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The Prevalence of Renewable Energy Projects and Legal Issues to Consider

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Global investment in the renewable energy sector has skyrocketed. Investments in renewable energy in 2015 were six times higher than in 2004. Renewable energy capacity in the United States alone has more than tripled since 2008. Last year, renewable energy from wind, hydropower, solar, biomass, and geothermal satisfied 15% of the total electricity demand in the United States (up from just 8% in 2008).

Advancements in renewable energy technologies have improved efficiency and helped lower the cost to build renewable energy projects. This, in turn, has helped to reduce the delivered cost of renewable energy to end-users. In fact, the (unsubsidized, levelized) cost of wind power over the last seven years has decreased by 66%, and the cost of solar has decreased by as much as 85% in the same period.

With the rise in renewable energy projects expected to continue into the foreseeable future, Colorado stands to benefit. For instance, wind energy is being sold for historically low prices. Xcel Energy recently announced that it is investing billions of dollars in wind energy across seven states. And due to the rapid growth of wind development, Renewable Energy Systems Americas, Inc. ("RES")—with its United States operations based in Broomfield, Colorado—also recently announced a joint development agreement to develop and construct approximately 3 GW of wind power across 10 projects in the United States expected to achieve commercial operations between 2018 and 2020. Further, Mortenson Construction was recently selected to build in Colorado "the largest single-phase wind farm ever built in North America." This Colorado wind farm is expected to increase Colorado's wind energy production by over 20%.

In addition to advancements in technology, there are two additional drivers for the rapid growth of renewable energy projects in the United States: (1) state-level renewable portfolio standards ("RPS") that require certain types of buyers of power to purchase specified amounts of power from renewable resources, and (2) federal tax credits. More than 29 states (as well as Washington D.C. and 3 U.S. territories) have an RPS. These standards have created a significant market for renewables across the country. And both the Production Tax Credit ("PTC") and the Investment Tax Credit ("ITC") have helped entice investors with sufficient tax appetite to make investments in these projects, reducing the overall cost of producing renewable energy. While both of these tax credits are scheduled to phase out in the next few years, renewable energy projects continue to rely on the financial benefits these tax credits bring to the table.

For practitioners with significant experience in construction work, helping clients build renewable energy projects seemingly presents many of the usual development and construction issues confronted on any project. While one might be tempted to treat these projects like any other construction undertaking, that would be a mistake.

In addition to working with experienced regulatory counsel (along with environmental lawyers, permitting experts, and dirt lawyers), counsel to clients that are developing these projects need to work with tax lawyers to understand how the financing structures work to ensure that the various parties are able to realize the appropriate financial incentives. As an example, for ITC projects, being clear as to which party owns a renewable energy project at the time it is "placed in service" (as defined by the Internal Revenue Service) is critical. In other words, a client cannot "flip the switch" on an ITC renewable energy project before the tax owner is in place, or the owner for tax purpose will not be able to claim the tax benefits.

And, be wary of purchase options on ITC renewable energy projects – if they arise too soon (and the owner for tax purposes doesn't remain in place long enough to earn the full benefits of the ITC) there is the possibility that the Internal Revenue Service might recapture the tax credits. Careful attention to how and when construction begins may also be critical to qualifying for ITC or PTC and satisfying continuous efforts or continuous construction test may likewise be important. For these issues and others, a good tax lawyer with experience with these issues is crucial.

[1] According to a report on sustainable energy in the United States published in February 2017 by the Business Council for Sustainable Energy.
[2] U.S. Energy Information Administration, https://www.eia.gov.
[3] http://scalinggreen.tigercomm.us/2016/12/lazards-brand-new-2016-levelized-cost-energy-analysis-shows-continued-declines-solar-offshore-wind-costs/
[4] See "Xcel Energy to invest billions in new wind farms in Colorado, elsewhere," Colorado Business Journal, March 21, 2017.
[5] Id.
[6] See "Mortenson to Build in Colorado the Largest Single-Phase Wind-Energy Project in North America," March 17, 2017, ENR Mountain States.
[7] Id.
[8] http://ncsolarcen-prod.s3.amazonaws.com/wp-content/uploads/2017/03/Renewable-Portfolio-Standards.pdf