

WHAT GOES INTO OPTIONS, LEASES AND EASEMENTS – THE DEVELOPER’S PERSPECTIVE

1. Keys to Development in General.

A. Renewal Energy Standard or Renewable Portfolio Standard

- i. No federal standard
- ii. SD “Objective” ten percent by 2015, but not mandatory (compare to Minnesota with a standard of 25% by 2025)

49-34A-101. State renewable and recycled energy objective established.

There is hereby established a state renewable, recycled, and conserved energy objective that ten percent of all electricity sold at retail within the state by the year 2015 be obtained from renewable, recycled, and conserved energy sources. In the case of renewable and recycled energy, the objective shall be measured by qualifying megawatt hours delivered at retail or by certificates representing credits purchased and retired to offset non-qualifying retail sales. In the case of conserved energy, the objective shall be measured by methods established by rules promulgated by the commission pursuant to chapter 1-26. This objective is voluntary, and there is no penalty or sanction for a retail provider of electricity that fails to meet this objective. The objective applies to each retail provider of electricity in the state, regardless of the ownership status of the electricity retailer. Any municipal or cooperative utility that receives wholesale electricity through a municipal power agency or generation and transmission cooperative may aggregate the utility's renewable, recycled, and conserved energy objective resources to meet this objective.

- iii. Cost of development and intermittent nature of wind make other alternatives attractive, especially with current low natural gas prices.

B. Transmission Capacity.

- i. Limited Capacity – prior right of access for existing power sources.
- ii. Cost High – estimate of \$100 Billion for national high voltage grid.

- iii. Mindset of politicians toward creating projects in their home states limits likelihood of federal solution.
- iv. “Oranges in South Dakota” – Dusty Johnson analogy.
- v. Limited Access – cost of over \$1 Million per mile to do 115 kv line to nearest substation and/or transmission line.
- vi. Loss of Bigstone II – delayed or cancelled projects in Northeast South Dakota due to loss of transmission access (although latest word is the 345 kv transmission facility may still be built from Bigstone substation) – 345 kv line can carry 1200 megawatts of new wind energy.

C. Grant and Tax Credit Programs.

- i. Stimulus Act included strong incentives that helped make wind development financially viable. We are nearing expiration of some significant programs, and if they are not renewed or replaced we will likely see a slowdown in development. Historically, wind development slowed when tax credits and grants were not available.
- ii. General economic slowdown makes capital scarce.

2. Development of a Specific Site.

A. Site Selection – (See power point.)

B. Process of project development.

- i. General wind resource.
- ii. Environmental impact – National Environmental Policy Act (NEPA) requires two potential sites be analyzed – includes avian and wildlife studies, cultural studies, noise analysis and full environmental analysis.
- iii. Transmission access.
- iv. Landowner participation.
- v. Interconnection.
- vi. Power Purchase Agreements.
- vii. State and local regulatory and permitting.
 - (a) State siting permit from PUC only if 100 megawatts or more.
 - (b) Large variation in counties from nothing but basic building permit to full set of wind development specific ordinances – haul road permits.
 - (c) Siting of associated transmission facilities.
- viii. Other federal regulatory.
 - (a) Federal power permits (FERC).
 - (b) Fish and wildlife easements.
- ix. Balance of plant/construction agreements.
- x. Turbine Purchase Agreements.

xi. Financing.

3. Form of Landowner Agreements.

A. Option – used sometimes as initial landowner agreement. Used to get landowner committed to be part of project and from there wind studies and other work done to determine layout of the project and turbine locations. Terms general – no commitment as to number and location of turbines.

i. Included in definition of wind easement.

43-13-16. Easements/servitudes - Definition - "Wind easement."

For purposes of §§ 43-13-17 to 43-13-20, inclusive, and §§ 43-13-20.1 to 43-13-20.5, inclusive, the term, wind easement, means a right, whether or not stated in the form of a restriction, option to obtain an easement, easement, covenant, or condition, in any deed, will, or other instrument executed by or on behalf of any owner of land or air space for the purpose of ensuring adequate exposure of a wind power system to the winds, or an agreement to refrain from developing a wind power system.

ii. Subject to five year development required – means pouring a foundation.

43-13-17. Easements/servitudes - Creating and granting wind easements - Filing written agreement - Maximum term - Development of energy potential required.

Any property owner may grant a wind easement in the same manner and with the same effect as a conveyance of an interest in real property. The easement shall be created in writing and shall be filed, duly recorded, and indexed in the office of the register of deeds of the county in which the easement is granted. Any such easement runs with the land or lands benefited and burdened and terminates upon the conditions stated in the easement, except that the term of any such easement may not exceed fifty years. Any such easement is void if no development of the potential to produce energy from wind power associated with the easement has occurred within five years after the

easement began. Any payments associated with the granting or continuance of any such easement shall be made on an annual basis to the owner of record of the real property at the time the payment is made. If the easement holder mortgages or otherwise encumbers to any party any part of the easement holder's rights and interests under the easement, any such mortgage or encumbrance on the easement is the responsibility of the easement holder and attaches only to the easement holder's rights and does not otherwise attach to the land or obligate the property owner. Each wind easement agreement shall include a statement disclosing that the easement holder may mortgage or encumber any part of the easement holder's rights and interests under the agreement unless otherwise specified in the agreement.

43-13-20.2. Development of potential to produce energy from wind power.

For purposes of §§ 43-13-17 to 43-13-20.5, inclusive, development of the potential to produce energy from wind power associated with the wind easement or wind lease occurs when the foundation is poured for the first wind turbine to be installed on any property that is part of any one wind energy project, on any property that is part of any single construction stage of a wind energy project, or on any property that is described in the notice required by § 49-41B-25.1.

These requirements are repeated in SD Title Standards 9-05.

9-05 Wind energy easements.

A property owner may grant a wind easement properly created and recorded, however, the maximum term of such easement is fifty years. Any such easement is void if no development of the potential to produce energy from wind power associated with the easement has occurred within five years after the easement began.

- iii. Must contain all of the requirements of a wind easement.

43-13-18. Easements/servitudes - Required terms and provisions of wind easements.

Any deed, will, or other instrument that creates a wind easement shall include:

- (1) A description of the real property subject to the easement and a description of the real property benefiting from the wind easement;
- (2) A description of the vertical and horizontal angles, expressed in degrees, and distances from the site of the wind power system in which an obstruction to the wind is prohibited or limited;
- (3) Any terms or conditions under which the easement is granted or may be terminated;
- (4) Any provisions for compensation of the owner of the real property benefiting from the easement in the event of interference with the enjoyment of the easement, or compensation of the owner of the real property subject to the easement for maintaining the easement; and
- (5) Any other provisions necessary or desirable to execute the instrument.

- iv. Have been used in the past by speculators to tie up and with no intent or ability to develop the project.
- v. Becoming less common.

B. Easements – Access not only to physical location but to flow of the wind. Usually contain restrictions in anything that obstructs wind flow.

- i. Restrictions and requirements in SDCL 43-13-16 through 43-16-18.
- ii. Limit of 50 years.
- iii. May or may not recite number of turbines or specific locations.
- iv. Not likely to see many pure easements due to limitation of right of redemption.

21-52-3. Estates subject to redemption.

Only real property held in fee, or by life estate, or by leasehold extending more than two years beyond the date of sale shall be subject to redemption.

21-52-4. Foreclosure and execution sales subject to redemption.

The interests in real property described in § 21-52-3, sold on foreclosure of a real estate mortgage or on special or general execution against the property of a

judgment debtor, including special executions upon the foreclosure of any lien upon real property other than a lien for taxes or assessments shall be sold subject to redemption.

New lenders obviously not excited about prospect of not having right to redeem out of foreclosure by pre-existing lender.

- C. Leases – Physical lease of the real estate in which the turbine towers are constructed, roads, transformers, cables and lines, interconnection facilities, substations and other improvements.
 - i. Restrictions and requirements as per SDCL 43-13-19 (5 year development – 50 year term).

43-13-19. Easements/servitudes - Severance of wind energy rights limited.

No interest in any resource located on a tract of land and associated with the production or potential production of energy from wind power on the tract of land may be severed from the surface estate as defined in § 45-5A-3, except that such rights may be leased for a period not to exceed fifty years. Any such lease is void if no development of the potential to produce energy from wind power has occurred on the land within five years after the lease began. The payment of any such lease shall be on an annual basis.

Repeated in South Dakota Title Standard 9-06.

9-06 Wind energy rights - Limitation on Severance.

No interest associated with the production or potential production of energy from wind power may be severed from the surface estate as defined in § 45-5A-3 except that such rights may be leased for a period not to exceed fifty years. Any such lease is void if no development of the potential to produce energy from wind power has occurred on the land within five years after the lease began.

- ii. Have right to redeem from foreclosure.
- iii. May or may not recite specific number or location of turbines at time of execution.

D. Combination Agreements – Most common now – have option, easement and lease provisions in a single document – usual provisions include:

- i. Terms of option or pre-development period – testing and meteorological towers – access during this period.
- ii. Exclusivity.
- iii. Specific lease and easement terms.
- iv. Right to build roads, bury cable, set up transformers and substations.
- v. Non-interference with wind flow – as per 43-13-18(2) (angles, degrees and distances).
- vi. Right of developer to sell, assign and encumber.
- vii. Landowner obligation to assist in obtaining subordinations from existing lenders.
- viii. Construction access and lay down areas.
- ix. Set back waivers.
- x. Retention of hunting and other rights by landowner.
- xi. Mutual indemnifications.
- xii. Payment schedule (addressed elsewhere).
- xiii. Decommissioning.

E. “Top Leases”.

May find that subsequent potential developer wants to or has obtained rights for the period commencing after a prior five year period in which to develop expires.

F. Miscellaneous – May also see separate:

- i. Underground Cable Easements.
- ii. Road leases and/or easements.
- iii. Transmission line leases and/or easements.
- iv. Access easements.
- v. Set back agreements or encroachment easements.

G. Recording – must be recorded – often use memorandum or short form agreements for recording.