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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PENDLETON DIVISION

DANIEL BRIAN WILLIAMS,

PLAINTIFF,

v.

INVENERGY, LLC, an Illinois Corporation; and WILLOW CREEK ENERGY, LLC, a Delaware Corporation.

DEFENDANTS.

Case No.:

PLAINTIFF'S COMPLAINT (NUISANCE; TRESPASS; PERMANENT INJUNCTION)

DEMAND FOR JURY TRIAL

I. INTRODUCTORY SUMMARY

1. Plaintiff alleges that the defendants (collectively referred to as "Invenergy") constructed and operated a wind turbine complex next door to plaintiff's rural property in

violation of and without any consideration being given to statewide noise pollution regulations which limit the amount of noise pollution wind complexes are allowed to generate. Plaintiff further alleges that the invasion of noise, vibrations, flicker/strobe glare and flashing red lights produced by defendants' wind turbine complex constitutes both (1) An illegal nuisance; and (2) A trespass cognizable under Oregon law, causing damage to his health and homestead. And further, that unless enjoined, the defendants will continue to harm plaintiff in the future.

2. Plaintiff is seeking an award of compensatory damages for emotional distress, deteriorating physical and emotional health, dizziness, inability to sleep, drowsiness, fatigue, headaches, difficulty thinking, irritation and lethargy suffered as a result of Invenergy's past and continuing invasion of his property. Plaintiff also seeks recompense for the cost of hiring an acoustical expert; diminution in the value of his land; legal fees expended and litigation costs incurred herein.

3. Plaintiff further alleges that because Invenergy has knowingly and intentionally continued for four years to operate its wind turbine complex for profit with knowledge of being in violation of statewide noise pollution regulations, and doing so with the further knowledge of causing continuing injury to plaintiff, an award of punitive damages is appropriate.

II. JURISDICTION

4. The court has jurisdiction over plaintiff's claims pursuant to USC 28 § 1332, as there is complete diversity of citizenship as between plaintiff and Invenergy; and plaintiff's claims herein exceed $75,000.00.

III. PARTIES

5. Plaintiff, Daniel Brian Williams, is the owner of approximately 209 acres of

property, with his home sitting on a hillock in the Willow Creek Valley, in Morrow County, Oregon, having resided there since 1997. Plaintiff's property is adjacent to the subsequently developed wind turbine complex built, owned and operated by Invenergy along a designated scenic rural highway. Plaintiff is and was at all times relevant, a citizen of the state of Oregon.

6. Defendant Invenergy, LLC is incorporated in the state of Illinois, which is also its principal place of business.

7. Defendant Willow Creek Energy, LLC is incorporated in the state of Delaware, with its principal place of business also being in Illinois. On information and belief, Willow Creek Energy, LLC is a wholly owned subsidiary, or otherwise closely related to Invenergy, LLC.

IV. FACTS

8. On January 31, 2005, Invenergy was granted conditional use approval by Morrow County to construct and operate a 72 megawatt wind-powered electrical generation facility consisting of 48 individual turbines at Willow Creek. This was Invenergy's first project in the state of Oregon, and the first wind energy complex permitted in Morrow County.

9. Plaintiff, although aware that a wind energy facility was contemplated, was not consulted and did not otherwise participate in the permitting and siting process.

10. In the summer of 2008 during the construction of the wind turbine complex, plaintiff and other neighbors complained to Invenergy about the adverse effects anticipated from the operation of the turbine complex being built so close to their homes. Invenergy's project developer for the Willow Creek facility at the time, Dave Iadarola, met with plaintiff and other

neighbors at plaintiff's home on July 16, 2008. Mr. Iadarola explained that the proper standard for measuring whether noise from the turbine complex was in compliance with applicable law was whether the noise exceeded county noise regulations (Morrow County Ordinance No. MC-C-5-96), *i.e.* 55 decibels ("dBA") during the daytime and 50 dBA during the nighttime. Nearly a month later, on August 13, 2008, a second neighborhood meeting was held at the home of the Eatons, close neighbors of plaintiff's. Mr. Eaton had researched the noise limitation issue and informed Mr. Iadarola and Clint Brooks, Invenergy's site manager also in attendance, that the correct standard was 36 dBA under statewide regulations, not 50/55 dBA. Mr. Iadarola and Mr. Brooks continued to disagree, reasserting that the local ordinance controlled.

11. OAR Chapter 340, Division 35, the Oregon Department of Environmental Quality's "Noise Control Regulations", specifically regulate noise generated by wind energy turbine complexes. OAR 340-035-0035(1)(b)(B)(i) limits Invenergy to an allowable 10 dBA increase in noise at plaintiff's home, which under OAR 340-035-0035(1)(b)(B)(iii)(I) can be measured in one of two ways: (1) Invenergy could either assume that the background ambient noise level (birds, airplanes, leaf rustling, wind, *etc.*) at plaintiff' s (and others) home(s) was at a default level of 26 dBA, or (2) Invenergy could conduct measurement studies to determine the actual ambient background noise level at any given home. Invenergy chose to use the default standard in its application process. Therefore, the measured levels at plaintiff and his neighbor's homes could not legally exceed 36 dBA, not the 50/55 dBA limit incorrectly asserted by Invenergy to plaintiff and his neighbors.

12. If a wind energy developer intends to build a turbine complex in a habited area

where noise levels are anticipated to exceed the allowable limit, these same DEQ regulations allow for the purchase of a noise easement from a neighboring homeowner. Invenergy did not ask plaintiff for an easement prior to beginning operations because the company believed it did not have a compliance issue.

13. On November 3, 2008, after being rebuffed by Invenergy, Plaintiff and other neighbors complained about the anticipated noise pollution to Morrow County officials, explaining that Invenergy had wrongly assumed that the Morrow County Ordinance 50 dBA maximum noise limit controlled; and further that Invenergy representatives had admitted to them that the company could not comply with the 36 dBA limit contained in the statewide standard. Plaintiff and his neighbors attached a map of the valley to their letter of complaint, demonstrating that Invenergy's own computer mapping showed expected non-compliance with the 36 dBA standard. The Director of the Planning Commission asked Invenergy to respond to plaintiff and his neighbors' allegations.

14. On December 3, 2008, the project manager for Invenergy wrote the Director of the Planning Commission in response, acknowledging that the standard was 36 dBA and asserting that its computer modeling showed that this standard would be met at plaintiff and the other complaining residents' homes. This assertion later was proven by Invenergy's own testing to be grossly false.

15. In December, 2008, the turbine field became operational, with the turbines beginning to come on line sequentially.

16. On or about January 7, 2009, plaintiff and other neighbors complained to Morrow County officials that the noise from defendant's turbine complex as they measured it in fact exceeded statewide noise standards; and further that the turbine complex operation was adversely affecting their health and disturbing their sleep in violation of Condition Number 1 of the Conditional Use Permit.

17. On or about February 4, 2009, the Planning Commission asked Invenergy to provide on the ground evidence that the noise standards were being met.

18. In response, Invenergy hired a wind energy consultant, Michael D. Theriault Acoustics Inc., to set up and conduct field noise studies. On May 13, 2009, noise level monitoring systems were operational at plaintiff's residence. By report dated June 19, 2009, Theriault acknowledged that regular noise level exceedences at plaintiff's residence ranged from 42 to 43 dBA, far above the levels negligently predicted by Invenergy's modeling; and grossly exceeding it's adopted 36 dBA level using the default ambient background number. Invenergy subsequently abandoned its chosen compliance method, *i.e.* using the default ambient background (26 dBA) plus 10 dBA standard, because it had not been complying and could not in fact comply with this standard.

19. Thereafter, Invenergy began a course of conduct from June, 2009, to the present of attempting to minimize its non-compliance under the default ambient standard, and concomitantly developing a strategy to achieve compliance using the actual ambient background noise level. Invenergy designed, tested and is now approaching implementation of a never before tried system for predicting when wind turbine noise adds more than 10 dBA to the actual

ambient background noise at plaintiff's residence. When three express conditions are extant, Invenergy plans to shut down a sufficient number of turbines closest to plaintiff's property to bring the wind farm into compliance. The combination of conditions thought to capture most exceedences are (1) High wind speed at the turbine hubs; (2) Low ground wind speed at plaintiff's residence; and (3) Wind out of the southwest. This system even when operating at maximum efficiency will not capture all exceedences at plaintiff's residence.

20. On or about May 25, 2010, the Morrow County Planning Commission ruled that Invenergy was in violation of the state-wide noise standards at plaintiff's residence. Over the next approximately two years, plaintiff's request that Invenergy shutdown its turbines until it was able to demonstrate compliance with the noise limits contained in its Conditional Use Permit was litigated in the land use administrative law process. Plaintiff's case was heard twice by the Morrow County Planning Commission, three times by the Morrow County Court and twice by the Land Use Board of Appeals ("LUBA"). All seven decisions during this administrative process upheld the finding of noise exceedences at plaintiff's residence. On March 16, 2012, LUBA in its second and final decision in the matter found it had no jurisdiction to grant injunctive and mandatory relief, *i.e.* LUBA did not have authority to compel Morrow County to enforce its own rules. Morrow County had found that Invenergy's own expert had conceded there were exceedences of 1 to 8 dBA at plaintiff's residence ten percent of the time the turbines were operating, a finding that Invenergy did not challenge, and the County declined to remedy. LUBA affirmed Morrow County's inaction, and suggested that plaintiff pursue his remedy in the court system.

21. On June 29, 2012, plaintiff agreed to allow Invenergy to set up acoustical measurement equipment on his property for the purpose of collecting data for Invenergy to design a system that would cutoff or curtail turbine operations to eliminate illegal noise exceedences at his residence. After six months of gathering data and planning a course of action, in January, 2013, Invenergy began shutting down a number of turbines closest to plaintiff's property when certain conditions were extant in order to test the relationship between curtailment of turbine operations and reducing turbine generated noise to less than 10 dBA over the actual ambient at plaintiff's home.

22. The system described above is not yet fully operational. When it is fully operational, as a predictive model, it will not curtail all exceedences.

23. After ten months of collecting data as described in paragraph 21 above, the following has been confirmed:

(a) Plaintiff and his neighbors provided Invenergy with logs detailing when the turbine noise was causing them sleeplessness and physical symptoms. Invenergy compared these logs with the data collected and has admitted that there is a direct correlation between the adverse effects reported by plaintiff and his neighbors from wind turbine noise and predicted wind turbine noise exceedences;

(b) Using the default ambient plus 10 dBA standard, the allowable limit was exceeded a majority of the time at plaintiff's residence.

(c) Using the alternative actual ambient plus 10dBA standard and accepting the

system developed without criticism, the number of exceedences is significant, even in the low wind season.

(d) In spite of repeated requests by plaintiff, Invenergy has declined to configure its algorithm, the mathematical model developed to predict an exceedence, in such a manner as to anticipate an exceedence. Rather, its algorithm is designed to cut out or curtail wind turbine operations only *after* an exceedence has been predicted to occur, with plaintiff being exposed to injury during the lag-time thereafter until shutdown is accomplished.

(e) The testing period identified various human errors and equipment malfunctions that have prevented or distorted the collection of data; and thus interfered with the proper identification of conditions that lead to noise level exceedences.

24. Invenergy's construction and operation of the wind turbine complex has caused plaintiff to incur economic loss as follows: (1) Plaintiff's real property has suffered a substantial reduction in value, estimated not to exceed $100,000.00; and (2) Plaintiff has paid approximately $10,000.00 to an acoustical engineering firm, Daley and Standlee, to provide noise measurement expertise; and (3) Plaintiff has paid approximately $11,000.00 in legal fees pursuing his claim in the administrative law system.

V.

FIRST CLAIM FOR RELIEF

(*Nuisance*)

25. Plaintiff incorporates herein paragraphs 1-24 above as if fully set-forth.

(Count 1--Statutory Violation)

26. Invenergy knew or should have known from the planning stage of the industrial turbine complex forward that the statewide noise limit of 36 dBA was applicable; and further that plaintiff's property was going to be subjected, and thereafter was subjected to noise exceedences.

27. As a direct and proximate result of Invenergy's negligent planning and application of the wrong noise limitation standard, Invenergy failed to properly design and test its noise predictive model in the planning stages of the project, which in turn caused it to configure its turbine complex in a manner that illegally invaded plaintiff's property rights and caused the damages alleged herein. More specifically, on information and belief Invenergy failed to use ISO 9613-2 properly, the internationally recognized standard for predicting sound level dissipation over terrain, which, *inter alia*, must be adjusted when both the noise generating and receiving points are elevated. The result of taking these circumstances into consideration is higher sound levels than would be normally predicted.

28. Invenergy's invasion is illegal in that it violates OAR 345-35-0035, *et.seq*., and is the more unreasonable because the violations occur most frequently between 10 p.m. and 6 a.m., plaintiff's normal sleeping hours. Additionally, Invenergy's invasion violates the express public policy of the state of Oregon, to wit:

> "[T]he increasing incidence of noise emissions in this state at unreasonable levels is as much a threat to the environmental quality of life in this state and the health, safety and welfare of the people of this state as is pollution of the air and waters of this state. To provide protection of the health, safety and welfare of Oregon citizens from the hazards and deterioration of the quality of life imposed by

> excessive noise emissions, it is hereby declared that the State of Oregon has an interest in the control of such pollution, and that a program of protection should be initiated. To carry out this purpose, it is desirable to centralize in the Environmental Quality Commission the authority to adopt reasonable statewide standards for noise emissions permitted within this state and to implement and enforce compliance with such standards. ORS 467.010."

29. Invenergy's invasion of plaintiff's property rights has caused and continues to cause him non-economic loss, including loss of enjoyment of his home and land, disturbance of his sleep, headaches, dizziness, fatigue, annoyance, discomfort, inconvenience and emotional upset, in an amount not to exceed $5 million.

30. Invenergy's invasion of plaintiff's property rights has caused and continues to cause him economic loss; more specifically, diminution in the value of his real property in an amount not to exceed $150,000.00; payment for an acoustical engineer in an amount not to exceed $10,000.00; and payment of legal fees in the administrative law process in an amount not to exceed $11,000.00.

31. Invenergy's continuing operation for profit over the last four years in acknowledged violation of statewide noise regulations and the declared public policy of this state, knowing that such illegal operation was to the detriment of plaintiff's health and well-being is outrageous conduct, justifying imposition of punitive damages for past and future exceedences in an amount not to exceed $5 million.

32. The compliance system developed by Invenergy is a predictive model and does not insure compliance as currently configured. Plaintiff requests that this Court enjoin Invenergy to develop and implement a compliance system that has a sufficient margin of error to insure that

no exceedences will occur prior to a shutdown being triggered.

(Count 2--Common Law)

33. Plaintiff incorporates herein paragraphs 1-32 above as if fully set-forth.

34. The Willow Creek wind energy complex invades plaintiff's property in that the turbine field (a) Generates a very low-frequency sound at .8 Hz and below; (b) Causes vibrations of a pulsing sensation as the blades pass by the turbine pedestals; (c) Causes a flicker/strobe effect inside plaintiff's home when sunlight passes through the blades; (d) Causes glare when sunlight shines on the turbines from certain angles; and (e) The numerous flashing red lights reflecting off the rotating blades overwhelm the night sky and are visible inside plaintiff's home.

35. Invenergy has created a substantial and unreasonable interference with plaintiff's use and enjoyment of his real property and home as described above.

36. Invenergy knew, or had reason to know, that an objectionable condition was created on plaintiff's property.

37. Invenergy realized, or should have realized, that the objectionable condition created an unreasonable risk of substantial interference with the use and enjoyment of plaintiff's property.

38. The utility of maintaining the objectionable condition and the burden of eliminating the objectionable condition were slight compared with the risk to plaintiff.

39. Invenergy failed to exercise reasonable care to eliminate the risk.

40. As a direct and proximate result of Invenergy's conduct, plaintiff has suffered the physical and emotional damages described above and has abandoned his home.

SECOND CLAIM FOR RELIEF

(***Trespass to Land***)

41. Plaintiff incorporates herein paragraphs 25-40 above as if fully set-forth.

42. Invenergy's intentional, reckless and negligent conduct as described herein has created a continuous unauthorized entry on plaintiff's land disturbing his exclusive right to possession

VI.

JURY TRIAL DEMAND

43. Plaintiff demands a jury trial.

VII.

PRAYER

Plaintiff prays for the following relief against both defendants individually on both claims:

1. Non-economic loss in an amount not to exceed $5 million dollars;
2. Economic loss as detailed above not to exceed $171,000.00.
3. Punitive damages not to exceed $5 million dollars;
4. A permanent injunction enjoining Invenergy from creating noise exceedences;
5. Costs and disbursements incurred herein; and

6. Such other relief as the Court may deem just.

DATED this 5th day of August, 2013.

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