When the Fast Track Hits the Off Ramp: Renewable Energy Permitting and Legal Resistance on Western Public Lands

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Table of Contents

I. INTRODUCTION

In recent years, the Bureau of Land Management ("BLM") has attempted to institute a "Fast-Track" permitting process for renewable energy projects on public lands, which is supposed to increase the efficiency and speed of project development.[1] However, previous attempts have met procedural and administrative hurdles that have led to legal resistance.[2] The new changes BLM is making are likely to encounter similar problems. Given the ten-year trend toward fast-tracking permitting processes on western public lands, and the continued resistance by environmental and cultural groups to such activities, the BLM approval process evidences a tension between speedy, efficient approval on one side, and ensuring full consideration of interest groups' concerns on the other. BLM will likely continue to pursue fast-tracking mechanisms. However, doing so without a process that outside groups consider to be legitimate, can put those same processes at risk of reduced efficiency. These inefficiencies will result from the increased financial and time burdens associated with overcoming legal challenges to renewable energy siting. Such an effect could reduce the efficiency at which fast-tracking aims. To avoid the increased controversy and time that could be a result of such opposition, BLM could benefit from including outside groups in its decision-making processes beyond those it already employs. On the other hand, it may be that any process, no matter how thorough, will meet resistance, and that fast-tracking could at least speed up the aspects of permitting that will not be bogged down by legal resistance. Additionally, whether or not fast-tracking works as promised, if renewable energy development companies perceive the process as one that will be over encumbered by opposition without a foreseeable payoff, they will not participate in development on public lands, making the attempt to lease such lands for renewable energy futile.

BLM's current approach to fast-tracking in the desert southwest is to more rapidly approve whole zones of land, to facilitate the permitting

1. Press Release, Bureau of Land Mgmt., Secretary Salazar, Governor Brown Expand Partnership to Expedite Renewable Energy Projects in California (Jan. 13, 2012), https://www.doi.gov/news/pressreleases/Secretary-Salazar-Governor-Brown-Expand-Partnership-to-Expedite-Renewable-Energy-Projects-in-California [hereinafter Salazar].

2. *See, e.g.,* Tom Kenworthy, *A Better Model for Energy on Public Lands: New Administration Plan Goes with a Zone Approach,* CENTER FOR AMERICAN PROGRESS (Nov. 1, 2011), https://www.americanprogress.org/issues/green/news/2011/11/01/10719/a-better-model-for-energy-on-public-lands/; *Tribe questions fast-tracking of solar energy projects by Obama administration*, INDIANZ.COM (Sept. 4, 2015), http://www.indianz.com/News/2015/018805.asp [hereinafter INDIANZ.COM].

process.[3] Given the likelihood of resistance to this plan,[4] BLM faces three courses of action: (1) continue pursuing fast-tracking with the hope that the burdens of legal resistance do not countervail any efficiency gains that may result; (2) attempt to consult and incorporate interest-group perspectives in such a way that does not excessively burden the process; or (3) forego fast-tracking activities in favor of slower, but perhaps more politically and legally feasible processes.

In September of 2014, the U.S. Secretary of the Interior released a Draft Programmatic Environmental Impact Statement ("PEIS") for the Desert Renewable Energy Conservation Plan ("DRECP"), a landscape-level attempt to manage renewable energies—including wind, solar, and geothermal resources—on more than 22 million acres of California desert [see Appendix A].[5] The DRECP aims to streamline renewable energy development by coordinating processes for several disparate agencies, and to facilitate permits for up to 20,000 megawatts of new projects, enough to power over 5,000 homes.[6] As it stands now, a network of state and federal agencies oversee the DRECP, including the BLM, the California Energy Commission ("CEC"), the California Department of Fish & Wildlife, and the U.S. Fish & Wildlife Service.[7]

Although DRECP exists to develop renewable energy, it also aims to maintain other ecological and cultural resources.[8] It promises to: (1) preserve, restore, and enhance natural communities and ecosystems and conserve sensitive species; (2) protect and enhance other resources and values on BLM-administered lands, including cultural resources, recreation opportunities, and visual landscapes; (3) identify appropriate areas for the siting of utility-scale renewable energy projects; and (4) streamline environmental review and permitting for projects sited in these areas.[9] Part of the resistance to DRECP stems from perceived

3. *Solar Energy Zones*, SOLAR ENERGY DEVELOPMENT PROGRAMMATIC EIS INFORMATION CENTER, http://solareis.anl.gov/sez/index.cfm (last visited Mar. 28, 2016).

4. *See* INDIANZ.COM, *supra* note 2.

5. Julie Cart, *Desert plan seeks to balance environment, renewable energy*, L.A. TIMES (Sep. 23, 2014, 9:04 PM), http://www.latimes.com/science/la-me-desert-plan-20140924-story.html.

6. Jennifer Roy, Marc Campopiano & Joshua T. Bledsoe, *Desert Renewable Energy Conservation Plan to Streamline Permitting for 20,000 Megawatts of Renewable Energy*, LATHAM'S CLEAN ENERGY LAW REPORT (Sep. 30, 2014), http://www.cleanenergylawreport.com/finance-and-project-development/desert-renewable-energy-conservation-plan-to-streamline-permitting-for-20000-megawatts-of-renewable/.

7. *REAT,* DESERT RENEWABLE ENERGY CONSERVATION PLAN http://www.drecp.org/participants/.

8. Cart, *supra* note 5.

9. *Frequently Asked Questions*, DESERT RENEWABLE ENERGY CONSERVATION PLAN, http://www.drecp.org/whatisdrecp/faq.html [hereinafter *Frequently Asked Questions*].

shortcomings related to the first and second of these goals. Specifically, environmental and cultural groups believe that shortcomings in the process could lead to denigration of both natural communities and cultural resources.

To accomplish these goals, the DRECP aims to utilize three components. Two of these involve instilling Natural Community Conservation Plans, which "takes a broad-based ecosystem approach to planning for the protection and perpetuation of biological diversity" and focuses on California environmental statutes,[10] and General Conservation Plans, managed by U.S. Fish & Wildlife Service under the Federal Endangered Species Act.[11] The third component of DRECP, a Land Use Plan Amendment developed under the authority of Federal Land Policy and Management Act ("FLPMA"),[12] is primarily BLM's responsibility.

In addition to mandating the development of land use plans by BLM, FLPMA lays out several criteria for developing such plans.[13] All BLM land management decisions must be "in accordance" with its land use plans.[14] If the gap between land management decisions and Land Use Plan Amendments is too wide, groups opposing BLM decisions could use such gaps as a hook for holding BLM accountable.

BLM's role in the DRECP follows an agency trend toward

10. *Natural Community Conservation Planning Program*, CALIFORNIA DEPARTMENT OF FISH & WILDLIFE, http://www.dfg.ca.gov/Climate_and_Energy/Climate_Change/Case_Studies/NCCP.aspx (last visited on Mar. 15, 2015).

11. *Frequently Asked Questions, supra* note 9.

12. *Id.*; Federal Land Policy and Management Act of 1976, Pub. L. 94–579, 43 U.S.C. § 1712(c) (2012).

13. 43 U.S.C. § 1712(c) (2012). According to FLPMA, BLM should:

> (1) use and observe the principles of multiple use and sustained yield . . .;
>
> (2) use a systematic interdisciplinary approach to achieve integrated consideration of physical, biological, economic, and other sciences;
>
> (3) give priority to the designation and protection of areas of critical environmental concern;
>
> (4) rely, to the extent it is available, on the inventory of the public lands, their resources, and other values;
>
> (5) consider present and potential uses of the public lands;
>
> (6) consider the relative scarcity of the values involved and the availability of alternative means (including recycling) and sites for realization of those values;
>
> (7) weigh long-term benefits to the public against short-term benefits;
>
> (8) provide for compliance with applicable pollution control laws . . .;
>
> (9). . . coordinate the land use inventory, planning, and management activities of or for such lands with the land use planning and management programs of other Federal departments and agencies and of the States and local [and tribal] governments . . . .

14. 43 U.S.C. § 1732(a) (2012).

promoting renewable energy development through its land-use planning activities. To succeed in its commitment to the DRECP, BLM must approve a plan that meets its commitments under its governing statute and that facilitates renewable energy development on DRECP lands. The Land Use Planning Amendment area is extensive; it covers BLM lands consisting of almost 10 million acres of the total DRECP area.[15] Furthermore, the lands fall within the FLPMA's California Desert Conservation Area, where BLM is bound to a higher standard for public participation, and must "preserve the unique and irreplaceable resources, including archeological values, and conserve the use of the economic resources of the California desert, the public must be provided more opportunity to participate in such planning and management."[16] In looking to promote renewable energy development, the BLM will have to ensure it meets these standards for participation in planning and management.

This Note first discusses the environmental considerations and other factors that have and will hamper fast-tracked renewable energy development on public lands. Next, it discusses the growth of cultural opposition, especially from groups representing tribal interests, in the face of BLM's approval processes. Following this, the Note discusses broader forces, including markets, politics, and executive branch policy, that both shape and impair the ability of BLM to make fast, effective decisions on renewable energy.

In discussing the DRECP and BLM processes, this Note proceeds to detail the gradual changes in national and BLM policy that have led to the current mechanisms BLM has in place. The next section details how the DRECP will work in execution. The final section discusses alternatives under which the BLM might frame its renewable energy approval processes, including a "business as usual" approach that continues along the current path, a strategy that explicitly aims to incorporate the views of local groups into processes, and a "no action" alternative in which the BLM reverts to strategies it used before fast-tracking was implemented.

15. DRAFT DESERT RENEWABLE ENERGY CONSERVATION PLAN: EXECUTIVE SUMMARY 9 (2014), http://www.drecp.org/draftdrecp/files/a_Front_Matter_and_Executive_Summary/Draft_DRECP_Executive_Summary.pdf.

16. 43 U.S.C. § 1781(a)(6) (2012).

II. FACTORS AND VALUES DRIVING RESISTANCE TO RENEWABLE DEVELOPMENT

Many people see the growth and development of renewable energy in the desert as a laudable environmental goal with ameliorative effects on point source pollution and greenhouse gas emissions. However, the promotion of such projects has led to a significant amount of resistance from local and regional groups. In what has been described as a conflict between competing public trust values, the goal of increased renewable energy development in the desert can clash with other goals, like those that promote the conservation of scarce ecological and cultural resources.[17] The public trust doctrine holds the government responsible for maintaining valued resources in trust for public use.[18] In its original form, the doctrine held that some resources either belong to the public inherently, or can be subject to an inherent easement that makes them available for public use.[19] In this case, one could argue either that conservation of desert environmental and cultural heritage is an important public trust consideration, or that responsible use of public lands for clean energy development is exactly the sort of resource conservation that should be central to public trust considerations. Although the public trust has often been applied as an idea for land conservation, extending the concept to resource conservation, and the promotion of energy sources that accomplish this, could provide a justification for programs like DRECP. But, does renewable energy—a resource that provides diffuse benefit to all of society in the form of clean, affordable, electricity, but that can theoretically be sourced in other locations—provide greater or lesser public value than maintaining rare species, pristine habitat, or unique cultural resources?

In attempting to fulfill its renewable energy goals, BLM has approved fifty-two utility-scale energy projects since 2009.[20] However, several of these projects have met substantial resistance, largely stemming from conflict between land-intensive facilities and wildlife needs,[21] the danger of solar and wind technologies to bird populations,[22]

17. Alexandra B. Klass, *Renewable Energy and the Public Trust Doctrine*, 45 U.C. DAVIS L. REV. 1021, 1073 (2012).

18. *See* Carol M. Rose, *Joseph Sax and the Idea of the Public Trust*, YALE LAW SCHOOL FACULTY SCHOLARSHIP SERIES Paper 1805, 351 (1998).

19. *Id*.

20. Press Release, Bureau of Land Mgmt., Secretary Jewell, Director Kornze "Flip the Switch" on Desert Sunlight Solar Farm (Feb. 9, 2015), http://www.blm.gov/wo/st/en/info/newsroom/2015/february/nr_02_09_2015.html.

21. *See, e.g.* Scott Streater, *Wind: Federal judge tosses out BLM approval of Nev.'s largest project*, GREENWIRE (Nov. 4, 2015), http://www.eenews.net/stories/1060027462.

or interference with sites of cultural significance.[23]

In August 2014, the Center for Biological Diversity filed a notice of intent to sue the Department of Interior ("DOI") for failing to protect the Yuma clapper rail, an endangered bird, in solar development areas in Southern California.[24] The Center filed suit after multiple documented deaths of the Yuma clapper rails, a marsh bird of with a total population of less than 1,000.[25] Birds can mistake solar panels for lakes, crashing into the panels themselves or burning to death.[26] Birds can also die in collisions with wind turbines.[27] Environmental groups have also raised public trust issues with prospective solar development of private lands in the Carrizo Plain associated with the California Valley Solar Ranch Project, citing harm to endangered plant and animal species as the reason for their suit.[28] The Carrizo Plains include endangered species such as the San Joaquin kit fox and giant kangaroo rat, along with golden eagles and other birds protected under the Bald and Golden Eagle Protection Acts and the Migratory Bird Treaty.[29] That project was delayed due to legal action but it was completed after the solar company, SunPower, negotiated a compromise with the Sierra Club and other groups who opposed it.[30]

Environmental and cultural groups have also directly targeted the approval processes for renewable energy siting. In 2010, the Sierra Club and the California Unions for Reliable Energy brought two lawsuits against CEC and BLM.[31] The plaintiffs claimed that the BLM approval

22. *See id.*

23. *See, e.g.* INDIANZ.COM, *supra* note 2.

24. Press Release, Center for Biological Diversity, Lawsuit Launched to Protect Endangered California Birds from Large-scale Desert Solar Projects (Aug. 21, 2014), http://www.biologicaldiversity.org/news/press_releases/2014/yuma-clapper-rail-08-21-2014.html.

25. John Upton, *Solar Farms Threaten Birds*, SCIENTIFICAMERICAN.COM (Aug. 27, 2014), http://www.scientificamerican.com/article/solar-farms-threaten-birds/.

26. *Id.*

27. *Id.*

28. David Sneed, *Lawsuit targets California Valley Solar Ranch*, SAN LUIS OBISPO TRIBUNE (May 30, 2011, 10:51 PM), http://www.sanluisobispo.com/news/local/article39153675.html.

29. Robert Moler, *Protecting Wildlife and Creating Renewable Energy on the Carrizo Plain*, U.S. FISH AND WILDLIFE SERV., SACRAMENTO FISH & WILDLIFE OFF., http://www.fws.gov/sacramento/outreach/Featured-Stories/RenewableEnergy-CarrizoPlain/RenewableEnergy-CarrizoPlain.htm (last updated Sept. 22, 2015).

30. Ucilia Wang, *The Rise Of A Giant Solar Power Plant In California's Central Plain*, FORBES.COM (Oct. 31, 2013, 7:36 PM), http://www.forbes.com/sites/uciliawang/2013/10/31/the-rise-of-a-giant-solar-power-plant-in-californias-central-plain/.

31. Laura Mulry, *Green vs. Green: Litigation for and Against Solar Power In California*, COLUMBIA LAW SCHOOL CLIMATE LAW BLOG (May 18, 2011),

process failed to properly assess the environmental impacts of the Calico Solar Project,[32] even though the CEC had already cut the size of the project by over twenty percent to reduce the impact on plants and animals. According to one environmental group, "BLM acted hastily in approving this subpar project and disregarded the conservation values of the public lands that would be lost."[33] Other projects have been suspended or cancelled due to ecological concerns. In 2011, BLM suspended development already under way at the Ivanpah Solar Electric Generating System because the facility had exceeded incidental take limits for desert tortoises.[34] In that instance, the petitioning Western Watersheds Project claimed that BLM had "precipitously approved unnecessarily destructive energy development of the California Desert Conservation Area without first conducting adequate environmental reviews."[35] Some of the development sites had since begun operation but were subsequently shut down by the agency.[36] However, the suspension was relatively short-lived; the Ivanpah opened in early 2014 and is now the world's largest concentrated solar plant.[37]

III. TRIBAL OPPOSITION

In addition to challenges based on the adequacy of environmental protections for desert habitat, other groups have attempted to use legal action to oppose BLM projects. Renewable energy projects risk running afoul of cultural requirements. An American Indian cultural protection group, the La Cuna de Aztlán Sacred Sites Protection Circle, also sued the Calico Project and five other projects claiming that the BLM did not adequately consult Native American groups during its approval

http://blogs.law.columbia.edu/climatechange/2011/05/18/green-vs-green-litigation-for-and-against-solar-power-in-california/.

32. *Id.*

33. Courtney Sexton, *Lights Out for Calico Solar*, DEFENDERS OF WILDLIFE BLOG (July 16, 2013), http://www.defendersblog.org/2013/07/lights-out-for-calico-solar/.

34. U.S. DEP'T OF INTERIOR: BUREAU OF LAND MGMT., IMMEDIATE TEMPORARY SUSPENSION OF ACTIVITIES ISSUED (Apr. 15, 2011), http://www.westernwatersheds.org/ca/ivanpah/04-15-11-ISEGSTemporarySuspensionNotice.pdf.

35. Complaint for Declarative and Injunctive Relief at 2, Western Watersheds Project v. Salazar, 993 F. Supp. 2d 1126 (C.D. Cal. Jan. 12, 2011) (No. CV 11-00492).

36. *BLM Lifts Suspension of Activities Order for Ivanpah Solar Electric Generating System*, BUREAU OF LAND MGMT. (Jun. 10, 2011), http://www.blm.gov/ca/st/en/info/newsroom/2011/june/CASO-05.html.

37. *Id.*; Peter W. Davidson, *Celebrating the Completion of the World's Largest Concentrating Solar Power Plant*, ENERGY.GOV (Feb 13, 2014, 9:21 AM), http://energy.gov/articles/celebrating-completion-worlds-largest-concentrating-solar-power-plant.

process.[38] A U.S. District Court judge agreed, noting that Indian tribes should be granted special consideration when land development intersects with the requirements of the National Historic Preservation Act ("NHPA").[39] Under the NHPA implementing regulations, "[c]onsultation should commence early in the planning process, in order to identify and discuss relevant preservation issues . . . ."[40] Thus, effective consultation should begin as the process begins, and be revisited as approval and renewable energy project planning proceed.

The District Court awarded another injunction to the La Cuna de Aztlán Sacred Sites Protection Circle, along with the Quechan Indian Tribe, in 2010.[41] That injunction halted the development of the Imperial Valley Solar Project.[42] At that time, the project had already undergone three years of permitting work and incurred costs of more than $20 million.[43] The complaint against the Imperial Valley Solar Project alleged that the DOI process failed to: (1) adequately evaluate the importance or impact of 432 cultural resource sites identified in the Environmental Impact Statement ("EIS"); and (2) analyze the cumulative impact to cultural resources at other sites in the Southern California desert.[44] In that case, BLM had approved its project before consulting with the Quechan Tribe, thus making it impossible for the agency to consider the Quechan Tribe's position as it was required to.[45]

Although many of these cases have been dismissed or settled out of court, they represent a trend of opposition from environmental, cultural, and community groups that attack fast-tracked processes and the resulting approvals. If the procedures guiding fast-tracking are inadequate for considering the environmental or cultural impacts of such projects, we can expect more lawsuits from groups claiming to have been unrepresented or underrepresented in the process. Speedy renewable energy development and efficiency of process are the primary goals of

38. Quechan Tribe of the Fort Yuma Indian Reservation v. U.S. Dep't of the Interior, 755 F. Supp. 2d 1104 (S.D. Cal. 2010).

39. *Id.* at 1108.

40. 36 C.F.R. § 800.2(c)(2)(ii)(A) (2016).

41. Sarah McBride, *Judge grants injunction halting California solar plant*, REUTERS (Dec. 16, 2010, 2:24 PM), http://www.reuters.com/article/2010/12/16/us-tessera-solar-idUSTRE6BF0XQ20101216.

42. *Id.*

43. Laura Mulry, *Native Americans Challenge Solar Projects on Federal and Tribal Lands*, COLUMBIA LAW SCH. CLIMATE LAW BLOG (Mar. 14, 2011), http://blogs.law.columbia.edu/climatechange/2011/03/14/native-americans-challenge-solar-projects-on-federal-and-tribal-lands/.

44. *Id.*

45. Quechan Tribe of the Fort Yuma Indian Reservation v. United States Dep't of the Interior, 755 F. Supp. 2d 1104, 1105 (S.D. Cal. 2010).

BLM and other institutional fast-tracking mechanisms.[46] Because of these goals, BLM must ensure that it is aware of these potential hurdles and institutes procedural safeguards against them. If it can do so, BLM will be able to implement a fast-track process that is actually fast. Otherwise, the process could be one that leads to greater opposition, increased financial burdens, and delay for both the government agencies involved and for the companies attempting to develop the lands.

IV. UNCERTAINTIES OUTSIDE THE APPROVAL PROCESS

In addition to adapting to the constantly evolving landscape for renewable energy approval and siting, renewable energy companies face a host of other uncertainties and hurdles. In developing and instituting renewable projects, renewable energy companies face issues, such as financing, market unpredictability, and regulatory uncertainty. Given these uncertainties, an inefficient process could result in backbreaking and burdensome lawsuits. Such a process could impede renewable energy development to a point where development on public lands is not feasible for many companies. Piled on top of the costs and uncertainties of renewable energy development highlighted below, the added costs of litigation could take away from what are already difficult-to-predict profit margins for companies promoting renewable energy.

Part and parcel of the cost considerations in renewable project financing is the intersection of renewable energy products and prices, with the market forces that influence those prices. Technological changes, like newer solar cells and turbines, resource availability, and newly discovered oil and natural gas fields, drive changes in prices. However, prices and profits are also subject to variations in federal policy. For wind production, Congress has typically extended the federal production tax credit in one- or two-year increments;[47] the current version of the production tax credit extends the expiration date for wind projects to 2019, with phase-downs beginning for wind projects commencing construction after December 31, 2016.[48] Congress has

46. Salazar, *supra* note 1.

47. *Wind power poises for a busy year: Five trends to watch in 2012*, AMERICAN WIND ENERGY ASSOCIATION (Dec. 28, 2011), http://www.awea.org/MediaCenter/pressrelease.aspx?ItemNumber=4813.

48. *Renewable Electricity Production Tax Credit*, ENERGY.GOV, http://energy.gov/savings/renewable-electricity-production-tax-credit-ptc (last visited Feb. 9, 2016).

allowed the credit to lapse four times since 1999.[49] This uncertainty can greatly diminish wind power's competitiveness in the renewable energy market. Each time Congress has allowed the credit to lapse, installation of wind power has dropped by at least seventy-five percent due to lack of competitiveness.[50] Similarly, a solar investment tax credit is currently in place until December 2022, but it is unclear whether it will continue to exist. Therefore, solar development possibly faces similar sluggishness as wind power development.[51] As a result, until renewable prices become competitive with the prices of traditional fossil fuels, many consumers will not adopt renewable methods because it is financially unpalatable. However, costs for renewable energy may be approaching those for certain fossil fuels.[52]

Uncertainty in financing, regulation, and siting processes can only hinder companies' willingness to undergo the procedural hurdles necessary to site renewable energy facilities on public lands. BLM recently attempted to auction opportunities in Colorado to develop solar installations in zones subject to fast-tracking and drew no bids.[53] Industry representatives attributed the lack of interest to future uncertainties in market conditions and in federal regulatory schemes.[54] A spokesman for the Solar Energy Industry Association echoed these concerns, stating, "[t]he ground rules are still very much in question. To date, BLM has yet to finalize any regional mitigation plans."[55]

BLM's approval processes have shown a decade-long evolution toward encouraging and facilitating fast-tracking and expedited review of renewable energy projects. Its regulations on development have changed

49. *Production Tax Credit for Renewable Energy*, UNION OF CONCERNED SCIENTISTS, http://www.ucsusa.org/clean_energy/smart-energy-solutions/increase-renewables/production-tax-credit-for.html#.Vvln9RJrisc (last visited Mar 28, 2016).

50. *Id.*

51. Richard Martin, *Tax Credit Extension Gives Solar Industry a New Boom*, MIT TECHNOLOGY REV. (Dec. 28, 2015), https://www.technologyreview.com/s/544981/tax-credit-extension-gives-solar-industry-a-new-boom/; *see also* Ari Natter, *Solar Industry Launches Lobbying Effort as Tax Deadline Prompts Canceled Projects*, BLOOMBERG BNA ENERGY AND ENV'T BLOG (Oct. 22, 2014), http://www.bna.com/solar-industry-launches-b17179907013/ ("At least two utility-scale thermal solar plants, including one planned by Oakland, Calif.-based BrightSource Energy Inc., have been mothballed amid uncertainty over whether companies would be able to qualify for the 30 percent investment tax credit.").

52. INTERNATIONAL ENERGY AGENCY, PROJECTED COSTS OF GENERATING ELECTRICITY 4-5 (2015), https://www.iea.org/Textbase/npsum/ElecCost2015SUM.pdf.

53. Mark Jafee, *1st Auction of Solar Rights on Public Lands in Colorado Draws No Bids*, THE DENVER POST (Oct. 24, 2013, 11:43 AM), http://www.denverpost.com/breakingnews/ci_24379351/first-auction-solar-rights-public-lands-colorado-draws-no-one.

54. *Id.*

55. *Id.*

consistently over recent years, with the proposed changes in California's DRECP serving as one of the newest iterations in the process. Additionally, the amount and intensity of support for expedited review of renewable energy projects can change with shifting congressional priorities. Changes in authorizing legislation could alter the priorities to which BLM must adhere; reduced appropriations for renewable energy activities can result in fewer resources available for BLM to use in pursuing renewable energy development.

Future prospects for developers remain uncertain due to changing priorities in the executive branch as well. Such changing priorities might have similar effects on BLM and its available resources. Most decisions regarding BLM management are made by the executive branch and can change with different political priorities under changing executive leadership, so that even four years of support for a project will not be guaranteed. For this reason, BLM must ensure the process it eventually adopts is sufficiently effective and consistent to counteract all of the other risks embedded in the leasing and development process. Although complicating factors, like market forces and political changes have always existed, BLM's own methods for undergoing review and approval can be a significant factor in facilitating or hindering renewable energy development on public lands.[56]

V. NEW PROCESS VERSUS OLD PROCESS

Efforts, such as the DRECP, can create more consistency and clarity in renewable energy development on public lands. However, this can come at the expense of ensuring that valued components remain part of the process, including meeting minimum thresholds of public participation and adherence to environmental priorities. To many groups, such components are more significant than the speed with which BLM can approve a project. The *Los Angeles Times* characterized BLM's previous efforts at fast-tracking as uneven in their ability to conduct sufficient review of environmental factors and to successfully manage the implementation of new energy projects:

> Since President Obama announced in his first term a federal commitment to expedite green energy development, there has been a rush to build renewable energy power plants here. What were typically long, complicated environmental reviews for such projects were rushed through. It triggered a flood of interest from the

56. Robert L. Glicksman, *Solar Energy Development on the Federal Public Lands: Environmental Trade-Offs on the Road to A Lower-Carbon Future*, 3 SAN DIEGO J. CLIMATE & ENERGY L. 107, 111-12 (2011).

> industry, but the Interior's Bureau of Land Management did not provide guidance for managing utility-scale projects on federal land.[57]

In addition to changes in policy at the national level, altering markets, and other external factors constraining the decision-making field surrounding renewable energy, BLM's process is affected by its own internal decision-making. BLM policy, regarding siting and regulation of renewable energy, has been gradually changing. As a new effort by the BLM to accomplish this policy change, the DRECP exists within the evolving BLM framework for renewable energy facilitation.

The recent changes in the BLM's priorities for, and approach to, renewable energy development began in the middle of the last decade. When Congress passed the Energy Policy Act of 2005, it included a goal of increasing the amount of renewable energy on public lands.[58] The Act posited the goal of generating at least 10,000 megawatts of renewable electricity from public lands within ten years.[59] BLM responded by issuing an instruction memorandum in 2007, setting up policies for establishing rights-of-way for solar energy projects.[60] These changes began a progression in rulemaking that eventually resulted in the policy mechanisms seen in the DRECP. One of the hallmarks of that progression has been the continued emphasis on fast-tracking.

Fast-tracking began in earnest under the American Recovery and Reinvestment Act ("ARRA").[61] At that time, fast-tracking was utilized as a means of utilizing ARRA funding to further the goal of rapidly installing renewable energy projects on public lands as part of a concerted effort to promote America's "green energy future."[62] In 2009, the Obama administration, through Secretary of Interior Ken Salazar, announced a commitment to "rapid development of renewable energy, especially on America's public lands."[63] Under that initiative, BLM

57. Cart, *supra* note 5.

58. Energy Policy Act of 2005, Pub. L. No. 109-58, §211, 119 Stat. 594, 660 (2005).

59. *Id.*

60. Memorandum from James Hughes, Acting Dir. of the Bureau of Land Mgmt. on Solar Energy Dev. Policy, to Field Officials, Instruction Memorandum No. 2007-097 (Apr. 4, 2007), http://www.blm.gov/wo/st/en/info/regulations/Instruction_Memos_and_Bulletins/national_instruction/2007/im_2007-097__.html.

61. American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115.

62. Press Release, Bureau of Land Mgmt., BLM Concentrating on Renewable Energy Projects That Could Meet Stimulus Funding Deadline (Dec. 29, 2009), http://www.blm.gov/wo/st/en/info/newsroom/2009/december/0.html.

63. Press Release, Bureau of Land Mgmt., Secretary Salazar, Senator Reid Announce 'Fast-Track' Initiatives for Solar Energy Development on Western Lands (June 29, 2009) http://www.blm.gov/wo/st/en/info/newsroom/2009/june/NR_0629_2009.html.

assigned twenty-four large tracts in western states as Solar Energy Study Areas, to be evaluated for environmental sensitivity and renewable resource suitability, subjected to a landscape-level planning and zoning processes, and then permitted under an expedited process.[64]

Secretary Salazar's Order No. 3285 codified the commitment to rapid development and made renewable energy an official priority for DOI.[65] Although a Secretarial Order only provides policy guidance and delegation for DOI, and does not have the force of law, it is a reflection of the Secretary's authority to authorize performance of secretarial functions to other employees of DOI.[66] In this instance, the order "establishe[d] the development of renewable energy as a priority for the Department of the Interior and establishe[d] a Departmental Task Force on Energy and Climate Change."[67] The order also amended and clarified "[d]epartmental roles and responsibilities to accomplish this goal."[68] One of the first aims of the task force was to "develop a strategy that is designed to increase the development and transmission of renewable energy from appropriate areas on public lands," to include goals of "working with individual states, tribes, local governments, and other interested stakeholders," and to "develop best management practices for renewable energy and transmission projects on the public lands to ensure the most environmentally responsible development and delivery of renewable energy."[69] Thus, the order sought to facilitate more renewable energy development, while still considering environmental impacts and explicitly supporting inclusion of local tribes, implicitly adding environmental stakeholders into the process.

In its second term, the Obama administration continued to support rapid development of renewable energy on public lands.[70] BLM's 2014 budget request included an addition of $9.1 million to its $22 million Renewable Energy Program.[71] Although not funded for the full amount,

64. *Id.*

65. Renewable Energy Development by the Department of the Interior, Sec'y of Interior Order No. 3285 (Dep't of Interior Mar. 11, 2009), http://www.blm.gov/or/energy/opportunity/files/order_3285.pdf.

66. Reorganization Plan No. 3 of 1950, 64 Stat. 1262.

67. *Id.*

68. *Id.*

69. *Id.*

70. Amy Wilson Morris & Jessica Owley, *Mitigating the Impacts of the Renewable Energy Gold Rush*, 15 MINN. J.L. SCI. & TECH. 293, 338-39 (2014); *see also* Executive Office of the President, The President's Climate Action Plan 7 (2013). President Obama made a goal to issue permits for 10 gigawatts of renewables on public lands by the end of the year. DOI achieved this goal and the President directed it to permit 10 more gigawatts by 2020. Since then, DOI has approved 25 solar installations, nine wind farms, and 11 geothermal plants, which could power over 4 million homes.

71. BUREAU OF LAND MANAGEMENT, BUREAU HIGHLIGHTS 7, 8 (2014),

the budget request reflected BLM's goal to increase efforts and resources to identify areas for renewable energy development.[72] This was an attempt to build on BLM's 2012 completion of its PEIS.[73] The 2012 Solar PEIS was part of a large-scale effort to facilitate utility-scale solar development across six western states.[74] In those states, the PEIS designated Solar Energy Zones ("SEZ's"), areas that the assessment found to be particularly well suited to solar energy development.[75] The SEZ's can be thought of as a predecessor to the current zoning system under the DRECP.[76] SEZ's include 285,000 acres on seventeen sites, over 153,000 acres of which are in California, and all of which are subject to fast-track development.[77]

The first wave of approved BLM renewable energy projects included fourteen solar, seven wind, three geothermal, and seven transmission projects.[78] As part of the effort, BLM also instituted Renewable Energy Coordination Offices in California, Nevada, Arizona, and Wyoming.[79] Because one of the problems fast-tracking has encountered is the lack of buy-in from local and regional environmental interest groups, and because that deficiency has led to lawsuits, BLM might consider using such offices to address those issues. Such offices could be helpful if they were used to work with local groups. In that context, regional offices could serve as focal points for contact with local environmental and cultural interest groups, provide on-the-ground context in which BLM could learn about local concerns, and help BLM in reaching out to groups to assuage the concerns that they might have with the process as a whole or with individual projects.

SEZs, and the decisions behind them, serve as a primary means for BLM to consider the environmental implications of siting projects in

https://www.doi.gov/sites/doi.opengov.ibmcloud.com/files/uploads/FY2012_BIB_BH007.pdf.

72. *Id.*

73. *Id.*; *see also* FINAL SOLAR ENERGY DEVELOPMENT PROGRAMMATIC ENVIRONMENTAL IMPACT STATEMENT (July 2012), http://solareis.anl.gov/documents/fpeis/index.cfm.

74. *Id.*

75. BUREAU OF LAND MGMT. & DEP'T OF ENERGY, DOES/EIS-0403, FINAL PROGRAMMATIC ENVIRONMENTAL IMPACT STATEMENT (PEIS) FOR SOLAR ENERGY DEVELOPMENT IN SIX SOUTHWESTERN STATES: EXECUTIVE SUMMARY ES-3 (July 2012), http://solareis.anl.gov/documents/fpeis/Solar_FPEIS_ExecutiveSummary.pdf.

76. *Infra* pp. 381–84.

77. *Id.*

78. Press Release, Bureau of Land Mgmt., BLM Concentrating on Renewable Energy Projects That Could Meet Stimulus Funding Deadline (Dec. 29, 2009), http://www.blm.gov/wo/st/en/info/newsroom/2009/december/0.html.

79. *Id.*

areas close to existing or planned transmission.[80] BLM intended the SEZ's to accelerate permitting.[81] BLM also intended to perform environmental analyses on the SEZs before actually beginning the National Environmental Policy Act ("NEPA") process for any specific site's permit.[82] NEPA requires BLM to consider and publish potential environmental impacts from a project before issuing a right-of-way.[83] FLPMA gives the BLM authority to "grant rights-of way for systems of generation, transmission, and distribution of electric energy,"[84] requiring the applicant to provide information on "plans, contracts, agreements, or other information reasonably related to the use, or intended use, of the right-of-way."[85] And typically, NEPA section 102(B) review for such projects includes development of an EIS if the action is a major federal action significantly affecting the quality of the human environment.[86] In some cases, energy sites may also intersect with established or potential historic sites, which can fall under the NHPA.[87] In these cases, the agency must "take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register."[88] Finally, because many of the sites intersect with the habitats of endangered species, like the desert tortoise, the Endangered Species Act applies.[89] In these cases, the BLM must ensure that its actions do not "jeopardize the continued existence of any endangered species or threatened species,"[90] adding another procedural and legal hurdle to the successful completion of a project.

By conducting preliminary environmental analyses, BLM intended the creation of the SEZ sites to speed up the NEPA process. In designating SEZ sites, BLM has attempted to undergo an initial environmental review. Such a review could serve as the basis for the more comprehensive consideration of environmental impacts, and the

80. *Solar Energy*, BUREAU OF LAND MGMT. (Sept. 25, 2015), http://www.blm.gov/wo/st/en/prog/energy/solar_energy.html [hereinafter BUREAU OF LAND MGMT.].

81. Press Release, Bureau of Land Mgmt., Interior Dep't Approves First Solar Energy Zone Projects (June 1, 2015), http://www.blm.gov/wo/st/en/info/newsroom/2015/June/nr_06_01_2015.html.

82. *NEPA Review for Projects in SEZs*, BUREAU OF LAND MGMT., http://blmsolar.anl.gov/sez/policies/nepa/; *see also* National Environmental Policy Act of 1969, 42 U.S.C. § 4321 et seq. (2012).

83. 42 U.S.C. § 4332(C) (2012).

84. 43 U.S.C. § 1761(a)(4) (2012).

85. 43 U.S.C. § 1761(b)(1) (2012).

86. 42 U.S.C. § 4332(C).

87. National Historic Preservation Act of 1969, 16 U.S.C. § 470 (2012).

88. 16 U.S.C. § 470(f) (2012).

89. Endangered Species Act of 1973, 16 U.S.C. § 1531 et seq.

90. 16 U.S.C. § 1536(a)(2) (2012).

NEPA process for an individual renewable energy site could use that review as a foundation. Therefore, although individual projects would still require NEPA review and site-specific mitigation planning, the basis for such review and planning would already exist from the processes creating the SEZ sites. The idea is to create a stepping stone by which the agency can utilize the foundational work done in the SEZ to go through the NEPA process faster.

The PEIS also incorporates attempts to manage the mitigation of environmental impacts more effectively. According to BLM, comments on an early draft of the Solar PEIS showed "discontent" from both developers and conservationists with regard to the PEIS mechanisms for addressing mitigation.[91] The original process required solar developers to propose off-site mitigation activities for negative environmental impacts, and was described by some of those who submitted comments for the PEIS as "inefficient and frustrating."[92]

To supplement the areas designated SEZs, the PEIS included a variance system. Under the variance system, developers can apply for permits outside the predetermined SEZs.[93] Applying for permits on variance lands means that developers do not benefit from the more streamlined permitting process, since variance lands have not undergone the prior environmental review that the BLM applies to SEZs.[94] Thus, developing on variance land would fall outside of the fast-tracked part of the permitting process and would likely require a developer to spend more time and money.

A Spanish solar company has already gone outside the fast-tracking process to use the variances available under the BLM framework to apply for a permit in California's Silurian Valley.[95] This case may set an example for future developers and test the fast-tracking initiative. First, it would offer clues as to the viability and efficiency of installing renewable energy on public lands outside of the fast-track system. Second, variance applications may provide a preview of how both the government and environmental groups will address attempts to develop

91. *Bureau of Land Mgmt.*, SOLAR REGIONAL MITIGATION PLANNING –FAQs, 1 (Oct. 2012), http://www.blm.gov/pgdata/etc/medialib/blm/nv/field_offices/las_vegas_field_office/energy/dry_lake_sez.Par.3790.File.dat/FAQs%20Oct2012.pdf.

92. *Id*.

93. BUREAU OF LAND MGMT., *supra* note 80.

94. DRECP, BLM LAND USE PLAN DESIGNATIONS, http://drecp.org/factsheets/archive/BLM_Land_Use_Plan_Designations.pdf (last visited Feb. 9, 2016) [hereinafter BLM LAND USE PLAN DESIGNATIONS].

95. Julie Cart, *Will renewable energy ruin an 'irreplaceable' Mojave desert oasis?,* L.A. TIMES (Nov. 8, 2014), http://www.latimes.com/science/la-me-solar-silurian-20141109-story.html#page=1.

energy sites in areas that have had less consideration of environmental impacts than those areas the SEZ process has already examined. The Silurian Valley project is locally controversial; opponents contend that it will harm wildlife and the pristine nature of the valley.[96] The National Park Service, along with California and U.S. Fish and Wildlife Agency have expressed fears that allowing the proposal to go forward would be too harmful.[97]

Secretary of the Interior Ken Salazar signed a Memorandum of Understanding with California Governor Arnold Schwarzenegger to set up a cooperative system for expedited review of renewable energy projects in 2009, beginning a collaboration between California and the federal agencies that eventually became the DRECP.[98] Yet, concerns remain. As BLM proceeds with the DRECP process and as other new ventures for evaluating and permitting renewable energy projects appear, groups attempting to block development still question its methods. In the case of the Ivanpah Solar Development, groups opposed to the project assert that BLM will still "precipitously approve unnecessarily destructive energy development" without undergoing sufficient consideration of impacts and alternatives.[99]

VI. DRECP SPECIFICS

The proposed alternative for the DRECP assigns development focus areas ("DFAs"), 2 million acres of land[100] with renewable energy resources and reduced habitat value,[101] where projects will be subject to streamlining with the goal that the managing agencies will be able to rule on applications quickly. The process does not cancel the existing BLM process, but instead builds on it to enhance coordination and expedited

96. *Id.*

97. *Id.* ("The U.S. Fish and Wildlife Service and California's Department of Fish and Wildlife have criticized its proposed location: a valley that serves as a crossroads for three major wildlife corridors and an important avian flyway. They warned that the long-standing migration corridors would be disrupted and wildlife would be injured or killed in the wind project's turbines or the solar project's superheated panels. The park service has said the visual impact would be 'significant, irreversible and likely unmitigable.'").

98. Press Release, Bureau of Land Mgmt., Secretary Salazar, Gov. Schwarzenegger Sign Initiative to Expedite Renewable Energy Development (Oct. 12, 2009), http://www.blm.gov/wo/st/en/info/newsroom/2009/october/NR_10_12A_2000.html.

99. Complaint for Declarative and Injunctive Relief at 2,Western Watersheds Project v. Salazar, 993 F. Supp. 2d 1126, (C.D. Cal. Jan. 12, 2011) (No. CV 11-00492), https://www.westernwatersheds.org/legal/11/california/IvanpahComplaint_1-12-11.pdf.

100. DRAFT DESERT RENEWABLE ENERGY CONSERVATION PLAN: EXECUTIVE SUMMARY, *supra* note 15, at 40.

101. *Id.* at 52.

review. The PEIS for the DRECP is programmatic, meaning it has a broad geographic range and tends to look at the general impacts and effects of renewable development rather than the impacts of specific sites or projects. This could mean that, if other processes do not account for them, site-specific data could be lost in the process, and that undiscovered or unassessed attributes of sites that might support opposition from environmental or cultural groups could lead to more costly legal battles.

The development focus areas are similar to the solar energy zones proposed under the PEIS but work on a geographically smaller scale. According to BLM, applying for siting within DFAs includes the same incentives for development within a SEZ.[102] In theory, this could allow for fast permitting and sufficient mitigation. "These areas, to the extent practicable, shall provide high-quality renewable energy resource potential, access to existing or planned transmission and other supporting infrastructure, and where impacts to wildlife and natural communities can be appropriately managed and mitigated."[103] The plan looks to establish clearer standards for processes such as species surveys and impact mitigation.[104] Applications will still go through the BLM right-of-way process under the planning rules set forth in FLPMA.

Within DFAs, energy developers will receive assurances that there will be no need for additional mitigation beyond what the DRECP calls for. Many NEPA environmental impact statements offer alternatives that detail the impacts under different development scenarios. Similarly, the current draft of the DRECP PEIS contains a preferred alternative, along with four other alternatives, and a "no action" alternative.[105] The current preferred alternative assigns 367,000 million acres of BLM managed

102. DRECP, DESCRIPTION AND COMPARATIVE ANALYSIS OF DRAFT DRECP ALTERNATIVES 2.2-17 (Dec 17, 2012), http://www.drecp.or1/g/documents/docs/alternatives_eval/Section_2_Description_of_Alternatives.pdf. ("These activities include facilitating faster and easier permitting in the DFAs, improving and facilitating mitigation, facilitating permitting of needed transmission to the DFAs, encouraging utility scale development on suitable adjacent nonfederal lands, and providing economic incentives for development in the DFAs. As an additional mechanism to support the establishment of priority areas for utility scale solar, wind and geothermal energy development, consideration is being given through a rulemaking to establish a competitive process for offering public lands for solar and wind development within DFAs and designated leasing areas. In addition, the Secretary of the Interior is considering whether to withdraw the public lands encompassed by DFAs from potentially conflicting uses through the issuance of a Public Land Order").

103. Letter to DRECP Stakeholders para. 3 (Mar. 28, 2013), http://www.drecp.org/documents/docs/DFA_and_streamlining_concepts_papers_March_28_2013.pdf [hereinafter Letter to DRECP Stakeholders].

104. *Id*. at 2.

105. DRAFT DESERT RENEWABLE ENERGY CONSERVATION PLAN: EXECUTIVE SUMMARY, *supra* note 15, at 40.

lands to DFAs and 106,000 acres to Study Area Lands for future consideration as potential DFAs.[106] The other proposed alternatives have the same DRECP Plan-Wide Conservation Strategy as the Preferred Alternative but with different configurations of DFAs, different balances of land-use allocations, and different possible mixes of renewables resulting from such allocations.[107] Under the no action alternative, there would be no DFAs, and thus no streamlining, so mitigation would not be guided by a comprehensive regional strategy.[108] In such circumstances, the approval process would not be fast-tracked, since mitigation plans would have to go through the full process without the benefits of streamlining.

Outside of the DFAs, BLM lands will fall under a variance system. Renewable energy producers may still apply to develop these lands, but projects will not be streamlined, requiring more information before BLM can make a determination.[109] Variance lands under the DRECP include lands already listed as variance lands under the process that created the PEIS, along with additional lands established by the DRECP participants during that process.[110] Thus, the variance system is similar to that which has been used by BLM in its post-ARRA fast-tracking activities. Unlike those lands that have already received a certain amount of environmental evaluation and fall within classification as DFAs, applications for permits on variance lands should take longer and cost more because of the increased burden of evaluating the lands. Variance lands may also be subject to a higher degree of controversy because of the lack of prior evaluation.[111] Assuming the DFA process can correctly identify land areas that are less environmentally sensitive, non-DFA lands subject to variance will likely have a tendency to be in areas where increased impacts and thus increased resistance should be expected. As a result, the promise to developers that they could utilize variance lands could end up being a false one.

The existence of DFAs incentivizes development of renewables on the lands that BLM has identified as less sensitive. These incentives include: (1) the possibility of an expedited process that can reduce time and uncertainty for developers; and (2) the fact that much of the environmental analysis has already been conducted by BLM and other agencies. However, such incentives might create the exact same

106. *Id*. at 32. (This number represents those DFAs located on BLM managed lands, and not the total acreage of DFAs in the entire DRECP).

107. *Id.*

108. *Id*. at 39.

109. Letter to DRECP Stakeholders, *supra* note 103, at 2.

110. *Id.*

111. BLM LAND USE PLAN DESIGNATIONS, *supra* note 94.

conditions for legal challenges if environmental and cultural groups continue to view the process as illegitimate. The DRECP, and in fact, any future fast-tracking process that does not legitimize the viewpoints of groups inclined to oppose such project approval processes, will need to either: (1) proceed as planned in the hope that legal challenges are not sufficient to bog down the process; (2) find means for more explicitly incorporating the concerns of groups that might file suits; or (3) revert to the more time-consuming and costly—but perhaps less likely to meet resistance—process that exists outside of the fast track.

VII. ALTERNATIVES FOR BLM-APPROVED DEVELOPMENT

A. Business as Usual: Let Fast-Tracking Work

If it continues operating under its current policies, BLM would be wagering that delays and costs associated from lawsuits challenging siting decisions would be low enough to not seriously jeopardize the projects' viability. While suits might still claim that BLM's processes are not sufficiently considering the potential impacts of renewable energy projects, the negative impact of such legal action could be outweighed by the gains made by implementation of the fast track process. This may not be a bad bet; many of the lawsuits challenging projects have been dismissed in court. Although some attempts to develop new installations, like the Ivanpah project, have been met with costly delay and resistance, the swiftness of approval in other instances could compensate for such delays. In this situation, some projects are meeting with resistance in the form of legal challenge, and some are experiencing the burden of cost and delay stemming from an imperfect process. But if most projects are able to go through the approval process without these burdens, the process as a whole could be seen as a success—though it would come at the expense of those that end up bogged down in lawsuits. Although this may not help individual developers that are subjected to lawsuits and delay, on balance, it may result in an optimized process.

B. Explicit and Increased Incorporation of Interest-group Perspectives

The NEPA process, and the renewable energy project approval processes proposed under the DRECP, already have basic public

participation measures built in. However, there is a gap between the amount of participation BLM has implemented, which bureau leadership might see as sufficient for making informed decisions, and the amount perceived by interest groups as enough to legitimize the process. As a result, under the fast-track process, groups have complained about a perceived lack of involvement.

It is also possible that these same groups will never agree to the development of large swaths of western lands for renewable energy and that any amount of involvement will not stem the flow of lawsuits every time a new project is considered. However, BLM does have an opportunity through its local and regional presences in the West to consult with local interests extensively when undergoing its planning and siting processes. There is evidence that the concerns of environmental and cultural groups could be assuaged by increased involvement in, and exposure to, the BLM decision process. To this point, a number of the lawsuits filed had their basis in the lack of inclusion of local and regional group concerns.[112]

There is support for the idea that including Indian tribes—along with other groups in opposition—in decision-making processes might increase the likelihood that development can move forward.[113] Ample social science academic literature supports the idea that inclusion in decision-making can make acceptance of final decisions more likely.[114] For the DRECP, including tribes would likely make projects more sensitive to cultural sites and decrease the likelihood of litigation and other delays. In some renewable development cases, Indian tribes do not believe federal agencies are fulfilling the minimum requirements for meeting their obligations to consult with tribes before making siting decisions. Thus, as one other stated "this federal agency's idea of what it means to 'consult' when making this determination is something other than what is required by its own clearly defined laws and regulations."[115] In *Quechan Tribe of the Fort Yuma Reservation v. U.S. Dep't of the*

112. *See* Quechan Tribe of the Fort Yuma Indian Reservation v. U.S. Dep't of the Interior. 755 F. Supp. 2d 1104 (S.D. Cal. 2010); *see also* McBride, *supra* note 41.

113. Ryan D. Dreveskracht, *Alternative Energy in American Indian Country: Catering to Both Sides of the Coin*, 33 ENERGY L.J. 431, 433–36 (2012).

114 *See, e.g.,* William C. Clark, Ronald B. Mitchell, & David W. Cash, *Evaluating the Influence of Global Environmental Assessments, in* GLOBAL ENVIRONMENTAL ASSESSMENTS: INFORMATION AND INFLUENCE 15–16 (William C. Clark et al. eds., 2006), http://www.ksg.harvard.edu/gea/pubs/geavol_info_chap_1.pdf; David Cash et al., *Salience, Credibility, Legitimacy and Boundaries: Linking Research, Assessment and Decision Making* 5 (John F. Kennedy Sch. of Gov't Harv. U. Fac. Research. Working Paper No. RWP02-046, Nov. 2002), http://tinyurl.com/hmdg3yd.

115. Dreveskracht, *supra* note 113 (citing *Quechan Tribe*, 755 F. Supp. 2d at 1108-11).

Interior, the court considered BLM consultation requirements of the NHPA, NEPA, and the FLPMA, and noted that tribes are entitled to special consideration.,[116] The court granted an injunction against the BLM-approved solar project.[117]

Federal agencies have worked to incorporate local concerns, and have done so successfully. For example, the DOI has worked to get stakeholders to the table in its management of grazing areas. BLM itself has twenty-nine Resource Advisory Councils, which are composed of commercial groups, environmentalists, tribes, historical and cultural concerns, and state and local governments. These Councils are formed for the express purpose of bringing "diverse and often competing interests to the table to deal with issues of mutual concern."[118] Such inclusivity could be extended to similar groups, and could focus its participation only on the DRECP decision processes, on decisions at a smaller scale, such as post approval decisions, or on both.

Academics have also pointed out that although there is public participation embedded in the process, that participation can be inadequate when considering the need for mitigation of impacts:

> Although the process of siting solar facilities is associated with many public hearings and much information is publicly available, the mitigation requirements often fall out of view. NEPA and [California Environmental Quality Act] allow the public to give input on the environmental impacts and draft mitigation for proposed projects. However, there is no clear legal mechanism for public input on mitigation land siting and management plans.[119]

One scholar, Sarah Imhoff, has supported greater inclusion of, and consultation with, local concerns during siting processes, suggesting such consultation as part of a five-pronged approach to increasing support for such projects. This approach entails:

> 1) coordinating communication through a central state office; *2) earlier and more coordinated environmental review processes;* 3) *encouraging public participation through town hall meetings and negotiated rulemaking*; 4) reducing litigation through a dedicated appeal processes and a one year statute of limitations; and 5) changing public attitudes towards the beauty of renewable energy structures.[120]

116. *Quechan Tribe*, 755 F. Supp. 2d at 1109.

117. *Id.* at 1122.

118. *Resource Advisory Councils*, U.S. DEPT. OF INTERIOR, BUREAU OF LAND MGMT., http://www.blm.gov/wo/st/en/info/resource_advisory.html (last updated Sept. 9, 2014).

119. Morris & Owley, *supra* note 70, at 383–84.

120. Sarah Imhoff, Note, *A Streamlined Approach to Renewable Energy*

The second and third points in Imhoff's proposal address the heart of the problems presented in this Note. The DRECP is an attempt to form a more coordinated review process, with state and federal efforts at environmental assessment combined to create a review mechanism that, in theory, also comprehensively reviews factors significant to an approval decision. But the success of this process may also depend on other factors beyond the ability to assess accurately, such as increasing capacity for the coordinated effort to successfully assess environmental impacts with less resistance. As part of this, success may depend on the ability of decision makers to integrate public concerns into the review processes.

Imhoff's other proposals, on coordinating communication, implementing dedicated appeal process, reducing statutes of limitations, and changing public attitudes, would likely enhance the approval process.[121] However, it does lead to two concerns. First, that shortening the statute of limitation on what are still, even in a fast-tracked BLM, relatively slow-moving approval processes could decrease the opportunity for valid opposition to participate. Second, successfully changing public attitudes on the beauty of renewable energy structures may be a difficult project because steering public ideas of what is aesthetic appears to be both daunting in scope and unpredictable in efficacy. Despite these concerns, Imhoff recognizes the significance of building effective processes and of including the public in those processes to enhance the perception of legitimacy.[122]

C. A No Action Alternative for Managing Public Lands

A no action alternative would not involve continuing on the current path, but would instead imply a reversion to pre-ARRA "slow-tracking." Real fast-tracking began under ARRA;[123] the need for recession recovery created strong reasons for approving projects in short time periods and for spending money as quickly as possible. As a recovery act passed in the middle of an economic crisis, ARRA aimed to spend the appropriated

Development: Bringing the United States into A Greener Energy Future, 26 GEO. INT'L ENVTL. L. REV. 69, 93 (2013) (emphasis added). Note that these recommendations also included a higher degree of coordination, a step the DRECP has already begun to take.

121. *Id.*

122. *Id.*

123. CALIFORNIA ENERGY COMMISSION, ARRA FUNDED ENERGY PROGRAMS: INVESTING IN CALIFORNIA'S ENERGY FUTURE 4 (July 1 2010), http://www.energy.ca.gov/2010publications/CEC-180-2010-003/CEC-180-2010-003.PDF.

money in such a way that shovel-ready projects could begin, thus providing an economic stimulus in a time of distress.[124] Thus, BLM originally needed to approve ARRA projects by the end of 2010 to meet that act's goal of rapidly injecting funding back into the economic system.[125]

Now that ARRA has ended and America has pulled out of the 2008 recession, there is an open question as to whether fast-tracking has value in itself. Without the deadlines and urgency imposed by the ARRA process there are strong reasons to ask why BLM is trying to get projects approved as quickly as possible. Obviously, getting things done in a quick, efficient manner is desirable, but when balanced against other goals, such as approving a higher proportion of projects that are in locations palatable to local people and reducing court costs or controversy, the process may in fact benefit from slowing down, rather than speeding up. Still, renewable development has the ability to provide economic stimulus and clean, domestic sources of energy. Although it is better to experience these benefits sooner rather than later, and the discount rates mean that nearer-term benefits are preferable, this kind of benefit is arguably less pressing than that conferred by getting shovel-ready projects under way during a recession, with the job creation that should ensue. In other words, there are always economic reasons to begin a project sooner, but in this case, those benefits could be outweighed by the other considerations discussed here, including some that impose real economic costs on the process.

Furthermore, given the long time periods developers require to install and the resulting permanent impacts, there is an argument to be made for utilizing time and resources to ensure that the process covers all necessary bases, under statutes like NEPA, in the arena of public opinion, and preventing potential litigation. Renewable energy installations, especially utility-scale installations, are facilities expected to exist for decades, and once they have been built, impacts on ecological and cultural resources are fairly permanent. The longstanding nature of the outcomes and effects of such projects appear to call for more care and consideration, not less. At the very least, it takes many years for species' habitats to recover, and destruction to cultural or historic resources is unlikely to ever be reparable. It could be that the thoroughness required for such work goes directly against the goals of fast-tracking.

124. American Recovery and Reinvestment Act of 2009, 111 Pub. L. No. 5 § 3, 123 Stat. 115.

125. Press Release, Bureau of Land Mgmt., BLM Concentrating on Renewable Energy Projects That Could Meet Stimulus Funding Deadline, Bureau of Land Mgmt. (Dec. 29, 2009), http://www.blm.gov/wo/st/en/info/newsroom/2009/december/0.html.

One author, Ryan Dreveskracht, writing in the Energy Law Journal, suggested that federal processes would improve if agencies actually consulted "meaningfully" with tribal groups when making energy decisions that could possibly interfere with sites of cultural or religious significance.[126] While perceived legitimacy is one benefit, such interactions could also lead to better long-run outcomes. Local groups might have more on-the-ground knowledge of where sites might run into problems, and where an energy project may be likely to succeed. Gathering such knowledge could take time, but it could also lead to more successful interactions with stakeholder groups.

In the case of a slowed-down, no action alternative, the possibility of rapid development of renewable energy on private lands still exists, since such lands are not subject to the high bars that siting energy projects on federal lands face. Although such projects may still have to deal with impacts on endangered species, generally the approval processes will be quicker without having to meet the public lands requirements of NEPA and the FLPMA. It may be that those developers who are in a rush to go from conceptualization to installation should go this route, while those that might benefit from the subsidization of projects due to the inexpensiveness of building on public land, should be able and willing to invest a larger amount of time to get those benefits.

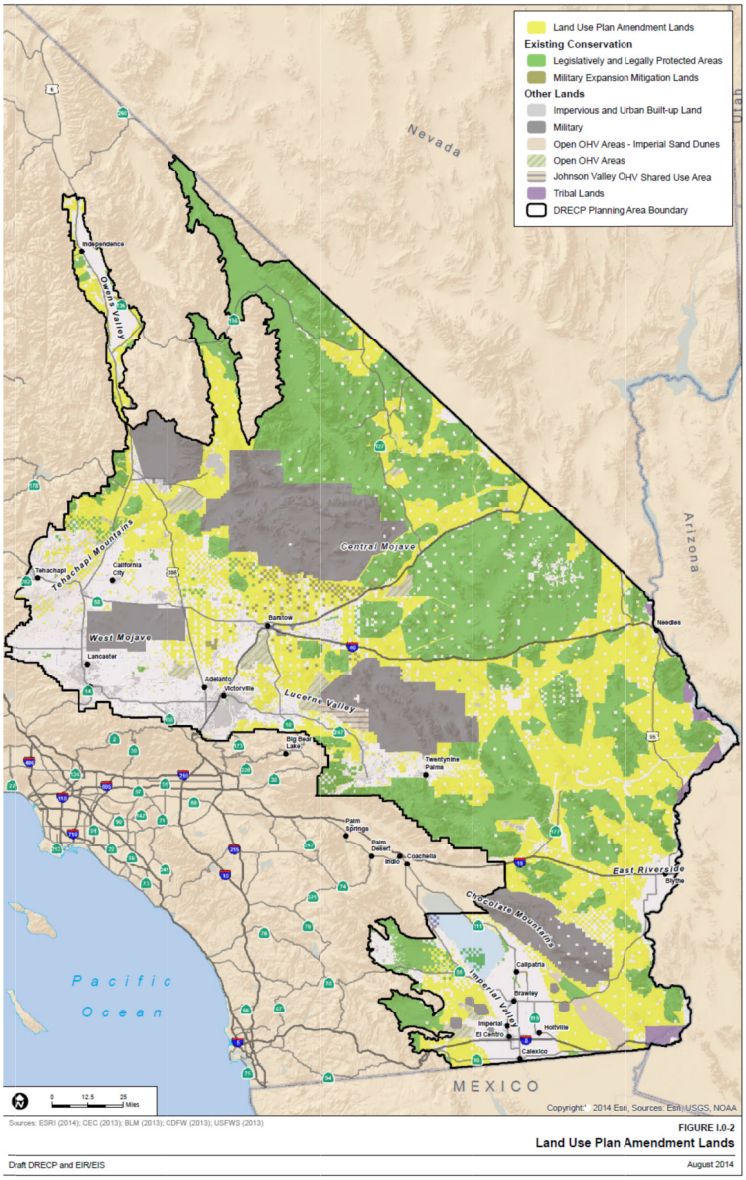
While private land development is an option, there are instances where there may still be litigation, such as in the case of the two private installations on the Carrizo Plain, which are still meeting resistance from environmental interest groups.[127] In such cases, there is also an increased cost of paying private landowners, because leasing or buying such land is often more expensive than installing a project on federal public lands. In addition, litigation may still occur from contracting problems, land ownership disputes, and zoning problems. Further, many private land owners will not have the amount of land necessary for a large renewable energy installation. Despite all this, even after energy companies have dealt with the increased upfront costs of paying landowners and the other difficulties that can come with contracting with private parties, procedural hurdles will generally be reduced if developers pursue development on private land.[128]

126. Dreveskracht, *supra* note 113, at 431, 435.
127. Sneed, *supra* note 28.
128. Mulry, *supra* note 31.

VIII. CONCLUSION

In considering each of these alternatives, it may be effective for BLM managers to think about what they want from an approval process. While it is tempting to approve the most projects in the least amount of time, and to show progress towards national energy goals, BLM might not want to concentrate all of its efforts on fast-tracking if doing so results in lawsuits, acrimony, and opposition. At the same time, slowing down the process to a crawl is unlikely to win BLM support from funders, who will see a process that was once approving projects at a fast rate and question why they are unable to continue installing projects at that rate. So, the preferred alternative for BLM may be to continue attempting to fast-track renewable energy projects, but to do so in such a way that local concerns are more explicitly addressed during each stage of the process. In other words, a simple assessment may not be sufficient; it may be that citizen groups should be consulted before zoning and other geographical decisions are made. This should occur during stages in which developers submit proposals for new energy projects as well as during and after project installation and implementation. Although this might incur greater financial costs for BLM, such mechanisms also could occur parallel with other parts of the process and thus not slow down the time frame of the overall process. In fact, if they were to reduce the number of lawsuits from groups now included in the process, such mechanisms could decrease the time from project conceptualization to energy production, and perhaps enable BLM to obtain more funding, devote more resources to renewable energy projects, and help to meet national energy goals.

Appendix A: DRECP Project Area Map[129]



129. DRAFT DESERT RENEWABLE ENERGY CONSERVATION PLAN AND ENVIRONMENTAL IMPACT REPORT/ENVIRONMENTAL IMPACT STATEMENT, 1.0-3, fig.1.0-1 (2014), http://www.blm.gov/style/medialib/blm/ca/pdf/pa/energy/drecp/draft_drecp.Par.50211.File.dat/I.0%20Introduction.pdf.