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

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

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

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I. INTRODUCTION

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

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

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

developers with respect to wind easements and wind energy leases.\footnote{“Wind easements” and “wind energy leases,” referred to individually in North Dakota Century Code sections 17-04-02 and -05, are sufficiently similar for purposes of this article to hereafter be collectively referred to as “wind easements.”} The wind industry actively lobbied against House Bill 1509, and negotiations resulted in the compromises codified in N.D.C.C. section 17-04-06\footnote{N.D. CENT. CODE § 17-04-06, available at http://www.legis.nd.gov/cencode/t17c04.pdf.} and a requirement that a 2009-2010 interim wind easement study be conducted to generate and offer recommendations to the 2011 legislature.\footnote{H.B. 1509, 61st Leg. Assem., § 2 (N.D. 2009) (enrolled), available at http://www.legis.nd.gov/assembly/61-2009/bill-text/JBSB0500.pdf.}

First of its kind in the nation, section 17-04-06 did not level the playing field but it did prevent wind projects from using their competitive advantage to distribute patently unfair wind easements. Its requirements include two negotiation protocols\footnote{N.D. CENT. CODE § 17-04-06(1)(a)-(b) (2009).} and the inclusion of wind easement terms that prevent certain project risks being shifted to landowners.\footnote{Id. §§ 17-04-06(1)(a)-(b) (2009).}

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

II. WIND PROJECT DEVELOPERS HAVE COMPETITIVE ADVANTAGE OVER RURAL LANDOWNERS

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

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

Rural landowners are not in the wind generation business, but wind projects are. This simple fact is the first source of wind project competitive advantage. It is axiomatic that he who has the most information about a
complex transaction also has competitive advantage, and the wind industry’s global giants are party to most North Dakota wind easements.

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

NextEra Energy Resources (NextEra) was the largest owner and operator of wind generating facilities in North America as of 2008. NextEra had sixty-five wind projects comprised of more than 8,200 individual wind turbines operating in sixteen states and Canada, with an installed capacity of nearly 6,400 MW of electricity. NextEra planned to add more than 1,000 MW of wind generation to its portfolio in 2009 and has approximately 28,000 MW in its wind-development pipeline. NextEra had adjusted earnings of $821 million in 2008 and its corporate parent, FPL Group, Inc., reported 2008 revenues of more than $16 billion. As a point of reference, North Dakota’s Tax Commissioner projects that the state’s total tax revenue for the 2007-2009 biennium will be $2.682 billion.
ACCIÓNNA Energy has been pioneering renewable energy for nearly twenty years and is ranked globally as a leading wind project developer and constructor; it is also among the world’s top wind turbine manufacturers. ACCIÓNNA Energy is a subsidiary of ACCIÓNNA S.A., a 100 year-old, multi-billion-dollar company that is publically traded in Spain and has more than 40,000 employees working on operations located in thirty countries on five continents.

Iberdrola Renewables is the worldwide leader in wind power with 9,300 MW in operation globally and 2,800 MW of that located in the United States. It entered the American market in 2006, and by 2009 was the second largest provider of wind power after investing $3.74 billion during 2007 and 2008. Iberdrola Renewables has the financial backing of its ultimate corporate parent, Iberdrola, S.A., Spain’s number one energy group and the fourth largest utility company in the world by market cap. Iberdrola, S.A. has been in business for 107 years and currently has 33,000 employees located in more than forty countries.

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

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20. Id.
21. ACCIÓNNA North America—About Us, supra note 18; ACCIÓNNA North America—History, supra note 19.
23. Id.
24. Id.
25. Id.
28. Id.
speeds at strategic locations\textsuperscript{29} and jointly developing the 400 MW Glacier Ridge Wind Project located in Barnes County.\textsuperscript{30}

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

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

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

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

\textsuperscript{29} Glacier Ridge Wind Project, FAQs, http://glacierridgewind.com/faqs (last visited Apr. 14, 2010).
\textsuperscript{30} Glacier Ridge Wind Project, Home, supra note 26. The Glacier Ridge project does not appear on the AWEA list of North Dakota wind projects discussed above because it is still in the development stage.
\textsuperscript{31} Glacier Ridge Wind Project, FAQs, supra note 29.
The enhanced level of trust typical in rural business relationships is another reason why rural landowners seldom seek legal counsel. Doug Burgum, North Dakota entrepreneur, founder of Great Plains Software, and former senior vice president of Microsoft Business Solutions, explains that he learned the role of trust in rural business relationships from his father who owned a grain elevator in Arthur, North Dakota. Burgum said, “The thing he taught me about the relationship between a business and its customers is it’s absolutely, positively based on trust . . . . What he taught me is if you screw grandpa, 50 years later his grandkid won’t bring you his grain. Families remember that.”

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

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

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

35. Id.
37. I spoke with the State Bar Association of North Dakota Lawyer Referral and Information Service on November 17, 2009, and learned that its lawyer referral software does not include a category for “wind easements and leases,” preventing them from tracking lawyers interested in receiving such referrals. The Lawyer Referral and Information Service representative said that
for North Dakota lawyers experienced in “wind energy” also yielded no results. Changing the martindale.com query to “renewable energy” yielded the name of one North Dakota lawyer, but his firm’s website indicated that its renewable practice was focused on representing developers.

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

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

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

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

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

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

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

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

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

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


The problem that’s unique to this [wind power] industry is that the landowner doesn’t have the same negotiating power the mineral owner has. The mineral developer is going to go where the petroleum is. What we’ve seen with the wind developer is they tend to pick the soft targets. If you want to negotiate with them they tend to go around
Dakota wind developers are primarily pursuing “low hanging fruit;” for example, landowners who do not try to negotiate wind easements. Without regulation, wind companies cannot be expected to distribute wind easements that adequately protect the landowners’ interests and a predominance of un-negotiated wind easements would effectively result in market terms for North Dakota’s wind easements that are more advantageous to wind projects than would otherwise occur.

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

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

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

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

Id.

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

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

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

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

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

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

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

46. Id. The legislative history of House Bill 1509 evidences that this approach is being used in North Dakota. Id.
powerful tactic that enhances the risks associated with kitchen table negotiations. The local person may be a co-developer, an individual hired for this purpose or a supportive recruit who has already signed a wind easement. The presence of the native son breaks the ice, but more insidiously, encourages the landowner to superimpose the local person’s credibility and trustworthiness onto the wind project.

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

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

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

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

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

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

47. Id. at 38, 43, 49, 77, 80. The legislative history of House Bill 1509 is also replete with evidence that such approaches are being used in North Dakota. Id.
One tack the legislature has taken is setting an outer boundary for a specified contract term and reinforcing that boundary with stiff penalties. This was how the legislature mitigated the ability of lenders to use their competitive advantage to charge excessive interest rates. 49 A statutory formula set the usurious interest rate. 50 Should a lender ignore this requirement, penalties include refunding twice the amount of interest paid plus 25% of the principal to the borrower 51 and being charged with a class B misdemeanor. 52

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

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

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

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50. Id. § 47-14-09(1).
51. Id. § 47-14-10.
52. Id. § 47-14-11.
54. Id. The law explains that
[a]ny provision contained in any note, bond, mortgage, security agreement, or other evidence of debt for the payment of an attorney’s fee in case of default in payment or in proceedings had to collect such note, bond, or evidence of debt, or to foreclose such mortgage or security agreement, is against public policy and void.
56. Id.
57. Id. § 38-18-07(3).
leasing companies include an “advance royalty” provision in their coal leases, they are required to follow this procedure: before execution, the clause must be “specially explained” to the surface owner and the surface owner must sign an acknowledgement in the format required by the legislature. The penalty for not following this procedure is that the advance royalty provision is deemed void.

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

A comprehensive package of protections targets the competitive advantage of those soliciting contracts for the sale or lease of consumer goods or services around kitchen tables, and other places that are not the solicitor’s place of business. The threat of this contracting approach is considered so severe that protection is triggered when the price of the contract amounts to just $25.00. A three business day window of opportunity—potentially fifteen business days if the individual is sixty-five years or older and the purchase price is more than fifty dollars—is allowed to cancel the contract. In addition, bonuses for referrals are regulated, covered contracts must contain a required notice provision, and a person is guilty of a class B misdemeanor for any violations of the chapter.

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

59. “Advance royalty” means the offset contemplated which would allow payments for rent, bonuses, and damages under the terms of the lease to be deducted from the amount of the royalty due to the lessor when the mining operation actually begins.” Id. § 38-17-03(1).
60. Id. § 38-17-06.
61. Id.
62. Id. § 38-17-04(2).
64. Id. § 51-18-08(2).
65. Id. § 51-18-02(1).
66. Id. § 51-18-03.
67. Id. § 51-18-04.
68. Id. § 51-18-09. Despite the similar modus operandi, because wind easements do not involve consumer goods or services, this comprehensive system offers no protection to landowners approached by wind projects. Id. § 51-18-01(1), (3).
Insurance Commissioner. If approval is given, the Insurance Commissioner can later decide after a hearing to rescind its approval if the contract “contains a provision which is unjust, unfair, inequitable, misleading, or deceptive[.]” It is instructive that the legislature did not just temper the insurance industry’s competitive advantage, but created a construct that could fully mitigate it such that fair and just contracts would result.

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

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

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

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

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70. Id. § 26.1-30-19(1).
71. Id. § 26.1-30-21(2).
72. See id.
76. HOUSE BILL AND RESOLUTION HISTORY, supra note 41, at 2-7, 65-83.
77. Id. at 82-83 (testimony of Illona A. Jeffcoat-Sacco, General Counsel to the Public Service Comm.).
Leases\textsuperscript{78} to the committee.\textsuperscript{79} The document was well received and the possibility of using it as a guide for a revised code of conduct was raised.\textsuperscript{80} The author of this article also testified to the committee about a form wind easement my mother had received.\textsuperscript{81}

The House Natural Resources Committee subsequently decided to significantly amend House Bill 1509 to replace the rulemaking approach with a more fulsome bill that served as a mandatory code of conduct.\textsuperscript{82} As amended, House Bill 1509 unanimously passed the House on February 16, 2009.\textsuperscript{83} Among other things, it required wind projects to draft wind easements in plain English,\textsuperscript{84} include a cover sheet advising landowners to retain legal counsel,\textsuperscript{85} and described required wind easement terms, several of which were suggested by Landowner Guidelines for Evaluating Wind Energy Production Leases,\textsuperscript{86} including banning confidentiality clauses.\textsuperscript{87}

On March 13, 2009, the Senate Natural Resources Committee heard testimony, including mine, on House Bill 1509.\textsuperscript{88} According to the Farmers Union, “[a]s the bill moved to the Senate there was a significant increase in opposition from the Wind Developer lobby. Proponents worked with legislators and opponents of the bill to address concerns and the Senate amended the bill as it saw appropriate.”\textsuperscript{89} By a vote of 32 to 14, the full Senate passed the amended bill on April 7, 2009.\textsuperscript{90}

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

\begin{thebibliography}{99}
\bibitem{79} HOUSE BILL AND RESOLUTION HISTORY, supra note 41, at 3, 67-74 (noting the article’s distribution by Rep. Phillip Mueller).
\bibitem{80} \textit{Id}. at 4.
\bibitem{81} \textit{Id}. at 4, 75-78.
\bibitem{82} \textit{Id}. at 12-14.
\bibitem{86} Harsh et al., supra note 78.
\bibitem{88} HOUSE BILL AND RESOLUTION HISTORY, supra note 41, at 16-20, 86-102.
\bibitem{89} North Dakota Farmers Union, H.B. 1509, supra note 75.
\bibitem{90} Measure Actions, H.B. 1509, supra note 83.
\bibitem{91} HOUSE BILL AND RESOLUTION HISTORY, supra note 41, at 32-33. The Senate eliminated the requirements that wind easements be written in plain English and that the wind developer
\end{thebibliography}
Natural Resources Committee moved that the House not concur in the Senate amendments and that a conference committee be appointed. The motion prevailed on a voice note. It is important to note that the bill as it passed both houses banned confidentiality clauses in executed wind easements. Once in conference committee, however, the Farmer’s Union reported that “the issue of ‘confidentiality’ was at the heart of the opposition.” After intense negotiations lasting several days, the conferees agreed to a compromise that allowed parties to mutually agree to confidentiality requirements in executed wind easements, but prevented this provision from covering negotiations or terms of proposed easements.

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

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

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

Compromises resulting from intense negotiations of House Bill 1509 are apparent in section 17-04-06. Although it mandates the adoption of two waive subrogation actions against the landowner, changed the waiting period to ten days, added a requirement that the landowner make accommodations to the wind project during construction and operation, and refined the landowner’s ability to terminate the agreement if the wind project stops operating. Id.


93. Id.


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

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


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

99. Id.

100. Id.

negotiation protocols\textsuperscript{102} and includes a short list of required wind easement terms that prohibit certain project risks being shifted to landowners,\textsuperscript{103} it also requires contract terms that favor wind projects\textsuperscript{104} and preserves the ability of wind projects to enhance their competitive advantage by insisting that executed wind easements contain confidentiality obligations.\textsuperscript{105} All facets of section 17-04-06 are discussed below.

A. REQUIRED NEGOTIATION PROTOCOLS

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

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

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

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

Unfortunately, the cover sheet does not clearly protect the landowners’ rights to discuss the terms of the proposed wind easement with others. Only discussions “about the wind project” and whether a neighbor “also received a proposed contract” are clearly protected.\textsuperscript{107} Although an executed wind easement cannot contain provisions requiring either party to maintain
the confidentiality of negotiations or proposed terms, there is no restriction on a separate confidentiality agreement being required to receive a proposed wind easement. This is an important oversight for the 2011 legislature to consider correcting.

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

Wind easements “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.” This requirement was in response to testimony, including mine, that landowners were willing to sign unread wind easements during the project’s first visit to the kitchen table. I told the Senate Natural Resources Committee that until my mother intervened, my 91-year-old father was ready to commit to a wind easement without reading it when a representative of a wind project visited his kitchen table.

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

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

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

108. Id. § 17-04-06(1)(c).
109. Id. § 17-04-06(1)(b).
110. HOUSE BILL AND RESOLUTION HISTORY, supra note 41, at 88.
neighbors had signed (which was not true) and that they did not need to talk with their family or a lawyer.\textsuperscript{112}

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

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

\section*{B. \hspace{1em} REQUIRED WIND EASEMENT TERMS}

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

The “North Dakota Easement” is the “North Dakota Wind Energy Option and Easement Agreement” prepared by RES North America Leasing,
LLC, and provided to my mother in July 2008 without requiring that she sign a confidentiality agreement. Relevant portions were attached to my testimony to the Senate Natural Resources Committee.\footnote{117} This agreement was prepared for the Glacier Ridge project and RES Americas represented to me that it contained the form wind easement terms and conditions that about eighty neighbors had signed.

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

Nacel filed the Texas Easement with the Securities and Exchange Commission (SEC) as Exhibit 10.3 to Nacel’s Form 10-K for fiscal year ending March 31, 2009.\footnote{120} The SEC does not require corporations to disclose information in their exhibits that meet the SEC’s confidentiality standards.\footnote{121} Confidential portions of filed exhibits may be redacted pending resolution of a petition to the SEC seeking exemption from public disclosure.\footnote{122} Despite the availability of this procedure, Nacel filed the entire Texas Easement, even compensation terms, without redactions.\footnote{123}

1. **Required Wind Easement Terms that Prevent Wind Project Risk Being Shifted to Landowners**

   a. Landowners are Protected from Property Tax Liability for Wind Facilities

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

\footnotesize
\begin{itemize}
\item \footnote{117} House Bill and Resolution History, supra note 41, at 92-99.
\item \footnote{118} Nacel Energy Corp., Annual Report (Form 10-k), at 4 (June 23, 2009), available at http://investing.businessweek.com/research/stocks/financials/drawFiling.asp?formType=10-K [hereinafter Nacel Form 10-k].
\item \footnote{120} Nacel Form 10-k, supra note 118, at Ex. 10.3.
\item \footnote{121} Securities and Exchange Act of 1934, ch. 394, 48 Stat. 881 (Rule 24-b).
\item \footnote{122} Id.
\item \footnote{123} Nacel Form 10-k, supra note 118, at Ex. 10.3.
\item \footnote{125} Nacel Form 10-k, supra note 118, at Ex. 10.3 § 6.3; House Bill and Resolution History, supra note 41, at 94.
\end{itemize}
This requirement still performs an important function, however; it prevents wind projects from using their competitive advantage to draft wind easements allowing them to escape this obvious responsibility.

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

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

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

127. See HOUSE BILL AND RESOLUTION HISTORY, supra note 41, at 94-95. Section 9.3 of the North Dakota Easement addresses the repair of improvements and reimbursement for crop damages:
(d) If Owner [landowner] has not planted a crop in the location of improvements for the growing season in which the improvements will be constructed, Owner shall not be entitled to payments for any loss of crops planted following receipt of the Construction Notice in the locations designated in the Construction Notice. If upon receipt of a Construction Notice, Owner (i) has not planted a crop in the location of improvements designated in the Construction Notice for a growing season in which the improvements will be constructed, but (ii) has applied fertilizer, pesticides, or other similar inputs in the location of such improvements, then Owner will not be entitled to payment for any loss of crops planted following receipt of the Construction Notice, but Grantee [wind project] will reimburse Owner for the actual cost of the fertilizer, pesticides or other inputs applied in the location of such improvements.
(e) Subject to the provisions of subsection (d) above, Owner and Grantee agree that Grantee shall pay, as liquidated damages for any crop loss and related disruption during Construction Activities, $500.00 per acre on which crops are destroyed or disturbed. Payments for damages to crops shall be paid within thirty (30) days of the determination of the amount of liquidated damages owed.

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

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

\textsuperscript{129} Section 5.6 of the Texas Easement addresses crop damage:
For crops destroyed or lost due to the [wind project operations], Grantee [wind project] will compensate Owner [landowner] as calculated below, but in no case will Grantee be required to pay more than a single, total crop loss in any one crop year, and no additional, subsequent payments will be due in later years for portions of the Property occupied by Wind Systems. Damages for destruction or loss of existing crops will be calculated using the following formula: Unit Price x Unit Yield Per Acre x Acres Damaged = Damages. Unit Price will be based on the average of the last previous March 1st and September 1st prices for that crop as listed on the Chicago Board of Trade or other equivalent trading market. Yield will be the average of the previous three (3) years’ yield according to Owner’s records for the smallest parcel of land that includes the damaged area. If Owner does not have yield records available, the parties will use FSA records or other commonly used yield information available for the area. The parties will try in good faith to agree to the extent of damage and acreage affected. If they cannot agree, they will promptly have the area measured and extent of damage assessed by an impartial party such as a crop insurance adjuster or extension agent. Payment will be made within thirty (30) days after determining the extent of damage.

\textsuperscript{130} Id.

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

\textsuperscript{132} Section 10.1 of the North Dakota Easement addresses the responsibility of the wind project developer to indemnify the landowner:
Grantee [wind project] shall indemnify, defend, protect and hold Owner [landowner] harmless from and against any Claims for physical damages to property and for physical injuries to any person, to the extent caused by Grantee or its employees’, agents’ or contractors’ negligence or willful misconduct; provided, however, that Grantee’s obligations for damages to crops shall be limited by Section 9.3. In no event shall Grantee be liable or responsible for losses of rent, businesses opportunities, profits and the like that may result from Owner’s loss of use of the portion of the Premises...