

IS THE WIND MINE TO GIVE AWAY? GUIDANCE FOR TESTATORS WISHING TO TRANSFER A WIND INTEREST

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I. INTRODUCTION

Arlon and his family have been through periods of devastating droughts as well as prosperous growth in the more than half century that they have grown cotton on their family farm in rural West Texas. Of the many difficulties that Mother Nature has imposed, wind has recently become of particular importance. The blowing winds were once something Arlon dreaded waking up to in the mornings. The winds caused soil erosion and made the long work days uncomfortable. Nowadays, he looks forward to waking up to a windy day and looking out across his sprawl of green seedlings to see the rotors of large white wind turbines gently turning.

For many farmers like Arlon, adding wind energy to their land represents much needed supplemental income to their farming operations, which have progressively become more difficult to maintain as profitable. In addition, the power that wind turbines produce will help to reduce pollution levels for generations to come.

With global warming and the uncertain price of fossil fuels, it is no surprise that we seek alternative, environment-friendly methods of energy production.¹ Wind development is at the forefront of our nation's green energy trend.² The boom in wind energy comes with prospective legal issues.³

1. See Brit T. Brown & Benjamin A. Escobar, *Wind Power: Generating Electricity and Lawsuits*, 28 ENERGY L.J. 489, 489-90 (2007).

2. See *id.* at 490-91.

This Comment discusses the concerns that go with severing the wind rights from real property and the approaches to successfully devising the severed wind right.⁴ Part II of this Comment demonstrates the importance of wind energy, the growth of wind energy, and how wind development affects us.⁵ Part III discusses the controversy that wind development causes families, beneficiaries, and co-tenants.⁶ Part IV describes agreements between landowners and developers and explains the structure and terms of a wind lease.⁷ Part V considers whether wind rights are a separate property right that can be severed from the surface estate and discusses several theories of law that could be followed.⁸ Part VI addresses drafting a will that severs the wind rights and transfers them to the testator's beneficiaries.⁹ Part VII sets forth a method of drafting a will that transfers a non-executive royalty interest in wind.¹⁰ Finally, Part VIII addresses additional concerns that arise when wind is transferred in jurisdictions that fail to recognize wind as a property right.¹¹ Ultimately, this Comment demonstrates the wind-energy development's effect on testators devising their property, highlights the current situation of wind rights without legislative action, and promotes wind as a separate property right to mitigate future problems.¹² It is vital that one have a basic understanding of wind energy to comprehend the implications wind development places on testators.¹³

II. WHY WIND ENERGY IS IMPORTANT

Wind energy continues to rapidly develop at a pace that will affect nearly all Americans.¹⁴ The United States has the largest wind electrical generating capacity in the world, and wind energy is the fastest growing source of electrical power.¹⁵ In 2007, the wind capacity of the United States grew 45%,¹⁶

3. See Ernest Smith, *Wind Energy: Siting Controversies and Rights in Wind*, 1 ENVTL. & ENERGY L. & POL'Y J. 281, 283 (2007).

4. See *infra* Parts V-VII.

5. See *infra* Part II.

6. See *infra* Part III.

7. See *infra* Part IV.

8. See *infra* Part V.

9. See *infra* Part VI.

10. See *infra* Part VII.

11. See *infra* Part VIII.

12. See *infra* Parts V-VII.

13. See *infra* Part II.

14. Brown & Escobar, *supra* note 1, at 490-92.

15. American Wind Energy Association, *U.S. Wind Energy Installations Surpass 20,000 Megawatts: Delay in Extending Federal Tax Credit Places 2009 Project Pipeline on Hold, Discourages Manufacturing Investment*, http://www.awea.org/newsroom/releases/Wind_Installations_Surpass_20K_MW_03Sept08.html.

16. Clifford Krauss, *Move Over, Oil, There's Money in Texas Wind*, N.Y. TIMES, Feb. 23, 2008, at A1.

and in 2008, it increased by a record 8,300 megawatts.¹⁷ At this rate, the United States Department of Energy estimates that wind power could potentially supply 20% of the country's electricity within the next two decades.¹⁸

Current technology coupled with the trend towards greater wind efficiency makes this estimate realistic. Today's wind turbines are capable of producing 1.0 to 3.0 megawatts each.¹⁹ For instance, Florida Power and Light's Horse Hollow Wind Farm in Nolan County, Texas, is capable of producing 736 megawatts of power during peak winds.²⁰ To demonstrate how much energy this is, one megawatt of power produces the amount of electricity typically consumed by 400 to 900 homes each year.²¹ The 1,708 megawatts of capacity installed in Texas in 2007 alone is enough to meet the consumption needs of 375,000 households during peak production.²²

In addition to supplying more American homes with green power, the increased wind development could reduce dependency on petroleum.²³ T. Boone Pickens proposed a plan that would reduce this dependency by developing a series of wind farms stretching from Texas to Canada.²⁴ The new developments would free up natural gas resources currently utilized by power plants and instead allow it to go toward transportation uses.²⁵ In the long-term, use of natural gas for transportation could reduce, or possibly eliminate, our dependency on foreign oil, saving the nation approximately \$700 billion annually.²⁶

On top of reducing domestic petroleum consumption, wind development stimulates economic activity.²⁷ Sweetwater, a rural town in West Texas, was once a typical middle-America town with a decreasing population and a

17. American Wind Energy Association, *Wind Energy Grown by Record 8,300 MW in 2008: Smart Policies, Stimulus Bill Needed to Maintain Momentum in 2009*, http://www.awea.org/newsroom/releases/wind_energy_growth2008_27Jan09.html.

18. U.S. DEP'T OF ENERGY, 20% WIND ENERGY BY 2030 REPORT: INCREASING WIND ENERGY'S CONTRIBUTION TO U.S. ENERGY SUPPLY (2008), available at http://www.20percentwind.org/20percent_wind_energy_report_revOct08.pdf.

19. See, e.g., GE Energy, *Wind Turbines*, http://www.gepower.com/prod_serv/products/wind_turbines/en/index.htm (last visited March 24, 2009); Mitsubishi Power Systems, *At Mitsubishi, Innovation Is in the Air*, http://www.mpsHQ.com/products_wind.htm (last visited March 24, 2009); see also Vestas, *Wind Power Solutions*, <http://www.vestas.com/en/wind-power-solutions/wind-turbines.aspx> (last visited March 24, 2009).

20. American Wind Energy Association, *Wind Power Trends to Watch for in 2009*, http://www.awea.org/newsroom/releases/trends_to_watch_09_29Dec08.html; see also Douglas V. Fant, ABC's of Electricity, 24th Annual Oil, Gas, and Energy Resources CLE 2 (Oct. 5-6, 2006).

21. Fant, *supra* note 20, at 3.

22. BLAIRE D. PARKER, HOUSE RESEARCH ORGANIZATION, CAPTURING THE WIND: THE CHALLENGES OF A NEW ENERGY SOURCE IN TEXAS 18 (2008).

23. PickensPlan, *The Plan: America is Addicted to Foreign Oil*, <http://www.pickensplan.com/theplan/> (last visited March 24, 2009) [hereinafter *The Plan*].

24. PickensPlan, *Did You Know?*, <http://www.pickensplan.com/didyouknow/> (last visited March 24, 2009) [hereinafter *Did You Know?*].

25. *The Plan*, *supra* note 23.

26. *Did You Know?*, *supra* note 24.

27. See *id.*; see also Krauss, *supra* note 16, at A1.

shortage of jobs, but wind farms changed all that.²⁸ The wind industry created jobs, and much of Sweetwater's youth has remained in the area to work in the industry instead of migrating to other places for employment.²⁹ Additionally, the wind companies renovated abandoned buildings for their operations and brought new businesses to town.³⁰ The development also increased area property values and the tax revenues, the latter of which the county has used to improve its infrastructure and its school system.³¹ Sweetwater is not unique; wind intensive localities around the country have benefited from wind development's similar, positive effects.³²

Wind development also stimulates the American economy by creating jobs in other parts of the country.³³ Many Americans are employed to manufacture turbine components, transport components, and construct transmission systems, and many more will be employed to do these jobs as wind development continues to increase.³⁴

There are numerous advantages to wind development, and wind energy will continue to affect more and more Americans.³⁵ We all know that the discovery of oil played a huge part in shaping our society over the last century. Similarly, wind energy will play a significant part in shaping our society in the future. As a judge in rural West Texas stated, "Wind reminds us of the old oil and gas booms."³⁶

III. THE CONTROVERSIAL WIND

Although the development of wind has gained the support of many, there are those who are still against the change.³⁷ At the Maple Ridge Wind Farm in Lowville, New York, John Yancey, a local dairy farmer, despises the deal his father made with a wind developer to allow wind turbines on the family land.³⁸ Yancey wanted the land untouched, but his father insisted that this would be his legacy and proceeded with the deal.³⁹ The family farm now has seven 400 foot turbines that nearly tore the family apart and destroyed Yancey's relationship with his father.⁴⁰ Yancey did not speak to his father for awhile,

28. See Krauss, *supra* note 16, at A1; see also *Did You Know?*, *supra* note 24.

29. See *id.*

30. Krauss, *supra* note 16, at A1.

31. *Id.*

32. See generally Helen O'Neill, *Wind Turbines Trigger Emotional Turbulence*, CHI. TRIB., Sept. 3, 2008, at 5A, available at 2008 WLNR 16632837.

33. See *Did You Know?*, *supra* note 24.

34. *Id.*

35. Brown & Escobar, *supra* note 1, at 490-92.

36. Krauss, *supra* note 16, at A1.

37. See discussion *supra* Part II.

38. O'Neill, *supra* note 32, at 5A.

39. *Id.*

40. *Id.*

and he contemplated leaving the Tug Hill area for good.⁴¹ Although each turbine brings in a minimum payment of \$6,600 per year, Yancey asks, “Is it worth destroying families, pitting neighbor against neighbor, father against son?”⁴²

Yancey’s situation demonstrates how construction of wind turbines can divide families. Although many potential issues like this will continue to arise with wind energy, this Comment mainly focuses on various methods of devising wind rights and reducing conflict amongst beneficiaries when land is transferred with wind turbines installed on it.⁴³ A parcel of land with turbines, or with the potential to have turbines, is usually more valuable than land without any expectation of turbines.⁴⁴ However, many times testators transfer a parcel of land to their beneficiaries with only a portion of the parcel including wind turbines or the potential to have wind turbines. If a testator who attempts to make an equitable division to beneficiaries in his will merely does so by partitioning his land into parcels of equal sizes, then it is very likely that the shares will not have equal value. The shares of property with turbines, or the most turbines, will be more valuable than those without turbines or those with fewer turbines. The result is that the testator’s intent may not be fulfilled. The testator may seem partial to some beneficiaries over others when they receive parcels equal in size but different in value. Such a devise could cause bitterness between beneficiaries, who at one time had an amicable relationship as family members or friends.

The testator may prevent this dilemma by doing one of two things. First, he could leave the entire parcel of property to all the beneficiaries as tenants in common, then let the beneficiaries sort it out on their own.⁴⁵ However, the problem may still arise if the owner wants to sell or change the arrangement by partition.⁴⁶ Second, the testator could sever the wind rights from the surface estate, thereby creating a separate wind estate that would be similar to a mineral estate. Although landowners currently employ this practice when executing wills, only one California court has authorized the severance of wind rights from the surface estate.⁴⁷ A discussion of severing wind rights will follow, but first it is necessary to examine how landowners develop wind through a wind lease.⁴⁸

41. *Id.*

42. *Id.*

43. *See infra* Parts VI-VII.

44. *See infra* App. A § 3.1.

45. JOSEPH WILLIAM SINGER, *PROPERTY LAW: RULES, POLICIES, AND PRACTICES* 640-41 (3d ed. 2002).

46. *Id.* at 643.

47. *See Contra Costa Water Dist. v. Vaquero Farms, Inc.*, 68 Cal. Rptr. 2d 272, 276-77 (Cal. Ct. App. 1997).

48. *See infra* Parts IV-V.

IV. THE WIND LEASE

Wind leases share similarities with mineral leases, which have the benefit of many years of evolution.⁴⁹ A wind lease is divided into two terms: the option or assessment period and the production period.⁵⁰ The option period usually ranges from two to seven years.⁵¹ During the option period, the wind developer (lessee) determines whether erection of wind turbines is commercially feasible on the parcel under the lease.⁵² Similar to the primary term of an oil and gas lease, the wind lessee must pay a lump sum or an annual minimum payment to the landowner (lessor) to extend the option to develop an additional year.⁵³ If the lessee decides to proceed with development, then construction must be commenced or completed before the option period set in the wind lease expires, depending on the terms of the lease.⁵⁴

Once the lessee proceeds with construction, the lease enters the production period.⁵⁵ The production period is usually set in the lease to last from twenty to thirty-five years, with some terms extending up to fifty years.⁵⁶ During the production period, the lessee will pay the lessor the greater of either (i) a set percentage of gross revenue from the sale of electricity produced by each particular turbine or (ii) the minimum turbine rent provided in the lease.⁵⁷ Most wind leases pay a royalty that averages between three to six percent of gross revenue, which is less than most oil and gas royalties but remains a substantial amount for an entity to pay to use a readily renewable resource.⁵⁸

The lease will provide that the lessor grant the lessee a wind easement that the lessee can utilize on any portion of the total acreage leased.⁵⁹ In addition to the wind easement, most leases grant the lessee the right to construct access roads to the turbine sites for construction and maintenance and allow the lessee reasonable use of the premises for production of wind-generated electricity.⁶⁰ To demonstrate the monetary value of wind rights and the burden wind construction can have on land, we will next analyze an actual lease executed in 2007.⁶¹

49. Roderick E. Wetsel & H. Alan Carmichael, *Current Issues in Texas Wind Energy Law 2008*, Wind Energy Institute CLE 2008 2 (Feb. 19-20, 2008); see also Judon Fambrough, *Wind Rights and Wrongs*, TIERRA GRANDE, REAL ESTATE CENTER J., Apr. 2008, at 1 [hereinafter *Wind Rights and Wrongs*].

50. See *Wind Rights and Wrongs*, *supra* note 49, at 1; see also *infra* App. A § 2.1(a).

51. *Wind Rights and Wrongs*, *supra* note 49, at 1.

52. Wetsel & Carmichael, *supra* note 49, at 4; see *Wind Rights and Wrongs*, *supra* note 49, at 1; see also Mark D. Safty, Davina C. Maes & Teresa Buffington, *Wind Energy Leases: What the Developer Wants*, 31 WYO. LAW. 12 (2008).

53. Wetsel & Carmichael, *supra* note 49, at 4; see *infra* App. A §§ 2.1(a), 3.1(a).

54. See *infra* App. A § 2.1(a).

55. *Wind Rights and Wrongs*, *supra* note 49, at 1; see *infra* App. A § 2.1(a).

56. *Wind Rights and Wrongs*, *supra* note 49, at 1; see Wetsel & Carmichael, *supra* note 49, at 4.

57. *Wind Rights and Wrongs*, *supra* note 49, at 1-2; see *infra* App. A § 3.1(b).

58. See *Wind Rights and Wrongs*, *supra* note 49, at 2; see also *infra* App. A § 3.1(b).

59. See *infra* App. A § 1.3.

60. See *Wind Rights and Wrongs*, *supra* note 49, at 2; *infra* App. A § 1.4(a)-(c).

61. See generally *infra* App. A.

This particular lease, attached as Appendix A, is a landowner agreement with the developer for the Roscoe Wind Farm project in Nolan County, Texas.⁶² The lessee leased from the lessor 259.3 acres of land, upon which wind turbines, infrastructure, and related facilities can be constructed on any portion of the property.⁶³ The term is for twenty-nine years: the first four years are the option or assessment period and the remaining twenty-five are the production phase.⁶⁴ In addition, the lessee has the right to construct new roads on the property with the eventual location of the new roads remaining in the lessee's discretion.⁶⁵ The terms of this lease can significantly burden the owner of the surface—the average wind turbine is over 400 feet high from base to tip; each rotor blade is approximately 125 feet long; a large crane pad is at the base; underground lines interconnect each turbine; there are overhead transmission lines; access roads connect all towers; and personnel are continually on sight for construction and maintenance purposes.⁶⁶

To compensate the lessor for the burden imposed by having these utility-scale wind turbines hovering above their premises, the lessor is paid a payment by the lessee.⁶⁷ This lease provides an escalating schedule for paying either the minimum per turbine payment or the percentage of gross revenue per turbine payment.⁶⁸ When the lease initially enters the production period, the lessor is entitled to a minimum rent of \$3,000 per turbine per year for the first five years.⁶⁹ At a minimum, the lessor will receive this payment regardless of whether there is any power generation from a particular turbine.⁷⁰ The annual payment will be greater than \$3,000 if the stated percentage of the lessors revenues exceed the minimum \$3,000 turbine rent.⁷¹ The method of calculating gross revenues is provided by the lease.⁷² During the first five years of the production period, the lessee will pay the lessor the greater of 4% of gross revenues from the electricity produced or the minimum rental payment previously discussed.⁷³ The payment should increase above the minimum rent when the turbine remains in operation and continues to rotate the generator.⁷⁴ By year twenty-six of the lease, the minimum annual payment will increase to the greater of either \$5,000 per turbine or 6% of gross revenues.⁷⁵ On a parcel of land where the lessee installs a large number of turbines, the lease payments

62. See generally *infra* App. A.

63. See *infra* App. A §§ 1.1, 1.2(a)-(b).

64. See *infra* App. A § 2.1(a).

65. See *infra* App. A § 1.4(b).

66. See *infra* App. A § 1.2(b); see also Parker, *supra* note 22, at 18.

67. See *Wind Rights and Wrongs*, *supra* note 49, at 2-3; see also Safty, *supra* note 52.

68. See *infra* App. A § 3.1(a)-(c).

69. See *infra* App. A § 3.1(b).

70. See *infra* App. A § 3.1(a).

71. See *infra* App. A § 3.1(a).

72. See *infra* App. A § 3.1(b)i-ii.

73. See *infra* App. A § 3.1(b).

74. See *infra* App. A, at § 3.1(b).

75. See *infra* App. A, at § 3.1(b).

could bring the lessor a significant stream of income derived from the wind easement.⁷⁶ For instance, Lewis Brooks, a rancher in West Texas, currently has seventy-six turbines on his land and an additional seventy-six under construction, and he receives \$500 per month for each turbine.⁷⁷ Bill Burke, a cash-strapped dairy farmer on the Tug Hill in New York is another good example.⁷⁸ He might have had to sell the family farm had he not installed turbines from which he receives an annual payment of \$6,600 per turbine.⁷⁹ Bill gladly states, "Its the best cash cow we ever had!"⁸⁰

Most landowners agree that the burden placed on the surface of the land is minimal when compared to compensation received from the lessees.⁸¹ This tends to be the consensus only when the surface landowner is also entitled to the wind royalties. A testator who intends to promote equitable division may sever the wind rights from the land, transfer the wind rights in equal shares to the beneficiaries, and partition the land in equal shares to the beneficiaries. Such action would create two grants: the wind rights and the surface rights. However, if the testator severs the wind rights from the surface in his will to promote equity, then a dilemma could arise between the beneficiaries.⁸² The beneficiary who receives the parcel of land with the most turbines, or the potential for wind development will, be burdened the most by the wind structures, infrastructure, and wind personnel that is on the land, while also sharing a reduced portion of the wind royalty payments with the beneficiaries who are transferred a lesser burdened parcel.⁸³ This situation will make a transfer unequal that the testator intends to be equal.

V. WIND AS A SEPARATE AND SEVERABLE PROPERTY RIGHT

Those involved with real property law commonly characterize property as a "bundle of rights" that, when severed, becomes many individual sticks, each representing a different right associated with property.⁸⁴ Although property owners execute sales reserving wind rights and testators draft wills devising these wind rights, most courts and legislatures have yet to rule as to the validity of wind as a separate property right.⁸⁵

76. See Krauss, *supra* note 16, at A1; see also O'Neill, *supra* note 32, at 5A.

77. Krauss, *supra* note 16, at A1.

78. O'Neill, *supra* note 32, at 5A.

79. *Id.*

80. *Id.*

81. See Krauss, *supra* note 16, at A1; see also O'Neill, *supra* note 32, at 5A.

82. See discussion *supra* Part II.

83. See discussion *supra* note 47.

84. See *Kaiser Aetna v. U.S.*, 444 U.S. 164, 176 (1979) (referring to the bundle of rights that are commonly characterized as property); see also Anthony Arnold, *The Reconstitution of Property: Property as a Web of Interests*, 26 HARV. ENVTL. L. REV. 281, 284-85 (2002).

85. See Brent Stahl, *Wind Development: Key Survey and Title Issues*, Wind Energy Institute 2007 CLE 7, Feb 2007.

Statutes and case law across the country have long established that a mineral interest can be conveyed, devised, or reserved.⁸⁶ However, as far as an interest in wind being a separate property right, there is very little authority for guidance. To date, only three jurisdictions have confronted the issue of severing wind rights from the surface estate.⁸⁷ Currently, states with no guiding authority are relying on contract and will instruments to grant, convey, and reserve wind rights.⁸⁸

In 1997, California became the first state to recognize wind as a separate property right.⁸⁹ In *Contra Costa Water Dist. v. Vaquero Farms, Inc.*, a municipal water district acquired 3,500 acres of Vaquero's land by eminent domain to be used for construction of a new reservoir project.⁹⁰ At the time of the taking, much of the land was subject to wind leases, and around 260 turbines were already completed on the ranch.⁹¹ The issue was whether the water district could acquire the surface use of the land while reserving the wind rights to Vaquero.⁹² Vaquero contended that the water district must acquire the entire parcel in fee, therefore compensating Vaquero for the value of the wind rights.⁹³ The water district proposed that it must only acquire Vaquero's wind rights that were inconsistent with the reservoir project and allow Vaquero to reserve and utilize the wind rights on the acquired land for the project.⁹⁴ The court compared the similarities of a wind interest and a mineral interest and held that Vaquero could continue operation of its wind lease without owning the surface estate.⁹⁵ The court reasoned that because wind rights are substantial rights that could be traded in the marketplace, the rights clearly could be excluded from condemnation.⁹⁶

In 2007, North Dakota enacted statutes describing a wind easement and prohibiting severance of any interest in a resource located on a parcel of land associated with wind power from the surface estate.⁹⁷ The only conveyance of a wind interest that North Dakota allows is the granting of the right to produce power from wind energy to another so long as the easement runs with the

86. See PATRICK H. MARTIN & BRUCE M. KRAMER, OIL AND GAS LAW § 202 (2d ed. 2004); see also *Miller v. Ridgley*, 117 N.E.2d 759, 761 (Ill. 1954); *State ex. rel. Comm'rs of Land Office v. Butler*, 753 P.2d 1334, 1338 (Okla. 1987).

87. See N.D. CENT. CODE §§ 17-04-03 to -04 (2004 & Supp. 2007); S.D. CODIFIED LAWS §§ 43-13-16 to -19 (2004); see also *Contra Costa Water Dist. v. Vaquero Farms, Inc.*, 68 Cal. Rptr. 2d 272 (Cal. Ct. App. 1997); see also Lisa Chavarria, *Wind Power: Prospective Issues*, 68 TEX. B. J. 832, 835-36 (2005) [hereinafter *Wind Power: Prospective Issues*].

88. See Parker, *supra* note 22, at 18.

89. *Contra Costa Water Dist.*, 68 Cal. Rptr. 2d at 277.

90. *Id.* at 273.

91. *Id.* at 275.

92. *Id.*

93. *Id.* at 274.

94. *Id.* at 276.

95. *Id.* at 278.

96. *Id.* at 277.

97. N.D. CENT. CODE § 17-04-04 (Supp. 2007).

burdened land and terminates by the terms of the agreement.⁹⁸ Additionally, if development has not occurred on the property within five years of the agreement, then the agreement is void and terminates.⁹⁹ The neighboring South Dakota legislature enacted statutes very similar to North Dakota's statutes in this area.¹⁰⁰ South Dakota defines a wind easement as a right executed by a landowner for the purpose of providing exposure of a wind generation system to the winds.¹⁰¹ Like North Dakota, South Dakota does not permit severance of any resource on a tract of land for production or potential energy production from wind power from the surface estate.¹⁰² Additionally, South Dakota does allow a landowner to grant a wind easement for production so long as the term is limited to fifty years or less.¹⁰³ While this restriction on the term limit may protect landowners, it could slow the progress of wind development within the state because developers are more likely to invest capital for a wind farm when they are not limited to a one-time, fifty-year lease.¹⁰⁴

Also, Minnesota has enacted a statute concerning property rights in wind.¹⁰⁵ In Minnesota, a landowner can grant a wind easement that has the same effect as a conveyance of a real property interest.¹⁰⁶ To date, neither the courts in South Dakota and Minnesota have established any case law interpreting these statutes.

Other states have taken no action to determine the validity of wind rights.¹⁰⁷ These other states include Texas, Iowa, and Washington, which make up three of the most wind intensive states.¹⁰⁸ For these states, there are several bodies of law that they could employ to determine property rights in wind.¹⁰⁹ One such body of law is that which governs wild animals.¹¹⁰ Under this body of law, ownership of the animal resides with the state until a person legally reduces the animal to possession.¹¹¹ Employing this theory by analogy to determine wind rights, one could not claim a wind right on land until the infrastructure had been installed to capture the wind for production; otherwise,

98. *Id.* § 17-04-04.

99. *Id.*

100. S.D. CODIFIED LAWS §§ 43-13-16 to -19 (2004).

101. § 43-13-16.

102. § 43-13-19.

103. *Id.*

104. *See Wind Power: Prospective Issues*, *supra* note 87, at 836-37.

105. MINN STAT. ANN. § 500.30 (West 2002 & Supp. 2009).

106. *Id.*

107. Parker, *supra* note 22, at 1.

108. *See id.*

109. TERRY E. HOGWOOD, *Against the Wind*, in 26 STATE BAR OF TEX.: OIL AND GAS RESOURCES SECTION REPORT 6, 11, No. 2 (2004).

110. *Id.*

111. *See Mertins v. Comm'r of Natural Res.*, 755 N.W.2d 329, 340 (Minn. Ct. App. 2008); *State v. Bartee*, 894 S.W.2d 34, 41 (Tex. App.—San Antonio 1994, no pet. h.).

ownership of the wind would remain with the state.¹¹² A landowner loses any claim to the wind by not capturing it when it passes his property.¹¹³ This would have the likely effect of validating reservations and transfers of a potential wind benefit on undeveloped land while making it permissible to reserve and transfer the wind interest on land already producing energy from wind.

The law of percolating water is another body of law that states could employ to determine property rights in wind.¹¹⁴ Percolating water is water that moves under the ground and is not an underground stream or reservoir.¹¹⁵ In some states, percolating water is privately owned by the landowner and is subject to the rule of capture.¹¹⁶ If landowners make reasonable use of the water and do not willfully waste it, then they can take as much water as can be captured from beneath their land.¹¹⁷ If wind were treated in the same legal manner as percolating water, then landowners could build wind turbines to capture all of the wind crossing their property and not be liable to an adjacent landowner for preventing the winds from crossing their property.¹¹⁸ However, the landowner capturing the wind could be liable to other landowners if the wind is prevented from crossing their property in a malicious or willfully wasteful manner.¹¹⁹ For instance, a landowner may not be able to build a structure blocking the wind for the sole purpose of preventing neighboring landowners from capturing the wind for the production of electricity unless the structure reasonably makes use of the wind.¹²⁰ Treating wind in the same legal manner as percolating water would make it a distinct and separate privately owned property right.¹²¹ This would allow landowners to reserve and transfer a right to the wind on land that only has a potential for wind development. However, the landowner would only have the right to capture the wind. Once the wind is captured it becomes the landowner's property.

States could also look to their oil and gas laws when analyzing property rights in wind.¹²² There are several oil and gas ownership theories followed by the states.¹²³ Some states, such as Ohio and Wyoming, follow the non-ownership theory.¹²⁴ Under the non-ownership theory, the owner of a mineral right does not own the oil and gas under the land until it is reduced to

112. Judon Fambrough, *Blowin' in the Wind*, TIERRA GRANDE, REAL ESTATE CENTER J., July 2002, at 1 [hereinafter *Blowin' in the Wind*].

113. *Id.*

114. See Smith, *supra* note 3, at 300.

115. *Blowin' in the Wind*, *supra* note 112, at 1-2.

116. Sipriano v. Great Spring Waters of Am., Inc., 1 S.W.3d 75, 75 (Tex. 1999).

117. Barshop v. Medina County Underground Water Conservation Dist., 925 S.W.2d 618, 625-26 (Tex. 1996).

118. *Blowin' in the Wind*, *supra* note 112, at 2.

119. See Barshop, 925 S.W.2d at 625-26.

120. See *Blowin' in the Wind*, *supra* note 112, at 2.

121. *Id.*

122. See Smith, *supra* note 3, at 302.

123. MARTIN & KRAMER, *supra* note 86, at § 203.

124. *Id.* at § 203.3.

possession.¹²⁵ The mineral interest owner has the exclusive right to explore, develop, and produce the oil under the land.¹²⁶ Other states, like Texas, New Mexico, Kansas, and Colorado, follow the ownership in place theory.¹²⁷ Under this theory, the owner of a mineral right owns all of the oil and gas in place under the land, but the owner is subject to being divested of ownership if other landowners producing oil and gas capture it.¹²⁸ Therefore, ownership of the oil and gas that was under the mineral interest owner's land terminates automatically when it moves under another landowner's land and is captured by his or her well.¹²⁹

Analogizing wind with oil and gas law and the law governing water rights has its flaws because wind does not share the same physical attributes as oil, gas, or water.¹³⁰ Therefore, it would be difficult to deem wind as owned in place by a landowner.¹³¹ However, one could apply a non-ownership theory that allows a landowner to go onto the property with the exclusive rights to explore and capture the wind by installing wind turbines.¹³² The wind blowing across a person's land is just another incident that comes with land ownership.¹³³ Therefore, states should recognize that the rights to prospect and develop the land are like other property rights that can be leased, sold, reserved, or devised.¹³⁴

Since only a few states have made legal determinations on the status of wind as a separate property right, most landowner's rights regarding severed wind rights are currently protected only by contractual agreements.¹³⁵ Nevertheless, this has not prevented landowners from considering wind as a distinguishable property right.¹³⁶ Within the last several years, when selling or conveying land, many landowners have started including deed reservation clauses relating to wind rights that are similar to mineral interest and royalty reservation clauses.¹³⁷ An appraiser in Texas indicated that the sellers of a substantial number of properties have reserved the rights of the wind royalty payments on the property.¹³⁸ It remains to be seen whether the courts will uphold these reservations in the future.

125. *Id.*

126. *Id.* at § 204.

127. *Id.* at § 203.3.

128. *Id.* at § 204.

129. *Id.*

130. Smith, *supra* note 3, at 301.

131. *Id.*

132. *Id.* at 304.

133. *Id.* at 302.

134. See *Barker v. Campbell Radcliff Co.*, 167 P. 468, 468 (Okla. 1917).

135. PARKER, *supra* note 22, at 18.

136. Stahl, *supra* note 85, at 7.

137. *Id.*; see also MARTIN & KRAMER, *supra* note 86, at §§ 219-20.

138. G. Philip Morehead, *Operational and Estate Planning for Wind Property Owners*, Wind Energy Institute 2008 CLE 5, Feb. 19-20, 2008.

VI. DEVISING A WIND RIGHT

Because there is no authority establishing wind as a property right in many states, estate planners must carefully draft wills that transfer wind rights in states that have neither permitted nor prohibited the severance of wind rights. In these states, an estate planner drafting a will for a testator wishing to sever the wind rights from the surface estate must ensure that the testator fully understands what he is doing and that his intentions are memorialized in the will with specificity.¹³⁹ The testator cannot simply grant the surface estate to one beneficiary and the wind rights to another without being ambiguous, which can be done when severing a mineral estate.¹⁴⁰ Granting only the wind rights, without a description of what is to be transferred, would be too ambiguous because most laws do not recognize wind rights as a distinct property right.¹⁴¹

In order to grant a wind estate, the testator must ensure that the grant carries with it all the rights necessary to ensure its use.¹⁴² At a very minimum, the conveyance must include: (i) a grant of rights that will ensure that the holder of the wind rights has the right to develop the wind; (ii) a description of the specific rights conveyed; and (iii) a description of the types of payments that the holder of the wind rights and the surface owner are entitled to.¹⁴³ If and when separate wind rights become both legally and commonly recognized, then it is likely that testators will need to utilize only a shortened form of these recommendations.¹⁴⁴

A. The Grant

The grant should be broad enough to ensure that the holder has the right to develop the wind estate.¹⁴⁵ For example, a broad grant would state:

[To A I give] all of the right, title, and interest to the surface estate necessary to use all of the wind resources on, over, above, and along the property including, without limitation, the exclusive and complete right and privilege to use any or all of the property for utility scale wind energy development, including converting wind energy into electrical, collecting and transmitting electrical energy, and all related activities.¹⁴⁶

139. See Lisa Chavarria, *Undertaking the Severance of Wind Rights*, Wind Energy Institute CLE 5, Feb. 19-20, 2008 [hereinafter *Undertaking the Severance of Wind Rights*].

140. See MARTIN & KRAMER, *supra* note 86, at § 301 (defining and analyzing the term “mineral estate”).

141. See Smith, *supra* note 3, at 305; see also Roderick E. Wetsel, H. Alan Carmichael & Lisa Chavarria, *Current Issues in Texas Wind Energy Law 2007: Leases, Ownership of Wind Rights and Litigation*, Wind Energy Institute CLE 15-16, Feb. 26, 2007.

142. See *Undertaking the Severance of Wind Rights*, *supra* note 139, at 5.

143. See *id.*

144. *Id.*

145. *Id.*

146. *Id.*

B. Detailed Description of Specific Rights

Additionally, the grant should provide a detailed description of the specific rights that are to be transferred with the wind estate.¹⁴⁷ Granted uses of the surface detailed in this section should closely resemble typical uses described in a wind lease.¹⁴⁸ The following are possible descriptions of the wind estate holder's rights and the surface estate owner's restrictions that could be included in the testator's grant:

[I give to A a]n exclusive easement and right to determine the feasibility of wind energy conversion and power generation in connection with the wind energy projects, including, but not limited to, conducting environmental studies, . . . wind direction and collecting meteorological and other data necessary for building a wind project.

[I give to A a]n exclusive easement and right to develop, construct, install, replace, repair, relocate, remove, maintain, operate and use utility scale wind turbines, underground and above ground electrical transmission and communications lines related to the operation of utility scale turbines, electric transformers; telecommunications equipment, roads, meteorological towers and other wind measurement equipment, control buildings, maintenance yards, and related facilities and equipment necessary and/or convenient for the operation and maintenance of one or more wind energy projects.

[I give to A a]n non-obstruction easement that prohibits the surface owner from placing improvements on the property that may interfere with the free flow of wind across the property or adjacent properties.

[I give to A a] non-exclusive easement over and across the property for the passage, intrusion or impact of any audio, visual, view, light, flicker, noise, vibration, electromagnetic, electrical, and radio frequency.¹⁴⁹

The grant should express that the description of rights is "not exhaustive and is not intended to limit the broad grant of wind rights and . . . surface use."¹⁵⁰ One purpose of the detailed description is to notify the surface owner of some limitations to his use of the surface and the types of surface uses granted to the owner of the wind rights.¹⁵¹ Another purpose is to limit claims by the surface owner challenging the validity of the grant by providing an unambiguous grant of specific rights necessary for a wind project.¹⁵²

147. *See id.*

148. *Id.*

149. *Id.* at 5-6.

150. *Id.* at 6.

151. *Id.*

152. *Id.*

If the testator wishes to grant the holder of the wind estate fewer rights to the accompanying surface and minimize the disruption of the surface owner's uses, then those wishes should be included in the detailed description.¹⁵³ The testator could include any number of limitations on the wind estate, such as restricting the placement overhead lines, prohibiting a substation on the property, and requesting that access roads be narrowed after construction.¹⁵⁴ A testator would likely restrict the wind estate's rights to maintain the integrity of the surface estate and encourage cooperation among the owners of the surface and wind rights. However, the testator must be careful to not deviate too far from terms included in a typical wind lease when specifically limiting or excluding the rights of the wind estate.¹⁵⁵ Too much restriction could discourage potential wind developers from leasing and could render the wind estate useless.¹⁵⁶ The following is an example of a clause limiting the rights of the wind estate:

No wind turbines, roads, transmission lines or related facilities shall be located within 1,200 feet of any existing residence, barns or corrals, church or school building, or 300 feet from any existing pump jacks, tank batteries or other improvements on the [p]remises [No substation shall be located on the premises unless agreed to by the landowner.] All transmission lines between turbines . . . must be placed underground. There shall be no overhead lines placed upon the [p]remises. . . . Lessee shall not conduct public tours of the wind energy project without the [land]owner's consent. Lessee shall not engage in any recreational activities, allow any pets on the [p]remises or carry firearms of any kind while on the [p]remises.

. . . .

At all times . . . [the land]owner shall have and reserve unto [the land]owner and [his] heirs, successors and assigns, the right to use all or any of the [p]roperty for all existing and future uses and activities which [will] not unreasonably interfere with the [wind rights granted under this conveyance], such as farming, ranching, and other agriculture uses; oil, gas and mineral exploration and development; drilling and development of water and other surface minerals for commercial or private use; and hunting and recreational activities.¹⁵⁷

This clause is merely an example and is not an exhaustive list of the limitations or requests that a testator may seek. The above clause includes rights and limitations that are not unreasonable and are similar to the ones included in a typical wind lease.¹⁵⁸ Additionally, the testator may reasonably

153. *Id.*

154. *Id.*

155. *See id.*

156. *See id.*

157. Wetsel & Carmichael, *supra* note 49, at Exhibit B, Part 5 (a)-(b).

158. *See id.*; *see generally infra* App. A.

require the owner of the wind rights or the lessee of the wind rights to obtain a bond to secure the removal of the wind power facilities and the restoration of the land upon termination of the owner's or lessee's use of the surface for wind energy production.¹⁵⁹ The person owning the wind rights can negotiate for these provisions in a lease with a developer to pass the burden of fulfilling the obligations to a third-party lessee.¹⁶⁰ It is important not to impose any limitations or requests on the wind estate that could unreasonably deter future wind development on the property.

C. Allocation of Payments

The testator could decide that all payments associated with wind production go to the holder of the wind estate or could provide a measured approach to allocate the payments between the surface estate and the wind estate.¹⁶¹ Under a measured approach, the testator would allocate payments to reflect both the surface owner's and the wind owner's interests in the property.¹⁶² The testator would likely prefer this allocation to reduce conflicts between the two parties and to ensure that the surface owner receives compensation for some of the items that interfere with the surface use.¹⁶³ One approach is to grant the wind rights owner all income payments generated from the wind turbines and to grant the surface owner specific surface disturbance payments.¹⁶⁴ Understanding the types of payments a wind lease provides will be necessary to draft the payment allocation section.¹⁶⁵ The following is a suggested clause to draft into the will to allocate payments:

[To A, I give as his separate property and estate, an] interest in and to all of the proceeds or value of any and all royalties, rentals, payments in lieu of royalty, or other benefits directly or indirectly paid . . . for, or in anticipation of, or in connection with, the generation of electricity from wind power on the following described lands . . . to wit:

[Description of the Real Property]

. . . .

There is excluded from this conveyance any sums paid . . . for surface damages to the above described land in connection with the generation of

159. See *Undertaking the Severance of Wind Rights*, *supra* note 139, at 6; see also Wetsel & Carmichael, *supra* note 49, at Exhibit B, Part 18(a); *infra* App. A § 9.4.

160. See generally Wetsel & Carmichael, *supra* note 49, at Exhibit B.

161. See *Undertaking the Severance of Wind Rights*, *supra* note 139, at 6.

162. See *id.*

163. See *id.* at 6, 9.

164. See *id.* at 9.

165. See *Undertaking the Severance of Wind Rights*, *supra* note 139, at 6; *infra* App. A at § 3.6.

electricity by wind power, including, but not limited to, easements for the location and use of roads, transmission lines, ingress and egress to [the] land; payments for the location or removal of wind turbines and substations, transmission lines, maintenance facilities[,] and storage yards; payments made to compensate for loss of hunting and grazing rights; sales of water, caliche, gravel[,] or other building materials.¹⁶⁶

VII. DEVISING A ROYALTY INTEREST IN WIND

A testator may wish that the wind rights not be severed from the surface estate but want to grant a percentage of the royalties from the wind rights to other beneficiaries. For instance, a testator may wish to exclusively leave the family farm to interested child A, who lives near the family farm, and leave child B a sum of money comparable to the farm's value in the will. However, the testator who wants the portions of the estate to be relatively equal may grant a royalty interest in the potential or developed wind rights to child B, the child who does not own the farm. This wind royalty would be similar to an oil and gas non-executive mineral interest and nonparticipating royalty.¹⁶⁷ In oil and gas law, the owner of a non-executive mineral interest has the right to a royalty and to either bonus or rental payments under existing or future leases.¹⁶⁸ However, the owner of the non-executive mineral interest has no rights to exploit the minerals or to execute leases.¹⁶⁹ Granting a wind royalty allows the wind rights owner the exclusive right to enter into a wind lease, while reserving or granting a percentage of the income payments to other beneficiaries.¹⁷⁰ The following is an example of a will provision granting a wind royalty using the above hypothetical:

[To A, I give my] following described lands . . . to wit:

[Description of the Real Property]

[To B, I give a nonparticipating wind royalty interest in and equal to a undivided one-half (1/2)] all of the proceeds or value of any and all royalties, rentals, payments in lieu of royalty, or other benefits directly or indirectly paid . . . for, or in anticipation of, or in connection with, the generation of electricity from wind power on [my] following described lands . . . to wit:

166. Wetsel & Carmichael, *supra* note 49, at App. 9.

167. See RICHARD MAXWELL, PATRICK H. MARTIN & BRUCE M. KRAMER, OIL AND GAS CASES AND MATERIALS 512 (8th ed. 2007); MARTIN & KRAMER, *supra* note 86, at § 301 (defining a non-executive mineral interest); *Undertaking the Severance of Wind Rights*, *supra* note 139, at 9.

168. MARTIN & KRAMER, *supra* note 86, at § 301.

169. *Id.*

170. *Undertaking the Severance of Wind Rights*, *supra* note 139, at 9.

[Description of the Real Property]

There is excluded from this [nonparticipating wind royalty interest] any sums paid . . . for surface disturbances to the above described land in connection with the generation of electricity by wind power, including, but not limited to, easements for the location and use of roads, transmission lines, ingress and egress to said lands; payments for the location or removal of wind turbines and substations, transmission lines, maintenance facilities[,] and storage yards; payments made to compensate for loss of hunting and grazing rights; sales of water, caliche, gravel[,] or other building materials.¹⁷¹

The effect of this transfer is to allow child A to have the entire farm and exclusive executive right to enter into leases with wind developers, while allowing child B, who has little interest in the family farm, a share of the income generated from wind energy.¹⁷² The testator may prefer devising a royalty interest if the testator believes that the beneficiary of the land and executive right will better maintain the integrity of the land and make better decisions utilizing the wind rights. As previously discussed in devising a wind interest, the testator may opt to define specific rights or limitations regarding the use of the land for wind development in the grant of the executive right to a beneficiary.¹⁷³

It is important that the will specifically define the extent of the nonparticipating wind royalty interest grant in a definitions section or define wind royalty interest directly in the provision; many jurisdictions have not recognized a wind royalty interest but have recognized a non-executive mineral interest.¹⁷⁴ Other jurisdictions still look to the language of the grant and the intent of the grantor to determine whether a mineral interest or non-executive mineral interest was conveyed.¹⁷⁵ If non-executive mineral interest and nonparticipating royalty are still considered ambiguous terms after more than a century of oil and gas law has evolved, then a nonparticipating wind royalty would also likely be considered ambiguous, making a specific definition of what is intended to be conveyed necessary.

171. See Wetsel & Carmichael, *supra* note 49, at App. 8 (noting that there is a reservation clause for grantors).

172. See generally MARTIN & KRAMER, *supra* note 86, at § 328 (noting the participation in lease benefits).

173. See discussion *supra* Part VI.B.

174. See *Altman v. Blake*, 712 S.W.2d 117, 118-20 (Tex. 1986); see also MARTIN & KRAMER, *supra* note 86, at § 301.

175. See *Thornhill v. Sys. Fuels, Inc.*, 523 So.2d 983, 989 (Miss. 1988). The court will consider the deed as written, the consideration paid, and the situation of the parties at the time of the conveyance to determine what interest was conveyed. *Id.*

VIII. CONCLUSION

Remember that this Comment provides only suggestions on successfully drafting will provisions to transfer wind rights. These provisions can be modified by an estate planner so that they are tailored to reflect a particular testator's intent.¹⁷⁶ It is prudent not to include limitations on the wind estate that are too inconsistent with a typical wind lease so that one can utilize the wind rights.¹⁷⁷ If and when more states widely recognize and legally define wind rights, then the clarity and comprehensive detail that testators currently need to include in their wills should be relaxed.¹⁷⁸

Once the testator dies, the title to property under the will vests immediately in its beneficiaries.¹⁷⁹ However, the effectiveness of an estate plan depends on completing the transfers.¹⁸⁰ Although it has not been determined whether wind rights may be transferred, it is important to ensure that there is a complete description of the wind rights transferred and that there is proper recording of the transfer once the will is probated.¹⁸¹ After the will is probated, a special warranty deed describing the wind right should be recorded in the county records just as one would record a mineral interest.¹⁸² Usually this can be easily accomplished through an executor's deed. This effectively puts others on constructive notice that the wind rights are owned separate from the land, and it prevents the transfer from being defeated by a subsequent transfer or purchase.¹⁸³ In many states, only the recording of the will is sufficient, but, as a practical matter, recording a deed reflecting the transfer should be recorded.¹⁸⁴ Additionally, any taxation effects that a transfer causes should always be considered by the estate planner.¹⁸⁵

Although reservation and devise currently sever wind rights and royalties, action by a state legislature or a court ruling that wind is not a transferable property right could invalidate these severances. In that case, a court could render the transfer void, and the surface owner would retain the right to develop the wind resources. However, it seems unlikely that a state would invalidate a wind-right grant on property with wind energy development already established because the wind has a quantifiable value assigned by the marketplace.¹⁸⁶ Estate planners should disclose to testators wishing to transfer wind rights the risk that the law may prevent carrying out their wishes.¹⁸⁷

176. *Undertaking the Severance of Wind Rights*, *supra* note 139, at 6.

177. *See id.* at 5.

178. *See id.*

179. TEX. PROB. CODE ANN. § 37 (Vernon 2003).

180. Morehead, *supra* note 138, at 4.

181. *Id.*; *see also* TEX. PROP. CODE ANN. § 11.001 (Vernon 2004 & Supp. 2008).

182. *See* MARTIN & KRAMER, *supra* note 86, at § 439.1.

183. *Id.*; *see also* TEX. PROP. CODE ANN. § 13.001-003.

184. *See* TEX. PROB. CODE ANN. § 96.

185. Morehead, *supra* note 138, at 4.

186. *Id.*

187. *See* Wetsel & Carmichael, *supra* note 49, at 17.

However, if the testator and estate planner do not keep the disclosure confidential, it could later be used to challenge the validity of the transfer on the grounds the testator and estate planner knew the transfer was invalid when they executed the will.

As wind development continues to expand in the United States, controversy will continue to develop. Transferring wind rights is one of the primary areas of controversy. States should be proactive and enact legislation to clarify the law on this cloudy issue instead of further obscuring it by allowing the law to develop over time through industry experience and the courts. Societal, political, and economic forces have aligned to allow for wind energy development to remain for the foreseeable future.

by Christianson Hartman

APPENDIX A

Sample Surface Lease and Wind Easement

This Surface Lease and Wind Easement (“Lease”) is made and entered into effect as of the Effective Date (as defined below) by and between [Lessor’s Name] (collectively, the “Lessor”), and [Lessee’s Name] (the “Lessee”). Lessor and Lessee are sometimes collectively referred to as the “Parties” or singularly as a “Party.”

WHEREAS, the Parties now wish to enter into and execute this Surface Lease and Wind Easement;

NOW, THEREFORE, in consideration of the covenants and agreements set forth herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged and agreed, the Parties hereby mutually agree as follows:

ARTICLE I.

DEFINITIONS & SCOPE OF LEASE

Section 1.1 Definitions

“Effective Date:”	February 1, 2007
“Lessor:”	(and such party’s successors and assigns)
“Lessee:”	(and such party’s successors and assigns)
“Premises:”	That certain 259.3 acres of real property in Nolan County, Texas, the legal description of which is attached hereto as Exhibit A and incorporated herein for all purposes.
“Term:”	The period commencing on the Effective Date and continuing for a period of twenty-nine (29) years thereafter, as more fully described in Section 2.1.
“Rent:”	Amounts to be paid by Lessee to Lessor in accordance with Section 3.1 hereof.
“Wind Project:”	The wind energy project consisting of Wind Facilities (as herein defined) to be developed by Lessee on some or all of the Premises and other properties in the

vicinity of the Premises, as more particularly described in Exhibit E (subject to expansion and/or contraction from time to time in Lessee's sole determination).

Section 1.2 Grant & Scope of Lease

- (a) **Granting Clause.** The Lessor, for and in consideration of the Rent and other charges to be paid hereunder, and the other covenants and agreements to be performed by Lessee, demises and leases the Premises to Lessee, and Lessee hereby leases the Premises from the Lessor on the terms and conditions set forth herein, commencing on the Effective Date and ending the last day of the Term unless sooner terminated or extended.
- (b) **Lessee's Permitted Uses.** Commencing on the Effective Date and ending on the last day of the Term (unless sooner terminated or extended), Lessee may continuously use and occupy the Premises for the purpose of converting wind energy to electricity, including, without limitation, (a) the generation, collection and/or transmission by Lessee of wind generated electric power on the Premises; (b) the construction, installation, operation, and maintenance by Lessee of wind turbine generators ("Wind Turbine Generators"); meteorological towers, supporting structures, foundations and pads, footings, electrical transformers, fixtures, above and below ground electric distribution, collection, and transmission lines; substations, control buildings, maintenance facilities, above and below ground communication cables and/or networks, access roads, lay-down and staging areas, crane pads, interconnection facilities (including but not limited to substations, relays, transformers and the like), related facilities, and equipment; and all other wind generation related equipment and facilities on the Premises (the foregoing items of Section 1.2(b)(b) collectively referred to herein as the "Wind Facilities") for their use or operation in conjunction with large wind turbines on the Premises; (c) conducting studies, surveys, or tests for the construction and operation of the Wind Facilities; and (d) access by Lessee to and from the Wind Facilities and the Wind Energy Project and for any purposes incidental thereto. Lessee reserves the right to relocate or replace existing Wind Facilities upon the Premises during the term of this Lease.
- (c) **Lessor's Permitted Uses.** Subject to Lessee's rights under Section 1.2(b), Lessor shall have the right to use of the Premises not occupied by Wind Facilities for farm, conservation, recreational,

and ranch purposes which do not interfere, currently or prospectively, with Lessee's use, enjoyment, and occupancy of the Premises, including the construction, maintenance or operation of, or access to, the Wind Facilities, whether located on the Premises or elsewhere, or other activities permitted hereunder. Lessor shall be entitled to use, without fee for such use or any required maintenance, any private road constructed by Lessee on the Premises for access to the balance of the Premises. Any such use by Lessor shall be at its own risk, expense, and liability; the Lessee shall have no responsibility therefore.

Section 1.3 Wind Easement

The "Easement Premises" means the area of real property owned by Lessor and described on Exhibit B attached hereto (the "Easement Land"), together with all vertical space from the surface of the Easement Land to six hundred (600) feet above the surface of the Easement Land.

Lessor understands that a free flow of wind to the Wind Energy Project is required for the Lessee to be able to finance and construct the Wind Energy Project, but that not all tracts of land within or near the Wind Energy Project may have Wind Turbine Generators located on them.

Lessor hereby covenants and agrees not to obstruct, or to allow any obstruction to the free flow of the wind throughout the Easement Premises. Trees, structures, and improvements located on the Easement Premises as of the date of this Lease shall be allowed to remain and Lessee may not require their removal except as required, in Lessee's reasonable judgment, for the construction and/or maintenance of the Wind Facilities, if any. Neither Lessor nor anyone on Lessor's behalf may place or plant any trees, structures or improvements taller than 40 feet on the Easement Premises (except drilling rigs, if permitted pursuant to Section 10.14) after the date of this Lease which may, in Lessee's sole judgment, impede or interfere with the flow of wind to any Wind Turbine Generator located anywhere within the Wind Energy Project, unless Lessor has received prior written approval from Lessee for any such trees, structure, or improvement.

In the event that no Wind Facilities are constructed on the Easement Premises, but Lessee or any of its affiliates have constructed Wind Turbine Generators within the "Minimum Distance" (defined below) of the Premises, Lessee may designate some or all of the Easement Premises as "Non-Obstruction Premises" in order to ensure the free flow of wind to the Wind Energy Project. The "Minimum Distance" means 40 times the

length of the diameter of the circle swept by the rotor of the largest Wind Turbine Generator located on the Wind Energy Project. If Lessee does designate some or all of the Easement Premises as Non-Obstruction Premises, Lessee shall compensate Lessor as provided in Section 3.7, and Lessor hereby covenants and agrees not to obstruct, or to allow any obstruction to the free flow of the wind throughout the Non-Obstruction Premises. Trees, structures, and improvements located on the Premises as of the date of this Lease shall be allowed to remain and Lessee may not require their removal except as required, in Lessee's reasonable judgment, for the construction and/or maintenance of the Wind Facilities, if any, regardless of whether any portion of the Premises or the Easement Premises is hereinafter released pursuant to Section 1.5. Neither Lessor nor anyone on Lessor's behalf may place or plant any trees, structures, or improvements taller than 40 feet on the Non-Obstruction Premises (except drilling rigs, if permitted pursuant to Section 10.14) after the date of this Lease which may, in Lessee's sole judgment, impede or interfere with the flow of wind to any Wind Turbine Generator located anywhere within the Wind Energy Project, unless Lessor has received prior written approval from Lessee for any such trees, structure, or improvement. Lessee shall have the right to record a memorandum of the Non-Obstruction Premises and Lessor shall execute any such memorandum upon written request of Lessee.

Section 1.3 shall survive the termination of this Lease for the full Term, but only as to the Non-Obstruction Premises that exist as of the date that is four (4) years after the Effective Date. If no Wind Facilities are constructed on the Premises, and no Wind Turbine Generators have been constructed by Lessee or any of its affiliates within the Minimum Distance of the Premises as of the date that is four (4) years after the Effective Date, no provisions of Section 1.3 shall survive the termination of this Lease.

Section 1.4 Roads

With respect to the use and installation of roads:

- (a) Lessee will use public roads and existing farm or ranch roads and "turnrows" (collectively, the "Existing Roads") where commercially reasonable for Lessee's use and access for the construction, operation, and maintenance of the Wind Energy Project. If Lessee upgrades an Existing Road (e.g., puts gravel or caliche on it) to make it usable as a road for the Wind Energy Project, such upgrade will be at Lessee's cost, as will the ongoing maintenance, subject to the provisions of Sections 10.14 and 10.20.

- (b) Where new roads are necessary, Lessee will consult with Lessor as to the location of such roads *before* finalizing the project's site plan and beginning construction. Lessee will comply with Lessor's request regarding the location of such roads to the extent such request is commercially reasonable, but the location of the roads shall remain in the Lessee's sole discretion and subject to change during construction of the Wind Facilities, if necessary to comply with laws, regulations, or engineering and design requirements. Any new roads will be constructed in such a manner to allow farm equipment crossing and minimal disturbance to land contour features.
- (c) During operation of the Wind Energy Project, Lessee shall use commercially reasonable efforts to control the growth of weeds and erosion within ten (10) feet of the roads that Lessee constructs or improves pursuant to this Lease. Lessee agrees to cooperate reasonably with local agricultural representatives to develop methods to control weed growth and erosion, and the implementation of any plan agreed upon by Lessee and such agricultural representatives to control weed growth and/or erosion shall be deemed to be a commercially reasonable effort.

Section 1.5 Release

On or before five (5) years after the Effective Date, Lessee shall release any portion of the Premises or Easement Premises (the "Released Premises") no longer deemed necessary by Lessee. Lessee shall have sole discretion to determine the portion (all, whole, or part(s)) of the Premises or Easement Premises necessary for its Wind Facilities. Furthermore, Lessor shall be released from the obligations of this Lease if, within four (4) years of the Effective Date, Lessee has failed to commence the installation of Wind Facilities on the Premises. At any point during the "Assessment Stage," as that term is defined in Section 2.1 below, Lessee may determine that the Premises are not suitable for the development of a wind farm, due to, but not limited to, measured and/or correlated wind resource assessment; permitting problems; interconnection issues and/or low power prices for wind generated electricity at the Premises, or for any other reason in the Lessee's sole discretion. In such a case, Lessee may give notice to Lessor during the Assessment Stage of its desire to terminate the Lease, at which point Lessor shall only be owed the then-current Assessment Rent through the date that Lessee's termination of the Lease and relinquishment of the Premises occurs.

**ARTICLE II.
LEASE TERM**

Section 2.1 Lease Term

- (a) The maximum term of this Lease ("Term") is twenty-nine (29) years from the Effective Date of the Lease unless terminated earlier or extended in accordance with its terms. The Term shall be further divided into two distinct stages: (i) the "Assessment Stage," which shall last no longer than four (4) years from the Effective Date but may end sooner if the installation of Wind Facilities on the Premises occurs before the fourth (4th) anniversary of the Effective Date; and (ii) the "Production Stage," which begins on the calendar day succeeding the Assessment Stage and lasts through the end of the Term. The Production Stage shall be for a minimum of twenty-five (25) years, but may be longer if the Lessee is able to enter the Production Stage at some point before the fourth (4th) anniversary of the Effective Date. If Lessee commences installation of Wind Facilities at any time before the end of the four (4) year Assessment Stage, then the Production Stage shall automatically be extended to be twenty-five (25) years plus the remaining term available under the Assessment Stage.
- (b) If, at any time during the term of this Lease, Lessee deems it to be necessary or to meet financing, legal or regulatory requirements, Lessor shall execute and enter into a new lease with Lessee or its designee in the same or substantially the same form as this Lease with a term equal to the remaining term of this Lease as of the date of execution of the new lease.

Section 2.2 Termination of Lease

The occurrence of any of the following events shall terminate this Lease:

- (a) The expiration of the term of this Lease as set forth in Section 2.1;
or
- (b) The written agreement of the parties to terminate this Lease; or
- (c) An uncured material breach of this Lease by either party and the election of the non-breaching party to terminate the Lease pursuant to Article IX; or

- (d) After the commencement of operation of the Wind Facilities, and subject to the rights of lenders set forth in Article VII, the failure of all of the Wind Facilities to operate for a continuous period of at least six months for reasons other than a Force Majeure; or
- (e) Lessee's failure to commence installation of the Wind Facilities prior to the end of the Assessment Stage or Lessee's decision (provided in a written notice to Lessor) made during the Assessment State that the Premises are not suitable for the development of a utility-scale wind farm; or
- (f) The Lessee determines, after at least fifteen "Production Years" (as defined below), that it is no longer economical to operate the wind farm due to the aging condition of the Wind Turbine Generators, and the Lessee desires to terminate the Lease and fulfill Lessee's obligations of "Removal and Restoration" in Section 4.4 hereof; or
- (g) Lessee exercises its rights to terminate the Lease in accordance with the provisions of Article VIII.

Section 2.3 Survival of Covenants

The Parties acknowledge that the covenants, conditions, rights, and restrictions in favor of Lessee pursuant to this Lease including, but not limited to, the easement described in Section 1.3, and Lessee's use of and benefit from those covenants, conditions, rights, and restrictions, may constitute a portion of a larger wind energy project with which the Premises will share structural and transmission components, ingress and egress, utility access, and other support, all of which are specifically designed to be interrelated and integrated in operation and used for the full life of the project, and that the covenants, conditions, rights, and restrictions in favor of Lessee pursuant to this Lease shall not be deemed nominal, invalid, inoperative, or otherwise be disregarded while any portion of the Wind Energy Project remains operational.

ARTICLE III. RENT, DAMAGES, AND TAXES

Section 3.1 Rent

Lessee shall pay to Lessor an annual rental payment comprised of either the "Assessment Rent" or the "Production Rent." The Assessment Rent

and Production Rent are sometimes referred to collectively herein as "Rent."

- (a) The first payment of Assessment Rent (i.e., the payment for the first Assessment Year, as defined below) shall be equal to one dollar (\$1.00) per acre for the year commencing on the Effective Date of this Lease and ending on the first anniversary of the Effective Date (the first "Assessment Year"), and shall be payable at the execution of this Lease or by posting with the U.S. mail service such payment (via first class, certified service). The payment of Assessment Rent for the second year of the Assessment Stage (i.e., the second Assessment Year) shall be in the amount of fifty cents (\$0.50) per acre, payable no later than seven (7) days after the first anniversary of the Effective Date. The Assessment Rent for the third year of the Assessment Stage (i.e., the third Assessment Year) shall be in the amount of forty-three cents (\$0.43) per acre, payable no later than seven (7) days after the second anniversary of the Effective Date. The Assessment Rent for the fourth year of the Assessment Stage (i.e., the fourth Assessment Year) shall be in the amount of twenty-eight cents (\$0.28) per acre, payable no later than seven (7) days after the third anniversary of the Effective Date. The Assessment Rent shall remain the same for the different year-long periods as indicated above whether or not Lessor has, or does not have, a meteorological measuring tower located on Lessor's property during the Assessment Stage.
- (b) As of the "Commencement Date," which shall be the first day of the Production Stage and the beginning of the first "Production Year," the rent due to Lessor shall be the "Production Rent," which shall be the *greater* of either the "Minimum Turbine Rent" or the "Percentage of Gross Revenues Rent" for the applicable periods as defined in the table below.

APPLICABLE PERIOD FOR PRODUCTION RENT	MINIMUM TURBINE RENT PER PRODUCTION YEAR FOR EACH MEGAWATT OF NAMEPLATE CAPACITY OF WIND TURBINE GENERATORS INSTALLED ON THE PREMISES	PERCENTAGE OF “GROSS REVENUES” RENT (BEING THE APPLICABLE PERCENTAGE SET FORTH BELOW OF GROSS REVENUES (DEFINED IN SECTION 3.1 (C)) RECEIVED BY LESSEE DURING THE PRODUCTION YEAR)
Production Years 1 through 5	\$3,000	4.00%
Production Years 6 through 10	\$3,400	4.00%
Production Years 11 through 15	\$3,800	4.50%
Production Years 16 through 20	\$4,200	5.00%
Production Years 21 through 25	\$4,600	5.50%
Production Years 26 through the end of the Term	\$5,000	6.00%

The “Commencement Date” shall be the date upon which the median Wind Turbine Generator for the entire Wind Energy Project is completely erected (meaning that all three blades have been connected to that Wind Turbine Generator’s hub and the erection crane has left the erection pad for that Wind Turbine Generator). In the event that the Wind Energy Project is to contain an even number of Wind Turbine Generators, the median Wind Turbine Generator shall be deemed to be that Wind Turbine Generator which is half of the number of Wind Turbine Generators to be installed at the Wind Energy Project. A “Production Year” shall consist of twelve calendar months. The first “Production Year” shall commence on the Commencement Date. Lessor agrees to execute a written confirmation of the Commencement Date, in recordable form, upon request by Lessee.

In the event that the Premises shall only have constructed upon it wind turbine generation infrastructure as contemplated in Section 1.2(b)(b) and no Wind Turbine Generators, the Production Rent due to Lessor shall be the greater of (1) \$500 per year or (2) payments as specified in the table below:

APPLICABLE PERIOD FOR PRODUCTION RENT WHEN ONLY WIND TURBINE GENERATION INFRASTRUCTURE IS ON THE PREMISES	RENT DUE TO LESSOR PER ACRE (NOT INCLUDING RELATED PREMISES)
Production Years 1 through 5	\$15 per acre
Production Years 6 through 10	\$15 per acre
Production Years 11 through 15	\$17.50 per acre
Production Years 16 through 20	\$22.50 per acre
Production Years 21 through 25	\$27.50 per acre
Production Years 26 through the end of the Term	\$32.50 per acre

Definition of “Gross Revenues”

- For the purposes of this Lease, “Gross Revenues” is defined as the sum of all gross receipts of Lessee from the sale of electricity generated by Lessee on the Premises, net of all expenses of collection from Lessee’s power purchaser(s), including, without limitation, attorneys’ fees and court costs. Gross Revenues shall include (A) any renewable energy credits generated by Lessee on the Premises (of state or national issue) (less the Lessor’s proportionate part of any sales expenses incurred by Lessee in the sale of renewable energy credits) (and less any adversarial expenses of collection—i.e. litigation, mediation, and/or arbitration) from Lessee’s power purchaser(s), and (B) carbon dioxide credits. Gross Revenues shall NOT include any of the following: any other tax credits or any other credits received by, or paid to, Lessee by any governmental or quasi governmental authority, including, without limitation, (1) any federal or state income tax credits or any property tax credits or abatements, or (2) Federal Production Tax Credits available pursuant to Section 45 of the United States Tax Code or its successor or any similar future Federal subsidy or incentive to encourage wind-powered electric power generation (“Federal Incentives”). The definition of “Gross Revenues” shall include and capture any inflation adjustment mechanism that Lessee’s power purchase arrangement(s) may contain.
- For purposes of determining payments in accordance with the foregoing, when electricity from the Wind Energy Project on both the Premises and other property is delivered to a common meter, the number of kilowatt hours of electricity generated on the Premises shall be determined for each period in accordance with the following formula:

$$(CM)(PT/WFT)=TKW$$

where (i) **CM** is the total number of kilowatt hours available for sale at such common meter; (ii) **PT** is the total number of wind turbine generators located on the Premises that deliver electricity to such common meter; (iii) **WFT** is the total number of wind turbine generators in the Wind Energy Project that deliver electricity to such common meter; and (iv) **TKW** is the total number of kilowatt hours generated by Lessee on the Premises for use in determining the payments due to Lessor in accordance with Section 3.

3. In conjunction with each payment of Production Rent made to Lessor, Lessee shall furnish to Lessor a statement setting forth the amount of Gross Revenues received by Lessee during the Production Year and the Production Rent due Lessor for each Production Year.

Section 3.2 Payments

- (a) Lessee shall pay Lessor the Assessment Rent as provided in Section 3.2. Lessee shall NOT be entitled to a *pro rata* credit of Assessment Rent in the event that the Commencement Date does not occur on the anniversary of the Effective Date. In the event that the Premises shall only have constructed upon it wind turbine generation infrastructure as contemplated in Section 1.2(b)(b) and no Wind Turbine Generators, the Production Rent shall be due within thirty (30) days of the beginning of each Production Year. If Wind Turbine Generators are located on the Premises, for every Production Year, Lessee shall pay the Minimum Turbine Rent at the beginning of the Production Year to Lessor, and shall, within thirty days of the end of such Production Year (as provided below), provide Lessor with the production figures for the Wind Turbine Generators located on the Premises as derived from the third-party meter used to measure electricity delivered to the electrical grid. In the event that the total wind farm is comprised of more than one landowner, the total production as measured at the aforementioned meter shall be adjusted *pro rata* for the total number of Wind Turbine Generators for which such meter serves as the measuring device for total electricity produced by the wind farm. In the event that the Minimum Turbine Rent is greater than the total dollar value of the applicable Percentage of Gross Revenues Rent due for that particular year of the

Production Stage, Lessee shall not owe Lessor any more Rent for that Production Year. If the Minimum Turbine Rent is less than the total dollar value of the applicable Percentage of Gross Revenues Rent due for that Production Year, Lessee shall owe to Lessor the difference in value between the Minimum Turbine Rent and the total dollar value of the applicable Percentage of Gross Revenues for that particular Production Year. Lessee shall present to Lessor the measured production figures within thirty (30) calendar days of the end of each Production Year, and shall pay to Lessor any amounts owed in addition to the Minimum Turbine Rent for that particular Production Year within sixty (60) days of the end of such Production Year.

- (b) **Delinquent Payments.** If Lessee should fail to pay Lessor any sum to be paid by Lessee to Lessor hereunder within thirty (30) days after such payment is due, interest on the unpaid amount shall accrue at a rate of ten percent (10%) per annum or the maximum rate allowed by law, whichever is less, from the date payment was due until the date payment is made. An adjustment payment made by Lessee as the result of an independent audit conducted at Lessee's expense shall not be subject to a late charge described herein.

Section 3.3 Records

Lessee shall prepare, and maintain for at least three (3) years, true, accurate, and complete records for each year of the Term, showing collections for all revenues received by Lessee as a result of operations on the Premises, including but not limited to wholesale sales of energy or capacity from the Wind Facilities, and any taxes, credits, refunds, or penalties paid or received by Lessee. Lessor may, through an independent certified public accountant (no more than once per year) examine and audit such records for the current and two (2) preceding lease years, and, if and to the extent Lessee is not legally prohibited from sharing the same with such accountant, the applicable power agreements between Lessee and the power companies, all at Lessor's expense, at the location where Lessee maintains the records, during Lessee's regular business hours. Lessee may condition provision of applicable power agreements to Lessor's accountant with such accountant's execution of a non-disclosure agreement satisfactory to Lessee in Lessor's reasonable discretion. If the audit reveals an understatement of Gross Revenues for any lease year of more than three percent (3%), Lessee shall reimburse Lessor for all reasonable costs of the audit. If the audit reveals an overstatement or understatement of Gross Revenues, an appropriate cash adjustment of

Production Rent shall be made between the Parties within thirty (30) days thereafter (Lessee may offset any amount owing to it against Rent hereunder next coming due).

Section 3.4 No Representation

Lessee makes no representation or warranty as to the likelihood that the Wind Facilities will generate sufficient electricity, or that any purchase or sales agreement for such electricity will provide adequate revenues, so as to create any entitlement in Lessor to Percentage of Gross Revenues Rent during any period of time. Lessor acknowledges that the operation of the Wind Facilities is subject to adverse weather, lack of wind, equipment failures, lack of market, and other events beyond the control of Lessee which may interrupt or prevent electricity generation and transmission, and that receipts for electricity generated may also be affected by the terms of any relevant purchase or sale agreement and performance by any buyer. Any representation by Lessee to Lessor as to the expected production from the Wind Facilities or the amount of expected Percentage of Gross Revenues Rent is purely an estimate based on the information available to Lessee at the time and is not a guarantee that any such production will occur or that such an amount of Percentage of Gross Revenues Rent will become due to Lessor at any time.

Section 3.5 Taxes, Assessments and Utilities

- (a) Lessor shall pay, when due, all real property taxes and assessments levied against the Premises and all personal property taxes and assessments levied against any property and improvements owned by Lessor and located on the Premises. Subject to Section 3.5 (c), if Lessor shall fail to pay any such taxes or assessments when due, Lessee may, at its option, pay those taxes and assessments and any accrued interest and penalties, and deduct the amount of its payment from any Rent or Percentage of Gross Revenues Rent otherwise due to Lessor from Lessee.
- (b) Lessee shall pay only the additional property taxes and assessments that may be levied or assessed by reason of Lessee's use of the Premises and all personal property taxes and assessments levied against the Wind Facilities when due. If the Premises experiences any increase in the amount of real property taxes assessed as a result of the installation of the Wind Facilities on the Premises, including any reclassification of the Premises, Lessee shall pay or reimburse Lessor an amount equal to the increase no later than ten

(10) days prior to the date each year on which the applicable real estate taxes are due to be paid, provided that Lessor provides Lessee with copies of the applicable current and past statements of real estate taxes payable for the Premises and any related information demonstrating the reasons for any increase in real estate taxes.

- (c) Either party may contest the validity or amount of any levied taxes, assessments or other charges for which each is responsible under this Lease as long as such contest is pursued in good faith and with due diligence and the party contesting the tax, assessment, or charge has paid the obligation in question or established adequate reserves to pay the obligation in the event of an adverse determination. In this regard, if the taxes that may be due if the contest is lost are not paid on or prior to the last possible date such taxes must be paid to avoid incurring interest or penalty expenses from the taxing authority, but a contest on the amount of taxes to be paid is continued by Lessee past such last possible due date, the Lessee shall deposit an amount adequate to pay for the contested taxes with the First National Bank of Sweetwater, Texas (or its successor organization), with directions to use the escrowed funds to pay the taxes at the time a final determination is made as to the amount of taxes to be paid. The Parties agree to reasonably cooperate with each other to reduce the taxes, assessments, and charges that may be levied or assessed with respect to the Premises and Lessee's use thereof.
- (d) Lessee shall pay for all water, electric, telecommunications, and any other utility services used by the Wind Facilities or Lessee on the Premises.

Section 3.6 Installation Fees/Surface Damages

If and when the Lessee commences construction, Lessee and its contractors, subcontractors, agents, employees, and consultants shall pursue and execute the construction and erection activities in a safe, professional and diligent manner (collectively, the "Construction Activities"). Nonetheless, the Parties hereto recognize that damages shall occur to the Premises and that Lessor shall be inconvenienced as a result of the Construction Activities and therefore the Parties hereto agree to the following pre-agreed damages/installation fees to account for all of the actual damage caused by the Construction Activities and the inconvenience associated therewith.

For the installation of transmission lines, communication lines, distribution/collection lines, and roads, the Lessee shall pay to the Lessor a one-time fee of eighteen dollars (\$18.00) per rod used. The Parties expressly agree that Lessee may consolidate the use of any footprint of the Premises without incurring additional fees owed to the Lessor in the event that such consolidated use occurs directly above or below a previously used area. The Parties expressly agree that Lessee may consolidate the use of any footprint of the Premises and incur a reduced fee of nine dollars (\$9.00) per rod used in the event that such consolidated use occurs directly adjacent to a previously used area. For purposes of this clause, adjacent means within eight feet of a previously used area. As an example and for the avoidance of doubt, if Lessee constructs a road under which transmission lines are laid at a depth of six feet and fiber optic cable is laid at a depth of three feet, Lessee shall only owe to the Lessor eighteen dollars (\$18.00) per rod used to construct the road and the fact that transmission lines and fiber optic cable are underneath the road shall not increase the fees owed to Lessor. As a further example and for the avoidance of doubt, if transmission and/or fiber optic line is installed by Lessee above or below ground, but adjacent to the road, Lessee shall owe to the Lessor eighteen dollars (\$18) per rod for the road and nine dollars (\$9.00) per rod for the adjacent transmission lines and fiber optic cable.

Lessee shall ensure that any large rocks, gravel, or caliche excavated (and not used as backfill or for roads or pads) during the construction process in any cultivated area be removed from the Premises if such large rocks, gravel, or caliche would interfere with the operation of a cotton stripper. Lessee shall further ensure that any topsoil removed or disturbed during the construction of underground Wind Facilities (and not placed under new or existing roads or immediately adjacent thereto in any cultivated area) be restored to its same approximate position (i.e., so that the land may be cultivated going forward, which may be accomplished by bringing in new topsoil to any affected area) and that all transmission, fiber optic, or other lines laid below ground are buried to a depth below plow depth, or a minimum of thirty-six (36) inches below grade. Lessee shall also ensure that to the extent that any type of material is buried underground (including, but not limited to, electrical collection cables, fiber optic cables and/or telecommunication cables), it is not otherwise placed (a) beneath any new or existing roads on the Premises or (b) directly adjacent to any new or existing roads on the Premises, and any topsoil disturbed when burying such material underground shall be replaced with the same topsoil, or topsoil of the same or similar type at the Premises. Double ditching will be performed by Lessee, if necessary, in order to replace the topsoil as free of large rocks, gravel or caliche as such topsoil would be prior to the construction process.

For the installation of an actual Wind Turbine Generator (and its associated pad mount transformer (to be located no more than twenty (20) feet from the base of the tower), the Lessee shall pay to Lessor a one-time fee of five thousand dollars (\$5,000.00) per Wind Turbine Generator and an associated pad mount transformer installed (“Turbine Installation Fee”).

For the installation of any substation or other interconnection device allowing Lessee to access the transmission lines of the Wind Energy Project, Lessee shall pay to Lessor a one-time fee of five thousand dollars (\$5,000) for the use of up to three (3.0) acres to build such substation or device, and in the event the amount needed exceeds the three (3.0) acres, the cost to Lessee shall be fifteen hundred dollars (\$1,500) per additional acre used (prorated for any partial acre used).

The various categories of surface damages referred in the above paragraphs of this Section 3.6 are sometimes referred to in this Lease collectively as the “Section 3.6 Damages.”

The Parties hereby expressly agree that the exact sums owed to Lessor, if any, as a result of the Construction Activities will depend on if any roads, transmission lines, communication lines, distribution/collection lines, Wind Turbine Generators, and/or substations are built on the Premises. The Parties furthermore agree that the definitive amount of money owed as a result of these activities will only be known once the Construction Activities have ceased, but in no event later than fifteen (15) days after the last Wind Turbine Generator foundation is poured for the Wind Energy Project. Consequently, the installation fees and surface damages owed to Lessor shall be paid in the following manner: (i) Lessee shall pay one-half (1/2) of the estimated damages related to the contemplated Construction Activities at the Premises on or before the date that construction begins and (ii) pay the remainder amount of actual damages relating to the actual Construction Activities within thirty (30) days after the last Wind Turbine Generator foundation is poured for the Wind Energy Project.

Section 3.7 Non-Obstruction Payment

On or before the Commencement Date, Lessee shall determine if Lessee intends to build any Wind Turbine Generators on the Premises. If Lessee determines that it does **not** intend to build any Wind Turbine Generators on the Premises, then on or before thirty (30) days after the Commencement Date, Lessee shall make a onetime payment to Lessor (the “Non-Obstruction Payment”) in consideration for Lessor’s observance of the non-obstruction covenants and agreements set forth in Section 1.3 of this Lease. The amount of the Non-Obstruction Payment shall be determined by the number of acres comprising the Non-Obstruction Premises, as follows:

- a. If the Non-Obstruction Premises is comprised of less than six hundred forty (640) acres, the amount of the Non-Obstruction Payment shall be three thousand five hundred dollars \$3,500.00.
- b. If the Non-Obstruction Premises is comprised of at least six hundred forty (640) acres but less than twelve hundred eighty (1280) acres, the amount of the Non-Obstruction Payment shall be seven thousand dollars (\$7,000.00).
- c. If the Non-Obstruction Premises is comprised of twelve hundred eighty (1280) acres or more, the amount of the Non-Obstruction Payment shall be ten thousand five hundred dollars (\$10,500).

If, as of the Commencement Date, Lessee determines that it **does** intend to build any Wind Turbine Generators on the Premises, then this Section 3.7. shall not apply and Lessee shall not be required to make any Non-Obstruction Payment to Lessor.

Section 3.8 Meteorological Tower Payment

On or before the Commencement Date, Lessee shall determine if Lessee intends to build any meteorological towers on the Premises. If Lessee determines that it does intend to build any meteorological towers on the Premises, then on or before thirty (30) days after the Commencement Date, Lessee shall make a one-time payment to Lessor (“Meteorological Tower Payment”) in consideration for Lessee’s construction of such meteorological tower(s) on the Premises. The amount of the Meteorological Tower Payment shall be determined as follows:

- a. If the Premises upon which the meteorological tower is located is “cultivated,” then the amount of the Meteorological Tower Payment shall be one thousand dollars (\$1,000.00).
- b. If the Premises upon which the meteorological tower is located is not “cultivated,” then the amount of the Meteorological Tower Payment shall be five hundred (\$500.00).

For purposes of this Lease, “cultivated” shall mean prepared for, seeded with, or containing growing crops. If, as of the Commencement Date, Lessee determines that it **does not** intend to build any meteorological towers on the Premises, then this Section 3.8 shall not apply and Lessee shall not be required to make any Meteorological Tower Payment to Lessor.

ARTICLE IV. LESSEE’S COVENANTS

Lessee hereby covenants, represents, and warrants to Lessor as follows:

Section 4.1 Liens

Lessee shall keep the Premises free and clear of any mechanic’s or materialman’s liens for labor, materials, services, supplies, and equipment performed on or furnished to Lessee in connection with Lessee’s use of the Premises. Lessee may contest any such lien, but shall post a bond to remove any lien that is created during the contested proceeding.

Section 4.2 Permits and Laws

Lessee and its designees shall at all times comply with all federal, state, and local laws, statutes, ordinances, rules, regulations, judgments, and other valid orders of any governmental authority with respect to Lessee’s activities pursuant to this Lease and shall obtain all permits, licenses, and orders required to conduct any and all such activities.

Section 4.3 Lessee’s Improvements

All Wind Facilities constructed, installed, or placed on the Premises by Lessee pursuant to this Lease shall be the sole property of Lessee, and Lessor shall have no ownership or other interest in any Wind Facilities on the Premises. The Wind Facilities are and shall remain property of the Lessee. Throughout the Term Lessee shall, at its sole cost and expense, maintain Lessee’s Wind Facilities in good condition and repair, ordinary

wear and tear excepted. All Wind Facilities constructed, installed or placed on the Premises by Lessee pursuant to this Lease may be moved, removed, replaced, repaired, or refurbished by Lessee at any time. Lessee shall keep the surface area around all Wind Facilities clean and neat at all times. All construction debris and trash of any kind shall be removed promptly from the Premises. To the extent that the construction of the Wind Energy Project uncovers rocks or stones that were not previously at the surface, any rock of such size that would interfere with the operation of a cotton stripper shall be removed from the Premises by Lessee.

Section 4.4 Removal and Restoration

At the end of the Term, including any termination of the Lease, Lessee shall, upon the written request of Lessor, remove all its Wind Facilities (other than roadways and collection lines) within twelve (12) months from the date Lessee receives such written request. Removal shall include foundations and power lines to a depth of three feet below grade (i.e., below plow depth). If Lessee fails to remove any of the Wind Facilities within the required time period, such Wind Facilities shall be considered abandoned by Lessee and Lessor may remove such Wind Facilities from the Premises and dispose of them. In the event Lessee fails to remove any of the Wind Facilities as required, and Lessor removes such Wind Facilities at Lessor's expense, Lessee shall reimburse Lessor for all reasonable and necessary costs of removing those Wind Facilities as required by the Lease, less any salvage value received by Lessor, within thirty (30) days after receipt of an invoice from Lessor.

Section 4.5 Conservation Reserve Program

Owner represents to Lessee that no part of the Premises is certified or otherwise included in the U.S. Department of Agriculture's Conservation Reserve Program ("CRP") or is in the process of being certified or otherwise included as CRP lands, and that Lessee's installation of Wind Facilities on the Premises will not cause any of the Premises to be removed from the CRP.

Section 4.6 Environmental Matters

Except for petroleum, oil, and gas products on the Premises associated with any mineral lease executed prior to the Effective Date for the Premises, Lessor represents and warrants that, to the best of Lessor's actual knowledge with no duty to investigate (i) the Premises is in compliance with Environmental Laws (defined below) and (ii) there are

no Hazardous Materials (defined below) in, on, or under the Premises, other than herbicides, pesticides and fertilizers that have been stored, mixed, and applied on the Premises in compliance with normal agricultural practices and in compliance with Environmental Laws.

Lessee assumes responsibility for and agrees to comply with (i) all Environmental Laws applicable to Lessee's use of the Premises and (ii) all remediation and other requirements (as well as all consequences of the existence of) Hazardous Materials located on or released on, from or onto, the Premises by Lessee or its contractors. Lessor assumes responsibility for and agrees to comply with (i) all Environmental Laws applicable to Lessor's use of the Premises and (ii) all remediation and other requirements (as well as all consequences of the existence of) Hazardous Materials located on or released on, from or onto, the Premises by Lessor.

"Environmental Laws" mean any and all federal, state, local, and foreign laws, ordinances, codes, and regulations relating to protection of the environment, health and safety, and natural resources. Environmental Laws include the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended ("CERCLA"), and the common law.

"Hazardous Materials" means (i) any and all substances, materials, chemicals, and wastes regulated by Environmental Laws and (ii) "hazardous substance," "pollutant or contaminant," "petroleum," and "natural gas liquids," as such terms are defined or used in Section 9601 of CERCLA.

Section 4.7 Insurance

Lessee shall obtain and maintain in force policies of insurance covering the Wind Facilities and Lessee's activities on the Premises at all times during the Term, including specifically comprehensive general liability insurance with a minimum combined occurrence and annual limitation of one million dollars (\$1,000,000.00). Such insurance coverage for the Wind Facilities and Premises may be provided as part of a blanket policy that covers other wind facilities or properties as well. Any such policies shall name Lessor as an additional insured and shall provide for thirty (30) days prior written notice to Lessor of any cancellation or material change. Lessee shall provide Lessor with copies of certificates of insurance evidencing this coverage upon request by Lessor.

ARTICLE V.
LESSOR’S COVENANTS, REPRESENTATIONS, AND WARRANTIES

Lessor hereby covenants, represents and warrants to Lessee as follows:

Section 5.1 Title and Authority

Lessor is the sole owner and holder of fee simple title of the surface of the Premises and Easement Premises and each person or entity signing the Lease on behalf of Lessor has the full and unrestricted authority to execute and deliver this Lease and to grant the easements and rights granted herein. All persons having any ownership interest in the Premises and Easement Premises (including spouses) are signing this Lease as Lessor. Without impairment of Lessee’s rights under the warranty in the event of failure of title, it is agreed that if Lessor owns an interest in the Premises that is less than the entire fee simple estate, then the Rent under Article III hereof, or any other payment of any type under this Lease to be paid Lessor, shall be reduced proportionately. When signed by Lessor, this Lease constitutes a valid and binding agreement enforceable against Lessor and Lessee in accordance with its terms.

Section 5.2 Liens/Third Party Contracts

Lessor hereby represents that it has not granted any mortgages, deeds of trust, oil and gas leases or liens, or security interests encumbering all or any portion of the Premises except as disclosed by Lessor to Lessee on Exhibit D attached hereto. Lessor further represents there are no currently existing purchase options, rights of refusal, or sales contracts in favor of any third parties relating to the Premises or any interest therein that could materially interfere with the development, construction, or operation of the Wind Energy Project on the Premises or that could materially and adversely affect or change the wind flow over the Premises.

Section 5.3 Quiet Enjoyment

Lessee shall have the quiet use and enjoyment of the Premises in accordance with the terms of this Lease without any interference of any kind by Lessor or any person claiming through Lessor. Lessor and its activities on the Premises and any grant of rights Lessor makes to any other person shall not interfere with any of Lessee’s activities pursuant to this Lease. Lessor shall not interfere or allow interference with the wind speed or wind direction over the Premises or otherwise engage in

activities which might impede or decrease the output or efficiency of the Wind Facilities.

Lessor shall not sell, transfer, assign, or encumber the land or grant any license, easement, lease, or other right with respect to the land which could interfere with Lessee's operations. Lessor must give written notice to Lessee of any lease, grant, or conveyance of any interest that affects the rights conveyed to Lessee herein involving the Premises.

Section 5.4 Hazardous Materials

Lessor shall not use, store, dispose of, or release on the Premises or cause or permit to exist or be used, stored, disposed of, or released on the Premises as a result of Lessor's operations, any Hazardous Materials, except in such quantities as may be required in its normal business operations and only if such use is not harmful to Lessee and is in full compliance with all Environmental Laws.

Section 5.5 Cooperation

Lessor shall cooperate with Lessee, and/or Lessee's lenders and investors, to obtain non-disturbance and subordination agreements from any person or entity with a lien, encumbrance, mortgage, lease, or other exception to Lessor's fee title to the Premises to the extent necessary to eliminate any actual or potential interference by any such lienholder with any rights granted to Lessee under this Lease. Lessor shall also cooperate with Lessee to obtain and maintain any permits needed for the Wind Facilities and shall work with Lessee for any environmental impact reviews, studies, approvals, analyses, etc. convenient or prudent for the Wind Facilities. Lessor shall also provide Lessee with such further assurances and shall execute any estoppel certificates, consents to assignments, or additional documents that may be reasonably necessary for recording purposes or requested by Lessee or any of its lenders or investors without demanding additional compensation.

Section 5.6 Hunting

Upon written request from Lessee, Lessor shall notify in writing all of its invitees, licensees, tenants, lessees, or agents who have the right to hunt on the Premises that they (including the Lessor) may not hunt on the Premises during the period in which Lessee shall have construction equipment and/or construction crews on the Premises and Lessor shall provide Lessee with a copy of such notices upon request. After the

construction equipment and construction crews have vacated the Premises, Lessor may hunt, or allow others to hunt, on the Premises *provided that* no paid rifle hunting occurs on the Premises during the Term.

ARTICLE VI. INDEMNIFICATION

Section 6.1 Indemnity

Each Party, on behalf of itself and its principals, members, officers, employees, agents, representatives, contractors, successors, and assigns (the “Indemnifying Party”), shall indemnify, defend, and hold harmless the other Party and its principals, members, officers, employees, agents, representatives, contractors, successors, and assigns (collectively, the “Indemnified Party”) from and against any losses, damages, expenses, and liabilities arising from (i) physical damage to property (including the personal property of the Indemnified Party) or physical injury to or death of any person, in each case to the extent caused by the Indemnifying Party, (ii) any violation by the Indemnifying Party of any Law including Environmental Laws, (iii) any material failure by the Indemnifying Party to perform its obligations under this Lease, or (iv) any representation or warranty made by the Indemnifying Party under this Lease being untrue in any material respect. To the extent necessary to prevent overcompensation to the Indemnified Party under any claim requiring the Indemnifying Party to indemnify the Indemnified Party hereunder, the reference to property damage in the preceding sentence does not include losses of rent, business opportunities, profits, and other consequential damages that result solely from Indemnified Party’s loss of use of any portion of the Premises occupied by Wind Facilities pursuant to the Lease. Each Party’s obligations under Section 6.1 shall survive the termination or expiration of the Lease and shall survive any assignment of the Lease.

Section 6.2 Property Damage

The Parties anticipate and acknowledge that Lessor may suffer damage to crops, fences, and other property or improvements on the Premises during Lessee’s construction and installation of Wind Facilities on the Premises; and as a result of any such damages, the Parties hereto have agreed that the amount of reimbursement owed to Lessor shall be the fair market value of any personal property (including but not limited to farming equipment, crops, barns, pens, water wells and livestock lost or damaged) damaged by the construction, repair or maintenance of the Wind Energy Project (“Section 6.2 Other Damages”) along with the damages set forth

in Section 3.6. Any damage to crops, livestock, or equipment suffered by a tenant or surface lessee shall be paid separately to such surface tenant. Nothing in Section 6.2 shall be construed to require Lessee to pay any damages more than once for the same item or category of damages. To the extent any damages to Lessor's crops, fences, and other property or improvements on the Premises is caused by Lessor, Lessee shall not be responsible or liable for any such damages.

ARTICLE VII. MORTGAGE AND ASSIGNMENT

Section 7.1 Mortgage Provisions

- (a) Right to Mortgage Interest. Notwithstanding anything herein to the contrary, Lessee may mortgage, pledge or otherwise encumber Lessee's leasehold and easement interests in the Premises, any Wind Facilities, the Lease, and any other improvements constructed on the Premises by Lessee (any such rights or property, or any portion thereof, being referred to as the "Mortgaged Property") to one or more Mortgagees. The term "Mortgagee" means (i) any mortgagee under any mortgage in the Mortgaged Property, (ii) any trustee and any beneficiary under any deed of trust in the Mortgaged Property, (iii) the beneficiary of a security agreement in the Mortgaged Property, (iv) the holder of any obligation secured by a mortgage or deed of trust in the Mortgaged Property, (v) a lender for, or equity investor in, the Wind Energy Project, (vi) the collateral or administrative agent for any mortgagee, beneficiary, trustee, holder, lender, or equity investor of or in the Wind Energy Project, and (vii) any successor thereof (any such collateral document giving rights to a Mortgagee being referred to herein as a "Mortgage"). No Mortgage shall encumber Lessor's fee interest in and to the Premises. No Mortgagee shall have any obligations under this Lease until such time as it exercises its rights to acquire Lessee's interests subject to the lien of Mortgagee's Mortgage by foreclosure or otherwise assumes the obligations of Lessee directly.
- (b) Lessor and Lessee agree that, once all or any part of Lessee's interests in the Lease are mortgaged or assigned to a Mortgagee, they will not modify or terminate this Lease without the prior written consent of any Mortgagee.

- (c) Lessor agrees that any Mortgagee shall have the right to make any payment and to do any other act or thing required to be performed by Lessee under this Lease, and any such payment, act, or thing performed by any Mortgagee shall be effective to prevent a default under this Lease and any forfeiture of any of Lessee's rights under this Lease as if done by Lessee itself.
- (d) Lessor shall provide each Mortgagee under the Mortgage affecting the Premises with notice of any default by Lessee, provided that Landowner has been provided notice of the Mortgage (including the address of the Mortgagee).

Any such notice to a Mortgagee shall be given in the same manner as provided elsewhere herein. The giving of any notice of default or the failure to deliver a copy to the Mortgagee shall not create any liability on the part of Lessor; provided, however, Lessor shall not be entitled to exercise any remedies against Lessee until the Mortgagee Notice of Default has been properly provided to all Mortgagees and all applicable cure periods following such notice have elapsed without cure of the specified default. If any notice shall be given of the default of Lessee and Lessee has failed to cure or commence to cure such default within the cure periods provided in Section 9.1 of this Lease, then Lessor shall notify all Mortgagees in the manner provided in this section that Lessee has failed to cure such default and any Mortgagee shall have thirty (30) days after said additional notice to cure any such default or, if such default cannot be cured within thirty (30) days, to diligently commence curing within such time and diligently pursue such cure to completion within a reasonable time thereafter.

- (e) The acquisition of all or any part of Lessee's interests in the Lease by any Mortgagee through foreclosure or other judicial or non-judicial proceedings in the nature of foreclosure, or by any conveyance in lieu of foreclosure, shall not require the consent of Lessor nor constitute a breach or default of this Lease by Lessee, and upon the completion of the acquisition or conveyance Lessor shall acknowledge and recognize Mortgagee as Lessee's proper successor under this Lease upon Mortgagee's cure of any existing Lessee defaults and assumption of the obligations of Lessee under this Lease prospectively.
- (f) In the event this Lease is rejected by a trustee or a debtor-in-possession in any bankruptcy or insolvency proceeding Lessor agrees, upon request by any Mortgagee within sixty (60) days

after the rejection or termination, to execute and deliver to Lessee or Mortgagee a new Lease for the Premises which (i) shall be effective as of the date of the rejection or termination of this Lease; (ii) shall be for a term equal to the remainder of the term of the Lease before giving effect to such rejection or termination; and (iii) shall contain the same terms, covenants, agreements, provisions, conditions, and limitations as are contained in this Lease (except for any obligations or requirements which have been fulfilled by Lessee or Mortgagee prior to rejection or termination). Prior to the execution and delivery of any such new lease, Lessee, or Mortgagee shall (i) pay Lessor any amounts which are due Lessor from Lessee; (ii) pay Lessor any and all amounts which would have been due under this Lease but for the rejection or termination from the date of the rejection or termination to the date of the new lease; and (iii) agree in writing to perform or cause to be performed all of the other covenants and agreements to be performed by Lessee under this Lease to the extent Lessee failed to perform them prior to the execution and delivery of the new lease.

- (g) Neither the bankruptcy nor the insolvency of Lessee shall be grounds for terminating this Lease as long as the Rent and all other monetary obligations of Lessee hereunder are paid by a Mortgagee in accordance with the terms of this Agreement.
- (h) If any Mortgagee is prohibited by any process or injunction issued by, or by reason of any action of, any court having jurisdiction over any bankruptcy, reorganization, insolvency, or other debtor-relief proceeding from commencing or prosecuting any cure of a default, then the times specified herein for commencing or prosecuting such cure shall be extended for the period of such prohibition; provided, however, that such Mortgagee (or another Mortgagee) shall have fully cured, within the time specified herein, any failure to perform any monetary obligations of Lessee hereunder, and shall thereafter continue to perform such monetary obligations when and as due hereunder.
- (i) Lessor agrees that it will, promptly after request therefore given from time to time, enter into an amendment to this Lease or enter into a separate agreement, for purposes of incorporating or memorializing any provisions which any existing or proposed Mortgagee reasonably requests for the purpose of implementing, amending, or expanding the provisions of Article VII or affording such existing or proposed Mortgagee reasonable and customary

protections in the event of a default by Lessee. The Parties each agree to execute and deliver (and to acknowledge, if necessary for recording purposes) any document or instrument reasonably required to give effect to any such provisions.

Lessor agrees, upon notice from any Mortgagee, to execute an estoppel certificate in favor of such Mortgagee certifying to the following (provided such facts are true): the status of the Lease as being in full force and effect, that no uncured events of default under the Lease exist, that all payments due have been made, and providing other certifications reasonably requested.

Section 7.2 Assignment; Division of Lease

Lessee may assign, sublease, transfer, or convey all or any portion of its interests in this Lease without Lessor's consent provided that (i) any such assignment or conveyance shall not be for a period beyond the Term of this Lease; (ii) the assignee or transferee shall be subject to all of the obligations, covenants, and conditions applicable to the Lessee; (iii) Lessee shall be fully relieved from liability as to the rights, title, interest, and obligations so assigned. Nothing herein shall be construed to be a limitation or prohibition of any type against Lessor's right or freedom to devise, convey, gift, assign, transfer, or sell Lessor's title to the Premises, *provided that* Lessor provides written notice to Lessee at the address specified in Section 10.1 within fifteen (15) calendar days of any such devise, conveyance, gifting, assignment, transfer, or sale. Likewise, Lessee shall provide written notice to the Lessor at the address specified in Section 10.1 within fifteen (15) calendar days of any assignment, sublease, transfer, or conveyance of all or any portion of its interest in this Lease *provided that* no such notice is required for assignments, subleases, transfers, or conveyances to entities which are affiliated with Lessor, or its ultimate parent company, or to any entity which Lessor (or any of its affiliates) holds an equity interest.

Lessee may, at any time and from time to time, conditionally or unconditionally, without obtaining the consent of Lessor, hypothecate, mortgage, grant, or pledge all or any portion of Lessee's right, title, or interest under this Lease or in any Windpower Facilities to any Mortgagee as security for the repayment of any indebtedness and/or the performance of any obligation relating in whole or in part to Wind Energy Project.

If Lessee from time to time so requests, Lessor shall promptly divide this Lease into two (2) or more separate, independent agreements for separate and distinct wind power projects by entering into two or more new agreements that provide Lessee (or its affiliates) with separate leasehold rights to different portions of the Premises, as designated by Lessee. Each of such new agreements shall (i) be to Lessee or its affiliates, (ii) contain the same terms and conditions as this Lease (except for any requirements that have been fulfilled by Lessee prior to the execution of such new agreements), (iii) be for a term equal to the remaining Term, (iv) contain a grant to Lessee (or its affiliates) of easements similar to the easements granted herein, (v) require payment to Lessor of Rent calculated using only the portion of the Premises covered by the new agreement, and (vi) enjoy the same priority as this Lease over any lien, encumbrance, or other interest created by Lessor. Further, in the event of an uncured Event of Default by the Lessee (or its affiliates) under either of such new agreements, such default shall not affect, or cause a termination of, any other such new agreement or any rights or interests granted to the Lessee under any such other new agreement.

Section 7.3 Continuing Nature of Obligations

- (a) The wind easement and related rights granted by Lessor in this Lease to Lessee are an easement in gross for the benefit of Lessee, its successors and assigns, as owner of the rights created by the easement. The easement and other rights granted by Lessor in this Lease are independent of any lands or estates, or interest in lands, because there is no other real property benefiting from the wind easement granted in this Lease and, as between the Premises and other tracts of property on which Lessee may locate Wind Facilities, no tract is considered dominant or servant as to the other.
- (b) The burdens of the wind easement and all other rights granted to Lessee in this Lease shall run with and against the Premises and the Easement Premises and shall be a charge and burden on the Premises and the Easement Premises and shall be binding upon and against Lessor and its successors, assigns, permittees, licensees, lessees, employees, and agents. The Lease and wind easement shall inure to the benefit of Lessee and its successors, assigns, permittees, licensees, and lessees.

ARTICLE VIII.
CONDEMNATION/FORCE MAJEURE

Section 8.1 Condemnation

- (a) Definitions. The following definitions apply in construing provisions of this Lease relating to a taking of all or any part of the Premises or the Wind Facilities or any interest in them by eminent domain or inverse condemnation:
 - 1. “Taking” means any taking by eminent domain or by inverse condemnation or for any public or quasi-public use under any statute. The transfer of title may be either a transfer resulting from the recording of a final order in condemnation or a voluntary transfer or conveyance to the condemning authority or entity under threat of condemnation in avoidance of an exercise of eminent domain. The Taking shall be considered to take place as of the earlier of (x) the date actual physical possession is taken by the condemner or (y) the date on which the right to compensation and damages accrues under the law applicable to the Premises.
 - 2. “Total Taking” means the Taking of the fee title to all the Premises.
 - 3. “Substantial Taking” means the Taking of so much of the Premises that the remaining Premises would not be economically and feasibly usable, in Lessee’s opinion, by Lessee in connection with the Permitted Use.
 - 4. “Partial Taking” means any Taking other than a Total Taking or Substantial Taking.
- (b) Notice to Other Party. The party receiving any notice of the kinds specified below shall promptly give the other party notice of the receipt, contents, and date of the notice received:
 - 1. Notice of intended Taking.
 - 2. Service of any legal process relating to condemnation of the Premises.

3. Notice in connection with any proceedings or negotiations with respect to such condemnation.
 4. Notice of intent or willingness to make or negotiate a private purchase, sale or transfer in lieu of condemnation.
- (c) **Representative of Each Party; Effectuation.** Lessor and Lessee shall each have the right to represent its respective interests in each proceeding or negotiation with respect to a Taking or intended Taking and to make full proof of his or its claims. Lessor and Lessee each agrees to execute and deliver to the other any instruments that may be required to effectuate or facilitate the provisions of this Lease relating to condemnation.
- (d) **Total or Substantial Taking.** On a Total or Substantial Taking, Lessee's obligation to pay Rent shall terminate on the date of Taking. If Lessee determines that the Taking is a Total or Substantial Taking, Lessee may, by notice to the Lessor given within one hundred twenty (120) days after Lessee receives notice of intended Taking, elect to treat the Taking as a Substantial Taking. If Lessee does not so notify the Lessor, the Taking shall be deemed a Partial Taking.
- (e) **Delivery of Possession.** Lessee may continue to occupy the Premises until the day of Taking.

Section 8.2 Proceeds

- (a) **Award for Total Taking or Substantial Taking.** On a Total Taking or Substantial Taking, the award therefore shall be distributed and paid to Lessee and Lessor as their respective interests under this Lease (as if the same had not been terminated) may appear. In determining their respective interests:
1. The interest of Lessor shall be based on the value of Lessor's reversionary interest in the Premises (excluding any of Wind Facilities or Lessee's other improvements) taking into account the leasehold estate created by this Lease, the amount of rental paid by Lessee hereunder, and all of the other terms and provisions of this Lease; and
 2. The interest of Lessee shall be based on the value of Lessee's interest in the Premises, including the value of the

Wind Facilities or Lessee's other improvements for the Term and the value of Lessee's leasehold estate and interests under this Lease.

- (b) **Partial Taking.** In the event of a Partial Taking, Lessor shall be entitled to a portion of the award equal to the value of the fee simple title to the portion of the Premises taken, exclusive of the value of the Wind Facilities or Lessee's other improvements and Lessee shall be entitled to the balance of the award. In such event, this Lease shall remain in full force and effect covering the remaining portion of the Premises.
- (c) **Taking the Less than Fee Title.** On any Taking of the temporary use of all or any part or parts of the Premises for a period, or of any estate less than the fee, ending on or before the expiration date of the Term, neither the Term nor the Rent shall be reduced or affected in any way, and Lessee shall be entitled to any and all awards for the use or estate taken. If any such Taking is for a period extending beyond the expiration date of the Term, the Taking shall be treated under the foregoing provisions for Total, Substantial, and Partial Takings.

Section 8.3 Force Majeure

Neither Lessor nor Lessee shall be liable to each other, or be permitted to terminate this Lease, for any failure to perform an obligation of this Lease to the extent such performance is prevented by a "Force Majeure Event," which shall mean an event beyond the control of the party affected and that, by exercise of due diligence and foresight, could not reasonably have been avoided. Notwithstanding the foregoing, on the calendar day following one hundred and eighty (180) days since the commencement of a Force Majeure Event, Lessee shall honor its commitment to pay any monetary obligations even if an event of Force Majeure effects Lessee's ability to conduct its normal business operations for one hundred and eighty (180) days due to such event of Force Majeure. If a Force Majeure Event persists for more than one hundred and eighty (180) days, Lessee may terminate this Lease without further obligation to Lessor, other than the removal of Lessee's property at the Premises, as secured by the decommissioning bond/security described in Section 9.4 hereof.

ARTICLE IX.
DEFAULT/TERMINATION

Section 9.1 Events of Default

Each of the following shall constitute an “Event of Default” that shall permit the non-defaulting party to terminate this Lease and pursue other remedies available at law or equity.

- (a) Any failure by Lessee to pay any Rent when due if the failure to pay continues for thirty (30) days after written notice from Lessor has been received by Lessee and Mortgagee’s extended rights to cure as set forth in Section 7.1 have also expired; or
- (b) Any other material breach of this Lease by either party which continues for ninety (90) days after written notice specifying the default from the non-defaulting party has been received by the defaulting party. In the event the default cannot reasonably be cured within the ninety (90) day period, the defaulting party shall not be deemed to be in default so long as it commences curing such failure within the ninety (90) day period and is making diligent efforts to cure during that time.

Section 9.2 Surrender

Upon the termination or expiration of this Lease, Lessee shall peaceably surrender the Premises to Lessor. Lessee shall have one hundred eighty (180) days from the date the Lease expires or is terminated to remove the Wind Facilities in accordance with the procedures and standards described in Section 9.4 hereto. If, and only if, this Lease terminates before the end of the Term as a result of Lessee’s breach, Lessee shall pay Rent on a monthly basis, prorated as applicable for the period between the date of termination or expiration and the date upon which Lessee completes removal of the Wind Facilities as required under Sections 4.3 and 9.4 of this Lease.

Section 9.3 Specific Performance

Lessor acknowledges and agrees that should Lessor breach any of its obligations hereunder or otherwise fail to permit Lessee to exercise any of the rights and privileges granted herein, Lessee shall have the right to seek specific enforcement of this Lease. In that event, Lessor agrees that Lessee has no adequate remedy at law.

Section 9.4 Bond for Removal of “Wind Power Facilities”

Commencing the fifteenth (15th) year of the Production Stage, Lessee shall be obligated to obtain and deliver to Lessor a bond in form and substance reasonably satisfactory to Lessor securing performance of Lessee’s obligation to remove the “Wind Power Facilities” located at the Wind Energy Project including the Premises (the “Removal Bond”). The term “Wind Power Facilities” shall mean the Wind Turbine Generators or the wind turbine generation infrastructure as contemplated in Section 1.2(b)(b) located inside the boundaries of the Wind Energy Project or the Premises. The aforementioned bond shall be equal to the estimated amount, if any (the “Net Removal Costs”), by which the cost of removing the Wind Power Facilities exceeds the salvage value of such Wind Power Facilities, which Net Removal Costs shall be determined as set forth below. To the extent that the Net Removal Costs are zero (or negative), a Removal Bond shall not be required on the part of the Lessee, provided, however that Lessee shall re-evaluate the need for a Removal Bond at least semi-annually after the fifteenth (15th) year of the Production Stage. Lessee shall not be required to deliver such Removal Bond to Lessor if Lessee or a Sublessee (i) is in the process of repowering or otherwise redeveloping the Wind Turbine Generators on the Premises with new Wind Turbine Generators (or commits in writing with notice to Lessor to do so within two (2) years of the fifteenth (15th) year of the Production Stage) or (ii) has delivered such a bond in connection with the permitting of the Premises for Lessee’s or such Sublessee’s Wind Turbine Generators. Once in place, Lessee shall keep such bond, or a like replacement bond, in force throughout the remainder of the Term of this Lease. The Net Removal Costs shall be determined by the parties associated with the Wind Energy Project acting in good faith. If the aforementioned parties cannot agree upon the Net Removal Costs within sixty (60) days of their first attempt to do so, then the Net Removal Costs shall be determined by an independent engineer mutually selected by Lessee and sixty per cent (60%) of all of the Lessors from whom land is leased or used in the Wind Energy Project. If those aforementioned parties cannot agree upon such independent engineer within the next thirty (30) days, then by an independent engineer appointed by the District Judge of Nolan County, Texas, and the decision of such an independent engineer (however selected) as to the Net Removal Costs shall be conclusive as between, and binding upon, the Parties (Lessor and Lessee of this Lease), as well as all other Lessors from whom land is leased and/or used in the Wind Energy Project. If an independent engineer is selected by the Lessee and the Lessors of the Wind Energy Project or appointed by the District Judge of Nolan County, as the case may be, then the Parties shall equally share all of the costs associated with the independent engineer’s

determination of the Net Removal Cost (proportionately for Lessor, based pro rata on the number of Lessors in the Wind Energy Project).

In order to maximize the economies of scale associated with the removal of a wind farm, the Parties agree that the Net Removal Costs shall be calculated on the basis of the entire Wind Energy Project and not on such Costs solely for the Premises.

The standards for removal of the Wind Facilities shall be as follows:

- (a) Wind Turbine Generators (including towers and pad-mount transformers) shall be cleared, cleaned, and removed from the Premises. Any liquids, greases, etc. contained in any of the mentioned equipment to this sub-clause (a) shall also be removed safely from the Premises in accordance with then-existing laws and regulations.
- (b) Tower Foundations and Pad Mount Transformer Foundations installed in the ground, the foundations shall be cleared, cleaned and removed from the ground at least three (3) feet from the grade of the land (i.e., below plow depth) affected thereby. Lessee shall ensure that any holes or cavities created in the ground as a result of such removal are filled with topsoil of the same or similar type at the Premises.
- (c) To the extent that Lessor desires that Roads be removed, the Roads shall be cleared, cleaned, and removed from the Premises. Lessee shall ensure that any holes or cavities in the ground as a result of such removal are filled with topsoil of the same or similar type at the Premises.
- (d) Overhead power and communication lines (if any) shall be cleared, cleaned, and removed from the Premises.
- (e) Substation(s) shall be cleared, cleaned, and removed from the Premises and any liquids, greases, etc. contained in the substation(s) shall be removed safely from the Premises in accordance with then-existing laws and regulations.
- (f) Buried Cables (power and communication) of whatever type (power, fiber-optic, communication, etc.) installed in the ground, shall be cleared, cleaned, and removed from the ground at least three (3) feet from the grade of the land (i.e. below plow depth)

effected thereby. Lessee shall ensure that any holes or cavities created in the ground as a result of such removal are filled with topsoil of the same or similar type at the Premises.

- (g) Lessee shall ensure that any Rocks excavated during the de-commissioning/removal process are removed from the Premises.