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Title Insurance in Wind and Solar Projects

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OVERVIEW OF TITLE INSURANCE FOR WIND AND SOLAR PROJECTS

According to the American Wind Energy Association, “American wind power is now the largest source of renewable energy generating capacity, thanks to more than 100,000 wind workers across all 50 states,”¹ and the Solar Energy Industries Association reported that “the U.S. solar market had its biggest year ever in 2016, nearly doubling its previous record and adding more electric generating capacity than any other source of energy for the first time ever.”² Based upon these figures we can anticipate more development of wind and solar projects in the future, and those projects will likely require title insurance coverage. The following is a brief overview of the title insurance concerns for wind and solar projects.

A. Assembling the Land for the Project

In the beginning stages of development of a wind or solar project the developer may not know for certain the exact boundaries of the project or locations of the improvements to be constructed. Large scale wind and solar projects are by their nature primarily located in rural locations and often times cover hundreds or thousands of acres of land. The title company assisting the developer is initially tasked with examining title to the various parcels of land to be considered for inclusion in the project and generating title reports or title commitments.

The project developer may seek the assistance of a single title company or office to assist them in coordinating title services for the project, and that office may or may not be located within the state where the project is located. If the assistance of a centralized title office is obtained that office will coordinate in contacting the necessary local title companies who maintain title plants and records related to the location of the project.

At this stage in the title examination process it is beneficial to maintain separate title reports or title commitments for each parcel of land on which the project is to be located. As the various title commitments are generated for review various title matters will need to be addressed on a case by case basis.

i. Clearing Title Issues

As the various title reports or title commitments are completed by the title examiner or local title office the developer or their delegate may begin addressing any title matters discovered. This may include on-the-ground contact with various property owners, but developers should be aware of who the record property owners are and what title issues to the property prior to entering into negotiations. Depending on the number and type of title matters to be addressed the process of addressing title matters may be quite lengthy.

Often title to a project area may never have been examined nor title insurance previously issued. Title to the land may be fractionalized for a number of reasons including death of historical title holders. This may require the title examiner to review probates or gather further information

¹ Turbine Timeline: 2000s. (2017, August 23). Retrieved from <http://www.awea.org/turbine-timeline-2000s>

² U.S. Solar Market Has Record-Breaking Year, Total Market Poised to Triple in the Next Five Years (2017, March 9). Retrieved from <http://www.seia.org/news/us-solar-market-has-record-breaking-year-total-market-poised-triple-next-five-years>

of deceased owners in the form of affidavits of heirship or other documents. In these instances the title company will require appropriate documentation to be filed in the real property records to establish insurable title.

Another important and sometimes difficult concern in examining title to rural lands, in particular for wind or solar projects, is the determination of adequate access to and from the property to be insured. This concern is amplified in the instance of a wind farm project that may have multiple parcels of land and wind turbine facilities spread over hundreds or thousands of acres. Right of access to and from the land is addressed under Covered Risks No. 4 of both the Texas T-1 owner's policy and T-2 loan policy. Should title examination not find insurable access to and from the land appropriate exceptions or requirements related to access should be expected in the title commitment. Furthermore, examination of access to and from the land may require the title examiner to expand the scope of their initial title examination beyond the boundaries of the project area. Request should be made of the surveyor to confirm that the lands covered by the project, including all easements and leases, are, taken together, contiguous from a public road to all of the proposed improvements and facilities.

Mortgages or other potential lien matters must be addressed with the lienholders by either obtaining releases or subordinations and non-disturbance agreements. Any additional encumbrances found of record affecting the fee or leasehold estate will be shown as title exceptions unless disposed of or addressed to the satisfaction of the title company.

ii. Consolidation of Project-Wide Title Commitment

As the project area is further defined and individual title reports are completed, the next step is to consolidate the individual title reports or title commitments into a project-wide title commitment. Depending upon the size of the project area and the number of title exceptions and title company requirements, the project title commitment may be quite lengthy. A project-wide title commitment assists the parties in addressing the various exception items or requirements as a group. For example, all title exceptions relating to easements or rights-of-way may be grouped together. This project-wide title commitment will also assist the surveyor in the preparation of the likely forthcoming land title survey of the project.

B. Identifying the Parties

In the course of generating a project-wide title commitment, we can expect that the title company will inquire who the parties are to the proposed transaction. If the project will involve construction financing it is helpful to involve the construction lender and its team as early as possible in the review of title matters so that any lender title requests may be addressed concurrently with developer requests.

C. Special Title Risk Concerns

i. Disturbance of the Surface Due to Mineral Exploration and Extraction

One of the more important title insurance matters in projects of this nature is the underwriting for coverage as to mineral development matters. In Texas such coverage is addressed by way of the T-19.1 endorsement for the owner's policy and the T-19 endorsement for the loan

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