

Fast-Tracking Nevada Wind Farm Construction

Law360, New York (July 28, 2011) -- Nevada's first utility-scale wind farm, the Spring Valley Wind Energy Facility, already on a fast-track approval process through the U.S. Bureau of Land Management (BLM), apparently also has been on a fast track through the courts.

The U.S. Ninth Circuit Court of Appeals on July 15 affirmed a March 28 decision by the U.S. District Court for Nevada that refused to block the 66-turbine project to be located about 30 miles east of Ely, Nev.

The plaintiffs, Western Watersheds Project and the Center for Biological Diversity, contended that the BLM's fast-track process failed to adequately assess impacts to the greater sage grouse and bat populations.

Sage Grouse

According to the plaintiffs, the project's significant effects on wildlife required that BLM do a full environmental impact statement (EIS), rather than a more limited environmental assessment (EA). The district court ruled, however, that there were no sage grouse mating grounds (called "leks") in the project area, existing highways separated leks from the project boundaries and, in any event, the BLM had implemented mitigation measures that would reduce impacts on sage grouse.

Accordingly, the court said the plaintiffs had not raised substantial questions that the project would cause significant deterioration to the sage grouse population and habitat, and therefore a more detailed EIS was not required.

Bats

The plaintiffs also argued that an EIS was necessary due to the presence of the Rose Guano Cave nearby (a seasonal roost to more than a million Brazilian free-tailed bats during the August-September migration season) and the likelihood that bats would fly near the project site while foraging or migrating.

The court disagreed and said that BLM had provided "persuasive scientific data" that the impact on bats, particularly with mitigation measures imposed on the project, will not be significant and, therefore BLM was not required to do an EIS.

Ninth Circuit

On appeal, the Ninth Circuit panel issued a memorandum (unpublished) decision agreeing with the district court, although Judge Susan Graber (a former Oregon Supreme Court justice and President Bill

Clinton appointee) wrote a concurring opinion. Judge Graber agreed that the project's construction was unlikely to cause irreparable harm, but she wrote that EA was not legally adequate in its consideration of the cumulative impacts.

Judge Graber pointed out that the BLM estimated future projects would add another 995 wind turbines to the region, 225 of which would be in Spring Valley, but the EA only stated this "would result in further mortality" to bats, while future projects would contribute to greater habitat fragmentation for sage grouse.

Judge Graber said: "BLM's statements regarding 'further mortality,' a 'somewhat larger percent increase in mortality,' and 'greater habitat fragmentation' are precisely the type of 'general statements about possible effects and some risk' that we have rejected as legally insufficient in the absence of an explanation as to why more definitive information was unavailable."

Going Forward

The plaintiffs have limited court options left to block the project. They will have until the end of July to petition for rehearing by the panel and/or by the court en banc, both of which are uphill battles. Meanwhile, grading work has begun on the site and, if no delays are encountered, the project is supposed to start operating in the summer of 2012.

--By Mike Nesteroff, Lane Powell PC

Mike Nesteroff is a shareholder in the Seattle office of Lane Powell.

The opinions expressed are those of the author and do not necessarily reflect the views of the firm, its clients, or Portfolio Media, publisher of Law360. This article is for general information purposes and is not intended to be and should not be taken as legal advice.
