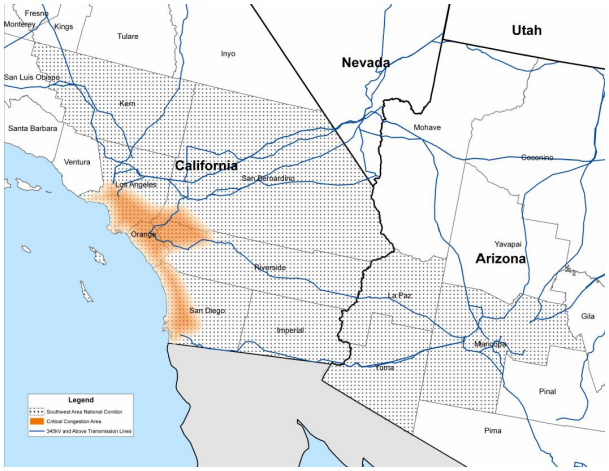

DOE's Southwest Corridor

When federal law tells a federal agency to consult with the states before issuing its rules, what is the agency obliged to do? Is it enough to allow the states to file comments on a proposed rule, or to invite their representatives to speak at a public hearing? According to the recent Ninth Circuit Court of Appeals decision in Cal Wilderness v. U.S. Department of Energy, at least when it comes identifying critical areas for new electric transmission lines, the answer is "no."

Traditionally, when siting new transmission lines, the states determined whether the line was needed and, if so, where to put it. Proponents of vigorous wholesale power markets and long-distance movement of renewable power became worried that the traditional approach was a recipe for gridlock. When a transmission line would cross state borders, it could only take one not-so-interested state to stop an important project. With its passage of the Energy Policy Act of 2005, Congress tried to address this concern by granting limited "backstop" transmission siting authority to the Federal Energy Regulatory Commission. But it was left to the Department of Energy to define the National Interest Electric Transmission Corridors in which FERC would be allowed to exercise its jurisdiction. Congress required that DOE consult with the states before designating those corridors.

DOE caught many states by surprise when it announced its two proposed "corridors". One cut a broad swath across Maryland, Pennsylvania, New Jersey, and New York. The other included parts of southern Arizona and all of southern California. These were hardly corridors in the traditional sense — more like broad jurisdictional strongholds. FERC would be free to overrule the states concerning not just the large, interstate lines, but also the smallest, shortest line that might be contemplated for construction anywhere within the "corridors". The effected states voiced their disapproval through filed comments and public statements, but DOE did little else to work through the states' concerns.

The federal law in question called for DOE to consult with the states, but did not specify the nature of the consultation. DOE found these instructions to be ambiguous, and suggested to the court that this left the agency free to adopt any reasonable interpretation. The Ninth Circuit disagreed. The common definition of "consult" is "confer," and DOE had made no effort to confer with the states. According to the court," Congress intended that affected States would participate in a study…" Despite this intent, "(n)o draft was circulated to the States, no committee was created that included representatives from the States, and the affected States were not given access to the supporting data."

The Ninth Circuit also rejected DOE's assertion that, if it erred, the error was harmless. "DOE admits that its determinations and conclusions in the Congestion Study were not decisions compelled by some mathematical formulae, but important discretionary decisions for which there was little guidance. The value of consulting with an agency before it makes a decision is greatest when the agency is tasked with adopting a 'novel approach' that will then affect all stakeholders. In such a situation, as here, a court can hardly conclude that the agency's refusal to consult with the affected States had no bearing on the substance of the decision reached."

Even if the court had not invalidated the corridor determination based on a failure to cooperate with the states, it would have rejected it based on a failure to consider the environmental consequences of its actions. DOE defended is lack of environmental review by arguing that there was no final action involved since there was no specific transmission line approved. It also argued that there are no reasonably- foreseeable impacts, and that the corridor designations do not limit the potential outcome of proceedings before FERC or the states. The court responded, "(t)here may be merit to some of DOE's arguments in terms of limiting the scope of an [Environmental Impact Statement] or in explaining why an [Environmental Assessment] and not an EIS should be prepared, but they fail both as a matter of law and fact to justify DOE's failure to undertake any study of the potential environmental impacts."

Cal Wilderness is not the first bump in the road related to FERC and transmission line siting. The Fourth Circuit's Piedmont decision, discussed here in 2009, interpreted federal law to preclude FERC from approving a project once it has been rejected by a state. Under that court's interpretation, FERC's role was limited, all along, to reviewing a project when a state fails to act with in a year, or when FERC finds that a state's approval came with overly-burdensome strings attached.

As a result, for DOE, it is back to the drawing board to reconsider its corridor designations in light of more substantive state involvement in the process, and potential environmental

implications. In the meantime, FERC's role in transmission line siting appears to be on hold. Since the DOE action reviewed by the court took place during the last administration, it is unclear how the current DOE will respond.