



DISCUSSION NOTE: INDUSTRIAL-SCALE WIND DEVELOPMENT AND THE PROPERTY-RIGHTS DILEMMA

In facing the tidal wave of wind farm promotion, Wyoming is fortunate: It has choices about where to site this development, with its vast acreage and infrastructure requirements. Wyoming can save its scenic, mixed-use mountain country while still welcoming wind farms in the high plains and basin areas so well suited for this kind of large-footprint, high-profile industrial facility.

To take advantage of its good fortune, though, Wyoming needs to adopt siting policies that recognize explicitly the differences among the various landscapes in the state, and encourage differing solutions to the inevitable conflicts that arise when projects of the scale associated with industrial wind development are proposed.

Two Landscapes, Two Models

The considerations at play for industrial wind development in the high plains and basins, on the one hand, and the varied-use areas of foothills and mountains differ sharply:

The high plains and in the sage-brush basins – the largest part of the state - have a great blend of wind conditions, terrain making for lower construction and maintenance costs, thin population, a tradition of relatively homogenous agricultural and energy land use, and a relatively small number of large-acreage private holdings. The broader community has less use for this landscape for hunting, fishing or other forms of outdoor recreation. It's better-suited to wind development and for property owners voluntarily to form wind associations to encourage it and ensure it benefits them.

Contrast this with the situation in the mixed-use mountain areas. The Northern Laramie Range is a good example, but it is not unique. The only characteristic these areas share with the high plains and basin wind country is the wind. In almost every other respect they're different: The topography is rugged, and therefore difficult and expensive to build and operate in. Outside the national forest, ownership is fragmented: There are a few large-acreage holdings interspersed with smaller properties. Property prices are higher, supported by scenic and recreational values. The uses landholders make of the property varies widely.

Even among the larger holders in these areas, perspectives about the land and how it should be used differ markedly:

- Our Northern Laramie Range Alliance, for example, has among its members ranchers whose families have lived on their mountain land for 125 years or more. These members are committed to traditional cattle ranching and making a reasonable living at it. They are adamantly opposed to industrial wind because it would completely transform the landscape around them for the financial benefit of a few of their neighbors.
- We have other members, with equally long histories, who own and operate ranches both on the high plains and in the mountains. Industrial wind development is beginning on a portion of their high-plains property, but they have made it clear – and joined the Northern Laramie Range Alliance as a result – that they believe industrial-scale wind development is inappropriate in the mountains.
- There are other landholders with similar local pedigrees who are attracted by industrial-scale wind development. They're engaged in ranching, but unhappy with the financial returns. Even though it may make sense financially to sell their mountain property at high, recreationally-driven prices and exchange into much larger, wind-appropriate acreage on the plains, their feelings of family heritage may lead them to push for industrial wind development on their existing mountain property. Not surprisingly, they are opposed to the objectives of the Alliance.

The other major difference between this mixed-use mountain countryside and the high plains is the degree of public engagement with the landscape. The reason that we've accumulated nearly 600 petitions opposing industrial wind in the Northern Laramies is that the broader community takes advantage of and values the hunting, fishing, outdoor recreation and overall experience of a landscape that's becoming rarer every year. For this broader community the fear is that the decisions of a handful of large landholders to industrialize will make this kind of landscape – and the contribution it makes to the quality of life in Wyoming - even rarer still.

The Property Rights Dilemma

Against this background, it's easy to understand why members of the Northern Laramie Range Alliance and similar groups elsewhere see the issue starkly: In a setting like ours, construction of an industrial-scale wind farm literally can strip neighboring property of most of the scenic and recreational value supporting it – value that for many ranchers in the area has been both an important part of their lives and an important supplement to their ag income. These landowners are amply justified in the belief that their neighbor's decision to go with industrial wind development will, in fact, dictate to them what they can do with their own property. Meanwhile, for the community at large it can irreversibly alter the quality of life.¹ What makes industrial wind different from other uses that sometimes cause disputes is sheer scale – both the footprint

¹ The wind industry, of course, disputes the assertion in the text. They tell us we can still hunt among the turbines, that reports of birds of prey killed by turbines are overstated, that the sound of these machines sound doesn't travel far, that the aircraft warning lights at night are no more annoying than the stars and that the transmission lines moving power through the mountains will be sited sensitively and eminent domain used sparingly to build them. Obviously, the industry focuses on the trees. The forest is something altogether different: Wind farms of the scale contemplated in Wyoming are among the largest industrial facilities ever devised, and utterly transform any landscape on or near which they are constructed.

and the verticality. It is so dominant in a foothill and mountain landscape, and the impairment of other uses so extensive, that land nearby almost can be said to have been “taken” in the same sense as that term is used in the 5th Amendment to the US Constitution.

But what of the rights of landholders in the mountains who want to go into the industrial-scale wind business on their mountain land? Understandably, they resent the suggestion that they may not be permitted to do so on the property they currently own - that neighbors and the public may dictate to them what they can and can't do with their property. For them, a constraint on their ability to contract with wind promoters may appear to be a “taking” as well.

In the high plains and basins, a voluntary solution works, via the cooperative “wind association” approach. REAL, for example, reportedly is doing an excellent job promoting this approach, and representing its member associations in the high plains and basins in working toward establishing the transmission infrastructure for them to deliver wind energy to market.

In the varied-use, mountain areas of the state, on the other hand, it is clear that a voluntary solution is not going to emerge, and that the property-rights dilemma can only be resolved through a public process using the standard tools – notably industrial zoning at the county level (for which statutory authority already is in place) or creation of a state-level framework tailored to industrial-scale wind development. There are a number of precedents for similar state action in other contexts – wind development simply is the latest variation on this common theme. To give local governments and the state legislature time to act, temporary moratoria may be needed in order to buy the time necessary for a permanent solution or solutions to emerge. Failing this, the courts may be asked to resolve the issue in actions brought under the law of nuisance.

The Need for an Orderly Resolution

What is clear is that the state needs quickly to settle on an approach to industrial wind development that will permit landholders to host it where is appropriate, and where cooperative approaches are viable. It also needs to distinguish those situations in which industrial wind is not appropriate, or the cooperative solution not viable, and encourage public decision-making in these areas. Otherwise, there will continue a process already well underway in the Northern Laramie Range and elsewhere: Wind promoters secretly trying to “sign up” a handful of landowners, then present the community with an “accomplished fact” that will lead others to resign themselves to the inevitability of industrial development and sign up, as well. The promoter's hope, of course, is that it can assemble holdings large enough to attract financing and – if no public utility interconnection is available or cheap enough – a so-called “merchant” transmission link that, under current state law, could be built under threat of eminent domain.

Finally, there needs to be a comprehensive approach to mitigating the opportunity cost for landholders unable to pursue wind development as a consequence of a public decision. Existing public and private conservation finance tools go some distance in this direction, but more could be done, perhaps funded out of part of the proceeds of a production tax on wind-energy generation such as has been adopted elsewhere.

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