2024 OVERVIEW OF STATE SPECIFIC REQUIREMENTS FOR WIND AND SOLAR PROJECT LAND CONTRACTS

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*Indicates states that have not enacted statutory requirements for specific language to be included in wind or solar project leases or easements.

INTRODUCTION.

In the U.S., wind and solar project development continues to increase. In fact, the Energy Information Administration (EIA) anticipates that wind and solar energy will continue to exceed electrical generation by other means. The EIA notes that new solar projects expected to come online in 2024 will increase solar power generation by 75%, with wind power generation increasing by 11%.[1] Solar power generation is predicted to increase from 163 billion kWh in 2023, to roughly 286 billion kWh in 2025. Wind power generation is expected to increase to 476 kWh during the same period (up from approximately 430 kWh in 2023).

With solar and wind power being intermittent energy generation sources (i.e., they only produce on sunny or windy days respectively), unsurprisingly battery storage projects have also increased in an effort to retain excess solar and wind electrical energy for later use. In fact, the EIA anticipates battery storage capacity in the U.S. to nearly double in 2024, increasing by 89%.[2] By the end of 2023, anticipated and actual operating utility-scale battery capacity in the U.S. totaled roughly 16 GW, with an additional 15GW anticipated in 2024.[3]

In response to this continued rapid growth, many state and local governments have continued to pursue opportunities to limit or outright ban such development for a multitude of reasons. Although roughly only 15% of U.S. counties have effectively prevented new utility-scale wind and solar developments, the rate of such bans appears to be increasing. In fact, in 2023, the number of counties preventing new utility-scale solar installations nearly equaled the number of counties welcoming their first solar project. However, the impediments can be far greater for wind projects. Over the last ten years, 183 counties in the U.S. accepted their first commercial wind project, but during the same period nearly 375 counties banned such development.[4]

While many state and local governments continue to enact restrictions on project development through zoning, permitting and setback requirements, many states have already required by statute specific language to be included in wind and solar land contracts, such as leases and easements. This overview is intended to provide a quick reference guide with respect to the various state statutory requirements for language to be included in wind and solar project leases and easements. Updates will be forthcoming as additional states enact such requirements, and as relevant case law interprets such statutory requirements or provides commentary on the repercussions of noncompliance.

We hope you find this overview useful and welcome your feedback.

Puanani E. Norwood
Partner

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[1] U.S. Energy Information Administration, *Solar and wind to lead growth of U.S. power generation for the next two years*, (January 16, 2024), https://www.eia.gov/todayinenergy/detail.php?id=61242#:~:text=As%20a%20result%20of%20new,476%20billion%20kWh%20in%202025.

[2] U.S. Energy Information Administration, *U.S. battery storage capacity expected to nearly double in 2024*, (January 9, 2024), https://www.eia.gov/todayinenergy/detail.php?id=61202#:~:text=Planned%20and%20currently%20operational%20U.S.,Preliminary%20Monthly%20Electric%20Generator%20Inventory.&text=Battery%20storage%20projects%20are%20getting%20larer%20in%20the%20United%20States.

[3] Id.

[4] USA Today, *US counties are blocking the future of renewable energy*, (February 2, 2024), https://www.usatoday.com/story/graphics/2024/02/04/us-renewable-energy-grid-maps-graphics/72042529007/.

ALABAMA.*

Alabama does not have state specific requirements for leases or easements conveying an interest in real property located in Alabama to be used for wind or solar project development.

ALASKA.

Alaska does not have state specific requirements for leases or easements conveying an interest in real property located in Alaska to be used for wind project development. However, in Alaska, an instrument creating a solar easement, defined as an easement obtained for the purpose of protecting the exposure of property to the direct rays of the sun, must include certain language discussed below.[5]

1. **The vertical and horizontal angles, expressed in degrees, at which the solar easement extends over the real property subject to the solar easement**. Such requirement may be satisfied by the following language:

   > "Any obstruction to the free flux of solar energy across the [subject property] is prohibited throughout the entire area of the [subject property] which shall exist vertically and horizontally 360° from any point where any portion of the [solar facilities] are located at any time and for a distance from each portion of such facilities to the boundaries of the [subject property]."

   The requirement does not prevent the parties to the agreement from including language that merely limits, rather than prohibits, potential obstruction. For example, in our experience, we have seen parties agree to height and distance requirements for future improvements to, or installations upon, the real property where the grantee's consent would be required before the grantor could make such improvements or installations. Such agreements might be agreed upon for any improvements or other installations within a distance from the project's facilities that would create a violation of any setback requirements in applicable zoning and safety standards or improvements that could cast a shadow across the solar array.

2. **Any terms or conditions under which the solar easement is granted or under which it will be terminated**. The terms of, or conditions to, the grant of easement rights should be included in such agreement, as well as a recorded memorandum thereof to give notice to third parties of such grant and the applicable conditions or restrictions, if any, thereto. Notwithstanding the foregoing requirement, provisions related to compensation to be paid under such agreement may (and should) be omitted from any recorded memorandum of the agreement.

   Likewise, a provision describing the terms and conditions upon which the easement may be terminated is also required by statute and should also be included in the recorded memorandum. Generally, such easements provide that the grantee may terminate the agreement at any time and for any reason upon written notice to the owner of the encumbered property. Conversely, such owner will be prohibited from pursuing termination of the easement if the grantee's solar facilities are installed o the property. In such instance, the owner will be limited to recovering damages in the event the grantee breaches any terms of the easement.

[5] Alaska Stat. § 34.15.145.

3. **Any provisions for compensation of the owner of the property benefiting from the solar easement in the event of interference with the enjoyment of the solar easement, or compensation of the owner of the property subject to the solar easement for maintaining the solar easement**. The Alaska statute necessarily requires a description of the property subject to the solar easement, which is otherwise required to record the easement of record in the public records for the county where the encumbered real property is located. Based on our experience in other states, we frequently see easements that fail to include a description of the property benefiting from an easement (where even more expressly required by statute). Often, such agreements will state that there is no real property benefiting from such agreement; however, solar projects are completely integrated projects. That is, the facilities located on one parcel of property are dependent upon and integrated with additional facilities located on other parcels of property within the project site such that the electrical energy generated by the project can be collected at the project's substation. Thus, each parcel of real property within a project site benefits from the easements likewise encumbering other parcels of real property so that, by way of example, the electrical energy produced or generated by facilities on one parcel of property can be transported across other properties in order to reach the project's substation and later the point of interconnection so such electrical energy can be disbursed for consumer use.

   Here, in addition to a description of subject property, the Alaska statute would require a description of the benefited property, which could be addressed by including language such as:

   > "The rights granted under this Agreement shall inure to the benefit of all real property upon which any solar facilities are installed for [grantee's project]."

   The Alaska statute expressly requires solar easements to include compensation terms due to the owner of the fee property encumbered by the solar easement (i.e., the subject property) for maintaining the solar easement area. Terms are also required to be set forth in the agreement with respect to compensation due to the solar project (i.e., the grantee under the solar easement) in the event of interference with its rights granted pursuant to the solar easement. Notwithstanding the foregoing, typically, provisions related to compensation to be paid under such agreement may (and should) be omitted from any recorded memorandum of the agreement.

There is currently no applicable case law in Alaska interpreting the applicability of the cited statute or remedies in the event of noncompliance.

ARIZONA.*

Arizona does not have state specific requirements for leases or easements conveying an interest in real property located in Arizona to be used for wind or solar project development.

ARKANSAS.*

Arkansas does not have state specific requirements for leases or easements conveying an interest in real property located in Arkansas to be used for wind or solar project development.

CALIFORNIA.

California does not have state specific requirements for leases or easements conveying an interest in real property located in California to be used for wind project development. However, California law does specify

that any solar easement, defined as a right to receive sunlight across the real property of another for any solar energy system, must contain certain language discussed below.[6]

1. **A description of the dimensions of the easement expressed in measurable terms, such as vertical or horizontal angles measured in degrees, or the hours of the day on specified dates during which direct sunlight to a specified surface of a solar collector, device or structural design feature may not be obstructed, or a combination of these descriptions**. Language expressing as vertical or horizontal angles measured in degrees wherein obstruction is prohibited or limited may be satisfied by the following language:

   > "Any obstruction to the free flux of solar energy across the [encumbered property] is prohibited throughout the entire area of the [encumbered property] which shall exist vertically and horizontally 360° from any point where any portion of the solar facilities are located at any time and for a distance from each portion of such facilities to the boundaries of the [encumbered property]."

2. **The restrictions placed upon vegetation, structures, and other objects that would impair or obstruct the passage of sunlight through the easement**. Typically, parties include language agreeing to height and distance requirements for future improvements to, or installations upon, the real property where the project grantee's consent would be required before the landowner could make such improvements or installations. For example, any improvements or other installations within a distance from the project's facilities that would create a violation of any setback requirements in applicable zoning and safety standards, or improvements that could cast a shadow across the solar array.

3. **The terms or conditions, if any, under which the easement may be revised or terminated**. Any terms or conditions to the grant of easement rights should be included not only in the easement, but also in a recorded memorandum thereof in order to give notice to third parties of such grant and the applicable conditions or restrictions, if any, thereto. Likewise, any revisions to the easement that could impact the rights of third parties should also be recorded (e.g., revisions to the length of term of the easement, or to the legal description of the encumbered real property). Here, a statement as to the terms and conditions upon which the easement may be revised, could simply state that the agreement may be amended by mutual agreement of the parties thereto evidenced in writing.

   Because a provision describing the terms and conditions upon which the easement may be terminated is also required by statute, such provision and any revision thereto should likewise be included in both the agreement and in a recorded memorandum thereof. Generally, such easements provide that the grantee may terminate the agreement at any time and for any reason upon written notice to the owner of the encumbered property. Conversely, such owner will be prohibited from pursuing termination of the agreement if the grantee's energy project facilities are installed on the property. In such instance, the owner will be limited to recovering damages.

There is currently no applicable case law in California interpreting the applicability of the statute or remedies in the event of noncompliance.

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[6] Cal. Civ. Code § 801.5.

COLORADO.

Colorado does not have state specific requirements for leases or easements conveying an interest in real property located in Colorado to be used for solar project development but does have certain requirements for wind project development. In Colorado, a wind energy right (i.e., the right to capture and use the kinetic energy of the wind) is not severable from the surface estate; however, like other rights to use the surface estate, a wind energy right may be created, transferred, encumbered, or modified by agreement.[7]

While Colorado statutory law does not expressly require that certain language be included in a lease or easement conveying rights related to wind or solar project development, Colorado does have specific statutes that govern wind energy agreements (which are defined as a lease, license, easement, or other agreement between the owner of a surface estate and a wind energy developer to develop wind-powered energy generation).[8] Such agreements, including any subsequent modification, assignment or encumbrance, must abide by all statutory requirements and other rules of law to the same extent as other agreements that create interests in, or rights to use, real property in the state.[9] For example, wind energy agreements are only valid between the parties thereto and any third parties who have notice of the agreement; thus, until recorded, the agreement is invalid as against any third party whose rights to the real property encumbered by the agreement was recorded first.

Similarly, Colorado allows wind energy developer's to record an affidavit stating the date when construction of the wind project commenced or is expected to commence.[10] Failure to record such affidavit results in the wind energy agreement terminating in accordance with its own terms; however, if no expiration date is referenced, the agreement will expire fifteen years after recordation of the wind energy agreement.[11] Such affidavit must:[12]

1. clearly identify the wind energy agreement, including related recording information;
2. include the names of the parties thereto; and
3. include the legal description of the property encumbered by the agreement.

In Colorado, wind energy developers are required by statute to record a release in the county where the land subject to the agreement is located upon expiration or termination of the agreement.[13] Alternatively, the owner of the surface estate or their agent may make written request to the wind energy developer of record (i.e., the wind project developer named in the recorded wind energy agreement or the most recent transferee thereof identified in the recorded documents related thereto) to record a release of the wind energy agreement.[14] Failure to record such release within ninety days after receipt of the request, creates liability to the owner of the surface estate for any damages caused by such failure.[15] While Colorado state law does not require that the aforementioned release requirement be included in a wind energy agreement, in our experience it is always best to include state specific requirements and obligations within both the agreement and the recorded memorandum of the agreement.

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[7] Colo. Rev. Stat. § 38-30.7-103(1).
[8] Colo. Rev. Stat. § 38-30.7-102.
[9] Colo. Rev. Stat. § 38-30.7-103(2).
[10] Colo. Rev. Stat. § 38-30.7-104(2).
[11] Id.
[12] Id.
[13] Colo. Rev. Stat. § 38-30.7-103(3).
[14] Colo. Rev. Stat. § 38-30.7-103(3), § 38-30.7-102.
[15] Colo. Rev. Stat. § 38-30.7-103(3).

After July 1, 2012, unless otherwise provided in the wind energy agreement, a wind energy developer's right to use the encumbered real property for a wind project expires if no wind-powered energy generation has occurred pursuant to the agreement for a continuous fifteen-year period.[16]

There is currently no applicable case law in Colorado interpreting the applicability of the statute or remedies in the event of noncompliance.

CONNECTICUT.*

Connecticut does not have state specific requirements for leases or easements conveying an interest in real property located in Connecticut to be used for wind or solar project development.

DELAWARE.*

Delaware does not have state specific requirements for leases or easements conveying an interest in real property located in Delaware to be used for wind or solar project development.

FLORIDA.

In Florida, easements granting rights to maintain exposure of a solar energy device to sunlight must be created in writing and are subject to the same recording requirements as any other instrument affecting the title to real property.[17] Additionally, solar easements must include:[18]

1. **A description of the servient and dominant properties encumbered by the agreement**. The Florida statute expressly requires a description of the servient real property, which is easily satisfied by reference to the legal description for the property subject to the easement. Note, such legal description is also required for recording of the easement or a memorandum thereof with the register of deeds for the county where the real property is located.

   The statute also expressly requires a description of the dominate real property, i.e., the easement area granted for use of the solar energy device. Given that solar projects are completely integrated projects, that is, the facilities located on one parcel of property are dependent upon and integrated with additional facilities located on other parcels of property within the project site in order for all of the electrical energy generated by the project to be collected at the project's substation. Thus, each parcel of real property within a project site benefits from the easements encumbering other parcels of real property so that, by way of example, the electrical energy produced or generated by facilities on one parcel of property can be transported across other properties in order to reach the project's substation and later the point of interconnection so such electrical energy can be disbursed for consumer use. Language satisfying the second requirement of this portion of the Florida statute could also include, in addition to the description of the easement area, the following:

   > "The rights granted under this Agreement shall inure to the benefit of all real property upon which any [wind/solar facilities] are installed for [lessee's/grantee's project]."

[16] Colo. Rev. Stat. § 38-30.7-104.
[17] Fla. Stat. § 704.07.
[18] Id.

2. **The vertical and horizontal angles, expressed in degrees, at which the solar easement extends over the real property subject to the solar easement**. Language expressing the vertical and horizontal angles measured in degrees of the solar easement area may be satisfied by the following language:

> "The solar easement rights granted herein shall encumber the entire area of the [servient property] which shall exist vertically and horizontally 360° from any point where any portion of the solar facilities are located at any time and for a distance from each portion of such facilities to the boundaries of the [servient property]."

3. **A description of where the easement falls across the servient property in relation to existing boundaries and various setbacks established by the local zoning authority**. Language identifying the solar easement area in relation to the servient property may be sufficiently addressed in the legal descriptions for the respective areas as discussed above at item 1. Here, reference to compliance with setback requirements established by local zoning authorities are also required.

4. **The point on the dominant property from where the angles describing the solar easement are to be measured**. Note, this requirement is addressed and included in the sample language provided above at item 2.

5. **Terms or conditions under which the solar easement is granted or will terminate**. The terms of, or conditions to, the grant of easement rights should be included in such agreement, as well as a recorded memorandum thereof to give notice to third parties of such grant and the applicable conditions or restrictions, if any, thereto. Notwithstanding the foregoing requirement, provisions related to compensation to be paid under such agreement may (and should) be omitted from any recorded memorandum of the agreement.

   Likewise, a provision describing the terms and conditions upon which the easement may be terminated is also required by statute and should also be included in the recorded memorandum. Generally, such easements provide that the grantee may terminate the agreement at any time and for any reason upon written notice to the owner of the encumbered property. Conversely, such owner will be prohibited from pursuing termination of the easement if the grantee's solar facilities are installed o the property. In such instance, the owner will be limited to recovering damages in the event the grantee breaches any terms of the easement.

6. **Any provisions for compensation of the owner of the property benefiting from the solar easement in the event of interference with the enjoyment of the solar easement or compensation of the owner of the property subject to the solar easement for maintaining the solar easement**. The Florida statute expressly requires solar easements to include compensation terms due to the owner of the fee property encumbered by the solar easement (i.e., the subject property) for maintaining the solar easement area. Terms are also required to be set forth in the agreement with respect to compensation due to the solar project (i.e., the grantee under the solar easement) in the event of interference with its rights granted pursuant to the solar easement. Notwithstanding the foregoing, typically, provisions related to compensation to be paid under such agreement may (and should) be omitted from any recorded memorandum of the agreement.

There is currently no applicable case law in Florida interpreting the applicability of the statute or remedies in the event of noncompliance. Florida does not have state specific requirements for leases or easements conveying an interest in real property located in Florida to be used for wind project development.

GEORGIA.

In Georgia, easements granting rights to maintain exposure of a solar energy device to sunlight must be created in writing and are subject to the same recording and conveyance requirements as any other instrument affecting the title to real property.[19] Any instrument creating a solar easement must include:[20]

1. **A definite and certain description of the airspace affected by such easement**. Such requirement may be satisfied by similar language required in other states with respect to the vertical and horizontal angles, expressed in degrees, at which the solar easement extends over the encumbered real property, such as:

   > "The solar easement rights granted herein shall encumber the entire area of the [encumbered property] which shall exist vertically and horizontally 360° from any point where any portion of the solar facilities are located at any time and for a distance from each portion of such facilities to the boundaries of the [encumbered property]."

2. **Any terms or conditions or both under which the solar easement is granted or will be terminated**. The terms of, or conditions to, the grant of easement rights should be included in such agreement, as well as a recorded memorandum thereof to give notice to third parties of such grant and the applicable conditions or restrictions, if any, thereto. Notwithstanding the foregoing requirement, provisions related to compensation to be paid under such agreement may (and should) be omitted from any recorded memorandum of the agreement.

   Likewise, a provision describing the terms and conditions upon which the easement may be terminated is also required by statute and should also be included in the recorded memorandum. Generally, such easements provide that the grantee may terminate the agreement at any time and for any reason upon written notice to the owner of the encumbered property. Conversely, such owner will be prohibited from pursuing termination of the easement if the grantee's solar facilities are installed o the property. In such instance, the owner will be limited to recovering damages in the event the grantee breaches any terms of the easement.

There is currently no applicable case law in Georgia interpreting the applicability of the statute or remedies in the event of noncompliance. Georgia does not have state specific requirements for leases or easements conveying an interest in real property located in Georgia to be used for wind project development.

HAWAII.*

Hawaii does not have state specific requirements for leases or easements conveying an interest in real property located in Hawaii to be used for wind or solar project development.

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[19] GA Code Ann. § 44-9-22.
[20] GA Code Ann. § 44-9-23.

IDAHO.

Idaho does not have state specific requirements for leases or easements conveying an interest in real property located in Idaho to be used for wind project development. However, in Idaho, any instrument creating a solar easement, defined as an easement for the purpose of exposure of a solar energy device to sunlight, must be in writing and must include certain language discussed below.[21]

1. **The vertical and horizontal angles, expressed in degrees, at which the solar easement extends over the real property subject to the solar easement**. Such requirement may be satisfied by the following language:

   > "The right to capture the flux of solar energy across the [subject property] is granted throughout the entire area of the [subject property] which shall exist vertically and horizontally 360° from any point where any portion of the solar facilities are located at any time and for a distance from each portion of such facilities to the boundaries of the [subject property]."

2. **Any terms or conditions or both under which the solar easement is granted or will be terminated**. The terms of, or conditions to, the grant of easement rights should be included in such agreement, as well as a recorded memorandum thereof to give notice to third parties of such grant and the applicable conditions or restrictions, if any, thereto. Notwithstanding the foregoing requirement, provisions related to compensation to be paid under such agreement may (and should) be omitted from any recorded memorandum of the agreement.

   Likewise, a provision describing the terms and conditions upon which the easement may be terminated is also required by statute and should also be included in the recorded memorandum. Generally, such easements provide that the grantee may terminate the agreement at any time and for any reason upon written notice to the owner of the encumbered property. Conversely, such owner will be prohibited from pursuing termination of the easement if the grantee's solar facilities are installed o the property. In such instance, the owner will be limited to recovering damages in the event the grantee breaches any terms of the easement.

3. **Any provisions for compensation of the owner of the property benefiting from the solar easement in the event of interference with the enjoyment of the solar easement or compensation of the owner of the property subject to the solar easement for maintaining the solar easement**. The Idaho statute necessarily requires a description of the property subject to the solar easement, which is otherwise required to record the easement of record in the public records for the county where the encumbered real property is located. Based on our experience in other states, we frequently see easements that fail to include a description of the property benefiting from an easement (where even more expressly required by statute). Often, such agreements will state that there is no real property benefiting from such agreement; however, solar projects are completely integrated projects. That is, the facilities located on one parcel of property are dependent upon and integrated with additional facilities located on other parcels of property within the project site such that the electrical energy generated by the project can be collected at the project's substation. Thus, each parcel of real property within a project site benefits from the easements likewise encumbering other parcels of real property so that, by way of example, the electrical energy produced or generated by facilities on one parcel of property can be

[21] Idaho Code Ann. § 55-615.

transported across other properties in order to reach the project's substation and later the point of interconnection so such electrical energy can be disbursed for consumer use.

Here, in addition to a description of subject property, the Idaho statute would require a description of the benefited property, which could be addressed by including language such as:

> "The rights granted under this Agreement shall inure to the benefit of all real property upon which any solar facilities are installed for [grantee's project]."

The Idaho statute expressly requires solar easements to include compensation terms due to the owner of the fee property encumbered by the solar easement (i.e., the subject property) for maintaining the solar easement area. Terms are also required to be set forth in the agreement with respect to compensation due to the solar project (i.e., the grantee under the solar easement) in the event of interference with its rights granted pursuant to the solar easement. Notwithstanding the foregoing, typically, provisions related to compensation to be paid under such agreement may (and should) be omitted from any recorded memorandum of the agreement..

Additionally, in Idaho, a solar easement shall be presumed to be attached to the real property on which it was first created and shall be deemed to pass with the property when title is transferred to another owner.

There is currently no applicable case law in Idaho interpreting the applicability of the statute or remedies in the event of noncompliance.

ILLINOIS.*

Illinois does not have state specific requirements for leases or easements conveying an interest in real property located in Illinois to be used for wind or solar project development.

INDIANA.*

Indiana does not have state specific requirements for leases or easements conveying an interest in real property located in Indiana to be used for wind or solar project development.

IOWA.*

Iowa does not have state specific requirements for leases or easements conveying an interest in real property located in Iowa to be used for wind or solar project development.

KANSAS.

In Kansas, leases and easements conveying an interest in real property located in Kansas to be used for the production or generation of wind or solar resources are statutorily required to include the following language:[22]

1. **Description of the encumbered and benefited real property**. The Kansas statute expressly requires a description of the real property subject to the easement. Typically, this requirement is easily satisfied by reference to the legal description for the property being leased or the relevant

[22] Kan. Stat. Ann. § 58-2272.

easement area. Note, such legal description is also required for recording of the agreement or a memorandum thereof within the register of deeds for the county where the real property is located.

In our experience, we frequently see such leases or easements that fail to satisfy the second requirement – a description of the real property benefiting from such wind or solar agreement. Often, such agreements will even expressly state that there is no real property benefiting from such agreement; however, wind and solar projects are completely integrated projects. That is, the facilities located on one parcel of property are dependent upon and integrated with additional facilities located on other parcels of property within the project site for all the electrical energy generated by the project to be collected at the project's substation. Thus, each parcel of real property within a project site benefits from the leases and easements encumbering other parcels of real property so that, by way of example, the electrical energy produced or generated by facilities on one parcel of property can be transported across other properties in order to reach the project's substation and later the point of interconnection so such electrical energy can be disbursed for consumer use. Satisfying the second requirement of this portion of the Kansas statue could easily be addressed by including language such as:

> "The rights granted under this Agreement shall inure to the benefit of all real property upon which any [wind/solar facilities] are installed for [lessee's/grantee's project]."

2. **Description of area prohibiting obstruction**. Here, the Kansas statute requires detail, expressed in degrees, of the angles (both vertical and horizontal) and distances from the location of the wind or solar facilities wherein obstruction is prohibited or limited. Often, such requirement may be satisfied by the following language:

> "Any obstruction to the free [flow of wind / flux of solar energy] across the [burdened property] is prohibited throughout the entire area of the [burdened property] which shall exist vertically and horizontally 360° from any point where any portion of the [wind/solar facilities] are located at any time and for a distance from each portion of such facilities to the boundaries of the [burdened property]."

Note, this requirement does not prevent the parties to the agreement from including language that merely limits, rather than prohibits, potential obstruction. For example, in our experience, we have seen parties agree to height and distance requirements for future improvements to, or installations upon, the real property wherein the project lessee's/grantee's prior consent would be required before the landowner could make such improvements or installations. Such agreements might be agreed upon for any improvements or other installations within a distance from the project's facilities that would create a violation of any setback requirements in applicable zoning and safety standards or improvements that could cast a shadow across the solar array.

3. **Terms and conditions of the grant**. The terms of, or conditions to, the conveyance of a lease or grant of easement rights should be included in such agreement, as well as a recorded memorandum thereof in order to give notice to third parties of such conveyance or grant and the applicable conditions or restrictions, if any, thereto. Notwithstanding the foregoing requirement, provisions related to compensation to be paid under such agreement may (and should) be omitted from any recorded memorandum of the agreement.

4. **Other necessary provisions**. The Kansas statute further includes a broad catch-all requiring the inclusion of any other provisions needed for the execution of the agreement. Such requirement

may include, but not be limited to, representations related to the authority of the signatories, contact information for the parties thereto, or other representations or warranties made by the parties thereto.

Finally, the Kansas statute remains aligned with a national trend against the severance of wind and solar rights from the surface estate. The statute specifically states that, as of July 1, 2011, only the surface owner of real property has the right to use such property to produce wind or solar generated energy, unless the surface owner grants such right to a third-party by lease or easement for a definite period. Note, that leases or easements filed of record prior to July 1, 2011, remain valid and are not subject to such requirement. The statute also makes clear that it is not to be interpreted as affecting any otherwise valid restriction on the use of real property for production of wind or solar energy, regardless of whether the restriction is within an easement for a definite period.

It is worth noting that the Kansas statute specifically applies to leases or easements granting rights for the production and generation of electricity. Arguably, the statute would not apply to agreements such as transmission easements, which typically only grant rights for the installation of facilities used in connection with the transmission or transportation of electricity across real property and not with respect to the installation of facilities used in the production or generation of such electricity.

There is currently no applicable case law in Kansas interpreting the applicability of the statute or remedies in the event of noncompliance.

KENTUCKY.

In Kentucky, a solar easement may be obtained, in writing, for the purpose of ensuring a property's access to direct sunlight.[23] The statute expressly provides that such solar easement cannot be acquired by prescription.[24]

Kentucky has no other state specific requirements for leases or easements conveying an interest in real property located in Kentucky to be used for wind or solar project development.

LOUISIANA.*

Louisiana does not have state specific requirements for leases or easements conveying an interest in real property located in Louisiana to be used for wind or solar project development.

MAINE.

In Maine, easements obtained for the purpose of ensuring a property's access to direct sunlight must be made by written agreement and be an interest in real property that may be acquired and transferred. The easement must also be recorded and indexed in the same way as other conveyances of real property interests.[25] The solar easement must be appurtenant to, and run with, both the benefited and burdened land, and remain subject to court decreed abandonment and other limitations provided by law.[26]

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[23] Ky. Rev. Stat. Ann. § 381.200.
[24] Id.
[25] Me. Rev. Stat. Ann. tit. 33, § 1401.
[26] Id.

Instruments creating solar easements may include, but are not limited to, either or both of the following:[27]

1. **A definite and certain description of the space affected by the easement**. Such requirement is easily satisfied by reference to the legal description for the property encumbered by the easement. Note, such legal description is also required for recording of the easement or a memorandum thereof with the register of deeds for the county where the real property is located. A map may be included to show the encumbered property and the easement area; however, if there is an inconsistency between such map the written easement, the written easement shall control.

2. **Any terms or conditions, or both, under which the solar easement is granted or will be terminated**. The terms of, or conditions to, the grant of easement rights should be included in such agreement, as well as a recorded memorandum thereof to give notice to third parties of such grant and the applicable conditions or restrictions, if any, thereto. Notwithstanding the foregoing requirement, provisions related to compensation to be paid under such agreement may (and should) be omitted from any recorded memorandum of the agreement.

   Likewise, a provision describing the terms and conditions upon which the easement may be terminated is also required by statute and should also be included in the recorded memorandum. Generally, such easements provide that the grantee may terminate the agreement at any time and for any reason upon written notice to the owner of the encumbered property. Conversely, such owner will be prohibited from pursuing termination of the easement if the grantee's solar facilities are installed on the property. In such instance, the owner will be limited to recovering damages in the event the grantee breaches any terms of the easement.

There is currently no applicable case law in Maine interpreting the applicability of the statute or remedies in the event of noncompliance. Maine does not have state specific requirements for leases or easements conveying an interest in real property located in Maine to be used for wind project development.

MARYLAND.*

Maryland does not have state specific requirements for leases or easements conveying an interest in real property located in Maryland to be used for wind or solar project development.

MASSACHUSETTS.

Massachusetts does not have state specific requirements for leases or easements conveying an interest in real property located in the state to be used for wind project development. However, in Massachusetts, any instrument granting easement rights for the use of real property in the state in connection with solar projects must include the following:[28]

1. **A description of the dimensions of the easement expressed in measurable terms (e.g., . vertical or horizontal angles measured in degrees; the hours of the day on specified dates prohibiting obstruction of direct sunlight; or a combination of such descriptions)**. Often, such requirement may be satisfied by the following language:

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[27] Me. Rev. Stat. Ann. tit. 33, § 1402.
[28] Mass. Gen. Laws Ann. ch. 187, § 1A.

"Any obstruction to the free flux of solar energy across the [burdened property] is prohibited throughout the entire area of the [burdened property] which shall exist vertically and horizontally 360° from any point where any portion of the [wind/solar facilities] are located at any time and for a distance from each portion of such facilities to the boundaries of the [burdened property]."

2. **Restrictions placed upon vegetation, structures, and other objects which would impair or obstruct the passage of sunlight through the easement**. Based on our experience with projects in other states, we have seen parties agree to height and distance requirements for future improvements (e.g., trees or other vegetation) to, or installations (e.g., buildings or other structures) upon, the real property wherein the solar easement holder's consent would be required before the landowner could make such improvements or installations. For example, any improvements or other installations within a distance from the project's facilities that would create a violation of any setback requirements in applicable zoning and safety standards, or improvements that could cast a shadow across the solar array.

3. **The amount, if any, of permissible obstruction of the passage of sunlight through the easement, expressed in measurable terms**. Here, language with respect to a specific percentage of permitted sunlight obstruction could be added to the above obstruction provisions.

4. **Any provisions for the compensation of the owner of the property benefiting from the easement in the event of impermissible obstruction of the easement**. The Massachusetts statute expressly requires solar easements to include compensation terms with respect to compensation due to the solar project (i.e., the grantee under the solar easement) in the event of interference with its rights granted pursuant to the solar easement. Notwithstanding the foregoing, typically, provisions related to compensation to be paid under such agreement may (and should) be omitted from any recorded memorandum of the agreement.

5. **The terms and conditions, if any, under which the easement may be revised or terminated**. Any terms or conditions to the grant of easement rights should be included not only in the easement, but also in a recorded memorandum thereof in order to give notice to third parties of such grant and the applicable conditions or restrictions, if any, thereto. Likewise, any revisions to the easement that could impact the rights of third parties should also be recorded (e.g., revisions to the length of term of the easement, or to the legal description of the encumbered real property). Here, a statement as to the terms and conditions upon which the easement may be revised, could simply state that the agreement may be amended by mutual agreement of the parties thereto evidenced in writing.

   Because a provision describing the terms and conditions upon which the easement may be terminated is also required by statute, such provision and any revision thereto should likewise be included in both the agreement and in a recorded memorandum thereof. Generally, such easements provide that the grantee may terminate the agreement at any time and for any reason upon written notice to the owner of the encumbered property. Conversely, such owner will be prohibited from pursuing termination of the agreement if the grantee's energy project facilities are installed on the property. In such instance, the owner will be limited to recovering damages.

There is currently no applicable case law in Massachusetts interpreting the applicability of the statute or remedies in the event of noncompliance.

MICHIGAN.*

Michigan does not have state specific requirements for leases or easements conveying an interest in real property located in Michigan to be used for wind or solar project development.

MINNESOTA.

Minnesota law defines a solar easement as a right granted by an owner of real property for the purpose of ensuring exposure of a solar energy system to sunlight. Similarly, the state defines a wind easement as a right granted by an owner of real property for the purpose of ensuring adequate exposure of wind power equipment to wind flow over such property. [29] In Minnesota, any agreement creating a solar or wind easement shall include the following:[30]

1. **A description of the real property subject to the easement and a description of the real property benefiting from the solar or wind easement**. The Minnesota statute expressly requires a description of the real property subject to the easement. Typically, this requirement is easily satisfied by reference to the legal description for the property being leased or the relevant easement area. Note, such legal description is also required for recording of the agreement or a memorandum thereof within the register of deeds for the county where the real property is located.

   In our experience, we frequently see such leases or easements that fail to satisfy the second requirement – a description of the real property benefiting from such wind or solar agreement. Often, such agreements will even expressly state that there is no real property benefiting from such agreement; however, wind and solar projects are completely integrated projects. That is, the facilities located on one parcel of property are dependent upon and integrated with additional facilities located on other parcels of property within the project site in order for all of the electrical energy generated by the project to be collected at the project's substation. Thus, each parcel of real property within a project site benefits from the leases and easements encumbering other parcels of real property so that, by way of example, the electrical energy produced or generated by facilities on one parcel of property can be transported across other properties in order to reach the project's substation and later the point of interconnection so such electrical energy can be disbursed for consumer use. Satisfying the second requirement of this portion of the Minnesota statue could easily be addressed by including language such as:

   > "The rights granted under this Agreement shall inure to the benefit of all real property upon which any [wind/solar facilities] are installed for [lessee's/grantee's project]."

2. **A description of the vertical and horizontal angles, expressed in degrees, and distances from the site of the wind power system in which an obstruction to the winds is prohibited or limited**. Here, the Minnesota statute requires detail, expressed in degrees, of the angles (both vertical and horizontal) and distances from the location of the wind facilities wherein obstruction is prohibited or limited. Often, such requirement may be satisfied by the following language:

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[29] Minn. Stat. § 500.30.
[30] Id.

> "Any obstruction to the free flow of wind across the [burdened property] is prohibited throughout the entire area of the [burdened property] which shall exist vertically and horizontally 360° from any point where any portion of the wind facilities are located at any time and for a distance from each portion of such facilities to the boundaries of the [burdened property]."

Note, this requirement does not prevent the parties to the agreement from including language that merely limits, rather than prohibits, potential obstruction. For example, in our experience, we have seen parties agree to height and distance requirements for future improvements to, or installations upon, the real property wherein the project grantee's consent would be required before the landowner could make such improvements or installations. Such agreements might be agreed upon for any improvements or other installations within a distance from the project's facilities that would create a violation of any setback requirements in applicable zoning and safety standards or improvements that could cast a shadow across the solar array.

3. **Any terms or conditions under which the easement is granted or may be terminated**. The terms of, or conditions to, the grant of easement rights should be included in such agreement, as well as a recorded memorandum thereof to give notice to third parties of such grant and the applicable conditions or restrictions, if any, thereto. Notwithstanding the foregoing requirement, provisions related to compensation to be paid under such agreement may (and should) be omitted from any recorded memorandum of the agreement.

   Likewise, a provision describing the terms and conditions upon which the easement may be terminated is also required by statute and should also be included in the recorded memorandum. Generally, such easements provide that the grantee may terminate the agreement at any time and for any reason upon written notice to the owner of the encumbered property. Conversely, such owner will be prohibited from pursuing termination of the easement if the grantee's solar facilities are installed o the property. In such instance, the owner will be limited to recovering damages in the event the grantee breaches any terms of the easement.

4. **Any provisions for compensation of the owner of the real property benefiting from the easement in the event of interference with the enjoyment of the easement, or compensation of the owner of the real property subject to the easement for maintaining the easement**. Here, the Minnesota statute expressly requires solar easements to include compensation terms due to the owner of the fee property encumbered by the solar easement (i.e., the subject property) for maintaining the solar easement area. Terms are also required to be set forth in the agreement with respect to compensation due to the solar project (i.e., the grantee under the solar easement) in the event of interference with its rights granted pursuant to the solar easement. Notwithstanding the foregoing, typically, provisions related to compensation to be paid under such agreement may (and should) be omitted from any recorded memorandum of the agreement.

5. **Any other provisions necessary or desirable to execute the instrument**. The Minnesota statute further includes a broad catch-all requiring the inclusion of any other provisions needed for the execution of the agreement. Such requirement may include, but not be limited to, representations related to the authority of the signatories, contact information for the parties thereto, or other representations or warranties made by the parties thereto.

6. **For solar easements, the instrument must also include a description of the vertical and horizontal angles, expressed in degrees and measured from the site of the solar energy system, at which the solar easement extends over the real property subject to the easement, or any other description which defines the three dimensional space, or the place and times of day in which an obstruction to direct sunlight is prohibited or limited**. Such requirement may be satisfied by similar language required in other states with respect to the vertical and horizontal angles of the solar easement property, such as:

> "The solar easement rights granted herein shall encumber the entire area of the [servient property] which shall exist vertically and horizontally 360° from any point where any portion of the solar facilities are located at any time and for a distance from each portion of such facilities to the boundaries of the [servient property]."

Here, the Minnesota statute also requires detail, expressed in degrees, of the angles (both vertical and horizontal) and distances from the location of the solar facilities wherein obstruction is prohibited or limited. Often, such requirement may be satisfied by the following language:

> "Any obstruction to the free flux of solar energy across the [burdened property] is prohibited throughout the entire area of the [burdened property] which shall exist vertically and horizontally 360° from any point where any portion of the solar facilities are located at any time and for a distance from each portion of such facilities to the boundaries of the [burdened property]."

Note, this requirement does not prevent the parties to the agreement from including language that merely limits, rather than prohibits, potential obstruction. For example, in our experience, we have seen parties agree to height and distance requirements for future improvements to, or installations upon, the real property wherein the project grantee's prior consent would be required before the landowner could make such improvements or installations, such as any improvements or other installations within a distance from the project's facilities that would create a violation of any setback requirements in applicable zoning and safety standards, or improvements that could cast a shadow across the solar array.

There is currently no applicable case law in Minnesota interpreting the applicability of the statute or remedies in the event of noncompliance.

MISSISSIPPI.*

Mississippi does not have state specific requirements for leases or easements conveying an interest in real property located in Mississippi to be used for wind or solar project development.

MISSOURI.*

Missouri does not have state specific requirements for leases or easements conveying an interest in real property located in Missouri to be used for wind or solar project development.

MONTANA.

Montana's solar and wind easement laws allow property owners to create solar and wind easements to protect and maintain proper access to sunlight and wind. Such easements must also contain certain statutorily required language as discussed below.

Solar Easements. The state defines a solar easement as a right granted by an owner of real property for the purpose of ensuring exposure of a solar energy system to sunlight. Such grants must be made in writing and remain subject to the same requirements for conveyance of real property interests and recording as other easement agreements for use of real property.[31] Solar easements in Montana must also specify:[32]

1. **The vertical and horizontal angles, expressed in degrees, at which the solar easement extends over the real property subject to the solar easement**. The Montana statute necessarily requires a description of the property subject to the solar easement, which is otherwise required to record the easement of record in the public records for the county where the encumbered real property is located.

   Here, in addition to a description of the real property subject to the solar easement, the Montana statute requires a description of the solar easement area, which in addition to a metes and bounds legal description of the area, must also be described in degrees such as:

   > "The solar easement right granted under this Agreement shall extend across the [subject property] vertically and horizontally 360° from any point where any portion of the [solar facilities] are located at any time and for a distance from each portion of such facilities to the boundaries of the [subject property]."

2. **Any terms or conditions under which the solar easement is granted or will be terminated**. The terms of, or conditions to, the grant of easement rights should be included in such agreement, as well as a recorded memorandum thereof to give notice to third parties of such grant and the applicable conditions or restrictions, if any, thereto. Notwithstanding the foregoing requirement, provisions related to compensation to be paid under such agreement may (and should) be omitted from any recorded memorandum of the agreement.

   Likewise, a provision describing the terms and conditions upon which the easement may be terminated is also required by statute and should also be included in the recorded memorandum. Generally, such easements provide that the grantee may terminate the agreement at any time and for any reason upon written notice to the owner of the encumbered property. Conversely, such owner will be prohibited from pursuing termination of the easement if the grantee's solar facilities are installed o the property. In such instance, the owner will be limited to recovering damages in the event the grantee breaches any terms of the easement.

Wind Easements. Similarly, Montana defines a wind easement as a right obtained by a wind energy developer from an owner of real property guaranteeing the developer's right to use the surface of the owner's real property to develop a wind energy project.[33] Such wind easement grants must be made in writing and remain subject to the same requirements for conveyance of real property interests and recording as other easement agreements for use of real property.[34] Notwithstanding the foregoing, even though the wind energy right (i.e., an interest in real property over which wind flows that is appurtenant to the real property[35]), related to the production of wind energy is not a severable interest from the real

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[31] Mont. Code Ann. § 70-17-301.
[32] Mont. Code Ann. § 70-17-302.
[33] Mont. Code Ann. § 70-17-402.
[34] Mont. Code Ann. § 70-17-403(1).
[35] Mont. Code Ann. § 70-17-402(4).

property interest, the state has no prohibition on the grantor's ability to retain any payments associated with an existing wind energy agreement.[36]

During the early stages of project development, when the wind energy developer is determining the site layout and location for a project, the developer may obtain a wind option agreement, which is an exclusive right to later obtain a wind easement. Such wind option agreements must be notarized and may not exceed 20 years, unless extended by mutual agreement of the parties.[37] After April 11, 2011, such wind option agreements must contain the same information generally required for conveyances of interests in real property, such as (i) the names and addresses of the parties to the wind option agreement; (ii) a legal description of the real project subject to the wind option agreement; (iii) the length of time within which the wind energy developer must exercise its option to obtain the wind energy right sought; (iv) and any other terms and conditions agreed upon between the parties, such as, by way of example, terms for shared use of access roads, restoration and maintenance of the real property, or limitations on future improvements or construction on the real property.[38] Wind option agreements must also include provisions setting forth the compensation owed to the owner of the real property in exchange for the wind energy right.[39] Although compensation terms are required in the agreement, typically, such provisions may (and should) be omitted from any recorded memorandum of the agreement.

A wind project developer may choose to forego obtaining a wind option agreement if it has already identified an intended project site and layout. In such situations, the wind project developer would seek to obtain a wind energy agreement (in lieu of an option to obtain such agreement at a later date), which can be any wind energy lease, license, or any other written document entered into between the owner of the real property and the wind energy developer that contains the grant of a wind easement.[40] After April 21, 2011, such wind energy agreements must be notarized and must contain the following:[41]

1. **The names and addresses of the parties to the wind energy agreement**. Note, such identifying information of the parties to the agreement is generally required for any conveyance and recording of an interest in real property to provide third parties with notice of the agreement and the respective interest holders thereof.

2. **A legal description of the real property subject to the wind easement and contained in the wind energy agreement**. Similarly, a description of the affected real property is generally required for any conveyance and recording of an interest in real property. Here, a description for the real property encumbered by the easement is required; however, a description of the wind easement area should also be included, particularly if such easement area is to be less than the entirety of the encumbered real property.

3. **The obligations of the owner of the real property to ensure the undisturbed flow of wind on and over the real property, including restrictions placed on vegetation, structures[42], and other objects that would impair or obstruct the wind flow on and over the real property**. Many states require wind easements to detail distances from the location of

[36] Mont. Code Ann. § 70-17-404.
[37] Mont. Code Ann. § 70-17-405(2), (3).
[38] Mont. Code Ann. § 70-17-405.
[39] Id.
[40] Mont. Code Ann. § 70-17-402(5).
[41] Mont. Code Ann. § 70-17-406.
[42] Under the Montana statute, structures do not include equipment necessary to access minerals as they relate to mineral rights. Mont. Code Ann. § 70-17-406.

the wind project facilities wherein obstruction is prohibited or limited. Often, such requirement can be satisfied by the following language:

> "Any obstruction across the [encumbered property] is prohibited throughout the entire area of the [encumbered property] which shall exist vertically and horizontally from any point where any portion of the wind project facilities are located at any time and for a distance from each portion of such facilities to the boundaries of the [encumbered property]."

Note, this requirement does not prevent the parties to the agreement from also including language that merely limits, rather than prohibits, potential obstruction. For example, in our experience, we have seen parties agree to height and distance requirements for future improvements to, or installations upon, the real property wherein the project grantee's consent would be required before the landowner could make such improvements or installations, such as provisions that identify any improvements or other installations within a distance from the project's facilities that would create a violation of any setback requirements in applicable zoning and safety standards, or improvements that could cast a shadow across the solar array..

4. **A specified term including the date on which the wind energy agreement or the wind easement terminates**. Language with respect to the length of the term of the agreement is generally required for any conveyance and recording of an interest in real property.

5. **Provisions to compensate the owner of the real property in exchange for the wind easement right granted**. Here, the Montana statute expressly requires wind easements to include compensation terms due to the owner of the fee property encumbered by the solar easement (i.e., the subject property) for maintaining the wind easement area. Notwithstanding the foregoing, typically, provisions related to compensation to be paid under such agreement may (and should) be omitted from any recorded memorandum of the agreement.

6. **Provisions ensuring that the owner of the real property is not liable for any property tax associated with the wind energy project or other equipment related to the development of the wind energy project during the term of the wind energy agreement**. Typically, wind agreements will expressly state that the owner of the real property encumbered by the wind agreement will be obligated to pay all real property taxes, assessments and all personal property taxes assessed against the owner's real property that is subject to the wind agreement, subject to the grantee's obligation to pay for any increase in taxes and assessments levied against the real property due to the presence of the wind project facilities and related operations. Generally, wind agreements entitle the grantee to pay any taxes or assessments in the event the owner of the real property fails to make such payments. In such event, the grantee under the wind agreement may offset such costs against rent due to the owner of the real property, plus interest a reasonable rate not to exceed the maximum legally permitted rate.

7. **Provisions addressing property owner and wind energy developer liability during the construction and operation of the wind energy project and equipment**. Often, wind agreements will include mutual indemnification obligations for the property owner and the wind energy developer. Such provision may obligate each party to indemnify the other party from and against any and all losses and claims for physical damage to property, personal injury or death to people, including reasonable attorneys' fees, to the extent resulting from or arising out of (i) any operations, activities of the indemnifying party on the property, including with respect to the owner

of the real property, any operations or activities occurring on the real property prior to the effective date of the wind agreement, (ii) any negligent or intentional act or omission by an indemnifying party, or (iii) any breach by the indemnifying party; in each instance, except to the extent caused by any negligent or intentional act or omission of the indemnified party. Typically, such indemnification obligations will survive termination of the wind agreement.

8. **Provisions obligating the wind energy developer to comply with federal, state, and local laws and regulations**. Such requirement may be satisfied by a general obligation for the wind project developer to comply, at its sole expense, with all applicable laws, ordinances, statutes, orders, and regulations of any governmental agency as applicable to the wind project facilities. Notwithstanding the foregoing, the wind project developer should remain entitled, in its sole discretion, to contest by appropriate legal or administrative proceedings, the validity or applicability of any such authority with respect to the wind project developer, the real property encumbered by the wind agreement, or the wind project facilities. Any such contest or proceeding should remain controlled and directed by the wind project developer.

9. **Conditions upon which the wind energy agreement may be terminated prior to its termination date**. Based on our experience with wind project development in other states, such requirement may be satisfied by language providing that the agreement will terminate upon the occurrence of any of the following: (a) expiration of the term of the agreement, subject to any extension right; (b) by written termination agreement signed by the parties; (c) a non-defaulting party elects to terminate the agreement after a defaulting party's failure to cure a material breach of, or default under, the agreement;[43] (d) upon expiration of the useful economic life of the wind project's facilities and the wind project developer's delivery to the owner of the real property subject to the easement of a written notice of termination; (e) upon the wind project developer's failure to pour the foundation for the first wind turbine to be installed for the wind energy project within [x] years after the effective date of the agreement; (f) upon written notice by the wind energy developer if it fails to obtain all necessary approvals and permits for construction of the wind energy project; (g) by the wind project developer upon written notice, at any time and for any reason, delivered to the owner of the real property encumbered by the wind agreement.

There is currently no applicable case law in Montana interpreting the applicability of the statute or remedies in the event of noncompliance; however, by statute, if a wind energy agreement fails to include the required information set forth above at items 1 – 9, a court may void the agreement or order any relief allowed by law.

NEBRASKA.

In Nebraska, rights or options obtained to secure a land right in real property, or in the vertical space above real property, pursuant to a solar or wind agreement must be made in writing and recorded in the office of the registrar of deeds for the county in which the real property subject to the agreement is located.[44] Note, it is common to record an abstract or a memorandum of the agreement, in lieu of the entire

[43] Note, it may benefit the wind energy project to include clarifying language limiting the owner of the real property encumbered by the wind agreement's ability to seek termination of the wind agreement from and after the date upon which the wind project has facilities installed on such real property. It is not uncommon for wind agreements to expressly provide that the owner of the real property encumbered by the wind agreement will be limited to seeking damages, in lieu of termination of the wind agreement, in the event that the wind project developer defaults in or breaches its obligations under the wind agreement.
[44] Neb. Rev. Stat. § 66-911.01.

agreement itself. Such grant of rights remains subject to the same conveyance requirements as any other interest in real property,[45] runs with the benefited and burdened real property, and terminates upon the conditions stated in the solar agreement or wind agreement.[46] Notwithstanding the foregoing, with respect to termination of such grant, Nebraska statutory law expressly provides that a wind agreement automatically terminates if development of the wind project facilities has not commenced within ten years after the date of the wind agreement, unless such period is extended by the parties thereto.[47] The statute goes on to limit the initial term of solar and wind agreements to not more than forty years, unless the parties thereto mutually agree to extend or renew such initial term.[48]

Any such solar or wind agreement must include, without limitation, the following information:[49]

1. **The names of the parties**. Such identifying information of the parties to the agreement is generally required for any conveyance and recording of an interest in real property to provide third parties with notice of the agreement and the respective interest holders thereof.

2. **A legal description of the real property involved**. Note, such legal description is also required for recording of the agreement or a memorandum thereof within the register of deeds for the county where the real property is located. A description of both (a) the real property encumbered by the agreement and (b) the real property that may be used for such solar or wind project purposes should also be included, particularly if such area is to be less than the entirety of the encumbered real property.

3. **The nature of the interest created**. Often a solar or wind project developer will obtain leasehold and/or easement interests in real property for construction and operation of solar or wind facilities. For real property that the project developer intends to use for a solar array or wind turbines, along with related access roads and collection lines, a leasehold interest might be obtained which may include additional easement rights, such as the right to cause effects (e.g., shadow, flicker, noise, electromagnetic interference) over the encumbered real property and adjacent property of the same owner. Such leasehold interest will grant an exclusive right of possession in the encumbered real property for the term of the lease. Where the project developer intends to use the encumbered real property for overhead transmission lines or underground collection lines, an easement interest might be obtained in lieu of a leasehold interest. Here, an easement interest grants a sufficient right to use the encumbered real property but without the right to exclude other third parties from also using such property. Notwithstanding the lack of exclusivity of an easement interest, the agreement should expressly prohibit the owner of the real property from using, allowing others to use, or granting interests to others to use, the property for any activities that interfere or have the potential to interfere, as reasonably determined by the solar or wind project developer, with the easement rights granted therein for such solar or wind project use.

4. **The consideration paid for the transfer**. Here, the Nebraska statute expressly requires agreements conveying an interest in real property to be used for solar or wind projects to include compensation terms due to the owner of the fee property encumbered by the solar easement (i.e., the subject property) for maintaining the solar or wind rights conveyed. Terms may also be included

[45] Neb. Rev. Stat. § 66-910.
[46] Neb. Rev. Stat. § 66-912.01.
[47] Id.
[48] Id.
[49] Neb. Rev. Stat. § 66-911.01.

with respect to compensation due to the solar or wind project (i.e., the lessee under a solar or wind lease) in the event of interference with the project's rights granted pursuant to the solar easement; which substantively operates as a reduction in the consideration paid for such transfer in addition to any other rights or remedies the project may be entitled to at law or in equity.

5. **A description of the improvements the developer intends to make on the real property**. Such description may include, without limitation, roads, transmission lines, collection lines, substations, wind turbines, solar arrays, meteorological towers. To allow for adjustments in future technological developments and uses, we frequently see agreements that include a catch-all provision, such as:

   > "The right to install, operate, maintain, repair, and replace any other improvements that [the project] reasonably determines are necessary, useful or appropriate to accomplish any of the rights granted herein."

6. **A description of any decommissioning security or local requirements related to decommissioning**. Often solar and wind agreements will obligate the grantee to deliver a security bond within a certain period following the date the project commences operations, if the project facilities are nearing the end of their useful life or the cost of the project's decommissioning obligations exceed the salvage value of the project's facilities. Any such security requirements should be combined in a blanket security bond for other land within the project site, or otherwise required by applicable governing authorities, but should not be required if the project is in the process of repowering or intends to report within a year.

7. **The terms or conditions, if any, under which the interest may be revised or terminated**. Any terms or conditions to the grant of easement rights should be included not only in the easement, but also in a recorded memorandum thereof in order to give notice to third parties of such grant and the applicable conditions or restrictions, if any, thereto. Likewise, any revisions to the easement that could impact the rights of third parties should also be recorded (e.g., revisions to the length of term of the easement, or to the legal description of the encumbered real property). Here, a statement as to the terms and conditions upon which the easement may be revised, could simply state that the agreement may be amended by mutual agreement of the parties thereto evidenced in writing.

   Because a provision describing the terms and conditions upon which the easement may be terminated is also required by statute, such provision and any revision thereto should likewise be included in both the agreement and in a recorded memorandum thereof. Generally, such easements provide that the grantee may terminate the agreement at any time and for any reason upon written notice to the owner of the encumbered property. Conversely, such owner will be prohibited from pursuing termination of the agreement if the grantee's energy project facilities are installed on the property. In such instance, the owner will be limited to recovering damages.

Of note, items 4 – 7 above are not required to be included in any recorded abstract or memorandum of the agreement.

There is currently no applicable case law in Nebraska interpreting the applicability of the statutes or remedies in the event of noncompliance; however, solar and wind agreements in Nebraska may be enforced by injunction or proceedings in equity or other civil action.[50]

NEVADA.

Nevada does not have statutory requirements for the creation of wind easements or leases; however, an easement for collection of solar energy is considered an interest in real property and must be made in writing signed by the owner of the real property encumbered by the easement.[51] The easement must be recorded in the public records of the county recorder for the county where the encumbered and benefited lands are located and must include a description of:[52]

1. **The burdened and benefited lands**. The Nevada statute expressly requires a description of the real property burdened by the easement. Typically, this requirement is easily satisfied by reference to the legal description for the relevant easement area. Note, such legal description is also required for recording of the agreement or a memorandum thereof within the register of deeds for the county where the real property is located.

   In our experience with solar projects in states with similar requirements, we frequently see such easements fail to satisfy the second requirement – a description of the real property benefiting from such solar easement. Often, such easements will even expressly state that there is no benefited real property; however, solar projects are completely integrated projects. That is, the facilities located on one parcel of property are dependent upon and integrated with additional facilities located on other parcels of property within the project site in order for all of the electrical energy generated by the project to be collected at the project's substation. Thus, each parcel of real property within a project site benefits from the easements encumbering other parcels of real property so that, by way of example, the electrical energy produced or generated by facilities on one parcel of property can be transported across other properties in order to reach the project's substation and later the point of interconnection so such electrical energy can be disbursed for consumer use. Satisfying the second requirement of this portion of the Nevada statue could easily be addressed by including language such as:

   > "The rights granted under this Agreement shall inure to the benefit of all real property upon which any [wind/solar facilities] are installed for [lessee's/grantee's project]."

2. **The location, size and periods of operation of the equipment to be used in collecting the solar energy**. Here, the specific location of the solar project equipment to be installed on the real property could be depicted by attaching a depiction of the relevant portion of the project's site plan. Such depiction may also include identification of any area within the real property where solar project equipment must not be installed.

3. **The open area to be preserved for passage of direct solar radiation across the burdened land to the collecting equipment, by dimensions or bearings from the collecting equipment or by a statement that no obstructions which cast a shadow on the**

[50] Neb. Rev. Stat. § 66-912.
[51] Nev. Rev. Stat. § 111.370.
[52] Id.

equipment during its periods of operation are allowed on the burdened land. Here, the Nevada statute requires detail wherein obstruction to solar operations permitted under the solar easement is prohibited or limited. Often, such requirement may be satisfied by the following language:

> "Any obstruction to the free flux of solar energy across the [burdened property] is prohibited throughout the entire area of the [burdened property] which shall exist vertically and horizontally 360° from any point where any portion of the solar facilities are located at any time and for a distance from each portion of such facilities to the boundaries of the [burdened property]."

The parties to the agreement are also permitted to include additional language limiting the potential for obstruction. For example, in our experience, we have seen parties agree to height and distance requirements for future improvements to, or installations upon, the real property wherein the project grantee's consent would be required before the landowner could make such improvements or installations. Such agreements might be agreed upon for any improvements or other installations within a distance from the project's facilities that would create a violation of any setback requirements in applicable zoning and safety standards or improvements that could cast a shadow across the solar array.

There is currently no applicable case law in Nevada interpreting the applicability of the statute or remedies in the event of noncompliance.

NEW HAMPSHIRE.

New Hampshire does not have state specific requirements for leases or easements conveying an interest in real property located in New Hampshire to be used for wind project development. However, New Hampshire recognizes solar skyspace easements, which create limitations, whether or not stated in the form of a restrictive easement, covenant, or condition, in any instrument executed by or on behalf of the fee owner of real property described therein.[53] Such limitations are intended to create and preserve another's right to the unobstructed access to sunlight within the granted easement area.[54] Solar skyspace easements can be obtained, transferred, and indexed in the same way as other conveyances of real property interests and continue to run with, both the benefited and burdened land, remain subject to court decreed abandonment or changed conditions and the terms set forth in the easement.[55] The grant of a solar skyspace easement must include:[56]

1. **A description of the vertical and horizontal angles, expressed in degrees and measured from the site of the solar energy system, at which the solar skyspace easement extends over the real property subject to the solar skyspace easement**. Such requirement may be satisfied by similar language required in other states with respect to the vertical and horizontal angles of the solar easement property, such as:

   > "The solar easement rights granted herein shall encumber the entire area of the [servient property] which shall exist vertically and horizontally 360° from any point

[53] N.H. Rev. Stat. Ann. § 477:49(IV).
[54] Id.
[55] N.H. Rev. Stat. Ann. § 477:50(I).
[56] N.H. Rev. Stat. Ann. § 477:50(II).

> where any portion of the solar facilities are located at any time and for a distance from each portion of such facilities to the boundaries of the [servient property]."

Here, the New Hampshire statute also requires detail, expressed in degrees, of the angles (both vertical and horizontal) and distances from the location of the solar facilities wherein obstruction is prohibited or limited. Often, such requirement may be satisfied by the following language:

> "Any obstruction to the free flux of solar energy across the [burdened property] is prohibited throughout the entire area of the [burdened property] which shall exist vertically and horizontally 360° from any point where any portion of the solar facilities are located at any time and for a distance from each portion of such facilities to the boundaries of the [burdened property]."

Note, this requirement does not prevent the parties to the agreement from including language that merely limits, rather than prohibits, potential obstruction. For example, in our experience, we have seen parties agree to height and distance requirements for future improvements to, or installations upon, the real property wherein the project grantee's prior consent would be required before the landowner could make such improvements or installations, such as any improvements or other installations within a distance from the project's facilities that would create a violation of any setback requirements in applicable zoning and safety standards, or improvements that could cast a shadow across the solar array.

2. **Terms or conditions under which the easement is granted or shall be terminated**. The terms of, or conditions to, the grant of easement rights should be included in such agreement, as well as a recorded memorandum thereof to give notice to third parties of such grant and the applicable conditions or restrictions, if any, thereto. Notwithstanding the foregoing requirement, provisions related to compensation to be paid under such agreement may (and should) be omitted from any recorded memorandum of the agreement.

   Likewise, a provision describing the terms and conditions upon which the easement may be terminated is also required by statute and should also be included in the recorded memorandum. Generally, such easements provide that the grantee may terminate the agreement at any time and for any reason upon written notice to the owner of the encumbered property. Conversely, such owner will be prohibited from pursuing termination of the easement if the grantee's solar facilities are installed o the property. In such instance, the owner will be limited to recovering damages in the event the grantee breaches any terms of the easement.

3. **Provisions for compensation of the benefited landowner in the event of interference with the enjoyment of the easement or compensation of the burdened landowner for maintaining the easement**. Here, the New Hampshire statute expressly requires solar easements include compensation terms due to the owner of the fee property encumbered by the solar easement (i.e., the servient property) for maintaining the solar easement area. Terms are also required to be set forth in the agreement with respect to compensation due to the solar project (i.e., the grantee under the solar easement) in the event of interference with its rights granted pursuant to the solar easement. Notwithstanding the foregoing, typically, provisions related to compensation to be paid under such agreement may (and should) be omitted from any recorded memorandum of the agreement.

4. **A description of the real property subject to the solar skyspace easement and a description of the real property benefiting from the solar skyspace easement**. The New

Hampshire statute expressly requires a description of the real property subject to the easement. Typically, this requirement is easily satisfied by reference to the legal description for the relevant easement area. Note, such legal description is also required for recording of the agreement or a memorandum thereof within the register of deeds for the county where the real property is located.

In our experience, we frequently see such easements fail provide a description of the real property benefiting from such easement. Often, easements will even expressly state that there is no real property benefiting from such agreement; however, wind and solar projects are completely integrated projects. That is, the facilities located on one parcel of property are dependent upon and integrated with additional facilities located on other parcels of property within the project site for all the electrical energy generated by the project to be collected at the project's substation. Thus, each parcel of real property within a project site benefits from the leases and easements encumbering other parcels of real property so that, by way of example, the electrical energy produced or generated by facilities on one parcel of property can be transported across other properties in order to reach the project's substation and later the point of interconnection so such electrical energy can be disbursed for consumer use. Satisfying the second requirement of this portion of the New Hampshire statue could easily be addressed by including language such as:

> "The rights granted under this Agreement shall inure to the benefit of all real property upon which any solar facilities are installed for grantee's project."

New Hampshire law also provides a statutory form of solar skyspace easement, a sample of which is provided below.[57] Certainly, the parties can agree upon and include other language or even use a different form of easement to create such solar skyspace rights. The below form is merely an example of the minimum language required to sufficiently create such grant.

(Form for solar skyspace easement)

_____ , of _____ county, state of _____ , _____ for consideration paid, hereby conveys, grants and warrants to _____ , _____ of _____ county, state of _____, a negative easement to restrict, in accordance with the following terms, the future use and development of the real property of grantor recorded in _____ registry of deeds, vol. _____ , page _____ . The solar energy collector for which solar skyspace is to be protected is on the real property of grantee, which is recorded in registry of deeds, vol. _____ , page _____ , at the following locations:

The boundaries of the solar skyspace for the solar collector of grantee are as follows: (Description of boundaries with reference to applicable survey map, if any.)

(Alternative A)

No structure, vegetation, activity, or land use of grantor except utility lines, antennas, wires, and poles shall cast a shadow on a solar energy collector of grantee during the times specified unless such structure, vegetation, activity, or land use exists on the effective date of this easement and is not required to be removed or is excepted by the terms of this instrument. A shadow shall not be cast from 3 hours before noon to 3 hours after noon from September 22 through March 21 and from 4 hours before noon to 4 hours after noon from March 22 to September 21, all times being eastern standard time.

[57] N.H. Rev. Stat. Ann. § 477:51.

(or)

(Alternative B)

No structure, vegetation, activity, or land use other than those which exist on the effective date of this easement and which are not required to be removed or are excepted by the terms of this instrument shall penetrate the airspace at a height greater than over the real property of grantor.

Burdens and benefits of this easement are transferable and run with the land to subsequent grantees of the grantor and the grantee. This solar skyspace easement shall remain in effect until use of the solar energy collector is abandoned, provided it shall remain in effect for a period of at least 10 years, or until the grantee and grantor or their successors in interest terminate it. The solar energy terms used in this instrument are defined in RSA 477:49. The survey map depicting the affected properties and the boundaries of the protected areas of solar skyspace is incorporated by reference as part of this instrument.

Witness _____ hand this _____ day of _____ , 20 _____ Witness:

(Here add acknowledgement).

There is currently no applicable case law in New Hampshire interpreting the applicability of the statute or remedies in the event of noncompliance.

NEW JERSEY.*

New Jersey does not have state specific requirements for leases or easements conveying an interest in real property located in New Jersey to be used for wind or solar project development.

NEW MEXICO.

New Mexico does not have statutory requirements for the creation of wind easements or leases; however, the state does have a statutorily required form for agreements granting a right to the unobstructed access of a solar array to sunlight.[58] Such grant must be substantially similar to the below form:[59]

SOLAR RIGHT DECLARATION

[Insert fee owner's name], owner of the real property described below, claims a solar right in favor of the following described real estate in [Insert the county where the property is located] county, New Mexico:

[Insert a description, either by metes and bounds if in a platted subdivision, by lot and block subdivision name, by middle Rio Grande conservancy district tract number, or other adequate legal description.]

[58] N.M. Stat. Ann. §§ 47-3-3; 47-3-9.
[59] N.M. Stat. Ann. § 47-3-9(A).

The following named persons have each received notification by certified mail evidenced by a return receipt signed by the named person, or if the address of any person was not known and could not be ascertained by reasonable diligence, or if a return receipt signed by the named person could not be obtained, then notification to that person shall be made by publication of a copy of this declaration, with the intended date of filing, at least once a week for two consecutive weeks in a newspaper of general circulation in the county in which the property for which the solar right is being claimed is located, the last publication of which was no less than ten days prior to the filing of this declaration:

[Insert a list of the names of the holders as shown in the records of the county clerk of any interest in property burdened by a claimed solar right, including owners, mortgagors, mortgagees, lessors, lessees, contract purchasers and contract owners or sellers, and a description, either by metes and bounds if in a platted subdivision, by lot and block and subdivision name, by middle Rio Grande conservancy district tract number or other adequate legal description, of that burdened property.]

The claimant has placed improvements on the land in the form of a solar collector, as shown by the attached survey or plot plan setting forth distances from lot lines and height from ground level of all solar collectors entitled to be recorded under the provisions of the Solar Recordation Act, Chapter __, Article __ NMSA 1978 and setting forth the maximum height of a theoretical fence located at the property lines of the property on which the solar collector is located which will not interfere with the solar easement.

Notice is hereby given that by virtue of the Solar Recordation Act, Chapter ___, Article -__ NMSA 1978, the holders of any interest in property described above as having been mailed notice must record a declaration, with the county clerk in each county in which solar right recordation has been filed, contesting the claimed solar right within sixty days, or the solar right shall be fully vested.

Witness _____hand and seal this _____ day of _____, ____.

[Insert notary acknowledgment]

Such solar rights are appurtenant to the burdened real property referenced in the relevant grant. In order to enforce a solar right, the grantee thereunder must record such right and give notice to the fee interest owners of the affected real property, as required by the Solar Recordation Act.[60] Failure to record such grant deprives any would be applicable court of subject matter jurisdiction to enforce the solar right, unless such solar rights granted have vested prior to the effective date of the applicable statutory subsection.[61]

Additionally, any recipient of a recorded notice of a solar right has sixty days after receipt thereof to contest such right of record.[62] In the event that such contest is recorded, the solar right shall not be enforced against the real property referenced therein and shall expire within one year after the date of the declaration of contest, unless agreed upon in writing by the relevant parties or ordered by a court of competent

[60] Id.
[61] N.M. Stat. Ann. § 47-3-9(B).
[62] N.M. Stat. Ann. § 47-3-9(C).

jurisdiction.[63] Such contest will run with the benefited real property under the solar right in the event of a transfer thereof.[64]

There is currently no applicable case law in New Mexico interpreting the applicability of the statute or remedies in the event of noncompliance.

NEW YORK.

In the state of New York, there are no state-specific language required to be included in wind project leases or easements; however, any easement obtained for the purpose of exposure of a solar energy device to sunlight must be in writing and shall remain subject to the same recording and conveyance requirements as any other instrument affecting the title to real property.[65] Such easements must also include the following:[66]

1. **The vertical and horizontal angles, expressed in degrees, at which the solar energy easement extends over the real property subject to the solar energy easement**. The New York statute necessarily requires a description of the property subject to the solar easement, which is otherwise required to record the easement of record in the public records for the county where the encumbered real property is located. In addition to a description of the real property subject to the solar easement, the New York statute also requires a description of the solar easement area, which in addition to any a metes and bounds legal description of the area, must also be described in degrees such as:

   > "The solar easement right granted under this Agreement shall extend across the [subject property] vertically and horizontally 360° from any point where any portion of the [solar facilities] are located at any time and for a distance from each portion of such facilities to the boundaries of the [subject property]."

2. **Any terms or conditions or both under which the solar energy easement is granted or will be terminated**. The terms of, or conditions to, the grant of easement rights should be included in such agreement, as well as a recorded memorandum thereof to give notice to third parties of such grant and the applicable conditions or restrictions, if any, thereto. Notwithstanding the foregoing requirement, provisions related to compensation to be paid under such agreement may (and should) be omitted from any recorded memorandum of the agreement.

   Likewise, a provision describing the terms and conditions upon which the easement may be terminated is also required by statute and should also be included in the recorded memorandum. Generally, such easements provide that the grantee may terminate the agreement at any time and for any reason upon written notice to the owner of the encumbered property. Conversely, such owner will be prohibited from pursuing termination of the easement if the grantee's solar facilities are installed o the property. In such instance, the owner will be limited to recovering damages in the event the grantee breaches any terms of the easement.

3. **Any provisions for compensation of the owner of the property benefiting from the solar energy easement in the event of interference with the enjoyment of the solar energy**

[63] Id.
[64] Id.
[65] N.Y. Real Prop. § 335-b.
[66] Id.

easement or compensation of the owner of the property subject to the solar energy easement for maintaining the solar energy easement. The New York statute necessarily requires a description of the property subject to the solar easement, which is otherwise required to record the easement of record in the public records for the county where the encumbered real property is located. Based on our experience in other states, we frequently see easements that fail to include a description of the property benefiting from an easement (where even more expressly required by statute). Often, such agreements will state that there is no real property benefiting from such agreement; however, solar projects are completely integrated projects. That is, the facilities located on one parcel of property are dependent upon and integrated with additional facilities located on other parcels of property within the project site such that the electrical energy generated by the project can be collected at the project's substation. Thus, each parcel of real property within a project site benefits from the easements likewise encumbering other parcels of real property so that, by way of example, the electrical energy produced or generated by facilities on one parcel of property can be transported across other properties in order to reach the project's substation and later the point of interconnection so such electrical energy can be disbursed for consumer use.

Here, in addition to a description of subject property, the New York statute would require a description of the benefited property, which could be addressed by including language such as:

> "The rights granted under this Agreement shall inure to the benefit of all real property upon which any solar facilities are installed for [grantee's project]."

The New York statute expressly requires solar easements to include compensation terms due to the owner of the fee property encumbered by the solar easement (i.e., the subject property) for maintaining the solar easement area. Terms are also required to be set forth in the agreement with respect to compensation due to the solar project (i.e., the grantee under the solar easement) in the event of interference with its rights granted pursuant to the solar easement. Notwithstanding the foregoing, typically, provisions related to compensation to be paid under such agreement may (and should) be omitted from any recorded memorandum of the agreement.

There is currently no applicable case law in New York interpreting the applicability of the statute or remedies in the event of noncompliance.

NORTH CAROLINA.*

North Carolina does not have state specific requirements for leases or easements conveying an interest in real property located in North Carolina to be used for wind or solar project development.

NORTH DAKOTA.

North Dakota prohibits the severance of wind resources over real property associated with wind projects producing electrical energy, except to the extent permitted by the creation of a wind easement or wind energy lease.[67] Notwithstanding the foregoing, a fee owner may reserve unto itself in any conveyance of a fee interest any payments associated with an existing wind project.[68] The state has certain state requirements for wind lease and easement agreements, as well as, solar easements conveying or granting

[67] N.D. Cent. Code § 17-04-04.
[68] Id.

an interest in real property located in the state to be used for wind or solar project development, as discussed below:

Wind Easements and Wind Energy Leases. Agreements granting an easement or conveying a leasehold interest in real property in North Dakota, executed by or on behalf of the fee owner, to ensure sufficient exposure of wind project facilities to the unobstructed flow of wind may be made by the same means as the conveyance interest in real property and continues to run with both the burdened and benefited properties.[69] Such wind easements terminate upon the satisfaction or occurrence of the conditions stated therein, as well as if a certificate of site compatibility or conditional use permit, and a transmission interconnection request is not in process within five years after commencement of the easement term.[70]

There are several additional termination rights granted by statute. If construction or operation of a wind project has not occurred during a thirty-six consecutive month period, the easement granting such rights will be presumed abandoned.[71] Additionally, if the grantee under the easement fails to file a plan outlining the scope and schedule for continued construction or operation of the wind project with the public service commission within such thirty-six month period, the fee owner may deliver to the wind easement grantee notice of intent to terminate the easement within sixty days.[72] In the event that the wind easement grantee fails to provide written objection to the fee owner within such sixty-day period, the fee owner may file a termination of the easement, which will be effective upon recording.[73]

North Dakota has several additional requirements for wind easements and wind energy lease, which:[74]

1. Must be delivered to the property owner with a cover page containing the following paragraph in at least sixteen-point type:

   > "Special message to property owners: This is an important agreement our lawyers have drafted that will bind you and your land for up to [insert the correct term of years] 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."

2. May 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.[75] Unlike most states, here, North Dakota expressly requires a period of time for the owner of the real property to review and consider the terms of the wind easement or wind energy lease.

3. May 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.

4. Must preserve the right of the property owner to continue conducting business operations as currently conducted for the term of the agreement. Notwithstanding the foregoing, the property

[69] N.D. Cent. Code § 17-04-02, 17-04-03.
[70] N.D. Cent. Code § 17-04-03(2)(a).
[71] N.D. Cent. Code § 17-04-03(2)(b).
[72] Id.
[73] Id.
[74] N.D. Cent. Code § 17-04-06.

owner must make accommodations to the developer, owner, or operator of the wind project for its business operations to allow the construction and operation of the wind energy facility.

5. May not make the property owner liable for any property tax associated with the wind energy facility or other equipment related to wind energy generation. Note, that the property owner should continue to be liable for property taxes associated with the real property, but the wind project owner will should be responsible for any increase in such taxes due to the presence of the wind project's equipment.

6. May not make 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.

7. Must obligate the developer, owner, and operator of the wind energy facility to comply with federal, state, and local laws and regulations and may not make the property owner liable in the case of a violation.

8. Must 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 wind project lessee/grantee continues to pay to the property all regularly required amounts of rent due under the wind energy lease or wind easement, as applicable, during such time.

9. Must clearly state any circumstances that will allow the developer, owner, and operator of the wind energy facility to withhold payments from the property owner.

Solar Easements. Any agreement creating a right for property hosting equipment designed to receive direct exposure to sunlight and convert the same into electrical energy must also be made in writing and remains subject to the same conveyance and recording requirements as other easements.[76] Such solar easements must contain the following, without limitation:[77]

1. **The vertical and horizontal angles, expressed in degrees, at which the solar easement extends over the real property subject to the solar easement**. Such requirement may be satisfied by the following language:

> "Any obstruction to the free flux of solar energy across the [subject property] is prohibited throughout the entire area of the [subject property] which shall exist vertically and horizontally 360° from any point where any portion of the [solar facilities] are located at any time and for a distance from each portion of such facilities to the boundaries of the [subject property]."

The requirement does not prevent the parties to the agreement from including language that merely limits, rather than prohibits, potential obstruction. For example, in our experience, we have seen parties agree to height and distance requirements for future improvements to, or installations upon, the real property where the grantee's consent would be required before the grantor could make such improvements or installations. Such agreements might be agreed upon for any improvements or other installations within a distance from the project's facilities that would create a violation of any setback requirements in applicable zoning and safety standards or improvements that could cast a shadow across the solar array.

[76] N.D. Cent. Code § 47-05-01.1.
[77] N.D. Cent. Code § 47-05-01.2.

2. **Any terms, conditions, or both under which the solar easement is granted or will be terminated**. The terms of, or conditions to, the grant of easement rights should be included in such agreement, as well as a recorded memorandum thereof to give notice to third parties of such grant and the applicable conditions or restrictions, if any, thereto. Notwithstanding the foregoing requirement, provisions related to compensation to be paid under such agreement may (and should) be omitted from any recorded memorandum of the agreement.

   Likewise, a provision describing the terms and conditions upon which the easement may be terminated is also required by statute and should also be included in the recorded memorandum. Generally, such easements provide that the grantee may terminate the agreement at any time and for any reason upon written notice to the owner of the encumbered property. Conversely, such owner will be prohibited from pursuing termination of the easement if the grantee's solar facilities are installed on the property. In such instance, the owner will be limited to recovering damages in the event the grantee breaches any terms of the easement.

3. **Any provisions for compensation of the owner of the property benefiting from the solar easement in the event of interference with the enjoyment of the solar easement or compensation of the owner of the property subject to the solar easement for maintaining the solar easement**. Here, the North Dakota statute expressly requires solar easements include compensation terms due to the owner of the fee property encumbered by the solar easement (i.e., the subject property) for maintaining the solar easement area. Terms are also required to be set forth in the agreement with respect to compensation due to the solar project (i.e., the grantee under the solar easement) in the event of interference with its rights granted pursuant to the solar easement. Notwithstanding the foregoing, typically, provisions related to compensation to be paid under such agreement may (and should) be omitted from any recorded memorandum of the agreement.

There is currently no applicable case law in North Dakota interpreting the applicability of the statute or remedies in the event of noncompliance.

OHIO.

Although Ohio does not have any statutory requirement for wind energy leases or easements, the state does have statutory requirements for solar easements. Ohio law provides that solar access easements may be granted "to ensure adequate access of solar energy collection devices to sunlight and may be granted by any person."[78] Such easements must be made in writing and remain subject to the same conveyance and recording requirements as other easements.[79]

Easements granting solar access rights must include:[80]

1. **A description of the real property burdened and benefited by the solar access easement**. The Ohio statute expressly requires a description of the real property subject to the easement. Typically, this requirement is easily satisfied by reference to the legal description for the relevant easement area. Note, such legal description is also required for recording of the agreement

[78] Ohio Rev. Code Ann. § 5301.63.
[79] Id.
[80] Id.

or a memorandum thereof within the register of deeds for the county where the real property is located.

In our experience with solar projects in other states with similar requirements, we frequently see such easements that fail to satisfy the second requirement – a description of the real property benefiting from such solar agreement. Often, such agreements will even expressly state that there is no real property benefiting from such agreement; however, solar projects are completely integrated projects. That is, the facilities located on one parcel of property are dependent upon and integrated with additional facilities located on other parcels of property within the project site in order for all of the electrical energy generated by the project to be collected at the project's substation. Thus, each parcel of real property within a project site benefits from the leases and easements encumbering other parcels of real property so that, by way of example, the electrical energy produced or generated by facilities on one parcel of property can be transported across other properties in order to reach the project's substation and later the point of interconnection so such electrical energy can be disbursed for consumer use. Satisfying the second requirement of this portion of the Ohio statue could easily be addressed by including language such as:

> "The rights granted under this Agreement shall inure to the benefit of all real property upon which any solar facilities are installed for grantee's project."

2. **A description of the limits in heights, locations, or both, of permissible development on the burdened land in terms of structures, vegetation, or both, for the purpose of providing solar access for the benefited land**. Here, the Ohio statute requires a broader description than required by other states (i.e., which require descriptions made in terms of degrees, vertical and horizontal angles). It is common for parties to agree upon including language limiting the height and distance requirements for future improvements to, or installations upon, the real property where the project grantee's consent would be required before the landowner could make such improvements or installations. Such agreements might be agreed upon for any improvements or other installations within a distance from the project's facilities that would create a violation of any setback requirements in applicable zoning and safety standards or improvements that could cast a shadow across the solar array.

   Of note, the Ohio statute expressly permits the solar access easement grantee, as the owner of the benefited land, to prevent any obstruction of sunlight available to the project's solar array by pursuing any equitable remedy available or by an action at law for damages incurred by such obstruction.

3. **Any terms or conditions under which the solar access easement is granted or may be terminated**. The terms of, or conditions to, the grant of easement rights should be included in such agreement, as well as a recorded memorandum thereof to give notice to third parties of such grant and the applicable conditions or restrictions, if any, thereto. Notwithstanding the foregoing requirement, provisions related to compensation to be paid under such agreement may (and should) be omitted from any recorded memorandum of the agreement.

   Likewise, a provision describing the terms and conditions upon which the easement may be terminated is also required by statute and should also be included in the recorded memorandum. Generally, such easements provide that the grantee may terminate the agreement at any time and for any reason upon written notice to the owner of the encumbered property. Conversely, such owner will be prohibited from pursuing termination of the easement if the grantee's solar facilities

are installed o the property. In such instance, the owner will be limited to recovering damages in the event the grantee breaches any terms of the easement.

4. **A term stating that the solar access easement runs with the land, unless terminated in accordance with the terms of the easement regarding termination, or unless otherwise agreed by the parties**. Here, the Ohio statute expressly requires a statement that easement right granted shall run with the benefited and burdened real property and terminate upon the conditions stated in the solar access easement.

5. **Any other provisions necessary or desirable to execute the instrument**. The Ohio statute further includes a broad catch-all requiring the inclusion of any other provisions needed for the execution of the agreement. Such requirement may include, but not be limited to, representations related to the authority of the signatories, contact information for the parties thereto, or other representations or warranties made by the parties thereto.

There is currently no applicable case law in Ohio interpreting the applicability of the statute or remedies in the event of noncompliance.

OKLAHOMA.*

Oklahoma does not have state specific requirements for leases or easements conveying an interest in real property located in Oklahoma to be used for wind or solar project development.

OREGON.

In Oregon, there are certain state requirements for both solar energy easements, wind energy easements, and wind project leases.

Solar Energy Easements. Agreements granting an easement, or any other access right, to insure the passage of sunlight across real property in Oregon must be made in writing and in form generally required to create an interest in real property.[81] Such easements remain subject to the same recording and conveyance requirements as any other instrument affecting the title to real property and must contain the following:[82]

1. **A legal description of the real property benefited and burdened by the easement**. The Oregon statute expressly requires a description of the real property subject to the easement. Typically, this requirement is easily satisfied by reference to the legal description for the property being leased or the relevant easement area. Note, such legal description is also required for recording of the agreement or a memorandum thereof within the register of deeds for the county where the real property is located.

   In our experience with solar projects in other states with similar requirements, we frequently see such leases or easements that fail to include a description of the real property benefiting from such wind or solar agreement. Often, such agreements will even expressly state that there is no real property benefiting from such agreement; however, wind and solar projects are completely integrated projects. That is, the facilities located on one parcel of property are dependent upon

[81] *See*, Or. Rev. Stat. § 93.710.
[82] Or. Rev. Stat. §§ 105.895(2), (4); 105.885; 105.895.

and integrated with additional facilities located on other parcels of property within the project site in order for all of the electrical energy generated by the project to be collected at the project's substation and disbursed for consumer use. Thus, each parcel of real property within a project site benefits from the leases and easements encumbering other parcels of real property so that, by way of example, the electrical energy produced or generated by facilities on one parcel of property can be transported across other properties in order to reach the project's substation and later the point of interconnection so such electrical energy can be disbursed for consumer use. Satisfying the second requirement of this portion of the Oregon statue could easily be addressed by including language such as:

> "The rights granted under this Agreement shall inure to the benefit of all real property upon which any solar facilities are installed for grantee's project."

2. **A description of the solar energy easement, which must be sufficient to determine the space over the burdened property which must remain unobstructed**. Here, like other states, the Oregon statute requires a specific description of the area within the burdened property (i.e., the real property encumbered by the solar energy easement) wherein obstructions, such as buildings or trees that could block the passage of sunlight onto the solar energy easement area, are prohibited. The statute expressly provides two approaches, by way of example and not as a limitation, of how such description may be provided:[83]

    a. **A sun chart**. The Oregon statute defines a sun chart as an illustration of the plotted position of the sun's path across the burdened real property during each hour of the day and month of a year at the nearest degree of latitude to the property.[84] Such chart should include depictions of vegetation and buildings, from the perspective of the center of the lower edge of the solar array installed on the benefited property.[85] The chart should also include a drawing showing the size and location of the solar array surface being protected oriented with respect to true south.

    b. **A description of the solar envelope**. A solar envelope is defined under the Oregon statute as the three-dimensional space over the burdened real property wherein expressed height restrictions for structures and vegetation on the burdened real property are located to protect the benefited property's access to sunlight.[86] The description must be sufficient to determine the space over the burdened property that must remain unobstructed.[87]

Wind Energy Easements. Similarly, any easement, covenant or condition contained with an agreement designed to ensure unobstructed wind flow over real property, must be made in writing and in form generally required to create an interest in real property.[88] Such easements also remain subject to the same recording and conveyance requirements as any other instrument affecting the title to real property and must contain the following: [89]

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[83] Or. Rev. Stat. § 105.895.
[84] Or. Rev. Stat. § 105.885(4).
[85] Or. Rev. Stat. § 105.895(1)(b)(A).
[86] Or. Rev. Stat. § 105.885(3).
[87] Or. Rev. Stat. § 105.895(1)(b)(B).
[88] Or. Rev. Stat. § 105.915(1); *and see*, Or. Rev. Stat. § 93.710.
[89] Or. Rev. Stat. § 105.910.

1. **A legal description of the real property benefited and burdened by the easement**. Note, this is the same requirement Oregon has with respect to solar energy easements discussed above.

2. **A description of the dimensions of the easement**. Here, like the solar energy easement discussed above, the description should be sufficient to determine the horizontal space across and the vertical space above the burdened property that must remain unobstructed to ensure unobstructed wind flow over the benefited property. Such requirement may be satisfied by the following language:

   > "The wind energy easement rights granted herein shall encumber the entire area of the [burdened property] which shall exist vertically and horizontally 360° from any point where any portion of the wind project's facilities are located at any time and for a distance from each portion of such facilities to the boundaries of the [burdened property]."

3. **The restrictions placed upon vegetation, structures, and other objects that would impair or obstruct the wind flow across and though the easement**. Based on our experience with wind projects in other states with similar requirements, we have frequently seen parties agree to height and distance requirements for future improvements (e.g., trees or other vegetation) to, or installations (e.g., buildings or other structures) upon, the real property wherein the win energy easement holder's consent would be required before the landowner could make such improvements or installations. For example, any improvements or other installations within a distance from the project's facilities that would create a violation of any setback requirements in applicable zoning and safety standards, or improvements that could interfere with or obstruct the flow of wind across the burdened and benefited properties.

4. **The terms or conditions, if any, under which the easement may be changed or terminated**. Any terms or conditions to the grant of easement rights should be included not only in the easement, but also in a recorded memorandum thereof in order to give notice to third parties of such grant and the applicable conditions or restrictions, if any, thereto. Likewise, any revisions to the easement that could impact the rights of third parties should also be recorded (e.g., revisions to the length of term of the easement, or to the legal description of the encumbered real property). Here, a statement as to the terms and conditions upon which the easement may be revised, could simply state that the agreement may be amended by mutual agreement of the parties thereto evidenced in writing.

   Because a provision describing the terms and conditions upon which the easement may be terminated is also required by statute, such provision and any revision thereto should likewise be included in both the agreement and in a recorded memorandum thereof. Generally, such easements provide that the grantee may terminate the agreement at any time and for any reason upon written notice to the owner of the encumbered property. Conversely, such owner will be prohibited from pursuing termination of the agreement if the grantee's energy project facilities are installed on the property. In such instance, the owner will be limited to recovering damages.

In Oregon, both solar energy easements and wind energy easements are appurtenant to and run with both the benefited and burdened real property.[90] In each instance, such easements terminate: (i) upon the satisfaction of conditions governing termination as set forth in the easement, (ii) by court order upon

[90] Or. Rev. Stat. §§ 105.890; 105.905.

abandonment of the easement or in the event of changed conditions, (iii) at any time by mutual agreement of the owners of the benefited and the burdened properties.[91]

Wind Energy Leases. Slightly different requirements exist with respect to the creation of a leasehold interest in real property for wind energy project use. In Oregon, an agreement conveying a lease for, or an option to lease, real property (including with respect to the vertical space above real property) for a wind energy conversion system (e.g., wind turbines) or for wind measuring equipment (e.g., meteorological towers or MET towers) must also be made in writing and in recordable form as required for other real property interests.[92] Such wind energy leases must contain:[93]

1. **The parties' names**. The names of the parties to the agreement, as well as their mailing addresses for notice purposes, are required for such wind energy leases. Note, the same requirement exists for the recording of any agreement conveying an interest in real property.

2. **A legal description of the real property involved**. Here, a legal description of both the burdened and benefited properties should be included. Such language would be similar to the property descriptions also required for solar energy easements and wind energy easements discussed above.[94]

3. **The consideration paid for the transfer**. Oregon, like most states, does not require any particular form of statement of the amounts paid (i.e., the consideration) for the conveyance of a wind energy lease (or any other conveyance of an interest in real property). Parties to such leases are not obligated to disclose the financial terms of such conveyance and may generally state that other value was given in whole or in part as consideration. By way of example, the following general statement may suffice:

> "For good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged by [the burdened property owner] and the lessee, upon the terms and conditions set forth in this agreement [the burdened property owner] hereby grants and conveys to lessee the leasehold interest in and to [the leased property] upon the terms and conditions set forth herein."

4. **The nature of the interest created**. Generally, the nature of the interest created by the lease will be evident by both the form and substance of the agreement. An express statement as to the purpose of the lease may also suffice to satisfy this requirement and could follow the aforementioned provision referencing the consideration paid therefor. By way of example, such language may include the following:

> "[the burdened property owner] hereby grants and conveys to lessee an exclusive easement and lease to convert, maintain, and capture the free, unobstructed flow of wind over, across and through the surface estate of that certain real property, including, but not limited to, the air space thereon, located in [●] County, state of Oregon, consisting of approximately [●] acres, as more particularly described in Exhibit [●] attached hereto and incorporated herein (the "**Property**"), for the purposes set forth below."

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[91] Id.
[92] Or. Rev. Stat. § 105.915; *and see*, Or. Rev. Stat. § 93.710.
[93] Or. Rev. Stat. § 105.915.
[94] Or. Rev. Stat. § 93.710(3)(a)(B).

5. **The terms or conditions, if any, under which the interest may be revised or terminated**. Note, this is the same requirement as for wind energy easements discussed above.

There is currently no applicable case law in Oregon interpreting the applicability of these statutes or remedies in the event of noncompliance.

PENNSYLVANIA.*

Pennsylvania does not have state specific requirements for leases or easements conveying an interest in real property located in Pennsylvania to be used for wind or solar project development.

RHODE ISLAND.

Rhode Island does not have state specific requirements for leases or easements conveying an interest in real property located in Rhode Island to be used for wind project development. However, solar easements may be obtained for the purpose of ensuring a solar energy system's exposure to direct sunlight.[95] The grant of such easements may be conveyed in the form of a restriction, easement, covenant, or conditions set forth in any deed or other written instrument signed by the owner of the encumbered property.[96] Such solar easements remain subject to the same conveyance and recording requirements as other agreements affecting title to real property and will run with the benefited and burdened real property as a perpetual easement, except to the extent the easement provides for termination or includes conditions to such conveyance.[97]

Any written agreement creating a solar easement across real property located in Rhode Island must include the following:[98]

1. **A description of the real property subject to the solar easement and a description of the real property benefiting from the solar easement**. The Rhode Island statute expressly requires a description of the real property subject to the easement. Typically, this requirement is easily satisfied by reference to the legal description for the property being leased or the relevant easement area. Note, such legal description is also required for recording of the agreement or a memorandum thereof within the register of deeds for the county where the real property is located.

   In our experience, we frequently see such leases or easements that fail to satisfy the second requirement – a description of the real property benefiting from such wind or solar agreement. Often, such agreements will even expressly state that there is no real property benefiting from such agreement; however, wind and solar projects are completely integrated projects. That is, the facilities located on one parcel of property are dependent upon and integrated with additional facilities located on other parcels of property within the project site in order for all of the electrical energy generated by the project to be collected at the project's substation and disbursed for consumer use. Thus, each parcel of real property within a project site benefits from the leases and easements encumbering other parcels of real property so that, by way of example, the electrical energy produced or generated by facilities on one parcel of property can be transported across

[95] R.I. Gen. Laws § 34-40-1.
[96] Id.
[97] R.I. Gen. Laws § 34-40-2.
[98] Id.

other properties in order to reach the project's substation and later the point of interconnection so such electrical energy can be disbursed for consumer use. Satisfying the second requirement of this portion of the Rhode Island statue could easily be addressed by including language such as:

> "The rights granted under this Agreement shall inure to the benefit of all real property upon which any [wind/solar facilities] are installed for [lessee's/grantee's project]."

2. **A description of the vertical and horizontal angles, expressed in degrees and measured from the site of the solar energy system, at which the solar easement extends over the real property subject to the solar easement, or any other description which defines the three-dimensional space, or the place in which and times of day during which an obstruction to direct sunlight is prohibited or limited**. Such requirement may be satisfied by similar language required in other states with respect to the vertical and horizontal angles of the solar easement property, such as:

> "The solar easement rights granted herein shall encumber the entire area of the [servient property] which shall exist vertically and horizontally 360° from any point where any portion of the solar facilities are located at any time and for a distance from each portion of such facilities to the boundaries of the [servient property]."

Here, the Rhode Island statute also requires detail, expressed in degrees, of the angles (both vertical and horizontal) and distances from the location of the solar facilities wherein obstruction is prohibited or limited. Often, such requirement may be satisfied by the following language:

> "Any obstruction to the free flux of solar energy across the [burdened property] is prohibited throughout the entire area of the [burdened property] which shall exist vertically and horizontally 360° from any point where any portion of the solar facilities are located at any time and for a distance from each portion of such facilities to the boundaries of the [burdened property]."

Note, this requirement does not prevent the parties to the agreement from including language that merely limits, rather than prohibits, potential obstruction. For example, in our experience, we have seen parties agree to height and distance requirements for future improvements to, or installations upon, the real property wherein the project grantee's prior consent would be required before the landowner could make such improvements or installations, such as any improvements or other installations within a distance from the project's facilities that would create a violation of any setback requirements in applicable zoning and safety standards, or improvements that could cast a shadow across the solar array.

3. **Any terms and/or conditions under which the solar easement is granted or may be terminated**. The terms of, or conditions to, the grant of easement rights should be included in such agreement, as well as a recorded memorandum thereof to give notice to third parties of such grant and the applicable conditions or restrictions, if any, thereto. Notwithstanding the foregoing requirement, provisions related to compensation to be paid under such agreement may (and should) be omitted from any recorded memorandum of the agreement.

Likewise, a provision describing the terms and conditions upon which the easement may be terminated is also required by statute and should also be included in the recorded memorandum. Generally, such easements provide that the grantee may terminate the agreement at any time and

for any reason upon written notice to the owner of the encumbered property. Conversely, such owner will be prohibited from pursuing termination of the easement if the grantee's solar facilities are installed o the property. In such instance, the owner will be limited to recovering damages in the event the grantee breaches any terms of the easement.

4. **Any provisions for compensation of the owner of the property benefiting from the solar easement in the event of interference with the enjoyment of the provisions of the solar easement, or any provisions for compensation of the owner of the property subject to the solar easement for maintaining the easement**. Here, the Rhode Island statute expressly requires solar easements include compensation terms due to the owner of the fee property encumbered by the solar easement (i.e., the subject property) for maintaining the solar easement area. Terms are also required to be set forth in the agreement with respect to compensation due to the solar project (i.e., the grantee under the solar easement) in the event of interference with its rights granted pursuant to the solar easement. Notwithstanding the foregoing, typically, provisions related to compensation to be paid under such agreement may (and should) be omitted from any recorded memorandum of the agreement.

There is currently no applicable case law in Rhode Island interpreting the applicability of the statute or remedies in the event of noncompliance.

SOUTH CAROLINA.

South Carolina does not have state specific requirements for leases or easements conveying an interest in real property located in South Carolina to be used for wind or solar project development.

SOUTH DAKOTA.

In South Dakota, an easement may be granted by or on behalf of a fee owner of real property to another for the right to ensure adequate exposure of wind turbines to the unobstructed flow of wind, or to ensure adequate exposure of a photovoltaic solar array to sunlight.[99] In either instance, such agreement could instead be an agreement prohibiting the development of a wind or solar project.[100]

The grant of a wind or solar easement must be conveyed in writing, signed by the owner of the encumbered property, and otherwise in the same manner as a conveyance of a real property interest.[101] Such easements remain subject to the same conveyance and recording requirements as other agreements affecting title to real property and will run with the benefited and burdened real property, except to the extent the easement provides for termination; provided, however, that the term of such easement must not exceed fifty years.[102] Notwithstanding the foregoing, in the event that development to produce wind or solar energy as provided under the easement does not occur within five years after the date thereof, the easement will be deemed void and of no further force or effect.[103] Although an interest in real property for the production of power from wind or solar energy resources located on such real property may be granted, subject to the limitations

[99] S.D. Codified Laws §§ 43-13-16; 43-13-16.1.
[100] Id.
[101] S.D. Codified Laws § 43-13-17.
[102] Id.
[103] Id.

discussed above, South Dakota expressly prohibits any severance of such wind or solar energy resources from the surface estate.[104]

Any deed, will, or other instrument creating a wind or solar easement encumbering real property in South Dakota is required to include the following:[105]

1. **A description of the real property subject to the easement and a description of the real property benefiting from the wind or solar easement**. The South Dakota statute expressly requires a description of the real property subject to the easement. Typically, this requirement is easily satisfied by reference to the legal description for the property being leased or the relevant easement area. Note, such legal description is also required for recording of the agreement or a memorandum thereof within the register of deeds for the county where the real property is located.

   In our experience, we frequently see such leases or easements that fail to satisfy the second requirement – a description of the real property benefiting from such wind or solar agreement. Often, such agreements will even expressly state that there is no real property benefiting from such agreement; however, wind and solar projects are completely integrated projects. That is, the facilities located on one parcel of property are dependent upon and integrated with additional facilities located on other parcels of property within the project site in order for all of the electrical energy generated by the project to be collected at the project's substation and disbursed for consumer use. Thus, each parcel of real property within a project site benefits from the leases and easements encumbering other parcels of real property so that, by way of example, the electrical energy produced or generated by facilities on one parcel of property can be transported across other properties in order to reach the project's substation and later the point of interconnection so such electrical energy can be disbursed for consumer use. Satisfying the second requirement of this portion of the South Dakota statue could easily be addressed by including language such as:

   > "The rights granted under this Agreement shall inure to the benefit of all real property upon which any [wind/solar facilities] are installed for grantee's project."

2. **A description of the vertical and horizontal angles, expressed in degrees, and distances from the site of the wind or solar power system in which an obstruction to the wind or sun is prohibited or limited**. Often, such requirement may be satisfied by the following language:

   > "Any obstruction to the free [flow of wind / flux of solar energy] across the [burdened property] is prohibited throughout the entire area of the [burdened property] which shall exist vertically and horizontally 360° from any point where any portion of the [wind/solar facilities] are located at any time and for a distance from each portion of such facilities to the boundaries of the [burdened property]."

   Note, this requirement does not prevent the parties to the agreement from including additional language that further limits potential obstruction. For example, in our experience, we have seen parties agree to height and distance requirements for future improvements to, or installations upon, the real property wherein the project grantee's consent would be required before the landowner could make such improvements or installations, or for any improvements or other installations

[104] S.D. Codified Laws § 43-13-19.
[105] S.D. Codified Laws § 43-13-18.

within a distance from the project's facilities that would create a violation of any setback requirements in applicable zoning or safety standards.

3. **Any terms or conditions under which the easement is granted or may be terminated**. The terms of, or conditions to, the grant of easement rights should be included in such agreement, as well as a recorded memorandum thereof to give notice to third parties of such grant and the applicable conditions or restrictions, if any, thereto. Notwithstanding the foregoing requirement, provisions related to compensation to be paid under such agreement may (and should) be omitted from any recorded memorandum of the agreement.

   Likewise, a provision describing the terms and conditions upon which the easement may be terminated is also required by statute and should also be included in the recorded memorandum. Generally, such easements provide that the grantee may terminate the agreement at any time and for any reason upon written notice to the owner of the encumbered property. Conversely, such owner will be prohibited from pursuing termination of the easement if the grantee's solar facilities are installed o the property. In such instance, the owner will be limited to recovering damages in the event the grantee breaches any terms of the easement.

4. **Any provisions for compensation of the owner of the real property benefiting from the easement in the event of interference with the enjoyment of the easement, or compensation of the owner of the real property subject to the easement for maintaining the easement**. Here, the South Dakota statute expressly requires solar easements include compensation terms due to the owner of the fee property encumbered by the solar easement (i.e., the servient property) for maintaining the solar easement area. Terms are also required to be set forth in the agreement with respect to compensation due to the solar project (i.e., the grantee under the solar easement) in the event of interference with its rights granted pursuant to the solar easement. Notwithstanding the foregoing, typically, provisions related to compensation to be paid under such agreement may (and should) be omitted from any recorded memorandum of the agreement.

5. **Any other provision necessary or desirable to execute the instrument**. The South Dakota statute further includes a broad catch-all requiring the inclusion of any other provisions needed for the execution of the agreement. Such requirement may include, but not be limited to, representations related to the authority of the signatories, contact information for the parties thereto, or other representations or warranties made by the parties thereto.

There is currently no applicable case law in South Dakota interpreting the applicability of the statute or remedies in the event of noncompliance.

TENNESSEE.

Tennessee does not have state specific requirements for leases or easements conveying an interest in real property located in Tennessee to be used for wind project development. However, any instrument creating a solar easement shall include, without limitation:[106]

1. **A description of the real property subject to the solar easement and a description of the real property benefiting from the solar easement**. The Tennessee statute expressly

[106] Tenn. Code Ann. § 66-9-204.

requires a description of the real property subject to the easement. Typically, this requirement is easily satisfied by reference to the legal description for the property being leased or the relevant easement area. Note, such legal description is also required for recording of the agreement or a memorandum thereof within the register of deeds for the county where the real property is located.

In our experience with similar projects in states with the same requirements, we frequently see such leases or easements that fail to satisfy the second requirement – a description of the real property benefiting from such wind or solar agreement. Often, such agreements will even expressly state that there is no real property benefiting from such agreement; however, wind and solar projects are completely integrated projects. That is, the facilities located on one parcel of property are dependent upon and integrated with additional facilities located on other parcels of property within the project site in order for all of the electrical energy generated by the project to be collected at the project's substation. Thus, each parcel of real property within a project site benefits from easements encumbering other parcels of real property so that, by way of example, the electrical energy produced or generated by facilities on one parcel of property can be transported across other properties in order to reach the project's substation and later the point of interconnection so such electrical energy can be disbursed for consumer use. Satisfying the second requirement of this portion of the statue could easily be addressed by including language such as:

> "The rights granted under this Agreement shall inure to the benefit of all real property upon which any solar facilities are installed for grantee's project."

2. **The vertical and horizontal angles, expressed in degrees or otherwise, at which the solar easement extends over the real property subject to the solar easement**. Such requirement may be satisfied by the following language:

> "Any obstruction to the free flux of solar energy across the [subject property] is prohibited throughout the entire area of the [subject property] which shall exist vertically and horizontally 360° from any point where any portion of the [solar facilities] are located at any time and for a distance from each portion of such facilities to the boundaries of the [subject property]."

The requirement does not prevent the parties to the agreement from including language that merely limits, rather than prohibits, potential obstruction. For example, in our experience, we have seen parties agree to height and distance requirements for future improvements to, or installations upon, the real property where the grantee's consent would be required before the grantor could make such improvements or installations, such as any improvements or other installations within a distance from the project's facilities that would create a violation of any setback requirements in applicable zoning and safety standards, or improvements that could cast a shadow across the solar array.

3. **Any terms or conditions, or both, under which the solar easement is granted or will terminate**. The terms of, or conditions to, the grant of easement rights should be included in such agreement, as well as a recorded memorandum thereof to give notice to third parties of such grant and the applicable conditions or restrictions, if any, thereto. Notwithstanding the foregoing requirement, provisions related to compensation to be paid under such agreement may (and should) be omitted from any recorded memorandum of the agreement.

Likewise, a provision describing the terms and conditions upon which the easement may be terminated is also required by statute and should also be included in the recorded memorandum. Generally, such easements provide that the grantee may terminate the agreement at any time and for any reason upon written notice to the owner of the encumbered property. Conversely, such owner will be prohibited from pursuing termination of the easement if the grantee's solar facilities are installed o the property. In such instance, the owner will be limited to recovering damages in the event the grantee breaches any terms of the easement.

4. **Any provisions for compensation of the owner of the property benefiting from the solar easement in the event of interference with the enjoyment of the solar easement or compensation of the owner of the property subject to the solar easement for maintaining the solar easement**. The Tennessee statute expressly requires solar easements to include compensation terms due to the owner of the fee property encumbered by the solar easement (i.e., the subject property) for maintaining the solar easement area. Terms are also required to be set forth in the agreement with respect to compensation due to the solar project (i.e., the grantee under the solar easement) in the event of interference with its rights granted pursuant to the solar easement. Notwithstanding the foregoing, typically, provisions related to compensation to be paid under such agreement may (and should) be omitted from any recorded memorandum of the agreement.

5. **The period of time for which the easement shall run**. Both the effective date of the easement agreement and the expiration date must be included in the easement agreement. Such information should also be included in any recorded memorandum thereof to give third parties notice of the easement agreement. Additional information should also be included with respect to the terms under which the easement agreement may be terminated prior to expiration.

There is currently no applicable case law in Tennessee interpreting the applicability of the statute or remedies in the event of noncompliance.

TEXAS.

Both wind power facility agreements and solar power facility agreements and are regulated under Texas law. Such agreements must include specific language required by state statute, as discussed below.

In Texas, the conveyance of a leasehold interest in real property from the fee owner thereof to another for operation of a wind turbine or solar energy device[107] and other facilities or equipment supporting the operation thereof, including, but not limited to, related underground or aboveground electrical communication or transmission lines, is considered by statute to be a wind power facility agreement or a solar power facilities agreement, respectively.[108] Such agreements must contain specific language addressing the lessee's obligations with respect to removal of such wind or solar power facilities upon expiration or earlier termination of the agreement, including:[109]

1. **Safe removal of facilities in accordance with any other applicable laws or regulations**. Here, the Texas statute obligates lessees under such agreements to clear, clean and remove from

[107] *See*, Tex. Util. Code § 185.001(2), which defines such devices as a solar energy collector or system collecting solar energy or the subsequent use thereof for thermal, mechanical, or electrical energy.
[108] Tex. Util. Code §§ 301.0001; 302.0001.
[109] Tex. Util. Code §§ 301.0003; 302.0004.

the property all wind power facilities or solar energy devices (each as defined by statute)[110] and substations, including related towers and transformers, as well as, all liquids, greases, and similar chemical substances contained therein.

2. **Removal of facility and equipment foundations**. Lessees in Texas are also required to remove all wind turbine or solar energy device foundations and any pad-mount transformer foundations from the surface of the leased real property to a depth of at least three feet below the surface where installed. Upon such removal, the surface of the real property must be restored and filled with the same or similar type of topsoil as is predominately found on the property.

3. **Removal of related underground and aboveground cables**. The Texas statute further obligates such lessees to remove all buried cables, including any power, fiber-optic, and communication cables. Any such underground cables must be removed to a depth of at least three feet below the surface where installed. Aboveground power and communication lines must also be removed. Following such removal, the surface of the property must also be restored and filled with the same or similar type of topsoil as is predominately found on the property.

4. **Removal of related roads installed in connection with the wind power facility**. Similarly, if requested by the fee owner of the real property encumbered by the agreement, the Texas statute obligates lessees under such agreements to remove any roads constructed on the property in connection with the wind or solar power facility's operations. Similar to the above required restoration obligations, the surface of the real property must be restored upon removal of such roads and filled with the same or similar type of topsoil as is predominately found on the property.

5. **Additional removal requirements required by the fee owner of the real property encumbered by the wind power facility agreement**. In addition to the foregoing, if requested by the fee owner of the real property, the lessee under a wind or solar power facility agreement must:

    a. remove all rocks in excess of the twelve inches in diameter from the real property while excavating the wind or solar power facilities during any removal or decommissioning process;

    b. restore the property to a tillable condition using scarification, V-rip, or disc methods, as appropriate;

    c. ensure that any holes or cavities created in the surface of the real property due to such removal are filled with the same or similar type of topsoil as is predominately found on the property; and

    d. ensure that the surface of the real property is restored as near as reasonably possible to the same condition that existed prior to such removal or decommissioning activities, including by reseeding the surface as required by any relevant governing agency.

With respect to the removal requirements discussed above at items 4 and 5, the fee owner of the real property encumbered by a wind or solar power facility agreement must make such requests related to removal of roads and any additional removal requirements within 180 days following the later of either: (i) the date when the wind or solar power facility is no longer capable of generating commercial quantities of

[110] Tex. Util. Code §§ 301.0001(2); 302.0001(2). *See also*, Tex. Util. Code § 185.001(2).

electricity, or (ii) the date the fee owner of the real property receives written notice from the lessee expressing its intent to decommission such facility.

Wind and solar power facility agreements must also address certain financial assurances granted by the lessee thereunder to the fee owner of the encumbered real property. Specifically, such agreements must obligate such lessee to deliver to the fee owner financial assurances in the form of a guaranty from the lessee's parent company having a minimum investment grade credit rating issued by a major domestic credit rating agency, letter of credit, bond, or other form acceptable to the fee owner.[111] Such financial assurance must adequately secure performance of the lessee's removal obligations as required by the applicable statute.[112]

The amount of security required in connection with the lessee's financial assurance must equal the estimated cost of removing such wind or solar power facilities from the fee owner's property, including any costs associated with restoration of the surface of the property to a condition as close as reasonably possible to the condition that existed upon commencement of the wind or solar power facility agreement.[113] Such security may be reduced by an amount equal to any portion of the value of such facilities that might have been pledged as security for any outstanding debt owed by the project.[114] Estimated costs of removal of the facilities and restoration of the surface of the real property are to be determined by an independent, third-party profession engineer licensed in the state of Texas. For wind power facility agreements, an updated estimate must be delivered to the fee owner of the encumbered real property at least once every five years for the remainder of the wind agreement's term.[115] However, for solar power facility agreements, an updated estimate is required both: (i) on or before the tenth anniversary of the solar project's commercial operations date (i.e., the date such solar facilities are approved for market operations by a regional transmission organization, exclusive of electrical generation for the purposes of maintenance or testing), and (ii) at least once every five years after the solar facility begins commercial operations for the remainder of the solar agreement's term.[116] Whether with respect to a wind power facility agreement or a solar power facility agreement, in each instance the lessee thereunder remains responsible, at its sole cost, for ensuring the financial assurances and related security continue to sufficiently cover such removal and restoration costs and remain consistent with the required estimates.[117]

A lessee under a wind or solar power facility agreement must deliver such financial assurances and related security to the fee owner of the real property encumbered thereunder not later than the earlier of: (i) the date the agreement is terminated; or (ii) ten years after the commercial operations date for wind projects and twenty years after the commercial operations date for solar projects.[118] The financial assurances and related security must remain in place until the lessee under the power facility agreement satisfies its removal and restoration obligations as required by statute and otherwise pursuant to the terms of the agreement and may only be cancelled if replacement assurances are delivered in advance to the fee owner of the encumbered real property.[119] Similarly, if ownership of the wind or solar power facilities is transferred or conveyed to a third-party, such financial assurances will remain in place until replacement assurances are delivered to the fee owner.[120]

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[111] Tex. Util. Code §§ 301.0004; 302.0005.
[112] *See*, Tex. Util. Code § 301.0003; 302.0004.
[113] Tex. Util. Code §§ 301.0004; 302.0005.
[114] Id.
[115] Tex. Util. Code § 301.0004(c)(1)-(2).
[116] Tex. Util. Code § 302.0005(c)(1)-(2).
[117] Tex. Util. Code. §§ 301.0004(c)(3), (d); 302.0005(c)(3), (d).
[118] Tex. Util. Code §§ 301.0004(e); 302.0005(e).
[119] Tex. Util. Code §§ 301.0004(g); 302.0005(g).
[120] Id.

The parties to a wind or solar power facility agreement are prohibited from waiving any statutory rights provided with respect to a project's removal or financial assurance obligations, as well as, from agreeing to exempt a lessee under such agreement from any liability or duty established with respect thereto.[121] In the event that a lessee under such agreement violates its statutory duties, the fee owner of the property shall be entitled to appropriate injunctive relief to avoid further violation, as well as any other remedies available at law.[122]

UTAH.

Utah does not have state specific requirements for leases or easements conveying an interest in real property located in Utah to be used for wind project development. However, in Utah, any property owner may grant a solar easement in the same manner and with the same effect as a conveyance of an interest in real property.[123] The easement must also be recorded and indexed in the same way as other conveyances of real property interests.[124] Such easements are appurtenant to, and run with, both the benefited and burdened land.

Any easement creating a solar easement shall include:[125]

1. **A description of the real property subject to the solar easement and a description of the real property benefiting from the solar easement**. The Utah statute expressly requires a description of the real property subject to the easement. Typically, this requirement is easily satisfied by reference to the legal description for the property being leased or the relevant easement area. Note, such legal description is also required for recording of the agreement or a memorandum thereof within the register of deeds for the county where the real property is located.

   In our experience with projects in states with similar statutory language, we frequently see such leases or easements that fail to satisfy the second requirement – a description of the real property benefiting from such wind or solar agreement. Often, such agreements will even expressly state that there is no real property benefiting from such agreement; however, wind and solar projects are completely integrated projects. That is, the facilities located on one parcel of property are dependent upon and integrated with additional facilities located on other parcels of property within the project site in order for all of the electrical energy generated by the project to be collected at the project's substation. Thus, each parcel of real property within a project site benefits from the leases and easements encumbering other parcels of real property so that, by way of example, the electrical energy produced or generated by facilities on one parcel of property can be transported across other properties in order to reach the project's substation and later the point of interconnection so such electrical energy can be disbursed for consumer use. Satisfying the second requirement of this portion of the Utah statue could easily be addressed by including language such as:

   > "The rights granted under this Agreement shall inure to the benefit of all real property upon which any solar facilities are installed for [grantee's project]."

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[121] Tex. Util. Code §§ 301.0002(a); 302.0003(a).
[122] Tex. Util. Code §§301.0002(b)-(c); 302.003(b)-(c).
[123] Utah Code Ann. § 57-13-2(1).
[124] Id.
[125] Utah Code Ann. § 57-13-2(2).

2. **A description of the vertical and horizontal angles, expressed in degrees and measured from the site of the solar energy system, at which the solar easement extends over the real property subject to the solar easement, or any other description which defines the three-dimensional space, or the place and times of day in which an obstruction to direct sunlight is prohibited or limited**. Such requirement may be satisfied by similar language required in other states with respect to the vertical and horizontal angles of the solar easement property, such as:

> "The solar easement rights granted herein shall encumber the entire area of the [servient property] which shall exist vertically and horizontally 360° from any point where any portion of the solar facilities are located at any time and for a distance from each portion of such facilities to the boundaries of the [servient property]."

Here, the Utah statute also requires detail, expressed in degrees, of the angles (both vertical and horizontal) and distances from the location of the solar facilities wherein obstruction is prohibited or limited. Often, such requirement may be satisfied by the following language:

> "Any obstruction to the free flux of solar energy across the [burdened property] is prohibited throughout the entire area of the [burdened property] which shall exist vertically and horizontally 360° from any point where any portion of the solar facilities] are located at any time and for a distance from each portion of such facilities to the boundaries of the [burdened property]."

Note, this requirement does not prevent the parties to the agreement from including language that merely limits, rather than prohibits, potential obstruction. For example, in our experience, we have seen parties agree to height and distance requirements for future improvements to, or installations upon, the real property wherein the project lessee's/grantee's prior consent would be required before the landowner could make such improvements or installations, such as any improvements or other installations within a distance from the project's facilities that would create a violation of any setback requirements in applicable zoning and safety standards, or improvements that could cast a shadow across the solar array.

3. **Any terms or conditions under which the solar easement is granted or may be terminated**. The terms of, or conditions to, the grant of easement rights should be included in such agreement, as well as a recorded memorandum thereof to give notice to third parties of such grant and the applicable conditions or restrictions, if any, thereto. Notwithstanding the foregoing requirement, provisions related to compensation to be paid under such agreement may (and should) be omitted from any recorded memorandum of the agreement.

   Likewise, a provision describing the terms and conditions upon which the easement may be terminated is also required by statute and should also be included in the recorded memorandum. Generally, such easements provide that the grantee may terminate the agreement at any time and for any reason upon written notice to the owner of the encumbered property. Conversely, such owner will be prohibited from pursuing termination of the easement if the grantee's solar facilities are installed o the property. In such instance, the owner will be limited to recovering damages in the event the grantee breaches any terms of the easement.

4. **Any provisions for compensation of the owner of the real property benefiting from the solar easement in the event of interference with the enjoyment of the solar easement, or compensation of the owner of the real property subject to the solar easement, or**

compensation of the owner of the real property subject to the solar easement for maintaining the solar easement. The Utah statute expressly requires solar easements to include compensation terms due to the owner of the fee property encumbered by the solar easement (i.e., the subject property) for maintaining the solar easement area. Terms are also required to be set forth in the agreement with respect to compensation due to the solar project (i.e., the grantee under the solar easement) in the event of interference with its rights granted pursuant to the solar easement. Notwithstanding the foregoing, typically, provisions related to compensation to be paid under such agreement may (and should) be omitted from any recorded memorandum of the agreement.

5. **Any other provisions necessary or desirable to execute the instrument**. The Utah statute further includes a broad catch-all requiring the inclusion of any other provisions needed for the execution of the agreement. Such requirement may include, but not be limited to, representations related to the authority of the signatories, contact information for the parties thereto, or other representations or warranties made by the parties thereto.

There is currently no applicable case law in Utah interpreting the applicability of the statute or remedies in the event of noncompliance.

VERMONT.

Vermont does not have state specific requirements for leases or easements conveying an interest in real property located in Vermont to be used for wind or solar project development.

VIRGINIA.

Virginia does not have state specific requirements for leases or easements conveying an interest in real property located in the state to be used for wind project development. However, in Virginia, easements obtained for the purpose of exposure of solar energy equipment, facilities, or devices to sunlight must be made in writing and are subject to the same requirements governing conveyance and recording of real property instruments.[126] Such easements must include, without limitation, the following:[127]

1. **The vertical and horizontal angles, expressed in degrees, at which the solar easement extends over the real property subject to the solar easement**. Language expressing the vertical or horizontal angles measured in degrees of the solar easement area may be satisfied by the following language:

> "The solar easement rights granted herein shall encumber the entire area of the [servient property] which shall exist vertically and horizontally 360° from any point where any portion of the solar facilities are located at any time and for a distance from each portion of such facilities to the boundaries of the [servient property]."

2. **Any terms or conditions under which the solar easement is granted or will be terminated**. The terms of, or conditions to, the grant of easement rights should be included in such agreement, as well as a recorded memorandum thereof to give notice to third parties of such grant and the applicable conditions or restrictions, if any, thereto. Notwithstanding the foregoing

[126] Va. Code Ann. § 55.1-137.
[127] Va. Code Ann. § 55.1-138.

requirement, provisions related to compensation to be paid under such agreement may (and should) be omitted from any recorded memorandum of the agreement.

Likewise, a provision describing the terms and conditions upon which the easement may be terminated is also required by statute and should also be included in the recorded memorandum. Generally, such easements provide that the grantee may terminate the agreement at any time and for any reason upon written notice to the owner of the encumbered property. Conversely, such owner will be prohibited from pursuing termination of the easement if the grantee's solar facilities are installed o the property. In such instance, the owner will be limited to recovering damages in the event the grantee breaches any terms of the easement.

3. **Any provisions for compensations of the owner of the property subject to the solar easement**. Here, the Virginia statute expressly requires solar easements to include compensation terms due to the owner of the fee property encumbered by the solar easement (i.e., the subject property) for maintaining the solar easement area. Terms are also required to be set forth in the agreement with respect to compensation due to the solar project (i.e., the grantee under the solar easement) in the event of interference with its rights granted pursuant to the solar easement. Notwithstanding the foregoing, typically, provisions related to compensation to be paid under such agreement may (and should) be omitted from any recorded memorandum of the agreement.

There is currently no applicable case law in Virginia interpreting the applicability of the statute or remedies in the event of noncompliance.

WASHINGTON.

In Washington, a solar easement is considered an interest in real property and refers to a right granted in an easement, restriction, covenant, or condition in a deed, contract or other written agreement for the purpose of assuring adequate access to sunlight for solar energy systems.[128] Any instrument creating a solar easement is subject to the same requirements governing conveyance and recording of real property instruments and must include:[129]

1. **A description of the real property subject to the solar easement and a description of the real property benefiting from the solar easement**. The Washington statute expressly requires a description of the real property subject to the solar easement. Typically, this requirement is easily satisfied by reference to the legal description for the relevant easement area. Note, such legal description is also required for recording of the agreement or a memorandum thereof within the register of deeds for the county where the real property is located.

   In our experience in other states with similar statutory requirements, we frequently see such easements fail to satisfy the second requirement – a description of the real property benefiting from the solar agreement. Often, such agreements will even expressly state that there is no benefited real property; however, solar projects are completely integrated projects. That is, the facilities located on one parcel of property are dependent upon and integrated with additional facilities located on other parcels of property within the project site in order for all of the electrical energy generated by the project to be collected at the project's substation. Thus, each parcel of real property within a project site benefits from the solar easements encumbering other parcels of real property so that, by way of example, the electrical energy produced or generated by facilities

[128] Wash. Rev. Code § 64.04.150.
[129] Id.

on one parcel of property can be transported across other properties in order to reach the project's substation and later the point of interconnection so such electrical energy can be disbursed for consumer use. Satisfying the second requirement of this portion of the Washington statue could easily be addressed by including language such as:

> "The rights granted under this Agreement shall inure to the benefit of all real property upon which any solar energy system is installed for [grantee's project]."

2. **A description of the extent of the solar easement which is sufficiently certain to allow the owner of the real property subject to the easement to ascertain the extent of the easement**. Such description must be reasonably certain. By way of example, the "description may be made by describing the vertical and horizontal angles, expressed in degrees, at which the solar easement extends over the real property subject to the easement and the points from which those angles are to be measured, or the height over the property above which the solar easement extends, or a prohibited shadow pattern."[130] Such requirement may be satisfied by the following language:

> "Any obstruction to the free flux of solar energy across the [burdened property] is prohibited throughout the entire area of the [burdened property] which shall exist vertically and horizontally 360° from any point where any portion of the solar energy system is located at any time and for a distance from each portion of such facilities to the boundaries of the [burdened property]."

Note, this requirement does not prevent the parties to the agreement from including language that further defines the extent of the solar easement. For example, in our experience, we have seen parties agree to height and distance requirements for future improvements to, or installations upon, the real property wherein the project lessee's/grantee's prior consent would be required before the landowner could make such improvements or installations. Such agreements might be agreed upon for any improvements or other installations within a distance from the project's facilities that would create a violation of any setback requirements in applicable zoning and safety standards or improvements that could cast a shadow across the solar array.

Instruments creating a solar easement may, but are not required to, include:[131]

1. **Terms and conditions of the grant, to its termination**. Naturally, any terms or conditions to the grant of easement rights should be included in such agreement, as well as a recorded memorandum thereof in order to give notice to third parties of such conveyance or grant and the applicable conditions or restrictions, if any, thereto. A provision describing the terms and conditions upon which the lease or easement may be terminated should likewise be included in the recorded memorandum.

2. **Any provisions for compensation to the owner of property benefiting from the solar easement in the event of interference with the enjoyment of the solar easement, or compensation to the owner of the property subject to the solar easement for maintaining the solar easement.** The Washington statute expressly requires solar easements to include compensation terms due to the owner of the fee property encumbered by the solar easement (i.e., the subject property) for maintaining the solar easement area. Terms are also required to be set forth in the agreement with respect to compensation due to the solar project

[130] Id.
[131] Id.

(i.e., the grantee under the solar easement) in the event of interference with its rights granted pursuant to the solar easement. Notwithstanding the foregoing, typically, provisions related to compensation to be paid under such agreement may (and should) be omitted from any recorded memorandum of the agreement.

There is currently no applicable case law in Washington interpreting the applicability of the statute or remedies in the event of noncompliance.

WEST VIRGINIA.

West Virginia does not have state specific requirements for leases or easements conveying an interest in real property located in West Virginia to be used for wind or solar project development.

WISCONSIN.

Wisconsin does not have state specific requirements for leases or easements conveying an interest in real property located in Wisconsin to be used for wind or solar project development.

WYOMING.

Wind Energy Rights. Wyoming has state specific requirements governing language, among other things, to be included in any lease, license, easement or other agreement granting an interest in real property to another allowing for development of a wind project, which right remains appurtenant to the surface estate of the burdened property.[132] Such grant of a wind development right, or a memorandum thereof, must:[133]

1. **Be recorded in the office of the county clerk where the land subject to the agreement is located**. Note, that recording of a document evidencing such grant, by either recording the agreement itself or a short form memorandum thereof, is generally required for all conveyances of an interest in real property in order to give third parties notice of such right.

2. **Include a description of the land subject to the agreement**. Similarly, the legal description of the real property encumbered by any agreement granting an interest therein is required for all conveyances of an interest in real property.

Upon termination or expiration of a wind development right, the fee owner of the surface estate may request the holder of the wind development right record a release of the agreement granting such right in the office of the county clerk where the land subject to the agreement is located, which recording must be made in writing and delivered to the holder of the wind development right , at its last known address, by personal service or registered mail.[134] Within twenty days after receipt thereof, the holder of the wind development right must record the release.[135] Failure to timely make such recording results in liability to the fee owner of the surface estate for all damages arising from such failure.[136]

Except as otherwise agreed among the parties to any such grant, wind development rights conveyed after April 1, 2011, expire and revert to the fee owner of the surface estate in the event that: (a) production of electrical energy from wind resources over the encumbered property ceases for a continuous ten-year

[132] Wyo. Stat. Ann. §§ 34-27-102(a)(i), (iii); 34-27-103(a).
[133] Wyo. Stat. Ann. § 34-27-103(c).
[134] Wyo. Stat. Ann. § 34-27-103(d).
[135] Id.
[136] Id.

period, or (b) generation of such electrical energy has not begun within twenty years after execution of the agreement granting such right.[137] Notwithstanding such reversion, the holder of a wind development right will remain obligated to perform all restoration and reclamation responsibilities with respect to the surface estate.[138]

Solar Rights. Wyoming's Solar Rights Act protects, as a property right subject to conveyances and transfers as any other interest in real property, a right to the unobstructed access to sunlight for the benefit of a solar project's solar array.[139] Such right, and any transfer thereof, must be recorded in accordance with the same statutory requirements as apply to other conveyances and transfers of real property interests and must include a description of the solar array surface, or the portion of such surface benefiting from the solar right.[140] To comply with the general requirements governing conveyances of real property rights, the legal description of the real property encumbered by such grant must be set forth in the agreement granting such right. Here, the Wyoming statute requires that such description also include (a) description of the solar array surface, (b) the direction such array is oriented, (c) the solar array's height above the surface of the encumbered real property, and (d) the location of the solar array within the boundaries of the encumbered real property.[141]

Notwithstanding the foregoing, the Act does not apply to solar projects: (a) with a rated power capacity in excess of five hundred kilowatts, or (b) disturbing the surface of more than one hundred acres of real property.[142] The Act further restricts a grant of such solar rights by providing that solar rights:

1. **May be violated during certain time periods**. Because the Act determines that access to sunlight is minimal before 9:00 a.m. and after 3:00 p.m. MST, a solar right may be infringed upon without compensation to the solar of such right. By way of example, if the fee owner of the surface or the real property encumbered by the solar right plants a large tree or installs a shed on such property in an orientation that causes a shadow to be cast upon the holder of a solar right's solar array from and after 3:00 p.m. MST, the solar right holder will not be entitled to compensation for such interference.

2. **May be subject to abandonment without priority**. In the event that the holder of a solar right fails to take action to benefit from such right (i.e., by installing and operating a solar array), for five or more years, will be deemed to have abandoned such right.

3. **Must reasonably accommodate the use of neighboring property**. The holder of a solar right must install its solar array in a manner to avoid unreasonable restrictions affecting the use of any adjoining property. For example, a solar array must not be installed on the real property encumbered by the solar right in a manner that would impede any right of access that an adjoining property might have over the same encumbered real property. Interference with crop farming on adjoining property, might also violate this portion of the statute, for example, if the solar array is oriented in a manner that casts a shadow on such adjoining property that decreases crop output which could be deemed an unreasonable restriction on such property's use for crop farming.

There is currently no applicable case law in Wyoming interpreting the applicability of the foregoing statutes or remedies in the event of noncompliance.

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[137] Wyo. Stat. Ann. § 34-27-107.
[138] Id.
[139] Wyo. Stat. Ann. §§ 34-22-102(ii); 34-22-103(c).
[140] Wyo. Stat. Ann. § 34-22-106.
[141] Id.
[142] Wyo. Stat. Ann. § 34-22-102(b).

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