

RESOLUTION 2024-19

A Resolution Detailing the Barton County, Kansas, Policy on National Interest Electric Transmission Corridors

WHEREAS, President Biden has set a national goal, by executive order, to completely transition America's electric power generation to 100% renewable sources by 2035, which could require doubling and perhaps tripling the capacity of the U.S. transmission system. The goal is based on an administrative decision to sign the Paris Accord, an international agreement that was never ratified by the U.S. Senate and does not reflect the views of a majority of people in this County; and

WHEREAS, this self-defined goal to decarbonize the U.S. economy was adopted with no public process and without congressional approval, even though such a fundamental transformation of the U.S. economy would cause further congestion on America's power grid and impose substantially higher costs on consumers, and

WHEREAS, to address the congestion this transition would cause, the government proposes to establish National Interest Electric Transmission Corridors (NIETCs) to connect massive new construction of wind and solar facilities, largely on western public lands, to the power grid by crossing wide swaths of private land and using the federal power of eminent domain to acquire the necessary land; and

WHEREAS, two routes proposed by the U.S. Department of Energy (DOE) include first, the "Midwest-Plains potential NIETC," a corridor 5 miles wide and 780 miles long, crossing large swaths of Kansas, Missouri, Illinois, and Indiana; second, the "Plains-Southwest potential NIETC", described as 5-100 miles wide, 345 miles long east to west, and 220 miles long north to south, including portions of Kansas, New Mexico, Oklahoma, and Texas. Preliminary maps published by DOE are intentionally vague, but appear to impact at least 15-20 Kansas counties, none of which have yet been coordinated with; and

WHEREAS, DOE has promised a “public engagement phase” during which the geographic boundaries of potential NIETCs are to be “refined,” but asserts that “Public activities will focus on DOE-led community engagement activities,” with no mentioned coordination with state or local governments, as required by law; and

WHEREAS, there is no precedent for such widespread use of eminent domain by a federal agency, which federal courts and decades of practice demonstrate as traditionally the province of state and local governments. There is no justification for a federal agency to assert such powers, especially before state and local governments have been asked to participate in such important planning; and

WHEREAS, the Supreme Court has established precedents that federal agencies such as DOE cannot presume the regulatory authority to force fundamental changes in the American economy without clear authority from Congress. Such rulings span a wide array of cases, including:

- *MCI Telecommunications Corp. v. AT&T* (1994)
- *Alabama Association of Realtors v. HHS* (2021)
- *FDA v. Brown & Williamson Tobacco Corp.* (2000)
- *National Federation of Independent Business v. Occupational Safety and Health Administration* (2022)
- *Utility Air Regulatory Group v. Environmental Protection Agency* (2014)
- And most recently, *West Virginia v. EPA* (2022), in which the Supreme Court ruled that only Congress has authority to require a complete shift in energy sources for electric generation – which is the intent of NIETCs. The court found that regulatory agencies attempting “to adopt a regulatory program that Congress had conspicuously and repeatedly declined to enact itself,” would create “unprecedented power over American industry.” The court said that agency would have needed “clear congressional authorization” to require such a sweeping change in the sources of American electricity, and

WHEREAS, the current plan to build massive new wind and solar installations on public lands across the West, and to use eminent domain powers to build NIETCs to transport that power to the grid, is an end run around both the courts and the Congress – to fundamentally change the U.S. economy without an Act of Congress; and

WHEREAS, federal policies, not a growing market, have created the perceived need for this massive addition to the nation's power infrastructure. The DOE claims increases in demand could be as high as 175% to 914% under "*high clean energy growth scenarios*," as justification for the urgent use of federal eminent domain powers to build NIETCs, meaning that the claimed dire need for increased capacity assume massive increases in the use of wind and solar sources the federal government seeks to impose by fiat; and

WHEREAS, electricity end use in the United States has remained relatively flat for two decades (more or less 4,000 terawatt hours annually since 2005), so it is international conventions and national political agendas that are being used to justify what could become one of the largest takings of private land for public purposes in modern times; and

WHEREAS, federal agencies running roughshod over state and local governments to satisfy this artificially created demand cannot be justified under the constitution and laws of the United States or the State of Kansas; and

WHEREAS, the DOE and FERC are relying for legal authority on a 2021 amendment to the Federal Power Act, Section 216, that gives DOE broad discretion to study electric transmission congestion and to designate NIETCs in areas experiencing, or expected to experience, capacity constraints or congestion that negatively affect consumers; and

WHEREAS, DOE completed its congestion study and designated several preliminary NIETCs, based on the flawed assumption of massive increases in renewable generation driven by federal policy, not consumer demand, and FERC published regulations establishing procedures for construction permits, including eminent

domain authority, implicitly ignoring clear statutory direction that such authority could only be used in very limited situations where state authority is lacking, or has been unreasonably withheld or denied, none of which is the case with any of the proposed NIETCs; and

WHEREAS, Congress did not authorize such sweeping powers merely to enable a political agenda to wean the American economy from fossil fuels, but in fact, limited both DOE and FERC powers and made clear that Congress *did not* intend to pre-empt state authority over land use planning and transmission line siting; and

WHEREAS, the Kansas Corporation Commission (KCC) has authority over major transmission lines, evaluates applications for companies seeking to operate as a public utility, and approves the routes of such transmission line longer than 5 miles. KCC has made clear that it does not intend to shirk this responsibility nor cede its authority to the federal government, nor should it do so under any circumstances; and

WHEREAS, because utility companies have generally not yet found large commercial-scale solar facilities to be affordable or profitable, the federal government has undertaken to change the economics by opening vast stretches of public lands for leasing for solar projects – almost 32 million acres or 50,000 square miles across 11 western states, which is not justified by any substantial increase in public demand, or growing end-use of electricity, but by federal policy; and

WHEREAS, this political agenda, and the resulting NIETC proposals, would create national sacrifice zones, areas where the increase in electric power is not needed, but where vast tracts of private land, including highly productive agricultural land, might be taken; and

WHEREAS, communities and citizens in this County do not intend to be part of any such sacrifice zone for someone else's national political agenda; and

WHEREAS, the National Environmental Protection Act of 1970 (NEPA), and a long-standing body of other laws and traditions, require federal agencies undertaking major actions with environmental consequences to consult, cooperate, and coordinate their actions with state and local governments; and

WHEREAS, NEPA requires both DOE and FERC to consult with appropriate Federal, regional, state, and local agencies during the planning stages of any proposed action that requires an environmental assessment or environmental impact statement "to ensure that all potential environmental impacts are identified." DOE has already said the NIETC proposals require such NEPA processes, though no coordination with counties has yet occurred; and

WHEREAS, NEPA further requires that DOE "shall notify the host state and host tribe of a DOE determination to prepare an EA or EIS for a DOE proposal..." and even though DOE has apparently made and announced that decision it has not coordinated with affected Kansas Counties, which are legal subdivisions of the State, nor has the State informed this County of any planned EA or EIS related to NIETCs, nor is it even clear which counties may be affected; and

WHEREAS, NEPA specifies that DOE actions will not have the potential to cause significant impacts on environmentally sensitive resources, defined as, "a resource that has been identified as needing protection through Executive Order, statute, or regulation by Federal, state, or local government..."; and

WHEREAS, NEPA requires that the position of the local government be properly described and analyzed in the environmental study. It further requires that all conflicts between the two planning positions be identified, and for those issues that cannot be resolved the analysis must include efforts made to mitigate the conflict, or a reasonable explanation documented as to why consistency could not be achieved; and

WHEREAS, to meet the coordination requirement the lead agency must involve local governments early in the preparation of the analysis, acquire a complete understanding of the local governments position and include this in the pre-public review

documents. Then they are to meaningfully work with the local governments to reach consistency. The outcome also needs to be stated in the draft publicly released documents so that the public and decisionmakers have the benefit of understanding the effect of the project on those directly impacted as they make their public comments; and

WHEREAS, such sensitive resources specifically include “Prime or unique farmland, or other farmland of statewide or local importance...” which is defined as “farmland that is determined by the appropriate state or unit of local government agency or agencies with concurrence of the Secretary to be farmland of statewide or local importance.” All existing farmland in this County is considered by the County to be of “statewide or local importance,” and this County, as keeper of land records, is in the best position to make that determination and federal agencies should defer to those local determinations; and

WHEREAS, no national energy or climate goal, however well-meaning, can justify federal agencies ignoring long-established practices and procedures by failing to fully analyze the economic and environmental consequences of NIETCs, nor to fail in their legal requirement to coordinate such decisions with state and local governments; and

WHEREAS, the history, economy, culture, and quality-of-life in this County are inextricably linked to agriculture, the future prosperity of which is crucial to the public health, safety, and welfare; and

WHEREAS, this County and its citizens will be harmed if this policy is violated and/or policies are implemented inconsistent with it.

NOW, THEREFORE, BE IT RESOLVED by the Board of County Commissioners of Barton County, Kansas, that it is the policy of this County that:

- The federal government's proposed Midwest-Plains and Plains-Southwest National Interest Electric Corridors (NIETCs) plan violates long-standing traditions regarding eminent domain, which has been recognized by federal courts as the primary province of state and local governments.

- No federal agency has asked this County for its views on the proposed NIETCs, nor its help with any necessary land acquisition, nor has this County done anything contrary that would justify pre-emptive use of federal eminent domain powers.
- The U.S. Department of Energy and the Federal Energy Regulatory Commission have both failed in their legal requirements under federal law to consult and coordinate with state and local governments prior to beginning any NEPA process.
- Regardless of legal authorities, no federal agency should undertake any new land acquisition for the proposed NIETCs, by eminent domain or otherwise, without the express agreement of the County commissioners and the Kansas Legislature.
- All matters involving land use planning should remain in state jurisdiction as matters of primary state interest. Federal agencies should defer to state law and coordinate with state and local governments in all matters regarding land use planning.
- The proposed NIETCs are only vaguely described and mapped but could be harmful to the general welfare of the citizens of this County.
- This County should be directly involved in federal decisions related to NIETCs, including matters concerning use of eminent domain and land acquisition, not merely with input equal to individuals, but as a full jurisdictional partner whose policies carry the weight of general public opinion.
- DOE and FERC must not proceed with any NIETC plan in Kansas before fully consulting the States and all counties involved, and fully including them in the decision-making process.
- Under state laws related to eminent domain, as a subdivision of the State of Kansas this County will assert its jurisdiction to hold public hearings regarding any proposed land acquisition or land use planning in areas that could affect this County, and federal managers will be expected to attend, disclose details of any proposals, and answer any questions that may arise.
- The Kansas Attorney General should be prepared to defend the primary jurisdiction of state and local governments, resisting any attempts to pre-emptively impose federal eminent domain powers in this State.

- This County may elect to take legal action to defend its citizens' interests and to preserve agricultural and other existing land uses, and the Kansas Attorney General is expected to defend the interests of this County and its citizens against any and all federal intrusions on those land uses without the permission of the counties involved, and should make clear the State's intention to defend those interests in court if necessary.
- It is the sense of this County that all Kansas Counties should work together as one coalition to defend state and local jurisdiction over land use and planning against all threats, including federal eminent domain powers. This should be official state policy, and official policy in all counties.

Adopted this 29th day of October, 2024.

BARTON COUNTY COMMISSION


Barb Esfeld, Chairman


Shawn Hutchinson, Commissioner


Duane Reif, Commissioner


Tricia Schlessiger, Commissioner

ABSENT

Donna Zimmerman, Commissioner

ATTEST:



Bev Schmeidler
County Clerk

APPROVED AS TO FORM:


Patrick Hoffman
County Counselor