

Practical Advice: Wind and Solar Projects on BLM Lands

by Scott Bank, in New York

At the start of the 20th century, individuals and companies could explore, develop and purchase US federal lands containing natural resources with relative ease. Under the General Mining Law of 1872, such resources were transferred to full private ownership for fairly nominal sums through a process known as “patenting.”

Eventually, Congress decided that natural resources on federal lands should remain under federal ownership. The Mineral Lands Leasing Act of 1920 signaled a policy shift in this regard. It was the first step toward what has become a complicated series of interrelated statutes and agency regulations that govern leasing and permitting for energy exploration and production on federal lands. These statutes and regulations now ensure that oil, gas and other natural resources found on federal lands remain under federal ownership or control.

One such statute, the Federal Land Policy and Management Act of 1976, empowers the Bureau of Land Management or “BLM,” an agency within the US Department of the Interior, to grant federal rights-of-way to qualified applicants who want to build wind and solar projects.

BLM administers approximately 253 million acres, or one eighth of the US land mass. BLM also manages 700 million acres of subsurface mineral rights underneath federal, state and private lands. Most BLM lands are not available for use by independent power companies. Lands designated as wilderness areas, national monuments, national conservation areas (with the notable exception of the California Desert Conservation Area), national wild and scenic rivers and national historic and scenic trails are all specifically closed to private development. However, vast swaths of BLM-administered land have been identified as having significant solar (22 million acres in six states) or wind (20.6 million acres in 11 states) potential. As of March 2011, BLM had approved nine solar projects with a total generating capacity of more than 3,600 megawatts and one 150-megawatt wind project. There are an additional 10 solar and five wind project applications, representing about 4,149 total megawatts, which BLM has designated for “priority” review status.

All of this activity — approved and pending — has required

billions of dollars in loans and loan commitments. Lenders review BLM rights-of-way in the same way they review leases, easements, licenses and other real estate rights for projects on private lands. Chadbourne has represented lenders, developers and equity participants in numerous BLM solar, wind and geothermal projects, and we have not had a transaction fail due to issues tied to BLM.

The rights-of-way granted by BLM for solar and wind projects differ from privately-granted real estate interests in several important respects. The lender concerns in this area generally fall into four categories.

Retained Rights

Perhaps the most significant difference between BLM rights-of-way and rights over private lands is the level of control BLM retains over the land it administers.

A private lessor or easement grantor generally retains very few rights.

BLM retains significant rights, including a right of continuing access, a right of common use of the subsurface and air space, authority for others to use the right-of-way for compatible uses, retention of mineral rights, the right to decide later whether the grant is renewable, and the right to change the terms and conditions of the right-of-way to conform to any changes in legislation or regulation or as otherwise necessary to protect public health or safety or the environment.

Estoppels and Consents

BLM will not, as a general rule, involve itself in the details of a developer’s financing transaction.

As such, unlike private landowners, BLM will not give typical estoppel certifications in favor of a lender. Rather, BLM will generally only acknowledge that the lender is taking a security interest in a right-of-way and, after reviewing the file pertaining to the right-of-way, state that the right-of-way is in good standing because rent payments are current or because BLM is unaware of any defaults by the holder of the right-of-way.

BLM allows lenders to record their mortgages or deeds of trust and to have those security interests / continued page 2

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reflected in the BLM's serial register.

However, BLM will not give a typical consent to collateral assignment (where foreclosure results in automatic assignment to the lender). Instead, BLM will require the lender, upon foreclosure, to apply to BLM for an assignment of the existing right-of-way or for a new right-of-way.

Mining Claims

With their potential to disrupt surface operations, mining claims are inimical to wind and solar projects (particularly solar). Unfortunately, mining claims that are filed or "located" prior to a final right-of-way grant are difficult obstacles to clear in the context of financing a solar or wind project.

Under the General Mining Law of 1872, a BLM right-of-way cannot endanger or interfere with a properly-located mining claim. Thus, mining claimants are free to stake new mining claims on solar or wind project sites while a right-of-way application is pending (except where lands have been segregated as described below).

While it is relatively easy and inexpensive to file a mining claim, it can be difficult, time consuming and costly to demonstrate that the mining claim was not properly filed or does not contain a valid discovery. While some mining claims filed on land where a right-of-way application is pending may be valid, many others are likely to be speculative and not located for true mining purposes. Instead, many of the suspect claims are filed for no other purpose than for the mining claimant to compel some sort of payment from the project developer. BLM reports that over the last two years, 437 new mining claims were staked on land where developers have applied to build new wind farms and 216 new mining claims were located on where developers have applied to build new solar projects. Of course, this is exactly the sort of uncertainty that can discourage lenders from financing these projects.

In an effort to address such conflicts, BLM proposed new rules in April 2011 that would give BLM the ability to "segregate" lands temporarily for which wind and solar developers have applied for rights-of-way, as well as lands that BLM has identified on its own as promising for potential wind or solar development. Once segregated, the land would be off limits for new mining claims for a period of up to two years.

BLM put an "interim" version of the proposed rules into effect immediately on April 26, 2011 and collected public comments to the rules through June 27, 2011. BLM is currently analyzing the comments received. In the meantime, the

agency temporarily segregated 24 tracts (677,000 acres) of lands previously identified as "solar energy zones" in Arizona, California, Nevada, New Mexico and Utah in June 2011.

Unfortunately, segregation does not completely solve the mining claim issue, as neither the interim nor proposed rules affect mining claims that were properly located before the land in question was segregated. Consequently, rights-of-way applicants (and their lenders) must do careful diligence to ensure that projects can be constructed and operated in harmony with pre-existing mining claims.

Notably, BLM is also seeking a five-year withdrawal of the solar energy zones from all mining claims or activity. According to BLM, temporarily segregating the solar energy zones for two years under the interim rules will give the agency time to complete the necessary environmental and other reviews necessary to assess their future solar energy potential.

Litigation Risk

Lenders typically will not commit to projects that are mired in litigation — at least, litigation that is viewed as a credible threat to development.

Perhaps because of this, neighboring landowners, environmental advocacy groups, Native American tribes and others often file suit to block rights-of-way for solar and wind projects in the hope of stopping the projects.

The central allegation in most of these challenges is that BLM did not comply with the National Environmental Policy Act or "NEPA" before issuing the right-of-way in question. NEPA does not expressly provide for the right to judicial review; instead, judicial challenges are brought under the Administrative Procedures Act, which has a six-year statute of limitations. Notwithstanding the six-year statute, because of standing and other procedural hurdles, an immediate NEPA challenge under the APA offers an opponent the best opportunity for success. A site with threatened or endangered species of plants or animals gives a challenger additional ammunition. Having the right-of-way for a project rescinded is the ultimate goal, but many opposition groups consider it a victory just to delay a project long enough for its financing to fall apart.

If an opponent has up to six years after a right-of-way for a project is issued to challenge it, how on earth can any project be financed?

The answer is the longer the opponent waits to file a lawsuit challenging the right-of-way, the less likely a court will be to award the injunctive relief sought by the opponent. To order construction halted, a court must weigh / *continued page 3*

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the balance of benefits and harms if the project is built versus if the project is not built, taking into consideration practical matters such as the state of construction and the procedural validity of the right-of-way. If the opponent did not challenge

the right-of-way by asking for an immediate preliminary injunction before construction started, then the passage of time is likely to tip the balance against granting an injunction. ☺

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