

Appendix K
Agency Correspondence

From: [WILLIS Casey \(ENGIE North America\)](#)
To: [WILLIS Casey \(ENGIE North America\)](#)
Subject: FW: Question on USFWS Grassland Easements
Date: Friday, December 14, 2018 7:57:27 AM
Attachments: [image002.png](#)
[image001.png](#)

From: Williams, Deborah [mailto:deborah_williams@fws.gov]

Sent: Monday, February 05, 2018 12:00 PM

To: Casey Willis <CWillis@infinityrenewables.com>

Cc: Natalie Gates <natalie_gates@fws.gov>

Subject: Re: FW: Question on USFWS Grassland Easements

Casey -

The language in your example easement is very thorough and in the case where that easement supersedes our easement(s) we are subject to the rights your company purchased. In other words - no authorization from the Service is needed as it relates to the easement. We would gladly still consult if you were looking to minimize impacts and any agreement on an easement does not address or remove the potential need to consult with our Ecological Services office as it relates to federal trust species.

As far as the other situation you mention - where your companies wind easement was recorded following our wet easement - our wet easement prohibits draining, burning and filling of protected wetland basins. The maps I provided you give the approximate size shape and location of the protected basins but are NOT meant to be digitized for GIS. So yes you are correct that if you avoid impacts to protected basins no authorization is needed from the Service. But I caution you to not try to "micro site" around the wetland basins based off those Exhibit A maps as they do not depict a finite wetland boundary. And - again I will gladly review site plans to ensure that there are no anticipated wetland impacts.

Thanks for being so thorough and call with any questions. I am in the office all this week but out most of the next two weeks then back in again the week of Feb 26.

Deb

Deborah Williams
Project Leader/Wildlife Refuge Manager
Huron Wetland Management District
Phone: 605-352-5894, ext 111
Cell: 605-350-0712
Fax: 605-352-6709

On Fri, Feb 2, 2018 at 11:11 AM, Casey Willis <CWillis@infinityrenewables.com> wrote:

Hi Deborah,
Just wanted to get your thoughts on this. Please let me know.
Casey

From: Casey Willis

Sent: Friday, January 26, 2018 8:57 AM

To: 'Williams, Deborah' <deborah_williams@fws.gov>

Cc: Natalie Gates <natalie_gates@fws.gov>

Subject: RE: Question on USFWS Grassland Easements

Hi Deborah,

Thanks for getting back to me. I can tell you that all of our easements are identical. We don't deviate at all as that just causes a host of problems. I've attached a memorandum of easement for this very circumstance. We signed an easement with the Rittel family and I've attached the recorded memorandum. The FWS executed one or more grassland and wetland easements after our easement was already in place. Our lease gives us the exclusive right to development anywhere on the tract in question and also includes supporting infrastructure. This is pretty well spelled out on page two under the purpose and scope in the memorandum of easement. I can't send the fully executed version for obvious reasons, but I've clipped out the section from that easement that further spells this issue out (see below).

With regard to the wetland easements, from the call that you and I had, the concern was not necessarily related to wetland easement itself, it was related to the actual wetland feature. If we avoid those delineated wetland features completely, so as to avoid a FWS permitting trigger. With regard to grassland easements that were executed by the FWS prior to our wind easements, in this circumstance we will be avoiding all impacts completely so as to avoid a FWS permit trigger, including the NEPA process.

It's this separate circumstance that I needed to get clarity from you where we have an executed wind easement in place and then the FWS executes a grassland easement after us and thus in an inferior position from a real easement perspective.

Take a look at the rights conveyed from our easement and please confirm that you agree that in the circumstance, where Infinity has an easement that's executed/recorded prior to the FWS, no further action is required related to the project.

Thanks,

Casey

3. Use of Owner's Property by Developer.

3.1 Permitted Uses. By this Easement, Owner hereby grants to Developer an exclusive easement, *in gross*, for wind resource assessment and analysis, wind energy conversion, for the collection and transmission of electric power, and for related and incidental purposes and activities (collectively, "**Operations**") during the Easement Term (subject to the

limitation on Developer's use of Owner's Property during the Development Period as provided in Section 2.1 above), including, without limitation:

(a) without limiting the generality of the foregoing, during all periods comprising the Easement Term, conducting studies of wind speed, wind direction, and other meteorological data, geotechnical studies, surveying, erection, operation, and maintenance of data collection equipment, ingress to and egress from Owner's Property by means of any existing roads and lanes thereon, and by such other route or routes as Developer or any transferee or assignee of Developer may construct on Owner's Property from time to time, for the benefit of and for purposes incidental to Operations on Owner's Property and for the benefit of and for purposes incidental to Operations, including Operations on lands other than Owner's Property;

(b) constructing, reconstructing, erecting, installing, improving, replacing, relocating and removing from time to time, and maintaining, using, monitoring and operating, existing, additional or new (i) wind turbines, wind energy conversion systems and other power generation facilities, of any type or technology ("WTGs"), and associated towers, (ii) electrical transmission and distribution facilities, including without limitation, overhead and underground transmission, distribution or collector lines, circuit breakers, meters, conduit, footings, towers, poles, crossarms, guy lines, anchors, cabling and wires, (iii) overhead and underground control, communications and radio relay systems, (iv) substations, interconnection and/or switching facilities and electric transformers and transformer pads, (v) energy storage facilities, (vi) meteorological towers and wind measurement equipment, (vii) control buildings, control boxes and computer monitoring hardware, (viii) utility installations, (ix) safety protection facilities, (x) maintenance buildings and yards and construction laydown yards, (xi) roads and erosion control facilities, (xii) signs and fences, and (xiii) other improvements, fixtures, facilities, machinery and equipment associated or connected with the generation, conversion, storage, switching, metering, step-up, step-down, transmission, distribution, conducting, wheeling, sale or other use or conveyance of electricity (all of the foregoing, including the WTGs, collectively "Windpower Facilities"); and

(c) undertaking any other lawful activities, whether accomplished by Developer or a third party authorized by Developer, that Developer reasonably determines are necessary, helpful, appropriate or convenient in connection with, incidental to or to accomplish any of the foregoing purposes.

From: Williams, Deborah [mailto:deborah_williams@fws.gov]

Sent: Friday, January 26, 2018 8:08 AM

To: Casey Willis <CWillis@infinityrenewables.com>

Cc: Natalie Gates <natalie_gates@fws.gov>

Subject: Re: Question on USFWS Grassland Easements

Hi Casey -

I learned a few things in regards to your specific question below - and as always sometimes one question leads to another. So here is what I know - you MAY be correct in your interpretation of superseding jurisdictional rights and NEPA. But it depends on the language in your lease agreement. We have seen lease agreements that only covered the actual turbines and not all the other associated infrastructure that could impact our easement (i.e. roads, substations, temporary impacts to wetlands). If any of the proposed actions trigger any of FWS jurisdiction (including temporary impacts to a wetland) where FWS would have to issue a permit - that (permit issuance) is a federal action and therefore NEPA would be triggered. I would be happy to look at your lease agreement and give you some feedback. Assuming you have all new agreements and aren't speaking of one that you purchased or inherited that another company wrote - your agreements are likely pretty broad. But we have seen ones (especially older ones) that did not confer all the needed rights. The other situation we have seen trip up folks in the

past are permits for temporary impacts to wetlands. If FWS issues a permit there is a "Federal Action" under NEPA.

Let me know if this makes sense to you - I am in the office all day today if you would like to catch up over the phone.

Deb

Deborah Williams
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On Thu, Jan 25, 2018 at 12:10 PM, Casey Willis <CWillis@infinityrenewables.com> wrote:

Hi Deborah,
I just wanted to check in and see if you have any feedback on this.
Thanks,
Casey

From: Deborah Williams [mailto:deborah_williams@fws.gov]

Sent: Friday, January 19, 2018 10:46 AM

To: Casey Willis <CWillis@infinityrenewables.com>

Subject: Re: Question on USFWS Grassland Easements

Casey - I am on travel this week and will get back to you next week when I return to SD - (assuming no furlough).

Deb

Sent from my iPhone

On Jan 19, 2018, at 11:55 AM, Casey Willis <CWillis@infinityrenewables.com> wrote:

Hello Deborah,
I'm reaching out to you today as I need to seek to clarify one issue as it pertains to the USFWS's grassland easement program. You and I discussed this program at length in a call in November and I have a pretty good idea of how it works. I understand that if the USFWS has an pre-existing grassland easement in place with a particular landowner and Infinity then elects to sign a wind easement, in this circumstance Infinity's easement would be recorded *after* the USFWS grassland easement and thus the rights granted to USFWS would be binding on Infinity's easement. There is a process associated with carving out areas of an existing grassland easement, but that would be a federal action and subject to NEPA. In this circumstance, we will likely seek to just avoid the area based on the discussion that you and I had.

The circumstance I wanted to address with you now is when we have an existing wind easement that has been executed with the landowner and recorded in the appropriate land records *before* the USFWS signs a grassland

easement for all or a portion of the property that is the subject of Infinity's wind easement. In that circumstance, Infinity's understanding is that the rights associated with the wind easement would be superior to (that is, not subject to) the USFWS grassland easement due to the fact that the Infinity's easement was executed and recorded prior in time to the grassland easement and, by recording the wind easement in the real property records, USFWS is on notice of the Infinity pre-existing easement rights. The rights associated with our easement allow us to develop and install one or more wind turbines along with associated infrastructure anywhere in the easement area. In those circumstances, it is Infinity's understanding that the development of the wind project on the Infinity easement property would not be subject to NEPA and there would be no authorization, agreement, concurrence, or other documentation that Infinity would need to seek for the project with the USFWS as it relates to the grassland easement on the property. Infinity's understanding is that, when a grassland easement is signed after the Infinity wind easement, USFWS and the landowner would be responsible for making any modifications or amendments related to the grassland easement, including to reflect the superior rights of the Infinity wind easement to use the property for wind energy purposes.

Could you please confirm that USFWS agrees as it pertains to this issue? I'm including Natalie on this as we were just on a call where I brought this very issue up.

Casey

Infinity Renewables

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