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IMPLEMENTING THE NORTHWEST POWER PLAN: CONFLICTS WITH MONTANA'S MAJOR FACILITY SITING ACT

Kathleen McBride

INTRODUCTION

A new concept in regional energy planning was initiated with the congressional enactment of the Pacific Northwest Electric Power Planning and Conservation Act¹ (the Power Planning Act) in late 1980. The goal of the Act was to provide the region with an adequate and economical electric power supply while encouraging conservation and the use of renewable resources.² Creation of the Northwest Power Planning Council³ (Council) and the development and adoption of the regional conservation and electric power plan⁴ (the Power Plan) both marked significant milestones in the implementation of the Power Planning Act.

The innovative energy planning strategy adopted by the Planning Council in the regional Power Plan uses flexibility in the selection of energy resources⁵ as a means to reduce the risks to both utilities and consumers of overbuilding or underbuilding electrical generating facilities. Methodological errors in traditional energy planning techniques in the Pacific Northwest previously resulted in the actual abandonment of partially completed power plants.⁶ The Power Plan incorporates a new arrangement called "options"⁷ into the energy planning process. The options approach allows a potential resource to move through the initial, but time consuming, design and site permitting stages before an actual decision to begin construction is made by the Council. In this process a resource option could be scheduled for construction, it could be eliminated from the group of possible resources under option or it could be "put on the shelf," or "banked," until there is a demand for the electricity and the resource is

1. Pub. L. No. 96-501, December 5, 1980, 94 Stat. 2697, 16 U.S.C. § 839 (1982).

2. 16 U.S.C. § 839 (1982).

3. *Id.* § 839b(a)(1).

4. *Id.* § 839b(a)(1)(A). The Planning Council adopted the Northwest Conservation and Electric Power Plan on April 27, 1983.

5. Northwest Power Planning Council, 1983 Northwest Conservation and Electric Power Plan 1, at 1-3 (1983) [hereinafter cited as Power Plan]. The Council is also mandated to develop a program to enhance the fish and wildlife of the Columbia Basin. 16 U.S.C. § 839b(a)(1)(B) (1982).

6. See, Bonneville Power Authority Analysis of Resource Alternatives: Summary and Conclusions (May 1983); Northwest Power Planning Council, WPPSS 1, 2, and 3; Decisions Under Uncertainty: Draft Issue Paper (October 1983); *Customers Pay Dearly For Nuke Energy and WPPSS Debacle Experienced at Other Plants*, Missoulian Jan. 8, 1984 at B-1.

7. Power Plan, *supra* note 5.

needed.⁸

The Power Planning Act prioritizes the acquisition of electric energy resources. The Act gives top priority to conservation, followed by renewable resources and cogeneration facilities.⁹ The lowest priority category, "all other resources,"¹⁰ includes traditional coal and nuclear fueled thermal power stations.¹¹ Siting authority for these facilities is retained by the state.¹² In Montana, siting decisions for large electric power stations must follow the Major Facility Siting Act¹³ (Siting Act). Thus, the procedural and substantive requirements of the Siting Act could constrain implementation of the Power Plan's option approach in Montana.

An examination of the history of the Siting Act can identify possible philosophical and legal impediments which must be addressed or changed before the optioning of energy resources is implemented in Montana. More importantly, an examination of the history of the Siting Act may provide some insight into whether Montanans will want to change the Siting Act in order to implement the option approach called for in the Power Plan.

This comment is divided into four sections. Section one describes the history of the Planning Act, the mechanics of resource optioning, and the development of the Power Plan. Section two examines the legislative history of the Montana Major Facility Siting Act and summarizes the siting procedure. Section three identifies conflicts between the Siting Act and the Power Plan. Section four provides conclusions and offers recommendations for implementing the Power Plan in Montana.

THE PACIFIC NORTHWEST ELECTRIC POWER PLANNING AND CONSERVATION ACT AND THE NORTHWEST CONSERVATION AND ELECTRIC POWER PLAN

I. BACKGROUND

Federal development of the electric energy potential of the Pacific Northwest began in 1937 when President Franklin Roosevelt signed into law the Bonneville Project Act¹⁴. This Act directed the Bonneville Power

8. *Id.* There are two other types of resource options: (1) acquisition prior to regional need and (2) acquisition of an existing resource options. *Id.* See Michie, *Impacts of the Pacific Northwest Electric Power Planning and Conservation Act on the Development of Energy Resources in the Pacific Northwest: An Analysis of the Resource Priority Scheme*, 4 U. PUGET SOUND L. REV. 299 (1981).

9. 16 U.S.C. § 839b(e)(1) (1982).

10. *Id.*

11. Power Plan, *supra* note 5, at 8-5 and 8-6.

12. 16 U.S.C. § 839g(a)(3) (1982).

13. Mont. Code Ann. §§ 75-20-101 to -503 (1983).

14. Bonneville Project Act enacted Aug. 20, 1937, ch. 720, 50 Stat. 731, (codified at 16 U.S.C. §§ 832a-832i (1982)).

Administration (BPA) "to encourage the widest possible use of all electric energy."¹⁵ BPA marketed power from hydroelectric generating facilities on the Columbia River and was very successful in meeting the stated purpose of the Act.

But by the early 1970's, despite efforts to seek a cooperative arrangement to obtain the regional efficiencies of an integrated electrical system while preserving local options, BPA and the regional private and public utilities projected that they could not keep up with the growing demand for electricity.¹⁶ Also, the development of all feasible dam sites on the main stream of the Columbia River caused the utilities and BPA to turn away from hydropower and toward more costly nuclear and coal-fired plants to meet the region's projected electrical needs.¹⁷ In addition, rate disparities between investor-owned and public utility customers, who were paying only about half as much as the customer of a private utility, prompted a divisive struggle for access to BPA's limited low-cost hydropower resources.¹⁸

The long-time historical involvement of the federal government with power development in the Pacific Northwest led Congress to address the complex issues of electrical power planning and allocation in this region. After five years of public debate, interest group lobbying, extensive hearings, and compromise, Congress in late 1980 passed a comprehensive energy act designed especially for the Pacific Northwest. The Pacific Northwest Electric Planning and Conservation Act directs BPA to reallocate the limited existing supplies of low cost federally produced hydropower among an expanded number of customers.¹⁹ It also authorizes BPA to continue its traditional role of transmitting and marketing power, but augments BPA authority to acquire electric power sources from non-

15. 16 U.S.C. § 832 (1976).

16. Under the Hydro-Thermal Power Plan, a precursor to the Northwest Power Plan, BPA agreed to acquire electricity by entering into net billing agreements with its publicly owned utility customers. These agreements made it possible for BPA to meld the higher rates of thermal generating plants with the lower hydropower costs—a benefit to the customers. These plants were built by both publicly owned and investor owned utilities. The Centralia coal-fired plant, the Trojan nuclear plant, and the three Washington Public Power Supply System (WPPSS) nuclear plants are all projects originating from the hydro thermal power plan. Bonneville Power Administration, *The Pacific Northwest Power Planning and Conservation Act* (n.d.) (available from Northwest Power Planning Council, Portland, OR).

Revisions in IRS regulations denying tax exempt status to bonds sold by public utilities to finance the building of plants where power from the facilities is sold by BPA partially caused the plan to fail. In addition the escalating cost of new thermal plants curtailed BPA's financial ability to participate in net-billing agreements since BPA reached its limit sooner than anticipated. *Id.* at 3.

17. *Id.* at 2.

18. *Id.* at 4.

19. The Power Act expands the resource base available. 16 U.S.C. § 839a(10) and § 839a(12) (1982).

federal entities in order to meet future regional energy demands.²⁰

II. PURPOSES OF THE ACT

The purposes of the Act²¹ are:

(1) to encourage conservation and efficiency in the use of electric power and the development of renewable resources within the region;

(2) to assure the region of an adequate, efficient, economical and reliable power supply;

(3) to provide for the participation and consultation of the region's states, local governments, consumers, customers, users of the Columbia Rivers System and the general public in developing the region's plans and programs, facilitating the orderly planning of the region's power system and providing environmental quality;

(4) to provide the full cost for electrical energy production be paid by the customers of BPA and their consumers;

(5) to ensure that state and local governments and other entities maintain their regulatory authority and responsibilities; and

(6) to protect, mitigate and enhance fish and wildlife.

These declared purposes of the Power Planning Act are to be construed in a manner consistent with other applicable environmental laws.²²

The Act established the Northwest Power Planning Council²³ (Council) to provide a publicly accountable body which would conduct regional energy planning²⁴ and review the new authority given to BPA to finance resources and conservation.²⁵ The governors of Washington, Idaho, Montana and Oregon each appoint two members to the council.²⁶ The Council is neither part of BPA nor a federal agency, but rather an independent regional organization. Council functions are funded by BPA, based upon power sales.²⁷

Section 839(b)(a)(1) of the Power Planning Act directs the Council to prepare and adopt a regional conservation and electric power plan; a plan which is to be a "blue print" for energy development in the region. BPA is

20. BPA now has authority to use the BPA fund to purchase electric power. 16 U.S.C. § 839d(b)(4) (1982).

21. 16 U.S.C. § 839 (1982).

22. *Id.*

23. *Id.* § 839b(a)(1).

24. *Id.* § 839b(a)(1)(A).

25. *Id.* § 839b(d)(2), c(d)(3), d(c)(1)(2). In addition the Council is responsible for developing a program to "protect, mitigate, and enhance fish and wildlife." *Id.* § 839b(a)(1)(B).

26. *Id.* § 839b(a)(2).

27. *Id.* § 839b(c)(10)(A).

given authority to decide what major projects to sponsor,²⁸ but the Council retains the authority to review whether or not a given project is consistent with the Power Plan.²⁹ Projects deemed to be inconsistent with the Power Plan must be authorized and funded by Congressional action.³⁰

Priority under the Power Plan is to be given to resources which the Council determines to be cost-effective.³¹ Cost-effective conservation resources are to be acquired first,³² followed by renewable resources.³³ "Resources utilizing waste heat or generating resources of high fuel conversion efficiency are to be acquired next."³⁴ Fourth in order of acquisition are "all other resources."³⁵ "Due consideration"³⁶ in resource

28. *Id.* § 839d(c)(1).

29. *Id.* § 839d(c)(2).

30. *Id.* § 839d(c)(3).

31. *Id.* § 839b(e)(1). Cost effective is defined in 16 U.S.C. § 839a(4)(A) (1982):

(4)(A) "Cost-effective", when applied to any measure or resource referred to in this Act, means that such measure or resource must be forecast—

(i) to be reliable and available within the time it is needed, and

(ii) to meet or reduce the electric power demand, as determined by the Council or the Administrator, as appropriate, of the consumers of the customers at an estimated incremental system cost no greater than that of the least-cost similarly reliable and available alternative measure or resource, or any combination thereof.

(B) For purposes of this paragraph, the term "system cost" means an estimate of all direct costs of a measure or resource over its effective life, including, if applicable, the cost of distribution and transmission to the consumer and, among other factors, waste disposal costs, end-of-cycle costs, and fuel costs (including projected increases), and such quantifiable environmental costs and benefits as the Administrator determines, on the basis of a methodology developed by the Council as part of the plan, or in the absence of the plan by the Administrator, are directly attributable to such measure or resource.

(C) In determining the amount of power that a conservation measure or other resource may be expected to save or to produce, the Council or the Administrator, as the case may be, shall take into account projected realization factors and plant factors, including appropriate historical experience with similar measures or resources.

(D) For purposes of this paragraph, the "estimated incremental system cost" of any conservation measure or resource shall not be treated as greater than that of any nonconservation measure or resource unless the incremental system cost of such conservation measure or resource is in excess of 110 per centum of the incremental system cost of the nonconservation measure or resource.

32. *Id.* § 839b(e)(1). Section 839a(3) defines conservation as "any reduction in electric power consumption as a result of increases in the efficiency of energy use, production, or distribution."

33. A renewable resource is defined as a resource which utilizes solar, wind, hydro, geothermal, biomass, or similar sources of energy and which is used for electric power generation or will reduce the electric power requirements of a consumer, including by direct application. *Id.* § 839a(17).

34. These resources include combustion turbines and co-generation.

35. Coal fired plants and nuclear facilities are included in this priority.

36. 16 U.S.C. § 839b(e)(2) (1982). See *Sierra Club v. Butz*, 349 F. Supp. 934 (9th Cir. 1972), interpreting due consideration. See Blumm, *Fulfilling the Parity Promise: A Perspective on Scientific Proof, Economic Cost, and Indian Treaty Rights in the Approval of the Columbia Basin Fish and Wildlife Program*, 13 ENV'T'L L. 103 (1983); Blumm and Johnson, *Promising a Process in Parity: The Pacific Northwest Electric Power Planning and Conservation Act and Anadromous Fish Protection*, 11 ENV'T'L L. 497 (1981).

acquisition is to be given to environmental quality, compatibility with the existing regional power system, and protection and enhancement of fish and wildlife.

III. THE NORTHWEST CONSERVATION AND ELECTRIC POWER PLAN

On April 27, 1983, after more than two years of Council work, and considerable public input,³⁷ the Council adopted the Northwest Conservation and Electric Power Plan.

In planning for the future electrical needs of the Pacific Northwest, the Council recognized that certainty about the future does not come from technical sophistication of the methods used to create a forecast.³⁸ Instead, it comes from the flexibility and confidence in the number and types of resources available to meet any given energy condition.³⁹ The Power Plan was developed with consideration of the following goals:

- * To provide an adequate supply of low-cost electricity;
- * To select resources following the cost-effectiveness principles and priorities in the Act;
- * To evaluate all resources from a total regional system perspective to ensure their compatibility with the existing hydro-power system;
- * To select resources with the least adverse impacts on the environment, or those whose adverse environmental impacts can be mitigated;
- * To select resources that are consistent with protecting and enhancing fish and wildlife, and that mitigate power system impacts on fish and wildlife;
- * To provide a reliable power supply that will meet any future load growth; and
- * To develop a flexible strategy so that the plan can be modified as conditions change and new information becomes available.⁴⁰

In the 1970's forecasts of future growth in energy consumption were most commonly straight line projections of future energy use based on past trends. The future was assumed to be the past written larger and no flexibility was provided.⁴¹ However, projections of future energy consumption under the Plan have been made by bracketing the region's assumed

37. See, e.g., Northwest Conservation Act Coalition, Model Electric Power and Conservation Plan for the Pacific Northwest: A Summary (May 5, 1982).

38. See for background: S. Aos, *et al.*, Design and Evaluation of a Flexible Power Plan, (prepared by Washington State Energy Office July 1982); Kai N. Lee, The Path Along the Ridge: Regional Planning in the Face of Uncertainty (A discussion paper) (March 1982); Northwest Power Planning Council, Power Planning in Uncertainty (n.d.).

39. Power Plan, *supra* note 5, at 2-1.

40. *Id.*

41. See S. Aos, *supra* note 38.

energy consumption between the highest and lowest plausible forecasts over the next 20 years.⁴² This type of projection, the Council believed, would more accurately reflect the region's potential demand for electricity.⁴³ The bracketed range in the forecast accounts for such factors as variable economic growth and energy prices.⁴⁴

Power Plan strategy also emphasizes flexibility in the selection of resources to meet the energy needs of the region⁴⁵ and incorporates the cost-effective requirement of the Act.⁴⁶ The Power Plan advocates the use of smaller resources such as conservation and renewable energy with shorter lead times wherever they are economic.⁴⁷ Major generating resources with longer lead times are included in the plan by a new arrangement called "options." This aspect of the Power Plan will be discussed in detail later in this comment.

The twenty-year energy forecast in the Power Plan⁴⁸ views conservation⁴⁹ as playing a major role in meeting future electric energy needs. Should the region need additional electric energy resources, hydropower "that could be developed with a minimum of damage to fish and wildlife and the environment"⁵⁰ will be utilized. Cogeneration facilities⁵¹ are foreseen to meet high energy consumption growth. The contingencies of very high economic and population growth, or the failure of conservation and renewable resources to perform as anticipated, are addressed by the inclusion of new thermal plants in the resource mix for the late 1990's.⁵² The Power Plan also proposes to sell within the region more of the low-cost interruptible power from the BPA hydro-electric power system.⁵³

Even in the short time since the passage of the Power Planning Act, the electrical energy supply picture changed dramatically. Development of the Power Planning Act occurred when electric energy consumption was expected to rise. The present unexpected surplus in electrical energy is

42. Power Plan, *supra* note 5, at 1-2. The Power Planning Act required a demand forecast of at least 20 years. 16 U.S.C. § 839b(e)(3)(D).

43. In fact, electrical energy demand is lower than the lowest bracket of projected electrical energy demand. *See, e.g. Energy Surplus Gives Planners More Time*, Montana Standard, Sept. 28, 1983, at 6.

44. Power Plan, *supra* note 5, at 4-3 and 4-4.

45. *Id.* at 1-3. *See also*, S. Aas, *supra* note 38.

46. 16 U.S.C. § 839b(e)(1) (1982). *See supra* note 31, for definition of cost-effectiveness.

47. Power Plan, *supra* note 5, at 1-3.

48. Required by 16 U.S.C. § 839b(e)(3)(D) (1982). *See* Power Plan, *supra* note 5, at 1-3.

49. 16 U.S.C. § 839b(b)(e)(1) (1982). Conservation is given the highest priority.

50. *Id.* § 839b(e)(1). Hydropower is included in the definition of renewable resources. *See supra* note 33.

51. *See supra* note 32.

52. Power Plan, *supra* note 5, at 1-3.

53. *Id.* BPA is required to expand the market for the low-cost hydropower under 16 U.S.C. § 839c (1982).

giving the region and the power planners "time to deliberate more carefully on future regional power needs."⁵⁴ Thus over the next two years the primary focus of the Power Plan will be to:

(1) develop and test conservation programs in all sectors of the economy so that the programs will be reliable and available when the region needs additional power.

(2) resolve potential problems associated with holding options on resources and with the use of combustion turbines to meet unanticipated local growth by working with state and federal regulatory agencies.

(3) develop research and demonstration programs to learn more about the cost and feasibility of renewable resources.

(4) provide marketing assistance to encourage the installation of co-generation facilities.⁵⁵

The overall planning strategy adopted by the Council must meet the purpose of the Power Planning Act—"to assure the Pacific Northwest of an adequate, efficient, economical and reliable power supply."⁵⁶ The Power Plan's response to this purpose is the recognition that both conventional and less-conventional resources may be necessary over the next 20 years to meet the region's electric energy needs. Ensuring an adequate supply of electricity at the lowest possible cost to the region's rate payers became the primary concern as the Council developed a comprehensive approach to regional energy planning.

The Council's approach emphasizes flexible resources and conservation programs that can be modified to meet changing demands for electricity. Some resources, like conservation programs, can be initiated quickly, and the rate of implementation can be adjusted over time to fit actual needs. On the other hand, major electric generating plants with long construction periods require critical decisions many years before the power might be needed. Therefore, long lead times increase the risk posed by the uncertainties inherent in energy planning. An investment in a long lead-time plant is warranted only when it is a much lower cost resource and the probability of needing that type of resource to produce electricity clearly indicates low probability of future demand falling short of the forecast.⁵⁷

Risk, resource lead time, and size are all incorporated into the Power Plan, which uses flexibility and cost effective resources to minimize both lead times and the amount of capital at risk.

There are two major components of the flexible planning strat-

54. *Energy Surplus Gives Planners More Time*, Montana Standard, September 28, 1983, at 6.

55. Power Plan, *supra* note 5, at 1-3.

56. 16 U.S.C. § 839 (1982).

57. Power Plan, *supra* note 5, at 3-1.

egy—conservation and “options.” Conservation adds flexibility to the Power Plan as the single resource with both a short lead time and the capability to be acquired in extremely small increments, each of which begins saving (generating) energy immediately.⁵⁸ In addition, plans involving conservation can be quickly and easily modified to respond to changing energy supply/demand conditions.

The second and novel approach called “options,”⁵⁹ involves shortening the length of lead time when the need for additional energy must be forecast and new resources acquired. The forecast period can be reduced through an option, a contract between a proposed electric power station owner and BPA:

An option authorizes the region [BPA] to construct, delay, or cancel the project as part of the cost-effective regional energy plan. The project sponsor would be compensated for the risk that the project might be rescheduled or terminated. An option is a form of insurance to the region, because it helps the regional planning process adapt to uncertain future loads. The preconstruction payments to the sponsor are similar to insurance premiums.⁶⁰

The Power Plan cites reduction of resource investment costs, increased flexibility of the resource mix and potential reduction of environmental degradation⁶¹ as the primary benefits of the option approach to energy planning.

There are three types of resource options:

(1) *Resource banking*: a resource is sited, licensed, and designed but the construction phase can be put on hold.

(2) *Acquisition prior to regional need*: a resource is acquired before the region needs the power, but power is sold outside the region at a price that recovers all costs of producing the electricity. Specific “callback” would permit BPA to use the power inside the region when necessary.

(3) *Existing resource option*: A resource used for temporary needs, may be gained from an existing resource whose output is acquired by paying for its operating costs.⁶²

Option 1, resource banking, as it relates to coal-fired power plants is addressed in this comment.

Under the option strategy, an electric power generating resource may

58. *Id.*

59. *Id.*

60. *Id.* at 3-3.

61. The Plan states that reducing environmental damage may be accomplished when “large scale generating plant construction can be postponed until need is more certain . . . [and] the accompanying environmental impacts can be post-poned or avoided.” Power Plan, *supra* note 5, at 3-2.

62. *Id.* at 3-3.

go through five steps:

1. *Option Planned:* The resource is identified as potentially needed, but no decision or financial commitment is necessary. Bonneville could begin developing incentives and requests for options, establishing criteria for selecting options, and resolving potential legal and technical questions. Based on the projected cost-effectiveness and need for the resource and the costs of securing an option, differing option points may be appropriate for each resource.

2. *Option Initiated:* The Council and Bonneville determine that the resource may be needed in the future and Bonneville enters into a contractual arrangement to provide regional financial assistance for the siting, licensing, and design of a resource, in return for regional control of project timing.

3. *Option Secured:* All technical, legal and administrative issues have been resolved and the resource is ready to move into the construction phase. At this stage, the construction of the resource could be delayed without affecting the ability of the region to move ahead on the project at some future date. Expected lifetime of the option will be determined by the Council at this time and the option will be scheduled for a comprehensive review when this lifetime expires. An option may be resecured after satisfying environmental and technical standards required to relicense the resource and site.

4. *Resource Acquired:* The Council and Bonneville determine that the secured option should be exercised based on current conditions and forecasts of demand. Under the resource acquisition provision of the Act, Bonneville would purchase the resource and the project sponsor would move into the more expensive construction phase.

5. *Resource Completed:* The power is available to meet the obligations of the Bonneville Power Administration.⁶³

But, as was previously noted, the states retain ultimate authority for siting major electrical generating facilities within their boundaries under the Power Planning Act. Thus, in Montana, compliance with the Major Facility Siting Act must also be secured.

MONTANA'S MAJOR FACILITY SITING ACT

I. BACKGROUND

The Fort Union coal formation, underlying much of eastern Montana, North Dakota and Wyoming, is an attractive energy source estimated to

63. *Id.* at 3-3.

contain 40% of known U.S. coal reserves. The development of these resources by strip mining and subsequent on-site electrical generation, coal gasification or liquifaction could require high environmental costs to a sparsely populated region which currently enjoys clean air and has scarce water resources to spare for industrial use and mine reclamation.

In Montana, strip mined coal production has increased substantially in recent years—from 4 million tons annual coal production in 1970, to 20 million in 1975, to over 26 million tons in 1983.⁶⁴ But, even these levels are insignificant compared to the predictions of some federal and corporate energy planners. The North Central Power Study⁶⁵ published in 1971 proposed 42 mine mouth electric generating plants located at strip mines throughout the Northern Great Plains; 21 of those sites were proposed for eastern Montana. Further plans for coal gasification and liquifaction plants were announced by private industry. This massive coal development scenario was immediately opposed by land owners and local citizen groups.⁶⁶

For Montana, part of the focus of planning for this predicted development was not on whether the coal would be mined, but rather on how the coal would be used. The coal could either be shipped to the "load centers" where it would be converted into useful energy or it could be converted to electricity or gaseous or liquid fuels at the mine mouth and transported through transmission lines and pipelines.

In 1972, the Montana Power Company announced the construction of the first two of a series of mine-mouth generating plants at Colstrip, Montana. Local landowners and citizen groups unsuccessfully attempted⁶⁷ to enjoin the actual construction at Colstrip until Montana Power had obtained a permit under the state's Air Pollution Control Act.⁶⁸ In early 1973 the Montana Department of Health and Environmental Sciences (DHES), issued the necessary air and water quality permits, noting: "While the technical specifications of the two plants required it [the Department of Health and Environmental Sciences] to grant the permits, the overall benefits associated with these plants were outweighed by the

64. For the 1983 Fiscal Year, 26,568,978 tons of coal were mined in Montana. (Personal communication, Department of Revenue, January 10, 1984).

65. U.S. Bureau of Reclamation (lead agency), North Central Power Study, Report of Phase 1, Vol. 1, Northern Great Plains Resource Program (October 1971).

66. Organizations such as the Northern Plains Resource Council (NPRC) formed in response to this announced development.

67. The unsuccessful legal action by the NPRC is one of the key reasons cited for the need for a comprehensive Siting Act. *The Utility Siting Act, 1973: Hearing on H.B. 127 Before the House Natural Resources Committee*. (January 25, 1973). The Siting Act is codified at MONT. CODE ANN. §§ 75-20-101 to -503 (1983).

68. MONT. CODE ANN. § 75-2-101 (1983).

long range damage they would inflict on the area."⁶⁹

The potential for environmental damage associated with coal development had not gone completely unnoticed by the Montana Legislature. Progressive environmental laws such as the Clean Air Act, Water Quality Act and Montana Environmental Policy Act⁷⁰ were passed. Also indicative of the State's political attitude was the adoption of the new 1972 state constitution, holding the state and each person to the duty to "maintain and improve a clean and healthful environment in Montana for present and future generations."⁷¹

Legislative response to the issues of power plant siting also came swiftly. By the time the 42nd legislature convened in January 1973, legislation was being drafted for a Utility Siting Act.⁷² The recent experience with the Colstrip plants then under construction clearly pointed out the need for this bill.⁷³ The failure of legal actions to control utility construction under existing law fostered the necessity for a more comprehensive framework for siting. Amid the recognition of a national energy crisis and the prospects of other government studies⁷⁴ indicating Montana as the site for electric generating plants, the Director of the Department of Natural Resources (DNRC) testified to the "urgency of this kind of legislation; as the state presently has little authority in this field."⁷⁵ Other testimony captured this urgency as well: "The social, economic and environmental concerns of Montanans, not only demand quick action, but institutionalized procedures and guidelines that control, direct, and when necessary, constrain exploitation of our state's coal resources . . . [The Utility Siting Act is] a procedure whereby Montana's coal resources may be utilized equitably, providing electricity for other states, yet maintaining the stability of our own economy and the integrity of our physical and social

69. Montana Department of Health and Environmental Sciences, Final Environmental Impact Statement on the Proposed Montana Power Company Electrical Generating Plant at Colstrip, Montana (1973).

70. Clean Air Act of Montana, ch. 313, 1967 Mont. Laws 1090 (1967), (current version at MONT. CODE ANN. §§ 75-2-101 to -429 (1983)); Water Quality Act of February 29, 1967, ch. 197, § 121, 1967 Mont. Laws 466 (1967) (current version MONT. CODE ANN. §§ 75-5-101 to -641 (1983)); Montana Environmental Policy Act, ch. 238, 1971 Mont. Law 984 (1971) (current version MONT. CODE ANN. § 75-1-101 to -207 (1983)).

71. Mont. Const. art. XI, MONT. CODE ANN. Vol. 1 (1983). For a discussion of environmental rights under the 1972 Montana Constitution, see Kemmis, *Environmental Rights, The Montana Constitution*, 39 MONT. L. REV. 224 (1978).

72. H.B. 127, 42d Montana Legislature (1973) (introduced by Bardanouve).

73. *Hearing on H.B. 127*, *supra* note 67, (statement of the Department of Health and Environmental Sciences).

74. *E.g.* the study of the Missouri Basin Systems Group (early 1972).

75. *Hearing on H.B. 127*, *supra* note 67 (statement of Gary Wicks, Director of the Montana Department of Natural Resources).

environment."⁷⁶

The four major concepts embodied in the Utility Siting Act were:

- (1) certification: construction of generating plants requires permission by the state before the fact.
- (2) fact-finding: gathering of knowledge by state agencies before the proposed utility construction is permitted.
- (3) funding: a filing fee paid by the applicant to fund expenses of the state agency performing siting studies.
- (4) public involvement: a public hearing related to the application; individuals are given legal standing to use court procedures if the requirements of the act are not enforced by the agencies.⁷⁷

The act was to accomplish the certification process in a "one-step . . . procedure . . . whereby the siting board would coordinate various state authorities now exercising fragmented power."⁷⁸ The legislature included in the statement of policy and findings: "[it] is necessary to ensure that the location, construction and operation of power and energy conversion facilities will produce minimal adverse effects on the environment and the citizens of this state"⁷⁹

By 1975, the legislature renamed the original Utility Siting Act the Major Facility Siting Act.⁸⁰ Besides major electric utility facilities, regulation was extended to facilities producing other products such as synthetic oil and natural gas and converting coal for industrial processes. Traditional oil and gas refineries were specifically excepted from the Act. Recognizing additions to existing facilities could also have a significant impact, the legislature set \$250,000 in construction cost⁸¹ as the threshold amount for expanded facilities to be brought under the Act. The electrical production output of new facilities to be regulated by this Act was also significantly reduced.⁸² Also now included in the Act were facilities utilizing, refining or converting 500,000 or more tons of coal per year and facilities involved with the underground in-situ gasification of coal.⁸³

The first test of the original utility siting procedure commenced with the Montana Power Company application for the certification of Colstrip

76. *Hearing on H.B. 127, supra* note 67 (statement of Eldon Smith).

77. *Id.*

78. *Id.*

79. MONT. CODE ANN. § 75-20-102 (1983).

80. H.B. 281, 44th Montana Legislature (1975).

81. This amount was increased to \$10 million in 1979. MONT. CODE ANN. § 75-20-104(10)(a)(i-v) (1983).

82. Gas production was reduced from 100 million to 25 million cubic feet per day. Liquid hydrocarbons were reduced from 50,000 to 25,000 barrels per day. H.B. 281, 44th Montana Legislature (1975), (codified at MONT. CODE ANN. § 75-20-104(10)(a)(ii) & (iii) (1983).

83. H.B. 281, 44th Montana Legislature (1975) (codified at MONT. CODE ANN. § 75-20-104(10)(a)(v) (1983)).

Units 3 and 4 in 1973. The Colstrip case prompted minor amendments⁸⁴ in the procedure by the 1975 legislature, including the placement of the burden of proof on the applicant in the certification proceeding; the provision of a maximum two year period for DNRC to complete all necessary studies; the setting of a deadline for the Board of Natural Resources (BNR) to render a decision 90 days after the close of the hearing; and the addition of the considerations of "public interest, convenience, and necessity." The BNR was given discretion to waive compliance of the certification proceedings if "an immediate, urgent need for a facility exists."⁸⁵

Even with the passage of the Siting Act two years before, it was not clear "whether facilities could be approved under the Act if the state does not need energy."⁸⁶ The state needed to develop an energy policy including a comprehensive plan for siting plants. The 1975 Legislature directed that "the siting of certain conversion facilities . . . be suspended . . . for 2 years . . . until a long-term, comprehensive state energy conversion policy and plan"⁸⁷ could be developed and specifically called for a "state wide siting inventory and proposed siting policy for the coordinated siting of energy conversion facilities to meet Montana's energy needs."⁸⁸

The study⁸⁹ of the siting policy prior to the convening of the 1977 legislature highlighted two major problems: (1) development of siting criteria and completion of a statewide siting inventory could be carried out by DNRC, only so long as funding is made available and (2) the definition of "need" should be determined.⁹⁰

The response of the 1977 legislature to these and other concerns about the Siting Act was the introduction of a dozen bills.⁹¹ The criteria of "need" proposed to be limited to consumptive requirements in state⁹² brought

84. H.B. 281, 44th Montana Legislature (1975).

85. *Id.* Added by the Senate, currently codified at MONT. CODE ANN. § 75-20-304(1).

86. H.B. 453, 44th Montana Legislature (1975). *Hearing before the Senate Natural Resources and Fish and Game Committee* (March 18, 1975) (testimony of Rep. Stolz, sponsor).

87. *Id.* As originally introduced, the bill required a suspension for six (6) years.

88. *See, supra* note 86.

89. Montana Energy Advisory Council, *Montana Siting Inventory and Policy Development* (January 1977) (prepared by S. Solomon and G. Kuntz).

90. *Id.*

91. Major legislation of interest proposed in 1977 included: H.B. 697, H.B. 717, H.B. 542, H.B. 441, H.B. 661, H.B. 702, H.B. 698, H.B. 609, H.B. 593, S.B. 247, S.B. 324.

92. H.B. 441, 45th Montana Legislature (1977). *Hearing before the House Natural Resources Committee* (February 19, 1977) (statement of Rep. Bradley, sponsor). *See also, Hearing on 698 before House Natural Resources Committee* (February 14, 1977) (testimony of Rep. Huennekens). This bill also proposed limiting need to Montana need. *See also Message From the Governor to Montana Senate*, 1 SENATE JOURNAL 64 (January 18, 1977). "[M]ontana should continue to encourage load center conversion of our coal. Conversion within Montana should be for Montana needs . . ." *Id.* at 68.

claims that such restriction would infringe on interstate commerce.⁹³ A similar amendment, defining "Montana need" for energy required that no more than 20% of the energy produced by a facility based on a 20 year average, could be sold outside the state.⁹⁴ The "need" determination was to be carried out by a load-forecasting procedure combining load projections prepared by both DNRC and the utility. Underlying the proposed "need" determinations was the policy that energy required in Montana could be converted in state, but that out-of-state needs should be met by shipment of coal, not transmission of electricity.⁹⁵ Proposals to have the Public Service Commission determine the need in place of the BNR were not accepted.⁹⁶

Provision for a state-wide siting inventory by DNRC was also introduced in the 1977 legislature.⁹⁷ In conducting the inventory, DNRC would adopt criteria for establishing preferred development sites, and define and delineate unsuitable areas.

Neither the definition of "need" nor the provision for the state wide inventory ever became law.⁹⁸ In addition, amendments to substantially reduce the time frames for the siting procedure, limit who could participate in the hearings, and remove fertilizer plants and some other industrial plants from the Siting Act all failed to become law.⁹⁹ Only one non-substantive measure passed: the type, size of facility to be applied for, its preferred location and other information that BNR rules required would now have to be specified in the optional notice of intent.¹⁰⁰

The 1979 legislative session was ripe for amending the Major Facility Siting Act. It had been four years since changes had been made and at least

93. H.B. 441, 45th Montana Legislature (1977). *Hearing before House Natural Resources Committee* (February 19, 1977).

94. H.B. 661, 45th Montana Legislature (1977). This legislation was eventually amended to include the features of H.B. 698 (defining need).

95. H.B. 441, *supra* note 92.

96. H.B. 697, 45th Montana Legislature (1977) and H.B. 312, 46th Montana Legislature (1979) (both introduced by Rep. Huennekens) both proposed to transfer the need determination from BNR to the PSC. The defeat of these bills suggests that the legislature wanted the need determination to remain separate from the duties of the PSC.

97. H.B. 661, *supra* note 94. It is interesting to note that by 1979, even the utilities were raising questions about whether site inventories would save time in the siting process. *See, e.g.*, the Tosco Foundation, *Siting Major Energy Facilities: A Process in Transition* (a report to the Rockefeller Foundation and to others) (October 1979).

98. Speculation by at least one observer is that so many bills were amended into H.B. 661 that it became a "monster," no longer appealing to any of the interests who had supported the original amendments.

99. H.B. 593, 45th Montana Legislature (1977) (introduced by Conroy).

100. H.B. 542, 45th Montana Legislature (1977) (introduced by Hirsch) (codified at MONT. CODE ANN. § 75-20-214 (1983). Efforts were made in the 1977 session to *require* the notice of intent. H.B. 431, 45th Legislature (1977) (introduced by Reps. Kessler and Harper). These efforts were not successful.

one important study sponsored by the Ford Foundation¹⁰¹ suggested major changes should be made to prevent federal preemption of state siting authority.¹⁰² Also contributing to the atmosphere for amending the Siting Act was the growing statewide attitude that the Colstrip Units 3 & 4 siting decision case which began in 1976 had been going on for too long.

In response to delays in the start of construction of Colstrip Units 3 & 4 caused by the lawsuit then on appeal to the state supreme court,¹⁰³ legislation was proposed to exempt from the requirements of the Major Facilities Siting Act all facilities with administrative proceedings commencing prior to January 1, 1979.¹⁰⁴ The effect of this legislation would have been to exempt Colstrip 3 & 4 from any other delays related to certification under the Act.¹⁰⁵ This legislation set the stage for the Major Facility Siting Act to become one of the most emotionally charged issues of the 46th Legislative session. Proponents of the exemption legislation claimed that the delay was costing money and jobs. Opponents countered with claims that such legislation was "writing a variance for one particular party"¹⁰⁶ and that "in order to save [Colstrip] 3 and 4 you will destroy the facility siting act."¹⁰⁷ The House Judiciary Committee amended the bill, stating the Board of Natural Resources decision to permit the plants must

101. James J. Lopach and Gregory J. Petesch, *Reforming the Major Facility Siting Act* (prepared for Ford Foundation in Policy Analysis for State Environmental Management) (November 1978).

102. *Id.* at 27.

103. *Northern Plains Resource Council v. Board of Natural Resources*, 181 Mont. 500, 594 P.2d 297 (1979). The court held that:

(1) certain entities were not "indispensable parties" entitled to individual service of copy of petition for review; (2) Board of Health's decision certifying that proposed facility would not violate state and federally established standards and implementation plans was a "final decision" for appeal purposes; (3) Board of Natural Resources and Conservation acted properly in denying motions to terminate proceedings before Board on ground of alleged invalidity of Board of Health's certification; (4) Board of Natural Resources and Conservation erred in failing to make adequate findings of fact and conclusions of law in regard to environmental impact; (5) Board was required to make more than mere conclusory findings of fact or conclusions of law in regard to location of transmission line corridor; (6) Board's decision that proposed facility represented minimum adverse environmental impact was supported by substantial credible evidence, and (7) the general refusal to permit parties opposing utility's application to cross-examine other party opponent's witnesses in the hearings before such Board and Board of Health was not error. *Id.* at 500, 594 P.2d at 297.

104. H.B. 452, 46th Montana Legislature (1979) (introduced by Conroy).

105. It is interesting to note that the intent of this legislation was not apparent in reading the bill. Rep. Herschel Robbins raised the question of how many legislators understood the intent at the time they signed as co-sponsors of the bill (Eighty-seven out of 100 representatives signed the original bill). H.B. 452, *Hearing Before the House Judiciary Committee* (February 5, 1979).

106. H.B. 452, 46th Montana Legislature (1979) *Hearing before the House Judiciary Committee* (February 5, 1979) (testimony of Frank Crowley, Montana Bar Association).

107. *Id.* (testimony of Rep. Bardanouve).

be abided by; the bill eventually left the committee on a tie vote, "without recommendation."¹⁰⁸ This version of the bill eventually passed the House and the Senate, only to be vetoed by the Governor.¹⁰⁹ However, the discussion of this bill and the resulting publicity and public outcry helped set the tone for substantive efforts to improve the siting act during the 1979 legislative session.

The utilities,¹¹⁰ the Rural Electric Cooperatives (REA)¹¹¹ and the DNRC,¹¹² all proposed major revisions to the Siting Act in 1979. As a compromise, the House Natural Resources Committee drafted a committee bill¹¹³ combining both the DNRC and REA bills. This bill, described as "something to speed up the process of siting major facilities and make a workable law," passed the House Natural Resources Committee without recommendation.¹¹⁴ The committee eventually tabled the utility supported amendments in favor of the compromise legislation.

Amendments to the Major Facilities Siting Act by the 1979 legislature began to address some of the existing major criticisms. Streamlining of the Act was accomplished by combining the required BNR and Board of Health (BH) hearings,¹¹⁵ setting time frames for the BNR hearings,¹¹⁶ delineating the responsibilities of the hearing examiner¹¹⁷ and allowing the DNRC to use existing environmental impact statements (EIS) where applicable and useful.¹¹⁸

The 1979 Legislature also made substantive changes in the Act. The Board of Health decision on certification of air and water quality standards would now be conclusive, but the Board of Natural Resources would retain the right to review the facility to assure minimum adverse environmental impacts.¹¹⁹ Conditional permits for air and water quality certification could now be issued by the DHES or BH.¹²⁰ A single Environmental Impact Statement would be done for future facilities by DNRC.¹²¹ The

108. H.B. 452, Executive Session action (February 9, 1979).

109. Governor's veto message H.B. 452 (May 4, 1979). The governor's message characterized this bill as "special legislation."

110. S.B. 514, 46th Montana Legislature (1979) (introduced by Senator Roskie).

111. H.B. 280, 46th Montana Legislature (1979) (introduced by Rep. Scully).

112. H.B. 829, 46th Montana Legislature (1979) (introduced by Rep. Bardanouve).

113. H.B. 883, 46th Montana Legislature (1979).

114. *Id.* Minutes of the House Natural Resources Committee (February 20, 1979). It is interesting to note that the committee took action on this legislation before it was even printed.

115. H.B. 883, *supra* note 113 (codified at MONT. CODE ANN. § 75-20-218 (1983)).

116. MONT. CODE ANN. § 75-20-218 (1983).

117. MONT. CODE ANN. § 75-20-220 (1983).

118. MONT. CODE ANN. § 75-20-216(2) (1983).

119. MONT. CODE ANN. § 75-20-216(3) (1983).

120. MONT. CODE ANN. § 75-20-216(3) (1983). The effect of allowing conditional permits was to negate the district court's ruling that conditional permits were not statutorily allowed.

121. MONT. CODE ANN. § 75-20-216(3) (1983). Thus the study done by DHES would no longer

DHES or BH would now certify the primary and reasonable alternative sites¹²² for air and water quality. Changes were also made allowing DNR to estimate the filing fee.¹²³

Amendments to the Major Facilities Siting Act also added time limits for the commencement of construction on transmission lines and pipelines.¹²⁴ Frustrated landowners with "permits [to construct transmission lines] hanging over their heads, making a cloud on their title and devaluating [sic] their land,"¹²⁵ successfully convinced legislators to place limits on the time such permits to construct transmission lines would remain valid.

By 1981, efforts to substantially revise the act had peaked. Major legislation promising to renew the controversy of the previous session was tabled without a hearing at the request of the sponsor.¹²⁶ Also defeated were measures proposed to streamline the siting procedure by transferring the siting responsibilities of the DHES to DNRC.¹²⁷ The memories of the debates of 1977 and 1979 haunted this legislature as it rejected resolutions to study the siting Act.¹²⁸ Only one minor amendment to the siting act was accepted. It assigned the burden of proof to the applicants when an application to amend a certificate of environmental compatibility and public need is filed.¹²⁹

The Legislature in 1983 addressed several issues related to the Siting Act. That legislature considered, but did not adopt a provision adding pipelines to the coverage of the Siting Act in connection with water marketing legislation.¹³⁰ Statutory language exempting projects of a federal agency from compliance with the state standards of the Siting Act was repealed.¹³¹ This repeal came partially in response to the Federal Land

have to meet the public participation requirements of the Montana Environmental Protection Act. MONT. CODE ANN. §§ 75-1-101 to -207 (1983).

122. MONT. CODE ANN. § 75-20-211(1)(a)(v) (1983).

123. MONT. CODE ANN. § 75-20-215 (1983).

124. H.B. 253, 46th Montana Legislature (1979) (introduced by Rep. Thoft). MONT. CODE ANN. § 75-20-303(3)(a)(vi) (1983).

125. H.B. 253, *Hearing before House Natural Resource Committee* (Jan. 26, 1979) (testimony of Virginia Brown) (codified at MONT. CODE ANN. § 75-20-303(4) (1983)).

126. H.B. 236, 47th Montana Legislature (1981) (introduced by Moore). *Hearing before the House Natural Resources Committee* (February 11, 1983).

127. S.B. 430, 47th Montana Legislature (1981) was amended into S.B. 258. S.B. 258 passed, but the provisions transferring the siting responsibility were deleted.

128. S.J.R. 14, 47th Montana Legislature (1981) (introduced by Sen. S. Brown).

129. H.B. 607, 47th Montana Legislature (1981) (introduced by Rep. Harp) (codified at MONT. CODE ANN. § 75-20-219(4) (1983)).

130. H.B. 893, 48th Montana Legislature (1983) (introduced by Rep. Newman) tabled by the House Natural Resources Committee (March 24, 1983); H.B. 908 (introduced by Harper) eventually passed the legislature, but not before it was amended into the water marketing study bill and the provisions regarding the pipelines were deleted.

131. H.B. 263, 48th Montana Legislature (1983) (introduced by Rep. Ream). MONT. CODE

Policy and Management Act (FLPMA) which requires federal agency compliance with state siting laws,¹³² it was also in response to recent experiences with BPA exempting itself from provisions of the Siting Act in order to construct a transmission line across Montana.¹³³ Efforts to require DNRC to adopt environmental standards under the siting Act, which came in reaction to the recent federal district court ruling that Montana's Siting Act lacked substantive standards¹³⁴ met resistance from opponents claiming adoption of such a requirement would allow the court considering the DNRC appeal to imply that the state currently has no standards.¹³⁵

II. THE SITING ACT

Throughout the history of the development of the Major Facilities Siting Act,¹³⁶ three major considerations have always been at the focus of discussions: (1) Siting utilities should be a public decision rather than one made by the private sector and should include public input, (2) a power facility should be built only if needed (mostly by Montana), (3) the facility should have minimal impact on the environment and life style of the people of the state.¹³⁷

The Siting Act begins by setting out a legislative finding that the construction of major energy conversion facilities has an effect on the environment, the population concentration, and the citizens of the state.¹³⁸ This policy further states that the location, construction, and operation of energy conversion facilities should not only consider environmental factors but that location should have "minimal adverse effects" on the environment and on the citizens of the state.¹³⁹ Before commencing construction of

ANN. § 75-20-202(1) was repealed. See compiler's comment following MONT. CODE ANN. § 75-20-202 (1983). This exemption was originally included in order to avoid constitutional challenges of the Siting Act under U.S. Constitution Supremacy Clause, article 4, § 2. H.B. 263, 48th Montana Legislature (1983), *Minutes of the Hearing before the House Natural Resources Committee* (January 31, 1983).

132. 43 U.S.C. § 1765 (1982).

133. DNR responded to BPA's preemption of the Siting Act requirements by bringing action to enjoin BPA from further construction. Eventually, the federal district court in Montana declared that the Montana Act lacked substantive requirements and that BPA therefore was exempt from the Siting Act. *State of Montana v. Peter Johnson, Administrator of BPA*, (CB-81-26-BU, unpublished opinion of Judge Battin, August 13, 1982). This decision is on appeal to the Ninth Circuit Court of Appeals and was argued November 10, 1983 in Portland. No decision has yet been handed down. (Personal communication, Tim Hall, attorney for Department of Natural Resources, Helena, Montana, April 18, 1984).

134. See *infra*, note 180.

135. H.B. 803, 48th Montana Legislature (1983) (introduced by Rep. Harp). *Hearing before the House Natural Resources Committee* (February 21, 1983) (testimony of Leo Berry, Director of DNRC). This bill was tabled by the Committee (February 21, 1983).

136. MONT. CODE ANN. §§ 75-20-101 to -503 (1983).

137. See *supra* notes 76-79 and accompanying text.

138. MONT. CODE ANN. § 75-20-102(2) (1983).

139. *Id.*

a facility, a "certificate of compatibility and public need" must be obtained from the Board of Natural Resources.¹⁴⁰

Facilities which must comply with the provisions of this act include: electrical generating plants,¹⁴¹ plants producing synthetic gas from coal,¹⁴² liquid hydrocarbon producing plants,¹⁴³ uranium enrichment facilities,¹⁴⁴ and any operation utilizing more than 500,000 tons of coal per year.¹⁴⁵ The statute also defines the maximum amount of energy that can be produced by a proposed facility before it is subject to the Act. The Act also covers transmission lines, and pipelines and associated facilities.¹⁴⁶ Geothermal resource facilities must comply with the Act,¹⁴⁷ but oil and natural gas refineries are specifically excluded from the Act.¹⁴⁸ Nuclear facilities are also included in the Act.¹⁴⁹

Before applying for a certificate of compatibility and public need, which is required prior to construction, each utility or person contemplating construction of a major energy conversion facility within the state in the ensuing 10 years must file with DNRC a long range construction and operation plan.¹⁵⁰ This plan must include descriptions of facilities currently operated by the utility or person, efforts at coordination of the plan with others in the state and region, efforts to minimize environmental problems, projections of demand for services, and other information requested by DNRC.¹⁵¹ No person may file an application for a facility unless a facility has been identified for at least the two prior years in the long range plan.¹⁵² The purpose for this advance identification of prospective facilities is to allow DNRC to begin evaluating the proposed location,¹⁵³ using the environmental criteria set forth in Mont. Code Ann. § 75-20-503 (1983).¹⁵⁴

140. MONT. CODE ANN. § 75-20-201(1) (1983).

141. MONT. CODE ANN. § 75-20-104(10)(a)(i) (1983).

142. MONT. CODE ANN. § 75-20-104(10)(a)(ii) (1983).

143. MONT. CODE ANN. § 75-20-104(10)(a)(iii) (1983).

144. MONT. CODE ANN. § 75-20-104(10)(a)(iv) (1983).

145. MONT. CODE ANN. § 75-20-104(10)(a)(v) (1983).

146. MONT. CODE ANN. § 75-20-104(10)(b) and (10)(c) (1983).

147. MONT. CODE ANN. § 75-20-104(10)(d) (1983).

148. MONT. CODE ANN. § 75-20-104(10)(a) (1983).

149. MONT. CODE ANN. § 75-20-201 (1983). Nuclear facilities must first have a certificate of need approved by the Board of Natural Resources. The issue is then placed before the voters by initiative (MONT. CODE ANN. § 75-20-201(4) and §§ 75-20-1201 to -1205 (1983). If the voters approve the initiative, the Board may issue the certificate.

150. MONT. CODE ANN. § 75-20-501 (1983).

151. MONT. CODE ANN. § 75-20-501(2)(a)-501(2)(e) (1983).

152. MONT. CODE ANN. § 75-20-501(5) (1983). *But see* MONT. CODE ANN. § 75-20-304 (1983) which allows the BNR to waive these requirements in an emergency.

153. MONT. CODE ANN. § 75-20-502 (1983).

154. A financial incentive is provided to encourage the filing of a "notice of intent to file for a certificate." MONT. CODE ANN. § 75-20-214 (1983).

Any person or utility seeking a certificate must file a joint application with the Department of Natural Resources and Conservation and the Department of Health and Environmental Sciences.¹⁵⁵ The application must contain: (1) a description of the facility and the proposed location; (2) a summary of environmental impact studies of the facility; (3) a statement explaining the need for the facility; (4) a description of reasonable alternative locations, a comparison of the advantages and disadvantages of the alternative sites and a description of why the primary location is best; (5) baseline data for the primary and alternative sites; (6) an environmental study plan (at the applicant's option); and (7) any other information the applicant considers relevant or is required by DNRC or DHES.¹⁵⁶ An application must be accompanied by a filing fee based upon the Department's estimated costs to process the application.¹⁵⁷

Upon receipt of an application the DNRC and DHES have 90 days in which to notify the applicant that either the application is complete and accepted or that the application is deficient.¹⁵⁸ After accepting the application the Department of Natural Resources can take up to 22 months to study and evaluate the application and make a report to the BNR considering all the criteria set out in the Act.¹⁵⁹ Responsibility rests with the DHES to certify that the facility meets the air and water quality standards.¹⁶⁰ This process must include an opportunity for public review and comment.¹⁶¹ The DNRC also retains authority¹⁶² to determine whether the facility "represents the minimum adverse environmental impact"¹⁶³ Other state departments¹⁶⁴ report relevant information concerning the impact of the proposed site to the DNRC.

The Board of Natural Resources must begin the hearing on the DNRC report within 120 days of receiving it.¹⁶⁵ A hearing officer appointed by the BNR conducts the certification proceedings.¹⁶⁶ The burden of proof rests with the applicant¹⁶⁷ to show by clear and convincing

155. MONT. CODE ANN. § 75-20-211(1)(a) (1983).

156. MONT. CODE ANN. § 75-20-211(1)(a)(i) to -211(1)(a)(vii) (1983).

157. MONT. CODE ANN. § 75-20-215 (1983).

158. MONT. CODE ANN. § 75-20-216(1) (1983).

159. MONT. CODE ANN. § 75-20-216(4) (1983).

160. MONT. CODE ANN. § 75-20-216(3) (1983). The judgment of the BH/DHES is conclusive.

161. *Id.*

162. *Id.*

163. MONT. CODE ANN. § 75-20-301(2)(c) (1983).

164. The departments of highways; commerce; fish, wildlife, and parks; state lands; revenue; and the public service commission report to DNRC information related to the proposed facility. The report may include the opinions as to the advisability of granting, denying or modifying the certificate. MONT. CODE ANN. § 75-20-216(5) (1983).

165. MONT. CODE ANN. § 75-20-218 (1983).

166. MONT. CODE ANN. § 75-20-219 (1983).

167. MONT. CODE ANN. § 75-20-222(3) (1983).

evidence that the application should be granted and that the statutory criteria¹⁶⁸ are met. Participation in the certification proceedings or proceedings involving the issuance of a certificate is limited to active parties.¹⁶⁹

A decision by the BNR must be rendered within 60 days after the submission of the hearing examiner's recommended decision.¹⁷⁰ The decision can be to grant or deny the application or grant the application upon condition.¹⁷¹ The Board is prohibited from granting a certificate unless it finds and determines:

- 1) basis of need for the facility;
- 2) nature of probable environmental impacts;
- 3) that the facility represents the minimum environmental impact, considering the available technology and the nature and economics of the alternatives;
- 4) the environmental criteria in § 53-20-503;
- 5) that the location conforms to applicable state and local laws and regulations;
- 6) that the facility will serve the public interest, convenience and necessity;
- 7) that the DHES has issued the necessary permit as required by § 75-20-216(3); and
- 8) that the use of public lands for the facility location was evaluated when the use of public lands is as economically practicable as the use of private lands.¹⁷²

In rendering the decision on an application for a certificate, the BNR must explain the reasons for the action taken.¹⁷³

The certificate issued by the BNR must contain an environmental evaluation including such information as the environmental impact of the facility, alternatives to the proposed facility, and time limits during which the construction of pipelines and transmission lines must be completed.¹⁷⁴

Judicial review¹⁷⁵ of any of the decisions of the Board of Natural Resources, Department of Health and Environmental Sciences or the Board of Health can be requested from a district court of competent jurisdiction only by a person or entity who was an active party in the

168. The criteria are set out in MONT. CODE ANN. § 75-20-301.

169. "Active parties" includes the applicant and DNRC, as well as interested persons and nonprofit organizations, MONT. CODE ANN. § 75-20-221 (1983).

170. MONT. CODE ANN. § 75-20-301(1) (1983).

171. *Id.*

172. MONT. CODE ANN. § 75-20-301(2)(a) to -303(2)(i) (1983).

173. MONT. CODE ANN. § 75-20-303(1) (1983).

174. MONT. CODE ANN. § 75-20-303(3) (1983).

175. MONT. CODE ANN. § 75-20-406 (1983).

certification procedure.¹⁷⁶ State courts are denied jurisdiction to hear or determine any controversy which has been decided in the proceeding before the Board of Natural Resources.¹⁷⁷

SOME CONFLICTS BETWEEN THE NORTHWEST POWER PLAN AND MONTANA'S MAJOR FACILITY SITING ACT

The preceding review and explanation of the historical development of the Northwest Power and Conservation Plan and Montana's Major Facility Siting Act provide a basis for discussing some potential¹⁷⁸ conflicts that may exist in implementing the Power Plan in Montana.

The Power Planning Act specifically ensures that siting authority is retained by the state.¹⁷⁹ Therefore, where there are conflicts in implementing the Power Plan in Montana, the Major Facility Siting Act should be determinative.¹⁸⁰

The Power Plan and the Siting Act both arise from problems related to uncertainties in energy planning.¹⁸¹ However, the approaches they take to solve these problem are significantly different. The essence of the Power Plan's option approach is to provide flexibility in deciding when to bring an electric power resource on line.¹⁸² This need for flexibility has most recently

176. MONT. CODE ANN. § 75-20-221 (1983).

177. MONT. CODE ANN. § 75-20-407 (1983).

178. Other issues involve (1) the National Environmental Policy Act and the Montana Environmental Policy Act and what decisions might trigger an EIS (i.e. at the time a project becomes an optioned project and when the decision is made to construct) and (2) Air quality permitting and the length of the shelf life of these permits.

179. 16 U.S.C. § 839g (1982). In addition the Federal Land Policy and Management Act of 1976 requires that all federal agencies follow state siting regulations. 43 U.S.C. § 1765 (1979).

180. The Power Planning Act states: "Nothing in this Act shall be construed to affect any right of any state . . . to . . . make energy facility siting decision . . ." 16 U.S.C. § 839g(a)(3). That such specific language requires the state process and decision to be determinative is supported by the Court's holding in *California v. United States*, 438 U.S. 645 (1978) in which specific statutory language in the Reclamation Act was held to require the Bureau of Reclamation to abide by the state permitting procedures. The court in *Columbia Basin Land Protection Ass'n v. Schlesinger*, 643 F.2d 585 (1981), distinguishes the specific statutory language of *Schlesinger* from language requiring mere compliance with state requirements and law as contained in *Hancock v. Train*, 426 U.S. 167 (1976), involving the Clean Air Act, and *EPA v. State Water Resource Control Board*, 426 U.S. 200 (1976). The *Schlesinger* opinion also is significant because it distinguishes substantive requirements from procedural requirement, requiring the federal agency only to meet the substantive requirements. Judge Battin's ruling in *State of Montana v. BPA*, Peter Johnson Administrator of BPA (CB81-26-BU, unpublished opinion) that the Montana Major Facility Act had no substantive requirements and thus BPA did not have to follow it, raises questions about how the Siting Act may apply to federal projects which are not connected with the Power Planning Act. See *supra* note 133.

181. See discussion of background leading up to the Power Plan, *supra* notes 14 to 63 and accompanying text, and the background of the Major Facility Siting Act, *supra* notes 63 to 177 and accompanying text.

182. Power Plan, *supra* note 5, at 3-1.

been demonstrated by several years of constantly downward revisions in projections of electric power consumption in the Pacific Northwest.¹⁸³ A forecast of future electrical energy consumption and a mix of cost-effective resources are used to meet the range of the anticipated load growth. If growth is faster than expected, then the options needed to meet the higher growth load are exercised; if growth is slower, then some options are dropped from the list of resources and others are delayed further.¹⁸⁴ The Power Plan is revised periodically, so the cost-effective mix of resources may change as technology changes and unexercised options are dropped. The goal of the Power Plan is to make sure there is adequate electrical energy at the most cost-effective¹⁸⁵ rates with as much certainty as possible.

The origin of Major Facility Siting Act at a time when projections of electrical consumption were constantly increasing and numerous coal-fired plants were being proposed for eastern Montana, may partially explain why the siting act now appears to be inflexible. The siting Act is responsive—a plant must be proposed to be built and an application for a certificate of need sought before the provisions of the Siting Act are activated.¹⁸⁶ The Siting Act was intended in part to reduce speculation about the location of proposed energy facilities and to provide adequate time for the study of a specific site before construction commenced. Thus, evaluation of the application and study of the site and the plant are based on commencement of construction soon after a certificate is granted. Though consideration has been given to prospective site evaluation, neither legislation nor funding have allowed this to occur.¹⁸⁷

In addition, the Siting Act was created to allow the state to make a final decision about whether or not a facility is to be built, rather than continuing to allow some other entity to make the decision.

I. NEED DETERMINATION

The Major Facility Siting Act requires the determination of need for a facility before certification for construction is granted.¹⁸⁸ A certificate

183. Bonneville Power Administration, *Forecasts of Electricity Consumption in the Pacific Northwest* (Executive Summary) at 5 (July 1983).

184. See Northwest Power Planning Council, *Resource Options Issue Paper* (October 13, 1982) and Northwest Power Planning Council, *Resource Options Decision Memorandum* (November 30, 1982).

185. The Northwest Electric Power Planning and Conservation Act requires that priority be given to "resources which the Council determines to be cost-effective." 16 U.S.C. § 839b(e)(1) (1982).

186. The study and evaluation aspects of the Siting Act may be activated before application, but only if the optional "notice of intent to file" is filed with DNRC (MONT. CODE ANN. § 75-20-214 (1983)).

187. See *supra* note 97.

188. MONT. CODE ANN. § 75-20-120 (1983).

permitting construction, which is valid for an unlimited time, appears on its face to be compatible with the option approach of resource banking. However, an optioned facility may be unable to meet the substantive requirements of the siting act.¹⁸⁹ The BNR, before issuing its certificate, must determine that a need for the energy exists and that the proposed facility represents the best available alternative to meet the need, considering economics and environmental impacts at a specific point in time.¹⁹⁰

In order for a facility to be a purchased and licensed option, the project sponsor must file under the Major Facility Siting Act to receive a certificate of public need and environmental compatibility.¹⁹¹ This certificate must be granted before the Council could consider the resource as a licensed and purchased option.¹⁹²

The Council's ability to decide to put the project "on the shelf," to "bank" it to meet future electrical consumption growth,¹⁹³ implies there may be no present need for the facility—a position which is contrary to present need requirement of the Major Facilities Siting Act.¹⁹⁴ Even assuming that the decision to option a project satisfies the "need criteria" of the Major Facilities Siting Act,¹⁹⁵ the facility might be needed, at best, far in the future at the high end of a series of regional energy forecasts.¹⁹⁶

In addition to the need, DNRC must also determine that the proposed plant represents the best available alternative method for gaining the energy needed.¹⁹⁷ Presuming the Council acquired all the higher priority conservation and renewable resources prior to initiating an option, then it could be assumed that the optioned resource is the best remaining alternative. However, DNRC could determine that the Council has under-

189. See Memorandum J. Koningsberg and L. Nordell to Leo Berry, Director of Department of Natural Resources (December 13, 1982).

190. MONT. CODE ANN. §§ 75-20-301 and 75-20-502(a) (1983).

191. MONT. CODE ANN. § 75-20-211 (1983).

192. See Power Plan, *supra* note 5, at 3-3.

193. *Id.*

194. The "present need" for the facility is implied throughout the act. The studies carried out by the DNRC and DHES consider such factors as the impact on population, MONT. CODE ANN. § 75-20-503(2)(e) and the availability of certain technologies. MONT. CODE ANN. § 75-20-503(1)(b) & (c) (1983). These factors as well as others listed in MONT. CODE ANN. § 75-20-503 (1983) are subject to change over periods of time. Therefore, the data used in the certification decision grows stale if the project is not commenced in the time frame foreseen by those making the evaluation. In addition, a project sponsor is required in its ten-year plan to identify projects on which construction is to begin during the ensuing 10 years; such a project must be identified at least two years before acceptance of an application. MONT. CODE ANN. § 75-20-501 (1983).

195. Pacific Northwest Utilities Conference Committee (PNUCC), Comments on the Power Plan 1983 (March 1983).

196. The Power Planning Act requires "other resources" such as coal-fired generation be utilized only after conservation, renewables, and "waste energy." 16 U.S.C. § 839b(e)(1) (1982).

197. MONT. CODE ANN. § 75-20-303(3)(a)(vi) (1983). The Board of Natural Resources must include an analysis of "alternatives to the proposed facility" with any certificate issued.

estimated the energy supply from conservation and renewable sources or that institutional barriers to the full energy benefit of conservation and renewables should be removed. The conclusion could easily be that either the need for energy at the high end of the forecast could be supplied from alternative sources rather than the proposed thermal plant or the high electrical consumption forecast is unreasonable and unlikely to be reached, so the plant would not be needed.

The BNR has authority to condition the certificate of need and environmental compatibility.¹⁹⁸ An example of a condition would be to allow construction only when energy loads had reached a high enough level and were growing at a fast enough rate to justify construction and only when all cost-effective alternatives had been implemented. Under such conditioning, the site would be approved, but the supply resource might be changed by future BNR decisions concerning load and alternatives, which require further detailed and expensive analysis.

If the DNRC were to make a finding of need for purposes of licensing, subject to later review when the Council decided to exercise the option on the resource,¹⁹⁹ DNRC would be required to analyze both the need and the available alternatives twice—at the time of application and again when the Council exercises the option. Even if the need and alternatives analysis by DNRC is to be done only when the Council decides to exercise its option, DNRC would have up to 22 months to do its study.²⁰⁰ This study time period, when combined with hearings and possible judicial review does not appear to decrease construction time—one of the chief goals of the option plan.²⁰¹

II. COST-EFFECTIVENESS/ENVIRONMENTAL CONCERNS

The Power Planning Act directs the Council to develop a plan which gives “priority to resources which the Council determines to be cost effective.”²⁰² Cost-effectiveness is defined in terms of reliability and availability at the time the resource is needed as well as the “estimated incremental system cost”,²⁰³ which includes “quantifiable environmental cost and benefits.”²⁰⁴ The quantifiable environmental costs and benefits are to be determined by the Administrator of BPA “on the basis of a

198. MONT. CODE ANN. § 75-20-301(1) (1983).

199. Pacific Northwest Utilities Conference Committee (PNUCC), Resource Options (September 1982).

200. MONT. CODE ANN. § 75-20-216(4) (1983).

201. Power Plan, *supra* note 5, at 1-3.

202. 16 U.S.C. § 839b(e)(1) (1982).

203. *Id.* § 839a(4)(A).

204. *Id.* § 839a(4)(B).

methodology²⁰⁵ developed by the Council as part of the Plan, or in the absence of the plan by the administrator, [as] . . . directly attributable to such measure or resource."²⁰⁶

Thus, the Council is not only responsible for developing procedures to be used by the BPA Administrator for estimating quantifiable environmental costs and benefits (the direct costs) related to resource development, but is also responsible for developing estimates of these costs and benefits in order to establish the priority of resources which the Council directs the Administrator to acquire.

The Council considered two approaches in evaluating what constitutes a "quantifiable" environmental impact.²⁰⁷ One approach equated "quantifiable" with "priceable." Thus, if all quantifiable environmental costs and benefits are assigned a monetary value, these costs and benefits can then be considered directly in the cost-effectiveness calculation. Impacts which could not be (or are not) assigned a price would therefore be considered non-quantifiable. The Council believed that "[t]he principal advantage of this policy is that monetary values need not be explicitly attached to impacts which for either ethical (i.e. should we?) or practical (i.e. can we?) reasons cannot be justified. For example, no price need be attached to such impacts as the loss of human life, the entire generational effects of air pollution, and the loss of ceremonial fisheries."²⁰⁸ Such non-quantifiable impacts could then be subjectively weighed against the cost-effectiveness criteria in the Power Planning Act.

Another approach is to consider quantified, but not-priceable impacts directly in the cost-effectiveness calculation.²⁰⁹ Quantifiable environmental impacts can be assigned a monetary value in dollar terms; where no monetary value could (or should) be assigned, a separate calculation in non-monetary terms would be included. This second approach, which was finally adopted in the Power Plan requires "[a] determination . . . as to whether the quantifiable but unpriceable costs or benefits are sufficient to make an otherwise less-expensive resource or measure, with such unpriceable environmental costs or benefits, more 'costly' than the next most 'costly' resources or measure."²¹⁰

The effect of this approach is to consider certain factors such as the easily quantifiable acquisition costs and the more apparent and *quantifiable* environmental costs and benefits directly in the cost-effectiveness test.

205. A summary of the methodology is included in Appendix C of the Power Plan, *supra* note 5.

206. 16 U.S.C. § 839a(4)(B) (1982).

207. Power Planning Council, Incorporating Environmental Costs and Benefits: Issue background (n.d.).

208. *Id.*

209. *Id.*

210. Power Plan, *supra* note 5, at Appendix C.

Other factors which are not quantifiable are treated separately from the highest test of a resource—its cost-effectiveness.²¹¹

Under the Major Facility Siting Act, a more comprehensive consideration of both quantifiable and non-quantifiable factors is to take place.²¹² Need for the facility, consideration of alternative technologies and environmental impacts and the other criteria²¹³ are given equal consideration.²¹⁴ It is not clear under the Power Plan how the non-quantified impacts might outweigh the hard cost data for a particular resource.

The Plan apparently does not include consideration of the facility's impact on the population already in the area, or the increased population attracted by construction or operation of a facility. This factor was a major reason for passage of the original Montana siting act and is an issue any time proposals to change the siting act are made.²¹⁵ Life style factors are essentially intangible, involving emotional attachments to, perceptions of and feelings about place.²¹⁶ "Thus, in spite of obvious economic advantages associated with expanded energy production, many state officials have warned that some energy production will be foregone if such expansion poses an excessive threat to existing life styles or closely associated environmental amenities."²¹⁷ Considerations such as these, tied closely to the value of a particular site, may be difficult to incorporate into a regional evaluation.

As a project goes through the optioning process, the Council will be responding to specific proposals made by the project sponsor.²¹⁸ If a project sponsor applies for a state certificate of need and environmental compatibility under the Montana Major Facility Siting Act, the project must have first received the approval of the Council as a planned option and a purchased/unlicensed option.²¹⁹ Thus, because the project sponsor is applying for the Siting Act certificate of need and environmental compatibility for a facility at a particular, and that facility is already optioned by the Council, the Council is in fact endorsing the particular project at the

211. P. Barrett, Coal-Fired Power Plant Siting Policy in the Pacific Northwest, May 1983 [copy on file with PUBLIC LAND LAW REVIEW].

212. MONT. CODE ANN. §§ 75-20-301 and 75-20-503. These statutes include the findings necessary for a certificate to be issued and the environmental factors to be considered.

213. Other criteria are listed at MONT. CODE ANN. § 75-20-503 (1983).

214. MONT. CODE ANN. § 75-20-301 (1983) requires the board to "find and determine" the factors listed in MONT. CODE ANN. § 75-20-301(2)(a)-(i) and MONT. CODE ANN. § 75-20-503 (1983) states "the board and department shall give consideration of the following list of environmental factors"

215. See *supra* notes 66, 76, 98, 104 to 109 and accompanying text.

216. Fitzsimmons, *State Energy Policy Making*, 23 NAT. RES. J. 305 (1983).

217. *Id.* at 312.

218. Power Plan, *supra* note 5, at 3-1.

219. *Id.* at 3-3.

particular site.²²⁰

One author notes that if the Council in optioning a resource is in fact suggesting a site, then the suggestion should be based on the highest considerations of equitably distributing the cost and minimizing the environmental and socio-political impact (the indirect costs) of the resource.²²¹ The Council, precluded from taking an active role in the siting of the resource by provisions of the Power Planning Act,²²² should make clear that it is not recommending the site for the resource, that alternative sites may be available, and that sole authority for siting rests with state siting agency.²²³

III. PERMITS AND RESOURCE BANKING

Once an optioned resource has all the necessary siting permits and licenses, flexibility under the Plan is gained by allowing this resource, to be put on hold, or "on the shelf" until it is needed. By completing the siting, licensing, and permitting in advance, it is believed that five to six years may be saved in the overall period to plan and construct a coal-fired electric power plant.²²⁴ However, placing the plans for a proposed plant "on the shelf" raises questions about the longevity and flexibility of the state siting certificate and other permits granted.

1) *Certificate of Need*

As mentioned previously in the discussion of "need,"²²⁵ the certificate of need and environmental compatibility is granted for a specific plant, at a particular site. Evaluation of the impacts of construction and operation are based on a designated and foreseeable time table.²²⁶ In addition, the statute designates certain time limits for construction of transmission lines associated with coal-fired generating facilities.²²⁷

The siting act does not allow for the kind of flexible decision-making and certification foreseen by the Plan. For example, once a certificate is granted, there is no mechanism to modify the certificate should there be a change in either the technology or the environmental or social considerations on which the issuance of the certificate was based.²²⁸ Thus, a plant put

220. P. Barrett, *supra* note 211.

221. *Id.* at 50.

222. 16 U.S.C. § 839g (1982).

223. Barrett, *supra* note 211.

224. Power Plan, *supra* note 5, at 3-1.

225. See *supra* notes 188 to 201 and accompanying text.

226. See *supra* note 194.

227. MONT. CODE ANN. § 75-20-303(3)(a)(vi) (1983).

228. To some degree the problem of incorporating changes is complicated because of the length of time needed to issue a certificate of need and environmental compatibility. See, e.g., Lopach, *supra*

"on the shelf" could be of an obsolete design with siting no longer appropriate because of changes in the environment and population. It is interesting to note that precisely this kind of regulatory suspension has been proposed by utilities. Security for the project sponsor is envisioned so that "resources under option which are granted licenses or permits should be 'grandfathered' to protect against costly *ex post facto* regulatory changes which might otherwise be imposed prior to the plant construction."²²⁹

An "on the shelf" resource could be monitored and the technological, environmental and social impacts updated so that information about the facility would be current when a decision to option is made. Questions related to who would do the monitoring (the state or the Council?) and who would pay for the costs of monitoring have not yet been addressed.

2) Water Use Permits

Water needed for a facility can only be appropriated by the issuance of a permit by the DNRC.²³⁰ The Montana state policy requires "that water resources . . . be put to optimum beneficial use and not wasted."²³¹ A permit can be granted only if the applicant proves by substantial credible evidence that adequate unappropriated water is available throughout the period the applicant seeks to appropriate the water.²³² The DNRC may limit the time for commencement of the appropriation works, completion of construction and actual application of the water to the proposed beneficial use.²³³ If the work on an appropriation is not commenced or completed within the time stated in the permit (or during an extension) or if the water is not being applied to the beneficial use contemplated in the permit, the DNRC may require the permittee to show cause why the permit should not be modified or revoked.²³⁴

The "shelf life" of such a permit may be limited. The department can grant a permit only where unappropriated water is available.²³⁵ If the water permit is "put on the shelf" with the optioned resource, then neither is the water being put to beneficial use nor are efforts being made to develop the resource with due diligence. Such action could be deemed to be speculative²³⁶ and therefore in violation of the general policy that water be

note 101. This comment documents the length of time to certify the Colstrip 3 and 4 projects.

229. See *supra* note 199.

230. MONT. CODE ANN. § 85-2-301 (1983).

231. MONT. CODE ANN. § 85-1-101(1) (1983).

232. MONT. CODE ANN. § 85-2-311 (Temporary) (1983).

233. MONT. CODE ANN. § 85-2-312(2) (1983).

234. MONT. CODE ANN. § 85-2-314 (1983).

235. MONT. CODE ANN. § 85-2-311(a) (Temporary) (1983).

236. The Montana court has not addressed the issue of what might be considered speculative use of

put to optimum beneficial use for the general welfare of the people of the state.²³⁷

Even special regulatory treatment of such water permits to allow deferred development of optioned resources²³⁸ raises fundamental questions about the *use* of water resources. Whether a permittee should be allowed to tie up a resource and thus essentially eliminate any other development that might come with the utilization of the water resource is an important policy issue which the state must address if optioned resources in Montana are to be banked.

IV. APPLICABILITY

One other important consideration in changing the Major Facility Siting Act to accommodate the Power Plan is that only the western half of Montana is served by BPA. Though the Act allows planning for and acquisition of resources outside of the region,²³⁹ it is the rate base of the customers within the BPA service area which is affected and benefited by the Plan. Therefore, careful consideration must be given to the impact on eastern Montana if coal-fired generation and transmission lines are located there, but the benefit goes to western Montana and the Pacific Northwest states. Requiring the people of eastern Montana to assume all of the major burdens with essentially none of the benefits will likely cause them to view siting plants in eastern Montana under the Power Plan no differently than they viewed government plans in the early 1970's to place numerous mine-mouth electric power stations in eastern Montana—the action which prompted Montana's Major Facility Siting Act in the first place.

CONCLUSION

The Northwest Power Plan with its regional approach to providing energy resources represents a major new direction for energy planning in the Pacific Northwest region. The additional flexibility gained by its "option" approach can have a needed, and, no doubt, desirable effect by reducing the risk for the utilities building the facilities and the consumers paying for the power generated.

Incorporation of the "option" approach for major facility siting in Montana will conflict with some aspects of the current Montana Major

water. MONT. CODE ANN. § 85-1-101(9) (1983) specifically relates to restrictions on gaining control of ground water for speculation.

237. MONT. CODE ANN. § 85-1-101(1) (1983).

238. A suggestion made by PNUCC. *See supra* note 199.

239. 16 U.S.C. § 839d(l)(1) (1982) authorizes and directs BPA to investigate opportunities to add to the region's resources outside of the four Pacific Northwest states. Such resources are limited to renewable resources.

Facility Siting Act. Regulation of criteria for awarding a certificate of need under the Siting Act must be clarified to determine whether the Council's decision to option a project satisfies the need determination under the Siting Act. Considering the comprehensive view of the Siting Act toward the impacts associated with a plant location, further study will be necessary to determine whether the Council's evaluation of the cost-effectiveness of a resource encompasses all the impacts included as part of the Montana siting requirements.

The length of time permits (i.e., water use) remain valid, but are unused will need to be increased to accommodate the "banking" of a resource until it is needed. In addition, changes will be needed so that a certificate of need and environmental compatibility can be modified or withdrawn if circumstances change.

While this comment has focused on the aspects of the Montana Major Facility Siting Act that could be barriers to the implementation of the Northwest Power Plan in Montana, there is an equally important consideration—does Montana *want* to change the Siting Act. The history of the Siting Act demonstrates that changing the Act is a highly political and emotional issue in Montana. Certainly proposing to amend the Siting Act to accommodate the western half of the state served by BPA may not be acceptable to the eastern Montanans who live near the coal mines and the potential sites for coal-fired power plants.

It is imperative that all potential barriers (including statutory changes) affecting the implementation of the higher priority resources (conservation and renewable resources), be removed before proposing legislative changes in the Siting Act. Failure to remove these barriers, so that the higher priority resources reach less than their full energy saving potential, may cause the Power Plan to become enmeshed in the political turmoil traditionally surrounding any proposal to substantively change the Siting Act. Even more crucial, the failure to remove these barriers first could erode the high credibility and strong support which the Plan currently enjoys.

The current surplus of electrical generating capacity in the Pacific Northwest permits some time for careful consideration of potential changes to the Siting Act. While the study of barriers to implementing the option approach under the Major Facility Siting Act should continue, this time should also be used to produce a strategy for implementing conservation and renewable resources development to the maximum extent possible under the Power Plan. With this approach, sufficient power may be available so that the issue of whether the Siting Act should be amended to meet the "option" approach may never need to be addressed at all.