
MEMORANDUM

TO: SENATOR JIM ANDERSON, CHAIRMAN OF THE WYOMING LEGISLATURE WIND ENERGY TASK FORCE

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SUBJECT: EXECUTIVE SUMMARY FOR WIND ENERGY TASK FORCE REPORT

DATE: 8/14/2009

CC: MARY BYRNES, UW SCHOOL OF ENERGY RESOURCES; PROFESSOR DENNIS STICKLEY, UW COLLEGE OF LAW

INTRODUCTION

The University of Wyoming Law School was invited to submit potential legal issues and possible solutions to the Legislative Wind Energy Task Force (Task Force) through the UW School of Energy Resources under the direction of Professor Dennis Stickley. Two UW Law students reviewed several aspects of wind energy development in Wyoming and identified a set of legal issues and potential solutions for consideration by the Task Force. While the issues discussed in the full paper represent a more complete picture of the challenges facing wind energy development in Wyoming, the list is not exhaustive, and a more detailed analysis of specific issues may be required.

SCOPE OF ISSUES COVERED IN RESEARCH

We have attempted to define and discuss several of the challenges facing wind energy development in Wyoming. Our submission begins with an analysis of the wind right in Wyoming and how the wind right will interact with other estates and property rights under state law. We also address the possibility of severing the wind rights from the surface estate and review different approaches taken by both courts and state legislatures. Finally, we have reviewed conflicts at the state-federal level and the state-local level and developed some options to improve state-local coordination. Noticeably absent from our discussion are three major issues that will certainly define the continued development of wind energy projects in Wyoming: (1) the possible electrical transmission planning or current transmission constraints; (2) the impact on wildlife, and the sage grouse and possible consequences of an Endangered Species Act listing by the federal government; (3) possible taxation or revenue approaches that will be part of the wind development project financial picture. Each of these issues requires a more detailed and significant examination than we were able to provide within the time allotted. However, we would welcome the opportunity to examine each of these issues further at the direction of the Task Force. With those exceptions in mind, this discussion is an attempt to highlight some significant legal issues facing wind energy development in Wyoming and an offering of additional options for the Task Force to pursue.

THE WIND RIGHT BELONGS TO THE OWNER OF THE SURFACE ESTATE

We are currently working on a law review comment attempting to define the nature of the wind energy right under Wyoming law. The research and analysis for the comment are still being finalized. However, we understand this issue is relevant to the consideration of wind energy by the Task Force. Therefore, we included some of our analysis in our submission to answer a few initial questions regarding ownership of the wind and the extent of the wind right. Based on our research, we feel comfortable with the legal assertion that the right to develop wind energy belongs to the owner of the surface estate. There are several reasons such a classification makes sense, and those are discussed more fully in this report and will be expanded upon by our law review comment.

The winds possess characteristics unique to the condition and location of the surface estate and are, therefore, intimately tied to the surface estate. The Wyoming Legislature declared, in 1931, that the space above the surface estate was owned by the several owners of the surface, subject to an easement for the right of public passage. While this was passed in the context of a uniform law on aeronautics, it appears to be an unequivocal statement by the legislature that the airspace above the surface belongs to the surface owner. Further, the winds flowing above the surface of the land are capable of classification according to wind development potential.

Wind ownership can be placed in the surface estate owner through a process of elimination of other estates recognized under Wyoming law. The physical properties of wind, and the doctrine of *edjuseum generis* (a means of interpretation in which a court will look to the specific language of a document in attempting to determine more general terms) exclude it from consideration as a part of the mineral estate, though a comparison with some minerals is useful in determining other issues associated with wind. Wind also shares no logical connection to the pore space under the land. Wind is capable of comparison with water, and has been the subject of such comparison in several publications and one court case, but such an analogy is difficult based on the treatment of water under Wyoming's prior appropriation system.

However, at least one aspect of Wyoming water law provides some insight regarding the ownership of wind rights. The law surrounding diffused water presents a solution to defining wind rights. Wind, like diffused water, occurs on specific lands and as such the owner of the land should be able to make use of the wind as the landowner sees fit, just as with diffused water. This creates a right that may be used on the land which it occurs, but the right is conditioned on ownership of land. The wind right is dependent on ownership of land, just as the use of diffused water is. Thus, wind may developed and used on the land but defining the rights in this manner preserves mineral dominance, makes the surface owner responsible and accountable, allows for multiple use development, and maintains the property owners right to develop the land.

WIND DEVELOPMENT AND LAND USE CONFLICTS

The determination that wind energy rests with the surface owner has an immediate impact on the potential land use conflicts that wind development creates. Under Wyoming law, the mineral estate is the dominant estate, making the extraction of minerals under the surface the priority use for the land. With the added consideration that wind energy is coming later in time than the mineral leases or other surface uses, wind energy development is limited, to a certain extent, by both the dominance of the mineral estate and the pre-existing uses on the land. Fortunately, most land use conflicts can be avoided due to the dominance of the mineral estate making the risk too high for a wind developer. In addition, conflicts can also be avoided through agreements between

parties to subjugate interests, for value, for a certain period. Finally, individual parties such as wind developers, mineral lessees, and surface owners can enter into agreements designed to maximize efficient use of the land while allowing each party to enjoy their respective rights under Wyoming law.

This is not to say that all conflicts between estates in land are easily resolved. Several issues remain, including whether a mineral lessee, despite the dominant position of their estate, would be liable to the wind developer for damages caused by sub-surface operations. In addition, the recent creation of pore space as a separate estate could place additional demands upon the land in addition to the surface, wind, and mineral development. Wyoming courts have not had the opportunity to rule on these issues, but with the increasing demands on the land for multiple uses, the potential for legal action by one or more parties is almost certain. The picture is further complicated by different ownership possibilities, severed mineral estates, and the varying terms and conditions of deeds, leases, and other contracts affecting ownership interests on the land. The scope of variation of these issues based on factual circumstances makes any prediction regarding how a court would decide a certain conflict difficult. However, we included some discussion of how the determination of the wind right will affect the resolution of these conflicts and how common issues could be resolved.

SEVERABILITY OF WIND RIGHTS FROM THE SURFACE ESTATE

The issue of whether wind rights are severable from the surface estate is one of the few areas in which case law has addressed a specific issue regarding wind rights. The case of *Contra Costa Water District v. Vaquero Farms*,¹ in which a California court found that the wind rights were severable from the surface estate in the context of a condemnation proceeding, is the leading cases recognizing wind rights as a separate and compensable property right. The *Contra Costa* case is also significant because the discussion about whether wind rights should be severable from the surface estate is based on a determination by the court that the body of law associated with oil and gas operations is a useful tool for making determinations of the wind right. However, the *Contra Costa* case was brought in the context of a condemnation proceeding and there is a possibility that the court was attempting to relieve a water district from responsibility for compensation in making the decision it did. However, despite the fact that the case was decided in 1997, it remains one of two cases that specifically address the issue of severability of wind rights.

In addition to the *Contra Costa* case, a case in federal district court in New Mexico addressed the severability of wind rights in the context of a partition proceeding. In *Romero v. Bernell*,² the court explicitly rejected the proposition that wind rights were comparable to oil and gas, relying instead on a comparison with water law to find that the wind rights were not capable of an independent valuation in the partition. Like *Contra Costa*, the *Romero* case does not offer a definitive answer to the question of severability of wind rights. The *Romero* case is subject to the same criticism as the *Contra Costa* case in that the facts and circumstances of the case likely played a more significant role in the outcome of the case than a principle of law regarding the wind rights. Further, the decision by the court to equate the wind rights with water rights were poorly supported by analysis and such a determination is not likely to be especially persuasive for courts looking resolve the issue of whether wind rights are able to be severed and independently valued from the surface estate.

¹ 58 Cal.App.4th 883, 68 Cal.Rptr.2d 272 (1997).

² 603 F.Supp.2d 1333 (D.N.M. 2009).

The conflicting case law has led at least one state legislature to answer the question of severability before court cases define the issue. In 1996, the South Dakota legislature acted to restrict the severability of the wind energy rights. The statute reads: “[N]o interest in any resource located on a tract of land and associated with the production or potential production of energy from wind power on the tract of land may be severed from the surface estate” as defined in South Dakota statute.³ Such an action by the state legislature avoids the problems associated with the ability to sever wind rights from the surface estate, including issues of fractional ownership and establishes a certainty in treatment under South Dakota law. However, such a determination could have led to an opposite result in the *Contra Costa* case, likely requiring the condemning agency to acquire the wind rights associated with the surface as well.

As wind energy systems become more widespread throughout the state, Wyoming courts will almost certainly be asked to make a determination regarding the severability of wind rights. This particular area represents a good candidate for some action by the state legislature to draft a statute regarding when and under what circumstances it would be appropriate or recommended to sever wind rights from the surface estate. Any action by the state legislature to amend the statute to either allow or disallow the severance of wind rights from the surface estate would have consequences that require more detailed study and a careful drafting of the statute. Our report highlights some of the potential issues associated with such a determination, and we would welcome the opportunity to more completely develop this issue and provide the Task Force with a more complete analysis.

CONFLICTS BETWEEN THE FEDERAL AND STATE GOVERNMENTS

Wind energy systems require significant amounts of open space in order to function with maximum efficiency. The large tracts of land under consideration for wind development are owned by private parties, the State of Wyoming, and the federal government. The federal government owns approximately 49 percent of the land in Wyoming, meaning that any large development project is likely to include federal and state lands in addition to private lands. However, current wind projects in Wyoming have demonstrated that wind developers are capable of working with all levels of government to acquire necessary permits and rights to construct wind energy systems.

On the federal side, Congress is currently working on the American Clean Energy and Security Act of 2009 (H.R. 2454). This legislation was introduced by Representatives Henry Waxman (D-CA-30) and Edward Markey (D-MA-7) on May 15, 2009 and passed the House of Representatives on June 26, 2009 by a vote of 219-212. The bill contains a number of controversial provisions including a cap-and-trade system for carbon dioxide emissions, a nationwide 20% renewable electricity standard, and significant investments in clean energy and transmission technologies. The bill was sent to the Senate and is likely to come up for consideration by that chamber this fall. However, the inclusion of controversial items, notably the cap-and-trade concept and the renewable electricity standard, combined with the lack of bipartisan support make the prospects of the legislation passing in its current form extremely unlikely. The bill, as currently written, contains no specific references to wind energy systems, but the effects of the cap-and-trade system and the renewable electricity standard would certainly be felt by the wind industry should the legislation become law. Also, the bill contains a number of provisions related to updating and expanding the energy grid, including transmission systems needed to continue major wind energy development in the West. The bill is discussed briefly in

³ S.D.C.L. § 43-13-19 (West 2009).

the submission, but the uncertain future of the legislation in Congress and the lack of specific provisions relating to wind energy mean that more intensive examination will be needed once the Senate begins consideration of the bill.

At present, the federal government has not elected to pre-empt state governments with respect to regulation of the wind industry. Sections of the American Clean Energy and Security Act do attempt to address some transmission problems, but it appears that Congress is content to allow state governments to regulate the development of wind energy systems. The Bureau of Land Management (BLM) and U.S. Forest Service have established guidelines for the development of wind energy systems on federal lands, but such guidelines fall short of actual regulations. Finally, there are a significant number of potential federal land use conflicts that could arise as a result of wind energy development in Wyoming. However, many of these issues are discussed in the section on land use conflicts and are capable of resolution through accommodation agreements or other negotiations.

CONFLICTS BETWEEN STATE AND COUNTY/LOCAL GOVERNMENTS

Currently, the potential for conflict between government agencies rests between the state government agencies and the county governments that are the primary regulators of wind energy development in their jurisdiction. Several counties in Wyoming have adopted wind energy regulations, including Albany, Laramie, Natrona, Platte, and Sweetwater counties, but others have no wind energy regulations, inhibiting their ability to control the wind development process. Over the course of our research, we came across several suggestions for state-developed wind energy regulations that could provide a basis for counties to enact their own wind energy regulations. In the last session, the state legislature elected to defer to the counties and allow county governments to enact their own wind energy regulations. However, in order to promote some harmony in the process for wind developers and landowners, the Task Force could encourage the development, either by the Legislative Services Office or the Industrial Siting Council, of a set of model wind energy regulations that could be distributed to county governments. Model wind energy regulations would provide county governments with a “blueprint” for wind regulations, but provide sufficient flexibility to allow the county to tailor the regulations to address specific problems or issues. We would welcome the opportunity, if deemed necessary by the Task Force, to assist in the drafting and review of these regulations.

In addition to a set of model wind regulations, the Industrial Siting Council (ISC) plays a significant role in the development of a wind energy project if the project falls under their jurisdiction. The current threshold amount for a project to fall under ISC jurisdiction is \$173.2 million.⁴ However, the ISC could potentially play a larger role in developing and harmonizing the regulatory atmosphere for wind energy in Wyoming. The ISC appears to be the logical state agency to supervise the development of wind energy projects in Wyoming, due to the agency’s current involvement with several wind projects that have crossed the \$173.2 million threshold. There are several potential ways for the state government to become more involved with the wind energy process, and such involvement is going to be necessary in the future as additional issues such as taxation and the sage grouse listing are incorporated into the wind energy discussion.

One option is to task an existing state agency with the responsibility to regulate the development of the wind industry. The Public Service Commission (PSC) appeared to be a likely

⁴ Wyoming Department of Environmental Quality website. <http://deq.state.wy.us/isd/downloads/Web%20-%20Threshold%20Rates.pdf>. Last accessed August 7, 2009.

candidate, but lacks the necessary jurisdiction to adequately regulate the wind industry. In the recent Wyoming case of *Bridal Bit Ranch Co. v. Basin Electric Power Co-Op*,⁵ the Wyoming Supreme Court held that a power company was not providing electricity as a public utility and was not subject to the jurisdiction of the PSC. This decision is significant because the stated purpose of many wind projects in Wyoming is to supply electricity to out-of-state customers. Under Wyoming law, it appears then that the PSC would be unable to regulate wind energy systems that did not provide power to in-state customers.

The ISC is the most likely candidate to be the state's point agency on wind energy development based on their experience with current wind projects that have fallen under their jurisdiction. However, the ISC is currently limited by their jurisdictional threshold and is not able to participate in planning for projects less than \$173.2 million. In this respect, we examined the possibility of granting the ISC the ability to intervene in a wind energy project, under specific conditions such as a lack of county wind energy regulations or a request for assistance by a county in evaluating a wind energy project. Again, we did not conduct an exhaustive study of this issue, but would be willing to do so if the Task Force is interested in pursuing the idea further.

CONCLUSION

Overall, we discuss several issues related to wind development in Wyoming in our submission to the Task Force. The report is not intended to be a conclusive analysis of all possible issues related to the wind industry presence in the state, but rather intended to frame the issues that could involve possible legislative action. We look forward to continuing our work with the Task Force to more fully develop these issues and possible solutions for the full legislature to consider in the future. We appreciate the opportunity for the UW law school to be involved in the vital work of this Task Force, and look forward to submitting our full report to the Task Force soon.

⁵ 118 P.3d 996 (Wyo. 2005), 2005 WY 108