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MECHANIC'S LIEN RIGHTS on WIND & SOLAR FARMS

By Kristin Alford, NCS Education & Marketing Specialist



MECHANIC'S LIEN RIGHTS on WIND & SOLAR FARMS

We have yet to achieve a mainstream Jetsons' way of life (hover cars, robotic maids, etc.), but we have made massive strides in alternative power sources like wind farms and solar farms. Wind Farms are areas of land with groups of energy-producing wind turbines. According to American Wind Energy Association, there are more than 500 wind manufacturing facilities spread across 43 states. Similarly, Solar Farms are areas of land with a large number of solar panels in order to generate electricity. The Solar Energy Industries Association reports there are over 799 major solar projects currently in their database.

It takes multiple contractors, subcontractors & material suppliers to successfully build one energy farm: unfortunately this also means there are multiple opportunities for payment issues. Special fabrication, change orders, construction defects, and the simple low liquidity of a company, are common factors contributing to non-payment on projects of these sizes. Since 2012 nearly 100 solar companies have closed their doors due to insolvency or bankruptcy, according to Green Tech Media. Although solar farms are growing in popularity, the flow of payment on these projects is slow.

Proactively securing mechanic's lien and bond claim rights, where allowed, will help protect your company in the event of non-payment. However, filing a mechanics lien on a solar farm or wind farm is nearly as complicated as the construction of the farms. Correctly identifying the property through the legal description as well as identifying the correct (and often multiple) owners, is no small feat.

Do Mechanic's Lien & Bond Claim Rights Exist on Wind & Solar Farms?

The short answer: it depends.

While this may not be the definitive answer you were hoping for, it's important to recognize that the area of wind & solar farms is very gray as to specific state statute and case law. Currently, there are no states whose statute provides specific language with reference to wind and solar farms. However, there have been cases that suggest mechanic's lien rights are afforded to contractors, subcontractors & suppliers who furnish labor and/or material to a wind or solar farm and several cases where parties have successfully filed mechanic's liens for non-payment on wind and solar farms.

What Should I Know before Serving a Bond Claim or Filing a Mechanic's Lien?

If the project is bonded (i.e. the contractor has a payment bond), the steps for claiming and collecting against the bond are relatively simple and straightforward if you have obtained a copy of the payment bond. With solar farms especially, it is important not to assume the project is bonded just because the materials are being used on a public building. See Power Purchase Agreements below!

It can be significantly more difficult to file a mechanic's lien.

Here are some of the most common hurdles:

- **Identifying the parcel(s) of land where materials are used**

It should come as no surprise that these farms are big – perhaps massive is a better term. Often the sizes of these farms are defined in acres and cover multiple parcels over multiple cities and counties.

Topaz Solar Farm, reportedly the largest solar farm in the world, is situated on 4,700 acres (or approximately 7.34 square miles) of private land in San Luis Obispo County in California. (This is according to a report released by MidAmerican Solar in 2014.) To help put the size into perspective, 4,700 acres of land is also the total area of the Atlanta Airport and according to the Atlanta Airport's website: seven 30-story office buildings could be constructed in the terminal space - 2.2 million square feet and more than 11 Astrodome playing fields would fit into the North and South Gate Complex.

Abengoa Solar Inc. is reportedly the owner of the Solana Solar Power Plant in Arizona. This farm consumes 780 hectares (or approximately 3.01 square miles) and the legal description for this solar farm is 8 pages in length, according to documents filed with the Maricopa County Recorder/Assessor. (According to LienFinder™, nearly a dozen contractors filed mechanic's liens in 2013, which totaled about \$16 million.)

- **Identifying the owner(s) of each parcel**

Not only are these farms large in the physical sense, but quite often there are just as many landowners as there are parcels.

Chisholm View Wind Project covers approximately 45,000 acres and involves over 150 landowners – according to Wade Patterson, Garfield County Assessor.

- **Expense for title work**

Here's the Equation

Multiple Parcels X Multiple Owners = Multiple Title Reports

Multiple Title Reports = Expensive

U.S. Concrete On Site Inc. reportedly filed 159 mechanic's liens on the Chisholm View Wind Project. *If* each of those mechanic's liens required individual title work and the average cost of title work is \$75 per parcel, simple math indicates that title work *could* cost \$11,925.

Easements

You may encounter existing easement liens when filing a mechanic's lien. Stephen J. Humes of Holland & Knight LLP notes the following in an article entitled "Solar Energy Project Development Issues: Preliminary Considerations"

"Some project developers seek an easement to convey the property interest needed. An easement is a possessory interest in real property that provides the holder with the right to use another party's real property for a specific purpose. Legal title to the real property encumbered by the easement is retained by the original owner for all other purposes."

- **The possibility that multiple liens are required (and the related expense)**

Occasionally farms may be under sole ownership (i.e. one person or company owns every parcel of land), but it's unlikely that this would be the norm. Just as U.S. Concrete On Site Inc. discovered, be prepared that there is a strong likelihood that more than one mechanic's lien will need to be filed.

According to Enid News "A contractor associated with the construction of the Chisholm View Wind Project has filed more than \$1.2 million in mechanic's liens against the project...U.S. Concrete On Site Inc. filed 147 mechanic's liens in Garfield County and another 12 liens in Grant County. Each lien is filed in the amount of \$1,273,923... Each of the liens was filed against project developer Chisholm View Wind Project LLC; former project developer Trade Wind Energy; and the individual property owner for each work site associated with the mechanic's liens."

- **The lien may be on only the leasehold interest (and not against the property)**

Often times, the energy companies will enter into lease agreements with the land owners: the landowner continues to own the real property and the energy company owns the equipment and the output generated. When liening a tenant improvement, the statutes vary by state as to whether a mechanic's lien would be available against the property, the leasehold interest of the tenant or both. If there are lease agreements in place, you will need to determine who is liable for the improvements to the project: the fee owner or the lessee.

- **The time it takes to properly prepare and record the lien(s)**

It's important to remember that a lot of work must be completed in order to successfully secure a mechanic's lien on a wind or solar farm. A lot of work equals a lot of time, so do not wait until the 11th hour. Make sure you are monitoring your lien deadlines closely and move forward with the mechanic's lien filing with plenty of time.

★ Joke ★

Q: Why is wind power popular? **A:** Because it has a lot of fans!

(Thank you Energy Efficiency Team at the Public Utilities Commission in Nevada for that light & airy joke.)

What about Power Purchase Agreements?

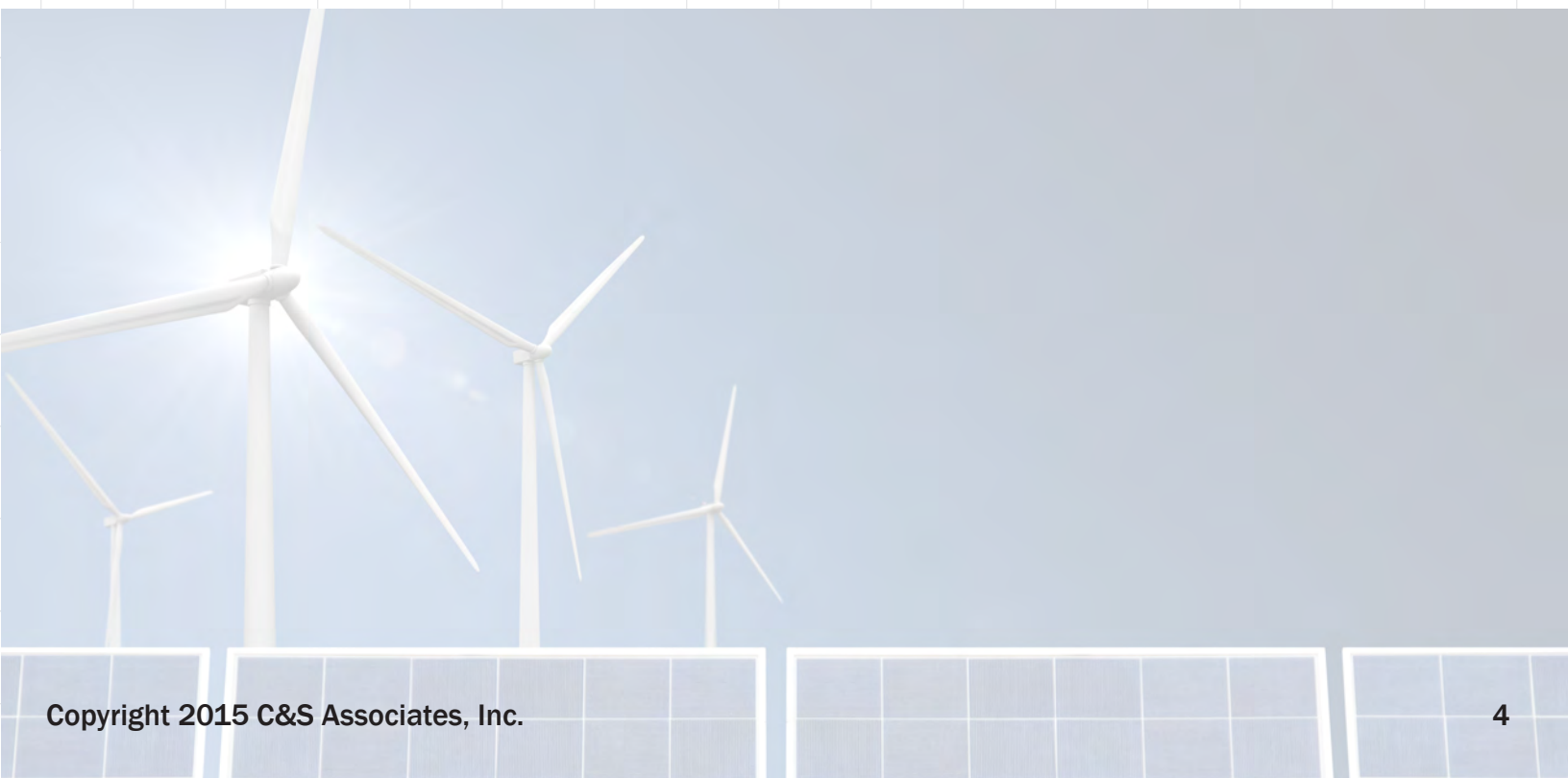
We have seen an increase in the number of solar projects, especially where Power Purchase Agreements may be involved. If you are furnishing to a project where the owner of the property contracted for the solar equipment, and will retain ownership of the solar equipment, it is likely the standard notice and/or mechanic's lien statutes will apply. However, under Power Purchase Agreements, the solar panels/equipment may be owned by one entity while being placed on another entity's property. In this type scenario, it is difficult to know whether lien rights will be available against the fee simple interest, against the solar property itself, or not at all. Further, the answer may vary by state or circumstance. Where Power Purchase Agreements exist, given their complexity, and due to the high dollar exposure on some projects, a legal opinion is recommended to ensure lien rights are available to secure your interests.

Is it ALL Worth It?

Short answer: it depends.

Again, the "gray" answer. You have to review your fiscal exposure and take appropriate steps based on what your company is willing to risk. Contracts for wind and solar farms are typically high, and to mitigate the risk, investment in the mechanic's lien process is a necessity. For example, if your contract is \$1,200,000 and the costs to secure lien rights are approximately \$20,000, and the lien filing allows you to successfully recover the \$1.2M, it is \$20,000 well spent. Not to mention, some courts may even award the claimant reimbursed attorney & filing fees in addition to the claim amount.

Do not let the potential high costs and time associated with these types of lien filings scare you away from becoming a secured creditor. Mechanic's Lien rights were created and are enforced to protect you. Implement a solid mechanic's lien process now to reduce DSO, improve cash flow and improve working capital.





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email SecureYourTomorrow@ncscredit.com

web <http://home.ncscredit.com>

