

Federal Government Establishes New Rental Policy for Solar Projects Located on Public Lands

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On June 10, 2010, the Bureau of Land Management (“BLM”) released an Interim Rental Policy for solar energy right-of-way authorizations on public lands. Solar project developers and investors should re-evaluate proposed projects in light of the new policy, which establishes rental rates that are now in effect.

Under the methodology reflected in the new rental policy, the annual rent for a solar project located on BLM-managed lands will depend on the project’s acreage, power capacity, and type of solar technology. The rental policy will provide a greater level of certainty about the costs associated with developing large-scale solar projects on public lands administered by the BLM.

Background

The BLM manages approximately 23 million acres in Arizona, California, Colorado, New Mexico, Nevada and Utah with potential for utility-scale solar energy development. For solar projects proposed to be located on BLM-managed lands, the agency processes applications under the right-of-way (“ROW”) provisions of the Federal Land Policy Management Act (“FLPMA”).¹ See Solar Energy Interim Rental Policy, BLM Instruction Memorandum No. 2010-141 (June 10, 2010).²

To begin the ROW application process, a project proponent files a ROW application followed by an initial Plan of Development. Once the BLM determines that these initial submissions are sufficiently complete, it publishes a Notice of Intent to study the ROW application under the National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321-4347. The agency’s environmental review under NEPA usually results in preparation of an Environmental Impact Statement (“EIS”) and, ultimately, issuance of a Record of Decision approving, denying, or modifying the ROW application.³

When the BLM grants a ROW application, the agency is required to impose terms and conditions to effectuate the goals of the FLPMA. Among other things, these terms and conditions include collecting rent equivalent to (but not in excess of) the fair market value of the land covered by the ROW application. See 43 U.S.C. §§ 1701(a)(9), 1734(g).

Interim Rental Policy

Rents imposed under the new rental policy for solar energy ROW authorizations consist of two components: (1) a “base rent” per-acre fee, and (2) a “megawatt (MW) capacity fee” based on the power capacity of the project. Royalties are not proposed under the policy, at least in part because the BLM lacks authority to collect royalties for solar projects.

The base rent will be charged on the entire acreage of public land described in the ROW authorization, regardless of the stage of development or disturbance of the land. The base rent is due annually, commencing upon issuance of the authorization, although the BLM may approve a rental payment plan to accommodate unique financing arrangements for some projects.

The base rental rates vary by county based on rural land values published by the National Agricultural Statistics Service, with an encumbrance factor that is a measure of the degree to which the project encumbers a ROW area or excludes other types of land uses. The BLM selected an encumbrance factor of 100% for solar projects, even though typically project proponents do not acquire mineral and other subsurface rights.⁴

The base rental rates for 2010 range from \$15.70 per acre in parts of Arizona and New Mexico to as high as \$313.88 per acre in Riverside County, California and Yuma County, Arizona. The next highest rates (\$188.34 per acre) apply to Imperial County, California; Maricopa County, Arizona; and Clark County, Nevada.⁵

The MW-capacity fee will be calculated based on the total authorized MW capacity for the project approved by BLM. The fee will be phased in over a five-year period beginning when the project starts generating electricity. If a project is built in phases, the fee will be implemented as each phase is completed and generates electricity.

The MW-capacity fee varies depending on the solar technology. The fee is \$5,256 per MW for photovoltaic ("PV") solar projects; \$6,570 per MW for concentrated PV and concentrated solar power ("CSP") projects without storage capacity; and \$7,884 per MW for CSP projects with at least three hours of storage capacity. The BLM set these fees using a formula that assumes an average electricity price of \$0.06 per kilowatt hour and efficiency factors of 20% for PV, 25% for CSP without storage, and 30% for CSP with storage. The BLM indicates that it will review these efficiency factors "periodically" to account for changes in technology.

This methodology is controversial because it could result in rental rates that are higher than rates for comparable private lands. Some commentators believe the rental rates will exceed the fair market value threshold for certain projects. Furthermore, by basing the MW-capacity fee on the efficiency of the solar technology, the new rental policy arguably penalizes more efficient technologies that require less land to generate the same amount of power.

Key Implications

The new rental policy took effect on June 10, 2010 and applies to pending and future solar energy ROW applications, including those with fast-track status for expedited processing by the BLM. Solar project developers and investors should review proposed projects on federal public lands in light of the new rental policy and consider the following:

- Rents will vary significantly depending on project acreage and power capacity, as well as the efficiency of the project's proposed solar technology.
- Per-acre rental rates will not be tied to site-specific commercial appraisal values.
- To the extent that rents on BLM lands are higher than rents on similar private lands, the new rental policy may inflate the costs of mitigating project impacts on special-status species as the value of private lands will increase.
- A developer who thinks the rent for its project is too high should object to BLM. If that is unsuccessful, the developer may appeal to the Interior Board of Land Appeals, but the

developer bears the burden of showing that the rent set by BLM is higher than fair market value.

- The BLM will include in all ROW authorizations a provision allowing it to adjust rents “whenever necessary” to reflect changes in fair market value. If rural land values, solar technology efficiencies, or average electricity prices increase in the future, rental rates could increase. Such uncertainty could present problems for power purchase agreements and other instruments that require fixed electricity prices.
- The new rental policy has been characterized as “interim,” meaning that the BLM may adopt it permanently (such as in the Record of Decision for the PEIS) or change it in the future.

Conclusion

The new rental policy provides solar project developers and investors with much-needed certainty about certain costs associated with developing large-scale solar projects on BLM-managed lands in the Southwest. While market participants may take issue with the agency’s methodology, future projects on federal public lands can be designed to reduce rental costs.

This is the latest in numerous changes in state and federal laws that directly affect renewable energy companies and their projects. Paul Hastings attorneys are actively involved in these developments and will continue to monitor and participate in matters that affect the clean tech sector.



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¹ See Title V of FLPMA, 43 U.S.C. §§ 1761-1771, and the BLM’s ROW regulations, 43 C.F.R. Part 2800.

² Available at http://www.blm.gov/wo/st/en/info/regulations/Instruction_Memos_and_Bulletins/national_instruction/2010/IM_2010-141.html.

³ The BLM and the Department of Energy are in the process of preparing a Solar Energy Development Programmatic Environmental Impact Statement (“PEIS”) that will evaluate potential environmental impacts associated with utility-scale (i.e., 10 MW or more) solar energy development on BLM lands in the six Southwestern states. The proposed action in the PEIS would include amendment of BLM land use plans to permit solar energy development in certain areas. The PEIS would not eliminate the need for site-specific environmental review for individual proposed projects, but site-specific NEPA reviews could be “tiered” to the PEIS. BLM is expected to release a draft PEIS by December 2010.

⁴ This encumbrance factor will result in higher base rental rates for solar projects than for linear ROWs (such as for power lines), to which the BLM applies a 50% encumbrance factor.

⁵ A complete list of the 2010 solar energy base rental rates by county is set forth in the Solar Energy Interim Rental Policy, BLM Instruction Memorandum No. 2010-141 (June 10, 2010).