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DEPARTMENT OF THE INTERIOR

Bureau of Land Management

43 CFR Part 2800

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RIN 1004-AE78

Rights-of-Way, Leasing, and Operations for Renewable Energy

AGENCY: Bureau of Land Management, Interior.

ACTION: Final Rule

SUMMARY: This final rule updates procedures governing the BLM's renewable energy and right-of-way programs, focusing on two main topics. The first topic is solar and wind energy generation rents and fees, implementing new authority from the Energy Act of 2020 to "reduce acreage rental rates and capacity fees, or both, for existing and new wind and solar authorizations" and making certain findings required by the statute. The second topic is expanding agency discretion to process applications for solar and wind energy generation rights-of-way inside designated leasing areas (DLAs). In addition to these two main topics, this final rule makes technical changes, corrections, and clarifications to the regulations. This final rule will update the BLM's procedures governing the BLM's administration of rights-of-way issued under Title V of the Federal Land Policy and Management Act (FLPMA), including for solar and wind energy applications and development authorizations.

FOR FURTHER INFORMATION CONTACT: Jayme Lopez, Interagency Coordination Liaison, by phone at (520) 235-4581, or by email at energy@blm.gov for information relating to

the BLM Renewable Energy programs and information about the final rule. Please use "RIN 1004-AE78" in the subject line. Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States.

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I. Executive Summary

In 2021, the Bureau of Land Management (BLM) initiated preliminary activities related to rulemaking through listening sessions seeking public comment on the BLM's potential use of the Energy Act of 2020 (43 U.S.C. 3003) authority to "reduce acreage rental rates and capacity fees" to "promote the greatest use of wind and solar energy resources." In May 2022, the BLM published BLM Manual section 2806.60 as interim guidance to implement that authority from the Energy Act of 2020 pending completion of this final rule. On June 16, 2023, the BLM published a proposed rule (88 FR 39726[1]) in the *Federal Register*, that, among other things, proposed updates to the BLM's methodology for determining acreage rents and capacity fees for

[1] https://www.federalregister.gov/documents/2023/06/16/2023-12178/rights-of-way-leasing-and-operations-for-renewable-energy

solar and wind energy development projects, including providing opportunities for reductions to rents and fees under the authority of the Energy Act of 2020. The BLM also proposed more flexibility in how the BLM processes applications for solar and wind energy development inside DLAs, and updates to how to prioritize solar and wind energy applications. The proposed rule also suggested technical changes, corrections, and clarifications to the existing right-of-way regulations. After considering comments on the proposed rule and other factors, the BLM prepared this final rule.

II. Background

The BLM's governing regulations for rights-of-way, including for solar and wind energy generation, are found at Title 43 CFR Part 2800. These regulations were last comprehensively updated by a final rule published in the Federal Register on December 19, 2016, *Competitive Processes, Terms, and Conditions for Leasing Public Lands for Solar and Wind Energy Development and Technical Changes and Corrections* (81 FR 92122). That final rule built upon existing rights-of-way regulations and policies to expand BLM's ability to responsibly facilitate solar and wind energy development.

Most recently, the BLM amended components of 43 CFR Part 2800 under its final rule, "Update of the Communications Uses Program, Cost Recovery Fee Schedules, and Section 512 of FLPMA for Rights-of-Way," (FR citation,) on April XX, 2024. That final rule updated BLM regulations to enhance the communications uses program, update its cost recovery fee schedules, and add provisions governing the development and approval of operations, maintenance, and fire prevention plans and agreements for rights-of-way for electric transmission and distribution facilities (i.e., powerlines). That final rule also included technical changes to certain sections that

this renewable energy rule proposed to make changes to, as will be discussed further in the section-by-section discussion of this final rule.

Solar and Wind Energy Rents and Fees

Title V of FLPMA (43 U.S.C. 1761–1772) generally requires grant holders, leaseholders, or both (holders) to "pay in advance the fair market value" for use of the public lands, subject to certain exceptions. The Energy Act of 2020, 43 U.S.C. 3003, introduced a new exception to FLPMA's fair market value requirement, authorizing the Secretary to "reduce acreage rental rates and capacity fees, or both, for existing and new wind and solar authorizations" if the agency makes certain findings. These findings can include that the existing rates "exceed fair market value," "impose economic hardships" or "limit commercial interest in a competitive lease sale or right-of-way grant," or "that a reduced rental rate or capacity fee is necessary to promote the greatest use of wind and solar energy resources." 43 U.S.C. 3003(b)(1)(A)-(C), 3003(b)(2).

As reflected in this final rule, the BLM determined that the changes to the acreage rents and capacity fees for solar and wind energy right-of-way authorizations are needed to "promote the greatest use of wind and solar energy resources" and maximize "commercial interest" in lease sales and right-of-way grants. . Reducing the acreage rent and capacity fee in this final rule will encourage solar and wind energy development with a goal of increasing the share of clean energy that is part of the United States' domestic power infrastructure as authorized by the Energy Act of 2020 and directed by Executive Orders 14008 and 14057. This will be done by decreasing the costs for developers to construct and operate solar and wind energy development, allowing them to increase investments in new facilities and thus promote additional development. These changes will result in the most additional deployment of solar and wind

energy development (see Regulatory Impact Analysis 3.1.D). The BLM's determination is supported by a regulatory impact analysis of economic impacts, public comments received on the proposed rule, and the BLM's experience with solar and wind energy development on public lands.

Reductions in costs will also benefit smaller-scale projects or projects that are on the margins of being economically profitable. Additionally, the BLM expects that the rule will not only increase interest among renewable energy developers to use BLM-administered public lands, but it will decrease the cost for developers such that they may be able to invest in additional wind and solar projects on Tribal, State, or private lands. Further, the decrease in cost to developers is expected to translate, over time, to a reduction in the average cost per MW of solar and wind energy, which will make solar- and wind-generated energy more competitive with other energy sources and will stabilize or even reduce the cost of energy to consumers, even as the cost of other energy sources may experience increased volatility.

The BLM also determined that the authority provided under the Energy Act of 2020, 43 U.S.C. 3003, supports two other reductions to the capacity fees under two potentially qualifying circumstances: (1) a Domestic Content reduction when a grant holder or lease holder demonstrates the use of American-made iron, steel, construction materials, or manufactured products in the construction of the project consistent with the requirements set forth in this final rule; and (2) a reduction for Project Labor Agreements (PLAs), i.e., when the holder uses PLAs to hire labor for the development and construction of a solar or wind development. The additional, voluntary reductions offered in this final rule advance the Energy Act of 2020 goal of

promoting the greatest use of solar and wind energy resources. First, a Domestic Content reduction will provide an incentive to use components made or manufactured in the United States in the construction of the solar or wind energy development project by offsetting those costs, which, if broadly adopted, could increase demand for domestically produced renewable energy parts and materials and, over the long term, lead to decreased costs for parts and materials, decreased reliance on potentially volatile foreign-sourced parts and materials, and ultimately increased economic certainty for and promotion of wind and solar energy resources on public lands. Second, the PLA reduction will incentivize good labor practices and in turn lead to responsible and productive construction, minimize the potential duration, and improve construction standards, thereby promoting the greatest use of wind and solar resources. These reductions will also incentivize project proponents to advance other Congressional and Administration goals that strengthen the use of American products and manufacturing and the associated labor markets.

Therefore, reductions in the final rule that rely upon authority from the Energy Act of 2020 include an 80 percent reduction to the MWh rate when setting the capacity fee and the two additional reductions to the capacity fee for which right-of-way holders may qualify: a 20 percent Domestic Content reduction and a 20 percent PLA reduction. The MWh rate reduction applies to projects when they are permitted (or grants or rights-of-way are re-issued under 2806.51(c)) and continues for the life of the grant. The MWh rate reduction will be 80 percent through 2035, 60 percent for new authorizations in 2036, 40 percent for new authorizations in 2037, and 20 percent for new authorizations in 2038 and beyond. Additional information on the

MWh rate is found under the discussions of §§ 2801.5 and 2806.52(b) of this preamble, as well as more broadly under Part 2806 of this preamble.

This final rule also codifies a new rate-setting methodology for solar and wind energy development projects. Under this rule, the BLM will collect from right-of-way holders the greater of either an acreage rent or a capacity fee. The BLM will assess acreage rent by applying the rate schedule, based on a survey of values for pastureland from the National Agricultural Statistics Service (NASS) Cash Rents Survey, to the number of acres that the right-of-way authorizes for use. Capacity fees reflect the value of generating electricity from solar and wind energy resources, which are quantified by the number of megawatt hours (MWh) of electricity produced from public lands. In this rule, the BLM has changed the definition of capacity to move away from the maximum capacity that a solar facility could produce and towards ensuring that the capacity fee reflects the actual capacity for solar or wind energy generation of a site covered by a given right-of-way grant or lease, taking into consideration environmental or other factors that may impact generation capacity of the site, including weather, servicing, and Acts of God. As provided in the final rule, the BLM will determine the capacity fee by considering the wholesale prices for major trading hubs serving 11 western States, and documentation concerning the price received by the right-of-way holder under a Power Purchase Agreement.

The final rule provides that, when issuing a grant or lease for solar or wind energy development, or a renewal of such grant or lease, the BLM will set the per-acre rate and the MWh rate (including applicable reductions). The acreage rent and capacity fee will be adjusted annually, however, using an annual adjustment factor set at the beginning of the grant or lease term. Upon renewal of a right-of-way, the per-acre rate and the MWh rate and reductions would

be updated based on the then-current rates, as well as any applicable reductions for which the right-of-way holder qualifies at that time.

Existing right-of-way holders may elect to continue using their current rate setting methodology, which may be updated periodically for changes in the market, or change to the new rate setting methodology in this final rule. Otherwise, the new rate setting methodology would only apply to new or renewed rights-of-way. If an existing right-of-way holder elects to change to the new rate setting methodology, that methodology will apply until the end of the right-of-way term.

This final rule bases the capacity fee for solar and wind energy generation facilities on actual energy generation at each facility rather than on nameplate capacity. The BLM believes this change more accurately reflects the actual capacity for energy production of an individual project based on a developer's selection of technology, project design, and the solar or wind resource available at a particular site. This change to the capacity fee indexes the required payment to the projects' energy generation, being greater when the project generates more energy and less when it generates less.

This rule improves payment predictability for grant and leaseholders by revising the key data used for determining the acreage rent and the capacity fee—the state-wide pastureland rent values and the wholesale price of electricity—at the time the right-of-way is issued. In doing so, the per-acre and MWh rates are set for the term of the right-of-way and only adjusted by the annual adjustment factor and, in the case of the capacity fee, by the holder's actual annual energy production. See preamble sections 2806.50 and 2805.52 for a more detailed discussion of the BLM's proposed methodology for determining the acreage rent and capacity fee.

Solar and Wind Energy Applications Inside Designated Leasing Areas

In this final rule, the BLM clarifies that it will review and process applications, including on a non-competitive basis, for proposed solar and energy generation rights-of-way inside DLAs, which are defined at 43 CFR 2801.5(b). The BLM retains discretion to conduct competitive processes, either inside or outside of DLAs, where the authorized officer decides to do so. In the proposed rule, the BLM used the terms "competitive offer" and "competitive process" interchangeably. To provide clarity and minimize confusion, the final rule uses only the term "competitive process" to describe the method by with the BLM will offer parcels in a competitive bidding process. To learn more about BLM's DLAs, see the 2012 Western Solar Plan (https://blmsolar.anl.gov/documents/solar-peis/), which identified approximately 285,000 acres of agency preferred development locations (i.e., DLAs) with high potential for solar energy production and low conflicts with other resources and uses. Subsequently, the BLM designated approximately 388,000 acres of preferred development locations for solar energy in California through the 2016 Desert Renewable Energy Conservation Plan (https://blmsolar.anl.gov/documents/drecp/) and over 192,000 acres of preferred development locations for solar, wind, and geothermal energy in Arizona through the 2017 Restoration Design Energy Project. Currently, the BLM is in the process of updating its 2012 Western Solar Plan to, among other things, make programmatic planning decisions for solar development on BLM-administered lands in 11 western states, including Arizona, California (exclusive of the area covered by the Desert Renewable Energy Conservation Plan), Colorado, Idaho, Montana, Nevada, New Mexico, Utah, Oregon, Washington, and Wyoming (See https://eplanning.blm.gov/eplanning-ui/project/2022371/510).

Under this final rule, if no competitive interest exists for a particular parcel, the BLM may issue leases without a competitive process. This change to the rule provides the BLM with increased flexibility and discretion to issue grants and leases through either competitive or non-competitive processes across all public lands inside and outside of DLAs, which is expected to maximize interest in renewable energy leasing and accelerate the deployment of solar and wind energy on the public lands. See subpart 2809 for a discussion of the competitive process for solar and wind energy.

Need for the Rule

FLPMA provides the BLM with comprehensive authority for the administration and protection of the public lands and their resources and directs that the public lands be managed "on the basis of multiple use and sustained yield" unless otherwise provided by law (43 U.S.C. 1732(a)). Further, FLPMA authorizes the BLM to issue rights-of-way on the public lands for electric generation systems, including solar and wind energy generation systems, and mandates that the United States receive fair market value for the use of the public lands and their resources unless otherwise provided for by statute (43 U.S.C. 1764(g)).

On December 27, 2020, the Energy Act of 2020 was enacted, establishing a minimum goal of "authoriz[ing] production of not less than 25 gigawatts of electricity from wind, solar, and geothermal energy projects by not later than 2025" on Federal lands. 43 U.S.C. 3004. Current information regarding the BLM's approved energy development projects and number of gigawatts is available on its website.[2] The Energy Act of 2020 also provides the BLM with new authority to reduce rates below fair market value based on specific findings, including "that a

[2] https://www.blm.gov/programs/energy-and-minerals/renewable-energy/active-renewable-projects

reduced rental rate or capacity fee is necessary to promote the greatest use of wind and solar energy resources" 43 U.S.C. 3003(b)(2). The BLM has determined that reduced rates and fees are necessary to promote the greatest use of wind and solar energy resources, and this rule seeks to implement such reductions consistent with the direction in the Energy Act of 2020.

On January 27, 2021, President Biden issued Executive Order (E.O.) 14008, "Tackling the Climate Crisis at Home and Abroad." Section 207 of E.O. 14008, titled "Renewable Energy on Public Lands and in Offshore Waters," instructs DOI "to increase renewable energy production on (public) lands."

The changes in this rulemaking will provide clearer direction for the BLM in processing proposed renewable energy right-of-way applications on public lands while also supporting the goals of the Energy Act of 2020 and E.O. 14008.

Statutory Authority

Section 310 of FLPMA (43 U.S.C. 1740) authorizes the Secretary to promulgate regulations to carry out the purposes of FLPMA and other laws applicable to public lands. Section 302 of FLPMA (43 U.S.C. 1732) also provides comprehensive authority for the administration and protection of the public lands and their resources and directs that the public lands be managed "under principles of multiple use and sustained yield," unless otherwise provided by law (43 U.S.C. 1732(a)). Sections 501, 504, and 505 of FLPMA authorize the Secretary to grant rights-of-way on public lands; to issue regulations governing such rights-of-way and charge rent for such rights-of-way; and to impose terms and conditions on rights-of-way grants, respectively (43 U.S.C. 1761, 1764, and 1765). Sections 304 and 504 of FLPMA (43 U.S.C. 1734(b) and 1764(g)) also authorize the BLM to collect funds from right-of-way

applicants or holders to reimburse the agency for its costs incurred while working on a proposed or authorized right-of-way. As defined by FLPMA, the term "right-of-way" includes an easement, lease, permit, or license to occupy, use, or traverse public lands (43 U.S.C. 1702(f)). See Title V of FLPMA (43 U.S.C. 1761–1772).

The Energy Act of 2020 authorizes the Secretary to reduce acreage rental rates and capacity fees if the Secretary makes certain findings, which can include that the existing rates "impose economic hardships" or "limit commercial interest in a competitive lease sale or right-of-way grant," or "that a reduced rental rate or capacity fee is necessary to promote the greatest use of wind and solar energy resources" (43 U.S.C. 3003).

III. Discussion of Public Comments on the Proposed Rule

This section of the preamble briefly summarizes broad and general comments on the proposed rule and the BLM's responses. Comment responses within this section of the preamble have been grouped and summarized by category that would apply to one or more sections of this final rule. You will find additional comments that are more specific to sections of this final rule, and their responses, in Section IV (Section-by-Section Discussion) of this preamble.

SOLAR AND WIND ENERGY RENTS AND FEES – Part 2806

Summary of Comments: While several commenters supported the proposal for reduced rents and fees, other commenters questioned the need for reduced rents and fees and requested more research and discussion to determine if current costs exceed fair market value, impose economic hardships, limit commercial interest, are not competitively priced, or disincentivize the greatest use of wind and solar energy resources.

Response: Under the Energy Act of 2020 (43 U.S.C. 3003(b)), Congress recognized the need to promote wind and solar energy projects on Federal lands, giving the Secretary the authority to reduce acreage rental rates, capacity fees, or both if she determines that "the existing rates (A) exceed fair market value; (B) impose economic hardships; (C) limit commercial interest in a competitive lease sale or right-of-way grant; or (D) are not competitively priced compared to other available land;" or that a reduction is "necessary to promote the greatest use of wind and solar energy resources." 43 U.S.C. 3003(b)(1)-(2). The BLM considered whether capacity fee reductions are necessary to promote the greatest use of wind and solar energy resources and has determined reductions are necessary. This final rule describes how the capacity fee reductions will increase interest in and incentivize wind and solar energy development on public lands and thereby accelerate deployment of renewable energy resources in the United States. This final rule also includes changes to the BLM's rate-setting methodology that improve future rate predictability (see Regulatory Impact Analysis) and reduce potential for economic hardships.

Summary of Comments: Commenters suggested that the BLM should not speculate on the economic impacts of the proposed rule or requested additional analysis and use of additional sources to back up statements made.

Response: The BLM prepared an economic analysis for the proposed rule and then completed a Regulatory Impact Analysis for this final rule that provides a transparent analysis of the anticipated economic consequences for this rulemaking. This analysis informs the agency decision, including whether this rulemaking would accomplish its goals. For further information

on the economic impacts of this rule, please see the Regulatory Impact Analysis that is available with a search at regulations.gov of this Regulatory Identifying Number "1004-AE78."

Summary of Comments: Commenters suggested rents and fees should be increased rather than decreased due to the environmental impacts of solar and wind energy development, as well as their incompatibility with other uses. Some further suggested that reducing fees on projects that are on the margins of being profitable creates the risk of projects failing and not being properly removed and rehabilitated.

Response: The BLM disagrees with the commenters' suggestion that rents and fees should be increased rather than decreased. As explained in more detail in the previous section on Solar and Wind Energy Rents and Fees, the Energy Act of 2020 (43 U.S.C. 3003) provides the BLM with authority to reduce acreage rents and capacity fees, including for the purpose of promoting the greatest use of wind and solar resources. The BLM has determined that reductions in acreage rents and capacity fees will promote wind and solar resources and is within the BLM's discretion under the Energy Act of 2020. Further, the BLM has carefully considered its final rule and concluded that decreasing rents and fees is necessary to accomplish the goals set forth by Congress in the Energy Act of 2020, by the President in E.O. 14008, and by the Secretary in Secretary's Order 3399. Congress set a national goal for renewable energy production on Federal land, directing the Secretary to seek to issue permits authorizing production of not less than 25 gigawatts of electricity from wind, solar, and geothermal energy projects on Federal land by not later than 2025. 43 U.S.C. 3004. Congress further provided the Secretary with discretion to reduce the acreage rental rates and capacity fees, including where necessary to promote the greatest use of solar and wind energy resources on BLM-administered public lands, which would

advance the goals set by the Energy Act of 2020, as well as those in E.O. 13990, "Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis," 86 FR 7037; E.O. 14008, "Tackling the Climate Crisis at Home and Abroad," 86 FR 7619; and Secretary's Order 3399, "Department-Wide Approach to the Climate Crisis and Restoring Transparency and Integrity to the Decision-Making Process." The use of public lands for energy generation systems is specifically contemplated in the FLPMA and the Energy Act of 2020. The BLM considers the potential environmental effects of solar or wind energy development when conducting land use planning and evaluating project applications, not when identifying appropriate rental rates and fees for development projects. The BLM considers and analyzes environmental impacts of proposed energy development, including appropriate mitigation measures, before authorizing any such project. Additionally, the BLM does not believe there is any correlation between reductions in capacity fees and the ability of project proponents to properly remove and remediate facilities. Any applicable fee reductions contemplated in this rule would not alter a project proponent's obligations to provide for adequate bonding associated with construction and remediation associated with terminated or abandoned facilities, as required by 43 CFR 2805.12(b), 2805.20, and 2809.18(e).

Summary of Comments: Commenters noted that reducing rents and fees for renewable energy projects on public lands would economically impact the developers of similar projects on private or Tribal lands and could impact property values.

Response: This final rule changes the BLM's administrative processes and rates for solar and wind energy development projects on public lands. While the final rule is intended to encourage solar and wind energy development on the public lands, it would be speculative for

the BLM to attempt to analyze whether and to what extent there may be secondary impacts to solar and wind energy development on private or Tribal property. This is particularly the case due to the wide variety of factors that influence developers' decisions about whether and where to pursue solar and wind energy projects, including, but not limited to, state, Tribal, and local permitting requirements, the ability to enter into power purchase or offtake agreements, the availability of existing or proposed transmission, and project-specific financing considerations. Notwithstanding these different factors, the final rule will generally decrease costs for developers on public lands, which may permit them to pursue additional opportunities for development on Tribal, state, and private lands and thereby further promote the greatest use of solar and wind energy.

Summary of Comments: Some comments asked about rate changes that would occur after 2036. Commenters raised four specific issues that the 2036 rate change causes. First, some commenters asserted that rates after 2036 would run higher than fair market value and are therefore a violation of FLPMA's requirement that the BLM charge no more than fair market value. Second, some commenters asserted that the Secretary's authority to reduce rates under the Energy Act extends beyond 2035, and America's need for renewable energy, set by Congressional and Presidential goals, would require incentives beyond 2036. Third, some commenters asserted that the 2036 rate increase would discourage right-of-way renewals after that year. Last, some commenters asserted that the BLM has not adequately explained why it is choosing to phase out the final rule's rate reductions in 2036.

Response: This final rule helps lead the way to accomplishing the national goal of a carbon pollution-free electricity sector by 2035, as highlighted in Executive Orders 14008 and

14057. Based on its review of comments, the BLM has modified the sunset provision in the final rule. Instead of immediately transitioning the capacity fee reduction from 80 percent to 20 percent, the final rule will lower the reduction by 20 percentage points per year over a period of three years starting in 2036. Instituting a phased sunset period to the 80 percent reduction in the capacity fee is appropriate as the renewable energy industry may no longer need this reduction to achieve the greatest use of wind and solar on public lands, and progress toward our national goal of a carbon-pollution free electricity sector may indicate that a reduction is no longer warranted. After the sunset period ends, this final rule will continue to provide a 20 percent reduction for solar and wind energy development projects. The BLM will evaluate progress towards reaching national goals and the benefit of the reduction before 2036 and could reinitiate rulemaking to adjust incentives, including extending them beyond 2036.

The BLM believes that knowing beforehand what the rates are for a facility and the increased predictability of those rates in the future will improve the economic certainty for project development and support a developer's or operator's decisions in power purchasing, financing, and other agreements that are necessary for a successful renewable energy project. This would be the same for existing authorization holders who choose to change to this new rate setting methodology, as well as for authorization renewals. Lastly, the BLM believes that the economics for renewable energy will continue to improve over time, and that the magnitude of such a reduction in 2036 is uncertain.

LANDS AVAILABLE FOR SOLAR AND WIND ENERGY APPLICATIONS

Summary of Comments: Some commenters recommended that the BLM further restrict renewable energy development outside of solar energy zones and prohibit such development

close to sensitive habitats or recreation areas. Commenters stated that competitive offers should not be allowed outside of designated zones.

Response: Through the National Environmental Policy Act (NEPA) process, the BLM considers the environmental impacts of proposed uses on the public lands, including solar and wind energy development, to inform the BLM decisions to deny, approve, or approve with modification the proposed use. The BLM will include terms and conditions as appropriate to address resource and environmental impacts of the project. The BLM also performs broader analysis to inform whether certain lands may be made available for that use through the land use planning process required by FLPMA, 43 U.S.C. 1712. As described further below, the BLM's ongoing planning process to update to its 2012 Western Solar Plan[3] will amend BLM land use plans in 11 Western States (Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming), or portions thereof, to identify new priority areas for solar energy development, variance areas, and public lands that are excluded from solar energy development, and to update requirements that holders must comply with, including for sensitive resources and uses that the BLM has previously authorized. This rulemaking does not make land use planning decisions—including determining whether areas should be excluded from solar and wind energy development because they would impact sensitive habitats or recreation areas—which are completed under a separate BLM process. This rulemaking does not change the competitive process outside of designated zones, but rather aligns the competitive process for solar and wind applications across all areas within and outside of designated areas. The BLM believes that where competitive interest exists—for example, in the form of multiple

[3] https://www.federalregister.gov/documents/2022/12/08/2022-26659/notice-of-intent-to-prepare-a-programmatic-environmental-impact-statement-to-evaluate-utility-scale

overlapping applications or a high level of interest in a general area—competitive processes should be used, regardless of whether the lands are in a DLA, to advance the projects that are most likely to proceed to development.

Summary of Comments: Commenters noted that the BLM references solar energy zones from the 2012 Western Solar Plan in the proposed rule without discussing that the 2012 Plan is now under revision and will include an additional 5 states (Idaho, Montana, Oregon, Washington, and Wyoming). Commenters requested that the BLM coordinate the rulemaking process with the land use planning effort accompanying the Western Solar Programmatic Environmental Impact Statement (Western Solar PEIS), recognizing the various alternatives being considered and the impacts that each (Western Solar PEIS vs. proposed rule) have on the other. Commenters believed many of the changes in this rule that refer to decisions or processes that occur prior to project approval are currently being considered as part of the Western Solar PEIS plan amendment process and may be better suited for the PEIS.

Response: This rulemaking effort and the Western Solar PEIS are two separate actions that complement one another, but they have different goals, are subject to different authorities, and will address different aspects of the ROW authorization process. This final rule sets out how the BLM will process applications and calculate rents, in order to implement new authorities and meet National goals established in the Energy Act and directed by Executive Order 14008 for both wind and solar energy development. This rulemaking does not make land use planning decisions. In contrast, the plan amendment process associated with the Western Solar PEIS focuses exclusively on solar development on public lands through a separate process governed by Section 202 of FLPMA (43 U.S.C. 1712) and the BLM resource management planning

regulations at 43 CFR 1610, *et seq.* to update the BLM's Western Solar Plan. That programmatic land use planning process will consider updating the BLM's Western Solar Plan, with a primarily focuses on identifying the best locations for utility-scale solar energy development, as well as restrictions and mitigation applicable to such development, on BLM-managed public lands in 11 Western States. The BLM's land use planning decisions, including any amendments to plans, will comply with applicable laws and regulations.

Comment Summary: The BLM understands from comments it has received that some believe that the proposed rule has insufficient analysis under E.O. 12866. These comments suggest that the BLM must coordinate more closely with local governments to collect economic data.

Response: The BLM appreciates the interest and engagement from partners across the multiple landscapes in the United States, however the BLM disagrees with comments that additional coordination must be performed with local governments for this rulemaking. This rule governs the BLM's administration of applications and authorizations for solar and wind energy development projects on public lands. While the rule does have some financial implications with adjustments to the BLM's rates, these are transfer payments as explained more fully in the Regulatory Impact Analysis accompanying this final rule and would not materially affect the resources available to the American economy. The BLM will continue to engage with the public it serves, and its many partners through BLM's public processes, including project-specific analysis and programmatic and land use planning analysis through NEPA. No change made based on these comments.

NEED FOR THE RULE

Summary of Comments: Commenters requested the BLM include a more meaningful explanation of the necessity of this rulemaking, including technical data that supports a need for increased preferences and favorable treatment for lease terms. Commenters stated that solar development is not in line with FLPMA and does not allow for multiple use on public lands.

Response: The BLM received new authority and guidance from Congress (Energy Act of 2020) and direction from the President (Executive Order 14008, among others) to promote renewable energy generation on public lands. This rule implements the new authority and direction for management of the public lands. The BLM disagrees with the comments suggesting that solar energy development is inconsistent with FLPMA's multiple use mandate. In managing the public lands, the BLM is not required to make every parcel of land available for all purposes. Consistent with FLPMA's multiple use mandate, the BLM has discretion through land use planning to identify areas that are available for, or excluded from, solar or wind energy development and to evaluate each proposed solar or wind energy development through a site-specific environmental analysis, including the need for environmental mitigation, as part of the decision-making process prior to issuing a grant or lease.

Summary of Comments: Other commenters stated that they believe the BLM must improve its approach to facilitating renewable energy development to meet congressional goals. Other commenters expressed a belief that the free market would provide better solutions to greenhouse gas emissions and the climate crisis without authorizing projects on public land or providing additional incentives to site projects on public land.

Response: The BLM does not agree that the free market alone would provide better solutions to greenhouse gas emissions and the climate crisis. Additionally, the approach

suggested by commenters would be inconsistent with direction from Congress and the President to promote renewable energy generation on public lands. Particularly, the Energy Act of 2020, which is aimed at facilitating and promoting further development of wind and solar energy on Federal lands, specifically directs the BLM to "issue permits that, in total, authorize production of not less than 25 gigawatts of electricity from wind, solar, and geothermal energy projects by not later than 2025, *through management of public lands and administration of Federal laws*," 43 USC 3004(b) (emphasis added). Additionally, as described above, on January 27, 2021, President Biden issued E.O. 14008, "Tackling the Climate Crisis at Home and Abroad." Section 207 of E.O. 14008, titled "Renewable Energy on Public Lands and in Offshore Waters," instructs DOI "to increase renewable energy production on [public] lands." This final rule updates and improves the BLM's approach to facilitating renewable energy development on public lands based on lessons learned from implementation of the 2016 rule as well as changes in National renewable energy goals and the maturation of energy market over the past eight years. This update to the BLM's rules improve the BLM's orderly administration of public lands and helps reach the goals set by Congress and at the direction of the President. The BLM expects to continue working with the public to provide better solutions to resource concerns, such as greenhouse gas emissions and climate change, to best manage the public lands and its resources. Addressing such resource solutions are not part of this rulemaking.

Summary of Comments: Commenters stated that the current market conditions, state and Federal mandates and regulations, and demand for green energy makes reducing fees unnecessary and that the BLM has failed to explain why the reductions are necessary.

Response: The changes in this rule clarify how the BLM will process renewable energy right-of-way applications on public lands while supporting the goals of the Energy Act of 2020 and direction from the President (E.O. 14008 and 14057). Through the BLM's experience administering solar and wind energy development rights-of-way, the BLM understands the importance of stable and predictable rates for the term of an authorization. The BLM expects that the rule will help to meet national renewable goals more expeditiously. The BLM expects that the rule will not only increase interest among renewable energy developers to use BLM-administered public lands, but will decrease the cost for developers such that they may be able to invest in additional wind and solar projects on Tribal, State, or private lands. The BLM explains more fully the need for the rule and its reductions in the section-by-section discussion portion of this rule under subpart 2806.

Summary of Comments: A commenter stated that section 3003(b) of the Energy Act does not explicitly authorize the Secretary of the Interior to reduce right-of-way rents and fees below fair market value and that Congress did not explicitly repeal, amend, or supersede FLPMA's unequivocal fair market value requirement. They questioned if the Energy Act supersedes FLPMA's fair market value requirement for rights-of-way.

Response: The BLM disagrees with the comments suggesting that the Energy Act of 2020 does not authorize the Secretary to reduce right-of-way rents and fees below fair market value. First, a plain reading of the Energy Act authorizes the Secretary to reduce rental rates and capacity fees below fair market value. Specifically, it authorizes the Secretary to reduce "acreage rental rates, capacity fees, and other recurring annual fees in total" for solar and wind energy generation projects on BLM-managed public lands under a broad set of circumstances.

Additionally, Congress presumably understood the fair market value requirement in FLPMA, and the discretion in the Energy Act to reduce rental rates and capacity fees is as a modification of that existing requirement. The reductions authorized in Section 3003 of the Energy Act would be meaningless if Congress intended the reductions to be limited by FLPMA's general requirement to collect fair market value for rights-of-way.

STATUTORY AUTHORITY

Summary of Comments: One commenter expressed concern that this proposed rule will set precedent for a similar issue DOI is trying to address under the Fluid Mineral Leases and Leasing process.

Response: This final rule modifies procedures that are specific to identifying rental rates and capacity fees for wind and solar authorizations; it does not apply to or set a precedent for other BLM authorizations or processes, including those under the Mineral Leasing Act (MLA).

Summary of Comments: Another commenter requested information about how this final rule interacts with other BLM rules and administration directives, including the Conservation and Landscape Health Rule, Secretary's Order 3362, *Improving Habitat Quality in Western Big-Game Winter Range and Migration Corridors* (Feb. 9, 2018), and BLM Instruction Memorandum 2023-005 Change 1, *Habitat Connectivity on Public Lands* (Nov. 18, 2022).

Response: This final rule updates the processes used in the BLM's orderly administration of the public lands. Any decisions made in connection with right-of-way grants following the procedures laid out in this rule will also be subject to all other applicable legal requirements and administrative directives, including the Conservation and Landscape Health Rule, Secretary's Order 3362, and BLM policies and guidance.

NATIONAL ENVIRONMENTAL POLICY ACT (NEPA)

Comment Summary: Commenters requested the BLM prepare a NEPA analysis to evaluate the environmental effects of the final rule, including because extraordinary circumstances (43 CFR 46.215) apply and therefore reliance on a Categorical Exclusion is not appropriate.

Response: The BLM disagrees with comments that an environmental assessment or environmental impact statement analysis under NEPA is required, or that extraordinary circumstances apply to this rulemaking. The BLM has determined that the categorical exclusion at 43 CFR 46.210(i), which excludes, "regulations… that are of an administrative, financial, legal, technical, or procedural nature; or whose environmental effects are too broad, speculative, or conjectural to lend themselves to meaningful analysis and will later be subject to the NEPA process, either collectively or case-by-case," applies to this final rule. The BLM has reviewed the extraordinary circumstances listed in 43 CFR 46.215 and determined that none applies. This categorical exclusion documentation is provided on the BLM's ePlanning web page at the following URL: https://eplanning.blm.gov/eplanning-ui/project/2016102/510. As such, the final rule fits within the categorical exclusion for rules, regulations, or policies to establish bureau-wide administrative procedures, program processes, or instructions. This final rule does not authorize any project or other on-the-ground activity and therefore would have no significant individual or cumulative effect on the quality of the human environment. At such time that specific solar or wind energy development projects are proposed, the BLM will consider those proposed actions in compliance with NEPA.

Comment Summary: Some commenters suggested that there should not be a requirement of a published environmental assessment (EA) or environmental impact statement (EIS) before foreclosing the opportunity to hold a competitive offer. Some commenters believed the BLM should require analysis of a competitive offer through an EIS to identify and disclose the impacts of such an action.

Response: The BLM is not required to perform environmental analyses on whether to hold a competitive process; nonetheless, in § 2809.12(b) the BLM reserves the right to complete a NEPA analysis before holding a competitive process. The BLM does not typically complete a NEPA analysis for a competitive leasing process, but at least one NEPA analysis will be completed before authorizing solar or wind energy development. Determining that there may be competitive interest and utilizing a competitive process is administrative and procedural only, does not trigger the need to prepare an environmental analysis under NEPA or have any significant effect on the human environment, and is simply based on whether there is adequate interest from more than one applicant. The BLM would complete a land use planning and NEPA analysis were it to change allocations in a current land use plan to allocate areas of public lands to either allow or exclude solar or wind energy development—a process the BLM is currently undertaking regarding solar energy for 11 western states by updating the 2012 Western Solar Plan through a PEIS.

For example, in the case of solar or wind energy development leasing, the BLM must first identify public lands as a designated leasing area for solar or wind energy development through a land use planning process with an associated NEPA analysis. If the BLM receives competitive interest in those lands the BLM would hold a competitive process to determine the

presumptive leaseholder. Alternatively, the BLM may determine that the NEPA analysis for a designated leasing area should be updated to reflect new or changing circumstances and in turn may offer such lands competitively to determine a preferred applicant. Upon determining the presumptive leaseholder or preferred applicant, the BLM would then complete a NEPA analysis before determining whether to authorize the wind or solar energy generation project proposed. For either the presumptive leaseholder or preferred applicant, even if the BLM does not complete a NEPA analysis to consider whether to hold a competitive process, the resulting project will be subject to multiple NEPA analyses before it is approved.

Additional comments: Additional comments and their responses are found in Section IV (Section-by-Section Discussion) of this preamble.

The BLM is a multiple-use agency, and solar and wind energy development is one of the many uses for which the BLM manages the public lands. While all comments that the BLM received are important, this final rule does not respond to those that are out of scope for the action the BLM is taking. Comments that are out of scope for this rulemaking include those regarding project-specific considerations, state laws and authorities, national energy policies and priorities that do not affect solar and wind energy or the public lands, engaging in specific partnerships, general statements of support or opposition to the rule which do not require a detailed response, and availability and distribution of financial resources, among others that are not specific to the BLM's administration of solar and wind energy development applications and rights-of-way and rate-setting.

The BLM will continue to engage with the public and Tribal, Federal, State, and local government partners on the BLM's management of its public lands, as appropriate. Subsequent

actions that the BLM may take will be subject to the policies, laws, and regulations in place at that time, including those for consultation, environmental review, and entering into agreements or partnerships with others.

IV. Section-by-Section Discussion

43 CFR Part 2800 Rights-of-Way Authorized Under FLPMA

Part 2800 of the CFR describes requirements for rights-of-way issued under Title V of FLPMA. This final rule revises the per acre rent and per MWh capacity fee schedules for solar and wind energy development rights-of-way. It updates the application process for public lands and focuses the BLM's competitive processes to places where there is competitive interest. This final rule also includes the principles for prioritizing solar and wind energy applications, establishing criteria for a "complete application," and corrects or clarifies existing regulations.

The BLM conducted extensive public and Tribal outreach on this rule both prior to its publication as a proposed rule and during the public comment period on the proposed rule. Prior to the publication of the proposed rule, the BLM notified Tribes in August 2021 of its upcoming rule and requested any comments and concerns that Tribes may have on such a rule. The BLM then held three public listening sessions in September 2021 on its potential use of the Energy Act of 2020 authority. The BLM also requested and received feedback from the public on preferred alternatives to use of the Energy Act of 2020 authority in its Manual 2806.60, "Rent," which was later published in May 2022 after three public listening sessions and public review and comment on the draft Manual. The BLM published its proposed rule in June 2023, receiving nearly 900 comments after holding three virtual public meetings. The BLM also sent Tribes another notice

about the rulemaking in July 2023, requesting Tribal input and whether there was any interest to consult on the rule. No Tribes responded with interest to consult on the BLM's rulemaking.

Section 2801.5 What Acronyms and terms are used in the regulations in this part?

The existing § 2801.5 contains the acronyms and defines the terms used in this part of the regulations. The BLM proposed to remove, revise, and add acronyms and terms to this section. Section 2801.5 of this final rule has some revisions in response to comments that are discussed further in this section for each respective revision.

Under this section, several commenters recommended the BLM engage relevant stakeholders and industry experts to ensure definitions accurately reflect industry practices and standards. The BLM regularly engages, and will continue to engage with, industry; Tribal, Federal, State and local authorities; and resource experts to supplement its knowledge about renewable energy and market advancements. The BLM sought public comment on the proposed rule and will seek public comment on any changes to its acronyms and terms in future rulemakings.

The BLM received comments requesting the BLM consider the full life cycle of materials, energy inputs and technology types, and resource and land use footprints, and suggesting that labeling all wind and solar energy as renewable energy is misleading. The BLM agrees that it should analyze land use footprints and resource impacts of proposed projects on public lands. However, analyzing the full lifecycle of materials, energy inputs, and technology types are addressed by other parts of the Federal government where such analysis is within their expertise. The BLM also believes that for purposes of this final rule, all solar and wind energy

generation projects are renewable energy development projects insofar as they use a natural resource on public lands that is not depleted to produce power .

One comment suggested that the BLM should include a definition for "current land use plan" to mean "a document developed through a formal planning process to guide the management of activities and uses of public lands that has been approved, amended, or recertified within the past ten years." The BLM has separate rules governing its land use planning processes found at 43 CFR Chapter V, Subchapter A, that provides definitions related to the BLM's land use planning. Accordingly, the BLM did not make changes in response to that comment since they are out of scope for this rule under 43 CFR Part 2800.

Commenters suggested that the term "economic hardship" under 43 U.S.C. § 3003 should be defined in this final rule and that the BLM should require proof of economic hardship for rent and fee reductions. The BLM does not define economic hardship in this rule as suggested. Each instance of hardship is unique to a holder and their circumstances and will be assessed on a case-by-case basis. The BLM does not intend to define hardship (economically, financially, or otherwise) so as not to unintentionally preclude reasonable requests to consider hardship.

Commenters stated that the proposed rule uses unclear language and is inconsistent with underlying resource management plans, agency guidance, and regulatory frameworks, and requested the BLM use more specific language such as pastureland, rangeland, habitat, or other terminology to denote the uses of the landscape. The BLM disagrees with the commenters' suggestion that the proposed rule uses unclear language and that the rule should include other definitions in this final rule. The BLM's use of "pastureland rents" comes from the name of the survey data used as the basis in determining the acreage rent in this final rule: The NASS Survey

of Pastureland Rents. This is a newer source of data from NASS that was not available in the original 2012 Western Solar Plan or when the BLM promulgated its 2016 rule for solar and wind energy and has not yet carried through to other guidance materials from the BLM. It is appropriate for the BLM to use this terminology in describing the data used and its source in the regulations. Future BLM guidance and actions would include this terminology as appropriate.

Commenters requested the BLM settle on one standard term ("preferred renewable energy development areas") for the preferred renewable energy project locations to avoid conflicts with other resources and uses. Commenters also suggested that the definitions for "variance areas" and "exclusion areas" should be added to the rule. The BLM understands the interest in defining such terms and has already done so in its land use planning efforts, such as the ongoing Solar Energy PEIS effort to update the 2012 Western Solar Plan. The BLM believes these terms are best identified and defined as part of the land use planning process and is not making any changes to this rule due to comments.

Paragraph (a) of this final rule provides for the acronyms and paragraph (b) provides for the terms used in this part. The final rule would remove, revise and add certain terms to the BLM's acronyms and definitions found in part 2800.

This final rule adds the acronym "FLPMA" to paragraph (a) meaning the Federal Land Policy and Management Act of 1976, as amended (43 U.S.C. 1701 *et seq*.). This acronym replaces the term "Act" from paragraph (b), providing clarity as to which act the BLM is referencing.

The BLM received no substantive comments on replacing the term "Act" with "FLPMA," and therefore this final rule makes no changes to the proposed rule.

This final rule removes definitions of "Megawatt (MW) capacity fee," "Net capacity factor," "Megawatt hour (MWh) price," "Rate of return," and "Hours per year." The BLM no longer charges a megawatt capacity fee based on solar and wind energy generation facility nameplate capacity; definitions related to the nameplate capacity fee are removed. The BLM did not make changes to the definitions in the final rule.

Some commenters noted inconsistencies related to the terms "Rate of Return" and "Hours per year." Commenters pointed out that the proposed rule stated that these terms would be removed from § 2801.5(b), noting the paragraph numbering for the *Federal Register* instructions were confusing whether the terms were removed or not. The BLM agrees with commenters and has revised the *Federal Register* instructions, removing the proposed instruction number vi, "removing paragraphs (1) and (2) in the term "Megawatt rate" and redesignating paragraphs (3) and (4) as paragraphs (1) and (2). There are no paragraphs for the revised term, and removing the instructions is consistent with the proposed definition. The BLM did not make any other changes to this definition in the final rule.

This final rule adds the term "Capacity fee" to mean the fee based on the amount of electricity produced from solar or wind energy resources on the public lands. This is consistent with the BLM's change implementing a capacity fee that is based on electricity production. There were no substantive comments on the term, and the BLM did not make changes to this definition in the final rule.

The BLM includes in this final rule a new term "Domestic Content reduction" to define the circumstances in which a holder meets the domestic content criteria and thus qualifies for a fee reduction. This final rule includes changes to the term for "domestic content" to mean an

item or product that qualifies for the Buy America preference as set forth in Section 70914 of the Build America, Buy American (BABA) Act, Public Law 117–58, 135 Stat. 429, §§ 70901–70927 (Nov. 15, 2021), and implementing guidance at 2 CFR Part 184. The final rule modifies the definition for "domestic content" from the definition of "domestic end product," as that term is used in Section 52.225-1 of the Federal Acquisition Regulations (FAR) (48 CFR 52.225-1) in the proposed rule, to the criteria for "domestic content preference" provided in the BABA Act and 2 CFR Part 184. As described below, the qualifying definition in this final rule offers clarity and consistency among federal programs regarding what constitutes domestic content and therefore is appropriate to apply to determine when a holder may obtain a fee reduction as identified under § 2806.52(b).

The BLM has determined that offering a Domestic Content reduction will further promote the greatest use of solar and wind resources because it will support the development of secure, reliable domestic supply chains while also reducing economic hardships for developers. As discussed in the preamble to the proposed rule, uncertainty in global supply chain dynamics, as seen in recent years, can delay deployment of solar and wind energy development projects on public lands (88 FR 39726, 39740-39742). By offsetting some of the costs of domestically sourced parts and materials, the Domestic Content reduction will insulate developers from global supply chain shocks of all kinds by reducing the economic dependence of developers on global supply chains and will also support the efforts of domestic suppliers. In this way, the proposed Domestic Content reduction supports the transition to more reliable domestic supply chains that will, in turn, increase interest in developing solar and wind energy projects throughout the

country, including on public lands (43 U.S.C. § 3003(b)(1)(C)), and thereby would promote the development of solar and wind energy resources on public lands (43 U.S.C. § 3003(b)(2)).

Similar to the BLM's use in the proposed rule of a definition for Buy American based on section 52.225-1(b) of the FAR, this final rule's use of the term "domestic content," following the BABA Act and 2 CFR Part 184, identifies the components of projects through categories—iron or steel products, manufactured products, or construction material—that must be produced or manufactured in the United States in order to qualify for the Domestic Content reduction. The BABA Act applies to Federal financial assistance funds for "infrastructure projects," which require the use of material produced in the United States. The Office of Management and Budget (OMB) published its final guidance implementing the BABA Act on August 23, 2023, under 2 CFR Part 184. Generally, under 2 CFR 184.4(e), a "domestic content" preference would apply to three separate product categories: (i) iron or steel products; (ii) manufactured products; and (iii) construction materials. The OMB's guidance defines each of these categories and makes clear how a proponent satisfies the categorical requirements to demonstrate that the components of an infrastructure project meet the domestic content standards. This final rule uses the term "domestic content" as a catch-all term to refer to items for which the holder might satisfy the Domestic Content reduction based on the definitions established 2 CFR Part 184.

Some commenters suggested that the proposed Buy American definition should be revised to reflect eligibility for the reduction to mimic the guidance published by the Treasury Department and Internal Revenue Service for the domestic content bonus credit from section 13701 of the Inflation Reduction Act (IRA), 117 Pub. L. 169, 136 Stat. 1818 (Aug. 16, 2022). Other commenters requested the BLM utilize a domestic content definition that incentivizes the

use of domestically manufactured core solar components, as laid out in Section 13502 of the Inflation Reduction Act. Commenters also urged the BLM to refine its approach and apply more robust origin standards to its domestic content proposal.

The BLM has considered the various comments suggesting different definitions for what constitutes American-made products for the purposes of this reduction. In response to this public input, the BLM has changed from the FAR definition to the BABA Act (and implementing guidance at 2 CFR Part 184) definition for the domestic content preference. The BLM is aware that the Treasury Department and Internal Revenue Service have issued guidance about the domestic content bonus under the Inflation Reduction Act for clean energy projects and facilities that meet American manufacturing and sourcing requirements. However, that guidance describes an intent to propose regulations that have not yet been finalized. This final rule's definition for domestic content aligns with definitions in other Federal programs with oversight over domestic products and content. This approach will promote consistency among these Federal programs, reducing the potential for unintended consequences resulting from conflicting definitions. As noted above, the BABA Act definition focuses on construction materials and components for infrastructure projects and is closely aligned with the type of projects covered in this final rule.

The final rule revises the term "grant" to reflect that solar or wind energy leases are not covered under the definition. The change provides clarity for where the BLM will issue a solar or wind energy grant and where a solar or wind energy lease will be issued.

Commenters suggested the term "lease" is unnecessary and to use "grants" instead, as the difference between a lease and a grant under the proposed rule is the location of a right-of-way either inside or outside a DLA. As identified in the BLM's 2012 Western Solar Plan, leases will

be issued in areas designated for leasing under the relevant land use plan. The BLM disagrees with these comments and retains the distinction between solar and wind energy grants and leases in this final rule based on location of their issuance. The BLM did not make any change to this definition in the final rule.

This final rule adds the term "Capacity fee" to mean the fee based on the amount of electricity produced from solar or wind energy resources on the public lands. This is consistent with the BLM's change implementing a capacity fee that is based on electricity production. There were no substantive comments on the term, and the BLM did not make changes to this definition in the final rule.

The final rule revises the definition of the term "Megawatt hour (MWh) rate" to mean the five-calendar-year average of the annual weighted average wholesale prices per MWh for major trading hubs serving the 11 western states of the continental United States. This revision is consistent with the BLM's change to implement a capacity fee for solar and wind energy development projects.

Some commenters were unclear whether the BLM had revised the definition of "Megawatt hour (MWh) rate" in the existing regulations, as § 2801.5(b) currently does not define that term. Commenters presumed that the BLM proposes to revise the existing definition of "Megawatt rate." The BLM understands the confusion raised by these comments. The BLM revises the term "Megawatt rate" to "Megawatt hour (MWh) rate" in this final rule, consistent with the change to implement a capacity fee for solar and wind energy development projects. The BLM did not make any other changes to this definition in the final rule.

This final rule revises the term "Reasonable costs" to be consistent with the rule change replacing the words "the Act" with the acronym "FLPMA." There were no substantive comments on the term, and the BLM did not make changes to this definition in the final rule.

"Renewable Energy Coordination Office (RECO)" is added in this final rule to mean one of the National, State, district, or field offices established by the Secretary under 43 U.S.C. 3002(a) that is responsible for implementing a program to improve Federal permitting coordination with respect to eligible projects on covered land and such other activities as the Secretary determines necessary. There were no substantive comments on the term, and the BLM did not make changes to this definition in the final rule.

This final rule includes the new term "solar or wind energy development" to mean the use of public lands to generate electricity from solar or wind energy resources on public lands. This definition clarifies that the term "energy development" refers to uses of public lands that directly involve the generation of electricity on public lands. This definition clarifies which right-of-way grants and leases are subject to the conditions in Section 50265(b)(1) of the IRA, which apply to "a right-of-way for wind or solar energy development on Federal land."

Commenters suggested revising the definition of "solar or wind energy development" to include language from the BLM's recent Instruction Memorandum 2023-036, *Inflation Reduction Act Conditions for Issuing Rights-of-Way for Solar or Wind Energy Development* (April 23, 2023), according to which solar or wind energy development "does not include site-testing, communication sites, transmission lines, gen-tie lines, pipelines, roads, installation of batteries and other energy storage systems, or other uses that might indirectly support energy production or transmission." The BLM does not agree that adding additional language to the

definition is necessary for this final rule. This rule and the BLM's policies were written to complement each other in how the BLM administers applications and rights-of-way for such projects. The BLM did not make a change to this definition in the final rule.

This final rule adds "Solar and wind energy lease" to mean any right-of-way issued under Title V of FLPMA within an area identified in a BLM land use plan as a DLA. Any right-of-way not issued within an area identified as a DLA would be a grant. The BLM received comments on this term, which are discussed with regard to the definition of "grant" in this final rule. The BLM did not make changes to this definition in the final rule.

Section 2801.6 Scope

Section 2801.6 describes the scope of 43 CFR Part 2800's applicability. Paragraph (a)(1) of this final rule includes the additional language "or leases" describing that this part applies to both authorization types: grants and leases.

A comment requested the following language be added to § 2801.6 Scope: "Applications for transportation or utility right-of-way crossing conservation system units, national recreation areas, or national conservation areas in Alaska are subject to the provisions of Title XI of the Alaska National Interest Lands Conservation Act and 43 CFR Part 36."

This rule focuses on the BLM's generally applicable process for administering applications and rights-of-way for solar and wind energy development projects on the public lands. It does not modify or amend other applicable statutory or regulatory requirements, and the BLM would comply with all such requirements during the process set forth in this rule. The BLM made no changes to this section in the final rule based upon public comments.

Section 2801.9 When do I need a grant or lease?

Section 2801.9 explains when a grant or lease is required for systems or facilities located on public lands. Paragraph (d) of this final rule extends the term for solar or wind energy development authorizations up to 50 years, and authorizations for other uses that support solar or wind energy development, to up to 50 years, and make other technical changes. Paragraph (d)(3) provides that solar or wind energy development facilities authorized with a grant or lease may be issued for up to 50 years (plus initial partial year of issuance). Paragraph (d)(4) provides that energy storage facilities that are authorized separate from an energy generation facility are authorized with a right-of-way grant for up to 50 years. Paragraph (d)(6) provides that electric transmission lines with a capacity of 100 kV or more are authorized with a right-of-way grant for up to 50 years. The BLM did not make a change to this section of the final rule.

Commenters raised concerns with a 50-year authorization term for large development projects because, they suggested, the longer the public lands are occupied by a wind or solar project the longer it will likely take for those lands to fully recover after removing the project. Commenters also suggested that the longer-term authorization may unreasonably occupy the public lands with a solar or wind energy development when preferable or newer energy technology could be deployed there.

The BLM disagrees with comments that assert the increase of the maximum term of an authorization from 30 years to 50 years is inappropriate because preferable technology may be desired at that location in the future. The BLM acknowledges that recovery of impacts might be greater for a 50-year right-of-way term. However, the BLM will analyze the environmental impacts of each proposed project, including the end of project life activities such as reclamation and restoration of public lands, under NEPA, and will consider the appropriate term for each

proposed right-of-way, before deciding whether to approve for deny a proposed right-of-way for energy development. Additionally, BLM notes that most of the ground-disturbing impacts of solar or wind development come during the construction phase, so the environmental effects of a 50-year authorization are therefore likely to be similar to the effects of a 30-year authorization with respect to recovery. Any such impacts, however, will be considered on a case-by-case basis, in compliance with NEPA, when the BLM evaluates each proposed project. Through this process, the BLM will consider the reasonably foreseeable use of public lands, including the technology proposed by an applicant and the environmental consequences of that use, when deciding whether and for what duration to authorize solar or wind energy development on the public lands.

Some commenters argued against increasing the maximum term length for a right-of-way and expressed concerns about the economic and environmental impacts and the lifespan of energy generation equipment. Commenters suggested that a longer term to an authorization may not be appropriate due to the shorter lifespans of solar panels and wind turbines (30 years for solar and 20-25 years for wind), and that a shorter initial term, like the current 30-year term, instead of 50 years may be more suitable.

The BLM understands the concerns raised by commenters regarding the proposal to increase the maximum term length for solar and wind energy development authorizations. In the BLM's experience, the lifespan of solar and wind energy projects has been increasing over time as the technologies advance. When the BLM last updated its rules for solar and wind energy in 2016, the lifespan of a solar or wind project was approximately 20 years. The 30-year term was appropriate for such a length, considering the amount of time necessary to construct a project and

then the expected time to decommission and reclaim and restore the public lands during the authorization term. With increasing lifespans of solar and wind equipment, a longer-term right-of-way is appropriate. See recent Berkeley National Laboratory, *Results from a Survey of U.S. Wind Industry Professionals*,[4] and the Department of Energy's, *Photovoltaics End-of-Life Action Plan*,[5] for a discussion of wind and solar energy project lifespans.

However, the BLM has made changes to other parts of the rule to address the commenters' concerns about dedicating public lands for up to fifty years to certain projects or uses that, over time, may become less efficient, see a significant decrease in production, or become entirely inactive. These changes also address concerns about public lands being used unlawfully for purposes other than those identified in the ROW grant (e.g., a former solar or wind generating site being used for equipment storage). In particular, the changes impose conditions aimed at ensuring diligent operations on the public lands, see § 2805.12(c)(8). These are in addition to the BLM's existing diligent development requirements under § 2805.12(c)(7).

Commenters suggested that the BLM evaluate changes to the environment or technology during the term of an authorization after it has been approved. The BLM did not adopt this suggestion. Once the BLM issues a final decision, the BLM would only re-address technological changes or environmental impacts during the term of an authorization if the BLM undertakes a new decision-making process, such as in response to a ROW holder's proposed change in technology. The BLM's original analysis for a proposed facility considers the environmental effects of the facility and technology proposed by the applicant for the term of the proposed

[4] https://emp.lbl.gov/publications/benchmarking-anticipated-wind-project
[5] https://www.energy.gov/sites/default/files/2022-03/Solar-Energy-Technologies-Office-PV-End-of-Life-Action-Plan_0.pdf

authorization, informing the BLM's decision to deny, approve, or approve with modification the proposed project. Any subsequent changes in equipment used at the site that would result in changes to environmental impacts that may occur after the BLM issues its decision, would be analyzed at the time the BLM considers issuing a new decision, based on the relevant information available at that time. The BLM may complete a new decision-making process to adjust the terms and conditions of the authorization under existing § 2805.15(e) under certain circumstances, such as a change to legislation or regulations, when necessary to protect public safety, an environmental change (e.g., new threatened or endangered species listing), or if proposed changes to technology may result in additional or different environmental impacts.

One comment requested clarification on how § 2801.9 may be modified based on outcomes of the ongoing update to the Western Solar Plan. The analysis of environmental impacts of energy development and decisions made in updating the Western Solar Plan do not affect this final rule, which that provides BLM procedures and requirements when administering applications and authorizations for solar and wind energy development projects.

Some comments suggested that proposed energy storage facilities and proposed energy generation facilities should be reviewed in separate NEPA documents due to differences in fire risk and toxicity concerns. While it is beyond the scope of this rulemaking to speculate as to how the BLM will comply with NEPA when evaluating individual projects, the BLM agrees that energy storage facilities may have environmental impacts that are distinct from those posed by energy generation facilities. Nevertheless, the BLM can prepare a single NEPA document to evaluate impacts from energy generation facilities and energy storage facilities and may find it appropriate to do so in certain circumstances.

Subpart 2802 – Lands available for FLPMA Grants or Leases

The BLM proposed to revise the title of subpart 2802 to include "or leases" to clarify for readers that public lands are available for both grants and leases, consistent with other revisions in this rule regarding leases. No comments were received on this, and the BLM did not make changes to the final rule.

Section 2802.11 How does the BLM designate right-of-way corridors and DLAs?

Section 2802.11 explains how the BLM designates right-of-way corridors and DLAs through its land use planning process. This section includes a non-exhaustive list of factors the BLM could consider when designating such areas under its land use planning process described in 43 CFR part 1600. Other technical changes in § 2802.11(b) improve readability and consistency between the BLM's regulatory authority under part 2800 and its statutory authority under FLPMA. The BLM did make changes to this section of the final rule.

Paragraph (b)(1) is unchanged from the proposed rule and includes Tribal land use plans that BLM reviews for consistency when it is developing, amending, or revising a land use plan in accordance with Section 202(c)(9) of FLPMA (43 USC 1712(c)(9)).

Paragraphs (b)(10) and (b)(11) add criteria that the BLM may consider when designating new leasing areas for solar and wind energy. Paragraph (b)(10) adds "access to electric transmission," and paragraph (b)(11) provides for consideration of relatively large areas where energy development is feasible and there is a low potential for conflict due to environmental, cultural, and other relevant criteria, including assessing the demand for new or expanded areas; applying environmental, cultural, and other screening criteria; and analyzing proposed areas through the land use planning process described in part 1600.

The BLM received comments about whether the BLM's proposal to carry forward three of the four criteria from the 2012 Western Solar Plan is consistent with other BLM planning actions. The BLM carried these three criteria forward from the 2012 Western Solar Plan, which is consistent with other BLM plans identifying solar and wind energy development areas.

Some commenters suggested that the BLM redesignate proposed paragraph (b)(11) as paragraph (b) and redesignate existing paragraphs (b)-(d) as newly designated paragraphs (c)-(e). The BLM did not change the rule due to this comment. Reorganizing the paragraphs as suggested would be confusing to a reader as considerations for solar energy would no longer be located together in one subparagraph. The BLM did revise paragraph (b)(11) to clarify that the factors BLM considers include "whether there are areas" consistent with revisions under paragraph (b).

One comment requested that wording be amended to "clarify that BLM may require sharing a gen-tie right of way subject to reasonable terms." The term "gen-tie" refers to a generation interconnect transmission line that connects the original source electric generation (for the purposes of this rule, a wind or solar energy development) to the transmission system. These gen-tie lines are typically less than five miles long and require a right-of-way grant if they cross public lands. The BLM retains authority under 43 CFR § 2805.15(b) to allow or not allow such common use of the right-of-way.

Commenters suggested that the BLM alter the language of proposed § 2802.11(b), which identifies factors or criteria that the BLM may consider when designating an area of public land as a right-of-way corridor or a DLA. Some commenters recommended replacing the proposed term "may" with "must." Other commenters suggested expressly incorporating all of the

considerations listed in 43 U.S.C. 1712(c), which governs criteria for consideration by BLM when it prepares land use plans, to this section. Other commenters suggested that the BLM add transmission and electric infrastructure to the list of criteria or factors. Finally, some commenters agreed with the language in the proposed rule, which provides a non-exclusive list of factors or criteria that the BLM may consider when designating a corridor or a DLA.

After considering comments on this section, the BLM did make some changes to this paragraph in the final rule. While §2802.11(b) provides examples of criteria that the BLM may consider, some of the listed criteria might not be relevant in all cases, and the BLM may consider additional factors or criteria as appropriate. Further, the BLM's land use planning regulations, 43 CFR 1600, provide additional direction for complying with the requirements of Section 202 of FLPMA, 43 U.S.C. 1712. The BLM did not add transmission and electric infrastructure to the list of criteria or factors because the proposed rule already included "access to electric transmission," which is retained as a criterion or factor in the final rule. However, the BLM revised paragraph (b) to replace "factors the BLM may consider include, but are not limited to, the following" to read as "the BLM may consider various factors, including" to clarify what the BLM considers when designating such areas.

Commenters suggested that adding three criteria to a list of other criteria for the BLM to consider may create confusion. Some commenters supported the BLM adding paragraphs (b)(10) and (b)(11) to provide more detail of what and how the BLM considers when designating new leasing areas. Other commenters requested the BLM evaluate criteria for designating exclusion areas in addition to the criteria for designating DLAs and right-of-way corridors. The BLM believes that adding the three additional criteria for consideration when designated corridors and

leasing areas is appropriate and provides for transparency when the BLM begins its land use planning processes to designate leasing areas. The BLM does not agree that exclusion criteria are appropriate when identifying DLAs. However, paragraph (d) of the existing regulations provides broad discretion for the BLM to identify areas where the BLM will not allow rights-of-way, which may include criteria to identify exclusion areas during the land use planning process. During the land use planning process, the BLM engages Federal, Tribal, State, and local government partners and the public to inform and clarify the factors analyzed when considering whether to designate exclusion areas. Including these criteria in the final rule will minimize the confusion that may arise in the future.

Some comments requested that the final rule include additional criteria for designating exclusion and avoidance or variance areas. Commenters suggested that including these criteria would encourage the appropriate designation of such areas and thus focus on processing right-of-way applications only in areas where development is best suited. The BLM disagrees with commenters that additional criteria for designating exclusion and avoidance or variance areas should be included in the final rule. Such criteria do not need to be included in the final rule and are better suited for policy (e.g., instruction memoranda), which can be implemented consistent with this rule and other applicable regulatory authority and environmental analysis, while also providing appropriate flexibility in the process. Further, exclusion criteria are based on the environmental impacts of a program on the public lands, which are identified through a NEPA analysis, such as the ongoing Western Solar PEIS that is updating the 2012 Western Solar Plan. Lastly, this final rule updates its prioritization principles under 2804.35, which were not in place in 2012 with the Western Solar Plan. The BLM believes that with the robust public engagement,

prioritization principles, and other preliminary application review meetings, holding a variance process is not necessary in administering applications for solar and wind energy development.

Section 2803.10 Who may hold a grant or lease?

Section 2803.10 provides the criteria for who may hold a grant or lease. In this final rule, the BLM clarifies that a holder who is of legal age and authorized to do business in one State must also meet this requirement in each other State in which the right-of-way grant they seek is located. No comments were received on this section, and the BLM did not make changes to this section of the final rule.

Section 2803.12 What happens to my grant if I die?

In the notice of proposed rulemaking for this rule, the BLM proposed to add new paragraph (a) and redesignate existing paragraphs (a) and (b) as paragraphs (b) and (c). This final rule does not carry forward those proposed revisions because another final rule included revisions that addressed those concerns. The BLM's final rule "Update of the Communications Uses Program, Cost Recovery Fee Schedules, and Section 512 of FLPMA for Rights-of-Way," (XX FR XXXXX) [date], updated § 2803.12 to remove reference to applications in the section title and paragraph (a).

This final rule retitles this section and revises paragraphs (a) and (b) to include "or lease" clarifying that this section applies to both grants and leases.

Paragraph (b) of this final rule replaces the word "distributee" with "receiver" to improve clarity to readers that when the BLM distributes a grant or lease, the instrument would be received by the holder. This final rule also includes the provision that unqualified receivers of a right-of-way must comply with all terms, conditions, and stipulations.

One comment suggested that the BLM clarify paragraph (b) to state that distribution will take place under state law in the state where the grant or lease is located. Including this suggested change could be inaccurate and potentially unenforceable. The BLM's rules should not dictate distribution of a lease as an inheritable interest in all instances.

Section 2804.12 What must I do when submitting my application?

Section 2804.12 explains what an applicant must do when submitting a right-of-way application. The BLM proposed changes to paragraphs (c) and proposed to add paragraphs (f) and (j). The BLM did make a change to this section of the final rule.

Paragraph (c) provides for additional requirements for solar and wind energy development or short-term rights-of-way. Paragraph (c)(1) requires payment of an application filing fee for solar and wind energy development and short-term applications as an initial payment toward cost recovery payments. The BLM will refund the balance of the application filing fee if it exceeds the processing costs. Paragraph (c)(1) is revised for readability and now reads "payment toward cost recovery" instead of "payment towards cost recovery." Paragraph (c)(2) requires payment of additional reasonable costs in addition to application filing fees. See existing § 2804.14 of this part for further information on reasonable costs in processing an application. Payment of category 6 cost recovery fees—which are based on full costs and are collected if the BLM has determined that processing efforts will take more than 64 hours to complete—may be reduced by the application filing fee that is paid when submitting an application.

Some comments requested lower fees for application submittal. Another comment suggested that the BLM keep the application fee until all "reasonable costs" are paid before any

refund is given. Under the existing regulations, application filing fees are a payment of reasonable costs for the United States to process an application and are intended to discourage applicants from unnecessarily applying for more land than is reasonable for a solar or wind energy development. As updated by this final rule, these application filing fees continue to be a payment of reasonable costs and may now clearly be applied to the processing fees, such as through a cost recovery agreement. Any overpayment of these costs may be reimbursed to the applicant or carried to cover the inspection and monitoring of the right-of-way, if authorized. Entering into a cost recovery agreement requires action by the BLM and applicant to complete, including the prioritization of an application under § 2804.35 by the BLM and payment of reasonable costs identified by the BLM in a cost recovery agreement.

Multiple comments suggested the BLM issue a cost recovery agreement within a certain timeframe, such as 30 days of receiving the required information. The BLM agrees that it is important for the BLM to be responsive to applicants who have provided the required information under this section. The proposed rule added paragraph (j) providing that an application is complete when an applicant submits the required information under this section. Upon receiving a complete application, the BLM would determine what cost recovery amounts would be necessary, and whether that should be under a cost recovery agreement. See § 2804.14 for further information. The BLM would notify an applicant within 30 days pursuant to § 2804.25(d) whether processing their application will take longer than 60 calendar days and what the expected processing timeframe is for the application. Section 2804.19 of the BLM's right-of-way regulations provides that the BLM and applicant work together to establish and issue the cost recovery agreement; the length of that process can vary widely based on a number of

variables including project complexity, analysis of the needs from a cost recovery agreement, and needed inputs from the developer. As noted under the previous comment response, entering into a cost recovery agreement requires action by the BLM and applicant to complete, including prioritization under § 2804.35 by the BLM and payment of reasonable costs identified by the BLM in a cost recovery agreement.

Section 2804.12(f) of this final rule clarifies that the BLM may require additional information at any time while processing an application. Additional information may be necessary, such as environmental resource data. The BLM will issue a deficiency notice pursuant to existing § 2804.25(c) to inform applicants of additional information requirements.

Comments requested that the BLM provide clear application requirements and limit the BLM's ability to request additional information beyond those requirements. The BLM believes that the existing rules clearly state what is required for applications under 2804.10, *What Should I do before I file my application?*; in § 2804.11, *Where do I file my grant application?*; and as updated by this final rule, § 2804.12, *What must I do when submitting my application?* Paragraph (f) of this final rule provides that BLM may request additional information while processing an application. Additional information may be requested under 2804.25(c) after an application is determined to be complete pursuant to added paragraph (j) of this final rule.

Paragraph (j) describes that a complete application meets or addresses the requirements of § 2804.12, as appropriate for the application submitted. Some comments asked the BLM to clarify the definition of "complete application" in paragraph (j). The BLM believes that new paragraph (j) clearly describes what a complete application is. Upon satisfying the requirements of this section, the BLM will provide the applicant notice in writing that the application is complete.

Some commenters suggested that the BLM provide a determination of application completeness within specified timeframes to promote a timelier application process. The BLM agrees that it is important to remain diligent in processing an application. However, the BLM did not propose to implement any timeframes for determining an application is complete as this section of the rules applies to applications for all rights-of-way, not just solar or wind energy applications. Reasonable expectations for timely and diligent application requirements will vary depending on the complexity of processing a certain type of system or use on the public lands.

Section 2804.14 What is the processing fee for a grant application?

The BLM recently published its final rule "Update of the Communications Uses Program, Cost Recovery Fee Schedules, and Section 512 of FLPMA for Rights-of-Way" (XX FR XXXXX) [date]. In that final rule, the BLM updated its address within this section. The proposed updates that the BLM included in this rulemaking are no longer necessary. No comments were received, and the BLM did not make a change to this section in this final rule.

Section 2804.22 How will the availability of funds affect the timing of the BLM's processing?

Section 2804.22 of this final rule clarifies how the availability of funds may affect the BLM's schedule for processing an application. Paragraph (a) clarifies that when the BLM is processing an application, it will not continue to process the application until funds become available or the applicant elects to pay full actual costs under § 2804.14(f). Paragraph (b) provides that the BLM may deny an application after 90 days if it has requested reasonable costs for processing an application and the proponent has failed to provide funds for reimbursement. The BLM did not change this section of the final rule.

One commenter supported denying applications for which fees had not been paid. Such a procedure, the commenter suggested, would disincentivize applicants from submitting applications that they do not intend to diligently process. While the BLM will not deny an application without cause, as described in more detail under § 2804.26, the BLM agrees that failure to diligently pursue an application, including unfunded application cost recovery agreements, and incomplete applications, among other reasons are good cause for denying an application. Denying applications for these reasons would deter applicants from submitting applications for projects that they do not intend to diligently pursue. Paragraph (c) of this final rule provides that funds paid towards the cost recovery agreement for a project may not be refundable. Such funds would be those identified in the cost recovery agreement for hiring additional staff or contractors and agreed to by the applicant or right-of-way holder.

Some comments supported the idea of cost recovery agreements that would allow the BLM to hire additional staff or contractors to aid in application processing and reduce processing times. This requirement helps ensure that there is available funding to the United States for reasonable costs of the government, including those BLM hiring and contracting decisions made to support processing applications.

Section 2804.23 What costs am I responsible for when the BLM decides to use a competitive process for my application?

Section 2804.23 of the final rule describes what costs an applicant is responsible for when the BLM decides to use a competitive process. Paragraph (b) requires, for cost recovery processing categories one through four, payment of cost recovery processing fees as if the other

applications had not been filed. Paragraph (c) clarifies who is responsible for processing costs within processing category six.

The BLM did not make a change to this section of the final rule.

One comment suggested the language be changed to read, "What costs am I responsible for *if* the BLM decides to use a competitive process for my application?" The BLM considered this change in title to the section and believes that the proposed naming of this section is clear with respect to what costs the applicant will be responsible for when the BLM determines it will use a competitive process.

Section 2804.25 How will the BLM process my application?

In the final rule, the BLM revised § 2804.25(c) to add that, if an applicant fails to comply with a deficiency notice under this section, the BLM may deny the application. To ensure that developers proceed diligently after entering into a cost recovery agreement, § 2804.25(c)(1) requires applicants to "commence any required resource surveys or inventories within one year of the request date, unless otherwise specified by the BLM." If the applicant fails to comply with a deficiency notice under that provision, the BLM may deny the application. See § 2804.26(a)(9). To clarify that the BLM retains the discretion to deny an application where the applicant does not proceed diligently, the final rule adds to § 2804.25(c): "Failure to meet requirements under this section may result in the BLM denying your application pursuant to § 2804.26."

This added provision clarifies that the BLM retains the discretion to deny an application where the applicant does not proceed diligently. This change is consistent with changes made to § 2809.10(e) regarding when the BLM will no longer hold a competitive process. Together these

amendments give the industry the certainty it needs to proceed with projects while retaining the BLM's discretion to deny an application or offer lands competitively if the applicant does not proceed diligently. In that way, these amendments balance the BLM's obligations to incentivize renewable energy development on public lands and to recover a fair return for U.S. taxpayers.

In this section, the BLM proposed removing a mandatory public meeting that is unique to solar and wind energy rights-of-way applications and is in addition to other public participation that would occur as part of the BLM's environmental review process. Paragraph (e)(2) describes public meeting requirements for solar or wind energy right-of-way applications. In the final rule, paragraph (e)(2) provides that the BLM may hold a local public meeting if there is no other public meeting or opportunity for early engagement. In other words, the final rule would require the BLM to hold a public meeting, offering the public opportunity to engage early, though the BLM could satisfy this requirement by holding a public scoping meeting or other public meeting that facilitates early engagement by the public.

Commenters suggested that the BLM provide a website of applications and authorizations for interested parties so that they could receive up-to-date information on the applications and authorized projects. The BLM agrees with comments about maintaining a site that is accessible to the public on existing and proposed (i.e., applications for) projects on public lands. The BLM currently maintains an active webpage at https://www.blm.gov/programs/energy-and-minerals/renewable-energy/active-renewable-projects where the public may access the most recent information on applications for solar, wind, and geothermal development projects, gen-tie-lines, upcoming lease sales, and other relevant application and development information about these sites.

Some comments supported the removal of the requirement that BLM hold pre-processing public meetings, noting that solar and wind energy technologies are better known now than they have been previously and that these meetings are unnecessary. The BLM also received comments that did not support removing that requirement. These comments expressed concerns that by removing this public meeting the BLM would be excluding the public and should instead increase outreach to the public in the area affected by these proposed development projects. To address these concerns, the BLM has changed the regulatory text in paragraph (e)(2)(i) to ensure that a public meeting is held if there is no other opportunity for the public's early engagement. The BLM also would retain discretion to hold additional public meetings under § 2804.25(e).

Paragraph (e)(4) is updated to replace "the National Environmental Policy Act (NEPA)" with "NEPA," consistent with the changes in paragraph (e)(2) of this section. The BLM updates the reference in this final rule, consistent with changes that CEQ has made to its regulations, such that 40 CFR Parts 1501 through 1508 are now referred to as 40 CFR Chapter V, Subchapter A.

Paragraph (e)(5) provides that the BLM will determine whether the proposed use complies with applicable Federal laws.

Paragraph (f) addresses the segregation of lands within a right-of-way application. Paragraph (f)(3) now provides that a segregation may be extended when an application is complete and cost recovery has been received.

Some comments suggested that the 2-year segregation limit is appropriate, that the BLM should begin NEPA within 2 years of segregating the lands, and that such limitations should be consistent with the NEPA timeline requirements within the Fiscal Responsibility Act. The BLM

agrees that the agency should be diligent in processing applications, including initiating NEPA. Because separate legal authority and policy guidance applies to NEPA compliance procedures, including applicable timelines to complete the NEPA process, the BLM did not make a change to this paragraph of the final rule in response to these comments.

Some comments suggested additional language should be added to establish timelines and deadlines supporting quick action in processing applications. Section 2804.25(c) in the existing regulations provides specific due diligence requirements for applications. Unless another timeline is specified by the BLM, applicants have one year to complete certain actions, and the BLM may deny an application for failure to comply with the one-year requirement or other specified timeframe for submitting necessary information to the BLM. The BLM believes this timeline is generally adequate to promote the timely processing of applications and permitting of solar and wind development projects and to ensure that developers cannot hold public lands by submitting, but not diligently pursuing, an application, thus precluding other uses of such lands. The BLM did not change the final rule in response to these comments.

The BLM received requests to revise the rule to require automatic segregation once an applicant has filed a complete application and has paid the required application fees and grant extensions past the four-year mark. Changing the method to segregate lands and the timeframes of those segregations is outside the scope of this rule. The BLM did not propose to change the method and timing of segregation, but only to make this paragraph consistent with new provisions in the final rule for complete applications and cost recovery.

Section 2804.26 Under what circumstances may the BLM deny my application?

Section 2804.26 of this final rule explains the circumstances under which the BLM may deny an application.

Paragraph (a)(4), consistent with this final rule replacing the term "the Act" with "FLPMA" discussed under § 2801.5, provides that the BLM may deny your application if issuing the grant would be inconsistent with applicable law or regulation.

Paragraphs (a)(9) and (10) incorporate requirements of this final rule that are discussed elsewhere. Paragraph (a)(9) provides for denying an application if the applicant fails to comply with a deficiency notice within the time specified by the BLM under § 2804.25(c). Paragraph (a)(10) provides that an application may be denied for failing to pay costs, as noted in § 2804.22(b).

As proposed, paragraph (c) is removed in this final rule. Any request for an alternative requirement received after an application has been denied is not a timely request. Requests for an alternative requirement must be timely. See § 2804.40(c) for further information on timely requests.

The BLM received a comment recommending that the BLM add another provision following section (a)(4), suggesting that this new provision address protection of special conservation areas managed by the BLM or other federal or state agencies. The BLM believes that including the suggested change to this section is unnecessary. The BLM's process to deny an application under this section is addressed in the existing regulations at § 2804.26. The BLM's management of special conservation and other sensitive areas is generally determined through the BLM's resource management planning and NEPA processes. The BLM retains broad

authority to deny an application on the basis that it would not be in the public interest, which may also address this concern to deny certain applications.

Section 2804.30 [Removed and Reserved]

Section 2804.30 is removed and reserved in this final rule. No comments were received on this section and the BLM did not make any changes to this section in the final rule. Prior § 2804.30 addressed competitive leasing inside of designated areas. The content of the prior § 2804.30 is now duplicative of this final rule in §§ 2809.13, 2809.14, and 2809.17.

Section 2804.31 [Removed and Reserved]

Section 2804.31 is removed and reserved in this final rule. Prior § 2804.31 addressed competitive process for site testing. This portion of the rule was not used since first put in place in 2016 and is removed. The BLM may still hold competitive processes for site testing if there is a competitive interest or other reasons as identified in § 2809.10 of this final rule.

Some comments supported the removal of competitive processes for site testing grants, and other commenters suggested that the section may be useful in local field office decision making in the future. The BLM agrees that retaining requirements for competitive processes related to solar and wind energy is important. Subpart 2809 of this final rule provides the requirements for solar and wind energy competitive processes, which includes the requirements of this section.

Section 2804.35 Application prioritization for solar and wind energy development rights-of-way.

Section 2804.35 is retitled to "Application prioritization for solar and wind energy development rights-of-way." This section provides for the relative importance of different

criteria that vary from location to location, giving weight to local resource issues and circumstances that are not equally relevant for every application. Additionally, there are practical concerns for the BLM when processing solar and wind energy applications. This section provides that the relevant criteria are to be applied holistically to prioritize applications in a manner that would facilitate environmentally responsible projects and ensure that agency workloads are allocated appropriately. The revised section would also explicitly recognize that the BLM may identify additional criteria in guidance, which may be national in scope or specific to an area.

Paragraph (a) clarifies that the purpose of prioritizing applications is to allocate agency resources to processing applications that have the greatest potential for approval and implementation. The BLM revised this section from the proposed rule to clarify that the BLM's prioritization of an application is not a decision and is not subject to appeal under 43 CFR Part 4.

One commenter asked whether the BLM's prioritization process might hinder development of renewable energy and potentially conflict with national priorities for renewable energy deployment. The BLM is endeavoring to increase the responsible deployment of renewable energy on the public lands consistent with congressional and presidential direction. In addition, the BLM must continue to manage public lands under the principles of multiple use and sustained yield unless otherwise provided by law (43 U.S.C. 1732(a)). The prioritization criteria support national renewable energy goals by helping the BLM to consider applications for the projects that are most likely to succeed and ensure the BLM's continued stewardship of the public lands.

Paragraph (b) identifies criteria that the BLM may consider when prioritizing applications. This section provides discretion to the BLM as to how best to apply the criteria to prioritize processing solar or wind energy generation applications.

Some comments suggested prioritizing applications for projects inside DLAs. Other comments suggested other criteria that should be considered when prioritizing applications, such as the presence of existing leasing agreements and rights-of-way, whether the application complies with all state and federal regulations, the size or location of the project, project features, proximity to transmission, and protection of natural resources.

The BLM believes that these considerations are important, but no changes to the regulatory text are warranted since these considerations were already included in the proposed rule. The six listed criteria in the rule provide flexibility in how the BLM may apply the criteria for applications in the BLM's varied landscapes on which a resource may have different sensitivities in one location as compared to another location. Prioritizing projects based on siting in designated or preferred areas is addressed in paragraph (b)(1). The BLM addressed comments concerning existing leasing agreements or rights-of-way in the BLM's application processing steps in subpart 2804 of these rules. Paragraph (b)(4) addresses commenter suggestions regarding prioritizing applications based on compliance with federal regulation. Paragraphs (b)(2) and (b)(5) address the size or location, project features, proximity to electric transmission, and the protection of natural resources.

Several comments requested clarity on the application of the prioritization criteria, including a description of the relative importance of each criterion. Other commenters also suggested that they believe the BLM should be prohibited from prioritizing applications based on

additional criteria that are not expressly listed in this section of the rule. In the BLM's experience, the relative importance of different criteria may vary from location to location due to resource considerations. Likewise, not all prioritization criteria are equally relevant for every application. The BLM has intentionally not set specific preferences or weights for the criteria it will apply when prioritizing applications. This final rule confirms that the BLM will consider the prioritization criteria holistically when considering applications, and that the BLM may establish additional criteria through local or national policy guidance.

In the final rule, the BLM changed paragraph (b) to refer to "criteria" instead of "factors" as proposed. This change is consistent with the BLM's use of the term "criteria" in paragraph (b)(6).

The first criterion is whether the proposed project is located within an area preferred for such development, such as a DLA. The BLM may reasonably presume that development projects proposed within these areas are more likely to proceed to approval as they pose less severe resource conflicts than other lands.

Some comments suggested that wind energy is disadvantaged since there are no wind energy designated leasing areas or equivalents. The BLM disagrees with these comments. First , the 2016 Desert Renewable Energy Conservation Plan (https://blmsolar.anl.gov/documents/drecp/) designated more than 192,000 acres of preferred development locations for solar, wind, and geothermal energy. Additionally, the criteria are not given specific preferences or weights when compared with one another, and, as such, the BLM would take into account the lack of wind DLAs when prioritizing wind energy development applications.

The second criterion is whether the proposed development avoids adverse impacts to or conflicts with known resources or uses on or adjacent to public lands and includes specific measures designed to further mitigate impacts or conflicts. When submitting an application to the BLM, the applicant must address known potential adverse resource conflicts, including those for sensitive resources and values that are the basis for special designations and protections, as well as potential conflicts with existing uses on or adjacent to the proposed energy generation facility. Under section 2804.12(b)(2), the applicant must also include specific measures to mitigate impacts or conflicts with resources and uses. Including this information is necessary for the BLM to determine that an application is complete. While subsequent consultation, public comment, and environmental review processes may reveal unknown resource or use conflicts, based on previous experience permitting wind and solar projects on public land, the BLM understands that projects with fewer known conflicts are more likely to proceed to approval and successful implementation.

The third criterion is whether the proposed project is in conformance with the governing BLM land use plans. Applications identify whether the proposed project is in conformance with the governing land use plan or would require an amendment or revision to the plan. The BLM may, in its discretion, consider applications for solar or wind energy generation facilities that would require an amendment or a revision to the governing land use plan under part 1600 of these regulations. However, such application could require greater resources to process and could present resource conflicts, which would result in a lower priority.

The fourth criterion is whether the proposed project is consistent with relevant State, local, and Tribal government laws, plans, or priorities. The purpose of this determination is not

to enforce these State, local, or Tribal laws, plans, or priorities, but rather to promote comity and identify projects that are more likely to be successfully approved. In addition, applying this principle helps to ensure that the BLM takes into account the existing resource knowledge and expertise that may be available through State, local, and Tribal plans and priorities. To carry out this prioritization, the BLM may enter into or rely on existing agreements with State, local, or Tribal governments.

Some comments suggested that prioritization of an application should be subject to Tribal consultation. The BLM engages Federally recognized Tribes early in the application process under § 2804.12(b)(4), which allows Tribes to participate in preliminary application review meetings with the BLM and provide early information to the BLM about an application. Additionally, under paragraph (b)(4), the BLM will consider "whether the proposed project is consistent with relevant State, Tribal, and local government laws, plans, or priorities," which may also include consultation with Tribes. Finally, the BLM acknowledges that E.O. 13175 sets forth criteria for when the BLM is required to consult with Tribes, and the BLM is committed to consulting with Tribes whenever such consultation is required under the E.O., without regard to whether that requirement is specifically articulated in this rule.

The fifth criterion is whether the proposed project incorporates the best management practices set forth in the applicable BLM land use plans and other BLM plans and policies. This principle ensures that the BLM takes into account the knowledge and expertise that has gone into formulating these existing plans and policies. Should an application require amending a BLM land use or other plan, it is likely to require more time and effort to process.

The sixth criterion considers any other circumstances or prioritization criteria identified by the BLM in subsequent policy guidance or land use planning for an area.

Paragraph (c) provides that the BLM will prioritize applications, once complete (as described in § 2804.12(j) of this part). The BLM's prioritization may use any available information provided in the application or its Plan of Development, applicant responses to deficiency notices, and information provided to the BLM in public meetings or by other Federal agencies and State, local, or Tribal governments.

Paragraph (d) clarifies the BLM discretion to re-categorize an application's priority at any time. Re-categorizing an application may be based on new information that the BLM has received or on changes the applicant has made to the application. Re-categorizing an application may also be based on the BLM's need to adjust its workload, if circumstances warrant such re-prioritization.

Some comments expressed concern that denying or de-prioritizing an application prior to any final land use designation, such as those which may be made in the ongoing update to the 2012 Western Solar Plan, is inappropriate or pre-decisional. Comments further expressed that pending applications should not be denied before land use designations are made. The BLM is not constrained by ongoing or potential future land use planning processes, but it must manage public lands in conformance with the land use plans currently in effect. Accordingly, the BLM generally will not deny or deprioritize an application based on non-conformance with a future or ongoing land use planning effort. The criteria in the rule refer to consideration of governing land use plans. The BLM would deny or de-prioritize an application pursuant to its broad discretion in considering right-of-way applications based on existing information and existing land use plans.

At the same time, the BLM retains authority to deny an application based on appropriate information even if the project would conform to the applicable land use plan, including, for example, where an application conflicts with current management policies that have not yet been incorporated into a land use plan.

Some comments suggested that the BLM should adopt a first-come, first-served system when processing applications or self-prioritization by an applicant for multiple applications within a single BLM field office. While in practice the BLM often processes applications on a first-come, first-served basis, it retains discretion to prioritize applications according to other considerations including input from an applicant about their applications. In practice, the BLM has observed that the prioritization of projects, particularly in Field and District Offices with high workloads, provides a number of benefits for the BLM and applicants. In coordinating with applicants, the BLM discusses workload capacities and will receive input from developers on the priority of their applications and whether there is a specific preferred order. Due to the many factors the BLM considers in this decision, however, the BLM's determination on a project's priority for processing may be different than that requested by a particular developer. Targeting workloads for BLM staff and management facilitates accelerated decision-making for those solar and wind energy development proposals with the greatest technical and financial feasibility and the least anticipated natural and cultural resource conflicts and increases consistency in processing project applications for the BLM and applicant. As detailed in the discussion of subpart 2809 in this rule, the BLM may also determine that there is a competitive interest for a right-of-way or system and hold a competitive process.

Section 2804.40 Alternative requirements.

Section 2804.40 of this final rule provides for situations when an applicant requests alternative requirements from the BLM if the requestor is unable to meet the requirements of this subpart. The final rule clarifies that this section applies specifically to the BLM's consideration of alternatives to the application requirements set forth in subpart 2804. Other requirements related to rights-of-way, such as the requirement to pay rent as set forth in subpart 2806, cannot be adjusted under this section. The BLM did not make a change to this section of the final rule.

Some commenters suggested that state and local governments should be brought into the decision-making process if an applicant is unable to meet the application requirements and they request an alternative to one or more application requirements. It is the BLM's responsibility to determine whether an alternative requirement for the application process should be allowed. Through agreements, including with cooperating agencies, the BLM engages with Tribal, Federal, State, and local government offices when it considers solar and wind energy development projects. The BLM would inform such partners of any changes to its requirements. Additionally, the BLM will consider under this section only requests for alternatives to modify the alternative requirements found in Part 2804 – *Applying for FLPMA Grants*. Requests to modify other requirements, including those identified in a decision authorizing a right-of-way, such as terms and conditions, cannot be approved under this section. This would include requests for alternative access.

Section 2805.10 How will I know whether the BLM has approved or denied my application or if my bid for a solar or wind energy development grant or lease is successful or unsuccessful?

Section 2805.10 of this final rule clarifies that agency decisions about whether to approve rights-of-way are generally administratively appealable while the issuance of a right-of-way grant or lease itself is not an opportunity for appeal.

Paragraph (c) of this final rule clarifies that "The BLM will issue the right-of-way by signing the grant or lease and transmitting it to you." The BLM's act of returning the signed instrument to the holder constitutes the "issuance" of the right-of-way. Identifying the point in time at which the right-of-way is "issued" is important for calculating when the term of a right-of-way begins to run (see § 2805.11) and when the holder's obligation to pay rent begins (see § 2806.12). Identifying the point at which the right-of-way is "issued" is also important for clarifying which actions are subject to the conditions in Section 50265(b)(1) of the IRA, which imposes conditions on when the Secretary may "issue a right-of-way for wind or solar energy development on Federal land." The BLM did not make a change to this section of the final rule.

Section 2805.11 What does a grant or lease contain?

Section 2805.11 of this final rule revises the right-of-way authorization term length for certain facilities, and the final rule includes minor updates to the proposed rule to improve technical clarity. No change was made in this section of the final rule due to public comment.

Section 2805.11(b) addresses the duration of rights-of-way. Section 2805.11(b)(2) provides specific terms for solar and wind energy grants and leases. Paragraphs (b)(2)(iv), (b)(2)(v), and (b)(4) now show the maximum terms for solar and wind energy generation facilities, energy storage facilities that are separate from energy generation facilities, and electric transmission lines with a capacity of 100 kV or more. The term for a grant or lease for these

types of authorizations may be up to 50 years. Revisions under this section are consistent with those made under § 2801.9(d).

Paragraph (b)(2)(iv) is updated for the maximum term for both grants and leases, for up to 50 years (plus initial partial year of issuance).

Paragraph (b)(2)(v) is updated for the maximum term for rights-of-way for energy storage facilities that are separate from energy generation facilities. Although the BLM generally treats energy storage facilities as linear rights-of-way, rather than solar or wind energy development rights-of-way, for purposes such as rent calculation, the BLM believes that the longer term of "up to 50 years," commensurate with the maximum term for solar or wind energy development rights-of-way, will facilitate the transition to cleaner sources of energy in the United States.

Paragraph (b)(4) would be added to update the term for electric transmission lines with a capacity of 100 kV or more, for up to 50 years, commensurate with the term for solar and wind energy development projects and energy storage facilities that are separate from energy generation facilities.

Some comments sought clarification on whether a presumptive leaseholder's (which is defined at § 2809.15(b)(1)) control of the property would preclude other uses, such as grazing or recreation, or during any period when use is not immediately initiated. Prior to the competitive process, a prospective bidder would be informed as to whether they were bidding on a location with existing authorized uses, such as recreation or grazing or other known casual uses. The BLM's identification of a presumptive leaseholder or issuance of a lease would not automatically exclude authorized uses. Rather, the BLM must follow its existing processes prior to ending

existing uses; for example, in the context of livestock grazing, notice and cancellation is provided, subject to any required public comment periods.

The BLM understands from comments it has received that there is some confusion whether solar and wind energy developments may also be projects. In the final rule, the BLM revised paragraph (b)(2) to add "projects" to clarify that solar and wind energy developments may be projects.

Section 2805.12 What terms and conditions must I comply with?

Section 2805.12 of this final rule lists certain terms and conditions that apply to all right-of-way grants and leases. The BLM revised this section to address public comments regarding the term length authorized for certain facilities. The BLM also included revisions to prevent a holder's non-use of the public lands for the authorized energy generation facilities.

Paragraph (c)(8) is added to this final rule addressing concerns raised in relation to § 2801.9(d) regarding the longer term for grants and leases. This rule provides diligent operation requirements wherein the holder of a solar or wind energy development grant or lease must maintain at least 75% of energy generation capacity for the authorized facility for the grant or lease term. A failure to meet this operational capacity for two consecutive years may support the suspension or termination of the grant or lease under §§ 2807.17 through 2807.19. The BLM would send notice to the grant or leaseholder with a reasonable opportunity to correct any noncompliance with the diligent operation requirement, including resuming use of the right-of-way.

The BLM believes it is reasonable to establish a requirement that solar and wind energy generation developments must operate within 75% of their generation capacity, allowing a 25%

operational change for each year. [6] This allows a solar or wind operator to safely accommodate operational changes related to unforeseen circumstances and maximize their energy production without the need to coordinate with the BLM for normal operations. A sustained reduction in output, such as for anomalous storm years or changes to a development's technology, that reduce the energy generation below 75% of the project's capacity would require coordination with the BLM to update project information. The energy generation capacity is first established by the right-of-way holder under section 2806.52(b)(5) in the first annual certified statement, and then informed by subsequent years' operational capacities in the annual statement. Since the BLM bills in advance for a calendar year (see part 2806 for further information on solar and wind energy capacity fee), the BLM believes that this operational standard is appropriate for the orderly administration of the public lands and to ensure appropriate use of its resources.

In response to the BLM's notice, a holder must provide reasonable justification for the reductions in energy generation, such as delays in equipment delivery, legal challenges, or Acts of God. Holders must also provide the anticipated date when energy generation will resume and a request for extension under paragraph (e) for an extension of operations period to satisfy the two-year diligent operation requirements of paragraph (c)(8). The BLM may deny a request for extension for failure to comply with this section.

The BLM will use the annual certified statement required under § 2806.52(b)(5) to determine whether a holder has been meeting the minimum energy generation capacity for the diligent operation requirement. Under paragraph 2806.52(b)(5)(vi), the holder must notify the

[6] As demonstrated in a 2018 NREL study, forecast modeling for solar photovoltaic and wind energy developments is generally within 10% of expected capacities over a one-year period. https://www.nrel.gov/docs/fy23osti/79498.pdf, Solar PV, Wind Generation, and Load Forecasting Dataset for ERCOT 2018: Performance-Based Energy Resource Feedback, Optimization, and Risk Management (P.E.R.F.O.R.M.)

BLM if they will reduce the amount of energy generated by 25 percent or more for that year. Two consecutive years with reduced energy generation would support the BLM's notice to the grant or leaseholder of noncompliance with the diligent operation requirement.

Paragraph (e)(2) of this final rule clarifies that the option of requesting alternative stipulations, terms, or conditions does not apply to terms or conditions related to rents or fees. As with requests for alternative application requirements under § 2804.40, requests for alternative stipulations, terms, or conditions under § 2805.12 are limited to technical obligations of the applicant or holder and not to the holder's obligation to compensate the United States for the use of the public lands and their resources. Requests for exemptions or deviations from the general rent provisions of subpart 2806 should be made under provisions of that subpart that specifically address such exemptions or deviations, such as existing § 2806.15(c) (not revised in this rulemaking), which sets forth a procedure for asking the BLM State Director to waive or reduce a holder's rent payment, or § 2806.52(b)(1)(i), which describes certain circumstances under which the BLM may calculate the capacity fee based on an alternative MWh rate.

A comment suggested that the fees could be based on third-party evaluations, such as an appraisal. The BLM considered whether an appraisal specific to each authorization would be appropriate and determined that using such a process would be costly and add considerable time to the processing of an application. The BLM chose not to use an appraisal, except when it determines under § 2806.70 that its rent schedules do not apply to the underlying right-of-way use. For example, if the BLM receives a right-of-way application requesting a permit for a long-term landscape art installation, the schedules for transmission, solar or wind energy development, or communications sites would not apply, and the BLM may elect to use an

appraisal to determine the appropriate rent. This final rule also provides for a specific alternative MWh rate for determining the capacity fee under § 2805.62(b)(1)(i) for development projects that use a Power Purchase Agreement (PPA). Such agreements must be provided to the BLM for review. If the BLM determines the lower rate is appropriate, it will use such agreements in place of the calculated MWh rate. The BLM did not make a change in response to this comment.

A comment requested that the BLM require applicants to include PLAs and add union labor protections as a term and condition of solar and wind energy rights-of-way. In this final rule, the BLM has elected to provide an opportunity for holders to receive capacity fee reductions under certain conditions, including where the holder can show it is using PLAs for the construction of the planned facility (see § 2806.52(b)), consistent with the reduction authority under the Energy Act of 2020. However, in administering the public lands, the BLM is making such compliance voluntary, offering the capacity fee reduction to incentivize the use of PLAs for solar and wind energy development projects instead of mandating compliance with such a term. The BLM believes this voluntary option provides opportunities to a wide variety of potential holders and recognizes the effort of those who qualify for such reductions consistent with criteria in § 2806.52(b). No change was made in the final rule due to this comment.

Section 2805.13 When is a grant or lease effective?

Section 2805.13 of this final rule includes a minor technical clarification to the title and section, adding "or lease," to build consistency for authorization term lengths inside and outside of DLAs.

The BLM received comments opposing this section regarding term length of authorizations. One comment recommended the BLM extend the maximum term from 30 years

to 50 years only for leases inside DLAs. Another comment opposed extending the maximum term to 50 years for any authorization. The BLM addressed this and other similar comments under § 2801.9 of this preamble.

Section 2805.14 What rights does a right-of-way grant or lease convey?

Section 2805.14 of this final rule clarifies that the term "right-of-way" is the category of authorizations that generally are issued as a grant or a lease under Title V of FLPMA. This clarity has become increasingly important for the internal and external understanding of right-of-way authorizations with the passage of new legislation. The BLM did not receive comments on this section.

The title is revised to "What rights does a right-of-way grant or lease convey?" The title clarifies that this section applies to both grants and leases.

Paragraph (g) removes the text "solar or wind energy development" and adds "right-of-way" to now read as "right-of-way grant or lease." This section provides for when an applicant applies to renew any right-of-way grant or lease under § 2807.22.

Section 2805.16 If I hold a grant or lease, what monitoring fees must I pay?

The BLM's final rule "Update of the Communications Uses Program, Cost Recovery Fee Schedules, and Section 512 of FLPMA for Rights-of-Way" (XX FR XXXXX)[date] updated the BLM Headquarters address in § 2805.16. Thus, the proposed rule's update to the BLM Headquarters address is no longer necessary. The BLM did not receive comments on this section and did not include it in the final rule.

Subpart 2806 Annual Rents and Payments

Subpart 2806 of this final rule clarifies that the term "right-of-way" is the category of authorizations that are generally issued as a grant or a lease under Title V of FLPMA. This clarity has become increasingly important for the internal and external understanding of right-of-way authorizations with the passage of new legislation.

In subpart 2806, the BLM sets the acreage rent and capacity fee calculation methodologies for solar and wind energy development rights-of-way. Section 504(g) of FLPMA, 43 U.S.C. 1764(g), requires right-of-way holders, subject to several narrow exceptions, "to pay in advance the fair market value" for the use of the public lands. Section 102(a) of FLPMA, 43 U.S.C. 1701(a), clarifies that "it is the policy of the United States that . . . the United States receive fair market value of the use of the public lands and their resources unless otherwise provided for by statute." The BLM has consistently taken the position that this statutory mandate includes the authority to charge acreage rent and capacity fees that reflect the fair market value of the public lands and their resources. For example, the preamble to the BLM's 2016 Final Rule, *Competitive Processes, Terms, and Conditions for Leasing Public Lands for Solar and Wind Energy Development and Technical Changes and Corrections*, explained that "(t)he BLM has determined that the most appropriate way to obtain fair market value is through the collection of multicomponent fee [sic] that comprises an acreage rent, a MW capacity fee, and, where applicable, a minimum and a bonus bid for lands offered competitively . . . . [T]he collection of this multicomponent fee will ensure that the BLM obtains fair market value for the BLM authorized uses of the public lands, including for solar and wind energy generation." 81 Fed. Reg. 92122, 92134 (Dec. 19, 2016). In that final rule, the BLM further explained that the use of a multicomponent rent and fee structure that comprises an acreage rent, a MW capacity

fee, and in some cases also a minimum and a bonus bid assists the BLM in achieving important objectives, including identifying and capturing fair market value for the use of public land, providing a consistent approach with other categories of public land uses, encouraging efficient use of the public lands by reducing relative costs for comparable projects using fewer acres, and employing an approach consistent with existing policies and regulations governing the BLM's renewable energy program. *See id.* The multicomponent fee of this final rule will continue to advance important objectives that serve the public interest, including allowing the BLM to capture fair market value for use of the land (subject to reductions pursuant to Energy Act of 2020 authority).

In the Energy Act of 2020, 43 U.S.C. 3003, Congress amended the fair market value requirement of Section 504(g) of FLPMA by providing the Secretary with discretion to "consider acreage rental rates, capacity fees, and other recurring annual fees in total when evaluating existing rates paid for the use of Federal land" for solar and wind energy projects and reduce acreage rental rates and capacity fees if the Secretary makes certain findings, including "that a reduced rental rate or capacity fee is necessary to promote the greatest use of wind and solar energy resources." Consistent with FLPMA and the Energy Act of 2020, the BLM will continue to charge solar and wind energy rights-of-way acreage rent and capacity fees. The final rule implements a methodology that bases rent and fee rates on local land values and wholesale energy market prices. This methodology also supports the direction in the Energy Act of 2020, 43 U.S.C. 3004, of meeting national clean energy objectives, including the congressional goal of permitting 25 GW of renewable energy by 2025 on Federal lands through reductions in rental rates and capacity fees. As described in the section-by-section discussion for subpart 2806, this

final rule is utilizing the authority in 43 U.S.C. 3003 to adjust the fair market value requirement through reductions in rental rates and capacity fees for solar and wind energy projects on public lands.

Under the final rule, acreage rent rates for solar and wind energy rights-of-way are determined using the NASS Cash Rents Survey, which reflects a nominal value of the land at the time the right-of-way is issued and prior to commercial use. This per-acre land rental value will be multiplied by an encumbrance factor (which differentiates between solar and wind energy facilities) and an annual adjustment factor that accounts for changes in the value of the land over the lifetime of the right-of-way due to inflation and similar factors. Because the NASS Cash Rents Survey used for solar and wind acreage rents reflects a valuation of annual rent, no rate of return is applied when determining solar and wind energy acreage rents. The acreage rent rate reflects a nominal value of the land to continue to maintain site control after the right-of-way is issued.

Once a solar or wind energy generation facility is utilizing the solar or wind resources on public land to produce electricity, the BLM may charge the capacity fee for the right-of-way unless the acreage rent remains higher than the fee. The capacity fee is determined in part using the annual MWh production multiplied by either wholesale power pricing information or pricing figures specific to a project's PPA to determine the market value of the electricity generated from the project. The wholesale power pricing information or other pricing basis variables in the BLM's calculation, like the pastureland rental value based on the NASS Cash Rents Survey used for calculating acreage rents, will be fixed at the time the right-of-way is issued and will be updated using a fixed annual adjustment factor. This market value of the electricity generated

will then be multiplied by a rate of return based on a percentage of wholesale pricing and by certain qualifying fee reductions to arrive at a capacity fee for the authorized project.

Some comments suggested that fees should be compared with the fees associated with other energy sources instead of being based on the per-acre values for pastureland. Other comments expressed support for the BLM using the NASS Cash Rents Survey to calculate acreage rent rates. The BLM manages different energy sources, e.g., oil and gas and geothermal, consistent with the applicable laws for each. As such, rent and fee values promulgated in regulations consider differences under law. Solar and wind energy generation facilities on public lands are authorized under Title V of the FLPMA (43 USC 1761– 1771) and its implementing regulations at 43 CFR part 2800. Section 504(g) of FLPMA generally sets the requirements for how the BLM will collect rents and fees for use of the public lands and their resources through a right-of-way. These requirements differ from those in the MLA (30 USC 181 *et seq*.) and the Geothermal Steam Act (30 USC 1001 *et seq*.), and thus a comparison of fees for production of these different energy sources on public lands would be inappropriate and irrelevant. In this final rule, the BLM updates rents and fees for solar and wind energy development rights-of-way under the authority provided by FLPMA to reflect the fair market value for use of the public lands and their resources by using acreage rental rates that reflect local land values prior to commercial electricity production through using pastureland cash rent survey values by NASS. The BLM then applies its authority under the Energy Act of 2020 to provide reductions that are necessary to promote the greatest use of wind and solar energy resources.

One comment suggested that the proposed rule should not offer acreage rent and capacity fee reductions to projects outside DLAs and instead should implement project-specific

reductions and other incentives to promote responsible development inside DLAs. DLAs are locations on public lands that the BLM has designated through the land use planning process as priority areas for solar and/or wind energy development. Limiting acreage rent and capacity fee reductions to DLAs would not, however, meet the Energy Act of 2020's direction to promote the greatest use of wind and solar resources. To date, the BLM has only allocated DLAs for solar facilities on public lands within six southwestern states for locations that are predominately favorable for thermal solar projects (i.e., concentrated solar). The BLM currently has no DLAs allocated for solar in other states. Furthermore, the BLM has no DLAs allocated for wind energy development on public lands in any state. The BLM determined that limiting rent and fee reductions to only DLAs would be sub-optimal in supporting clean energy goals. As such, the final rule will provide for rent and fee reductions on public lands both inside and outside DLAs, which will serve the BLM's purpose of promoting the greatest use of wind and solar energy resources on public lands.

One comment suggested that subpart 2806 should not eliminate fair market value for rental and leases on public lands or the competitive bid process. The commenter did not support incentivizing renewable development for a specific project by eliminating the competitive leasing process. Contrary to the commenter's suggestion, this final rule does not eliminate the BLM's ability to utilize a competitive bid process for solar and wind energy development. The final rule adjusts the competitive process requirements for wind and solar energy development proposals within DLAs by aligning it to be consistent with agency discretion for utilizing a competitive process outside DLAs when the BLM's authorized officer decides to use a competitive process.

Some comments suggested that this rule should generally raise fees for developers and require more upfront mitigation money to address long term environmental issues. Related comments suggested that the BLM should establish an environmental mitigation fund in addition to rents and fees to accommodate the high probability of direct and cumulative impacts. The BLM considered these comments and is not making these suggested changes. The BLM believes such changes are unnecessary because the final rule does not limit the BLM's existing authority and ability to appropriately impose mitigation requirements as a component of the terms, conditions, and stipulations for a solar or wind energy development. The BLM will continue to require appropriate mitigation and conditions of approval to address environmental impacts for right-of-way grants and leases without further requirements promulgated under this final rule.

Other commenters stated that the BLM should implement a minimum efficiency criterion to ensure that consumers receive the necessary amount of power to keep up with demand. The BLM disagrees with comments suggesting that the BLM should regulate how efficiently a project must operate. Developing a project is a complex process that depends on several factors, including the availability and cost of appropriate technology. The BLM has included a provision in this final rule that sets an operational standard requiring a development project to annually maintain at least 75 percent of its energy generation capacity. See § 2805.12(c)(8) for further information on the operational standards for solar and wind energy development projects on public lands.

Section 2806.10 What rent must I pay for my grant or lease?

Section 2806.10 of this final rule provides a minor technical clarification described below. The BLM did not receive comments on this section and has made no changes to it in the final rule.

Section 2806.10 provides rent requirements that apply to all grants and leases, requiring payment in advance, consistent with Section 504(g) of FLPMA, as amended. New § 2806.10(c) would clarify to a reader that the per acre rent schedule for linear right-of-way grants must be used unless a separate rent schedule is established for your use—such as with communication sites under § 2806.30 or solar and wind energy development facilities per § 2806.50—or the BLM determines under § 2806.70 that its rent schedules do not apply to the underlying right-of-way use.

Section 2806.12 When and where do I pay rent?

Section 2806.12 of this final rule provides a minor technical clarification as described below. The BLM did not receive comments on this section and has made no changes to it in the final rule.

Paragraphs 2806.12(a) and (b) describe the proration of rent for the first year of a grant and the schedule for payment of rents. Paragraphs 2806.12(a) and (b) would be revised by deleting the term "non-linear," which is not defined in the regulations, to clarify that these provisions apply to all right-of-way grants or leases.

Section 2806.20 What is the rent for a linear right-of-way grant?

Section 2806.20 of this final rule clarifies the BLM's mailing address. Section 2806.20(c) addresses how to obtain a current rent schedule for linear rights-of-way. This paragraph provides the BLM's mailing address of record by reference to § 2804.14(c).

Solar and Wind Energy Development Rights-of-Way

The existing regulations contain two undesignated center headings to organize and differentiate sections pertaining to solar (see existing §§ 2806.50 through 58) and wind (see existing §§ 2806.60-68) energy rights-of-way. The final rule revises those sections and undesignated headings to provide a single set of provisions for all solar and wind energy development rights-of-way. The rent, fee, and payment requirements under the final rule are discussed in the following sections and are identical for solar and wind except for the difference in the encumbrance factor used in calculating the acreage rent that is discussed under § 2806.52(a). Sections 2806.50 through 2806.58 address solar and wind energy rents and capacity fees.

The final rule updates the acreage rent and capacity fee calculation methods to improve predictability of rates for solar and wind energy development projects on public land. The combined rent and fee calculation methodologies have the flexibility to meet FLPMA's fair market value requirement while also applying calculation factors to reduce rates to promote the greatest use of wind and solar energy resources on the public lands consistent with the Energy Act of 2020.

The final rule retains flexibility to utilize different data sources for electricity market values over time. Developers of solar and wind energy on public lands will have improved rate predictability over the term of an authorization. This is accomplished by establishing an acreage rate and capacity fee rate at the beginning of a grant or lease term with upfront built-in rate adjustments and by indexing the capacity fee to the annual energy production.

The BLM's acreage rent is the average of the state-wide pastureland rent from the NASS Cash Rent Survey. The acreage rent is the minimum payment made to the BLM each year by the developer. See § 2806.52(a) for further information on the acreage rent.

The capacity fee, based on wholesale power prices, serves to compensate the United States for long-term site control and the production value of the electricity generated by solar and wind energy projects on public lands. The capacity fee will be collected annually, but only when the capacity fee exceeds the acreage rent for the year. See § 2806.52(b) for further information on the capacity fee.

The final rule includes certain reductions that may be applied under the authority granted to the Secretary in the Energy Act of 2020, which provides that annual acreage rent and capacity fees may be reduced if the Secretary determines that a reduced rental rate or capacity fee is necessary to promote the greatest use of wind and solar energy resources, among other reasons. Adjustments to the capacity fee from the MWh rate reduction, The Domestic Content reduction, and PLA reduction are discussed in greater detail in § 2806.52(b)(1)(ii) through (iv). The BLM has determined that the rate reductions in this final rule would help to promote the greatest use of wind and solar energy resources on public lands.

Section 2806.50 Rents and fees for solar and wind energy development.

Section 2806.50 of the final rule requires the holder of a solar or wind energy right-of-way to pay in advance the greater of either an annual acreage rent or a capacity fee, consistent with Section 504(g) of FLPMA (43 U.S.C. 1764(g)). There are no provisions in this rule for a phased-in rent or fee.

The acreage rent or capacity fee, as applicable, is calculated based on the requirements found in §§ 2806.11 and 2806.12. The acreage rent is calculated according to the formula set forth in § 2806.52(a), while the capacity fee is calculated according to the formula set forth in § 2806.52(b).

Some comments expressed concern that this rule creates negative market incentives by keeping acreage rents and capacity fees artificially low. These commenters suggest that the BLM should implement a consistent yearly increase in acreage rent and capacity fees based on initial rates, with reductions provided only for projects in specific circumstances, such as siting within solar zones or on disturbed lands, and with strong commitments to domestic content. The BLM is cognizant that the rent and fee rate structure is important for promoting the greatest use of wind and solar energy resources and is a critical component to providing short- to medium-term stability for emerging energy markets. There is a strong public interest in maintaining rate predictability for electricity generating entities that are subject to long-term interconnect and PPAs. This final rule sets rates that are also increased annually, through the annual adjustment factor (see § 2806.52(b)(2)). The annual adjustment continues through the term of the authorization. Additionally, this final rule provides an opportunity for rate reductions for all solar and wind energy development projects that further the goals of the Energy Act of 2020, which is to authorize 25 gigawatts of renewable energy on Federal lands by 2025 and further national clean energy priorities. The BLM did not make a change to this section of the final rule.

Section 2806.51 Grant and Lease Rate Adjustments.

Section 2806.51's title is changed from the proposed rule to clarify that this section applies to all grants and leases. This section provides for right-of-way grant and leaseholders to

transition to the new rate making under this final rule through an affirmative request to the BLM. Absent a request, they would retain the rate setting method in effect prior to this final rule.

Paragraph (c) informs holders of existing solar or wind energy development rights-of-way that they may request the new rate methodology in this final rule be applied to their existing grant or lease. Existing holders have two years from the date this final rule becomes effective to request a change to the new rate making method. The BLM will continue to apply the grant holder's or lessee's current rate methodology if a timely request is not received.

The BLM received a comment that does not support any rate reduction based on an estimation of energy generated because all rates should be assessed on actual production. The BLM has the administrative flexibility to collect payment in advance based on estimated energy. The amount the BLM may collect for the right-of-way may change once the BLM determines the actual energy production on the right-of-way. The BLM will reconcile any difference in the amount due and credit any overpayment, and right-of-way grant holders and lessees are liable for any underpayment. See § 2806.52(b)(5) of this rule for the BLM's annual certified statement that provides more information about the estimated and actual energy generation. The BLM did not change this section of the final rule in response to this comment.

Some comments recommended that the final rule cap the total amount of reduction in acreage rents and capacity fees that an individual leaseholder can claim for a right-of-way. The final rule does not cap the number or level of reductions an applicant or holder may qualify for; however, the final rule does require that the BLM collect no less than the acreage rent for the right-of-way each year, notwithstanding the number of reductions that apply to the grant per § 2806.52(b). The BLM did not change this section of the final rule in response to this comment.

Some comments suggested that rate reductions may be achieved without any changes to where the BLM sources its market pricing data. In the final rule, the BLM preserves its discretion to change the source of market data. In the BLM's experience, access to such information may change over time. For this final rule, the BLM is using the Energy Information Administration pricing data that may be found at https://www.eia.gov/electricity/wholesale/. Energy Information Administration data is free and open to the public, increasing transparency into the BLM's rate schedule. The BLM did not change to this section of the final rule in response to this comment.

Some comments recommended that the BLM seek to increase domestically sourced products and materials and that the BLM should use this rule to mandate robust domestic content thresholds for projects permitted on Federal land. The BLM agrees with these commenters' interest in increased use of domestic content for solar and wind energy development projects. This final rule includes a financial incentive in the form of a "Domestic Content reduction" under § 2806.52(b)(1)(iii) to encourage holders to use components made or manufactured in the United States in the construction of the solar or wind energy project. This capacity fee reduction is intended to offset costs associated with using only iron, steel, manufactured products, and construction materials incorporated into the project that are produced in the United States consistent with the direction in the Energy Act of 2020. The BLM anticipates that this proposed capacity fee reduction would increase economic certainty for renewable energy projects on BLM-managed public lands. By incentivizing the use of domestically made parts and materials in exchange for a reduced capacity fee, the BLM expects to reduce costs for developers that choose to incorporate domestically produced materials into their projects. The BLM believes that

this reduction will help increase demand for domestically produced renewable energy parts and materials. These intended outcomes would serve to promote the greatest use of wind and solar energy resources on public lands. Currently, wind and solar energy developers face a choice between relying on foreign-sourced parts and materials or paying higher prices for domestically sourced parts and materials, if available. (See for example the Department of Energy's Solar Photovoltaics—Supply Chain Deep Dive Assessment, available at https://www.energy.gov/sites/default/files/2022-02/Solar%20Energy%20Supply%20Chain%20Report%20-%20Final.pdf). As seen in recent years, uncertainty in global supply chain dynamics has the potential to delay deployment of solar and wind energy development projects on public lands. Using incentives to create demand for American-made renewable energy parts and materials will help develop domestic supply chains and reduce impacts on renewable energy deployment on public lands from potential supply chain delays. The BLM believes that incentivizing the use of parts and materials that qualify for the Domestic Content reduction will increase the responsible deployment of renewable energy and will increase commercial interest in the use of public lands, promoting the development of solar and wind energy resources on public lands. This final rule changes the definition used for domestic content to align with the BABA Act and implementing guidance at 2 CFR 184. See § 2806.52(b) for further information on the domestic content reduction.

Some comments suggested that a broad approach to rate reductions may have revenue implications and fail to guarantee that taxpayers obtain a fair return for the utilization of our public lands. Consistent with congressional and presidential direction, the BLM is endeavoring to increase the responsible deployment of renewable energy on the public lands and as part of

that direction has been authorized to reduce rents and fees to promote the greatest use of wind and solar resources on public lands. As part of this rulemaking process, the BLM carefully deliberated on how to implement the directives and new authorities while maintaining a reasonable return for the use of the public lands and their resources. Following the BLM's implementation of previous rate reductions in calendar year 2022 for solar and wind energy development projects, the agency received feedback which generally indicated that overall costs for permitting, development, and operations on Federal public lands were still perceived as a barrier to entry and a disincentive to the BLM's ability to promote solar and wind deployment on public lands. The BLM believes the fee reductions will assist in removing barriers inhibiting deployment of solar and wind development on public lands.

Section 2806.52 Annual rents and fees for solar and wind energy development.

Section 2806.52 of this final rule describes the BLM’s methodology to determine the acreage rent and capacity fee for solar and wind development rights-of-way. Payment is required of the greater of either an acreage rent, which is calculated in advance of authorization, or a capacity fee, which is calculated upon the start of energy generation. This section was revised based on public comments.

Section 2806.52(a) provides that acreage rent would be determined by multiplying the number of acres authorized for a project (rounded up to the nearest tenth) by the state-specific per-acre rate from the solar and wind energy acreage rent schedule in effect at the time a grant or lease is issued. The acreage rent would be the minimum yearly payment for a grant or lease and would not be required if the capacity fee under paragraph (b) of this section exceeds the acreage rent.

Paragraph (a)(1) explains that the per-acre rate is calculated by multiplying the state-specific per-acre value by the encumbrance factor and a factor that reflects the compound annual adjustment since the start of the grant or lease term, according to the formula A × B × ((1 + C) ^ D)).

Paragraph (a)(1)(i) identifies "A" as the per-acre rate, using the state-specific per-acre value from the solar or wind energy acreage rent schedule for the state where a project is located for the year when the grant or lease is issued. The average per acre value will be determined using the NASS pastureland rents reported within the previous 5-year period. The BLM will update the acreage rent schedule and its per-acre rate every 5 years consistent with the timing of rent adjustments under § 2806.22 for the linear rents schedule. Based on the pastureland rent value in the NASS Cash Rents Survey through 2021, the most recent 5-year average ranges from $2.10 per acre in Arizona to $12.60 per acre in California with a median value of $6.62 per acre in the Western States. The next year the BLM will update its rent schedule will be for calendar year 2026.

Using Nevada as an example for how the BLM will average NASS pastureland rents, assume that NASS reported values of $10.00, $13.00, and $10.00 per acre respectively for 2019, 2020, and 2021. NASS reported values during the 5-year period only for those 3 years and did not report values for 2017 and 2018. In that case, the BLM would average the reported values using three years for that 5-year period, which would equate to $11.00 per acre.

The per-acre rate charged to the right-of-way holder for a grant or lease will not change once calculated and the authorization is issued. Rates for an existing authorization will not

change with updates to the acreage rent schedule; instead, the acreage rent will be adjusted by the annual adjustment factor, "C" in the formula above, under 2806.52(a)(1)(iii).

Paragraph (a)(1)(ii) identifies "B" in the formula above as the encumbrance factor. The encumbrance factor is applied to account for the intensity of the solar or wind development's surface use of the public lands. In the final rule, solar energy generation facilities are subject to a 100 percent encumbrance factor and wind energy generation facilities are subject to a five percent encumbrance factor. The 100 percent encumbrance factor for solar facilities reflects a greater intensity of development on the surface of public lands and a virtual exclusion of other uses on the right-of-way. The five percent encumbrance factor for wind facilities recognizes that a wind energy facility only partially encumbers the land, allowing other uses to co-exist.

Some comments suggest that a lower encumbrance value for solar is appropriate, noting that facilities may incorporate design elements or construction methods that reduce impacts to resources, such as raised fences for wildlife passage or vegetation disturbance caps. The BLM appreciates that projects incorporating such improvements may cause fewer impacts to public land resources. However, the BLM disagrees that such improvements reduce the encumbrance factor, which is based on the occupancy of the land and impact to other uses of the land. Solar energy developments have a greater occupancy of the land and impact to other uses because they preclude the majority and sometimes all other uses. This encumbrance factor for solar energy developments is appropriate for public lands, and the BLM retains its 100 percent encumbrance factor for this rule.

One comment asserted that the proposed encumbrance value of five percent for wind energy is too low and should be set around 50 percent and that if the BLM decreases the

encumbrance factor from 10 percent, the BLM should a explain its rationale in this rule. Others believed the encumbrance factor should be lower, asserting that a mid-point encumbrance factor of 3% is appropriate based on the Department of Energy's Wind Vision analysis. The BLM considered the intensity of the surface use and exclusion of other uses when setting the encumbrance factor in this final rule. While the commenters that advocated for a 50 percent encumbrance factor did not provide data supporting that figure, the National Renewable Energy Laboratory has found that generally "only a small fraction of that area (<1% - 4%) is estimated to be directly impacted or permanently occupied by physical wind energy infrastructure."[7] In practice, the BLM has found that, based on geography or project design, and effect on other uses, the encumbrance may be more or less than that reported by NREL occupied land percentages and therefore set a five percent encumbrance factor for wind energy.

Paragraph (a)(1)(iii) clarifies that "C" in the formula above is the annual adjustment factor, which is three percent, and Paragraph (a)(1)(iv) clarifies that "D" is the year of the grant or lease term, where the first year (whether partial or a full year) would be 0 (that is, there is no inflation for the first year of the term). Under the final rule, the annual adjustment factor would be fixed at three percent and compounded annually for the term of the authorization.

Paragraph (a)(2) describes where you may obtain a copy of the current per-acre rates for the solar and wind energy rent schedule.

Paragraph (b) describes that the capacity fee is calculated by multiplying the MWh rate or the alternative MWh rate (which is described below), the MWh rate reduction, the Domestic Content reduction, PLA reduction, the rate of return, and the annual power generated on public

[7] https://www.nrel.gov/news/program/2022/nrel-explores-the-dynamic-nature-of-wind-deployment-and-land-use.html

lands for the grant or lease in question (measured in MWh) by a factor that reflects the compound annual adjustment. The capacity fee is required to be paid annually beginning in the first year that generation begins for the energy generation facility. There will be no capacity fee levied for the first year or any other year if the acreage rent exceeds the capacity fee. The formula for calculating the annual capacity fee is A x B x C x D x [(1 + E) ^F] x G x H.

Paragraph (b)(1)(i) describes that "A" is either the MWh rate, an amount determined based on the average of the annual weighted average wholesale price per MWh for the major trading hubs serving the 11 Western States of the continental United States, or the alternative MWh rate. The MWh rate is calculated based on the wholesale prices from the full five calendar-year period preceding the most recent MWh rate adjustment before the right-of-way was issued, rounded to the nearest dollar. There is no MWh rate phase-in for energy generation facilities except for existing holders that elect to continue paying under their current rate adjustment method per § 2806.51(c).

The BLM may use an alternative MWh rate when a grant or leaseholder enters into a PPA with a utility for a price per MWh that is lower than the average of the annual weighted average wholesale price. In those instances, the BLM will determine if the rate in the PPA is appropriate to use instead of the MWh rate. For example, an alternative MWh rate may not be appropriate if a utility issues itself a PPA for its solar or wind energy development. If the rate in the PPA is appropriate, then the BLM would set an alternative MWh rate for the grant or lease at the rate in the PPA.

The BLM received a request to remove the BLM's discretion to use an alternative MWh rate rather than a MWh rate calculated on the average wholesale pricing as described under §

2806.52(b)(1)(i). The BLM provides an opportunity for an alternative MWh rate in this rule in the event that there is a difference between wholesale pricing (energy pricing at market) compared to the negotiated pricing that may be achieved in a PPA. The BLM understands from a recent report from Lawrence Berkeley National Lab (available at https://emp.lbl.gov/utility-scale-solar/) that PPA pricing may be less than wholesale market pricing. The BLM does not want to disincentivize reasonable development on public lands or more favorable power purchase rates, which would be contrary to national goals set by law and directed by executive order, by disincentivizing such actions. However, the BLM also wishes to ensure it retains the discretion necessary to ensure that an alternative MWh rate is appropriate. The BLM did not make changes in the final rule due to these comments.

In paragraph (b)(1)(ii), "B" is the *MWh rate reduction*. The final rule sets the capacity fee at 20 percent of the wholesale price per MWh or alternative MWh rate through calendar year 2035. This reduction is consistent with the authority provided in the Energy Act of 2020 allowing the Secretary to reduce acreage rental rates and capacity fees if, among other things, the Secretary determines "that a reduced rental rate or capacity fee is necessary to promote the greatest use of wind and solar energy resources." Further, this reduction would help BLM meet the goal under the Energy Act of 2020 of "authoriz[ing] production of not less than 25 gigawatts of electricity from wind, solar, and geothermal projects by not later than 2025." Implementing this reduction is necessary to promote the greatest use of wind and solar energy resources and maximize commercial interest in lease sales by lowering the entry cost of prospective energy generating facilities. Additionally, implementing this reduction puts the rates the BLM charges closer to what the BLM charged developers in 2007 and 2008 when interest in solar and wind

energy development on public lands began to increase. The reduced rates and new rate setting methodology lower the potential that existing right-of-way holders who agreed to terms and conditions for using public lands that were later updated based on market changes will experience economic hardship as a result of those adjustments. This final rule uses predetermined adjustments instead.

For example, the MWh rate reduction for a newly authorized solar or wind energy grant or lease in 2035 will be set at 20 percent of the wholesale price per MWh or alternative MWh rate. This will yield a continued 80 percent reduction through the end of that authorization's term consistent with the Energy Act of 2020 authority.

Starting in 2036, the BLM will begin to transition the MWh rate reduction to 20 percent by 2038. The MWh rate reduction will be reduced to 60 percent for new projects authorized in 2036, 40 percent for new projects authorized in 2037, and 20 percent for new projects authorized in 2038 and beyond. The rates for existing authorizations will not change with this transition to a 20 percent reduction. For example, an authorization for solar or wind energy development in 2037 would receive a 40 percent reduction through the end of the authorization's term. The BLM would similarly apply this reduction to authorizations it issues based on the year of issuance.

Some comments suggested the transition from an 80 percent MWh rate reduction to a 20 percent MWh rate reduction appears arbitrary and without grounding in economic analysis of market conditions and suggested instead allowing the 80 percent reduction to continue until a future rulemaking. The BLM understands the concerns raised by the commenters regarding the change to the reduction in the proposed rule. However, the BLM disagrees that the 80 percent MWh rate reduction should continue until a future rulemaking. Instituting a phased sunset period

to the 80 percent reduction in the capacity fee is appropriate as the renewable energy industry may no longer need this reduction to achieve the greatest use of wind and solar on public lands, and progress toward our national goal of a carbon-pollution free electricity sector may indicate that a reduction is no longer warranted. In this final rule, the BLM is revising the transition from MWh rate reduction from 80 percent to 20 percent over several years. This transition would lessen the year-over-year rate change until 2038, when the MWh rate reduction would remain at 20 percent. The BLM will evaluate progress towards reaching national goals before 2036 and could reinitiate rulemaking to adjust incentives, including extending them beyond 2036, if appropriate under the authority in the Energy Act of 2020 or other applicable authority.

In paragraph (b)(1)(iii), "C" is the *Domestic Content reduction*. This paragraph is revised consistent with the changes discussed under § 2801.5. As explained previously, the BLM is promoting the development of solar and wind energy resources on public lands by offsetting some of the costs of using items and materials produced in the United States in the construction of solar and wind energy development facilities. The BABA Act, Public Law 117–58, 135 Stat. 429, §§ 70901–70927 (Nov. 15, 2021) and the implementing regulations at 2 CFR Part 184, describe certain categories of items or products that are eligible for the domestic content preference. As noted in § 2801.5, the BLM adopts the term "domestic content" to refer to the items and materials associated with the construction of a solar or wind energy facility on public lands that are eligible for the domestic content preference. Paragraph (b)(1)(iii) of § 2806.52 of the BLM's regulation would reduce the capacity fee for solar or wind energy generation facilities if the holder can demonstrate that the construction of the facilities for the right-of-way—excluding labor costs—qualify as produced in the United States as described in 2 CFR Part

184.4. The Domestic Content reduction is 20 percent for facilities qualifying for the domestic content preference defined in 2 CFR Part 184. To qualify for this capacity fee reduction, the percent of the energy generation facility's total cost that consists of items qualifying for the domestic content preference would have to meet or exceed the "Produced in the United States" requirements in 2 CFR 184.3. Generally, this would mean that: (1) all manufacturing processes for iron or steel products used as a component of the project occurred in the United States; (2) manufactured products (a) were manufactured in the United States, and (b) the cost of the components of the manufactured product that are mined, produced, or manufactured in the United States is greater than 55 percent of the total cost of the manufactured product, as determined in 2 CFR 184.5; and (3) all manufacturing processes for construction materials occurred in the United States, as defined in 2 CFR 184.6. The holder would have to provide sufficient documentation (e.g., purchase orders for end products, materials, and supplies of the facility; as-built or construction plans) to demonstrate that the products used in the energy generation facility meet the thresholds identified in 2 CFR Part 184.

Once an energy generation facility qualifies for a Domestic Content reduction, the facility will continue to benefit from the reduction for the term of the grant or lease. The BLM will only revisit the reduction at the time of an assignment, amendment, or renewal of an energy generation facility grant or lease to determine what reduction, if any, it may qualify for. The BLM will apply the criteria defining the domestic content preference and the components of construction for the version of 2 CFR Part 184 in effect at the time the right-of-way is issued unless OMB amends that guidance in the future in such a way that the current definition contemplated in this final rule no longer provides a clear meaning. In that circumstance, the

BLM will apply the most recent version of 2 CFR Part 184 that provides a workable definition until such time as the BLM is able to amend its rules.

In addition to changing the definition to qualify for a domestic content reduction from a FAR to a BABA-based definition, this final rule only provides for a single 20 percent reduction that interested parties qualify for if they meet the requirements of 2 CFR 184 instead of the incremental reduction that the BLM had proposed. Under the BABA definition described above, projects qualify for the domestic content preference by meeting or exceeding specific materials requirements. As this is a binary qualification, an incremental reduction would be untenable. Further, using a single reduction based on the BABA threshold will provide for simpler implementation of the regulation and more clarity to applicants.

One comment suggested that the BLM use the Electronic Product Environmental Assessment Tool (EPEAT) product registry for photovoltaic module use in development projects and any Domestic Content reduction. EPEAT is a global label managed by the Global Electronics Council that identifies environmentally sustainable electronic products. Currently, however, EPEAT only covers a narrow set of products and construction material related to solar development facilities (specifically, photovoltaic modules and inverters) and does not cover any materials related to wind energy generation facilities. As a result, requiring applicants to use EPEAT-registered products for renewable energy facilities on public lands could frustrate the goals of the Domestic Content reduction. Further, such a requirement would not serve the purposes Energy Act of 2020 or relevant direction in Executive Orders because it would limit the technology that could be deployed on public lands. The BLM may, however, consider such criteria for the Domestic Content reduction in the future once the EPEAT covers a broader range

of solar and wind energy materials. The BLM made no changes to the final rule due to this comment.

Some comments suggested that the BLM should require proof of compliance with the domestic content incentive prior to reducing rates. The BLM agrees with these comments and will require confirmation that the holder seeking to obtain this reduction satisfies the qualifying definitions the BLM is utilizing: the standard in 2 CFR Part 184. See § 2806.52(b)(5) regarding conditional approvals where the BLM makes it clear that approval will be granted by the BLM once it has been demonstrated to the satisfaction of the BLM that the facility qualifies for the reduction.

Some comments suggested that rate reductions in the final rule should be consistent with the IRA. The BLM considered a reduction based on the domestic content bonus tax credits in the IRA and its definition of Buy America bonus tax credits. The BLM is aware that the Treasury Department has issued guidance about the domestic content bonus under the IRA for clean energy projects and facilities that meet American manufacturing and sourcing requirements. However, that guidance describes an intent to propose regulations that have not yet been finalized, and this final rule's definition for domestic content aligns with definitions in other Federal programs with oversight over domestic products and content. No changes were made due to these comments.

Paragraph (b)(1)(iv) is "D", the *Project Labor Agreement reduction*. The BLM is promoting the development of solar and wind energy resources on public lands by offsetting some of the costs when using a PLA during construction of solar and wind energy development projects consistent with authority under the Energy Act of 2020. The BLM's approach also is

consistent with the policy direction in Executive Order 14063 directing Federal agencies to use PLAs in connection with large-scale construction projects to promote economy and efficiency in the context of Federal procurement. A PLA is a pre-hire collective bargaining agreement negotiated between one or more construction unions and one or more construction employers that establishes the terms and conditions of employment for a specific construction project, consistent with 29 U.S.C. 158(f).

The 20 percent reduction of the capacity fee offered in this final rule to incentivize the use of a PLA is necessary to promote the greatest use of solar and wind energy resources on public land, as authorized by the Energy Act of 2020 (43 U.S.C. § 3003(b)(2). In particular, PLAs lead to better and more efficient outcomes in the construction of solar and wind energy projects in the following ways, which in turn leads to the greatest use of solar and wind resources. First, PLAs provide better access to and retention of skilled laborers, especially in a limited labor market.[8] Studies and reports demonstrate that skilled labor provided through PLAs offer a higher quality of work, increased labor standards, more timely construction, and fewer deviations from construction plans.[9] Second, PLAs improve workplace safety by offering more apprentice-trained journey workers, which studies have shown lead to fewer injuries.[10] Third,

[8] Greg Lacurci, CNBC: *Workers till Quitting At High Rates--And Getting a Big Bump In Pay* (Jan. 4, 2023);
Jo Constantz, Bloomberg*: The Great Resignation Worked: Most Job-Swappers Got a Raise* (July 29, 2022);
Frank Manzo IV, Larissa Petrucci, & Robert Bruno, Ill. Econ. Policy Inst.: *The Union Advantage During the Construction Labor Shortage* 5 (2022)

[9] McFadden, Sai Santosh, and Ronit Shetty: *Quantifying the Value of Union Labor in Construction Projects*, Independent Project Analysis, 2 and 8-9 (December 2022): https://acrobat.adobe.com/link/review?uri=urn%3Aaaid%3Ascds%3AUS%3Ad9e7f15b-9bf9-313f-b4eb-de7a1dc11d9f; and
Fred B. Kotler: Project Labor Agreements in New York State II: *In the Public Interest and of Proven Value*, Cornell University ILR School, 10, 19 and 36 (May 1, 2011),
https://ecommons.cornell.edu/bitstream/handle/1813/74333/LaborAgreementsinNYS_II.pdf?sequence=1

[10] Emma Waitzman & Peter Philips, UC Berkeley Labor Ctr: *Project Labor Agreements and Bidding Outcomes: The Case of Community College Construction in California* 10, 16 (2017);
Bureau of Labor Statistics, National Census of Occupational Injuries in 2021, USDL-22-2309 (2022) (construction work is second highest for occupational deaths)

PLAs can ensure construction administration is streamlined, which minimizes undue costs, delays, and inefficiencies in construction projects, particularly complex projects such as wind or solar energy generation facilities.[11] Finally, PLAs contain no-strike, no-lockout clauses that can prevent project construction delays associated with labor disputes.[12]

The benefits associated with PLAs, in turn, would have positive impacts for renewable energy projects on public lands, including ensuring responsible and productive construction, and minimizing the potential duration. These improved construction standards will better meet resource management objectives and ensure authorized uses on public lands are meeting the goal of the Energy Act of 2020 to promote the greatest use of solar and wind energy resources. These improved construction standards also are consistent with the BLM's authority under FLPMA to incorporate right-of-way terms and conditions that, among other things, "protect Federal property and economic interests," "manage efficiently the lands . . . subject to the right-of-way," and "protect lives and property." (43 U.S.C. § 1765(b)). Further, as demonstrated by the reports and studies cited above, the use of PLAs leads to higher and more stable wages for workers. These reductions to the rates will further incentivize the use of PLAs by developers and will help to offset higher wages for workers, which, in turn, may help to reduce or eliminate economic hardships for workers who would otherwise not benefit from the higher standards and protections in PLAs.

Some comments argued against the use of the labor union incentives included in the proposed rule and questioned the BLM's authority to offer these incentives. Other comments requested additional provisions be added to ensure responsible use of labor. As described above,

[11] Dep't of Labor, *Implementation of Project Labor Agreements in Federal Construction Projects: An Evaluation* 20 (2011)
[12] Dep't of Labor, *Implementation of Project Labor Agreements in Federal Construction Projects: An Evaluation* 30 (2011)

the BLM has concluded that, under the authority provided in the Energy Act of 2020 and FLPMA, it has discretion to include reductions for the use of PLAs. These reductions will incentivize the use of PLAs, providing for increased assurances of timely, efficient construction; improved worker safety; and higher and more stable wages for workers. The BLM expects to publish additional policy guidance, such as through instruction memoranda, to clarify how qualifying PLAs will be identified, among other things. In providing this reduction in the final rule, the BLM is promoting responsible use of labor and the greatest use of solar and wind energy resources, as authorized by the Energy Act of 2020, by encouraging solar and wind energy development on public lands.

Some comments suggested that the rule should apply a tiered incentive for developers based on the percentage of local labor they commit to hire, which could be implemented by certified payroll reports that include employee permanent addresses and in consultation with local officials. Several comments supported the inclusion of a reduction for Union Labor or PLAs. In the proposed rule, the BLM described the potential of adding a 20 percent capacity fee reduction for a holder's use of Union Labor or on the contingency of a PLA. In this final rule, the BLM has decided to include a reduction for holders who have entered into, or expect to enter into, a PLA for the construction of a project, based on comments and additional support for the benefits of using PLAs to advance infrastructure projects such as renewable energy projects. This additional reduction parallels the domestic content reduction in this rule in how it is applied in the calculation. This reduction is based on the use of a PLA in project construction and would offset some developer costs. The BLM does not include in this final rule the suggested local

labor reduction, but the BLM believes the reduction for a PLA may also support the use of local labor.

Paragraph (b)(1)(v) explains how the BLM applies the alternative MWh rate and the Domestic Content and PLA reductions from paragraphs (b)(1)(ii), (iii), and (iv) of this section. By default, the BLM will apply the ordinary MWh rate under paragraph (b)(1)(i) and the MWh rate reduction under paragraph (b)(1)(ii). A developer who wished to benefit from the alternative MWh rate, the domestic content reduction, or the PLA reduction will need to submit a request for conditional approval prior to the issuance of a grant or lease, along with sufficient documentation to demonstrate that the development qualifies or may later qualify for these rate reductions. In some cases, the BLM will not be able to determine definitively in advance whether the proponent qualifies for these reductions. The BLM may then conditionally approve the requested reductions, but the reductions will not go into effect until the proponent adequately demonstrates that the facility qualifies for the relevant reduction. If energy generation begins before the holder has demonstrated that the facility qualifies, the BLM will charge the holder the capacity fee absent the reduction. The capacity fee could be updated for subsequent calendar years after the holder demonstrates that the facility qualifies, but the BLM will not refund past payments made before the holder demonstrates that they qualify and rate reductions go into effect.

For example, an applicant or presumptive leaseholder (see §§ 2809.13 and 2809.15, below) might request conditional approval of an alternative MWh rate. In that situation, a request for conditional approval for an energy generation facility may be granted if the presumptive leaseholder has entered into or intends to enter into a PPA (see (b)(1)(i) of this section) that has a

lower rate than the MWh rate. Documentation submitted to the BLM when requesting conditional approval may include draft or interim PPAs or confirmation in writing from the purchasing party that the parties have entered into negotiations. While the BLM may then conditionally approve the request for an alternative MWh rate, the alternative rate would not go into effect and be used when calculating the payment obligations until the PPA is finalized and the BLM determines, in writing, that the facility qualifies for the alternative rate. The holder's MWh rate would then be updated for the next year's billing. Payments for past years would not be adjusted retroactively.

In another example of a request for conditional approval, an applicant or presumptive leaseholder might request conditional approval of a Domestic Content reduction. In this example, a request for conditional approval may be granted if the proponent demonstrates that it has firm plans to use items qualifying for the preference. Documentation submitted to the BLM when requesting conditional approval may include procurement contracts or design documents showing that the facility would qualify for this reduction. While the BLM may then conditionally approve the request for a Domestic Content reduction, the reduction would not go into effect and be used to calculate the proponent's payment obligations until the proponent submits documentation of actual costs associated with the construction of the facility, such as fulfilled purchase orders and as-built design documents demonstrating installation of the qualifying domestic content items in that facility and the BLM determines, in writing, that the facility actually qualifies for the reduction. The holder's MWh rate then would be updated for the next year's billing. Payments for past years would not be adjusted retroactively.

Paragraph (b)(2) clarifies that "E" is the annual adjustment factor, which is set at three percent. This is the same adjustment factor used for the annual acreage rent under § 2806.52(a)(1)(iii). See § 2806.52(a) of this preamble for further discussion on the annual adjustment factor.

The BLM understands that generally when a solar or wind energy operator begins generating electricity, it has entered into an agreement with a utility or other party to sell its power. It is customary that such agreements include an escalation clause that increases the purchase price of power each year of the agreement. These annual escalations vary by agreement; however, in general, the annual increase is approximately one percent to five percent each year for the contract term to account for gradual decreases in system operational efficiency, operating and maintenance costs, and increases in the retail rate of electricity. There may be some higher annual escalation rates, but that is not common. The BLM determined that a three percent annual adjustment factor is a reasonable escalation for the MWh rate based on a review of the average inflation rate over the previous fifteen years. The BLM considered both an adjustment for inflation that is predictable and an adjustment that changes more precisely with inflation over time. The BLM determined that a set inflationary adjustment that would alter the starting electricity price per MWh by a fixed factor each year was preferrable, because it would increase the predictability of future annual payments. While it is possible that the market price of electricity will deviate from this fixed rate over time, the benefit of rate predictability is important to renewable energy deployment on public lands. Future inflation may be higher than the historically low inflation of the decade or more prior to 2019. To accommodate the more recent inflationary trends, the BLM relied on the IDP-GDP average annual change for the most

recent five-year period, 2018-2022 (estimating 2022 with data for three available quarters), which was 3.36 percent, while taking into account that for the ten-year period preceding 2018, the rate was 1.52 percent. The BLM derived the 3 percent rate in the final rule by rounding to the nearest whole percent of the recent inflationary trends.

Some comments requested that the BLM remove the annual adjustment factor or reduce it, possibly using the prior year's IPD-GDP calculation as an adjustment factor. These comments noted that the BLM should be promoting the greatest use of solar and wind energy resources and maximize commercial interest in development on public lands. Other commenters suggested a higher annual adjustment factor, noting that recent inflation amounts are higher than the three percent proposed.

The BLM considered a range of annual adjustment factors, including those based on IPD-GDP calculations. The BLM's use of three percent aims to capture a reasonable annual adjustment based on changes over time. This rule promotes the greatest use of solar and wind energy resources by applying and offering reductions to the capacity fee for qualifying developments. Additionally, the BLM's methodology focuses on rate predictability; making a recurring calculation using the IPD-GDP is a disincentive for solar or wind development because future rates change by uncertain amounts making the BLM rates unpredictable. This final rule does not change the annual adjustment factor due to these comments.

The regular adjustment factor also provides improved predictability of rates over time for renewable energy developers compared to the BLM's previous periodic adjustments of the MWh fee, which were based on a combination of the annual weighted average wholesale price per MWh and the adjusted rate of return for certain U.S. Treasury Bonds, both of which are variable.

Paragraph (b)(3) clarifies that "F" is the year of the grant or lease term, which is the same number used for the annual acreage rent under § 2806.52(a)(1)(iv). See § 2806.52(a) of this preamble for further discussion on the year of the grant or lease term.

Paragraph (b)(4) clarifies that "G" is the rate of return, which is set at seven percent. By setting the rate of return in this rule, the BLM increases the rate predictability of its capacity fee. This rate of return will not adjust during the term of the authorization. In this final rule, the rate of return is the relationship of income to the total value for a granted use of the public land resource. The rate of return accounts for the value of the authorization each year for use of the resource on public lands that is provided to the BLM through an annual payment.

A comment recommended that the BLM recalculate the rate of return using a 30-year average rate of return for 10-year Treasury Bond rates. The BLM appreciates the suggested recalculation of the rate of return over a 30-year period. The BLM selected the 50-year average of the 10-year Treasury Bond as the reasonable rate to set its rate of return for this rule. See the BLM's Regulatory Impact Analysis accompanying this final rule for further information on how the BLM calculated the rate of return. No changes were made in this final rule due to this comment.

The 50-year simple (i.e., arithmetic) average of the real annual return on 10-year Treasury Bonds is approximately seven percent. This 50-year period includes times when the United States went through periods of stagflation, high inflation, economic boom, and relatively calm market conditions. The BLM's use of the average of the 10-year Treasury Bond rates is a reasonable reflection of a modest return to the government reflective of relatively low risk to the public. The proposed seven percent rate of return is also supported by the Council of Economic

Advisors, which estimates a real return to U.S. capital of around seven percent from 1960 to 2014 using data from the National Income Product Accounts and other sources.[13] By setting the rate of return in this final rule, it would not be adjusted in the future, except by further rulemaking.

One comment suggested that the rate of return stay at two percent as currently provided in BLM Manual 2806.60. The comment further suggested that the proposed increase from two to seven percent does not appear to be reasonable and is inconsistent with the Energy Act of 2020. The updated rate setting methodology in this final rule includes an increased rate of return, consistent with the BLM's authority under FLPMA to collect fair market value. The change in the rate of return is commensurate with other sectors of the energy market that base their return on a percentage of the commodity or energy generation value. It is appropriate that the rate of return change when transitioning from a capacity fee based on nameplate capacities to one based on the value of energy generation at market. The former rate setting methodology (see BLM Manual 2806.60) implemented the authority of the Energy Act of 2020 by reducing the rate of return to two percent. In this final rule, the BLM is applying the authority of the Energy Act of 2020 to the MWh Rate as reductions under § 2806.52(b) instead of reducing the rate of return. In this final rule, the BLM has determined that reductions under § 2806.52(b) for solar and wind energy are more meaningful than the reductions in the Manual 2806.60 and are necessary to promote the greatest use of solar and wind energy resources on the public lands. The BLM did not change this section of the final rule in response to this comment.

[13] Council of Economic Advisers Issue Brief, "Discounting for Public Policy: Theory and Recent Evidence on the Merits of Updating the Discount Rate" (January 2017).

Paragraph (b)(5) clarifies that "H" is the annual energy generated on public lands for the right-of-way in question. The BLM will issue a bill to coincide with the calendar year based on the annual certified statement provided to the BLM that gives either the amount of estimated or actual electricity generated by the development. The payment for the first year of energy generation will be based on an estimate of energy generation, and then the BLM will determine final payment for that first year based on actual energy generation. The following years of payments made in advance, pursuant to 504(g) of FLPMA, will be based on the most recent calendar year's actual energy generation reported on the certified statement. Exception to using actual energy generation is provided for, in certain circumstances, under paragraph (b)(5)(vi) of this section. Paragraph (vii) addresses late payments specific to underestimating energy generation in certain circumstances.

Paragraph (b)(5) has changed from the proposed rule due to public comments. The BLM proposed to require developers to provide an estimate for each year of energy generation of a development project to calculate the payment in advance. Those estimated energy generation amounts would be updated after that calendar year using actual energy generation amounts and any over or underpayment would be determined at that time. Revisions to this paragraph now provide in the following subparagraphs that:

(i) The holder must submit an annual certified statement to the BLM before the first year of energy generation begins or is scheduled to begin. Thereafter, annual certified statements must be submitted by the end of October.

(ii) Prior to the start of energy generation, the holder must submit the annual certified statement containing an estimate of energy generation on the right-of-way (estimate of first year's energy generation).

(iii) Once energy generation has begun, the holder must submit to the BLM an annual certified statement of the most recent calendar year's actual energy generation on the right-of-way.

(iv) The BLM's calculation for payment of the capacity fee will be based on the certified annual statement. Calculation for payment of the capacity fee for development projects that contain both public and non-public lands will be prorated by multiplying the total energy generated by the percentage of the total development area made up of the right-of-way footprint on public lands.

(v) If the year's actual energy generation exceeds or is less than the amount of energy generation used to bill for the payment in advance, the holder will be billed, credited, or refunded for the underpayment or overpayments pursuant to §§ 2806.13(e) and 2806.16. In no event will the total payment required be less than the annual acreage rent.

(vi) The BLM may approve a request by a holder to provide a new estimate of energy generation in certain circumstances. Circumstances would including those when energy generation is expected to be interrupted, such as with planned maintenance activities, where the amount of energy generated is expected to interrupt energy generation by 25 percent or more, or where the right-of-way holder is aware that the energy generation in the subsequent year will exceed the actual energy generation for the previous year by 25 percent or more such that the

BLM's use of the actual generation from the previous year as the basis for a bill would result in an underestimate of more than 25 percent.

(vii) The BLM may assess a late payment fee of 10 percent of actual energy generation for the year in which the underestimation occurs. The holder will pay a late payment fee for each year of underestimation if the right-of-way holder underestimates energy generation by 25 percent or more of the actual energy generation or does not provide the BLM with a new estimate when energy production will exceed the previous year's actual production by more than 25 percent. The BLM may decide not to assess the late payment if the right-of-way holder provides an adequate justification that the underestimation was reasonably unforeseeable prior to payment of the annual bill, consistent with § 2805.12(e).

Some comments asserted that penalties for underestimating generation are inappropriate as factors outside of a developer's control, such as weather or grid related interruptions, may cause unexpected generation shortfalls. Additionally, comments noted that developers have every incentive to maximize production, which may itself cause a developer to underestimate generation. The BLM has revised the rule to reduce the potential that a holder would be subject to a penalty while minimizing the potential for underestimation. Consistent with other comments related to the term length under 2801.9, the BLM has made revisions to 2806.52(b)(5) that are consistent with revisions made under §§ 2805.12(c)(8) and 2807.17(c). The BLM revised paragraph (vi) and added paragraph (vii) to this final rule due to comments.

Pursuant to 2805.12(c)(8), a holder may receive a notice from the BLM of their noncompliance with the right-of-way and that they are subject to right-of-way termination. Additionally, the BLM may address a holder's chronic underestimation through existing §

2807.17(a), resulting in suspension or termination of the authorization. The BLM may make such a determination after collecting relevant information, including information provided pursuant to § 2805.12(a)(15).

Some comments requested that the rule preserve sensitive competitive information amongst operators of solar and wind energy development projects. These comments suggested that the BLM could allow developers to submit generation data based on Form 923, which is provided to the Energy Information Administration. The final rule does not carry forward the suggested use of Form 923. The BLM disagrees with waiting the additional time to collect actual energy generation and update or validate prior year bill and payments with rights-of-way holders. As suggested by commenters, using Form 923 would delay billing for actual energy generation amount by an additional year, which is not acceptable for the BLM's responsible stewardship of the public lands. No changes were made due to this comment.

Section 2805.12(c)(8) sets the diligent operation standards for solar and wind energy development projects and provides steps to follow when a holder expects to fail in meeting diligent operation requirements. Holders may follow the steps outlined in this section to ensure compliance with this final rule.

Paragraph (b)(6) of this section describes where you may obtain a copy of the current MWh rate schedule for solar and wind energy generation.

Paragraph (b)(7) of this section provides for periodic adjustments to the MWh rate. This paragraph applies unless you are an existing holder and elect to continue paying under your current rate adjustment method per § 2806.51(c).

Paragraph (b)(7)(i) of this section clarifies that the rate from the MWh rate schedule for the first year of energy generation will not change once your grant or lease is authorized. The annual adjustment factor under § 2806.52(b)(1)(i) applies to the MWh rate during the term of the grant or lease. Any subsequent MWh rate schedule updates will apply to new grants and leases.

Paragraph (b)(7)(ii) of this section provides that the MWh rate schedule will be updated once every five years consistent with the timing of acreage rent adjustments. The MWh rate schedule will include the annual adjustment factor for the five-year period it covers.

Paragraph (b)(8) of this section provides that the general payment provisions for rents under § 2806.14(a)(4) also apply to the capacity fee.

Paragraph (c) applies unless you are an existing grant or leaseholder and elect to continue with your current MW capacity fee adjustment method. The fee is set at the time of authorization or re-issuance and not adjusted further except by the annual adjustment factor from § 2806.52(b)(2).

Some comments suggested that the BLM should retain discretion under § 2805.12(e) to adjust rent and fee values, including at the request of a right-of-way applicant or holder. While section 2805.12(e)(2) of this final rule does not include a mechanism for applicants or holders to request alternative rent or fee rates in general, the BLM has revised § 2806.52(b)(1)(i) to identify circumstances where the BLM would have discretion to select an alternative MWh rate.

Some comments suggested a wide range of potential fee structures to address environmental and economic factors. Some comments also requested that the BLM clarify how the rents and fee numbers were developed. The BLM's development of the acreage rent and capacity fee was an iterative process that included consideration of the BLM’s legal authority;

taxpayer concerns for the collection of reasonable rent for the use of public lands and resources; the BLM's prior policies for rents and fees and their impact to solar and wind deployment on public lands; and the national renewable energy goals on public lands set in § 3004 of the Energy Act of 2020. The BLM initially solicited comments in September 2021 after which the BLM published interim guidance in Manual section 2806.60 - Rent.

Some comments requested a publication or annual report from the BLM on the payments it has received from solar and wind energy development projects. This information can be found in the BLM's annual publication of Public Land Statistics, which enumerates annual revenues from energy resources including wind and solar rents and fees.

Some comments requested that the BLM provide fee reductions for projects that are sited on previously disturbed lands or outside of sensitive wildlife habitats. The BLM contemplated various methods and models by which to potentially apply rate reductions in this final rule. Additional information on the alternatives considered may be seen in the proposed rule's preamble discussion under subpart 2806. The BLM determined that an across-the-board reduction best meets national energy goals. This methodology provides flexibility and financial incentives without regard to where projects may be sited. Having reduced rent and fee rates that are independent of location complements the BLM's ability to update land use planning, which defines where project applications may be proposed and where projects will not become obsolete if or when technology advances and siting needs shift for economic or environmental reasons.

One comment suggested that a holder should be able to select whether they wish to pay an acreage rent or capacity fee. The BLM disagrees with this comment. This final rule clearly provides for both an acreage rent or a capacity fee for solar and wind energy development

projects. Generally, the acreage rent is required for the intensity of use and the occupancy, including site control, of the surface of the public lands. The capacity fee reflects the value of the energy generated from the solar or wind energy resource located on public lands. The BLM will collect the greater of either the acreage rent or the capacity fee for a solar or wind energy development.

One comment suggested rate reductions be made available for existing right-of-way holders who enter into new PPAs for a project during the term of an authorization, such as when they repower. This final rule provides for greatly increased rate predictability for solar and wind energy development rights-of-way. Under § 2806.52(b)(v), the BLM provides an opportunity for conditionally approving a reduction if it receives a request with sufficient documentation demonstrating that the holder may qualify for the reduction before the BLM issues the right-of-way. No other opportunity for later qualifying for a reduction is made available in this rule as the reductions to its rates are available prior to the BLM issuing the ROW. The BLM believes that the adjustments to improve rate predictability, including allowing for a longer term (see § 2801.9) for certain rights-of-way, will provide for the longer economical life of a particular project. An operator or a holder of an existing authorization may elect to keep their current rate methodology, including future adjustments that may be made, if they do not wish to change to the rate-setting methodology of this final rule.

Some comments suggested that the 80 percent reduction of capacity fees without any qualifying stipulations will adversely distort the energy market and land uses. The BLM does not expect this final rule to alter the solar or wind energy markets or uses of public lands adversely. This final rule implements the authority of the Energy Act of 2020 and direction of Executive

Order 14008, among others, that set goals to promote the greatest use of solar and wind energy resources on public lands. The rule is intended to incentivize development of wind and solar energy projects on BLM-managed lands. The BLM sees any resulting change that benefits solar or wind in energy markets as a positive development. See *Reductions and Discounts* under 5.1 of the Regulatory Impact Analysis for further information on the 80 percent reduction and the economic impacts of the rule.

Some comments suggested that the BLM should collect fair market value for the use of federal lands under the BLM's rule. While FLPMA generally requires the BLM to collect the fair market value for the use of the public lands, the Energy Act of 2020 provides the Secretary of the Interior with additional authority to reduce acreage rents and capacity fees, including to less than fair market value in certain circumstances. The BLM is implementing this authority to reduce the financial burden to solar and wind energy developers to promote the national interest of developing a clean energy economy.

Section 2806.54 Energy storage facilities that are not part of a solar or wind energy development.

Section 2806.54 clarifies that the rent the BLM determines for an energy storage facility that is not part of a solar or wind energy development facility is based on the linear rent schedule. Energy storage facilities may be authorized separately from a solar or wind energy development facility. In these instances, the BLM will apply the linear rent schedule unless the BLM determines that the linear rent schedule does not apply to the underlying right-of-way use under § 2806.70, such as when the BLM may determine that a small site rent schedule applies to an energy storage facility.

The BLM will not charge the rent or fee of a solar or wind energy development right-of-way for an energy storage facility that is separate and independent from a right-of-way for an energy generation facility. Charging a capacity fee would be inappropriate as no energy generation from the facility would be occurring from the use of public lands. Using the pastureland rents for energy storage would also be inappropriate, as use of those acreage rates is intended to be coupled with the capacity fee to determine solar and wind energy generation payments for use of public lands.

Sections 2806.60 through 2806.68 are removed from the final rule. Information formerly contained in these sections is now found in sections 2806.50 through 2806.58.

Subpart 2807 - Grant Administration and Operation

Section 2807.17 Under what conditions may BLM suspend or terminate my grant?

Section 2807.17 of this final rule is updated based upon comments on § 2801.9 regarding term length and updates to § 2805.12 regarding new diligent operation requirements for solar and wind energy development. See the respective sections of this preamble for further information on the term length and the terms and conditions of grants and leases for solar and wind energy.

Section 2807.17(c) provides that the BLM may suspend or terminate a right-of-way upon abandonment. The BLM presumes that a right-of-way holder has abandoned its right-of-way by failing to use it for a continuous 5-year period, except for solar and wind energy. Solar and wind energy rights-of-way are presumed to be abandoned after two continuous years of insufficient productivity or upon abandonment. This section is updated consistent with the new provision in § 2805.12(c)(8), which provides for a holder to receive notice of the BLM's presumption and gives a reasonable time to cure the noncompliance with the diligent operations requirement.

Section 2807.20 When must I amend my application, seek an amendment of my grant or lease, or obtain a new grant or lease?

Section 2807.20 describes when a right-of-way applicant must seek to amend its application, grant, or lease.

Paragraph (b) clarifies that "except for qualifying energy development grants and leases per § 2806.51(c)," the requirements for amending an application or grant are the same as processing a new application, including payment of processing and monitoring cost recovery fees. Section 2806.51(c) provides a unique exception for existing solar and wind energy rights-of-way authorized before this final rule that may convert to the rent adjustment methodology of this final rule. See § 2806.51(c) of this preamble for further information on qualifying authorizations.

Paragraph (f) describes how the BLM would administer an approved solar and wind energy grant or lease if the holder requests to change the rent adjustment methodology. Any request would have to be received within 2 years of the date this rule becomes effective and would be processed as an amendment by which the BLM would re-issue the grant or lease and update the terms and conditions under § 2805.12 and rent provisions under §§ 2806.50 through 2806.52. The BLM would be able to collect or use processing and monitoring costs under §§ 2804.14 and 2805.16 for handling the request. See § 2806.51(c) for further discussion regarding requests to use the rent adjustment methodology of this rule.

One comment suggested that State and local governments should have a shared decision-making role with the BLM when the BLM considers re-issuing a grant or lease to convert the right-of-way over to the new rate adjustment methodology. The BLM does not agree with the

suggestion that State or local government offices should share in a decision-making role when the BLM decides whether to authorize a change to the rent adjustment methodology. Re-issuing an authorization under this final rule is an administrative action that will convert existing authorized projects to the new rate setting methodology for the use of BLM-administered public lands and resources. The BLM will continue to engage with the public, and Tribal, Federal, State and local government partners on the BLM's management of its public lands, as appropriate. The BLM did not change this section of the final rule.

Section 2807.21 May I assign or make other changes to my grant or lease?

Section 2807.21 describes the requirements for a holder seeking to assign or make other changes to a grant or lease.

Paragraph (e) clarifies that when the BLM assigns a right-of-way from one holder to another, it may modify a grant or lease, such as by adding additional terms and conditions. The paragraph exempts solar and wind energy leases from that provision unless modifications are warranted under § 2805.15(e), which provides for changes to terms and conditions as a result of changes in legislation, regulation, or as otherwise necessary to protect the public health or safety or the environment. This final rule removes provisions that distinguished between inside and outside DLAs for solar and wind energy development. The BLM may assign leases inside of DLAs without competition.

One comment suggested that the BLM should retain the authority to impose additional requirements on solar and wind projects. The commenter expressed concern that the BLM may be constrained when it comes to regulating a bad operator especially with regards to excepting a bond requirement and that bond requirements should be mandatory on solar and wind projects,

so the BLM does not have to clean up sites after company closure or refusal to perform reclamation. The BLM requires a bond for all solar and wind energy grants and leases. The BLM requires this bonding upfront to cover reclamation costs and to enforce the terms and conditions, such as those for rent and capacity fees. Paragraph (e) provides that the BLM, when assigning a grant or lease to a new holder, may modify the right-of-way and add bonding and other requirements, including additional terms and conditions, except for wind and solar leases which the BLM can only modify when warranted as a result of changes in legislation, regulation, or as otherwise necessary to protect public health or safety or the environment as reflected in § 2805.15(e). The BLM also has diligent development and operation requirements, among other terms and conditions, in § 2805.12 that further ensure a holders' compliance with the right-of-way authorization and all its requirements. The BLM did not change this section of the final rule.

Subpart 2809 – Competitive Process for Solar and Wind Energy Development Applications or Leases

Subpart 2809, "Competitive Process for Leasing Lands for Solar and Wind Energy Development Inside Designated Leasing Areas" is dedicated to competitive solar and wind energy processes. In the final rule, Subpart 2809 generally applies the same competitive process both within and outside DLAs.

Section 2809.10 Competitive process for energy development grants and leases.

Section 2809.10, "Competitive process for energy development grants and leases," applies to public lands located both inside and outside of DLAs. Paragraphs (a) through (d) explain that the BLM may conduct a competitive process to consider solar or wind energy development applications or leases: (1) on its own initiative; (2) based on responses to a call for

nominations; (3) based on a request submitted by a member of the public in writing; or (4) when it receives two or more competing applications. These provisions incorporate the BLM's broad discretion under FLPMA to determine under what circumstances it may utilize a competitive process. This section is revised to replace "offer" with "process" to remain consistent with this section's requirements for solar and wind energy development grant and leases competitive process.

The BLM has determined that it will implement its discretion under FLPMA to potentially utilize a competitive process for lands both inside and outside of DLAs and thus standardize a competitive process where competitive interest exists. More specifically, the BLM will use the most appropriate process given the circumstances of a particular location, spurring more competition for the most desirable areas, while continuing to increase solar and wind energy deployment consistent with the statutory direction in the Energy Act of 2020.

As proposed, prior paragraph (d) is removed consistent with changes made under § 2804.35(b) and elsewhere in subpart 2809. The BLM has discretion to process applications inside DLAs without going through a competitive process. Accepting applications inside DLAs reduces timelines and costs and removes barriers for considering development projects where there is no competitive interest.

Proposed § 2809.10(e) would have precluded the BLM from holding a competitive process when the BLM has accepted a complete application, received a Plan of Development, entered into a cost recovery agreement, and published an EA or Draft EIS. Industry comments suggested that the BLM commit to not holding a competitive process earlier than in the proposed rule. In response to those comments, the final rule establishes that the BLM will not initiate a

competitive process for those lands where the BLM has accepted a completed application, received a Plan of Development, and entered into a cost recovery agreement, while removing the requirement that the BLM must have published an EA or a draft EIS.

The final rule also adds to § 2809.10(e) an exception referencing § 2804.25(c). Even where the BLM has accepted a complete application, received a Plan of Development, and entered into a cost recovery agreement, it may nonetheless offer lands in a competitive process if the applicant has not proceeded diligently as required by § 2804.25(c). These amendments give the industry the certainty it needs to proceed with projects while retaining the BLM's discretion to deny an application or offer lands competitively if the applicant does not proceed diligently. In that way, these amendments balance the BLM's obligations to incentivize renewable energy development on public lands and to recover a fair return for U.S. taxpayers.

Some comments suggested that requiring a competitive leasing process in designated leasing areas has helped ensure that only well-thought-out projects are proposed. These commenters raised concerns that eliminating a required competitive process will cause a rush of poorly planned projects and will decrease use of the designated leasing areas. Several comments argued in favor of requiring a competitive process in designated areas, emphasizing that it shifts the burden from taxpayers to those who stand to profit, validates demand, increases financial return for use of public lands, drives innovation, and ensures transparency and fairness in the process. These comments expressed concerns that non-competitive leasing may discourage investment and lead to inefficiencies.

In this final rule, the BLM's change in the use of competitive processes is intended to provide flexibility in addressing interest in the use of public lands for solar and wind energy and

will not allow for or authorize poorly planned projects. The BLM retains its discretion to authorize or deny solar or wind energy development projects. As explained in the preamble to the proposed rule, the requirement to undertake competitive processes for all applications in DLA's extends the timeline and increases costs, creating a barrier for authorizing projects in areas where there is no competitive interest. The BLM has broad discretion under FLPMA to determine under what circumstances it may utilize a competitive process for lands both inside and outside of DLAs and to use competitive processes only where competitive interest exists. The BLM anticipates that accepting applications in DLAs without the prerequisite of holding a competitive process will likely generate more applications in the most desirable locations. The final rule also provides the BLM with the flexibility to utilize a competitive process where there are multiple competing applications. The purpose of these changes is to ensure that the BLM can use the most appropriate process given the circumstances of a particular location, which the BLM believes will spur more competition for the most desirable areas, while continuing to increase solar and wind energy deployment consistent with the statutory direction in the Energy Act of 2020.

For the same reasons, the BLM disagrees with the comments that focusing the BLM's competitive process and resources to where there is competitive interest on public lands is a negative impact to taxpayers, demand, financial return, innovation, and transparency. This final rule improves transparency over all processes of the BLM's administration of applications and right-of-way authorizations and achieves the goals set by the Energy Act of 2020 and direction of Executive Order 14008. Moreover, although DLAs represent areas specifically designated for renewable energy development, they are not the only areas where such development may be

appropriate, nor are they the only areas where use of a competitive process may be appropriate. These projects are complex and require many different steps and actions to occur to be successful. The BLM believes offering areas outside of DLAs for a competitive process is appropriate and would help to meet the goals of the Energy Act of 2020 and direction of Executive Order 14008.

Some comments suggested leasing should not be competitive, or at least only be considered in specific circumstances, such as when multiple applications for the same area are submitted or when certain conditions are met, such as when labor agreements are not used. This section of the final rule clarifies when the BLM may conduct a competitive process, including for competing applications under paragraph (d). The BLM disagrees that attaining an agreement to use certain labor should determine whether the BLM holds a competitive process or not. The BLM's discretion to hold a competitive process includes when there is competitive interest for that system or land or upon the BLM's own initiative, among other reasons identified in this section of the rule.

Some comments highlighted the interest in a clear and standardized process and suggested that the potential for competition should be limited to avoid deterring investment. In this final rule, the BLM has provided a clear process that the BLM will follow for solar and wind energy development projects when a competitive process is held. However, the BLM does not agree with comments to limit competition. The BLM will generally hold a competitive process where there is a competitive interest, whether it is inside or outside of designated leasing areas, or on its own initiative.

Other comments recommended adding steps to ensure no competition exists before processing applications without a competitive process. Suggestions given to the BLM include filing a notice in the local newspaper, online, or in the *Federal Register* whenever the BLM receives an application requesting any other applications to be submitted. This final rule does not include provisions to require solicitation of public interest with every application submitted to the BLM for a solar or wind energy development. The Energy Act of 2020 and direction of Executive Order 14008 are clear in seeking expedited deployment of renewable energy projects on public lands. Adding provisions in the BLM's rules that require additional steps to solicit competitive interest where there may not be any may slow the deployment of renewable energy. Historically, the majority of solar and wind rights-of-way authorized on BLM-administered public lands have been authorized after an application process without a competitive process, and there are only six existing competitively issued leases, which is only approximately six percent of authorized development projects on public lands. You may find information on the BLM's authorized and pending solar and wind energy projects on its website at: https://www.blm.gov/programs/energy-and-minerals/renewable-energy/active-renewable-projects. More specifically, since the BLM began using competitive processes for permitting solar leases on BLM public lands, the agency has held five competitive processes for 16 parcels. These have resulted in multiple bids for nine parcels, a single bid for three parcels, and no bids for four parcels. In the circumstances that BLM held a competitive process and received no bids, the BLM had previously received several expressions of interest and applications for those public lands. The BLM then held a competitive auction resulting in no bids for three parcels. The BLM did not change this section of the final rule.

A comment requested that the final rule clarify when the BLM will not require an auction. The BLM does not believe additional clarification is necessary, as § 2809.10(e) provides that the BLM would not offer lands through a competitive process when the BLM has accepted a completed application, received a Plan of Development, and entered into a cost recovery agreement.

One comment suggested that the final rule clarify that the BLM should be precluded from using a competitive process to award a solar or wind energy development lease or grant on an area of public lands once an applicant has either submitted a right-of-way application for solar or wind energy development or made substantial investments in potentially developing that area of the public lands. While the proposed rule provided that BLM would not offer lands in a competitive process if four criteria were met, this final rule removes the fourth proposed criterion in section (e): "on publication of an Environmental Assessment or Draft Environmental Statement." The final rule retains the first three, such that the BLM would not offer lands in a competitive process for which it has accepted a complete application (see § 2804.12(j)), received a Plan of Development (see § 2804.12(b)), and entered into a cost recovery agreement (see § 2804.14). This change requires fewer milestones to close the window for holding a competitive process than the proposed rule and improves certainty for interested developers to proceed with applications but it does not move the threshold for prohibiting competitive processes earlier than in the existing regulations as the commenter suggested.

In addition to the changes under 2809.10(e), the BLM revised § 2804.25(c) to clarify that the BLM retains discretion to deny an application where the applicant does not proceed diligently. An applicant's failure to remain diligent in processing an application may result in the

BLM denying the application and offering the lands competitively. These amendments balance the BLM's obligations to incentivize renewable energy development on public lands and to recover a fair return for U.S. taxpayers.

A comment suggested that the BLM should not require a competitive process where an applicant's facilities are located on both private and federal lands and the applicant has secured agreements with the adjacent landowners. This final rule governs the BLM's administration of applications and authorizations, including competitive processes. The BLM will consider all relevant and available information when determining whether a competitive process is appropriate, including whether separate agreements had already been met for adjacent lands. However, this rule does not preclude the BLM from holding a competitive process when agreements are held for adjacent lands, which would allow developers and adjacent landholders to effectively monopolize the use of the public lands without first obtaining authorization from the BLM. In instances where the BLM believes it is appropriate, it may determine to hold a competitive process.

Other commenters suggested that the BLM should only have the discretion to move to a competitive process in the initiation phase of a project and not after an application is complete and the cost recovery is funded. This final rule maintains the BLM's discretion to determine whether there is a competitive interest in the public lands. In the BLM's experience, some applications progress more slowly than others once the existing requirements of the BLM rules are met. By requiring a complete application pursuant to § 2804.12(j), a Plan of Development pursuant to § 2804.12(b), and a cost recovery agreement pursuant to § 2804.14, the BLM will help ensure that applicants remain diligent in pursuing their use of the public lands, while

preserving discretion to utilize a competitive process. Even after that point, § 2804.25(c) of the final rule clarifies that the BLM retains discretion to deny an application where the applicant does not proceed diligently. These additional conditions will not unreasonably burden diligent applicants and will help identify those applicants who are not working with the BLM to process applications diligently.

Section 2809.11 How will the BLM call for nominations?

Section 2809.11 is retitled to improve consistency with this section of the final rule. No changes were made to this section due to comments. Consistent with the change in terminology of § 2809.10, the BLM changed "offer" with "process" throughout this section.

Paragraph (a) provides that the BLM may publish a notice in the *Federal Register* calling for nominations of lands to be offered through a competitive process for solar and wind energy development. Other notification methods may also be used, such as a newspaper of general circulation in the affected area or the Internet. The section allows for the BLM's discretionary use of a competitive process discussed in § 2809.10. The paragraph would also specify information that will be included in a call for nominations as follows:

(1) The date, time, and location by which nominations must be submitted;

(2) The date by which nominators will be notified of the BLM's decision on timely submissions;

(3) The area or areas for which nominations are being requested; and

(4) The qualification for a nominator, which must include at a minimum the requirements for an applicant, see § 2803.10.

Paragraph (b) provides the requirements for nominating a parcel of land for a competitive process. Paragraph (b)(1) requires payment of $5 per acre for nominated parcels. The nomination fee is collected by the BLM under its cost recovery authority under Sections 304(b) and 504(g) of FLPMA, and the portion not spent in processing the nomination and preparing for a competitive process may be refunded to the nominator if not successful in the competitive process. These fees reimburse the BLM for the expense of preparing and holding a competitive process.

Paragraph (b)(2) requires the nomination to include the nominator's name and address of record. This information is necessary for the BLM to communicate with the nominator about a future competitive process for the parcel.

Paragraph (b)(3) requires that a nomination be accompanied by a legal land description and a map of the parcel of land. This information helps identify nominated parcels for the competitive process.

Paragraph (c) provides that the BLM will not accept nomination submissions that do not comply with this section or from submitters who are not qualified per § 2803.10 to hold a grant or lease.

Paragraph (d) provides that a nomination cannot be withdrawn except by the BLM for cause, in which case the nomination fee would be refunded.

Paragraph (e) provides that the decision whether to hold a competitive process in response to a nomination lies in the BLM's discretion.

Some comments requested that the BLM make the nomination fee non-refundable. One comment further suggested that the BLM require "skin in the game" from project proponents and

that the BLM should keep the fee to cover at least any reasonable costs it incurred in pursuing the nomination. The BLM agrees with comments suggesting that the fee should be used in recovering its reasonable costs in processing the nomination and preparing for a competitive process. The BLM's authority under Sections 304(b) and 504(g) of FLPMA allows for the use of these funds in processing applications. Per existing rules, the BLM may refund the balance, if any, of collected cost recovery funds when they are no longer needed. Please see existing subpart 2804, starting with § 2804.14, for more information on the BLM's administration of cost recovery fees.

Section 2809.12 How will the BLM select and prepare parcels?

Section 2809.12 describes how the BLM identifies parcels suitable for competitive processes. The BLM did not make changes to this section of the final rule in response to comments received, except that, consistent with the change in terminology of prior sections, the BLM changed "offer" to "process" throughout this section. The BLM also removed "on existing" when describing land use designations to avoid confusion and clarify that only existing land use designations may be considered.

Paragraph (a) clarifies that the BLM may rely on any information it deems relevant in identifying parcels for competitive processes, but also describes more precisely the most common sources of information, which include public nominations and existing land use designations. The BLM is not constrained to consider only these listed sources of information when deciding whether to conduct competitive processes for certain parcels.

Paragraph (b) clarifies that the BLM may conduct necessary studies and site evaluation work, including applicable environmental reviews and public meetings, either before or after

offering lands for a competitive process. The BLM has sometimes found that the necessary studies and site evaluation work cannot be completed until the competitive process is held and the successful bidder has submitted an application or Plan of Development. The BLM must complete site-specific NEPA analysis even when the BLM has identified a successful bidder as the presumptive leaseholder. The BLM retains discretion to approve, approve with modification, or deny a proposed energy development.

The BLM revised the language of proposed paragraph (c) to clarify that it is the BLM's choice whether to use a competitive process or not and that such choices do not constitute a decision to approve or deny a grant or lease and are not subject to appeal under 43 CFR Part 4.

A comment suggested that under paragraph (c), the final rule should allow for administrative appeals, as it relates to BLM procedures used to make decisions. Paragraph (c) of the final rule clarifies that the BLM's choice about whether to use a competitive process is not a decision to grant or deny a right-of-way or otherwise final agency action; instead it represents only an intermediate step that may or may not lead to a decision. The public's ability to administratively appeal an agency decision to grant or deny a right-of-way is unaffected by this provision. The BLM will continue to provide ample opportunities to the public for engagement throughout both the competitive and non-competitive permitting processes. An appeal may be considered when the BLM issues a decision under 43 CFR part 2800.

A comment suggested that allowing for an administrative appeal process to challenge a BLM choice to use a non-competitive process would assist the BLM in identifying whether there is any competitive interest in the public land, getting a better return for the public. The BLM disagrees with this comment. Administrative appeals may be submitted only for agency

decisions (see existing § 2801.10). Additionally, allowing for administrative appeals over interim choices by the BLM about which procedures to follow to reach a decision would likely delay its decision-making process substantially.

Section 2809.13 How will the BLM conduct competitive processes?

Section 2809.13 is retitled from the proposed rule consistent with other changes to replace "offer" with "process." The change from the proposed rule to read "process" when describing the BLM's competitive process is made throughout this section when appropriate.

This section describes how the BLM conducts competitive processes. Paragraph (b) provides that the BLM publishes a notice of competitive process in the *Federal Register* and through other notification methods, such as a newspaper of general circulation in the area affected or the Internet. Paragraph (b)(7) clarifies that the notice of competitive process would state whether a successful bidder would become a preferred applicant or a presumptive leaseholder. Preferred applicants are required to meet application submission requirements under § 2804.12, and presumptive leaseholders are required to submit a Plan of Development per § 2809.18. The preferred applicants and presumptive leaseholders are discussed further in § 2809.15.

Under paragraph (c) of this final rule, the BLM will notify nominators of its decision to conduct a competitive process at least 30 days in advance of the bidding for the lands that were nominated if the nominator has paid the nomination fees and demonstrated qualifications to hold a grant or lease.

Some comments suggested that under paragraph (b)(7) the BLM should continue to require a successful bidder to submit a Plan of Development. The BLM agrees with these

comments. A Plan of Development is required in this final rule by a presumptive leaseholder under paragraph 2809.15(a)(ii) and by a preferred applicant who would follow the application process for solar and wind energy applications, including the submission of a Plan of Development required under § 2804.25(c).

Section 2809.15 How will the BLM select the successful bidder?

Section 2809.15 explains how the successful bidder is selected. In this final rule, the distinction between preferred applicants and presumptive leaseholders reflects the fact that the BLM may conduct competitive processes in a variety of circumstances with different outcomes. The distinction between presumptive leaseholder and preferred applicant is intended to ensure that the BLM can expedite approval of proposed projects in areas where the environmental impacts of solar and wind energy development have been previously analyzed and disclosed through a land use planning process. This will help ensure that the BLM does not commit public land resources before completing the necessary analyses. This section is also revised, consistent with other changes in this rule, to refer to "process" where appropriate when describing the BLM's competitive process.

Paragraph (a) of this final rule provides that the highest bidder, prior to any variable offsets, is the successful bidder. Successful bidders may become either the presumptive leaseholder or the preferred applicant.

The term "presumptive leaseholder" describes situations in which at least one round of environmental review for solar or wind energy development has been conducted before the competitive process is held, so that the environmental impacts of potential development are relatively well understood before the competitive process is held and the successful bidder has a

high likelihood of being able to obtain an authorization to develop its proposed project. As set forth in paragraph (b)(1)(i), a successful bidder would only be designated as a presumptive leaseholder if the lands for which the competitive process is held are located within a DLA and the BLM has indicated in advance that the successful bidder would become a presumptive leaseholder (see also § 2809.13(b)(7)). These requirements would limit the use of the term "presumptive leaseholder" to situations in which the BLM has previously completed an environmental analysis for solar or wind energy development in the area through the land use planning process and has specified in advance (through the notice of competitive process) many of the terms, conditions, and mitigation measures that would need to be incorporated into an approved authorization. A presumptive leaseholder does not have to complete the initial application review stage, which is designed to ensure that the site is generally appropriate for solar or wind energy development. A presumptive leaseholder has site control for a solar or wind energy development, precluding other competing solar or wind energy development projects from siting on that land, unless allowed by the presumptive leaseholder. The BLM would also not process other applications for use of that land unless allowed by the presumptive leaseholder.

This final rule also recognizes that even with a presumptive leaseholder, an additional site-specific environmental analysis may be required before the BLM irretrievably commits to allowing a facility to be developed. The BLM retains its full discretion in considering whether to approve a presumptive leaseholder's proposal based on site-specific environmental analysis, which would typically be tiered to the area-wide environmental analysis accompanying the identification of the area as a DLA. Paragraph (b)(1)(ii) therefore notes that the presumptive leaseholder's right to develop a project on the site is contingent upon the BLM's approval of the

presumptive leaseholder's Plan of Development. Once the BLM approves the proposed Plan of Development, following a site-specific environmental analysis, a lease could be awarded, conferring a right to develop a project on the site, and the presumptive leaseholder would become a leaseholder.

In other cases, the BLM could conduct a competitive process without having completed an initial environmental analysis for solar or wind energy development for that area. In such cases, as set forth in paragraph (b)(2), the successful bidder would become the "preferred applicant" and would obtain only the exclusive right to submit an application for solar or wind energy development on that site without further competition from other applicants for solar or wind energy development. Such an application would be processed under subpart 2804 in the same manner as other, non-competitive applications. The BLM would conduct a full environmental analysis before the preferred applicant may obtain a grant and the right to develop a project on the site. A preferred applicant that fails to meet the requirements of subpart 2804 may lose their status as the preferred applicant, and the BLM may deny their application consistent with § 2804.26.

Paragraph (b) provides that a successful bidder becomes a presumptive leaseholder or preferred applicant only after making payments required in paragraph (d) of this section and satisfying the requirements for holding a grant or lease under § 2803.10. The BLM could move on to the next highest bidder or re-offer the lands under § 2809.17 if the successful bidder does not satisfy these requirements.

Paragraph (b)(1) describes the requirements to become a presumptive leaseholder, which are that the public lands successfully bid upon are located within a DLA and that the notice of

competitive process indicated successful bidders would become presumptive leaseholders. This paragraph also provides that the BLM would only award a presumptive leaseholder a lease if the BLM approves the Plan of Development that is submitted in accordance with § 2804.25(c).

Paragraph (b)(2) describes the requirements for a preferred applicant. A successful bidder who does not become a presumptive leaseholder in accordance with paragraph (b)(1) would become a preferred applicant. The BLM would process applications for a grant or lease under § 2809.12. As with presumptive leaseholders, approval of a preferred applicant's application is not guaranteed. However, the BLM would not process other applications for solar and wind energy development on lands where a preferred applicant has been identified, unless allowed by the preferred applicant.

The BLM may consider issuing authorizations for other uses, such as roadways, testing facilities, recreation permits, or even rights-of-way under MLA authority on the lands for which there is a preferred applicant. Processing authorizations for other uses under Title V of FLPMA would be performed under subpart 2804. Recreation permits and rights-of-way under MLA authority would be processed under Parts 2920 and 2880, respectively. In some instances, such as with applications for incompatible uses, the BLM may determine that the proposed uses would be incompatible, and therefore that processing these other applications must wait until it issues a decision on a preferred applicant's application for solar or wind energy development.

Previous paragraphs (b) and (c) are redesignated as (c) and (d) respectively. Redesignated paragraph (c) is not revised; it provides that the BLM will determine variable offsets for the successful bidder in accordance with § 2809.16.

Redesignated paragraph (d) provides for bidder payment terms. Paragraph (d)(1) provides for certain payment methods, such as personal check, cashier's check, certified check, bank draft, or money order, as well as other methods deemed acceptable by the BLM, should be paid to the Department of the Interior – Bureau of Land Management.

Paragraph (d)(2) requires payment of 20 percent of the bonus bid and the minimum bid amount by the close of official business hours on the day on which the BLM conducts the competitive process or other time the BLM has specified in its notice.

Paragraph (d)(3) requires payment of the balance of the bonus bid within 15 days after the day on which the BLM conducts the competitive process. Variable offsets are applied under paragraph (c) of this section. Such payments are made to the BLM office conducting the competitive process.

Paragraph (d)(4) requires payment within 15 days after the day on which the BLM conducts the competitive process to pay: for preferred applicants, the application filing fee under § 2804.12(c) less any application fee already paid under § 2809.11(c)(1); or for presumptive leaseholders, the acreage rent for the first full year of the lease as provided in subpart 2806.

Paragraph (d)(5) clarifies that the BLM may require successful bidders to pay reasonable costs in addition to the application filing fee when processing an application. Additional reasonable costs may include a Category 6 cost recovery for the BLM to complete processing the application. If a Category 6 cost recovery fee is required, it will be reduced by the amount of the application filing fee already paid. See § 2804.19 of existing regulations for further information on Category 6 cost recovery.

Paragraph (e) explains that the successful bidder will not become a preferred applicant or a presumptive leaseholder and the BLM will keep all money that has been submitted with the competitive process if the successful bidder does not satisfy the payment terms under paragraph (d) of this section. In such a case, the BLM could proceed to the next highest bidder or re-offer the lands through a competitive process under § 2809.17.

A comment questioned the rationale behind determining the highest bidder as the presumptive leaseholder instead of the BLM making an offer to the highest bidder. The commenter suggested that the BLM would then offer the lease to subsequent bidders if the preceding highest bidder declines. The BLM's competitive process in this final rule informs prospective bidders what they would be bidding for in advance of a competitive process. The BLM's required process under this final rule provides important information to prospective bidders up front, reducing uncertainty on what they may bid on. Prospective bidders will be able to bid more confidently with that information. This will also likely result in more and higher bids than would be received if the BLM provided such information after a competitive process and will reduce the need for the BLM to engage the second highest bidder should the highest bidder decline.

The BLM understands from a comment that there may have been some confusion on how the rule distinguishes between holding a competitive process and selecting a presumptive leaseholder or preferred applicant. In this final rule, § 2809.15(b) makes clear that both of the following criteria must be met to be a presumptive leaseholder: first, lands offered must be located within a DLA, and second, the notice of competitive process must indicate that bidders are bidding to become a presumptive leaseholder. The requirement that the lands be within a

DLA is important because DLAs, by definition, have been subject to prior environmental analysis and a land use plan decision to designate the area for solar or wind energy leasing. The environmental analysis would have identified potential conflicts and assessed the environmental impacts of siting a solar or wind energy generation facility, and through the land use planning process the BLM would have determined any necessary mitigation measures prior to the BLM offering the site for leasing. The requirement that the notice of competitive process must indicate that bidders are bidding to become a presumptive leaseholder, meanwhile, is important because it ensures that the terms and consequences of the competitive process are clear to all parties before the bidding occurs, and because it retains the BLM's discretion to conduct a competitive process for a preferred applicant, rather than a presumptive leaseholder, even within a DLA.

Some comments expressed concern that the BLM continues to determine that processing of applications for "incompatible" uses must wait until it issues a decision for a first-in-line solar or wind energy development and believe this violates the intent of FLPMA. Commenters believed the language of the rule is unclear about whether these other applications are from other applicants for a similar right-of-way or whether it would apply to applications for other land uses. These commenters assert that either scenario is inconsistent with FLPMA's multiple-use mandate.

In this portion of the rule, the BLM's presumption is that the BLM has already identified a "preferred applicant" or that the lands have already been identified in the BLM's land use planning process as a DLA. The FLPMA gives BLM discretion as to how it will process applications, including competing ones for the same parcel. This does not violate FLPMA's multiple-use mandate.

Section 2809.16 When do variable offsets apply?

Section 2809.16 provides that a successful bidder may be eligible for a variable offset of bonus bids. This section is also revised, consistent with other changes in this rule, to read as "process" where appropriate when describing the BLM's competitive process.

Paragraph (c) in this final rule clarifies to readers that the offsets are not limited explicitly to what is listed and that the BLM may use other factors, including progressive steps towards the listed factors.

Paragraph (c)(10) is unchanged except for formatting to account for new paragraphs (c)(11) and (12).

Paragraph (c)(11) provides an incentive for use of items that qualify for the Domestic Content preference in solar and wind energy generation facilities on public lands, to complement the fee reduction described in § 2806.52(b)(1)(iii). To qualify for the Domestic Content variable offset, prospective bidders must demonstrate how they will meet the thresholds to qualify for the variable offset. Similar to the Domestic Content reduction for the capacity fee described in 2806.52(b)(1)(iii), the thresholds identified in the notice of competitive process are consistent with the requirements for the domestic content preference in 2 CFR Part 184. A prospective bidder is required to provide sufficient documentation to the BLM prior to the competitive process to show how the bidder qualifies or will qualify for this variable offset. This may be documentation in an initial Plan of Development provided to the BLM or other methods discussed in § 2806.52(b)(1)(v) of this preamble. As discussed below, the BLM may hold in suspense the amounts corresponding to the variable offset until construction of the facility is

substantially complete or the successful bidder otherwise demonstrates to the BLM that the project has met the domestic content thresholds.

Some comments suggested that including a requirement for a domestic content preference as a variable offset would raise the cost to taxpayers. The BLM disagrees with commenters that this rule will increase costs to taxpayers. This final rule does not require bidders or holders to qualify for the Domestic Content preference as a variable offset or other reductions and variable offsets. As the comments were based on an incorrect assumption that the rule requires buying domestic equipment, no change was made in response to comments.

Paragraph (c)(12) provides an incentive for use of qualifying PLAs, such as during the construction of a solar or wind energy generation facility on public lands, to complement the fee reduction described in § 2806.52(b)(1)(iv). To receive the PLA variable offset, prospective bidders must demonstrate how they qualify in the notice of competitive process. A prospective bidder is required to provide sufficient documentation to the BLM to show how they qualify, such as in an initial Plan of Development or other methods discussed in § 2806.52(b)(1)(v) of this final rule. The BLM may hold in suspense the amounts corresponding to the variable offset until construction of the facility is substantially complete or the successful bidder can otherwise demonstrate to the BLM that the PLA has been executed for the facility.

Some comments supported the use of a PLA as a basis for offering a variable offset. These comments requested that the BLM hold a second competitive process if the BLM does not receive bidders qualifying for a PLA variable offset. This second competitive process would allow for other potential bidders to qualify. The final rule does not limit the number of

competitive processes that the BLM may hold. However, the BLM has included PLAs as an optional variable offset.

Some comments noted that union labor laws vary from State to State, suggesting that oversight should be by the State. This final rule provides a variable offset for interested bidders when using a qualifying PLA for competitive processes for solar or wind energy. The BLM's offer of a PLA variable offset does not rely on or necessarily preclude applicable State laws as they may apply to project labor. The BLM may not approve a variable offset from a bidder if it does not comply with applicable laws.

Some commenters disagreed with the BLM offering variable offsets, such as for domestic content and the use of union labor, because developers may also receive reduced payments under § 2806.52. This final rule offers a bidder potential benefits from both a variable offset and a capacity fee reduction. The BLM believes these variable offsets will incentivize prospective bidders to initiate projects with known benefits and approaches that will further benefit the public. Moreover, as described above, reductions to the capacity fee under § 2806.52(b) will promote the greatest use of solar and wind energy resources on public lands consistent with 43 U.S.C. 3003.

Paragraph (c)(13) provides that the BLM may use other factors when determining whether additional types of variable offsets for a competitive process are appropriate.

Some comments requested additional variable offsets to promote responsible wind and solar development, using efficient technology, agreements with local authorities that benefit communities, redevelopment of disturbed sites, and combining or collocating energy infrastructure. The final rule continues to provide an opportunity for additional variable offsets in

a competitive process under § 2809.16(c)(13). The BLM will describe the additional variable offsets, including how you may qualify for such additional variable offsets, in the notice of competitive process.

Paragraph (e) provides for bidders to qualify for a variable offset after the BLM holds a competitive process. This final rule recognizes that a bidder may not be able to demonstrate the qualifications for some variable offsets to the BLM's satisfaction until after the BLM holds the competitive process, such as with new provisions in §§ 2809.16(c)(11) or 2809.16(c)(12) for energy development facilities that would contain items qualifying for the Domestic Content preference or use of a PLA. A bidder may conditionally qualify for a variable offset before the competitive process and then later demonstrate their qualification to the BLM and perfect their qualification. The BLM will describe in the notice of competitive process the way a bidder may conditionally qualify for the variable offset and could include methods such as a written statement to the BLM that they intend to qualify for the variable offset. The bidder, if successful, must later demonstrate to the BLM that they have qualified for the variable offset. The BLM may set a deadline in the notice for bidders to demonstrate that the proposed facility qualifies for the variable offset. If the bidder does not qualify for the variable offset in the time provided or the bidder is not able to adequately demonstrate they qualify for the variable offset, the U.S. Government will retain the bid money as the balance of the bonus bid.

A comment stated that if the BLM sets a deadline to qualify for a variable offset in the notice of competitive process, there should be a reasonable deadline given to demonstrate qualifications. The BLM agrees with this comment and provides a deadline, including the

timeframe to qualify for the variable offset, in its notice of competitive process. See § 2809.16(e) of this part.

Section 2809.17 Will the BLM ever reject bids or re-conduct a competitive process?

Section 2809.17 identifies situations when the BLM may reject a bid, offer a lease to another bidder, or re-offer a parcel. This section is retitled from the proposed rule, consistent with other changes in the final rule to read "process" when describing the BLM's competitive process.

Paragraph (b) provides that the BLM may make the next highest bidder the successful bidder if the named successful bidder does not satisfy the successful bidder requirements identified under § 2809.15, does not execute the lease, or is for any reason disqualified from holding the lease.

As proposed, paragraph (d) is removed from this section as it is unnecessary with other revisions made in this final rule to make public lands inside of DLAs available to application without a competitive process.

Section 2809.18 What terms and conditions apply to a solar or wind energy development lease?

Section 2809.18 lists the terms and conditions of solar and wind energy leases, which are issued inside of areas classified or allocated for solar or wind energy (e.g., DLAs).

Paragraph (a) clarifies that a lease awarded from a competitive process provides site control to a lessee. However, the presumptive leaseholder may not construct any facilities on the right-of-way until the BLM issues a subsequent notice to proceed, see paragraph 2809.15(b)(1)(ii) of this final rule. The term of a lease is consistent with § 2805.11(b) of this

final rule, which provides for a reasonable term up to 50 years, considering the cost of the facility, its useful life, and the public purpose it serves.

Paragraph (b) provides for rent terms for solar and wind energy leases as specified in § 2806.52.

Paragraph (f) provides that lease assignments are applied for under § 2807.21. The BLM will not make any changes to the lease terms or conditions, as provided in § 2807.21(e), except for modifications required under § 2805.15(e). Changes to right-of-way terms or conditions would involve an amendment action by the BLM in addition to the assignment action.

One comment recommended that the BLM adjust the terms and conditions with an assignment to provide for land access, lease length, processes, collaboration with other agencies, and decommissioning. This final rule maintains the BLM's process for assigning leases. Generally, a solar or wind energy lease assignment is an administrative action transferring the lease from a holder to a prospective holder. The BLM's analysis to approve or approve with modification the development lease includes analyzing the access, lease term length, participation from public and partners, and the end-of-life decommissioning and restoration of the public lands. The BLM does not need to revisit these considerations before assigning a lease unless there are substantial changes that may justify a change to the lease. For example, the BLM may modify a lease under § 2805.15(e), which reserve the BLM's right to change the terms and conditions as a result in changes in legislation, regulation, or as otherwise necessary to protect public health or safety or the environment.

Section 2809.19 Applications in designated leasing areas or on lands that later become designated leasing areas.

As proposed, Section 2809.19 is removed from the BLM's rules in its entirety. In this former section, the BLM explained how it would evaluate applications for public lands that later become a DLA. The former section is inconsistent with the changes in this rule that allow for applications in DLAs without first holding a competitive process. Because designation of a DLA does not preclude non-competitive leasing, there is no need for the BLM to automatically suspend a non-competitive leasing application because the lands at issue are being considered for designation. At the same time, the BLM may in its discretion deny an application or assign the application a low priority under § 2804.35.

Some commenters supported the BLM making public lands inside DLAs available for non-competitive leasing by application. These commenters continued to suggest that the BLM should provide public notice regarding how the BLM will handle non-competitive lease applications. The notice should provide for at least a 30-day cutoff date for any expressions of interest regarding a competitive interest for offering lands within the DLA. The BLM agrees with comments that notice to the public is appropriate regarding how the BLM will administer solar and wind energy applications in an area affected by a land use plan amendment. However, each planning action or programmatic analysis is unique, and the BLM will respond to the unique conditions for solar and wind energy applications specific to that plan amendment or programmatic analysis. This may or may not include a period of time in which the BLM would continue to accept applications.

Severability

Existing § 2801.8 provides: "If a court holds any provisions of the regulations in this part or their applicability to any person or circumstances invalid, the remainder of these rules and

their applicability to other people or circumstances will not be affected." If any portion of this final rule were to be stayed or invalidated by a reviewing court, the remaining elements would continue to provide BLM with important and independently effective tools relating to the administration of its right-of-way and renewable energy programs. Hence, if a court prevents any provision of one part of this rule from taking effect, that should not affect the other parts of the rule. The remaining provisions would remain in force because they could still operate sensibly.

For example, the provisions that reduce rents and fees to implement the Energy Act of 2020 may function independently of the rest of the rule. Indeed, each particular change in rents and fees may function independently. Thus, if a court were to invalidate the Domestic Content reduction or Project Labor Agreement reduction, the other rent and fee provisions should remain undisturbed. Similarly, the provisions that reduce rents and fees may function independently of the provisions that allow the BLM to choose whether to conduct competitive processes inside and outside DLAs.

V. PROCEDURAL MATTERS

Regulatory Planning and Review (Executive Orders 12866 and 13563) and Modernizing Regulatory Review (Executive Order 14094)

Executive Order (E.O.) 12866 provides that the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget will review all significant rules. E.O. 14094 updates the significance criteria in section 3(f) of E.O. 12866.

OIRA has determined that this final rule is a "significant regulatory action" within the scope of E.O. 12866, as amended by E.O. 14094.

The BLM's Regulatory Impact Analysis concluded that the rule may have an annual effect on the economy of $200 million or more. These effects are associated with construction of projects induced by this rule. Additionally, the BLM estimated that the rule would have distributional impacts in the form of transfer payments from right-of-way applicants and holders to the BLM. Transfer payments are monetary payments from one group to another that do not affect total resources available to society. While disclosing the estimated transfers are important for describing the distributional effects of the rule, these payments should not be included in the estimated costs and benefits per OMB Circular A-4.

For more detailed information, see the Regulatory Impact Analysis for Revisions to 43 CFR 2800 (Regulatory Impact Analysis) prepared for this rule. This Regulatory Impact Analysis has been posted in the docket for the rule on the Federal eRulemaking Portal: https://www.regulations.gov. In the Searchbox, enter "RIN 1004-AE78," click the "Search" button, open the Docket Folder, and look under Supporting Documents.

E.O. 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the Nation's regulatory system to promote predictability, reduce uncertainty, and use the best, most innovative, and least burdensome tools for achieving regulatory ends. The E.O. directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rule making process must allow for public participation and an open exchange of ideas. The BLM has developed this rule in a manner consistent with these requirements.

Regulatory Flexibility Act

This rule will not likely have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*). The RFA generally requires that Federal agencies prepare a regulatory flexibility analysis for rules subject to the "notice-and-comment" rulemaking requirements found in the Administrative Procedure Act (5 U.S.C. 500 *et seq.*), if the rule would have a significant economic impact, whether detrimental or beneficial, on a substantial number of small entities. See 5 U.S.C. 601–612. Congress enacted the RFA to ensure that government regulations do not unnecessarily or disproportionately burden small entities. Small entities include small businesses, small governmental jurisdictions, and small not-for-profit enterprises.

The BLM reviewed the Small Business Size standards for the affected industries. We determined that a small share of the entities in the affected industries are small businesses as defined by the Small Business Act (SBA). However, the BLM believes that the impact on the small entities is not significant. Although the rule could potentially affect a substantial number of small entities, the BLM does not believe that these effects would be economically significant.

The rule would benefit small businesses by streamlining the BLM's processes and reducing annual rent and capacity fee payments. These reductions may motivate investment in additional generation capacity and facilities by freeing up money that would have otherwise been paid to the BLM as rents or fees. The rule also modifies provisions that allow for an entity to request a waiver or reduction to annual rent and capacity fee payments.

For the purpose of conducting its review pursuant to the RFA, the BLM believes that the rule would not likely have a "significant economic impact on a substantial number of small

entities," as that phrase is used in 5 U.S.C. 605. Therefore, the BLM has not prepared a final regulatory flexibility analysis.

Some comments noted that they believe there has been insufficient analysis on this rule and request the BLM perform an initial and final regulatory flexibility analysis, as it is required by Sections 603 and 604 of the Regulatory Flexibility Act for rules that may have a significant economic impact on a substantial number of small business and governmental entities. Some commenters also believe the BLM has broken down connected and interrelated rule-making processes to avoid significance and therefore has failed to conduct the necessary impacts analysis under the Regulatory Flexibility Act, NEPA, E.O. 12866 and other applicable authorities as required under the Administrative Procedure Act.

The BLM determines that solar and wind projects with generating capacities of less than 100 MW have average annual receipts of $5.2 million (solar) and $4.1 million (wind), which falls within the range of receipts identified for small businesses in the SBA size standards. The average size of projects currently under review by the BLM is 500MW. Also, projects smaller than 100MW may still fail to be small businesses if they are owned by larger corporations or governmental entities. While it is reasonable to expect that some small businesses will be affected, it is not expected to be a substantial number. Further, the principal effect will be a reduction in rents and capacity fees for the small businesses -- a benefit. In general, the share of rents and capacity fees is small relative to project revenues. Therefore, the benefits are not a significant economic impact on the small businesses.

Congressional Review Act

This action is subject to the CRA, and BLM will submit a rule report to each chamber of

Congress and to the Comptroller General of the United States. This action meets the criteria in 5 U.S.C. 804(2). **Comment Summary:** In response to the proposed rule, a commenter requested that the BLM explain contradictory conclusions of regulatory impact in accordance with the Congressional Review Act and E.O 12866, and coordinate with local governments and businesses to collect inclusive and broad economic data to make an informed determination.

Response: The commenter's concern has been overtaken because DOI will report to Congress on the promulgation of this rule prior to its effective date. The report will state that the Office of Information and Regulatory Affairs has determined that this rule meets the criteria set forth in 5 U.S.C. 804(2)."

Unfunded Mandates Reform Act

This rule does not impose an unfunded mandate on State, local, or Tribal governments, or the private sector of more than $100 million per year. The rule does not have a significant or unique effect on State, local, or Tribal governments, or the private sector. Under the Unfunded Mandates Reform Act (UMRA) (2 U.S.C. 1531 *et seq.*), agencies must prepare a written statement about benefits and costs, prior to issuing a proposed or final rule that may result in aggregate expenditure by State, local, and Tribal governments, or the private sector, of $100 million or more in any 1 year.

This rule is not subject to the requirements under the UMRA. The rule does not contain a Federal mandate that may result in expenditures of $100 million or more for State, local, and Tribal governments, in the aggregate, or to the private sector in any one year. The rule would not

significantly or uniquely affect small governments. A statement containing the information required by the UMRA is not required.

One comment requested that the BLM submit documentation that is complete, transparent, and factual for this rulemaking and that is informed by economic data obtained through coordination with local governments and a diverse range of private sector industries, such as grazing, mining and recreation. The resubmitted documentation should support the claim that this rule does not impose an unfunded mandate under the UMRA. If a finding shows that the rule does impose an unfunded mandate, then the BLM must complete a cost and benefit analysis as required by the UMRA. The BLM disagrees that this rule requires resubmitting documentation supporting the BLM's unfunded mandate determination. This final rule, including its Regulatory Impact Analysis, clearly, transparently, and factually discusses the impacts of the rule, which governs the BLM's administration of applications and right-of-way grants and leases for solar and wind energy. This rule does not result in Tribal, State, or local governments having to expend funds. Therefore, this rule does not impose an unfunded federal mandate and does not require a cost and benefit analysis. In any event, this rule and the accompanying Regulatory Impact Analysis provide all the information the UMRA requires.

Governmental Actions and Interference with Constitutionally Protected Property Right - Takings (E.O. 12630)

This rule does not affect a taking of private property or otherwise have taking implications under E.O. 12630. Section 2(a) of E.O. 12630 identifies policies that do not have takings implications, such as those that abolish regulations, discontinue governmental programs,

or modify regulations in a manner that lessens interference with the use of private property. The rule would not interfere with private property. A takings implication assessment is not required.

Some comments noted that access across federal, state, or county managed lands should not entail encumbrances or restrictions on private property. This final rule does not restrict access across any lands. Through separate environmental review, such as through land use planning, the BLM may consider actions that affect access. Tribal, Federal, State, and local government offices, as well as communities and private citizens will have opportunity to engage in those environmental processes.

Federalism (E.O. 13132)

Under the criteria in Section 1 of E.O. 13132, this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement. It does not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. A federalism summary impact statement is not required.

Civil Justice Reform (E.O. 12988)

This rule complies with the requirements of E.O. 12988. Specifically, this rule:

a. Meets the criteria of Section 3(a) requiring that all regulations be reviewed to eliminate errors and ambiguity and be written to minimize litigation; and

b. Meets the criteria of Section 3(b)(2) requiring that all regulations be written in clear language and contain clear legal standards.

Consultation and Coordination with Indian tribes (E.O. 13175 and Departmental policy)

DOI strives to maintain and strengthen its government-to-government relationship with Indian Tribes through a commitment to consultation with Indian Tribes and recognition of their right to self-governance and Tribal sovereignty. We have evaluated this rule under the DOI's consultation policy and under the criteria in E.O. 13175 and have determined that it has no substantial direct effects on federally recognized Indian Tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes, and that consultation under the DOI's Tribal consultation policy is not required. However, consistent with the DOI's consultation policy (52 Departmental Manual 4) and the criteria in E.O. 13175, the BLM will consult with federally recognized Indian Tribes on any renewable energy project proposals that may have a substantial direct effect on the Tribes.

Paperwork Reduction Act

The Paperwork Reduction Act (PRA) (44 U.S.C. 3501–3521) generally provides that an agency may not conduct or sponsor and, not withstanding any other provision of law, a person is not required to respond to a collection of information, unless it displays a currently valid OMB control number. Collections of information include any request or requirement that persons obtain, maintain, retain, or report information to an agency, or disclose information to a third party or to the public (44 U.S.C. 3502(3) and 5 CFR 1320.3(c)).

This rule contains information-collection requirements that are subject to review by OMB under the PRA. OMB has generally approved the existing information-collection requirements contained in 43 CFR Parts 2800 associated with wind and solar rights-of-way grants or leases under OMB control number 1004-0206 (expiration date: June 30, 2026). Additionally, the

BLM's regulations at 43 CFR part 2800 require the use of Standard Form 299 (SF-299), "Application for Transportation and Utility Systems and Facilities on Federal Lands," for right-of-way applications and the regulations at 43 CFR part 2800. OMB has approved the requirements associated with SF-299 and has assigned control number 0596-0249.

This rule does not include any changes to the information-collection requirements currently contained in 43 CFR Parts 2800 and 2880 and approved by OMB as noted above. There is a new information-collection requirement contained in 43 CFR 2806.52(b)(5) regarding an annual certified statement. The rule would require that by October of each year wind and solar grant or leaseholders must submit to the BLM a certified statement identifying the first year's estimated energy generation on public lands and the prior year's actual energy generation on public lands. The BLM will determine the capacity fee based on the certified statement provided. To prepare the annual certified statement, grant or leaseholders will need to compile information based on capacity fee as instructed in 43 CFR 2806.

The information-collection requirements contained in 43 CFR 2800 and 2880 and approved under OMB Control Number 1004-0206 and the aforementioned new information-collection pertaining to 43 CFR 2806.52(b)(5) are described below.

Activities That Require SF-299

The following discussion describes the information-collection activities in this control number that require use of SF-299.

Application for a Solar or Wind Energy Development Project Outside Any Designated Leasing Area (43 CFR 2804.12, 2804.25(c), 2804.26(a)(5), and 2804.30(g)); and Application for an

Electric Transmission Line with a Capacity of 100 kV or More (43 CFR 2804.12, 2804.25(c), and 2804.26(a)(5)).

Section 2804.12(b) applies to solar and wind energy development grants outside any DLA and electric transmission lines with a capacity of 100 kV or more.

Section 2804.12(b) includes the following requirements for applications for a solar or wind energy development project outside a DLA and for applications for a transmission line project with a capacity of 100 kV or more:

- A discussion of all known potential resource conflicts with sensitive resources and values, including special designations or protections; and
- Applicant-proposed measures to avoid, minimize, and compensate for such resource conflicts, if any.

Section 2804.12(b) also requires applicants to initiate early discussions with any grazing permittees that may be affected by the proposed project. This requirement stems from FLPMA Section 402(g) (43 U.S.C. 1752(g)) and a BLM grazing regulation (section 4110.4-2(b)) that require 2 years' prior notice to grazing permittees and lessees before cancellation of their grazing privileges.

In addition to the information listed at § 2804.12(b), an application for a solar or wind project, or for a transmission line of at least 100 kV, must include the information listed at §§ 2804.12(a)(1) through (a)(7).

Section 2804.25 provides that the BLM will notify an applicant upon receipt of an application and may require the applicant to submit additional information necessary to process the application (such as a Plan of Development or cultural resource surveys). As amended, §

2084.25(c) provides that, for solar or wind energy development projects and transmission lines with a capacity of 100 kV or more, the applicant must commence any required resource surveys or inventories within 1 year of the request date, unless otherwise specified by the BLM. The amended regulation also authorizes an applicant to submit a request for an alternative requirement by showing good cause under § 2804.40.

Applications for solar or wind energy development outside any DLA, but not applications for large-scale transmission lines, are subject to a requirement (at § 2804.12(c)(2)) to submit an "application filing fee" of $15 per acre. As defined in an amendment to § 2801.5, an application filing fee is specific to solar and wind energy right-of-way applications. Section 2804.30(e)(4) provides that the BLM will refund the fee, except for the reasonable costs incurred on behalf of the applicant, if the applicant is not a successful bidder in the competitive process outlined in subpart 2804.

Section 2804.26(a)(5) provides the authority that allows the BLM to deny an application for a right-of-way grant if the applicant does not have or cannot demonstrate the technical or financial capability to construct the project or operate facilities within the right-of-way. Amendments to that provision list the following ways an applicant may demonstrate their financial and technical capability to construct, operate, maintain, and terminate a project:

- Documenting any previous successful experience in construction, operation, and maintenance of similar facilities on either public or non-public lands;
- Providing information on the availability of sufficient capitalization to carry out development, including the preliminary study stage of the project and the environmental review and clearance process; or

- Providing written copies of conditional commitments of Federal and other loan guarantees; confirmed power purchase agreements; engineering, procurement, and construction contracts; and supply contracts with credible third-party vendors for the manufacture or supply of key components for the project facilities.

General Description of a Proposed Project and Schedule for Submittal of a Plan of Development (43 CFR 2804.12(b)(1) and (b)(2)).

Sections 2804.12(b)(1) and (b)(2) require applicants for a solar or wind development project outside a DLA to submit the following information, using Form SF-299:

- A general description of the proposed project and a schedule for the submission of a Plan of Development (POD) conforming to the POD template at http://www.blm.gov;
- A discussion of all known potential resource conflicts with sensitive resources and values, including special designations or protections; and
- Proposals to avoid, minimize, and compensate for such resource conflicts, if any.

Application for an Energy Site-Specific Testing Grant (43 CFR 2804.12(a), and 2804.30(g)); Application for an Energy Project-Area Testing Grant (43 CFR 2804.12(a), and 2804.30(g)); and Application for a Short-Term Grant (43 CFR 2804.12(a)).

Section 2804.12(a) addresses the general requirements of an application for a FLPMA right-of-way grant. Section 2804.30(g) authorizes only one applicant (i.e., a "preferred applicant") to apply for an energy project-area testing grant or an energy site-specific testing grant for land outside any DLA.

Each of these grants is for 3 years or less, in accordance with § 2805.11(b)(2). All of these applications must be submitted on SF-299. Applications for project-area grants (but not

site-specific grants) are subject to a $2 per-acre application filing fee in accordance with § 2804.12(c)(2). Applicants for short-term grants for other purposes (such as geotechnical testing and temporary land-disturbing activities) are subject to a processing fee in accordance with § 2804.1.

Request to Assign a Solar or Wind Energy Development Right-of-Way (43 CFR 2807.21).

Section 2807.21, as amended, provides for assignment, in whole or in part, of any right or interest in a grant or lease for a solar or wind development right-of-way. Actions that may require an assignment include the transfer by the holder (assignor) of any right or interest in the grant or lease to a third party (assignee) or any change in control transaction involving the grant holder or leaseholder, including corporate mergers or acquisitions. The proposed assignee must file an assignment application, using SF-299, and pay application and processing fees.

The assignment application must include:

- Documentation that the assignor agrees to the assignment; and
- A signed statement that the proposed assignee agrees to comply with and be bound by the terms and conditions of the grant that is being assigned and all applicable laws and regulations.

Environmental, Technical, and Financial Records, Reports, and Other Information (43 CFR 2805.12(a)(15)).

Section 2805.12(a)(15) authorizes the BLM to require a holder of any type of right-of-way to provide, or give the BLM access to, any pertinent environmental, technical, and financial records, reports, and other information. The use of SF-299 is required. The BLM will use the information for monitoring and inspection activities.

Application for Renewal of a Solar or Wind Energy Development Grant or Lease (43 CFR 2805.14(g) and 2807.22).

Section 2805.14(g) provides that a holder of a right-of-way grant, which includes solar or wind energy generating facilities, may apply for renewal in accordance with § 2807.22. Section 2807.22(c) provides that an application to renew a grant must include the same information, on SF-299, that is necessary for a new application. It also provides that processing fees, in accordance with § 2804.14, as amended, apply to these renewal applications. Sections 2807.22(a) and (b) provide that an application for renewal of any right-of-way grant or lease, including a solar or wind energy development grant or lease, must be submitted at least 120 calendar days before the grant or lease expires. The application must show that the grantee or lessee is complying with the renewal terms and conditions (if any), with the other terms, conditions, and stipulations of the grant or lease, and with other applicable laws and regulations. The application also must explain why a renewal of the grant or lease is necessary.

Request for Amendment, Assignment, or Other Change (FLPMA) (43 CFR 2807.11(b) and (d) and 2807.21).

Section 2807.11(b) requires a holder of any type of right-of-way grant to contact the BLM to seek an amendment to the grant under § 2807.20 and obtain the BLM's approval before beginning any activity that is a "substantial deviation" from what is authorized.

Section 2807.11(d) requires contacting the BLM to request an amendment to the pertinent right-of-way grant or lease and prior approval whenever site-specific circumstances or conditions result in the need for changes to an approved right-of-way grant or lease, Plan of

Development, site plan, mitigation measures, or construction, operation, or termination procedures that are not "substantial deviations."

Section 2807.21 authorizes assignment of a grant or lease with the BLM's approval. It also authorizes the BLM to require a grant or leaseholder to file new or revised information in circumstances that include, but are not limited to:

- Transactions within the same corporate family;
- Changes in the holder's name only; and
- Changes in the holder's articles of incorporation.

A request for an amendment of a right-of-way, using SF-299, is required in cases of a substantial deviation (for example, a change in the boundaries of the right-of-way, major improvements not previously approved by the BLM, or a change in the use of the right-of-way). Other changes, such as changes in project materials, or changes in mitigation measures within the existing, approved right-of-way area, must be submitted to the BLM for review and approval. In order to assign a grant, the proposed assignee must file an assignment application and follow the same procedures and standards as for a new grant or lease, as well as pay application and processing fees. In order to request a name change, the holder will be required to file an application and follow the same procedures and standards as for a new grant or lease and pay processing fees, but no application fee is required. The following documents are also required in the case of a name change:

- A copy of the court order or legal document effectuating the name change of an individual; or

- If the name change is for a corporation, a copy of the corporate resolution proposing and approving the name change, a copy of a document showing acceptance of the name change by the State in which incorporated, and a copy of the appropriate resolution, order, or other document showing the name change.

In all these cases, the BLM will use the information to monitor and inspect rights-of-way, and to maintain current data.

ACTIVITIES THAT DO NOT REQUIRE ANY FORM

Preliminary Application Review Meetings for a Large-Scale Right-of-Way (43 CFR 2804.12(b)(4)).

"Preliminary application review meetings" are required after submission of an application for a large-scale right-of-way. A large-scale right-of-way is for solar or wind energy development outside a DLA, or for a transmission line with a capacity of 100 kV or more.

Within 6 months from the date that the BLM receives the cost recovery fee for an application for a large-scale project, the applicant must schedule and hold at least two preliminary application review meetings.

In the first meeting, the BLM will collect information from the applicant to supplement the application on subjects such as the general project proposal. The BLM will also discuss with the applicant subjects such as the status of the BLM's land use planning for the lands involved, potential siting issues or concerns, potential environmental issues or concerns, potential alternative site locations, and the right-of-way application process.

In the second meeting, the applicant and the BLM will meet with appropriate Federal and State agencies and Tribal and local governments to facilitate coordination of potential environmental and siting issues and concerns.

The applicant and the BLM may agree to hold additional preliminary application review meetings.

Application for Renewal of an Energy Project-Area Testing Grant or Other Short-Term Grant (43 CFR 2805.11(b)(2(ii), 2805.14(h), and 2807.22).

Section 2805.11(b)(2)(ii) provides that holders of energy project-area testing grants may seek renewal of those grants. The initial term for such a grant is 3 years or less, with the option to renew for one additional 3-year period.

For other short-term grants, such as for geotechnical testing and temporary land-disturbing activities, the initial term is 3 years or less. Short-term grants include an option for renewal.

Section 2805.14(h) provides that applications to renew an energy project-area testing grant must include an energy development application submitted in accordance with § 2801.9(d)(2). Cost recovery fees in accordance with § 2804.14, as amended, apply to these renewal applications.

Section 2807.22 provides that an application for renewal of any right-of-way grant or lease, including an energy project-area testing grant or a short-term grant, must be submitted at least 120 calendar days before the grant or lease expires. The application must show that the grantee or lessee is complying with the renewal terms and conditions (if any), with the other

terms, conditions, and stipulations of the grant or lease, and with other applicable laws and regulations. The application also must explain why a renewal of the grant or lease is necessary.

Showing of Good Cause (43 CFR 2804.40 and 2805.12).

Under § 2804.40, an applicant for a FLPMA right-of-way grant who is unable to meet any of the requirements in subpart 2804 may request approval for an alternative requirement from the BLM. Any such request is not approved until the applicant receives BLM approval in writing. This type of request to the BLM must:

(a) Show good cause for the applicant's inability to meet a requirement;

(b) Suggest an alternative requirement and explain why that requirement is appropriate; and

(c) Be received in writing by the BLM in a timely manner, before the deadline to meet a particular requirement has passed.

The BLM will use the information to determine whether to apply an alternative requirement.

Other showings of good cause are authorized or may be required by § 2805.12, which requires due diligence in development and operations of any right-of-way grant or lease. In accordance with § 2805.12(c)(6) and (c)(8), the BLM will notify the holder before suspending or terminating a right-of-way for lack of due diligence. This notice will provide the holder with a reasonable opportunity to correct any noncompliance or to start or resume use of the right-of-way. A showing of good cause will be required in response. That showing must include:

- Reasonable justification for any delays in construction or reductions in energy generation (for example, delays in equipment delivery, legal challenges, and acts of God);

- The anticipated date for the completion of construction or resumption of energy generation; and evidence of progress toward the start or resumption of construction; and
- A request for extension of the timelines in the approved POD or extension of the period in which the holder must satisfy the minimum energy threshold.

Section 2805.12(e), as amended, applies as soon as a right-of-way holder anticipates noncompliance with stipulation, term, or condition of the approved right-of-way grant or lease, or in the event of noncompliance with any such stipulation, term, or condition. In these circumstances, the holder must notify the BLM in writing and show good cause for the noncompliance, including an explanation of the reasons for the noncompliance.

In addition, the holder may request that the BLM consider alternative stipulations, terms, or conditions. Any request for an alternative stipulation, term, or condition must comply with applicable law in order to be considered. Any proposed alternative to applicable bonding requirements must provide the United States with adequate financial assurance for potential liabilities associated with the right-of-way grant or lease. Any such request is not approved until the holder receives the BLM's approval in writing.

Bonding Requirements (43 CFR 2805.20).

Section 2805.20 provides that the bond amount for projects other than a solar or wind energy lease under subpart 2809 (i.e., inside a DLA) will be determined based on the preparation of a reclamation cost estimate that includes the cost to the BLM to administer a reclamation contract and review it periodically for adequacy.

Section 2805.20(a)(5) provides that the reclamation cost estimate must include at a minimum:

- Remediation of environmental liabilities such as use of hazardous materials waste and hazardous substances, herbicide use, the use of petroleum-based fluids, and dust control or soil stabilization materials;
- The decommissioning, removal, and proper disposal, as appropriate, of any improvements and facilities; and
- Interim and final reclamation, re-vegetation, recontouring, and soil stabilization.

Sections 2805.20(b) and 2805.20(c) identify specific bond requirements for solar and wind energy development respectively outside of DLAs. A holder of a solar or wind energy grant outside of a DLA will be required to submit a reclamation cost estimate to help the BLM determine the bond amount. For solar energy development grants outside of DLAs, the bond amount will be no less than $10,000 per acre. For wind energy development grants outside of DLAs, the bond amount will be no less than $10,000 per authorized turbine with a nameplate generating capacity of less than one Megawatt (MW), and no less than $20,000 per authorized turbine with a nameplate generating capacity of one MW or greater.

Section 2805.20(d) separates site- and project-area testing authorization bond requirements from § 2805.20(c). Meteorological and other instrumentation facilities are required to be bonded at no less than $2,000 per location. These bond amounts are the same as standard bond amounts for leases required under § 2809.18(e)(3).

Annual Certified Statement. (43 CFR 2806.52(b)(5)) - New Information Collection.

The rule requires that by October of each year, wind and solar grant or leaseholders must submit to the BLM a certified statement identifying the first year's estimated energy generation on public lands and the prior year's actual energy generation on public lands. The BLM will

determine the capacity fee based on the certified statement provided. To prepare the annual certified statement, grant or leaseholders will need to compile information based on the capacity fee as instructed in subpart 2806. This is the only new information-collection requirement contained in this rule.

Nomination of a Parcel of Land Inside a Designated Leasing Area (43 CFR 2809.11).

Sections 2809.10 and 2809.11 authorize the BLM, on its own initiative, to offer land through a competitive process for solar or wind energy development. These regulations also authorize the BLM to solicit nominations for such development by publishing a notice in the *Federal Register*. To nominate a parcel under this process, the nominator must be qualified to hold a right-of-way under 43 CFR 2803.10. After publication of a notice by the BLM, anyone meeting the qualifications may submit a nomination for a specific parcel of land to be developed for solar or wind energy. There is a fee of $5 per acre for each nomination. The following information is required:

- The nominator's name and personal or business address;
- The legal land description; and
- A map of the nominated lands.

The BLM will use the information to communicate with the nominator and to determine whether to proceed with a competitive process.

Plan of Development for a Solar or Wind Energy Development Lease Inside a Designated Leasing Area (43 CFR 2809.18).

Section 2809.l8(c) requires the holder of a lease for solar or wind energy development to submit a Plan of Development (POD) within 2 years of the lease issuance date. The POD must

be consistent with the development schedule and other requirements in the POD template posted at http://www.blm.gov; and must address all pre-development and development activities.

Section 2809.18(d) requires the holder of a solar or wind energy development lease for land inside a DLA to pay reasonable costs for the BLM or other Federal agencies to review and approve the POD and monitor the lease. To expedite review and monitoring, the holder may notify the BLM in writing of an intention to pay the full actual costs incurred by the BLM.

Request for Amendment, Assignment, or Other Change (MLA) (43 CFR 2886.12(b) and (d) and 43 CFR 2887.11).

Sections 2886.12 and 2887.11 pertain to holders of rights-of-way and temporary use permits authorized under the MLA. A temporary use permit authorizes a holder of a MLA right-of-way to use land temporarily in order to construct, operate, maintain, or terminate a pipeline, or for purposes of environmental protection or public safety. See § 2881.12. The regulations require these holders to contact the BLM:

- Before engaging in any activity that is a "substantial deviation" from what is authorized;
- Whenever site-specific circumstances or conditions arise that result in the need for changes that are not substantial deviations;
- When the holder submits a certification of construction;
- Before assigning, in whole or in part, any right or interest in a grant or lease;
- Before any change in control transaction involving the grant- or lease-holder; and
- Before changing the name of a holder (i.e., when the name change is not the result of an underlying change in control of the right-of-way).

A request for an amendment of a right-of-way or temporary use permit is required in cases of a substantial deviation (e.g., a change in the boundaries of the right-of-way, major improvements not previously approved by the BLM, or a change in the use of the right-of-way). Other changes, such as changes in project materials, or changes in mitigation measures within the existing, approved right-of-way area are required to be submitted to the BLM for review and approval. In order to assign a grant, the proposed assignee must file an assignment application and follow the same procedures and standards as for a new grant or lease, as well as pay processing fees. In order to request a name change, the holder will be required to file an application and follow the same procedures and standards as for a new grant or lease and pay processing fees, but no application fee is required. The following documents are also required in the case of a name change:

- A copy of the court order or legal document effectuating the name change of an individual; or
- If the name change is for a corporation, a copy of the corporate resolution proposing and approving the name change, a copy of a document showing acceptance of the name change by the State in which incorporated, and a copy of the appropriate resolution, order, or other document showing the name change.

In all these cases, the BLM will use the information gathered for monitoring and inspection purposes, and to maintain current data on rights-of-way.

Certification of Construction (43 CFR 2886.12(f)).

A certification of construction is a document a holder of an MLA right-of-way must submit to the BLM after finishing construction of a facility, but before operations begin. The

BLM will use the information to verify that the holder has constructed and tested the facility to ensure that it complies with the terms of the right-of-way and is in accordance with applicable Federal and State laws and regulations.

The information-collection request for this rule has been submitted to OMB for review under 44 U.S.C. 3507(d). You may view the information-collection request(s) at http://www.reginfo.gov/public/do/PRAMain.

As part of our continuing effort to reduce paperwork and respondent burdens, we invite the public and other Federal agencies to comment on any aspect of this information-collection, including:

- Whether the collection of information is necessary for the proper functioning of the BLM, including whether the information will have practical utility;
- The accuracy of the BLM's estimate of the burden of collecting the information, including the validity of the methodology and assumptions used;
- The quality, utility, and clarity of the information to be collected; and
- How to minimize the information-collection burden on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other forms of information technology.

Currently, the information-collection requirements contained in 43 CFR Parts 2800 and 2880 and approved under OMB control number 1004-0206 are estimated as follows: 3,042 annual responses; 47,112, annual burden hours; and $2,182,302 annual cost burden. We are projecting a burden increase of 75 new annual responses and 150 new annual burden hours as result of this rule. This burden hour increase would result from a new information collection

requirement contained in § 2806.52(b)(5) pertaining to the annual certified statement. This new information collection is needed to help the BLM more accurately determine the capacity fee based on the certified statement provided.

The final rule also removes an existing information collection previously contained in 43 CFR 2809.11(c) titled, *Expression of Interest in a Parcel of Land Inside a Designated Leasing Area.* The removal of this information collection results in the reduction of 1 annual response and 4 annual burden hours.

Therefore, we estimate that the final rule will result in a net increase of 74 annual responses and 226 annual burden hours.

We are also adjusting the burden for two existing and unchanged information collections to reflect more accurately the burden those activities would involve the industry. These adjustments include the following:

- *Preliminary Application Review Meetings for 2 public meetings for a Large-Scale Right-of-Way (43 CFR 2804.12(b)(4))*. The average response time is adjusted from 2 hours to 4 hours. This adjustment resulted in a 40-hour burden increase (from 40 hours to 80 hours).
- *Environmental, Technical, and Financial Records, Reports, and Other Information (43 CFR 2805.12(a)(15))*. We have added a 50 percent increase in the hours required to prepare reports (from 4 per response to 6 per response). This resulted in an increasing the estimated annual burden hours for these activities from 80 hours to 120 hours.

There are no projected changes to the non-hour cost burdens as a result of this rule. The resulting new estimated total burdens for OMB Control Number 1004-0206 are provided below.

Title of Collection: Competitive Processes, Terms, and Conditions for Leasing Public Lands for Solar and Wind Energy Development (43 CFR Parts 2800 and 2880).

OMB Control Number: 1004-0206.

Form Number: SF-299 (Burden approved by OMB in Request for Common Form under OMB Control No. 0596-0249).

Type of Review: Revision of a currently approved collection of information.

Respondents/Affected Public: Private sector (applicants for and holders of wind and solar rights -of-way grants or leases on Federal public lands.

Respondent's Obligation: Required to obtain or retain a benefit.

Frequency of Collection: On occasion and annually for the Annual Certified Statement in 43 CFR 2806.52(i).

Number of Respondents: 75.

Annual Responses: 3,116.

Annual Burden Hours: 47,338.

Annual Burden Cost: $2,182,302.

If you want to comment on the information-collection requirements this in this rule, please send your comments and suggestions on this information-collection request within 30 days of publication of this final rule in the *Federal Register* to OMB at *www.reginfo.gov*. Click on the link, "Currently under Review - Open for Public Comments."

National Environmental Policy Act

These proposed regulatory amendments are of an administrative or procedural nature and thus are eligible to be categorically excluded from the requirement to prepare an EA or an EIS.

See 43 CFR 46.205 and 46.210(i). They do not present any of the extraordinary circumstances listed at 43 CFR 46.215.

Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use (Executive Order 13211)

Federal agencies are to prepare and submit to OMB a Statement of Energy Effects for any proposed significant energy action. A ‘‘‘‘significant energy action” is defined as any action by an agency that: (1) Is a significant regulatory action under Executive Order 12866, or any successor order, and (2) Is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (3) Is designated by the Administrator of OIRA as a significant energy action.

The BLM reviewed the rule and determined that it is not likely a significant energy action as defined by E.O. 13211. While the rights-of-way affected by this rule are for solar and wind energy generation, the rule is limited in scope and would not likely have a significant, adverse effect on the supply, distribution, or use of energy from these sources. The rule would not result in a shortfall in supply, price increases, or increase the use of foreign supplies.

Authors

The principal authors of this rule are: Jayme M. Lopez, BLM National Renewable Energy Coordination Office; Jeremy Bluma, BLM National Renewable Energy Coordination Office; Radford Schantz, Division of Lands, Realty and Cadastral Survey; Patrick Lee, DOI, Office of Policy Analysis; Jeff Holdren, BLM Division of Lands, Realty and Cadastral Survey; Darrin King, BLM Division of Regulatory Affairs; Jennifer Noe, BLM Division of Regulatory Affairs, assisted by the DOI Office of the Solicitor.

Steven H. Feldgus, Ph.D.
Principal Deputy Assistant Secretary
Land and Minerals Management
The action taken herein is pursuant to an existing delegation of authority.

List Of Subjects

43 CFR Part 2800

Electric power, Highways and roads, Penalties, Public lands and rights-of-way, Reporting and recordkeeping requirements.

Accordingly, for the reasons stated in the preamble, the BLM proposes to amend 43 CFR part 2800 as set forth below:

PART 2800 - RIGHTS-OF-WAY UNDER THE FEDERAL LAND POLICY AND MANAGEMENT ACT

1. The authority citation for part 2800 continues to read as follows:

Authority: 43 U.S.C. 1733, 1740, 1763, 1764, and 3003.

2. Amend § 2801.5:

a. In paragraph (a) by adding the acronym for “FLPMA” in alphabetical order;

b. In paragraph (b) by:

i. Removing the term “Act”;

ii. Adding in alphabetical order the terms “Domestic Content” and “Capacity fee”;

iii. Revising the term for "Grant";

iv. Removing the term "Megawatt (mw) capacity fee";

v. Revising the term for "Megawatt hour (MWh) rate";

vi. Revising the term "Reasonable costs"; and

vii. Adding in alphabetical order the terms "Renewable energy coordination office (RECO)", "Solar or wind energy development", and "solar or wind energy lease".

The additions and revisions to read as follows:

§ 2801.5 What acronyms and terms are used in the regulations in this part?

(a) * * *

FLPMA means the Federal Land Policy and Management Act of 1976, as amended (43 U.S.C. 1701 *et seq.*).

* * * * *

(b) * * *

Domestic Content reduction means an item or product that qualifies for the domestic content preference under the Build America, Buy America Act, Public Law 117–58, 135 Stat. 429, §§ 70901–70927 (Nov. 15, 2021), and the implementing guidance at 2 CFR Part 184.

Capacity fee is the fee charged to right-of-way holders once energy production commences that is based on the production of energy on public lands from solar and wind energy generating facilities.

* * * * *

Grant means an authorization or instrument (e.g., easement, license, or permit) the BLM issues under Title V of the Federal Land Policy and Management Act, 43 U.S.C. 1761 *et seq.*,

and any authorization or instrument the BLM and its predecessors issued for like purposes before October 21, 1976, under then existing statutory authority, except for solar or wind energy leases. It does not include authorizations issued under the Mineral Leasing Act (30 U.S.C. 185).

* * * * *

Megawatt hour (MWh) rate means the 5 calendar-year average of the annual average wholesale electricity prices per MWh for the major trading hubs serving the 11 western States of the continental United States.

* * * * *

Reasonable costs has the meaning found in Section 304(b) of FLPMA.

* * * * *

Renewable energy coordination office (RECO) means one of the National, State, district, or field offices established by the Secretary under 43 U.S.C. 3002(a) that is responsible for implementing a program for improving Federal permit coordination with respect to solar, wind, and geothermal projects on BLM-administered land, and such other activities as the Secretary determines necessary.

* * * * *

Solar or wind energy development means the use of public lands to generate electricity from solar or wind energy resources. It includes the construction, operation, maintenance, and decommissioning of any such facilities, as well as the subsequent reclamation of the site.

Solar or wind energy lease means any right-of-way issued for solar or wind energy development in an area classified or allocated for solar or wind energy (i.e., a designated leasing area) in a resource management plan.

* * * * *

3. Amend § 2801.6 by revising paragraph (a)(1) to read as follows:

§ 2801.6 Scope.

(a) * * *

(1) Grants or leases for necessary transportation or other systems and facilities that are in the public interest and require the use of public lands for the purposes identified in 43 U.S.C. 1761, and administering, amending, assigning, monitoring, renewing, and terminating them;

* * * * *

4. Amend § 2801.9 by revising paragraphs (d) introductory text, (d)(3) and (4), and adding paragraph (d)(6) to read as follows:

§ 2801.9 When do I need a grant?

* * * * *

(d) All systems, facilities, and related activities for energy generation, storage, or transmission projects are specifically authorized as follows:

* * * * *

(3) Energy generation facilities, including solar and wind energy development facilities, are authorized with a right-of-way grant or lease that may be issued for up to 50 years (plus initial partial year of issuance);

(4) Energy storage facilities, which are separate from energy generation facilities, are authorized with a right-of-way grant that may be issued for up to 50 years;

* * * * *

(6) Electric transmission lines with a capacity of 100 kV or more are authorized with a right-of-way grant that may be issued for up to 50 years.

5. Revise the heading for subpart 2802 to read as follows:

Subpart 2802—Lands Available for FLPMA Grants or Leases

6. Amend § 2802.11 by revising paragraphs (b) introductory text and (b)(1) and adding paragraphs (b)(10) and (11) to read as follows:

§ 2802.11 How does the BLM designate right-of-way corridors and designated leasing areas?

* * * * *

(b) When determining which public lands may be suitable for right-of-way corridors or designated leasing areas, the BLM may consider various factors, including:

(1) Federal, State, Tribal, and local land use plans, and applicable Federal, State, Tribal, and local laws;

* * * * *

(10) Access to electric transmission; and

(11) Whether there are areas for solar and wind energy development with low potential for conflict with resources or uses due to environmental, cultural, and other relevant criteria, which the BLM will identify by:

(i) Assessing the demand for new or expanded areas;

(ii) Applying environmental, cultural, and other screening criteria; and

(iii) Analyzing proposed areas through the land use planning process described in part 1600 of this chapter.

* * * * *

7. Amend § 2803.10 by revising paragraph (c) to read as follows:

§ 2803.10 Who may hold a grant or lease?

* * * * *

(c) Of legal age and authorized to do business in the State or States where the right-of-way you seek is located.

8. Revise § 2803.12 to read as follows:

§ 2803.12 What happens to my grant or lease if I die?

(a) If a grant holder dies, any inheritable interest in a grant or lease will be distributed under State law.

(b) If the receiver of a grant or lease is not qualified to hold a grant or lease under § 2803.10 of this subpart, the BLM will recognize the receiver as grant or leaseholder for up to two years, subject to full compliance with all terms, conditions, and stipulations. During that period, the receiver must either become qualified or divest itself of the interest.

9. Amend § 2804.12 by revising paragraphs (c) and (f) and adding paragraph (j) to read as follows:

§ 2804.12 What must I do when submitting my application?

* * * * *

(c) You must meet additional requirements when applying for a solar or wind energy development or short-term right-of-way, as follows:

(1) Pay an application filing fee of $2 per acre for short-term right-of-way applications or $15 per acre for solar or wind energy development applications. The BLM will apply the

application filing fee toward the processing fees described in §§ 2804.14 through 2804.22. The BLM will refund the balance of any application filing fee at the end of the BLM's application review process if the application filing fee exceeds the amount of the processing fee.

(2) Pay additional reasonable costs in addition to payment of the application filing fee when processing your application, pursuant to § 2804.14. A processing or monitoring Category 6 cost recovery fee may be reduced by the application filing fee paid when submitting an application.

* * * * *

(f) The BLM may require you to submit additional information at any time while processing your application. The BLM will identify additional information in a written deficiency notice asking you to provide the information within a specified time pursuant to § 2804.25(c).

* * * * *

(j) Complete applications: Your application will not be complete until you have met or addressed the requirements of this section to the satisfaction of the BLM. The BLM will notify you in writing when your application is complete.

10. Revise § 2804.22 to read as follows:

§ 2804.22 How will the availability of funds affect the timing of the BLM's processing your application?

(a) If the BLM has insufficient funds to process your application, we will not continue to process it until funds become available or you elect to pay full actual costs under § 2804.14(f) of this part.

(b) The BLM may deny your application if we have not received requested reasonable costs for processing your application within 90 days.

(c) If your cost recovery agreement provides that a portion of the funds you pay will be used in the hiring of additional staff or contractors, such funds may not be refundable.

11. Revise § 2804.23 read as follows:

§ 2804.23 What costs am I responsible for when the BLM decides to use a competitive process for lands included in my application?

If the BLM decides to use a competitive process for lands included in your application and your application is in:

(a) *Processing Categories 1 through 4.* You must reimburse the Federal Government for processing costs as if the other application or applications had not been filed.

(b) *Processing Category 6.* You are responsible for processing costs identified in your application. If the BLM cannot readily separate costs, such as costs associated with preparing environmental analyses, you and any competing applicants must pay an equal share, or a proportion agreed to in writing among all applicants and the BLM. If you agree to share the costs that are common to your application and that of a competing applicant, and the competitor does not pay the agreed upon amount, you are liable for the entire amount due. You must pay the entire processing fee in advance. The BLM will not process your application until we receive the advance payments.

12. Amend § 2804.25 by revising the section heading, removing paragraph (e)(2)(i), redesignating paragraphs(e)(2)(ii) and (iii) as (e)(2)(i) and (ii), respectively, and revising them, and revising paragraphs (c), (e)(5) and (f)(3) to read as follows:

§ 2804.25 How will the BLM process my application?

* * * * *

(c) The BLM may require you to submit additional information necessary to process the application. This information may include a detailed construction, operation, rehabilitation, and environmental protection plan (*i.e.,* a POD), and any needed cultural resource surveys or inventories for threatened or endangered species. If the BLM needs more information, the BLM will identify this information in a written deficiency notice asking you to provide the additional information within a specified period of time. The failure to provide additional information requested by the BLM under this section may result in the BLM denying your application pursuant to § 2804.26.

(e) * * *

(2) * * *

(i) Hold a local public meeting if there is no other public meeting or opportunity for early engagement on the project, such as those completed when complying with the National Environmental Policy Act (NEPA).

(ii) Prioritize the application in accordance with § 2804.35; and

(iii) Evaluate the application based on the information provided by the applicant and input from other parties, such as Federal, State, Tribal, and local government agencies, as well as comments received in preliminary application review meetings held under § 2804.12(b)(4) and any public meeting held under paragraph (e)(1) of this section. Based on these evaluations, the BLM will either deny your application or continue processing it.

* * * * *

(4) Complete appropriate NEPA compliance for the application, as required by 43 CFR Part 46 and 40 CFR Chapter V, Subchapter A;

(5) Determine whether your proposed use complies with applicable Federal laws;

* * * * *

(f) * * *

(3) The segregation period may not exceed 2 years from the date of publication in the *Federal Register* of the notice initiating the segregation, unless the state director determines and documents in writing, prior to the expiration of the segregation period, that an extension is necessary for the orderly administration of the public lands. If the state director determines an extension is necessary, the BLM will extend the segregation for up to 2 years by publishing a notice in the *Federal Register*, prior to the expiration of the initial segregation period. A segregation will not be extended unless the application is complete and cost recovery has been received. Segregations under this part may only be extended once and the total segregation period may not exceed 4 years.

13. Amend § 2804.26 by revising the section heading and paragraph (a)(4), adding paragraphs (a)(9) and (10), and removing paragraph (c).

The revisions and additions read as follows:

§ 2804.26 Under what circumstances may the BLM deny my application?

(a) * * *

(4) Issuing the grant would be inconsistent with FLPMA, other laws, or these or other regulations;

* * * * *

(9) You do not comply with a deficiency notice (see § 2804.25(c) of this subpart) within the time specified in the notice.

(10) You fail to pay costs for processing your application within 90 days of receiving the BLM's request for funds under § 2804.22(b).

* * * * *

14. Remove and reserve § 2804.30:

§ 2804.30 [Removed and Reserved]

15. Remove and reserve § 2804.31:

§ 2804.31 [Removed and Reserved]

16. Revise § 2804.35 to read as follows:

§ 2804.35 Application prioritization for solar and wind energy development rights-of-way.

(a) The BLM will prioritize the processing of applications to ensure that agency resources are allocated to applications with the greatest potential for approval and implementation. The BLM's prioritization of an application is not a decision and is not subject to appeal under 43 CFR Part 4.

(b) The BLM will consider relevant criteria when prioritizing applications, including the following:

(1) Whether the proposed project is located within an area preferred for solar or wind energy development, such as designated leasing areas, which include solar energy zones, development focus areas, and renewable energy development areas;

(2) Whether the proposed project is likely to avoid adverse impacts to or conflicts with known resources or uses on or adjacent to public lands, and includes specific measures designed to further mitigate impacts or conflicts;

(3) Whether the proposed project is in conformance with the governing BLM land use plans;

(4) Whether the proposed project is consistent with relevant State, Tribal, and local government laws, plans, or priorities;

(5) Whether the proposed project incorporates the best management practices set forth in the applicable BLM land use plans and other BLM plans and policies; and

(6) Any other circumstances or prioritization criteria identified by the BLM in subsequent policy guidance or management direction through land use planning.

(c) The BLM will prioritize your complete application based on all available information, including information you provide to the BLM in the application or in response to deficiency notices, and information provided to the BLM in public meetings or consultations.

(d) The BLM may re-prioritize your application at any time.

17. Amend § 2804.40 by revising the introductory text to read as follows:

§ 2804.40 Alternative requirements.

If you are unable to meet any of the application requirements in this subpart, you may request approval for an alternative requirement from the BLM. Any such request is not approved until you receive BLM approval in writing. Your request to the BLM must:

* * * * *

Subpart 2805—Terms and Conditions of Grants

18. Amend § 2805.10 by revising paragraph (c) to read as follows:

§ 2805.10 How will I know whether the BLM has approved or denied my application or if my bid for a solar or wind energy development grant or lease is successful or unsuccessful?

* * * * *

(c) If you agree with the terms and conditions of the unsigned grant or lease, you should sign and return it to the BLM with any payment required under § 2805.16. The BLM will issue the right-of-way by signing the grant or lease and transmitting it to you, if the regulations in this part, including § 2804.26, remain satisfied.

* * * * *

19. Amend § 2805.11 by revising the section heading and paragraphs (b)(2) introductory text and (b)(2)(iv) and (v) and adding paragraph (b)(4) to read as follows:

§ 2805.11 What does a grant or lease contain?

* * * * *

(b) * * *

(2) Specific terms for energy grants and leases, such as solar or wind energy development projects, are as follows:

* * * * *

(iv) Energy generation facilities, including solar or wind energy development facilities, are authorized with a grant or lease for up to 50 years (plus initial partial year of issuance), subject to the terms and conditions including but not limited to § 2805.12(c); and

(v) Energy storage facilities which are separate from energy generation facilities are authorized with a right-of-way grant for up to 50 years, subject to the terms and conditions including but not limited to § 2805.12(c);

* * * * *

(4) Electric transmission lines with a capacity of 100 kV or more are authorized with a right-of-way grant for up to 50 years.

* * * * *

20. Amend § 2805.12 to add (c)(8) and by revising paragraph (e)(2) to read as follows:

* * * * *

§ 2805.12 What terms and conditions must I comply with?

(c)***

(8) Comply with the operational standards in this section for solar or wind energy development projects on public lands. The holder of a grant or lease for solar or wind energy development is authorized to operate for the purpose of generating energy. Diligent operation requires the holder to annually maintain at least 75% of energy generation capacity for the authorized development. Failure to meet this required generation in continuous two calendar year period during the term of the grant or lease may support suspension or termination of the grant or lease under §§ 2807.17 through 2807.19. Before suspending or terminating the authorization, the BLM will send you a notice that gives you a reasonable opportunity to correct any noncompliance or to start or resume use of the right-of-way (see § 2807.18). In response to this notice, you must:

(i) Provide reasonable justification for any reductions in energy generation (for example, delays in equipment delivery, legal challenges, and Acts of God);

(ii) Provide the anticipated date in which production of energy generation will resume; and

(iii) Submit a written request under paragraph (e) of this section for extension of the period in which the holder must satisfy the minimum energy threshold. If you do not comply with the requirements of paragraph (c)(8) of this section, the BLM may deny your request for an extension of the period for complying with the minimum energy generation threshold.

(e)***

(2) You may also request that the BLM consider alternative stipulations, terms, or conditions, other than rents or fees, and except as provided in § 2806.52(b)(1)(i). Any proposed alternative stipulation, term, or condition must comply with applicable law in order to be considered. Any proposed alternative to applicable bonding requirements must provide the United States with adequate financial assurance for potential liabilities associated with your right-of-way grant or lease. Any such request is not approved until you receive BLM approval in writing.

21. Revise § 2805.13 to read as follows:

§ 2805.13 When is a grant or lease effective?

A grant is effective after both you and the BLM sign it. You must accept its terms and conditions in writing and pay any necessary rent and monitoring fees as set forth in subpart 2806 of this part and §2805.16 of this subpart. Your written acceptance constitutes an agreement between you and the BLM that your right to use the public lands, as specified in the grant or

lease, is subject to the terms and conditions of the grant or lease and applicable laws and regulations.

22. Amend § 2805.14 by revising the section heading and paragraph (g) to read as follows:

§ 2805.14 What rights does a right-of-way grant or lease convey?

* * * * *

(g) Apply to renew your right-of-way grant or lease under § 2807.22;

* * * * *

Subpart 2806—Annual Rents and Payments

23. Amend § 2806.10 by revising the section heading and adding paragraph (c) to read as follows:

§2806.10 What rent must I pay for my grant or lease?

* * * * *

(c) You must pay rent for your grant or lease using the per-acre rent schedule for linear right-of-way grants (see § 2806.20) unless a separate rent schedule is established for your use, such as for communication sites per § 2806.30 or solar and wind energy development per § 2806.50. The BLM may also determine that these schedules do not apply to your right-of-way pursuant to §2806.70.

24. Amend § 2806.12 by revising paragraphs (a)(1) introductory text, (a)(2), and (b) to read as follows:

§ 2806.12 When and where do I pay rent?

(a) * * *

(1) If your grant or lease is effective on:

* * * * *

(2) If your grant or lease allows for multi-year payments, such as a short-term grant issued for energy site-specific testing, you may request that your initial rent bill be for the full term instead of the initial rent bill periods provided under paragraph (a)(1)(i) or (ii) of this section.

(b) You must make all rent payments for rights-of-way according to the payment plan described in § 2806.24.

* * * * *

25. Amend § 2806.20 by revising paragraph (c) to read as follows:

§ 2806.20 What is the rent for a linear right-of-way grant?

* * * * *

(c) You may obtain a copy of the current Per Acre Rent Schedule from any BLM state, district, or field office or by writing the address found under section 2804.14(c) of this part. We also post the current rent schedule at http://www.blm.gov.

26. Revise the undesignated center heading that precedes § 2806.50 and § 2806.50 to read as follows:

Solar and Wind Energy Development Rights-of-Way

§ 2806.50 Rents and fees for solar and wind energy development.

If you hold a right-of-way for solar or wind energy development, you must pay an annual rent and fee in accordance with this section and subpart. The annual rent and fee is the greater of the acreage rent or the capacity fee that would be due in a given year, and must be paid in

advance each year. The acreage rent will be calculated consistent with § 2806.11 and prorated consistent with § 2806.12(a). The capacity fee will vary depending on the project's annual energy generation on public lands and will be calculated consistent with § 2806.52(b). Any underpayment will be billed pursuant to § 2806.13 and any overpayment will be credited pursuant to § 2806.16.

27. Amend § 2806.51 by revising the section heading and paragraph (c) to read as follows:

§ 2806.51 Grant and lease rate adjustments.

* * * * *

(c) If you hold a right-of-way for solar or wind energy development that is in effect prior to [insert effective date of the final rule], you may either request that the BLM apply the annual rent and fee set forth in § 2806.52 or use the rate methodology applicable to your authorization immediately prior to this rule. If you wish to use the annual rent and fee set forth in § 2806.52, your request must be received by the BLM before [Date 2 years after effective date of the final rule]. The BLM will continue to apply the rate in effect immediately prior to this rule unless it receives your request to use the rate adjustments in this part. A request to change your rate methodology will include your agreement to a re-issuance of the grant or lease with updated Terms and Conditions found under this part, pursuant to § 2807.20(f).

28. Amend § 2806.52 by revising the section heading, the introductory text and paragraphs (a), (b), and (c) to read as follows:

§ 2806.52 Annual rents and fees for solar and wind energy development.

You must pay the greater of either an annual acreage rent or a capacity fee. The acreage rent and capacity fee are determined as follows:

(a) *Acreage rent.* The BLM will calculate the acreage rent for your grant or lease by multiplying the number of acres of the authorized area (rounded up to the nearest tenth of an acre) by the annual per-acre rate for the year in which the payment is due.

(1) *Per-acre rate.* The annual per-acre rate for your grant or lease is calculated using the State per-acre value from the solar or wind energy acreage rent schedule, the encumbrance factor, the year of the grant or lease term, and the annual adjustment factor. The calculation for determining the annual per-acre rate is A × B × [(1 + C) ^ D] where:

(i) A is the state per-acre value from the solar or wind energy acreage rent schedule published by the BLM for the year on which your right-of-way grant or lease is issued and is based on the National Agricultural Statistics Service (NASS) Survey of Pastureland Rents. The BLM will prepare the rent schedule by averaging the NASS reported pastureland rents for the most recent 5-year period, using only those years for which rent is reported by NASS. The BLM will update the rent schedule every 5 years consistent with the timing of rent adjustments under § 2806.22.

(ii) B is the encumbrance factor, which is 100 percent for solar energy and 5 percent for wind energy;

(iii) C is the annual adjustment factor, which is 3 percent; and,

(iv) D is the year of the grant or lease term, which is the number of years the grant or lease has been authorized. For example, the first year (whether partial or full year) would be 1 and the second year would be 2.

(2) You may obtain a copy of the current solar or wind energy acreage rent schedule from any BLM state, district, or field office or by writing the address found under § 2804.14(c) of this part, Attention: Renewable Energy Coordination Office. The BLM also posts the current solar energy acreage rent schedule at http://www.blm.gov.

(b) *Capacity fee.* (1) The capacity fee is calculated using the MWh rate or the alternative MWh rate, the MWh rate reduction, the domestic content reduction, the Project Labor Agreement (PLA) reduction, the rate of return, the year of the grant or lease, the annual adjustment factor, and the annual power generated on the right-of-way. You must pay the capacity fee annually, beginning the year in which electricity generation begins or is scheduled to begin in the approved POD, whichever comes first, unless the acreage rent (see paragraph (a) of this section) exceeds the capacity fee in a given year. The calculation for determining the capacity fee is A x B x C x D x [(1 + E) ^F] x G x H where:

(i) A is the *MWh rate* or the *alternative MWh rate.* The MWh rate is the annual weighted average wholesale price per MWh for the major trading hubs serving the 11 Western States of the continental United States for the full 5 calendar-year period preceding the year in which your grant or lease was issued, rounded to the nearest dollar increment (see paragraph (7)). An Alternative MWh rate may be approved by the BLM if you have entered into a power purchase agreement, such as with a utility, and that rate is lower than the MWh rate. You must provide proof of the lower rate to the BLM, and if the BLM determines the lower rate is appropriate, the alternative MWh rate will be used in place of the MWh rate.

(ii) B is the *MWh rate reduction*, which is equal to 80 percent for fee payments due before 2036. Starting 2036 the MWh rate reduction for new authorizations transitions to 20 percent, as follows:

Table 1 to Paragraph (b)(1)(ii)

Calendar Year	**MWh rate reduction**	**B – calculation multiplier**
2035	80%	20%
2036	60%	40%
2037	40%	60%
2038 and beyond	20%	80%

(iii) C is the *Domestic Content reduction*, which is equal to 1.0 for fee payments when a holder's project does not qualify for the domestic content reduction. C is equal to 0.8 when the holder can demonstrate that a facility qualifies for the domestic content reduction. A facility qualifies for the domestic content reduction if a holder documents that the facility would qualify as "Produced in the United States", consistent with 2 CFR Part 184.

(iv) D is the factor for the *Project Labor Agreement reduction*, which is equal to 1.0 for fee payments when the holder does not execute a PLA. D is equal to 0.8 if the holder executes a PLA for the construction of the project.

(v) *Request for conditional approval: Alternative MWh rate, Domestic Content reduction and PLA reduction*. The alternative MWh rate, the Domestic Content reduction and PLA reduction (paragraphs (b)(1)(ii) and (iii) and (iv) of this section) may only be applied if a request for conditional approval is received by the BLM prior to the issuance of a grant or lease. A

request for conditional approval must be submitted with sufficient documentation to demonstrate that the development qualifies or may later qualify for the rate reductions. A request for conditional approval is subject to the holder demonstrating, to the satisfaction of the BLM's Authorized Officer, that the development qualifies. If energy generation begins before the holder has demonstrated that the facility qualifies, the BLM will charge the holder the full capacity fee, without the alternative MWh rate, Domestic Content reduction, or PLA reduction. The capacity fee may be updated for subsequent calendar years after the holder demonstrates that the facility qualifies, but the BLM will not refund past payments made before the alternative MWh rate, domestic content reduction, or PLA reduction went into effect.

(2) E is the annual adjustment factor, which is 3 percent.

(3) F is the year of the grant or lease term, which is the number of years the grant or lease has been authorized. For example, the first year (whether partial or full year) would be 1 and the second year would be 2.

(4) G is the rate of return, which is 7 percent.

(5) H is the annual energy generated on the right-of-way and will be provided to the BLM by the grant or leaseholder in an annual certified statement. The BLM will bill to coincide with the start of the calendar year. The first-year payment in advance will be based on estimated energy generation and the BLM will determine final payment for the first year based on actual energy generation. Subsequent payments in advance will be based on the most recent calendar year's actual energy generation reported on the certified statement, unless exception is approved in paragraph (vi) of this section.

(i) The holder must submit the annual certified statement to the BLM before the first year of energy generation begins or is scheduled to begin as approved in the Plan of Development, whichever comes first. Certified annual statements must be submitted to the BLM by October, each year.

(ii) Prior to the start of energy generation, the holder must submit to the BLM in the certified statement the estimated energy generation of the development for the first year.

(iii) Once energy generation has begun, the holder must submit to the BLM in the certified statement the most recent calendar year's actual energy generation of the development.

(iv) The BLM will calculate the capacity fee from the certified statement. For projects that include generation on public and non-public lands, the holder will prorate the total energy generation by the percentage of the right-of-way footprint on public lands relative to the total development area footprint.

(v) If the year's actual energy generation exceeds or is less than the amount of energy generation used to bill for the payment in advance, the holder will be billed, credited or refunded for the underpayment or overpayments pursuant to §§ 2806.13(e) and 2806.16. In no event will the total payment be less than the annual acreage rent.

(vi) The BLM may approve a request made by a right-of-way holder to provide a new estimate of energy generation to the BLM in the annual certified statement to use for billing the next year's payment in advance if: (1) the right-of-way holder has planned maintenance activities, or other interruptions to energy generation, that would reduce the amount of energy generated by 25 percent or more; or, (2) the right-of-way holder is aware that the energy generation in the subsequent year will exceed the actual energy generation for the previous year

by 25 percent or more. See § 2805.12(c)(8)(i) through (iii) for the steps to follow when failing to meet diligent operation requirements.

(vii) If the right-of-way holder underestimates energy generation by 25 percent or more of the actual energy generation or does not provide the BLM with a new estimate when energy production will exceed the previous year's actual production by more than 25 percent, the BLM may assess the holder a late payment fee of 10 percent of the actual generation for each year of underestimation. This section applies unless the BLM has approved a request to provide a new estimate under section 2806.52(b)(5)(vi), and the approved new estimate does not underestimate energy generation by 25 percent or more of actual energy generation or if the holder can provide the BLM with justification consistent with section 2805.12(e).

(6) *MWh rate schedule.* You may obtain a copy of the current MWh rate schedule from any BLM state, district, or field office or by writing the address found under § 2804.14(c) of this part, Attention: Renewable Energy Coordination Office. The BLM also posts the current MWh rate schedule at http://www.blm.gov.

(7) *Periodic adjustments.* (i) The MWh rate applicable to your right-of-way will be the MWh rate in effect the first year for your grant or lease and will not be updated with subsequent MWh rate schedule adjustments. The MWh rate applicable to your right-of-way will only be updated each year by the annual adjustment factor under paragraph (b)(2) of this section.

(ii) The MWh rate schedule for new grants and leases will be adjusted once every 5 years consistent with the timing of rent adjustments under § 2806.22 of this part and consistent with paragraph (b)(1) of this section.

(8) The general payment provisions for rents described in this subpart, except for § 2806.14(a)(4), also apply to the capacity fee.

(c) *Implementation of the acreage rent and capacity fee.* The rates for acreage rent and capacity fees apply to all grants and leases issued after the effective date of this rule, and to existing grants and leases if the holder elects to continue paying under the rate setting methodology established at the time of your authorization per § 2806.51(c).

* * * * *

29. Add an undesignated center heading between §§ 2806.52 and 2806.54 and revise § 2806.54 by to read as follows:

Renewable Energy Rights-of-Way

§ 2806.54 Rent for energy storage facilities that are not part of a solar or wind energy development facility.

Rent for energy storage facilities that are not part of a solar or wind energy development facility will be determined pursuant to the linear rent formula set forth in § 2806.23. The BLM may determine your rent pursuant to § 2806.70 if we determine the linear rent schedule does not apply.

§§ 2806.60 through 2806.68 [Removed]

30. Remove the undesignated center heading “Wind Energy Rights-of-Way” and §§ 2806.60 through 2806.68.

Subpart 2807—Grant Administration and Operation

31. Amend § 2807.17 by revising paragraph (c) to read as follows:

§ 2807.17 Under what conditions may BLM suspend or terminate my grant or lease?

* * * * *

(c) Your failure to use your right-of-way for its authorized purpose for any continuous 5-year period creates a presumption of abandonment, except for solar and wind energy rights-of-way. Consistent with § 2805.12(c)(8), a presumption of abandonment or insufficient productivity of a grant or lease for a solar or wind energy generation occurs for any continuous two calendar-year period.

32. Amend § 2807.20 by revising paragraph (b) and adding paragraph (f) to read as follows:

§ 2807.20 When must I amend my application, seek an amendment of my grant or lease, or obtain a new grant or lease?

* * * * *

(b) The requirements to amend an application or grant are the same as those for a new application, including paying processing and monitoring fees and rent according to §§ 2804.14, 2805.16, and 2806.10, except for solar and wind energy development grants and leases per § 2806.51(c) requesting a rent adjustment addressed under paragraph (f) of this section.

* * * * *

(f) A request to the BLM per § 2806.51(c) to adjust your solar or wind energy rates must be received before [date 2 years after the effective date of the final rule]. The BLM will re-issue your grant or lease, without further review, for the remainder of your existing term consistent with the requirements of this part, including processing and monitoring costs under §§ 2804.14 and 2805.16, the terms and conditions under § 2805.12, and rent provision under § 2806.50.

33. Amend § 2807.21 by revising paragraph (e) to read as follows:

§ 2807.21 May I assign or make other changes to my grant or lease?

* * * * *

(e) Your assignment is not recognized until the BLM approves it in writing. We will approve the assignment if doing so is in the public interest. We may modify the grant or lease or add bonding and other requirements, including additional terms and conditions, to the grant or lease when approving the assignment, except that we may only modify solar or wind energy leases where modification is warranted under § 2805.15(e). We may decrease rents if the new holder qualifies for an exemption (see § 2806.14) or waiver or reduction (see § 2806.15) and the previous holder did not. Similarly, we may increase rents if the previous holder qualified for an exemption or waiver or reduction and the new holder does not. If we approve the assignment, the benefits and liabilities of the grant or lease apply to the new grant or leaseholder.

* * * * *

34. Revise the heading of subpart 2809 to read as follows:

Subpart 2809—Competitive Process for Solar and Wind Energy Development Applications or Leases

35. Revise § 2809.10 to read as follows:

§ 2809.10 Competitive process for energy development grants and leases.

(a) The BLM may conduct a competitive process for solar and wind energy development grants or leases on its own initiative; or

(b) The BLM may solicit nominations for public lands to be included in a competitive process by publishing a call for nominations under § 2809.11(a); or

(c) You may request that the BLM conduct a competitive process by submitting a request in writing that complies with § 2809.11(b); or

(d) The BLM may conduct a competitive process if it receives two or more competing applications.

(e) Except where an applicant has failed to timely provide information requested by the BLM under § 2804.25(c), the BLM will not offer lands in a competitive process for which the BLM has accepted a complete application, received a Plan of Development, and entered into a cost recovery agreement.

36. Revise § 2809.11 to read as follows:

§ 2809.11 How will the BLM call for nominations?

(a) *Call for nominations.* The BLM may publish a call for nominations for lands to be included in a competitive process. The BLM will publish this notice in the *Federal Register* and may also use other notification methods, such as a newspaper of general circulation in the area affected, or the Internet. The *Federal Register* notice and any other notices will include:

(1) The date, time, and location by which nominations must be submitted;

(2) The date by which nominators will be notified of the BLM's decision on timely submissions;

(3) The area or areas within which nominations are being requested; and

(4) The qualification for a nominator, which must include, at a minimum, the requirements for an applicant, see § 2803.10.

(b) *Nomination submission.* Nominations for lands to be included in a competitive process must be in writing, and include the following:

(1) A refundable nomination fee of $5 per acre;

(2) The nominator's name and personal or business address. The name of only one citizen, association, partnership, corporation, or municipality may appear as the nominator. All communications relating to submissions will be sent to that name and address, which constitutes the nominator's name and address of record; and

(3) The legal land description and a map of the nominated lands. The lands nominated may be the entire area or part of the area made available under the call for nominations.

(c) The BLM will not accept your submission if it does not comply with the requirements of this section, or if you are not qualified to hold a grant or lease under § 2803.10.

(d) *Withdrawing a nomination.* A nomination cannot be withdrawn, except by the BLM for cause, in which case the nomination fee will be refunded.

(e) The BLM may decide whether to conduct an offer for nominated lands.

37. Revise § 2809.12 to read as follows:

§ 2809.12 How will the BLM select and prepare parcels?

(a) The BLM will identify parcels for a competitive process based on information received in public nominations, land use designations, and on any other information it deems relevant.

(b) The BLM and other Federal agencies, as applicable, may conduct necessary studies and site evaluation work, including applicable environmental reviews and public meetings, before offering lands in a competitive process.

(c) The BLM's choice to conduct a competitive process is not a decision to grant or deny a right-of-way application and is not subject to appeal under 43 CFR Part 4.

38. Amend § 2809.13 by revising paragraphs (b)(7) and (c) to read as follows:

§ 2809.13 How will the BLM conduct competitive processes?

* * * * *

(b) * * *

(7) The terms and conditions of the process, including whether a successful bidder will become a preferred applicant or a presumptive leaseholder; the requirements for the successful bidder to submit an application, see § 2804.12, or a Plan of Development, see § 2809.18; and any mitigation requirements, including compensatory mitigation.

(c) We will notify you in writing of our decision to conduct a competitive process at least 30 days prior to the competitive process if you nominated lands that are included in the process, paid the nomination fees, and demonstrated your qualifications to hold a grant or lease as required by § 2809.11.

39. Amend § 2809.15 by:

a. Revising paragraph (a);

b. Removing paragraph (d);

c. Redesignating paragraphs (b) and (c) as paragraphs (c) and (d), respectively;

d. Adding a new paragraph (b); and

e. Revising newly redesignated paragraphs (d)(1) through (4);

f. Adding paragraph (d)(5); and

f. Revising paragraph (e).

The revisions and addition read as follows:

§ 2809.15 How will the BLM select the successful bidder?

(a) The bidder with the highest total bid, prior to any variable offset, is the successful bidder, and may become the preferred applicant or the presumptive leaseholder in accordance with § 2809.15(b).

(b) The successful bidder will become the presumptive leaseholder or preferred applicant only after making the payments required in paragraph (d) and satisfying the requirements of this section and § 2803.10. If the successful bidder does not satisfy these requirements, the BLM may make the next highest bidder the successful bidder under § 2809.17(b) or re-offer the lands under § 2809.17(d).

(1) *Presumptive leaseholder*. (i) The successful bidder will become a presumptive leaseholder if:

(A) The lands for which the bidder has successfully bid are located within a designated leasing area; and,

(B) The notice of the competitive process indicated that a successful bidder will become a presumptive leaseholder.

(ii) A presumptive leaseholder will be awarded a lease only if the presumptive leaseholder submits a proposed Plan of Development in accordance with § 2804.25(c) and the proposed Plan of Development is approved by the BLM.

(2) *Preferred applicant.* A successful bidder who does not become a presumptive leaseholder in accordance with § 2809.15(b)(1) may become a preferred applicant. The preferred applicant's application for a grant or lease will be processed for the parcel identified in the submission under § 2809.12(b). Approval of the application is not guaranteed and is solely at the BLM's discretion. The BLM will not process other applications for solar and wind energy

development on lands where a preferred applicant has been identified, unless allowed by the preferred applicant.

* * * * *

(d) * * *

(1) Make payments by personal check, cashier's check, certified check, bank draft, or money order, or by other means deemed acceptable by the BLM, payable to the Department of the Interior—Bureau of Land Management;

(2) By the close of official business hours on the day on which the BLM conducts the competitive process or such other time as the BLM may have specified in the offer notices, submit for each parcel:

(3) Within 15 calendar days after the day on which the BLM conducts the competitive process, submit the balance of the bonus bid (after the variable offsets are applied under paragraph (c) of this section) to the BLM office conducting the process; and

(4) Within 15 calendar days after the day on which the BLM conducts the competitive process, submit the application filing fee under § 2804.12(c) less the application fee submitted under § 2809.11(c)(1) (if you are the preferred applicant), or submit the acreage rent for the first full year of the lease as provided in part 2806 (if you are the presumptive leaseholder).

(5) You may be required to pay reasonable costs in addition to payment of the application filing fee when processing your application, pursuant to § 2804.14. A processing or monitoring Category 6 cost recovery fee may be reduced by the application filing fee paid when submitting an application.

(e) The successful bidder will not become the preferred applicant or be offered a lease and the BLM will keep all money that has been submitted with the competitive process if the successful bidder does not satisfy the requirements of paragraph (d) of this section. In this case, the BLM may make the next highest bidder the successful bidder under § 2809.17(b) or re-offer the lands.

40. Amend § 2809.16 by redesignating existing paragraph (c)(11) as paragraph (c)(13), revising paragraphs (c) introductory text and (c)(10), adding a new paragraph (c)(11), and adding paragraphs (c)(12) and (e) to read as follows:

§ 2809.16 When do variable offsets apply?

* * * * *

(c) The variable offset may be based on the following factors, including progressive steps towards:

* * * * *

(10) Public benefits;

(11) Use of items qualifying for the Domestic Content preference;

(12) Use of a project labor agreement; and

(13) Other factors.

* * * * *

(e) If the successful bidder's eligibility for a variable offset cannot be verified until a later time, the BLM may require the successful bidder to submit the full bid amount, without taking into account the variable offset, and hold the amount of the variable offset in suspense. The amount of the bonus bid corresponding to the variable offset will be refunded or credited to the

successful bidder once the successful bidder has demonstrated that it has qualified for the variable offset. The BLM may set a deadline in the notice of competitive process by which the successful bidder must demonstrate its qualifications.

41. Amend § 2809.17 by revising paragraph (b) and removing paragraph (d).

The revision reads as follows:

§ 2809.17 Will the BLM ever reject bids or re-conduct a competitive process?

* * * * *

(b) We may make the next highest bidder the successful bidder if the first successful bidder does not satisfy the requirements of § 2809.15, does not execute the lease, or is for any reason disqualified from holding the lease.

* * * * *

42. Amend § 2809.18 by revising the introductory text and paragraphs (a), (b), and (f) to read as follows:

§ 2809.18 What terms and conditions apply to a solar and wind energy development lease?

The lease will be issued subject to the following terms and conditions:

(a) A lease provides site control to the leaseholder. The term of your lease will be consistent with § 2805.11(b) and will terminate on December 31 of the final year of the lease term. You may submit an application for renewal under § 2805.14(g). A leaseholder may not construct any facilities on the right-of-way until the BLM issues a notice to proceed or other written form of approval to begin surface disturbing activities.

(b) *Rent.* You must pay any rent as specified in § 2806.52.

* * * * *

(f) *Assignments.* You may apply to assign your lease under § 2807.21, and if an assignment is approved, the BLM will not make any changes to the lease terms or conditions, as provided for by § 2807.21(e), except for modifications required under § 2805.15(e).

* * * * *

43. Remove section 2809.19 in its entirety.