

LEGISLATURE OF NEBRASKA

ONE HUNDRED SECOND LEGISLATURE

SECOND SESSION

**LEGISLATIVE BILL 828**

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

14 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 airspace 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 airspace.

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

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

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

25           (1) The names of the parties;

- 1                   (2) A legal description of the real property involved;
- 2                   (3) The nature of the interest created;
- 3                   (4) The consideration paid for the transfer;
- 4                   (5) A description of the improvements the developer
- 5 intends to make on the real property, including, but not limited to:
- 6 Roads; transmission lines; substations; wind turbines; and
- 7 meteorological towers;
- 8                   (6) A description of any decommissioning security as
- 9 ~~defined in section 76-3001~~ or local requirements related to
- 10 decommissioning; and
- 11                   (7) The terms or conditions, if any, under which the
- 12 interest may be revised or terminated.

13                   An abstract under this section need not include the items

14 described in subdivisions (4) through (7) of this section.

15                   Sec. 8. Section 66-912, Reissue Revised Statutes of

16 Nebraska, is amended to read:

17                   66-912 A solar ~~skyspace easement agreement~~ or wind energy

18 ~~easement agreement~~ may be enforced by injunction or proceedings in

19 equity or other civil action.

20                   Sec. 9. A solar agreement or wind agreement shall run

21 with the land benefited and burdened and shall terminate upon the

22 conditions stated in the wind agreement. The initial term of a solar

23 agreement or wind agreement shall not exceed forty years, except that

24 the parties to a solar agreement or wind agreement may extend or

25 renew the initial term by mutual written agreement. A wind agreement

1 shall terminate if development of a wind energy conversion system has  
2 not commenced within ten years after the effective date of the wind  
3 agreement, except that this period may be extended by mutual  
4 agreement of the parties to the wind agreement.

5           Sec. 10. No interest in any resource located on a tract  
6 of land and associated with the production or potential production of  
7 wind-generated energy on the tract of land may be severed from the  
8 surface estate.

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

11           72-270 ~~Leases~~ Agreements involving the production of wind  
12 or solar energy on lands under the control of the Board of  
13 Educational Lands and Funds shall be regulated by sections 72-270 to  
14 72-274.

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

17           72-271 For purposes of sections 72-270 to 72-274:

18           (1) Agreement means: (a) For purposes of a solar energy  
19 system, a solar agreement as defined in section 66-909 and (b) for  
20 purposes of a wind energy conversion system, a wind agreement as  
21 defined in section 4 of this act;

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

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

25           (3) Lessee means any individual, corporation, or other

1 entity that enters into ~~a lease~~ an agreement with the board;

2 (4) Solar energy means radiant energy, direct, diffuse,  
3 or reflected, received from the sun at wavelengths suitable for  
4 conversion into thermal, chemical, or electrical energy; and

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

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

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

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

3           72-273 (1) If ~~a~~an agreement relating to wind energy or  
4 solar energy lease~~is~~ authorized by the board on land already being  
5 leased for agricultural or other purposes by a prior lessee, the  
6 existing rights of the prior lessee shall not be impaired, and the  
7 board shall reduce the rental amount due from such prior lessee in  
8 proportion to the amount of land that is removed from use as a result  
9 of the ~~wind or solar energy lease~~ agreement.

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

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

25           Sec. 15. Section 72-274, Revised Statutes Cumulative

1 Supplement, 2010, is amended to read:

2           72-274 The board may adopt and promulgate such rules and  
3 regulations as it shall deem necessary and proper to regulate the  
4 ~~leasing of school and public lands for agreements relating to wind~~  
5 energy or solar energy exploration and development on school and  
6 public lands pursuant to sections 72-270 to 72-274 and to prescribe  
7 such terms and conditions, including bonds, as it shall deem  
8 necessary in order to protect the interests of the state and its  
9 lessees.

10           Sec. 16. Section 76-3001, Revised Statutes Supplement,  
11 2011, is amended to read:

12           76-3001 For purposes of sections 76-3001 to 76-3004:

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

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

1           Sec. 17. Section 77-2704.57, Revised Statutes Cumulative  
2 Supplement, 2010, is amended to read:

3           77-2704.57 (1) Sales and use tax shall not be imposed on  
4 the gross receipts from the sale, lease, or rental of personal  
5 property for use in a C-BED project or community-based energy  
6 development project. This exemption shall be conditioned upon filing  
7 requirements for the exemption as imposed by the Tax Commissioner.  
8 The requirements imposed by the Tax Commissioner shall be related to  
9 ensuring that the property purchased qualifies for the exemption. The  
10 Tax Commissioner may require the filing of the documents showing  
11 compliance with section 70-1907, the organization of the project, the  
12 distribution of the payments, the power purchase agreements, the  
13 project pro forma, articles of incorporation, operating agreements,  
14 and any amendments or changes to these documents during the life of  
15 the power purchase agreement.

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

24           (3) For purposes of this section:

25           (a) C-BED project or community-based energy development

1 project means a new wind energy project that:

2 (i) Has an ownership structure as follows:

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

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

13 (ii) Has a resolution of support adopted:

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

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

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

24 (c) New wind energy project means any tangible personal  
25 property incorporated into the manufacture, installation,

1 construction, repair, or replacement of a device, such as a wind  
2 charger, windmill, or wind turbine, which is used to convert wind  
3 energy to electrical energy or for the transmission of electricity to  
4 the purchaser; and

5 (d) Qualified owner means:

6 (i) A Nebraska resident;

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

11 (iii) A Nebraska nonprofit corporation organized under  
12 the Nebraska Nonprofit Corporation Act;

13 (iv) An electric supplier as defined in section  
14 70-1001.01, except that ownership in a single C-BED project is  
15 limited to no more than:

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

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

20 (v) A tribal council.

21 (4) Gross power purchase agreement payments are the total  
22 amount of payments during the life of the agreement. For power  
23 purchase agreements entered into on or before December 31, 2011, if  
24 the qualified owners have a combined total of at least thirty-three  
25 percent of the equity ownership in the C-BED project, gross power

1 purchase agreement payments shall be reduced by the debt financing  
2 payments. For the purpose of determining eligibility of the project,  
3 an estimate of the payments and their recipients shall be used.

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

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

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

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

24 Sec. 18. Section 79-309.01, Revised Statutes Cumulative  
25 Supplement, 2010, is amended to read:

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

9                   (b)(i) If the seventy-five percent requirement has been  
10 met for the year, the Commissioner of Education shall use the  
11 separate accounting provided by the State Treasurer under subdivision  
12 (1)(b) of section 79-1035 to determine the amount of the  
13 apportionment to each school district under section 79-1035 that is  
14 attributable to income from solar or wind ~~energy~~ ~~leases~~ agreements on  
15 school lands. The commissioner shall notify each school district of  
16 such amount within five days after certification of the apportionment  
17 required pursuant to subsection (3) of section 79-1035. Each school  
18 district shall use the amount of apportionment funds specified in the  
19 notice provided by the commissioner for the purpose of teacher  
20 performance pay. Such amount shall be used as a supplement to the  
21 salary schedule as provided in local collective-bargaining  
22 agreements. For purposes of distribution of such funds only, the  
23 Legislature finds that teacher performance pay measurements,  
24 criteria, and payout amounts are mandatory topics of collective  
25 bargaining. If a school district has not included a system for

1 distributing apportionment funds attributable to income from solar or  
2 wind ~~energy leases agreements~~ on school lands for teacher performance  
3 pay within its local collective-bargaining agreement, the amount of  
4 apportionment funds specified in the notice provided by the  
5 commissioner shall be returned to the State Treasurer within one  
6 month of receipt of such funds. The State Treasurer shall immediately  
7 credit any funds returned under this section to the temporary school  
8 fund. Any funds returned under this section shall be redistributed  
9 from the temporary school fund in the following year and shall no  
10 longer be designated as income attributable to solar or wind ~~energy~~  
11 ~~leases agreements~~ on school lands.

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

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

18 (3) For purposes of this section:

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

21 (b) Teacher performance pay means a systematic process  
22 for measuring teachers' performance and linking the measurements to  
23 changes in teacher pay. Indicators of teacher performance may include  
24 improving professional skills and knowledge, classroom performance or  
25 instructional behavior, and instructional outcomes. Teacher

1 performance pay may include predetermined bonus amounts and payout  
2 criteria.

3 Sec. 19. Section 79-1035, Revised Statutes Cumulative  
4 Supplement, 2010, is amended to read:

5 79-1035 (1)(a) The State Treasurer shall, each year on or  
6 before the third Monday in January, make a complete exhibit of all  
7 money belonging to the permanent school fund and the temporary school  
8 fund as returned to him or her from the several counties, together  
9 with the amount derived from other sources, and deliver such exhibit  
10 duly certified to the Commissioner of Education.

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

20 (2) On or before February 25 following receipt of the  
21 exhibit from the State Treasurer pursuant to subsection (1) of this  
22 section, the Commissioner of Education shall make the apportionment  
23 of the temporary school fund to each school district as follows: From  
24 the whole amount there shall be paid to those districts in which  
25 there are school or saline lands, which lands are used for a public

1 purpose, an amount in lieu of tax money that would be raised if such  
2 lands were taxable, to be fixed in the manner prescribed in section  
3 79-1036; and the remainder shall be apportioned to the districts  
4 according to the pro rata enumeration of children who are five  
5 through eighteen years of age in each district last returned from the  
6 school district. The calculation of apportionment for each school  
7 fiscal year shall include any corrections to the prior school fiscal  
8 year's apportionment.

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

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

17 Sec. 20. Original sections 66-901, 66-902, 66-909,  
18 66-910, 66-911.01, and 66-912, Reissue Revised Statutes of Nebraska,  
19 sections 72-270, 72-271, 72-272, 72-273, 72-274, 77-2704.57,  
20 79-309.01, and 79-1035, Revised Statutes Cumulative Supplement, 2010,  
21 and section 76-3001, Revised Statutes Supplement, 2011, are repealed.

22 Sec. 21. The following sections are outright repealed:  
23 Sections 66-907, 66-909.03, and 66-911, Reissue Revised Statutes of  
24 Nebraska.