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THE MONTANA MAJOR FACILITY SITING ACT

Mickale Carter

[T]he machinery to thwart efforts such as those of Montana . . . are available in Congress, and surely Montana and other similarly situated states do not have the political power to impose their will on the rest of the country.¹

I. INTRODUCTION

Buried beneath Montana are large deposits of low-sulfur coal.² In fact, Montana has about twenty-five percent of the total coal reserves in the United States³ and 50 percent of the nation's low sulfur coal.⁴ In the early 1970's, with the oil embargo and the ensuing explosion in oil prices, coal became much less expensive than oil. There were predictions that Montana would be inundated with requests to build industrial plants in order to take advantage of its coal. The Federal Power Commission predicted the construction of 138 fossil-fueled steam-electrical facilities in the United States from 1969 through 1976.⁵ In 1971, the North Central Power Study proposed construction of twenty-one mine mouth generating plants in Montana.⁶

In response, Montana, in 1973, enacted the most stringent facility siting act in the nation. The original Utility Siting Act,⁷

2. The low sulfur content of Montana's coal makes it easier for users to comply with federal clean air laws, 42 U.S.C. §§ 7408-7412 (Supp. 1977), as well as with other federal regulations which restrict the level of sulfur dioxide pollution. The lower BTU content of Montana coal, however, requires more coal to be burned to produce the same amount of energy as high sulfur eastern coals. Graybill, Environmental Compatibility and Public Need: A Case Study of Montana's Major Facility Siting Act, 1 HARV. ENVTL. L. REV. 458, 460 n.9 (1977).
3. Young, Energy Development and a Clean Environment: Coal, A Coal Producer Perspective, 1982 A.B.A. SEC. PUB. UTIL. L. REP. 5. (Young is Vice President, General Counsel, and Secretary of Peabody Coal Company, St. Louis, Missouri.)
6. "[T]he study] was produced under the aegis of the U.S. Department of the Interior, but drew largely on the expertise of major power companies. . . ." Graybill, supra note 2, at 460.
7. MONT. REV. CODES ANN. §§ 70-801 to -829 (1947).
which regulated only facilities and power lines built by public utilities,\(^8\) was amended in 1975 to become the Montana Major Facility Siting Act (Siting Act or Act).\(^9\) The amendment extended regulation to include not only utility facilities regulated by the Utility Siting Act, but also certain large, privately owned, industrial facilities.

This comment will explain the Siting Act, point out problem areas, and suggest possible remedies. Part II briefly reviews the history of Colstrip Units 3 and 4, the only facility sited pursuant to the Siting Act.\(^10\) Part III summarizes the Siting Act in a practical “how to” format. After a brief discussion of the Act generally, it will set out the requirements of the Act. The sequence will follow that of an actual application, from conception of a facility to appeal of an adverse decision. Part IV discusses problems revealed by the Colstrip 3 and 4 experience. Part V sets forth possible legal challenges along with the possibility of congressional preemption. Part VI consists of suggested revisions designed to remedy problems indicated in Parts IV and V without sacrificing the interests of the State of Montana.

II. The Colstrip Experience

On June 6, 1973, five Pacific Northwest utility companies,\(^11\) including Montana Power Company, applied for a certificate to build Units 3 and 4 of the Colstrip project. The applicants proposed two 700 megawatt coal-fired generating plants (Units 3 and 4), a thirty-mile pipeline to carry water from the Yellowstone River to the location of the project at Colstrip, and two parallel 500 kilovolt transmission lines connecting the Colstrip project with terminal facilities at Hot Springs. All four units of the Colstrip project were projected to have capacity to produce enough power to light a city of 1,500,000 people. Only Units 3 and 4 were constructed pursuant to the Siting Act because construction on Units 1 and 2 had

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10. Several electrical transmission lines have been sited pursuant to the Act but through abbreviated procedures. Only Colstrip Units 3 and 4 have gone through the entire procedure.

commenced prior to 1973 and therefore did not fall within the pur-
view of the Siting Act.\textsuperscript{12}

The applicants contracted with the Westinghouse Corpora-
tion’s Environmental Systems Department to make a complete en-
vironmental and cost/benefit analysis of the entire Colstrip project. Com-
pleted in November of 1973, the applicants paid about one million dollars for the final report.\textsuperscript{13} Although the report served as
the applicants’ major environmental analysis, it had become out-
dated by 1975 when the Board of the Department of Natural Re-
sources and Conservation (Board of DNRC) conducted public
hearings.\textsuperscript{14} The hearing transcript, which included expert witness
testimony, became the Board of DNRC’s primary record. The De-
partment of Natural Resources and Conservation’s (DNRC) Envi-
ronmental Impact Statement, similarly outdated by 1975, cost the
Department $855,000.\textsuperscript{15}

Two separate sets of public hearings were conducted: one by
the Board of the Department of Health and Environmental Sci-
ces (Board of Health) and the other by the Board of DNRC. The
Board of Health, which began its hearings June 5, 1975, heard
fifty-three witnesses over a total of fifty-three days, resulting in
7027 pages of transcript.\textsuperscript{16} The Board of Health concluded that the
applicants would have to modify their proposal in order to comply
with air and water quality standards.\textsuperscript{17}

The Board of DNRC hearings, continued five times,\textsuperscript{18} began
on May 20, 1975, but were recessed indefinitely after only thirteen
days.\textsuperscript{19} The hearings were finally concluded on March 30, 1976.
The actual hearings lasted a total of fifty days, involved 255 wit-
nesses and produced 10,000 pages of transcript.\textsuperscript{20} The DNRC spent
more than $735,000 on the hearings.\textsuperscript{21}

In spite of opposition by both the Department of Health and

\textsuperscript{12} Montana Board of Natural Resources and Conservation v. Montana Power Co.,
166 Mont. 522, 536 P.2d 758 (1975).
\textsuperscript{13} Graybill, \textit{supra} note 2, at 470 n.66 (citing letter and financial summary from Don
MacIntyre, Montana Department of Natural Resources, to Turner Graybill, January 7, 1977).
\textsuperscript{14} \textit{Id.} at 471.
\textsuperscript{15} \textit{Id.} at 470.
\textsuperscript{16} \textit{Id.} at 478.
\textsuperscript{17} \textit{In re Montana Power Co., Montana Board of Health, Findings of Fact and Con-
clusions of Law, November 21, 1975.}
\textsuperscript{18} Ross, \textit{Colstrip 3 and 4: One Point of View, MONT. LAWYER, March 1981, at 7, 9.}
John Ross was a staff attorney for Montana Power Company during the siting of Colstrip
Units 3 and 4.
\textsuperscript{19} Graybill, \textit{supra} note 2, at 478.
\textsuperscript{20} \textit{Id.} at 481.
\textsuperscript{21} \textit{Id.} at 470.
the DNRC, on July 22, 1976, the Board of DNRC decided by a four to three vote to issue the certificate for Colstrip Units 3 and 4. The Northern Plains Resource Council and the Northern Cheyenne Tribe appealed the Board’s decision, which was reversed in district court.22

On appeal, the Montana Supreme Court, following the principle of limited judicial review and deference to administrative expertise, reversed the lower court’s decision.23 Holding that the record supported the Board of DNRC’s ultimate conclusion, it remanded the case to the Board of DNRC to cure procedural errors. The Board of DNRC was also required to notify the supreme court of its corrective measures, so that the court could determine adequacy.24 In 1979, the supreme court acknowledged the Board of DNRC’s cure and affirmed the issuance of the certificate.25

In response to the supreme court’s remand, and before the Board of DNRC’s cure, the Montana Legislature passed House Bill 45226 by a wide margin. House Bill 452 provided a legislative cure of all procedural deficiencies as well as a legislative ratification of the Colstrip Units 3 and 4 certificate. This attempt to circumvent the Siting Act’s procedural requirements was quashed when Thomas Judge, then the governor of Montana, vetoed the bill.27

The final roadblock to construction of Colstrip Units 3 and 4 did not result from the Siting Act. In 1979, the Northern Cheyenne Tribe successfully halted construction based on violation of federal air quality standards.28 The injunction, however, was subsequently lifted pursuant to an agreement between the five utilities and the Northern Cheyenne Tribe.29

24. Id. at 538-39, 594 P.2d at 318-19.
29. Ross, supra note 18, at 11, 15. The agreement is on file at the legal department of Montana Power Co.
III. MONTANA MAJOR FACILITY SITING ACT

A. Facilities Regulated By the Siting Act

The Siting Act requires that any person wishing to construct a major facility in Montana must apply to the DNRC for a Certificate of Environmental Compatibility and Public Need. The Act prohibits construction, operation, or maintenance of a major facility without first obtaining a certificate from the Board of DNRC. Enforcement of the Act is the responsibility of the attorney general and the DNRC. Violations carry stiff monetary penalties as well as possible imprisonment.

The Act supersedes all other laws or regulations except federal and state standards for air and water quality. Appropriate state and federal air and water control agencies retain authority to determine compliance. No other agency or governmental entity can place any condition upon construction, operation, or maintenance of a certificated facility.

Applicability of the Siting Act is generally determined by production capacity and estimated cost of construction. A facility is subject to the Act if its estimated cost is greater than ten million dollars, and the facility is designed for or capable of: (1) generating at least fifty megawatts of electricity; (2) producing at least twenty-five million cubic feet or more of gas derived from coal per day; (3) producing at least twenty-five thousand barrels of liquid hydrocarbon products per day; (4) enriching uranium minerals; or (5) utilizing or converting five hundred thousand tons of coal per year.

Special rules apply to particular types of facilities. Any facility which performs underground in situ gasification of coal is covered by the Act, regardless of construction cost. Any facility which uses geothermal resources is covered if it has an estimated cost

30. MONT. CODE ANN. § 75-20-201(1) (1983). The application, however, must be filed with both the DNRC and the Department of Health. MONT. CODE ANN. § 75-20-211 (1983).
33. MONT. CODE ANN. § 75-20-408(1) (1983) provides for a civil penalty of not more than $10,000 for each violation. If the violation is willful, § 75-20-408(2) requires a fine of “not more than $10,000 for each violation or imprisonment for not more than 1 year, or both. Each day of a continuing violation constitutes a separate offense.”
34. MONT. CODE ANN. § 75-20-103 (1983).
greater than $750,000.\textsuperscript{38} Crude oil and natural gas refineries and any associated facility are specifically exempted from the Act, as are facilities subject to the Montana Strip and Underground Mine Reclamation Act.\textsuperscript{39} 

Certain electric transmission lines and pipelines are also covered by the Siting Act. Transmission lines are regulated according to capacity and length. Any electric transmission line designed to accommodate more than sixty-nine kilovolts is covered except that a transmission line ten miles or less in length is covered only if it has design capacity of greater than 230 kilovolts.\textsuperscript{40} Pipelines are regulated only if associated with a facility of the types listed above. All natural gas pipelines are excepted.\textsuperscript{41}

### B. Applying for a Certificate

#### 1. Pre-application Requirements

Any person\textsuperscript{42} who wants to construct a facility in Montana must comply with certain pre-application requirements before he can even apply for the certificate required for construction. At least two years before the potential applicant wants to apply for a certificate, he must begin to furnish the DNRC with annual reports of his future construction plans.\textsuperscript{43} An application for a certificate will not be accepted unless the facility has been identified as a proposed facility for at least two years in the person's annual reports.\textsuperscript{44} Also, one year before the person wants to apply for the certificate he must file a notice of intent to apply.\textsuperscript{45}

The annual report required by the Act is known as the annual long-range plan. Due April 1 of each year, the long-range plan must indicate the person's facility construction plans for the next ten years, indicating general location, size, and type of proposed facility.\textsuperscript{46} This information must be furnished to the DNRC, the governing body of the county of situs of the proposed facility, and various state agencies.\textsuperscript{47} Description of projected demand for the

\textsuperscript{38} MONT. CODE ANN. § 75-20-104(10)(d) (1983).

\textsuperscript{39} MONT. CODE ANN. § 75-20-104(10)(a) (1983).

\textsuperscript{40} MONT. CODE ANN. § 75-20-104(10)(b) (1983).

\textsuperscript{41} MONT. CODE ANN. § 75-20-104(10)(c) (1983).

\textsuperscript{42} MONT. CODE ANN. § 75-20-104(11) (1983) defines "person" to mean "any individual, group, firm, partnership, corporation, cooperative, association, government subdivision, government agency, local government, or other organization or entity."

\textsuperscript{43} MONT. CODE ANN. § 75-20-501(1) (1983).

\textsuperscript{44} MONT. CODE ANN. § 75-20-501(5) (1983).

\textsuperscript{45} MONT. CODE ANN. § 75-20-214 (1983).

\textsuperscript{46} MONT. CODE ANN. § 75-20-501(2)(a) (1983).

\textsuperscript{47} The plan must be filed "with the environmental quality council, the department of
service to be rendered by the facility and efforts to minimize environmental impact must also be included. In addition, utilities are required to describe efforts to coordinate with other area utilities to meet regional energy needs. The information required and procedures for the notice of intent to apply are similar to that of the long-range plans except that a description of reasonable alternative locations must also be included.

2. Application

Conforming to Board of DNRC rules and the application requirements of the Act can be tedious and time-consuming. The applicant must not only file the application for a Certificate of Environmental Compatibility and Public Need with the DNRC and the Department of Health, but must also send copies to local environmental protection agencies and seven state agencies.

The application must include: (1) a description of the preferred location; (2) a summary of any relevant studies of impact of the facility; (3) a statement explaining the need for the facility; (4) a description of all reasonable alternatives with a discussion of merits and demerits of each; (5) baseline data for primary reasonable alternatives; (6) proof of service of a copy to those designated; and (7) filing fee based on the department’s estimated costs of processing the application.

Within ninety days of receipt of the application, the DNRC and the Department of Health will notify the applicant whether the application is complete and acceptable, or will list deficiencies. After correction of the deficiencies, the applicant will be notified of the application’s status within thirty days. The process continues until the application is accepted.

49. “Utility” is defined as “any person engaged in any aspect of the production, storage, sale, delivery, or furnishing of heat, electricity, gas, hydrocarbon products, or energy in any form for ultimate public use.” Mont. Code Ann. § 75-20-104(13) (1983).
52. Mont. Code Ann. § 75-20-211 (1983). Section 75-20-105(1) grants the Board power to adopt rules governing the form and content of applications.
C. Processing the Application

Once the application is deemed acceptable, various state agencies begin making studies of the facility. During this process, which may take two or more years, there is little for the applicant to do.

The Board of DNRC is vested with the power to determine whether the certificate will be granted. Consequently, all department reports are sent to the Board. Upon receipt of the reports, the Board of DNRC sets public hearing dates. The applicant has the burden of proving by clear and convincing evidence that certification should be granted.

The Department of Health must commence its study within one year after acceptance of the application. In determining compliance with standards under its jurisdiction, the Department of Health must provide an opportunity for public review and comment. The decision is due six months after commencement of the study. The DNRC must report its findings resulting from an intensive study of the proposed facility within twenty-two months after acceptance of the application.

Other state agencies also study the impact of the proposed facility in their area of expertise. Their reports may include department opinions and conclusions as to the proposed facility. There is no time limit designated for initiation or conclusion of these department studies.

The Board of DNRC may appoint a hearing examiner to conduct public hearings, who then ensures that the hearings are completed within nine months after the Board's receipt of the department reports. After the public hearings, the Board of

57. The DNRC must report to the Board of DNRC within 22 months and the Board of Health must issue a decision within 18 months, but there is no time limit for the other department studies. MONT. CODE ANN. § 75-20-216(4), (5) (1983).
58. MONT. CODE ANN. § 75-20-201 (1983). It should be noted that the Board of Health has power to veto the facility if it is not in compliance with air and water quality standards. See §§ 75-20-103, -216(3), -401. Also, in the case of a nuclear facility, the certificate may not be issued without approval of a majority of the voters in a statewide election. MONT. CODE ANN. § 75-20-201(4) (1983).
59. MONT. CODE ANN. § 75-20-218(1) (1983). The hearing date must be set within 120 days of receipt of the reports.
60. MONT. CODE ANN. § 75-20-222(3) (1983).
64. MONT. CODE ANN. § 75-20-220(1) (1983).
66. MONT. CODE ANN. §§ 75-20-220 to -222 (1983) set forth the procedures required in
DNRC must decide whether to grant the certificate. In making its decision, the board must balance seven potentially conflicting factors: energy needs, land use impacts, water resources impacts, air quality impacts, solid wastes impacts, radiation impacts, and noise impacts. 67

The Board of DNRC is precluded from granting the certificate unless it makes findings which indicate that: (a) the facility represents the minimum adverse environmental impact; (b) the location of the facility conforms to applicable state and local laws and regulations; and, (c) if the applicant is a utility, the facility will serve the public interest, conveniences, and necessity. 68

D. Judicial Review

Any active party 69 may appeal the final decision of the Board of DNRC. 70 The appeal is made by filing a petition in a state district court of competent jurisdiction. The review procedures are the same as for contested cases under the Montana Administrative Procedures Act. 71 The Montana Supreme Court is the court of last resort.

IV. PROBLEMS UNDER THE SITING ACT

Colstrip Units 3 and 4 proceedings provide insight into problems apparent in Montana's Siting Act. 72 Although the Montana Legislature remedied some of these problems, 73 others remain. This comment will discuss only remaining problems. 74

68. MONT. CODE ANN. § 75-20-301 (1983).
69. An "active party" is defined in MONT. CODE ANN. § 75-20-221 (1983). It includes all persons who established an interest in the proceedings and who participated in the hearing before the Board of DNRC or the Board of Health.
70. Any decision of the Board of DNRC may only be appealed in conjunction with the final decision. MONT. CODE ANN. § 75-20-406(3) (1983). A negative decision by the Board of Health may be immediately appealed or the right to appeal may be reserved until after the Board of DNRC's final decision. Id.
72. For a discussion of problems revealed by the Colstrip Units 3 and 4 experience, see Graybill, supra note 2; Lopach & Petesch, Reforming the Montana Major Facility Siting Act (1978) (a study funded by the Ford Foundation).
73. MONT. CODE ANN. § 75-20-220 (1983) was the legislature's response. It provides for a prehearing conference in order to determine issues and identify witnesses and exhibits. Also, active parties must submit in writing and serve to opposing parties all direct testimony the party wishes the Board of DNRC to consider. For a discussion of the incredible volume of testimony spawned by the Colstrip Units 3 and 4 hearings, see Lopach & Petesch, supra note 72, at 475-81.
74. One other potential problem is worth noting. MONT. CODE ANN. § 75-20-304 (1983)
A. Processing Time of the Application

The time required to complete processing of the application can amount to several years. Between the date of filing for a certificate to construct Colstrip Units 3 and 4 (June 6, 1973) and the final granting of the certificate (July 22, 1976), more than three years elapsed. In 1973, the estimated cost of construction of Colstrip Units 3 and 4 was $368,000,000. By the time the certificate was granted, the estimated cost had more than quadrupled to $1.8 billion.

Even after the post-Colstrip legislative changes, it can still take three years to go through the certification procedure. A study of time limits imposed by other states reveals that Montana's requirements may produce unnecessary pre-construction delay. In Washington the Energy Facility Site Evaluation Council must make its recommendations to the governor within twelve months after receipt (not acceptance as in Montana) of the application. The governor must decide within two months, making the total time from application to decision fourteen months. Oregon's Energy Facility Siting Council has a variety of time limits on its final decision, depending on the type of facility proposed. The longest period, for nuclear and thermal power facilities, is two years. The North Dakota Public Service Commission must make

provides for a waiver of substantially all the requirements of the Siting Act upon a showing of an immediate need for the proposed facility. The applicant must also show a lack of sufficient advance knowledge to comply with the provisions of the Siting Act. The results of the present request to the Public Service Commission by Montana Power Company to include Colstrip Unit 3 in the rate base may have great impact on the "no advance knowledge" requirement. In 1973, when Colstrip Units 3 and 4 were proposed, there was predicted need for the electricity that would be generated. In the past ten years, conditions have changed and the electricity demand predictions have not materialized. A decision not to allow Colstrip Unit 3 in the rate base will encourage utilities to argue the inability to predict accurately. The utilities could wait until there is an actual, immediate need before commencing construction and then request waiver of the provisions of the Siting Act.

75. See Lopach & Petesch, supra note 72, app. A, for a chronology of the Colstrip Units 3 and 4 siting process.
76. Graybill, supra note 2, at 469.
77. Ross, supra note 18, at 8. This cost includes not only inflation but also costs of the regulatory process.
78. See supra text accompanying notes 55-62.
79. Neither Idaho nor Colorado, for example, has significant provisions for energy facility siting, and thus no time limits are set by those states. Washington, Oregon, and North Dakota were chosen for purposes of comparison because of the distinctive qualities of those states' siting acts.
80. WASH. REV. CODE ANN. § 80.50.100(1) (1982).
81. WASH. REV. CODE ANN. § 80.50.100(2) (1982).
82. OR. REV. STAT. § 469.370(3) (1983).
its decision within six months after receipt of an application.\textsuperscript{84}

Montana, in addition to actual application processing time, requires identification of the proposed facility two years prior to filing.\textsuperscript{85} Washington does not require any reporting of future plans. Oregon requires only a notice of intent to construct four months prior to application.\textsuperscript{86} North Dakota, like Montana, has a ten year plan requirement,\textsuperscript{87} but does not require any prior notice before filing of an application other than a letter of intent to build.\textsuperscript{88}

\textbf{B. Application Fee}

Montana's filing fee appears to be the highest in the nation.\textsuperscript{89} The Siting Act provides for a graduated fee schedule depending on the estimated cost of the proposed facility.\textsuperscript{90} The fee is paid in installments, as determined by the Board of DNRC.\textsuperscript{91} The applicant pays for the entire cost of processing its application, up to the amount of the filing fee.\textsuperscript{92} Any unused monies are refunded to the applicant.\textsuperscript{93}

The filing fee for Colstrip Units 3 and 4 was $1,232,930.\textsuperscript{94} In Washington the filing fee for all facilities is $25,000.\textsuperscript{95} The fee in Oregon is $200 per $1 million estimated cost of construction.\textsuperscript{96} The filing fee for Colstrip Units 3 and 4 would have been $73,600 in Oregon. In North Dakota the filing fee would have been the maximum filing fee, $150,000.\textsuperscript{97} It should be noted that although Washington, Oregon, and North Dakota make the applicant responsible for processing costs,\textsuperscript{98} only North Dakota, like Montana, places a limit on the amount the applicant pays.\textsuperscript{99} In both Wash-

\begin{itemize}
\item \textsuperscript{84} N.D. Cent. Code § 49-22-08(5) (1978).
\item \textsuperscript{86} Or. Rev. Stat. § 469.350(1) (1983).
\item \textsuperscript{87} N.D. Cent. Code § 49-22-04 (1978).
\item \textsuperscript{88} N.D. Cent. Code § 49-22-07.1 (1978).
\item \textsuperscript{89} The Southern States Energy Board, supra note 8, at x, indicates that North Dakota's filing fee with its maximum of $150,000 is the highest in the nation. The filing fee for Colstrip Units 3 and 4 was $1,232,930, which substantially dwarfs North Dakota's fee.
\item \textsuperscript{90} Mont. Code Ann. § 75-20-215(1) (1983).
\item \textsuperscript{91} Mont. Code Ann. § 75-20-215(2)(b) (1983).
\item \textsuperscript{92} Mont. Code Ann. § 75-20-215(1) (1983).
\item \textsuperscript{93} Mont. Code Ann. § 75-20-215(5) (1983).
\item \textsuperscript{94} Greybill, supra note 2, at 469.
\item \textsuperscript{95} Wash. Rev. Code Ann. § 80.50.071(1) (1982).
\item \textsuperscript{96} Or. Rev. Stat. § 469.420(2) (1983).
\item \textsuperscript{97} N.D. Cent. Code § 49-22-22(1) (1983). The filing fee is $500 per million, with a $150,000 maximum.
\item \textsuperscript{99} North Dakota has a ceiling of $1,000 for each $1,000,000 investment. N.D. Cent.
ingston and Oregon the applicant must make payments in addition to the application fee as costs accrue after the application fee is exhausted.\textsuperscript{100}

C. Public Need

Before the Board of DNRC will grant the Certificate of Environmental Compatibility and Public Need to a utility applicant, the utility must show that there is public need for the facility.\textsuperscript{101} The utility facility must serve the "public interest, convenience and necessity."\textsuperscript{102} This requirement can result in confusion for utilities serving residents of Montana.

This confusion will become apparent once the first facility certificated pursuant to the Siting Act is completed. Upon completion, the utility will apply to the Public Service Commission (PSC) for inclusion of the facility in its rate base.\textsuperscript{103} The PSC is the body designated by the Regulation of Utilities chapter of the Montana Code Annotated\textsuperscript{104} to regulate public utilities doing business within the State of Montana. If the facility is included in the rate base, consumers rather than shareholders will absorb the cost of construction. The PSC will not allow the facility into the rate base unless the facility is "useful for the convenience of the public."\textsuperscript{105} This standard is nearly the same as that of the Siting Act.

Although the Siting Act states that it supersedes all other laws and regulations,\textsuperscript{106} it does not address the specific issue of whether the showing of public need pursuant to the Act satisfies the showing of "useful" required for inclusion in the rate base. If the Act does supersede the Regulation of Utilities chapter, a utility facility, sited pursuant to the Siting Act, would, upon completion, automatically be included in the rate base. The PSC would then have no


\textsuperscript{101} Mont. Code Ann. § 75-20-301(4) (1983).

\textsuperscript{102} Mont. Code Ann. § 75-20-301(2)(g) (1983).

\textsuperscript{103} Montana Power Company is presently in this situation. Colstrip Unit 3 came on line in late 1983; Unit 4 is expected to come on line in 1984 or 1985. Montana Power Company has applied for a rate increase resulting from the inclusion of Unit 3 in its rate base.

\textsuperscript{104} Mont. Code Ann. §§ 69-3-101 to -713 (1983). Section 69-1-102 obligates the PSC to supervise and regulate utilities, common carriers, and railroads. Under § 69-3-102, the PSC is "invested with full power of supervision, regulation, and control" over public utilities.

\textsuperscript{105} Mont. Code Ann. § 69-3-109 (1983). This statute also gives the PSC the power to determine the value of property of a public utility which is "actually used and useful for the convenience of the public." The determined value is then included in the utility's rate base.

authority to determine whether the facility is “useful for the convenience of the public.” However, because the Act is unclear and without a legislative statement, the PSC and ultimately the Montana Supreme Court will determine whether the showing of public need pursuant to the Siting Act supersedes the “useful for the convenience of the public” requirement of the Regulation of Utilities chapter.

V. PREEMPTION/Congressional Challenge

A. Possibility of Congressional Preemption

Congress has essentially unlimited power to regulate the private development of natural resources. This power is compounded in Montana because almost seventy-five percent of Montana’s coal lies under land owned by the federal government. Congress also has power to preempt all state regulations that interfere with interstate commerce.

The United States Supreme Court has long held that projects that generate electricity for an interstate power system “affect commerce among the states and therefore are within the purview of the Commerce Clause.” Because of “commingling” of power in transmission lines, interstate commerce can even include generation which is destined only for local use. Thus it appears that construction of any electric generating facility may affect interstate commerce.

107. This is an important issue now because Colstrip Unit 3 will produce excess electricity. At issue is whether there is a present need for the facility and consequently if it is actually useful.


110. U.S. Const. art. I, § 8, cl. 2.


commerce and fall within the federal regulatory powers.

Recognizing state regulation of instate utilities as a legitimate expression of state police power, Congress preserved state regulatory power when it established the Federal Power Commission (FPC). The power of the FPC is now vested in the Federal Energy Regulatory Commission (FERC). FERC regulates interstate activities of utilities and has jurisdiction over siting of all hydroelectric facilities. In 1975 the Supreme Court held that the FPC had no authority over licensing of thermal generating plants because they are not explicitly mentioned in its congressional grant of power.

It would be a relatively small modification for Congress to include siting of all electric generating facilities in FERC's jurisdiction. In fact, commentators desiring to create a coordinated energy system and recognizing the impact on regional energy needs of unilateral state siting, have indicated the desirability of extending FERC's authority to include all energy facility sitings.

Since the means are readily available, the important question is under what circumstances would Congress exercise its power and preempt state jurisdiction over energy facility sitings. Commentators have offered general theories on conditions that might cause Congress to preempt state law. The consensus indicates that parochial state attitudes—i.e., where the state ignores national needs—would lead to congressional action.

One commentator suggests that Congress will "override state law in order to achieve national objectives such as energy development." With respect to public lands in the West, one author predicts a clash in federal and state interests of such proportion that Congress will enact a "massive federal mineral law." Another indicates the need for trade-offs during times of energy crisis and warns of congressional preemption in the areas of environment-


114. 42 U.S.C. § 7172 (Supp. 1977). This provision transfers the functions of the FPC to FERC.


117. Stewart, supra note 108, at 257.

tional regulation and energy development if states fail to recognize national and international needs.\textsuperscript{119}

Heeding these warnings, Montana should reevaluate the Siting Act from the perspective of the rest of the nation. Is Montana acting parochially? Does it appear as if Montana has failed to consider the energy needs of the rest of the nation? More specifically, are the identified Siting Act problems—lengthy time requirements, high fees, and heavy burden of proof—justifiable, especially in light of national needs, to protect the state’s environment?

\section*{B. Constitutional Challenge}

Although there are possible constitutional challenges\textsuperscript{120} to Montana’s Siting Act, success appears unlikely. The United States Supreme Court is quite deferential to states in the area of natural resource regulation when the state purports to protect the environment.\textsuperscript{121} Unless a state law discriminates against interstate commerce on its face,\textsuperscript{122} giving an instate economic advantage,\textsuperscript{123} the Court will probably not find an unconstitutional restriction on interstate commerce.\textsuperscript{124} The three policies indicated in Montana’s

\begin{itemize}
\item \textsuperscript{119} Lyons, \textit{Federalism and Resource Development: A New Role for States}, 12 \textit{Envtl. L.} 931 (1982).
\item \textsuperscript{120} A possible challenge to Montana’s Siting Act is that “the burden imposed on (interstate) commerce is clearly excessive in relation to the putative local benefits.” Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970). Another along the same line would be the charge that the local interest could be “promoted as well with a lesser impact on interstate activities.” \textit{Id.} Similarly, it could be argued that some provisions of the Siting Act do not bear a sufficiently close relationship to legitimate conservation purposes. Sporhase v. Nebraska, 458 U.S. 941 (1982).
\item \textsuperscript{121} See, e.g., Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1980) (upholding statute banning the retail sale of milk in plastic nonreturnable, nonrefillable containers); Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981). The \textit{Commonwealth Edison} Court held that Montana’s severance tax on coal mined in the state did not violate the commerce clause or the supremacy clause. It reached this conclusion even though the tax, up to 30\% of the contract sales price, burdened mainly out of state consumers in that 90\% of the coal is shipped out of state. \textit{Id.} at 613-16.
\item \textsuperscript{122} The Court has held that states may not prohibit the export of natural resources. \textit{See} Hughes v. Oklahoma, 441 U.S. 322 (1979) (game); City of Altus v. Carr, 255 F. Supp. (W.D. Tex.) \textit{aff'd per curiam}, 385 U.S. 35 (1966) (groundwater); Pennsylvania v. West Virginia, 262 U.S. 553 (1923) (natural gas).
\item \textsuperscript{123} For example, a state may not reserve for its citizens the economic benefits of electric power generated within the state. New England Power Co. v. New Hampshire, 455 U.S. 331 (1982).
\end{itemize}
Siting Act all relate to the protection of the environment.\textsuperscript{125} Also, Montana's Siting Act does not grant preference to instate applicants.\textsuperscript{126} The Siting Act purports to protect the environment and gives no instate economic advantage, so it would likely be upheld as constitutional if a challenge should arise.

Nonetheless, a challenge to the Act could conceivably succeed on the ground that Montana has no power to regulate out-of-state utilities.\textsuperscript{127} The Siting Act requires that all utilities show public need. The proponents of this challenge could argue that this requirement exceeds Montana's authority when the utility is an out-of-state utility which serves out-of-state consumers exclusively.

The strength of this argument is dependent upon a court's finding on a threshold question: is the requirement to demonstrate public need a regulation of natural resources development or a regulation of utilities? If a court finds the requirement to be the former, it is likely to uphold the validity of the requirement because the requirement applies to all utilities. It seems that even if the regulation interferes with interstate commerce and affects mainly out-of-state consumers, the Supreme Court would not determine a natural resource regulation to be unconstitutional.\textsuperscript{128}

As noted earlier, the public need demonstration is required only of utilities. This should be a red flag in alerting one to what the state is thereby actually regulating, i.e., utilities. Supporting this proposition is the fact that in most states the utility regulatory commission not only regulates consumer sales but also has the authority to control utility construction of facilities.\textsuperscript{129} In Montana, of course, the Board of DNRC regulates all facility construction. Recognizing this anomaly, a study of the Siting Act, funded by the Ford Foundation, concluded that the Siting Act should be amended to allow the PSC to make the threshold determination of public need before a utility applicant could continue in the application process.\textsuperscript{130}

If a court finds that the requirement to show public need is a regulation of utilities, it could well conclude that Montana has no authority to require out of state utilities to make this showing. As

\textsuperscript{127} For a discussion of state power to regulate utilities, see Arkansas Electric Coop. Corp. v. Arkansas Public Serv. Comm' n, 103 S. Ct. 1905 (1983).
\textsuperscript{128} See supra note 121.
\textsuperscript{129} Lopach, supra note 116, at 12.
\textsuperscript{130} Lopach & Petesch, supra note 72, at 26.
FACILITY SITING ACT

VI. RECOMMENDATIONS

Three of the Siting Act's problems could be eliminated by relatively simple changes. The legislature could make a clear statement indicating whether the showing of public need pursuant to the Siting Act supersedes the "useful" showing required to include the facility in the utility's rate base. The requisite heavy burden of proof could be changed from clear and convincing to preponderance of the evidence. The application fee could be substantially reduced without relieving the applicant of responsibility to cover all costs of processing his application, if the applicant is required to pay expenses which exceed the application fee as they are incurred. A maximum application fee of $150,000, as in North Dakota, although higher than in all other states, is more reasonable than Montana's present scheme.

Challenges to Montana's scope of power to regulate out-of-state utilities can be avoided by making minor changes in the definition of utility. Because Montana can only regulate utilities which serve Montana consumers, it should be made clear that utilities for the purposes of the Siting Act are only those utilities which serve the public within Montana. This could be effectuated by changing the last phrase in the definition of utility from "for ultimate public use" to "for ultimate public use in Montana."

The time required to process an application is perhaps the Act's most significant problem. The procedure is an ad hoc, one application at a time, processing. With each application the Board of DNRC is brought together and the numerous studies of the proposed facility and each proposed site begin, followed by public hearings. This procedure, by its very nature, consumes a great deal of time. How can the time problem be remedied without sacrificing the integrity of the process?

The American Bar Association's Special Committee on Environmental Law in its final report recommends planning as the

131. Southern States Energy Bd., supra note 8, at x.
132. See supra note 49.
133. This would then be consistent with the federal definition of state commission. See supra note 113.
134. Report, Development and the Environment: Legal Reforms to Facilitate Indus-
solution. The final report marked the culmination of a three-year study on industrial siting in the United States. The main thrust of the study, conducted in the early 1970's, was to determine legal reforms which would improve the decision-making process with respect to facility siting. The Committee concluded that planning is "the root of the overall decision-making process."¹³⁵

The Committee divided planning into two categories: basic and specific. Basic planning represents a general plan for the allocation and use of natural resources. The entire state is surveyed with regard to feasibility of development. Specific planning concentrates on the location of a particular facility at particular sites. The basic planning should be completed in advance of any application. Upon application, specific planning would commence.¹³⁶ Montana's Siting Act includes only specific planning.

The Committee predicted, and Colstrip Units 3 and 4 confirm, that when there has been no basic planning the potential for time-consuming conflicts is magnified.¹³⁷ Many of these conflicts can be avoided by a "fair accommodation of the various elements of the public interest during the early stages of the basic planning process."¹³⁸

The basic plan, which should be continuously updated, is a statewide land use plan. The plan should contain an inventory of all the state's natural resources. Areas that the people in the state desire to be preserved, such as parks or archeological or historical sites, should be identified along with those areas most suitable for development. Population centers, availability of labor forces, transportation facilities, and any other relevant considerations should be included in the plan. The relative priorities and values of the public should be assessed.¹³⁹ Natural resources should then be developed in accordance with the indicated priorities in the basic plan.

Colorado's approach to land use planning provides a model which can be modified to meet Montana's needs in creating a basic

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¹³⁵ Id. at 29.
¹³⁶ Id.
¹³⁷ Id.
¹³⁸ Id. (emphasis added).
¹³⁹ Id. at 29-33. In North Dakota, the siting authority, the Public Service Commission, has the responsibility of publishing an inventory of energy conversion and transmission facility exclusion areas. N.D. CENT. CODE § 49-22-05.1 (1983). The Commission must develop criteria for identifying these areas and has the continuing responsibility to evaluate, update, and publish the inventory. Although this plan is a mere shadow of what it ought to be, it is a step in the right direction. Neither Oregon nor Washington has any basic planning built into its siting act.
plan. Even though Colorado does not have a facility siting agency\textsuperscript{140} it does have a comprehensive land use plan.\textsuperscript{141} Each local government, after public hearings, designates matters of state interest and adopts guidelines for the administration thereof.\textsuperscript{142} For example, an area of state interest can be a mineral resource area, a natural hazard area, or an area which has significant impact upon historical, natural, or archeological resources of statewide importance.\textsuperscript{143} The Colorado Legislature has established criteria which the local governments apply in making the designation.\textsuperscript{144} State agencies not only provide technical assistance to local governments, but also have primary responsibility for recommendations in their designated area of expertise.\textsuperscript{145} For example, the state forest service is responsible for recommendations with regard to wildfire hazard areas.\textsuperscript{146}

Both the local governments\textsuperscript{147} and the state agencies\textsuperscript{148} send their determinations to the Colorado Land Use Commission. After receipt of the local government’s designation of a matter of state interest and administrative guidelines, the Colorado Land Use Commission decides, in light of agency recommendations, whether the designation or the proposed plan of administration should be modified. The Land Use Commission then sends its recommendation to the local government. The local government, however, has the option of rejecting the land use commission’s recommendation.\textsuperscript{149} This provision allows local governments to ignore statewide interest. Because it defeats the purpose of statewide planning,\textsuperscript{150} Montana should avoid creating a similar provision.

With a basic plan in place a potential applicant could survey the statewide plan and get an idea of the prospects for obtaining a suitable site. The wise applicant would eliminate areas designated to be preserved from consideration, focusing on those areas labeled suitable for development. Also, information about the values and relative priorities in each area under consideration would give a

\textsuperscript{140} In Colorado local governments grant or deny siting permits. COLO. REV. STAT. § 24-65.1-301 (1982).
\textsuperscript{141} COLO. REV. STAT. § 24-65.1-101 to -502 (1982).
\textsuperscript{142} COLO. REV. STAT. § 24-65.1-301 (1982).
\textsuperscript{143} COLO. REV. STAT. § 24-65.1-201 (1982).
\textsuperscript{144} COLO. REV. STAT. § 24-65.1-401 to -407 (1982).
\textsuperscript{145} COLO. REV. STAT. § 24-65.1-302 (1982).
\textsuperscript{146} COLO. REV. STAT. § 24-65.1-302(2)(b) (1982).
\textsuperscript{147} COLO. REV. STAT. § 24-65.1-301(e) (1982).
\textsuperscript{148} COLO. REV. STAT. § 24-65.1-302(a) (1982).
\textsuperscript{149} COLO. REV. STAT. § 24-65.1-406 (1982).
\textsuperscript{150} See, e.g., Comment, Regionalism or Parochialism: The Land Use Planner’s Dilemma—Boulder, Colorado's Danish Plan, 48 U. COLO. L. REV. 575 (1977).
potential applicant insight into public reaction to the proposed facility.

This procedure can be accomplished informally, as James A. Patten, former staff counsel for the Northern Plains Resource Council observed:

The Montana Power Company is to be given credit for its process used to determine the site for Montana Power's next powerplant, Resource '89; the decision to site the project in Great Falls was based on many of the same criteria which the Colstrip opponents steadfastly argued should control the siting of Units 3 and 4. Hopefully Montana Power now sees the advantages of listening to the citizens and considering their views when making siting decisions.¹⁵¹

The rigors of the Colstrip experience have given Montana Power Company an appreciation for the advantages of pre-planning facility siting. It would be to the advantage of the State of Montana if the legislature would make a similar realization and initiate a procedure for the creation of a comprehensive land use plan. Not only would such a plan reduce the time requirements and costs of siting, but it would also go a long way in mitigating any claim that Montana is arbitrarily prohibiting construction. This might be enough to convince Congress that it should refrain from preempting Montana's siting procedure.

¹⁵¹ Patten, Colstrip Units 3 and 4, Another Perspective, MONT. LAWYER, Apr. 1981, at 6.