Memorandum
on
State-Federal Relations

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State – Federal Relations in the Regulation of Wind-Energy Development

Executive Summary

There are serious gaps in the State of Wyoming's ability to regulate wind-energy development. The gaps have primarily resulted from successful challenges in the Wyoming Supreme Court that have been based on either federal pre-emption of state law, or the lack of authority to regulate electrical energy companies that do not operate as "public utilities". Furthermore, this gap is likely to widen under pending Congressional proposals to promote renewable energy development in Western States that will give the Federal Energy Regulatory Authority the ability to grant approvals for transmission lines in cases where state approvals are either not forthcoming or burdened with unreasonable conditions.

The position of the State of Wyoming in dealing with both wind-energy developers and federal agencies would be substantially strengthened if the proposed amendments to the Industrial Siting Act included provisions that underscored the role of the Act as protective of the impact on the state's human and social environment, as well as designating the Office of Industrial Siting as the state agency responsible for participation in regional transmission planning and approval of wind-energy generation and transmission development. The inclusion of these provisions would fit within the "environmental protection" exception to federal pre-emption the state regulation of private activities on federal lands articulated by the U.S. Supreme Court. Such amendments could be written so as not to conflict with federal law and renewable energy policy, thereby surviving pre-emption challenges.

I. Introduction

As with other natural resources, the development of wind-energy, particularly for a Public Land Law State such as Wyoming, raises questions about relations between the states and the federal government. This Memorandum discusses the legal principles governing the relationship between the several states and the federal government in the areas of interstate commerce and the management of public lands concerning wind-energy development. The focus of this discussion is on the ability of the State of Wyoming and its political subdivisions to exercise of so-called "state police powers", whether under legislation such as the Industrial Development Information and Siting Act or country ordinances and plants in regulating wind-energy.

The National Academy of Sciences (NAS) noted that federal regulation of wind-energy activities on private land is minimal and that most states are inexperienced in planning and regulating wind-energy.[1] The NAS went on to propose that policies should be adopted at the national level to help guide state and local regulatory efforts. The nature of State-Federal relations in the area of renewable energy, which includes wind-energy, is the topic of legislation being considered by the Congress.[2] The manner in which Congress proposes to accommodate the interests of states under this legislation should be considered in any legislation which the Taskforce on Wind Energy supports for introduction in the next session.

[1] Environmental Impacts of Wind-Energy Projects (2007), National Academy of Sciences.

[2] The House of Representatives has passed, on a vote of 219 to 212, HR 2453 American Clean Energy and Security Act of 2009, which is not on the Senate's Legislative Calendar. In the Senate, Senators Boxer and Kerry have introduced the Clean Energy Jobs and American Power Act which will be heard by the Committee on Energy & Natural Resources.

II. Gaps in Wyoming Law

The potential for Congress to legislate on the subject of wind-energy development raises the question of pre-emption of state and local law. The extent of pre-emption will depend upon whether the area has been completely occupied by Congress either in: (1) regulating interstate commerce; or (2) the management of public lands. Federal authority is supreme where either Congress has shown the intent to pre-empt state laws, or state regulation is either found to be an obstacle to the accomplishment of federal objective or in direct conflict with federal policy.[3]

A. Generation & Transmission

The U.S. Constitution, grants the federal government express control over the interstate commerce.[4] Simply engaging in interstate commerce does not divest a state from enacting laws and regulations that impact on that business. Further inquiry is needed to determine whether the issue is a matter of the dormant power of the Federal Government to regulate interstate commerce; or a true pre-emption of state authority. As the U.S. Supreme Court has stated:

> "Pre-emption of state law by federal statute or regulations is not favoured 'in the absence of persuasive reasons – either that the nature of the regulated subject matter permit not other conclusion, or that Congress has unmistakably so ordained'. *Florida Lime & Avocado Growers v. Paul,* 373 U.S. 132, 142, 83 S. Ct. 1210, 1217, 10 L. Ed. 2d 248 (1963).

While the federal government does not regulate the construction of individual generation, transmission or distribution facilities to the exclusion of the states, the U.S. Supreme Court has ruled that Congress has pre-empted states in the regulation of interstate sale of electrical power.[5] Interestingly, the scope of federal pre-emption under the Commerce Clause does not include the imposition of state severance taxes on energy resources.[6] However, states which impose taxes on electricity that is sold in interstate commerce could be looked at much differently.

The Wyoming Supreme Court is likely to be the forum for ruling on whether the Industrial Siting Act or county ordinances regulating wind-energy development have been pre-empted. For example, the Wyoming Supreme Court applied the pre-emption doctrine in a challenge to state regulation of the rail transportation of coal under the Industrial Development Information and Siting Act, § 35-12-101 et seq. *Industrial Siting Council v. Chicago and North Western Transportation Company*, 660 P.2d 776 (Wyo. 1983). The Court found that the Transportation Act of 1920, which amended the Interstate Commerce Act, resulted in the Interstate Commerce Commission (ICC) having exclusive authority to ". . . regulate the construction, extension and operation of interstate railroad lines". Because the ICC had previously imposed mitigating conditions on the issuance of a certificate of convenience and necessity for the construction of the connecting rail line, the Justices unanimously upheld the decision of the District Court to exempt the project from the jurisdiction of the Industrial Siting Council.

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[3] As noted in the NAS report, 'Policy' is broadly defined to encompass a variety of goals, tools, and practices, including laws and regulations as well as less formally codified such as guidance documents and resource management plans.

[4] Art. I § 8 United States Constitution.

[5] *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission.* 461 U.S. 190, 103 S. Ct. 1722, 75 L. Ed. 2d 152 (1983).

[6] *Commonwealth Edison v. Montana*, 453 U.S. 609 (1981).

More recently, in *Bridal Bit Ranch Co. v. Basin Electric Power Co-op,* 118 P.3d 996 (Wyo. 2005) the Public Service Commission was held to lack the authority to issue a Certificate of Public Convenience and Necessity where an electrical energy company did not provide service to the general public. Wind-energy developers tend to focus on markets that are beyond the boundaries of the state and are unlikely to be considered as public utilities. In such situations, generation and transmission of wind-energy should clearly be subject to the Industrial Siting Act.

If the provisions of HR 2454 regarding the siting and construction of western transmission line are adopted, a similar outcome could be expected if the State of Wyoming were to assert jurisdiction over transmission lines as well as wind-energy turbines. However, as discussed later in this Memorandum, pending federal legislation as well as judicial precedent may allow some conditions under the Industrial Siting Act to be imposed on wind-energy projects.

B. Public Lands

The federal government is the proprietor of approximately 49 percent of the surface and 66 percent of the subsurface in Wyoming. The management of natural resources, including wind-energy, is determined in accordance with the relevant federal legislation and prerogatives of federal land management agencies under the Property Clause of the U.S. Constitution.[7]

Congress expressed its sense that 10,000 MW of electricity from non-hydro renewable resources should be generated from public lands within a decade.[8] In response to this policy, the Bureau of Land Management (BLM) conducted a programmatic study of the wind-energy potential on the lands under its administration in the 11 western states.[9] Rather than adopt regulations, the BLM and US Forest Service have only prepared guidance documents on the development of wind-energy under permits granted by these agencies.[10]

As with interstate commerce, state regulation of activities on public lands are unenforceable if they conflict with federal law. However, states are often given greater latitude when it comes to site-specific activities. The U.S. Supreme Court has sustained the imposition of state environmental conditions on federal mineral lessees, so long as they do not constitute land use regulations.[11] In the *Granite Rock* case, a majority of the U.S. Supreme Court upheld the actions of a state agency to regulate mining operations on the National Forest where state legislation granted authority to the agency ". . . to provide maximum state involvement in federal activities allowable under federal law or regulation".

On the basis of this decision, the State of Wyoming, or one of its political subdivisions, would be permitted to impose conditions on wind-energy project sited on federal lands so long as they were for the purpose of protecting the human and natural environment, and not as land use regulation.[12] The ability to apply the Industrial Siting Act to wind-energy development would be strengthened if it were amended to reflect the U.S. Supreme Court's ruling in *Granite Rock.*

[7] Art. I § 8 United States Constitution.
[8] § 211, Energy Policy Act of 2005,
[9] The Wind Energy Development Program (2005) U.S. Bureau of Land Management.
[10] BLM, USFS
[11] *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572 (1987)
[12] The Court drew the following distinction between impermissible state land use controls and environmental regulation: "Land use planning in essence chooses particular uses for the land; environmental regulation, at its core, does not mandate particular uses of the land but requires only, however, the land is used, damage to the environment is kept within prescribed limits" 480 U.S. at 575.

This approach would also be in accord with the reasoning of the Wyoming Supreme Court in *Gulf Oil Corp. v. Wyoming Oil & Gas Conservation Commission and Story Oil Impact Committee*, 693 P. 2d 277 (Wyo. 1985). This case denied a challenge brought by a federal lessee to the imposition of an order by the Oil and Gas Conservation Commission. The Wyoming Supreme Court observed that, "Federal law does not preempt a state from imposing reasonable, non-conflicting environmental regulations."[13]

III. Federal Legislation

A. Current Law

Wind-energy, particularly the construction of transmission lines, presents a situation that has implication for both interstate commerce and the management of public lands. The process of regulating the construction and operation of electrical power systems is typically led by the states, with the Federal Energy Regulatory Commission (FERC) exercising "back stop" authority under the Federal Power Act for those issues that were beyond the reach of effective state regulation.[14]

While Congress has not enacted a pervasive scheme for the wind-energy development, there have been a noticeable movement in this direction. Section 1221 of the Energy Policy Act of 2005 contained provisions for the designation of National Interest Transmission Corridors (NITC).[15] This amendment to the Federal Power Act gives the FERC authority to grant permits for the construction of electrical transmission lines within an NITC if either: (1) a state does not have siting authority; or (2) has withheld approval for more than one year. This provision does not appear to pre-empt state regulation. The construction or modification of any transmission facility must be in accordance with state law. Persons who hold NITC construction permits can exercise the right of federal eminent domain if acceptable terms cannot be negotiated with landowners.

B. Pending Legislation

The Obama Administration appears to be prepared to go further than current law in pursuit of its objective to have 25 percent of the nation's electricity by 2025. When discussing the need to connect remote sites where wind energy is produced with consumers FERC's Chairman stated: "Only Congress, exercising its authority to regulate commerce among the States, can address this problem".[16] Legislation pending before Congress seems to be intended to implement this expression of policy.

The House of Representatives has passed the American Clean Energy and Security Act of 2009 (H.R. 2454). The bill contains two provisions in Subtitle F – Transmission Planning that is relevant to wind-energy development. Section 216A directs the Federal Energy Regulatory Commission (FERC) to adopt national grid planning principles and to work with regional planning entities (RPE) to coordinate the adoption and approval of transmission plans that are consistent with national grid planning principles. Under this process, the State of Wyoming would, by necessity, need to participate in one or more regional planning process with it neighboring states. In order to do so, a state agency such as the Industrial Siting

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[13] *Gulf Oil Corp. v. Wyoming Oil & Gas Conservation Commission and Story Oil Impact Committee*, 693 P. 2d 277 (Wyo. 1985) citing *Kleppe v. New Mexico, 428* U.S. 529 (1976).

[14] *Connecticut Light & Power Co.*, 324 U.S. 515 at 524, 65 S. Ct. 749, 89 L.Ed. 1150 (1945).

[15] 16 USC § 824 q.

[16] Testimony of Chairman Jon Wellinghof Federal Energy Regulatory Commission Before the Energy and Environmental Subcommittee of the Committee on Energy and Commerce United States House of Representatives Hearing on Future Grid: Proposals for Reforming National Transmission Policy, June 12, 2009.

Council or the Public Utility Commission would need to be given the legislative authority to engage in this activity.

Section 216B gives FERC authority to pre-empt state regulation concerning the siting and construction of transmission lines associated with the Western Interconnection. This includes Wyoming. Under this provision, the FERC is given the discretion to issue a Certificate of Public Convenience and Necessity under the following conditions: (1) a state commission has withheld approval of an application for one year; (2) a complete application has been denied; or (3) an application has been approved with conditions that unreasonable interfere with development. In exercising its authority under Section 216B, FERC is to engage in consultation with the states on approval of an application and to give consideration to state recommendations for resource protection.

The Clean Energy Jobs and American Power Act was introduced on September 28, 2009. The wind-energy related provisions in this measure are contained in Subtitle H – Clean Energy and Natural Gas. Unlike the House bill, this provision seeks to foster the development of wind-energy by providing grants to the states for the development of Renewable Portfolio Standards[17] rather than creating federal standards and approval processes. At present, Wyoming has not adopted Renewable Portfolio Standards.

IV. Conclusion

The position of the State of Wyoming in dealing with wind-energy developers and federal agencies would be substantially strengthened if the proposed amendments to the Industrial Siting Act included provisions that both underscored the role of the Act as protective of the impact on the state's human and social environment as well as designating the Office of Industrial Siting as the state agency responsible for participation in regional transmission planning and approval of wind-energy generation and transmission.

The inclusion of these provisions would fit within the "environmental protection" exception to federal pre-emption of state regulation of private activities on federal lands while also coming within the role created for the states in legislation pending before Congress to promote renewable energy projects.

Without the adoption of such provisions, the actions of the Industrial Siting Council will be more open to a challenge that state regulation of wind-energy projects conflicts with federal law and policy under either the Commerce or Property Clauses of the U.S. Constitution. This amendment would also fill the gap in regulating electrical energy companies that are not regarded as public utilities.

[17] According the bill, Renewable Portfolio Standards "means a state statute that requires electricity providers to obtain a minimum percentage of their power from renewable energy sources by a certain date."