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Renewable Energy Projects and Land Rights Issues: Leases, Easements, Competing Land Use Activities

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RENEWABLE ENERGY PROJECTS AND LAND RIGHTS ISSUES

APRIL 27, 2021

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Introduction

The purpose of this program is to help renewable energy professionals:

Assess appropriate site control documents

Understand relevant siting considerations

Identify conflicting uses and prior rights of use or occupancy

Address and resolve conflicts

Today's Topics



Part I: Documenting Site Control

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Types of Site Control Agreements

- Purchase Agreements/Deeds
- Lease Agreements
- Easement Agreements
- Licenses
- Franchise Agreements/Encroachment Permits

Part I: Documenting Site Control

In General:

- Project site should be owned in fee or held pursuant to a lease or easement by the renewable energy company.
- Ancillary rights such as access roads and transmission lines may be held as easements.
- For projects on public lands (e.g., BLM lands), a lease or right-of-way is generally the only option as the government will not convey fee title.
- The land subject to the site control documents should be contiguous; there should not be gaps where the renewable energy company does not hold site control rights.
- Vesting/ownership should be confirmed.

Part I: Documenting Site Control

Fee Ownership (Purchase Agreements/Deeds)

Note: Landowner preference matters in determining the form of site control document. Sometimes they want to sell, and sometimes they want to lease.

Benefits

Full control over the land.

No on-going landowner-tenant relationship or need to obtain approvals or consents from the landowner.

Drawbacks

Can require large capital outlay upfront to pay the purchase price, as opposed to rent payments over time.

Depending on the jurisdiction, a purchase can trigger property tax reassessment and transfer tax.

Part I: Documenting Site Control

Leasehold (Lease Agreements)

Note: The term of the lease must be coterminous or longer than the term of the PPA.

Note: In California, a lease of 35 years or more is considered a “change in ownership” (triggering property tax reassessment and transfer tax); terms often structured as 34 years and 11 months.

Benefits

Certain obligations and liabilities of ownership can be allocated to the landowner instead of the renewable company (e.g., taxes).

No major capital outlay at the closing; negotiated rent payments that can be relatively small until the operations period.

Drawbacks

No control of the land after the lease term ends.

Long-term relationship with landowner, which can lead to disputes and potential breach or termination issues.

Part I: Documenting Site Control

Option and Development Periods:

- Site acquisition documents usually provide for an “Option Period” or “Development Period” before fee title, an easement interest, or a long-term leasehold is acquired.
- The renewable energy company enters upon the land to perform inspections and surveys (and the site acquisition agreement needs to grant this right).
- The feasibility of site is evaluated, including review of existing uses and third party rights, and the permits, contracts, and rights necessary for the project are pursued (e.g., PPA, Interconnection Agreement).
- Construction generally not commenced or permitted during this period.

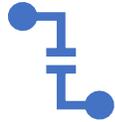
Part I: Documenting Site Control

Option and Development Periods, continued:

- Long development/option periods with extension rights are preferable to provide flexibility and allow time for permitting, finding off-takers, working through any project opposition, etc.
- Memorandums of site acquisition documents should be recorded to provide notice to third parties of the renewable company's rights in the land.

Part II: Siting Considerations

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Transmission / Interconnection

How close to nearest substation / point of interconnection?



Access

Is site adjacent to public roads?
Are private easements required to access project site?
Is special construction vehicle access required?



Topography and Climatic Conditions

Availability / quality of the renewable resource?



Biological Constraints

Are there threatened or endangered species, habitat areas, or wetlands? Could they constrain development and require additional permitting?

Part II: Siting Considerations



Cultural Resources

Are there archeology sites or tribal cultural areas?



Land Use Laws

Does zoning or other applicable land use laws and policies allow for the project?



Water

Availability of water for construction and operations?



Future Development & Neighboring Uses

Potential for conflict with infrastructure projects (e.g., high speed rail in California)?

Part III: Identifying and Resolving Competing Land Rights and Uses

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Methods/Tools for Identifying Competing Rights:

- Physical Inspections
 - What is on the land and who is using and occupying the land (e.g., oil and gas production)
 - Unrecorded property interests (e.g., unrecorded leases)
 - Use without right (people entering upon or using the land without permission who may have obtained prescriptive rights)
- ALTA/NSPS Land Title Surveys
 - Legal boundaries of the site
 - Improvements
 - Recorded property interests
 - Encroachments and gaps between parcels

Part III: Identifying and Resolving Competing Land Rights and Uses

Methods/Tools for Identifying Competing Rights, continued:

- Title Reports
 - Recorded property interests (*e.g., easements, restrictions, liens*)
 - Mineral severances
- Reps and Warranties in Site Acquisition Agreements
- Biological, Cultural, and Environmental Studies
- “Well Finder” sites (*for oil and gas wells*)

Part III: Identifying and Resolving Competing Land Rights and Uses

Leases and Existing Uses:

- Are there leases that give tenants the right to occupy the land?
 - Review all leases and occupancy agreements, recorded and unrecorded, to determine when they expire, extension rights, if any, and compatibility with the renewable energy project.
 - As a general matter, existing leases will need to be terminated prior to construction.
- Does the landowner want to reserve any rights to use the land?
 - The deal may need to be structured to give the landowner the right to use specified improvements (like wells) or roads following the closing/lease commencement.
 - If the landowner resides on the land, will they stay on the land?
 - If so, will the land need to be subdivided?

Part III: Identifying and Resolving Competing Land Rights and Uses

Leases and Existing Uses, continued:

- Agricultural and Grazing Leases/Uses issues to address:
 - Right of landowner/tenant to continue to farm, graze or hunt, extend existing leases, and enter new leases during development period or option period (i.e., before construction of the “closing”)
- Compensation to landowner/tenant for:
 - Crops/livestock that are damaged
 - Lost revenue as a result of not leasing land or cultivating crops to accommodate project development

Part III: Identifying and Resolving Competing Land Rights and Uses

Third-Party Easements:

- The rights of existing easement holders can potentially constrain development of the site:
 - Examples: road, utilities, railroads, aqueducts, flood plains
 - Patents
- Easements can be identified and analyzed by reviewing a title report and an ALTA/NSPS Land Title Survey:
 - Blanket easements v. specifically described
 - Exclusive v. non-exclusive
 - Prohibitions on the landowner's reserved rights to use easement area (e.g., no build restrictions)

Part III: Identifying and Resolving Competing Land Rights and Uses

Third-Party Easements, continued:

- Crossing Consents and Crossing Agreements
 - An agreement whereby the easement holder consents to the renewable company's use of the easement area, generally subject to certain parameters
 - Provides assurance that the easement holder will not later claim its rights have been interfered with or infringed upon by the project
 - Generally required for any major utility crossing (*e.g., transmission lines and gas pipelines*)
 - Generally required by title insurance companies in order to issue affirmative “encroachments” coverage if there is a potential conflict between the easement holder's rights and the project

Part III: Identifying and Resolving Competing Land Rights and Uses

Third-Party Easements, continued:

- If there is a potential conflict, solutions include:
 - Crossing consents
 - Relocation/modification
 - Termination/quitclaim
 - Vacations (*for public easements*)
 - Site plan modifications to avoid easements

Note: Confirm the title company will provide affirmative “encroachments” coverage with respect to the crossing/potential conflict, and any requirements for coverage.

Part III: Identifying and Resolving Competing Land Rights and Uses

Mineral Rights:

- The rights of third-party mineral owners and lessees have the potential to limit the development of a site.
 - Mineral rights can be severed from the surface estate through a direct deed or reservation in deed
 - The mineral estate has a dominant right to use the surface estate for the exploration, development and production of minerals unless surface access is limited in the reservation or lease
 - State law governs the extent of the mineral owner's surface rights
 - Mineral rights, whether severed or not, can be leased to third parties

Identifying Severed Mineral Rights and Lessees:

- Title Report
 - Severances should appear in legal description, but not always
 - Should identify oil and gas leases or other MOG documents
 - Mineral Ownership Report
 - Tracks each severance to current owner, identifies fractional interests
- If there are no severances or oil and gas leases, then there should not be a problem; site control agreements should restrict or prohibit the landowner's use of the surface estate for MOG

Part III: Identifying and Resolving Competing Land Rights and Uses

Resolving Severed Mineral Rights and Lessees:

- Obtain Surface Rights Waivers/Accommodation Agreements
 - Can be blanket waiver, or can allow limited surface rights (e.g., drill pads/islands with related access rights)
- Purchase the Mineral Rights
- Old/Expired Oil and Gas Leases - Obtain Affidavits of Non-Production
- Obtain Mineral Coverage Title Endorsement (e.g., ALTA 35.3-06)
 - Title Companies generally require 90%-100% “control” of mineral estate surface access rights, including waivers and ownership, to issue the Mineral Endorsement, but increasingly 100%
 - If all mineral estate surface rights cannot be obtained, mineral remoteness opinions may be helpful

Part III: Identifying and Resolving Competing Land Rights and Uses

Agricultural and Conservation Related Use Restrictions:

- Land Enrollment in Programs that Restrict Uses for Reduced Property Taxes (*e.g., Williamson Act contracts in California*)
 - Determine if project is a compatible use under the program; if not, determine if enrollment/contract can be cancelled and if termination fees are required
- Conservation Reserve Program Contracts
 - Landowners agree not to farm and instead plant species that promote conservation values; cancellation generally requires payment of fees
- Conservation Easements
 - Prohibit development or other uses that are not compatible with conservation values
 - Intended to be perpetual, and likely difficult to resolve

Part III: Identifying and Resolving Competing Land Rights and Uses

Existing Liens and Deeds of Trusts:

- Liens for delinquent real property taxes, state and federal income taxes, judgment liens, mechanics liens, etc. must be cured
 - Cannot close construction financing if these liens exist
- Mortgages and deeds of trust securing loans to landowner:
 - If acquiring fee title, these must be paid off and released at or before closing
 - If acquiring easement or leasehold interest, an SNDA from the landowner's lender is required
- “Ancient” mortgages

Part III: Identifying and Resolving Competing Land Rights and Uses

Natural Resources, Habitat and Endangered Species:

- Natural resources located on the site can constrain and limit development and complicate permitting
 - Habitat areas and wetland areas may need to be avoided
 - Extra state and federal permitting may be required (Section 404, ITP)
 - Expensive - may have to buy compensatory mitigation or dedicate a part of the project site for mitigation

Conclusion



QUESTIONS?



THANK YOU!