Stephen Moore and Bill Lock, Research Analysts,
Revenue Committee, Nebraska Legislature (January10, 2011).

LR 496 Interim Study: Nebraska's Taxation of the Wind Energy Industry

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Addendum

Since the date that this 2010 Revenue Committee interim study committee report was written (January 10, 2011), the Nebraska Supreme Court issued its decision in *Vandenberg v. Butler County Board of Equalization*, 281 Neb. 437 (April 28, 2011) (hereinafter referred to as *Vandenberg*).

In the *Vandenberg* case, the Nebraska Supreme Court held that the traditional "three-part test for determining whether a fixture is real or personal property. . . does not apply to determinations"[i] involving the question "trade fixtures," as defined in Neb. Rev. Stat. section 77-105, are real or personal property, because, in the Court's view, section 77-105 "clearly controls the issue of classification of fixtures for purposes of taxation."[ii]

Furthermore, in its *Vandenberg* opinion, the Nebraska Supreme Court "expressly overruled"[iii] its prior decision in *Northern Natural Gas Co. v. State Board of Equalization*, 232 Neb. 806, 443 N.W.2d 249 (1989), "[t]o the extent that *Northern Natural Gas Co.* holds to the contrary. . . ."[iv]

The Nebraska Supreme Court's decision in the *Vandenberg* case is relevant to the discussion of trade fixtures throughout this 2010 Revenue Committee interim study committee report, especially Part IV of this report.

Moreover, the Court's decision in the *Vandenberg* case is sufficiently significant to *caution readers* that the analysis and related conclusions expressed in this interim study committee report should now be read, contemplated, and altered accordingly in light of the Court's decision and rationale in the *Vandenberg* case.

A copy of the *Vandenberg* case is attached to this "Addendum" for the convenience of readers of this 2010 Revenue Committee interim study committee report.

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[i] *Vandenberg v. Butler County Board of Equalization*, 281 Neb. 437, 442 (April 28, 2011).

[ii] Id.

[iii] Id.

[iv] Id.

criminal act of making false statements under oath. Even in rough-and-tumble political discourse, a charge of specific illegal conduct by a public individual, if false and made with actual malice, is not protected by the First Amendment and is defamatory. Whether these accusations are false and made with malice can only be determined by examining evidence at trial. Neither the trial court nor this court has seen the affidavit. I would conclude that the district court erred when it determined prematurely that the affidavit-related allegations in publications Nos. 3 and 4 could not succeed at trial and therefore dismissed these claims at the pretrial stage. To this limited extent, I would reverse the district court's order, permit the case to proceed solely as to the defamation claims regarding publications Nos. 3 and 4, and await the evidence.

BETTY VANDENBERG, APPELLEE, V. BUTLER COUNTY BOARD OF EQUALIZATION, APPELLANT.

___ N.W.2d ___

Filed April 28, 2011. No. S-10-783.

1. **Taxation: Judgments: Appeal and Error.** Appellate courts review decisions rendered by the Tax Equalization and Review Commission for errors appearing on the record.
2. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Taxation: Appeal and Error.** Questions of law arising during appellate review of Tax Equalization and Review Commission decisions are reviewed de novo on the record.

Appeal from the Tax Equalization and Review Commission. Reversed and remanded.

Julie L. Reiter, Butler County Attorney, for appellant.

No appearance for appellee.

HEAVICAN, C.J., CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

McCORMACK, J.

NATURE OF CASE

The Butler County Board of Equalization (Butler County) appeals an order of the Tax Equalization and Review Commission (TERC). TERC determined that the irrigation pump at issue in this case is a fixture and should be taxed as real property. The issue on appeal is whether the irrigation pump should be classified as a fixture and taxed as real property or a trade fixture and taxed as personal property, as defined in Neb. Rev. Stat. § 77-105 (Reissue 2009). For the following reasons, we reverse TERC's determination.

BACKGROUND

Betty Vandenberg owns a parcel of land which she leases to individuals who farm the land. The parcel contains an irrigation well, a pump, a motor for the pump, a gear box attaching the motor to the pump, a pipe to carry water from the pump to a center pivot, and the center pivot, which is used to irrigate the land. The only property at issue in this appeal is the irrigation pump. The pump hangs inside a cased well and is secured to the land with a cement cap and bolts. The county assessor determined the pump was taxable as personal property. Vandenberg appealed this determination to TERC.

After a hearing, TERC reversed the assessor's determination and found that the pump qualified as a fixture. TERC relied, in part, on *Cook v. Beermann*.[1] In *Cook*, this court determined that an irrigation pump in a well was a fixture included in the sale of real property. The pump in the present case, TERC reasoned, is like the irrigation pump in *Cook* and qualifies as a fixture. TERC noted that not all fixtures are real property for purposes of taxation.[2] To determine whether the pump should be taxed as real or personal property, TERC analyzed the applicability of § 77-105. While § 77-103 provides that "fixtures" shall be taxed as real property, "trade fixtures" are taxable as personal property under § 77-105. Section 77-105 states in part: "The term tangible personal property also includes trade fixtures,

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[1] *Cook v. Beermann*, 201 Neb. 675, 271 N.W.2d 459 (1978).

[2] See Neb. Rev. Stat. § 77-103 (Reissue 2009).

which means machinery and equipment, regardless of the degree of attachment to real property, used directly in commercial, manufacturing, or processing activities conducted on real property, regardless of whether the real property is owned or leased." TERC noted that the pump is machinery, but is not "used in a commercial, manufacturing or processing activity." Accordingly, TERC determined that the pump was a fixture and should be taxed as real property.

Butler County appeals. No brief was filed on behalf of Vandenberg.

ASSIGNMENTS OF ERROR

Butler County assigns that TERC erred in finding that an irrigation pump is (1) a fixture and therefore real property for the purposes of taxation and (2) not "machinery and equipment" used directly in "commercial, manufacturing, or processing activities," as set forth in § 77-105.

STANDARD OF REVIEW

[1-3] Appellate courts review decisions rendered by TERC for errors appearing on the record.[3] When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.[4] Questions of law arising during appellate review of TERC decisions are reviewed de novo on the record.[5]

ANALYSIS

AMENDMENT TO § 77-105

Section 77-105 states in full:

> The term tangible personal property includes all personal property possessing a physical existence, excluding money. *The term tangible personal property also includes trade fixtures, which means machinery and equipment,*

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[3] *Vitalix, Inc. v. Box Butte Cty. Bd. of Equal.*, 280 Neb. 186, 786 N.W.2d 326 (2010).

[4] *Id.*

[5] *Id.*

> *regardless of the degree of attachment to real property, used directly in commercial, manufacturing, or processing activities conducted on real property, regardless of whether the real property is owned or leased.* The term intangible personal property includes all other personal property, including money.

(Emphasis supplied.) The emphasized portion above was added by the passage of 2007 Neb. Laws, L.B. 334. The Committee Statement on L.B. 334 gives the purpose of the amendment:

> [T]o specifically exclude trade fixtures from the definition of real property (section 77-103), and include trade fixtures within the definition of personal property (section 77-105). Trade fixtures would be defined as machinery and equipment used directly in commercial, manufacturing, or processing activities. The degree of attachment to the real property would be irrelevant under [the amendment].[6]

The Nebraska Administrative Code also defines trade fixtures:

> Trade fixture shall mean an item of machinery or equipment, used in commercial, manufacturing, or processing activities. The degree of attachment shall have no influence towards classifying the machinery or equipment as real property. Trade fixtures are items of personal property which are placed upon or affixed to real property for the sole purpose of carrying on a trade or business.[7]

Because Vandenberg leases the land to farmers who utilize the land to obtain monetary profits, Butler County argues that the pump is a piece of machinery used in commercial activities. At the hearing before TERC, Vandenberg argued that according to the tax code, she obtains rental income from the property, not income from a trade or business. Based upon our de novo review of the record, we determine that the pump in this case qualifies as a trade fixture.

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[6] Committee Statement, L.B. 334, Revenue Committee, 100th Leg., 1st Sess. (Feb. 1, 2007).

[7] 350 Neb. Admin. Code, ch. 10, § 001.29 (2009).

The language of § 77-105 is clear: The term "tangible personal property" includes trade fixtures, which means machinery and equipment, regardless of the degree of attachment to real property, used directly in commercial, manufacturing, or processing activities conducted on real property, regardless of whether the real property is owned or leased. TERC correctly determined that the pump qualifies as machinery. The statute does not specify *who* must use the machinery so that it shall be classified as a trade fixture. The language only specifies *how* the machinery must be used to be classified as personal property—such use being commercial, manufacturing, or processing activities.

It is undisputed that the parcel of land in this case is used for farming. The Nebraska Administrative Code defines agricultural land as "a parcel of land primarily used for agricultural . . . purposes."[8] "Agricultural purposes" means "used for the commercial production of any plant or animal product in a raw or unprocessed state that is derived from the science and art of agriculture."[9] Commercial production is also defined as "agricultural and horticultural products produced for the primary purpose of obtaining a monetary profit."[10] The pump is used to move water from a well to a pivot system in order to irrigate the crops produced on the parcel land. These crops are produced for the primary purpose of obtaining a monetary profit. Such use amounts to commercial production of agricultural products, which qualifies as "commercial activity" for the purposes of § 77-105.

Whether Vandenberg personally engages in commercial activities on the land is irrelevant. The statutory language clearly focuses on the activity being conducted on the land, not who is conducting that activity. The pump is used directly in commercial activity conducted on the property. The pump meets the requirements provided in § 77-105, and therefore,

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[8] 350 Neb. Admin. Code, ch. 14, § 002.05 (2009).

[9] 350 Neb. Admin. Code, ch. 10, § 001.05F (2009).

[10] 350 Neb. Admin. Code, ch. 14, § 002.58 (2009).

it should be classified as a trade fixture and taxed as personal property.

APPLICABILITY OF THREE-PART TEST

Butler County argues that the three-part test for determining whether a fixture is real or personal property, discussed in *Cook*[11] and later approved in *Northern Natural Gas Co. v. State Bd. of Equal.*,[12] was superseded by the amendment to § 77-105. The test was articulated in *Northern Natural Gas Co.*:

> To determine whether an item constitutes a fixture, this court looks at three factors: (1) actual annexation to the realty, or something appurtenant thereto, (2) appropriation to the use or purpose of that part of the realty with which it is connected, and (3) the intention of the party making the annexation to make the article a permanent accession to the freehold.[13]

The three-part test was appropriately applied in *Cook* and remains appropriate for determinations of whether fixtures should be encompassed by land sale contracts. However, § 77-105 clearly controls the issue of classifications of fixtures for taxation purposes. Accordingly, the three-part test does not apply to taxation determinations of this nature. To the extent that *Northern Natural Gas Co.*[14] holds to the contrary, it is expressly overruled.

CONCLUSION

For the foregoing reasons, we reverse TERC's determination and remand the cause for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

WRIGHT, J., not participating.

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[11] *Cook v. Beermann, supra* note 1.

[12] *Northern Natural Gas Co. v. State Bd. of Equal.*, 232 Neb. 806, 443 N.W.2d 249 (1989), *disapproved on other grounds, MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991).

[13] *Id.* at 817, 443 N.W.2d at 257.

[14] *Northern Natural Gas Co. v. State Bd. of Equal., supra* note 12.

Overview of Wind Energy Tax Policy in Nebraska

In general, the purpose of LR 496 is to study issues relating to state and local taxation of wind energy electrical generation facilities.

Passage of LB 1048 during the 2010 session put Nebraska in a better position to develop wind energy resources in this state. The main purpose of the legislation was creating a clearly defined regulatory environment where permission to build wind energy facilities and transmission lines for wind export can now be obtained under Nebraska law.

Tax treatment of this industry was also changed under LB 1048. The legislation created a property tax exemption for wind energy facilities and a new form of tax on such facilities, termed a nameplate capacity tax. LR 496 was introduced to provide a legislative study on the tax aspects of LB 1048.

A public hearing was held in September of 2010 to give local officials in Knox County Nebraska an opportunity to voice any concerns about the LB 1048 tax provisions. This location was chosen for a hearing because the states first major privately owned investment in a wind farm is located there. The Revenue Committee members were joined by Senator Chris Langemeier, a sponsor of LB 1048, at this hearing. Testimony was taken from several members of the Knox County board, two elected county assessors from Knox and Antelope Counties, and some local citizens. No representative of other local governments testified, although the Bloomfield school district did submit testimony by correspondence with the Revenue Committee after the hearing. Concerns that surfaced or were the source of questions at this hearing are addressed in this report.

One concern expressed in this hearing involved the impact on the Knox County governments of a provision in the legislation which grants wind farms a credit for prior property taxes paid. This credit offsets liability under the new nameplate capacity tax created under LB 1048. The impact on Knox County governments is that they will receive no tax revenues from the nameplate capacity tax for approximately 7 years. Taxes levied in Knox County in the first year of the project under Nebraskans property tax laws were approximately 2 million dollars. Taxes which could be collected under the nameplate capacity tax are set at 3815 dollars per megawatt of nameplate capacity. The Knox County project is a 81 megawatt facility. The total nameplate capacity taxes due in any one year on a 81 megawatt facility under the new tax structure would total just under 285,000 dollars per year. The facility in Knox County is the only facility which does qualify for the credit, and was declared exempt from property taxes in its second year of existence. It appears that Knox County local governments will not derive any tax revenue from the project for at least seven years.

A second concern was expressed about the ability of local assessing officials to assign taxable value to the sites of wind towers under property tax law. Discussions between state officials in the Revenue Department and local assessing officials led local officials to the conclusion that LB 1048 allowed a complete property tax exemption for <u>all</u> wind farm equipment and fixtures. This includes items which had been valued as real property

in previously published guidelines for assessment of such facilities. A portion of the unit value of the Knox County wind farm was classified as real property in the 2009 tax year.

Guidance on enforcement of the new law received by local officials was that the sites of the towers were part of the state centrally assessed property, and were made exempt under LB 1048 based on the Department's interpretation. The effective date of the act occurred prior to the department's required report of centrally assessed value to the local officials. Significantly, Nebraska statute section 77-1201 provides that "All tangible personal property in this state subject to taxation shall be assessed as of January 1 at 12:01 a.m., which assessment shall be used as a basis of taxation until the next assessment" and also requires taxpayers to make "[a] complete list of all taxable tangible personal property held or owned on the assessment date. . . ."

Local officials testified that they were advised to value the land on which the towers stood as though no tower or wind farm use was present. The result is an assessment of these physical sites at agricultural use value, as that is the use of the adjoining land. This will be the result in all other site value determinations occurring in Nebraska for wind farms under the total property value exemption language adopted by the Legislature.

Nebraska's state constitution allows the Legislature to grant exemptions for personal property value, including defined classes of personal property. [Article VIII, section 2(9), of the Nebraska Constitution.] That article provides that:

> "the Legislature may define and classify <u>personal property</u> in such manner as it sees fit, whether by type, use, user, or owner, and may exempt any such class or classes of property from taxation if such exemption is reasonable or may exempt all personal property from taxation. . . ." (Emphasis added.)

Lease payments for commercial site use are made to landowners in Knox County, and appear to be made in most situations. Local assessing officials testifying believed it was appropriate to determine real property value for the sites under site assessment practices used for other commercial sites. However, LB 1048 exempts <u>all</u> property value, real and personal, associated with the wind farms. The wind farms are centrally assessed by the state under the law, and they have been determined to be nontaxable sites. All <u>real and personal property value</u> has been viewed as exempt under LB 1048.

The instructions given the local officials were to assess the land value as though the entire development site and improvements were in use as agricultural land, and no wind farm tower site existed, due to the all-encompassing real and personal property tax exemption granted by LB 1048. Local assessing officials questioned whether this policy was the correct result, given real property value treatment of the centrally assessed wind farm, and current policy on other assessed property.

Under law prior to LB 1048, wind farms which had been subject to taxation under property tax law were required to report the taxable property value to state assessing officials, as wind farms are businesses subject to centralized assessment as public utilities. This policy is implemented by the Division of Property Assessment of the Nebraska Revenue Department. A similar policy applies to other utility and public service properties including telephone utilities, railroads and pipelines.

Personal and real property value was added to the tax base of each government imposing a tax on the site of the wind farm in Knox County. This had occurred in 2009 when the Elkhorn Ridge wind farm was built. Under Nebraska law, the taxable personal property value of the wind farm is determined using the "net book value" concept. Under this concept Nebraska uses federal law on depreciation of assets as a basis for property value and taxation. In the case of the wind turbines installed in 2009, the net book value calculation used a five year depreciation provision found in federal law. These facilities are commonly estimated to have a useful life which is longer than five years, extending to 20 years in some cases. The use of five year depreciated value gave a fixed and limited term impact to the broadening of the local tax base from construction of this approximately 140 million dollar investment. The total taxable value was determined by state officials using methods used for all other "centrally assessed" property. Most of the wind farm value was determined to be personal property (approximately 97 million dollars of value in the first year), while some value (approximately 24 million) was determined to be real property value.

The portion of value that is personal property value decreases rapidly due to the five year period of net book value depreciation. However, under personal property tax law, if new turbines were installed to replace the originally installed turbines, the net book value method would begin anew on that equipment. This would create an increase in the taxable value at the site. In addition, if the used turbines were to be sold to another owner, the net book value method would begin again for that new owner. This would produce another increase in taxable value at a different site, payable by the new owners.

LB 1048 repealed this set of property tax laws, and established a nameplate capacity tax. Under this new tax structure, the tax liability will be determined using a statutorily fixed rate of tax multiplied times the nameplate rated capacity of each turbine. Changes in ownership of the wind farm, or replacement of existing turbines with a new and as yet undepreciated turbines of the same capacity will not change the tax liability of the wind farm site under this new tax structure. Its impact on the local tax base is now fixed by law at 3,518 dollars per megawatt of capacity. In the case of a 81 megawatt facility, this annual tax yield is $284,958 dollars. By way of contrast, the first year impact the turbine project in Knox County was approximately 2 million dollars, with 121 million dollars of total value taxed at a rate of 1.65 dollars per one hundred dollars of taxable value. This combined tax rate ($1.65 per $100 of taxable value) is typical in Nebraska in the rural areas where these wind farms are likely to be located. Notably, in the year prior to the construction of the wind farm the combined tax rate at this Knox county site was approximately 1.9773 dollars per one hundred dollars of taxable value. Addition of this large increment of new taxable value resulted in a 33-cent reduction in tax rate. This yield

and applied rates from the original local property value would have changed over time. We assume the total combined rate would have increased over time as the original taxable value is rapidly depreciated.

Under the new tax structure created by LB 1048, local budget and tax rate decisions will have no impact on the tax liability of wind farms. The total taxes paid will remain the same as long as the installed capacity remains the same.

No higher taxable value or tax liability will emerge when ownership changes, or when failed turbines are replaced with new machines of the same capacity. Replacement of original turbines with more costly and/or efficient turbines of the same capacity will not increase or change in any fashion the tax liability of the wind farm. This gives investors and owners of wind farms and wind farm sites a stable and predictable tax liability into the future. It leaves local government a steady and secure source of local funding, although it will have a much smaller impact on local rates and finances than adding large amounts of value at initial construction.

This policy also removes any significant tax burden shifting the impact on the tax liability borne by other local property taxpayers. Communities will be less likely to benefit from a lower rate from a broader tax base due to economic growth. Nor will there be a significant impact of increased revenue for public services.

Communities would, we assume, base their judgement of the merits of wind farm and transmission line development on the other impacts in their community. These include the impacts from new jobs in the community. There are direct economic impacts for the original land owners of each wind farm site who benefit directly from the additional lease or rental income paid by the wind farm project. Under Nebraska's tax policy there will be no large impact on local tax rates or public services. Discussion by community members will instead focus on economic factors, such as impact on rates, economic externalities (including noise, visual impacts, potential harm to other natural resources, or interference with other economic uses of the land). Tax shifting effects, tax exporting effects, and opportunity for increased public services probably will have minimal effect.

County board testifiers at the Revenue Committee hearing in Bloomfield expressed some concern that road maintenance costs were increased by the projects. They asserted that without an ongoing stream of tax revenues from the project this may shift the service burdens on to other taxpayers. This scenario will only be relevant for the Knox County local governments, as none of them will receive any nameplate capacity revenue for approximately seven years. The credit for prior property taxes paid operates only in that county and only for the Elkhorn Ridge Project, as no other projects existed when LB 1048 was enacted, approved, and became law.

All other qualified wind farms developed after LB 1048 became law will pay the new nameplate capacity tax from the first year of their connection to the electric grid,. This will give a *county* government an annual payment of approximately 55,000 dollars for a 80 megawatt wind farm given the *typical* Nebraska county property tax share of the yield

from the nameplate capacity tax. This amount will be available to fund public service provided by counties governments. The impact on schools—the largest major public service provider and property tax funded local government—will be larger in terms of revenue. The amount typically received by a school district with an 80 megawatt wind farm will be approximately 180,000 dollars of revenue. This would be equivalent to 6.5 percent of the annual 2009 funding needs of the Bloomfield school system.

Under the new nameplate capacity tax the impact on state tax resources will be minimal. The amount added to school resources from this tax will reduce the need for state aid resources. Nebraska's state aid formula will treat the nameplate capacity tax as a new resource, which could reduce the state aid provided to the school district where a wind farm is sited, provided the school is receiving state equalization aid. This will not have a major tax shifting impact on the other property taxpayers or the schools resources for education of children. 800 megawatts of statewide installed capacity may reduce the amount of statewide school aid budgeted by 2,700,000 dollars annually. The actual amount of state aid offset is likely to be much smaller than this, because it appears that most facilities will be built in districts with high taxable value relative to school needs.

Certain wind producing equipment receives a sales tax exemption under Section 77-2704.57, shown here:

(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.

The impact on state finances of this exemption is not well known, as few wind farms have been placed in service. An estimate assumes that taxable sales of 1 million dollars per megawatt would be possible, yielding 55,000 dollars of state sales tax per megawatt constructed. If all such sales are subject to sales tax, the development of 800 megawatts statewide would generate 44 million dollars of sales tax revenue over the period it took to build that much capacity.

We assume most, if not all, wind farm machinery and equipment will be sales tax-exempt under state law.

If wind farms become a successful export industry, taxes paid by the owners and investors could become a source of tax-exporting for Nebraska, much like coal, oil and natural gas industries are for energy rich states including Wyoming, North Dakota, and Montana. Policymakers in Nebraska clearly intend for an export industry to emerge.

State and local taxation has, in some instances, been viewed by courts as a barrier to interstate commerce. Nebraska legislators are cautioned against creating a tax which discriminates against interstate commerce by giving favorable tax treatment to in-state taxpayers at the expense of out-of-state taxpayers. In that regard, we note that under LB 1048, "customer-generators" are exempt from both property tax and nameplate capacity

tax. Commissioned wind generation facilities selling to out-of-state customers are subject to the name plate capacity tax.

If wind turbines and ancillary equipment are eventually manufactured and made in Nebraska, which is a generally accepted goal of the legislation, this will also benefit the Nebraska economy. Nebraska is well prepared to incentivize this goal. Nebraska Advantage Act tax incentives are available to manufacturing industries.

It seems likely that these manufacturing jobs will be created in cities where a large enough workforce with sufficient skills can be assembled to manufacture a complex piece of equipment. If this is the case, tax increment financing by cities may also be available for new manufacturing facilities infrastructure. Ethanol plants provide a recent example of use of this Nebraska economic development tool.

These tax policies, if firmly and clearly established, will provide the public policy environment for this industry to eventually mature and prosper into an important contributor to Nebraska's economy. Nebraskans may expect a result like that obtained from the ethanol industry. We note, however, that production credits and mandated purchases have done much to cause the ethanol industry to grow over the course of its 50-year history. No equivalent policies exist in Nebraska for wind farms.

The short-term prospects for this growth scenario are good, given the existence of federal financing and favorable federal tax treatment for the wind industry. Mandated purchases and rates for wind capacity are in use as policy tools in many other states. Mandated purchases and production credits may be the policy tool used in order to incentivize investment in this emerging industry, much as it did for the ethanol industry.

Federal transfers, favorable federal and state tax treatment, and mandated purchasing of clean energy in other states may cause the emergence of the wind industry in Nebraska as they did for the ethanol industry. Nebraskans may be able to make a contribution to a national energy production goal with a minimal impact on other taxpayers' tax burdens, no increased impact on ratepayers, and a minimal sacrifice of Nebraska's natural resources and environment. This development will have the long term effect of providing good jobs producing energy with known environmental impacts.

Its important to maintain a stable and predictable policy environment, including a tax policy environment which is on firm legal ground, in order for this industry growth scenario to emerge.

In that regard, the nameplate capacity tax will provide stable and predictable tax treatment for investors. It creates a tax liability which will remain known and certain regardless of changes of ownership, purchase of new equipment, and improved technologies. However, reasonable doubts about the legal soundness of this tax policy should be resolved.

Some aspects of this new tax policy may need legislative clarification in order for this stable tax policy environment stability to exist.

In the opinion of Revenue Committee staff, the credit for past property taxes paid against the new nameplate capacity may constitute a commutation of taxes, a policy deemed unconstitutional under Article VIII, section 4, of the Nebraska Constitution, which provides:

> "Except as to tax and assessment charges against real property remaining delinquent and unpaid for a period of fifteen years or longer, the Legislature shall have no power to release or discharge any county, city, township, town, or district whatever, or the inhabitants thereof, or any corporation, or the property therein, from their or its proportionate share of taxes to be levied for state purposes, or due any municipal corporation, nor shall commutation for such taxes be authorized in any form whatever; Provided, that the Legislature may provide by law for the payment or cancellation of taxes or assessments against real estate remaining unpaid against real estate owned or acquired by the state or its governmental subdivisions."

In addition, the total exemption of all wind farm property from property taxation may constitute an overly broad and unconstitutional grant of exemption of a property value under Article VIII, sections 1 and 2, of the Nebraska Constitution. The Legislature's power to exempt real property value from taxation is limited in scope. Exempting personal property must be for a reasonably defined class of personal property.

Resolution of the site value issue raised in Revenue Committee hearings should follow from a clarification of the extent of real or personal property definitions. Determination of that value remains the task of state government officials, as the real property value is part of the determination made through the centrally-assessed valuation process.

Finally, language guiding distribution of the nameplate capacity tax to Nebraska local governments may need revision. This is needed in order to practically divide the yield from the new tax among each relevant local government imposing a separate tax rate on the wind farm site. The procedure that should be used must determine how many turbines of what capacity are sited in which combination of local taxing units. If a wind farm of 80 megawatts is located in two counties, each county should get a share based on the county location of the site of each turbine. If 30 turbines are located in one county, and 50 turbines in an adjoining county, the distribution of the nameplate capacity should be done first by county turbine location. Then each taxing unit in the county must be given its share based on the tax rate applied at the site of each turbine in the prior tax year. If the 30 turbines in one county are located in different school districts, fire districts, and townships, the distribution of those turbines' capacity tax should be a taxing subdivision's percentage share of the total rate applicable to each turbine site. The current language may not provide sufficient guidance for this process, since it makes reference to taxes collected. Given that the wind farms are now exempt from property taxes, this instruction may not provide completely logical enforcement language.

Revenue Committee staff suggest that legislation be introduced to clarify portions of the legislation passed in 2010. As to the nameplate capacity tax credit mechanism for property taxes previously paid, it is arguably a commutation of taxes in violation of Article VIII, section 4, of the Nebraska Constitution. A 2011 legislative hearing on a bill to remove the tax credit provision should give wind-energy representatives an opportunity to represent their legal opinion with respect to this tax policy issue in the Legislature's public hearing environment.

We also recommend changes in the language defining the personal property tax exemption. This exemption should be limited to those items which can clearly be agreed to be depreciable tangible personal property. This language should not include items previously determined to be real property. Legislation to change this provision should be introduced and the issue examined during hearings.

We recommend that both of these issues be the subject of a request for a Nebraska Attorney General's opinion. Such an opinion can only be sought on pending legislation. Therefore, we are recommending the introduction of a bill that raises these issues. If such an Attorney Generals' opinion and the public hearing testimony resolves reasonable doubts about commutation of tax, the constitutionality of the property tax exemption, and other state and federal constitutional issues, the legislation may be unneeded.

Absent a lawsuit from a local government or taxpayer dissatisfied with this resolution of these issues, Nebraska will have a clearly defined and stable tax policy environment for development of the wind industry in Nebraska. The balance of this interim study committee report addresses some of the state and federal constitutional questions which have arisen as a result this interim study.

I. Purpose of Legislative Resolution 496

The purpose of LR 496 is "to study issues relating to state and local taxation of wind energy electrical generation facilities."[1]

II. Limitations placed on state and local taxation by the commerce clause of the United States Constitution, including the United States Supreme Court's "dormant" commerce clause jurisprudence, with respect to all types of taxes that could conceivably be imposed on such facilities or in connection with such facilities, including property taxes and excise taxes, such as income taxes, sales and use taxes, production taxes, and other excise taxes.

A. United States Supreme Court's "Dormant" Commerce Clause and Due Process Clause Jurisprudence Generally.

The U.S. Supreme Court clarified its Commerce Clause and Due Process jurisprudence with respect to state and local taxation in *Complete Auto Transit, Inc. v. Brady*,[2] which set forth a four-prong test to evaluate the constitutionality of state and local taxes under the Commerce Clause and Due Process Clauses of the U.S. Constitution.

1. The **first prong** of the *Complete Auto* test provides that "a state tax will withstand scrutiny under the Commerce Clause if 'the tax is applied to an activity with a ***substantial nexus with the taxing State***' . . . ."[3]

2. The "central purpose" of **second prong** of the *Complete Auto* test, the ***apportionment*** requirement, "is to ensure that each State taxes only its fair share of an interstate transaction."[4] There are two parts to the second prong of the *Complete Auto* test: Courts will analyze a state tax scheme to see if it is both internally and externally consistent.

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[1] LR 496 (2010), p. 1. More specifically, study "(1) Limitations placed on state and local taxation by the commerce clause of the United States Constitution, including the United States Supreme Court's "dormant" commerce clause jurisprudence, with respect to all types of taxes that could conceivably be imposed on such facilities or in connection with such facilities, including property taxes and excise taxes, such as income taxes, sales and use taxes, production taxes, and other excise taxes; (2) The classification of wind energy property as real property, personal property, and fixtures, including trade fixtures, and the Nebraska Supreme Court's jurisprudence with respect to the classification of property as real property, personal property, and fixtures, including trade fixtures; (3) Whether taxation of wind energy property should be centrally assessed property, locally assessed property, or both as may be necessary or appropriate; and (4) The distribution of state and local tax revenue that may be derived from the imposition of any types of taxes that could conceivably be imposed lawfully on such facilities or in connection with such facilities." [LR 496 (2010), pp. 1-2.]

[2] *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977)(hereinafter cited as *Complete Auto*).

[3] *Goldberg v. Sweet* and *GTE Sprint Communications Corporation v. Sweet*, 488 U.S. 252, 257 (1989)(hereinafter cited as *Goldberg*), quoting *Complete Auto*, 430 U.S. at 279.

[4] *Goldberg*, 488 U.S. at 260-61.

- To be externally consistent, a tax can lawfully reach "only that portion of the revenues from the interstate activity which reasonably reflects the in-state component of the activity being taxed."[5]

- "To be internally consistent, a tax must be structured so that if every state were to impose an identical tax, no multiple taxation would result."[6] The "internal consistency test focuses on the text of the challenged statute and hypothesizes a situation where other States have passed an identical statute."[7]

The U.S. Supreme Court has said that "'the Constitution imposes no single [apportionment] formula on the states'" and it has consistently "declined to undertake the essentially legislative task of establishing a 'single constitutionally mandated method of taxation.'"[8]

3. The **third prong** of the *Complete Auto* test asks if the State is "imposing a ***discriminatory tax on interstate commerce***."[9] In recent times, the Court has taken a pragmatic approach to this problem by focusing more on the practical realities of modern-day commercial transactions and less on measurable quantitative factors.[10]
4. The **fourth prong** of the *Complete Auto* test asks whether the "tax is fairly related to the presence and activities of the taxpayer within the State. . . . ***The purpose of this test is to ensure that a State's tax burden is not placed upon persons who do not benefit from***

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[5] *Goldberg*, 488 U.S. at 262.

[6] *Goldberg*, 488 U.S. at 261.

[7] *Goldberg*, 488 U.S. at 261.

[8] *Goldberg*, 488 U.S. at 261, quoting *Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159, 164, 171 (1983).

[9] *Goldberg*, 488 U.S. at 265.

[10] See, e.g., *Goldberg*, 488 U.S. at 252 (footnote 2 omitted): "This case comes to us against a backdrop of massive technological and legal changes in the telecommunications industry. Years ago, all interstate telephone calls were relayed through electric wires and transferred by human operators working switchboards. Those days are past. Today, a computerized network of electronic paths transmit thousands of electronic signals per minute through a complex system of microwave radios, fiber optics, satellites and cables. When fully connected, this network offers billions of paths from one point to another. When a direct path is full or not working efficiently, the computer instantly activates another path. Signals may even change paths in the middle of a telephone call without perceptible interruption. Thus, the path taken by the electronic signals is often indirect and typically bears no relation to state boundaries. The number of possible paths, the nature of the electronic signals, and the system of computerized switching make it virtually impossible to trace and record the actual paths taken by the electronic signals which create an individual telephone call."

services provided by the State. . . . [It] focuses on the wide range of benefits provided to the taxpayer, not just the precise activity connected to the interstate activity at issue."[11]

B. Equal Protection Clause Jurisprudence Generally

"The Equal Protection Clause does not mean that a State may not draw lines that treat one class of individuals or entities differently from the others. Where taxation is concerned and no specific federal right, apart from equal protection is concerned, the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation."[12]

"[S]tate tax classifications require only a ***rational basis*** to satisfy the Equal Protection Clause."[13] "States are, of course, bound by Supreme Court precedent when they construe the *federal* Equal Protection Clause. When construing equal protection clauses of state constitutions, however, the state courts are free to depart from the Supreme Court's view of equal protection."[14]

C. Nebraska's "Nameplate Capacity Tax" Evaluated in Light of the U.S. Supreme Court's Dormant Commerce Clause and Equal Protection Clause Jurisprudence.

Laws 2010, LB 1048, sections 12 to 15, impose Nebraska's nameplate capacity tax. [15]

1. Legislative Findings and Declarations

The legislation set forth four legislative findings and declarations, two of which are of particular significance for purposes of examining the constitutionality of Nebraska's nameplate capacity tax.

- "The purpose of the nameplate capacity tax levied under section 77-6203 is to replace property taxes currently imposed on wind infrastructure and depreciated over a short period of time in a way that causes local budgeting challenges and increases upfront costs for wind developers. . . ."[16]

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[11] *Goldberg*, 488 U.S. at 266-67, citing *Commonwealth Edison v. Montana*, 453 US 609, 627 (1981).

[12] *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 357 (1973) (emphasis added) (case challenging the constitutionality of Illinois' personal property tax under the Equal Protection Clause of the 14th Amendment of the United States Constitution).

[13] *General Motors Corp. v. Tracy*, 519 U.S. 278 (1997).

[14] *State and Local Taxation*, p. 60 (emphasis in original).

[15] Nebraska Laws 2010, LB 1048, sections 12 to 15, are codified at Neb. Rev. Stat. sections 77-6201 to 77-6204.

[16] Nebraska Laws 2010, LB 1048, section 12(1), codified at Neb. Rev. Stat. section 6201(1).

- "The nameplate capacity tax should be fair and nondiscriminatory when compared with other taxes imposed on other industries in the state. . . "[17]

2. The Tax Base and Rate of the Nameplate Capacity Tax

Nebraska's nameplate capacity tax is imposed on the total nameplate capacity of a commissioned wind turbine of a wind generation facility at a rate of $3,518 per megawatt of generating capacity.[18] Therefore, the tax base is "total nameplate capacity" and the tax rate is $3,518 per megawatt of generating capacity.

- "Nameplate capacity" means "the capacity of a wind turbine to generate electricity as measured in megawatts, including fractions of a megawatt. . . ."[19]
- "Commissioned" means "the wind turbine of a wind generation facility has been in commercial operation for at least twenty-four hours. A wind turbine is not in commercial operation unless the wind energy generation facility is connected to the electrical grid. . . ."[20]

3. Exemptions from the Nameplate Capacity Tax

The legislation expressly provides that:

> "No tax shall be imposed on a wind energy generation facility: (a) Owned or operated by the federal government, the State of Nebraska, a public power district, a public power and irrigation district, an individual municipality, a registered group of municipalities, an electric membership association, or a cooperative; or (b) That is a customer-generator as defined in section 70-2002."[21]

4. Credits Against the Nameplate Capacity Tax

The legislation expressly provides, in relevant part, that:

> "The amount of *property tax* previously paid on a wind energy generation facility commissioned prior to July 15, 2010, which is greater than the amount that would have been paid pursuant to sections 77-6201 to 77-6204 from the date of commissioning until January 1, 2010, shall be credited against any tax due under

[17] Nebraska Laws 2010, LB 1048, section 12(3), codified at Neb. Rev. Stat. section 6201(3).

[18] Nebraska Laws 2010, LB 1048, section 14(1), codified at Neb. Rev. Stat. section 6203(1).

[19] Nebraska Laws 2010, LB 1048, section 12(2), codified at Neb. Rev. Stat. section 6202(2).

[20] Nebraska Laws 2010, LB 1048, section 12(1), codified at Neb. Rev. Stat. section 6202(1).

[21] Nebraska Laws 2010, LB 1048, section 14(2), codified at Neb. Rev. Stat. section 6203(2).

Chapter 77, and any amount so credited that is unused in any tax year shall be carried over to subsequent tax years until fully utilized."[22]

5. Analysis of Nebraska's Nameplate Capacity Tax in light of the U.S. Supreme Court' Dormant Commerce Clause, Due Process, and Equal Protection Jurisprudence

a. The Substantial Nexus Requirement

Clearly, Nebraska's nameplate capacity tax does not violate the substantial nexus requirement because the property that comprises a wind-energy electrical generating facility is physically present within the geographic borders of the State of Nebraska.

b. The Fair Apportionment Requirement

Arguably, Nebraska's nameplate capacity tax does not violate the fair appotionment requirement because the nameplate capacity tax is both internally and externally consistent. Therefore, it arguaby meets the requirement of the U.S. Supreme Court's dormant commerce clause and due process jurisprudence with respect to fair apportionment.

The nameplate capacity tax is structured so that it can lawfully reach only that portion of the revenues from the interstate activity which reasonably reflects the in-state component of the activity being taxed. Therefore, the nameplate capacity tax arguably meets the "external consistency"

The nameplate capacity tax is structured so that if every state were to impose an identical tax, no multiple taxation would result. Hypothesize a situation where other States have passed an identical statute: Can reasonable minds identify a hypothetical situation in which multiple taxation would be the result? Probably not. Therefore, the nameplate capacity tax arguably meets the "internal consistency" requirement.

c. The Nondiscriminatory Tax on Interstate Commerce Requirement

Does the nameplate capacity tax impose a discriminatory tax on interstate commerce? The answer to that question is, arguably, yes, because of the exemptions from the nameplate capacity tax provided for "an electric membership association", "a cooperative", and "a customer-generator as defined in section 70-2002."[23] Those tax exemptions present a troublesome Commerce Clause issue because they arguably unlawfully

[22] Nebraska Laws 2010, LB 1048, section 14(5)(b), codified at Neb. Rev. Stat. section 6203(5)(b) (emphasis added).

[23] Nebraska Laws 2010, LB 1048, section 14(2), codified at Neb. Rev. Stat. section 6203(2).

discriminates against interstate commerce—the tax exemptions for those entities appear to rest on a "distinction between in-state and out-of-state consumers"[24] and the "premise" of U.S Supreme Court "discrimination cases is that '[t]he very purpose of the Commerce Clause was to create an area of free trade among the several States.'"[25] It appears within the realm of possibility that in-state consumers—but *not* out-of-state consumers—can purchase electricity produced by certain wind-energy generators (e.g., a qualified customer-generator) located within Nebraska without having the nameplate capacity tax passed on to them in the form of higher prices, whereas no out-of-state consumers can purchase electricity produced by a "commissioned" wind-energy generation facility without having the nameplate capacity tax passed on to them in the form of higher prices for the exported electricity. The nameplate capacity tax exemptions can, arguably, function to inhibit free trade among the states because the nameplate capacity tax burden is borne according to a distinction between in-state and out-of-state consumers and that, arguably, constitutes unlawful discrimination in light of the U.S Supreme Court's dormant Commerce Clause jurisprudence.

Commonwealth Edison Co. v. Montana is a case on point and it is instructive. That case involved the question whether Montana's coal severance tax, which was levied on each ton of coal mined in the State, violated the dormant Commerce Clause and the Supremacy Clause of the U.S. Constitution. The "gravamen" of the taxpayer's complaint was "that a state tax must be considered discriminatory for purposes of the Commerce Clause if the tax burden is borne primarily by out-of-state consumers."[26]

The taxpayer alleged that Montana's coal severance tax discriminated against interstate commerce "because 90% of Montana coal is shipped to other States under contracts that shift the tax burden primarily to non-Montana utility companies and thus to citizens of other States."[27]

The U.S. Supreme Court upheld the constitutionality of Montana's coal severance tax in *Commonwealth Edison* saying, "The premise of our

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[24] *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 619 (1981)(hereinafter referred to as *Commonwealth Edison*), citing *Philadelphia v. New Jersey.*, 437 U.S. at 626.

[25] *Commonwealth Edison Co. v. Montana*, 453 U.S. at 618, quoting and citing *McLeod v. J.E. Dilworth Co.*, 322 U.S. at 330.

[26] *Commonwealth Edison Co. v. Montana*, 453 U.S. at 618.

[27] *Commonwealth Edison Co. v. Montana*, 453 U.S. at 618.

discrimination cases is that '[t]he very purpose of the Commerce Clause was to create an area of free trade among the several States.'"[28]

> "Furthermore, [the taxpayer's] assertion that Montana may not 'exploit' its 'monopoly' position by exporting tax burdens to other States, cannot rest on a claim that there is a need to protect the out-of-state consumers of Montana coal from discriminatory tax treatment. . . . [T]here is no real discrimination in this case; the tax burden is borne according to the amount of coal consumed and not according to any distinction between in-state and out-of-state consumers. Rather, [the taxpayer] assume[s] that the Commerce Clause gives residents of one State a right of access at 'reasonable' prices to resources located in another State that is richly endowed with such resources, without regard to whether and on what terms residents of the resource-rich State have access to the resources. We are not convinced that the Commerce Clause, of its own force, gives residents of one State the right to control in this fashion the terms of resources development and depletion in a sister State."[29]

In light of all that, it is of especially important to note that Laws 2010, LB 1048, section 3, provides, in relevant part, that:

> "certified renewable export facility means a facility approved under section 6 of this act that . . . (c) has a power purchase or similar agreement or agreements with an initial term of ten years or more for the sale of *at least ninety percent of the output of the facility with a customer or customers located outside the State of Nebraska* and maintains such an agreement or agreements for the life of the facility. Output sold pursuant to subdivision (2)(a)(iv) of section 70-1014.02 shall not be included when calculating such ninety percent. Certified renewable export facility includes all generating equipment, easements, and interconnection equipment within the facility and connecting the facility to the transmission grid. . . ."[30]

Perhaps it is no coincidence that the 90-percent export requirement set forth in Laws 2010, LB 1048, section 3, is equal to the size (90 percent) of

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[28] *Commonwealth Edison Co. v. Montana*, 453 U.S. at 618, quoting and citing *McLeod v. J.E. Dilworth Co.*, 322 U.S. at 330.

[29] *Commonwealth Edison Co. v. Montana*, 453 U.S. at 619, citing *Philadelphia v. New Jersey.*, 437 U.S. at 626.

[30] Laws 2010, LB 1048, section 3, amending Neb. Rev. Stat. section 70-1001.01 by adding new subsection (2) (emphasis added).

Montana's coal that was exported to out-of-state consumers in the *Commonwealth Edison* case discussed above.

d. The "Fairly Related to the Presence and Activities of the Taxpayer within the State" Requirement

Ordinarily, the fourth prong of the *Complete Auto Transit* test is the easiest of the four-prong test for states to meet. The purpose of this requirement is to ensure that a State's tax burden is not placed upon persons who do not benefit from services provided by the State and it focuses on the wide range of benefits provided to the taxpayer, not just the precise activity connected to the interstate activity at issue.

Clearly, a wind-energy electrical generating facility that is physically present within the geographic borders of the State of Nebraska benefits from a wide range of benefits provided to the taxpayer by the State of Nebraska and its political subdivisions, including, among other things, police and fire protection and access to the state's courts of law for purposes of filing lawsuits to enforce legally binding contracts.

In the *Commonwealth Edison* case, the U.S. Supreme Court explained as follows:

"Furthermore, the reference in the cases to police and fire protection and other advantages of civilized society is not . . . a disingenuous incantation designed to avoid a more searching inquiry into the relationship between the *value* of the benefits conferred on the taxpayer and the *amount* of taxes it pays. Rather, when the measure of a tax is reasonably related to the taxpayer's activities or presence in the State—from which it derives some benefit such as the substantial privilege of mining—the taxpayer will realize, in proper proportion to the taxes it pays, '[t]he only benefit to whichit is constitutionally entitled . . . that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes.'[31] . . . Correspondingly, when the measure of a tax bears no relationship to the taxpayer's presence or activities in a State, a court may properly conclude under the fourth prong of the *Complete Auto Transit* test that the State is imposing an undue burden on interstate commerce."[32]

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[31] *Commonwealth Edison Co. v. Montana*, 453 U.S. at 628-629, citing *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. at 522.

[32] *Commonwealth Edison Co. v. Montana*, 453 U.S. at 629, citing *Nippert v. City of Richmond*, 327 U.S. at 427.

6. Analysis of Nebraska's Nameplate Capacity Tax in light of the U.S. Supreme Court's Equal Protection Clause Jurisprudence

The federal Equal Protection Clause issue is whether there is a "rational basis" for the classifications drawn by Laws 2010, LB 1048, section 14(2), which exempt certain persons who own or operate a wind-energy electrical generator from the nameplate capacity tax. The answer to that question is, arguably, no, at least not with respect to certain exemptions from the nameplate capacity tax.

Arguably, the rational basis for *exempting* from the nameplate capacity tax a wind-generator "Owned or operated by the federal government, the State of Nebraska, a public power district, a public power and irrigation district, an individual municipality, a registered group of municipalities, an electric membership association, or a cooperative"[33] is that a wind-generator owned or operated by a governmental entity such as a public power district is that Nebraska's wind energy policy is "to encourage and allow opportunities for private developers to develop, own, and operate renewable energy facilities intended primarily for export from Nebraska "under a statutory framework which protects the ratepayers of consumer-owned utility systems operating in the state from subsidizing the costs of such export facilities through their rates."[34]

However, the exemption from the nameplate capacity tax for a an "electric membership association", "a cooperative," and a qualified "customer-generator" arguably deny equal protection of the law to wind farms that are not exempt from the nameplate capacity tax. The rational basis for exempting from the nameplate capacity tax a "customer-generator"[35] (as defined in Neb. Rev. Stat. section 70-2002)[36] is, arguably, that a customer-generator is not a wind-energy generator "intended primarily" for exporting electricity from the state.[37] Rather, a customer-generator is intended primarily to generate electricity for "end-use" by the consumer who owns and operates the customer-generator.[38] However, exemption from the nameplate capacity tax for an electric membership association, coorperative, and a qualified "customer-generator" arguably denies equal protection to similarly situated wind-energy businesses that are subject to the tax because there appears to be no rational basis for exempting such privately owned entities while taxing other similarly situated privately owned entities.

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[33] Laws 2010, LB 1048, section 14(2), codified at Neb. Rev. Stat. section 77-6203(2)(a).

[34] Laws 2010, LB 1048, section 2, amending Neb. Rev. Stat. section 70-1001 by adding a new unnumbered paragraph.

[35] Laws 2010, LB 1048, section 14(2), codified at Neb. Rev. Stat. section 77-6203(2)(b).

[36] Neb. Rev. Stat. section 70-2002(1) defines "customer-generator" to mean "an end-use electricity customer that generates electricity on the customer's side of the meter from a qualified facility. . . ."

[37] Laws 2010, LB 1048, section 2, amending Neb. Rev. Stat. section 70-1001 by adding a new unnumbered paragraph.

[38] Neb. Rev. Stat. section 70-2002(1).

"States sometimes grant exemptions to domestic corporations that they do not extend to foreign corporations. For example, New Jersey denied a propertyy tax exemption to a foreign corporation, which was engaged in non-commercial educational television and which owned and maintained a station and transmission tower in the state. Thirty percent of the television's audience was in that state. Admittedly, a New Jersey corporation would have been exempt from all state real and personal property taxes, if it had conducted the same activities in the state. . . . The U.S. Supreme Court . . . [said] thatonce foreign corporations are admitted to the state, 'the adopted corporations are entitled to equal protection with the state's own corporate progeny, at least to the extent that their property is entitled to an equally favorable ad valoem tax basis.'

* * *

State courts have invalidated a number of provisions that discriminated against foreign corporations when the states were unable to advance any persuasive justifications for unequal treatment of the foreign corporation. . . . The Missouri Supreme Court struch down an organization tax that would have been $50 if imposed on a doestic corporation but came to $96,600 as applied to a foreign corporation. . . . The New York courts have likewise invalidated a license tax on foreign corporations imposed at higher rates than the organization tax on domestic corporations, even though the disparity had existed for more than half a century. . . . And the Pennsylvania Supreme Court struck down a provision of the staet's capital stock tax that granted an election to domestic corporations to apportion their income by either of two alternative methods, but limited foreign corporations to a single method of apportionment. . . ."[39]

III. Analysis of the Nameplate Capacity Tax in Light of the Nebraska Supreme Court's "Commutation of Tax" and "Special Legislation" Jurisprudence

A. The Commutation of Tax Issue: Does the *credit* against the nameplate capacity tax for property taxes previously paid arguably constitute a commutation of tax in violation of Article VIII, section 4, of the Nebraska Constition? That section of the Nebraska Constitution provides, in pertinent part, that: "[T]he Legislature shall have no power to release or discharge . . . any corporation . . . from . . . its proportionate share of taxes to be levied for state purposes . . . *nor shall commutation for such taxes be authorized in any form whatever. . . .*"[40]

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[39] Hellerstein and Hellerstein, *State and Local Taxation*, pp. 81-82 (6th ed. 1997), quoting *WHYY, Inc. v. Borough of Glassborough*, 393 U.S. 117 (1968), and citing *Missouri Pacific R.R. v. Kirkpatrick*, 652 S.W.2d 128 (Mo. 1983), *In re Aurora Corp. of Illinois v. Tully*, 457 N.E.2d 735 (NY 1983), and *Gilbert Associates, Inc. v. Commonwealth*, 447 A.2d 944 (1982).

[40] Article VIII, section 4, of the Nebraska Constition. (Emphasis added.)

Answer: The answer to the question presented is, arguably, yes. The credit against the nameplate capacity tax for *property taxes previously paid* on a wind energy generation facility arguably constitutes an impermisible commutation of tax. The credit, *as applied*, can function to fully or partially eliminate a taxpayer's liability for the nameplate capacity tax for one or more years; namely, when a taxpayer previously paid property taxes that were *levied before* the nameplate capacity tax is levied. Apparently, only one taxpayer will benefit from the credit.[41] The Nebraska Supreme Court's holding in *Natural Gas Pipeline Company v. State Board of Equalization and Assessment*[42] that the power to tax is exercised when a tax is *levied* arguably refers here to the date of the *levy of property taxes previously paid* for which the credit against the nameplate capacity tax is claimed, *as opposed to the date the nameplate capacity tax is levied*, and that is a significant distinction for purposes of analysis.

- ***Nebraska Case Law Governing the Prohibition of Commutation of Taxes:***
    - The Blanket Mill Tax Levy Act operated to release and discharge taxes, and was held unconstitutional in violation of Article VIII, section 4, of the Nebraska Constitution. *Peterson v. Hancock*, 155 Neb. 801, 54 N.W.2d 85 (1952). Important principles of constitutional interpretation, including the following, were articluated in the *Peterson v. Hancock* case:
        - "'[I]n construing an act of the legislature, all reasonable doubt must be resolved in favor of constitutionality.'" 54 N.W.2d at 91, quoting and citing *Nelsen v. Tilley*, 137 Neb. 327, 289 N.W. 388, 395.
        - "[I]f a statute is subject to more than one construction, one of which would make the act constitutional and the other unconstitutional, this court is required to adopt the former." 54 N.W.2d at 91, citing *Nelsen v. Tilley*, 137 Neb. 327, 289 N.W. 388, 395.
        - "'The court in considering the meaning of a statute should if possible discover the legislative intent from the language of the act and give it effect.'" 155 Neb. at 810-811, quoting and citing *Armstrong v. Board of Supervisors*, 153 Neb. 858, 46 N.W.2d 602, 603.
        - "'If portions of an act are unconstitutional, and the remainder is so connected with the invalid portions that it cannot be upheld without doing violence to the legislative intent as a whole, . . . the entire act must fall. . . .'" 54 N.W.2d at 98, quoting and citing *Thorin v. Burke*, 146 Neb. 94, 18 N.W.2d 664, 669.
        - Sections of the Blanket Mill Tax Levy Act, which provided that only districts having five or more pupils can receive a distribution of the levy collected by the blanket mill tax, are unconstitutional as releasing

[41] Incidentally, that factual circumstance influences analysis of whether the credit, as applied, violates the prohibition against special legislation, which is another constitutioinal issue discussed below.

[42] *Natural Gas Pipeline Company v. State Board of Equalization and Assessment*, 237 Neb. 357, 367, 466 N.W.2d 461, 468 (1991)(holding that the challenged statute, *as applied*, was a commutation of tax).

or discharging regular school district taxes in districts with five or more pupils at the expense of districts having less than five pupils which are required not only to pay the blanket mill tax levy but also to pay all regular school taxes. 54 N.W.2d at 92.

- Statute attempting to exempt insurance companies from taxation is void. *State ex rel. Cornell v. Poynter*, 59 Neb. 417, 81 N.W. 431 (1899).
- Statute providing that, under certain conditions, delinquent real estate taxes may be paid in ten equal annual installments contravenes constitutional provision prohibiting commutation of taxes in any form whatever. *Steinacher v. Swanson*, 131 Neb. 439, 268 N.W. 317 (1936).
- Interest, penalties and costs imposed for nonpayment of taxes are no part of the tax and may be remitted by the Legislature. *Tukey v. Douglas County*, 133 Neb. 732, 277 N.W. 57 (1938).
- Intangible property of foreign corporation could not be released from taxation by Legislature. *International Harvester Co. v. County of Douglas*, 146 Neb. 555, 20 N.W.2d 620 (1945).
- Legislature does not have the power to release or discharge a tax. *State ex rel. Meyer v. Story*, 173 Neb. 741, 114 N.W.2d 769 (1962).
- In *Natural Gas Pipeline Company v. State Board of Equalization and Assessment*, 237 Neb. 357, 466 N.W.2d 461 (1991), the Nebraska Supreme Court held that: (1) commutation of taxes in any form is prohibited; (2) the power to tax is exercised when a tax is levied; and (3) a statute purporting to make certain property real property for tax purposes cannot be applied to the tax year for which the entire process for levying taxes has been completed; and (4) the federal 4-R Act prohibits only discriminatory taxation of railroads and does not prohibit nondiscriminatory taxation of railroads.
- "The constitutional proscription against commuting a tax prevents the Legislature from releasing either persons or property from contributing a proportionate share of the tax." *Jaksha v. State*, 241 Neb. 106, 486 N.W.2d 858, 874 (1992), citing *State ex rel. Meyer v. Story*, 173 Neb. 741, 114 N.W.2d 769 (1962), and distinguishing the facts of the *Jaksha* case from the facts of the *Natural Gas Pipeline Company* case.

B. The "Special Legislation" Issue: Does the *credit* against the nameplate capacity tax for property taxes previously paid constitute special legislation in violation of Article III, section 18, of the Nebraska Constitution? That section of the Nebraska Constitution provides, in relevant part, that: "The Legislature shall not pass local or special laws in any of the following cases, that is to say: . . . Granting to any corporation, association, or individual any special or exclusive privileges, immunity, or franchise whatever. . . . In all other cases where a general law can be made applicable, no special law shall be enacted."[43]

Answer: The answer to the question presented is, arguably, yes. Apparently, only one taxpayer *can* benefit from the credit. The credit arguably violates the prohibition

[43] Article III, section , of the Nebraska Constition. (Emphasis added.)

against special legislation because: (1) Only that one taxpayer can claim the credit, which means the class of taxpayers who can claim the credit is a "permanently closed class"; and (2) The classification to which that one taxpayer belongs is, arguably, a totally arbitrary and unreasonable method of classification because it confers a valuable tax benefit on that one particular taxper in exchange for nothing and thereby rewards that taxpayer for having made a strategic business decision to exercise what is known as the "first mover's advantage" in the marketplace, and for having done so *before* Laws 2010, LB 1048, was enacted and approved. In light of all that, the classification of taxpayers who can claim the credit arguably does *not* rest upon a difference in situation or circumstance which, in reason, calls for distinctive legislation for the class: Why reward a taxpayer with a tax incentive for doing what the taxpayer had already done *before* the tax credit was enacted and approved?

- ***Nebraska Case Law Governing the Prohibition of Special Legislation:***
    - A legislative act can violate this provision as special legislation (1) by creating a totally arbitrary and unreasonable method of classification or (2) by creating a permanently closed class. *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991).
    - The Legislature may, for the purpose of legislating, classify persons, places, objects, or subjects, but such classification must rest upon some difference in situation or circumstance which, in reason, calls for distinctive legislation for the class. *Natural Gas Pipeline Co. v. State Bd. of Equal.*, 237 Neb. 357, 466 N.W.2d 461 (1991).
    - A legislative classification must operate uniformly on all within a class which is reasonable. *Natural Gas Pipeline Co. v. State Bd. of Equal.*, 237 Neb. 357, 466 N.W.2d 461 (1991).

IV. The classification of wind energy property as real property, personal property, and fixtures, including trade fixtures, and the Nebraska Supreme Court's jurisprudence with respect to the classification of property as real property, personal property, and fixtures, including trade fixtures.

A. Classification of wind energy property as real property, personal property, and fixtures, including trade fixtures.

Trying to correctly answer the question, "Is It Real Or Is It Personal?,"[44] can be a difficult challenge, depending on the circumstances.

> "Many of the judicial decisions are contradictory and therefore confusing. These decisions establish opposing points of view regarding classification of property as real or personal and are products of common law guidelines, disciplines

[44] "Is It Real Or Is It Personal?" is the title of Chapter 10, *Property Taxation*, Institute of Property Taxation (2d ed.).

developed in legal relationships having no bearing on taxation, language variations in statutes and local reaction to all of the above as practiced in assessing circles."[45]

1. "Real Property" Defined Generally and Under Nebraska Law

"77-103. Real property shall mean: (1) All land; (2) All buildings, improvements, and fixtures, except trade fixtures; (3) Mobile homes, cabin trailers, and similar property, not registered for highway use, which are used, or designed to be used, for residential, office, commercial, agricultural, or other similar purposes, but not including mobile homes, cabin trailers, and similar property when unoccupied and held for sale by persons engaged in the business of selling such property when such property is at the location of the business; (4) Mines, minerals, quarries, mineral springs and wells, oil and gas wells, overriding royalty interests, and production payments with respect to oil or gas leases; and (5) All privileges pertaining to real property described in subdivisions (1) through (4) of this section."[46]

2. "Tangible Personal Property" and "Fixtures" Defined Generally and Under Nebraska Law

Laws 2010, LB 1048, section 10, amended Neb. Rev. Stat. section 77-105 by adding the underscored language shown below:

"77-105. The term tangible personal property includes all personal property possessing a physical existence, excluding money. The term tangible personal property also includes trade fixtures, which means machinery and equipment, regardless of the degree of attachment to real property, used directly in commercial, manufacturing, or processing activities conducted on real property, regardless of whether the real property is owned or leased, <u>and all property used in the generation of electricity using wind as the fuel source, including, but not limited to, that listed in subsection (9) of section 77-202</u>. The term intangible personal property includes all other personal property, including money."[47]

3. LR 496 Interim Study Committee Meeting in Bloomfield, Nebraska

During the Revenue Committee's interim study committee meeting held in Bloomfield, Nebraska, on September 29, 2010, property tax assessors from two different counties in Nebraska where wind farms are located testified that they had been *verbally* advised by

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[45] *Property Taxation*, p. 535, Institute of Property Taxation (2d ed.)(hereinafter cited as *Property Taxation*).

[46] Neb. Rev. Stat. section 77-103. (Note that Laws 2010, LB 1048, did *not* amend Neb. Rev. Stat. section 77-103.)

[47] Laws 2010, LB 1048, section 10, amending Neb. Rev. Stat. section 77-105.

one or more representatives of the Nebraska Department of Revenue's Division of Property Assessment that *land* located beneath a wind energy electrical generation facility should continue to be treated and valued as agricultural land for purposes of property taxation *if* such land had been previously treated and valued as agricultural land for purposes of property taxation. Those county assessors questioned the correctness of that advice, because they believe such land no longer constitutes agricultural land and should, therefore, be treated as commercial property and valued for purposes of real property taxation using the income method of valuation.

Prior to enactment of Laws 2010, LB 1048, the Nebraska Department of Revenue's Division of Property Assessment issued *Property Tax Directive 09-5* on August 28, 2009, for the purpose of advising "county assessors of the assessment procedures for wind turbines and wind farms."[48] That property tax directive provides, in pertinent part, that:

> (1) "Each wind turbine is anchored to a concrete foundation base. The area or footprint of each turbine is based on the size of the concrete foundation base. The property owner can use the land for grazing or farming around the concrete foundation base."[49]
>
> (2) "Real property is defined as land, all buildings, improvements, and fixtures, except trade fixtures. The concrete foundation pads, maintenance buildings, roads, and fences on a wind farm project have been deemed to be real property. The costs associated for clearing and grading the land, and the addition of gravel or crushed stone are site enhancements and should be considered part of the real property value."[50]

As of December 29, 2010, it appears that the Division of Property Assessment of the Nebraska Department of Revenue has not yet issued rules or regulations interpreting or otherwise providing guidance with respect to implementing the provisions of Laws 2010, LB 1048.

B. The Nebraska Supreme Court's jurisprudence with respect to property tax exemptions and the classification of property as real property, personal property, and fixtures, including trade fixtures.[51]

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[48] *Property Tax Directive 09-5* , p. 1, Nebraska Department of Revenue (August 28, 2009)(hereinafter cited as *Property Tax Directive 09-5*). ***Appendix A*** contains a copy.

[49] *Property Tax Directive 09-5* , p. 2.

[50] *Property Tax Directive 09-5* , p. 4.

[51] For a concise review of the Nebraska Supreme Court's uniformity clause jurisprudence and the so-called personal property tax crisis of the late 1980s and early 1990s, see S. Moore, "The Quest for Property Tax Exemptions," *A Brief History of Property Taxation in Nebraska During the Last Half Century*, pp 18-26, Legislative Research Division, Nebraska Legislature (2002). Copy available upon request.

The Legislature's power to define terms is limited by its common law powers and legislation defining terms can violate the prohibition of special legislation under Article III, section 18, of the Nebraska Constitution.

> "*Banner County* and *Stahmer* indicate that in determining whether exemptions enacted pursuant to article VIII, § 2, are valid, this court must consider (1) whether the exemptions improperly shift the property tax burden to the remaining tax base, and (2) whether there is a substantial difference of situation or circumstance justifying the differing legislation for the objects classified.
> * * *
> Having struck down L.B. 7 in *Natural Gas Pipeline Co.*, the court proceeded to strike down L.B. 1 as well, holding that the Legislature's attempt to 'designate as a "fixture" that which is in fact and in truth, personal property' exceeded its common-law powers of definition and violated the special legislation provision of article III, § 18.
> * * *
> Faced with the same discriminatory tax structure at issue in *Northern Natural Gas Co.* and *Natural Gas Pipeline Co.*, but no remedy, the *MAPCO Ammonia Pipeline* court embarked on a significantly different approach to the personal property tax dilemma. The court recognized that if the Legislature's system of exemptions *prevents* the uniformity required by the Constitution, the exemptions themselves are unconstitutional, and thus the exempt property must be returned to the tax rolls. This approach essentially transformed *MAPCO Ammonia Pipeline* from a case involving a claim for 'equalization' to a declaratory judgment action regarding the constitutionality of the exemptions contained in § 77-202(6) through (9)."[52]

- **Special Legislation:** Article III, section 18, of the Nebraska Constitution provides, in relevant part, that: "The Legislature shall not pass local or special laws in any of the following cases, that is to say: . . . Granting to any corporation, association, or individual any special or exclusive privileges, immunity, or franchise whatever. . . . In all other cases where a general law can be made applicable, no special law shall be enacted."

- **Nebraska Case Governing Special Legislation:**

  - A legislative act can violate this provision as special legislation (1) by creating a totally arbitrary and unreasonable method of classification or (2) by creating a permanently closed class. *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991).
  - A legislative act can violate this provision as special legislation in one of two ways: (1) by creating a totally arbitrary and unreasonable

[52] *Jaksha v. State*, 486 N.W. 2d 106, 866, 869-870, 241 Neb. 106 (1992)(emphasis in original), quoting and citing *MAPCO Ammonia Pipeline v. State Board of Equalization*, 471 N.W.2d 734, 740, 238 Neb. 565, 573 (1991).

method of classification, or (2) by creating a permanently closed class. *Haman v. Marsh*, 237 Neb. 699, 467 N.W.2d 836 (1991).

- The term "class legislation" is a characterization of legislation in contravention of this provision. It is that which makes improper discrimination by conferring privileges on a class arbitrarily selected from a large number of persons standing in the same relation to the privileges, without reasonable distinction or substantial difference. *Haman v. Marsh*, 237 Neb. 699, 467 N.W.2d 836 (1991).
- A legislative classification must operate uniformly on all within a class which is reasonable. *Natural Gas Pipeline Co. v. State Bd. of Equal.*, 237 Neb. 357, 466 N.W.2d 461 (1991).
- The Legislature may, for the purpose of legislating, classify persons, places, objects, or subjects, but such classification must rest upon some difference in situation or circumstance which, in reason, calls for distinctive legislation for the class. *Natural Gas Pipeline Co. v. State Bd. of Equal.*, 237 Neb. 357, 466 N.W.2d 461 (1991).
- The partial exemption from taxation of classes of property specified in section 77-202.25, is not unreasonable, objectionable as discriminatory, or violative hereof. *Stahmer v. State*, 192 Neb. 63, 218 N.W.2d 893 (1974).
- In Nebraska, both equal protection and the prohibition against special legislation emanate from this provision, however the test of validity under each is different. *Haman v. Marsh*, 237 Neb. 699, 467 N.W.2d 836 (1991).
- Free port law does not violate constitutional provisions for uniformity and against special privileges. *Norden Laboratories, Inc. v. County Board of Equalization*, 189 Neb. 437, 203 N.W.2d 152 (1973).
- Cigarette Tax Act, sections 77-2602 et seq., 1971 Supp., is not void for unreasonable classification, nor is it a special law. *Sandberg v. State*, 188 Neb. 335, 196 N.W.2d 501 (1972).
- Act which fixed value of agricultural income-producing machinery and equipment as those used by taxpayer in determining federal income tax violated this section. *State ex rel. Meyer v. McNeil*, 185 Neb. 586, 177 N.W.2d 596 (1970).
- Cited legislation violated this section by creating permanently closed class and by being totally arbitrary and unreasonable in method of classification. *City of Scottsbluff v. Tiemann*, 185 Neb. 256, 175 N.W.2d 74 (1970).
- Penalty for failure to return property for taxation was special law in violation of this section. *Bachus v. Swanson*, 179 Neb. 1, 136 N.W.2d 189 (1965).
- Statute requiring reporting of property in warehouse for taxation and excepting household goods was violative of this section. United States Cold Storage Corp. v. Stolinski, 168 Neb. 513, 96 N.W.2d 408 (1959).
- Classification of business or property for taxation can be permitted only if classification is reasonable and the tax operates uniformly upon

all members of the class. *Thorin v. Burke*, 146 Neb. 94, 18 N.W.2d 664 (1945).

- Penalties for nonpayment of taxes are punitive in their nature and their remission by Legislature is not forbidden as arbitrary class legislation. *Tukey v. Douglas County*, 133 Neb. 732, 277 N.W. 57 (1938).
- Act providing for annual tax on fire insurance companies based on gross premiums received by each for insurance written within state was invalid because it did not operate equally and uniformly upon all members of class. *Continental Ins. Co. v. Smrha*, 131 Neb. 791, 270 N.W. 122 (1936).
- Act extending time in which to pay taxes was invalid as based on arbitrary classification. *Steinacher v. Swanson*, 131 Neb. 439, 268 N.W. 317 (1936).
- Law authorizing counties of more than 150,000 to use portion of gas tax to retire highway construction bonds was invalid, as special legislation. *State ex rel. Cone v. Bauman*, 120 Neb. 77, 231 N.W. 693 (1930).

- **State Constitutional Issue:** In light of the foregoing guidance provided by the Nebraska Supreme Court, does the following language from Laws 2010, LB 1048, section 11, arguably violate the uniformity requirements of Article VIII, sections 1 and 2, of the Nebraska Constitution?

  "77-202. (1) The following property shall be exempt from property taxes: . . . (9) *Any property* used directly in the generation of electricity using wind as the fuel source shall be exempt from the property tax. Personal property used directly in the generation of electricity using wind as the fuel source includes, but is not limited to, wind turbines, rotors and blades, towers, trackers, generating equipment, transmission components, substations, supporting structures or racks, inverters, and other system components such as wiring, control systems, switchgears, and generator step-up transformers."[53]

  Answer: The answer to that question is, arguably, yes. The plain and ordinary meaning of the phrase "Any property" as used in Neb. Rev. Stat. section 77-202(9) is broad enough to include *real property* in addition to depreciable tangible personal property.

  Applying the Nebraska Supreme Court's two-part test set forth above can lead one to reasonably conclude that Laws 2010, LB 1048, section 11:

  (1) Improperly shifts the property tax burden to the remaining tax base (i.e., it shifts the real property tax burden to real property that is not used directly in the

[53] Laws 2010, LB 1048, section 11, amending Neb. Rev. Stat. section 77-202 by adding new subsection (9) (emphasis added).

generation of electricity using wind as the fuel source, such as residential and commercial real property); and

(2) There is no substantial difference of situation or circumstance justifying the differing legislation for the objects classified (i.e., real property used directly in the generation of electricity using wind as the fuel versus real property that is not used directly in the generation of electricity using wind as the fuel source, such as residential and commercial real property).

However, some Nebraska senators who spoke during the Revenue Committee's LR 496 public hearing (which was held in Bloomfield, Nebraska, on September 29, 2010) verbaly expressed their belief that the legislative intent of Laws 2010, LB 1048, section 11, was to exempt from property taxation *only* depreciable tangible personal property used directly in the generation of electricity using wind as the fuel source, *not* real property too.

In light of all that, enacting new legislation to clarify, correct, and change the current statutory language in question would, arguably, be a wise thing for the Nebraska Legislature to do as soon as possible.

- **State Constitutional Issue:** In light of the foregoing guidance provided by the Nebraska Supreme Court, does the following language from Laws 2010, LB 1048, section 10, arguably violate the Nebraska Supreme Court's juriprudence governing the Legislature's common-law power of definition and the prohibition of special legislation by Article III, section 18, of the Nebraska Constitution?

  "77-105. The term tangible personal property includes all personal property possessing a physical existence, excluding money. The term tangible personal property also includes trade fixtures, which means machinery and equipment, regardless of the degree of attachment to real property, used directly in commercial, manufacturing, or processing activities conducted on real property, regardless of whether the real property is owned or leased, and *all property* used in the generation of electricity using wind as the fuel source, including, *but not limited to*, that listed in subsection (9) of section 77-202. The term intangible personal property includes all other personal property, including money."[54]

Answer: The answer to that question is, arguably, yes. Applying the Nebraska Supreme Court's admonition that "the Legislature's attempt to 'designate as a "fixture" that which is in fact and in truth, personal property' exceeded its common-law powers of definition and violated the special legislation provision of article III, § 18"[55] can lead one to reasonably conclude that—*as applied*—Laws 2010, LB 1048,

[54] Laws 2010, LB 1048, section 10, amending Neb. Rev. Stat. section 77-105. (*Italicized* emphasis added.)

[55] *Jaksha v. State*, 486 N.W. 2d 106, 866, 869, 241 Neb. 106 (1992)(emphasis in original), quoting and citing *MAPCO Ammonia Pipeline v. State Board of Equalization*, 471 N.W.2d 734, 740, 238 Neb. 565, 573 (1991).

section 10, can exceed the Legislature's common-law powers of definition and might therefore violate the special legislation provision of Article III, section 18, of the Nebraska Constitution because, in fact, "*all property* used in the generation of electricity using wind as the fuel source, including, *but not limited to*, that listed in subsection (9) of section 77-202"[56] can conceivably include property that is a "fixture" which should be classified and taxed as real property rather than being classified and taxed or exempt from taxation as depreciable tangible personal property.

In light of all that, enacting new legislation to clarify, correct, and change the current statutory language in question would, arguably, be a wise thing for the Nebraska Legislature to do as soon as possible.

- **State Constitutional Issue:** For purposes of Nebraska's system of subjecting depreciable tangible personal property to taxation, whether the classification of wind-energy electrical generators as property with a useful life of *five years* contravenes the provisions of Article VIII, section 1, of the Nebraska Constitution which provides, in relevant part, that "(2) tangible personal property, as defined by the Legislature, not exempted by this Constitution or by legislation, shall all be taxed at depreciated cost using the same depreciation method *with reasonable class lives*, as determined by the Legislature, or shall all be taxed by valuation uniformly and proportionately"[57]

  Answer: The answer to that question depends on the constitutional validity of the property tax exemption provided for by Laws 2010, LB 1048, section 11, and the related language in Laws 2010, LB 1048, section 10, which defines tangible personal property to include trade fixtures. If a depreciable tangible personal property tax exemption created by the Legislature is constitutional, then the question whether classifying wind-energy electrical generators as property with a useful life of five years is a moot question and that would end this particular inquiry. However, if any exemption of wind-energy electrical generators from property taxation fails to pass constitutional muster, then such property would be subject to taxation and that would then raise the question whether classifying wind-energy electrical generators as property with a useful life of five years is a *reasonable* class life for purposes of Article VIII, section 1(2).

  To incentivize the development of the wind-energy industry, Congress provided a federal income tax incentive to the wind-energy industry that classifies wind-energy electrical generators as five-year property for purposes of depreciation deductions allowable under Internal Revenue Code, even though it is, purportedly, common

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[56] Laws 2010, LB 1048, section 10, amending Neb. Rev. Stat. section 77-105. (*Italicized* emphasis added.)

[57] Article VIII, section 1(2), of the Nebraska Constitution (emphasis added).

knowledge within the industry that the *reasonable* useful life of a wind-energy electrical generator ranges from approximately 15- to 20-years, *not* five years.[58]

The troublesome issue, for purposes of subjecting depreciable tangible personal property to property taxation in Nebraska, can be found in: (1) Neb. Rev. Stat. section 77-120(3), which provides that "Class life shall be based upon the anticipate useful life of a class of property and shall be determined by the Property Tax Administrator under the Internal Revenue Code"; (2) Neb. Rev. Stat. section 77-120(2)(b), which provides that "(b) Five-year property shall include property with a class life of more than four years and less than ten years"; and (3) Neb. Rev. Stat. section 77-120(2)(e), which provides that "(e) Fifteen-year property shall include property with a class life of twenty years or more but less than twenty-five years. . . ." As yet, there is no Nebraska Supreme Court case law addressing that issue; therefore, the issue could be one of first impression for the courts to decide if it were ever raised in a lawsuit.

V. Whether taxation of wind energy property should be centrally assessed property, locally assessed property, or both as may be necessary or appropriate.

A. Centrally Assessed Property

Laws 2010, LB 1048, requires qualified wind energy electrical generation property in Nebraska to be centrally assessed property. Requiring such property to be centrally assessed property is, arguably, sound tax policy because taxable property owned by other producers of electrical energy (e.g., nuclear power producers) in Nebraska is centrally assessed property.

B. Locally Assessed Property

During the Revenue Committee's interim study committee meeting held in Bloomfield, Nebraska, on September 29, 2010, property tax assessors from two different counties in Nebraska where wind farms are located testified that they had been *verbally* advised by one or more representatives of the Nebraska Department of Revenue's Division of Property Assessment that *land* located beneath a wind energy electrical generation facility should continue to be treated and valued as agricultural land for purposes of property taxation *if* such land had been previously treated and valued as agricultural land for purposes of property taxation. Those county assessors questioned the correctness of that advice, because they believe such land no longer constitutes agricultural land and should, therefore, be treated as commercial property and valued for purposes of real property taxation using the income method of valuation.

Prior to enactment of Laws 2010, LB 1048, the Nebraska Department of Revenue's Division of Property Assessment issued *Property Tax Directive 09-5* on August 28, 2009,

[58] "12 turbines in [Minnesota] . . . , each 20 years old, spent their earlier years twirling in California." M. Davey, "When Windmills Don't Spin, People Expect Some Answers," *The New York Times* (Feb. 5, 2010).

for the purpose of advising "county assessors of the assessment procedures for wind turbines and wind farms."[59] That property tax directive provides, in pertinent part, that:

> (1) "Each wind turbine is anchored to a concrete foundation base. The area or footprint of each turbine is based on the size of the concrete foundation base. The property owner can use the land for grazing or farming around the concrete foundation base."[60]
>
> (2) "Real property is defined as land, all buildings, improvements, and fixtures, except trade fixtures. The concrete foundation pads, maintenance buildings, roads, and fences on a wind farm project have been deemed to be real property. The costs associated for clearing and grading the land, and the addition of gravel or crushed stone are site enhancements and should be considered part of the real property value."[61]

VI. The distribution of state and local tax revenue that may be derived from the imposition of any types of taxes that could conceivably be imposed lawfully on such facilities or in connection with such facilities.

Nebraska Laws 2010, LB 1048, section 15, provides for the distribution of nameplate capacity tax revenue to local taxing entities as follows:

> "(1) The county treasurer shall distribute all revenue received from the Department of Revenue pursuant to section 77-6203 to local taxing entities which, but for such personal property tax exemption, would have received distribution of personal property tax revenue from depreciable personal property used directly in the generation of electricity using wind as the fuel source.
>
> (2) A local taxing entity's status as eligible for distribution under subsection (1) of this section shall not be affected when and if the net book value of personal property used directly in the generation of electricity using wind as the fuel source becomes zero. A local taxing entity's status as eligible for distribution under such subsection shall be affected by the disposal of all of the exempt depreciable personal property used directly in the generation of electricity using wind as the fuel source.
>
> (3) The distribution to each eligible local taxing entity shall be calculated by determining the amount of taxes that the eligible local taxing entity levied during the taxable year and dividing this amount by the total tax levied by all of the eligible local taxing entities during the year. Each eligible entity's resulting fraction shall then be multiplied by the revenue distributed to the county treasurer

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[59] *Property Tax Directive 09-5* , p. 1, Nebraska Department of Revenue (August 28, 2009).

[60] *Property Tax Directive 09-5* , p. 2.

[61] *Property Tax Directive 09-5* , p. 4.

by the department to determine the portion of such revenue due each local taxing entity.

(4) The Department of Revenue shall not retain any revenue collected pursuant to sections 77-6201 to 77-6204 for distribution, use, transfer, pledge, or allocation to or from the General Fund."[62]

Revenue from any other types of taxes that could conceivably be imposed lawfully on a commissioned wind-energy electrical generation facility in Nebraska should, arguably, be distributed to local taxing entities in a manner that would equitably replace depreciable tangible personal property tax revenue foregone by local taxing entities due to the exemption of depreciable tangible personal property from property taxation in Nebraska if such property is used directly in the generation of electricity using wind as the fuel source. The language quoted above from Laws 2010, LB 1048, section 15, would appear to achieve that result.

VII. The Law in Other States Governing Taxation of Wind Energy Facilities

The following material provides a review of published articles showing how (and whether and to what extent) wind-energy electrical generation facilities are subject to taxation or exempt from taxation in other states.

Appendix B contains a copy of two published, related, articles concerning taxation and tax incentives for the wind energy industry:

(1) D. McConville and C. Lindblom, "As the Wind Turns: Incentives for Wind Energy," *State Tax Notes*, pp. 699 to 706 (March 8, 2010)(Part 1 of a two-part study); and

(2) D. McConville and C. Lindblom, "As the Wind Turns: Tax Incentives for Wind Energy Producers," *State Tax Notes*, pp. 175 to 181 (October 18, 2010)(Part 2 of a two-part study).

The following material is a list of other published articles concerning the tax treatment of wind energy facilities in other states (a copy of each article is available upon request):

- J. Gamilich, "Wind Tax Debate not over in Wyoming," *Stateline.org* (October 19, 2010).
- "Wyoming—Property Tax: Appraisal Practices Provided for Valuation of Wind Power Generation," *State Tax Review*, p. 22, CCH (October 7, 2010), citing *Procedures for Appraisal/Assessment of Wind Farm Generation*, Wyoming Department of Revenue (September 22, 2010).
- "New Jersey—Multiple Taxes: Wind Energy Facility Credit Enacted," *State Tax Review*, p. 13, CCH (September 2, 2010), citing Laws 2010, Ch. 56, SB 2036, effective August 19, 2010.

[62] Nebraska Laws 2010, LB 1048, section 15, codified at Neb. Rev. Stat. section 6204.

- "Massachusetts—S&U [Sales and Use] Tax: Wind Turbine Not Subject to Tax," *State Tax Review*, p. 14, CCH (July 22, 2010), citing Letter Ruling 10-3, Massachusetts Department of Revenue (July 7, 2010).
- "Iowa—Property, Utilities Taxes: Tax Credit Enacted for Cogeneration Facilities," *State Tax Review*, p. 17, CCH (May 6, 2010), citing Laws 2010, SF 2373, effective April 23, 2010, but retroactive to January 1, 2010.
- "Nebraska: Exemption Enacted for Property Used in Generating Electricity from Wind," *State Tax Review*, p. 18, CCH (April 22, 2010), citing Laws 2010, LB 1048, effective three calendar months after adjournment.
- "South Dakota—Property Tax: Small Renewable Energy Facility Provisions and Exemptions Addressed," *State Tax Review*, p. 18, CCH (April 22, 2010), citing Laws 2010, SB 58, effective July 1, 2010.
- "Wind Over the Plains: ARRA and Wyoming's Wind Tax," *State Tax Notes*, pp. 49-54 (April 5, 2010).
- "South Dakota—Sales and Use Tax: Legislature Overrides Governor's Veto of Tax Refund for Large Wind Projects," *Tax Newsletter*, CCH (March 31, 2010), citing Laws 2010, HB 1060, effective July 1, 2010.
- "Wyoming considers becoming first state to tax wind energy production," *The Washington Post*, online edition (February 15, 2010) (www.washingtonpost.com/wp-dyn/content/article/2010/02/13/AR2010021303507_pf.html).
- "Wyoming—Multiple Taxes: Governor Supports Wind Energy Tax, Proposes Sales Tax Break for Data Centers," *Tax Newsletter*, CCH (February 10, 2010).
- Drew Russell, "Wind Farm Development in Rural Illinois: The Crescent Ridge Model" (undated PowerPoint presentation). Contact: drurussell@gmail.com.
- R. Wisner, *State Policy Update: A Review of Effective Wind Power Incentives*, Midwestern Wind Policy Institute (June 15, 2007).
- M. Bolinger, *A Survey of State Support for Community Wind Power Development*, Lawrence Berkley National Laboratory (March 2004).
- J. Bailey and D. Morris, *Taxing Wind Energy in Minnesota*, Institute for Local Self-Reliance (January 1995).

VIII. Summary of Conclusions Pertaining to Questions of Constitutionality

- Arguably, the nameplate capacity tax structure, especially its tax-exemption provisions, impose a discriminatory tax on interstate commerce in contravention of the U.S. Supreme Court's dormant Commerce Clause jurisprudence. The exemptions from the nameplate capacity tax provided for "an electric membership association", "a cooperative", and "a customer-generator as defined in section 70-2002"[63] present a troublesome Commerce Clause issue because they arguably unlawfully discriminates against interstate commerce. The tax exemptions for those entities appear to rest on a "distinction between in-state and out-of-state consumers"[64] and the "premise" of U.S

[63] Nebraska Laws 2010, LB 1048, section 14(2), codified at Neb. Rev. Stat. section 6203(2).
[64] *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 619 (1981)(hereinafter referred to as *Commonwealth Edison*), citing *Philadelphia v. New Jersey.*, 437 U.S. at 626.

Supreme Court "discrimination cases is that '[t]he very purpose of the Commerce Clause was to create an area of free trade among the several States.'"[65] It appears within the realm of possibility that in-state consumers—but *not* out-of-state consumers—can purchase electricity produced by certain wind-energy generators (e.g., a qualified customer-generator) located within Nebraska without having the nameplate capacity tax passed on to them in the form of higher prices, whereas no out-of-state consumers can purchase electricity produced by a "commissioned" wind-energy generation facility without having the nameplate capacity tax passed on to them in the form of higher prices for the exported electricity. Therefore, the nameplate capacity tax exemptions arguably inhibit free trade among the states because the nameplate capacity tax burden is borne according to a statutory distinction drawn between in-state and out-of-state consumers and that, arguably, constitutes unlawful discrimination in light of the U.S Supreme Court's dormant Commerce Clause jurisprudence.

- With respect to the U.S. Supreme Court's Equal Protection Clause jurisprudence, the exemption from the nameplate capacity tax for an electric membership association, a coorperative, and a qualified "customer-generator" arguably denies equal protection to similarly situated wind-energy businesses that are subject to the tax because there appears to be no rational basis for exempting such privately owned entities while taxing other similarly situated privately owned entities.

- The credit against the nameplate capacity tax for *property taxes previously paid* on a wind energy generation facility arguably constitutes an impermisible commutation of tax in violation of Article VIII, section 4, of the Nebraska Constitution. The credit, *as applied*, can function to fully or partially eliminate a taxpayer's liability for the nameplate capacity tax for one or more years; namely, when a taxpayer previously paid property taxes that were *levied before* the nameplate capacity tax is levied.

- The credit against the nameplate capacity tax for *property taxes previously paid* on a wind energy generation facility arguably violates the prohibition against special legislation because: (1) Only one particular taxpayer can claim the credit, which means the class of taxpayers who can claim the credit is a "permanently closed class"; and (2) The classification to which that one taxpayer belongs is, arguably, a totally arbitrary and unreasonable method of classification because it confers a valuable tax benefit on that one particular taxper in exchange for nothing and thereby rewards that taxpayer for having made a strategic business decision to exercise what is known as the "first mover's advantage" in the marketplace, and for having done so *before* Laws 2010, LB 1048, was enacted and approved. Why reward a taxpayer with a tax incentive for doing what the taxpayer had already done *before* Laws 2010, LB 1048, was enacted and approved?

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[65] *Commonwealth Edison Co. v. Montana*, 453 U.S. at 618, quoting and citing *McLeod v. J.E. Dilworth Co.*, 322 U.S. at 330.

- Applying the Nebraska Supreme Court's two-part test for evaluating the constitutionality of property tax exemptions can lead one to reasonably conclude that Laws 2010, LB 1048, section 11: (1) Improperly shifts the property tax burden to the remaining tax base (i.e., it shifts the real property tax burden to real property that is not used directly in the generation of electricity using wind as the fuel source, such as residential and commercial real property); and (2) There is no substantial difference of situation or circumstance justifying the differing legislation for the objects classified (i.e., real property used directly in the generation of electricity using wind as the fuel versus real property that is not used directly in the generation of electricity using wind as the fuel source, such as residential and commercial real property).

- Laws 2010, LB 1048, section 11, arguably violates the uniformity requirements of Article VIII, sections 1 and 2, of the Nebraska Constitution. The plain and ordinary meaning of the phrase "Any property" as used in Neb. Rev. Stat. section 77-202(9) is broad enough to include *real property* in addition to depreciable tangible personal property.Applying the Nebraska Supreme Court's two-part test set for evaluating the constitutionality of property tax exemptions can lead one to reasonably conclude that Laws 2010, LB 1048, section 11: (1) Improperly shifts the property tax burden to the remaining tax base (i.e., it shifts the real property tax burden to real property that is not used directly in the generation of electricity using wind as the fuel source, such as residential and commercial real property); and (2) There is no substantial difference of situation or circumstance justifying the differing legislation for the objects classified (i.e., real property used directly in the generation of electricity using wind as the fuel versus real property that is not used directly in the generation of electricity using wind as the fuel source, such as residential and commercial real property).

- Laws 2010, LB 1048, section 10, arguably violates the Nebraska Supreme Court's juriprudence governing the Legislature's common-law power of definition and the prohibition of special legislation by Article III, section 18, of the Nebraska Constitution.

- If any exemption of wind-energy electrical generators from property taxation in Nebraska fails to pass constitutional muster, then such property would be subject to taxation and that would then raise the question whether classifying wind-energy electrical generators as property with a useful life of five years is a *reasonable* class life for purposes of Article VIII, section 1(2). The troublesome issue, for purposes of subjecting depreciable tangible personal property to property taxation in Nebraska, can be found in: (1) Neb. Rev. Stat. section 77-120(3), which provides that "Class life shall be based upon the anticipate useful life of a class of property and shall be determined by the Property Tax Administrator under the Internal Revenue Code"; (2) Neb. Rev. Stat. section 77-120(2)(b), which provides that "(b) Five-year property shall include property with a class life of more than four years and less than ten years"; and (3) Neb. Rev. Stat. section 77-120(2)(e), which provides that "(e) Fifteen-year property shall include property with a class life of twenty years or more but less than twenty-five years. . . ." To incentivize the development of the wind-energy

industry, Congress provided a federal income tax incentive to the wind-energy industry that classifies wind-energy electrical generators as five-year property for purposes of depreciation deductions allowable under the Internal Revenue Code, even though it is, purportedly, common knowledge within the industry that the *reasonable* useful life of a wind-energy electrical generator ranges from approximately 15- to 20-years, *not* five years. As yet, there is no Nebraska Supreme Court case law addressing that issue; therefore, the issue could be one of first impression for the courts to decide if it were ever raised in a lawsuit.

- Laws 2010, LB 1048, requires qualified wind energy electrical generation property in Nebraska to be centrally assessed property. Requiring such property to be centrally assessed property is, arguably, sound tax policy because taxable property owned by other producers of electrical energy (e.g., nuclear power producers) in Nebraska is centrally assessed property.

- Nebraska Laws 2010, LB 1048, section 15, provides for the distribution of nameplate capacity tax revenue to local taxing entities and that appears to be sound tax policy, because the nameplate capacity tax was intended to replace property tax revenue foregone by virtue of the property tax exemption provided for by Laws 2010, LB 1048.

- In light of the foregoing material and in-depth analysis of the numerous constitutional issues presented, enacting new legislation to clarify, correct, and change the current statutory language in question would, arguably, be a wise thing for the Nebraska Legislature to do as soon as possible.

APPENDIX A

Nebraska Department of
REVENUE
PROPERTY ASSESSMENT

DIRECTIVE 09-5

August 28, 2009

ASSESSMENT OF WIND TURBINES AND WIND FARMS

Purpose. This directive will advise county assessors of the assessment procedures for wind turbines and wind farms.

Statutory Authority Neb. Rev. Stat. §77-801 (Cum. Supp. 2008) provides, in relevant part:

> All public service entities shall, on or before April 15 of each year, furnish a statement specifying such information as may be required by the Property Tax Administrator on forms prescribed by the Tax Commissioner to determine and distribute the entity's total taxable value including the franchise value ... The county assessor shall assess all nonoperating property of any public service entity. A public service entity operating within the State of Nebraska shall, on or before January 1 of each year, report to the county assessor of each county in which it has situs all nonoperating property belonging to such entity which is not subject to assessment and assessed by the Property Tax Administrator under section 77-802.

General Terms. The following terms are used throughout this Directive:

Nonoperating Property means property owned or leased by a public service entity that does not contribute to the entity's function.

Operating Property means property owned or leased that contributes to a public service entity's function.

Public Service Entity means any person or entity organized for profit under the laws of this state or any other state or government and engaged in the business of waterworks, electrical power, gas works, natural gas, telecommunications, pipelines used for the transmission of oil, heat, steam, or any substance to be used for lighting, heating, or power, and pipelines used for the transmission of articles by pneumatic or other power and all other similar or like entities.

Unit Value means the valuation of the operating property of the company as an integrated group of assets functioning as an economic unit without reference to the independent value of the component parts.

Terms Related to Wind Farm Projects

Project Area Boundary can encompass a large number of acres. For example, a single project area boundary may be 10,000 acres. These areas may encompass more than one county or state. The project components sited within this Project Area Boundary occupy a permanent footprint.

Wind Farm Project Components may consist of the following:

Wind Turbines. Comprised of three elements – the tower, nacelle, and rotor blades. The tower is constructed of tubular steel, and is topped by the nacelle, which houses the turbine's mechanical components. The rotor, mounted on the nacelle, consists of the blades.

Concrete Foundation Base. Each wind turbine is anchored to a concrete foundation base. The area or footprint of each turbine is based on the size of the concrete foundation base. The property owner can use the land for grazing or farming around the concrete foundation base.

Maintenance Building. A maintenance building used for general operations may be constructed at the project site.

Wind Farm Ancillary Facilities may consist of the following items:

1. Roads;
2. Underground electrical interconnections between wind turbines to collect and deliver electricity to a substation;
3. Fiber optic communication lines installed with the electrical collection system to monitor the operation of the wind farm;
4. Step-up transformers at each wind turbine location, plus a transformer for the electrical substation site. Each step-up transformer would be located on the concrete foundation base;
5. Electrical substations to step up the electrical collection system voltage to the existing local transmission line voltage;
6. Transmission lines and distribution plants used to connect the proposed substation to existing transmission lines; and
7. Meteorological monitoring towers that are constructed and used to collect data within a project area boundary. Depending on the project, some meteorological towers could remain within the project area during the life of the project.

Procedure and Implementation.

To determine whether the wind turbine or wind farm is to be locally or centrally assessed, the county assessor must look to the ownership of the wind turbine or wind farm. If the wind turbine or wind farm is owned by a(n):

- Government entity, it is exempt from property taxation.
- Public power district, the gross receipts are not subject to property tax but are subject to in lieu of tax payments to local governments.
- Nonprofit entity, it is subject to local assessment.
- Individuals and businesses where the primary purpose is something other than electrical power generation, such as agricultural producers, it is subject to local assessment.
- Entity organized for profit, it may be subject to central assessment.

Real Property at a Wind Farm

Real property is defined as land, all buildings, improvements, and fixtures, except trade fixtures. The concrete foundation pads, maintenance building, roads, and fences on a wind farm project have been deemed to be real property. The costs associated for clearing and grading the land, and the addition of gravel or crushed stones are site enhancements and should be considered part of the real property value.

Personal Property at a Wind Farm

The wind turbines, transformers, step-up transformers, meteorological monitoring towers, electrical substations, distribution plants, and transmission lines have been deemed to be personal property and are subject to personal property taxation to the owner of the property at net book value, as provided by Neb. Rev. Stat. §77-120. To determine the net book value of the personal property at a wind farm project, the following recovery periods should be used:

Recovery Periods:	
Turbines:	5 years
Electric transmission lines:	20 years
Substation and distribution plant:	20 years

Assessment

Centrally assessed public service entities are subject to unit valuation by the Property Tax Administrator. If a centrally assessed public service entity owns or leases real or personal property, the leased property is included in the unit valuation. For example, if a centrally assessed public service entity has built operating property on leased land, the site value is already included in the unit valuation. If a wind developer, subject to central assessment, leases land for wind turbines, the site value (i.e., the concrete pad and site improvements) will be included in the centrally assessed unit value.

The county assessor shall not determine a site value for operating property, leased or owned, of a centrally assessed public service entity. Any land surrounding the wind turbine or wind farm site shall be assessed to the owner in accordance with Neb. Rev. Stat. §77-201; 100% of actual value if it is a residential or commercial parcel, or 75% of actual value if it is an agricultural or horticultural parcel of land.

If a wind turbine is subject to local assessment, the county assessor shall determine the market value for the real property. The majority of wind farm projects are built on leased land. The concrete foundation pad, roads, and fences are improvements on leased land. Improvements on leased land shall be assessed to the owner of the leased land, unless an Improvements on Leased Land Assessment Application, Form 402 (http://www.pat.ne.gov/general/forms/pdf/402_impr_on_leased_land_assmt_app.pdf) has been filed specifically describing that the improvements are the property of the lessee. Form 402 must be filed by the owner of the leased land in the respective county assessor's office. Personal property is subject to the same recovery periods as indicated above.

Conclusion. The assessment procedure for wind turbines and wind farms begins with determining the ownership, which will allow the county assessor to make the determination as to whether the wind turbine or wind farm is to be locally assessed or centrally assessed by the state.

If the wind turbine or wind farm is to be locally assessed, the real property shall be assessed at either 100% for residential or commercial parcels, or 75% of actual value for agricultural or horticultural land. The personal property is to be assessed to the owner of the property as the net book value of the property using the recovery periods set forth in this Directive.

Enforcement. Pursuant to Neb. Rev. Stat. §77-1330, the Nebraska Department of Revenue Property Assessment Division may take corrective action if any county official violates any directive of the Division.

APPROVED:

/s

Ruth A. Sorensen
Property Tax Administrator
August 28, 2009

/s

Douglas A. Ewald
Tax Commissioner
August 28, 2009

This is a PDF document from the Nebraska Dept. of Revenue Property Assessment Division's website www.pat.ne.gov.

APPENDIX B

Part I

taxanalysts special report

As the Wind Turns: Incentives for Wind Energy

by Donna McConville and Cristi Lindblom

Donna McConville, CPA, J.D., and Cristi Lindblom, Ph.D., are lecturers at Bentley University, Waltham, Mass.

"Wind power is a symbol of hope in our economy." So says American Wind Energy Association (AWEA) CEO Denise Bode, a nationally recognized energy expert. In 2009 Bode was named Woman of the Year for the Women's Council for Energy and the Environment and was listed among the *Washingtonian*'s "100 Most Powerful Women of Washington."

The United States has tremendous wind energy resources, but not all states are using those resources. As of December 31, 2009, the wind industry has surpassed 35,000 megawatts (MW) in installed capacity, producing enough energy to serve nearly 9.7 million American homes. Wind power will eliminate the burning of 62 million tons of coal annually, the equivalent of reducing carbon emissions from the electricity sector by 2.5 percent, using approximately 134 million fewer barrels of oil each year, or taking 10.5 million cars off the road. The electricity generated from the fleet of turbines installed through 2009 will conserve over 20 billion gallons of water annually — water normally withdrawn for steam or for cooling power plant facilities.

U.S. wind power capacity has grown by an average of 39 percent each year for the five-year period from 2005-2009, according to the AWEA report of January 26, 2010. A total of 9,922 MW of wind generation was installed in the United States in 2009. A total of over 8,500 MW of wind generation was installed in the United States in 2008, an increase of 50 percent from 2007, with 55 new wind turbine manufacturing facilities being opened, expanded, or announced. Over 5,000 turbines were brought online in 2008 and the industry now employs 85,000 workers. New wind projects in 2008 represented an investment of $17 billion, with 35,000 jobs created at a time when the nation lost about 2 million jobs. In 2007, 5,249 MW were installed, an increase of 45 percent from the previous year. More growth is needed in that industry, because it now represents only approximately 2 percent of the nation's electricity. Wind is one of the largest sources of new power generation in the country, second only to natural gas.

With the correct governmental incentives and policies in place, wind energy could contribute 20 percent of the U.S. electric power supply by 2030, according to a study conducted by the U.S. Department of Energy. This report examines progress in four key areas: technology development, manufacturing, siting and transmission, and integration.

The United States received a solid "B" for its 2008 progress toward reaching the 20 percent goal of electricity supply from wind energy by 2030.

Just to give it perspective, with wind energy at the level of 20 percent of the total supply of energy (according to the AWEA):

- 500,000 new jobs will be needed (150,000 workers directly employed in wind industry);
- carbon dioxide emissions from electricity generation would be reduced by 25 percent (the equivalent of taking 140 million vehicles off the road), which could avoid an estimated 98 billion in CO^2 regulation costs;
- natural gas use would be reduced by 11 percent; and
- there would be a reduction of 4 trillion gallons or 17 percent in water consumption associated with electricity generation.

Wind energy projects are on the rise, with more wind turbines being installed in 2007 and 2008 than what had previously taken more than two decades to accomplish. By the end of September 2008, the United States passed Germany to become the world leader in wind energy production and in wind power generating capacity. As of the second quarter of 2009, over 4,000 MW have been added, compared with 2,900 MW added in the first six months of 2008. The United States was the world's largest market of installations added in 2008.

To sustain that growth, short- and long-term government incentives and policies must be in place as soon as possible. President Obama has initiated a dramatic shift in favor of renewable energy technologies. Since the announcement in July 2009 of

the rules to implement the stimulus bill, the wind energy industry has seen over 1,600 MW of completed projects and over 1,700 MW of construction jobs started. A market report for the third quarter of 2009 said that 1,649 MW were installed, which was higher than the second quarter of 2009, and the fourth quarter of 2009 was the strongest in the year, with the installation of 4,041 MW.

However, according to the AWEA, enacting those policies is a challenge. Wind turbine manufacturing lagged in 2009 compared with 2008 levels. Manufacturers have been leery of investing in a market that in the past has provided only short-term incentives. The wind industry is urging an adoption of a national renewable electricity standard (RES) to provide a nationwide long-term incentive for capital investment. That would provide a targeted manufacturing base and would also create tens of thousands of jobs. An RES ensures that some amount of renewable energy is included in the portfolio of electricity resources serving a state or country. Twenty-nine states and the District of Columbia have RES policies in place, but a national program is necessary to take advantage of the renewable resources that exist across the nation. Forecasts say that without that national RES, growth will not continue at the pace it has sustained over the last several years. Experience has shown that a firm, long-term national renewable energy policy is the key to capital investment in this industry. A target of generating at least 25 percent of the nation's electricity from renewable energy by 2025 and a near-term target of 10 percent by 2012 was outlined by President Obama to encourage investments in wind and other renewable energy projects. A *Washington Post* poll conducted in December 2008 found that 84 percent of Americans support that sort of standard, according to the AWEA.

The AWEA credits the industry's expansion to the stability over the past three years of the federal renewable energy production tax credit (PTC) (IRC section 45). The PTC, created under the Energy Policy Act of 1992, provides the investor or owner of qualifying property an annual income tax credit based on the amount of electricity generated. The federal government allows a corporate income tax credit for electricity generated. The PTC is 2.1 cents per kilowatt-hour of electricity produced and is adjusted annually for inflation. The electricity produced must be from qualified energy resources at a qualified facility during the first 10-year period in which the facility was originally placed in service, and the electricity must be sold by the taxpayer to an unrelated party during the tax year.

During the periods in which the PTC was allowed to expire (1999, 2001, and 2003), production on installations dropped by as much as 93 percent in the following year. When the credit expired at the end of 2003 and was not renewed until October 2004, production dropped 77 percent. The American Recovery and Reinvestment Act (signed into law on February 17, 2009) established a three-year extension of the PTC through December 31, 2012.

Also, for those wind project developers that placed facilities in service during 2009 and 2010, a new energy investment tax credit is available in place of the PTC. Facilities placed in service before 2013 also qualify for the ITC, as long as construction begins before the end of 2010. The ITC generally provides a 30 percent tax credit for investments in energy projects and can be claimed entirely in the year the facility is placed in service. Businesses can elect either the ITC or the PTC, but not both for the same facility. The decision whether to elect the ITC (immediate credit or cash payment) in lieu of the PTC (over 10 years) will depend on each taxpayer's situation. The ITC can be converted to a grant from the Department of Treasury. The Treasury must pay the grant within 60 days of an application being submitted. The new ITC was designed to assist the wind energy industry in financing projects during the challenging economic times.

The incentives and credits mentioned throughout this report apply to various facets of the wind energy industry. These credits are available to wind energy producers and manufacturers of wind energy equipment components. As a result of the manufacturing tax credit, "wind power is a bright source of manufacturing jobs in the U.S. today," Bode claims. Domestically manufactured wind turbine components rose to 50 percent of the wind turbines installed in the nation for 2008 (30 percent in 2005) and are expected to become an even larger source of U.S. jobs in the future. One device to help ensure this progress is for the federal government to enact a national RES, as mentioned earlier. According to Bode, U.S. wind turbine manufacturing is lagging, while the global clean energy race is heating up. If the government does not enact a national RES soon, manufacturing investments, along with thousands of jobs, will go overseas.

Many states allow various tax incentives for the production of renewable energy. However, the installation of wind power is not proportionately distributed across the 50 states with wind power potential. Wind power production is occurring in nearly all states, but at this point, the magnitude of wind power production in the United States is still small, accounting for only approximately 2 percent of the U.S. electricity consumption.

Table 1 illustrates the top five states in wind energy production and their ranking in wind energy potential.

Table 2 illustrates the top five states in wind energy potential and their ranking in wind energy production. (Figures as of December 31, 2009.)

As you can see from the two tables, there is not a correlation between the rankings for wind energy

Table 1.
Top Five States for Wind Energy Production and Wind Energy Potential

		Total power existing, in MW	Total power under construction, in MW	Ranking for wind energy production	Ranking for wind energy potential
1	Texas	9,410	302	1	2
2	Iowa	3,670	200	2	10
3	California	2,794	121	3	17
4	Washington	1,980	170	4	24
5	Minnesota	1,809	60	5	9

Table 2.
Top Five States for Wind Energy Potential and Production ranking

		Total power existing, in MW	Total power under construction, in MW	Ranking for wind energy potential	Ranking for wind energy production
1	North Dakota	1,203	76	1	10
2	Texas	9,410	302	2	1
3	Kansas	1,013	12	3	14
4	South Dakota	313	99	4	20
5	Montana	375	0	5	18

potential and production, with the exception of Texas. Why is there this lack of correlation? And why aren't most companies taking advantage of the tax credits and incentives available in their states for producing alternative renewable energy? There is no question that renewable energy sources are environmentally favorable compared with fossil fuel and nuclear technologies, but there are two main reasons why more renewable energy is not being produced, according to the Energy Information Administration.

Why aren't most companies taking advantage of the tax credits and incentives available in their states for producing alternative renewable energy?

The first reason is that renewable energy facilities are generally more expensive to build and to operate than coal and natural gas plants. The second reason is that the best renewable resources are often available only in remote areas, so building transmission lines to deliver power to large metropolitan areas is very expensive. To help make renewable energy facilities competitive and to encourage the building of transmission lines, several tax incentives are available at the state and local levels in addition to those available at the federal level.

The following section will focus on the following incentives being used at the state and local levels: corporate tax, sales tax, property tax, and production incentives. Table 3 (next page) illustrates the various financial and tax incentives available for renewable energy for the nine states mentioned in tables 1 and 2. A description of each incentive follows.

Texas

Corporate Tax

- Companies that engage solely in the business of manufacturing, selling, or installing solar energy devices are exempt from the franchise tax. The franchise tax is Texas's equivalent to a corporate tax. (Texas Tax Code section 171.056.)
- There is a franchise tax deduction of 10 percent of the amortized cost of a solar energy device. Wind energy qualifies under the definition of solar energy. (Texas Tax Code section 171.107.)

Property Tax

- An exemption is allowed for the amount of the appraised property value that arises from the installation or construction of a wind-powered energy device that is primarily for the production and distribution of thermal, mechanical, or electrical energy for on-site use, or devices used to store that energy. (Texas Statutes section 11.27.)

Table 3.
Tax Incentives for Renewable Energy by State

State	Corporate Tax	Sales Tax	Property Tax	Production Incentives/Other
Texas	Texas Tax Code section 171.107 and section 171.056		Texas Statutes section 11.27	Energy buyback program for residential producers through Green Mountain Energy Co.
Iowa	Iowa Code 476B Iowa Code 476C Iowa Admin. Code 199-15.18 - 199-15.21 SF 456	Iowa Code section 423.3, Section 54	Iowa Code section 441.21(8)	
California				CA Feed-In Tariff CA Rebate Program
Washington		RCW section 82.08.02567 SB 6170		RCW section 82.16.110 et seq. SB 5101
Minnesota		Minnesota Statute section 297A.68 subd.12	Minnesota Statute section 272.02, section 272.028 and section 272.029 Minnesota Sessions Law HF 1298, Article 2, section 12	Minnesota Statute section 216C.41
North Dakota	North Dakota Century Code 57-38-01.8		North Dakota Century Code 57-02-08(27) 57-06-14.1	
Kansas			Kansas Statute 79-201 (11)	SB 108
South Dakota			South Dakota Codified Laws section 10-6-35.8, section 10-4-36, and HB 1320 section 10-35-16	
Montana	Montana Code Annotated section 15-32-401		Montana Code Annotated section 15-6-225 section 15-6-224 section 15-32-102 section 15-24-1402	Green Tag Purchase Program Montana Code Annotated section 15-24-3111 section 15-6-157

Production Incentive

- Green Mountain Energy Co. is a retailer of green electricity. It offers an energy buyback program to Texas customers that produce renewable energy from home-sited systems. That program is available only to residential customers of Green Mountain Energy Co. The first 500 kWh per month are credited to the customers' account at the retail rate. Anything over 500 kWh per month is credited to the customers' account at half of the retail rate.

Iowa

Corporate Tax (eligible facility can qualify only for one of the following two credits)

- A production tax credit of 1.5 cents per kilowatt-hour is available for energy generated and sold by eligible wind energy generators and other renewable energy facilities. That credit may be applied toward the state's personal income tax, business tax, or sales and use tax. The facility must be placed into service on or after July 1, 2005, and before January 1, 2012. The facility cannot exceed 2.5 MW per qualifying owner, and facility owners may not have an ownership interest in more than two eligible facilities. Any tax credits in excess of tax liability in a given year may be carried forward up to seven years. (Iowa Code section 476C.)

- A production tax credit of 1 cent per kilowatt-hour is available for electricity generated by eligible wind energy facilities, including electricity used for on-site consumption. That credit may be applied toward the state's personal income tax, business income tax, sales and use tax, or energy replacement generation tax. The facility must be placed into service on or after July 1, 2005, and before January 1, 2012. Facility owners may not own more than two eligible facilities. For applications filed on or after March 1, 2008, facilities must have a minimum capacity of at least 2 MW and a

maximum capacity of 30 MW. Applications from schools, colleges, universities, and hospitals filed on or after July 1, 2009, must have a minimum capacity of 750 kW. The maximum total amount of generating capacity eligible for the credit is 150 MW. Facility owners may apply for wind energy tax credit certificates over a 10-year period, beginning with the initial period of electricity. Any tax credits in excess of tax liability in a given year may be carried forward up to seven years. (Iowa Code section 476B.)

Sales Tax

- Exemption is available from state sales tax for the total cost of wind energy equipment and all materials used to manufacture, install, or construct wind energy systems. The exemption does not apply to equipment used to construct a plant to manufacture wind energy systems. (Iowa Code section 423.3, section 54.)

Property Tax

- The market value added to a property by a wind energy system is exempt from the state's property tax for five full assessment years. That exemption can be applied to systems whose primary purpose is to store or provide electricity for use at the site where the system is located or for those systems that periodically export electricity to the grid, as long as they are used primarily to serve on-site electricity demand. (Iowa Code section 441.21(8).)

California

Production Incentive/Other

- Effective October 11, 2009, the California feed-in tariff was amended. This new law takes effect January 1, 2010. This tariff allows eligible customer-generators to enter into contracts to sell the electricity produced by small renewable energy systems (up to 3 MW) at market-based prices. (California Public Utilities Code section 399.20, SB 32, and California Public Utilities Commission Resolution E-4137.)
- The California Energy Commission offers cash incentives to promote the installation of grid-connected, small wind renewable energy electric-generating systems through its Emerging Renewables Program. Rebate levels are as follows:
  - small wind turbines (up to 50 kW): $2.50/W for first 7.5 kW and $1.50/W for increments greater than 7.5 kW and less than 30 kW;
  - rebates for eligible renewable energy systems installed on affordable housing projects are available at 25 percent above the standard rebate level, up to 75 percent of the system's installed cost; and
  - incentives received from sources other than that program will reduce the amount of the rebate by no less than 5 percent in an effort to prevent total incentives exceeding total system costs.

Washington

Sales Tax

- Sales tax does not apply to the sale of equipment used to generate electricity using wind energy. The tax exemption applies to labor and services related to the installation of the equipment, as well as to the sale of equipment and machinery. Eligible systems are those with a generating capacity of at least 1 kW. In May 2009 Washington passed SB 6170, effective July 1, 2009, which extended the sales and use tax exemption to June 30, 2011. From July 1, 2011, to June 30, 2013, the exemption will be reduced from 100 percent of the sales and use tax to 75 percent of the sales and use tax. The exemption is due to expire on June 30, 2013. (RCW section 82.08.02567 and SB 6170.)

Production Incentive

- In May 2005 Washington enacted SB 5101, establishing production incentives for individuals, businesses, and local governments. that generate electricity from wind power. The multipliers result in production incentives ranging from 12 cents to 54 cents per kilowatt-hour, capped at $5,000 per year. (RCW section 82.16.110 et seq. and SB 5101.)

Minnesota

Sales Tax

- Wind energy conversion systems used as electric power sources are exempt from sales tax. Materials used to manufacture, install, construct, repair, or replace wind energy systems are also exempt from sales tax. (Minn. Stat. section 297A.68, subd. 12.)

Property Tax

- All real and personal property of wind energy systems are exempt from property tax. However, in lieu of a property tax on large wind energy systems, a production tax was implemented in 2002. The following are the rates for that production tax:
  - wind systems greater than 12 MW are taxed at a rate of 0.12 cent/kWh;
  - wind systems between 2 MW and 12 MW are taxed at a rate of 0.036 cent/kWh;
  - wind systems between 250 kW and 2 MW are taxed at a rate of 0.012 cent/kWh; and
  - wind systems under 250 kW are exempt from the production tax.

For 2006-2009, the revenue generated by the production tax is distributed to local taxing districts (counties, cities, and townships). (Minn. Stat. section 272.02, 272.028, 272.029, and Minnesota Session Laws H.F. 1298, article 2, section 12.)

Production Incentive

- A payment of 1 cent to 1.5 cents per kWh is issued for electricity generated by new wind energy projects for 10 years for qualified wind energy projects of less than 2 MW in capacity. However, that program was closed to new applicants on January 1, 2005. Payments continue to those that had facilities in operation before January 1, 2005. This statute is due to expire on January 1, 2018. (Minn. Stat. section 216C.41.)

North Dakota

Corporate Tax

- North Dakota offers a corporate income tax credit for the cost of acquiring and installing a wind energy system for installations after December 31, 2000, and before January 1, 2015. The credit is equal to 3 percent per year for five years for the actual cost of acquisition and installation of the system. If the tax credit exceeds the taxpayer's liability, the excess may be carried over to each of the next five succeeding tax years. For those wind energy systems installed after September 30, 2008, and before January 1, 2012, the credit may be carried over to each of the next 20 tax years. For wind energy systems installed after January 1, 2012, any excess may be carried over to each of the next 10 tax years. (North Dakota Century Code 57-38-01.8.)

Property Tax

- North Dakota exempts from local property taxes any locally assessed wind energy devices that serve a new or existing building or structure. Stand-alone systems and systems that are part of conventional systems are also eligible. For systems that are part of a conventional system, only the renewable energy portion of the total system is eligible. This exemption is applied only during the five-year period following installation. This exemption does not apply to those centrally assessed wind energy systems (produces electric power for public use) greater than 100 kW. (North Dakota Century Code 57-02-08(27).)
- In 2001 North Dakota began offering property tax reductions for commercial wind turbines constructed before 2011. Originally, the law reduced the taxable value of centrally assessed wind turbines with a capacity of 100 kW or more from 10 percent to 3 percent of their assessed value, which resulted in a property tax savings of 70 percent. Currently, all centrally assessed wind turbines with a capacity of 100 kW or greater that are constructed after June 30, 2006, and before January 1, 2015, are valued at 1.5 percent of their assessed value, which results in a property tax savings of 85 percent. All other centrally assessed wind turbines with a capacity of 100 kW or more are valued at 3 percent of assessed value, which results in a property tax savings of 70 percent (prior rule). Construction must be completed before January 1, 2015, to be eligible for this tax reduction. (North Dakota Century Code 57-06-14.1.)

Kansas

Property Tax

- Kansas law exempts renewable energy equipment from property taxes. The equipment must be actually and regularly used predominantly to produce and generate electricity. (Kansas Statute 79-201, section 11.)

Other

- Kansas may provide up to $5 million in financing for a wind manufacturing project. Manufacturing companies building wind equipment or components in Kansas may be eligible for financing through the Kansas Department of Commerce to support research, development, engineering, and manufacturing. To qualify, the project must result in $30 million in new investment in Kansas and the hiring of at least 200 new employees within five years, and the company must pay at least $32,500 of average annual compensation per Kansas employee. The principal and interest payments for the bonds are retired using the payroll tax withholdings created from the new jobs. That financing is due to expire on July 1, 2013. (SB 108.)

South Dakota

Property Tax

- South Dakota exempts from local property taxes renewable energy systems on residential and commercial property. This exemption is not allowed for systems that produce energy for resale. Separate laws cover commercial wind facilities (see below). For residential systems, the exemption applies 100 percent to the entire assessed value of the system and may be transferred when the property is sold, provided the new owner is the first occupant of the structure. For commercial systems, the exemption is 50 percent of the installed cost of the system and may not be transferred when the system is sold. The exemption may be applied for three continuous years. After three years, the property owner may claim a portion of the exemption for three subsequent years according to the following (South Dakota Codified Laws section 10-6-35.8 et seq.):
  - year 1: 75 percent of the exemption;
  - year 2: 50 percent of the exemption; and
  - year 3: 25 percent of the exemption.

- Commercial wind farms with less than 5 MW in total capacity are afforded a property tax incentive. The property value assessment does not include the wind turbine or the blades, as they are considered personal property. The assessed property value takes only the base, foundation, tower, and substations into account. All commercial wind facilities covered under this law are assessed at the local level. Before 2003 some facilities were centrally assessed for tax purposes at the state level. (South Dakota Codified Laws section 10-4-36 et seq. and HB 1320.)
- Commercial wind farms constructed after July 1, 2007, with a minimum capacity of 5 MW are subject to an alternative taxation calculation in lieu of all taxes on real and personal property. The alternative taxation method has two components. The first component is an annual tax equal to $3 per kW of capacity of the wind farm. The second component is a 2 percent annual tax on the gross receipts of the wind farm. The gross receipts are calculated as the number of kilowatt-hours produced multiplied by a base electricity rate of $0.0475/kWh in 2008, with the base rate increasing by 2.5 percent annually thereafter. The money generated by the alternative taxation method will be deposited into the state's wind energy tax fund. All receipts from the capacity tax and 20 percent of the gross receipts tax will be redistributed back to the county treasurer where the wind farm is located before May of each year. (South Dakota Codified Laws section 10-35-16 et seq.)

Montana

Corporate Tax

- Montana provides an alternative energy investment tax credit of up to 35 percent against individual or corporate tax on income generated by a commercial alternative energy investment of $5,000 or more. The credit can be applied only against taxes due from taxable or net income produced by one of the following:
  - — a manufacturing plant located in Montana that produces alternative-energy-generating equipment;
  - — a new business facility or an expansion, for which the alternative-energy-generating equipment supplies the basic energy needed; or
  - — the alternative-energy-generating equipment in which the investment was made.

The credit is available to taxpayers purchasing an existing facility, as well as to those building a new facility. The tax credit must be taken the year the equipment is placed in service. However, any amount of the tax credit that exceeds the tax liability may be carried over and applied against state tax liability for the following seven years. A credit may be extended through the 15th tax year succeeding the tax year of installation for projects on a Montana Indian reservation that meets other specified criteria. Taxpayers may not take that credit in conjunction with any other state energy or state investment tax benefits. (Montana Code Annotated section 15-32-401 et seq.)

Property Tax

- New electricity-generating facilities built in Montana that use an alternative renewable energy source with a capacity less than 1 MW are exempt from property taxes for five years after operation begins. (Montana Code Annotated section 15-6-225.)
- Montana exempts from property tax recognized nonfossil forms of energy generation for 10 years after installation of the property. The exemption is allowed up to $20,000 for single-family residential dwellings in value and up to $100,000 in value for multifamily residential dwellings or a nonresidential structure. (Montana Code Annotated sections 15-6-224 and 15-32-102.)
- Montana generating plants producing 1 MW or more by means of an alternative renewable energy source are eligible for the new or expanded industry property tax reduction during the first nine years of operation. If approved, the facility is taxed at 50 percent of its taxable value in the first five years after the construction permit is issued. Each year thereafter, the percentage is increased by equal percentages until the full taxable value is attained in the 10th year. (Montana Code Annotated section 15-24-1402.)

Production Incentive

- The Northwest Solar Cooperative offers to purchase wind energy at a rate of $0.02 per kWh through December 31, 2009. Production of up to 50 kW is automatically approved, and production of over 50 kW is approved on a case-by-case basis. Residential and nonresidential owners of wind energy systems installed after June 2, 2002, in Oregon, Washington, Idaho, and Montana are eligible to participate in the Green Tag Purchase Program.

Other

- In May 2007 Montana enacted legislation (HB 3) that allows a property tax abatement for new renewable energy production facilities, new renewable energy manufacturing facilities, and renewable energy research and development equipment. Eligible facilities and equipment are assessed at 50 percent of their taxable value. Under that policy, those facilities are assessed at 50 percent of their taxable value for the construction period and the first 15 years after the facility commences operation, not to

exceed 19 years. To qualify, facilities must begin construction after June 1, 2007. Also, all renewable energy research and development equipment up to $1 million in value may qualify for a 50 percent property tax abatement if it is placed in service after June 30, 2007. (Montana Code Annotated sections 15-24-3111 and 15-6-157.)

The states that are ranked in the top five in the United States for wind energy production all have renewable electricity standards. Of the top five states ranked for wind energy potential, only Texas and Montana have RESs. In other news, states that are not mentioned above continued to grow in the wind energy industry in 2009. The state reporting the fastest growth rate for the third quarter of 2009 was Arizona, which installed its first utility-scale project. Pennsylvania ranked second in growth with 29 percent, followed by Illinois with 22 percent, Wyoming with 21 percent, and New Mexico with 20 percent.

According to Bode, U.S. wind turbine component manufacturing lagged in 2009. Wind power is a large source of manufacturing jobs in the United States today, but more can certainly still be done. To summarize, the three types of policies to assist the continuing growth of renewable energy are:

- tax credits — the PTC and the ITC (credit or cash grant);
- RESs; and
- production incentives and markets

If a national RES is passed soon enough, it will work in conjunction with ARRA and provide the signal that companies are waiting for to invest in new and expanded facilities in the nation on a long-term basis. Manufacturers need that stability to expand their operations in the United States. As mentioned earlier, these on-again, off-again tax credit policies have a tremendous impact on the production of renewable energy projects. Also, several states have adopted production incentives or markets for the production and sale of renewable energy. Those producers can sell electricity and use the proceeds from the sale of electricity to reinvest in their renewable energy projects to keep the cycle going.

On January 8, 2010, Bode announced that the administration has awarded $2.3 billion in clean energy manufacturing tax credits and that the president is calling on Congress for an additional $5 billion. The AWEA believes that wind will continue to be a leading source of new power generation in 2010. Wind is a domestic and inexhaustible energy supply and is one of the cleanest and most environmentally friendly energy sources in the world today. According to the forecasts, 2010 should be another record year for renewable energy projects in the United States. ☆

(Part 2)

taxanalysts special report

As the Wind Turns: Tax Incentives For Wind Energy Producers

by Donna McConville and Cristi Lindblom

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This article is a continuation of the analysis in an article published earlier that outlined the various state tax incentives available to the top five producers and the top five potential producers of wind energy. ("As the Wind Turns: Incentives for Wind Energy," *State Tax Notes*, Mar. 8, 2010, p. 699, *Doc 2010-2135*, or *2010 STT 44-1*.) This article explains the various state incentives for the top 15 states that produce wind energy with their respective ranking for wind energy potential.

"Wind works for America," says American Wind Energy Association (AWEA) CEO Denise Bode, who is a nationally recognized energy expert. As of July 20, 2010, the wind industry has installed 36,303 megawatts (MW) in wind energy projects in the United States. As of December 31, 2009, 35,159 MW in wind energy projects had been installed. The results for the first and second quarter of 2010 are far below expectations. In the first quarter of 2010, only 539 MW were installed, which is the lowest first-quarter results since 2007. In the second quarter of 2010, only 700 MW were installed, bringing the total to only 1,239 MW installed for 2010. You can see the growth results in Table 1 (next page), which show the growth in MW for 2009 compared with 2010, as of July 20, 2010.

Wind power installations for 2010 have dropped by 57 percent and 71 percent from 2008 and 2009 levels respectively, according to AWEA. Manufacturing investment for 2010 also continues to lag below the levels for 2008 and 2009. Only two new manufacturing facilities have come on line in the first half of 2010. In 2008 there were seven and in 2009 there were five new manufacturing facilities brought on line. With such drastic results, investments in new manufacturing facilities will most likely not happen. The United States is losing the clean energy manufacturing race to both Europe and China, both of which have firm, long-term renewable energy targets, commitments, and policies in place.

A strong federal policy that supports the U.S. wind energy industry has never been more important, Bode says. AWEA and a coalition of renewable energy, labor, utility, and environmental organizations are urging Congress to put in place a strong national renewable electricity standard (RES) to bring life back to an industry that was booming in 2008 and 2009. An RES ensures that some amount of renewable energy is included in the portfolio of electricity resources servicing a state or country. Currently, 29 states and the District of Columbia have RES policies in place (see Table 3, p. 182).

Experience has shown that a long-term national renewable energy policy is critical to attracting capital investment in this industry. With a strong RES, manufacturing investments would be on the rise and hundreds of thousands of current and future jobs would be saved and created. There would also be less dependence on imported energy if there were more clean, affordable energy available in the United States. Without an RES, manufacturing facilities will go idle and many jobs will be lost or surrendered to other countries.

Wind energy is available and would help to stimulate our economy, but unless Congress passes a national RES, there is little the wind energy industry can do.

Wind power production is occurring in nearly all states, but the magnitude of wind power production in the United States is still small, accounting for only about 2 percent of the U.S. electricity consumption. Table 1 shows the top 15 states in wind energy production and their respective ranking in wind energy potential.

The following section will focus on the following incentives being used at the state and local levels: corporate tax, sales tax, property tax, and performance-based incentives. Table 2 (p. 177) shows the various financial/tax incentives available for renewable energy for the 15 states mentioned in Table 1. The top three producers of wind energy are the same as reported in the March 8, 2010, article,

Table 1.
Top 15 States for Wind Energy Production
(as of July 20, 2010)

		Total power existing in MW	Total power under construction in MW	Ranking for wind energy production	Ranking for wind energy potential	Growth in 2009 in MW	Growth in 2010 in MW
1	Texas	9,707	370	1	2	2,282	302
2	Iowa	3,670	0	2	10	879	0
3	California	2,739	443	3	17	276	16
4	Oregon	1,920	614	4	23	754	98
5	Washington	1,914	815	5	24	541	6
6	Illinois	1,848	437	6	16	631	300
7	Minnesota	1,797	673	7	9	58	.75
8	New York	1,274	95	8	15	567	0
9	Colorado	1,248	552	9	11	178	1
10	North Dakota	1,222	37	10	1	488	19
11	Oklahoma	1,130	381	11	8	299	0
12	Indiana	1,127	210	12	44	905	91
13	Wyoming	1,101	311	13	7	425	0
14	Kansas	1,026	0	14	3	199	12
15	Pennsylvania	748	0	15	22	387	0

but are updated and repeated here. A description of each incentive follows Table 2.

Texas

Corporate Tax

Companies that engage solely in the business of manufacturing, selling, or installing solar energy devices are exempt from the franchise tax. The franchise tax is Texas's equivalent to a corporate tax (Texas Tax Code section 171.056).

There is a franchise tax deduction of 10 percent of the amortized cost of a solar energy device. Wind energy qualifies under the definition of solar energy (Texas Tax Code section 171.107).

Property Tax

An exemption is allowed for the amount of the appraised property value that arises from the installation or construction of a wind-powered energy device that is primarily for the production and distribution of thermal, mechanical, or electrical energy for on-site use, or devices used to store that energy (Texas Statutes section 11.27).

Iowa

Corporate Tax

An eligible facility can qualify for only one of the following two credits:

- A production tax credit of 1.5 cents per kilowatt (kWh)-hour is available for energy generated and sold by eligible wind energy generators and other renewable energy facilities. That credit may be applied toward the state's personal income tax, business tax, or sales and use tax. The facility must be placed into service on or after July 1, 2005, and before January 1, 2012. The facility cannot exceed 2.5 MW per qualifying owner, and facility owners may not have an ownership interest in more than two eligible facilities. Any tax credits in excess of tax liability in a given year may be carried forward up to seven years (Iowa Code section 476C).
- A production tax credit of 1-cent-per-kWh is available for electricity generated by eligible wind energy facilities, including electricity used for on-site consumption. That credit may be applied toward the state's personal income tax, business income tax, sales and use tax, or energy replacement generation tax. The facility must be placed into service on or after July 1, 2005, and before July 1, 2012. Facility owners may not own more than two eligible facilities. For applications filed on or after March 1, 2008, facilities must have a minimum capacity of at least 2 MW and a maximum capacity of 30 MW. Applications from schools, colleges, universities, and hospitals filed on or after July 1, 2009, must have a minimum capacity of 750 kW. The maximum total amount of generating capacity eligible for the credit is 150 MW. Facility owners may apply for wind energy tax credit certificates over a 10-year period, beginning with the initial period of electricity. Any tax credits

Table 2.
Tax Incentives for Renewable Energy by State

State	Corporate Tax	Sales Tax	Property Tax	Performance-Based Incentives/ Other
Texas	Texas Tax Code sections 171.107 and 171.056		Texas Statutes section 11.27	
Iowa	Iowa Code 476B Iowa Code 476C Iowa Admin Code 199-15.18 - 199-15.21 SF 456	Iowa Code sections 423.3 and 54	Iowa Code section 441.21(8)	Farmers Electric Cooperative
California		SB 71		Calif. Feed-in Tariff Calif. Rebate Program Sacramento Municipal Utility District Feed-in Tariff
Oregon	HB 3680 Temporary Oregon Administrative Rules 330-090-0105		ORS section 307.175	Energy Trust of Oregon's Community Wind Program OAR 330-090-0105 to 330-090-0150
Washington		RCW section 82.08.02567 SB 6170		RCW section 82.16.110 et seq. SB 5101
Illinois		section 20 ILCS 655/5.5	section 35 ILCS 200/10-600 et seq. HB 4797	
Minnesota		Minnesota Statute section 297A.68 subd.12	Minnesota Statute sections 272.02, 272.028, and 272.029 Minnesota Sessions Law HF 1298, Article 2, sec. 12	
New York			NY CLS Real Property Tax Article 4 section 487	New York State Energy Research and Development Authority (NYSERDA)
Colorado		CRS sections 39-26-724, 29-2-105, 30-11-107.3, and 30-11-107.3	CRS sections 31-20-101.3, 39-4-101, et seq. SBs 174, 177, and 19	Colorado Governor's Energy Office
North Dakota	North Dakota Century Code 57-38-01.8		North Dakota Century Code 57-02-08(27) 57-06-14.1	
Oklahoma	68 Okl. St. section 2357.32A HB 3024			68 Okl. St. section 2357.32B
Indiana			Ind. Code section 6-1.1-12-26 et seq.	Indianapolis Power & Light Company IURC No. E-16 Case 43623
Wyoming		Wyo. Stat. section 39-15-105(a)(viii)(N) Wyo. Stat. section 39-16-105(a)(viii)(C) HB 215		Business and Industry Division of the Wyoming Business Council
Kansas	Kansas Statutes 79-32, 245		Kansas Statute 79-201 (11)	Kansas Statute 74-50, 136
Pennsylvania			72 P.S. section 5453.201 et seq.	Special Session HB 1

in excess of tax liability in a given year may be carried forward up to seven years (Iowa Code section 476B).

Sales Tax

There is an exemption from the state sales tax for the total cost of wind energy equipment and all materials used to manufacture, install, or construct wind energy systems. The exemption does not apply to equipment used to construct a plant to manufacture wind energy systems (Iowa Code sections 423.3 and 54).

Property Tax

The market value added to a property by a wind energy system is exempt from the state's property tax for five full assessment years. This exemption can be applied to systems whose primary purpose is to store or provide electricity for use at the site where the system is located or for those systems that periodically export electricity to the grid, as long as they are used primarily to serve on-site electricity demand. (Iowa Code section 441.21(8))

Performance-Based Incentive

The Farmers Electric Cooperative (FEC) offers a production incentive to members that install qualifying wind electricity generating systems. Commercial and residential qualifying systems are eligible for a 20-cents-per-kilowatt-hour production incentive for up to 10 years for energy production that offsets up to 25 percent of monthly energy usage.

California

Sales Tax

California provides an exclusion from the state's sales and use tax for expenses related to the design, manufacture, production, or assembly of renewable energy equipment. That exemption is due to expire on January 1, 2021 (SB 71).

Performance-Based Incentive/Other

On October 11, 2009, the California feed-in tariff was amended as of January 1, 2010. This tariff allows eligible customer-generators to enter into contracts to sell the electricity produced by small renewable energy systems (up to 3 MW) at market-based prices (CA Public Utilities Code section 399.20, SB 32, and CA Public Utilities Commission Resolution E-4137).

The California Energy Commission offers cash incentives to promote the installation of grid-connected small wind renewable energy electric-generating systems through its Emerging Renewables Program. Rebate levels are as follows:

- for small wind turbines (up to 50 kW): $3/W for first 10 kW and $1.50/W for increments greater than 10 kW and less than 30 kW;
- rebates for eligible renewable energy systems installed on affordable housing projects are available at 25 percent above the standard rebate level up to 75 percent of the system's installed cost; and
- incentives received from sources other than this program will reduce the amount of the rebate by no less than 5 percent to prevent total incentives exceeding total system costs.

The Sacramento Municipal Utility District offers a feed-in tariff for various renewable energy technologies. The rates are dependent on the year the system is placed in service. Once a system is installed, the rates are locked in at that rate for the life of the contract. The tariff is limited to systems 5 MW or less.

Oregon

Corporate Tax

Oregon's business energy tax credit (BETC) is available for investments in renewable energy resources. The tax credit can cover costs directly related to the project, including the building, excavation, machinery and equipment cost, engineering and designs fees, materials, supplies, and installation costs (HB 3680 and Temporary Oregon Administrative Rules 330-090-0105 to 330-090-0150). The BETC is available for:

- Renewable energy generation and renewable energy equipment manufacturing, for 50 percent of certified project costs, distributed over five years (10 percent per year) up to $10 million for generation and up to $20 million for equipment manufacturing. Renewable energy equipment manufacturing facilities must receive preliminary certification before January 1, 2014, to use the tax credit.
- Wind projects over 10 MW, for 50 percent of the certified project costs, though only 5 percent of total project costs are included in certified project costs. The maximum incentive is $3.5 million for projects precertified between January 1, 2010, and December 31, 2010; $2.5 million for projects precertified between January 1, 2011, and December 31, 2011; and $1.5 million for projects precertified on or after January 1, 2012.
- The tax credit for facilities using or producing renewable energy resources is capped at $300 million for systems precertified from July 1, 2009, to June 30, 2011, and $150 million for systems precertified between July 1, 2011, and June 30, 2012.

Property Tax

Oregon excludes from property tax the added value to any property from the installation of a qualifying renewable energy system. This exemption is due to expire on July 1, 2012 (ORS section 307.175).

Performance-Based Incentive/Other

The Energy Trust of Oregon's Community Wind Incentive Program provides resources and cash incentives to help communities, businesses, and government entities install wind turbine systems up to 20 MW in capacity. Incentive levels are based on many factors and vary by project. The Energy Trust will disburse the incentives over time, contingent on the project's actual delivery of power to the grid (Community Wind Incentive Program).

The Energy Trust of Oregon's Community Wind program provides resources and cash incentives for customers of Portland General Electric and Pacific Power that are installing turbines up to 50 kW. The incentives are as follows:

- residential systems: $4,500 per rated kW of the wind turbine, up to $35,000; and
- commercial systems: $4,000 per rated kW of the wind turbine, up to $60,000 (the Small Wind Incentive Program).

Washington

Sales Tax

Sales tax does not apply to the sale of equipment used to generate electricity using wind energy. The tax exemption applies to labor and services related to the installation of the equipment, as well as to the sale of equipment and machinery. Eligible systems are those with a generating capacity of at least 1 kW. In May 2009 lawmakers passed SB 6170, effective July 1, 2009, which extended the sales and use tax exemption to June 30, 2011. From July 1, 2011, to June 30, 2013, the exemption will be reduced from 100 percent of the sales and use tax to 75 percent of the sales and use tax. That exemption is due to expire on June 30, 2013 (RCW section 82.08.02567 and SB 6170).

Performance-Based Incentive

In May 2005 Washington enacted SB 5101, establishing production incentives for individuals, businesses, and local governments that generate electricity from wind power. The multipliers result in production incentives ranging from 12 cents to 54 cents per kWh, capped at $5,000 per year (RCW section 82.16.110 et seq. and SB 5101).

Illinois

Sales Tax

A business establishing a new wind power facility in Illinois that is not located in an enterprise zone may be eligible for designation as a high-impact business. For that designation, the facility is entitled to a full exemption of the state sales tax and any local state sales taxes for building materials incorporated into the facility. The wind power facility must be placed in service on or after July 1, 2009, and must generate electricity using wind turbines 500 kW or greater (section 20 ILCS 655/5.5).

Property Tax

Beginning in 2007, for a 10-year period, wind energy devices larger than 500 kW of capacity and producing power for commercial sale will be valued at $360,000 MW of capacity. That value will be adjusted annually for inflation. The assessed value will be $119,988/MW, because Illinois assesses property for property tax purposes at one-third of its fair cash value.

An allowance for depreciation is also available, calculated by dividing the age of the turbine by 25 and then multiplying the result by the real property cost basis. The depreciation allowance may not exceed 70 percent of the real property cost basis. Both incentives are due to expire in the 2016 assessment year (section 35 ILCS 200/10-600 et seq. and HB 4797).

Minnesota

Sales Tax

Wind energy conversion systems used as electric power sources are exempt from sales tax. Materials used to manufacture, install, construct, repair, or replace wind energy systems are also exempt from sales tax (Minn. Stat. section 297A.68 subd 12).

Property Tax

All real and personal property of wind energy systems are exempt from property tax. However, in lieu of a property tax on large wind energy systems, a production tax was implemented in 2002. The following are the rates for that production tax:

- wind systems greater than 12 MW are taxed at a rate of 12 cents/kWh;
- wind systems between 2 MW and 12 MW are taxed at a rate of 3.6 cents/kWh;
- wind systems between 250 kW and 2 MW are taxed at a rate of 1.2 cents/kWh; and
- wind systems under 250kW are exempt from the production tax.

For 2006-2009, the revenue generated by the production tax is distributed to local taxing districts (counties, cities, and townships) (Minn. Stat. sections 272.02, 272.028, and 272.029, and MN Session Laws HF 1298, Article 2, section 12).

New York

Property Tax

The New York State Real Property Tax Law provides a 15-year real property tax exemption for wind energy systems constructed in New York state. Local governments are permitted to decide whether to allow this exemption. The exemption applies to systems that are existing or constructed before July 1, 1988, or constructed between January 1, 1991, and before January 1, 2015. The exemption is equal

to the increase in assessed value attributable to the wind energy system. This exemption is due to expire on December 31, 2014 (NY CLS Real Property Tax, Article 4, section 487).

Performance-Based Incentive/Other

A program funded by the New York System Benefits Charge (SBC) provides funds to manufacturers to develop or expand facilities. Eligibility is limited to renewable or clean energy products that produce or support the production of renewable electricity for delivery to the grid. The New York State Energy Research and Development Authority (NYSERDA) — Renewable, Clean Energy and Energy Efficient Product Manufacturing Incentive Program funding is as follows:

- phase I funding (facility and site characterization activities) is limited to the lesser of 5 percent of the project or $75,000;
- phase II funding (preproduction development) is limited to the lesser of 20 percent or $300,000; and
- phase III funding (production incentive) up to $1.125 million. The total cannot exceed $1.5 million per project.

Another program funded by the New York SBC grants up to 50 percent of a project's cost, with a maximum of $200,000 per project (NYSERDA — Clean Energy Business Growth and Development).

Colorado

Sales Tax

Colorado exempts from the state's sales and use tax all sales and use of components used in the production of alternating current electricity from a renewable energy source (C.R.S. 39-26-724 and C.R.S. 29-2-105).

Colorado also authorizes counties and municipalities to issue property or sales tax rebates or credits to residential and commercial property owners who install renewable energy systems on their property (CRS section 30-11-107.3).

Property Tax

Colorado authorizes counties and municipalities to offer property tax rebates or credits to residential and commercial property owners who install renewable energy systems on their property (CRS section 30-11-107.3 and CRS section 31-20-101.3).

The incremental value of the renewable facility above the value of the nonrenewable energy facility is not subject to property taxes. For 2009 the nonrenewable facility value was determined to be $1,128 per kW for renewable energy projects up to 2 MW and $421 per kW for systems over 100 MW, with other values for various size ranges between 2 MW and 100 MW (CRS section 39-4-101 et seq., SB 174, 177, and 19).

Performance-Based Incentive

The Colorado Governor's Energy Office is providing rebates to Colorado residents who purchase and install qualifying wind energy systems. The incentives are up to $1/watt for the first 5 kW and up to 50 cents/watt for the next 5-10 kW.

The Energy Office also is providing rebates to Colorado businesses and organizations that pay commercial utility rates and that purchase and install qualifying wind energy systems. The incentives are up to $1/watt for the first 15 kW for a system with a maximum size of 50 kW. Wind turbines must be approved and listed by NYSERDA.

North Dakota

Corporate Tax

North Dakota offers a corporate income tax credit for the cost of acquiring and installing a wind energy system for installations after December 31, 2000, and before January 1, 2015. The credit is equal to 3 percent per year for five years for the actual cost of acquisition and installation of the system. If the tax credit exceeds the taxpayer's liability, the excess may be carried over to each of the next five succeeding taxable years. For those wind energy systems installed after September 30, 2008, and before January 1, 2012, the credit may be carried over to each of the next 20 succeeding taxable years. For wind energy systems installed after January 1, 2011, any excess may be carried over to each of the next 10 succeeding taxable years (North Dakota Century Code 57-38-01.8).

Property Tax

North Dakota exempts from local property taxes any locally assessed wind energy devices that serve a new or existing building or structure. Stand-alone systems and systems that are part of conventional systems are also eligible. For systems that are part of a conventional system, only the renewable energy portion of the total system is eligible. This exemption is applied only during the five-year period following installation. It does not apply to those centrally assessed wind energy systems (producing electric power for public use) greater than 100 kW (North Dakota Century Code 57-02-08(27)).

In 2001 North Dakota began offering property tax reductions for commercial wind turbines constructed before 2011. Originally, the law reduced the taxable value of centrally assessed wind turbines (produces electric power for public use) with a capacity of 100 kW or greater from 10 percent to 3 percent of their assessed value, which resulted in a property tax savings of 70 percent. Currently, all centrally assessed wind turbines with a capacity of 100 kW or greater that are constructed after June 30, 2006, and before January 1, 2015, are valued at 1.5 percent of their assessed value, which results in a property tax savings of 85 percent. All other

centrally assessed wind turbines with a capacity of 100 kW or greater are valued at 3 percent of assessed value, which results in a property tax savings of 70 percent (prior rule). Construction must be completed before January 1, 2015, to be eligible for this tax reduction (North Dakota Century Code 57-06-14.1).

Oklahoma

Corporate Tax

Oklahoma offers a state income tax credit to producers of electric power using renewable energy resources from a zero-emission facility located in Oklahoma. The facility must have a production capacity of 1 MW or greater. The facility must be placed in operation after June 4, 2001, and the electricity must be sold to an unrelated party. The amount of the credit varies depending on when the electricity is generated and may be claimed for electricity generated on or after January 1, 2003, during a 10-year period following the date the facility is placed in operation (after June 4, 2001). The amount of the credit ranges from 0.25 cents/kWh to 0.75 cents/kWh for 10 years. HB 3024 was signed in June 2010, reinstating the tax credit, but with restrictions. Credits will not be paid during 2011 for electricity produced from July 1, 2010, through June 30, 2011. Any credits that accrue during that period will be paid during the 2012 tax year (68 Okl. St. section 2357.32A and HB 3024).

Performance-Based Incentive/Other

Oklahoma offers an income tax credit to the manufacturers of small wind turbines for tax years 2003 through 2012. Oklahoma manufacturers of wind turbines with a rated capacity of between 1 kW and 50 kW are eligible for the credit, but they must agree in advance to allow their production and claims to that production to be audited by the Oklahoma Tax Commission. The credit amount varies based on the turbine's square footage of rotor swept area. The credit was $25 per square foot produced in 2003, $12.50 per square foot produced in 2004, and $25 per square foot produced each year from 2005 to 2012. The credit is transferable during the 10 years following the year of qualification. This income tax credit is due to expire on December 31, 2012 (68 Okl. St. section 2357.32B).

Indiana

Property Tax

Systems that generate energy using wind are exempt from property tax. The exemption is allowed every year that a qualifying system functions (Ind. Code section 6-1.1-12-26 et seq.).

Performance-Based Incentive

Indianapolis Power & Light Co. offers a feed-in tariff as payment for the production and renewable energy attributes associated with the production from renewable energy facilities. The incentive for wind facilities is as follows:

- small wind facilities (50 kW to 100 kW) — 14 cents/kWh;
- midsize wind facilities (greater than 100 kW to 1 MW) — 10.5 cents/kWh; and
- large wind facilities (greater than 1 MW, maximum 10 MW) — 7.5 cents /kWh (IURC No. E-16 Case 43623).

Wyoming

Sales Tax

The sales of equipment used to generate electricity from renewable resources are exempt from the state excise tax. The exemption is limited to the acquisition of equipment used in a project to make it operational up to the point of interconnection with an existing transmission grid. Equipment that is eligible for this exemption includes wind turbines, generating equipment, control and monitoring systems, power lines, substation equipment, lighting, fencing, pipes and other equipment for locating power lines and poles. Equipment ineligible for the exemption includes tools and other equipment used in construction of a new facility and routine maintenance activities and equipment utilized or acquired after the project is operational. HB 215 (2009) amended that exemption by establishing two separate expiration dates. For eligible renewable energy equipment with a net rating capacity of 25 kW or less and systems used entirely off-grid, the expiration date remains at June 30, 2012, as established by HB 319 (2007). For eligible renewable energy equipment with a net rating capacity greater than 25 kW, the expiration date is December 31, 2011 (Wyo. Stat. section 39-15-105(a)(viii)(N), Wyo. Stat. section 39-16-105(a)(viii)(C), and HB 215).

Performance-Based Incentive

The State Energy Office, a division of the Business and Industry Division of the Wyoming Business Council, awards up to $10,000 or 50 percent of the installed cost for wind systems. The amount awarded is $2,000 per kW and the incentives are limited to wind systems of 20 kW of less.

Kansas

Corporate Tax

Kansas provides an investment tax credit for some renewable energy facilities constructed between January 1, 2007, and December 31, 2011. The facility must be owned by the owner of a commercial, industrial, or agricultural business and be located on the property of that business. The electricity produced by the renewable energy facility must be either used on-site or displace current or future electric load. The investment tax credit is equal to 10 percent of the first $50 million invested in the

Table 3.
Top Five States for Wind Energy Potential and Production Ranking
(as of July 20, 2010)

		Total Power existing in MW	Total Power under construction in MW	Ranking for wind energy potential	Ranking for wind energy production	Renewable Portfolio Standards
1	North Dakota	1,222	37	1	10	Y*
2	Texas	9,707	370	2	1	Y
3	Kansas	1,026	0	3	14	Y
4	South Dakota	412	210	4	20	Y*
5	Montana	385	0	5	21	Y
6	Nebraska	153	183	6	25	N
7	Wyoming	1,101	311	7	13	N
8	Oklahoma	1,130	381	8	11	N
9	Minnesota	1,797	673	9	7	Y
10	Iowa	3,670	0	10	2	Y
11	Colorado	1,248	552	11	9	Y
12	New Mexico	597	102	12	16	Y
13	Idaho	164	125	13	24	N
14	Michigan	143	20	14	26	Y
15	New York	1,274	95	15	8	Y

*North Dakota and South Dakota have set voluntary goals for adopting renewable energy instead of portfolio standards with binding targets.

project and 5 percent for expenditures above $50 million. The credit must be claimed in 10 equal annual installments and the project must remain in service during those 10 years. Any unused credit may be carried forward in subsequent years as a deduction. Deductions can be carried forward for up to 14 years past the year the first credit was applied. The program is due to expire on December 31, 2011 (Kansas Statutes 79-32, 245).

Property Tax

Kansas exempts renewable energy equipment from property taxes. The equipment must be actually and regularly used predominantly to produce and generate electricity (Kansas Statute 79-201, section 11),

Performance-Based Incentive/Other

Kansas may provide up to $5 million in financing for a wind manufacturing project. Manufacturing companies building wind equipment or components in Kansas may be eligible for financing through the Kansas Department of Commerce to support research, development, engineering, and manufacturing. To qualify, the project must result in $30 million in new investments in Kansas, the hiring of at least 200 new employees within five years, and the company must pay at least $32,500 of average annual compensation per Kansas employee. The principal and interest payments for the bonds are retired using the payroll tax withholdings created from the new jobs. This financing is due to expire on July 1, 2013 (Kansas Statute 74-50, 136).

Pennsylvania

Property Tax

Pennsylvania exempts wind turbines and related equipment toward the value of property (72 P.S. section 5453.201 et seq.)

Performance-Based Incentive/Other

In July 2008 Pennsylvania enacted a broad $650 million alternative energy bill designed to provide support for a variety of renewable energy and energy efficiency technologies. The program will offer support for wind technologies in the form of loans, grants, and loan guarantees. Eligible wind energy-related applications include energy production facilities and manufacturing facilities for wind turbines and other system components. Funds may be used for the following:

- acquisition of land and buildings necessary for project construction;
- clearing and preparation of land to build an eligible project;
- construction or renovation of a building to manufacture wind systems;
- equipment purchases for the manufacture of wind systems;
- purchase, installation, and construction of facilities to produce and distribute wind energy;
- feasibility studies and project planning;

- permit fees; and
- administrative costs associated with an eligible project, not to exceed 3 percent of funding.

Loans are available at a fixed interest rate for terms of up to 10 years for equipment or 15 years for real estate. Loans for wind energy generation or distribution projects are limited to $5 million. Grants for renewable energy manufacturing facilities are available for up to $5,000 per job created within three years of grant approval. Grants for wind energy production or distribution facilities are limited to $1 million. Planning and feasibility studies are also eligible for grants of the lesser of 50 percent of the cost of the study or $175,000. Loan guarantees will take the form of a grant that may be used in the event of financing default on the part of the applicant. Loan guarantees are limited to 75 percent of the deficiency up to $5 million. The term of the grant may not exceed five years. (Special Session HB 1).

RES Standards

Eleven of the 15 states that are listed above have RES or have set voluntary goals for adopting renewable energy instead of portfolio standards with binding targets. The four states listed in the top 15 that do not currently have renewable portfolio standards are Nebraska, Wyoming, Oklahoma, and Idaho.

Without a national RES, progress for 2010 and future years will continue to lag behind expectations because investments will go elsewhere. Bode said, "the U.S. wind industry is in distress. An RES is a critical component to ensure the U.S. wind industry thrives." As shown in Table 1, the growth in 2010 through July 20, 2010, is far below the growth in 2009. An RES is essential for creating hundreds of thousands of American jobs, increasing American independence from foreign oil, and helping to reduce carbon emissions. ☆

APPENDIX A

Nebraska Department of
REVENUE
PROPERTY ASSESSMENT

DIRECTIVE 09-5

August 28, 2009

ASSESSMENT OF WIND TURBINES AND WIND FARMS

Purpose. This directive will advise county assessors of the assessment procedures for wind turbines and wind farms.

Statutory Authority Neb. Rev. Stat. §77-801 (Cum. Supp. 2008) provides, in relevant part:

> All public service entities shall, on or before April 15 of each year, furnish a statement specifying such information as may be required by the Property Tax Administrator on forms prescribed by the Tax Commissioner to determine and distribute the entity's total taxable value including the franchise value ... The county assessor shall assess all nonoperating property of any public service entity. A public service entity operating within the State of Nebraska shall, on or before January 1 of each year, report to the county assessor of each county in which it has situs all nonoperating property belonging to such entity which is not subject to assessment and assessed by the Property Tax Administrator under section 77-802.

General Terms. The following terms are used throughout this Directive:

Nonoperating Property means property owned or leased by a public service entity that does not contribute to the entity's function.

Operating Property means property owned or leased that contributes to a public service entity's function.

Public Service Entity means any person or entity organized for profit under the laws of this state or any other state or government and engaged in the business of waterworks, electrical power, gas works, natural gas, telecommunications, pipelines used for the transmission of oil, heat, steam, or any substance to be used for lighting, heating, or power, and pipelines used for the transmission of articles by pneumatic or other power and all other similar or like entities.

Unit Value means the valuation of the operating property of the company as an integrated group of assets functioning as an economic unit without reference to the independent value of the component parts.

Terms Related to Wind Farm Projects

Project Area Boundary can encompass a large number of acres. For example, a single project area boundary may be 10,000 acres. These areas may encompass more than one county or state. The project components sited within this Project Area Boundary occupy a permanent footprint.

Wind Farm Project Components may consist of the following:

Wind Turbines. Comprised of three elements – the tower, nacelle, and rotor blades. The tower is constructed of tubular steel, and is topped by the nacelle, which houses the turbine's mechanical components. The rotor, mounted on the nacelle, consists of the blades.

Concrete Foundation Base. Each wind turbine is anchored to a concrete foundation base. The area or footprint of each turbine is based on the size of the concrete foundation base. The property owner can use the land for grazing or farming around the concrete foundation base.

Maintenance Building. A maintenance building used for general operations may be constructed at the project site.

Wind Farm Ancillary Facilities may consist of the following items:

1. Roads;
2. Underground electrical interconnections between wind turbines to collect and deliver electricity to a substation;
3. Fiber optic communication lines installed with the electrical collection system to monitor the operation of the wind farm;
4. Step-up transformers at each wind turbine location, plus a transformer for the electrical substation site. Each step-up transformer would be located on the concrete foundation base;
5. Electrical substations to step up the electrical collection system voltage to the existing local transmission line voltage;
6. Transmission lines and distribution plants used to connect the proposed substation to existing transmission lines; and
7. Meteorological monitoring towers that are constructed and used to collect data within a project area boundary. Depending on the project, some meteorological towers could remain within the project area during the life of the project.

Procedure and Implementation.

To determine whether the wind turbine or wind farm is to be locally or centrally assessed, the county assessor must look to the ownership of the wind turbine or wind farm. If the wind turbine or wind farm is owned by a(n):

- Government entity, it is exempt from property taxation.
- Public power district, the gross receipts are not subject to property tax but are subject to in lieu of tax payments to local governments.
- Nonprofit entity, it is subject to local assessment.
- Individuals and businesses where the primary purpose is something other than electrical power generation, such as agricultural producers, it is subject to local assessment.
- Entity organized for profit, it may be subject to central assessment.

Real Property at a Wind Farm

Real property is defined as land, all buildings, improvements, and fixtures, except trade fixtures. The concrete foundation pads, maintenance building, roads, and fences on a wind farm project have been deemed to be real property. The costs associated for clearing and grading the land, and the addition of gravel or crushed stones are site enhancements and should be considered part of the real property value.

Personal Property at a Wind Farm

The wind turbines, transformers, step-up transformers, meteorological monitoring towers, electrical substations, distribution plants, and transmission lines have been deemed to be personal property and are subject to personal property taxation to the owner of the property at net book value, as provided by Neb. Rev. Stat. §77-120. To determine the net book value of the personal property at a wind farm project, the following recovery periods should be used:

Recovery Periods:	
Turbines:	5 years
Electric transmission lines:	20 years
Substation and distribution plant:	20 years

Assessment

Centrally assessed public service entities are subject to unit valuation by the Property Tax Administrator. If a centrally assessed public service entity owns or leases real or personal property, the leased property is included in the unit valuation. For example, if a centrally assessed public service entity has built operating property on leased land, the site value is already included in the unit valuation. If a wind developer, subject to central assessment, leases land for wind turbines, the site value (i.e., the concrete pad and site improvements) will be included in the centrally assessed unit value.

The county assessor shall not determine a site value for operating property, leased or owned, of a centrally assessed public service entity. Any land surrounding the wind turbine or wind farm site shall be assessed to the owner in accordance with Neb. Rev. Stat. §77-201; 100% of actual value if it is a residential or commercial parcel, or 75% of actual value if it is an agricultural or horticultural parcel of land.

If a wind turbine is subject to local assessment, the county assessor shall determine the market value for the real property. The majority of wind farm projects are built on leased land. The concrete foundation pad, roads, and fences are improvements on leased land. Improvements on leased land shall be assessed to the owner of the leased land, unless an Improvements on Leased Land Assessment Application, Form 402 (http://www.pat.ne.gov/general/forms/pdf/402_impr_on_leased_land_assmt_app.pdf) has been filed specifically describing that the improvements are the property of the lessee. Form 402 must be filed by the owner of the leased land in the respective county assessor's office. Personal property is subject to the same recovery periods as indicated above.

Conclusion. The assessment procedure for wind turbines and wind farms begins with determining the ownership, which will allow the county assessor to make the determination as to whether the wind turbine or wind farm is to be locally assessed or centrally assessed by the state.

If the wind turbine or wind farm is to be locally assessed, the real property shall be assessed at either 100% for residential or commercial parcels, or 75% of actual value for agricultural or horticultural land. The personal property is to be assessed to the owner of the property as the net book value of the property using the recovery periods set forth in this Directive.

Enforcement. Pursuant to Neb. Rev. Stat. §77-1330, the Nebraska Department of Revenue Property Assessment Division may take corrective action if any county official violates any directive of the Division.

APPROVED:

/s

Ruth A. Sorensen
Property Tax Administrator
August 28, 2009

/s

Douglas A. Ewald
Tax Commissioner
August 28, 2009

This is a PDF document from the Nebraska Dept. of Revenue Property Assessment Division's website www.pat.ne.gov.

APPENDIX B

As the Wind Turns: Incentives for Wind Energy

by Donna McConville and Cristi Lindblom

Donna McConville, CPA, J.D., and Cristi Lindblom, Ph.D., are lecturers at Bentley University, Waltham, Mass.

"Wind power is a symbol of hope in our economy." So says American Wind Energy Association (AWEA) CEO Denise Bode, a nationally recognized energy expert. In 2009 Bode was named Woman of the Year for the Women's Council for Energy and the Environment and was listed among the *Washingtonian*'s "100 Most Powerful Women of Washington."

The United States has tremendous wind energy resources, but not all states are using those resources. As of December 31, 2009, the wind industry has surpassed 35,000 megawatts (MW) in installed capacity, producing enough energy to serve nearly 9.7 million American homes. Wind power will eliminate the burning of 62 million tons of coal annually, the equivalent of reducing carbon emissions from the electricity sector by 2.5 percent, using approximately 134 million fewer barrels of oil each year, or taking 10.5 million cars off the road. The electricity generated from the fleet of turbines installed through 2009 will conserve over 20 billion gallons of water annually — water normally withdrawn for steam or for cooling power plant facilities.

U.S. wind power capacity has grown by an average of 39 percent each year for the five-year period from 2005-2009, according to the AWEA report of January 26, 2010. A total of 9,922 MW of wind generation was installed in the United States in 2009. A total of over 8,500 MW of wind generation was installed in the United States in 2008, an increase of 50 percent from 2007, with 55 new wind turbine manufacturing facilities being opened, expanded, or announced. Over 5,000 turbines were brought online in 2008 and the industry now employs 85,000 workers. New wind projects in 2008 represented an investment of $17 billion, with 35,000 jobs created at a time when the nation lost about 2 million jobs. In 2007, 5,249 MW were installed, an increase of 45 percent from the previous year. More growth is needed in that industry, because it now represents only approximately 2 percent of the nation's electricity. Wind is one of the largest sources of new power generation in the country, second only to natural gas.

With the correct governmental incentives and policies in place, wind energy could contribute 20 percent of the U.S. electric power supply by 2030, according to a study conducted by the U.S. Department of Energy. This report examines progress in four key areas: technology development, manufacturing, siting and transmission, and integration.

The United States received a solid "B" for its 2008 progress toward reaching the 20 percent goal of electricity supply from wind energy by 2030.

Just to give it perspective, with wind energy at the level of 20 percent of the total supply of energy (according to the AWEA):

- 500,000 new jobs will be needed (150,000 workers directly employed in wind industry);
- carbon dioxide emissions from electricity generation would be reduced by 25 percent (the equivalent of taking 140 million vehicles off the road), which could avoid an estimated 98 billion in CO^2 regulation costs;
- natural gas use would be reduced by 11 percent; and
- there would be a reduction of 4 trillion gallons or 17 percent in water consumption associated with electricity generation.

Wind energy projects are on the rise, with more wind turbines being installed in 2007 and 2008 than what had previously taken more than two decades to accomplish. By the end of September 2008, the United States passed Germany to become the world leader in wind energy production and in wind power generating capacity. As of the second quarter of 2009, over 4,000 MW have been added, compared with 2,900 MW added in the first six months of 2008. The United States was the world's largest market of installations added in 2008.

To sustain that growth, short- and long-term government incentives and policies must be in place as soon as possible. President Obama has initiated a dramatic shift in favor of renewable energy technologies. Since the announcement in July 2009 of

the rules to implement the stimulus bill, the wind energy industry has seen over 1,600 MW of completed projects and over 1,700 MW of construction jobs started. A market report for the third quarter of 2009 said that 1,649 MW were installed, which was higher than the second quarter of 2009, and the fourth quarter of 2009 was the strongest in the year, with the installation of 4,041 MW.

However, according to the AWEA, enacting those policies is a challenge. Wind turbine manufacturing lagged in 2009 compared with 2008 levels. Manufacturers have been leery of investing in a market that in the past has provided only short-term incentives. The wind industry is urging an adoption of a national renewable electricity standard (RES) to provide a nationwide long-term incentive for capital investment. That would provide a targeted manufacturing base and would also create tens of thousands of jobs. An RES ensures that some amount of renewable energy is included in the portfolio of electricity resources serving a state or country. Twenty-nine states and the District of Columbia have RES policies in place, but a national program is necessary to take advantage of the renewable resources that exist across the nation. Forecasts say that without that national RES, growth will not continue at the pace it has sustained over the last several years. Experience has shown that a firm, long-term national renewable energy policy is the key to capital investment in this industry. A target of generating at least 25 percent of the nation's electricity from renewable energy by 2025 and a near-term target of 10 percent by 2012 was outlined by President Obama to encourage investments in wind and other renewable energy projects. A *Washington Post* poll conducted in December 2008 found that 84 percent of Americans support that sort of standard, according to the AWEA.

The AWEA credits the industry's expansion to the stability over the past three years of the federal renewable energy production tax credit (PTC) (IRC section 45). The PTC, created under the Energy Policy Act of 1992, provides the investor or owner of qualifying property an annual income tax credit based on the amount of electricity generated. The federal government allows a corporate income tax credit for electricity generated. The PTC is 2.1 cents per kilowatt-hour of electricity produced and is adjusted annually for inflation. The electricity produced must be from qualified energy resources at a qualified facility during the first 10-year period in which the facility was originally placed in service, and the electricity must be sold by the taxpayer to an unrelated party during the tax year.

During the periods in which the PTC was allowed to expire (1999, 2001, and 2003), production on installations dropped by as much as 93 percent in the following year. When the credit expired at the end of 2003 and was not renewed until October 2004, production dropped 77 percent. The American Recovery and Reinvestment Act (signed into law on February 17, 2009) established a three-year extension of the PTC through December 31, 2012.

Also, for those wind project developers that placed facilities in service during 2009 and 2010, a new energy investment tax credit is available in place of the PTC. Facilities placed in service before 2013 also qualify for the ITC, as long as construction begins before the end of 2010. The ITC generally provides a 30 percent tax credit for investments in energy projects and can be claimed entirely in the year the facility is placed in service. Businesses can elect either the ITC or the PTC, but not both for the same facility. The decision whether to elect the ITC (immediate credit or cash payment) in lieu of the PTC (over 10 years) will depend on each taxpayer's situation. The ITC can be converted to a grant from the Department of Treasury. The Treasury must pay the grant within 60 days of an application being submitted. The new ITC was designed to assist the wind energy industry in financing projects during the challenging economic times.

The incentives and credits mentioned throughout this report apply to various facets of the wind energy industry. These credits are available to wind energy producers and manufacturers of wind energy equipment components. As a result of the manufacturing tax credit, "wind power is a bright source of manufacturing jobs in the U.S. today," Bode claims. Domestically manufactured wind turbine components rose to 50 percent of the wind turbines installed in the nation for 2008 (30 percent in 2005) and are expected to become an even larger source of U.S. jobs in the future. One device to help ensure this progress is for the federal government to enact a national RES, as mentioned earlier. According to Bode, U.S. wind turbine manufacturing is lagging, while the global clean energy race is heating up. If the government does not enact a national RES soon, manufacturing investments, along with thousands of jobs, will go overseas.

Many states allow various tax incentives for the production of renewable energy. However, the installation of wind power is not proportionately distributed across the 50 states with wind power potential. Wind power production is occurring in nearly all states, but at this point, the magnitude of wind power production in the United States is still small, accounting for only approximately 2 percent of the U.S. electricity consumption.

Table 1 illustrates the top five states in wind energy production and their ranking in wind energy potential.

Table 2 illustrates the top five states in wind energy potential and their ranking in wind energy production. (Figures as of December 31, 2009.)

As you can see from the two tables, there is not a correlation between the rankings for wind energy

Table 1.
Top Five States for Wind Energy Production and Wind Energy Potential

		Total power existing, in MW	Total power under construction, in MW	Ranking for wind energy production	Ranking for wind energy potential
1	Texas	9,410	302	1	2
2	Iowa	3,670	200	2	10
3	California	2,794	121	3	17
4	Washington	1,980	170	4	24
5	Minnesota	1,809	60	5	9

Table 2.
Top Five States for Wind Energy Potential and Production ranking

		Total power existing, in MW	Total power under construction, in MW	Ranking for wind energy potential	Ranking for wind energy production
1	North Dakota	1,203	76	1	10
2	Texas	9,410	302	2	1
3	Kansas	1,013	12	3	14
4	South Dakota	313	99	4	20
5	Montana	375	0	5	18

potential and production, with the exception of Texas. Why is there this lack of correlation? And why aren't most companies taking advantage of the tax credits and incentives available in their states for producing alternative renewable energy? There is no question that renewable energy sources are environmentally favorable compared with fossil fuel and nuclear technologies, but there are two main reasons why more renewable energy is not being produced, according to the Energy Information Administration.

Why aren't most companies taking advantage of the tax credits and incentives available in their states for producing alternative renewable energy?

The first reason is that renewable energy facilities are generally more expensive to build and to operate than coal and natural gas plants. The second reason is that the best renewable resources are often available only in remote areas, so building transmission lines to deliver power to large metropolitan areas is very expensive. To help make renewable energy facilities competitive and to encourage the building of transmission lines, several tax incentives are available at the state and local levels in addition to those available at the federal level.

The following section will focus on the following incentives being used at the state and local levels: corporate tax, sales tax, property tax, and production incentives. Table 3 (next page) illustrates the various financial and tax incentives available for renewable energy for the nine states mentioned in tables 1 and 2. A description of each incentive follows.

Texas

Corporate Tax

- Companies that engage solely in the business of manufacturing, selling, or installing solar energy devices are exempt from the franchise tax. The franchise tax is Texas's equivalent to a corporate tax. (Texas Tax Code section 171.056.)
- There is a franchise tax deduction of 10 percent of the amortized cost of a solar energy device. Wind energy qualifies under the definition of solar energy. (Texas Tax Code section 171.107.)

Property Tax

- An exemption is allowed for the amount of the appraised property value that arises from the installation or construction of a wind-powered energy device that is primarily for the production and distribution of thermal, mechanical, or electrical energy for on-site use, or devices used to store that energy. (Texas Statutes section 11.27.)

Table 3.
Tax Incentives for Renewable Energy by State

State	Corporate Tax	Sales Tax	Property Tax	Production Incentives/Other
Texas	Texas Tax Code section 171.107 and section 171.056		Texas Statutes section 11.27	Energy buyback program for residential producers through Green Mountain Energy Co.
Iowa	Iowa Code 476B Iowa Code 476C Iowa Admin. Code 199-15.18 - 199-15.21 SF 456	Iowa Code section 423.3, Section 54	Iowa Code section 441.21(8)	
California				CA Feed-In Tariff CA Rebate Program
Washington		RCW section 82.08.02567 SB 6170		RCW section 82.16.110 et seq. SB 5101
Minnesota		Minnesota Statute section 297A.68 subd.12	Minnesota Statute section 272.02, section 272.028 and section 272.029 Minnesota Sessions Law HF 1298, Article 2, section 12	Minnesota Statute section 216C.41
North Dakota	North Dakota Century Code 57-38-01.8		North Dakota Century Code 57-02-08(27) 57-06-14.1	
Kansas			Kansas Statute 79-201 (11)	SB 108
South Dakota			South Dakota Codified Laws section 10-6-35.8, section 10-4-36, and HB 1320 section 10-35-16	
Montana	Montana Code Annotated section 15-32-401		Montana Code Annotated section 15-6-225 section 15-6-224 section 15-32-102 section 15-24-1402	Green Tag Purchase Program Montana Code Annotated section 15-24-3111 section 15-6-157

Production Incentive

- Green Mountain Energy Co. is a retailer of green electricity. It offers an energy buyback program to Texas customers that produce renewable energy from home-sited systems. That program is available only to residential customers of Green Mountain Energy Co. The first 500 kWh per month are credited to the customers' account at the retail rate. Anything over 500 kWh per month is credited to the customers' account at half of the retail rate.

Iowa

Corporate Tax (eligible facility can qualify only for one of the following two credits)

- A production tax credit of 1.5 cents per kilowatt-hour is available for energy generated and sold by eligible wind energy generators and other renewable energy facilities. That credit may be applied toward the state's personal income tax, business tax, or sales and use tax. The facility must be placed into service on or after July 1, 2005, and before January 1, 2012. The facility cannot exceed 2.5 MW per qualifying owner, and facility owners may not have an ownership interest in more than two eligible facilities. Any tax credits in excess of tax liability in a given year may be carried forward up to seven years. (Iowa Code section 476C.)

- A production tax credit of 1 cent per kilowatt-hour is available for electricity generated by eligible wind energy facilities, including electricity used for on-site consumption. That credit may be applied toward the state's personal income tax, business income tax, sales and use tax, or energy replacement generation tax. The facility must be placed into service on or after July 1, 2005, and before January 1, 2012. Facility owners may not own more than two eligible facilities. For applications filed on or after March 1, 2008, facilities must have a minimum capacity of at least 2 MW and a

maximum capacity of 30 MW. Applications from schools, colleges, universities, and hospitals filed on or after July 1, 2009, must have a minimum capacity of 750 kW. The maximum total amount of generating capacity eligible for the credit is 150 MW. Facility owners may apply for wind energy tax credit certificates over a 10-year period, beginning with the initial period of electricity. Any tax credits in excess of tax liability in a given year may be carried forward up to seven years. (Iowa Code section 476B.)

Sales Tax

- Exemption is available from state sales tax for the total cost of wind energy equipment and all materials used to manufacture, install, or construct wind energy systems. The exemption does not apply to equipment used to construct a plant to manufacture wind energy systems. (Iowa Code section 423.3, section 54.)

Property Tax

- The market value added to a property by a wind energy system is exempt from the state's property tax for five full assessment years. That exemption can be applied to systems whose primary purpose is to store or provide electricity for use at the site where the system is located or for those systems that periodically export electricity to the grid, as long as they are used primarily to serve on-site electricity demand. (Iowa Code section 441.21(8).)

California

Production Incentive/Other

- Effective October 11, 2009, the California feed-in tariff was amended. This new law takes effect January 1, 2010. This tariff allows eligible customer-generators to enter into contracts to sell the electricity produced by small renewable energy systems (up to 3 MW) at market-based prices. (California Public Utilities Code section 399.20, SB 32, and California Public Utilities Commission Resolution E-4137.)
- The California Energy Commission offers cash incentives to promote the installation of grid-connected, small wind renewable energy electric-generating systems through its Emerging Renewables Program. Rebate levels are as follows:
  - small wind turbines (up to 50 kW): $2.50/W for first 7.5 kW and $1.50/W for increments greater than 7.5 kW and less than 30 kW;
  - rebates for eligible renewable energy systems installed on affordable housing projects are available at 25 percent above the standard rebate level, up to 75 percent of the system's installed cost; and
  - incentives received from sources other than that program will reduce the amount of the rebate by no less than 5 percent in an effort to prevent total incentives exceeding total system costs.

Washington

Sales Tax

- Sales tax does not apply to the sale of equipment used to generate electricity using wind energy. The tax exemption applies to labor and services related to the installation of the equipment, as well as to the sale of equipment and machinery. Eligible systems are those with a generating capacity of at least 1 kW. In May 2009 Washington passed SB 6170, effective July 1, 2009, which extended the sales and use tax exemption to June 30, 2011. From July 1, 2011, to June 30, 2013, the exemption will be reduced from 100 percent of the sales and use tax to 75 percent of the sales and use tax. The exemption is due to expire on June 30, 2013. (RCW section 82.08.02567 and SB 6170.)

Production Incentive

- In May 2005 Washington enacted SB 5101, establishing production incentives for individuals, businesses, and local governments that generate electricity from wind power. The multipliers result in production incentives ranging from 12 cents to 54 cents per kilowatt-hour, capped at $5,000 per year. (RCW section 82.16.110 et seq. and SB 5101.)

Minnesota

Sales Tax

- Wind energy conversion systems used as electric power sources are exempt from sales tax. Materials used to manufacture, install, construct, repair, or replace wind energy systems are also exempt from sales tax. (Minn. Stat. section 297A.68, subd. 12.)

Property Tax

- All real and personal property of wind energy systems are exempt from property tax. However, in lieu of a property tax on large wind energy systems, a production tax was implemented in 2002. The following are the rates for that production tax:
  - wind systems greater than 12 MW are taxed at a rate of 0.12 cent/kWh;
  - wind systems between 2 MW and 12 MW are taxed at a rate of 0.036 cent/kWh;
  - wind systems between 250 kW and 2 MW are taxed at a rate of 0.012 cent/kWh; and
  - wind systems under 250 kW are exempt from the production tax.

For 2006-2009, the revenue generated by the production tax is distributed to local taxing districts (counties, cities, and townships). (Minn. Stat. section 272.02, 272.028, 272.029, and Minnesota Session Laws H.F. 1298, article 2, section 12.)

Production Incentive

- A payment of 1 cent to 1.5 cents per kWh is issued for electricity generated by new wind energy projects for 10 years for qualified wind energy projects of less than 2 MW in capacity. However, that program was closed to new applicants on January 1, 2005. Payments continue to those that had facilities in operation before January 1, 2005. This statute is due to expire on January 1, 2018. (Minn. Stat. section 216C.41.)

North Dakota

Corporate Tax

- North Dakota offers a corporate income tax credit for the cost of acquiring and installing a wind energy system for installations after December 31, 2000, and before January 1, 2015. The credit is equal to 3 percent per year for five years for the actual cost of acquisition and installation of the system. If the tax credit exceeds the taxpayer's liability, the excess may be carried over to each of the next five succeeding tax years. For those wind energy systems installed after September 30, 2008, and before January 1, 2012, the credit may be carried over to each of the next 20 tax years. For wind energy systems installed after January 1, 2012, any excess may be carried over to each of the next 10 tax years. (North Dakota Century Code 57-38-01.8.)

Property Tax

- North Dakota exempts from local property taxes any locally assessed wind energy devices that serve a new or existing building or structure. Stand-alone systems and systems that are part of conventional systems are also eligible. For systems that are part of a conventional system, only the renewable energy portion of the total system is eligible. This exemption is applied only during the five-year period following installation. This exemption does not apply to those centrally assessed wind energy systems (produces electric power for public use) greater than 100 kW. (North Dakota Century Code 57-02-08(27).)
- In 2001 North Dakota began offering property tax reductions for commercial wind turbines constructed before 2011. Originally, the law reduced the taxable value of centrally assessed wind turbines with a capacity of 100 kW or more from 10 percent to 3 percent of their assessed value, which resulted in a property tax savings of 70 percent. Currently, all centrally assessed wind turbines with a capacity of 100 kW or greater that are constructed after June 30, 2006, and before January 1, 2015, are valued at 1.5 percent of their assessed value, which results in a property tax savings of 85 percent. All other centrally assessed wind turbines with a capacity of 100 kW or more are valued at 3 percent of assessed value, which results in a property tax savings of 70 percent (prior rule). Construction must be completed before January 1, 2015, to be eligible for this tax reduction. (North Dakota Century Code 57-06-14.1.)

Kansas

Property Tax

- Kansas law exempts renewable energy equipment from property taxes. The equipment must be actually and regularly used predominantly to produce and generate electricity. (Kansas Statute 79-201, section 11.)

Other

- Kansas may provide up to $5 million in financing for a wind manufacturing project. Manufacturing companies building wind equipment or components in Kansas may be eligible for financing through the Kansas Department of Commerce to support research, development, engineering, and manufacturing. To qualify, the project must result in $30 million in new investment in Kansas and the hiring of at least 200 new employees within five years, and the company must pay at least $32,500 of average annual compensation per Kansas employee. The principal and interest payments for the bonds are retired using the payroll tax withholdings created from the new jobs. That financing is due to expire on July 1, 2013. (SB 108.)

South Dakota

Property Tax

- South Dakota exempts from local property taxes renewable energy systems on residential and commercial property. This exemption is not allowed for systems that produce energy for resale. Separate laws cover commercial wind facilities (see below). For residential systems, the exemption applies 100 percent to the entire assessed value of the system and may be transferred when the property is sold, provided the new owner is the first occupant of the structure. For commercial systems, the exemption is 50 percent of the installed cost of the system and may not be transferred when the system is sold. The exemption may be applied for three continuous years. After three years, the property owner may claim a portion of the exemption for three subsequent years according to the following (South Dakota Codified Laws section 10-6-35.8 et seq.):
  - year 1: 75 percent of the exemption;
  - year 2: 50 percent of the exemption; and
  - year 3: 25 percent of the exemption.

- Commercial wind farms with less than 5 MW in total capacity are afforded a property tax incentive. The property value assessment does not include the wind turbine or the blades, as they are considered personal property. The assessed property value takes only the base, foundation, tower, and substations into account. All commercial wind facilities covered under this law are assessed at the local level. Before 2003 some facilities were centrally assessed for tax purposes at the state level. (South Dakota Codified Laws section 10-4-36 et seq. and HB 1320.)
- Commercial wind farms constructed after July 1, 2007, with a minimum capacity of 5 MW are subject to an alternative taxation calculation in lieu of all taxes on real and personal property. The alternative taxation method has two components. The first component is an annual tax equal to $3 per kW of capacity of the wind farm. The second component is a 2 percent annual tax on the gross receipts of the wind farm. The gross receipts are calculated as the number of kilowatt-hours produced multiplied by a base electricity rate of $0.0475/kWh in 2008, with the base rate increasing by 2.5 percent annually thereafter. The money generated by the alternative taxation method will be deposited into the state's wind energy tax fund. All receipts from the capacity tax and 20 percent of the gross receipts tax will be redistributed back to the county treasurer where the wind farm is located before May of each year. (South Dakota Codified Laws section 10-35-16 et seq.)

Montana

Corporate Tax

- Montana provides an alternative energy investment tax credit of up to 35 percent against individual or corporate tax on income generated by a commercial alternative energy investment of $5,000 or more. The credit can be applied only against taxes due from taxable or net income produced by one of the following:
  - a manufacturing plant located in Montana that produces alternative-energy-generating equipment;
  - a new business facility or an expansion, for which the alternative-energy-generating equipment supplies the basic energy needed; or
  - the alternative-energy-generating equipment in which the investment was made.

The credit is available to taxpayers purchasing an existing facility, as well as to those building a new facility. The tax credit must be taken the year the equipment is placed in service. However, any amount of the tax credit that exceeds the tax liability may be carried over and applied against state tax liability for the following seven years. A credit may be extended through the 15th tax year succeeding the tax year of installation for projects on a Montana Indian reservation that meets other specified criteria. Taxpayers may not take that credit in conjunction with any other state energy or state investment tax benefits. (Montana Code Annotated section 15-32-401 et seq.)

Property Tax

- New electricity-generating facilities built in Montana that use an alternative renewable energy source with a capacity less than 1 MW are exempt from property taxes for five years after operation begins. (Montana Code Annotated section 15-6-225.)
- Montana exempts from property tax recognized nonfossil forms of energy generation for 10 years after installation of the property. The exemption is allowed up to $20,000 for single-family residential dwellings in value and up to $100,000 in value for multifamily residential dwellings or a nonresidential structure. (Montana Code Annotated sections 15-6-224 and 15-32-102.)
- Montana generating plants producing 1 MW or more by means of an alternative renewable energy source are eligible for the new or expanded industry property tax reduction during the first nine years of operation. If approved, the facility is taxed at 50 percent of its taxable value in the first five years after the construction permit is issued. Each year thereafter, the percentage is increased by equal percentages until the full taxable value is attained in the 10th year. (Montana Code Annotated section 15-24-1402.)

Production Incentive

- The Northwest Solar Cooperative offers to purchase wind energy at a rate of $0.02 per kWh through December 31, 2009. Production of up to 50 kW is automatically approved, and production of over 50 kW is approved on a case-by-case basis. Residential and nonresidential owners of wind energy systems installed after June 2, 2002, in Oregon, Washington, Idaho, and Montana are eligible to participate in the Green Tag Purchase Program.

Other

- In May 2007 Montana enacted legislation (HB 3) that allows a property tax abatement for new renewable energy production facilities, new renewable energy manufacturing facilities, and renewable energy research and development equipment. Eligible facilities and equipment are assessed at 50 percent of their taxable value. Under that policy, those facilities are assessed at 50 percent of their taxable value for the construction period and the first 15 years after the facility commences operation, not to

exceed 19 years. To qualify, facilities must begin construction after June 1, 2007. Also, all renewable energy research and development equipment up to $1 million in value may qualify for a 50 percent property tax abatement if it is placed in service after June 30, 2007. (Montana Code Annotated sections 15-24-3111 and 15-6-157.)

The states that are ranked in the top five in the United States for wind energy production all have renewable electricity standards. Of the top five states ranked for wind energy potential, only Texas and Montana have RESs. In other news, states that are not mentioned above continued to grow in the wind energy industry in 2009. The state reporting the fastest growth rate for the third quarter of 2009 was Arizona, which installed its first utility-scale project. Pennsylvania ranked second in growth with 29 percent, followed by Illinois with 22 percent, Wyoming with 21 percent, and New Mexico with 20 percent.

According to Bode, U.S. wind turbine component manufacturing lagged in 2009. Wind power is a large source of manufacturing jobs in the United States today, but more can certainly still be done. To summarize, the three types of policies to assist the continuing growth of renewable energy are:

- tax credits — the PTC and the ITC (credit or cash grant);
- RESs; and
- production incentives and markets

If a national RES is passed soon enough, it will work in conjunction with ARRA and provide the signal that companies are waiting for to invest in new and expanded facilities in the nation on a long-term basis. Manufacturers need that stability to expand their operations in the United States. As mentioned earlier, these on-again, off-again tax credit policies have a tremendous impact on the production of renewable energy projects. Also, several states have adopted production incentives or markets for the production and sale of renewable energy. Those producers can sell electricity and use the proceeds from the sale of electricity to reinvest in their renewable energy projects to keep the cycle going.

On January 8, 2010, Bode announced that the administration has awarded $2.3 billion in clean energy manufacturing tax credits and that the president is calling on Congress for an additional $5 billion. The AWEA believes that wind will continue to be a leading source of new power generation in 2010. Wind is a domestic and inexhaustible energy supply and is one of the cleanest and most environmentally friendly energy sources in the world today. According to the forecasts, 2010 should be another record year for renewable energy projects in the United States. ☆

taxanalysts special report

As the Wind Turns: Tax Incentives For Wind Energy Producers

by Donna McConville and Cristi Lindblom

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This article is a continuation of the analysis in an article published earlier that outlined the various state tax incentives available to the top five producers and the top five potential producers of wind energy. ("As the Wind Turns: Incentives for Wind Energy," *State Tax Notes*, Mar. 8, 2010, p. 699, *Doc 2010-2135*, or *2010 STT 44-1*.) This article explains the various state incentives for the top 15 states that produce wind energy with their respective ranking for wind energy potential.

"Wind works for America," says American Wind Energy Association (AWEA) CEO Denise Bode, who is a nationally recognized energy expert. As of July 20, 2010, the wind industry has installed 36,303 megawatts (MW) in wind energy projects in the United States. As of December 31, 2009, 35,159 MW in wind energy projects had been installed. The results for the first and second quarter of 2010 are far below expectations. In the first quarter of 2010, only 539 MW were installed, which is the lowest first-quarter results since 2007. In the second quarter of 2010, only 700 MW were installed, bringing the total to only 1,239 MW installed for 2010. You can see the growth results in Table 1 (next page), which show the growth in MW for 2009 compared with 2010, as of July 20, 2010.

Wind power installations for 2010 have dropped by 57 percent and 71 percent from 2008 and 2009 levels respectively, according to AWEA. Manufacturing investment for 2010 also continues to lag below the levels for 2008 and 2009. Only two new manufacturing facilities have come on line in the first half of 2010. In 2008 there were seven and in 2009 there were five new manufacturing facilities brought on line. With such drastic results, investments in new manufacturing facilities will most likely not happen. The United States is losing the clean energy manufacturing race to both Europe and China, both of which have firm, long-term renewable energy targets, commitments, and policies in place.

A strong federal policy that supports the U.S. wind energy industry has never been more important, Bode says. AWEA and a coalition of renewable energy, labor, utility, and environmental organizations are urging Congress to put in place a strong national renewable electricity standard (RES) to bring life back to an industry that was booming in 2008 and 2009. An RES ensures that some amount of renewable energy is included in the portfolio of electricity resources servicing a state or country. Currently, 29 states and the District of Columbia have RES policies in place (see Table 3, p. 182).

Experience has shown that a long-term national renewable energy policy is critical to attracting capital investment in this industry. With a strong RES, manufacturing investments would be on the rise and hundreds of thousands of current and future jobs would be saved and created. There would also be less dependence on imported energy if there were more clean, affordable energy available in the United States. Without an RES, manufacturing facilities will go idle and many jobs will be lost or surrendered to other countries.

Wind energy is available and would help to stimulate our economy, but unless Congress passes a national RES, there is little the wind energy industry can do.

Wind power production is occurring in nearly all states, but the magnitude of wind power production in the United States is still small, accounting for only about 2 percent of the U.S. electricity consumption. Table 1 shows the top 15 states in wind energy production and their respective ranking in wind energy potential.

The following section will focus on the following incentives being used at the state and local levels: corporate tax, sales tax, property tax, and performance-based incentives. Table 2 (p. 177) shows the various financial/tax incentives available for renewable energy for the 15 states mentioned in Table 1. The top three producers of wind energy are the same as reported in the March 8, 2010, article,

Table 1.
Top 15 States for Wind Energy Production
(as of July 20, 2010)

		Total power existing in MW	Total power under construction in MW	Ranking for wind energy production	Ranking for wind energy potential	Growth in 2009 in MW	Growth in 2010 in MW
1	Texas	9,707	370	1	2	2,282	302
2	Iowa	3,670	0	2	10	879	0
3	California	2,739	443	3	17	276	16
4	Oregon	1,920	614	4	23	754	98
5	Washington	1,914	815	5	24	541	6
6	Illinois	1,848	437	6	16	631	300
7	Minnesota	1,797	673	7	9	58	.75
8	New York	1,274	95	8	15	567	0
9	Colorado	1,248	552	9	11	178	1
10	North Dakota	1,222	37	10	1	488	19
11	Oklahoma	1,130	381	11	8	299	0
12	Indiana	1,127	210	12	44	905	91
13	Wyoming	1,101	311	13	7	425	0
14	Kansas	1,026	0	14	3	199	12
15	Pennsylvania	748	0	15	22	387	0

but are updated and repeated here. A description of each incentive follows Table 2.

Texas

Corporate Tax

Companies that engage solely in the business of manufacturing, selling, or installing solar energy devices are exempt from the franchise tax. The franchise tax is Texas's equivalent to a corporate tax (Texas Tax Code section 171.056).

There is a franchise tax deduction of 10 percent of the amortized cost of a solar energy device. Wind energy qualifies under the definition of solar energy (Texas Tax Code section 171.107).

Property Tax

An exemption is allowed for the amount of the appraised property value that arises from the installation or construction of a wind-powered energy device that is primarily for the production and distribution of thermal, mechanical, or electrical energy for on-site use, or devices used to store that energy (Texas Statutes section 11.27).

Iowa

Corporate Tax

An eligible facility can qualify for only one of the following two credits:

- A production tax credit of 1.5 cents per kilowatt (kWh)-hour is available for energy generated and sold by eligible wind energy generators and other renewable energy facilities. That credit may be applied toward the state's personal income tax, business tax, or sales and use tax. The facility must be placed into service on or after July 1, 2005, and before January 1, 2012. The facility cannot exceed 2.5 MW per qualifying owner, and facility owners may not have an ownership interest in more than two eligible facilities. Any tax credits in excess of tax liability in a given year may be carried forward up to seven years (Iowa Code section 476C).
- A production tax credit of 1-cent-per-kWh is available for electricity generated by eligible wind energy facilities, including electricity used for on-site consumption. That credit may be applied toward the state's personal income tax, business income tax, sales and use tax, or energy replacement generation tax. The facility must be placed into service on or after July 1, 2005, and before July 1, 2012. Facility owners may not own more than two eligible facilities. For applications filed on or after March 1, 2008, facilities must have a minimum capacity of at least 2 MW and a maximum capacity of 30 MW. Applications from schools, colleges, universities, and hospitals filed on or after July 1, 2009, must have a minimum capacity of 750 kW. The maximum total amount of generating capacity eligible for the credit is 150 MW. Facility owners may apply for wind energy tax credit certificates over a 10-year period, beginning with the initial period of electricity. Any tax credits

Table 2.
Tax Incentives for Renewable Energy by State

State	Corporate Tax	Sales Tax	Property Tax	Performance-Based Incentives/ Other
Texas	Texas Tax Code sections 171.107 and 171.056		Texas Statutes section 11.27	
Iowa	Iowa Code 476B Iowa Code 476C Iowa Admin Code 199-15.18 - 199-15.21 SF 456	Iowa Code sections 423.3 and 54	Iowa Code section 441.21(8)	Farmers Electric Cooperative
California		SB 71		Calif. Feed-in Tariff Calif. Rebate Program Sacramento Municipal Utility District Feed-in Tariff
Oregon	HB 3680 Temporary Oregon Administrative Rules 330-090-0105		ORS section 307.175	Energy Trust of Oregon's Community Wind Program OAR 330-090-0105 to 330-090-0150
Washington		RCW section 82.08.02567 SB 6170		RCW section 82.16.110 et seq. SB 5101
Illinois		section 20 ILCS 655/5.5	section 35 ILCS 200/10-600 et seq. HB 4797	
Minnesota		Minnesota Statute section 297A.68 subd.12	Minnesota Statute sections 272.02, 272.028, and 272.029 Minnesota Sessions Law HF 1298, Article 2, sec. 12	
New York			NY CLS Real Property Tax Article 4 section 487	New York State Energy Research and Development Authority (NYSERDA)
Colorado		CRS sections 39-26-724, 29-2-105, 30-11-107.3, and 30-11-107.3	CRS sections 31-20-101.3, 39-4-101, et seq. SBs 174, 177, and 19	Colorado Governor's Energy Office
North Dakota	North Dakota Century Code 57-38-01.8		North Dakota Century Code 57-02-08(27) 57-06-14.1	
Oklahoma	68 Okl. St. section 2357.32A HB 3024			68 Okl. St. section 2357.32B
Indiana			Ind. Code section 6-1.1-12-26 et seq.	Indianapolis Power & Light Company IURC No. E-16 Case 43623
Wyoming		Wyo. Stat. section 39-15-105(a)(viii)(N) Wyo. Stat. section 39-16-105(a)(viii)(C) HB 215		Business and Industry Division of the Wyoming Business Council
Kansas	Kansas Statutes 79-32, 245		Kansas Statute 79-201 (11)	Kansas Statute 74-50, 136
Pennsylvania			72 P.S. section 5453.201 et seq.	Special Session HB 1

in excess of tax liability in a given year may be carried forward up to seven years (Iowa Code section 476B).

Sales Tax

There is an exemption from the state sales tax for the total cost of wind energy equipment and all materials used to manufacture, install, or construct wind energy systems. The exemption does not apply to equipment used to construct a plant to manufacture wind energy systems (Iowa Code sections 423.3 and 54).

Property Tax

The market value added to a property by a wind energy system is exempt from the state's property tax for five full assessment years. This exemption can be applied to systems whose primary purpose is to store or provide electricity for use at the site where the system is located or for those systems that periodically export electricity to the grid, as long as they are used primarily to serve on-site electricity demand. (Iowa Code section 441.21(8))

Performance-Based Incentive

The Farmers Electric Cooperative (FEC) offers a production incentive to members that install qualifying wind electricity generating systems. Commercial and residential qualifying systems are eligible for a 20-cents-per-kilowatt-hour production incentive for up to 10 years for energy production that offsets up to 25 percent of monthly energy usage.

California

Sales Tax

California provides an exclusion from the state's sales and use tax for expenses related to the design, manufacture, production, or assembly of renewable energy equipment. That exemption is due to expire on January 1, 2021 (SB 71).

Performance-Based Incentive/Other

On October 11, 2009, the California feed-in tariff was amended as of January 1, 2010. This tariff allows eligible customer-generators to enter into contracts to sell the electricity produced by small renewable energy systems (up to 3 MW) at market-based prices (CA Public Utilities Code section 399.20, SB 32, and CA Public Utilities Commission Resolution E-4137).

The California Energy Commission offers cash incentives to promote the installation of grid-connected small wind renewable energy electric-generating systems through its Emerging Renewables Program. Rebate levels are as follows:

- for small wind turbines (up to 50 kW): $3/W for first 10 kW and $1.50/W for increments greater than 10 kW and less than 30 kW;
- rebates for eligible renewable energy systems installed on affordable housing projects are available at 25 percent above the standard rebate level up to 75 percent of the system's installed cost; and
- incentives received from sources other than this program will reduce the amount of the rebate by no less than 5 percent to prevent total incentives exceeding total system costs.

The Sacramento Municipal Utility District offers a feed-in tariff for various renewable energy technologies. The rates are dependent on the year the system is placed in service. Once a system is installed, the rates are locked in at that rate for the life of the contract. The tariff is limited to systems 5 MW or less.

Oregon

Corporate Tax

Oregon's business energy tax credit (BETC) is available for investments in renewable energy resources. The tax credit can cover costs directly related to the project, including the building, excavation, machinery and equipment cost, engineering and designs fees, materials, supplies, and installation costs (HB 3680 and Temporary Oregon Administrative Rules 330-090-0105 to 330-090-0150). The BETC is available for:

- Renewable energy generation and renewable energy equipment manufacturing, for 50 percent of certified project costs, distributed over five years (10 percent per year) up to $10 million for generation and up to $20 million for equipment manufacturing. Renewable energy equipment manufacturing facilities must receive preliminary certification before January 1, 2014, to use the tax credit.
- Wind projects over 10 MW, for 50 percent of the certified project costs, though only 5 percent of total project costs are included in certified project costs. The maximum incentive is $3.5 million for projects precertified between January 1, 2010, and December 31, 2010; $2.5 million for projects precertified between January 1, 2011, and December 31, 2011; and $1.5 million for projects precertified on or after January 1, 2012.
- The tax credit for facilities using or producing renewable energy resources is capped at $300 million for systems precertified from July 1, 2009, to June 30, 2011, and $150 million for systems precertified between July 1, 2011, and June 30, 2012.

Property Tax

Oregon excludes from property tax the added value to any property from the installation of a qualifying renewable energy system. This exemption is due to expire on July 1, 2012 (ORS section 307.175).

Performance-Based Incentive/Other

The Energy Trust of Oregon's Community Wind Incentive Program provides resources and cash incentives to help communities, businesses, and government entities install wind turbine systems up to 20 MW in capacity. Incentive levels are based on many factors and vary by project. The Energy Trust will disburse the incentives over time, contingent on the project's actual delivery of power to the grid (Community Wind Incentive Program).

The Energy Trust of Oregon's Community Wind program provides resources and cash incentives for customers of Portland General Electric and Pacific Power that are installing turbines up to 50 kW. The incentives are as follows:

- residential systems: $4,500 per rated kW of the wind turbine, up to $35,000; and
- commercial systems: $4,000 per rated kW of the wind turbine, up to $60,000 (the Small Wind Incentive Program).

Washington

Sales Tax

Sales tax does not apply to the sale of equipment used to generate electricity using wind energy. The tax exemption applies to labor and services related to the installation of the equipment, as well as to the sale of equipment and machinery. Eligible systems are those with a generating capacity of at least 1 kW. In May 2009 lawmakers passed SB 6170, effective July 1, 2009, which extended the sales and use tax exemption to June 30, 2011. From July 1, 2011, to June 30, 2013, the exemption will be reduced from 100 percent of the sales and use tax to 75 percent of the sales and use tax. That exemption is due to expire on June 30, 2013 (RCW section 82.08.02567 and SB 6170).

Performance-Based Incentive

In May 2005 Washington enacted SB 5101, establishing production incentives for individuals, businesses, and local governments that generate electricity from wind power. The multipliers result in production incentives ranging from 12 cents to 54 cents per kWh, capped at $5,000 per year (RCW section 82.16.110 et seq. and SB 5101).

Illinois

Sales Tax

A business establishing a new wind power facility in Illinois that is not located in an enterprise zone may be eligible for designation as a high-impact business. For that designation, the facility is entitled to a full exemption of the state sales tax and any local state sales taxes for building materials incorporated into the facility. The wind power facility must be placed in service on or after July 1, 2009, and must generate electricity using wind turbines 500 kW or greater (section 20 ILCS 655/5.5).

Property Tax

Beginning in 2007, for a 10-year period, wind energy devices larger than 500 kW of capacity and producing power for commercial sale will be valued at $360,000 MW of capacity. That value will be adjusted annually for inflation. The assessed value will be $119,988/MW, because Illinois assesses property for property tax purposes at one-third of its fair cash value.

An allowance for depreciation is also available, calculated by dividing the age of the turbine by 25 and then multiplying the result by the real property cost basis. The depreciation allowance may not exceed 70 percent of the real property cost basis. Both incentives are due to expire in the 2016 assessment year (section 35 ILCS 200/10-600 et seq. and HB 4797).

Minnesota

Sales Tax

Wind energy conversion systems used as electric power sources are exempt from sales tax. Materials used to manufacture, install, construct, repair, or replace wind energy systems are also exempt from sales tax (Minn. Stat. section 297A.68 subd 12).

Property Tax

All real and personal property of wind energy systems are exempt from property tax. However, in lieu of a property tax on large wind energy systems, a production tax was implemented in 2002. The following are the rates for that production tax:

- wind systems greater than 12 MW are taxed at a rate of 12 cents/kWh;
- wind systems between 2 MW and 12 MW are taxed at a rate of 3.6 cents/kWh;
- wind systems between 250 kW and 2 MW are taxed at a rate of 1.2 cents/kWh; and
- wind systems under 250kW are exempt from the production tax.

For 2006-2009, the revenue generated by the production tax is distributed to local taxing districts (counties, cities, and townships) (Minn. Stat. sections 272.02, 272.028, and 272.029, and MN Session Laws HF 1298, Article 2, section 12).

New York

Property Tax

The New York State Real Property Tax Law provides a 15-year real property tax exemption for wind energy systems constructed in New York state. Local governments are permitted to decide whether to allow this exemption. The exemption applies to systems that are existing or constructed before July 1, 1988, or constructed between January 1, 1991, and before January 1, 2015. The exemption is equal

to the increase in assessed value attributable to the wind energy system. This exemption is due to expire on December 31, 2014 (NY CLS Real Property Tax, Article 4, section 487).

Performance-Based Incentive/Other

A program funded by the New York System Benefits Charge (SBC) provides funds to manufacturers to develop or expand facilities. Eligibility is limited to renewable or clean energy products that produce or support the production of renewable electricity for delivery to the grid. The New York State Energy Research and Development Authority (NYSERDA) — Renewable, Clean Energy and Energy Efficient Product Manufacturing Incentive Program funding is as follows:

- phase I funding (facility and site characterization activities) is limited to the lesser of 5 percent of the project or $75,000;
- phase II funding (preproduction development) is limited to the lesser of 20 percent or $300,000; and
- phase III funding (production incentive) up to $1.125 million. The total cannot exceed $1.5 million per project.

Another program funded by the New York SBC grants up to 50 percent of a project's cost, with a maximum of $200,000 per project (NYSERDA — Clean Energy Business Growth and Development).

Colorado

Sales Tax

Colorado exempts from the state's sales and use tax all sales and use of components used in the production of alternating current electricity from a renewable energy source (C.R.S. 39-26-724 and C.R.S. 29-2-105).

Colorado also authorizes counties and municipalities to issue property or sales tax rebates or credits to residential and commercial property owners who install renewable energy systems on their property (CRS section 30-11-107.3).

Property Tax

Colorado authorizes counties and municipalities to offer property tax rebates or credits to residential and commercial property owners who install renewable energy systems on their property (CRS section 30-11-107.3 and CRS section 31-20-101.3).

The incremental value of the renewable facility above the value of the nonrenewable energy facility is not subject to property taxes. For 2009 the nonrenewable facility value was determined to be $1,128 per kW for renewable energy projects up to 2 MW and $421 per kW for systems over 100 MW, with other values for various size ranges between 2 MW and 100 MW (CRS section 39-4-101 et seq., SB 174, 177, and 19).

Performance-Based Incentive

The Colorado Governor's Energy Office is providing rebates to Colorado residents who purchase and install qualifying wind energy systems. The incentives are up to $1/watt for the first 5 kW and up to 50 cents/watt for the next 5-10 kW.

The Energy Office also is providing rebates to Colorado businesses and organizations that pay commercial utility rates and that purchase and install qualifying wind energy systems. The incentives are up to $1/watt for the first 15 kW for a system with a maximum size of 50 kW. Wind turbines must be approved and listed by NYSERDA.

North Dakota

Corporate Tax

North Dakota offers a corporate income tax credit for the cost of acquiring and installing a wind energy system for installations after December 31, 2000, and before January 1, 2015. The credit is equal to 3 percent per year for five years for the actual cost of acquisition and installation of the system. If the tax credit exceeds the taxpayer's liability, the excess may be carried over to each of the next five succeeding taxable years. For those wind energy systems installed after September 30, 2008, and before January 1, 2012, the credit may be carried over to each of the next 20 succeeding taxable years. For wind energy systems installed after January 1, 2011, any excess may be carried over to each of the next 10 succeeding taxable years (North Dakota Century Code 57-38-01.8).

Property Tax

North Dakota exempts from local property taxes any locally assessed wind energy devices that serve a new or existing building or structure. Stand-alone systems and systems that are part of conventional systems are also eligible. For systems that are part of a conventional system, only the renewable energy portion of the total system is eligible. This exemption is applied only during the five-year period following installation. It does not apply to those centrally assessed wind energy systems (producing electric power for public use) greater than 100 kW (North Dakota Century Code 57-02-08(27)).

In 2001 North Dakota began offering property tax reductions for commercial wind turbines constructed before 2011. Originally, the law reduced the taxable value of centrally assessed wind turbines (produces electric power for public use) with a capacity of 100 kW or greater from 10 percent to 3 percent of their assessed value, which resulted in a property tax savings of 70 percent. Currently, all centrally assessed wind turbines with a capacity of 100 kW or greater that are constructed after June 30, 2006, and before January 1, 2015, are valued at 1.5 percent of their assessed value, which results in a property tax savings of 85 percent. All other

centrally assessed wind turbines with a capacity of 100 kW or greater are valued at 3 percent of assessed value, which results in a property tax savings of 70 percent (prior rule). Construction must be completed before January 1, 2015, to be eligible for this tax reduction (North Dakota Century Code 57-06-14.1).

Oklahoma

Corporate Tax

Oklahoma offers a state income tax credit to producers of electric power using renewable energy resources from a zero-emission facility located in Oklahoma. The facility must have a production capacity of 1 MW or greater. The facility must be placed in operation after June 4, 2001, and the electricity must be sold to an unrelated party. The amount of the credit varies depending on when the electricity is generated and may be claimed for electricity generated on or after January 1, 2003, during a 10-year period following the date the facility is placed in operation (after June 4, 2001). The amount of the credit ranges from 0.25 cents/kWh to 0.75 cents/kWh for 10 years. HB 3024 was signed in June 2010, reinstating the tax credit, but with restrictions. Credits will not be paid during 2011 for electricity produced from July 1, 2010, through June 30, 2011. Any credits that accrue during that period will be paid during the 2012 tax year (68 Okl. St. section 2357.32A and HB 3024).

Performance-Based Incentive/Other

Oklahoma offers an income tax credit to the manufacturers of small wind turbines for tax years 2003 through 2012. Oklahoma manufacturers of wind turbines with a rated capacity of between 1 kW and 50 kW are eligible for the credit, but they must agree in advance to allow their production and claims to that production to be audited by the Oklahoma Tax Commission. The credit amount varies based on the turbine's square footage of rotor swept area. The credit was $25 per square foot produced in 2003, $12.50 per square foot produced in 2004, and $25 per square foot produced each year from 2005 to 2012. The credit is transferable during the 10 years following the year of qualification. This income tax credit is due to expire on December 31, 2012 (68 Okl. St. section 2357.32B).

Indiana

Property Tax

Systems that generate energy using wind are exempt from property tax. The exemption is allowed every year that a qualifying system functions (Ind. Code section 6-1.1-12-26 et seq.).

Performance-Based Incentive

Indianapolis Power & Light Co. offers a feed-in tariff as payment for the production and renewable energy attributes associated with the production from renewable energy facilities. The incentive for wind facilities is as follows:

- small wind facilities (50 kW to 100 kW) — 14 cents/kWh;
- midsize wind facilities (greater than 100 kW to 1 MW) — 10.5 cents/kWh; and
- large wind facilities (greater than 1 MW, maximum 10 MW) — 7.5 cents /kWh (IURC No. E-16 Case 43623).

Wyoming

Sales Tax

The sales of equipment used to generate electricity from renewable resources are exempt from the state excise tax. The exemption is limited to the acquisition of equipment used in a project to make it operational up to the point of interconnection with an existing transmission grid. Equipment that is eligible for this exemption includes wind turbines, generating equipment, control and monitoring systems, power lines, substation equipment, lighting, fencing, pipes and other equipment for locating power lines and poles. Equipment ineligible for the exemption includes tools and other equipment used in construction of a new facility and routine maintenance activities and equipment utilized or acquired after the project is operational. HB 215 (2009) amended that exemption by establishing two separate expiration dates. For eligible renewable energy equipment with a net rating capacity of 25 kW or less and systems used entirely off-grid, the expiration date remains at June 30, 2012, as established by HB 319 (2007). For eligible renewable energy equipment with a net rating capacity greater than 25 kW, the expiration date is December 31, 2011 (Wyo. Stat. section 39-15-105(a)(viii)(N), Wyo. Stat. section 39-16-105(a)(viii)(C), and HB 215).

Performance-Based Incentive

The State Energy Office, a division of the Business and Industry Division of the Wyoming Business Council, awards up to $10,000 or 50 percent of the installed cost for wind systems. The amount awarded is $2,000 per kW and the incentives are limited to wind systems of 20 kW of less.

Kansas

Corporate Tax

Kansas provides an investment tax credit for some renewable energy facilities constructed between January 1, 2007, and December 31, 2011. The facility must be owned by the owner of a commercial, industrial, or agricultural business and be located on the property of that business. The electricity produced by the renewable energy facility must be either used on-site or displace current or future electric load. The investment tax credit is equal to 10 percent of the first $50 million invested in the

Table 3.
Top Five States for Wind Energy Potential and Production Ranking
(as of July 20, 2010)

		Total Power existing in MW	Total Power under construction in MW	Ranking for wind energy potential	Ranking for wind energy production	Renewable Portfolio Standards
1	North Dakota	1,222	37	1	10	Y*
2	Texas	9,707	370	2	1	Y
3	Kansas	1,026	0	3	14	Y
4	South Dakota	412	210	4	20	Y*
5	Montana	385	0	5	21	Y
6	Nebraska	153	183	6	25	N
7	Wyoming	1,101	311	7	13	N
8	Oklahoma	1,130	381	8	11	N
9	Minnesota	1,797	673	9	7	Y
10	Iowa	3,670	0	10	2	Y
11	Colorado	1,248	552	11	9	Y
12	New Mexico	597	102	12	16	Y
13	Idaho	164	125	13	24	N
14	Michigan	143	20	14	26	Y
15	New York	1,274	95	15	8	Y

*North Dakota and South Dakota have set voluntary goals for adopting renewable energy instead of portfolio standards with binding targets.

project and 5 percent for expenditures above $50 million. The credit must be claimed in 10 equal annual installments and the project must remain in service during those 10 years. Any unused credit may be carried forward in subsequent years as a deduction. Deductions can be carried forward for up to 14 years past the year the first credit was applied. The program is due to expire on December 31, 2011 (Kansas Statutes 79-32, 245).

Property Tax

Kansas exempts renewable energy equipment from property taxes. The equipment must be actually and regularly used predominantly to produce and generate electricity (Kansas Statute 79-201, section 11),

Performance-Based Incentive/Other

Kansas may provide up to $5 million in financing for a wind manufacturing project. Manufacturing companies building wind equipment or components in Kansas may be eligible for financing through the Kansas Department of Commerce to support research, development, engineering, and manufacturing. To qualify, the project must result in $30 million in new investments in Kansas, the hiring of at least 200 new employees within five years, and the company must pay at least $32,500 of average annual compensation per Kansas employee. The principal and interest payments for the bonds are retired using the payroll tax withholdings created from the new jobs. This financing is due to expire on July 1, 2013 (Kansas Statute 74-50, 136).

Pennsylvania

Property Tax

Pennsylvania exempts wind turbines and related equipment toward the value of property (72 P.S. section 5453.201 et seq.)

Performance-Based Incentive/Other

In July 2008 Pennsylvania enacted a broad $650 million alternative energy bill designed to provide support for a variety of renewable energy and energy efficiency technologies. The program will offer support for wind technologies in the form of loans, grants, and loan guarantees. Eligible wind energy-related applications include energy production facilities and manufacturing facilities for wind turbines and other system components. Funds may be used for the following:

- acquisition of land and buildings necessary for project construction;
- clearing and preparation of land to build an eligible project;
- construction or renovation of a building to manufacture wind systems;
- equipment purchases for the manufacture of wind systems;
- purchase, installation, and construction of facilities to produce and distribute wind energy;
- feasibility studies and project planning;

- permit fees; and
- administrative costs associated with an eligible project, not to exceed 3 percent of funding.

Loans are available at a fixed interest rate for terms of up to 10 years for equipment or 15 years for real estate. Loans for wind energy generation or distribution projects are limited to $5 million. Grants for renewable energy manufacturing facilities are available for up to $5,000 per job created within three years of grant approval. Grants for wind energy production or distribution facilities are limited to $1 million. Planning and feasibility studies are also eligible for grants of the lesser of 50 percent of the cost of the study or $175,000. Loan guarantees will take the form of a grant that may be used in the event of financing default on the part of the applicant. Loan guarantees are limited to 75 percent of the deficiency up to $5 million. The term of the grant may not exceed five years. (Special Session HB 1).

RES Standards

Eleven of the 15 states that are listed above have RES or have set voluntary goals for adopting renewable energy instead of portfolio standards with binding targets. The four states listed in the top 15 that do not currently have renewable portfolio standards are Nebraska, Wyoming, Oklahoma, and Idaho.

Without a national RES, progress for 2010 and future years will continue to lag behind expectations because investments will go elsewhere. Bode said, "the U.S. wind industry is in distress. An RES is a critical component to ensure the U.S. wind industry thrives." As shown in Table 1, the growth in 2010 through July 20, 2010, is far below the growth in 2009. An RES is essential for creating hundreds of thousands of American jobs, increasing American independence from foreign oil, and helping to reduce carbon emissions. ☆