

# DIRT ALERT

June 1, 2009

*The latest updates in real estate, land use, renewable energy, environmental and construction law.*

## *Governor Heineman Signs Legislation to Facilitate Wind Energy Development in Nebraska*

On May 29, 2009, Nebraska Governor Dave Heineman signed into law a bill that addresses three key technical issues that have hampered wind energy development in Nebraska. Legislative Bill 561, introduced by Senator Steve Lathrop, started off as a simple bill to address one of these three issues, but it became somewhat of an omnibus bill, which will prove very important for the future of wind energy development in Nebraska.

### **1. Eminent Domain Waiver**

First, LB 561 allows public power districts to waive their eminent domain authority in a power purchase agreement for a project that does not qualify as a Community Based Energy Development (C-BED) project under state law. Previously, the only authority for a public power district to waive its eminent domain authority for a wind energy project was contained in the C-BED statute and could be used only for a C-BED project. Without a waiver of the public power district's eminent domain authority, investors and lenders are reluctant to finance a wind energy project. Without financing, most large wind energy projects are not feasible.

### **2. Power Review Board Approval**

Second, LB 561 provides for a limited alternative form of Power Review Board approval of a renewable energy project that is larger than 80 megawatts (MW).<sup>1</sup> State law requires Power Review Board approval for any project adding more than 80 MW of new electricity generation. In granting this approval, the Power Review Board must find that any such project is the least cost alternative and does not result in unnecessary redundancy. The nature of wind energy projects makes these findings difficult, if not impossible, to make. Thus, prior to LB 561, Nebraska law effectively limited wind energy projects to 80 MW or less.

*The legislation addresses three key technical issues that have limited wind energy development in Nebraska.*

These amendments address this limitation by requiring the Power Review Board to approve a project if the governmental entity that would purchase the electricity from the project, e.g., a public power district, holds an advertised public hearing and takes

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<sup>1</sup> These provisions started out as a separate bill, LB 471, which the Natural Resources Committee merged into LB 561.

comments from its ratepayers, prior to submitting the application to the Power Review Board. This alternative process is only available for projects totaling up to 10 percent of the entity's total energy sales. It is available to a C-BED project if it has a power purchase agreement that requires sales exclusively to a governmental entity, *e.g.*, a public power district, and has a term of at least 20 years.

### 3. C-BED Finance Revision

Third, LB 561 amends the C-BED statute to change the definition of "gross revenues." The C-BED statute requires that 33 percent of "gross revenues" from a power purchase agreement flow to Nebraska residents, a limited liability company made up of Nebraska residents, a Nebraska nonprofit corporation, an electric supplier, or a Native American tribe (collectively, the "qualified owner(s)"). It does not require the qualified owner(s) to hold an equity stake in the project. A project where the qualified owner(s) hold(s) an equity stake in the project is typically known as an "equity C-BED" project.

LB 561 amends the statute to exclude debt service payments from "gross revenues," and thus from the amount on which the share of revenues dedicated to the qualified owner(s) is calculated, if the qualified owner(s) own(s) at least a 33 percent equity stake in the project and the project has a power purchase agreement executed on or before December 31, 2011. This facilitates financing for C-BED projects, which is anticipated to open up additional capital from qualified owners, and to ease and encourage additional development of C-BED projects.

Baird Holm was active in the passage of this legislation. Baird Holm also represented the developer of Nebraska's first, and to date, only, commercially developed, utility grade wind farm.

**David C. Levy**

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