



Spring 2014

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Recommended Citation

Rachel Giron, *Struggles on the Path to Renewable Energy: Lessons from SunZia*, 54 Nat. Resources J. 81 (2014).

Available at: <https://digitalrepository.unm.edu/nrj/vol54/iss1/5>

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Struggles on the Path to Renewable Energy: Lessons from SunZia

ABSTRACT

The SunZia Southwest Transmission Project is a high-voltage transmission line under development in southern New Mexico and Arizona. The project was created to allow the expansion of the renewable energy production economy, and is also part of larger efforts at climate change mitigation. It has the support of federal and state governments, and has been fast-tracked by the Obama Administration. However, in spite of its potential to increase the availability of clean energy, conflicts between local environmental groups and government agencies over siting difficulties have impeded its development. Efforts to streamline the permitting process have been largely unsuccessful, as they often focus on centralizing authority at the expense of local input, and result in increased opposition from citizen groups and local governments who feel their needs and concerns are being ignored. This article examines the current permitting process, potential methods of centralization to increase efficiency, and the procedural protections that will be necessary to ensure that this efficiency does not reduce local input. Easing the development of renewable energy is both necessary to protect the climate, and a concept that lends itself to broad support from environmental groups, government agencies, and the business sector. This article proposes that this potential for support should be encouraged and conflict minimized by ensuring adequate opportunities for meaningful citizen input that can help SunZia and similar projects be embraced rather than rejected by their local communities.

INTRODUCTION

Transporting renewable energy poses several difficulties, particularly in the complex approval process for transmission projects. The SunZia Southwest Transmission Project is a proposed high-voltage transmission project designed to carry largely renewable-generated electricity from sources in the New Mexico and Arizona deserts to load centers in

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the Western Interconnection.¹ This project exemplifies the difficulties faced in multistate transmission siting.

SunZia is managed by SouthWestern Power Group II, an independent developer based in Phoenix.² In addition, it is sponsored by the Arizona utility companies Salt River Project and Tucson Electric Power, Tri-State Generation & Transmission Association, and Shell WindEnergy, so it represents a joint effort by electric utilities, a wind generation developer, and a merchant transmission developer.³ The immediate impetus for the project is mainly economic—to provide access to stranded renewable energy zones⁴ and allow the expansion of the energy production economy—but it is also expected to increase the reliability of electrical service and further state and federal policy goals of encouraging renewable energy development.⁵ The creation of new energy infrastructure is necessary to allow the development of renewable resources, to meet state Renewable Portfolio Standards, and as part of larger climate change mitigation efforts. Yet multistate transmission siting, even for renewable generation, often faces numerous challenges, both from the complexity of the siting process itself, and from local opposition based on environmental or economic concerns stemming from a perceived lack of benefits.

This article will examine the transmission siting process and opposition through the SunZia Project, and suggest methods of resolving procedural and substantive issues. This article proposes that centralized review to increase efficiency combined with increased procedural protections to ensure meaningful citizen input and reduce opposition will allow compromise to be reached on these necessary siting decisions.

1. *SunZia Southwest Transmission Project*, U.S. DEP'T OF THE INTERIOR BUREAU OF LAND MGMT., http://www.blm.gov/nm/st/en/prog/more/lands_realty/sunzia_southwest_transmission.html (last visited Dec. 14, 2012) [hereinafter BLM].

2. *Project Portal: SunZia Southwest Transmission Project*, WESTERN ELECTRICITY COORDINATING COUNCIL, <http://www.wecc.biz/Planning/TransmissionExpansion/Transmission/Lists/Project%20Portal/DisplayForm.aspx?ID=18&Source=http://www.wecc.biz/Planning/TransmissionExpansion/Transmission/Pages/default.aspx> (last visited May 30, 2013) [hereinafter *WECC Project Portal*].

3. *Id.*

4. Stranded renewable energy zones are areas where resources for generation are abundant, but there is no means of transporting the resulting power to customers. See CHI-JEN YANG, CLIMATE CHANGE POLICY PARTNERSHIP, NICHOLAS SCH. OF THE ENV'T AT DUKE UNIV., ELECTRICAL TRANSMISSION: BARRIERS & POLICY SOLUTIONS 5 (Aug. 2009), available at http://www.nicholas.duke.edu/ccpp/ccpp_pdfs/transmission.pdf.

5. *WECC Project Portal*, *supra* note 2.

I. BACKGROUND

The electric system in the mainland United States consists of three interconnected transmission grids, fed into at various points by different forms of generation.⁶ Historically, electricity has been provided to rate-paying customers by public utilities, who constructed their own transmission lines in order to meet the capacity needs of their customers.⁷ Since the cost of these lines was included in the per-kilowatt (kW) rate charged to the customers, utilities were generally required to demonstrate a local need that would outweigh the added cost before they would be granted a permit to install new transmissions.⁸ When the electricity market was partially deregulated and the Federal Energy Regulatory Commission (FERC) mandated open access to transmission lines, utilities had even less incentive to build anything beyond the capacity that they needed to serve their customers, since they would be required to allow other companies to use the lines without discrimination.⁹ For these reasons, investment in the electricity transmission system in the United States has not been sufficient to meet growing demand or replace aging infrastructure, and is inadequate to meet the needs of today's interstate energy market, or the increased transmission needs of a renewable energy market.¹⁰

The need for expanded access to renewable energy is urgent, due to climate change, the need for energy independence, the economy, and security.¹¹ Renewable resources are fundamentally different than fossil fuels, in that the energy source itself cannot be transported.¹² Wind, solar, and geothermal power must be generated where the resources exist, and then the electricity can be transmitted to load centers. This creates problems with the traditional utility siting paradigm: typically there is no unmet transmission need that would justify the installation of new lines when generation facilities have not yet been constructed, yet devel-

6. YANG, *supra* note 4, at 11.

7. Ashley C. Brown & Jim Rossi, *Siting Transmission Lines in a Changed Milieu: Evolving Notions of the "Public Interest" in Balancing State and Regional Considerations*, 81 U. COLO. L. REV. 705, 706 (2010).

8. *Id.* at 707.

9. Order No. 888, *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities*, 61 Fed. Reg. 21,540 (May 10, 1996) (codified at 18 C.F.R. pts. 35, 37); Order 890, *Preventing Undue Discrimination & Preference in Transmission Service*, 72 Fed. Reg. 12,266 (Mar. 15, 2007) (codified at 18 C.F.R. pts. 35, 37).

10. YANG, *supra* note 4, at 5.

11. Steven Ferrey, *Restructuring A Green Grid: Legal Challenges to Accommodate New Renewable Energy Infrastructure*, 39 ENVTL. L. 977, 986 (2009).

12. Brown & Rossi, *supra* note 7, at 737.

operators are reluctant to construct generation facilities when the transmission lines necessary to transport power to market do not exist.¹³ This “chicken-and-egg” problem has made it ineffective to rely solely on market forces to expand transmission. Instead, incentives and policies have been put in place to encourage the growth of the renewable energy. For example, many states, including both New Mexico and Arizona, have put in place Renewable Portfolio Standards (RPS) requiring their public utilities to supply a percentage of the power they sell from renewable resources.¹⁴ In addition, the American Recovery & Reinvestment Act of 2009, otherwise known as the Stimulus Bill, offered tax incentives from the federal government.¹⁵

These efforts have been effective, and demand for renewable-generated power is growing.¹⁶ The transmission system needs to be expanded to access these renewable resources and meet growing needs, but the legal framework originally developed to deal with local siting of utility-owned facilities has not kept up with new realities.¹⁷ The siting process is generally still controlled by state and local governments, but may also fall under federal authority depending on the project’s location.¹⁸

Common issues in siting are redundancy and delay in the permitting process, and strong local opposition to new transmission line installations.¹⁹ Because of the jurisdictional layers and severity of possible impacts, one project may require years of review by numerous agencies before approval can be granted—especially at the federal level, but also in many states.²⁰ Legal reform efforts have attempted to streamline this process, but fast-track attempts often engender fears of losing control and exacerbate opposition.²¹ Opposition to renewable energy development can come from state and local governments, and from private citizens and advocacy organizations.²² Often, opposition results from the perception that concrete local costs outweigh abstract distant or future

13. Uma Outka, *The Renewable Energy Footprint*, 30 STAN. ENVTL. L.J. 241, 269 (2011).

14. ARIZ. ADMIN. CODE § 14-2-1804 (2007) (RPS of 15 percent by 2025); N.M. CODE R. § 17.9.572.10(B) (LexisNexis 2007) (RPS of 20 percent by 2020).

15. Ferrey, *supra* note 11, at 983.

16. Outka, *supra* note 13, at 248.

17. David Hurlbut, *Multistate Decision Making For Renewable Energy & Transmission: An Overview*, 81 U. COLO. L. REV. 677, 678 (2010).

18. *See infra* text accompanying notes 32–38.

19. Sandeep Vaheesan, *Preempting Parochialism & Protectionism in Power*, 49 HARV. J. ON LEGIS. 87, 133 (2012).

20. Robert Glennon & Andrew M. Reeves, *Solar Energy’s Cloudy Future*, 1 ARIZ. J. ENVTL. L. & POL’Y 91, 113–14 (2010-2011).

21. Outka, *supra* note 13, at 283–84.

22. Glennon & Reeves, *supra* note 20, at 120; Vaheesan, *supra* note 19, at 88–89.

benefits, especially if projects stretch across state lines or impact environmentally sensitive areas.²³ In an attempt to overcome this, streamlining efforts often focus on centralizing siting authority and forcing consideration of interstate or even global benefits when assessing project cost.²⁴ Procedural reforms to reduce duplicative analyses and fully consider the broadly-construed needs for and benefits of renewable energy will help to ease siting difficulties, but thorough review with procedural protections to ensure adequate citizen input is necessary to reduce local opposition to transmission. These issues are examined below in the siting process for the SunZia Project.

II. SUNZIA SITING PROCESS OVERVIEW

SunZia will start in central New Mexico near the small town of Corona, at a new substation called SunZia East in Lincoln County, and extend to southeastern Arizona, terminating at a proposed Pinal Central substation, near Casa Grande in Pinal County.²⁵ The project will consist of two single-circuit 500 kilovolt (kV) transmission lines, which will have at least three intermediate interconnections: the Midpoint Substation in Luna County, New Mexico; the Lordsburg Substation in Hidalgo County, New Mexico; and the Willow Substation in Graham County, Arizona.²⁶ The proposed routes will stretch for 460–542 miles, depending on the exact path chosen.²⁷ The alternative route preferred by the U.S. Bureau of Land Management (BLM) would be approximately 515 miles in length.²⁸ The rights-of-way will be between 400–1,000 feet wide, crossing approximately 190 miles of BLM lands in Arizona and New Mexico, along with state and private lands.²⁹ The Western Electricity Coordinating Council (WECC) has approved the project for a 3,000 megawatt bidirectional path.³⁰

23. *See id.* at 116.

24. Jim Rossi, *The Trojan Horse of Electric Power Transmission Line Siting Authority*, 39 ENVTL. L. 1015, 1017 (2009).

25. BLM, *supra* note 1.

26. BUREAU OF LAND MANAGEMENT, FINAL ENVIRONMENTAL IMPACT STATEMENT & RESOURCE MANAGEMENT PLAN AMENDMENTS FOR THE SUNZIA SOUTHWEST TRANSMISSION PROJECT 1-1 to 1-2 (May 2012), available at http://www.blm.gov/nm/st/en/prog/more/lands_realty/sunzia_southwest_transmission/feis/feis_docs.html [hereinafter SUNZIA FEIS].

27. *Id.* at E-2.

28. *Id.*

29. *Id.* at 2-68, 2-107, tbl. 2-12.

30. DANA CABBELL, WECC PLANNING COORDINATION COMMITTEE, SUNZIA SOUTHWEST TRANSMISSION PROJECT ACHIEVE PHASE 3 STATUS (Mar. 25, 2011), available at http://www.sunzia.net/documents_pdfs/wecc_pcc_letter_phase_3_status_3_25_2011.pdf.

The proposed route for the SunZia Project will place the lines primarily on public lands in both Arizona and New Mexico, and will travel around the perimeter of the White Sands Missile Range.³¹ Consequently, although the project is not subject to direct siting authority by the FERC since it does not lie in a National Interest Electric Transmission Corridor (NIETC),³² it will nonetheless require both federal and state permits, thus involving oversight by multiple agencies.

A. Federal Siting Process

The federal permitting process has been fast-tracked, as SunZia was one of seven pilot projects chosen by the Obama administration's Rapid Response Team for Transmission (RRTT), formed in October 2011.³³ The RRTT is a cooperative endeavor of nine federal agencies, originally entered into through a 2009 Memorandum of Understanding (MOU) that gave the U.S. Department of Energy (DOE) authority to designate a "lead agency" through which all applicable federal permitting for the participating agencies could take place.³⁴ The BLM was designated as the lead federal agency for the SunZia project since it controls the largest percentage of land likely to be affected, which means that the BLM will coordinate the development of the Environmental Impact Statement (EIS) and Resource Management Plan Amendment (RMPA),³⁵ pursuant to the National Environmental Policy Act (NEPA),³⁶ Federal Land Policy and Management Act (FLPMA),³⁷ and associated regulations. Numerous other federal and state agencies are working with the BLM on this process.³⁸

31. SUNZIA FEIS, *supra* note 26, at 1-3.

32. Energy Policy Act of 2005, 16 U.S.C. § 824p(a) (2006).

33. *Obama Administration Announces Job-Creating Grid Modernization Pilot Projects*, COUNCIL ON ENVTL. QUALITY (Oct. 5, 2011), http://www.whitehouse.gov/administration/eop/ceq/Press_Releases/October_5_2011.

34. MEMORANDUM OF UNDERSTANDING AMONG THE U.S. DEPARTMENT OF AGRICULTURE, DEPARTMENT OF COMMERCE, DEPARTMENT OF DEFENSE, DEPARTMENT OF ENERGY, ENVIRONMENTAL PROTECTION AGENCY, THE COUNCIL ON ENVIRONMENTAL QUALITY, THE FEDERAL ENERGY REGULATORY COMMISSION, THE ADVISORY COUNCIL ON HISTORIC PRESERVATION, AND DEPARTMENT OF THE INTERIOR, REGARDING COORDINATION IN FEDERAL AGENCY REVIEW OF ELECTRIC TRANSMISSION FACILITIES ON FEDERAL LAND (Oct. 23, 2009), *available at* <http://www.ferc.gov/legal/maj-ord-reg/mou/mou-transmission-siting.pdf> [hereinafter 2009 MOU].

35. BLM, *supra* note 1.

36. National Environmental Policy Act of 1969, 42 U.S.C. § 4321 et seq. (2006).

37. Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761 (2006).

38. Notice of Availability of the Draft Environmental Impact Statement for the SunZia Southwest 500 kV Transmission Line Project in New Mexico and Arizona, and Prospective Draft Land Use Plan Amendment, 77 Fed. Reg. 31,637-02 (May 29, 2012). Cooperating agen-

Development for the SunZia Project actually began in 2008, with an agreement formed between the sponsors that April.³⁹ The group submitted a right-of-way (ROW) application to the BLM in September 2008, and the BLM filed a notice of intent to prepare an EIS in the Federal Register and began scoping for the project that spring.⁴⁰ After a lengthy public comment process, including numerous public meetings and approximately 1,400 comments, the draft EIS was finally released in May 2012.⁴¹ At that point public comment was reopened until August 22, 2012, and after considering this input the BLM released the final EIS on June 14, 2013.⁴² The BLM will now use the information gathered during the EIS process to consider the ROW grant needed to cross BLM-managed federal lands.⁴³

Even though SunZia will make use of previously designated Section 368 energy corridors, a site-specific EIS and ROW decision is still required.⁴⁴ Section 368 of the 2005 Energy Policy Act required federal agencies to designate preferred corridors for energy transportation in the

cies include the Arizona Department of Transportation, Arizona State Land Department, Arizona Game and Fish Department, National Park Service, New Mexico Space Authority, New Mexico State Land Office, Holloman Air Force Base, Ft. Bliss (U.S. Army), White Sands Missile Range (U.S. Army), Ft. Huachuca (U.S. Army), U.S. Army Corps of Engineers, U.S. Fish and Wildlife Service, and the Department of Defense Siting Clearinghouse. Numerous federally recognized tribes have also been invited to participate. *See also* SUNZIA FEIS, *supra* note 26, at 1-12.

39. *EUCI Western Transmission Conference*, SUNZIA SOUTHWEST TRANSMISSION PROJECT (Oct. 24, 2011), available at http://www.sunzia.net/presentation_pdfs/euci_10_24_2011.pdf.

40. Notice of Availability of the Draft Environmental Impact Statement for the SunZia Southwest 500 kV Transmission Line Project in New Mexico and Arizona, and Prospective Draft Land Use Plan Amendments, 77 Fed. Reg. at 31,637-02; Notice of Intent to Prepare an Environmental Impact Statement and Possible Resource Management Plan Amendments for the SunZia Southwest Transmission Project in Arizona and New Mexico, 74 Fed. Reg. 25,764 (May 29, 2009). Scoping involved public meetings to encourage participation and comment in the early stages of project development.

41. Notice of Availability of the Draft Environmental Impact Statement for the SunZia Southwest 500 kV Transmission Line Project in New Mexico and Arizona, and Prospective Draft Land Use Plan Amendment, 77 Fed. Reg. at 31,637-02; SUNZIA FEIS, *supra* note 26, at 1-11 to 1-12.

42. *Draft EIS Released for Proposed SunZia Line*, Bureau of Land Management (May 29, 2012), available at http://www.blm.gov/az/st/en/info/newsroom/2012/may/draft_eis_released.html; *BLM Releases Final Environmental Impact Statement and Preferred Alternative for SunZia Southwest Transmission Line Project*, Bureau of Land Management (Jun. 14, 2013), available at http://www.blm.gov/nm/st/en/info/news_releases0/2013/june/blm_releases_final.html.

43. 43 C.F.R. § 2801.9 (2005).

44. *Wilderness Soc'y v. U.S. Dep't of Interior*, No. 3:09-cv-03048 JW (N.D. Cal. July 9, 2012).

11 Western states, and also to perform any environmental reviews or land use plan amendments necessary for their designation.⁴⁵ Once designated, that prior analysis could be used to expedite the permit applications for projects within these corridors. The BLM conducted a three-year study, including public comment periods, culminating in a Programmatic Environmental Impact Statement (PEIS) designating thousands of miles of Section 368 corridors.⁴⁶ The PEIS considered transmission needs for both traditional and renewable energy development, and emphasized interconnection with the existing electricity grid, compatibility with current land use plans, reuse of previously developed land where possible, and minimization of potential environmental impacts.⁴⁷ It identified preferred locations for energy transmission and amended land-use plans to facilitate the ROW application process for projects in these areas.⁴⁸ The corridor sites were selected to minimize potential environmental impact and allow the creation of a robust multistate transmission system in the West. However, despite the streamlining process, the PEIS was unable to consider project-specific impacts due to its programmatic nature. A PEIS can speed up the individual project review process by providing some of the data that will be required later, but individual developments must still undergo individual EIS analysis as part of the ROW application.

Pursuant to their FLMPA multiple-use mandate and their ROW regulations, the BLM objectives in granting a ROW are to protect the natural resources on public and adjacent lands, prevent unnecessary or undue degradation, promote the use of ROWs in common where possible, and coordinate with state and local governments and other interested parties.⁴⁹ The BLM recognizes the need for new transmission facilities, and considers existing RMPs along with the possibility of amendments if routes intersect with exclusion areas, avoidance areas, or restrictive visual resource management areas.⁵⁰ It may grant a ROW with terms and conditions in the public interest, including modifications of use or route, and mitigation requirements.⁵¹ NEPA requires considera-

45. Energy Policy Act of 2005, Pub. L. No. 58-109, § 368, 42 U.S.C. § 15926 (2006).

46. BLM, APPROVED RESOURCE MANAGEMENT PLAN AMENDMENTS/RECORD OF DECISION (ROD) FOR DESIGNATION OF ENERGY CORRIDORS ON BUREAU OF LAND MANAGEMENT-ADMINISTERED LANDS IN THE 11 WESTERN STATES 5 (Jan. 2009), available at http://corridoreis.anl.gov/documents/docs/Energy_Corridors_final_signed_ROD_1_14_2009.pdf [hereinafter BLM PEIS].

47. *Id.* at 13.

48. *Id.* at 3.

49. 43 C.F.R. § 2801.2 (2005).

50. SUNZIA FEIS, *supra* note 26, at 1-21.

51. *Id.* at 1-19.

tion of cumulative impacts, but usually these impacts are limited to the local and immediate, and do not account for future or global benefits of renewable energy.⁵²

Because the cooperative federal process authorized by the 2009 MOU applies only to lands controlled by those agency signatories, SunZia will still need to obtain separate permits to cross other federal lands. These include the Middle Rio Grande Conservancy District (MRGCD) in New Mexico and the Central Arizona Project (CAP) canal, managed by the Bureau of Reclamation, and the San Carlos Irrigation Project canal system, administered by the Bureau of Indian Affairs, which will both require separate NEPA decisions to grant ROWs.⁵³ In addition, the application is subject to review by the Department of the Army, because some BLM lands have been reserved for exclusive use by the military, and its permission must be given to cross these lands.⁵⁴

B. State Siting Process

As the federal permits are granted, the state permitting process will begin.⁵⁵ SunZia must apply to the Arizona Corporation Commission (ACC) for a Certificate of Environmental Compatibility (CEC), required for any lines 115kV or higher, and to the New Mexico Public Regulation Commission (NMPRC) for a Location Permit.⁵⁶ Considerations for these siting permits are based on needs, costs, and environmental factors.

The New Mexico legislature requires a Location Permit based on the idea that it is in the public interest to consider any adverse effects on the environment or quality of life of state residents before granting siting permission.⁵⁷ Issuance requires environmental studies and mitigation development.⁵⁸ The NMPRC is required to approve applications for transmission siting unless it finds that “the location will unduly impair important environmental values.”⁵⁹ These values include, but are not limited to, the preservation of air and water quality, soil, flora, fauna, water, mineral, socioeconomic, cultural, historic, religious, visual, geo-

52. Outka, *supra* note 13, at 265.

53. SUNZIA FEIS, *supra* note 26, at 1-19, 1-21.

54. Military Lands Withdrawal Act of 1999, Pub. L. No. 106-65, 113 Stat. 885 (1999); SUNZIA FEIS, *supra* note 26, at 1-20.

55. Because the federal permitting process is much longer, may impact the final route chosen, and may provide reviews that can be incorporated into state agency analysis, it is generally completed first although that is not required.

56. SUNZIA FEIS, *supra* note 26, at 3-246.

57. N.M. STAT. ANN. § 62-9-3(A) (2005).

58. N.M. CODE R. § 17.9.592.10(C-E) (2004).

59. N.M. STAT. ANN. § 62-9-3(F).

logic and geographic resources, and land uses.⁶⁰ These determinations are made considering existing state, local, or private development plans; fish, wildlife and plant life; noise emission levels and communications interference; proposed availability of the location to the public for recreational purposes with safety considerations; existing scenic, historic, cultural, archaeological, or religious sites in the area; and any additional factors that require consideration under applicable federal and state laws.⁶¹ The applicant must also provide proof of compliance with local regulations, unless the commission finds the regulation unreasonably restrictive and compliance not in the interests of public convenience and necessity, in which case it will preempt local authority and void the regulation as to the siting.⁶² Applications to the NMPRC must include proof that the applicant has also provided notice to all local authorities where the transmission line will be located, as well as the New Mexico Attorney General, the New Mexico Environment Department, and the New Mexico State Engineer.⁶³ Location Permits may be issued conditionally, upon acquisition of all other necessary environmental permits.⁶⁴

In Arizona, the ACC refers applications for a CEC to the Arizona State Power Plant and Transmission Lines Siting Committee (Committee), whose sole function is to consider these applications.⁶⁵ These applications must include all necessary environmental studies, and require hearings in affected communities.⁶⁶ Factors to be considered in granting a CEC are similar to those for a NMPRC Location Permit, except that the ACC also requires consideration of costs and the protection of unique environmental areas. This is due to the recognition that increased facility costs represent potential increases in costs to customers and applicants, and that unique areas may have important biological resources or habitat for rare or endangered species.⁶⁷ The Committee has broad discretion, largely due to the vague criterion requiring consideration of the “total environment of the area.”⁶⁸ Once the Committee makes a decision granting or denying the CEC application, or imposing conditions on a grant, the decision must be affirmed by the ACC, who may approve, deny, or modify it based on considerations of public interest, project need, and

60. N.M. CODE R. § 17.9.592.10(H).

61. N.M. STAT. ANN. § 62-9-3(M).

62. N.M. STAT. ANN. § 62-9-3(G).

63. N.M. CODE R. § 17.9.592.10(J).

64. N.M. STAT. ANN. § 62-9-3(C).

65. ARIZ. REV. STAT. ANN. § 40-360.03 (2007); Albert H. Acken & Matthew G. Bingham, *Sustainable Energy In Arizona*, 43 ARIZ. ST. L.J. 669, 686 (2011).

66. See ARIZ. REV. STAT. ANN. §§ 40-360.04, 40-360.06 (2007).

67. *Id.* at § 40-360.06(A)(8), (B).

68. Acken & Bingham, *supra* note 65, at 686–87.

environmental impact.⁶⁹ Although review before affirmation appears to be required only upon applicant request, in practice the ACC reviews every CEC decision.⁷⁰ Failure to demonstrate project need will result in denial of the CEC.⁷¹

Because of New Mexico and Arizona siting laws, which allow these centralized state authorities to preempt local rules, no local siting permits will be needed.⁷² However, both states still require compliance with all local rules, unless the state agency determines that the rules are unreasonable and not in the public interest.⁷³ Numerous other permits are also required, and the process can still be lengthy and cumbersome. SunZia must obtain ROWs across state and private land, and environmental, historic preservation, and encroachment permits from a variety of state agencies.

The ROWs across state trust land are granted by the Arizona State Land Department and the New Mexico State Land Office.⁷⁴ Because of the restrictive terms under which land was granted to these states, the State Land Commissioner, as trustee, is required to administer the state trust lands for the benefit of the trust beneficiaries, generally state residents or institutions such as public schools.⁷⁵ All uses of State Trust land must benefit the Trust.⁷⁶ Therefore, both New Mexico and Arizona agencies require applicants to demonstrate that the ROW is in the interest of the Trust for it to be granted.⁷⁷

69. ARIZ. REV. STAT. ANN. § 40-360.07(B).

70. Acken & Bingham, *supra* note 65, at 687.

71. *See id.*

72. N.M. STAT. ANN. § 62-9-3(G), (I); ARIZ. REV. STAT. ANN. § 40-360.06(D); *see also* WECC Project Portal, *supra* note 2.

73. *See supra* text accompanying notes 61–63.

74. *Right of Way Section*, ARIZONA STATE LAND DEPARTMENT, <http://www.land.state.az.us/programs/realestate/sections/row.htm>; *Rights of Way Division*, NEW MEXICO STATE LAND OFFICE, http://www.nmstatelands.org/Overview_7.aspx.

75. New Mexico-Arizona Enabling Act, 36 Stat. 557 (1910); PETER W. CULP, DIANE B. CONRADI, & CYNTHIA C. TUELL, LINCOLN INSTITUTE OF LAND POLICY/SONORAN INSTITUTE, TRUST LANDS IN THE AMERICAN WEST: A LEGAL OVERVIEW & POLICY ASSESSMENT 62–64, 110–11 (2005), *available at* <http://www.lincolnst.edu/subcenters/managing-state-trust-lands/publications/>.

76. ARIZ. STATE LAND DEP'T, ANNUAL REPORT 2010–2011 4 (2011), *available at* <http://land.state.az.us/report.htm>.

77. ARIZ. STATE LAND OFFICE, ROW FLYER, *available at* <http://www.azland.gov/programs/realestate/pdfs/ROWFlyer.pdf> (“It is the Land Department’s responsibility, on behalf of the beneficiaries, to assure the highest and best use of State Trust Lands.”); *Right of Way Division*, N.M. STATE LAND OFFICE, http://www.nmstatelands.org/Right_of_Ways_FAQs.aspx (“By statute and constitution, the State Land Office must manage state trust land so the 22 Beneficiary Institutions of public schools, universities and hospitals receive income from the trust.”).

In spite of the detailed EIS conducted by the BLM, state environmental permits will also be required. The Clean Water Act requires water quality permits to be certified by the Arizona Department of Environmental Quality (ADEQ) and New Mexico Environment Department (NMED) for compliance with state standards.⁷⁸ A similar permit is required from these agencies for air quality and pollution, and for possible hazardous waste management and storage.⁷⁹ Removal of plants must be permitted through New Mexico Department of Energy, Minerals & Natural Resources, and the Arizona Department of Agriculture.⁸⁰ Possible effects on endangered animal species are managed in consultation with the Arizona Game and Fish Department and the New Mexico Department of Game and Fish.⁸¹ The state environmental review process overlaps with the BLM process, but state agencies may only incorporate this federal review, not substitute it for their own.⁸²

In addition to the general environmental effects, specific impact on cultural or historical resources is also overseen by state agencies even though, as the lead federal agency, the BLM is also responsible for consultations under Section 106 of the National Historic Preservation Act.⁸³ State permits must be obtained from the Arizona State Museum, the Arizona State Historic Preservation Office, and the New Mexico State Historic Preservation Division.⁸⁴ The Arizona State Museum administers the Arizona Antiquities Act and state laws dealing with the discovery of human remains, and issues permits for archaeological work on state

78. Clean Water Act § 303, 33 U.S.C. § 1313 (2006); 33 C.F.R. §§ 320, 322, 323, 325 (2012); ARIZ. REV. STAT. ANN. § 49-255 (1996); ARIZ. ADMIN. CODE §§ 18-9-1 to 2 (2005); ARIZ. ADMIN. CODE § 18-11-1 (2009); N.M. STAT. ANN. § 74-6-5 (2009); N.M. CODE R. § 20.6.2 (LexisNexis 2011).

79. SUNZIA FEIS, *supra* note 26, at 1-26 to 1-27, tbl. 1-5.

80. ARIZ. REV. STAT. ANN. §§ 3-901 to 916 (1990); N.M. STAT. ANN. § 75-6-1 (1985); N.M. CODE R. § 19.21.2.13 (LexisNexis 2006).

81. U.S. Fish & Wildlife Coordination Act, 16 U.S.C. §§ 661-667e (2006); N.M. STAT. ANN. § 17-2-42 (1974); NEW MEXICO DEPARTMENT OF GAME & FISH, HABITAT HANDBOOK, http://www.wildlife.state.nm.us/conservation/habitat_handbook/index.htm.

82. N.M. ENV'T DEP'T, CONSTRUCTION PROGRAMS BUREAU STATE ENVIRONMENTAL REVIEW PROCESS 2 (Jan. 2, 2008), *available at* www.nmenv.state.nm.us/cpb/documents/NEPASERP_000.doc.

83. SUNZIA FEIS, *supra* note 26, at 1-12.

84. ARIZ. REV. STAT. ANN. §§ 41-841 to 847 (1990) (Arizona State Museum Permit to Investigate); ARIZ. REV. STAT. ANN. § 41-865 (1990) (Permission to Disturb); ARIZ. REV. STAT. ANN. §§ 41-861 to 864 (1990) (State Historic Preservation Officer review of potential disturbance to cultural resources on state land); N.M. STAT. ANN. § 18-6 (2004); N.M. CODE R. § 4.10.15 (LexisNexis 2006) (NM State Historic Preservation Division Cultural Survey Permit).

lands.⁸⁵ The Arizona State Historic Preservation Office (SHPO) reviews state and federal actions that may impact historical or archaeological properties under the Arizona Historical Preservation Act and the National Historic Preservation Act.⁸⁶ The New Mexico State Historic Preservation Division does the same, under New Mexico's Cultural Properties Act and the Prehistoric and Historic Sites Preservation Act of 1989.⁸⁷ The use of land from any historic site is prohibited, unless there is no feasible alternative and the project includes all possible protections.⁸⁸ The Arizona SHPO provides guidelines for streamlining the review process by having all involved agencies be signatories to an agreement based on a single consultation.⁸⁹ However, neither the Arizona nor the New Mexico State agencies are signatories to the BLM review, and thus may duplicate work already completed under federal guidelines.⁹⁰

Finally, encroachment permits from both the New Mexico Department of Transportation (NMDOT) and Arizona Department of Transportation (ADOT) will be needed wherever transmission lines cross any NMDOT or ADOT right-of-way.⁹¹ NMDOT will issue an encroachment permit upon a showing that the occupancy is in the public interest and will not impair the safety of the highway or the free flow of traffic.⁹² ADOT requires proof of compliance with all applicable environmental and historic preservation regulations under the Clean Air Act, Clean Water Act, Endangered Species Act, Arizona Native Plant Law, and National Historic Preservation Act.⁹³ The Arizona State Historic Preservation Act mandates that ADOT consider the effects a permit will have on historic properties.⁹⁴ Prior permission of the Federal Highway Adminis-

85. *Cultural Resource Services*, ARIZ. STATE MUSEUM, <http://statemuseum.arizona.edu/crservices/index.shtml> (last visited Oct. 12, 2012).

86. ARIZ. REV. STAT. ANN. § 41-864 (1990).

87. N.M. STAT. ANN. § 18-6-8.1 (1993).

88. N.M. STAT. ANN. § 18-8-7 (1989).

89. ARIZONA STATE PARKS STATE HISTORIC PRESERVATION OFFICE, GUIDELINES FOR THE STATE HISTORIC PRESERVATION ACT 15 (Jan. 18, 2001), available at http://azstateparks.com/SHPO/downloads/SHPO_Guidelines_SHPA.pdf.

90. SUNZIA FEIS, *supra* note 26, at 1-12.

91. SUNZIA FEIS, *supra* note 26, at 1-26 to 1-27, tbl. 1-5.

92. N.M. DEP'T OF TRANSPORTATION, RIGHT OF WAY HANDBOOK, VOLUME VI: PROGRAMS & INFRASTRUCTURE PROPERTY ASSET MANAGEMENT PROCEDURAL MANUAL 4-8 to 4-9 (Jan. 1, 2011), available at http://dot.state.nm.us/content/dam/nmdot/Infrastructure/ROW_Handbook.pdf.

93. ARIZ. DEP'T OF TRANSPORTATION, GUIDELINES FOR ENCROACHMENT PERMITTEE'S STATE AND FEDERAL ENVIRONMENTAL REGULATIONS (Mar. 2007), available at <http://www.azdot.gov/docs/default-source/business/adot-guidelines-for-encroachment-permittee's-state-and-federal-environmental-regulations.pdf?sfvrsn=2>.

94. *Id.*

tration is also needed if federal-aid interstate highways are affected.⁹⁵ SunZia's state permits are expected to be issued in 2013, so that construction can begin in 2014 and operation can be expected, at the earliest, in 2016.⁹⁶

III. SUNZIA OBSTACLES—PERMITTING AND OPPOSITION

Although SunZia is expected to provide tangible benefits to New Mexico and Arizona, and renewable energy development has been theoretically supported in both of these states, nevertheless there has been significant delay in the permitting process. Some of this results from gridlock in the permitting process itself, as described above. Efforts to ease this procedural delay, however, have given rise to even more time-consuming conflict by stirring up local opposition to the project. In spite of its positive potential, SunZia has faced opposition in various forms from the military, local governments, and environmental groups. Much of this opposition raises valid concerns that must be negotiated in the siting process and balanced against the long-term project benefit.

The economic impact of SunZia is expected to be positive and significant in both Arizona and New Mexico.⁹⁷ New Mexico and Arizona are both energy producing states, in that they have the resource capability of producing more energy than the state resident populations will consume, and will likely be able to export the excess for profit.⁹⁸ In the case of renewable energy in particular, both states have some of the highest concentrations of solar and wind power potential in the nation.⁹⁹ In order to develop these resources and meet their respective Renewable Portfolio Standards,¹⁰⁰ they have implemented progressive renewables policies. They participate in various regional associations, including the Southwest Area Transmission (SWAT) work group, the WECC, and the Western Governor's Association (WGA). These groups conduct renewable resource and transmission studies and coordinate expansion-plan-

95. N.M. DEP'T OF TRANSPORTATION, *supra* note 92.

96. DAVID GETTS, SUNZIA SOUTHWEST TRANSMISSION PROJECT, PROJECT UPDATE NEW MEXICO RETA 11 (Aug. 22, 2012), available at http://www.sunzia.net/presentation_pdfs/nm_reta_8_22_12.pdf.

97. See generally ALBERTA H. CHARNEY ET AL., SUNZIA SOUTHWEST TRANSMISSION PROJECT ECONOMIC IMPACT ASSESSMENT (Jan. 2012), available at http://www.sunzia.net/documents_pdfs/sunzia_eia_revised_final_jan_2012.pdf.

98. Brown & Rossi, *supra* note 7, at 711; SUNZIA FEIS, *supra* note 26, at 1-7.

99. NAT'L RENEWABLE ENERGY LAB., RENEWABLE ELECTRICITY FUTURES STUDY, VOLUME 1: EXPLORATION OF HIGH-PENETRATION RENEWABLE ELECTRICITY FUTURES xxv fig.ES-2 (2012), available at http://www.nrel.gov/analysis/re_futures/.

100. ARIZ. ADMIN. CODE § 14-2-1804 (2007) (RPS of 15 percent by 2025); N.M. CODE R. § 17.9.572.10(B) (LexisNexis 2007) (RPS of 20 percent by 2020).

ning efforts, but their focus is on information gathering and sharing, and they have no legal siting authority. New Mexico has created the New Mexico Renewable Energy Transmission Authority (NMRETA), tasked with planning and financing projects to develop renewable resources and create economic opportunities, and specifically authorized to consider the benefits of interstate projects.¹⁰¹ As a state agency, NMRETA has the power of eminent domain, but it does not issue siting permits.¹⁰²

Arizona legislators attempted to further streamline the siting process for renewable energy projects with SB 1517. Proposed but never enacted, SB 1517 would have allowed state agencies to make use of federally-collected data as a basis for their permitting decisions.¹⁰³ For example, the environmental and historical preservation data collected by the BLM in creating their EIS could have been used by ADEQ to issue environmental permits and SHPO to assure compliance with the National and State Historical Preservation Acts, rather than requiring state agencies to undertake their own analyses. However, due to concerns for state and local autonomy, thorough review, and citizen input, the bill was defeated in the Arizona House on April 18, 2011. Critics point out that SunZia sponsored the bill, and characterize it as an attempt to avoid proper oversight of local issues by local authority.¹⁰⁴ They maintain that consolidating the review process would amount to federal preemption, and result in a lack of consideration for local concerns and insufficient input from local residents.¹⁰⁵

This local input/centralized efficiency conflict is at the heart of current transmission siting problems. The inefficiency of the current process results in duplication of federal and multiple state inquiries, many working under the same or similar statutes, collecting the same data, and conducting the same reviews. However, each party is unwilling to give up their control over the process, resulting in long delays in approval for necessary transmission infrastructure. These issues have been well-docu-

101. New Mexico Renewable Energy Transmission Authority Act, N.M. STAT. ANN. § 62-16A-4 (2007).

102. N.M. CODE R. § 17.8.3 (LexisNexis 2011).

103. Proposed House of Representatives Amendments to S.B. 1517, H. 1517, 50th Leg., 1st Reg. Sess., (Ariz. 2011), available at http://www.azleg.gov//FormatDocument.asp?in-Doc=/legtext/50leg/1R/proposed/H.1517-SE-PRATT.DOC.htm&Session_ID=102.

104. Scott Streater, *Arizona Permitting Bill Sparks Opposition*, ENV'T & ENERGY DAILY (Apr. 14, 2011), <http://www.eenews.net/search/stories?> (select "April 14 2011" from both "Start Date" and "End Date"; then search "Arizona Permitting Bill"; then follow article name).

105. Griselda Nevarez, *Lawmaker Wants To Use Federal Standards in Considering Some Power Projects*, ARIZ. CAPITOL TIMES (Apr. 7, 2011), available at <http://azcapitoltimes.com/news/2011/04/07/lawmaker-wants-to-use-federal-standards-for-approving-power-projects/>.

mented.¹⁰⁶ Nevertheless, despite broad agreement that there is a problem, any possible solutions have been met with resistance.

In addition to permitting duplicity and delay, SunZia has faced direct opposition from several groups. One group, the military, had legal authority to halt the project, and so was allowed to intervene in the BLM route selection to allay their concerns. They did temporarily halt the project and forced a reconsideration of the route through military land.¹⁰⁷ Groups without such authority could resort only to the public comment process and the media. Some local governments have raised economic issues, and objected to perceived decreases in property value.¹⁰⁸ However, especially in New Mexico, where the majority of the power is expected to be generated, most financial concerns are outweighed by the prospect of economic growth.¹⁰⁹ In addition, the project location on largely federal and state lands minimizes the impact to private property values.

By far, the strongest objections to the SunZia project are made on environmental grounds. Concerns raised include aesthetic issues due to the presence of towers, lines, and access roads; devegetation necessary under the lines and associated increases in erosion; possible effects on water quality and flow of the San Pedro River in Arizona; damage to wildlife habitat, breeding habits, and migratory patterns; and mistrust or disbelief in the renewable nature of the project.¹¹⁰ Environmental groups such as the Audubon Society, the Sierra Club, Friends of the Bosque, and Cascabel Working Group have raised serious opposition to routes that

106. Rossi, *supra* note 24, at 1017.

107. Scott Streater, *N.M.-to-Ariz. Power Project Crosses Pentagon Firing Line*, ENVIRONMENT & ENERGY DAILY (Apr. 8, 2010), <http://www.eenews.net/search/stories?> (select "April 8 2010" from both "Start Date" and "End Date"; then search "Power Project"; then follow article name).

108. Mike Sievers, *Bosque Friends Respond To SunZia's Proposed Route*, MOUNTAIN MAIL (July 17, 2009), <http://mountainmail.blogspot.com/2009/07/friends-of-bosque-respond-to-sunzias.html>; Socorro Cnty. Bd. of Cnty. Comm'rs Res., June 22, 2010 (N.M.), available at http://www.sunzia.net/documents_pdfs/socorro_county_res_6_22_2010.pdf.

109. GOVERNOR RICHARDSON'S TASK FORCE ON STATEWIDE ELEC. TRANSMISSION PLANNING, NEW MEXICO ELECTRICITY PLANNING REPORT 20 (Nov. 1, 2010), available at <http://www.emnrd.state.nm.us/main/documents/NMElectricityTransmissionReport.pdf>.

110. Chester F. Phillips, Paul Green & Chris McVie, *Power Lines Threaten Lower San Pedro River Valley*, TUCSON AUDUBON VERMILION FLYCATCHER 16, Mar.-Apr. 2010, available at http://www.tucsonaudubon.org/images/stories/vflycatcher/VF_MA10.pdf; Shelley Shelton, "Green" or Not, *Power-Line Plan Opposed*, ARIZ. DAILY STAR, May 10, 2010, http://azstarnet.com/business/local/green-or-not-power-line-plan-opposed/article_e0c39db9-71dd-5e32-9d6f-c219503d2b67.html.

will impact the Bosque del Apache Wildlife Refuge in New Mexico and the San Pedro River Valley in Arizona.¹¹¹

Before the SunZia scoping process even began, developers reached out to the environmental community proactively and received positive responses for doing so.¹¹² The need for renewable energy development was broadly acknowledged, and stakeholders appeared confident that they could reach an agreement.¹¹³ However, once the formal public comment process began, many concerned citizens and environmental groups felt that the BLM public meetings were not truly giving them a voice.¹¹⁴ These “hearings” were conducted as open-house presentations, controlled by BLM officials, and members of the public were allowed written comment only.¹¹⁵ The BLM denied requests for extension of the comment period on the Draft EIS, and has selected a preferred alternate route that parallels rather than simply crosses the San Pedro Valley, increasing potential impact on the environment and going against recommendations of not only the environmental groups, but also the developers themselves.¹¹⁶ The final EIS was just released in June 2013, and local groups have filed protests to the proposed route.¹¹⁷ They feel as

111. DEIS Comments, CASCABEL WORKING GROUP, <http://cascabelworkinggroup.org/RESmain.html> (last visited Dec. 6, 2012).

112. Scott Streater, *500-kV SunZia Line Wins Early Positive Reviews From Enviro Groups*, ENV'T & ENERGY DAILY (June 11, 2009), <http://www.eenews.net/search/stories?> (select “June 11 2009” from both “Start Date” and “End Date”; then search “SunZia Line”; then follow article name); Katherine Ling, *Resource Panels Explore Siting Models*, ENV'T & ENERGY DAILY (Nov. 2, 2009), <http://www.eenews.net/search/stories?> (select “November 2 2009” from both “Start Date” and “End Date”; then search “Resource Panels”; then follow article name).

113. Juliet Eilperin & Steven Mufson, *Renewable Energy's Environmental Paradox*, WASH. POST, Apr. 16, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/04/15/AR2009041503622.html?hpid=topnews&sid=ST2009041602328>.

114. Scott Streater, *Groups Demand More Time to Comment on NM-to-Ariz. Power Line*, ENV'T & ENERGY DAILY (Aug. 21, 2012), <http://www.eenews.net/search/stories?> (select “August 21 2012” from both “Start Date” and “End Date”; then search “Groups Demand”; then follow article name) [hereinafter *More Time to Comment*].

115. Tim Vanderpool, *Power Push: People Want to Talk About the Proposed SunZia Power Line -but the BLM does not Want to Hear it*, TUCSON WEEKLY, Aug. 23, 2012, <http://www.tucsonweekly.com/tucson/power-push/Content?oid=3511605>.

116. *More Time to Comment*, *supra* note 114; Carol Broeder, *City Council Gives Support for One SunZia Route*, ARIZ. RANGE NEWS, Sept. 12, 2012, http://www.willcoxrangenews.com/news/article_5f8dba7e-fc5e-11e1-a145-0019bb2963f4.html.

117. Jonathan Thompson, *Renewable Energy Transmission Projects Create Tension Among Greens*, HIGH COUNTRY NEWS, July 25, 2013, <http://www.hcn.org/blogs/goat/greens-battle-greens-on-sunzia-and-other-big-transmission-lines>; see also *Protest of Resource Management Plan Amendments and Final Environmental Impact Statement for the SunZia Southwest Transmission Project*, CASCABEL WORKING GROUP (July 12, 2013), [www.cascabelworkinggroup.org/downloads/SunZia Protest Letter_Final_07-12-2013.pdf](http://www.cascabelworkinggroup.org/downloads/SunZia%20Protest%20Letter_Final_07-12-2013.pdf).

though their opinions have not been truly considered and, consequently, have raised greater objections. For example, the Cascabel Working Group (Cascabel), whose mission is the preservation of the lower San Pedro Valley, has currently dedicated itself solely to fighting this project.¹¹⁸ Its members accuse the agencies of “greenwashing,” claiming that because the renewable generation is not yet contracted it will not actually exist.¹¹⁹ However, this argument ignores the fact that generation projects are unlikely to be pursued before a protracted and contentious transmission approval process is complete. Although Cascabel has supported the need for renewable energy in theory, the group seems to have given up the attempt to reach a compromise that could reconcile its valid concerns about fragile ecosystems with this acknowledged need. Instead, it has released a flurry of articles arguing against the project, joined forces with local ranchers to oppose and successfully defeat SB 1517 in the Arizona House,¹²⁰ and even held a benefit concert/protest to rally and finance their opposition movement.¹²¹

Unfortunately, this type of controversy—pitting local environmentalists against renewable energy projects—is not uncommon in spite of the similar interests of the two sides.¹²² For example, BrightSource Energy’s Ivanpah concentrating solar power project, located in the California Mojave Desert, faced strong opposition from environmental groups such as the Center for Biological Diversity, the local chapter of the Sierra Club, and the Defenders of Wildlife, despite careful site selection and elaborate mitigation plans.¹²³ The company chose a site adjacent to the interstate highway, across from a natural gas plant, and containing no designated critical habitat.¹²⁴ However, due to opposition from environmental groups, the company was still required to reduce the site footprint and generating capacity and pay over \$20 million to relocate threatened desert tortoises—even though the site was considered “least important habitat” for the species—before finally receiving BLM ap-

118. *Current Focus: Sunzia*, CASCABEL WORKING GROUP, <http://cascabelworkinggroup.org/SZhome.html> (last visited Oct. 23, 2012).

119. *Id.*; *Information Quality Act Petition*, CASCABEL WORKING GROUP, <http://cascabelworkinggroup.org/SZinfoqual.html> (last visited Oct. 23, 2012) (“SunZia’s claim to be ‘primarily renewable’ has misled the public.”).

120. *SB1517 Overwhelmingly Defeated in the Arizona House*, CASCABEL WORKING GROUP, <http://cascabelworkinggroup.org/SZ1547.html> (last visited Oct. 23, 2012).

121. *Latest News*, CASCABEL WORKING GROUP (Sept. 2012), <http://www.cascabelworkinggroup.org/SZnews.html>.

122. See Alexandra Klass, *Renewable Energy & the Public Trust Doctrine*, 45 U.C. DAVIS L. REV. 1021, 1024 (Feb. 2012).

123. Glennon & Reeves, *supra* note 20, at 117–18.

124. *Id.* at 117.

proval in 2010.¹²⁵ Environmental opposition may even occur within the same organization, with a national body supporting the project in the interests of climate change mitigation through renewable energy development, while a local chapter opposes the development due to localized environmental impacts.¹²⁶ Although climate change “includes and eclipses” other environmental harms, direct and immediate impact from land use for renewable energy is nevertheless significant.¹²⁷

IV. SITING PROCESS IMPROVEMENTS

In order to build the new interstate energy infrastructure required for a national transition to renewable energy, the siting process needs to be improved.¹²⁸ Fossil fuel shortages and the impending crisis of climate change demand that we make this transition as swiftly as possible. In order for efficient renewable energy production and increased reliance on renewable energy sources to be possible, there is an urgent national need for reliable infrastructure to be put in place to distribute this energy. Transmission siting procedures must be improved to allow this infrastructure to be built. These improved procedures will help address global climate change imperatives, but must still adequately cope with local economic and environmental concerns.¹²⁹ Siting authority and analysis should be centralized under one federal authority, the FERC, to increase efficiency, but this centralized authority must also include enhanced procedural protections to ensure that the voices of state and local governments and citizens are heard, and their views are taken seriously and incorporated into the final decisions. Expansion of federal or regional siting authority is a frequently suggested jurisdictional reform that will streamline the permitting process and allow a more balanced national perspective on the public interest.¹³⁰ Ensuring meaningful local input will enable consideration of local concerns and decrease citizen opposition to new infrastructure.¹³¹

Many commentators have advocated federal preemption, as it would offer a uniform national energy policy and allow coordination of infrastructure development with nationwide needs.¹³² The FERC cur-

125. *Id.* at 117–19.

126. See Klass, *supra* note 122, at 1062–63; Glennon & Reeves, *supra* note 20, at 116–21.

127. Outka, *supra* note 13, at 253.

128. Ferrey, *supra* note 11, at 998.

129. Vaheesan, *supra* note 19, at 133.

130. Vaheesan, *supra* note 19, at 125–26.

131. Sean F. Nolon, *Negotiating the Wind: A Framework to Engage Citizens in Siting Wind Turbines*, 12 CARDOZO J. CONFLICT RESOL. 327, 353 (2011).

132. See Vaheesan, *supra* note 19, at 126.

rently reviews cost-allocation for all interstate transmission facilities, but, as explained below, the agency has siting authority only as a backstop for projects located within NIETCs, in spite of expansion of FERC's authority under the Energy Policy Act of 2005.¹³³ Although the DOE could in theory designate the entire country as a NIETC, they have in fact only designated two corridors, and have not yet sited a single project within these corridors.¹³⁴ Even within the NIETC, FERC authority is limited to specific circumstances, and has already been limited further by the courts.¹³⁵ The FERC may only issue a siting permit for three reasons. First, if the state in which the facilities will be located lacks the authority to site or cannot consider interstate benefits expected from the construction; second, if the applicant does not qualify for approval because it does not serve in-state customers; or third, if a state has withheld siting approval for over one year or conditioned approval so that construction will not be economically feasible or effective in reducing transmission congestion.¹³⁶ Additionally, the sited facilities must transmit electricity that travels in interstate commerce, must be expected to significantly reduce congestion in this transmission while also protecting or benefiting customers and maximizing capacity of existing structures, and must be consistent with sound national energy policy and the public interest.¹³⁷ The Fourth Circuit has interpreted this already-limited authority even more narrowly, so that the term "withheld" includes only situations where a state has delayed the permitting process of an otherwise eligible facility for over a year, but does not apply if a state has actually considered and denied the permit.¹³⁸ Thus, states are free to deny any permits they object to, and the FERC has no authority to overrule these decisions.

Allowing the FERC to preempt all state and local siting authority, without requirements for location or prior state consideration, would centralize authority while avoiding the possibility of unconstitutional interstate compacts formed without federal approval.¹³⁹ This would be a constitutional solution to the inability of the current system to look be-

133. Vaheesan, *supra* note 19, at 98; Rossi, *supra* note 24, at 1033.

134. See Rossi, *supra* note 24, at 1034–35. (The National Interest Electric Transmission Congestion Report and Order designated the Mid-Atlantic Area NIETC and the Southwest Area NIETC. Only one application has been submitted for siting in an NIETC, and it was withdrawn due to uncertainty over FERC authority.)

135. *Piedmont Envtl. Council v. Fed. Energy Regulatory Comm'n*, 558 F.3d 304, 320 (4th Cir. 2009).

136. Energy Policy Act of 2005, 16 U.S.C. § 824p(b)(1)(A)(i)–(C)(ii) (2006).

137. 16 U.S.C. § 824p(b)(2)–(6).

138. *Piedmont Envtl. Council*, 558 F.3d at 310.

139. See U.S. Const. art. I, § 10, cl. 3 ("No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another state. . . .").

yond borders and consider broad benefits to the public interest.¹⁴⁰ However, states are concerned with losing their authority and with a lack of representation in national decision-making bodies.¹⁴¹ The FERC and the Energy Policy Act advocated for the creation of regional authorities, authorizing interstate compacts for energy development, as a partial solution to this concern.¹⁴² However, difficulties in interstate cooperation have hindered the formation of such compacts because they would create regional binding law, and so the compacts could simply replicate the federal preemption problem on a regional level. Although regional compacts are smaller, and so perhaps more cognizant of local issues, they would still involve a state giving up individual authority to the cooperative body. Additionally, they would not have the advantage of national uniformity provided by federal preemption. In the West, many states, including New Mexico and Arizona, have chosen to participate in voluntary regional planning groups like Southwest Area Transmission.¹⁴³ These groups can facilitate coordination of transmission expansion efforts without ceding decision-making power, but they are often still duplicative, and they do not resolve any authority issues if they are non-binding. Although land use has traditionally been a state concern, using the preemption doctrine to allow the FERC to site all transmission projects would resolve issues of parochialism and protectionism often found in state and local siting decisions. However, this preemption alone would not resolve all siting difficulties, as centralization risks increasing opposition along with efficiency, and so does not necessarily remove the delay inherent in the current process.

Questions of siting authority are only part of the problem. Delay and redundancy result largely from the permitting process itself, and from citizen opposition, which jurisdictional changes alone will not fix.¹⁴⁴ Streamlining mechanisms, such as the Federal MOU authorizing inter-agency cooperation, are also necessary. Although more complex, it would be possible to streamline the permitting process without necessarily altering jurisdiction over siting by using methods similar to this, but a combination with federal preemption will provide the most efficient and effective solution. Current efforts at streamlining by federal, regional, and state entities have focused on identifying potential energy

140. Vaheesan, *supra* note 19, at 128.

141. Rossi, *supra* note 24, at 1017.

142. Energy Policy Act of 2005, 16 U.S.C. § 824p(i)(1)(A)–(B) (2006)(outside of Federal lands, states may enter into interstate compacts for regional siting authorities, which can have authority to review, certify, and permit siting).

143. *WestConnect Transmission Planning-SWAT*, WESTCONNECT, www.westconnect.com/planning_swat.php (last visited Dec. 6, 2012).

144. See Vaheesan, *supra* note 19, at 133.

corridors and establishing standards for the evaluation of specific projects.¹⁴⁵ However, an emphasis on fast track streamlining must ensure the best decision, not only the quickest.¹⁴⁶ This identification of corridors and standards is a first step, but to effectively address the lengthy permit process future efforts will require cross-jurisdictional collaboration. While general identification of energy development areas and relevant environmental standards will help to speed up future applications in these areas, the reuse of, or collaboration on, project-specific analysis is also necessary to avoid redundancy. Legislation such as SB 1517's proposed sharing of federal data for state decision-making would further streamline the permitting process by allowing this cooperation to take place. The FERC should set standards and hold final siting authority, while states, local governments, and citizens should be given access to the data collected and a meaningful opportunity to provide their input on the decision-making process.

The fears of preemption and loss of control that often accompany proposals to streamline analysis—and contributed to the defeat of SB 1517 in Arizona—can be allayed by enhanced procedural mechanisms to ensure adequate citizen involvement in the decision-making process, thus lessening citizen opposition. Even under NEPA, which has extensive requirements for public involvement through notice and comment, the manner in which these procedures are carried out sometimes defeats their intended purpose. Agencies are not required to allow more than written comments,¹⁴⁷ and often resist additional public input on decisions,¹⁴⁸ but limiting procedures to the point where they do not accomplish their aim renders them ineffective. This was exemplified in the BLM public hearings on SunZia where the public could not actually provide oral comments.¹⁴⁹ At these SunZia meetings, citizens who supported the idea of renewable energy but were already hesitant to endorse development because of environmental concerns were unable to publicly voice those concerns.¹⁵⁰ They felt as though their legitimate worries were not heard, and so their opposition to the project was solidified. One of the reasons behind the defeat of SB 1517 was the desire to ensure local

145. See 2009 MOU, *supra* note 34; BLM PEIS, *supra* note 46, at 1-2; Energy Policy Act of 2005, 42 U.S.C. § 15926 (2006); WESTERN GOVERNOR'S ASSOCIATION & U.S. DEPARTMENT OF ENERGY, WESTERN RENEWABLE ENERGY ZONES—PHASE 1 REPORT 2-3 (June 2009), available at <http://www.westgov.org/rtep/219> (follow "WREZ Phase 1 report" hyperlink).

146. Outka, *supra* note 13, at 283.

147. Administrative Procedures Act, 5 U.S.C. § 553(c) (2006).

148. Nolon, *supra* note 131, at 330.

149. See *supra* text accompanying notes 114-18.

150. See *supra* text accompanying notes 109-12.

input through the Transmission Lines Siting Committee hearings,¹⁵¹ despite the fact that the BLM has already held hearings required under NEPA. If citizens are allowed to speak publicly, it will, of course, make the hearing process longer and more complex, but procedural rules such as time limits could reduce that delay. If it removes the need to hold an entire second hearing under a different committee, a single, longer hearing would still help to streamline the process, while facilitating a well-informed decision.

Although federal preemption provides a solution to siting authority conflicts and would give a balanced national view and a more streamlined process, to be successful it must include thorough review and methods for meaningful citizen participation.¹⁵² Ensuring citizen input, while still making rational decisions for the greater good in a reasonable time, is a central factor in the construction of good policy.¹⁵³ In siting, citizen participation is necessary to match mitigation requirements with local needs.¹⁵⁴ The resistance of state and local governments to loss of siting control is based on fears that local concerns for the economy, environment, property values, aesthetics, and any other particularized needs will not be seriously addressed.

The problem with local authority is the tendency of state and local officials to make parochial or protectionist decisions based on perceptions of greater risk or negative impact, political interests, and their failure to sufficiently value benefits that may occur outside the local area.¹⁵⁵ Arguments in favor of federal preemption often assume that these decisions are made out of not-in-my-backyard (NIMBY) ignorance, which may be mitigated by education, or out of selfishness, which can only be solved by taking the decisions out of citizen, local, or state hands.¹⁵⁶ However, these assumptions have been called into question by research into cultural cognition phenomena, which suggest that biased responses are produced not by ignorance or prejudice, but by actual differences in perception based on the worldview and circumstance of the viewer.¹⁵⁷ People tend to believe their perceptions are accurate, which causes them

151. Tony Davis, *Strange Bedfellows Join Forces to Kill Power-Line-Siting Bill*, ARIZ. DAILY STAR, Apr. 24, 2011, http://azstarnet.com/news/science/environment/strange-bedfellows-join-forces-to-kill-power-line-siting-bill/article_eae4c3ce-bcbd-5db5-aca9-68ecbb7a4d0b.html.

152. Vaheesan, *supra* note 19, at 133.

153. See Nolon, *supra* note 131, at 228, 330.

154. *Id.* at 360.

155. Vaheesan, *supra* note 19, at 115.

156. Nolon, *supra* note 131, at 343.

157. *Id.* at 345–46; see also Dan Kahan, *Why We Are Poles Apart on Climate Change*, 488 NATURE 255 (2012).

to overvalue information that supports these views, and discount anything contrary.¹⁵⁸ Generally, if evaluating something they are unsure of, people will assume the outcome they desire is more likely.¹⁵⁹ In an adversarial relationship, any concessions offered are seen as less valuable, and parties believe that any gain to one side must be a loss to the other.¹⁶⁰ Most people tend to have a preference for the status quo, place greater value on things they feel possession of, and see potential losses as greater than potential gains of the same magnitude.¹⁶¹ Thus, it is much more likely that a group facing a negative impact on personal property or local areas will actively oppose these projects than it is that a group that could potentially benefit from the changes will actively endorse them.¹⁶² In a siting context, these phenomena may lead local environmental groups to see potential concrete impacts to local wildlife as a greater harm than the abstract threat of climate change, no matter how much science supports it. They may also cause interactions between groups pre-disposed to mistrust each other—like interactions between environmentalists, developers, and agencies—to become increasingly more hostile.¹⁶³

Community perception of the risks and benefits of development is often closely tied to the way a project is presented, regardless of actual cost.¹⁶⁴ A framework for citizen participation that takes these principles into account would ensure local concerns were part of siting decisions, while lowering opposition. Traditional notice and comment requirements, such as those imposed under the Administrative Procedures Act, give people the option to submit their views and mandate that the agency give a rational explanation for its decisions, but these requirements do not directly address the strong emotions involved in these issues or give an authentic feeling of involvement or empowerment.¹⁶⁵ During the SunZia EIS process, the BLM held public meetings and accepted comments, yet due to the format of these meetings, the attendees still felt shut out from the decision-making process because they were not allowed to speak publicly.¹⁶⁶ The good will of local environmental groups that had been gained by the developers' early efforts at inclusion in planning has dissipated, leaving the project's future uncertain in spite of broad consensus on the general need to promote renewable energy.

158. Nolon, *supra* note 131, at 346.

159. *Id.* at 347.

160. *Id.* at 348.

161. *Id.* at 349–50.

162. Vaheesan, *supra* note 19, at 118.

163. See Nolon, *supra* note 131, at 348.

164. *Id.* at 349.

165. *Id.* at 352–53.

166. Vanderpool, *supra* note 115.

A more cooperative process with real citizen input into project review, assessment of mitigation, and compensation for real loss where appropriate will help to maintain support for projects such as SunZia. Even simple changes, such as reformatting the public meetings that are already being held so that they better meet the needs of the community, would improve the process. The National Environmental Justice Advisory Council has published a public participation guide that suggests the parties, including key stakeholders such as affected citizen groups, share in the decision-making process on setting an agenda, goals, and leadership before the meeting is even held; focus on an atmosphere of equality with shared presentations; and consider time, location, and methods that make participation accessible to community members.¹⁶⁷ Clear goals and timelines, with active follow-up on concerns or suggestions, would make meetings more effective and satisfactory for participants. Using a professional facilitator—especially a trained mediator—instead of agency personnel would help to resolve conflicts and establish a more neutral setting, in order to reduce hostility and the appearance of bias.

CONCLUSION

The local environmental impacts of land use for renewable energy development are real and can be significant, and there is no easy solution to these difficult trade-offs.¹⁶⁸ However, an open dialogue between equals and real consideration of citizen input will reduce hostility, which, especially on a topic with shared values, is the first step to finding common ground. It will not be possible to allow citizen-groups absolute veto power over siting decisions because the infrastructure must be built, but an explicit interest-balancing approach will help to facilitate compromise. Following the principles of negotiated rulemaking, agencies and other stakeholders should attempt to reach a consensus. If such consensus is impossible, the agency will still be responsible for the ultimate decision. However, local interests may trump global interests in some circumstances, and the least-damaging methods should be chosen in all cases, with appropriate mitigation requirements and consideration of all points of view. Fully considering all issues and openly acknowledging the compromises being made around shared values will help to encourage continued support for renewable energy projects in the environmental community.

167. NAT'L ENVTL. JUSTICE ADVISORY COUNCIL, EPA, MODEL PLAN FOR PUBLIC PARTICIPATION <http://www.epa.gov/projctxl/nejac.htm> (last visited Oct. 2, 2013).

168. See Klass, *supra* note 122, at 1063–65.

In the case of SunZia, the broad support that existed early in the design process could have continued if an open dialogue had been maintained and if environmentalists had been encouraged to participate and offer real input in formulating the best possible route for a much-needed project. Cascabel is currently supporting the Southline transmission project, a different proposed development now beginning the BLM EIS process.¹⁶⁹ Southline could stretch from southern New Mexico into southern Arizona, covering an area very similar to and even partially overlapping with SunZia.¹⁷⁰ Southline endeavors to reuse existing corridors and facilities wherever possible, and is marketed as an environmentally responsible development.¹⁷¹ It remains to be seen if this support from environmentalists will survive the BLM EIS process. Incorporating solid mechanisms for citizen participation into the permitting process, and ensuring that these procedures are followed in a meaningful, not merely perfunctory, way will give concerned citizens the opportunity to voice their worries and enable them to feel that these concerns have been taken seriously. A process that centralizes review as much as possible without sacrificing thorough analysis or citizen input will reduce opposition and allow compromises to be reached, projects to move forward, and much-needed national infrastructure to be built.

169. *Southline Transmission Project*, U.S. DEP'T OF THE INTERIOR BUREAU OF LAND MGMT., http://www.blm.gov/nm/st/en/prog/more/lands_realty/southline_transmission.html (last visited Dec. 14, 2012); *Latest News*, CASCABEL WORKING GROUP (May 2012), <http://cascabelworkinggroup.org/SZnews.html>.

170. *Project Description*, SOUTHLINE TRANSMISSION PROJECT, <http://www.southlinetransmissionproject.com/location.html> (last visited Dec. 14, 2012).

171. *Id.*