



# **Legal Aspects of *Wind for Schools***

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# Introduction/Methodology



- About Me
  - Environmental and Natural Resource Legal Internship Program
- Research
  - Background and Guidance - Ian, Larry & Marguerite
  - Legal Sources and Guidance - Ron Lehr
  - Site Visitation - Tom Potter
  - School Board and Dept. of Education Contacts
  - Business Perspectives - Charles Newcomb
- Issues addressed:
  - **Ownership**
  - Finance
  - Liability, etc.

# School Ownership of Wind Turbines



- **Problem:** Independent Power Production
  - Not deemed a “public good” + Beyond the scope of a “school purpose”
- **Solution:** The Synthetic Lease
  - Non-profit ownership and donation to school
- **Question: *Can a school own a wind turbine outright?***
  - CO school districts *may* purchase land (property)
    - Amendment 16 mandates that the Land Board allow school districts to buy lands they require for educational purposes
    - Joint Ownership Limitation: Colo. Const. art. XI § 2
  - The CO State Land Board *may* sell land
    - Approval requires 4 out of 5 votes
  - *Wind for Schools* programs **do** satisfy a “School Purpose”
    - See Colo. Stat. § 22-89: *Wind For Schools Grant Program*

## CO ST § 22-89-102. Legislative declaration



*(1) The general assembly hereby finds, determines, and declares that:*

*(a) Colorado's schools face a perennial struggle with tight budgets, and their financial difficulties are worsened by volatile electricity prices that often lead to high electricity bills.*

- **Problem Identified:**

- The **societal/public need** to lower school electricity costs

- A *servable public purpose* stated in the plain text of the legislation

- Endorses actions directed at achieving this end, in the absence of contradictory law; AND

- Can be used as supporting legal precedent in a balancing of interests argument

*(b) A small but growing number of schools have responded to these difficulties by beginning to produce their own electricity with wind turbines.*

# CO ST § 22-89-102. Legislative declaration, continued...



*(c) By producing their own electricity with wind turbines, some schools have reduced their electricity costs while promoting energy independence and environmental responsibility and have provided students with an opportunity to understand this burgeoning technology.*

- Identified public goods (that serve **Public Policy**):

PP① = The **societal benefit** derived from schools reducing their electricity costs by producing their own electricity

PP② = The **societal benefit** derived from the promotion of energy independence and environmental responsibility

PP③ = The **educational benefit** derived from students learning about

- 1) Wind technology OR

- 2) Another burgeoning technology that addresses PP②



# Legislative Intent of § 22-89

## § 22-89-102. Legislative declaration, continued...

*(1)(d) The general assembly would serve the best interests of Colorado schools by supporting the efforts of public schools and community colleges that are **considering** wind power projects.*

## § 22-89-105. Wind for schools grant program-- rules--awarding grants

*(1) The office of energy management and conservation shall adopt policies for the implementation of the wind for schools grant program. At minimum, the policies shall specify [a list of administrative duties aimed at awarding grants to support the efforts of schools **attempting to implement** wind power projects].*

# CO ST § 22-89-105. Rules for awarding grants, continued...



*(2)(b) In awarding grants pursuant to this article, the office of energy management and conservation shall consider, at minimum, whether a qualified school:*

*(I) **Would reduce their electricity costs by the implementation of a wind for school's project;** and* PP①!

*(II) **Has a plan in place to incorporate the implementation of a wind for schools project into their educational curriculum.*** PP③!

*(c) A qualified school shall not receive an aggregate amount of grants pursuant to this article that exceeds \$5,000.*

*(3) The office of energy management and conservation shall use at least \$50,000 for the implementation of this grant program from the existing resources of the office of energy management and conservation. The minimum funding requirement for the implementation of this grant program may be met in one or more fiscal years. The office of the governor shall not submit a request for an appropriation or a supplemental appropriation for this purpose.*



# Ownership, revisited

- **Question:** Can a school own a wind turbine outright?
- **Answer:** Yes
- **Reasoning:**
  - PP① = The **societal benefit** of schools reducing their electricity costs by owning a wind turbine serves the public good.
  - PP③ = The **educational benefit** of having students learn about the technology associated with a wind turbine serves the public good.
    - Which in large part, is a reflection of PP② (the promotion of energy independence and environmental responsibility)

# Overcoming the Independent Power Producer Obstacle



- **Former Problem:** IPP  $\neq$  a public good
- **Resolution:** Enabling *schools* to reduce their *own* energy cost **is** a public good. See PP①
  - Additional support: The public benefits from the promotion of energy independence and environmental responsibility. See PP②
- **Former Problem:** IPP  $\neq$  a school purpose
- **Resolution:** Even if *power production* does not satisfy a school purpose, *the educational benefit derived* from a curriculum associated with power production **does** satisfy a school purpose because teaching students about burgeoning technology is educational in nature. See PP③
  - Additional support: Teaching students about the societal benefits of energy independence and environmental responsibility is also educational. See PP②
  - Additional support: Legal definitions of “school district” and “public purpose”; Wind turbine  $\approx$  new boiler (capital improvement)

# Limitations on Energy Production



- **Limitation:** Behind-Meter Generation versus IPP Sale
  - Behind-the-meter: OK
    - Courts will consider public policy in borderline cases
  - Selling back to the utility: ? (New PP may overcome old IPP problem)
- **Remaining Question:** How extensive can a school's profit-making ventures be to support educational needs?
  - ***Not Applicable*** to the current Wind for Schools program because the 1.8 kW turbine's generation << school's electric bill.

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  - *Not applicable* to the current Wind for Schools program because the 1.8 kW turbine's generation << school's electric bill.
  - *But...* this question is critical for schools considering larger turbine implementation.
- **Answer:** To be determined...
  - "The term 'school' [is] broad enough to include institutions run for profit" *Pitcher v. Miss Wolcott School Ass'n (1917)*.
  - Much depends on the argument...

# Examples of Acceptable Profit-Making Ventures Employed by School Districts



- Enterprises that keep revenues within a particular school or school district:
  - Vending machines, video games, ATM's
  - School bus advertising space
  - Cafeteria space
  - Stock and funds made available through donations to particular districts/for a particular purpose
  - An additional local property tax “override” approved by voters

*A money-making venture requires approval from the local school board*

# Are Schools Permitted to Receive Monetary Gains for Net-Metering and Beyond?



## ▪ **Supporting Doctrines**

- Analogies to accepted practices in Colorado and other jurisdictions
- Extension of PP① → The societal benefit of schools reducing their *operating* (not just electricity) expenses by owning a wind turbine (or farm) serves the public good
  - Perhaps bolstered by the promotional② and educational③ benefits of wind being a renewable energy resource

## ▪ **Opposing Doctrines**

- *Public* schools must remain non-profit / cannot become traditional IPP's
  - Schools are not prohibited from collecting extra funds to enhance themselves, but their options have been limited by their resources
- Potential problems down the line: slippery slope of corruption

As Revenues  $\uparrow$ , Approval of Ownership  $\downarrow$



- Assume the revenue generated from a school wind turbine =  $X$ 
  - $X < \text{Electric Bill}$ 
    - Ownership permissible
  - $\text{Electric Bill} < X < \text{Total Utility Bill (or related costs)}$ 
    - Ownership likely permissible
  - $\text{Total Related Costs} < X < \text{Total School District Budget}$ 
    - Ownership may be permissible
  - $X > \text{Total School District Budget}$ 
    - Ownership might be permitted, if excess \$ went to the general fund or other legal contingencies were put in place



# Finance

- Governing law: Colo. Stat. § 22-54. Public School Finance Act of 1994
- Schools financed by:
  - 1) Federal funding
  - 2) State government
  - 3) Local cities or school districts
    - Local property tax is the primary source of funding
    - District inequity is constitutional in Colorado
    - Overrides must be voted upon



# Financing Options

- *Wind for Schools* sample model
  - School contribution
  - Green tag sales
  - Grant money
  - Community / Utility contribution
- Traditional financing (i.e. loans from local banks) & Bonds
  - Loan assistance via
    - The Community Reinvestment Act
    - School municipal rates
    - Other government subsidies or low interest options
- Renewable Energy Service Agreements
  - Wind developer maintains ownership and leases to schools
    - Provides school (1) option to buy, (2) renew lease, (3) cancel after each period
- School “rainy day funds”
- Endowments & Donations

# Determining a *Wind for Schools* Break-Even Point



- Applying the sample financial model of a *Wind for Schools* project; and
- Assuming an 11.5¢ cost of electricity per kWh (Brush, CO)...
  - At 100% capacity, a 1.8-kW wind turbine makes \$1,813 per year
  - Given that the expected contribution by a Wind for School is approximately this amount (\$1,500-2,000)...
- The buyback period will be proportional and inversely related to the capacity factor:
  - At 25% capacity, the *Wind for Schools* project will be paid for in approximately 4 years;
  - At 20% (or 1/5), capacity, the turbine will be paid for in approximately 5 years;
  - And so on...



# Liability

- As state agencies, local school boards are protected by the 11th Amendment and state immunity statutes
  - Even though sovereign immunity is no longer a *complete* defense in Colorado
- Instances not protected by immunity privileges are generally held to the principles of tort liability applicable to private landowners
- School boards can purchase all types of insurance
- The developer is at risk during construction
- The school is responsible for maintenance & operation
- Wind turbine ≈ flagpole or similar equipment
  - Cause of action for a fall - Valid
    - Assuming either the board erected/maintained a nuisance or was negligent in its duty to repair
  - Other hypothetical situations...

*Note:* Negligence - Reasonable person standard



# Other Legal Issues

- Property
  - Easements for access
  - Effect on property value
- Contract
  - Schools have power to contract - boards more authority than principals
  - Disclosures are required to be made for developers and investors
  - Types of contracts
    - Power purchase agreement between wind turbine owner and utility
    - Interconnection agreement between developer and utility
    - Development option contract contingent upon an agreement with the utility
    - Synthetic lease between Non-profit & School
    - Flip model between Company & School: Takes advantage of 10-year PTC
    - Performance contracting between School, Vendor, & State
- Land Use & Zoning
  - NIMBYism
  - Local Regulations
  - *Note:* School district boundaries can be changed for financial reasons
    - To increase the efficiency of educational expenditures



# Retracing Research Steps

- Overall information gathering technique:
  - Conversations, meetings, and interviews with local school district officers, principals, the CO state school board finance unit, wind engineers, lawyers, and developers
- Ownership
  - Westlaw computer searches for cases, statutes, and regulations
  - DU Law Library resources: Casebooks and treatises on Public Education Law
  - Government websites relating to Colorado School Finance
- Finance
  - DU Law Library resources: Casebooks and treatises on Public Education Law
  - Government websites relating to Colorado School Finance
- Liability, etc.
  - Westlaw computer searches and hardcopy DU Law Library resources starting from American Law Report Articles and using footnotes to find relevant cases and statutes

# Questions?

