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North Dakota Century Code 17-04-06: The First Step Toward a Level Playing Field for Wind Projects and Rural Landowners

Colleen Rice

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NORTH DAKOTA CENTURY CODE SECTION 17-04-06:
THE FIRST STEP TOWARD A LEVEL PLAYING FIELD
FOR WIND PROJECTS AND RURAL LANDOWNERS

COLLEEN J. RICE*

ABSTRACT

This article prepares the reader to engage in the ongoing debate concerning mitigating wind projects' competitive advantage with respect to wind easements and wind energy leases. The 2009 North Dakota legislature addressed this issue by passing North Dakota Century Code (N.D.C.C.) Section 17-04-06 and requiring that a 2009-2010 interim wind easement study be conducted to generate and offer recommendations to the 2011 legislature.

First of its kind in the nation, N.D.C.C. section 17-04-06 began leveling the playing field between rural landowners and wind projects by requiring two negotiation protocols and the inclusion of wind easement terms that prevent certain project risks being shifted to landowners. Although the playing field remains unlevel, wind projects are no longer allowed to distribute patently unfair wind easements and leases in North Dakota.

The article begins by explaining how wind projects gain and cultivate competitive advantage over rural landowners. The North Dakota legislature's authority, responsibility, and past practice of mitigating unfair competitive advantage are discussed next. The legislative history of N.D.C.C. section 17-04-06 and its attempt to mitigate the competitive advantage of wind projects is then reviewed. The article concludes with a suggested approach for establishing a solid foundation on which to complete mitigation efforts during the 2011 legislative session.

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I. INTRODUCTION

An important stakeholder in wind generating projects is often overlooked as state lawmakers pass legislation supporting this growing industry.¹ The overlooked stakeholder owns the land on which wind projects are built. Because project economics seldom allow construction on purchased land, long-term wind easements and wind energy leases grant projects necessary wind exposure rights while also establishing the ground rules for two separate enterprises, one agrarian and the other energy production, to exist side by side.

House Bill 1509² asked the 2009 North Dakota legislature to acknowledge and address the competitive advantage held by wind project

1. See N.D. CENT. CODE § 17-04-06 (2009) (recognizing that all other legislation related to wind energy passed during the 2009 North Dakota legislative session served the needs of wind projects). The 2009 North Dakota legislature extended availability of the reduced property tax assessment formula for certain wind towers. *Id.* § 57-06- 14.1. It also extended wind project sales and use tax exemptions. *Id.* § 57-39.2-04.2; § 57-40.2-04.2. Further, it extended income tax credits for installing wind facilities. *Id.* § 57-38-01.8. Lastly, it clarified that wind projects only need to receive either a certificate of site compatibility or conditional use permit and have an active transmission interconnection request pending to satisfy the five year development deadline. *Id.* §§ 17-04-01, -03, -05. As introduced, Senate Bill No. 2245 would have required that wind turbines be constructed within five years. S.B. 2245, 61st Leg. Assem. (N.D. 2009). Bills that focused on landowner issues were generally less successful. The attempt of House Bill No. 1426 to establish setback requirements for wind turbines failed to pass the House. H.B. 1426, 61st Leg. Assem. (N.D. 2009). Other important landowner issues were tabled until 2011. The Legislative Council received assignments to study and make recommendations to the 2011 legislature on both the issue of wind rights allocation—see H.C.R. 3044, 61st Leg. Assem. (N.D. 2009)—and the desirability of regulations to address the impact of wind projects on the environment and the future development of other natural resources—see H.B. 1449, 61st Leg. Assem. (N.D. 2009).

2. H.B. 1509, 61st Leg. Assem. (N.D. 2009).

developers with respect to wind easements and wind energy leases.³ The wind industry actively lobbied against House Bill 1509, and negotiations resulted in the compromises codified in N.D.C.C. section 17-04-06⁴ and a requirement that a 2009-2010 interim wind easement study be conducted to generate and offer recommendations to the 2011 legislature.⁵

First of its kind in the nation, section 17-04-06 did not level the playing field but it did prevent wind projects from using their competitive advantage to distribute patently unfair wind easements. Its requirements include two negotiation protocols⁶ and the inclusion of wind easement terms that prevent certain project risks being shifted to landowners.⁷

This article prepares the reader to engage in this ongoing debate. It begins by explaining how wind project developers gain and cultivate competitive advantage over rural landowners. The legislature's authority, responsibility, and past practice of mitigating unfair competitive advantage is discussed next. The legislative history of section 17-04-06 and its attempt to mitigate the competitive advantage of wind projects is then reviewed. The article concludes with a suggested approach for establishing a solid foundation on which to complete mitigation efforts during the 2011 legislative session.

II. WIND PROJECT DEVELOPERS HAVE COMPETITIVE ADVANTAGE OVER RURAL LANDOWNERS

The competitive advantage that wind project developers have over rural landowners with respect to wind easements arises from several factors indigenous to rural North Dakota, and is preserved and cultivated by developers' negotiating tactics. Both sources of competitive advantage are discussed below.

A. SOURCES OF WIND PROJECT COMPETITIVE ADVANTAGE INDIGENOUS TO RURAL NORTH DAKOTA

Rural landowners are not in the wind generation business, but wind projects are. This simple fact is the first source of wind project competitive advantage. It is axiomatic that he who has the most information about a

3. "Wind easements" and "wind energy leases," referred to individually in North Dakota Century Code sections 17-04-02 and -05, are sufficiently similar for purposes of this article to hereafter be collectively referred to as "wind easements."

4. N.D. CENT. CODE § 17-04-06, *available at* <http://www.legis.nd.gov/cencode/t17c04.pdf>.

5. H.B. 1509, 61st Leg. Assem., § 2 (N.D. 2009) (enrolled), *available at* <http://www.legis.nd.gov/assembly/61-2009/bill-text/JBSB0500.pdf>.

6. N.D. CENT. CODE § 17-04-06(1)(a)-(b) (2009).

7. *Id.* §§ 17-04-06(1)(e)-(g), (i).

complex transaction also has competitive advantage, and the wind industry's global giants are party to most North Dakota wind easements.

The American Wind Energy Association (AWEA), a national trade association representing wind power project developers and others involved in the wind industry,⁸ reports that North Dakota has twenty-six wind projects existing or under construction, with a total capacity of 1,175 megawatts (MW) of energy.⁹ AWEA also reports that three of the wind industry's largest companies, NextEra Energy Resources LLC (formerly FPL Energy LLC), ACCIONA Energy, and Iberdrola Renewables, own all or part of fifteen of these projects.¹⁰ Their fifteen projects constitute 82% (996.2 MW) of the total wind capacity in existence or under construction in North Dakota.¹¹ Taking a closer look at these companies reveals who has been at kitchen tables across North Dakota negotiating the vast majority of wind easements for existing projects.

NextEra Energy Resources (NextEra) was the largest owner and operator of wind generating facilities in North America as of 2008.¹² NextEra had sixty-five wind projects comprised of more than 8,200 individual wind turbines operating in sixteen states and Canada, with an installed capacity of nearly 6,400 MW of electricity.¹³ NextEra planned to add more than 1,000 MW of wind generation to its portfolio in 2009 and has approximately 28,000 MW in its wind-development pipeline.¹⁴ NextEra had adjusted earnings of \$821 million in 2008¹⁵ and its corporate parent, FPL Group, Inc., reported 2008 revenues of more than \$16 billion.¹⁶ As a point of reference, North Dakota's Tax Commissioner projects that the state's total tax revenue for the 2007-2009 biennium will be \$2.682 billion.¹⁷

8. About AWEA, <http://www.awea.org/about/> (last visited Apr. 14, 2010).

9. U.S. Wind Energy Projects—North Dakota (as of 6/27/2009), <http://www.awea.org/projects> (last visited Apr. 14, 2010). One MW of wind generation is considered sufficient to provide electricity to 225 to 300 homes. Wind Web Tutorial, Wind Energy Basics, <http://www.awea.org/faq> (last visited Apr. 14, 2010).

10. U.S. Wind Energy Projects—North Dakota (as of 6/27/2009), *supra* note 9.

11. *Id.*

12. FPL Group, About Us—NextEra Energy Resources, <http://www.fplgroup.com/about/contents/fple.shtml> (last visited Apr. 14, 2010).

13. *Id.*

14. *Id.*

15. *Id.*

16. FPL Group: Profile—Energy Solutions for the Next Era, <http://www.fplgroup.com/reports/contents/2008profile.shtml> (last visited Apr. 14, 2010).

17. North Dakota State and Local Taxes: An Overview and Comparative Guide (2008), <http://www.nd.gov/tax/genpubs/2008-redbook.pdf> (last visited Apr. 14, 2010).

ACCIONA Energy has been pioneering renewable energy for nearly twenty years¹⁸ and is ranked globally as a leading wind project developer and constructor;¹⁹ it is also among the world's top wind turbine manufacturers.²⁰ ACCIONA Energy is a subsidiary of ACCIONA S.A., a 100 year-old, multi-billion-dollar company that is publically traded in Spain and has more than 40,000 employees working on operations located in thirty countries on five continents.²¹

Iberdrola Renewables is the worldwide leader in wind power with 9,300 MW in operation globally and 2,800 MW of that located in the United States.²² It entered the American market in 2006, and by 2009 was the second largest provider of wind power after investing \$3.74 billion during 2007 and 2008.²³ Iberdrola Renewables has the financial backing of its ultimate corporate parent, Iberdrola, S.A., Spain's number one energy group and the fourth largest utility company in the world by market cap.²⁴ Iberdrola, S.A. has been in business for 107 years and currently has 33,000 employees located in more than forty countries.²⁵

Renewable Energy Systems Americas (RES Americas) is another large international wind energy company active in North Dakota.²⁶ RES Americas is a subsidiary of RES Group which is headquartered in the United Kingdom and has a long history of developing, constructing, and owning wind projects.²⁷ RES Group has about eighty-nine wind projects located around the world with a capacity of more than 4,911 MW, of which 3,799 MW were constructed or are under construction by RES Americas.²⁸ RES Americas' current North Dakota operations include measuring wind

18. ACCIONA North America—About Us, <http://acciona-na.com/About-Us.aspx> (last visited Apr. 14, 2010).

19. ACCIONA North America—History, <http://acciona-na.com/About-Us/History.aspx> (last visited Apr. 14, 2010).

20. *Id.*

21. ACCIONA North America—About Us, *supra* note 18; ACCIONA North America—History, *supra* note 19.

22. Iberdrola Renewables—Who We Are—Fact Sheet, <http://www.iberdrolarenewables.us/pdf/iberdrola-renewables-fact-sheet-032309.pdf> (last visited Apr. 14, 2010).

23. *Id.*

24. *Id.*

25. *Id.*

26. About RES Americas, <http://www.res-americas.com/about-us/res-americas.aspx> (last visited Apr. 14, 2010); Glacier Ridge Wind Project, Home, <http://glacrieridgewind.com/> (last visited Apr. 14, 2010).

27. About RES Americas, *supra* note 26.

28. *Id.*

speeds at strategic locations²⁹ and jointly developing the 400 MW Glacier Ridge Wind Project located in Barnes County.³⁰

A second factor contributing to wind projects developers' competitive advantage is the large geographic size of commercial wind projects. North Dakota's commercial wind projects vary in size but, as an example, Glacier Ridge is expected to span 30,000 acres.³¹ The large geographic size of North Dakota wind projects means that developers will need wind access rights from several landowners in order to have a viable project. Efficiency requires that wind projects develop a standard uniform wind easement to be distributed to every interested land owner within the potential project's footprint.

Form wind easements increase projects' competitive advantage because project sales staffs typically argue that they can't negotiate changes to the form. Form contracts wouldn't be form contracts if wholesale edits were allowed, but landowner reluctance to request changes appears to be a trend given the title of the cover article chosen by the North Dakota Farmer's Union for its April 2008 issue of *Union Farmer*, "Landowners, Wind Farm Developers Can Negotiate."³² Any trusting landowner who signs a form wind easement containing unfair terms makes it more difficult for his neighbors to negotiate changes.

Another boon to wind project competitive advantage is rural landowner reluctance to hire legal counsel. Like small businesses everywhere, hiring a lawyer to review contracts is rarely in the typical farmer or rancher's budget. But there are additional reasons indigenous to rural North Dakota that explain why rural landowners are unlikely to have contracts reviewed by attorneys.

Physical distance to a lawyer's office is perhaps one reason why legal counsel is often not obtained. According to the State Bar Association of North Dakota, there are only thirteen North Dakota cities home to more than six lawyers.³³ Many landowners would therefore have to travel eighty miles to reach a small general practice law firm.

29. Glacier Ridge Wind Project, FAQs, <http://glacierridgewind.com/faqs> (last visited Apr. 14, 2010).

30. Glacier Ridge Wind Project, Home, *supra* note 26. The Glacier Ridge project does not appear on the AWEA list of North Dakota wind projects discussed above because it is still in the development stage.

31. Glacier Ridge Wind Project, FAQs, *supra* note 29.

32. Bob Kjelland, *Landowners, Wind Farm Developers Can Negotiate*, UNION FARMER, Apr. 2008, at 1.

33. North Dakota Lawyers Directory—Licensed Lawyers by North Dakota Cities, <http://www.ndcourts.com/> (follow "Lawyers" hyperlink; then follow "Cities" hyperlink).

The enhanced level of trust typical in rural business relationships is another reason why rural landowners seldom seek legal counsel. Doug Burgum, North Dakota entrepreneur, founder of Great Plains Software, and former senior vice president of Microsoft Business Solutions, explains that he learned the role of trust in rural business relationships from his father who owned a grain elevator in Arthur, North Dakota.³⁴ Burgum said, “The thing he taught me about the relationship between a business and its customers is it’s absolutely, positively based on trust What he taught me is if you screw grandpa, 50 years later his grandkid won’t bring you his grain. Families remember that.”³⁵

In rural business relationships, there is a strong tendency to rely on trust to bridge any gaps in one’s understanding of a transaction. This approach is reasonable when there are limited numbers of businesses requiring repeat customers, but rural landowners must understand that a wind project asking for a single transaction that will bind their land for generations does not deserve the same level of trust that is placed in area elevators and local businesses.

And even if a North Dakota landowner retains an attorney, that attorney may lack the expertise in wind easement issues needed to close the gap created by the wind project’s competitive advantage. There are thirty-eight rural towns in North Dakota with only one lawyer and another twenty towns with two or three lawyers.³⁶ Although closest in proximity to the landowners being approached by wind projects, these practitioners must already stay abreast of a heroic number of practice areas. It may be too much to ask that they also level the playing field between local landowners and the world-class companies negotiating most of the state’s wind easements.

North Dakota lawyers experienced in representing landowners with respect to wind easements are not easy to find. For example, in November 2009, the State Bar Association of North Dakota Lawyer Referral and Information Service was unable to refer a landowner to an attorney experienced in wind easements or leases.³⁷ A November 2009 search at martindale.com

34. Barbara Darrow, *Burgum Reflects On His Past And MBS’ Future*, CHANNEL WEB, Mar. 31, 2006, <http://www.crn.com/software/184417383>.

35. *Id.*

36. North Dakota Lawyers Directory—Licensed Lawyers by North Dakota Cities, *supra* note 33.

37. I spoke with the State Bar Association of North Dakota Lawyer Referral and Information Service on November 17, 2009, and learned that its lawyer referral software does not include a category for “wind easements and leases,” preventing them from tracking lawyers interested in receiving such referrals. The Lawyer Referral and Information Service representative said that

for North Dakota lawyers experienced in “wind energy” also yielded no results. Changing the martindale.com query to “renewable energy” yielded the name of one North Dakota lawyer,³⁸ but his firm’s website indicated that its renewable practice was focused on representing developers.³⁹

Last on this illustrative list of indigenous sources of wind project competitive advantage is the ethereal nature of wind. Wind’s invisibility breeds the inaccurate sales pitch that landowners are “getting something for nothing” when they sign a wind easement. Although wind easement payments are touted as “free money,” this view ignores both the fact that wind has become a valuable commodity and the possibility that wind easements may transfer significant legal risk to landowners.

B. WIND PROJECTS CHOOSE NEGOTIATING TACTICS THAT PRESERVE AND CULTIVATE THEIR COMPETITIVE ADVANTAGE

The competitive advantage held by developers not only results from the indigenous factors of rural life discussed above, but also from intentionally chosen tactics, including their penchant for confidentiality and several contracting strategies discussed below. Confidentiality requirements are probably the most potent tactic developers employ to protect and enhance their competitive advantage. One strategy requires landowners to sign confidentiality agreements as a prerequisite to receiving the form wind easement. The project thereby gains competitive advantage by isolating the landowner on a virtual island, denying him access to information from which to rebut a project’s position that the form contract is non-negotiable.

Another effective way project developers use confidentiality requirements to cultivate competitive advantage is to draft confidentiality obligations into final executed wind easements that protect the contract terms from being disclosed. Confidentiality requirements are rarely a “deal breaker” for the individual landowner, but collectively these confidentiality requirements cultivate wind project competitive advantage in at least three important ways.

First, keeping wind easements confidential hinders the educational efforts of state government through its universities and agricultural agencies, as well as by organizations like the Farm Bureau and Farmer’s Union. If one cannot learn the terms of North Dakota’s wind easements, it is

they expect to receive authorization to upgrade their software soon and will then be able to register lawyers interested in this practice area.

38. Martindale-Hubbell, <http://www.martindale.com> (entering “renewable energy” for “Practice Area” and “North Dakota” for “State/Province” in the “Find Lawyers & Firms” search).

39. Fredrikson & Byron, P.A.: Energy, <http://www.fredlaw.com/areas/energy/index.html>.

impossible to pinpoint issues, spot trends, and prepare educational materials focused on North Dakota's issues.

Second, confidential wind easements hinder lobbying efforts on behalf of rural landowners. Groups with legitimate interests in protecting rural America like the Farm Bureau and Farmer's Union are prevented from obtaining the best, most accurate information and are therefore disadvantaged when lobbying wind easement related issues. Even legislators who want to find out how their constituents are being treated by wind projects are stymied by their constituents' inability to provide details.

Third, keeping wind easements confidential makes it virtually impossible for landowners to find out what "market" terms are for wind easements, denying them a typical and often potent negotiation strategy. For example, if a landowner wants to know the market rate for cash renting farmland, a county extension agent can likely tell him and the information can be used during lease negotiations. But a North Dakota landowner has no source of accurate information if he wants to know what typical terms are for North Dakota wind easements or how North Dakota wind easement terms compare with terms given in other states. North Dakota lawyers beginning to practice in the area of wind easements will have the same difficulty learning what market terms are for wind easements. In contrast, large wind project companies and their lawyers know the range of what the various markets will bear by virtue of the number of wind easements they enter into in North Dakota and across the country.

This disparity in knowledge of market terms generates competitive advantage because wind projects are allowed to distribute below market wind easements in North Dakota with relative impunity.⁴⁰ Rural landowners and their attorneys lack the information to persuasively argue that the terms are not market, nor can they rebut wind project claims that the terms are market for North Dakota. In addition, however, the legislative history of House Bill 1509 evidences an apparent attempt by wind projects to artificially lower the bar on what market wind easement terms are in North Dakota.⁴¹ Conference committee minutes reference a trend that North

40. See discussion *infra* Part IV. The terms of a North Dakota wind easement that the author considers blatantly unfair will be contrasted with the terms of a wind easement used in Texas. *Id.*

41. HOUSE BILL AND RESOLUTION HISTORY—STANDING COMMITTEE MINUTES, H.B. 1509, 61st Leg. Assem., at 43, 37-38 (N.D. 2009) (comment of Sen. David Hogue), available at <http://www.legis.nd.gov/assembly/61-2009/bill-status/house/HB1509.PDF>. [hereinafter HOUSE BILL AND RESOLUTION HISTORY].

The problem that's unique to this [wind power] industry is that the landowner doesn't have the same negotiating power the mineral owner has. The mineral developer is going to go where the petroleum is. What we've seen with the wind developer is they tend to pick the soft targets. If you want to negotiate with them they tend to go around

Dakota wind developers are primarily pursuing “low hanging fruit;” for example, landowners who do not try to negotiate wind easements.⁴² Without regulation, wind companies cannot be expected to distribute wind easements that adequately protect the landowners’ interests and a predominance of un-negotiated wind easements would effectively result in market terms for North Dakota’s wind easements that are more advantageous to wind projects than would otherwise occur.

The contracting process by which wind projects acquire wind easements also enhances their competitive advantage. The wind easement is the last in a series of contractual commitments a developer needs from a landowner. The wind easement is also the most important and complicated of these commitments because it is the source of any substantive monies possibly paid to the landowner, and it sets forth the ground rules for the wind operation and agrarian operation to coexist. Instead of approaching this series of commitments methodically, wind projects prefer to commingle the commitments into one transaction, an approach that benefits the wind project.

The first contractual commitment a wind project needs from a landowner is an option to subsequently enter into a wind easement. The option requires the developer to pay the landowner a nominal amount to refrain from negotiating with other wind companies so that the contracting project has time to conduct the due diligence needed to determine if the site is viable for a wind project, and if so, to create a business plan to develop the project.

In addition to an option, the wind project will secondly need access to the landowner’s property in order to complete its due diligence. For example, the wind project may need access to the property in order to install and regularly monitor a device that records the property’s wind characteristics. Access rights could be provided most simply via a short-term lease or license agreement but are typically inserted into the option.

Third, should due diligence confirm that the wind project is viable, the project owner will need to exercise the option and enter into a long-term wind easement with the landowner. Although the wind easement could be a free-standing agreement negotiated after the project is known to be viable, either the form wind easement or its key terms will most typically be part of the option.

you and go to the next track of land that will not be as willing to negotiate. Within certain parameters they can locate their wind towers where they can find a low hanging fruit.

Id.

42. *Id.*

Commingling all three contractual commitments into one transaction requires the landowner to promptly make an all or nothing decision—whether to have a long term business relationship with the wind project developing a project in his area or, alternatively, run the risk of experiencing the sight and sound of wind turbines without any remuneration. The length of the “getting to know you stage” varies with the wind project; some companies make an effort to establish a relationship and others apply pressure for a quick decision⁴³ resulting in some landowners being forced into deciding whether to marry a “blind date” or alternatively, run the risk of never getting “married.”

Making the effort to reach a well-considered decision may be wasted if the project is proven not viable, or if viable, the landowner’s property is not chosen to host wind towers. Even if the landowner takes the time to gain expertise and spends the money to negotiate the agreement, early contracting requires the landowner to evaluate the transaction wearing blinders because the location of wind turbines and other project facilities will not be known yet. There are generally no guaranties that wind towers will be placed on a landowner’s property and therefore even landowners who sign wind easements risk a future of living with his neighbors’ turbines while receiving the minimal compensation paid for access roads and transmission lines.⁴⁴

Another standard tactic used by wind projects to enhance their competitive advantage is to send employees or agents to landowners’ homes to both discuss and close proposed transactions.⁴⁵ The danger of contracts being signed around kitchen tables is well recognized; it is difficult to exercise the same level of professional skepticism while serving coffee and cookies.

Wind projects sometimes include a person who is well-respected in the community on their team of people sent to landowners’ homes.⁴⁶ This is a

43. HOUSE BILL AND RESOLUTION HISTORY at 48-49. The legislative history of House Bill 1509 tells of some developers who hold community meetings designed to share information and others who offered a signing bonus if a landowner committed within fifteen days. *Id.*

44. This typical contracting process may also discourage lawyers from actively pursuing a wind easement practice. The legal costs associated with completely understanding the transaction and negotiating changes, many of which will be focused on limiting risk, will be the same even if the landowner ultimately receives nothing more than the nominal option payment or minimal payments for access to roads and transmission lines. Although it is the client’s money that will be wasted in the short term, the attorney, especially one in a small community, faces the longer term risk of a dissatisfied client.

45. HOUSE BILL AND RESOLUTION HISTORY, *supra* note 41, at 88. The legislative history of House Bill 1509 evidences that this approach is being used in North Dakota. *Id.*

46. *Id.* The legislative history of House Bill 1509 evidences that this approach is being used in North Dakota. *Id.*

powerful tactic that enhances the risks associated with kitchen table negotiations. The local person may be a co-developer, an individual hired for this purpose or a supportive recruit who has already signed a wind easement. The presence of the native son breaks the ice, but more insidiously, encourages the landowner to superimpose the local person's credibility and trustworthiness onto the wind project.

This list of wind project negotiating tactics is not intended to be complete but attempts to highlight those whose shrewdness makes them less visible. Other more blatant negotiating techniques are also relied upon. These include standard high pressure tactics of refusing to negotiate changes to the form wind easement and insisting that the landowner act promptly.⁴⁷

This combination of factors and tactics enhances the competitive advantage of wind projects such that the descent of their sales staff onto a rural community can be considered akin to the New York Yankees challenging the local 4-H club softball team to a game. Only the stakes are much higher.

III. LEGISLATION MITIGATING THE COMPETITIVE ADVANTAGE OF WIND PROJECTS IS JUSTIFIED

The North Dakota legislature does not have to stand idle while wind project developers visit kitchen tables across the state. Continuing the above analogy, the legislature can enact new game rules to even the odds between the local 4-H club and the Yankees. This section first reviews the legislature's authority and past practice of mitigating unfair competitive advantage by inserting legislation into the contracting processes of other industries, and then summarizes the legislative history of N.D.C.C. section 17-04-06.

A. LEGISLATURE'S AUTHORITY AND PAST PRACTICE OF MITIGATING COMPETITIVE ADVANTAGE

North Dakota's state government was instituted "for the protection, security and benefit of the people[.]"⁴⁸ Although the legislature is not in the business of drafting contracts for its constituents, the North Dakota legislature has inserted legislation in various ways into a variety of contracting processes by virtue of its authority and responsibility to protect, secure and benefit the public.

47. *Id.* at 38, 43, 49, 77, 80. The legislative history of House Bill 1509 is also replete with evidence that such approaches are being used in North Dakota. *Id.*

48. N.D. CONST. art. I, § 2, available at <http://www.legis.nd.gov/constitution/Const.pdf>.

One tack the legislature has taken is setting an outer boundary for a specified contract term and reinforcing that boundary with stiff penalties. This was how the legislature mitigated the ability of lenders to use their competitive advantage to charge excessive interest rates.⁴⁹ A statutory formula set the usurious interest rate.⁵⁰ Should a lender ignore this requirement, penalties include refunding twice the amount of interest paid plus 25% of the principal to the borrower⁵¹ and being charged with a class B misdemeanor.⁵²

A second approach declares a certain contract term void as against public policy. This approach was used to further mitigate lenders' competitive advantage, specifically their ability to require that borrowers sign loan documents obligating the borrower to pay the lender's attorney's fees in the event of a collection action.⁵³ Instead of prohibiting lenders from including such provisions in their loan instruments, the legislature declared such provisions void as against public policy.⁵⁴

The legislature has also proactively drafted a damages provision and required that it be inserted into mineral leases that were silent on the subject.⁵⁵ This required clause specifies the circumstances giving rise to damages, requires the parties to mutually agree on the damages formula, and sets December 31 as the annual due date.⁵⁶ And to guaranty that the competitive advantage of mining companies did not interfere with its intent, the legislature clarified that these rights were "absolute and unwaivable" and that "[a]ny instrument which purports to waive rights granted by this section is null and void and of no legal effect."⁵⁷

The legislature required special negotiating protocols when mitigating the power of companies acquiring coal leases.⁵⁸ For example, when coal

49. N.D. CENT. CODE ch. 47-14 (2009), available at <http://www.legis.nd.gov/cencode/t47c14.pdf>.

50. *Id.* § 47-14-09(1).

51. *Id.* § 47-14-10.

52. *Id.* § 47-14-11.

53. *Id.* § 28-26-04 (2005), available at <http://www.legis.nd.gov/cencode/t28c26.pdf>.

54. *Id.* The law explains that

[a]ny provision contained in any note, bond, mortgage, security agreement, or other evidence of debt for the payment of an attorney's fee in case of default in payment or in proceedings had to collect such note, bond, or evidence of debt, or to foreclose such mortgage or security agreement, is against public policy and void.

Id.

55. *Id.* § 38-18-07(1) (2004), available at <http://www.legis.nd.gov/cencode/t38c18.pdf>.

56. *Id.*

57. *Id.* § 38-18-07(3).

58. *See id.* ch. 38-17, available at <http://www.legis.nd.gov/cencode/t38c17.pdf>.

leasing companies include an “advance royalty”⁵⁹ provision in their coal leases, they are required to follow this procedure: before execution, the clause must be “specially explained” to the surface owner and the surface owner must sign an acknowledgement in the format required by the legislature.⁶⁰ The penalty for not following this procedure is that the advance royalty provision is deemed void.⁶¹

Instead of focusing on contractual terms, a fifth approach provides a window of opportunity to cancel an executed contract. In another attempt to mitigate the competitive advantage of coal mines, parties to coal leases are allowed fifteen business days after execution to terminate them without penalty.⁶²

A comprehensive package of protections targets the competitive advantage of those soliciting contracts for the sale or lease of consumer goods or services around kitchen tables, and other places that are not the solicitor’s place of business.⁶³ The threat of this contracting approach is considered so severe that protection is triggered when the price of the contract amounts to just \$25.00.⁶⁴ A three business day window of opportunity—potentially fifteen business days if the individual is sixty-five years or older and the purchase price is more than fifty dollars—is allowed to cancel the contract.⁶⁵ In addition, bonuses for referrals are regulated,⁶⁶ covered contracts must contain a required notice provision,⁶⁷ and a person is guilty of a class B misdemeanor for any violations of the chapter.⁶⁸

The legislature used a global approach to mitigate the insurance industry’s competitive advantage. Regulatory authority was first delegated to the Insurance Commissioner and then reinforced with numerous dictates regarding the content of insurance policies.⁶⁹ Insurance companies cannot even issue a new form contract without first seeking the approval of the

59. “‘Advance royalty’ means the offset contemplated which would allow payments for rent, bonuses, and damages under the terms of the lease to be deducted from the amount of the royalty due to the lessor when the mining operation actually begins.” *Id.* § 38-17-03(1).

60. *Id.* § 38-17-06.

61. *Id.*

62. *Id.* § 38-17-04(2).

63. *See id.* ch. 51-18 (2007), available at <http://www.legis.nd.gov/cencode/t51c18.pdf>.

64. *Id.* § 51-18-08(2).

65. *Id.* § 51-18-02(1).

66. *Id.* § 51-18-03.

67. *Id.* § 51-18-04.

68. *Id.* § 51-18-09. Despite the similar *modus operandi*, because wind easements do not involve consumer goods or services, this comprehensive system offers no protection to landowners approached by wind projects. *Id.* § 51-18-01(1), (3).

69. *Id.* tit. 26.1 (2009), available at <http://www.legis.nd.gov/cencode/t261.html>.

Insurance Commissioner.⁷⁰ If approval is given, the Insurance Commissioner can later decide after a hearing to rescind its approval if the contract “contains a provision which is unjust, unfair, inequitable, misleading, or deceptive[.]”⁷¹ It is instructive that the legislature did not just temper the insurance industry’s competitive advantage, but created a construct that could fully mitigate it such that fair and just contracts would result.⁷²

How an industry acquires its competitive advantage is not relevant to whether the legislature is authorized and obligated to mitigate it. Even if competitive advantage has been gained innocently, the question for the North Dakota legislature is whether it needs to be mitigated “for the protection, security and benefit of the people[.]”⁷³ In the case of wind projects and wind easements, the 2009 North Dakota legislature decided that the answer was “yes.”

B. SUMMARY OF SECTION 17-04-06’S LEGISLATIVE HISTORY

As introduced, House Bill 1509 required the North Dakota Public Service Commission to adopt rules establishing a voluntary code of conduct for wind projects.⁷⁴ The North Dakota Farmers Union described the genesis of this approach as follows, “The bill [was] developed from feedback by a number of member organizations that expressed a need for landowner protections when dealing with wind developers. The initial concept was seen as a more palatable means of getting at the bigger issue which was fairness and transparency.”⁷⁵

On January 29, 2009, the House Natural Resources Committee heard testimony on House Bill 1509.⁷⁶ A representative of the North Dakota Public Service Commission testified that for several reasons the commission did not think it was the appropriate entity to create the code of conduct.⁷⁷ One of House Bill 1509’s sponsors distributed copies of an article entitled *Landowner Guidelines for Evaluating Wind Energy Production*

70. *Id.* § 26.1-30-19(1).

71. *Id.* § 26.1-30-21(2).

72. *See id.*

73. N.D. CONST. art. I, § 2, available at <http://www.legis.nd.gov/constitution/Const.pdf>.

74. H.B. 1509, 61st Leg. Assem. (N.D. 2009) (introduced), available at <http://www.legis.nd.gov/assembly/61-2009/bill-text/JBSB0100.pdf>.

75. North Dakota Farmers Union, H.B. 1509, <http://ndfu.org/addPages/index.asp?linkname=HB%201509>.

76. HOUSE BILL AND RESOLUTION HISTORY, *supra* note 41, at 2-7, 65-83.

77. *Id.* at 82-83 (testimony of Illona A. Jeffcoat-Sacco, General Counsel to the Public Service Comm.).

*Leases*⁷⁸ to the committee.⁷⁹ The document was well received and the possibility of using it as a guide for a revised code of conduct was raised.⁸⁰ The author of this article also testified to the committee about a form wind easement my mother had received.⁸¹

The House Natural Resources Committee subsequently decided to significantly amend House Bill 1509 to replace the rulemaking approach with a more fulsome bill that served as a mandatory code of conduct.⁸² As amended, House Bill 1509 unanimously passed the House on February 16, 2009.⁸³ Among other things, it required wind projects to draft wind easements in plain English,⁸⁴ include a cover sheet advising landowners to retain legal counsel,⁸⁵ and described required wind easement terms, several of which were suggested by *Landowner Guidelines for Evaluating Wind Energy Production Leases*,⁸⁶ including banning confidentiality clauses.⁸⁷

On March 13, 2009, the Senate Natural Resources Committee heard testimony, including mine, on House Bill 1509.⁸⁸ According to the Farmers Union, “[a]s the bill moved to the Senate there was a significant increase in opposition from the Wind Developer lobby. Proponents worked with legislators and opponents of the bill to address concerns and the Senate amended the bill as it saw appropriate.”⁸⁹ By a vote of 32 to 14, the full Senate passed the amended bill on April 7, 2009.⁹⁰

Although the Senate amendments were relatively minor,⁹¹ when House Bill 1509 went back to the House, chairman Todd Porter of the House

78. Stephen B. Harsh et al., *Landowner Guidelines for Evaluating Wind Energy Production Leases*, MICH. ST. U. DEP’T OF AGRIC., FOOD AND RESOURCE ECON., Feb. 2008, available at http://web1.msue.msu.edu/wind/WindLease_WorkSheet.pdf (observing that an abbreviated version of this paper appeared in the April 2008 issue of the North Dakota Farmers Union UNION FARMER described at note 33 above).

79. HOUSE BILL AND RESOLUTION HISTORY, *supra* note 41, at 3, 67-74 (noting the article’s distribution by Rep. Phillip Mueller).

80. *Id.* at 4.

81. *Id.* at 4, 75-78.

82. *Id.* at 12-14.

83. Measure Actions, H.B. 1509, <http://www.legis.nd.gov/assembly/61-2009/bill-actions/ba1509.html>.

84. H.B. 1509, 61st Leg. Assem., § 1(1)(a) (N.D. 2009) (engrossed), available at <http://www.legis.nd.gov/assembly/61-2009/bill-text/JBSB0200.pdf>.

85. H.B. 1509, 61st Leg. Assem., § 1(1)(b) (N.D. 2009) (engrossed), available at <http://www.legis.nd.gov/assembly/61-2009/bill-text/JBSB0200.pdf>.

86. Harsh et al., *supra* note 78.

87. H.B. 1509, 61st Leg. Assem., § 1(1)(d) (N.D. 2009) (engrossed), available at <http://www.legis.nd.gov/assembly/61-2009/bill-text/JBSB0200.pdf>.

88. HOUSE BILL AND RESOLUTION HISTORY, *supra* note 41, at 16-20, 86-102.

89. North Dakota Farmers Union, H.B. 1509, *supra* note 75.

90. Measure Actions, H.B. 1509, *supra* note 83.

91. HOUSE BILL AND RESOLUTION HISTORY, *supra* note 41, at 32-33. The Senate eliminated the requirements that wind easements be written in plain English and that the wind developer

Natural Resources Committee moved that the House not concur in the Senate amendments and that a conference committee be appointed.⁹² The motion prevailed on a voice note.⁹³ It is important to note that the bill as it passed both houses banned confidentiality clauses in executed wind easements.⁹⁴ Once in conference committee, however, the Farmer's Union reported that "the issue of 'confidentiality' was at the heart of the opposition."⁹⁵ After intense negotiations lasting several days,⁹⁶ the conferees agreed to a compromise that allowed parties to mutually agree to confidentiality requirements in executed wind easements, but prevented this provision from covering negotiations or terms of proposed easements.⁹⁷

The final version of House Bill 1509 passed the House on April 29, 2009, with a vote of 86 to 5;⁹⁸ passed the Senate on April 30, 2009, with a vote of 41 to 6;⁹⁹ was signed by the governor on May 4, 2009;¹⁰⁰ and was codified at section 17-04-06 with an effective date of August 1, 2009.

Although many North Dakotans are subject to wind easements executed before August 1, 2009, future opportunities for wind projects to use their competitive advantage are apparent from statistics ranking North Dakota first in wind power potential.¹⁰¹ There are obviously many more North Dakota kitchen tables left for wind project developers to approach.

IV. THE SCOPE OF NORTH DAKOTA CENTURY CODE SECTION 17-04-06

Compromises resulting from intense negotiations of House Bill 1509 are apparent in section 17-04-06. Although it mandates the adoption of two

waive subrogation actions against the landowner, changed the waiting period to ten days, added a requirement that the landowner make accommodations to the wind project during construction and operation, and refined the landowner's ability to terminate the agreement if the wind project stops operating. *Id.*

92. HOUSE JOURNAL, 61st Leg. Assem., 1422 (N.D. 2009), available at <http://www.legis.nd.gov/assembl/61-2009/journals/HR64.pdf>.

93. *Id.*

94. H.B. 1509, 61st Leg. Assem., § 1(1)(c) (N.D. 2009) (first engrossment with Conference Committee Amendments), available at <http://www.legis.nd.gov/assembly/61-2009/bill-text/JBSB0300.pdf>.

95. North Dakota Farmers Union, H.B. 1509, *supra* note 75.

96. HOUSE BILL AND RESOLUTION HISTORY, *supra* note 41, at 34-63.

97. H.B. 1509, 61st Leg. Assem., § 1(1)(c) (N.D. 2009) (first engrossment with conference committee amendments), available at <http://www.legis.nd.gov/assembly/61-2009/bill-text/JBSB0400.pdf>.

98. Measure Actions, H.B. 1509, *supra* note 83.

99. *Id.*

100. *Id.*

101. U.S. Wind Energy Projects—North Dakota (as of 6/27/2009), <http://www.awea.org/projects> (last visited Apr. 14, 2010).

negotiation protocols¹⁰² and includes a short list of required wind easement terms that prohibit certain project risks being shifted to landowners,¹⁰³ it also requires contract terms that favor wind projects¹⁰⁴ and preserves the ability of wind projects to enhance their competitive advantage by insisting that executed wind easements contain confidentiality obligations.¹⁰⁵ All facets of section 17-04-06 are discussed below.

A. REQUIRED NEGOTIATION PROTOCOLS

1. *Wind Easements Must Have a Cover Page Encouraging Landowners to Retain Legal Representation*

Wind project developers are required to attach a cover page to wind easements that contains the following message to landowners in at least sixteen-point type:

This is an important agreement our lawyers have drafted that will bind you and your land for up to __ years. We will give you enough time to study and thoroughly understand it. We strongly encourage you to hire a lawyer to explain this agreement to you. You may talk with your neighbors about the wind project and find out if they also received a proposed contract. You and your neighbors may choose to hire the same attorney to review the agreement and negotiate changes on your behalf.¹⁰⁶

This paragraph sends an important message to landowners at the exact time they need to hear it—when they are around their kitchen table with wind project representatives. Just when the landowner may be hearing the siren call that trust can bridge any gaps in his understanding and that legal representation is not necessary, this paragraph attempts to provide an antidote.

Unfortunately, the cover sheet does not clearly protect the landowners' rights to discuss the terms of the proposed wind easement with others. Only discussions "about the wind project" and whether a neighbor "also received a proposed contract" are clearly protected.¹⁰⁷ Although an executed wind easement cannot contain provisions requiring either party to maintain

102. N.D. CENT. CODE § 17-04-06(1)(a)-(b) (2009), available at <http://www.legis.nd.gov/cencode/t17c04.pdf>.

103. *Id.* § 17-04-06 (1)(e)-(g), (i).

104. *Id.* § 17-04-06 (1)(d), (1)(h), (2).

105. *Id.* § 17-04-06(1)(c).

106. *Id.* § 17-04-06(1)(a).

107. *Id.*

the confidentiality of negotiations or proposed terms,¹⁰⁸ there is no restriction on a separate confidentiality agreement being required to receive a proposed wind easement. This is an important oversight for the 2011 legislature to consider correcting.

2. *A Minimum of a Ten Business Day Waiting Period Before Wind Easements May be Executed*

Wind easements “[m]ay not be executed by the parties until at least ten business days after the first proposed easement or lease has been delivered to the property owner.”¹⁰⁹ This requirement was in response to testimony, including mine, that landowners were willing to sign unread wind easements during the project’s first visit to the kitchen table. I told the Senate Natural Resources Committee that until my mother intervened, my 91-year-old father was ready to commit to a wind easement without reading it when a representative of a wind project visited his kitchen table.¹¹⁰

The following testimony was not part of the House Bill 1509 hearings but graphically describes the benefit of a waiting period. The President of Peak Wind Development, LLC, a North Dakota limited liability company formed by a group of local landowners,¹¹¹ complained to the Federal Energy Regulatory Commission that FPL Energy (n/k/a NextEra) took the following approach when encouraging him and his neighbors to sign a wind easement.

Mr. Kavanaugh [FPL Energy’s representative] told our family that FPL Energy was developing a wind farm in the area that could be fourteen miles long and one and a half miles wide. Kavanaugh indicated that FPL Energy was offering \$1,000 per year per landowner to retain development rights for five years; if a wind turbine was actually constructed, the landowner would receive \$4,000 per year, but would have to commit to a 99-year lease. Mr. Kavanaugh said that the contracts needed to be signed within two days

FPL Energy representatives gave my neighbors (many of them elderly and without legal representation) a hard sell, telling them that all their

108. *Id.* § 17-04-06(1)(c).

109. *Id.* § 17-04-06(1)(b).

110. HOUSE BILL AND RESOLUTION HISTORY, *supra* note 41, at 88.

111. Glacier Ridge Wind Project, Peak Wind LLC, <http://glacierridgewind.com/peak-wind-llc> (last visited Apr. 14, 2010). Peak Wind Development, LLC, has approximately 80 members and is co-developing the Glacier Ridge Wind Project with RES Americas. Glacier Ridge Wind Project, Home, <http://glacierridgewind.com/index> (last visited Apr. 14, 2010).

neighbors had signed (which was not true) and that they did not need to talk with their family or a lawyer.¹¹²

A ten business day waiting period mitigates these negotiation approaches,¹¹³ but its protection is easily circumvented if wind projects begin delivering proposed easements by mail and following up with personal sales visits ten business days later. If such an approach is adopted, North Dakota landowners are no better off than before. Redefining what starts the ten day waiting period during the 2011 legislative session would help fill this loophole.

Alternatively, the waiting period could be replaced with a window of opportunity to cancel the wind easement akin to North Dakotans' ability to cancel \$25.00 consumer contracts signed at their kitchen tables,¹¹⁴ and their ability to cancel coal leases.¹¹⁵ While waiting periods and cancellation periods both have pros and cons, one thing is clear: North Dakotans are today better protected from traditional "Avon ladies" than from sophisticated, multi-national wind energy companies with skilled sales staffs backed by world-class attorneys.¹¹⁶

B. REQUIRED WIND EASEMENT TERMS

Wind easement terms required by section 17-04-06 will be discussed in the context of two wind easements, one drafted for a North Dakota project and the other drafted for a Texas project. For convenience they will be referred to as the "North Dakota Easement" and the "Texas Easement." Given the history of wind project competitive advantage in North Dakota, it is important to compare North Dakota wind easements with wind easements from other states. Substantive disparities disadvantaging North Dakotans evidence that the power of wind projects' competitive advantage has been wielded more effectively in North Dakota.

The "North Dakota Easement" is the "North Dakota Wind Energy Option and Easement Agreement" prepared by RES North America Leasing,

112. Affidavit of William Noeske, ¶¶ 8,9, Attachment 1 to the Complaint of Renewable Energy Systems Americas Inc. and PEAK Wind Development, LLC v. Otter Tail Power Company and Minnkota Power Cooperative, Inc., FERC Docket EL08-86-000.

113. N.D. CENT. CODE § 17-04-06(1)(b).

114. *See Id.* § 51-18-02(1), available at <http://legis.nd.gov/cencode/t51c18.pdf> (creating a 3 business day window to cancel a contract for consumer goods and potentially 15 business days if the individual is 65 years or older and the purchase price is greater than fifty dollars).

115. *Id.* § 38-17-04(2), available at <http://legis.nd.gov/cencode/t38c17.pdf> (providing a 15 business day window to cancel).

116. Avon may choose to circumvent their customers' section 51-18-02 cancellation rights by offering a full section 51-18-08(7) return and refund privilege. *Id.* § 51-18-08(7), available at <http://legis.nd.gov/cencode/t51c.18.pdf>.

LLC, and provided to my mother in July 2008 without requiring that she sign a confidentiality agreement. Relevant portions were attached to my testimony to the Senate Natural Resources Committee.¹¹⁷ This agreement was prepared for the Glacier Ridge project and RES Americas represented to me that it contained the form wind easement terms and conditions that about eighty neighbors had signed.

The “Texas Easement” is the “Wind Power Agreement” prepared by Nacel Energy Corporation (Nacel), a publicly traded Wyoming corporation engaged in the business of developing wind projects.¹¹⁸ Nacel is currently developing six wind projects located in Texas and Arizona, including the Texas project governed by this Texas Easement.¹¹⁹

Nacel filed the Texas Easement with the Securities and Exchange Commission (SEC) as Exhibit 10.3 to Nacel’s Form 10-K for fiscal year ending March 31, 2009.¹²⁰ The SEC does not require corporations to disclose information in their exhibits that meet the SEC’s confidentiality standards.¹²¹ Confidential portions of filed exhibits may be redacted pending resolution of a petition to the SEC seeking exemption from public disclosure.¹²² Despite the availability of this procedure, Nacel filed the entire Texas Easement, even compensation terms, without redactions.¹²³

1. *Required Wind Easement Terms that Prevent Wind Project Risk Being Shifted to Landowners*
 - a. Landowners are Protected from Property Tax Liability for Wind Facilities

Wind easements cannot include terms that make the landowner “liable for any property tax associated with the wind energy facility or other equipment related to wind energy generation.”¹²⁴ This requirement is typically in wind easements and both of the easements referenced above contain it.¹²⁵

117. HOUSE BILL AND RESOLUTION HISTORY, *supra* note 41, at 92-99.

118. Nacel Energy Corp., Annual Report (Form 10-k), at 4 (June 23, 2009), *available at* <http://investing.businessweek.com/research/stocks/financials/drawFiling.asp?formType=10-K> [hereinafter Nacel Form 10-k].

119. Nacel Energy, Our Projects, <http://www.nacelenergy.com/business/projects.html> (last visited Apr. 14, 2010).

120. Nacel Form 10-k, *supra* note 118, at Ex. 10.3.

121. Securities and Exchange Act of 1934, ch. 394, 48 Stat. 881 (Rule 24-b).

122. *Id.*

123. Nacel Form 10-k, *supra* note 118, at Ex. 10.3.

124. N.D. CENT. CODE § 17-04-06(1)(e) (2009), *available at* <http://www.legis.nd.gov/cencode/t17c04.pdf>.

125. Nacel Form 10-k, *supra* note 118, at Ex. 10.3 § 6.3; HOUSE BILL AND RESOLUTION HISTORY, *supra* note 41, at 94.

This requirement still performs an important function, however; it prevents wind projects from using their competitive advantage to draft wind easements allowing them to escape this obvious responsibility.

b. Landowners are Protected From Liability for Damages Caused by Wind Projects

Wind easements are prohibited from making “the property owner liable for any damages caused by the wind energy facility and equipment or the operation of the generating facility and equipment, including liability or damage to the property owner or to third parties.”¹²⁶ Two typical wind easement provisions affected by this requirement are crop loss and indemnity. Both are examined below.

Wind easements pertaining to agricultural property typically contain a crop loss provision obligating the wind project developer to reimburse the landowner for crop loss caused by the project at any time during the wind easement’s term. Although this obligation is typical, the North Dakota Easement demonstrates why this statutory requirement is needed. The North Dakota Easement limited the wind project’s obligation to pay damages for crop loss caused by the project to the period of “Construction Activities,” a defined term referencing only the construction and erection of the wind facilities.¹²⁷ Therefore, during the balance of the 40 year term the wind project could damage the landowner’s crops with contractual impunity. This inequity is now statutorily prevented.¹²⁸

126. N.D. CENT. CODE § 17-04-06(1)(f) (2009).

127. See HOUSE BILL AND RESOLUTION HISTORY, *supra* note 41, at 94-95. Section 9.3 of the North Dakota Easement addresses the repair of improvements and reimbursement for crop damages:

(d) If Owner [landowner] has not planted a crop in the location of improvements for the growing season in which the improvements will be constructed, Owner shall not be entitled to payments for any loss of crops planted following receipt of the Construction Notice in the locations designated in the Construction Notice. If upon receipt of a Construction Notice, Owner (i) has not planted a crop in the location of improvements designated in the Construction Notice for a growing season in which the improvements will be constructed, but (ii) has applied fertilizer, pesticides, or other similar inputs in the location of such improvements, then Owner will not be entitled to payment for an[y] [sic] loss of crops planted following receipt of the Construction Notice, but Grantee [wind project] will reimburse Owner for the actual cost of the fertilizer, pesticides or other inputs applied in the location of such improvements.

(e) Subject to the provisions of subsection (d) above, Owner and Grantee agree that Grantee shall pay, as liquidated damages for any crop loss and related disruption during Construction Activities, \$500.00 per acre on which crops are destroyed or disturbed. Payments for damages to crops shall be paid within thirty (30) days of the determination of the amount of liquidated damages owed.

Id.

128. N.D. CENT. CODE § 17-04-06(1)(f) (2009).

The Texas Easement provides an example of a wind easement crop loss provision drafted without the influence of unfair competitive advantage.¹²⁹ The Texas clause limits the wind project's obligation to pay crop loss damages to once per growing season and contains a fair formula to calculate damages, a swift dispute resolution technique, and a payment due date.¹³⁰

Wind easement indemnity provisions are now required to indemnify the landowner for damages caused by the project.¹³¹ Although seeming superfluous, the North Dakota Easement indemnity clause demonstrates why this statutory requirement is needed.¹³² The last phrase of the North Dakota Easement's provision describing the developer's obligation to indemnify the landowner contains an exception for damage or injuries "attributable to dangers associated with electrical generating facilities."¹³³ Given the breadth of this exception, it is difficult to see how any damage to the landowner caused by the wind project would ever give rise to a duty to indemnify.

129. Section 5.6 of the Texas Easement addresses crop damage:

For crops destroyed or lost due to the [wind project operations], Grantee [wind project] will compensate Owner [landowner] as calculated below, but in no case will Grantee be required to pay more than a single, total crop loss in any one crop year, and no additional, subsequent payments will be due in later years for portions of the Property occupied by Wind Systems. Damages for destruction or loss of existing crops will be calculated using the following formula: Unit Price x Unit Yield Per Acre x Acres Damaged = Damages. Unit Price will be based on the average of the last previous March 1st and September 1st prices for that crop as listed on the Chicago Board of Trade or other equivalent trading market. Yield will be the average of the previous three (3) years' yield according to Owner's records for the smallest parcel of land that includes the damaged area. If Owner does not have yield records available, the parties will use FSA records or other commonly used yield information available for the area. The parties will try in good faith to agree to the extent of damage and acreage affected. If they cannot agree, they will promptly have the area measured and extent of damage assessed by an impartial party such as a crop insurance adjuster or extension agent. Payment will be made within thirty (30) days after determining the extent of damage.

Nacel Form 10-k, *supra* note 118, at Ex. 10.3 § 5.6.

130. *Id.*

131. N.D. CENT. CODE § 17-04-06(1)(f) (2009).

132. Section 10.1 of the North Dakota Easement addresses the responsibility of the wind project developer to indemnify the landowner:

Grantee [wind project] shall indemnify, defend, protect and hold Owner [landowner] harmless from and against any Claims for physical damages to property and for physical injuries to any person, to the extent caused by Grantee or its employees', agents' or contractors' negligence or willful misconduct; provided, however, that Grantee's obligations for damages to crops shall be limited by Section 9.3. In no event shall Grantee be liable or responsible for losses of rent, businesses opportunities, profits and the like that may result from Owner's loss of use of the portion of the Premises occupied by the Windpower Facilities pursuant to this Agreement, nor for property damage or personal injuries attributable to dangers associated with electrical generating facilities.

HOUSE BILL AND RESOLUTION HISTORY, *supra* note 41, at 96.

133. *Id.*

The unfairness of the North Dakota Easement becomes especially apparent when comparing the wind project developer's indemnity obligation with the landowner's indemnity obligation. The North Dakota Easement obligates the landowner to indemnify the wind project for any damage the landowner causes, whether or not the landowner is negligent and with no exceptions for lost profits or other consequential damages.¹³⁴

Wind project developers are no longer allowed to flex their competitive advantage in ways similar to the North Dakota Easement indemnity provision,¹³⁵ and hopefully the bar in North Dakota will move closer to the Texas Easement. The Texas Easement contains an indemnity clause devoid of any signs that unfair competitive advantage played a role in drafting it.¹³⁶ The Texas Easement contains one mutual indemnity clause that conveys the same degree of indemnity obligation and protection to both the wind project and the landowner.¹³⁷

c. Wind Projects Must Comply With Law

Wind easements must "obligate the developer, owner and operator of the wind energy facility to comply with federal, state, and local laws and

134. The landowner also has a duty to indemnify the developer under section 11.6:

Owner [landowner] shall indemnify, defend, protect and hold Grantee [wind project] harmless from and against Claims for physical damage to property (including, without limitation, Grantee's roads) and for physical injuries to any person, to the extent caused by the operations or activities of Owner or those acting by, for or under Owner.

HOUSE BILL AND RESOLUTION HISTORY, *supra* note 41, at 97.

135. See N.D. CENT. CODE § 17-04-06(1)(f) (2009).

136. The Texas Easement's indemnification clause, section 8.1, reads as follows:

Each Party (such "Indemnifying Party") will defend, hold harmless, and indemnify the other Party and other Party's agents, contractors, employees, invitees, licensees, Lenders, mortgagees, officers, and permittees (each an "Indemnified Party") against any and all claims, damages, expenses, losses, and other liabilities, including, without limitation, reasonable attorneys' fees, resulting from or arising out of (a) any actions of the Indemnifying Party or the Indemnifying Party's agents, contractors, employees, invitees, licenses, or permittees, on the Property, (b) any negligent act or negligent failure to act on the part of the Indemnifying Party or the Indemnifying Party's agents, contractors, employees, invitees, licensees, or permittees, or (c) any breach of this Agreement by the Indemnifying Party; provided, however, the Indemnifying Party will not be liable to the Indemnified Party for consequential damages (such as, but not limited to lost profits) or exemplary or punitive damages that may be claimed by the Indemnified Party. The foregoing limitation on consequential damages will not apply to the extent of an Indemnifying Party's liability for consequential damages to a third party and for which the Indemnifying Party is liable under this Section. This indemnification will survive the termination of this Agreement, but will not extend beyond the applicable statute(s) of limitations. This indemnification will not apply to claims, damages, expenses, losses, and other liabilities to the extent caused by the negligent or willful act or omission on the part of the Indemnified Party.

Nacel Form 10-k, *supra* note 118, at Ex. 10.3 § 8.1.

137. *Id.*

regulations and may not make the property owner liable in the case of a violation.”¹³⁸ General commitments to comply with law are standard in wind easements and both the North Dakota Easement and the Texas Easement contain one.¹³⁹

The usefulness of this statutory requirement extends beyond requiring general compliance with law provisions, though; it would also protect a landowner from wind easement provisions specifically allowing a wind project to potentially skirt the law. For example, the North Dakota Easement contains a hazardous materials provision that allows the developer to dispose hazardous materials on the landowner’s property, and only requires that the property be remediated if the project is caught and required to remediate.¹⁴⁰ If remediation was otherwise required by law, the landowner will now have a basis to insist that it be done whether or not a governmental authority was aware and had required it. In contrast, the Texas Easement does not allow the wind project to dispose hazardous materials on the landowner’s property.¹⁴¹

d. Reasons to Withhold Landowner Payments Must Be Clearly Stated

Wind easements must “state clearly any circumstances that will allow the developer, owner, and operator of the wind energy facility to withhold payments from the property owner.”¹⁴² This is a safety net that prevents

138. N.D. CENT. CODE § 17-04-06(1)(g) (2009).

139. Nacel Form 10-k, *supra* note 118, at Ex. 10.3 §6.1; HOUSE BILL AND RESOLUTION HISTORY, *supra* note 41, at 96, § 10.3.

140. The North Dakota Easement’s hazardous materials provision, section 10.5, is as follows:

Grantee’s Responsibility for Hazardous Materials. If Grantee [wind project] places, disposes or releases any Hazardous Material in or onto the Premises [landowner’s property] and such placement, disposal or release results in the contamination of the Premises, then Grantee shall remediate such Hazardous Materials to the extent ordered to do so by a governmental authority with jurisdiction. Owner acknowledges that Grantee has disclosed to Owner that in connection with the ordinary course of construction, operation and maintenance of the Windpower Facilities, Grantee will use limited quantities of Hazardous Materials, at all times in compliance with environmental Law.

HOUSE BILL AND RESOLUTION HISTORY, *supra* note 41, at 96.

141. Section 6.4 of the Texas Easement, relating to hazardous materials, provides:

Grantee [wind project] will not dispose of, release, store, or use on the Property [landowner’s property] or cause or permit to be disposed of, released, stored, or used on the Property in connection with the Operations any substance defined as hazardous in any federal, state or local law, statute or ordinance, except in such quantities as may be required in normal Operations and only if such use is in compliance with applicable law.

Nacel Form 10-k, *supra* note 118, at Ex. 10.3 § 6.4.

142. N.D. CENT. CODE § 17-04-06(1)(i) (2009).

wind projects from exercising their competitive advantage to use creative drafting to contractually allow them to withhold landowner payments in unexpected ways.

An example of this type of creative drafting is buried in the lengthy North Dakota Easement force majeure definition.¹⁴³ The fourth alternative definition of an event of force majeure is “any change in applicable law or regulation or any order from an authority with appropriate jurisdiction that makes it impossible for a Party to perform its obligations hereunder in a commercially reasonable manner”¹⁴⁴ The force majeure provision¹⁴⁵—as opposed to the definition—did not limit the type of obligation that force majeure would forgive. And therefore, unlike typical power purchase contracts¹⁴⁶—the contracts by which the wind project will earn its revenue—the wind project could rely on force majeure to forgive its obligation to pay the landowners. This careful drafting will forgive the project owner for not paying the landowners should changes in laws or regulations increase project expenses over the 40 year term such that the project cannot pay all its other obligations. This conclusion results from the reasonable presumption that it will be commercially unreasonable to pay the landowners (an obligation that can be forgiven by force majeure) if

143. The definition is as follows:

Force majeure” means any occurrence beyond the reasonable control of a party, which causes that party to be unable to perform, in whole or in part, an obligation under this Agreement, and which was not anticipated as of the Effective Date, and which could not have been avoided by the exercise of due diligence. Force Majeure includes, but is not limited to: (i) acts of God and natural catastrophes; (ii) actual or threatened civil disturbance, terrorism, war, or riot; (iii) strike or other labor dispute (in which case the affected party shall have no obligation to settle the strike or labor dispute on terms it deems unreasonable); (iv) any change in applicable law or regulation or any order from an authority with appropriate jurisdiction that makes it impossible for a Party to perform its obligations hereunder in a commercially reasonable manner; (v) emergencies declared by or forced curtailment required by the ISO or any other authorized successor or regional transmission organization or any state or federal regulator or legislature; and (vi) physical damage to the transmission system making it impossible to transmit energy from the Project.

HOUSE BILL AND RESOLUTION HISTORY, *supra* note 41, at 93.

144. *Id.* at 93.

145. Section 19.3 of the North Dakota Easement lays out the force majeure provision:

If performance of this Agreement or of any obligation hereunder is prevented or substantially restricted or interfered with by reason of an event of Force Majeure (as defined below) [sic], the affected party, upon giving notice to the other party, shall be excused from such performance to the extent of and for the duration of such prevention, restriction or interference. The affected party shall use its reasonable efforts to avoid or remove such causes of nonperformance and shall continue performance as soon as such causes are removed.

Id. at 99.

146. See WSPP Agreement, § 10 (follow “current WSPP Agreement”), http://www.WSPP.org/documents_agreement.php (showing a force majeure clause in a contract for electrical power sales).

doing so would cause a payment default elsewhere. Such clever drafting denying landowners payments in unexpected ways is no longer allowed.¹⁴⁷

2. *Required Wind Easement Terms that Favor Wind Projects*

a. Tensions Between Competing Business Operations are Resolved in Favor of the Wind Project

When two separate business operations co-exist on the same general acreage—usually a wind project and an agricultural operation—tensions will arise at some point and wind easements have planned ahead to resolve those tensions. Wind easements:

[m]ust preserve the right of the property owner to continue conducting business operations as currently conducted for the term of the agreement. When a wind energy facility is being constructed and when it is completed, the property owner must make accommodations to the developer, owner, or operator of the facility for the facility’s business operations to allow the construction and operation of the wind energy facility.¹⁴⁸

Only the first sentence of this provision was contained in the version of House Bill 1509 originally passed by the House.¹⁴⁹ The Senate added the second sentence.¹⁵⁰ As a result, except during the development phase, North Dakota law requires that the needs of wind projects trump the needs of North Dakota landowners.

There are alternative approaches better suited to balancing the needs of both operations. The Texas Easement specifically addresses “agricultural activities” and produces fairer results to competing business operation issues.¹⁵¹ The Texas wind project assumes the burden to take reasonable

147. N.D. CENT. CODE § 17-04-06(1)(i) (2009) (providing that wind easements and leases “must state clearly any circumstances that will allow the developer, owner, and operator of the wind energy facility to withhold payments from the property owner”).

148. *Id.* § 17-04-06(1)(d).

149. H.B. 1509, 61st Leg. Assem., § 1(1)(e) (N.D. 2009), available at <http://www.legis.nd.gov/assembly/61-2009/bill-text/JBSB0200.pdf>.

150. H.B. 1509, 61st Leg. Assem., § 1(1)(d) (N.D. 2009), available at <http://www.legis.nd.gov/assembly/61-2009/bill-text/JBSB0300.pdf>.

151. Section 6.5 of the Texas Easement sets forth this provision:

In connection with Operations [wind project operations] on the Property [landowner’s property], Grantee [wind project] will take reasonable efforts not to interfere with Owner’s agricultural activities on the Property; provided, however, the Parties acknowledge and agree the Operations will affect Owner’s activities on the Property, particular during installation, maintenance, and repair, including preventing Owner’s operations on those portions of the Property on which Wind Systems are located.

Nacl Form 10-k, *supra* note 118, at Ex. 10.3 § 6.5.

efforts to not interfere with the agrarian operation but the project clearly has preference during installation, maintenance, and repair—but not operation. As a result, the Texas Easement is actually more pro-landowner than current North Dakota law allows.¹⁵² The 2011 legislature could consider scaling back “construction and operation” in section 17-04-06(1)(d) to “construction, maintenance and repair.”

b. Landowner’s Ability to Terminate Wind Easements Due to Project Inactivity

Changes in wind project economics could cause the current phase of wind project expansion to change such that one day North Dakota landowners are forced to look at abandoned wind towers without contractual recourse. To ward off that possibility, wind easements:

[m]ust allow the property owner to terminate the agreement if the wind energy facility has not operated for a period of at least three years unless the property owner receives the normal minimum lease payments that would have occurred if the wind energy facility had been operating during that time.¹⁵³

As initially passed by the House, this provision contained just the first clause and ended with a period after “three years.”¹⁵⁴ The Senate added the concept that the contract could not be terminated if the landowner had been receiving full payments.¹⁵⁵ An additional compromise came out of the conference committee when minimum payments became sufficient to prevent termination.¹⁵⁶

North Dakota’s decommissioning regulations currently provide that two years of wind tower inactivity constitutes a presumption that a facility is at the end of its useful life, triggering an eight month period to begin decommissioning and an eighteen month window to complete

152. N.D. CENT. CODE § 17-04-06(1)(d) (2009).

153. *Id.* § 17-04-06(1)(h). This section continues:

For the purposes of this subdivision, the term “normal minimum lease payments” means a payment in the lease or easement called a “base amount” or “minimum payment”, or similar language, or if this language is not provided for in the lease or easement, payments at least equal to the periodic payments received by the property owner in the last calendar year that the wind energy facility was in full operation.

Id.

154. H.B. 1509, 61st Leg. Assem., § 1(1)(j) (N.D. 2009), available at <http://www.legis.nd.gov/assembly/61-2009/bill-text/JBSB0200.pdf>.

155. H.B. 1509, 61st Leg. Assem., § 1(1)(i) (first engrossment with Senate amendments), available at <http://www.legis.nd.gov/assembly/61-2009/bill-text/JBSB0300.pdf>.

156. H.B. 1509, 61st Leg. Assem., § 1(1)(h) (first engrossment with conference committee amendments), available at <http://www.legis.nd.gov/assembly/61-2009/bill-text/JBSB0400.pdf>.

decommissioning.¹⁵⁷ North Dakota's decommissioning regulations and House Bill 1509 were never perfectly meshed, and the 2011 legislature will have an opportunity to review N.D.C.C. section 17-04-06(1)(d) in light of the then-current version of the decommissioning regulations.

c. Required Wind Project Insurance

Owners of wind projects are required to "carry general liability insurance relating to claims for property damage or bodily injury arising out of the construction or operation of the wind energy facility project site and may include the property owner as an additional insured on the policy."¹⁵⁸ Earlier versions of House Bill 1509 passed by both the House and the Senate had required that landowners be named as additional insureds on the wind project's policy.¹⁵⁹ This requirement was compromised into an option during the conference committee.¹⁶⁰ Because the project's lenders will require the project to carry general liability insurance coverage, section 17-04-06(2) has limited value until project financing is paid off.

It is extremely important that a landowner be named an additional insured on the wind project's general liability policies. Doing so prevents the project's insurer from pursuing a subrogation action against the landowner to recover amounts paid when the landowner's action arguably caused the covered damage to occur.

Comparing the insurance provisions in the North Dakota Easement and the Texas Easement demonstrates the difference between an insurance provision drafted under the influence of excessive competitive advantage and one that was not. Section 10.2 of the North Dakota Easement provides the provision regarding insurance:

Grantee [wind project] shall maintain commercial general liability insurance insuring Grantee against loss caused by Grantee's use of the Premises, in an amount not less than One Million Dollars (\$1,000,000.00) of combined single-limit coverage, and

157. N.D. ADMIN. CODE § 69-09-09-03, -04 (2009), *available at* <http://www.legis.nd.gov/information/acdata/pdf/69-09-09.pdf>.

158. N.D. CENT. CODE § 17-04-06(2) (2009).

159. H.B. 1509, 61st Leg. Assem., § 1(2) (N.D. 2009) (first engrossment), *available at* <http://www.legis.nd.gov/assembly/61-2009/bill-text/JBSB0200.pdf>; H.B. 1509, 61st Leg. Assem., § 1(2) (N.D. 2009) (first engrossment with Senate amendments), *available at* <http://www.legis.nd.gov/assembly/61-2009/bill-text/JBSB0300.pdf>.

160. H.B. 1509, 61st Leg. Assem., § 1(2) (N.D. 2009) (first engrossment with conference committee amendments), *available at* <http://www.legis.nd.gov/assembly/61-2009/bill-text/JBSB0400.pdf>.

shall provide certificates of this insurance coverage to Owner [landowner] upon written request.”¹⁶¹

Section 8.2 of the Texas Easement provides its provision regarding insurance:

Grantee [wind project] will maintain liability insurance covering the Operations on the Property and will cause Owner [landowner] to be named as an additional insured. Such coverage will have a minimum combined occurrence and annual limitation of one million dollars (\$1,000,000.00) during the Evaluation Period and two million dollars (\$2,000,000.00) during the Operating Period, provided that such amount may be provided as part of a blanket policy covering other properties. Grantee will supply Owner with certificates and other evidence of this insurance as Owner may reasonably request.”¹⁶²

The Texas Easement fairly balanced the interests of the landowner and project by requiring that the landowner be named as an additional insured and setting the minimum amount of insurance at two million dollars once the project was constructed. Excessive competitive advantage is evidenced by the North Dakota Easement’s failure to require the wind project to make the landowner an additional insured, and by setting the minimum amount of insurance at only one million dollars.

d. The Ability of Wind Projects to Require That Wind Easements Remain Confidential

Wind easements “[m]ay not require either party to maintain the confidentiality of any negotiations or the terms of any proposed lease or easement except that the parties may agree to a mutual confidentiality agreement in the final executed lease or easement.”¹⁶³

Even though both the North Dakota House and the Senate passed versions of House Bill 1509 that banned wind easement confidentiality clauses,¹⁶⁴ the conference committee compromise¹⁶⁵ preserved the status

161. HOUSE BILL AND RESOLUTION HISTORY, *supra* note 41, at 96.

162. Nacel Form 10-k, *supra* note 118, at Ex. 10.3 § 8.2.

163. N.D. CENT. CODE § 17-04-06(1)(c) (2009).

164. H.B. 1509, 61st Leg. Assem., § 1(1)(d) (N.D. 2009) (first engrossment), *available at* <http://www.legis.nd.gov/assembly/61-2009/bill-text/JBSB0200.pdf>; H.B. 1509, 61st Leg. Assem., § 1(1)(c) (N.D. 2009) (first engrossment with Senate amendments), *available at* <http://www.legis.nd.gov/assembly/61-2009/bill-text/JBSB0300.pdf>.

165. H.B. 1509, 61st Leg. Assem., § 1(1)(c) (N.D. 2009) (first engrossment with conference committee amendments), *available at* <http://www.legis.nd.gov/assembly/61-2009/bill-text/JBSB0400.pdf>.

quo: (a) wind easements will continue to have confidentiality provisions because no individual landowner would compromise economic terms to avoid a confidentiality requirement; and (b) signing separate confidentiality agreements may still be required before receiving a proposed wind easement.¹⁶⁶

Confidentiality requirements are the wind industry's most effective tool to preserve and cultivate their competitive advantage. Publicly traded wind companies like Nacel are filing unredacted copies of their executed wind easements with the SEC¹⁶⁷ making it more difficult for North Dakota wind companies to credibly argue that confidentiality is crucial. The 2009 legislature failed to mitigate this key source of wind project competitive advantage.¹⁶⁸ The 2011 legislature will have an opportunity to revisit the issue.

V. NEXT STEPS

The playing field on which wind projects and landowners negotiate wind easements is not yet level. But the 2009 legislature took the important step of preventing wind projects from exercising their competitive advantage to distribute form wind easements that are patently unfair. As seen above, the mitigating efforts of section 17-04-06 reined in the North Dakota Easement on many fronts.

The debate over how to mitigate wind project competitive advantage will continue during the 2011 legislative session but the interim study on "wind easements and wind energy leases" required by House Bill 1509¹⁶⁹ will provide a better foundation on which to advance the debate. This study "must include consideration of confidentiality clauses, the liability of each party for damages and taxes, instrument provisions relating to insurance and the need for insurance, and the concerns of property owners and wind developers."¹⁷⁰ The study will conclude by "report[ing] its findings and recommendations, together with any legislation required to implement the recommendations to the sixty-second legislative assembly" which convenes in January 2011.¹⁷¹

166. *See supra* text accompanying notes 105-106.

167. Nacel Form 10-k, *supra* note 117, at Ex. 10.3.

168. N.D. CENT. CODE § 17-04-06(1)(c) (2009).

169. H.B. 1509 § 2, 61st Leg. Assem. (N.D. 2009) (enrolled), available at <http://www.legis.nd.gov/assembly/61-2009/bill-text/JBSB0500.pdf>.

170. H.B. 1509 § 2, 61st Leg. Assem. (N.D. 2009) (enrolled), available at <http://www.legis.nd.gov/assembly/61-2009/bill-text/JBSB0500.pdf>.

171. H.B. 1509 § 2, 61st Leg. Assem. (N.D. 2009) (enrolled), available at <http://www.legis.nd.gov/assembly/61-2009/bill-text/JBSB0500.pdf>.

The interim study's required focus on wind easement terms and conditions has the potential to provide the clearest possible picture of the degree to which the wind industry has competitive advantage in North Dakota. A high pressure technique to one person may be mere sport to a hardier soul, but the contract terms will be objective evidence subject to little interpretation. The fact that high pressure sales techniques are not used to pressure people into signing fair contracts indicates that the amount of competitive advantage can be measured by gauging the fairness of the respective contracts.

The 2009 legislature had little opportunity to receive and review actual wind easement terms. First and foremost, confidentiality obligations prevented landowners from either testifying about their contracts or submitting copies. But even if allowed, verbal descriptions of contract terms have little probative value because it is too easy for landowners to confuse the actual written terms with what wind project representatives have told them the contract says. In addition, as was seen in the discussion of the North Dakota Easement, small phrases buried deep in long paragraphs can pack a significant punch.¹⁷²

The Energy Development and Transmission Committee is responsible for conducting the interim study¹⁷³ and it is destined to experience the same limitations as the 2009 legislature. Although it will be able to hear testimony on "the concerns of property owners and wind developers,"¹⁷⁴ confidentiality provisions will also prevent it from hearing testimony concerning the other subjects assigned to it—confidentiality clauses, the liability of each party for damages and taxes, and wind easement provisions relating to insurance.¹⁷⁵ A vehicle other than public testimony is required to obtain verifiable information on the interim study's contractual components and this paper concludes by suggesting what that alternative vehicle is.

I propose the Energy Development and Transmission Committee accomplish the contractual review component of the interim study by designating a team of North Dakota lawyers or law students to analyze numerous unsigned form wind easements. Details of this proposal follow.

What contracts need to be reviewed? Unsigned form wind easements that have been distributed to North Dakota landowners, as well as unsigned

172. See HOUSE BILL AND RESOLUTION HISTORY, *supra* note 41, at 93, 96, 99.

173. North Dakota Legislative Council, Study Directives Considered and Assignments Made by the Legislative Management for the 2009-2010 Interim, 61st Legis. Assem., at 1-5 (N.D. 2009), available at <http://www.legis.gov.assembly/61-2009/docs/pdf/citation.pdf>.

174. H.B. 1509, 61st Leg. Assem., § 2 (N.D. 2009) (enrolled), available at <http://www.legis.nd.gov/assembly/61-2009/bill-text/JBSB0500.pdf>.

175. See *id.*

form easements used in other states should be studied. Reviewing contracts from other states is crucial because they are necessary to determine whether or not years of unbridled exercise of competitive advantage in North Dakota has already lowered the bar, as was suggested by the above comparison between the North Dakota Easement and the Texas Easement.

Who will provide the contracts? Owners of wind projects located in North Dakota should be willing to provide the Energy Development and Transmission Committee with accurate unsigned copies of their form North Dakota wind easements and a representative selection of unsigned form wind easements that their affiliates use in other states. A procedure to verify the accuracy of the form contracts could be implemented and confidentiality obligations could be imposed. The pool of agreements should also include those publicly available through SEC filings.

Why ask for unsigned form wind easements? Signed contracts are subject to confidentiality obligations and unsigned documents should be within the total control of the wind project owner. In addition, reviewing unsigned form wind easements allows the legislature to better understand what landowners are signing when they fail to retain legal counsel or otherwise negotiate changes, or when wind projects refuse to negotiate.

What if wind projects are unwilling to supply the unsigned form easements? Since the goal of reviewing the form wind easements is to determine the scope of wind project competitive advantage, wind industry stonewalling allows the legislature to conclude that the level of wind project competitive advantage is significantly high for purposes of evaluating appropriate mitigation. Wind projects can choose to rebut that conclusion by delivering copies of their unsigned form wind easements.

Who would do the review? There should be North Dakota attorneys or law students willing to perform the review pro bono in order to gain the experience and knowledge necessary to pursue the representation of landowners on a regular basis. Retaining a third party to conduct the review may also make it easier to keep the form easements out of the public domain.

What will the reviewers be asked to do? The reviewers must be asked to meet the minimal requirements of the interim study; that is, review and compare confidentiality clauses, the liability of each party for damages and taxes, and provisions relating to insurance. Reviewing actual contracts is the only way to get this information. Second, it would be extremely informative to extend their review to contractual elements set forth in

*Landowner Guidelines for Evaluating Wind Energy Production Leases.*¹⁷⁶ Third, the review could include how close North Dakota wind easements come to meeting North Dakota's standards for fairness. Do they contain any provisions that are "unjust, unfair, inequitable, misleading, or deceptive"?¹⁷⁷

How would information gleaned from their review be distributed and used? The reviewers would prepare a report for the Energy Development and Transmission Committee that describes their findings in such a way that contract terms cannot be traced to a certain wind project company. Their report will provide a firm foundation on which the Committee can determine the degree to which wind projects have competitive advantage in North Dakota, evaluate mitigation necessary to allow fairness to prevail, and support any proposed legislation during the 2011 legislative session.

VI. CONCLUSION

Both wind energy and agriculture are important industries in North Dakota today and into the distant future. Allowing one to have unbridled competitive advantage over the other is not conducive to maximizing the long term success of either. The goal of North Dakota's wind easement statute is to level the playing field between wind projects and North Dakota landowners so that fair and just wind easements result. That goal was not reached in 2009, but is more likely to be achieved in 2011 if the detailed contractual analysis described above is done first.

176. Harsh et al., *supra* note 78.

177. N.D. CENT. CODE § 26.1-30-21(2) (2002), available at <http://www.legis.nd.gov/cencode/t261c30.pdf>.