

An Update On Wind, Solar Energy On Public Lands

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Law360, New York (July 10, 2009) -- The Obama administration faces a major challenge in managing the demand for the use of public lands for wind and solar development. Many hope that these two alternative energy resources will help reverse our long reliance on fossil fuels and combat climate change.

Since the United States still owns approximately one third of the Nation's lands and the Bureau of Land Management, commonly known as the BLM, administers around 260 million acres of land mostly in the western United States, it is not surprising that public lands are being eyed for the development of wind and solar facilities.

After all, nearly 10 percent of the onshore oil and gas, almost half of the coal and most of the geothermal resources produced in the United States are produced on public lands.

Moreover, section 211 of the Energy Policy Act of 2005 states that the Secretary of the Interior should seek to have approved at least 10,000 megawatts of nonhydropower renewable generation capacity on public lands by 2015.

The History of Public Lands Development

The high profile and interest that wind and solar development on public lands are generating have been repeated in the past for other energy resources. In the energy crises in the 1970s, the BLM was charged with developing a new federal coal leasing program.

That effort took nearly a decade to complete. There was also a major push for use of public lands for oil shale production and the federal govern-

ment completed massive planning studies on the potential of using public lands for coal liquefaction and gasification.

Ultimately, while neither effort panned out, both were intense. Similar dedication will be needed to address wind and solar development, hopefully with a more productive outcome.

Historically, public lands have played a key role in the nation's development going back to the era when laws like the Homestead Act, the Stockraising Homestead Act, grants to railroads and, the still surviving Mining Law of 1872, transferred millions of acres of land to private owners at nominal cost.

The term "land rush" owes its name to the activity that was spurred when lands were opened for development.

Public Lands Development Today

The simplicity of public lands in the era of the Homestead Act has long since passed. Over the last 100 years, the attitudes and laws governing use of public lands have been transformed.

Today, land disposal is virtually nonexistent and use of public lands is heavily constrained and regulated. While there is no current statutory or regulatory framework specific to these resources on public lands, many laws govern the consideration of wind and solar — FLPMA, NEPA, ESA and NHPA to use a few well-known acronyms.

The BLM cannot allow any new use without thorough, some might say exhaustive, study. Users of public lands must pay the government fair market value for the use of public land and provide assurance for environmental protection.

The general public, and competing interests and

users, such as grazing, recreation, wildlife, wilderness and recreation have repeated opportunities to provide public comment.

The BLM will pay special attention to the views of the state and local governments. Resources being developed on public lands will need to mesh with state and local laws especially since energy produced on public lands needs to be conveyed to the ultimate users on transmission lines that cross non-public lands.

Federal courts will likely be the final arbiters of a myriad of disputes as they have been in recent years for hundreds of natural resource issues. Perhaps the only thing that is certain today is that the process for deciding which public lands will be used for wind and solar facilities is likely to be controversial and time consuming.

The Challenge Ahead: Wind and Solar Development

What is the magnitude of the issues facing the Obama administration and their point person for this issue, Secretary of the Interior Ken Salazar? The BLM, which reports to Secretary Salazar, is facing a modern land rush as wind and solar interests seek to develop utility scale projects on public lands.

It has received nearly 200 applications for wind facilities and 160 applications for solar facilities, covering more than 1.8 million acres for solar development alone.

Potentially, this is enough to provide solar power to 29 million homes. These applications comprise a huge workload and a major challenge for the BLM, even despite the influx of stimulus funds for this purpose.

Under the Bush administration, the BLM took a number of initial steps to address the future of wind and solar on public lands.

For wind, the BLM completed a Wind Energy Development Programmatic Environmental Impact Statement ("EIS") in 2005, and updated its Wind Energy Development Policy in 2008 to further bolster its policy framework. The BLM has issued nearly 200 authorizations for wind power sites with more than 300 megawatts of installed capacity.

Existing solar energy applications are being

processed under the BLM's April 2007 Solar Energy Development Policy.

The BLM's existing solar energy policy: describes options for generating electricity using solar power, and the land characteristics that make a site suitable for locating solar facilities and projects, identifies some of the potential environmental impacts associated with the large land requirements, directs BLM Field Offices to consider renewable resources — specifically solar energy development — when undertaking the land use planning process, places a priority on processing solar energy applications that are feasible and can reasonably meet environmental requirements, directs field staff to coordinate planning and applications with local officials to reduce duplication and delays, reiterates existing policy that current users and permittees do not need additional authorizations to install solar energy devices on existing authorized facilities, phases in rent over a three-year period to allow time for state and utility approvals and initial construction, reinforces due diligence requirements to discourage speculation or attempts to control or hinder solar energy development on public lands, and directs expanded use of solar energy devices, where feasible, for BLM buildings and facilities and other uses on public lands.

The most recent action to address this modern land rush was Secretary Salazar's June 29 announcement of a plan to speed up approvals of solar projects on public lands.

Salazar is quoted in a Department of the Interior press release, as stating that "President Obama's comprehensive energy strategy calls for rapid development of renewable energy, especially on America's public lands."

The key component of the Salazar plan is a Solar Programmatic Environmental Impact Statement, a collaborative effort with the Department of Energy.

The Programmatic EIS will address the "impacts of utility-scale solar energy development on public lands in 24 Solar Energy Study Areas" located in the Western States of Nevada, Arizona, California, Colorado, New Mexico and Utah.

The EIS is perhaps somewhat optimistically projected to be completed at the end of 2010. Salazar

stated that "the two dozen areas we are evaluating could generate nearly 100,000 megawatts of solar electricity.

With coordinated environmental studies, good land-use planning and zoning and priority processing, we can accelerate responsible solar energy production that will help build a clean-energy economy for the 21st century."

Once the Programmatic EIS is completed, project-specific EIS's for proposed solar projects will be able to "tier" off of the Programmatic EIS.

The BLM has not placed a moratorium on projects pending this review and solar projects can proceed on the basis of project-specific environmental review.

The BLM will begin site-specific environmental reviews for two major projects in Nevada that would have a combined capacity of more than 400 megawatts of electricity: the NextLight Silver State South array is planned to produce 267 megawatts; and the NextLight Silver State North would produce about 140 megawatts.

Interior will also continue to work with the Western Governors Association to develop renewable energy zones and transmission corridors.

The decision to prepare a Programmatic EIS appears to be a response to critics such as Senator Feinstein who favor solar development but who want to avoid locating facilities in areas of environmental sensitivity in the eastern Mojave Desert.

By focusing on a set of specific areas, the BLM will be able to compare sites and determine which ones will provide the greatest benefit at the least environmental cost.

This will also enable the BLM to address concerns raised by the National Park Service and others that one type of solar development, concentrating solar power ("CSP") systems, employ water-cooled technology that may require significant amounts of

water for operation and that siting of such facilities on public lands will negatively impact sensitive, water-dependent ecosystems located in national parks and conservation areas.

The Natural Resources Defense Council has been working with other stakeholders to identify suitable areas for wind and solar and the Programmatic EIS can build on that work.

The NRDC commented favorably on the proposal stating that, "[t]his announcement signals the Department of the Interior's commitment to proactively finding appropriate places for solar energy development on public lands based on stakeholder input and taking into account environmental impacts."

The Programmatic EIS can also address concerns that the rush for public lands in siting wind and solar facilities is also fueling land speculation and address the issue of ensuring the public receives fair market value for these uses. The BLM has included due diligence provisions in its Right-of-Way applications that are designed to discourage speculation.

For example, applicants must demonstrate technical and financial capability through experience with energy-related projects, sufficient capitalization, and so on.

In addition, terms and conditions of grants are limited to three years and construction of energy facilities must occur within a certain period of time.

However, it remains to be seen whether these safeguards will be effective in preventing the types of speculation present in previous land rushes. The Programmatic EIS can address these issues as well.

Conclusion

The current public lands rush for siting of wind and solar facilities is already proving contentious. The stakes are high and the difficulty of the course ahead should not be underestimated.

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