

## LEGISLATIVE BILL 828

Approved by the Governor March 7, 2012

Introduced by Dubas, 34.

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

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

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

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

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

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

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

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

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

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

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

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

66-910 Any property owner may grant a solar ~~skyspace easement agreement~~ agreement or wind energy ~~easement agreement~~ agreement in the same manner and with the same effect as a conveyance of any other interest in real property. The ~~easement shall be created in writing and shall be filed, duly recorded, and indexed in the office of the register of deeds of the county in which the real property subject to the easement is located. No duly recorded easement shall be unenforceable on account of lack of privity of estate or privity of contract. Such easements shall run with the land or lands benefited and burdened and shall constitute a perpetual easement, except that a solar~~

~~skyspace easement or wind energy easement may terminate upon the conditions stated therein or by agreement of the owners of the lands benefited and burdened.~~

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

72-272 The board may authorize ~~leases~~ agreements for the use of any school or public lands belonging to the state and under its control for exploration and development of wind energy or solar energy for such durations and under such terms and conditions as the board shall deem appropriate,

except that ~~the initial term for any such wind energy lease and any amendment thereto shall not exceed forty years.~~ such agreements shall comply with sections 66-901 to 66-914 and sections 3, 4, 9, and 10 of this act. In making such determinations, the board shall consider comparable arrangements involving other lands similarly situated and any other relevant factors bearing upon such leases. Any such lease authorized by the board shall be created in writing and shall be filed, duly recorded, and indexed in the office of the register of deeds of the county in which the real property subject to the lease is located. Such leases shall run with the land benefited and burdened and shall include, as applicable, the contents specified in sections 66-911 and 66-911.01. agreements.

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

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

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

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

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

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

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

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

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

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

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

76-3004 No interest in any wind or solar resource located on a tract of land and associated with the production or potential production of ~~wind-generated~~ wind or solar energy on the tract of land may be severed from the surface estate.

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

77-2704.57 (1) Sales and use tax shall not be imposed on the gross receipts from the sale, lease, or rental of personal property for use in a C-BED project or community-based energy development project. This exemption shall be conditioned upon filing requirements for the exemption as imposed by the Tax Commissioner. The requirements imposed by the Tax Commissioner shall be related to ensuring that the property purchased qualifies for the exemption. The Tax Commissioner may require the filing of the documents showing compliance with section 70-1907, the organization of the project, the

distribution of the payments, the power purchase agreements, the project pro forma, articles of incorporation, operating agreements, and any amendments or changes to these documents during the life of the power purchase agreement.

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

(3) For purposes of this section:

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

(i) Has an ownership structure as follows:

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

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

(ii) Has a resolution of support adopted:

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

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

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

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

(d) Qualified owner means:

(i) A Nebraska resident;

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

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

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

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

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

(v) A tribal council.

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

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

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

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

been due.

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

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

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

(b)(i) If the seventy-five percent requirement has been met for the year, the Commissioner of Education shall use the separate accounting provided by the State Treasurer under subdivision (1)(b) of section 79-1035 to determine the amount of the apportionment to each school district under section 79-1035 that is attributable to income from solar or wind energy leases agreements on school lands. The commissioner shall notify each school district of such amount within five days after certification of the apportionment required pursuant to subsection (3) of section 79-1035. Each school district shall use the amount of apportionment funds specified in the notice provided by the commissioner for the purpose of teacher performance pay. Such amount shall be used as a supplement to the salary schedule as provided in local collective-bargaining agreements. For purposes of distribution of such funds only, the Legislature finds that teacher performance pay measurements, criteria, and payout amounts are mandatory topics of collective bargaining. If a school district has not included a system for distributing apportionment funds attributable to income from solar or wind energy leases agreements on school lands for teacher performance pay within its local collective-bargaining agreement, the amount of apportionment funds specified in the notice provided by the commissioner shall be returned to the State Treasurer within one month of receipt of such funds. The State Treasurer shall immediately credit any funds returned under this section to the temporary school fund. Any funds returned under this section shall be redistributed from the temporary school fund in the following year and shall no longer be designated as income attributable to solar or wind energy leases agreements on school lands.

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

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

(3) For purposes of this section:

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

(b) Teacher performance pay means a systematic process for measuring teachers' performance and linking the measurements to changes in teacher pay. Indicators of teacher performance may include improving professional skills and knowledge, classroom performance or instructional behavior, and instructional outcomes. Teacher performance pay may include predetermined bonus amounts and payout criteria.

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

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

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

(2) On or before February 25 following receipt of the exhibit from the State Treasurer pursuant to subsection (1) of this section, the

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

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

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

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

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

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