United States Department of the Interior

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In Reply Refer to:
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EMS TRANSMISSION 01/10/2023
Instruction Memorandum No. AZ-IM-2023-007
Expires: 9/30/2024

To: State Leadership Team

From: State Director

Subject: Involvement of Grazing Permittee/Lessee with Solar and Wind Energy Right-of-Way (ROW) Application Process

Program Area: Rangeland Management (1020), Renewable Energy Management (1340), and Lands and Realty Management (1440).

Purpose: This Instruction Memorandum (IM) clarifies when the Bureau of Land Management (BLM) Field Offices (FO) will notify a grazing permittee/lessee that a solar or wind energy development application may affect a livestock grazing operation. Specifically, Regulation 43 CFR 4110.4-2(b) (2005) requires that when public lands are disposed of or devoted to a public purpose that precludes livestock grazing, the permittee/lessee shall be given 2 years' prior notification (except in cases of emergency) before the grazing permit/lease and grazing preference may be cancelled. This IM also addresses potential mitigation and compensation strategies and the relationship of energy application steps/decisions with grazing administrative steps/decisions.

Any cancellations, in whole or in part, of grazing permits/leases (see 43 CFR 4110.4-2(b) (2005)) are more likely to occur with solar energy development ROW authorizations due to their intensive land use requirements than wind energy development ROW authorizations. With the limited land disturbance footprint of a wind energy development ROW authorization, there should be limited impacts on grazing permits/leases except during construction activities.

Policy/Action: The Authorized Officer (AO) is encouraged to send this IM to renewable wind and solar energy applicants and potentially affected permittee(s)/lessee(s) with allotment(s) that

may be impacted by energy proposals. As discussed below and shown in the attached chart (Attachment 1), the AO will notify permittees/lessees in accordance with 43 C.F.R. 4110.4-2(b) and will encourage communications between the ROW applicant and permittees and lessees at the earliest possible time.

When the FO initiates the variance/pre-application process they should inform the livestock permittee/lessee in writing about the proposed project (see Attachment 1, Step 1a and 1b). During the variance/pre-application process, the BLM may conduct an on-site visit with the ROW applicant and the permittee/lessee to: a) inform the permittee/lessee of the proposed solar/wind project; b) discuss how the proposed project may impact grazing operations and address possible alternatives; c) address mitigation and compensation strategies; and d) clarify and encourage participation in the BLM's decision process under the National Environmental Policy Act (NEPA) to consider the environmental impact of the proposed project and present alternatives to the proposed project. Early and transparent coordination among the ROW applicant, the permittee/lessee and the BLM should help to resolve or minimize potential impacts to grazing operations, reduce potential resource conflicts, and provide the permittee/lessee an understanding of the NEPA process, timeframes, and the relevant procedures (including the 2-year notification requirement at 43 CFR 4110.4-2(b) (2005)).

The ROW applicant should address grazing operations and potential impacts in its Variance Factors Analysis Report (VFAR) and preliminary Plan of Development (POD).

If the BLM grants a solar variance to the applicant, the FO will initiate the pre-NEPA phase and send a certified letter to the permittee/lessee to serve as the 2-year notification of the BLM's potential decision to cancel the permit/lease, in whole or in part, and devote the public lands to a public purpose that may preclude livestock grazing, as required by 43 CFR 4110.4-2(b) (2005).[1] The intent of the 2-year notification is to provide the grazing permittee/lessee time to make any necessary financial, business, or management adjustments should the permit/lease be cancelled (in whole or in part). The letter will also inform the permittee/lessee of their ability to unconditionally waive the 2-year prior notification. Any waiver must be in writing (see Attachment 1, Step 2, Grazing; Attachment 2, Sample Grazing Notification to Permittee/Lessee; Attachment 2, Sample Grazing Cancellation Waiver). Providing the two-year notification at the time the BLM accepts the POD (Attachment 1, Step 2), is supported by Interior Board of Land Appeals (IBLA) decisions[2] and the Federal Land Policy and Management Act (FLPMA) Conference Report.[3] Moreover, the BLM's sales regulations at 43 C.F.R. § 2711.1-3 similarly provide that the publication of a notice of realty action, as provided in 43 C.F.R. § 2711.1-2(c),

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[1] This certified letter notifies the permittee/ lessee that an allotment has been identified for possible alternative use only and may require the removal of livestock grazing and permitted uses on the allotment, depending on the outcome of the BLM's final decision on the grazing permit and the ROW application. If the BLM determines that the energy project proponent's ROW application will not be authorized or the processing of the application will take longer than the 2-year notification period, the BLM will promptly notify the permittee.

[2] *W.J. and Betty Lo Wells*, 122 IBLA 250 (Feb. 28, 1992) (notification under 43 C.F.R. § 4110.4-2(b) is satisfied by NORA issued months before the BLM's final decision approving a land exchange). *City of Santa Fe*, 120 IBLA 308 (Sept. 11, 1991) (BLM's publication of a NORA prior to the two-year period satisfied the two-year notification requirement under 43 C.F.R. § 4110.4-2(b)). *John S. Peck*, et al., 114 IBLA 393 (1990) (notification under 43 C.F.R. 4110.4-2(b) occurred months before NORA and BLM decision denying protests to a land exchange).

[3] *Providing for the Management, Protection, and Development of the Natural Resource Lands, and Other Purposes*, H.R. Rep. No. 94-1724, at 63-64, para. 30 (referring to the two-year notification requirement as a notification of intention to cancel only, and not stating in paragraph 30 that the notification must issue when or after a final decision is made).

satisfies the two-year notification requirement of 43 C.F.R. § 4110.4-2(b) if notice was not already given prior to its publication.

Potential mitigation and compensation strategies

During the pre-NEPA phase, potential mitigation and compensation strategies should be considered. Regulation 43 CFR 4120.3-6(c) (2005) provides that if a grazing permittee/lessee has placed or constructed authorized permanent range improvements on lands within a permit/lease subsequently cancelled for another public purpose, the permittee/lessee is entitled to receive reasonable compensation from the United States for the adjusted value of their interest in such improvements (refer to H-4120-1.36C). The ROW applicant and permittee/lessee should be strongly encouraged to enter into an agreement that addresses compensation for range improvements. If such an agreement is reached to the satisfaction of the parties, the permittee/lessee must file the agreement in writing with the BLM AO. Discussions on these agreements may continue throughout the process and conclude by the time of decision. However, the FO should stay aware of these on-going discussions, if applicable.

- In the event the applicant and permittee/lessee do not come to an agreement on compensation for such authorized permanent range improvements and the permit/lease is subsequently cancelled, in whole or in part, for the solar or wind energy project, the permittee/lessee is entitled to receive, from the United States, reasonable compensation for the adjusted value of their interest in such improvements. The adjusted value is to be determined by the AO through an appraisal of the qualified range improvements impacted by the project. Compensation (by the BLM) must not exceed the fair market value of the terminated portion of the permittee's/lessee's interest in such improvements (see 43 CFR 4120.3-6(c) (2005)). Consider creating a contributed funds account and notify the ROW applicant of the cost.

Where a range improvement is authorized by a range improvement permit, the livestock operator may elect to salvage the materials and perform rehabilitation measures rather than be compensated for the adjusted value (see 43 CFR 4120.3-6(c) (2005)). Salvage and rehabilitation measures may trigger the need for a NEPA analysis of the impacts of those measures, and must be coordinated with, and approved by, the AO prior to any action taking place.

- Discussion of mitigation and compensation strategies may address loss of forage, water rights owned by the permittee/lessee, access for management purposes, or other items, as necessary, to provide for expeditious processing of the ROW application for solar or wind development. The ROW applicant and the permittee/lessee should be strongly encouraged to enter into an agreement that addresses mitigation and compensation strategies to be submitted concurrent with the POD, but the BLM will not directly participate in these discussions. The United States is not responsible for any mitigation or compensation agreed upon by the parties in these agreements.

The NEPA analysis for a solar or wind energy project may consider an alternative that minimizes impacts to livestock grazing. Additionally, all alternatives proposed to be sited on land within a grazing permit/lease must consider the environmental impacts from two actions: 1) the

grant/denial of the ROW, and 2) the cancellation/continuation of the grazing permit/lease, and issuance of a new grazing permit/lease, if appropriate.

Once the BLM completes and issues the Environmental Assessment (EA) or Draft Environmental Impact Statement (EIS) addressing the ROW application and the grazing management, the BLM will then issue a proposed grazing decision that will: a) state that the effective date of the permit/lease cancellation, and issuance of any new permit/lease for any remaining permitted use, will be 2 years from the permittee's/lessee's receipt of the certified letter sent in Step 2 above, b) address compensation for range improvements (see 43 CFR 4110.4-2 (2005)), c) address grazing management changes for the new permit/lease, as well as interim grazing adjustments as appropriate, and d) state that in the absence of a protest the decision will become final concurrent with the EA/Decision Record or Final EIS/ROD (see Attachment 1, Step 4,). The BLM will send the proposed grazing decision to the affected ROW applicant, grazing permittees/lessees, interested public, any agent and lienholder of record who is affected by the proposed action, terms and conditions, or modifications relating to applications, permits and agreements by certified mail or personal delivery. Copies of proposed decisions shall also be sent to the interested public (see 43 C.F.R. 4160.1 (2005)). The applicant, permittee, lessee, or other interested member of the public may protest the proposed decision (see 43 C.F.R. 4160.1) in person or in writing to the AO within 15 days after receipt of such decision (see Attachment 1, Step 4).

If the decision results in canceling grazing, in whole or in part, BLM should clearly specify adequate notice to permittees/lessees to vacate closed areas prior to construction activities.

- If the proposed decision is protested, the AO will issue a final grazing decision concurrent with the EA/Decision Record or Final EIS/ROD after completing the review process described in 43 CFR 4160.3(b) (2005) (see Attachment 1, Steps 4a and 4c). The AO shall serve their final grazing decision on the ROW applicant and permittee/lessee, or their agent, or both, and the interested public.

- If no protest is received, the decision will become final without further notification upon issuance of the EA/Decision Record or Final EIS/ROD (see 43 CFR 4160.3(a) (2005)) (see Attachment 1, Steps 4b).

The final grazing decision takes effect/issue EA/Decision Record or Final EIS/ROD (see Attachment 1, Step 5).

If the AO receives a written waiver of the 2-year notification requirement, it will be documented and filed in the lands case file, grazing case file, and allotment file (see Attachment 1, Step 6, and Attachment 2 and 3). With a written waiver, the BLM may issue a decision on the ROW application following issuance of a final grazing decision any time prior to the 2-year period. Appropriate Notices to Proceed (NTP) may also be issued, in accordance with ROW stipulations. The existing grazing permit/lease will be cancelled, and a new permit/lease issued, supported by appropriate NEPA, if permitted use remains available within the allotment or on other allotments on the former permit/lease. If an agreement between the ROW holder and permittee/lessee that

addressed compensation for range improvements was not reached, reimbursement for the permittee/lessee's interest in qualified range improvements is issued at this time.

- If the AO does not receive a written waiver of the 2-year notification requirement, and the NEPA analysis supports a conclusion that livestock grazing can be accommodated with energy project development during the 2-year notification period, then the AO may issue the ROW grant and any NTP when agreement is reached, in accordance with ROW stipulations. Interim grazing can be adjusted as necessary with the annual application/billing statement, or as described in the proposed grazing decision for the interim livestock management (see Attachment 1, Step 6). At the end of the 2-year period, the existing grazing permit will be cancelled, and a new permit issued, supported by appropriate NEPA, if permitted use remains available within the allotment or on other allotments on the former permit/lease. If an agreement between the ROW holder and permittee/lessee that addressed compensation for range improvements was not reached, reimbursement for the permittee/lessee's interest in qualified range improvements is issued at this time.

- If the AO does not receive a written waiver of the 2-year notification requirement, and the NEPA analysis does not support a conclusion that livestock grazing can be accommodated with energy project development during the 2-year notification period (see Attachment, Step 2, Grazing), then the AO may issue the ROW grant and any NTP after the 2-year period has ended, in accordance with ROW stipulations (see Attachment 1, Step 6). At the end of the 2-year period, the existing grazing permit will be cancelled, and a new permit issued, supported by appropriate NEPA, if permitted use remains available within the allotment or on other allotments on the former permit/lease. If an agreement between the ROW holder and permittee/lessee that addressed compensation for range improvements was not reached, reimbursement for the permittee/lessee's interest in qualified range improvements is issued at this time.

This policy will apply to permits or leases that authorize grazing use on both perennial, ephemeral, and perennial/ephemeral allotments.

Timeframe: This policy is effective immediately.

Budget Impact: There may be a budget impact to the United States if the Federal Government is responsible for the range improvement compensation. The impact could range from a hundred dollars to several thousand dollars depending on the type and condition of range improvements.

Background: Several FOs have received solar and wind energy development applications. Clarification is needed to ensure consistency on when to notify the permittee/lessee and issue the 2-year notification, clarify timing issuance of the ROW grant, NTP, and grazing permit/lease, and address other mitigation and compensation issues.

Coordination: This IM was coordinated with the Division of Lands, Minerals, and Energy, the Division of Resources and Planning, and the Solicitor's Office.

Contact: Any questions may be directed to Doug Whitbeck, Rangeland Management Program Lead, at 602-417-9217; or Derek Eysenbach, Renewable Energy Project Manager, at 602-417-9505.

RAYMOND SUAZO

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3 Attachments:

1 - Solar ROW and livestock grazing workflow (1 pp)

2 - Sample Grazing Notification to Permittee/Lessee and Sample Grazing Cancellation Waiver (3 pp)

3 - Renewable Energy/Livestock Operator FAQs (3 pp)