INDUSTRY CURRENT

Idaho Rewrites Tax Regime for Solar Projects

In this week's Industry Current, **David Burton** of **Mayer Brown** and **Richard Page** of **Akin Gump Strauss Hauer & Feld** discuss the latest tax incentives for solar generation in Idaho, which could encourage additional solar developments in the state.

Burton recently joined Mayer Brown's tax transactions & consulting practice and serves as leader of the renewable energy group for the firm's New York office. Burton was previously a tax and project finance partner at Akin Gump. Richard Page is an associate in Akin Gump's New York office.

Idaho Governor **Butch Otter** (R) has signed into law House Bill 534, revising the way that solar energy producers will be taxed in the state. Under revised Idaho statute 63-3502B, "solar energy producers" will not pay property taxes on their solar energy equipment but will instead pay a tax of 3.5% on "gross solar energy earnings". Idaho has an existing nearly identical tax regime for wind and geothermal energy producers, albeit at a tax rate of 3%.

The term "gross solar energy earnings" is defined under Idaho statute 63-3501 as the "gross receipts" of a "solar energy generator" from "the distribution, delivery and sale to a customer for the direct use or resale of electrical energy generated, manufactured or produced by means of . . . solar energy."

David Burton

NET METERING

On its own, the statute is not clear as to how the regime might apply in the context of net metering. Net metering refers to the "selling" of energy to a utility company by a property owner, where the property owner maintains energy producing equipment that is connected to the utility company's energy grid. Net metering results in the property receiving a credit on its bill for the electricity it sells to the utility. At least three Idaho utility companies offer net metering: **Avista Utilities**, **Idaho Power**, and **Rocky Mountain Power**.

Administrative guidance regarding net metering would be particularly relevant in the context of solar power purchase agreements between solar companies and residential (or other distributed generation) customers, through which it is possible that the same power could unintentionally be taxed twice under the new regime — for example, once upon sale to a residential customer by the solar company (e.g., **Sunrun**) and then a second time upon the residential customer "reselling" the power to a utility company via net metering.

Such an outcome would depend on the residential customer being deemed to be a "solar energy generator," which is a term in the statute that is not defined.

We assume that double taxation is not intended, as the goal of the new regime appears to be to encourage solar energy production. Further, we believe it unlikely that a utility would be deemed to be a "solar energy generator" for purposes of the net earnings tax because in the case of energy it sources through net metering it is merely selling generic electricity to its customers, rather than selling them solar electricity.

Pursuant to Idaho statute 63-3504, the Idaho state tax commission will annually notify county treasurers of the amounts taxpayers owe under this regime, and the county treasurers must then inform taxpayers of these amounts by June 15 of each year. Taxes owed must then be paid by July 1 to avoid incurring late penalties.

OTHER STATES

Regimes that exempt solar energy property from property taxes and instead impose an alternative tax are not uncommon. For example, earlier this year South Dakota revised its laws to exempt large-scale solar energy facilities from property taxes, instead imposing on them a less onerous tax on the amount of energy produced. Like Idaho, South Dakota has already had such a regime in place with respect to wind energy property. Also, like Idaho, South Dakota's alternative tax regime imposes a lower tax burden on wind energy than it does on solar.

The **Snake River Alliance**, an organization that describes itself as "Idaho's nuclear watchdog and Idaho's advocate for renewable and nuclear-free energy," has described this new solar energy law as a win–win for local governments and solar energy developers. The logic is as follows: "[The new law] is something counties have welcomed in part because they stand to receive a more predictable, stable, revenue stream from these renewable energy investments from a production tax rather than from a property tax assessment that declines over the years as the property is depreciated."

Although this is a shrewd observation, to the extent taxes are in fact deferred (in the sense of the earnings tax being less in the early years than a property tax would be), solar energy developers will certainly benefit from the time value of money with respect to the delayed taxation.

The *Idaho Statesman* reports that at least five solar projects are currently underway in the state, with at least two in the Boise area, the state's most populous area. Perhaps this new law will encourage additional solar developments. On average, Idaho has the ninth highest number of sunny hours per year among the United States. ■