liability Concerns for Landowners in Iowa and Across the Nation, wind generates only about one percent of the power utilized in the U.S. but it is believed by 2020, six percent of the nation's power will be generated by wind.
- A section of land can house anywhere from six to twelve turbines.
- Some states provide reductions or exemptions for state or local property, sales or other taxes applicable to "renewable energy property."

The Top Ten Questions You Should Ask Before Signing an Agreement

1. How much of my land will be used?
2. How long will be land be used?
3. What land rights are sacrificed?
4. What can I continue doing on the land?
5. How much will I be paid?
6. How will I receive payments for my land?
7. Are the payments adequate now and sustainable in the future?
8. Do the payments present tax consequences?
9. What can I be held liable for?
10. What are the developer's termination rights?

The Agreement Fundamentals

The Wind Energy Agreements usually consists of two components. The first allows the developer to form an agreement for the wind development rights for a certain period of time and the second accounts for the actual tower operation and related future development. The development rights give a company permission to enter the property, evaluate and construct the wind project. This usually accounts for two to five years with a renewal option in the contract. The operation and development is a much longer agreement, anywhere from 20 to 50 years allowing time to earn a market rate of return.

Double check that...

The contract specifies the option to renegotiate lease terms at time of renewal to adjust for current changes in the market.

The contract specifies how soon the tower and access roads will be removed after the tower is no longer generating income and who will be responsible for this task.

The contract specifies the landowner is not responsible for negligence of others with respect to the turbine. A farmer can be further protected by having liability insurance in place to cover unexpected claims.

The contract should include provisions for paying all crop damages during construction, maintenance of access roads and any necessary fencing, gates and cattle guards.

The contract should specify that the landowner is not responsible for any property tax assessment.

The contract outlines landowner's wind rights with unrestricted flow of wind and some say in the future development of the wind property.

What Are the Payment Options?

Payments may be in the form of lump-sum or periodic payments. One time lump-sum may seem attractive but calculating the time value for future payments can be difficult and time consuming. This may also bring undesirable tax consequences. Periodic payments are more common with an upfront payment for signing the contract and periodic payments dependant on several factors.

Operating fees are the most profitable and most negotiated aspect of the agreement. These payments begin after construction and based on a fixed amount or percentage of gross revenue. Ideally, fixed payments should include an escalator such as Consumer Price Index (CPI) to adjust for inflation and keep future payments acceptable. Royalty or percentage of gross revenues are received from sale of electricity generated, a millage rate per kilowatt-hour of electricity generated with a capacity factor, per turbine or per-acre annual lump-sum payments. Percentages of revenue payments have advantages for both developers and landowners providing incentive to ensure the tower continues to operate most efficiently.

Combinations of fixed and percentage based payments is another option as well as equity partnership where income is earned according to ownership percentage of the project.

There may also be a minimum payment for the number of turbines installed on the property and the amount of acreage in the agreement Gross revenue percentages should

include relevant information about power sales and company's financial records to verify all revenues of the project.

Landowners should receive additional compensation for developer's special facilities needed on their property. Developers seek to maximize the amount of property subject to the agreement in order to reduce development costs, increase productivity and maximize efficiency through economies of scale.

Installation fees are also paid to the landowner based per turbine or more desirably by total installed electricity capacity, measured in megawatts.

The income from leases or annual payments from turbines is considered rental or royalty income not subject to self-employment tax. The annual income from the lease payments should be reported on Schedule E (Form 1040.)

All sale prices of the land should include current wind energy values.

Liability Concerns

Farm and personal liability policies may not cover a wind project. Have your insurance agent review the agreement before signing to avoid any nuisance or other lawsuit.

Liability issues arise due to:

- Noise
- avian impacts
- visual obstruction
- alternation of surface water flow to the construction of access roads
- vandalism
- environmental contamination
- ice
- fire
- lightning
- radio, telecommunications and electromagnetic field obstructions
- stray voltage from turbines, a common concern for area dairy operations

Other Factors to Consider:

Will aerial crop spraying be impacted?

Will placement of the turbine affect future expansion?

Will hunting and recreational use activities be affected?

Will approval be needed from the U.S. Department of Ag if land or landowner is involved in any government program such as Wetlands or Conservation Reserve Program (CRP)?

The Most Common Setbacks of the Agreement

- The terms extend too far into the future
- The language of the agreement legally binds landowners
- Inadequate compensation
- Unequal bargaining power between landowners and developers

Permitting

Processes are localized and vary from state to state and location to location. Landowners may be required to work with local planning commissions, zoning boards and county boards. A board of commissioners must approve and issue a permit for local permitting and permits are subject to review under local authorities.

Wind energy projects that require a federal agency to take action require National Environment Policy Act (NEPA) review. This could acquire special permitting from the Bureau of Land Management (BLM), the U.S. Forest Service or other land managing federal agencies.

Lasting Comments

Never agree to confidentiality clauses concerning terms and conditions of agreement. Landowners will want to discuss with others involved in the project because contracts do not have to be fixed for everyone involved.

Once the contract is signed, all parties are legally bound to fulfill their responsibilities. Before signing, all provisions are negotiable.

Wind farming has utmost potential for economic benefits with security and flexibility. Make sure to seek legal and insurance advice before signing the agreement to ensure your rights and interests are protected. Take the initiative to speak with your local power company to look at wind maps and understand the long-term payoff issues to get the most of your investment. With vigilant effort and review, harvesting the wind can be very profitable for applicable rural landowners.