"New" (and Old) Energy on Public Lands: Renewable Energy and Oil and Gas Leasing Reforms

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I. INTRODUCTION

The election of President Obama has resulted in a number of new federal energy policy initiatives. Although it might seem an eon ago, energy was a key topic of the 2008 presidential election. The context of the energy debate was slightly different in 2008 than it is in 2010, but the ultimate goal of an Obama energy policy—a decided move away from conventional energy towards renewable energy - has not changed. In the summer of 2008, Americans were facing $4.00 gasoline and considering global climate change legislation. As a candidate, Obama called for the transformation of America's energy economy: he proposed a 25% national renewable portfolio standard and ambitious cap and trade legislation to address climate change and provide a massive source of new federal funding to retool our energy economy. During the election, Obama and the congressional Democrats contrasted their "New Energy" approach to the wrong choice of the Bush administration to support the development of domestic oil and gas.

Once in office, President Obama continued to emphasize the need to change the energy mix, but now cast the effort more in terms of a cure for the ailing economy--clean energy was to provide new jobs, and a new manufacturing base. In March 2009, the President argued, "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." The American Recovery and Reinvestment Act (2009)(ARRA) – President Obama's $787 billion stimulus – implemented the President's energy policy by pouring money – tax incentives, grants and new funding – into renewable energy, conservation and clean tech. In an August 25, 2010 article in *Time*, columnist Michael Grunwald pointed out that one-sixth of the total cost of ARRA ($90 billion), "is an all-out effort to exploit the [economic] crisis to make green energy, green building and green transportation real [and] launch green manufacturing industries . . . ." Although the Obama administration recognized the need to produce domestic oil and gas, many of the initial actions of the Interior Department were designed to highlight a new focus on renewable energy and a rejection of how the Bush administration had developed oil and gas on public land.

What has this Obama energy initiative meant for public land energy – oil and gas and renewable energy? This paper will look first, at Interior initiatives and processes to develop renewable energy (wind and solar), and second, Interior reforms of oil and gas development on public lands managed by the Department of the Interior.

II. RENEWABLE ENERGY AT INTERIOR

A. The Right-of-Way Framework and Setting the Stage for Renewable Energy.

The management of those federal lands[1] commonly referred to as "public lands" is primarily governed by the Federal Land Policy and Management Act of 1976 (FLPMA).[2] FLPMA governs a broad array of multiple-use land management issues, from wilderness to grazing, mining, timber, recreation and energy development, and establishes the Bureau of Land Management (BLM) as the manager of public lands. In this capacity, BLM is given authority under FLPMA through its planning process[3] 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 Act[4]) to enable private parties to use public land. Under the Mineral Leasing Act, BLM has the authority to lease federal energy and geothermal minerals[5] through a competitive leasing system. Rights-of-way (ROW) under Title V of FLPMA[6] and regulations at 43 CFR § 2800 *et seq*. provide for discretionary access and use of federal lands.

In the Bush administration, BLM elected to manage access for wind and solar energy facilities under FLPMA's ROW provision. In 2002, BLM issued its first wind energy policy[7] and in 2003, began work on a wind programmatic environmental impact study (PEIS) that was completed in 2005.[8] 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.[9] The first geothermal permits issued in 20 years were approved in the Bush administration, as well as numerous wind permits. In 2005, after three years of debate, the Energy Policy Act (EPACT) was passed.[10] This 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,[11] important revisions to existing law to encourage the development of geothermal energy,[12] and providing the formerly named Minerals Management Service with authority to regulate the development of alternative energy in the

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[1] 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. It is anticipated that final U.S. Forest Service guidance may be issued by the end of 2010. Wind Energy, Proposed Forest Service Directives, 72 Fed. Reg. 54,233 (Sept. 24, 2007).

[2] 43 USC § 1701 *et seq.*

[3] 43 USC § 1712

[4] 30 USC § 181 *et seq.*

[5] 30 USC § 1001 *et seq.* Time and space will not allow for a discussion of the federal geothermal leasing structure, but the passage in 2005 of the revisions to the geothermal leasing program and promulgation of new rules have injected life into what was once a dormant program. *See infra*, note 10. Since 2007, some 347 lease parcels totaling close to 1 million acres have been leased for the development of geothermal. On September 11, 2010, BLM Colorado announced its first geothermal lease sale of some 799 acres near Mt. Princeton Hot Springs. For a brief introduction to geothermal, see Mark Detsky, "Getting Into Hot Water: The Law of Geothermal Resources in Colorado," The Colorado Lawyer, Vol. 39, No. 9, at 65 (September 2010).

[6] 43 USC §§ 1761-1771. The regulations were substantially revised in 2005. "Rights-of-Way Under the Federal Land Policy and Management Act and the Mineral Leasing Act," 70 Fed. Reg. 20,970 (Apr. 22, 2005).

[7] BLM Instruction Memorandum No. 2003-020, "Interim Wind Energy Development Policy," October 16, 2002 (IM 2003-020).

[8] 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).

[9] 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/nr10212004.html.

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

[11] EPACT § 203(a); 42 USC § 15852(a).

[12] EPACT § 221 *et seq.*; 30 USC § 1001 *et seq.*

Outer Continental Shelf.[13] 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.[14]

B. Secretary Salazar's Policy Intitiatives.

Secretary Salazar underscored the focus of the Obama administration in renewable energy by high-lighting green energy at his January 15, 2009 confirmation hearing and, upon confirmation, promptly articulating new policies to support renewable energy on public lands and waters. On March 11, 2009, the Secretary 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."[15] At the Department, $41 million of ARRA stimulus monies were allocated to reducing the permitting backlog of BLM wind and solar projects. In May 2009, the Secretary built on an earlier Secretarial Order by Secretary Kempthorne[16] in announcing the opening of four BLM Renewable Energy Coordination offices or RECOs to provide focused permitting teams for green energy.[17] In June 2009, the Secretary announced "fast-track initiatives for solar energy development" on BLM public lands in 24 identified solar energy zones.[18]

Since those early efforts, the focus of the Department has been to identify and support "fast track" renewable energy projects – wind, solar, geothermal and transmission – to get the projects through the permitting process and under construction by December 31, 2010 in order to allow the projects to benefit from ARRA stimulus funding (grants for 30% of construction costs).[19] In July 2010, the BLM identified 14 solar fast-track projects with a combined 6,000 megawatts; 7 wind fast-track projects with a combined 800 megawatts; and 6 geothermal fast-track projects with a combined capacity of 285 megawatts. [20] There are also 7 fast-track transmission projects. At the time of this writing, it is expected that one or more solar records of decisions will be signed in October, 2010.

C. ROW Regulatory Process

1. Introduction to ROW framework

The ROW authority in FLPMA Title V authorizes the use of public land in a ROW for electric power generation, transmission and distribution systems and BLM relies on this

[13] EPACT § 388; 43 USC § 1337(p).
[14] 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- hydropower renewable energy projects located on the public lands with a generation capacity of at least 10,000 megawatts of electricity."
[15] Secretary of the Interior, Order No. 3285, "Renewable Energy Development by the Department of the Interior" (Mar. 11, 2009).
[16] *See* U.S. Dept of the Interior, "Enhancing Renewable Energy Dev. On Pub. Lands," Secretary's Order No. 3283 (Jan. 16, 2009).
[17] Press Release, U.S. Dept of the Interior, "Secretary Salazar Pledges to Open Four Renewable Energy Permitting Offices, Create Renewable Energy Team" (May 5, 2009).
[18] Press Release, U.S. Dept 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/09NewsReleases/062909.html.
[19] ARRA § 1603.
[20] http://www.blm.gov/pgdata/etc/medialib/blm/wo/MINERALS__REALTY__AND_RESOURCE_PROTECTION_/energy/renewable_references.Par.95879.File.dat/2010%20Renewable%20Energy%20headed.pdf

Section to permit wind and solar facilities.[21] The grant of a ROW occurs within the context of the specific land use or resource management plan (RMP) governing the public lands proposed for the ROW.[22] 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.[23] The ROW grant is a license that provides authorization to use public land for a specific period of time for a specific purpose and with certain restrictions.[24] ROW grants are 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."[25]

BLM has a "first come, first served" policy for processing ROWs. "ROW applications are generally processed in the order they are received."[26] Generally, a ROW is granted by BLM for a term appropriate for the life of the project.[27] ROWs may be terminated by BLM upon notice.[28] In addition, the ROW grant process must comply with the National Environmental Policy Act (NEPA).[29] Issuing a ROW qualifies as a "major Federal [action] significantly affecting the quality of the human environment"[30] under NEPA and therefore requires review under the Act typically through an Environmental Impact Statement (EIS).[31] A ROW applicant must also comply with the procedural and substantive requirements of federal and state environmental laws.[32]

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."[33] 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."[34] The Interior Board of Land Appeals, the Department of the Interior's

[21] 43 USC § 1761.
[22] 43 USC § 1712(a).
[23] 43 CFR § 2802.10.
[24] *See* 43 CFR § 2805.14.
[25] 43 USC § 1765; *Shell Pipe Line Corp.*, 69 IBLA 103, 105 (1982); 43 CFR § 2801.2 .
[26] Bureau of Land Management Office of Lands and Realty, "Obtaining a Right-of-Way on Public Lands" at 10 (Revised February 5, 2008) (ROW Brochure).
[27] 43 USC § 1764(b); 43 CFR § 2805.11(b)(1); ROW Brochure at 1.
[28] 43 USC § 1766; 43 CFR § 2807.17; *see also* discussion in Coggins, *Public Natural Resources Law*, § 15.25.
[29] 42 USC § 4321, *et seq*.
[30] 42 USC § 4332(2)(C).
[31] 43 USC § 1765(a).
[32] 43 CFR § 2807.21.
[33] *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.").

[34] 43 CFR § 2804.26; *International Sand & Gravel Corp.*, 153 I B LA 295, 298 (2000) (a ROW grant is "wholly discretionary").

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.[35]

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);[36] (3) a pre-application meeting with a BLM Realty Specialist or appropriate staff member in order to jointly review the application form and requirements;[37] (4) submittal of the completed SF-299 to the appropriate BLM office in person or by mail – not electronically;[38] (5) payment of BLM cost-recovery processing fee.[39] 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. 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 which BLM has described in the wind and solar policies.[40]

On its face, SF-299 appears to be a relatively short application of about 3 pages.[41] However, several 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[42] (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); and reasonable alternatives (Item 13).

A wind developer may apply for a 3-year monitoring and testing grant to conduct meteorological testing ("met testing") of a public land site. No POD is required; typically an environmental assessment (EA) or a categorical exclusion is deemed sufficient for NEPA compliance for met testing.[43] This temporary grant will act to exclude other applicants during

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[35] 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 I BLA 223 (2008).

[36] 43 CFR § 4.12.

[37] 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, "Solar Energy Development Policy" at 3 (April 4, 2007) (2007 Solar Policy).

[38] 43 CFR § 2804.11.

[39] 43 CFR § 2804.14.

[40] 2008 Wind Policy; "Solar Energy Interim Rental Policy," IM 2010-141 (June 10, 2010).

[41] Bureau of Land Mgmt., Standard Form 299, "Application for Transportation and Utility Systems and Facilities on Federal Lands," p. 3.

[42] *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."). 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

[43] 2008 Wind Policy at 4-7, 10.

the term, which in guidance is non-renewable, but typically can be renewed with BLM's approval.[44] There is no similar "testing" grant for solar energy.

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 complete SF-299 application has been submitted.[45] 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.[46] 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.[47] FLPMA § 1764(g) requires a ROW holder to pay the "fair market value" for a ROW and the regulations provide for rental payments.[48] 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.[49] BLM's Wind Policy provides for a rental fee based on a formula related to the total installed capacity in kilowatts.[50] BLM's interim solar rent policy requires a rent (base rent and a MW capacity fee) established by BLM using county real estate data developed by the Department of Agriculture in a schedule. [51] It is anticipated that the wind rental fee will be changed to a calculation similar to that described in the interim solar rent policy. Finally, a wind and solar applicant will be required to post a bond at the issuance of the ROW grant to ensure reclamation of the site at the end of it use.[52]

D. Compliance With Other Laws and Regulations and Permitting Challenges

Wind and solar energy facilities that can impact thousands of acres of public land trigger an EIS with all the process, public participation and opportunities for challenge typically found in the NEPA process. BLM's goal is to complete NEPA on solar and wind projects within a year – a goal it has found difficult to meet. In addition to NEPA, BLM requires ROW applications to comply with a broad range of federal policies, laws and regulations that can add to complexity, delay and expense during the permitting process.

1. *Conflicting Multiple Uses*: Conflicting multiple uses can range from wildlife habitat and recreation to grazing permits, other ROW requests, mining claims and other energy leases. An important first step is to use BLM's LR2000 and grazing data bases to identify potential conflicts in advance of the 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. Further, to the extent possible, renewable

[44] *Id.* at 5-6.
[45] ROW Brochure at 4-5.
[46] 43 CFR § 2804.14; 2008 Wind Policy at 7; 2007 Solar Policy at 7.
[47] 43 CFR § 2805.16
[48] 43 CFR § 2806.10-.16.
[49] 73 Fed. Reg. 65040 (October 31, 2008).
[50] 43 CFR § 2806.10(a); 2008 Wind Policy at 5.
[51] IM 2010 - 141 (June 10, 2010)
[52] 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.

energy project developers may not prevent other land uses. To date, 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, but new policy guidance on both issues is expected before the end of the year.[53]

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.[54] 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 solar power tower siting as early in the planning process as appropriate. The consultation process is outlined in an interagency protocol agreement.[55] Cooperative efforts among Interior, renewable energy applicants and DOD and renewable energy review panels in DOD have been used to resolve conflicts.

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.[56] In addition to the ESA, FWS also implements the Migratory Bird Treaty Act[57] and the Bald and Golden Eagle Protection Act.[58] On May 13, 2003, FWS issued its "Interim Guidelines to Avoid and Minimize Wildlife Impacts from Wind Turbines."[59] 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 and later Secretary Salazar to develop a series of recommendations for the Secretary.[60] 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.[61] For solar projects in the desert, impacts to the protected desert tortoise have resulted in demands from state wildlife agencies for mitigation lands and funds.

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

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[53] 43 CFR § 2804.23.

[54] 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).

[55] 2008 Wind Policy, Attachment 1-2.

[56] 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).

[57] 16 USC §§ 668-668d.

[58] 16 USC §§ 703-712.

[59] 68 Fed. Reg. 41174 (July 10, 2003).

[60] *See* Dept 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/windturbineadvisorycommittee.html.

[61] 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). In August 2010, the Governor updated and expanded the core area strategy to protect sage grouse. *See* State of Wyoming Exec. Order 2010-4 (August 18, 2010).

included in or eligible for inclusion in the National Register [of Historic Places]."[62] NHPA is a procedural act that requires detailed survey information, consultation with the state as well as interested Tribes and provides for public participation.

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. Some VRM designations in RMPs may not allow for wind and solar projects or may require a plan amendment. In 2009, the BLM issued an Instruction Memorandum to clarify the VRM process as it applies to renewable energy.[63] 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. In addition, project developers must consider site design elements to integrate facilities with the surrounding landscape.

6. *Federal Aviation Administration (FAA)*: Wind and solar 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. 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.

E. Public Land Renewables -What's Next?

The challenge for the administration is to overcome the complex process challenges and place-based opposition that face most large-scale projects on public land to allow the projects to take advantage of the ARRA funds due to expire at the end of 2010. In late July and early August, six Final EISs for solar projects were published. But, in September 2010, the Associated Press carried a critical article noting that no solar project on public lands had been approved, "Instead, five years after federal land managers opened up stretches of the Southwest to developers, vast tracts still sit idle."[64] The administration is working hard to issue some final authorizations in October and November in advance of the December 31 cut-off for ARRA construction grants. BLM is trying to address a number of issues as it handles an unprecedented influx of applications. Is there a better way? The Secretary and several environmental groups argue that you need to be "right from the start" – identify non-controversial public lands for renewable development while others, including Congress, have advocated new laws specific to renewable energy permitting on federal lands. As these projects dash to the 2010 finish line, expect new renewable policy initiatives to be announced to expedite renewable energy permitting.

[62] 16 USC § 470f.
[63] IM 2009-167, "Application of the Visual Resource Management Program to Renewable Energy" (July 7, 2009); *see also* BLM's VRM webpage, http://www.blm.gov/nstc/VRM/
[64] "Feds fail to use land for solar power," Jason Dearen, Associated Press (September 1, 2010)

III. OIL AND GAS LEASING REFORMS

A. Setting the Stage for Reform

In contrast to the administration's efforts to speed up green energy permitting, when it came to oil and gas, the message seemed to be that it was time to slow down or at least take a second look at decisions made by the prior administration. Nine days after the inauguration, on January 29, 2010, Secretary Salazar came to Denver to announce, "there's a new Sheriff in town" and that he was re-opening an investigation of the drugs and sex scandal at the Lakewood Office of MMS. "The anything goes era is over." Five days later, on February 4, 2009, Secretary Salazar announced that he was taking the unprecedented step of canceling 77 leases sold in the December 2008 Utah lease sale by the prior administration because, the Secretary argued, the sale had been rushed without proper environmental review. "I believe, as President Obama does, that we need to responsibly develop our oil and gas supplies…, but we must do so in a thoughtful and balanced way."[65] Two Interior reports examining how the 77 Utah leases were sold followed that Secretarial action, the first by Deputy Secretary Hayes on June 11 2009 (Hayes Report) [66]and the second on October 8, 2009 by an inter-disciplinary team led by a U.S. Forest Service employee, Mark Stiles (Stiles Report).[67] These two Interior reports and a September General Accountability Office (GAO) report on EPACT § 390 oil and gas categorical exclusions (CXs) [68] set the stage for the Department's leasing reforms announced on May 15, 2010.[69]

1. Hayes Report**.** The 77 withdrawn leases had been offered for lease pursuant to three 2008 Utah RMPs. The Utah lease sale was challenged in federal court and a temporary restraining order was obtained halting the issuance of the leases.[70] It was then the Secretary took the step of withdrawing the 77 leases. The Hayes Report examined the events leading to the Utah lease sale and made four recommendations to address the perceived deficiencies in the Utah lease sale. The recommendations were: 1) improve communications between BLM and the National Park Service and other stakeholders regarding leasing decisions. The Hayes Report directed case by case consideration of lease parcels with interested agencies and stake holders rather than reliance on RMP public participation; 2) BLM should develop guidance (leasing criteria) to assist the BLM in making parcel-specific leasing decisions, including whether the parcels are close to "special landscapes," possess wilderness qualities and are near existing development and infrastructure; 3) appoint an "inter-disciplinary team" of

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[65] Secretary Salazar's Feb. 4, 2009 Press Release available at http://www.doi.gov/news/pressreleases/2009_02_04_release.cfm**.** Interestingly, after a mid-summer 2010 FOIA request, a December 29, 2009 report on the contested Utah December 2008 lease sale was belatedly released. This report, by the Department's Inspector General, determined, "Our investigation found no evidence to support the allegation that undue pressure was exerted on BLM personnel to complete the [plans] so that previously deferred lease parcels could be included in the lease sale prior to a change in White House administration." In addition, the Secretary lost a challenge to his assertion of discretion to withdraw the 77 leases after they had been sold. *Impact Energy Resources, LLC v. Salazar*, 2010 WL 3489544 (D. Utah, Sept. 1, 2010), slip op. at *10. Although the case was dismissed on the basis of a technicality, the *dicta* in the decision strongly rejected the Secretary's argument that he retains leasing discretion until a lease is issued.

[66] David J. Hayes, Deputy Secretary, U.S. Department of the Interior, "Report to Secretary Ken Salazar Regarding the Potential Leasing of 77 Parcels in Utah," (June 11, 2009), http://www.blm.gov/wo/st/en/info/newsroom/2009/june/NR_0611_2009.html

[67] "Final BLM Review of 77 Oil and Gas Lease Parcels Offered in BLM-Utah's December 2008 Lease Sale," (October 7, 2008) http://www.doi.gov/documents/BLM_Utah77LeaseParcelReport.pdf

[68] GAO, "Energy Policy Act of 2005: "Greater Clarity Needed to Address Concerns with Categorical Exclusions for Oil and Gas Development under Section 390 of the Act," GAO-09-872 (September 16, 2009) (GAO CX Report).

[69] http://www.blm.gov/wo/st/en/info/newsroom/2010/may/NR_05_17_2010.html.

http://www.doioig.gov/images/stories/reports/pdf/BLM%20Lease%20Report_508.pdf

[70] *Southern Wilderness Alliance v. Allred*, No.08-0287 (D.D.C. January 17,2009)

federal officials – not involved with the Utah leasing decisions – to make site-specific decisions on whether the 77 lease parcels should be re-offered under the same or different terms or deferred; and 4) develop a comprehensive air quality strategy for the region in consultation with EPA Region VIII, the National Park Service, and state officials.[71]

2. GAO CX Report. On September 16, 2009, the GAO issued a report on the BLM's implementation of the EPACT 2005, Section 390 CXs. These five CXs had been enacted into law by Congress to expedite the processing of Applications for Permit to Drill (APDs) in areas previously analyzed in NEPA documents. These CXs were not popular with environmental interests who objected to this perceived loss of a comment opportunity and to the decision of the BLM not to apply the "extraordinary circumstances" exception applicable to administratively developed CXs.[72] The GAO found, "a lack of clarity in section 390 and BLM's guidance has raised serious concerns".[73] The GAO CX Report said there was confusion about what categorical exclusions are and how they should be used, disagreement as to whether BLM must screen section 390 categorical exclusions for extraordinary circumstances with the result of varied interpretations among field offices and concerns about misuse and a lack of transparency.

3. Stiles Report. On October 7, 2009, the Stiles Report was issued in response to the broad direction in the Hayes Report. Based on the inter-agency team's site visits to each parcel, the Stiles Report recommended specific actions on each of the 77 leases -- 17 of the lease parcels should be re-offered at a future lease sale; 52 parcels should be deferred pending additional environmental analysis; and 8 parcels should be withdrawn from any future leasing. More significantly, the Report also recommended that the inter-agency, parcel by parcel review process used by the team in their review of the sale should form the basis for future agency lease sales. The Report praised the value of a pre-sale, site specific review of each lease parcel, but recognized it would "present enormous challenges to the BLM in terms of staffing, skills, availability, budget, and foregone work under current levels of leasing interest and activity." Accordingly, the Report suggested that, "BLM could take steps to limit the scope of oil and gas lease offerings. . ." to allow for the parcel specific reviews.[74] The Report also discussed, in some detail, the need for a comprehensive interagency air strategy to consider "air quality effects of oil and gas leasing and permitting actions for eastern Utah, as well as the potential need for a similar air analysis for Colorado, New Mexico, Wyoming, and Montana."[75] The foundation for such a comprehensive air strategy would include an inter-agency team, air quality monitoring, the selection of an appropriate air quality model and the preparation of an EIS.[76]

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[71] Hayes Report at 6-11.

[72] "*Extraordinary circumstances*" are circumstances in which actions that are otherwise categorically excluded from the requirements under NEPA to prepare an EA or EIS may have a significant effect and require additional analysis and action. *See also* 43 CFR 46.215 and Appendix 5 of the BLM NEPA Handbook, H-1790-1 (January 30, 2008).

[73] GAO CX Report at 1.

[74] Stiles Report at 18.

[75] *Id.* at 20.

[76] *Id.* at 21-23.

B. BLM Onshore Oil and Gas Leasing Reforms

1. Secretarial Announcement. Based on the results in the Hayes, GAO and Stiles reports, on January 6, 2010, Secretary Salazar announced several BLM oil and gas reforms. His stated intent was two-fold: 1) to improve protections for land, water, and wildlife; and 2) to reduce potential conflicts that can lead to costly and time-consuming protests and litigation of leases."[77] The Secretary strongly contrasted this approach to that of the Bush administration, "[i]n the prior administration the oil and gas industry essentially were the kings of the world . . . our public lands were the essential candy store of the oil and gas industry, where they walk in and take whatever they wanted, and that's not the way it ought to be done." The Secretary's announcement focused on two areas – oil and gas leasing reform and redefining the use of EPACT § 390 categorical extensions.[78] Finally, the Secretary issued a Secretarial Order, No. 3294, "Energy Management Reform" directing the creation of an Energy Reform Team in the Office of the Assistant Secretary, Land and Minerals Management, to address federal on and off-shore energy development.[79]

2. BLM Instruction Memorandum 2010-117. On May 17, in the midst of the BP Macondo blowout, Secretary Salazar announced the long-anticipated on-shore oil and gas leasing reforms and sought to tie that action to his response to the BP oil spill. "The BP oil spill is a stark reminder of how we must continue to push ahead with the reforms we have been working on and which we know are needed."

The BLM's Instruction Memorandum[80] and the Secretary's remarks focused on four stated policy drivers: the first, to bring "greater certainty and predictability" to the oil and gas leasing process which the Secretary described as troubled by leasing protests and litigation. The second and third goals focus on due consideration of multiple use values, in particular natural and cultural resources, in the lease process. The fourth goal was to ensure public involvement.[81] These four goals are to be met in the three main components of IM-2010-117: land use plan review; the Master Leasing Plan concept; and improved processes for lease parcel nominations and issuance.[82]

The *land use plan review* requires BLM field officers to consider whether the RMP "adequately protects important resource values in light of changing circumstances, updated policies and new information."[83] The guidance reminds the BLM field officer that the "open for leasing" designation in a land use plan is not the determining factor in whether the lands should be leased – BLM retains the discretion not to lease.[84] In addition, the guidance revisits the issue

[77] U.S. Department of the Interior Press Release, "Secretary Salazar Launches Onshore Oil and Gas Leasing Reforms to Improve Certainty, Reduce Conflicts and Restore Balance on U.S. Lands" (January 6, 2010). For an analysis of lease protests, *see also*, GAO "Onshore Oil and Gas, BLM's Management of Public Protests to its Lease Sales Needs Improvement," GAO 10-670 (July 30, 2010).

[78] "New Oil and Gas Policy Fact Sheet" (January 6, 2010). http://www.doi.gov /news/pressreleases/Secretary-Salazar-Launches-Onshore-Oil-and-Gas-Leasing-Reforms.cfm. The CX reform was buttressed by a March 2010 settlement in Utah, in which BLM agreed to issue new guidance to require "extraordinary circumstances review." *Nine Mile Canyon Coalition v. Stiewig*, Civil Nos. 2:08 CV 586 DB (D.C. Utah March 30, 2020).

[79] "New Oil and Gas Policy Fact Sheet," *supra.*

[80] Instruction Memorandum 2010-117, "Oil and Gas Leasing Reform – Land Use Planning and Lease Parcel Reviews" (May 17, 2010).

[81] *Id.* at 1.

[82] *Id.*

[83] *Id.* at 3.

[84] *Id.*

of lease stipulations addressed by three prior BLM reports to Congress.[85] The guidance requires a review for consistency by BLM and a legal review by the Office of the Regional Solicitor. In addition, this section of the guidance directs the use of adaptive management and monitoring to address changing conditions on the ground and incorporates by reference two prior BLM Instruction Memoranda on adaptive management and monitoring.[86]

The *Master Leasing Plan* (MLP) concept builds on existing tools used for full field development – Plans of Development (PODs) and Master Development Plan (MDPs) with the important difference that those plans are based on site-specific information developed after leasing and exploration while the MLP must be prepared prior to leasing. The focus of the MLP is to "reconsider RMP decisions pertaining to leasing" by analyzing likely development scenarios and varying mitigation levels at a less site-specific level."[87] The new guidance rightly recognizes that any significant change to the RMP's decisions, as a result of an MLP, would require a formal plan amendment process with the opportunity for public participation and NEPA.[88] The *mandatory* use of MLPs is limited to situations where these four criteria are present:

- A substantial portion of the area to be analyzed in the MLP is *not* currently leased
- There is a *majority* federal mineral interest
- There is an expressed interest in leasing and moderate or high potential for oil and gas *confirmed by the discovery* of oil and gas in the area.
- Additional analysis is needed to address resource and cumulative impacts to multiple use resources, air resources and impacts on and to special places.[89]

BLM, however, retains the option to use an MLP in other circumstances. There is already pressure from the environmental community for BLM state offices to identify greater numbers of these discretionary MLPs.[90]

Lease Parcel Review is the final component of the oil and gas reform. The most significant change is the new requirement for an additional layer of NEPA analysis post-land use plan. In the past, the BLM would rely on RMP level NEPA and a "Determination of NEPA Adequacy" (DNA) to put a parcel up for sale. (Additional NEPA is conducted prior to the issuance of an APD or POD). The new guidance rejects that approach – all lease parcels must have parcel specific NEPA – typically an EA before the parcel can be offered for sale.[91] In addition, each parcel must have an inter-disciplinary review team conduct a review, a site-

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[85] Energy Policy and Conservation Act of 2000 (EPCA), § 604, as amended by EPACT § 364, required an inventory of oil and gas resources and a description of the extent and nature of any restrictions or impediments to development (stipulations). https://www.blm.gov./wo/st/en/prog/energy/oil_and_gas/EPCA III.html (May 21, 2008)

[86] "Exceptions, waivers and modifications of Fluid Minerals Stipulations and Conditions of Approval, and Associated Rights-of-Way Terms and Conditions", BLM IM-2008-032 (November 27, 2007); and "Use and Application of the Fluid Minerals Surface and Environmental Monitoring Program Element – MW," IM-2009-224 (September 30, 2009).

[87] IM 2010-117 at 4.

[88] *Id.* at 5.

[89] *Id.*

[90] Personal correspondence with J. Perry, BLM, September 27, 2010.

[91] IM 2010-117 at 12.

specific visit and provide for public participation.[92] The guidance directs a 30-day comment period for lease parcel EAs.[93]

The Field Office recommendation to lease a particular parcel is to be sent to the State office. The parcel and NEPA document are posted on the Internet for at least 90 days prior to the lease sale.[94] That posting starts the 30-day protest clock and will allow BLM 60 days prior to the lease sale, to address and resolve protests. The result of this one change to BLM leasing procedures will significantly change oil and gas leasing – parcels nominated by industry may not be sold for several sales as BLM conducts this more detailed review, NEPA and public participation process.

Finally, the guidance required a report to be filed on August 16, 2010 from each state office describing the oil and gas reform implementation plan and a one-year out report on the results of the oil and gas reform.[95]

3. BLM Instruction Memorandum 2010-118. This guidance captured the policy changes to the EPACT 2005, Section 390 categorical exclusions agreed to in the settlement of the *Nine Mile Canyon* litigation.[96] The Instruction Memorandum rewrites the criteria specified in the statute for two of the five CXs (CX2 and CX3)[97] and requires the 'extraordinary circumstances' review process for all of the statutory CXs.

As to CX2, Congress provided a CX when "drilling an oil or gas well at a location or well pad site at which drilling has occurred previously within 5 years prior to the date of spudding the well." The new BLM guidance now provides that, this CX can only be used if the specific location and/or well pad site for the proposed drilling was "adequately analyzed" in an existing "activity-level" or "project-specific" EIS or EA. As to CX3, Congress provided a CX when, "drilling an oil or gas well within a developed field for which an approved land use plan or any environmental document prepared pursuant to NEPA analyzed such drilling as a reasonably foreseeable activity, so long as such plan or document was approved within 5 years prior to the date of spudding the well." The new BLM guidance now provides a CX3 may only be used if the developed field in which the proposed drilling will take place was "adequately analyzed" in an "existing activity-level" or "project-specific" EIS or EA – a land use plan will not suffice. Whether or not these agency interpretations of the statutory language accord with Congressional intent is an open question.

Finally, the guidance also requires the use of an "extraordinary circumstances" review for all of the statutory CXs. The Department argued in making this change that this application of "extraordinary circumstances" was not discretionary, but required by NEPA, and the guidance of the White House, Council on Environmental Quality (CEQ), the recognized expert on NEPA interpretation. That argument was somewhat undercut by CEQ's guidance on the use of CXs. In February 2010 guidance, CEQ noted there was a distinction between administrative and statutory CXs. Statutory CXs are governed, not by CEQ guidance, but by the language of the

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[92] *Id.* at 11.
[93] *Id.* at 12.
[94] *Id.* at 13.
[95] *Id.* at 14.
[96] Instruction Memorandum 2010-117, Oil and Gas Leasing Reform – Land Use Planning and Lease Parcel Reviews (May 17, 2010); *supra* at n. 78.
[97] *See* BLM NEPA Handbook, App. 2.

statute and the interpretation of that statute by the implementing agency.[98] In this instance, the statute did not address extraordinary circumstances and the two administrations differed on the interpretation of Congressional intent.

4. Air Resource Management Strategy. Finally, the last prong of the administration's oil and gas leasing reform agenda is still "under construction." BLM and EPA Region VIII are developing a regional air quality strategy to model, monitor, conduct NEPA analysis and manage air quality impacts from oil and gas development. It is recognized by the agencies that it will take at least two years to develop and implement a model and some additional time to improve air quality monitoring. In the meantime, new, mandatory "best management practices" to address air quality impacts will be put in place by BLM in consultation with EPA. It is anticipated that Interior's air management strategy will be published for public comment.

IV. CONCLUSION

The Obama administration has been focused on energy policy reform since before the election. Although several key energy goals of the President have not yet been met – global climate change legislation and a national renewable portfolio standard – the administration has been successful in accelerating the pace of public land renewable energy development and in announcing some fundamental changes to public land and oil and gas leasing.

[98] "Establishing And Applying Categorical Exclusions Under The National Environmental Policy Act" (February 18, 2010) at n.5. "This guidance does not address categorical exclusions established by Congress, as their use is governed by the terms of specific legislation and its interpretation by the agencies charged with implementation of that statute and NEPA." http://ceq.hss.doe.gov/nepa/regs/Categorical_Exclusion_Draft_NEPA_Guidance_FINAL_02182010.pdf