

LEGISLATURE OF NEBRASKA
 ONE HUNDRED SECOND LEGISLATURE
 SECOND SESSION
LEGISLATIVE BILL 828

Final Reading

Introduced by Dubas, 34.

Read first time January 05, 2012

Committee: Natural Resources

A BILL

1 FOR AN ACT relating to energy; to amend sections 66-901, 66-902,
 2 66-909, 66-910, 66-911.01, 66-912, and 76-3004, Reissue
 3 Revised Statutes of Nebraska, sections 72-270, 72-271,
 4 72-272, 72-273, 72-274, 77-2704.57, 79-309.01, and
 5 79-1035, Revised Statutes Cumulative Supplement, 2010,
 6 and section 76-3001, Revised Statutes Supplement, 2011;
 7 to define, redefine, and eliminate terms; to change and
 8 eliminate provisions relating to easements; to provide
 9 for duration of solar and wind agreements as prescribed;
 10 to prohibit severance of certain ownership interests as
 11 prescribed; to harmonize provisions; to repeal the
 12 original sections; to outright repeal sections 66-907,
 13 66-909.03, and 66-911, Reissue Revised Statutes of
 14 Nebraska; and to declare an emergency.

15 Be it enacted by the people of the State of Nebraska,

1 Section 1. Section 66-901, Reissue Revised Statutes of
2 Nebraska, is amended to read:

3 66-901 The Legislature hereby finds and declares that the
4 use of solar energy and wind energy in Nebraska: (1) Can help reduce
5 the nation's reliance upon irreplaceable domestic and imported fossil
6 fuels; (2) can reduce air and water pollution resulting from the use
7 of conventional energy sources; (3) requires effective legislation
8 and efficient administration of state and local programs to be of
9 greatest value to its citizens; and (4) is of such importance to the
10 public health, safety, and welfare that the state should take
11 appropriate action to encourage its use.

12 As the use of solar energy and wind energy devices
13 increases, the possibility of future shading and obstruction of such
14 devices by structures or vegetation will also increase. The
15 Legislature therefor declares that the purpose of sections 66-901 to
16 66-914 and sections 3, 4, 9, and 10 of this act is to promote the
17 public health, safety, and welfare by protecting access to solar
18 ~~skyspace~~energy and wind energy as provided in sections 66-901 to
19 66-914 and sections 3, 4, 9, and 10 of this act.

20 Sec. 2. Section 66-902, Reissue Revised Statutes of
21 Nebraska, is amended to read:

22 66-902 For purposes of sections 66-901 to 66-914 and
23 sections 3, 4, 9, and 10 of this act, unless the context otherwise
24 requires, the definitions found in sections 66-903 to ~~66-909.03~~
25 66-909.02 and sections 3 and 4 of this act apply.

1 Sec. 3. Decommissioning security means a security
2 instrument that is posted or given by a wind developer to a
3 municipality or other governmental entity to ensure sufficient
4 funding is available for removal of a wind energy conversion system
5 and reclamation at the end of the useful life of such a system.

6 Sec. 4. Wind agreement means a right, whether or not
7 stated in the form of a restriction, easement, covenant, or
8 condition, in any deed, wind easement, wind option, lease, or lease
9 option securing land for the study or production of wind-generated
10 energy or any other instrument executed by or on behalf of any owner
11 of land or air space for the purpose of allowing another party to
12 study the potential for or to develop a wind energy conversion system
13 on such land or in such air space.

14 Sec. 5. Section 66-909, Reissue Revised Statutes of
15 Nebraska, is amended to read:

16 66-909 Solar ~~skyspace easement agreement~~ shall mean a
17 right, whether or not stated in the form of a restriction, easement,
18 covenant, or condition, in any deed, will, or other instrument
19 executed by any person for the purpose of insuring adequate access of
20 a solar energy system to solar energy.

21 Sec. 6. Section 66-910, Reissue Revised Statutes of
22 Nebraska, is amended to read:

23 66-910 Any property owner may grant a solar ~~skyspace~~
24 ~~easement agreement~~ or wind ~~energy easement agreement~~ in the same
25 manner and with the same effect as a conveyance of any other interest

1 in real property. ~~The easement shall be created in writing and shall~~
2 ~~be filed, duly recorded, and indexed in the office of the register of~~
3 ~~deeds of the county in which the real property subject to the~~
4 ~~easement is located. No duly recorded easement shall be unenforceable~~
5 ~~on account of lack of privity of estate or privity of contract. Such~~
6 ~~easements shall run with the land or lands benefited and burdened and~~
7 ~~shall constitute a perpetual easement, except that a solar skyspace~~
8 ~~easement or wind energy easement may terminate upon the conditions~~
9 ~~stated therein or by agreement of the owners of the lands benefited~~
10 ~~and burdened.~~

11 Sec. 7. Section 66-911.01, Reissue Revised Statutes of
12 Nebraska, is amended to read:

13 66-911.01 An instrument creating a land right or an
14 option to secure a land right in real property or the vertical space
15 above real property for a solar energy system, ~~for a wind energy~~
16 ~~conversion system, or for wind measurement equipment agreement or a~~
17 wind agreement shall be created in writing, and the instrument, or an
18 abstract, shall be filed, duly recorded, and indexed in the office of
19 the register of deeds of the county in which the real property
20 subject to the instrument is located. The instrument shall include,
21 but the contents are not limited to:

- 22 (1) The names of the parties;
- 23 (2) A legal description of the real property involved;
- 24 (3) The nature of the interest created;
- 25 (4) The consideration paid for the transfer;

1 (5) A description of the improvements the developer
2 intends to make on the real property, including, but not limited to:
3 Roads; transmission lines; substations; wind turbines; and
4 meteorological towers;

5 (6) A description of any decommissioning security ~~as~~
6 ~~defined in section 76-3001~~ or local requirements related to
7 decommissioning; and

8 (7) The terms or conditions, if any, under which the
9 interest may be revised or terminated.

10 An abstract under this section need not include the items
11 described in subdivisions (4) through (7) of this section.

12 Sec. 8. Section 66-912, Reissue Revised Statutes of
13 Nebraska, is amended to read:

14 66-912 A solar ~~skyspace easement agreement~~ or wind energy
15 ~~easement agreement~~ may be enforced by injunction or proceedings in
16 equity or other civil action.

17 Sec. 9. A solar agreement or wind agreement shall run
18 with the land benefited and burdened and shall terminate upon the
19 conditions stated in the solar agreement or wind agreement. The
20 initial term of a solar agreement or wind agreement shall not exceed
21 forty years, except that the parties to a solar agreement or wind
22 agreement may extend or renew the initial term by mutual written
23 agreement. A wind agreement shall terminate if development of a wind
24 energy conversion system has not commenced within ten years after the
25 effective date of the wind agreement, except that this period may be

1 extended by mutual agreement of the parties to the wind agreement.

2 Sec. 10. No interest in any wind or solar resource
3 located on a tract of land and associated with the production or
4 potential production of wind or solar energy on the tract of land may
5 be severed from the surface estate.

6 Sec. 11. Section 72-270, Revised Statutes Cumulative
7 Supplement, 2010, is amended to read:

8 72-270 ~~Leases~~ Agreements involving the production of wind
9 or solar energy on lands under the control of the Board of
10 Educational Lands and Funds shall be regulated by sections 72-270 to
11 72-274.

12 Sec. 12. Section 72-271, Revised Statutes Cumulative
13 Supplement, 2010, is amended to read:

14 72-271 For purposes of sections 72-270 to 72-274:

15 (1) Agreement means (a) for purposes of a solar energy
16 system, a solar agreement as defined in section 66-909 and (b) for
17 purposes of a wind energy conversion system, a wind agreement as
18 defined in section 4 of this act;

19 (2) Board means the Board of Educational Lands and Funds;

20 ~~(2) Lease means any lease, easement, covenant, or other~~
21 ~~such contractual arrangement;~~

22 (3) Lessee means any individual, corporation, or other
23 entity that enters into ~~a lease~~ an agreement with the board;

24 (4) Solar energy means radiant energy, direct, diffuse,
25 or reflected, received from the sun at wavelengths suitable for

1 conversion into thermal, chemical, or electrical energy; and

2 (5) Wind energy means ~~the use of wind to produce~~
3 ~~electricity.~~ has the definition found in section 66-909.01.

4 Sec. 13. Section 72-272, Revised Statutes Cumulative
5 Supplement, 2010, is amended to read:

6 72-272 The board may authorize ~~leases~~ agreements for the
7 use of any school or public lands belonging to the state and under
8 its control for exploration and development of wind energy or solar
9 energy for such durations and under such terms and conditions as the
10 board shall deem appropriate, except that ~~the initial term for any~~
11 ~~such wind energy lease and any amendment thereto shall not exceed~~
12 ~~forty years.~~ such agreements shall comply with sections 66-901 to
13 66-914 and sections 3, 4, 9, and 10 of this act. In making such
14 determinations, the board shall consider comparable arrangements
15 involving other lands similarly situated and any other relevant
16 factors bearing upon such leases. ~~Any such lease authorized by the~~
17 ~~board shall be created in writing and shall be filed, duly recorded,~~
18 ~~and indexed in the office of the register of deeds of the county in~~
19 ~~which the real property subject to the lease is located. Such leases~~
20 ~~shall run with the land benefited and burdened and shall include, as~~
21 ~~applicable, the contents specified in sections 66-911 and 66-911.01.~~
22 agreements.

23 Sec. 14. Section 72-273, Revised Statutes Cumulative
24 Supplement, 2010, is amended to read:

25 72-273 (1) If ~~a~~ an agreement relating to wind energy or

1 solar energy lease—is authorized by the board on land already being
2 leased for agricultural or other purposes by a prior lessee, the
3 existing rights of the prior lessee shall not be impaired, and the
4 board shall reduce the rental amount due from such prior lessee in
5 proportion to the amount of land that is removed from use as a result
6 of the ~~wind or solar energy lease~~. agreement.

7 (2) A lessee for agricultural or other purposes shall be
8 compensated for all damages to personal property owned by such lessee
9 or to growing crops, including grass, caused by operations under a
10 concurrent ~~lease of~~ agreement regarding such land for wind energy or
11 solar energy purposes, and the board shall require the lessee under
12 the ~~wind or solar energy lease~~ agreement to provide such insurance
13 and indemnity agreements which the board determines are necessary for
14 the protection of the state and its lessees.

15 (3) If a ~~an~~ agreement relating to wind energy or solar
16 energy lease—is authorized by the board on land concurrently being
17 leased for agricultural purposes, the lessee for agricultural
18 purposes shall have priority as to the use of the water on the land,
19 but lessees for other purposes, including parties to agreements
20 relating to wind energy or solar energy, ~~lessees,~~ shall be allowed
21 reasonable use of the water on the land.

22 Sec. 15. Section 72-274, Revised Statutes Cumulative
23 Supplement, 2010, is amended to read:

24 72-274 The board may adopt and promulgate such rules and
25 regulations as it shall deem necessary and proper to regulate the

1 ~~leasing of school and public lands for agreements relating to wind~~
2 ~~energy or solar energy exploration and development on school and~~
3 ~~public lands pursuant to sections 72-270 to 72-274 and to prescribe~~
4 such terms and conditions, including bonds, as it shall deem
5 necessary in order to protect the interests of the state and its
6 lessees.

7 Sec. 16. Section 76-3001, Revised Statutes Supplement,
8 2011, is amended to read:

9 76-3001 For purposes of sections 76-3001 to 76-3004:

10 (1) Decommissioning security means a security instrument
11 that is posted or given by ~~the~~ a wind developer to a municipality or
12 other governmental entity to ensure sufficient funding is available
13 for removal of a wind energy conversion system and reclamation at the
14 end of the useful life of such a system; and

15 (2) Wind agreement means a right, whether or not stated
16 in the form of a restriction, easement, covenant, or condition, in
17 any deed, wind easement, wind option, or lease or lease option
18 securing land for the study or production of wind-generated energy or
19 any other instrument executed by or on behalf of any owner of land or
20 air space for the purpose of allowing another party to study the
21 potential for, or to develop, a wind energy conversion system as
22 defined in section 66-909.02 on the land or in the air space.

23 Sec. 17. Section 76-3004, Reissue Revised Statutes of
24 Nebraska, is amended to read:

25 76-3004 No interest in any wind or solar resource located

1 on a tract of land and associated with the production or potential
2 production of ~~wind-generated~~ wind or solar energy on the tract of
3 land may be severed from the surface estate.

4 Sec. 18. Section 77-2704.57, Revised Statutes Cumulative
5 Supplement, 2010, is amended to read:

6 77-2704.57 (1) Sales and use tax shall not be imposed on
7 the gross receipts from the sale, lease, or rental of personal
8 property for use in a C-BED project or community-based energy
9 development project. This exemption shall be conditioned upon filing
10 requirements for the exemption as imposed by the Tax Commissioner.
11 The requirements imposed by the Tax Commissioner shall be related to
12 ensuring that the property purchased qualifies for the exemption. The
13 Tax Commissioner may require the filing of the documents showing
14 compliance with section 70-1907, the organization of the project, the
15 distribution of the payments, the power purchase agreements, the
16 project pro forma, articles of incorporation, operating agreements,
17 and any amendments or changes to these documents during the life of
18 the power purchase agreement.

19 (2) The Tax Commissioner shall notify an electric utility
20 that has a power purchase agreement with a C-BED project if there is
21 a change in project ownership which makes the project no longer
22 eligible as a C-BED project. Purchase of a C-BED project by an
23 electric utility prior to the end of the power purchase agreement
24 disqualifies the C-BED project for the exemption, but the Department
25 of Revenue may not recover the amount of the sales and use tax that

1 was not paid by the project prior to the purchase.

2 (3) For purposes of this section:

3 (a) C-BED project or community-based energy development
4 project means a new wind energy project that:

5 (i) Has an ownership structure as follows:

6 (A) For a C-BED project that consists of more than two
7 turbines, has one or more qualified owners with no single individual
8 qualified owner owning directly or indirectly more than fifteen
9 percent of the project and with at least thirty-three percent of the
10 gross power purchase agreement payments flowing to the qualified
11 owner or owners or local community; or

12 (B) For a C-BED project that consists of one or two
13 turbines, has one or more qualified owners with at least thirty-three
14 percent of the gross power purchase agreement payments flowing to a
15 qualified owner or owners or local community; and

16 (ii) Has a resolution of support adopted:

17 (A) By the county board of each county in which the C-BED
18 project is to be located; or

19 (B) By the tribal council for a C-BED project located
20 within the boundaries of an Indian reservation;

21 (b) Debt financing payments means principal, interest,
22 and other typical financing costs paid by the C-BED project company
23 to one or more third-party financial institutions for the financing
24 or refinancing of the construction of the C-BED project. Debt
25 financing payments does not include the repayment of principal at the

1 time of a refinancing;

2 (c) New wind energy project means any tangible personal
3 property incorporated into the manufacture, installation,
4 construction, repair, or replacement of a device, such as a wind
5 charger, windmill, or wind turbine, which is used to convert wind
6 energy to electrical energy or for the transmission of electricity to
7 the purchaser; and

8 (d) Qualified owner means:

9 (i) A Nebraska resident;

10 (ii) A limited liability company that is organized under
11 the Limited Liability Company Act or the Nebraska Uniform Limited
12 Liability Company Act and that is entirely made up of members who are
13 Nebraska residents;

14 (iii) A Nebraska nonprofit corporation organized under
15 the Nebraska Nonprofit Corporation Act;

16 (iv) An electric supplier as defined in section
17 70-1001.01, except that ownership in a single C-BED project is
18 limited to no more than:

19 (A) Fifteen percent either directly or indirectly by a
20 single electric supplier; and

21 (B) A combined total of twenty-five percent ownership
22 either directly or indirectly by multiple electric suppliers; or

23 (v) A tribal council.

24 (4) Gross power purchase agreement payments are the total
25 amount of payments during the life of the agreement. For power

1 purchase agreements entered into on or before December 31, 2011, if
2 the qualified owners have a combined total of at least thirty-three
3 percent of the equity ownership in the C-BED project, gross power
4 purchase agreement payments shall be reduced by the debt financing
5 payments. For the purpose of determining eligibility of the project,
6 an estimate of the payments and their recipients shall be used.

7 (5) Payments to the local community include, but are not
8 limited to, lease payments to property owners on whose property a
9 turbine is located, wind ~~energy easement agreement~~ payments, and real
10 and personal property tax receipts from the C-BED project.

11 (6) The Department of Revenue may examine the actual
12 payments and the distribution of the payments to determine if the
13 projected distributions were met. If the payment distributions to
14 qualified owners do not meet the requirements of this section, the
15 department may recover the amount of the sales or use tax that was
16 not paid by the project at any time up until the end of three years
17 after the end of the power purchase agreement.

18 (7) At any time prior to the end of the power purchase
19 agreements, the project may voluntarily surrender the exemption
20 granted by the Tax Commissioner and pay the amount of sales and use
21 tax that would otherwise have been due.

22 (8) The amount of the tax due under either subsection (6)
23 or (7) of this section shall be increased by interest at the rate
24 specified in section 45-104.02, as such rate may from time to time be
25 adjusted, from the date the tax would have been due if no exemption

1 was granted until the date paid.

2 Sec. 19. Section 79-309.01, Revised Statutes Cumulative
3 Supplement, 2010, is amended to read:

4 79-309.01 (1)(a) Beginning in 2016, the Commissioner of
5 Education shall annually collect data from each school district prior
6 to February 25 and determine whether at least seventy-five percent of
7 the school districts have included a system for distributing
8 apportionment funds attributable to income from solar or wind ~~energy~~
9 ~~leases agreements~~ on school lands for teacher performance pay within
10 such districts' local collective-bargaining agreements for the
11 ensuing school fiscal year.

12 (b)(i) If the seventy-five percent requirement has been
13 met for the year, the Commissioner of Education shall use the
14 separate accounting provided by the State Treasurer under subdivision
15 (1)(b) of section 79-1035 to determine the amount of the
16 apportionment to each school district under section 79-1035 that is
17 attributable to income from solar or wind ~~energy leases agreements~~ on
18 school lands. The commissioner shall notify each school district of
19 such amount within five days after certification of the apportionment
20 required pursuant to subsection (3) of section 79-1035. Each school
21 district shall use the amount of apportionment funds specified in the
22 notice provided by the commissioner for the purpose of teacher
23 performance pay. Such amount shall be used as a supplement to the
24 salary schedule as provided in local collective-bargaining
25 agreements. For purposes of distribution of such funds only, the

1 Legislature finds that teacher performance pay measurements,
2 criteria, and payout amounts are mandatory topics of collective
3 bargaining. If a school district has not included a system for
4 distributing apportionment funds attributable to income from solar or
5 wind ~~energy leases agreements~~ on school lands for teacher performance
6 pay within its local collective-bargaining agreement, the amount of
7 apportionment funds specified in the notice provided by the
8 commissioner shall be returned to the State Treasurer within one
9 month of receipt of such funds. The State Treasurer shall immediately
10 credit any funds returned under this section to the temporary school
11 fund. Any funds returned under this section shall be redistributed
12 from the temporary school fund in the following year and shall no
13 longer be designated as income attributable to solar or wind ~~energy~~
14 ~~leases agreements~~ on school lands.

15 (ii) If the seventy-five percent requirement has not been
16 met for the year, then subdivision (1)(b)(i) of this section shall
17 not apply for that year.

18 (2) If the seventy-five percent requirement has not been
19 met in 2016, 2017, or 2018, then this section shall not apply in 2019
20 or any year thereafter.

21 (3) For purposes of this section:

22 (a) ~~Lease Agreement~~ means any lease, easement, covenant,
23 or other such contractual arrangement; and

24 (b) Teacher performance pay means a systematic process
25 for measuring teachers' performance and linking the measurements to

1 changes in teacher pay. Indicators of teacher performance may include
2 improving professional skills and knowledge, classroom performance or
3 instructional behavior, and instructional outcomes. Teacher
4 performance pay may include predetermined bonus amounts and payout
5 criteria.

6 Sec. 20. Section 79-1035, Revised Statutes Cumulative
7 Supplement, 2010, is amended to read:

8 79-1035 (1)(a) The State Treasurer shall, each year on or
9 before the third Monday in January, make a complete exhibit of all
10 money belonging to the permanent school fund and the temporary school
11 fund as returned to him or her from the several counties, together
12 with the amount derived from other sources, and deliver such exhibit
13 duly certified to the Commissioner of Education.

14 (b) Beginning in 2016 and each year thereafter, the
15 exhibit required in subdivision (1)(a) of this section shall include
16 a separate accounting, not to exceed an amount of ten million
17 dollars, of the income from solar and wind ~~energy leases agreements~~
18 on school lands. The Board of Educational Lands and Funds shall
19 provide the State Treasurer with the information necessary to make
20 the exhibit required by this subsection. Separate accounting shall
21 not be made for income from solar or wind ~~energy leases agreements~~
22 school lands that exceeds the sum of ten million dollars.

23 (2) On or before February 25 following receipt of the
24 exhibit from the State Treasurer pursuant to subsection (1) of this
25 section, the Commissioner of Education shall make the apportionment

1 of the temporary school fund to each school district as follows: From
2 the whole amount there shall be paid to those districts in which
3 there are school or saline lands, which lands are used for a public
4 purpose, an amount in lieu of tax money that would be raised if such
5 lands were taxable, to be fixed in the manner prescribed in section
6 79-1036; and the remainder shall be apportioned to the districts
7 according to the pro rata enumeration of children who are five
8 through eighteen years of age in each district last returned from the
9 school district. The calculation of apportionment for each school
10 fiscal year shall include any corrections to the prior school fiscal
11 year's apportionment.

12 (3) The Commissioner of Education shall certify the
13 amount of the apportionment of the temporary school fund as provided
14 in subsection (2) of this section to the Director of Administrative
15 Services. The Director of Administrative Services shall draw a
16 warrant on the State Treasurer in favor of the various districts for
17 the respective amounts so certified by the Commissioner of Education.

18 (4) For purposes of this section, ~~lease-agreement~~ means
19 any lease, easement, covenant, or other such contractual arrangement.

20 Sec. 21. Original sections 66-901, 66-902, 66-909,
21 66-910, 66-911.01, 66-912, and 76-3004, Reissue Revised Statutes of
22 Nebraska, sections 72-270, 72-271, 72-272, 72-273, 72-274,
23 77-2704.57, 79-309.01, and 79-1035, Revised Statutes Cumulative
24 Supplement, 2010, and section 76-3001, Revised Statutes Supplement,
25 2011, are repealed.

1 Sec. 22. The following sections are outright repealed:
2 Sections 66-907, 66-909.03, and 66-911, Reissue Revised Statutes of
3 Nebraska.

4 Sec. 23. Since an emergency exists, this act takes effect
5 when passed and approved according to law.