

RENEWABLE POWER PROJECTS ON FEDERAL LANDS: WIND AND SOLAR AND THE FLPMA RIGHT-OF-WAY – IS IT WORKING?

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I. Introduction

There is a fundamental disconnect between the policy goals of the new Administration² and of Congress to encourage significant and rapid development of renewable energy resources on public lands and existing congressional and agency direction on permitting projects on federal land. In short, the federal right-of-way authorization is ill-suited for rapid development of green energy. But is hope on the way? This paper focuses on the intersection of current federal policy regarding the development of renewable energy resources, especially wind and solar energy, on the one hand, and federal laws, regulations, policy and practice governing land use by the Bureau of Land Management (BLM), on the other. In particular, the emphasis of this paper is on the BLM right-of-way (ROW) permitting process as the regulatory framework for the use of federal land for utility-scale renewable energy projects. Although there are significant challenges, the Department of Interior, BLM and Congress are looking at ways to improve the ROW process to expedite renewable energy project development.

After an introduction to the ROW framework and applicable federal laws and regulations and an overview of current federal renewable energy policy in Section I, Section II considers the challenges raised by the current ROW framework for permitting of wind and solar projects. Section III then reviews what is currently being done and suggests several options that could be undertaken to alleviate these challenges.

A. Federal Land Regulation – the Right-of-Way Framework

The management of federal lands³ commonly referred to as “public lands” is primarily governed by the Federal Land Policy and Management Act of 1976 (FLPMA).⁴ FLPMA governs a broad scope of multiple-use land management issues, from wilderness to grazing, mining, timber, recreation and energy development, and establishes BLM as the manager of public lands. In this capacity, BLM is given authority under FLPMA through its

¹ The assistance in the preparation of this paper of Hogan & Hartson Project Finance associates Wylie Levone and Maria Garton is gratefully acknowledged.

² “So we have a choice to make. We can remain one of the world’s leading importers of foreign oil, or we can make the investments that would allow us to become the world’s leading exporter of renewable energy.” President Obama, March 13, 2009. http://www.whitehouse.gov/issues/energy_and_environment.

³ This paper will not address the permitting of renewable energy on U.S. Forest Service lands which is managed under similar multiple-use laws and regulations and FLPMA Title V. The U.S. Forest Service processes wind proposals under 36 CFR § 251.54 as a “special use.” The U.S. Forest Service is also struggling with its permitting process for wind energy and has yet to finalize new directives to govern that process. Wind Energy, Proposed Forest Service Directives, 72 Fed. Reg. 54,233 (Sept. 24, 2007).

⁴ 43 USC § 1701 *et seq.*

planning process⁵ to make public lands available for use and access; and through a variety of legal mechanisms in FLPMA and other federal statutes (e.g. the Mineral Leasing Act⁶) to enable private parties to lease, use and, in some cases, even acquire public land.

Under the Mineral Leasing Act, BLM has the authority to lease federal minerals (coal, oil, gas, potash, etc.) through a competitive leasing system. In 2005, the Geothermal Steam Act⁷ was updated to provide for a similar competitive geothermal leasing system. Grazing has its own well-developed system of grazing permits under FLPMA and related laws. Access to, and certain other uses of, public lands are provided for in Title V of FLPMA⁸ which sought to “clean up” the tangle of earlier access laws and create a more well-defined ROW process. The procedure for the issuance of ROWs and the authority of BLM to administer them are outlined in regulations issued pursuant to FLPMA, at 43 CFR § 2800 *et seq.* The regulations, which were substantially revised in 2005,⁹ describe the process for applying for an ROW, the criteria for evaluation by BLM of an ROW application, the requirements for obtaining and maintaining a ROW grant, and assignment of ROW grants.

B. Federal Renewable Energy Policy

The federal government’s expanded interest and involvement in renewable energy policy dates back to President Carter’s commitment in 1978 to provide substantial funding to the Solar Energy Research Institute, which is today known as the National Renewable Energy Laboratory (NREL), located in Golden, Colorado. Over the past three decades, the federal government’s interest, and commensurate funding, of renewable energy activities, both private and government-sponsored, has ebbed and flowed, often in conjunction with the fluctuations of the global oil markets. When oil prices have risen sharply, interest has often turned to renewable energy advancements. In recent years, the federal government’s interest in renewable energy grew substantially, as improved technologies, increased concern over global warming, state renewable portfolio standards and greater government-funded incentives in the form of grants, loans and tax credits for renewable energy, gave the renewable energy sector a substantial boost. In the space of a few years, the fledgling renewable energy sector developed into a rapidly-growing industry. Behind much of this development stands federal government policies and incentives aimed at encouraging the development of renewable energy technologies and the construction and deployment of renewable energy facilities throughout the country.

1. Bush II-Era Policies

In 2001 and 2002, as part of the George W. Bush energy policy initiative, Interior Secretary Norton convened renewable energy conferences with green energy developers out of which followed several new initiatives to support the development of federal renewable energy

⁵ 43 USC § 1712.

⁶ 30 USC § 181 *et seq.*

⁷ 30 USC § 1001 *et seq.*

⁸ 43 USC §§ 1761-1771; Steve Quarles & Rebecca Thomson “The Law of Access Across Federal Lands, in SONREEL, The Natural Resources Law Manual, 355 (R. Fink ed. 1995).

⁹ Rights-of-Way Under the Federal Land Policy and Management Act and the Mineral Leasing Act, 70 Fed. Reg. 20,970 (Apr. 22, 2005).

resources.¹⁰ In 2002, BLM issued its first wind energy policy¹¹ and in 2003, began work on a wind programmatic environmental impact study (PEIS) that was completed in 2005.¹² In 2003, Secretary Norton appointed an Interior Renewable Ombudsman, to track all renewable energy actions and help developers navigate the federal permitting process.¹³ Also in 2003, BLM, working with NREL, completed a Geographic Information System (GIS) assessment of the best locations on federal land for all forms of renewable energy from biomass to wind.¹⁴ Wind and geothermal permitting increased exponentially during these years.¹⁵ In October 2004, the Department of the Interior announced the issuance of a solar policy to encourage the development of solar projects on public land.¹⁶

In 2005, after three years of debate, the Energy Policy Act (EPACT) was passed.¹⁷ This landmark legislation addressed several key issues relating to the promotion and development of renewable energy, including the establishment of minimum thresholds for renewable energy purchases by the federal government,¹⁸ important revisions to existing law to encourage the development of geothermal energy,¹⁹ providing the Minerals Management Service (“MMS”) with authority to regulate the development of alternative energy in the Outer Continental Shelf²⁰ and the expansion of certain tax credits, notably the Investment Tax Credit (ITC) for solar projects.²¹ Of particular significance to the development of renewable projects on public lands, Congress set out an explicit objective to build 10,000 MW of renewable energy on public lands within ten years of the Act’s enactment.²² Interior began implementation of EPACT

¹⁰ National Energy Policy: Report of the National Energy Policy Development Group, May 2001; “Renewable Resources for America’s Future United States Department of the Interior,” at 5 (Jan. 2005). <http://www.doi.gov/initiatives/renewableenergy.pdf>.

¹¹ BLM Instruction Memorandum No. 2003-020 on Interim Wind Energy Development Policy, October 16, 2002 (“IM 2003-020”).

¹² U.S. Department of Interior Bureau of Land Management, “Final Programmatic Environmental Impact Statement on Wind Energy Development on BLM-Administered Lands in the Western United States” (June 2005) (“Wind PEIS”).

¹³ “Secretary Norton Appoints Brenda Aird as the Department’s Renewable Energy Ombudsman” (Oct. 31, 2003). http://www.doi.gov/news/03_News_Releases/031031c.htm.

¹⁴ BLM & DOE’s Office of Energy Efficiency and Renewable Energy, “Assessing the Potential for Renewable Energy on Public Lands,” Feb. 2003. <http://www.nrel.gov/docs/fy03osti/33530.pdf>.

¹⁵ For example, from 2001-2007, wind energy permits issued by BLM went from 5 permits issued during the four prior years to over 100. During this same period BLM processed more than 200 geothermal applications compared to 20 in the four preceding years. Statement of Jim Hughes, Acting Director, BLM Before the House Natural Resources Committee, oversight Hearing on Climate Change: Renewable Energy Development on Public Lands (Apr. 19, 2007).

¹⁶ Press Release, U.S. Dept. of the Interior Bureau of Land Management New Policy Encourages Solar Energy Development in America’s Public Lands (Oct. 21, 2004) *available at* http://www.blm.gov/wo/st/en/info/newsroom/2004/october/nr_10_21_2004.html.

¹⁷ Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 660 (2005)(codified in scattered sections of U.S.C.).

¹⁸ EPACT §203(a); 42 USC § 15852(a).

¹⁹ EPACT § 221 *et seq.*; 30 USC § 1001 *et seq.*

²⁰ EPACT § 388; 43 USC § 1337(p).

²¹ EPACT §1337, amending several tax provisions in 26 USC § 48(a).

²² EPACT § 211. “It is the sense of the Congress that the Secretary of the Interior should, before the end of the 10-year period beginning on the date of enactment of this Act, seek to have approved non-

through rulemakings for geothermal and off-shore alternative energy, geothermal and solar Programmatic Environmental Impact Statements and wood biomass policies. The impact of EPACT was significant, not only for the financial incentives and government initiatives it set out, but also for its reinforcement and confirmation of the federal government's commitment to playing an active role in encouraging the development of renewable energy.

2. Obama-era Policies

The American Recovery and Reinvestment Act (2009) (ARRA), the Obama Administration's economic stimulus initiative, expanded the federal government's renewable energy policy objectives beyond the promotion of energy independence to a new level of commitment that embraced the renewable energy industry as a source for employment opportunities and technological innovation that could potentially strengthen the U.S. economy in relation to other developed nations. Renewable energy projects were not just encouraged because of the energy they would develop and the carbon emissions they would avoid, but also for the jobs they would create, the technologies they would spawn for export to other countries, and the development of a "green economy."²³

At a practical level, ARRA increased or expanded upon existing tax incentives, for example by extending the expiration date of the production tax credit (PTC) for projects placed in service prior to the end of 2012.²⁴ More significantly, in light of the current economic downturn, ARRA allowed the PTC and ITC to be converted into renewable energy grants from the U.S. Treasury Department,²⁵ while simultaneously substantially expanding the loan guarantees available through the Department of Energy to include commercial generation projects generally, as opposed to innovative technology projects in particular.²⁶ If the EPACT was intended to expand and strengthen the federal government's commitment to renewable energy projects, ARRA's objective was to keep that commitment alive and to expand upon it so that the renewable energy industry could not only survive the economic recession, but actually become one of the leading sectors of the economy to pull the country out of it.

Secretary Salazar underscored the Obama Administration's interest in renewable energy by high-lighting green energy at his January 15, 2009 confirmation hearing and promptly articulating new policies to support federal renewable energy on public lands and waters. In his testimony, Secretary Salazar called President Obama's energy imperative "our moon shot" for energy independence and in remarks after the hearing told reporters, "in many ways, the Department of the Interior is the real energy department."²⁷ On March 11, 2009, the Secretary

hydropower renewable energy projects located on the public lands with a generation capacity of at least 10,000 megawatts of electricity."

²³ See, http://www.whitehouse.gov/issues/energy_and_environment, "Guiding Principles."

²⁴ ARRA § 1101.

²⁵ ARRA § 1603. On August 1, 2009, DOE and the Department of Treasury began to accept applications for \$3 billion in renewable energy grants.

²⁶ This loan guarantee program, established by EPACT, had previously been available only for innovative technologies. EPACT § 1701 *et seq.*

²⁷ Katherine Ling, *Energy Policy: New Bingaman Draft Gives Interior Greater Share of Transmission Siting*, *Env't & Energy Daily*, May 6, 2009.

issued his first Secretarial Order which established a Department Task Force on Energy and Climate Change and made the development, production and delivery of renewable energy one of the Interior Department's "highest priorities."²⁸ The Task Force is responsible for quantifying the contributions of renewable energy resources on public lands and federal off-shore waters and identifying and prioritizing specific "zones" on public lands for increased production of renewable energy and transmission. At the Department, \$41 million of ARRA stimulus monies were allocated to reducing the permitting backlog of BLM wind and solar projects through the preparation of regionally focused environmental analyses. In April, the Secretary was joined by President Obama to announce the completion of an environmental assessment to develop renewable energy in the Outer Continental Shelf.²⁹ In May, the Secretary built on an earlier Secretarial Order by Secretary Kempthorne³⁰ in announcing the opening of four BLM Renewable Energy Coordination offices.³¹ In June, the Secretary announced "fast-track initiatives for solar energy development" on BLM public lands in 24 identified solar energy zones.³² In July, Secretary Salazar testified to the U.S. Senate that, "[a]s the Secretary of the Interior, I can see the economic opportunity presented by the new energy economy. Since coming into office, we have prioritized the development of renewable energy on our public lands and off-shore waters."³³

Over the past several years, as the federal government has increased its commitment to renewable energy, the industry has reacted accordingly. Even recently, slowly but unmistakably, and despite the absence of a viable credit market or the tax incentive-based investors that were once a fundamental aspect of renewable energy project financing, the level of renewable energy project activity across the country has risen.³⁴ At the same time, project sponsors and developers have increasingly been looking to public lands as siting options, often in conjunction with adjoining private lands. This is especially true in the West, where open areas and meteorological conditions create ideal locations for utility-scale solar and wind projects, each of which require large tracts of land and appropriate levels of wind or solar resources. As a result, those developers turned to BLM, the manager of public lands, to make those lands available in order to enable actual implementation of the federal government's commitment to renewable energy development. BLM has opted to rely on its existing ROW permitting process

²⁸ Secretary of the Interior, Order No. 3285, Renewable Energy Development by the Department of the Interior (Mar. 11, 2009).

²⁹ Press Release, U.S. Dep't of the Interior, President Obama, Secretary Salazar Announce Framework for Renewable Energy Development on the U.S. Outer Continental Shelf (April 22, 2009) *available at* <http://www.mms.gov/ooc/press/2009/press0422.htm>.

³⁰ See U.S. Dep't of the Interior, Enhancing Renewable Energy Dev. On Pub. Lands, Secretary's Order No. 3283 (Jan. 16, 2009).

³¹ Press Release, U.S. Dep't of the Interior, Secretary Salazar Pledges to Open Four Renewable Energy Permitting Offices, Create Renewable Energy Team (May 5, 2009).

³² Press Release, U.S. Dep't of the Interior Secretary Salazar, Senator Reid Announce, 'Fast-Track' Initiatives for Solar Energy Development on Western Lands" (June 29, 2009), *available at* http://www.doi.gov/news/09_News_Releases/062909.html.

³³ Ken Salazar, Secretary U.S. Dep't of the Interior, Statement at the Hearing on Energy and Climate Legislation, Committee on Environmental Public Works, U.S. Senate (July 7, 2009).

³⁴ 2008: Another Record Year for Wind Energy Installations, American Wind Energy Association Fact Sheet, *available at* http://www.awea.org/pubs/factsheets/Market_Update_Factsheet.pdf.

as the primary method for wind and solar developers to request access to these public lands. And so the rush to ROWs began.

II. Overview of the ROW Framework and Problems Associated with ROWs

This section focuses on the ROW framework and the inherent challenges in this framework when trying to implement the federal government's stated objectives of expanding and accelerating the development of renewable energy generation.

A. ROW Regulatory Process

1. Introduction to ROW framework

BLM relies on the authority in FLPMA Title V authorizing the use of public land in a ROW for electric power generation, transmission and distribution systems and other facilities or systems to permit wind and solar facilities in a ROW.³⁵ An ROW is an authorization to any qualified individual, business, or government entity to use a specific piece of public land for a certain project, such as a road, pipeline or renewable energy project. The grant of a ROW occurs within the context of the multiple-use statutory mission of the BLM and the specific land use or resource management plan (RMP) governing the public lands proposed for the ROW.³⁶ Unless a RMP, statute, regulation or order withdraws or identifies the land as not appropriate for a ROW, the land is available for solar or wind ROWs.³⁷ The ROW grant differs from a lease in that it does not give the applicant an interest in the land itself, but is a license that provides authorization to use public land for a specific period of time for a specific purpose and with certain restrictions.³⁸ FLPMA grants the Secretary broad authority to make ROW grants subject to specific terms and conditions, which, "minimize damage to scenic and esthetic values and fish and wildlife habitat and otherwise protect the environment," and "manage efficiently the lands which are subject to the right-of-way or adjacent thereto and protect the other lawful users of the lands adjacent to or traversed by such right-of-way."³⁹

BLM has a "first come, first served" policy for processing ROWs. "ROW applications are generally processed in the order they are received."⁴⁰ Generally, a ROW is granted by BLM for a term appropriate for the life of the project.⁴¹ ROWs may be terminated by BLM upon notice.⁴² It is BLM's stated objective to grant the ROW in a manner that "(a) protects the natural resources associated with public lands and adjacent lands, whether private or administered by a government entity; (b) prevents unnecessary or undue degradation to public

³⁵ 43 USC § 1761.

³⁶ 43 USC § 1712(a).

³⁷ 43 CFR § 2802.10.

³⁸ See 43 CFR § 2805.14.

³⁹ 43 USC § 1765; *Shell Pipe Line Corp.*, 69 IBLA 103, 105 (1982).

⁴⁰ Bureau of Land Management Office of Lands and Realty, *Obtaining a Right-of-Way on Public Lands 10* (Revised February 5, 2008) ("ROW Brochure").

⁴¹ 43 USC § 1764(b); 43 CFR § 2805.11(b)(1); ROW Brochure at 1.

⁴² 43 USC § 1766; 43 CFR § 2807.17; see also discussion in Coggins, *Public Natural Resources Law*, § 15.25.

lands; (c) promotes the use of rights-of-way in common considering engineering and technological compatibility, national security, and land use plans; and (d) coordinates, to the fullest extent possible, all BLM actions under the regulations in this part with state and local governments, interested individuals, and appropriate quasi-public entities.”⁴³ In addition, the ROW grant process must comply with the National Environmental Policy Act (NEPA).⁴⁴ Issuing a ROW qualifies as a “major Federal [action] significantly affecting the quality of the human environment”⁴⁵ under NEPA and therefore requires review under the Act.⁴⁶ A ROW applicant must also comply with the procedural and substantive requirements of federal and state environmental laws.⁴⁷

The grant of a ROW by BLM is a discretionary action, and “a decision granting or denying a ROW ordinarily will be affirmed when the record shows the decision was based on a reasoned analysis of the factors involved, including environmental impacts, made with due regard for the public interest, and no sufficient reason is shown to disturb BLM’s decision.”⁴⁸ An application for a ROW can be denied by BLM for any one of the following reasons: “the proposal is not in conformance with the applicable Land Use Plans; the proposal would not be in the public interest; the applicant is not qualified; the proposal is inconsistent with Federal, State, or local laws; the applicant is not technically or financially capable of accomplishing the project; or serious environmental consequences may occur from the proposed project that cannot be mitigated.”⁴⁹ The Interior Board of Land Appeals, the Department of the Interior’s administrative review board, will uphold a rejection of a ROW application or a restriction or condition on a ROW if the record is based on a reasonable analysis and the public interest.⁵⁰

2. Application Process

Project sponsors apply for an ROW grant and pay the BLM’s costs to process the application. There are a series of initial steps that are required for any renewable energy project for which an ROW grant is sought: (1) establishing contact with the BLM Field office with management responsibility; (2) obtaining a Standard Form 299 “Application for Transportation and Utility Systems and Facilities on Federal Lands” (SF-299);⁵¹ (3) a pre-application meeting with a BLM Realty Specialist or appropriate staff member in order to jointly review the

⁴³ 43 CFR § 2801.2.

⁴⁴ 42 USC § 4321, *et seq.*; *see infra* at Section II.C.

⁴⁵ 42 USC § 4332(2)(C).

⁴⁶ 43 USC § 1765(a).

⁴⁷ 43 CFR § 2807.21.

⁴⁸ *Orion Energy, LLC*, 175 IBLA 81, 89 (2008); *see also* ROW Brochure at 5 (“The approval of a right-of-way application is a discretionary action by BLM, but it must consider the public interest in making its decision.”).

⁴⁹ 43 CFR § 2804.26; *International Sand & Gravel Corp.*, 153 IBLA 295, 298 (2000) (a ROW grant is “wholly discretionary”).

⁵⁰ 43 USC § 4.310 *et seq.*; *Santa Fe, NM Info. Council, Inc.*, 174 IBLA 93, 104-07 (2008); *Mary Byrne, d/b/a Hat Butte Ranch*, 174 IBLA 223 (2008).

⁵¹ 43 CFR § 4.12.

application form and requirements;⁵² (4) submittal of the completed SF-299 to the appropriate BLM office in person or by mail;⁵³ (5) payment of BLM cost-recovery processing fee.⁵⁴ An application is not “filed” until the BLM deems the application is complete in a formal, appealable decision letter and the cost-recovery processing fee is paid. All projects require a detailed Plan of Development (POD) to verify their technical and financial soundness before the NEPA review commences.⁵⁵ Approved projects must post a bond to ensure compliance with the grant’s terms and conditions, including reclamation costs. ROW grantees pay an annual rent based on the fair market value of the ROW.

On its face, SF-299 appears to be a relatively short application of about 3 pages, with instructions included in the application itself.⁵⁶ However, some of the items required to be submitted as part of the application are comprehensive and resource-intensive. For example, the “Project Description” portion of the SF-299 includes the POD (discussed below) (Item 7); a map showing the proposed position of the ROW (Item 8); State or local government approval (Item 9); a statement of technical and financial capability (Item 12); reasonable alternatives (Item 13) and company information to be submitted by all business entities (Supplemental, p. 4). Therefore, although SF-299 is a relatively short and seemingly straightforward application, it requires detailed information that can take months for a renewable energy project developer to gather and prepare.

A wind developer may apply for a 3-year monitoring and testing grant to conduct meteorological testing of a public land site. No POD is required; typically an environmental assessment (EA) or sometimes a categorical exclusion is deemed sufficient for NEPA compliance.⁵⁷ This temporary grant will act to exclude other applicants during the term, which in guidance is non-renewable, but typically can be renewed with BLM’s approval.⁵⁸ To actually develop the site, however, a separate SF-299 must be filed.

3. Required Fees and Bonding

The fees associated with the ROW process are (1) the processing category fee, (2) the monitoring fee, and (3) the rental fee. As described above, no processing fee is required at the time of the filing of the ROW application, but the appropriate fee is assessed by BLM once a

⁵² 43 CFR § 2804.10. BLM Instruction Memorandum No. 2009-043, BLM Wind Energy Development Policy (December 18, 2008) (2008 Wind Policy) describes the following purposes for the pre-application meeting: assist in preparation and processing applications; identify potential issues and conflict areas; identify visual resource issues and define the viewshed; identify environmental cultural resource studies needed; assess public interest and concerns; identify other authorized uses; identify recreation and public uses in area; discuss potential alternative sites; discuss potential financial obligations. 2008 Wind Policy at 2; *see also* BLM’s Instruction Memorandum No. 2007-097 on Solar Energy Development Policy at 3 (April 4, 2007) (2007 Solar Policy).

⁵³ 43 CFR § 2804.11.

⁵⁴ 43 CFR § 2804.14.

⁵⁵ *See* discussion *infra* at Section II.A.4.

⁵⁶ Bureau of Land Mgmt., Standard Form 299, “Application for Transportation and Utility Systems and Facilities on Federal Lands,” p. 3.

⁵⁷ 2008 Wind Policy at 4-7, 10.

⁵⁸ *Id.* at 5-6.

complete SF-299 application has been submitted.⁵⁹ BLM has issued a cost-recovery fee schedule, but the wind and solar policies assume that processing utility-grade wind farms and solar projects will be assessed under the full reimbursable cost category 6.⁶⁰ A monitoring fee is charged by BLM to reimburse the agency for its expenditures related to monitoring the construction, operation, maintenance, and termination of the project.⁶¹ FLPMA § 1764(g) requires a ROW holder to pay the “fair market value” for a ROW and the regulations provide for rental payments.⁶² Depending on the facility, rental fees may be determined by an agency rent schedule for linear facilities, a value determination or a fair market appraisal.⁶³ BLM’s Wind Policy provides for a rental fee based on a formula related to the total installed capacity in kilowatts.⁶⁴ No similar formula has been developed for solar. BLM’s solar policy requires a rent established by BLM using real estate appraisals on site-specific comparable lands (“commercial or industrial land”). BLM does provide for a phase-in of solar rent over three years.⁶⁵ In addition to these fees, a wind and solar applicant will be required to post a bond at the issuance of the ROW grant.⁶⁶

4. Plans of Development

Although BLM regulations do not mandate the submission of a POD with an ROW application,⁶⁷ PODs are now a necessary component of all ROW applications for renewable energy projects. The BLM-drafted template for solar PODs indicates that the POD must be submitted prior to the initiation of any NEPA review, because the POD provides the “basic information” necessary to begin the NEPA process.⁶⁸ Thus, the BLM’s environmental review will not commence until it receives a satisfactory POD.

Through the POD, an applicant must demonstrate a real intent and capacity to actually build a renewable energy project on the public land it is applying for access to. Even serious developers, however, may find the POD to be overly demanding – for example, the expectation that a POD contain a 30% Engineering and Civil Design package “to adequately

⁵⁹ ROW Brochure at 4-5.

⁶⁰ 43 CFR § 2804.14; 2008 Wind Policy at 7; 2007 Solar Policy at 7.

⁶¹ 43 CFR § 2805.16

⁶² 43 CFR § 2806.10-.16.

⁶³ 73 Fed. Reg. 65040 (October 31, 2008).

⁶⁴ 43 CFR § 2806.10(a); 2008 Wind Policy at 5.

⁶⁵ 43 CFR § 2806.10(a); 2007 Solar Policy at 4.

⁶⁶ 43 USC § 1764(i) (“the Secretary ... may require a holder of a right-of-way to furnish a bond, or other security ... to secure all or any of the obligations imposed by the terms and conditions ...”); 43 CFR § 2805.12(g) (“BLM may require a bond, an increase or decrease ... at any time during the term of the grant.”). 2008 Wind Policy at 5; 2007 Solar Policy at 4.

⁶⁷ See 43 CFR § 2804.24(b) (“BLM may require you to submit additional information necessary to process the application. This information may include a detailed construction, operation, rehabilitation, and environmental protection plan, i.e., a ‘Plan of Development’ ...”). See also 2007 Solar Policy, at p. 3 (“...an approved Plan of Development (POD) for construction and operation of the solar facility must be completed prior to beginning construction. When possible, the right-of-way authorization and POD can be processed simultaneously.”).

⁶⁸ POD outlines for solar and wind projects are available at http://www.blm.gov/wo/st/en/prog/energy/cost_recovery_regulations/pre-application.html.

describe the proposed project and evaluate the design considerations for soils, drainage and watershed management.”⁶⁹ This is a high standard and an expensive commitment for an applicant that is still in the preliminary stages of the ROW application.

Once BLM receives a complete SF-299 application with all necessary information (including a POD), it will begin processing the application and conducting a NEPA review. The stated goal of BLM is to process an ROW application within 60 days,⁷⁰ but in actuality, the processing time for a renewable energy ROW application can be closer to 18 months to two years or more, for reasons described below. The BLM permitting process, pursuant to FLPMA, must result in terms and conditions to “minimize damage to scenic and aesthetic values and fish and wildlife habitat and otherwise protect the environment . . . [and] require compliance with applicable air and water quality standards.”⁷¹ A ROW grant is effective once BLM and the grantee execute the grant.⁷² The term of a grant is typically 30 years plus an extension.⁷³ A ROW grant cannot be assigned without BLM’s approval.⁷⁴ A ROW may be terminated from non-use or as a result of violation of law or the terms and conditions of the grant.⁷⁵

B. Increased interest in solar and wind development has created an overload at BLM of ROW applications

From 2003 to 2009, the number of applications for ROW permits for wind and solar generation projects has grown exponentially, yet agency resources to support this work have not grown at a similar pace. In 2004, when the Solar Energy Development Policy⁷⁶ was first issued, there were no solar ROW applications pending. In 2006, BLM received six applications and in 2007, 43 applications for solar energy projects were pending.⁷⁷ By comparison, from the middle of 2008 to the middle of 2009, BLM received 130 applications.⁷⁸ The current queue for ROW applications, as of the time of this writing, stands at over 200 solar

⁶⁹ See the Solar POD outline available at *id.*

⁷⁰ 43 CFR § 2804.25.

⁷¹ 43 USC § 1765(a); 43 CFR § 2805.12; the 2005 Wind PEIS Record of Decision (ROD) established “best management practices” to minimize adverse impacts from wind development to be incorporated as terms and conditions. Wind PEIS ROD at 5 (December 2005).

⁷² 43 CFR § 2805.13.

⁷³ 2007 Solar Policy at 4; 2008 Wind Policy at 8.

⁷⁴ 43 CFR § 2807.21.

⁷⁵ 43 USC § 1766; 43 CFR §§ 2807.17, 2807.18 and 2807.19.

⁷⁶ See *supra* note 16.

⁷⁷ Solar developers have lagged behind wind developers in seeking access to public lands. In 2003 there were approximately 60 ROW applications from companies seeking to perform preliminary wind resource tests to assess the feasibility of siting wind projects in particular areas. See press release of the Dep’t of Energy Federal Energy Mgmt. Program, May 7, 2007, available at http://www1.eere.energy.gov/femp/news/news_detail.html?news_id=10614. The Governor of Wyoming has recently described the rush to permit wind in Wyoming as a “gold rush” both in pace and mentality. Letter from Governor Freudenthal to Wyoming Legislative Task Force (May 19, 2009), available at <http://governor.wy.gov/press-releases/governor-outlines-wind-concerns-to-legislative-task-force.html>.

⁷⁸ Louis Sahagun, *Renewable Energy Sparks a Probe of a Modern-Day Land Rush*, L.A. Times, June 1, 2009.

project applications and some 281 wind project applications.⁷⁹ While the precise numbers are ever-changing, two salient facts are inescapable: (1) the number of ROW applications for renewable energy projects has increased dramatically in the past few years, and (2) in its current state, BLM lacks the capacity to efficiently process these applications. The result has been an enormous backlog that threatens the viability of proposed projects on federal land and, in turn, the federal government's stated objectives with regard to renewable energy development. According to the Solar Energy Industries Association, while "the Bureau of Land Management has approved 7,000 oil and gas drilling applications on federal lands since 2007, it has not approved a single new solar project" showing "a lack of a plan, a lack of a process and probably lack of focused resources to date on this issue."⁸⁰

Why the sudden rush for ROW applications? The first is that, as discussed above, the industry itself has grown significantly in the past few years, and it was an inevitable result of this process that developers would look for suitable land wherever it could be found, given the site-specific nature of solar and wind projects that mandates suitable environmental conditions to support their economic feasibility. A second reason is that state renewable portfolio standards and federal efforts to promote renewable energy through tax incentives, loan guarantees, grants and other policy mechanisms over the past decade have led to a confluence of private development interest and public policy objectives. It is a short step from federal tax incentives to federal land usage rights; in the mind of the developer, the federal government's generosity with the former should naturally lead to generosity with the latter, at least in terms of making public lands available on a priority basis.⁸¹

A third and less laudatory reason why ROW applications may have soared in recent years is one of increasing interest and concern to the federal government: that speculators with no real interest or capacity to develop actual renewable energy projects got an early "jump" into the ROW queue, so as to be able to profit from their valuable positions in line. Since ROW applications are handled on a "first come, first served" basis, the process rewards those who submit applications early with a priority right to the applied-for public land.⁸²

The extent of this speculative activity is unclear, but it appears to have the attention of BLM and the Department of the Interior's Inspector General. The BLM's 2007

⁷⁹ See Press Release, U.S. Dep't. of the Interior *Q&As: BLM Solar Programmatic Environmental Impact Statement (EIS)*, (June 29, 2009), noting that there are currently 225 pending ROW applications for solar energy projects, 158 of which are "active" applications because they are first in line for a given property, while the remainder are second or third in line for properties that already have applications on file. The BLM public information page regarding ARRA (undated) puts the number of applications for wind projects at 281 and the number of solar applications at 199; see <http://recovery.doi.gov/press/bureaus/bureau-of-land-management/bureau-of-land-management-renewable-energy-authorization/>.

⁸⁰ Scott Streater, 'Solar Energy Zone' Concept Laudable, but Flawed, Critics Say, N.Y. Times, July 9, 2009, available at <http://www.nytimes.com/gwire/2009/07/09/09greenwire-solar-energy-zone-concept-laudable-but-flawed-85061.html?pagewanted=1> (quoting Monique Hanis, Representative of Solar Energy Industries Association).

⁸¹ Mathew Preusch, "Chase for wind power turns to Oregon's Public Lands," Oregon Live.com (May 23, 2009).

⁸² See 2007 Solar Policy at 5.

Solar Policy discourages speculation, stating that “the BLM will discourage applicants from holding ROW authorizations for purposes of speculating, controlling, or hindering development.”⁸³ The 2007 Solar Policy adds that the qualification requirements of the ROW regulations⁸⁴ and due diligence requirements can mitigate speculative interest. These qualifications require that an applicant be “[t]echnically and financially able to construct, operate, maintain, and terminate” the solar facility.⁸⁵ BLM has the authority to deny an application where the applicant “do[es] not have or cannot demonstrate the technical or financial capability to construct the project or operate facilities within the right-of-way,” or fails to “adequately comply with a deficiency notice . . . or with any BLM requests for additional information needed to process the application.”⁸⁶ In 2008, as a way to tamp down speculation, BLM issued policy direction that required a solar developer to submit a detailed POD early in the process.⁸⁷ And, once a ROW grant is issued, BLM’s due diligence requirement requires the commencement of construction within 3 years.⁸⁸

Recently, the Department of the Interior reinforced its concern about speculation by launching an Inspector General investigation of First Solar Inc., which earlier this year acquired OptiSolar for \$400 million, and which acquisition apparently included OptiSolar’s pending solar ROW applications for 136,000 acres of public land as part of its valuation. Rejecting the notion that an ROW application could be included as an asset to be valued in an acquisition, one BLM representative stated “A company can buy another company along with its applications, as long as those applications are not listed as assets. That would be wrong. We’re trying to weed out speculators who are filing applications, then waiting for someone to buy them at the highest price.”⁸⁹ Despite that statement, BLM has not objected to the sale of one company holding pending solar applications to another and it has continued to recognize the relative priority position of the acquired applicant’s pending SF-299 post-sale so long as notice is provided and the applicant remains unchanged.⁹⁰

BLM’s own policy of “first come, first served” for accepting solar ROW applications⁹¹ placed a market value on pending applications and fed the rush for applications, as the public land available for solar and wind projects is a finite resource that appears to have an

⁸³ Solar Policy at 5.

⁸⁴ 43 CFR § 2803.10(a-c).

⁸⁵ Solar Policy at 5; 43 CFR § 2803.10(b).

⁸⁶ 43 CFR §§ 2804.26(a)(5) and (6) (denial of application); 43 CFR § 2804.25(b) (requests for additional information).

⁸⁷ “The following outline identifies the minimum requirements for a Solar Energy Plan of Development (POD) to be submitted prior to initiation of a NEPA analysis . . .” Solar POD Outline, Information Needed to Publish NOI (7/3/2008).

⁸⁸ 2007 Solar Policy at 5 (“[f]ailure of the holder to comply with the due diligence provisions of the solar energy development right-of-way grants provides the authorized officer the authority to terminate the authorization.”); 2008 Wind Policy at 9-10; 43 CFR § 2807.17.

⁸⁹ *Trouble With First Solar’s OptiSolar Acquisition*, <http://www.businessinsider.com/jay-yarow> (June 1, 2009, 5:44 EST).

⁹⁰ 43 CFR § 2807.11.

⁹¹ 2007 Solar Policy at 5.

ever-increasing value.⁹² This outcome may have been avoidable, if BLM had elected to establish a competitive process for public lands for which multiple applications are received, so as to at least partially mitigate the “first in time” land rush.⁹³ To date, BLM has not taken advantage of this authority to initiate a competitive leasing process for ROW applications for any renewable land projects. Instead, in May 2008, BLM sought to stem the flood of applications and provide a planning window by placing a moratorium on the acceptance of any new solar applications.⁹⁴ Only one month later, the strong industry opposition to this moratorium led BLM to reverse its decision, and BLM continued to accept new solar applications.⁹⁵ As discussed below, BLM is now commencing a planning effort to delineate regional areas – renewable energy zones – to be used for solar energy development and has also indicated it may develop a competitive process for applications in solar energy zones, but it remains unclear how, or whether, it will address the 200 pending ROW applications.

The Solar PEIS that was announced in May 2008⁹⁶ was significantly modified in June 2009 when Secretary Salazar (and Senator Reid) announced a solar “fast-track” initiative to “designate tracts of U.S. public lands in the West as prime zones for utility-scale solar energy development,” by identifying 24 Solar Energy Study Areas in six states – Nevada, Arizona, California, Colorado, New Mexico and Utah.⁹⁷ “The objective is to provide landscape scale planning and zoning for solar projects in the West, allowing a more efficient process for permitting and siting responsible solar development.”⁹⁸

Compounding the sudden influx of applications, the ROW application process itself is so comprehensive, burdensome and cautious that processing times are inherently and unavoidably lengthy, not to mention expensive for developers. The remainder of this section considers the particular aspects of the ROW application procedure that contribute to this challenge.

⁹² *BLM Shocked that Lease Rights have Value*, [http://real propertyalpha.com/2009/06101/blm-shocked-that-lease-rights-have-value](http://realpropertyalpha.com/2009/06101/blm-shocked-that-lease-rights-have-value) (June 1, 2009); see also *Opti-Solar, Inc.*, IBLA 2008-85 and 2008-97 (Apr. 28, 2008) at 8 where the IBLA recognizes the value to Opti-Solar of its priority application position and reinstates the application to pending status by granting a stay.

⁹³ See 43 CFR § 2804.23 (competing applications); 2007 Solar Policy at 5; 2008 Wind Policy at 9.

⁹⁴ Notice of Intent to Prepare a Programmatic Environmental Impact Statement to Evaluate Solar Energy Development, 73 Fed. Reg. 30,908, at 30,910 (May 29, 2008). (Solar PEIS).

⁹⁵ Press Release, Bureau of Land Mgmt., BLM to Continue Accepting Solar Energy Applications (July 2, 2008), available at http://solareis.anl.gov/documents/docs/press_release_solar_applic_review_02July08.pdf.

⁹⁶ *Id.* at note 91.

⁹⁷ The Solar Energy Study Area Maps to be used for the Solar PEIS are available at <http://solareis.anl.gov/eis/maps/index.cfm>.

⁹⁸ Press Release, U.S. Dep’t of the Interior, Secretary Ken Salazar, Senator Reid Announce ‘Fast Track’ Initiatives for Solar Energy Development on Western Lands (June 29, 2009) (Fast-Track Press Release), available at http://www.doi.gov/news/09_News_Releases/062909.html.

C. National Environmental Policy Act (NEPA)

For many observers of the current backlog at BLM, NEPA⁹⁹ compliance is identified as the primary culprit. As “our basic national charter for protection of the environment,”¹⁰⁰ NEPA requires the federal government to consider the environmental impacts of any proposed federal project or federally funded initiative.¹⁰¹ Compliance with NEPA, particularly for utility-scale wind or solar projects, is time-consuming and resource-intensive for both government agencies and developers.

NEPA analysis may occur at different levels. The NEPA process begins with agency planning by directing that environmental considerations be included in that planning.¹⁰² When an agency begins to analyze a proposed action, it must determine if an environmental impact statement (EIS) is required. First, a determination is made as to whether a categorical exclusion applies, that is, that the scope and scale of effects to the land and resources as a result of the proposed project has been analyzed before repeatedly and will have no significant effects, or a particular categorical exclusion provided by the agency or Congress applies.¹⁰³ If not, an environmental assessment (EA) is prepared to determine if the effects of the proposed action are significant and trigger an EIS.¹⁰⁴ If there is no determination of a “Finding of No Significant Impact” (FONSI),¹⁰⁵ an EIS must be prepared.¹⁰⁶ This document, a detailed evaluation of the proposed federal activity and its expected environmental impact, is subject to input from other federal, state and Tribal agencies and public stakeholders through a comprehensive review and comment process. Once this process has been completed, the federal agency prepares a public record of its decision on the particular action, which decision may be further subject to appeals both at the administrative and judicial levels.¹⁰⁷

Since most large-scale solar projects and wind farms trigger the more detailed EIS, one especially problematic aspect of NEPA from a development perspective is that there are no deadlines to NEPA compliance reviews. By contrast, for example, the California Energy Commission (“CEC”) equivalent for utility solar environmental compliance review, based on the California Environmental Quality Act (“CEQA”), has specific deadlines,¹⁰⁸ and the state

⁹⁹ 42 USC §§ 4321–4347; 40 CFR §§ 1500–1518.

¹⁰⁰ 40 CFR § 1500.1(a); *see also* 42 USC § 4321 (“to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man ...”).

¹⁰¹ 40 CFR § 1502.1; 42 USC § 4332.

¹⁰² 40 CFR § 1501.1(a).

¹⁰³ 40 CFR § 1508.4; *see e.g.* 2008 Wind Policy at 6.

¹⁰⁴ 40 CFR § 1501.4(b); § 1508.9(a)(1).

¹⁰⁵ 40 CFR § 1501.4(e).

¹⁰⁶ 42 USC § 4332(2)(c) (“detailed statement”); 40 CFR § 1508.11.

¹⁰⁷ This summary discussion notwithstanding, NEPA compliance reviews are a very complex, well-litigated, ever-changing process. BLM guidance may be found at U.S. Dep’t of Interior, Bureau of Land Mgmt., “National Environmental Policy Act Handbook (January 2008); *see also* Daniel R. Mandelker, NEPA Law and Litigation (Thomson West 2008); NEPA Federal Land Development Special Institute, Rocky Mtn. Min. L. Inst. (Feb. 2006).

¹⁰⁸ Cal. Pub. Res. Code § 21159.3. Note this is actually a CEQA-like process in the CEC rules.

government has the burden of identifying and responding to any potential environmental impacts in accordance with those deadlines.¹⁰⁹ NEPA reviews can therefore extend for months and even years, and the uncertainty associated with this review and the timing and content of its outcome, leaves developers in a state of uncertainty that is challenging to project development or planning.

D. FLPMA Resource Management Plans

An added wrinkle to ROW permitting and NEPA compliance for renewable energy projects is the Secretary of the Interior's responsibility to develop RMPs,¹¹⁰ long-term strategic plans that identify the allowed uses of particular federal land administered by the BLM. It is in RMPs that BLM plans how to meet FLPMA's multiple-use mandate. Many of the RMPs for federal land were issued in the 1980s and are considerably out of date, and even those more recently updated failed to plan for the level of renewable energy now contemplated. When deciding whether a new proposal triggers a plan amendment, the BLM must decide if it conforms to the RMP and is supported by adequate plan-level NEPA analysis.¹¹¹ Amending an RMP requires an EIS, additional procedures and adds several months to the process.¹¹² Thus, as sponsors look to develop renewable energy projects on public land, they are often faced with RMPs that do not support development of large-scale renewable energy projects and the requirement for BLM to amend those RMPs.

E. Compliance With Other Laws and Regulations

In addition to NEPA, BLM requires ROW applications to comply with a broad range of federal laws and regulations, making the ROW application process comprehensive and detailed. The public participation requirements of NEPA and the terms and conditions to be made a part of the ROW grant require that BLM has accounted for most of these requirements by the time the draft EIS is issued, and all of it before the ROW is issued. The process allows BLM to assess and manage the impacts to multiple resources – oil, gas, minerals, grazing, recreation, viewsheds, wildlife and plants.

We briefly describe in this section some of the federal laws, regulations and other issues that must be taken into account by wind and solar project developers in the ROW permitting process and accompanying NEPA review.

¹⁰⁹ This was an issue that was a central focal point in the May 2009 hearing regarding the Ivanpah thermal solar project. *See Application for Certification of Ivanpah Solar Electric Generating System Before the Energy Resources Conservation and Development Commission of the State of California*, California Energy Commission, No. 07-AFC-5, May 18, 2009 (“Ivanpah Hearing”).

¹¹⁰ 43 USC § 1711(a).

¹¹¹ 43 USC § 1712(a), (c); 43 CFR § 1600 *et seq.* 43 CFR § 1610.0-5(b); Bureau of Land Mgmt., Land Use Planning Handbook (March 2005) (“Planning Handbook”) at 41-42.

¹¹² 43 CFR § 1610.5-2 (protest of RMP amendment 30 days); Planning Handbook at App. 3, p. 1 (resolution of protests within 90 days); 43 CFR § 1610.3-2 (60-day Governor's consistency review). The protest period and Governor's consistency review may run simultaneously. All land use planning decisions are subject to review, upon protest, by the BLM Director. 43 CFR § 1610.5-2. *See also Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 70 (2004).

1. *Conflicting Multiple Uses:* Conflicting multiple uses can range from wildlife habitat and recreation to grazing permits, other ROW requests, mining claims and oil and gas leases. The BLM's wind and solar policies encourage pre-application meetings, "to identify other authorized uses within or near the area . . ." ¹¹³ An important first step is to use BLM's LR2000 and grazing data bases to identify potential conflicts in advance of a pre-application meeting. Wind and solar energy projects will not be permitted where they are "incompatible with specific resources values" or on certain conservation lands. ¹¹⁴ Further, to the extent possible, renewable energy project developers may not "prevent other land uses, including minerals extraction, livestock grazing, recreational use, and other ROW uses." ¹¹⁵ Both wind and solar developers must address the challenge of split estate mineral ownership – and have used surface use agreements or negotiated purchases to manage that potential conflict. Addressing grazing permittees can be particularly challenging for solar projects that entirely preclude grazing because BLM has taken the position that the two-year regulatory notice to terminate a grazing privilege ¹¹⁶ is not triggered until the ROW grant stage. BLM does not have a regulatory mechanism that would prioritize a renewable energy application over existing mineral or grazing interests. The regulations do not address conflicts between different types of ROWs, only how to manage the processing of competing applications for the same system through a competitive process. ¹¹⁷

2. *Department of Defense:* Project developers must consult with and obtain the approval of the Department of Defense to ensure that a proposed wind or solar farm does not interfere with military airspace or otherwise impact military activities. ¹¹⁸ This approval process is itself rather involved, requiring project developers to "consult with the U.S. Department of Defense (DOD), in conjunction with the BLM Washington Office and Field Office staff, regarding the location of wind power projects and turbine siting as early in the planning process as appropriate. The consultation process is outlined in an interagency protocol agreement." ¹¹⁹

¹¹³ 2007 Solar Policy at 3; 43 CFR § 2801.2; ROW Brochure at 9-10.

¹¹⁴ ROD to Implement Final Wind Energy PEIS A-2, available at <http://windeis.anl.gov/documents/docs/WindPEISROD.pdf>. Solar PEIS, at 73 Red. Reg. 30,910.

¹¹⁵ *Id.*

¹¹⁶ 43 CFR § 4110.4-2(b); 43 USC § 1752(g). A grazing permittee could protest the BLM's termination of his grazing allotment. 43 CFR § 4160.2 A 30-day appeal period follows the final decision. 43 CFR § 4160.3(c); 4160.4.

¹¹⁷ 43 CFR § 2804.23.

¹¹⁸ Steve Mufson, *Solar Project Meets Bigger Foe than Cloudy Skies: The Air Force*, Wash. Post, June 20, 2009 (a proposed Nevada solar power plant met opposition from Nellis Air Force base for compromising classified aspects of the training range).

¹¹⁹ 2008 Wind Policy, Attachment 1-2.

3. *U.S. Fish and Wildlife Service (FWS)*: BLM and FWS must undertake an Endangered Species Act (ESA) § 7 consultation on the proposed action to ensure a proposed project will not jeopardize ESA-listed species.¹²⁰ In addition to the ESA, FWS also implements the Migratory Bird Treaty Act¹²¹ and the Bald and Golden Eagle Protection Act.¹²² On May 13, 2003, FWS issued its “Interim Guidelines to Avoid and Minimize Wildlife Impacts From Wind Turbines.”¹²³ These guidelines set out the critical risks to wildlife – particularly birds and bats – posed by wind turbines, and the procedure for evaluating the level of risk for a particular project. The Guidelines were met with strong disapproval from the wind industry and as a result a Federal Advisory Committee Act (FACA) committee was convened in 2007 by Secretary Kempthorne to develop a series of recommendations for the Secretary.¹²⁴ For the wind industry in Wyoming, the issue has taken on an added urgency as a result of the Governor’s position on protecting sage grouse core areas from wind energy development.¹²⁵ Similarly, the solar industry in California faces desert tortoise challenges, and in Nevada, the Devil’s Hole pupfish is proving an obstacle.¹²⁶

4. *National Historic Preservation Act, Cultural Resources, Tribal Consultation*: Under Section 106 of the National Historic Preservation Act (NHPA), BLM must consult with the local State Historic Preservation Office to “take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register [of Historic Places].”¹²⁷ Like NEPA, the NHPA is a procedural act that requires detailed survey information,

¹²⁰ 16 USC §§ 1531-1544, at § 1536. BLM may deny a ROW if the ROW may harm an ESA-listed or candidate species. *See Edward R. Woodside*, 125 IBLA 317 (1993).

¹²¹ 16 USC §§ 668-668d.

¹²² 16 USC §§ 703-712.

¹²³ 68 Fed. Reg. 41174 (July 10, 2003).

¹²⁴ *See* Dep’t of the Interior Wind Turbine Guidelines Advisory Committee, Legal White Paper (October 22, 2008), Wind Turbine Guidelines Advisory Committee.

http://www.fws.gov/habitatconservation/windpower/wind_turbine_advisory_committee.html.

¹²⁵ In an effort to avoid listing of the sage grouse under ESA and the implications such a listing would have on Wyoming industries, Wyoming Governor Freudenthal in August 2008 enacted a “sage grouse management plan” by executive order, establishing “core areas” in which the sage grouse habitats would be protected. *See* State of Wyoming Exec. Order No. 2008-2 (Aug. 1, 2008). As a result, wind developers now face a difficult challenge to siting proposed projects in these “core areas.” *See* Associated Press, *Wind Farms may be Barred from Key Wyo Grouse Areas*, July 2, 2009, available at <http://www.forbes.com/feeds/ap/2009/07/02/ap6613489.html>. On August 3, 2009, Horizon Wind Energy put its 500 MW Simpson Ridge project on indefinite hold citing, “too many unknowns,” as a result of the Governor’s ban on development in sage grouse core areas. Dustin Bleizeffer, *Wind Farm Plans Put on Hold*, Casper-Star Tribune, August 3, 2009.

¹²⁶ Stephen Power, “*In a Small Fish, a Large Lesson in Renewable Energy’s Obstacles*,” Wall St. J., June 16, 2009.

¹²⁷ 16 USC § 470f.

consultation with the state as well as interested Tribes and provides for public participation. Applicants must determine the presence or potential presence of resources of cultural, historical or paleontological value on the public land for which an ROW application has been submitted. Consultation with Tribes located in the project area is also a requirement of this process.

5. *Visual Resource Management policies*: Any proposed ROW application must comply with BLM's Visual Resource Management (VRM) policies as applied in a particular land use plan. As stated in the 2008 Wind Policy, "The goal of the VRM program is to apply the basic principles of design of wind energy projects at the site-specific project level to mitigate or minimize visual resource impacts and meet VRM objectives established in the land use plan."¹²⁸ To meet this objective, viewshed analyses and assessment of "visual resource values" are now an integral part of the BLM review process. For the applicants, satisfaction of the VRM requirements necessitates using digital terrain mapping software, "field assessments, applied GPS technology, photo documentation, use of computer-aided design and development software, and visual simulations..."¹²⁹ In addition, project developers must consider site design elements to integrate the turbines with the surrounding landscape, maintain visual uniformity and minimize non-conforming visual elements such as commercial symbols and lighting on ancillary structures.¹³⁰ In 2009, BLM issued further VRM guidance for all renewable energy facilities to "emphasize the importance of proper implementation of the VRM program specifically in regard to renewable energy."¹³¹
6. *Federal Aviation Administration (FAA)*: Project developers must take into account FAA regulations pertaining to lighting, tower height, proximity to airports and landing strips, and inclusion of any towers in aerial navigation hazard maps.¹³² Applicants are encouraged to submit FAA filings "as early in the application process as possible" in order to identify any key air navigation-related issues that BLM must take into account in reviewing the ROW application.
7. *Noise*: as part of its wind Best Management Practices, BLM suggests that "Proponents of a wind energy development project ... take measurements to assess the existing background noise levels at a given site and compare them to the anticipated noise levels associated with the proposed project."¹³³ There is no clear guidance on what level of noise is acceptable,

128 2008 Wind Policy, at p. 2.

129 *Id.* at Attachment 1-7.

130 *Id.*

131 IM 2009 – 167 (July 7, 2009).

132 *Id.* at p. 4 & Attachment 1-12.

133 *Id.* at Attachment 1-9.

and what factors are to be taken into account in assessing and including the results of such assessment in the ROW application.

8. *Transportation*: An applicant's POD must include a detailed assessment of transportation-related issues, both during the construction period and during the project's operation.¹³⁴
9. *Pesticides*: The level of detail required of applicants in their PODs is underscored by the 2008 Wind Policy's suggested best practices for project developers' management of weeds and use of pesticides. The guidelines stipulate what types of pesticides should be used and when they can be used, and suggest that "if pesticides are used on the site, an integrated pest management plan shall be developed to ensure that applications will be conducted within the framework of BLM and DOI policies and entail only the use of EPA-registered pesticides."¹³⁵
10. *Hazardous waste management*: Focusing on hazardous waste produced by the proposed projects, the applicants' PODs must set forth a hazardous materials management plan, a waste management plan and a spill prevention and response plan.¹³⁶
11. *Storm water management*: Applicants "shall develop a storm water management plan for the site to ensure compliance with applicable regulations and prevent offsite migration of contaminated storm water or increased soil erosion." This requirement can require complex engineering and information to be developed at an early stage – before the draft EIS.¹³⁷
12. *Health and Safety*: BLM requires ROW applicants to include in their PODs an assessment of any safety issues or work hazards at the proposed project site, and to develop a "health and safety program" for both workers and the public, including compliance with the standards of the Occupational Safety and Health Administration (OSHA).¹³⁸
13. *Federal Communications Commission (FCC)*: PODs must demonstrate, and BLM must confirm in its review, that projects to be developed will not interfere with existing electromagnetic transmissions.¹³⁹ This may require performing signal strength studies and taking electromagnetic interference

¹³⁴ *Id.* at Attachment 1-8.

¹³⁵ *Id.* at Attachment 1-9.

¹³⁶ *Id.* at Attachment 1-11.

¹³⁷ *See*, Ivanpah Solar Electric Generating System, Documents Page, Comments on Applicants Revised Storm Water Design Plans, (April 8, 2009), available at http://www.energy.ca.gov/siting_of_cases/ivanpah/documents/index.html.

¹³⁸ *Id.*

¹³⁹ *Id.* at Attachment 1-12.

into account when siting projects and identifying specific siting for turbines (or solar equipment) within the project area.

14. *Clean Air Act*: Clean Air Act compliance issues may be raised by renewable energy development. The construction phase will raise fugitive dust issues and certain solar technologies that use natural gas can trigger CAA compliance issues.

F. Summary: Key Difficulties with the ROW Process

In addition to the inherently burdensome nature of the ROW application process itself, as described in the previous section, there are several fundamental and recurring problems that have severely hampered the ability of applicants and BLM to move ROW applications through the necessary review process in a reasonable time frame: lack of deadlines, lack of resources, lack of coordination of a complex process, and multiple third-party challenge opportunities.

First, as discussed above, neither the ROW review process under FLPMA nor NEPA have any mandatory deadlines or timelines. Applicants face certain deadlines for submission of applications, provisions of follow-up information, responses to queries from BLM and other stages of the process, but once the information goes to BLM it can, and often does, reside there for what seems lengthy, indeterminate periods without any date certain that applicants can look to for relief.¹⁴⁰

A second issue is lack of resources in the agency's budget, personnel and expertise. Renewable technologies pose new challenges for BLM staff who have less experience in permitting power plants and more in managing the extraction of energy fuels, grazing and recreation. The aging and retirement of BLM personnel adds to a scarcity of personnel to process applications as well as to handle existing management responsibilities. Federal budgets have a long lead time and the level of development interest in public land renewables was not anticipated when today's budgets were planned. An added challenge is priority setting – how does a multiple use agency or field office prioritize one use over another? The lack of clear guidance to answer this question is a cause of delay in the process.

Another key difficulty with the ROW process is that the lack of coordination among federal and state (and sometimes also county and municipal) agencies for each of the application requirements significantly increases the processing time of ROW applications.¹⁴¹ This lack of coordination produces inefficiencies, redundancies and inconsistent responses to applicants. Although most states do not have a process equivalent to NEPA for the review of environmental issues, there is considerable need for involvement at the state and local level in

¹⁴⁰ Letter from Jeffrey D. Harris, Esq., Attorney for the Ivanpah Solar Energy Generating System, Ellison, Schneider & Harris, LLP, to Commissioner Jeffrey Byron, Presiding Member, and Commissioner James Boyd, Associate Member, California Energy Commission (June 8, 2009), *available at* http://www.energy.ca.gov/sitingcases/ivanpah/documents/applicant/2009-06-08_Letter_Regarding_Scheduling_Order_TN-51877.pdf (“Ivanpah Letter”).

¹⁴¹ See Ivanpah Hearing, at pp. 36-42.

reviewing ROW applications.¹⁴² As discussed below, both federal and state governments have identified this lack of coordination as an important obstacle to ROW application processing and have taken steps to mitigate this problem, at least in certain areas, by the establishment of coordinating committees, joint offices or memoranda of understanding on how to conduct joint permitting.¹⁴³ Lack of resources and staff in federal and state agencies add to this coordination challenge.

Yet another problematic aspect of the ROW process is that the ROW/NEPA review creates several “entry points” for public comment, which in effect creates multiple opportunities for individuals and interest groups to challenge ROW applications. Opposition to solar and wind ROW applications has come from environmental groups seeking to protect species or habitats in proposed project areas.¹⁴⁴ Others, including Senator Lamar Alexander (“renewable energy sprawl”) and Senator Diane Feinstein¹⁴⁵ have challenged projects because of the impact on viewsheds, concern over noise or traffic, or alternative “better” uses (such as housing, e.g.).¹⁴⁶ In some cases these challenges can evolve into litigation, which can tie up issuance of a ROW grant for months, or even years.

G. Comparison to Private Land Model

By way of comparison, it is worth noting that, in the context of renewable energy projects on private land, the same issues described above either do not arise or are addressed in other ways. Deadlines are often imposed by the parties contracting for the use of private land; risk is allocated through the negotiation of contracts; and challenges to projects by third parties are often more rare and handled more quickly.

There are generally no deadlines in agreements for the use of private land for renewable energy projects. However, private parties often place an outside time limit by which a

¹⁴² FLPMA requires that BLM plans be consistent with state and local plans and environmental regulations. 43 USC § 1712.

¹⁴³ See e.g., Memorandum of Understanding Between the California Department of Fish and Game, the California Energy Commission, the Bureau of Land Management, and the U.S. Fish and Wildlife Service regarding the establishment of the California Renewable Energy Action Team (November 17, 2008), available at http://www.energy.ca.gov/siting/2008-11-17_MOU_BLM_FWS_DFG_CEC.PDF

¹⁴⁴ See e.g., *Back Country Against Dumps*, IBLA 2009-153 (July 14, 2009) (an appeal of the BLM’s Record of Decision for the Sunrise Powerline Transmission Project for renewable energy transmission); Wyoming Governor Freudenthal sage grouse core areas protected from wind energy, *supra* at 125; Ben Arnoldy, *Are Some Solar Projects No Longer ‘Green’?*, Christian Science Monitor, September 25, 2008 (desert tortoise issue in Mohave).

¹⁴⁵ Letter, from Senator Diane Feinstein to Secretary of the U.S. Dep’t of the Interior, Ken Salazar (March 3, 2009) (requesting a suspension of wind and solar applications in Mohave Desert, California); Marla Dickerson, “Solar Thermal Gathers Steam – and Opposition,” L.A. Times, December 3, 2008 (“They are trying to perpetuate the old Big Energy paradigm into the renewable-energy era.”); BLM, Summary of Public Scoping Comments on Solar Energy Development PEIS at 9 (October 2008), available at http://www.solareis.anl.gov/involve/scoping_comments/index.cfm.

¹⁴⁶ Dustin Bleizeffer, “Landowners: Slowdown Wind Energy,” Wyoming Tribune, May 12, 2009; Marty Durlin, *Wind Setbacks, Local Governments Grapple With Where to Put Wind Farms*, High Country News February 16, 2009, at 7.

transaction must be signed and/or implemented. This arrangement allows landowners to seek alternative counterparties if proposed developers or their lenders turn out to be inadequate and also gives developers an opportunity to pull out of the deal if the landowners with which they are negotiating do not seem to be moving toward a deal quickly enough. This is a vastly different system than what is seen in public land projects, where applications are drawn out over years with no deadlines to give developers any certainty as to when a project may be approved.

In addition, private land use and other contractual arrangements for renewable energy projects may achieve many of the same objectives as BLM through contractual mechanisms. ROWs are replaced with long-term leases that identify the risks of a certain project and allocate those risks among the contracting parties. Representations, warranties and covenants provide assurances (enforceable under applicable principles of contract law) that parties are and will remain in compliance with the laws, regulations and guidelines mandated by the ROW process. While such negotiations can be time-consuming and resource-intensive at times, they generally pale in comparison to the time and effort required in the review of ROW applications by multiple levels of government.

Finally, challenges by third parties of private land use arrangements are generally handled in a more expeditious manner in private land projects than in those on public land. While challenges to renewable projects on private land do arise, they frequently move through the judicial process directly without the intervening stages of comment periods, public hearings and administrative review. Third-party opposition to projects on private land is therefore more often handled in a direct and expedited fashion, and resolution is often quicker than with proposed projects on public land.

As a result of these private mechanisms, renewable energy project developers are likely to prefer the process of obtaining rights to private land rather than public land. But public land cannot be ignored: it is abundant (especially in the West), “checkerboard” land patterns often require developers to site projects on a combination of public and private land, and as a practical matter, some of the most attractive locations for both solar and wind resources – and the necessary supporting transmission – are on lands currently under BLM’s administration.

III. Suggestions to Address the Problems with the ROW Framework

Having reviewed the statutory and regulatory framework of the ROW process and the inherent problems in this process, this final section considers, first, what steps have been taken or are currently contemplated by state and federal governments to address these challenges and make the ROW process more efficient and effective to achieve the federal renewable energy policy objectives. It then suggests alternative options and considerations for improvements to this process.

A. What is already being done

1. Use of Programmatic Environmental Impact Statements

Two of the process barriers to the ROW application review process are the need to ascertain compliance with existing RMPs and, as discussed previously, the resource-intensive, comprehensive and indeterminate compliance process with NEPA. As described above, BLM

RMPs are large-scale programmatic plans that cover a large geographic area and are intended to delineate long-term public land objectives, yet many RMPs do not contemplate renewable energy development.

One administrative solution to the obstacles posed by out-of-date RMPs that BLM has used is the PEIS. A PEIS is large-scale NEPA analysis to analyze an entire program area – like wind, geothermal or solar energy development – and with one Record of Decision amend multiple RMPs to permit the development.¹⁴⁷

Recognizing the utility of a PEIS to facilitate ROW applications, BLM adopted a Wind PEIS¹⁴⁸ (and an accompanying ROD with “best management practices”) on December 15, 2005. This PEIS covered 11 western states with the most promising public land sites for wind farm development. The Wind PEIS amended the RMPs in the region covered by the PEIS, and set forth standards and guidelines (best management practices). The Wind PEIS and best management practices were meant to provide NEPA streamlining by permitting project-level NEPA analysis to rely on, or “tier” to the Wind PEIS.¹⁴⁹

The Wind PEIS “worked” to amend the RMPs, but unfortunately BLM’s expectation for NEPA tiering efficiency has not resulted. BLM Field offices continue to prefer the relative safety and bureaucratic comfort of a project-specific EIS and have not used EAs or even simplified EISs tiered to the Wind PEIS to the extent anticipated.

2. Identification of Renewable Energy Zones

In 2007, Congressman Nick Rahall II proposed legislation for the Energy Policy Reform and Revitalization Act of 2007 to create “Strategic Solar Reserves” on federal land.¹⁵⁰ This proposal, developed by the solar industry, which was later dropped from the final 2007 energy legislation, introduced several important concepts. The proposal called for the establishment of an expedited “solar reserve leasing program” on federal public lands for concentrating solar power projects between 4 and 25 GW. BLM was charged with identifying suitable public lands for projects of this size, and the Interior Department was instructed to perform the necessary environmental reviews in order to identify and confirm these sites for strategic solar development. Criteria for acceptance of these projects were to be pre-determined by the Interior Department, and these solar reserves were to be incorporated into BLM’s RMPs.¹⁵¹ Also included in this proposal was a requirement that the Interior Department “ensure that all strategic solar reserve installation pursuant to this section is permitted using an expedited

¹⁴⁷ 40 CFR § 1502.4(b); *see also* Mandelker, *supra*, at note 106, § 9.2 describing a PEIS as “an impact statement on a group of related actions or an agency program that may lead to later individual actions. . .”; Rebecca Watson & Danielle DiMauro, *Expanding the Use of Programmatic Environmental Impact Statements for Renewable Energy Development on Public Lands*, A.B.A. Section of Environment, Energy and Resources, Public Land Resources Committee Newsletter, Vol. 10, No. 2 at 1 (July 2008).

¹⁴⁸ Bureau of Land Management, Record of Decision: Implementation of a Wind Energy Development Program and Associated Land Use Plan Amendments, December 15, 2005. (“Wind PEIS ROD”); *see also* Solar PEIS, *supra* at note 94.

¹⁴⁹ 40 CFR §§ 1502.4(d), 1502.20, 1508.28.

¹⁵⁰ H.R. 2337 (2007) § 304.

¹⁵¹ *Id.*, § 304(b)(1).

permitting process. The Secretary [of the Interior] shall, in consultation with the Secretary of Energy, complete the preparation of a Programmatic Environmental Impact Statement by the Departments of Energy and the Interior for concentrating solar power on Federal lands.”¹⁵² This combination of approaches – identification of strategic reserves or zones, use of predetermined project criteria, performance of a PEIS prior to receipt of ROW applications and expedited permitting – continue to be the key elements identified by BLM and others as the means to address the current shortcomings of the ROW application process.

In May and June 2009, Secretary Salazar began to shift the focus of the pending Solar PEIS¹⁵³ to a “solar zone” concept. He said that “federal agencies will work with western leaders to designate tracts of U.S. public lands in the West as prime zones for utility-scale solar energy development, fund environmental studies, open new solar energy permitting offices and speed reviews of industry proposals.”¹⁵⁴ Secretary Salazar said BLM will study 24 solar energy zones covering 670,000 acres and he committed to providing the resources necessary to support a fast-track process that would have 13 utility-scale solar projects under development by the end of 2010 to take advantage of the ARRA grants.¹⁵⁵

Among other effects, this Solar PEIS would bring all covered RMPs, *i.e.* those which cover the area in which the “prime zones” will be identified, into conformance with the federal public policy objective to promote renewable energy development. As a practical matter, this initiative could facilitate applicants’ compliance with NEPA requirements and BLM’s NEPA review of the ROW application,¹⁵⁶ and DOI has also indicated that ROW applications for these properties, while they won’t be processed during the study, will be given priority in processing.¹⁵⁷ These lands will be withdrawn from all other uses for two years.¹⁵⁸

¹⁵² *Id.*, § 304((b)(6).

¹⁵³ *Supra* at note 91; Solar PEIS Web site: <http://Solareis.anl.gov/involve/index.cfm>.

¹⁵⁴ Fast-Track Press Release, *supra*, at 97. Note that in many respects this DOI initiative adopted the approach of the Western Governors Association (“WGA”), which released its own study on June 15, 2009 that identified several zones for renewable energy project development by conducting environmental and feasibility studies. WGA, Western Renewable Energy Zones – Phase I Report (June 2009). *See also* Secretary Salazar’s request to the House Appropriations Committee for money to complete a major renewable energy zoning process for southern California. Ken Salazar, Secretary U.S. Dep’t of the Interior, Statement before the House Appropriations Subcommittee on the Interior, Environment, and Related Agencies on the 2010 President’s Budget Request (May 13, 2009), *available at* http://appropriations.house.gov/witness_testimony/INT/Ken_Salazar_05_13_09.pdf. The public scoping period on the Solar PEIS has been extended until September 14, 2009.

¹⁵⁵ *Id.* Fast-Track Press Release *supra* at note 78; Scott Streater *Fast-tracked Solar Project Reflects High interest in Ariz. Desert*, Land Letter, August 8, 2008..

¹⁵⁶ “Companies proposing solar energy projects in designated areas would be able to ‘tier’ to this study, using it as part of their environmental impact studies for site-specific projects, which are required by the National Environmental Policy Act.” Fast-Track Press Release, Q & A’s, *supra*, at note 78.

¹⁵⁷ “Companies that propose projects on that scale in areas already approved for this type of development would be eligible for priority processing. The BLM may also decide to use alternative competitive or noncompetitive procedures in processing new solar applications for these areas.” *Id.*

¹⁵⁸ Notice of Proposed Withdrawal and Opportunity for Public Meeting; Arizona, California, Colorado, Nevada, New Mexico and Utah, 74 Fed. Reg. 31307 (June 30, 2009).

This approach, combining a PEIS with expedited processing for predetermined geographic regions of public land, is an important step in the right direction to bring BLM's ROW process into compliance with the federal government's renewable energy policy objectives. Environmentalists have generally praised the landscape level approach with important considerations given to environmentally sensitive areas, but other groups have expressed concern over any use of undeveloped public land and prefer a focus on previously disturbed sites.¹⁵⁹ The Solar PEIS will take a substantial amount of time to be completed, more than would be preferable both from the administration's standpoint and that of project developers, but it is unquestionably a critical initiative. Because part of the Solar PEIS will be funded by the ARRA stimulus funding, it is imperative that these types of initiatives be supported by adequate ongoing funding. Wind proponents wonder if the same "wind zone" approach will be used to expedite wind energy. The Secretary's policy does not address wind and there are no announced plans to do so. By the time the Solar PEIS is completed, the Wind PEIS will be five years old and likely in need of review and revision – perhaps by then BLM, working with the western states, will be in a position to address more comprehensive renewable energy zones.

3. Prioritization and Agency Collaboration

A frequent complaint against the ROW review process at BLM is the lack of coordination between federal agencies, and between state and federal agencies, whose review and approval are required for ROW applications.¹⁶⁰ The disparate agencies and processes are, at best, only loosely coordinated by BLM, and as a result there is substantial overlap and inefficiency. In addition, and in part related to this lack of coordinated reviews, there is a need to prioritize ROW applications for renewable energy projects, to devote increased resources and attention to clearing the current backlog and getting current ROW applications approved (or denied) within a reasonable time frame. These two issues – interagency coordination and prioritization – are often linked for two reasons: first, because the prioritization of ROW applications to achieve an expedited review process is meaningless without this coordination; and second, as an administrative matter, allocating the necessary resources to interagency coordination requires an explicit statement (accompanied by budgetary commitments) that the relevant agencies are prioritizing the processing of these ROW applications.

As BLM began receiving increasing numbers of ROW applications in the past few years and demand far surpassed BLM's ability to process them, the agency responded by committing to dedicate greater resources for interagency coordination and expedited processing of the ROW applications. So, for example, BLM's 2007 Solar Policy stated that "Right-of-way applications for solar energy development projects will be identified as a high priority Field Office workload and will be processed in a timely manner. This priority is consistent with the President's National Energy Policy of 2001 and the Energy Policy Act of 2005. Adequate resources should be provided to review and process the application."¹⁶¹ As a practical matter,

¹⁵⁹ See Center for Biological Diversity Statement on U.S. Dep't of the Interior, Secretary Salazar's Plan to Fast-track Solar Energy Development on Public Lands (June 30, 2009), www.biologicaldiversity.org; Scott Streater, "Renewable Energy: 'Solar Energy Zone' Concept Laudable but Flawed Critics Say", Land Letter, July 9, 2009.

¹⁶⁰ See Ivanpah Hearing, at pp. 36-42.

¹⁶¹ Solar Policy, at p. 2.

however, the use of terms like “high priority,” “timely manner” and “adequate resources” rang hollow in the continuing absence of the staff, budget, resources and interagency coordination that were adequate to actually perform the necessary reviews within a reasonable time frame. BLM has sought to address this, in part, with the use of National Project managers to supplement Field Office staff on wind, solar and transmission projects.

On January 16, 2009 outgoing Secretary of the Interior Kempthorne issued a Secretarial Order that proposed the establishment of new interagency “Renewable Energy Coordination Offices.”¹⁶² This Order was issued in reaction to the need for increased interagency coordination in the areas that were seeing a high number of applications for utility-scale solar and wind energy development and the success of a similar EPACT-directed “inter-agency coordinating office” concept for oil and gas permitting (EPACT § 365).

On March 11, 2009, Secretary Ken Salazar signed Secretarial Order No. 3285 on Renewable Energy Development. This Order built on prior efforts and confirmed as a policy matter the priority of the development of renewable energy projects, and created a Departmental Task Force on Energy and Climate Change. Among other tasks, the Task Force was charged with identifying and prioritizing certain renewable energy zones, and Assistant Secretaries were instructed explicitly to facilitate cross-agency cooperation and reporting, including between federal and non-federal participants in the application review process.¹⁶³ In May 2009, the Secretary pledged to create four Renewable Energy Coordination offices, one each in California, Nevada, Wyoming and Arizona and smaller teams in five other western states.¹⁶⁴

ARRA requires agencies using stimulus funding to accelerate certain federally-supported objectives, and renewable energy is a particularly high priority in this respect.¹⁶⁵ Projects that are funded by ARRA, for example, are supposed to be entitled to NEPA review “on an expeditious basis” and using “the shortest existing applicable process under” NEPA.¹⁶⁶ Any substantial delays in the ROW processing are to be reported to the White House Council of Environmental Quality (CEQ).¹⁶⁷

¹⁶² Secretary’s Order No. 3283, *supra*, at note 30.

¹⁶³ U.S. Dep’t of the Interior Renewable Energy Dev. by the Department of the Interior, Secretary’s Order No. 3285 (March 11, 2009). *See also* the proposed legislation by Representative Rahall, discussed below.

¹⁶⁴ Press Release U.S. Dep’t of the Interior, *supra* at note 31.

¹⁶⁵ Approximately \$41 million ARRA dollars have been dedicated to BLM to reduce the current backlog of ROW applications. *See* Press Release, U.S. Dep’t of the Interior, Salazar Announces \$305 Million Economic Stimulus Investment Through the Bureau of Land Management to Restore Landscapes, Develop Renewable Energy, and Create Jobs, (May 1, 2009).

¹⁶⁶ *See* Memorandum for Heads of Departments and Federal Agencies Re: Environmental Compliance and Guidance for Reporting NEPA Status and Progress for Recovery Act Activities and Projects, April 3, 2009, citing ARRA Section 1609(b).

¹⁶⁷ *Id.*, citing ARRA Section 1609(c) (“The President shall report to the Senate Environment and Public Works Committee and the House Natural Resources Committee every 90 days following the date of enactment until September 30, 2011 on the status and progress of projects and activities funded by this Act with respect to compliance with National Environmental Policy Act requirements and documentation.”). The April 3 Memorandum sets out the substance and guidelines for satisfying this periodic status reporting requirement.

In sum, recent administrative and legislative acts have hoisted the banner of prioritization and interagency coordination, and in past several months BLM, under the leadership of both the former and current Interior Secretaries, has demonstrated a commitment to these objectives by forming coordinated review offices and instituting procedures to give substance to the goal of prioritizing ROW applications for renewable energy projects.

B. What Else Could Be Done.

Finally, we suggest four other approaches that may be useful in facilitating the ROW application and review process: use of Master Agreements and post-approval enforcement; expediting NEPA compliance; limiting the scope of NEPA review; and establishing fixed timelines for NEPA and ROW processing.

1. Master Agreements.

Master Agreements¹⁶⁸ are tools provided to BLM in the ROW regulations and could prove useful to process several related proposals in one confined geographic area. For example, a pending solar application may be intended to support the construction of several facilities over a period of time. Addressing how to conduct the processing and NEPA compliance for a phased project is complex and BLM has struggled for an answer that complies with law yet also addresses the technical and financial challenges of a solar applicant. A Master Agreement is “a written agreement covering processing and monitoring fees negotiated between BLM and [the applicant] that involves multiple BLM grant approvals for projects within a defined geographic area.”¹⁶⁹ The Master Agreement “is not strictly limited to negotiation of processing and monitoring fees. A Master Agreement may contain negotiated agreements between BLM and an applicant concerning other aspects of application processing and monitoring.”¹⁷⁰ The negotiated framework of a Master Agreement may allow a project to move more quickly through the permitting process in a more coordinated and comprehensive manner for multiple geographically related ROWs. The use of Master Agreements has not been widely adopted by BLM in either conventional or renewable energy, but should be considered.

2. NEPA EAs and Categorical Exemptions.

BLM should consider how it can more strongly encourage the use of EAs or focused EISs tiered to the Wind and Solar PEISs. BLM could seek the assistance of CEQ to prepare specific NEPA guidance on how an EA or EIS may appropriately tier to the completed PEIS. This type of program-specific NEPA guidance was obtained from CEQ by BLM and the U.S. Forest Service for the “model EA” in the Healthy Forest Initiative.¹⁷¹

¹⁶⁸ 43 CFR §§ 2804.17 and 18.

¹⁶⁹ 43 CFR § 2804.17(a); *see* discussion, 64 Fed. Reg. 32106 at 32,108 (June 15, 1999).

¹⁷⁰ 70 Fed. Reg. 20970, 20991 (April 22, 2005).

¹⁷¹ Council on Env'tl. Quality Preparation of EA's for Fuel Reduction and Five Adapted Ecosystem – Restoration Projects” (December 9, 2002), *available at* <http://ceq.eh.doc.gov/nepa/regs/guidance.html>.

At the agency or federal legislative level,¹⁷² it is worth considering the identification of statutory categorical exclusions to NEPA in certain circumstances, such as additional wind or solar capacity within an established project area that was used for the same purpose within the last five years. By way of comparison, EPACT established five categorical exclusions for oil and gas development, including individual surface disturbances of less than five acres if a site-specific NEPA analysis has been previously completed.¹⁷³ While this may be of only limited value in the renewable energy context, as five acres is likely too small to be relevant for any utility-scale renewable energy project, the principle is one that may be acceptable to provide a categorical exclusion for renewable energy projects under certain circumstances.

Congress in recent legislation has included NEPA streamlining measures for high priority development. For example, recent legislation supporting aviation requires the agency to develop an “expedited and coordinated environmental review process” to provide for better agency coordination and concurrent environmental reviews¹⁷⁴ and further requires that all environmental reviews be given high priority and specifies procedures to carry out these reviews.¹⁷⁵ Similarly, renewable energy development, which is a high-priority focus of this Administration for security, environmental and economic reasons, could benefit from similar streamlining.

3. Limit Alternatives and Scope of Review.

In order to mitigate the problems of overly-comprehensive NEPA review and multiple “entry points” for challenges to ROW applications, as discussed above in Sections II.B and II.F, Congress may adopt legislation to limit the alternatives that must be considered in the NEPA analysis, and also to set certain reasonable constraints on any judicial appeals to ROW applications. A similar approach was adopted in the Healthy Forests Restoration Act of 2003 (“HFRA”) with regard to judicial challenges to hazardous fuel reduction projects.¹⁷⁶ Under HFRA, lawsuits can be filed only in the district in which the project is located, the judiciary is “encouraged” by Congress to expedite any judicial proceedings challenging a covered project, preliminary injunctions or stays are limited to 60 days (subject to renewal) and in considering injunction requests courts are instructed by Congress to consider the “short- and long-term effects” of the proposed projects.¹⁷⁷ A comparable statutory mandate by Congress to limit and expedite any judicial reviews of proposed ROW applications to build renewable energy projects on public lands would also be an effective way to reduce lengthy and damaging challenges to these applications, and to give developers greater assurance that their up-front investments in the ROW applications will not dissipate in the form of legal fees to defend the applications.

¹⁷² Congress has the authority to streamline NEPA for certain projects and has done so. *See* Mandelker, *supra* at 106, § 5.6.

¹⁷³ EPACT § 390.

¹⁷⁴ Century of Aviation Reauthorization Act, 49 USC § 4717.

¹⁷⁵ *Id.* at 49 USC § 4717(c) to (i).

¹⁷⁶ HFRA § 106, Pub. L. 108-148, 117 stat. 1887, 16 USC §§ 6501 *et seq.* (2003).

¹⁷⁷ *Id.* at §§ 106(b) and (c).

4. Establish ROW and NEPA Timelines.

Finally, it may be time to consider introducing deadlines to be observed by BLM in its review of ROW renewable applications. Again, EPACT provides a comparison where “hard” permit processing deadlines were put in place by Congress.¹⁷⁸ In the legislation in support of aviation, *supra*, Congress provided the Secretary with authority to set a deadline for completion of all environmental reviews.¹⁷⁹ In recent federal highway legislation, Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy of Users (SAFETEA-LU),¹⁸⁰ there are deadlines for public comments, and obligations for agencies to resolve issues that could delay the environmental review.¹⁸¹ SAFETEA-LU also imposes a 6-month statute of limitations for judicial review that begins with the ROD and limits supplemental NEPA.¹⁸² Given the strong support the federal government has expressed as a matter of policy for the rapid implementation of utility-scale solar and wind projects (and the needed transmissions), it is not unreasonable for Interior and Congress to consider hard deadlines and the budget support for staff to meet those deadlines. Congress, as it did for oil and gas in EPACT, can identify the processing of these renewable energy ROW applications as a priority commitment, require that interagency coordination to review ROW applications for renewable energy projects is made effective, whether through the establishment of additional coordinating offices, deadlines or otherwise.

C. Looking Ahead

Congressman Rahall, the author of the proposed legislation in 2007 to create “Strategic Solar Reserves” (see the discussion in Section III.A.1 above) is currently in the process of drafting new legislation, tentatively entitled “The Consolidated Land, Energy and Aquatic Resources Act of 2009” (CLEAR).¹⁸³ If adopted, CLEAR will fundamentally modify the current framework for renewable energy project developers to obtain access and usage rights on public lands. At the administrative level, it proposes the creation of an “Office of Federal Energy and Mineral Leasing” to serve as “leasing agent, inspector and auditor for all federal renewable and non-renewable energy and mineral leasing.”¹⁸⁴ Substantively, CLEAR proposes to replace wind and solar rights-of-way with leases for public lands.¹⁸⁵

¹⁷⁸ 30 USC § 226 (p) (10 days to determine if an application is complete, 30 days to approve or defer a complete application, if deferred notice to applicant on what is needed and a time-line for deadlines to complete each action. Upon deferral, applicant has two years to complete specified requirements upon completion, the BLM has 10 days to issue a decision).

¹⁷⁹ 49 USC § 4717(a).

¹⁸⁰ 109 Pub. L. No. 59, 119 Stat. 1144 (2005) variously codified.

¹⁸¹ 23 USC § 139(g), (h).

¹⁸² 23 USC § 139(1)(1) and (2).

¹⁸³ A Committee on Natural Resources Majority Staff discussion draft of CLEAR was released on July 28, 2009. This was a revision to an earlier (May 20, 2009) Committee Discussion Draft.

¹⁸⁴ Majority Staff Discussion Draft Summary, p. 1.

¹⁸⁵ *Id.* at 4-5.

Under Title V of CLEAR, wind and solar projects that seek access to public lands would no longer submit applications for rights-of-way. Instead, renewable projects would be governed by the same framework under which oil, gas and geothermal projects are currently managed, commercial leases issued on a competitive basis.¹⁸⁶ This sweeping change would eliminate entirely the ROW process for renewable energy projects and replace it with a competitive auction-like process according to which developers would bid for the rights to use public land. CLEAR would establish a requirement for royalties, fees, rentals and bonus bids.¹⁸⁷ The requirements for these auctions and the terms and conditions of the leases that would be addressed in the lease framework have not yet been directly addressed in CLEAR, but presumably these could be modeled on current oil and gas or geothermal leasing regulations.¹⁸⁸ Audits and “substantial” underreporting penalty assessments are provided for.¹⁸⁹ No NEPA streamlining or renewable energy zones are provided for in the draft legislation. This proposed legislation effectively tosses out the baby with the bathwater, resetting the current BLM process for management of permitting for public lands and requiring applicants in the queue who have not yet filed a POD to start afresh with a new and fundamentally different approach.

IV. Conclusion

BLM finds itself today at the center of the crucial intersection of major national renewable energy policy objectives and private development activities. Initially taken by surprise and overwhelmed by the volume of reasonable energy ROW applications in recent years, but with increasing attention and support from Congress and the Executive branch, BLM is now taking significant steps to try to relieve the backlog of ROW applications, streamline its processes, facilitate NEPA reviews and promote interagency coordination. BLM did not alone create the current problems inherent in the ROW process and will not solve them alone, but it is, and for the foreseeable future will continue to be, the gatekeeper to implementation of the federal government’s policy objectives to significantly expand development of wind and solar energy projects on public lands. This paper has sought to describe the ROW process, to identify those inherent problems and to illustrate both what is currently being done and what else may be done to facilitate federal renewable energy objectives while simultaneously ensuring compliance with all applicable laws and addressing the challenges and concerns facing private project developers.

¹⁸⁶ *Id.* at CLEAR § 501. Recognizing the large number of currently pending applications, the bill allows any applicant that has already submitted a POD for approval to continue with the ROW process. *See* Section 501(f) of the proposed bill.

¹⁸⁷ CLEAR at § 503.

¹⁸⁸ 43 CFR Groups 3000 and 3100.

¹⁸⁹ CLEAR at § 505 (audits) and § 507 (penalties).