Environmental & Land Use Law

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In This Issue

Section Chair's Message – Fall 2012

By Millie Judge

Fall is always a time of transition and the same is true for our Section. We are pleased to announce the election of Chuck Maduell and Lisa Nickel to the Executive Committee and welcome them aboard! We also want to thank our terrific slate of candidates for running, and have been very pleased that many of them have expressed an interest in working on Section programs throughout the year.

We also say farewell to our Past Chair, Jill Guernsey, who has led the ELUL Section for many years. Jill is the sort of leader we all aspire to be. She is extremely smart, organized, and a steady hand at the wheel. Leaders like her are rare, and we are lucky to have had her on our team. The citizens of Gig Harbor also recognized her skill and elected her to the City Council last year. Like many of you, I am proud to call her my friend.

Courtney Flora is also leaving the Executive Committee, having finished her term with a bouncing new baby boy! Congratulations to the whole family! I first met Courtney in the Snohomish County Prosecutor's Office, where she proved to be a whiz when it came to solving complex land use issues. That hasn't changed. She was a key player in helping the Section migrate its Newsletter to an electronic format, saving us thousands of dollars each year. She was a tireless volunteer, always first to step forward to tackle a project, and kept us laughing with her terrific sense of humor. We will miss her and wish her the best with her growing family and law practice.

Michael O'Connell is stepping down as Editor of our Newsletter at the end of December. We truly appreciate his tireless skill on behalf of the Section, ensuring that this vital resource is well written and published on time. We are actively seeking volunteers to fill this vital function. Please contact the Executive Committee if you are interested in learning more about the position.

As for me, I will become Past Chair and hand over the reins to Steve Jones, our new Chair, as we start a new Section year. He will be supported by Tom McDonald, our Chair Elect, and the rest of your Executive Committee. Although I'll always be a member of the Section at heart, I am stepping down early in January, due to my election to the Snohomish County Superior Court bench.

As we look back on another productive year and forward to the future, I can say with confidence that the Section is fiscally healthy and moving forward to continually create new programs. Although the WSBA has eliminated its subsidy of all sections, we do not anticipate raising dues because we have saved a significant amount of funds by migrating to the electronic Newsletter.

Our membership is strong at 867 members—making us one of the largest Sections in the WSBA. Don't forget to renew! (The membership year is from September to August each year based on WSBA accounting rules.)

The Annual Midyear Meeting & CLE Program is scheduled for May 2-3, 2013, and by popular demand, will once again be held at the Alderbrook Inn on Hood Canal. We expect to hold the ELUL-law school mixers again this year with the U.W., Seattle University and Gonzaga. It's going to be a busy year and hope you'll make time to join us.

It has been an honor and a privilege to serve you on the Executive Committee. A huge thank you to fellow Executive Committee Members Jamie Carmody, Jay Derr, Darren Carnell, Kristie Carevich Elliott, Courtney Flora, Laura Kisielius, Jill Guernsey, Steve Jones, Tom McDonald, and Paris Seabrook and Melina Lambuth, our fantastic WSBA staff, for all of your support, guidance and humor. I look forward to seeing you in court!

Editor's Message

By Michael O'Connell, Newsletter Editor

This issue includes four articles. The first article is an update on the 2012 Legislative session by Karen Terwilliger. Next is an article on Renewable Energy Siting in Washington by Erin Anderson. Third is an article on Working with Indian Tribes to Identify Historic Properties by Dean Suagee. The final article is on recent federal legislation, the HEARTH Act, which authorizes Indian tribes to lease tribal land without Bureau of Indian Affairs approval, by the Editor.

The Editorial Board welcomes new members Marie Quasius, Ankur Tohan and Ryan Vancil. The Editorial Board invites suggestions for articles. If you have comments or questions about the Newsletter or its content, please contact me or any member of the Editorial Board listed on the back page of this Newsletter.

2012 Legislative Update

By Karen Terwilleger, Director of Governmental Relations, Washington State Department of Ecology

The defining legislative issue during the 2012 regular session was a significant general fund budget deficit. Special Legislative Sessions were held in November 2011 and March 2012 to deal with budget issues. Budget cuts again hit state natural resource agencies and programs. Detailed budget information is available at: http://leap.leg.wa.gov/leap/default.asp.

With budget restrictions, much legislative energy was focused on streamlining regulatory requirements, enhancing revenue for environmental programs, bonding environmental revenue streams and making programs more efficient. Despite budget challenges, the Legislature did pass significant bills during the 2012 regular and special sessions. Listed below are brief descriptions of many of the bills enacted into law related to energy, land use, water, toxics and natural resources issues. Also included are interesting bills that did not pass but provided a venue for legislative dialogue on emerging issues: water supply coordination with land use planning, product stewardship, and product alternatives assessments.

The author wishes to acknowledge the significant contribution to this article from staff members of the House of Representatives and the Senate. Legislative staff members' bill reports and documents provided the baseline information and material in this update. Full reports, as well as other legislative information, can be found on the Legislature's website: www.leg.wa.gov. During the legislative session, electronic copies of documents used during House and Senate Committee meetings can be accessed through the electronic bill book at: http://apps.leg.wa.gov/cmd/start.aspx.

I. Natural Resource Reform

A. 2ESSB 6406: State's Natural Resources – *Signed by the Governor, partial veto*

2ESSB 6406 is the most comprehensive natural resource program reform during the session. The bill included provisions related to Hydraulic Permit Application (HPA), Forest Practices Applications (FPA), the State Environmental Policy Act (SEPA), and municipal general stormwater permits. As introduced, the bill also included a revision to the standing requirement under the Growth Management Act (GMA).

Hydraulic Permit and Forest Practices

2ESSB 6406 establishes a system of HPA fees and exemptions. The bill requires the Department of Fish and Wildlife (DFW) to charge an application fee of $150 for an HPA located at or below the ordinary high water line. Exemptions from the application fee include pamphlet permits, applicant funded contracts, HPAs on farm and agricultural lands, and mineral prospecting and mining activities. The authority to impose the application fee expires June 30, 2017. DFW may also issue multiple-site permits, which provide site-specific permitting for multiple projects. The bill expands activities that may be conducted under an existing specific category of HPA for regular maintenance activities at marinas and marine terminals.

The bill integrates HPAs for forestry activities into the associated forest practices applications (FPAs). By December 31, 2013, the Forest Practices Board must incorporate fish protection standards from current DFW rules into the Forest Practices Rules. Once the HPA rules have been incorporated into the forest practices rules, a hydraulic project requiring an FPA is exempt from the requirement to get a separate HPA. Future changes in DFW's fish protection rules relevant to forestry must go through the forest practices adaptive management process, consistent with provisions of the 1999 Forests and Fish report.

DFW may continue to review and comment on any FPA, but DFW must review, and either verify that the review has occurred, or comment on forest practices applications relating to fish-bearing waters or shorelines of the state. DFW must also provide concurrence review for certain FPAs that involve a water-crossing structure, including specified culvert projects, bridge projects, and projects involving fill. Under this process, DFW has up to 30 days to review the project for consistency with standards for the protection of fish life prior to review of the FPA by the Department of Natural Resources (DNR).

The bill extends the duration of an FPA or forest practice notification from two to three years, which can be renewed subject to any new forest practices rules. FPA fees are generally increased threefold. Specifically, Class II, III, and IV special permits are increased from $50 to $150. However, this fee is reduced to $100 for small forest landowners harvesting on a single, contiguous ownership. Class IV general applications involving land use conversion related activities are increased from $500 to $1500.

SEPA Rulemaking

2ESSB 6406 requires the Department of Ecology (Ecology) to proceed with SEPA-related rulemaking. By December 31, 2012, Ecology must update the rule-based categorical exemptions to SEPA and the SEPA environmental checklist. In updating the categorical exemptions, Ecology must increase the existing maximum threshold levels for the specified project types such as the construction or location of residential developments, agricultural structures, or construction of a commercial building. The maximum exemption levels must vary based on the location of the project, such as whether the project

is proposed to occur inside or outside of an urban growth area. Ecology may not include any new subjects in updating the checklist, including climate change and greenhouse gasses.

By December 31, 2013, Ecology must update the thresholds for all other project actions, create categorical exemptions for minor code amendments that do not lessen environmental protection, and propose methods for more closely integrating SEPA with the GMA. Under the current SEPA rule, local jurisdictions can go beyond standard categorical exemptions by ordinance. During the rulemaking processes required under the bill, a local government may generally apply the highest rule-based categorical exemption level regardless of whether the city or county with jurisdiction has exercised its authority to raise the exemption level above the established minimum.

During the rulemaking processes, Ecology must convene an advisory committee that includes local governments, businesses, environmental interests, state agencies and tribal governments. The advisory committee must assist in the rulemaking processes and work to ensure that tribes, agencies, and stakeholders can receive notice of projects through SEPA and other means.

The bill also modifies and creates new statutory categorical exemptions related to planned actions to include essential public facilities that are part of a residential, office, school, commercial, recreational, service, or industrial development that is designated as a planned action. The bill allows commercial development up to 65,000 square feet, excluding retail development, to be eligible for the infill development categorical exemptions where they are consistent with planning and environmental review criteria.

2ESSB 6406 establishes new categorical exemptions for certain nonproject actions including amendments to development regulations that are required to ensure consistency with comprehensive plans or shoreline master programs, or that provide an increase in specified types of environmental protection. The bill also allows lead agencies to identify within an environmental checklist items that are adequately covered by other legal authorities; however, a lead entity may not ignore or delete a question.

Partial Veto: The Governor vetoed provisions related to funding of local government nonproject environmental impact statements. Her statement also cited specific legislative intent in interpreting the meaning of the bill's language restricting Ecology's update of the SEPA checklist regarding climate change and greenhouse gasses.

Municipal Storm Water General Permits

2ESSB 6406 requires that Ecology reissue without modification for two years the current phase II municipal storm water general permit for Eastern Washington municipalities. The updated permit for these Eastern Washington municipalities will become effective on August 1, 2014.

The bill requires that the updated Western Washington phase II municipal storm water general permits become effective on August 1, 2013, as under current law. However, the bill specifies timeframes for particular provisions in the updated permit, including dates for low impact development requirements and local code reviews, catch basin inspection and illicit discharge detection frequencies, and application of storm water controls to projects smaller than one acre.

B. E2SHB 2238: Environmental Mitigation – *Signed by the Governor*

E2SHB 2238 creates a new mitigation opportunity for project proponents dealing with reductions to existing wetland or ecological function. Under the bill, the proponent may coordinate with Ecology or DFW to pair the project's mitigation investment with the funding needs of one of three existing state programs: the Forestry Riparian Easement Program, the Riparian Open Space Program, and the Family Forest Fish Passage Program. The bill authorizes DNR to serve as a resource to project proponents, Ecology, and the DFW when identifying potential projects within the three programs that could be utilized in a mitigation plan. The inclusion of funding for one of these three programs in any mitigation plan may not be additive to any existing mitigation requirements. Ecology and DFW are provided with specific authority to seek federal, private, and in-kind funds to implement the new mitigation option. By December 31, 2012, Ecology and DFW must report to the Legislature about utilization of the existing three state programs as mitigation plan elements and identification of any constraints to using the programs as mitigation options. An additional report due on December 31, 2013 must identify any other existing program that may be appropriate for inclusion in a mitigation plan and explore the feasibility of developing new programs.

C. HB 2304: Low Level Radiation – *Signed by the Governor*

The Departments of Health and Ecology share jurisdiction over low-level radiation site permits. HB 2304 consolidates low-level radiation site permit authority at the Department of Health.

D. ESHB 2335: Standards for the Use of Science to Support Public Policy – *Died in the Senate Ways & Means Committee*

Before taking a significant agency action, ESHB 2335 would have required that Ecology and DFW identify sources of scientific information they have reviewed and relied upon in making the decision, including peer-reviewed literature. The agencies would be required to post on their websites the index of records relied upon or invoked in support of

a proposal for significant agency action. Such information would have been made available at the outset of any comment period. "Significant agency action" is defined as an act of Ecology or DFW that results in the development of a significant legislative rule; technical guidance, technical assessments, or technical documents used to directly support implementation of a state rule or state statute; or fish and wildlife recovery and management plans. These bill provisions were not intended to affect agency action regarding individual permitting, compliance and enforcement decisions, or guidance provided by an agency to a local government on a case-by-case basis.

II. Water Resources & Water Quality

A. HB 1381: Water Nonuse/Sufficient Cause – *Signed by the Governor*

HB 1381 adds an exception to the water relinquishment statute. For the purposes of relinquishment, waiting for a final determination from Ecology on a change application for a temporary permit, change, transfer, or amendment to a water right is sufficient cause for nonuse of a water right and does not result in relinquishment of the water right.

B. SHB 2212: Voluntary Regional Agreements – *Signed by the Governor*

SHB 2212 extends Ecology's authority to enter into voluntary regional agreements for the purposes of providing new water for out-of-stream use in the Columbia River basin from June 30, 2012 to June 30, 2018.

C. SSB 6044: Columbia River Public Utility Districts – *Signed by the Governor*

Public Utility Districts (PUDs) are municipal corporations authorized to provide electricity, water and sewer services and wholesale telecommunications; fifteen PUDs border the Columbia River. While PUDs are generally authorized to buy and sell electricity and water, they may not sell water to a privately owned utility for the production of electric energy. Pumped storage projects generate electricity by moving water between two bodies of water at different elevations – during times of low electricity demand, less expensive electricity is used to pump water to an upper reservoir, which is released during periods of high electricity demand to generate electricity in the same manner as a conventional hydropower facility. SSB 6044 authorizes PUDs to supply water, as authorized by a previously perfected water right under its control, to be used in a pumped storage generating facility.

D. HB 2651: Industrial Stormwater – *Signed by the Governor*

State law implementing the Federal Clean Water Act requires permittees under the industrial stormwater general permit to ensure that their stormwater runoff complies with strict numeric limits for pollutants if their stormwater runoff goes to a water body that is "impaired" by that pollutant. Since the issuance of the current general industrial stormwater permit, monitoring data has shown that many businesses will be out of permit compliance for bacteria. However, most of these businesses do not generate bacteria in their operations. By July 1, 2012, HB 2651 requires the industrial stormwater general permit to allow permittees with discharges to water bodies listed as impaired for bacteria to comply with nonnumeric, narrative effluent limitations.

E. ESSB 6312: Home Construction/Water – *Died in House Rules Committee*

ESSB 6312 would have entitled certain property owners located in a Skagit River sub-basin closed to further groundwater withdraws to withdraw up to 350 gallons each day for domestic uses as long as a mitigation plan is being implemented and funded. The bill would have prohibited Ecology from requiring the metering of any existing wells that are not currently being metered as long as the water from the well is being put to domestic uses and no more than 5,000 gallons a day is being withdrawn.

III. Energy and Energy Independence

A. SHB 2422: Aviation Biofuels Production – *Signed by the Governor*

Since 1997 a statutory process has existed to expedite completion of "projects of statewide significance." SHB 2422 adds aviation biofuels production facilities to the definition of projects of statewide significance. These facilities are exempted from meeting "project of statewide significance" qualification requirements relating to the amount of capital investment, the level of post-construction employment, or the designation of the facility by the Department of Commerce (Commerce) as a project of statewide significance. The bill also authorizes the Housing Finance Commission to issue bonds, make or purchase loans, or enter into financing documents for the purpose of financing facilities that are primarily for the production, processing, or handling of aviation biofuels or the nonfossil biogenic feedstocks of such fuels. Innovate Washington is directed to convene a Sustainable Aviation Biofuels Work Group to: further the development of sustainable aviation fuel as a productive industry in Washington; facilitate communication and coordination among aviation biofuels stakeholders; provide a forum for discussion and problem solving regarding potential and current barriers related to technology development, production, distribution, supply chain development, and commercialization of aviation biofuels; and provide recommendations to the Legislature on potential legislation that will facilitate the technology development, production, distribution, and commercialization of aviation biofuels.

B. ESSB 5575: Biomass Energy Facilities – *Signed by the Governor*

ESSB 5575 focuses on expanding the Renewable Energy Credits (RECs) for existing grid-connected biomass facilities. The bill adds the following biomass fuels as eligible renewable resources under I-937:

- organic by-products of pulping and the wood manufacturing process;
- untreated wooden demolition or construction debris;
- yard waste;
- food waste and food processing residuals;
- animal manure (replacing the term animal waste);
- liquors derived from algae; and
- qualified biomass energy.

Qualified biomass energy means electricity produced from a biomass energy facility that: commenced operation prior to March 31, 1999; contributes to the qualifying utility's load; and is owned either by a qualifying utility or an industrial facility that is directly interconnected with electricity facilities that are owned by a qualifying utility and capable of carrying electricity at transmission voltage. Beginning January 1, 2016, a utility that owns or is directly interconnected to a qualified biomass energy facility may use qualified biomass energy to meet its I-937 compliance target. An industrial facility that hosts a qualified biomass energy facility may only transfer or sell RECs associated with its facility to the qualifying utility with which it is directly interconnected. The utility may only use an amount of RECs from qualified biomass energy to meet an I-937 target that is equivalent to the proportionate amount of the load created by the industrial facility.

C. SSB 6414: Pre-Approval of Renewable Energy Projects – *Signed by the Governor*

SSB 6414 authorizes project proponents or consumer-owned qualifying utilities to seek advisory opinions from Commerce on whether a proposed electric generation project or conservation resource would qualify for RECs under I-937. When forming its advisory opinion, Commerce must: consider previous opinions issued by the I-937 Technical Working Group and solicit and consider comments from interested parties including staff of the requesting utility. An advisory opinion is binding on the auditors responsible for determining compliance with I-937, only if: (1) the advisory opinion affirmatively qualifies the project or resource; (2) the governing board of the consumer-owned utility that will use the project or resource adopts the advisory opinion after public notice and hearing; and (3) the project or resource is built or acquired as proposed.

D. HB 2654/SB 6396: Modifying the Energy Independence Act – *Died in Committee*

These companion bills modifying I-937 would have given greater recognition of Washington's clean hydropower resources and biomass stocks; generated new revenue ($20 million over 10 years) for major new investments in green transportation infrastructure, such as electric vehicle charging stations and public fleet conversions; created incentives for investments in conservation and efficiency by allowing "banking"; authorized a pre-approval process to create greater certainty whether proposed projects qualify for credit under the law; controlled costs by making the existing cost caps more workable; provided flexibility to utilities that are long on power to meet their requirements in ways other than buying power they don't need; and defined new requirements for utilities in years beyond 2020 by eventually requiring utilities to meet a 20 percent renewable standard over time as they have a need to acquire additional energy.

E. SHB 2783: Coal Transition Power – *Died in the House Rules Committee*

SHB 2783 would have listed coal transition power as a specific generation source identified as part of a fuel mix disclosure prepared by a retail electric utility. The bill allows a retail electric utility to report coal transition power as either coal power or as coal transition power. Any disclosure regarding coal transition power must contain a specific footnote explaining that coal transition power is electricity provided by a coal-fired power plant in Washington that is required to shut down part of its operations in 2020 and all of its coal use in 2025.

IV. Land use

A. ESHB 1627: Boundary Review Boards – *Signed by the Governor*

ESHB 1627 authorizes a boundary review board to modify a proposed local government action by adding territory that would increase the total area of the proposal before the board. If the proposed action is a city or town annexation, a board may not add an amount of territory that exceeds 100 percent of the total area of the proposal before the board. If a board increases the total area of a proposed city or town annexation, the board must hold a separate public hearing on the proposed increase and must, subject to delineated requirements, notify the registered voters and property owners residing within the area subject to the proposed increase.

B. EHB 2152: Timelines Associated with Plats – *Signed by the Governor*

EHB 2152 modifies temporary plat timeline extensions adopted by the 2010 Legislature. Time limitations governing the submission of final plats are modified as follows:

- If a preliminary plat is approved by the local government on or before December 31, 2014, the final plat must be submitted to the local government within seven years of the preliminary plat approval.
- If a preliminary plat is approved by the local government on or after January 1, 2015, the final plat must be submitted to the local government within five years of the preliminary plat approval.
- The bill creates an exception to these seven- and five-year time limits if a preliminary plat is approved by the local government on or before December 31, 2007, and if the project is within city limits and not subject to the SMA, the final plat must be submitted to the local government within nine years of the preliminary plat approval.

Time limitations for provisions governing lots in final plats and subdivisions are modified as follows:

- Any lots in a final plat filed for record are a valid land use, notwithstanding changes in zoning laws, for seven years from the date of filing if the date of filing is on or before December 31, 2014.
- Any lots in a final plat filed for record are a valid land use, notwithstanding changes in zoning laws, for five years from the date of filing if the date of filing is on or after January 1, 2015.
- An exception to these seven- and five-year time limits is for projects that are within city limits, not subject to the SMA, and date of filing is on or before December 31, 2007; any lots in a such final plat filed for record are a valid land use, notwithstanding changes in zoning laws, for nine years from the date of filing

General time limitations associated with requirements governing subdivisions are modified as follows:

- Subdivisions are governed by the terms of approval of the final plat, and the requirements in effect at the time of approval, for seven years after final plat approval, provided the date of final plat approval is on or before December 31, 2014.
- Subdivisions are governed by the terms of approval of the final plat, and the requirements in effect at the time of approval, for five years if the date of final plat approval is on or after January 1, 2015.
- Absent public health or safety concerns, the bill allows one exception to these seven- and five-year time limits: subdivisions are governed by the terms of approval of the final plat, and the requirements in effect at the time of approval, for nine years after final plat approval if the project is within city limits, not subject to the SMA, and the date of final plat approval is on or before December 31, 2007.

C. HB 2671: Local Shoreline Master Program Appeals – *Signed by the Governor*

HB 2671 reduces inconsistencies in Shoreline Master Plan Appeals issues between the Shoreline Management Act (SMA), the GMA and the Administrative Procedures Act (APA). The bill covers provisions related to standing and standard for review and clarifies SEPA procedures.

D. EHB 2469: Boatyard Stormwater Treatment – *Signed by the Governor*

The SMA exempts remedial actions conducted at a facility or by Ecology under the Model Toxics Control Act from requirements to obtain a substantial development permit, conditional use permit, or a variance. These facilities are not exempt from procedural requirements of the SMA. EHB 2469 adds an exemption from these permits for the installation of site improvements for stormwater treatment in an existing boatyard facility to comply with a National Pollution Discharge Elimination System stormwater general permit. Ecology is obligated to ensure that the installation of the site improvements complies with the substantive requirements of the SMA through the review of engineering reports, site plans, and other installation-related documents.

E. SSB 5995: Industrial Land – *Signed by the Governor*

In limited circumstances, SSB 5995 allows a city within a county planning under the GMA to request an amendment to increase the amount of territory within the urban growth area (UGA) zoned for industrial purposes. The increase must be needed to meet the city and county's documented needs for industrial land to serve their planned population growth. The additional land may not increase the amount of territory within the amended UGA by an amount exceeding 7 percent of the total area within the city. Such a request must meet the following criteria: it may only occur in counties located east of the crest of the Cascade mountain range that have a population between 120,000 and 200,000; it must meet the county's application deadline for the annual comprehensive plan amendment process; and it must be preceded by a completed development proposal and phased master plan for the area to which the amendment applies and a capital facilities plan with identified funding sources to provide the public facilities and services needed to serve the area. A request will be null and void if the appli-

cable development proposal has not been wholly or partially implemented or if the applicable area has not been annexed within five years of the UGA amendment. This authority expires on December 31, 2015.

F. SB 6082: Agricultural Resource Lands – *Signed by the Governor*

By December 31, 2013, SB 6082 requires Ecology to conduct rulemaking to review whether the current SEPA environmental checklist ensures consideration of potential impacts to agricultural lands of long-term commercial significance. The review and update must ensure that the checklist is adequate to allow consideration of impacts on adjacent agricultural properties, drainage patterns, agricultural soils, and normal agricultural operations.

G. 2SSB 6263: Marine Management Planning – *Signed by the Governor, partial veto*

2SSB 6263 amends the statutory marine management planning process by: authorizing the planning team to develop the comprehensive marine management plan in geographic segments and move forward with plans for geographic areas on different schedules; removing the requirement that the comprehensive marine management plan be completed within two years of the plan initiation; and removing the requirement that the availability of nonstate funding be a prerequisite to initiating the comprehensive planning process. Until July 1, 2016, the permissible uses of funding from the marine resources stewardship trust account are temporarily narrowed to: ecosystem assessments and mapping activities, with a focus on those that relate to marine resource uses and the development of potential economic opportunities; development of a marine management plan for the outer coast; and coordination of regional marine waters planning activities.

Partial Veto: The Governor vetoed sections of the bill dealing with the establishment of a Washington State Coastal Solutions Council.

H. EHB 2417: Dock Construction – *Died on the Senate Floor Calendar*

EHB 2417 would have increased the threshold for exempting construction of a dock in fresh waters from the substantial development permit requirement of $10,000 to $20,000. If subsequent construction on a dock occurs within five years of completion of the prior construction, and the combined fair market value of the construction exceeds $2,500 for a dock in salt waters and $20,000 for a dock in fresh waters, the subsequent construction would have been considered a substantial development.

I. ESSB 6170: Working Waterfront Redevelopment – *Died in the House Local Government Committee*

ESSB 6170 would have established a permit review and approval process for qualifying redevelopment and restoration projects located on or adjacent to certain marine shorelines. The bill designates DFW as the reviewing agency and approving authority for marine area redevelopment and restoration project permits. To be eligible for the alternate permit review and approval process, a project must have met specified criteria, including:

- Location on a site adjacent to or including marine shorelands upon which commercial and industrial uses are permitted under the applicable master program;
- Generation of 10 or more jobs on an ongoing basis;
- Redevelopment and reuse of lands on which previous uses have substantially degraded shoreline ecological functions;
- Exempt from preparation of an environmental impact statement under the State Environmental Policy Act; and
- Consistent with fish protection requirements and shoreline regulations.

Projects receiving this approval would be exempt from a substantial development permit under the SMA, a permit required by a shoreline master program, or a permit or other approval under the GMA.

V. Toxics and Air Emissions

A. SHB 2326: Solid Fuel Burning Devices – *Signed by the Governor*

SHB 2326 is designed to help local communities deal with fine particulate nonattainment under the Federal Clean Air Act. While federal law establishes the framework for assessing whether communities are in compliance with federal standards, state law regulates burning from solid fuel burning devices. SHB 2326 lowers the thresholds for determining when Ecology or a local air pollution control authority may call a first and second stage burn ban due to impaired air quality in an area of fine particulate nonattainment or in areas at risk of fine particulate nonattainment. The bill allows Ecology or a local air pollution control authority to prohibit the use of fireplaces in areas of nonattainment for fine particulates, if needed to meet federal requirements as a contingency measure in a state implementation plan for a fine particulate nonattainment area. Such a prohibition does not apply to a person in a residence or commercial establishment that does not have an adequate source of heat without burning wood. Under the bill, a city, county or local health department may agree to assist Ecology

or a local air pollution control authority with enforcement of a prohibition on the use of solid fuel burning devices in a fine particulate nonattainment area. By January 1, 2015, Ecology or a local air pollution control authority must provide assistance, within existing resources, to households using solid fuel burning devices to reduce the emissions from those devices or change to a lower emission device. Prior to the effective date of a prohibition, Ecology or a local air pollution control authority must provide public education in the nonattainment area regarding how households can reduce their emissions through cleaner burning practices, the importance of respecting burn bans, and opportunities for assistance in obtaining a cleaner device.

B. SHB 2590: Pollution Liability Insurance Agency – *Signed by the Governor*

The Washington Pollution Liability Insurance Agency (PLIA) was created in 1989 to make pollution liability insurance available and affordable to the owners and operators of regulated underground petroleum storage tanks. PLIA provides secondary insurance to insurance companies that insure owners and operators of USTs and heating oil tanks. Funding comes from two sources: a pollution liability fee imposed on dealers making sales of heating oil to a homeowner or a consumer which is deposited into the Heating Oil Pollution Liability Trust Account; and an excise tax on the wholesale value of petroleum which is deposited into the Pollution Liability Insurance Program Trust Account. SHB 2590 extends the PLIA and associated funding sources until July 1, 2020.

C. 2SSB 5343: Anaerobic Digesters – *Signed by the Governor*

Under the State Clean Air Act, anaerobic digester operators are required to obtain air emission permits for digester engines and satisfy monitoring requirements. Some digesters are currently unable to meet permit requirements. 2SSB 5343 grants an extended compliance period to December 31, 2016, to certain electric generating projects powered by gas from anaerobic digesters for the sulfur emissions limits established by Ecology or a local air authority. To qualify for this extension, a generator must be:

- Operating at an electric generating project with an installed generator capacity of at least 750 kilowatts, but not exceeding 1000 kilowatts;
- In operation on the effective date of this act and have begun operating after 2008;
- Located on agricultural lands of long-term commercial significance under the GMA; and
- Located outside in a federally designated nonattainment or maintenance area.

Upon request, Ecology or a local air authority must provide technical assistance to a generator meeting the requirements above, in reducing its emissions. Ecology must also submit a report by December 1, 2012, to the Legislature, containing information about the degree to which current state air quality regulations consider different feed sources for anaerobic digesters, and strategies to address the different feed sources used in anaerobic digesters.

D. SB 6131: Bulk Mercury – *Signed by the Governor*

Under current law, the sale or purchase of bulk mercury is prohibited beginning June 30, 2012. SB 6131 modifies the definition of bulk mercury to exclude mercury-added products and devices regulated by the federal Food, Drug, and Cosmetic Act. The bill also deletes a reporting provision that dangerous waste recycling facilities, treatment, storage, disposal facilities, sales to research facilities, and industrial facilities must submit an annual inventory of their purchases and uses of bulk mercury to Ecology.

E. EHB 2821/ SB 6630: Toxic Children's Products – *Died in Committee*

Beginning June 30, 2014, EHB 2821 and SB 6630 would have prohibited the manufacture, sale, or distribution of children's products containing TCEP (Tris(2-chloroethyl) phosphate) and TDCPP (Tris(1, 3-dichloro-2-propyl) phosphate) in amounts greater than 100 parts per million in any component. The bills also had provisions related to product alternatives assessments.

F. E2SSB 6211: Brownfield Redevelopment – *Died in House Ways & Means Committee*

E2SSB 6211 would have modified brownfield redevelopment provisions of state law. The bill authorizes a city, county, and port district to designate redevelopment opportunity zones and to establish a brownfield renewal authority when certain conditions are met. It authorizes the Attorney General and Ecology to agree to a settlement with a prospective purchaser of a brownfield property and funding from the state Toxics Control Account in paying for the costs of remedial action if certain conditions are met. E2SSB 6211 allows Ecology to provide integrated planning grants or loans to local governments to fund studies for remedial actions and adaptive reuse.

G. SHB 2450: Rechargeable Battery – *Died in the House Committee on General Government Appropriations & Oversight*

SSB 6145: Paint Stewardship – *Died in the Senate Ways & Means Committee*

SSB 6336: Electronic Product Recycling – *Died in the Senate Rules Committee*

SSB 6341: Discarded Carpet Recycling – *Died in the Senate Ways & Means Committee*

Although there was significant discussion about product stewardship, all of these bills died during the session.

VI. Forests, Fish, Wildlife and Parks

A. SHB 2349: Beaver Management – *Signed by the Governor*

SHB 2349 authorizes DFW to permit the release of captured beavers on public or private property if the landowner of the property consents to the release. Beaver relocations may be limited by DFW to areas of the state where there is a low probability of released beavers becoming a problem; where there is evidence of a historic endemic beaver population; and where conditions exist for the released beavers to improve the riparian area into which they are introduced. DFW may condition beaver relocations to maximize the success and minimize the risk of the relocation.

B. HB 2329: Encumbered State Forest Lands – *Signed by the Governor*

HB 2329 gives the Board of Natural Resources (Board) discretionary authority to create a state forest land pool (land pool) to be managed by the DNR for the benefit of counties that have a population of 25,000 or fewer and that have existing state forest lands encumbered with 30 year or longer timber harvest deferrals associated with wildlife species listed under the federal Endangered Species Act. The land pool will be a collection of discrete parcels located over multiple counties that are managed together for multiple beneficiaries.

C. E2SHB 2373: Discover Pass – *Signed by the Governor*

E2SHB 2373 modifies provisions related to the Discover Pass. The revised Pass will include all state land and state forest lands, other than aquatic, managed by the DNR. The bill authorizes a Family Discover Pass available for $50 that may be transferred to any vehicle. Each Discover Pass is required to contain space for two vehicle license plate numbers to be written on the pass. No agency is permitted to refund money for either pass prior to the effective date. The State Parks Department is required to provide 12 free access days each year and, when practicable, coordinate those days with National Park Service free days.

D. ESB 5661: Derelict Fishing Gear – *Signed by the Governor*

ESB 5661 requires a person who loses or abandons commercial net fishing gear to report the location and gear type lost to DFW within 24 hours. As under current law, a person who loses or abandons shellfish pots is encouraged to report the loss. By December 31, 2012, DFW must work with interested tribes to develop a program to assist coordination and communication on the location of lost or abandoned fishing nets from tribal fisheries.

E. SSB 6135: Fish and Wildlife Enforcement – *Signed by the Governor*

SSB 6135 modifies selective DFW enforcement authorities, clarifies infraction and criminal penalties, amends specific crimes and strengthens resource protection.

F. E2SHB 2365: Large Wild Carnivores – *Died in the Senate Rules Committee*

SSB 6137: Livestock Attacks by Wolves – *Died in the Senate Rules Committee*

Although there was significant discussion dealing with large carnivore issues, these bills died during the session.

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Renewable Energy Siting in Washington

By Erin L. Anderson, Stoel Rives LLP

Introduction

Washington plans for the future of its energy supply through the State Energy Strategy, development of which is overseen by the Department of Commerce.[1] In 2010, the Legislature directed that the strategy be revised to meet the goals of (a) maintaining competitive energy prices; (b) fostering a clean energy economy and jobs; and (c) reducing greenhouse gas emissions.[2] Separately, the Energy Facilities Site Evaluation Council (EFSEC or Council herein) is charged with issuing timely energy facility siting approvals while balancing the public's interest in abundant power at a reasonable cost with the environmental impacts of such facilities.[3] However, neither enabling body of legislation mentions the other, much less synchronizes the goals of ensuring an abundant future energy supply with actual siting decisions of the Council. Within this context is Initiative 937 – the Energy Independence Act (I-937)[4] – passed by voters in 2006, which mandates that investor-owned and certain public utilities receive increasing amounts of their base power supply by certain dates from renewable energy sources, reducing our dependence on foreign fuels for power generation and protecting the environment through use of renewable fuel sources.

Each of these three legislative regimes reflects compelling interests to the state of Washington as a whole. Nonetheless, siting approval and development of renewable energy-fueled facilities in Washington has largely proceeded in an uncoordinated fashion outside of the state's centralized EFSEC siting process. Avoidance of EFSEC by the renewable energy development community in favor of receptive local permitting authorities for reasons explored below invites a discussion of whether EFSEC, as currently configured, remains a viable venue for implementing energy policy related to renewable facilities siting.

Renewable Energy Facility Siting Alternatives in Washington

The critical nature of a reliable energy supply to modern society and the difficulties inherent in siting power plants and transmission lines led the state of Washington to adopt the Energy Facilities Site Location Act, Ch. 80.50 RCW (EFSLA) in 1970. A principle behind EFSLA was that the creation of a centralized, one-stop state siting agency should lead to timely project approvals by a body experienced in balancing the public's interest in abundant power at a reasonable cost with the environmental impacts of such facilities.

EFSLA initially addressed the state's authority to issue certificates for the siting of nuclear-powered generation plants.[5] Over the years, the jurisdiction of EFSEC has expanded to include large-diameter oil and gas pipelines over 15 miles in length,[6] specified electrical transmission facilities,[7] and thermal-fueled generation plants, e.g. combined cycle natural gas turbine, of 350 megawatts (MWs) generating capacity and larger.[8] To the extent there are conflicts between EFSLA and other Washington state and local laws, Ch. 80.50 prevails.[9] A single siting certificate from EFSEC addresses all state and local agency permits, and provides on-going environmental and safety oversight for the duration of the facility's existence.

The most recent facilities brought under EFSEC's jurisdiction are those fueled by alternative energy sources, i.e., renewables energy such as wind, solar and geothermal energy.[10] Significantly, these renewable energy-fueled proposals only come to EFSEC if a project proponent *chooses* to obtain certification there. Unlike all nuclear facilities and certain thermal-fueled facilities below 350 MWs, there is no mandate that alternative energy facilities be sited only through EFSEC.[11] Consequently, regardless of the size of a project or the MWs of energy to be generated, renewable energy developers can choose to seek authorization at the local level, typically counties, if local laws provide a suitable permitting framework as an alternative to applying directly to EFSEC. If a developer is unable to obtain local siting approval, it may seek state preemption of the local rules through EFSEC, thereby leaving the state with ultimate authority to site renewable energy facilities under state law.[12]

EFSEC is charged with siting energy facilities consistent with the state's interest in providing abundant power at a reasonable cost while protecting the quality of the environment through a timely process that avoids costly, duplicative or conflicting siting processes.[13] The composition of the Council includes a Chair appointed by the Governor,[14] representatives from five enumerated state agencies with particular topical expertise,[15] and additional delegates on a project-by-project basis.[16] Applications for Site Certificate (ASC) are reviewed by Council staff housed within the Washington Utilities and Transportation Commission. Staff members assist proponents in identifying potential application issues and resolutions, and develop recommended siting conditions for Council consideration. An additional mandatory participant in the review and processing of an ASC is the Counsel for the Environment (CFE). The CFE representative is an appointed assistant attorney general whose role is to represent the public in furthering protection of the environment.[17] Intervening participants in the process frequently include stakeholders such as individuals, governmental entities, and non-governmental organizations both in support of and in opposition to the proposal. Each ASC is subject

to review under State Environmental Policy Act (SEPA), Ch. 43.21C RCW, as supplemented by the Council's SEPA Rules, Ch. 463-47 WAC.

As an administrative agency subject to Washington's Administrative Procedures Act (WAPA), Ch. 34.05 RCW,[18] EFSEC conducts three types of public proceedings on an ASC.[19] The Council may, and consistently does, utilize an administrative law judge (ALJ) to facilitate its adjudicative processes. *Id*. EFSEC also uses court reporting services to create a record of all proceedings. The entire Council as well as support staff and ALJ necessary to the proceeding travel to the location of the project proposal for all three formal proceedings. The Council first conducts a public informational meeting in the county where the project is proposed within 60 days of receiving a complete ASC.[20] Following the informational meeting, a separate public hearing[21] is conducted to determine whether the proposal is consistent with the local jurisdiction's land use plans and ordinances.[22] A finding of consistency prevents the local jurisdiction from then enacting legislation that would render the application inconsistent with local laws.[23] If the application is inconsistent with local land use laws, the Council conducts an adjudicative process to determine whether it should recommend that the local land use provisions be preempted under the authority of RCW 80.50.110(2).

The third formal proceeding is the adjudication on the ASC itself.[24] Well in advance of the actual hearing on the merits of the ASC, interested parties may seek intervention.[25] Pre-hearing motions are heard, including motions for reconsideration, discovery is conducted,[26] and other preliminary matters are addressed and reduced to a series of Pre-Hearing Orders. The ASC adjudication itself, which may be consolidated with the hearing on issues of land use inconsistency, is conducted in accordance with WAPA, including live witness testimony and evidence received in accordance with RCW 34.05.452.[27] Pre-filed, direct testimony also must be filed in advance of any live testimony.[28] The adjudication is often followed by lengthy post-hearing briefing over many weeks before the Council takes up deliberations.

EFSEC's ASC filing requirements are complex and time-consuming, and typically require the use of consultants and legal counsel especially conversant with the Council's rules. Similarly, the Council itself may rely on outside, independent third-party consultants for drafting environmental review documents and other topical assistance. All Council costs associated with siting a facility under EFSLA are borne by the applicant.[29] These costs are far from *de minimis;* recoverable Council costs can include, without limitation, the significant costs of Council and staff travel associated with each Council public hearing or meeting in the county where the proposed project is located, as well as all of the Council's "independent consultants' costs, council-member's wages, employee benefits, costs of a hearing examiner, costs of a court reporter, staff salaries, wages and employee benefits, goods and services, travel expenses, and miscellaneous direct expenses as arise directly from processing an application."[30] Moreover, once the Site Certificate is issued, costs continue to accrue: the applicant is proportionately responsible for on-going EFSEC operational costs for the entire term of the Site Certificate, which is regularly monitored by the Council, through the completion of decommissioning. Opting into the EFSEC process is a cradle-to-grave financial marriage to the agency.

In most but not all cases, an ASC requires preparation of a SEPA Environmental Impact Statement (EIS). The time and cost of completing the EIS may be complicated by the need to prepare a joint SEPA/National Environmental Policy Act (NEPA) document if the project requires federal agency action. In that case, the process of establishing lead agency roles and responsibilities, as well as compliance with the federal procedural steps and additional topical subjects of NEPA adds yet more time and procedures to environmental review. Despite the costly and complex *process* associated with EFSEC site certification and environmental review, the EFSEC regulations have yet to integrate environmental criteria to which a project's SEPA review can lead to substantive effect based on the discussions within an environmental review document. In addition, under EFSEC regulations, EFSEC's EIS is not finalized until after the adjudication on the ASC is complete.[31] The lack of a final EIS until after the adjudication is complete leaves all parties to question the influence that SEPA analysis will have on the ultimate determination of whether, and how, the project meets state siting criteria.

After all of EFSEC's work is completed, its decisions of EFSEC on both land use preemption (if necessary) and siting of a project are only *recommendations* to the Governor, who has 60 days to approve, reject or direct reconsideration of the Councils' recommendations.[32] The Governor's decision on the ASC is the final action, appealable to Thurston County for a determination of completeness of the record, after which case the matter is certified to the Washington Supreme Court for review under RCW 80.50.140(1).

While EFSLA espouses an aspirational goal of processing each application within 12 months,[33] the Council's procedures lack hard, enforced deadlines by which specified processes *must* be completed. In practice, obtaining an ASC from EFSEC is not a 12-month process – it takes years to work through all that is required by EFSEC in order to learn whether the Council will recommend, and the Governor will approve, the siting of a jurisdictional energy facility.

The lengthy hearings processes, the potential for trench warfare-like litigation of every issue through motions and requests for reconsideration,

the absence of enforceable processing deadlines, the extraordinary processing and perpetual cost of supporting all of EFSEC's certificate compliance monitoring duties among the few applicants that are under its jurisdiction, and the inability of an applicant to know, with a degree of certainty, what siting criteria must be met to obtain a project siting approval, present a great risk and challenge to an energy project proponent. Unlike most thermal facilities whose fuel can be transported to sites that can be evaluated for siting suitability, making more sites available for evaluation prior to submission of an ASC, renewable energy generation facilities *must* be built where the energy resource is located. This magnifies the risk to a renewable energy developer, whose site selection options have little flexibility. Against this backdrop, the ability of energy facility developers to pursue approval of renewable energy projects outside of EFSEC has been a boon for local siting jurisdictions.

Unlike EFSEC, the zoning, i.e., siting, ordinances of Washington's local jurisdictions are not guided by EFSLA policy and intent or I-937. Land use zoning and regulatory controls are developed consistent with local policies contained in comprehensive plans adopted by the individual counties and cities. These plans must be consistent with state planning principles established in the Planning Enabling Act[34] and growth management goals established through the Growth Management Act[35] but in all instances are adopted at the local level, reflecting local goals, policies and objectives. As a result, no two Washington counties share a common siting ordinance – each county adopts its own policies and ordinances regarding the propriety of siting renewable energy generation facilities.

Of the over 30 renewable energy projects (not including multiple phases permitted separately over time) which have received development approval in Washington over the past twenty years[36] only four (all wind facilities) have been submitted to EFSEC.[37] Those four projects, if fully built out, would total 638 MWs combined.[38] To date, only two of EFSEC's jurisdictional wind projects (Wild Horse Wind and Kittitas Valley Wind), totaling 373 MWs, have been built. Of the other two, the 75-MW Whistling Ridge Energy Project remains in litigation nearly three-and-a-half years after its ASC was originally submitted to EFSEC in March, 2009.[39]

Speaking to wind alone, the U.S. Department of Energy reports that Washington had 2,699 MWs of wind energy installed through March, 2012,[40] the overwhelming majority of which were approved for development at the county level in Columbia, Garfield, Klickitat, Walla Walla and Whitman Counties.[41] Garfield County alone, by issuing a Conditional Use Permit for the Lower Snake River Wind Project, has permitted more renewable energy development in a single approval – 800 MWs – than EFSEC's four wind projects combined.

To illustrate the contrast, the permitting process conducted by Garfield County, inclusive of an informational open house, full SEPA review through scoping and preparation of an EIS and an open public hearing process conducted by an independent, experienced land use hearings examiner was completed in less than 12 months.[42] The 79-page decision document contains 178 conditions addressing all areas of standard siting topics, including preconstruction surveys, cultural resource and critical areas protection, environmental monitoring, construction standards, wetlands protection, noise, visual and aesthetic impacts, adaptive wildlife management, operational safety and facility decommissioning.[43] The Garfield County siting process does not include a CFE-type position to speak independently for the environmental and the public interest, nor does it require the level of detail EFSEC demands in a complete application. However, the application undergoes state-mandated review for completeness and public notifications under the Regulatory Reform Act, RCW 30.70B, and the application for siting approval is subject to both administrative appeals under the Garfield County Zoning Code as well as review in the courts under provisions of the Land Use Petition Act, RCW 36.70C.[44] While the local siting ordinance necessarily is not as complex as the EFSEC WAC's, it is fully bolstered by the various other state and federal agencies, such as the Departments of Ecology, Natural Resources, and Transportation as well as the U.S. Army Corps of Engineers, whose laws and regulations will be applied to the project as its site design, development and operations proceed.

There are important trade-offs between siting at the state and local levels. Certainly, EFSEC's ability to issue all state and locally required permits provides a unified single siting process. Locally-issued land use permits cannot include necessary approvals issued by state agencies. Conceptually, the decision of a body of civil servants such as EFSEC is less politicized and therefore more predictable than local decisions by elected officials, who risk losing their jobs at the polling booth if they make decisions that are unpopular with the local electorate or a well-heeled and financed constituency thereof regardless of the merits of the proposal. In many Washington counties, the risk of a political decision on a siting application is ameliorated, although not eliminated, by the use of appointed hearing examiners who are typically attorneys specially trained and experienced in land use matters including zoning, SEPA, and regulatory reform. The depth of topical expertise of the various agency representatives sitting on the Council likely is not capable of being replicated at the local level. Nonetheless, the application of SEPA to major project proposals across the state provides a mechanism for the public to ask for specialized expert input on matters impacting the built and natural environment, even in a local siting process. Because local agencies cannot issue all

state-mandated permits, those agencies' expertise will still come into play in the development of an energy facility, just not up-front in a unified single permitting process.

One process is not held out here as superior to the other: instead, they are both raised within the context of the Legislature having expressed the need to advance the public interests of timely processing of power facility permits in order to advance Washington citizens' compelling energy and environmental interests, and to approach energy supply with some form of strategy. None of these processes is undertaken in a vacuum, however; they are each invoked at the instance of a proponent seeking to develop a business interest within the energy industry. The nature of fluctuating energy markets demands that developers be able to respond rapidly to market conditions as they emerge and evolve. Because the fuel supply for renewables is not portable, the decision on land use approval at a given site is particularly critical. An energy facility developer wanting to invest hundreds of millions of dollars in a renewable energy generation facility simply cannot wait years for an EFSEC decision on whether a proposed facility can be built where desired, regardless of whether all the other state permits necessary to build the project also come in the same approval. EFSEC's inability to meet the EFSLA's aspirational goal of processing each ASC within 12 months has left developers with three options: obtain local land use decisions in a timely fashion in order to support a business decision to invest in a new Washington facility, go through EFSEC's time, cost and risk-intensive process, or take their business to other states.

That the market has sought out local siting jurisdictions in Washington instead of EFSEC in order to obtain timely permitting decisions is evident by the number of EFSEC sub-jurisdictional gas and wind energy generation facilities across the state. Many millions of dollars of capital investment and jobs have been captured across Washington by the dozens of wind energy facilities locally sited. However, if local siting is unavailable, the history of renewable energy facility siting at EFSEC suggests it is not a reasonable alternative in terms of time, cost and lack of certainty. In that case, investing in another state offering more timely, predictable and cost-efficient processing is a viable option that makes sense from a business and investment perspective.

None of these options serves the Legislature's objective of securing a predictable future energy supply in a strategic fashion. If Washington is serious about meeting its future energy supply in a strategic fashion, the current EFSEC model cannot deliver. Generation facility investors, developers and utilities will continue to make risk-based business decisions taking into account certainty, cost and timeliness, none of which Washington's current siting framework offers. Accomplishing the state's multifold objectives of energy security and affordability, local investment, jobs creation and environmental protection is not impossible or even improbable. One needs to look no further than across the Columbia River to find an effective centralized siting framework. Oregon's Energy Facility Siting Council (EFSC) has one-stop, environmentally protective and timely processing objectives similar to those in Washington.[45] However, it operates within the Oregon Department of Energy's tightly prescribed siting and operational standards as well as strict processing guidelines.[46] Moreover, the Oregon EFSC decisions are final, rather than advisory to a governor.[47] While the siting process in Oregon may include contentious hearings just as any other state or locality, the specificity of Oregon's siting and compliance standards and the tightly administered review processes give proponents reasonable assurances that their applications will be reviewed timely and predictably. Any business willing to risk millions of dollars just to determine whether they will be approved to build at a given site expects these assurances. Any state or locality wanting to attract that type of investment needs to take that expectation into account in its processes or take the risk that investments in energy generation resources will go elsewhere.

Conclusion

Oregon's approach is not the only alternative, but it illustrates that there are other successful methods of using centralized siting of major energy facilities in a strategic yet timely and cost-effective manner to secure energy facility siting and supply decisions. The continued existence of EFSEC suggests that the Legislature continues to find centralized, one-stop siting in the public's best interest. In that case, unless EFSEC's current framework of centralized siting undergoes serious change to meet the stated objectives of timely and strategic development of an abundant, affordable, clean, and environmentally responsible energy supply while generating associated jobs and investment, Washington can expect continued uncoordinated energy facility development operating under as many different development frameworks as there are facilities, or little to none at all.

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1 RCW 43.21F.045.
2 E2SHB 2658.
3 RCW 80.50.010.
4 Ch. 19.285 RCW.
5 RCW 80.50.040.
6 RCW 80.50.060(3)(a).

7 RCW 80.50.060(3).
8 RCW 80.50.060(1).
9 RCW 80.50.110; *see also Residents Opposed to Kittitas Turbines v. EFSEC*, 165 Wn.2d 275, 197 P.3d 1153 (2008).
10 Laws of 2001, ch. 214, §2.
11 RCW 80.50.060(2).
12 Ch. 463-28 WAC.
13 RCW 80.50.010(2), (3), and (5).
14 RCW 80.50.030(2).
15 RCW 80.50.030(3)(a).
16 RCW 80.50.030(3)(b) through (6).
17 RCW 80.50.080.
18 WAC 463-30-020.
19 Expedited processing is available in very narrow circumstances under RCW 80.50.075, and is almost never invoked.
20 RCW 80.50.090(1); WAC 463-26-025.
21 The first two proceedings may be run consecutively.
22 RCW 80.50.090(2).
23 *Id.*
24 RCW 80.50.090(3).
25 WAC 463-30-091.
26 WAC 463-30-190.
27 WAC 463-30-310.
28 WAC 463-30-270.
29 RCW 80.50.071(1)(a).
30 RCW 80.50.071(1)(a).
31 http://www.efsec.wa.gov/cert.shtml#4. Environmental Impact Statement
32 RCW 80.50.100(2), (3).
33 RCW 80.50.100(1).
34 Ch. 36.70 RCW.
35 Ch. 36.70A RCW
36 http://www.rnp.org at project_map, excluding wave energy projects
37 http://www.efsec.wa.gov/default.shtm
38 *See* http://www.efsec.wa.gov/Desert%20Claim.shtml; http://www.efsec.wa.gov/kittitaswind.shtml; http://www.efsec.wa.gov/wildhorse.shtml; http://www.efsec.wa.gov/whistling%20ridge.shtml
39 http://dw.courts.wa.gov/index.cfm?fa=home.casesummary&crt_itl_nu=S34&casenumber=12-2-00692-7&searchtype=sName&token=19CEBDCFC0390EBE8FED69FBEEE0CC9C&dt=3A186FCAC58DFCA8DCAD29DAD6CDDFAD&courtClassCode=S&casekey=158943218&courtname=THURSTON SUPERIOR
40 http://www.windpoweringamerica.gov/wind_installed_capacity.asp
41 Notably, the prevalence of siting approvals at the local level is not limited to renewables alone. Of the ten gas-fueled power generation facilities operating in Washington, only two of them – at Chehalis and Grays Harbor Energy – were sited through EFSEC. See http://www.eia.gov/state/state-energy-profiles-print.cfm?sid=WA
42 http://co.garfield.wa.us/lower_snake_river_wind_energy_project_cup_012609
43 http://co.garfield.wa.us/sites/co.garfield.wa.us/files/Image/Hearing%20Examiner%20Decision_112509.pdf
44 *See* http://www.co.garfield.wa.us/sites/co.garfield.wa.us/files//Zoning%20Ordinance%2012-3-08.pdf
45 *See generally* http://cms.oregon.gov/energy/Siting/Pages/process.aspx#intro
46 *Id.*
47 ORS 469.101(1).

Working with Indian Tribes to Identify Historic Properties

By Dean B. Suagee, Hobbs, Straus, Dean & Walker LLP

Abstract

The National Historic Preservation Act (NHPA) establishes the legal framework for consulting with federally-recognized Indian tribes regarding the effects of energy projects on historic properties that hold religious and cultural importance for tribes but which are located outside the boundaries of Indian reservations. As implemented through regulations issued by the Advisory Council on Historic Preservation, the NHPA consultation process is a procedural mechanism which has the potential, at least in some cases, to bridge a chasm between worldviews. As a procedural mechanism, its potential for building bridges can only be fulfilled if the process is used in good faith, with genuine efforts to find ways of resolving conflicts that are mutually acceptable. This paper focuses on the step in the process during which the consulting parties identify properties and evaluate their eligibility for the National Register of Historic Places. At this step of the process, tribal traditional cultural knowledge must be included, and the best sources of this kind of knowledge tend to be the tribes themselves. Gaining access to this knowledge requires respect. This knowledge is tribal cultural heritage, and this paper suggests that it is useful to approach it from a human rights frame of reference.

Introduction

Throughout the United States there are places, and landscapes, that hold religious and cultural significance for Indian tribes. A tribe's oral tradition may include stories about important events that occurred at a place or in a landscape, some of which may have taken place during the lives of the present-day elders and some of which may reach back to the tribe's origin as a people. A landscape may be culturally important because there are places where medicine plants have traditionally been harvested, or there may be habitat for culturally important wildlife. A landscape that looks empty to someone from a perspective grounded in the dominant American society might be holy ground for someone grounded in a tribal religious tradition. The sacredness of such a place might have something to do with its apparent emptiness. Maybe the emptiness is important for tribal members to perform certain ceremonies or other religious practices. The landscape may include unmarked burials, and tribes generally regard the graves of ancestors as sacred.

Energy projects may cause a variety of environmental impacts, from water and air pollution to the kinds of earth-moving impacts associated with construction of facilities such as power transmis-

sion lines, pipelines, and access roads. Some of the environmental impacts associated with renewable energy projects are generally an order of magnitude or two less intense than the impacts of activities associated with fossil fuels such as mountaintop removal mining, or ordinary run-of-the-mill strip mining, or the extraction of oil from tar sands, but renewable energy projects do tend to take up space. Wind farms cover a lot of space, and wind turbines tend to be visible at considerable distances beyond a project's footprint. The footprint of a concentrating solar thermal power plant can also be substantial. Geothermal projects have the potential to disrupt hydrological features such as hot springs, and hot springs may be regarded as sacred places. When located far from load centers, utility scale renewable energy projects need transmission lines, and some routes for those lines might cross through places that tribes regard as sacred or culturally important.

Utility scale renewable energy projects will no doubt become more commonplace. If we are going to have any hope of reducing greenhouse gas emissions on the scale needed to avoid the more catastrophic effects of global climate change, we need to ramp up our use of renewable energy. Of course, we also need a real commitment to energy efficiency. But, if the widespread deployment of utility scale renewable energy projects is to become a reality any time soon, the people involved would be well-advised to develop some expertise in engaging with Indian tribes in the consultation process established pursuant to the National Historic Preservation Act (NHPA).[1] Tribal concerns about, or opposition to, a project can cost time and money even if a project ultimately gets built. To reduce such risks, it is critically important to engage in meaningful consultation with concerned tribes, and to do so early.[2]

Overview of the Legal Requirements

If a federal agency has authority to give an official "yes" or "no" for an energy project – renewable, non-renewable, pipeline, or transmission – that makes the project a proposed federal or federally-assisted "undertaking" in the parlance of the NHPA.[3] Such a proposed undertaking is subject to the section 106 review requirement,[4] which is implemented through regulations issued by the Advisory Council on Historic Preservation (ACHP or "Advisory Council").[5] If the proposed undertaking would affect any historic property that holds "religious and cultural significance" for an Indian tribe or Native Hawaiian organization, then federal law *requires* the agency to consult with any concerned tribe or Native Hawaiian organization in the section 106 process.[6] (This paper does not address the rights and interests of Native Hawaiian organizations.)

The Advisory Council's regulations require agencies to seek the involvement of concerned tribes, and Native Hawaiian organizations, at each step in the process. The Advisory Council has issued a number of guidance documents on various aspects of the section 106 process, including Consultation with Indian Tribes in the Section 106 Review Process: A Handbook (hereinafter *"ACHP Handbook"*).[7] At the first step of the section 106 process the responsible federal agency:

> shall make a reasonable and good faith effort to identify any Indian tribes or Native Hawaiian organizations that might attach religious and cultural significance to historic properties in the area of potential effects and invite them to be consulting parties. Such Indian tribe or Native Hawaiian organization that requests in writing to be a consulting party *shall be one*.[8]

The *ACHP Handbook* explains how the regulations apply to tribal involvement at every step of the section 106 process. This paper focuses on the step in the process during which the consulting parties identify properties and evaluate their eligibility for the National Register of Historic Places.

The Graves of Ancestors

In addition to NHPA, projects on federal land may encounter sites that are subject to the inadvertent discovery and intentional excavation provisions of the Native American Graves Protection and Repatriation Act (NAGPRA).[9] This law provides that if a project inadvertently discovers Native American graves on federal land, the activity in the area of the discovery must stop, generally for at least 30 days, while the federal agency consults with the appropriate tribes and decides what to do, which may mean excavation and reburial. (NAGPRA applies somewhat differently within reservation boundaries.) NAGPRA does not include any proactive requirements to identify such burial sites ahead of time. The NHPA consultation process, however, can be used to gather information about where burials may be located so that likelihood of encountering such areas can be reduced.

The Identification Step

A "historic property" is one that is "included in, or eligible for the inclusion on" the National Register of Historic Places.[10] The criteria for eligibility are set out in regulations issued by the National Park Service.[11] Many places that hold religious and cultural significance for an Indian tribe have not been identified and evaluated for National Register eligibility. Identification and evaluation typically takes place within the section 106 process, during the identification step.[12] The *ACHP Handbook* provides guidance on how the identification step is supposed to be carried out. Guidance documents issued by the National Park Service (NPS) may also be useful, including National Register Bulletin 38, Guidelines for Evaluating and Documenting Traditional Cultural Properties (hereinafter "Bulletin 38").[13] The term

"traditional cultural property" (TCP) refers to a particular kind of historic property that is:

> eligible for inclusion in the National Register because of its association with cultural practices or beliefs of a living community that (a) are rooted in that community's history, and (b) are important in maintaining the continuing cultural identity of the community.[14]

The *ACHP Handbook* stresses that the term "traditional cultural property" is not used in the statute, but, rather, the factor that gives rise to the statutory right to be consulted is that the proposed undertaking might affect a historic property that holds "religious and cultural significance" for an Indian tribe.[15] In other words, a TCP is but one kind of historic property that holds religious and cultural significance, and a historic property need not be a TCP for a tribe to have the right to be consulted.

Identifying historic properties that hold religious and cultural significance for an Indian tribe requires, among other things, some degree of access to the tribe's traditional cultural knowledge. The ACHP regulations recognize that tribes have "special expertise in assessing the eligibility of historic properties that may possess religious and cultural significance to them."[16] A literature search and a pedestrian survey for archaeological sites are not enough. The research techniques of ethnography must generally be used, including interviews with tribal elders and others who have knowledge of cultural practices and oral traditions. Just as archaeological sites may be eligible for the National Register under Criterion D (for the information such sites may yield about history and prehistory),[17] places that hold religious and cultural significance for tribes may be found eligible under Criterion D (when appropriate research techniques are used).[18]

In many tribal cultures, information about religious and cultural traditions is closely guarded, sometimes because of religious teachings, sometimes based on practical concerns regarding possible damage to sites or disruption of religious practices. The NHPA does include statutory authorization to withhold sensitive information from disclosure,[19] but tribal informants nevertheless may not be satisfied with federal agency promises to preserve confidentiality.

Tribal members who have acquired the education and experience to work in the cultural resources professions, and non-tribal members who work in tribal cultural resources programs, may be particularly well-suited to conduct interviews with tribal elders, especially if they can do so using the tribal language. Such interviewers can be "cross-cultural bridges" between tribal cultures and the larger American society.[20]

One way that a federal agency or an applicant for federal authorization can gain access to the information needed for the identification step is to enter into an agreement with a tribe, or with a tribal government agency such as a cultural resources department or Tribal Historic Preservation Officer (THPO) program. As explained in the *ACHP Handbook*, it is perfectly appropriate for an agency or applicant to pay a tribe for providing:

> specific information and documentation regarding the location, nature, and condition of individual sites, or even to request that a survey be conducted by the tribe. In doing so, the agency or applicant is essentially asking the tribe to fulfill the duties of the agency in a role similar to that of a consultant or contractor. In such a case, the tribe would be justified in requesting payment for its services, just as is appropriate for any other contractor.[21]

Contracting with a tribal government agency may well be the best way to obtain the information needed for the identification step, but this work takes time, even for tribal agencies, so the advice to start early still applies. In starting early, agencies and applicants should recognize that it can take some time to negotiate an agreement with a tribal agency. Some of the issues have to do with intellectual property rights in the work products.

Intellectual Property and Cultural Heritage

Contracting with a tribal agency presents some issues that are different from contracting with a consulting firm. One set of differences might be summarized by saying that the people who work for tribal cultural resources agencies are not just working for a living, they are working to preserve the manifestations of a way of life, to preserve the tribe's cultural heritage. This is a matter of human rights. The United Nations Declaration on the Rights of Indigenous Peoples (U.N. Declaration)[22] contains a number of articles on cultural heritage, including the following:

> Article 11
>
> 1. Indigenous peoples have the right to practice and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.
>
> ***
>
> Article 12
>
> 1. Indigenous peoples have the right to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects, and

the right to the repatriation of their human remains.

***

Article 13

1. Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, and traditional philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.

***

Article 15

1. Indigenous peoples have the right to the dignity and diversity of their cultures, traditions, histories and aspirations which shall be appropriately reflected in education and public information.

***

Article 24

1. Indigenous peoples have the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals. …

***

Article 25

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

Article 31

Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge and traditional cultural expressions.

When the U.N. Declaration was adopted by the U.N. General Assembly in September 2007, the United States voted against it, but since then, in December 2010, the United States has formally endorsed the Declaration.[23] While it is widely considered an aspirational rather than a legally binding instrument, the "rights recognized [in the Declaration] constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world."[23]

The reason for referring to these provisions in the U.N. Declaration is to make the point that boilerplate contract language that declares the work products of a contract with a tribal agency to be, in effect, "work for hire" is totally inappropriate. Such boilerplate language has a tendency to appear when an agency or applicant directs an environmental consulting firm to subcontract with a tribal agency but does not provide direction on how the intellectual property is to be treated. Some guidance from federal agencies would be helpful. As a contribution to the development of a "best practice" on this point, here are two examples of a contract clause. The first is from a subcontract between a Tribe's Department of Cultural Resources and a consulting firm for work relating to a pipeline project; the second is for work relating to a proposed wind farm.

Example No. 1.

[The Tribe] agrees to provide [consultants] with reports on the results of all ethnographic work conducted during the project. … Original ethnographic and ethnohistorical data will be retained by the [Tribe]. Summaries of ethnographic and ethnohistorical data will be incorporated into the resulting report and shall be the property of [consultants], provided that the [Tribe] retains license to use data included in the report. Ethnohistorical data gathered from the public domain shall be made available to [consultants].

Example No. 2.

With regard to ownership of work product …, the … Tribe will retain ownership of the reports prepared by the Tribe, as well as all intellectual property developed in the performance of the Work, and all records relating to the Work, including, without limitation, all drawings, specifications, reports, summaries, samples, photographs, memoranda, notes, calculations, and other documents ("Work Product"). [The tribe] is hereby deemed to grant license to Contractor to use such reports and other deliverables in carrying out its contractual responsibilities

These are but two examples. Many tribes have established programs with the capability to conduct cultural resources research, and they tend to have strong interests in doing this research, since in doing so they are documenting aspects of their cultural heritage. Tribal agencies can help federal agencies and applicants fulfill the requirements of the section 106 process, but contracts and other agreements must recognize and respect tribal rights in their cultural heritage.

Confidentiality

As noted earlier, NHPA section 304[25] authorizes federal agencies to withhold information from disclosure to the public about the location, character and ownership of historic resources. Withholding is authorized if the Secretary of the Interior and the agency official determines, after consultation with the Secretary of the Interior, that disclosure may:

(1) cause a significant invasion of privacy;

(2) risk harm to the historic resources; or

(3) impede the use of a traditional religious site by practitioners.

The Archaeological Resources Protection Act includes a similar provision, which mandates withholding information from public disclosure "unless the Federal land manager concerned determines that such disclosure would … not create a risk of harm to such resources or to the site at which such resources are located."[26] Thus, under both statutes, the agency must make a finding before deciding whether to withhold. Neither statute requires consultation with a concerned tribe.

Example clause number 3 was negotiated for a Memorandum of Agreement for a proposed wind farm on land under the jurisdiction of the Bureau of Land Management. This clause adds a requirement to consult with a tribe if a Freedom of Information Act request is received for "records or documents that relate to a historic property to which an Indian tribe attaches religious or cultural significance." If the agency decides to withhold, there is no real need to consult with the Tribe. Thus, under the sample clause, the requirement to consult is limited to instances in which the agency is leaning toward disclosure.

> Example No. 3.
> Confidentiality
>
> As may be requested by an Indian tribe during consultation, [the Federal agency] will strive to maintain confidentiality of sensitive information regarding historic properties to which an Indian tribe attaches religious or cultural significance. The Consulting Parties acknowledge, however, that any documents or records that [the Federal agency] has in its possession are subject to the Freedom of Information Act (FOIA) 5 U.S.C. § 552 et seq., and its exemptions, as applicable. As such, FOIA requests for particular records and/or documents will be determined on a case-by-case basis. In the event that a FOIA request is received for records or documents that relate to a historic property to which an Indian tribe attaches religious or cultural significance and that contain information that the Federal agency is authorized to withhold from disclosure by other statures including the NHPA, 16 U.S.C. § 470w-3, and the Archaeological Resources Protection Act, 16 U.S.C. § 470hh, then, prior to making a determination in response to such a FOIA request not to withhold particular records and/or documents from disclosure, the Federal agency will consult with such tribe.

Coordination with NEPA

Federal agencies that use documents prepared for the National Environmental Policy Act (NEPA) for NHPA compliance must pay attention to requirements of the ACHP regulations.[27] For example, an agency can use the NEPA scoping process to identify potential consulting parties, as long as the results are consistent with the ACHP regulations.[28] As quoted earlier, that section requires the agency to "make a reasonable and good faith effort" to identify concerned Indian tribes and invite them to be consulting parties. If an environmental impact statement is prepared for a proposed project, the lead federal agency may invite concerned tribes to be cooperating agencies.[29] In light of their special expertise regarding impacts on places that have religious and cultural significance, tribes will generally qualify to serve as cooperating agencies. In this role, tribes can actively help to develop alternatives to avoid or mitigate adverse effects.

The involvement of tribes in the NEPA process should not be limited to cultural resources. Rather, tribes should be invited to participate in the scoping process, including the exploration of alternatives. For example, as an alternative to a centralized solar power project, or as a component of such a project, a tribe could help develop the potential for distributed photovoltaics on reservation rooftops and parking lots.

Conclusion

The NHPA requirement to consult with tribes was enacted in 1992.[30] Implementing regulations have been in place since 1999.[31] NAGPRA, with its graves protection provisions, was enacted in 1990,[32] with final rules issued in 1995.[33] In addition, it has been two decades since the National Park Service, the agency that administers the National Register, issued *Bulletin 38*, the guidance document on how to identify and evaluate traditional cultural properties. Many tribes have established (THP) programs, which are tribal sources of expertise in cultural resources management.[34] Federal agencies, especially land managing agencies, should be expected to be familiar with this body of law. Some federal agencies have been quicker and better than others in learning how to consult with tribes in the NHPA section 106 process. There is an ongoing need for training. And new issues arise as the national historic preservation program evolves.

One topic that has recently found a place on the agenda of both ACHP and NPS is the concept of Native American Traditional Cultural Landscapes. As discussed by ACHP:

> These large scale properties are often comprised of multiple, linked features that form a cohesive "landscape." The recognition, understanding, and treatment of such places can be a struggle for the non-tribal or non-Native Hawaiian participants in the Section 106 process, partly due to the lack of experience in addressing such places and partly due to the lack of guidance regarding these traditional cultural landscapes.[35]

While the traditional cultural landscapes concept is bound to arise, probably with increasing frequency as renewable energy projects spring up with their related transmission facilities, a detailed discussion of this topic is beyond the scope of this paper.

By engaging tribes early in the review process, the risk of delays in federal approvals for renewable energy projects can be reduced, and some projects might even be improved. For consultation and collaboration to be successful, there must be a foundation of respect for tribal cultural heritage. Our national historic preservation program will also benefit, by documenting and preserving some of the places that are important for tribal cultures. The history of each Indian tribe is, after all, an important part of the history of the American people.

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1 16 U.S.C. §§ 470 – 470x-6.

2 Dean B. Suagee, *Consulting with Tribes for Off-Reservation Projects,* 25:1 Nat. Res. & Envt. 54 (Summer 2010).

3 16 U.S.C. § 470w(7). The wording "proposed Federal or federally-assisted" is used in NHPA section 106, 16 U.S.C. § 470f.

4 16 U.S.C. § 470f.

5 36 C.F.R. part 800.

6 NHPA section 101(d)(6), 16 U.S.C. § 470a(d)(6). This statutory provision was enacted in the NHPA Amendments of 1992. Pub. L. No. 102-575, tit. XL; *see generally* Cohen's Handbook of Federal Indian Law § 20.02[3] (2005 ed.).

7 The *ACHP Handbook* is available on the website of the ACHP Office of Native American Affairs: www.achp.gov/nap.html. This website also includes a number of other guidance documents relating to the involvement of tribes and Native Hawaiian organizations in the section 106 process.

8 36 C.F.R. § 800.3(f)(2) (emphasis added).

9 25 U.S.C. § 3002; implementing regulations at 43 C.F.R. part 10; *see generally* Cohen's Handbook of Federal Indian Law § 20.02[1] (2005 ed.)

10 16 U.S.C. § 470w(5).

11 36 C.F.R. § 60.4.

12 36 C.F.R. § 800.4.

13 Patricia L. Parker & Thomas F. King, National Register Bulletin 38, Guidelines for Evaluating and Documenting Traditional Cultural Properties (1990, revised 1992, 1998), available at: www.nps.gov/nr/publications/bulletins/nrb38/.

14 Bulletin 38, at 1.

15 *ACHP Handbook, supra* note 7, at 19.

16 36 C.F.R. § 800.4(c)(1).

17 36 C.F.R. § 60.4.

18 Tribal TCPs and other tribal historic properties also may be eligible under Criterion A (associated with events that have made a significant contribution to broad patterns of history), Criterion B (associated with the lives of persons significant in our past), and Criterion C (places with distinctive construction characteristics). See Keeper of the National Register, Determination of Eligibility, Nantucket Sound (January 4, 2010) (determining Nantucket Sound is eligible for the National Register with respect to tribal interests under Criteria A, B, C, and D).

19 NHPA § 304; 16 U.S.C. § 470w-3.

20 Dean B. Suagee, *Tribal Voices in Historic Preservation: Sacred Landscapes, Cross-Cultural Bridges, and Common Ground,* 21 Vt. L. Rev. 145, 215 (1996).

21 *ACHP Handbook*, *supra* note 7, at 12.

22 United Nations Declaration on the Rights of Indigenous Peoples, U.N. document A/61/L.67 (7 Sept. 2007), available at www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf.

23 U.S. Department of State: Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples (Dec. 16, 2010), www.state.gov/r/pa/prs/ps/2010/12/153027.htm.

24 U.N. Declaration, Article 43.

25 16 U.S.C. § 470w-3.

26 16 USC 470hh.

27 36 C.F.R. § 800.8.

28 Specifically, with 36 C.F.R. § 800.3(f).

29 *See* 40 C.F.R. §§ 1501.6, 1508.5.

30 Pub. L. No. 102-575, tit. XL.

31 64 Fed. Reg. 27043 (May 18, 1999); *republished* 65 Fed. Reg. 77697 (Dec. 12, 2000).

32 Pub. L. No. 101-601.

33 60 Fed. Reg. 62134 (Dec. 4, 1995) (codified at 43 C.F.R. part 10).

34 *See generally* National Association of Tribal Historic Preservation Officers: www.nathpo.org.

35 Advisory Council on Historic Preservation, Native American Traditional Cultural Landscapes Action Plan (Nov. 23, 2011), available at www.achp.gov/news10102011.html. Regarding the NPS initiative, *see* 77 Fed. Reg. 47875 (August 10, 2012).

HEARTH Act: Indian Tribes Can Lease Tribal Land Without BIA Approval

By Michael P. O'Connell, Stoel Rives LLP

On July 30, 2012, President Obama signed the Helping Expedite and Address Responsible Tribal Home Ownership Act of 2012 (HEARTH Act), Public Law 112-151, amending the Indian Long Term Leasing Act of 1955, 25 U.S.C. §415. The HEARTH Act authorizes Indian tribes to lease tribal land for business and other purposes for up to 75 years (25 year base term with option for two renewals terms of 25 years each for business and agricultural leases) without review and approval by the Secretary of the Interior (Secretary), acting through the Bureau of Indian Affairs (BIA), after the BIA approves tribal leasing regulations. By removing the requirement for BIA approval of tribal leases for tribes that adopt their own leasing regulations, the HEARTH Act eliminates the delays, costs, federal environmental reviews, federal consultation processes, federal administrative and judicial litigation, and other risks associated with BIA review and approval of tribal leases of tribal land; burdens that have discouraged and frustrated development of tribal land.

This article identifies key provisions of the HEARTH Act that improve opportunities for Indian tribes and those doing business with Indian tribes to lease and develop business projects on tribal land. This article compares HEARTH Act provisions with leases of tribal land by tribal government corporations authorized by section 17 of the Indian Reorganization Act (IRA), 25 U.S.C. § 477, and Tribal Energy Resource Agreement (TERA) leases, business agreements, and rights of way for energy development on tribal land authorized by the Energy Policy Act of 2005, 25 U.S.C. § 3504.

The HEARTH Act is an important step forward, empowering Indian tribes to exercise greater sovereignty, self-sufficiency and tribal self-government control over business development on tribal land. As another future step in this direction, as Congress has already done for leases by IRA tribal government corporations for up to 25 years, Congress could enact further legislation authorizing those Indian tribes volunteering to do so to have authority to lease tribal land, enter other business agreements involving the use of tribal land, and issue rights of way for development of tribal land up to 75 years without any BIA action, including but not limited to no BIA approval of tribal leasing regulations or TERAs.

I. Background to the HEARTH Act

The United States holds fee title in trust for Indian tribes to millions of acres of tribal land. BIA and related federal actions approving or disapproving leases, encumbrances of tribal land for seven years or more under 25 U.S.C. § 81, and issuance of rights of way on tribal land pursuant to the federal government's "trust responsibility" are fundamentally different from federal actions authorizing the use of land the federal government owns or manages for its own purposes, such as Forest Service, Bureau of Land Management, National Parks, and Defense Department lands.

With respect to tribal trust land, the Indian Nonintercourse Act (INA), 25 U.S.C. § 177, provides in part: "No purchase, grant, lease, or other conveyance of lands, or any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution." In consequence of the broad scope and severe consequences of non-compliance with this statute, the first task of Indian tribes and those proposing projects for use of tribal land is to search for a federal statute or treaty expressly authorizing such use, in addition of course to tribal authority under tribal law. The Indian Long Term Leasing Act of 1955, 25 U.S.C. § 415, is a general statutory authorization for surface leases of tribal and individual Indian trust land.

Prior to approval of any lease or lease modification under section 415(a), that statute requires the BIA, acting on behalf of the Secretary, to satisfy itself "that adequate consideration has been given to the relationship between the use of the leased land and the use of neighboring lands; the height, quality, and safety of any structures or other facilities to be constructed on such lands; the availability of police and fire protection and other services; the availability of judicial forums for all criminal and civil causes arising on the leased lands; and the effect on the environment of the uses to which the leased land will be subject." To implement these and other responsibilities in connection with federal trust responsibility regarding tribal trust land, the BIA adopted leasing and permitting regulations found at 25 C.F.R. Part 162. The BIA has proposed significant revisions to these regulations that would among other things establish specific rules for business leases, sections 162.401 through 162.471, and wind and solar resource leases, sections 162.501 through 162.596. 76 Federal Register 73784 (November 29, 2011).

Because the BIA is a federal agency, its actions approving leases of tribal and individual Indian lands and issuing rights of way under 25 U.S.C. §§ 323-328 and implementing regulations at 25 C.F.R. Part 169 must comply with those laws that apply to discretionary federal actions. These include the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 et seq., and Council on Environmental Quality (CEQ) NEPA regulations, 40 C.F.R. Part 1500, *see* 46 C.F.R. Part 46 (establishing procedures for compliance by Department of the Interior

and its bureaus with NEPA and CEQ regulations, 43 C.F.R. § 46.10);[1] section 7(a)(2) of the Endangered Species Act (ESA), 16 U.S.C. § 1536(a)(2), and the interagency ESA compliance regulations, 50 C.F.R. Part 402; section 106 of the National Historic Preservation Act (NHPA), 16 U.S.C. § 470f, Advisory Council on Historic Preservation (ACHP) regulations, 36 C.F.R. Part 800; and as applicable, Coastal Zone Management Act consistency determinations, 16 U.S.C. § 1456, and implementing regulations, 15 C.F.R. Part 930, Subpart D; Clean Water Act section 401 for water quality certifications, 33 U.S.C. § 1341; and National Marine Fisheries Service consultation with regard to effects of the federal action on essential fish habitat, 16 U.S.C. § 1855(b), and implementing regulations, 50 C.F.R. § 600.805 et seq. Each of these laws and their respective implementing regulations establish complex procedures that in themselves increase the time and costs of developing a project.

Decisions of the BIA approving or disapproving a lease of tribal land are subject to appeal to the Interior Board of Indian Appeals or by the Secretary. 25 C.F.R. Part 2 and 43 C.F.R. Subpart D. In turn, decisions of the Board or Secretary, as applicable, are subject to judicial review under the Administrative Procedure Act. 5 U.S.C. § 701 et seq.[2] Federal administrative and judicial proceedings to determine agency compliance with statutory and regulatory requirements add still further costs and time to project development. In some cases, these regulatory compliance and administrative and judicial review costs and delays have the incidental effect of delaying and in some cases killing projects outright.

Before enactment of the HEARTH Act, Congress enacted section 415 subsections authorizing the Tulalip Tribes, Navajo Nation, Puyallup Tribe of Indians, Swinomish Indian Tribal Community, Kalispel Tribe of Indians and Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation to issue leases without BIA approval after the BIA had approved tribal leasing regulations.[3] Experience with leases under these statutory authorizations confirms that projects on tribal land can be developed in less time, cost and risk when BIA lease review and approval is not required.

II. Implementing the HEARTH Act

The HEARTH Act is voluntary. Until a tribe acts to obtain BIA approval of tribal leasing regulations under the HEARTH ACT, the BIA retains authority to review and approve or disapprove leases of tribal land under 25 U.S.C. § 415(a). The HEARTH Act applies to surface leases for business, agricultural, recreational, educational, religious or residential purposes. The Hearth Act does not cover mineral resource exploration, development or extraction mineral agreements or leases or leases of Indian-owned allotments.

To exercise HEARTH Act leasing authority, Indian tribes must adopt tribal leasing regulations, subject to BIA approval, which must be consistent with the BIA's lease approval rules, codified at 25 C.F.R. Part 162, or future amendments to the BIA's. Hearth Act, section 2. In addition, tribal regulations must include a tribal environmental review process providing for identification and evaluation of "any significant environmental effects of the proposed action on the environment." If an Indian tribe carries out a project or activity funded by a federal agency, the tribe will have the option of relying on the environmental review process of the applicable federal agency rather than any tribal environmental review process otherwise authorized under the HEARTH Act.

Tribal regulations must include a process ensuring the public is informed of and has a reasonable opportunity to comment on any significant environmental impacts of the proposed action and that the Indian tribe respond to relevant and substantive comments before a tribe approves a lease. Federal safeguards are established to ensure that a tribe complies with its regulations and that a lessee complies with its lease.

Under the HEARTH Act, the BIA must take action on tribal lease regulations within 120 days of submittal. This time may be extended by the BIA "after consultation with the Indian tribe." The Act does not make tribal regulations automatically effective if the BIA fails to act in a timely manner. That may leave tribes with the task of seeking relief under applicable administrative or judicial remedies for failure to take action mandated by law. If the BIA disapproves tribal leasing regulations, the HEARTH Act requires the BIA to provide its reasons for doing so in writing.

Although tribal leasing regulations must be consistent with the BIA leasing regulations, the fact that Indian tribes can now take command of the process for leasing tribal land has procedural implications that could accelerate the schedule for approval of such leases and in turn development of projects on tribal land. Among the most significant procedural changes are that NEPA review, ESA section 7(a)(2) consultations, NHPA section 106 consultations and compliance, and essential fish habitat consultations, where required, will not be triggered by tribal action on review and approval of tribal leases. In turn, federal administrative or judicial review proceedings for review of federal actions will not be triggered in connection with tribal lease approval.

Overall, provisions for tribal assumption of authority for lease review and approval or disapproval authorized by the HEARTH Act should improve opportunities to develop projects on tribal land in less time and cost compared to tribal leases requiring federal review and approval. This positive assessment of the HEARTH Act needs to be tempered by the fact that projects on tribal land must comply with all applicable provisions of federal law. For example, if a project would propose that dredged or

fill material be discharged into waters of the United States, a permit from the Corps of Engineers (Corps) would be required under section 404 of the Clean Water Act, 33 U.S.C. § 1344. To issue such a permit, the Corps must comply with its permitting regulations, 33 C.F.R. Part 325, NEPA, ESA section 7(a)(2), NHPA section 106, Clean Water Act section 401 water quality certification requirements, and where applicable state concurrence that a Corps permit will be consistent with enforceable provisions of a state's coastal program, as required by section 307 of the Coastal Zone Management Act, 16 U.S.C. § 1456. If the project will have air emissions for which a permit is required under the Clean Air Act, that permit must be obtained, ordinarily from EPA. While tribal approval of a lease on tribal land does not itself trigger ESA section 7(a)(2) consultation requirements, actions taken under a tribal lease are subject to the ESA's take prohibitions. 16 U.S.C. §§ 1533(d) and 1358. In short, there is no general exemption from federal environmental laws for projects on Indian reservations conducted pursuant to leases issued by Indian tribes. In addition, many tribes have tribal environmental laws that must be complied with on tribal land. And while states generally lack authority to regulate Indian tribes and tribal members on their own reservations, non-members conducting activities on tribal land should carefully consider whether one or more state laws and regulations affect their activities, such as a state highway access authorization, and state taxes imposed on the leasehold interest held by a non-member under a lease of tribal land.

III. Comparison to Section 17 and TERA Leases, Business Agreements and Rights of Way

A. Section 17

Section 17 of the IRA, as amended in 1990, authorizes the Secretary, upon petition of any Indian tribe, to issue a charter of incorporation to the tribe, which becomes operative upon ratification by the governing entity of the tribe. 25 U.S.C. § 177. The section 17 corporation is a separate legal entity from the tribe. The charter may convey to the section 17 corporation the power to, among other things, "own, hold, manage, operate, and dispose of property of every description, real and personal, … but no authority shall be granted to sell, mortgage, or lease for a period exceeding twenty-five years, any trust or restricted lands included in the limits of any reservation. Any charter so issued shall not be revoked or surrendered except by an Act of Congress."

The power to "lease" tribal trust land within a reservation for up to 25 years that may be included in a section 17 charter is not conditioned on BIA approval or adoption of tribal leasing regulations approved by the BIA. As a statute enacted by Congress, section 17 appears to satisfy the INA requirement that a lease of tribal land be made "pursuant to the Constitution."

Prior to 1990, section 17 was available only to Indian tribes that had accepted the IRA (many had not) and limited the time that charters could authorize leases to 10 years. The 1990 amendment to section 17 expanded to "any tribe" authority to petition the Secretary for issuance of a section 17 charter. The 1990 amendment also expanded the time charters could authorize leases to 25 years. To take advantage of the extended time for lease authorizations, tribes which had obtained charters prior to the 1990 amendment must seek an amendment to their corporate charters first from the Secretary and then approval from the governing body of the tribe.

There has been relatively modest use of leasing authority under section 17. This may change with time. The advantage of issuing a lease without the need for BIA approval that is the foundation of the HEARTH Act applies to section 17 leases as well. One of the main drawbacks to section 17 currently is that such leases cannot exceed 25 years. For certain energy projects and other projects requiring significant capital investments and return on investment time frames, 25 years is too short a time frame. Congress could amend section 17 to (a) authorize leases of tribal land by section 17 corporations on base terms up to at least 50 years, (b) include authorization for an additional term up to 25 years, and (c) expand the scope of matters that section 17 corporations could enter to include business agreements other than leases rights of way and mineral development. These modifications would make section 17 very attractive as a means of promoting business development on tribal lands.

B. TERA Leases, Business Agreements and Rights of Way

TERAs were authorized by the Energy Policy Act of 2005. 25 U.S.C. § 3504. A TERA is an agreement between an Indian tribe and the Secretary authorizing a tribe to issue and manage leases, business agreements other than leases and rights of way for energy development on tribal land. Once a tribe and the Secretary enter a TERA, the tribal party is authorized to issue leases, business agreements and rights of way for energy development on tribal land without BIA approval. TERAs may include authorization to develop energy minerals.

The BIA regulations implementing this statutory authority span 27 pages in the Code of Federal Regulations. 25 C.F.R. Part 224. Among other requirements, the BIA must comply with NEPA, before approving a TERA. 25 C.F.R. § 224.70. By the time an Indian tribe and the BIA do everything necessary to enter a TERA and a tribe then uses this authority to develop tribal energy resources, it is not clear what advantage has been gained over seeking BIA approval of the lease or business agreement or issuance of right of way under conventional au-

thority. In the seven years since Congress authorized TERAs, none have been entered and in consequence no tribe has used this authority to issue a lease, business agreement or right.

This is not to say that TERAs will never be approved and used or that they cannot be useful. But the initial hope that TERAs would significantly improve opportunities for Indian tribes and business entities to develop energy resources on tribal land without BIA oversight and procedural burdens has been frustrated by procedures that reinvent obstacles TERAs were intended to solve.

IV. The HEARTH Act and Beyond

The HEARTH Act empowers all Indian tribes to seek authority to lease tribal land without BIA approval for up to 75 years. Based on experience with existing statutory authorizations granting this authority, the HEARTH Act could significantly improve tribal and counterparty opportunities to develop business on Indian reservations.

The HEARTH Act is limited to surface leases; it does not include mineral agreements or rights of way. One way Congress could improve on the HEARTH Act is to authorize those Indian tribes wishing to do so to manage tribal mineral resources and rights of way without BIA approval. This could take the model established by the HEARTH Act, requiring Indian tribes to adopt tribal regulations similar to the BIA's regulations and subject to BIA approval.

Nonetheless, the HEARTH Act is built on a model that deprives Indian tribes of authority to manage their own business affairs without federal oversight. The primary arguments for keeping this federal role is that the federal government has a trust responsibility to Indian tribes and that the federal government, as owner of the fee to tribal trust land, has an interest in how tribal trust land is managed. To say that the United States has done poorly on the whole as a trustee, and frequently has been burdened by conflicts of interest as a trustee, is an understatement.

Indian tribes that are willing to manage all their land resources, surface and mineral, with little or no BIA oversight, should be given the authority to do so. Congress could authorize those Indian tribes wishing to do so on their own or through their section 17 corporations to (a) lease, enter other business agreements to develop tribal land, including mineral agreements, and issue rights of way for base terms up to at least 50 years, (b) grant options for such transactions for an additional term up to 25 years without BIA review, and (c) develop their mineral resources through leases and other mineral agreements for similar periods without BIA approval or oversight of any kind. Congress should allow Indian tribes to use conventional procedures for developing tribal land and resources in cases where a tribe would prefer greater BIA involvement. Congress also should authorize the BIA to provide technical assistance in development and administration of business agreements to those Indian tribes that request such assistance.

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1 *E.g., Davis v. Morton,* 469 F.2d 593 (10th Cir. 1972) (BIA lease approval requires compliance with NEPA); BIA Final Environmental Impact Statement for the K Road Moapa Solar Generation Facility Project lease, 77 Federal Register 15794 (March 16, 2012), and Record of Decision signed by Secretary of the Interior Salazar approving the project lease (June 12, 2012).

2 *See Skull Valley Band of Goshute Indians v. Davis,* 728 F. Supp. 2d 1287 (D. Utah 2010) (setting aside as arbitrary and capricious Department of the Interior disapproval of a tribal lease).

3 The BIA has approved at least the Tulalip, Swinomish and Navajo tribal leasing regulations.

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