



Government of the Netherlands

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# CREATION OF A RIGHT IN REM OF SUPERFICIES AND EASEMENT FOR WINDTURBINES HOLLANDSE KUST (ZUID) WIND FARM ZONE SITES III & IV

*Hollandse Kust (zuid) Wind Farm Zone Sites III & IV*

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## CREATION OF A RIGHT IN REM OF SUPERFICIES AND EASEMENT FOR WIND TURBINES

### Hollandse Kust (zuid) Wind Farm Sites III and IV

[date]

Today, [\*\*]  
appeared before me, [\*\*] civil-law notary practising in [\*\*],

Date  
\*\*\*

1.  
residing at

Contract number  
\*\*\*

according to his or her statement, acting as authorised representative of [\*\*], Head [\*\*] of the Lettings & Valuations Directorate of the Central Government Real Estate Agency, with its business address in Assen (Postbus 16700, 2500 BS Den Haag), born in [\*\*] on [\*\*], proof of identity: [\*\*], upon granting this power of attorney acting on behalf of the State of the Netherlands, hereinafter referred to as “**the State**”, authorised to do so under the provisions of the Central Government Real Estate Agency Mandate Decision 2016 of 27 June 2016 (Government Gazette, 8 July 2016, No 35455),

in which capacity he, the grantor, is acting on behalf of the State Secretary for the Interior and Kingdom Relations, the existence of which mandate and power of attorney is evidenced by a private instrument containing a power of attorney of

which is appended to this original Instrument as (**Appendix 1**);

2. [\*\*], with its registered office in [\*\*] and its principal place of business in [\*\*], listed in the Commercial Register under number [\*\*], hereinafter referred to as “**the Superficiary**”.

#### A. INTRODUCTION

A.1 Following an open procedure [indicate which one, if necessary], the State granted the Superficiary a Permit [name] to operate Hollandse Kust (zuid) Wind Farm Sites III and IV.

A.2 Following the granting of the Permit, the State and the Superficiary concluded an Agreement [details of the Agreement] (**Appendix 2**) on the creation of a Right of Superficies for the Superficiary's Wind Turbines and on the drawing up of a Lease for the Superficiary's cabling.

A.3 The aforementioned Permit was granted irrevocably on [date on which the Permit becomes irrevocable], enabling the Parties to create the Right of Superficies and easement for the operation of the Wind Farm by means of this Instrument.

The State and the Superficiary, hereinafter also referred to as “**the Parties**”, acting as stated, have declared that the Parties have agreed on the following:

#### B. Definitions

B.1. Unless otherwise indicated, the following terms have the following meaning in the Instrument.

- **Initial Period:**

A successive period which starts immediately with the signing of this Instrument and ends when the Production Period starts.

- **Decommissioning Period:**

A successive period which immediately follows the Production Period and ends as soon as the Superficiary no longer has disposal of the Permit.

- **General Terms and Conditions:**

The "State Property and Development Agency (RVOB)'s General Conditions pertaining to a Right of Superficies for Wind Turbines 2012", a copy of which is appended as **Appendix 3** to this instrument and which were lodged with the court registry of the District Court of Utrecht on 8 October 2012 under number 177/2012 and were registered with the public registers for property subject to registration on 5 September 2012 in the register Mortgages 4, part 61912, number 146.

- **The State:**

The State of the Netherlands, the undersigned referred to under 1.

- **Documentation:**

All the information provided by the State in relation to the Location, the Right of Superficies, the Right of Lease and the Works, which information was provided to the Other Party during the preceding open procedure [tender details], including the tender scheme, the Other Party's tender and the supplements and/or changes thereto as a result of further information that has come to the attention of the State. No rights may be derived by the Other Party from the information referred to herein. The purpose of this information is to enable the Other Party to conduct further research.

- **Award:**

The decision of the State to award the Agreement, pursuant to which decision the Agreement was drawn up in accordance with the provisions of Article [\*\*] of the Terms and Conditions.

- **Civil-law Notary:**

[Details], civil-law notary at The Hague, or his or her deputy.

- **Superficiary:**

The undersigned referred to under 2.

- **Right of Superficies:**

the independent Right of Superficies over the Immovable Property which entitles the Superficiary to construct, maintain, inspect, operate, remove, change, replace, service and own the Works in accordance with the present designated use, namely the generation of wind energy, to be created by the State for the Superficiary, for a duration of [\*\*] years.

- **Agreement:**

The Agreement drawn up pursuant to the Award creating the Right of Superficies, which is laid down in the private agreement referred to above under A.2.

- **Parties:**

The State and the Superficiary.

- **Parcels:**

(i) A parcel of land with an area of approximately [\*\*] hectares, [\*\*] ares and [\*\*] centiares [(\*\*.\*\*.\*\* hectares)], comprising contiguous parts of the parcel recorded in the land register as [\*\*], section [\*\*], number [\*\*] (hereinafter also referred to as **Parcel 1**);

(ii) A parcel of land with an area of approximately [\*\*] hectares, [\*\*] ares and [\*\*] centiares [(\*\*.\*\*.\*\* hectares)], comprising contiguous parts of the parcel recorded in the land register as [\*\*], section [\*\*], number [\*\*] (hereinafter also referred to as **Parcel 2**);

Etc.

– specifically the [\*\*] [(\*\*)] parcels of seabed as indicated in outline using hatching in the site plan or plans certified by the Parties and appended to this Instrument with reference [\*\*] and dated [\*\*], with the proviso that after this Instrument has been registered with the Land Registry Office, the result of the land registry survey as shown in the land registry documents shall replace the above site plan or plans and description (**Appendix 4**). The aforementioned site plan or plans is or are intended to be registered in the register Mortgages 4 at the offices of the Cadastre, Land Registry and Mapping Agency;

hereinafter to be referred to as the "**Parcels**".

- **Production Period:**

A successive period which starts immediately on the day when (4) years have expired since the Permit became irrevocable and runs until the date on which twenty-nine (29) years have elapsed since the issuing of the Permit. The Production Period will be extended if the term of the Permit is extended.

- **Directorate-General for Public Works and Water Management (Rijkswaterstaat, RWS)**

Rijkswaterstaat Sea and Delta Department, PO Box 2232, 3500 GE Utrecht, The Netherlands.

- **Open Tendering Procedure/Tender Scheme:**

The open procedure held between [\*\*] and [\*\*] pursuant to the Offshore Wind Energy Act (*Wet windenergie op zee, Wwoz*) for the construction, operation and removal of a Wind Farm in Hollandse Kust (zuid) Wind Farm Sites III and IV, as detailed in the Terms and Conditions.

- **Permit**

[Details of the permit], as well as the requirements set for it in the preceding Wind Farm Site Decisions III ([Government Gazette 2018, 2543](#)) and IV ([Government Gazette 2018, 2497](#)) and the Offshore Wind Energy Act ([Bulletin of Acts and Decrees 2015, 261](#)).

- **Terms and Conditions:**

The conditions and provisions applicable to the Open Tendering Procedure/Tender Scheme, included in the Documentation.

- **Works:**

The Works to be realised on the Parcels, comprising [\*\*] [(\*\*)] Wind Turbines, among other things.

- **Wind Farm:**

The Wind Farm called [\*\*] comprising [\*\*] Wind Turbines, situated as closely as possible to the following locations:

- WT 1 (XY coordinates: X = [\*\*] and Y = [\*\*]);
- WT 2 (XY coordinates: X = [\*\*] and Y = [\*\*]);
- WT 3 (XY coordinates: X = [\*\*] and Y = [\*\*]).

- **Wind Turbine:**

A [\*\*] [(\*\*)] wind turbine with a rotor diameter of [\*\*] [(\*\*)] metres, an axis height of [\*\*] [(\*\*)] metres relative to the Wind Turbine's foundation and a nominal capacity of [\*\*] [(\*\*)] megawatts.

B.2. The definitions may be used in the singular or plural without losing their substantive meaning.

## C. CREATION OF A RIGHT OF SUPERFICIES

C.1 In implementation of the Agreement, the State is herewith creating for the Superficiary the exclusive and independent Right of Superficies as referred to in Section 101(2) of Book 5 of the Dutch Civil Code (Burgerlijk Wetboek, BW) for the Parcels, which Right of Superficies the Superficiary herewith accepts.

C.2 The Right of Superficies does not cover the internal site cabling with appurtenances (including cables for electricity conduits and telecommunication, cables and pipes) for the Wind Farm. The Parties will conclude a Lease for that purpose independently of this Instrument.

### Restrictions under public law

The land registry record shows that the Parcels are not subject to any statutory restrictions.

### Mode of acquisition

The Parcels are the property of the State under the provisions of Section 27 of Book 5 of the Dutch Civil Code.

### Legal status of the Parcels

Except in so far as the Instrument provides otherwise, the State shall guarantee the following:

- I. The State is entitled to create the Right of Superficies and to grant the undermentioned easement.
- II. No obligations towards third parties by reason of a pre-emption right or right of option, nor by reason of a repurchase stipulation or leasing exist.
- III. No subsidies in connection with which obligations must be met have been applied for or granted by the authorities in respect of the Parcels.
- IV. Unless otherwise provided in the Instrument, no leases, tenancy agreements or other contracts for use, or agreements which could lead to the entering into such agreements, other than those stated in this Instrument have been concluded.

## D. TERMS AND CONDITIONS

The following terms and conditions shall apply to the Right of Superficies:

#### **Article 1. General Terms and Conditions**

1. The State Property and Development Agency (RVOB)'s General Terms and Conditions pertaining to a right of superficies for wind turbines 2012, hereinafter referred to as the **General Terms and Conditions**, shall apply to the Right of Superficies, in so far as this Instrument or an Instrument amending the Right of Superficies does not depart from them. The General Terms and Conditions were filed with the District Court of Utrecht on 8 October 2012 under number 177/2012 and recorded in the public registers held by the Land Registry on 5 September 2012 under part 61912, number 146 of Mortgages 4. The Superficiary declares that he received a copy of the General Terms and Conditions before entering into the Agreement creating the Right of Superficies and is wholly familiar with the contents thereof.
2. The reference to Article 2 in Article 15(2) is not applicable to the Right of Superficies.
3. Article 6(6) and (7) of the General Terms and Conditions are not applicable to the Right of Superficies.

#### **Article 2. Other provisions**

In addition to the General Terms and Conditions, the following provisions shall also apply:

1. Routine maintenance activities and inspections carried out in connection with the State's public function, in so far as not arising from use of the Right of Superficies, shall be at the risk and expense of the State.
2. The Superficiary shall allow the State access to the Parcels at any time in order to carry out maintenance activities and inspections in connection with the public function within the management area of the North Sea.

#### **Article 3. Acceptance**

Upon the creation of the Right of Superficies, the Parcels were made available and accepted as found, including all known and unknown defects.

If the size of the Parcels and/or any other description thereof is incorrect or incomplete, neither the Superficiary nor the State may derive any rights from such errors or omissions.

#### **Article 4. Term; start date**

1. The Right of Superficies shall continue to exist for as long as the Superficiary has disposal of the Permit. In principle, this term is thirty (30) years, as from the date on which the Permit was granted to the Superficiary. If the term of the Permit is extended or shortened for whatever reason, the same shall apply by analogy to the term of the Agreement.
2. The Right of Superficies shall enter into effect today and end by operation of law on the same day as the Permit ends.

#### **Article 5. Amount and interim adjustment of the fee**

1. The annual fee for the Right of Superficies has been determined on the basis of a fixed price, namely ninety-eight euro cents per megawatt hour per year (MWh/year) times the total number of megawatt hours (MWh) of the total Wind Farm, namely three hundred and fifty (350) MW times the number of full load hours per year, namely four thousand (4,000), calculated on the basis of the percentage of the Wind Farm's surface area within the 12 nautical mile zone, which amounts to 71.85% for Wind Farm Site III and 68.23% for Wind Farm Site IV.
  - I. Wind Farm Site III: 350 megawatts *times* 71.85% *times* 4,000 full load hours *times* €0.98 per MWh per year. This sum amounts to €985,782 per year.
  - II. Wind Farm Site IV: 350 megawatts *times* 68.23% *times* 4,000 full load hours *times* €0.98 per MWh per year. This sum amounts to €936,115.60 per year.
  - III. These amounts are exclusive of any turnover tax payable.
  - IV. The obligation to pay the fee as referred to in this subclause shall apply only during the Production Period as described in the definitions.
2. Notwithstanding the provisions of subclause 1, the following fee shall apply to the Initial Period and the Decommissioning Period as described in the definitions.
  - I. During the Initial Period, the Other Party shall be liable to pay a fee of €650 for each megawatt, namely three hundred and fifty (350), calculated on the basis of the percentage of the Wind Farm's surface area located within the 12 nautical mile zone, which amounts to 71.85% for Wind Farm Site III and 68.23% for Wind Farm Site IV.

- i. Wind Farm Site III: €650 times 350 times 71.85% which equals €163,458.75 per year.
    - ii. Wind Farm Site IV: €650 times 350 times 68.23% which equals €155,223.25 per year.
  - II. The fee for the Decommissioning Period shall be calculated in the same way as the fee for the Initial Period is calculated, and will be indexed at the commencement of the Decommissioning Period in accordance with Article 4 of the General Terms and Conditions, with the date of the Instrument being used as the commencement date for indexing.
3. Article 21 of the General Terms and Conditions shall not apply with respect to the adjustment of the fee or the fee for the Initial Period and the Decommissioning Period.

#### **Article 6. Method of payment for the fee**

1. Once it has been invoiced by the State, the fee due during the Initial Period and the Decommissioning Period must be paid by means of direct debit or transfer to account number NL34INGB0705002683 in the name of the Dutch Ministry of the Interior and Kingdom Relations. Invoices should be sent to: [\*\*].
2. After the end of the Right of Superficies or after the time at which the fee due during the Production Period or the fee due during the Initial Period and/or the Decommissioning Period can be revised, submitting an invoice or paying the fee during the Production Period and paying the fee during the Initial Period and/or Decommissioning Period shall not create an entitlement to an extension of the Right of Superficies or to an unchanged fee during the Production Period or a fee during the Initial Period and/or Decommissioning Period for the new period.

#### **Article 7. Designated use**

The Superficiary shall be obliged to use the Parcels exclusively for the purposes as laid down in the Permit.

#### **Article 8. Cables and pipelines**

1. The State is responsible for providing the Superficiary with all the information that should be made known to the Superficiary, including the location of cables, pipelines and ray paths in, on and/or above the Parcels, with the proviso that information about facts which are known to the Superficiary or could have been known on the basis of his own research, to the extent that any such research may be required of the Superficiary according to currently prevailing opinion, need not be provided by the State.
2. If such is necessary for the construction of the Wind Farm, the Superficiary shall relocate the cables and/or pipes at his own expense, in consultation with and to the satisfaction of the manager concerned.

#### **Article 9. Aquatic soil analysis**

The Superficiary and the State have agreed the following with regard to the risk of aquatic soil contamination in the Parcels:

1. The State and the Superficiary have not had an analysis carried out to establish the existence, if any, of ground contamination for the purpose of the present Right of Superficies.
2. The discovery of ground contamination during the term of the present Right of Superficies shall not constitute a defect.
3. The State shall not be liable for any loss suffered by the Superficiary as a result of the existence of ground contamination in the Parcels.
4. The Superficiary shall report all existing ground contamination discovered during the operation of the Parcels and during the term of the present Right of Superficies to the State without delay.
5. The Superficiary shall make every effort to prevent contamination of the ground belonging to the Parcels during the operation of the Parcels and during the term of the present Right of Superficies.
6. The Superficiary shall always report any ground contamination that occurs during the term of the present Right of Superficies directly to the State and the manager of the waters directly, comply with any resultant orders issued by the manager as referred to in Section 5:1 of the Dutch Water Act (*Waterwet*) regardless of the party on which they have been imposed, directly and at its own expense, and shall also transmit reports transmitted to the manager and decisions received from the manager in this context to the State directly. The aforementioned obligation for

- the Superficiary to comply with orders directly and at its own expense shall not apply if the Superficiary can prove that the contamination cannot reasonably be attributed to it.
7. The Superficiary shall be liable towards the State for the costs of remedying any contamination of the ground belonging to the Parcels during the term of the present Right of Superficies and for all other loss (including any decrease in value of the Parcels) and costs with which the State is faced as a result of that contamination, unless it can prove that the contamination cannot reasonably be attributed to it.
  8. The Right of Superficies shall be deemed to continue until any orders to be implemented by the Superficiary as referred to in subclause 6 have been implemented to the satisfaction of the manager as evidenced by a decision issued by the manager.
  9. The Superficiary cannot derive any rights with respect to the State from the obligation to implement orders as referred to in subclause 6 regardless of on whom it has been imposed.

#### **Article 10. Indemnification**

1. The Superficiary shall indemnify the State against all claims (of whatever kind) of third parties in respect of loss suffered which can be attributed to the construction, operation and/or removal of the Wind Farm by the Superficiary.
2. In this Article, construction, operation and/or removal of the Wind Farm is also understood to mean the removal of anything in, on or above the Parcels.
3. In the event of loss, including consequential loss, which has a causal link with the construction, operation and/or removal of the Wind Farm, arisen with a State user or users of land immediately adjoining the Parcels, the Superficiary shall compensate that land user or those land users directly.

#### **Article 11. Public registers**

The Superficiary shall authorise the State irrevocably to have an entry made of the termination of the Right of Superficies, as referred to in Article 8, in the Public Registers immediately after its termination, at the expense of the Superficiary.

### **E. MISCELLANEOUS**

#### **Article 12. Qualitative obligation; perpetual clause**

1. If and in so far as the provisions declared applicable above to the Right of Superficies cannot be regarded as provisions pertaining to the Right of Superficies, the State and the Superficiary shall agree that they shall be deemed qualitative obligations as referred to in Section 252 of Book 6 of the Dutch Civil Code and shall be transferred as such to successor parties entitled to the Right of Superficies, and that the users of the Parcels shall also be bound by them. The choice of address for service stated at the end of this Instrument was made in part with a view to these qualitative obligations.
  2. If and in so far as the provisions declared applicable above under C cannot be regarded as provisions pertaining to the Right of Superficies and do not qualify as qualitative obligations as referred to above under 1 either, the State and the Superficiary shall agree that the Superficiary and his legal successors in respect of the Right of Superficies shall be obliged to impose the obligations concerned as a perpetual clause on the successor Superficiary or Superficiaries upon transfer of the Right of Superficies, and to have it or them accept them and also accept the rights consequently arising for the State on the State's behalf. Equally, the State and its legal successors in respect of the Parcels shall be obliged to impose the obligations concerned as a perpetual clause on the successor owner or owners of the land upon transfer of the Parcels, and to have them accept them and also accept the rights consequently arising for the Superficiary on behalf of the Superficiary;
- all the foregoing being subject to an immediately payable penalty in accordance with Article 17(a) of the General Terms and Conditions in favour of the State or the Superficiary, or its legal successor or successors. In connection with this perpetual clause, the Superficiary and the State and their legal successors in respect of the Right of Superficies or the Parcels shall be mutually obliged to cite verbatim the provisions declared above as applicable to the Right of Superficies in every deed of transfer.

#### **Article 13. Creation of an easement**

To create as easement on the parts of the Parcels that remain in the full ownership of the State, recorded in the Land Register as Municipality of [\*\*], section [\*\*], number or numbers [\*\*], jointly constituting the **servient land**, for the benefit and enjoyment of the

Parcels, being the **dominant land**: the easement entailing the obligation to tolerate rotor blades sweeping over the servient land and their being allowed to be kept there;

hereinafter referred to as the **Easement**;

the Parties declare that they will accept the Easement.

1. The Easement relates only to the parts of the Parcels as indicated in the site plan or plans with the reference or references [\*\*], which is or are attached to this Instrument (**Appendix 5**).
2. The Easement shall end as soon as the Right of Superficies ends and the Wind Farm has been removed in accordance with Article 12 of the General Terms and Conditions and Article 11 of the present Instrument.
3. The Superficiary, its staff, third parties designated by the Superficiary, as well as anyone carrying out work on the instructions of all of the aforementioned officers, shall have access to the Parcels and also to the servient land referred to in subclause 1 for the purposes of the tasks assigned to them.
4. The Easement shall be entered into with due observance of the provisions set out in the Permit.
5. No fee shall be payable for the Easement described in this Article. The Parties expressly take the view that the Easement is valueless.

#### **Article 14. Turnover tax/Transfer tax**

##### **1. Turnover tax**

- a. Within the meaning of [Section 3\(2\)](#) of the Dutch Turnover Tax Act 1968 (*Wet op de omzetbelasting* 1968), the creation of the Right of Superficies qualifies as a service that is considered equivalent to leasing and not as a supply within the meaning of the Act (analogous to leasing) because the capitalised value of the fee plus the turnover tax is less than the market value of the Right of Superficies.
- b. The State and the Superficiary shall make use of the opportunity to opt for taxed rent as referred to in Section 11(1)(5) of the Dutch Turnover Tax Act 1968 in conjunction with Section 6a of the Turnover Tax (Implementation) Decree 1968 (*Uitvoeringsbeschikking omzetbelasting* 1968). The Parties shall refrain from submitting a joint request opting for rent to be subjected to turnover tax, but shall nevertheless opt to have the rent subjected to turnover tax; this Instrument shall be regarded as a written lease for the purposes of turnover tax. The Superficiary declares, also for the benefit of the legal successor or successors of the State, that:
  - it will comply with the requirement that the Right of Superficies is based on use for activities ninety per cent (90%) of more of which are eligible for deduction of VAT pursuant to [Section 15](#) of the Dutch Turnover Tax Act 1968;
  - the date of creation of the Right of Superficies shall be taken as the start date for that taxed service/rent;
  - the Superficiary's financial year shall run from 1 January to 31 December inclusive;
  - it has included documents relating to the taxed service/rent in its records.
- c. If the aforementioned right to deduct input tax is not applicable, in addition to the State's fee, the Superficiary shall owe a sum equivalent to the amount of the turnover tax that would have been due had the right to deduct input tax been applicable. The same shall apply if it subsequently transpires that the said right to deduct input tax did not exist or ended at any time. In such a case, the increase of the fee described in this Instrument shall apply from the moment that the right to deduct input tax ceased to exist. Furthermore, the Superficiary shall be bound to compensate the State for all non-deductible investment turnover tax, as well as all other turnover tax-related loss such as turnover tax on maintenance and general operating costs in so far as that loss results from the Superficiary's failure to comply with the said right to deduct input tax and that loss is not covered by the increase in the fee. The aforementioned compensation payments shall be immediately due and payable. The foregoing shall also apply if the State is faced with loss related to turnover tax after the end of the Right of Superficies.
- d. The turnover tax payable by the Superficiary to the State in accordance with the above provisions shall be calculated on the basis of the compensation as referred to in [Section 5](#) of the Turnover Tax (Implementing) Decree 1968. The turnover tax amount shall be paid upon submission of an invoice.



- e. The State declares that the creation set out in this Instrument is not covered by the provisions of Section 27 of the Dutch Turnover Tax Act 1968.

## 2. *Transfer tax*

As the acquirer of the Right of Superficies, the Superficiary shall invoke the exemption from transfer tax as referred to in [Section 15\(1\)\(a\)](#) of the Dutch Legal Transactions (Taxation) Act (*Wet op belastingen van rechtsverkeer, WBRV*), since it concerns an acquisition by virtue of a service as referred to in Section 11(1)(b), final paragraph, of the Dutch Turnover Tax Act 1968, in respect of which turnover tax is due and payable, and the Parcels have not been used as an asset to date.

### **Article 15. Devolution and transfer of claims**

The Other Party may transfer the Right of Superficies to a third party to which it is also transferring the Permit only after it has met all the requirements as stated in the Permit relating to a transfer to third parties. The Other Party shall inform the State of the manner in which and the time at which the transfer takes place. The Other Party shall not be entitled to transfer the Permit to third parties without also transferring the Right of Superficies.

### **Article 16. Dispute resolution**

1. Disputes relating to this Instrument shall initially be resolved in joint consultation.
2. Where the joint consultation does not lead to agreement, mediation pursuant to the regulations of the Netherlands Institute at Rotterdam (NMI) shall be used.
3. Where it proves impossible to resolve a dispute with the aid of mediation, the dispute shall be settled by the competent court in The Hague.

### **Article 17. Choice of an address for service & Choice of law**

1. This Instrument shall be deposited at the offices of the Civil-law Notary, which the Parties have chosen as their address for service for the purposes of this Instrument.
2. This Instrument is governed by Dutch law.

### **Article 18. Original version**

This Instrument has been drawn up in Dutch. Rights may be derived from the Dutch version only. Any translations provided are purely for information purposes.

In witness whereof .....

Appendices:

1. Power of attorney
2. Agreement between the Superficiary and the State dated [\*\*]
3. General Terms and Conditions
4. Drawing of the cadastral parcels
5. Drawing of the easement

