

## Client Alert

### BLM Seeking Comments on Competitive Leasing for Wind and Solar Development on Public Lands

January 9, 2012

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On December 29, 2011, the Bureau of Land Management (BLM) issued an Advance Notice of Proposed Rulemaking (ANPR) as the first step in establishing a competitive process for leasing public lands for solar and wind energy development. The ANPR solicits public comments to assist BLM in preparing a proposed rule that is meant to foster the growth of renewable energy by establishing an efficient competitive process for issuing right-of-way (ROW) leases for solar and wind energy development. BLM is accepting comments on the ANPR until February 27, 2012. The ANPR can be accessed at <http://www.gpo.gov/fdsys/pkg/FR-2011-12-29/pdf/2011-33429.pdf>

### Facilitating Development of Wind and Solar Projects on Public Lands

Section 211 of the Energy Policy Act of 2005 instructs the Secretary of the Interior to seek to approve at least 10,000 megawatts of non-hydropower renewable energy generation capacity on public lands by 2015. To meet this goal, BLM is proposing a competitive leasing process that the bureau believes will ensure fair access to leasing opportunities for renewable energy development, while also capturing fair market value for the use of public lands, as required by federal law. This rulemaking will establish competitive bidding procedures for lands within designated solar and wind energy development leasing areas, define qualifications for potential bidders and structure the financial arrangements necessary for the leasing process.

The public lands that will be subject to competitive lease—to be known as the “designated solar and wind energy development leasing areas”—will be those with the highest wind and solar energy potential and the fewest environmental and resource conflicts. BLM will identify the designated solar areas through its “Programmatic Environmental Impact Statement for Solar Energy Development in Six Southwestern States,” which is expected to be completed at the end of 2012. Designated wind areas will be identified through local planning processes and will likely lag behind solar. These designated areas will have been prescreened for environmental resource impacts and military conflicts and, thus, should provide developers with greater regulatory certainty, reduced financing risk and streamlined permitting.

While it is unlikely that the rulemaking will affect existing leases (except, potentially, upon renewal), ROW applications pending at the time the final rule goes into effect could become subject to the competitive bidding process.

### Potential Competitive Leasing Framework

The ANPR identifies the competitive leasing process “that the new regulations could include:” (i) BLM would publish a **call for nominations** to solicit expressions of interest for parcels of land within designated solar or wind energy development leasing areas; (ii) BLM would **review the nominations** to identify parcels suitable for a competitive offering and then complete the necessary environmental reviews for these parcels; (iii) BLM would provide **notice of**



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**intent to offer** a parcel competitively through any one of a variety of competitive bid procedures (e.g., sealed bids, oral auctions or ascending bidding, two-stage bidding or multiple-factor bidding); and (iv) BLM would **issue the ROW lease** to the successful bidder, which would be required to submit a plan of development defining the leaseholder's specific development plans.

## Unique Opportunity to Shape Policy Through Submission of Comments

The leasing policy developed through this rulemaking could have significant implications for the planning, development and financing of wind and solar projects on public lands. The ANPR provides a unique opportunity for wind and solar developers to provide early input and to shape BLM's leasing policy. While BLM has requested comments on the general content and structure of the proposed competitive leasing process, the bureau has indicated a "particular interest" in receiving comments on the following questions:

1. How should a competitive process be structured for leasing lands within designated solar or wind energy development leasing areas?
2. Should a competitive leasing process be implemented for public lands outside of designated solar or wind energy development leasing areas? If so, how should such a competitive leasing process be structured?
3. What competitive bidding procedures should the BLM adopt?
4. What is the appropriate term for a competitive solar energy ROW lease?
5. What is the appropriate term for a competitive wind energy ROW lease?
6. Should nomination fees be established for the competitive process? If so, how should the fees be determined?
7. How should the bidding process for competitive solar and wind energy ROW leases be structured to ensure receipt of fair market value?
8. Should a standard performance bond be required for competitive solar and wind energy ROW leases, and how should the bond amount be determined?
9. What diligent development requirements should be included in competitive solar and wind energy ROW leases?

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### CONTACT INFORMATION

Akin Gump's attorneys have significant experience with BLM land issues, wind and solar project leasing and development of infrastructure projects on public lands. Clients contemplating undertaking or financing renewable projects on public lands or that have questions about, or wish to submit comments on, the ANPR should feel free to contact the attorneys listed below—

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