

Groups press federal appeals court to block large Calif. wind farm

Jeremy P. Jacobs, Environment & Energy Publishing, 11-3-15

PASADENA -- Environmental groups, labor unions and Native American tribes today pressed federal judges to undo the Obama administration's approval of one of the largest wind farms ever built on public lands.

In three cases at the 9th U.S. Circuit Court of Appeals, the parties challenged the Ocotillo Wind Energy Facility Project in the desert east of San Diego.

The Bureau of Land Management in May 2012 signed off on San Francisco-based Pattern Energy Group's plan to build 112 wind turbines on more than 10,000 acres of federal land.

Administration officials have touted it as one of the roughly 60 renewable energy projects it has brought online in its effort to approve 10,000 megawatts of renewable energy projects on federal lands by the end of this year.

But environmental groups including Backcountry Against Dumps and the Desert Protective Council contend that BLM violated the National Environmental Policy Act by how it treated the impact of the turbines on birds, including Swainson's hawks, as well as threatened bighorn sheep.

And the Quechan Tribe of Fort Yuma-Quechan Reservation and other tribes argued that the public lands right of way granted for the turbines failed to meet congressionally mandated standards for protecting sensitive or culturally significant areas.

Michael Lozeau, representing a local labor union, argued that BLM provided "no discussion" for why it treated protections for golden eagles differently than those for other raptors, such as the hawks.

He argued for more protections for the birds, including requiring the turbines to be turned off more frequently.

But Lozeau, as well as attorneys for the other challengers, ran into some opposition from members of the three-judge panel.

Judge N. Randy Smith, a Republican appointee, told Lozeau that in order to overturn a lower-court decision siding with the government and BLM's reasoning, the appellate court had to find convincing evidence that a mistake was made.

He noted that BLM's environmental impact statement included language that allowed it to increase mitigation measures to protect birds if needed in the future.

"It doesn't seem to me that I can undo what was done" in the environmental impact statement, Smith said.

Mark Haag of the Department of Justice repeatedly emphasized that the 315 MW facility, which has been operational since December 2012, is located in a "relatively low-use area" for birds and wildlife.

"The environmental impacts are relatively modest," he said.

He added that the project produces enough electricity for 94,500 homes and offsets about 288,000 tons of greenhouse gas emissions annually.

However, both Smith and Judge Jay Bybee, another Republican appointee, pressed Haag on BLM's reliance on studies of bird migration patterns that the environmental groups claim were conducted at the wrong time of year and consequently "watered down" the number of birds present in the area.

Land-use issues

Both the environmental groups and tribes separately raised questions about BLM's issuance of a right of way on the public lands.

At issue is BLM's 1980 California Desert Conservation Area Plan. Under those regulations, BLM manages at least 10 million acres in the state -- roughly the size of New Hampshire and Vermont combined -- and set standards for what criteria must be met for different types of development.

The Ocotillo wind farm is located on what was labeled as "Class L" -- for "limited use" -- lands. The classification was restrictive and prohibited wind farm developments.

BLM, however, amended the regulations at about the same time it approved the Ocotillo project right of way, clearing the wind farm's path.

Attorney Stephan Volker, representing Backcountry Against Dumps, argued that even with the amendment, BLM was required to satisfy the standards for Class L lands. It didn't, he said, as the bureau "threw those standards out the window when it bent over backward to approve this project."

"Contrary to those clear distinctions," he said, "when BLM approved the right of way and the amendment ... it failed to understand its own standards and it didn't apply them."

Haag, the DOJ attorney, sought to refute that point, arguing that the amendment decision was "intertwined" with the bureau's Class L considerations.

"BLM's legal analysis, legal approach here, is that we have to make two separate decisions," he said. "BLM complied with all those steps and procedures."

He added that the bureau went to "extraordinary lengths" to coordinate with local tribes, noting that the proposal had 43 more turbines than the final project has and was about 2,000 acres larger. Further, the energy company's lawyer added that archaeologists spent 20,000 hours walking the site with local tribes to make sure their concerns were addressed.

Bybee, however, asked Haag what exactly the bureau did "to meet the Class L standard."