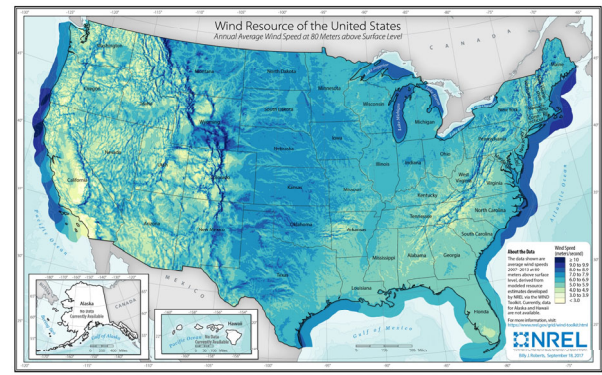


LANDOWNER CONSIDERATIONS FOR WIND AND SOLAR LEASE AGREEMENTS



WENDEE GRADY
 DIRECTOR OF THE KANSAS FARM BUREAU LEGAL FOUNDATION
 K-STATE KANSAS LANDOWNER CONFERENCE, OCTOBER 10, 2024



8,277 MW

Operating wind, solar, and energy storage capacity in Kansas.

State rank: **5th**



Clean power projects provide extra income to farmers, ranchers, and other private landowners. In 2022, these drought-proof land lease payments totaled

\$49 million

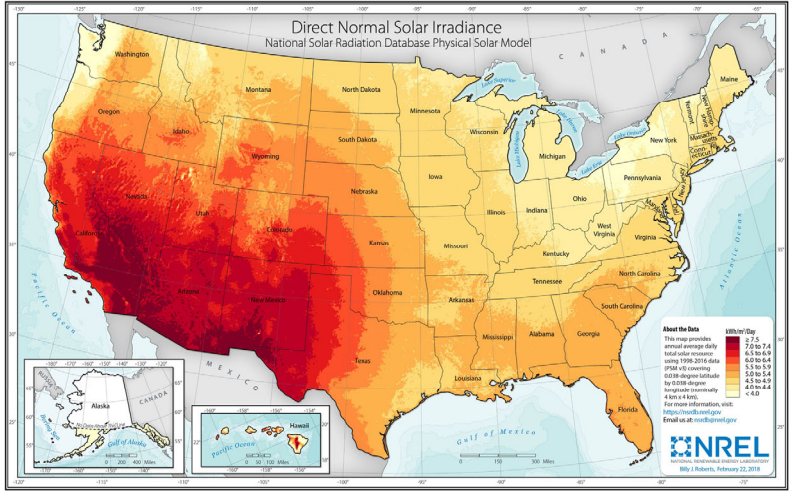


2.6 million

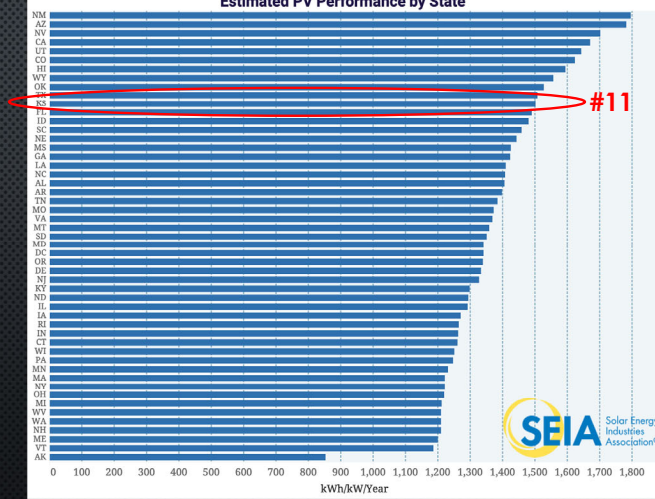
Homes that can be powered by clean energy generated in Kansas.



Source: American Clean Power, 2022



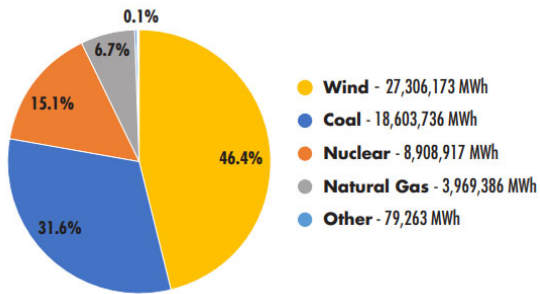
Estimated PV Performance by State



Kansas Electric Generation Sources by Total Megawatt hours

July 2022 to June 2023

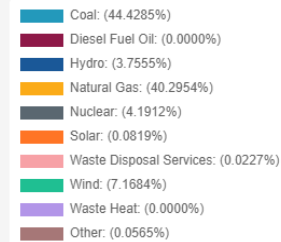
Source: U.S. Department of Energy, The Energy Information Administration (EIA)



ELECTRIC ENERGY GENERATION IN KANSAS

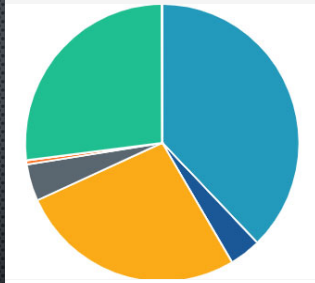
Generation Mix for 2022-08-25 19:55:00 (Central Time)

Pie chart view of current generation mix percentage by fuel type.



Source: <https://marketplace.spp.org/pages/generation-mix>

Generation Mix for 2022-08-28 14:20:00 (Central Time)



WIND – LEASE PROVISIONS

- GET IT IN WRITING
- LEASE TERM
 - OPTION TERM (FEASIBILITY PERIOD) – 2-5 YEARS (EXTENSION?)
 - FOR THE OWNER, THE SHORTER THE BETTER
 - ACCESS, SURVEYS, ENVIRONMENTAL STUDIES, WIND DATA COLLECTION, DEVELOPER WORKING TO GET REGULATORY APPROVALS
- CONSTRUCTION TERM ~1 YEAR

WIND AND SOLAR – BIG PICTURE CONSIDERATIONS

- IMPACT TO LAND
 - WHERE THE PROJECT IS (NOW AND LONG-TERM)
 - EFFECTS ON NON-LEASED/ADJACENT LAND (ACCESS, WIND FLOW, AERIAL APPLICATIONS, BURNING, DEVELOPMENT OF MINERAL INTERESTS)
- USDA PROGRAM COMPLIANCE – TALK TO FSA OFFICE
- CONSULT WITH LEGAL AND TAX ADVISORS (\$500-1000 STIPEND)
- DUE DILIGENCE ON THE COMPANY
- EXISTING LEASES (FARM, HUNTING, MINERALS)

WIND – LEASE PROVISIONS

- LEASE TERM, CONT'D
 - OPERATIONAL TERM – 20-50 YEARS
 - INITIAL TERM, PLUS RENEWAL OPTIONS (INCREMENTALLY FOR 20 MORE YEARS?)
 - MAY WANT TO TIE THIS TO THE LIFE OF THE PROJECT, OTHERWISE THINK ABOUT STRUCTURE FOR REPOWERING
 - DEVELOPER NEEDS: DURATION OF POWER PURCHASE AGREEMENT (PPA), LOAN PAYMENT DEMANDS, MAXIMUM RETURN ON INVESTMENT
 - DECOMMISSIONING PERIOD – 1-2 YEARS

WIND – LEASE PROVISIONS

- COMPENSATION
 - OPTION PERIOD
 - SIGNING BONUS: \$1,000 - \$5,000, OR \$3.00-\$10.00/A
 - ANNUAL: \$1,000 - \$3,000, OR \$3.00-\$20.00/A
 - INSTALLATION PAYMENTS
 - PER WIND TURBINE (\$2,500 OFFER)
 - PER STRUCTURE (\$15,000 OFFER)
 - PER METEOROLOGICAL TOWER (\$1,500 OFFER)

WIND – LEASE PROVISIONS

- COMPENSATION, CONT'D
 - ANNUAL LEASE COMPENSATION
 - FIXED PER TURBINE OR PRODUCTION CAPACITY, ROYALTY
 - THE GREATER OF:
 - FLAT \$1,000-3,000; OR
 - PER ACRE (\$20-\$40/A OFFER)
 - FIXED PER TURBINE (\$10,000–15,000 ANNUALLY); OR
 - PRODUCTION CAPACITY (\$4,000–6,500/MWH ANNUALLY), OR
 - ROYALTY (\$1.30-3.50/MWH (OLD?), OR 4-6.5% OF GROSS REVENUE, WHAT GOES INTO GROSS REVENUES – GOV'T INCENTIVES?)

WIND – LEASE PROVISIONS

- COMPENSATION, CONT'D
 - AUTOMATIC INFLATION ANNUAL INCREASE TO BASE RENTS 2.5% - 5% (COMPOUNDED?)
 - TIMING
 - PAYMENT FOR EASEMENTS SEPARATE FROM LEASES
 - ULTIMATELY, A LANDOWNER MUST FIGURE OUT WHAT MAKES A LEASE A GOOD DEAL FOR THEM

WIND – LEASE PROVISIONS

- DESCRIPTION OF LEASED AREA
 - LOOK AT A SITE PLAN
- TAXES
 - REQUIRE WIND COMPANY TO PAY
 - REQUIRE RESERVE OR BOND IF A PARTY CHALLENGES TAXES WITHOUT PAYMENT
 - KSA 79-201 – PROPERTY TAX EXEMPTIONS FOR RENEWABLE ENERGY GENERATORS, INCL. WIND, SOLAR
 - ENTIRE LIFE OF PROJECT – FACILITIES FROM 1999 TO DECEMBER 31, 2016
 - 10 TAXABLE YEARS IMMEDIATELY FOLLOWING YEAR IN WHICH CONSTRUCTION/INSTALLATION IS COMPLETED. – FACILITIES ON OR AFTER JANUARY 1, 2017

WIND – LEASE PROVISIONS

- LESSOR OBLIGATIONS UNDER THE LEASE
 - GENERALLY, LESSOR OR LANDOWNER SHALL
 - REVIEW TIMING
 - LANDOWNERS SHOULD NOT AGREE TO THINGS OUT OF THEIR CONTROL
- OPERATIONS
 - MAINTENANCE OF ROADS, VEGETATION CLEARANCE, DRAINAGE (EROSION/FLOODING), BUFFER ZONES, FIRE SAFETY, AND WILDLIFE
 - IF DEVELOPER IS RESPONSIBLE BUT FAILS TO MAINTAIN, CAN LANDOWNER MAINTAIN AND BE REIMBURSED FOR EXPENSES?
 - INSTALLATION OF LIVESTOCK FENCING, GATE PROCEDURE/CATTLE GUARDS FOR ADJOINING AG OPERATIONS?

WIND – LEASE PROVISIONS

- DEALING WITH DAMAGES
 - SURFACE DAMAGE PAYMENTS (NEW ROADS, STORAGE YARDS, SUBSTATION BUILDINGS, TRANSMISSION LINES)
 - LIQUIDATED DAMAGES CLAUSE – HOW DOES AGREEMENT HANDLE DAMAGES TO GROWING CROPS / LIVESTOCK, LOSS OF IRRIGATION USE
 - HOW DOES AGREEMENT HANDLE “BLOCKING” CROP OR LIVESTOCK PRODUCTION FOR A SEASON?
 - POSSIBLE TOOLS (SET SCHEDULE – PRE-DETERMINED PRICE PER HEAD / PER ACRE, CHICAGO BOARD OF TRADE X YIELD)
- INSURANCE
 - LANDOWNER WILL WANT DEVELOPER TO HAVE SUFFICIENT COMMERCIAL LIABILITY INSURANCE, AND NAME LANDOWNER AS AN ADDITIONAL INSURED
 - LANDOWNER INSURANCE PREMIUMS – MAKE PREMIUM INCREASES RESPONSIBILITY OF LESSEE

WIND – LEASE PROVISIONS

- LIABILITY ISSUES
 - TRESPASSERS, THIRD PARTY USAGE, ENVIRONMENTAL/AESTHETIC ISSUES, NUISANCE OR DISTURBANCES
- INDEMNIFICATION – ONE OF THE MOST IMPORTANT CONTRACT PROVISIONS!
 - MAKE SURE TO HAVE STRONG REQUIREMENTS FOR INDEMNIFICATION FROM DEVELOPER/OPERATOR
 - IF REQUIRED FROM LANDOWNER, MAKE SURE INSURANCE POLICY COVERS IT
 - WILL IT APPLY TO NEGLIGENT AND WILLFUL ACTS, OR GROSSLY NEGLIGENT AND WILLFUL ACTS?
 - DOES IT COVER ENVIRONMENTAL IMPACTS/REGULATORY VIOLATIONS?
 - LOOK FOR THIS TERM IN OTHER SECTIONS, TOO, LIKE HAZARDOUS MATERIALS

WIND – LEASE PROVISIONS

- MORTGAGE
 - WILL THE BANK ALLOW (MAY BE RESTRICTIONS IN THE MORTGAGE)
 - YOUR BANK MAY HAVE TO SIGN A SUBORDINATION (WON'T EJECT WIND COMPANY IN EVENT OF FORECLOSURE)
- OTHER LANDOWNER EXPENSES ASSOCIATED WITH THE PROPERTY
- WATER, MINERALS, NATURAL RESOURCES
 - SHOULD BE EXPRESSLY RESERVED TO THE LANDOWNER
 - ASK COMPANY ABOUT PROPOSED WATER USE
 - POTENTIAL CONFLICTS IF SOMEONE ELSE OWNS THE MINERAL INTEREST (LANDOWNER DOESN'T HAVE TO WARRANT WHO OWNS SEVERED MINERAL INTERESTS)

WIND – LEASE PROVISIONS

- PRESERVE LANDOWNER'S RIGHTS
 - FOR AGRICULTURAL, RECREATIONAL, AND OTHER DESIRED USES (TO MAXIMUM EXTENT POSSIBLE)
 - TO MORTGAGE OR SELL PROPERTY
 - PLUS, CONSIDER A BLANKET RESERVATION FOR ALL OTHER RIGHTS NOT GRANTED TO THE LESSEE
- MECHANIC'S LIENS
 - REQUIRE DEVELOPER TO KEEP LAND FREE OF LIENS
 - REQUIRE A RESERVE OR BOND IF CHALLENGED
- REGULATORY REQUIREMENTS
 - LESSEE TO OBTAIN ALL NECESSARY PERMITS (LOCAL, STATE, & FEDERAL)
- WATCH OUT FOR RIGHT OF FIRST REFUSAL TO BUY OR LEASE

WIND – LEASE PROVISIONS

- ATTORNEYS FEES – STIPEND OFFERED BY ENERGY COMPANY (\$500-1000)
- WORK COLLECTIVELY AS A LANDOWNER GROUP
- CONFIDENTIALITY
 - HOW BROAD? HOW LONG? DON'T BACKDATE
 - IS THE DEVELOPER WILLING TO STRIKE THE CONFIDENTIALITY CLAUSE?
 - IF NOT, RESERVE RIGHT TO DIVULGE INFORMATION TO ADVISORS, OTHER LANDOWNERS WITH WHOM LANDOWNER IS NEGOTIATING
- FURTHER COOPERATION (ZONING, TITLE MATTERS, PERMITTING, ETC.)
 - IF INCLUDED, REQUIRE REIMBURSEMENT FOR TIME AND EXPENSE
- ASSIGNMENT

WIND – LEASE PROVISIONS

- WHAT HAPPENS TO THE IMPROVEMENTS AT THE END OF THE LEASE (DECOMMISSIONING)?
 - MAKE SURE REMEDIATION OBLIGATIONS APPLY NO MATTER HOW LEASE ENDS (TERMINATION, RELEASE, SURRENDER, CANCELLATION OR FORFEITURE IN BANKRUPTCY, CONDEMNATION, CASUALTY, ETC.)
 - REMOVE IMPROVEMENTS AND RETURN LAND TO ORIGINAL STATE (REGRADE AND RESTORE) – BE EVEN MORE SPECIFIC
 - REMOVE TURBINES/PANELS AND FOOTINGS TO 4' DEPTH BELOW SURFACE
 - TOPSOIL REPLACEMENT
 - DRAINAGE RESTORED
 - DON'T JUST REQUIRE SEEDING, BUT REQUIRE REPLACING VEGETATION (SEEDING AND CARE UNTIL ESTABLISHED). WHAT TYPE OF SEED OR WHO SELECTS IT, APPLICATION RATE, CAN THE LANDOWNER BE PAID TO REESTABLISH VEGETATION?
- EXPENSIVE – REQUIRE A PERFORMANCE BOND OF THE ENERGY COMPANY
 - SETTLE ON A SALVAGE VALUE BOND?

WIND – EASEMENTS

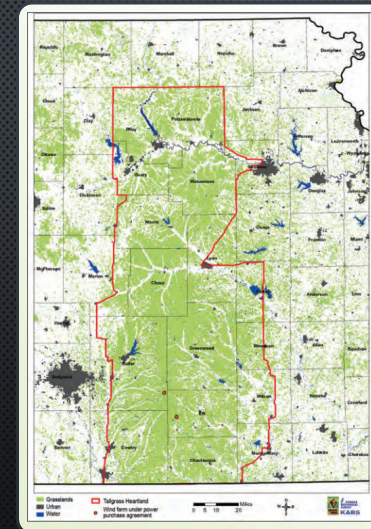
- EASEMENT (SAME OR SEPARATE AGREEMENT)
 - ACCESS, TRANSMISSION, CONSTRUCTION, NON-OBSTRUCTION
 - TEMPORARY (CONSTRUCTION), TERMED (FOR THE TERM OF THE LEASE), TRY TO AVOID PERPETUAL (PERMANENT)
 - LANDOWNER SHOULD LOOK AT A SITE PLAN / MAP OF THE TRANSMISSION LINE COMPARED TO ROADS, AND DETERMINE HOW THEY WOULD PREFER ACCESS BE MADE – MAKE THOSE THE EXCLUSIVE RIGHTS
 - PARALLEL ROAD CONSTRUCTION?
 - EXCLUSIVE FOR WIND PRODUCTION
 - OTHERWISE ENERGY COMPANY MAY BE ABLE TO ALLOW OTHERS TO USE THE EASEMENT FOR ANOTHER PURPOSE (TRANSMISSION, BROADBAND, CELLULAR)
- NUISANCE EASEMENT (OWNER), OR A “GOOD NEIGHBOR” AGREEMENT?

WIND – COUNTY CONSIDERATIONS

- ZONING
 - APPROXIMATELY 1/2 OF KANSAS COUNTIES HAVE ZONING REGULATIONS
 - COMMON PROVISIONS
 - SAFETY (ACCESS, PROOF OF INSURANCE), HEIGHT (MINIMUM AND MAXIMUM), FUNCTION (E.G. BRAKING)
 - SITING AND INSTALLATION (LOCATION NEAR AND CONNECTION TO EXISTING ROADS AND FACILITIES IF POSSIBLE), WIRING UNDER OR ABOVEGROUND, ENVIRONMENTAL IMPACTS, SETBACKS
 - PERMITTING REQUIREMENTS (PERMIT OR CONDITIONAL PERMIT).
 - NUISANCE (NOISE LIMITS, MINIMIZE IMPACTS WITH RADIO/PHONE/TV SIGNALS)
 - DECOMMISSIONING (BOND, SPECIFICATIONS)
- **ZIMMERMAN v Bd. Of County Comm'rs, 289 Kan. 926 (2009), ZIMMERMAN v Bd. Of County Comm'rs, 293 Kan. 332 (2011).** (WABAUNSEE COUNTY)
 - MORATORIUM WHILE REGULATIONS WERE DEVELOPED, THEN COMMERCIAL WIND PROHIBITED.
 - NO TAKING, BECAUSE NO VESTED CONSTITUTIONAL RIGHTS IN CUPs WHEN ITS ISSUANCE DEPENDS UPON THE DISCRETIONARY APPROVAL OF A GOVERNMENTAL AUTHORITY.

WIND – COUNTY CONSIDERATIONS

- TAX EXEMPTIONS
 - MEANS LOSS OF TAX REVENUE FOR COUNTIES
- PILOT
 - PAYMENT IN LIEU OF TAXES (CONTRIBUTION AGREEMENT)
 - AGREEMENTS REACHED WITH COUNTY COMMISSION
- ROAD, BRIDGE MAINTENANCE AGREEMENTS
- DECOMMISSIONING



WIND – TALLGRASS HEARTLAND WIND MORATORIUM

- 2004 – Governor Sebelius
- 2011 – Governor Brownback (affirmed and expanded)
- 2020 – Governor Kelly reaffirmed

STATE STATUTES

- K.S.A. 58-2272
 - REQUIRES A LEASE TO HAVE A DESCRIPTION OF VERTICAL & HORIZONTAL ANGLES, EXPRESSED IN DEGREES, & DISTANCES FROM SITE OF WIND OR SOLAR POWER SYSTEM IN WHICH AN OBSTRUCTION TO WIND OR SOLAR SYSTEM IS PROHIBITED OR LIMITED
- K.S.A. 66-104(G) – EMINENT DOMAIN NOT ALLOWED FOR
 - WIND POWERED ELECTRICAL GENERATORS OR TURBINES, INCLUDING THE TOWERS; OR
 - SOLAR POWERED ELECTRIC GENERATION EQUIPMENT, INCLUDING PANELS.



SOLAR LEASES

SIMILARITIES OF WIND AND SOLAR LEASES

- SIMILAR "TERMS"
 - USUALLY AN OPTION TERM, CONSTRUCTION TERM AND OPERATING TERM
- LEASE AND EASEMENT
- CROP COMPENSATION
- SIMILAR RESTRICTIONS ON LANDOWNER'S USE (EXPANDED BECAUSE OF PROJECT "FOOTPRINT")
 - GENERAL RULE: CANNOT INTERFERE WITH COMPANY'S ACTIVITIES (DUST?)
- DECOMMISSIONING
 - BOND
 - SAME ASSIGNMENT CONCERNS

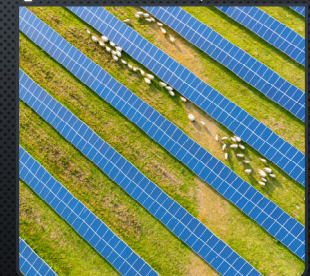
DIFFERENCES BETWEEN SOLAR AND WIND LEASES

LAND USE AND TAXATION

- LOSS OF AGRICULTURAL LAND USE CLASSIFICATION
 - TAXES GROW EXPONENTIALLY
- CONTINUED AGRICULTURAL USE?
 - FAMILY GOALS
 - AGRIVOLTAICS?



↑ Jack's Solar Farm – Photo by Werner Slocum: NREL



DIFFERENCES BETWEEN SOLAR AND WIND LEASES

PAYMENT STRUCTURES

- USUALLY A FLAT RATE PER ACRE WITH INCREASE OVER TIME.
 - READ THIS CAREFULLY!!!!!! PAY ATTENTION TO DEFINITIONS!
 - EXAMPLE: "PROPERTY" VERSUS "LEASED PREMISES"
 - NET RELEASE CLAUSE
 - LUCRATIVE (\$850 - \$1,300 - \$2,000 / A / YR)
 - WIND LEASES CAN ENHANCE FARM INCOME.
 - SOLAR LEASES CAN REPLACE FARM INCOME.

DIFFERENCES BETWEEN SOLAR AND WIND LEASES

WATER

- IF NEEDED BY PROJECT, CHANGE IN USE?
- IF NOT NEEDED BY PROJECT, RISK OF ABANDONMENT?

KFB RURAL LAW PRACTICE GRANT

- APPLICATIONS DUE NOVEMBER 1
- \$16,500 OVER THE FIRST 2 YEARS OF PRACTICE IN RURAL KANSAS
- AWARDED GRANTS TO 9 RECIPIENTS SO FAR



QUESTIONS?


KANSAS FARM BUREAU[®]
Legal Foundation

CONTACT INFORMATION:

WENDEE GRADY
785-587-6101
GRADYW@KFB.ORG

[HTTPS://WWW.KFB.ORG/LEGALFOUNDATION](https://www.kfb.org/legalfoundation)

