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ABA SECTION OF ENVIRONMENT ENERGY AND RESOURCES

Public Land and Resources Committee Newsletter

Vol. 10, No. 2 **July 2008**

MESSAGE FROM THE CHAIR, PUBLIC LAND AND RESOURCES COMMITTEE

Denise A. Dragoo
Snell & Wilmer L.L.P.

Welcome to the summer newsletter of the Public Land and Resources Committee! Our committee is pleased to present this edition which features articles on renewable energy development on public lands, the delisting of the Maguire Daisy under the Endangered Species Act, and the BLM's Healthy Land Initiative. We also invite you to participate in the 16th Section Fall Meeting to be held Sept. 17-20, in Phoenix, Arizona. Our committee is sponsoring two break-out sessions at the Fall Meeting, including a Thursday panel on carbon sequestration on public, private, and Indian lands, and a Friday session on Resource Hot Topics, including forest management, wildfire policies, and mining law reform. Also, as the outgoing chair of the committee, I wish to thank our vice chairs for their outstanding service this year including:

- Craig T. Donovan, Committee Newsletter;
- Kim Harb, Programs;
- Peter Schaumberg, Public Service;
- Jonathan D. Simons, Technology;
- Jim Butler, *Year in Review*; and
- Veronica Larvie, Membership

Please contact us if you are interested in participating on a committee teleconference, submitting an article, or contributing to the 2008 *The Year in Review*. Contact information is provided on the Section Web site at www.abanet.org/environ/. Enjoy the newsletter!

EXPANDING USE OF THE PROGRAMMATIC ENVIRONMENTAL IMPACT STATEMENT FOR RENEWABLE ENERGY DEVELOPMENT ON PUBLIC LANDS

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During the last five years, the Bureau of Land Management (BLM), often in concert with other federal agencies, has expanded the use of the programmatic environmental impact statement (PEIS) to evaluate the effects of wide-reaching agency policies and Congressional directives affecting the public lands. This has been particularly true in the case of the rapidly growing use of public lands for renewable energy development. The PEIS does not replace project-specific environmental analysis in accordance with the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370f. Instead, it is a tool that land managers may use to make more efficient use of scarce agency resources by simultaneously amending a series of land-use plans and narrowing the scope of the individual project NEPA analysis to focus on project-specific impacts. Most recently, on May 29, 2008, the BLM and the U.S. Department of Energy (DOE) issued a Notice of Intent to prepare a PEIS to evaluate solar energy development on the public lands and the implementation of related actions, including the amendment of multiple BLM land-use plans.

Public Land and Resources Committee Newsletter
Vol. 10, No. 2, July 2008
Craig T. Donovan, Editor

In this issue:

This newsletter is a publication of the ABA Section of Environment, Energy, and Resources, and reports on the activities of the committee. All persons interested in joining the Section or one of its committees should contact the Section of Environment, Energy, and Resources, American Bar Association, 321 N. Clark St., Chicago, IL 60654.

Statutory and Regulatory Basis for the PEIS

NEPA requires federal agencies that propose "major Federal actions significantly affecting the quality of the human environment" to evaluate the effects of those actions and their alternatives in an environmental impact statement (EIS). 42 U.S.C. § 4332(2)(C). However, in some cases, "an impact statement on a group of related actions or an agency program that may lead to later individual actions" may be useful. Daniel R. Mandelker, NEPA LAW AND LITIGATION § 9:2. Such an analysis is known as a programmatic environmental impact statement, or "PEIS." The PEIS is particularly useful in situations in which it is "difficult to evaluate the cumulative impact of a number of individual but related actions when they are evaluated one at a time." *Id.* The PEIS allows comprehensive evaluation of a group of related actions or an agency's program in advance of individual actions. *Id.*

The Council on Environmental Quality (CEQ) NEPA regulations authorize federal agencies to prepare an EIS for "broad Federal actions such as the adoption of new agency programs or regulations." 40 C.F.R. § 1502.4(b); *see also* 45 Fed. Reg. (1981), Forty Most Asked Questions Concerning CEQ's [NEPA] Regulations, No. 24a ("An EIS must be prepared if an agency proposes to implement a specific policy, to adopt a plan for a group of related actions, or to implement a specific statutory program or executive directive."). Section 1502.4(b) is interpreted to authorize a PEIS. In further support of the utility of a PEIS, the CEQ regulations suggest that agencies "may find it useful to evaluate" proposed actions in one of several ways, including "[g]enerically, including actions which have relevant similarities, such as common timing, impacts, alternatives, methods of implementation, media, or subject matter." 40 C.F.R. § 1502.4(c)(2).

Practical Effect of the PEIS

Section 202 of the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. § 1712, requires that the Department of the Interior develop land use plans to guide management of the public

lands. Land management units may only be used for purposes identified in the land use plan; thus a proposed project can only be approved if the relevant land use plan allows the use of that particular land for the specific use sought. *See* 43 C.F.R. § 1610.5-3(a). Otherwise, the plan must be amended in the project-specific EIS before the use can be authorized. *Id.* § 1610.5-3(c). In the past, most existing land use plans did not provide for renewable energy uses. The PEIS offers a way to jump-start the amendment process, because it can be used to amend a number of land use plans in one Record of Decision (ROD).

Because the PEIS contains broad analyses of factors and impacts that are common to all projects within its scope, land managers reviewing subsequent specific projects can rely on those broad analyses to avoid individual plan amendments and duplicative analyses of similar environmental impacts, and to focus their resources on the analysis of project-specific impacts. This practice of incorporating broad-scope environmental analyses from an EIS or PEIS into narrower subsequent environmental analysis in a project level Environmental Analysis (EA) or EIS is called "tiering." 40 C.F.R. §§ 1502.20, 1502.28; *see also* 48 Fed. Reg. 34,263 (1983), CEQ 1983 Guidance Regarding NEPA Regulations (discussing appropriate use of tiering). When tiering, the second, site-specific EIS summarizes the issues discussed in the PEIS and incorporates by reference discussion from the PEIS. The site-specific EIS then focuses "on the issues relevant to the specific proposal, and [does] not duplicate material found in the first EIS." *Id.*

The PEIS can also be used to develop policy, address mitigation, and identify Best Management Practices (BMPs), baseline requirements to avoid common environmental impacts from the analyzed activity. When BMPs identified in a PEIS are incorporated into a proposed project, the potential impacts of the project are reduced, thereby minimizing the number of potential issues requiring site-specific analysis. Thus, the availability of tiering from a PEIS allows land managers to reduce the scope of the NEPA analysis required for individual projects that undergo NEPA review after completion of the applicable PEIS. In addition, amending a land use plan through a PEIS eliminates the requirement for a project-specific EIS to amend the plan, thus expediting project-specific NEPA.

Use of the PEIS for Renewable Energy Development and Energy Infrastructure

In recent years, BLM and DOE have used the PEIS to support renewable energy development on public lands. These four PEIS projects, which are in varying stages of preparation and completion, are described in turn below.

Wind Energy Development Program

In 2005, BLM completed a Wind Energy Development PEIS for most Western public lands under its jurisdiction (excluding Alaska). *See* Wind Energy Development Final Programmatic EIS Web site, *available at* www.windeis.anl.gov. BLM established the Wind Energy Development Program to further the objectives of its 2002 Interim Wind Energy Development Policy. *See* BLM Instructional Memorandum 2003-020 (Oct. 16, 2002). The PEIS was conducted to evaluate "the potential impacts associated with the proposed action to develop a Wind Energy Development Program, including the adoption of policies and best management practices (BMPs) and the amendment of 52 BLM land use plans to address wind energy development." *Available at* http://www.windeis.anl.gov/eis/index.cfm. The ROD implementing the BMPs and land use plan amendments was entered on Dec. 15, 2005. BLM subsequently issued a revised Wind Energy Development Policy to ensure "consistency in the processing of right-of-way applications and the management of authorizations for wind energy development on public land" and address "the amendment of land use plans to address wind energy development and the potential to tier future site-specific [NEPA] analyses to the Programmatic EIS." BLM Instructional Memorandum 2006-16 (Aug. 24, 2006).

According to the revised policy,

> Policies included in the ROD identify specific lands on which wind energy development would not be allowed; establish requirements for public

involvement, consultation with other Federal and state agencies, and government-to-government consultation; define the need for project-level environmental review; establish requirements for the scope and content of the project-level Plan of Development (POD); and incorporate adaptive management strategies.

Id. Further, the BMPs identified in the PEIS and implemented in the ROD "establish environmentally sound and economically feasible mechanisms to protect and enhance natural and cultural resources [and] identify the issues and concerns that must be addressed by project-specific plans, during each phase of project development." *Id.* Mitigation measures, including both programmatic and site-specific BMPs, must be incorporated into project-level PODs. *Id.* For example, "scientifically rigorous" bird and bat surveys must be conducted, turbines should be configured to avoid landscape features known to attract raptors, mitigation measures should be used to avoid hazards to bat populations; disturbance of any population of federally listed plant species shall not be permitted, design elements should be visually integrated with the surrounding landscape, and an access road siting and management plan must be prepared. Record of Decision, Appendix A (Dec. 15, 2005). Thus, the PEIS does not replace project-level environmental analysis and mitigation, but tiering to the PEIS streamlines the process by allowing managers to focus on site-specific concerns for individual right-of-way applications.

West-wide Energy Corridor Program

The Energy Policy Act of 2005 (EPACT), Pub. L. 109-58 (Aug. 8, 2005), identified improved transmission infrastructure as an important component of delivering energy, particularly renewable energy, to consumers. Western public lands contain vast energy resources—both conventional and renewable. Yet these resources are located far from the demand centers on the East and West Coasts. According to BLM, some 90 percent of all transmission in the West must cross public lands. Congress directed, in Section 368 of the EPACT, that federal land-management agencies analyze the best corridors across federal lands to deliver energy to market. Specifically, Congress required the Secretaries of the Interior, Agriculture, Energy, Commerce, and Defense to "designate . . . corridors for oil, gas, and hydrogen pipelines and electricity transmission and distribution facilities on Federal land in the eleven contiguous Western States," as well as "perform any environmental reviews that may be required to complete the designation of such corridors. EPACT § 368(a) (Aug. 8, 2005). Further, the designated corridors are to be incorporated "into the relevant agency land use and resource management plans or equivalent plans." *Id.*

The West-Wide Energy Corridor PEIS is the administrative response to the directive contained in Section 368 of EPACT. *See* West-wide Energy Corridor PEIS Web site, *available at* www.corridoreis.anl.gov. The agencies concluded that it would be appropriate to prepare a PEIS for the process of designating corridors and amending land and resource management plans "to examine region-wide environmental concerns" even though "local environmental impacts must inevitably await site-specific proposals and the required site-specific environmental review." Draft PEIS at ES-8. Preparing a PEIS allows for the integration of NEPA into the process "at the earliest possible time," and further allows for early public participation "to better inform [the agencies'] decision-making process." *Id*. at ES-8-9.

In the Draft PEIS, the Secretaries explained that the corridors represent the agencies' preferred locations for future rights-of-way for energy transport projects. *Id.* at ES-4, ES-14. The corridors were located to connect supply and demand areas, "while avoiding sensitive resources and land use and regulatory constraints to the fullest extent possible." *Id.* Neither the act nor the Draft PEIS requires that all of the corridors be used for energy transport projects, nor that project developers exclusively use those corridors. Further, the designation of the corridors would not authorize any site-specific projects; rather, those projects would still be subject to all applicable environmental reviews. *Id.* at ES-8. However, the preferred corridors are expected to be incorporated

into land and resource management plans, and the various agencies plan to adopt procedures for interagency coordination in the processing of applications for rights of way for proposed projects in the corridors. *Id.* at ES-4-5. Accordingly, the approval process is likely to be significantly streamlined for projects that are located within the proposed corridors. *Id.* at ES-5.

The West-Wide Energy Corridor Draft PEIS was released in October 2007, and public comments were received until mid-February 2008. The Final PEIS is scheduled to be released during the summer of 2008.

Geothermal Resources Leasing Program

Some 48 percent of geothermal energy is found on public lands, yet leasing, particularly on U.S. Forest Service (USFS) lands, has been stalled for over 20 years. The 2005 EPACT contained major revisions to the Geothermal Steam Act, 30 U.S.C. § 1001 *et seq.*, and directed BLM and USFS to work in concert to resolve the geothermal leasing impasse. *See* 42 U.S.C. § 15871. In June 2007, BLM and USFS announced they were beginning the preparation of a PEIS for leasing geothermal resources: "The goal of the PEIS is to examine the potential impacts of geothermal leasing on certain lands administered by BLM and the USFS. Completion of the PEIS will improve the efficiency and effectiveness of the geothermal leasing and application process on federal lands." 72 Fed. Reg. 32,679, 32,680 (June 13, 2007).

A December 2007 Scoping Report, available at the Geothermal Resources Leasing Program Web site, described comments received during the public scoping process. Web site *available at* http://www.blm.gov/wo/st/en/prog/energy/geothermal/geothermal_nationwide.html. The comments received mainly related to the NEPA process (*e.g.*, the PEIS should include adequate cumulative impacts analysis), the purposes and need for the PEIS (*e.g.*, questions about how the PEIS would address the existing backlog of lease applications), the requirement for adequate impact analysis, suggestions for additional alternatives, and concerns about agency coordination and consultation. Scoping Report at 13-14. In May 2008, the BLM published proposed "planning criteria" to be used in amending land use plans to address geothermal leasing. 73 Fed. Reg. 28,500 (May 16, 2008).

On June 13, 2008, BLM and USFS released the Draft PEIS for public comment. *See* 73 Fed. Reg. 33,802. The Draft PEIS may be downloaded from the PEIS Web site at http://www.blm.gov/ wo/st/en/prog/energy/geothermal/geothermal_nationwide/Documents/draft_programmatic.html. The BLM and USFS together propose to identify "lands with geothermal potential as being legally open or closed to leasing," and "issue or deny geothermal lease applications pending as of January 1, 2005." Draft PEIS at ES-2. In addition to identifying public lands that are closed or open to leasing, and under what conditions, BLM further proposes to "develop a comprehensive list of stipulations, best management practices, and procedures to serve as consistent guidance for future geothermal leasing and development on [BLM] and [National Forest System] lands," and amend land use plans to adopt those stipulations, BMPs, and procedures. *Id.* The Draft PEIS analyzes a no-action alternative (Alternative A) and two action alternatives (Alternatives B and C). The action alternatives would both involve the allocation of BLM and USFS lands as open or closed to geothermal leasing, but under Alternative C, only lands within a 20-mile corridor from transmission lines would be considered, whereas no such restriction would exist under Alternative B. *Id.* at ES-5. Lands closed to geothermal leasing by statute, including National Park System lands, are not part of the analysis. *Id.* at ES-4.

The public comment period will be open for 90 days, and public hearings will be conducted in thirteen cities in the twelve western states (including Alaska) during July 2008. Further information about the public meetings and the public comment process is available on the PEIS Web site: http://www.blm.gov/wo/st/en/prog/energy/geothermal/geothermal_nationwide.html.

Solar Energy Development Program

At the end of May 2008, BLM announced the start of a Solar Energy Development PEIS. In 2004, when BLM's first Solar Energy Development Policy was

announced, there were zero pending applications for solar energy development rights-of-way. By 2006, that number had risen to one. But in 2007 and 2008, demand exploded, and BLM now has over 160 pending solar right-of-way applications in California, Nevada, Arizona, and New Mexico. The Solar PEIS will help address this dramatic increase in interest in solar energy development on public lands.

A 2007 revised Solar Energy Development Policy directs BLM "to facilitate environmentally responsible commercial development of solar energy projects on public lands." *See* BLM Instruction Memorandum No. 2007-097, 1 (Apr. 4, 2007). None of the area land use plans in the western states was developed with any expectation of the level of solar power development that is presently anticipated. Addressing this demand in compliance with the solar policy can be expected to involve multiple projects with similar impacts and methods of implementation. Thus, the preparation of a Solar PEIS is the most efficient way for BLM to comply with NEPA and amend its land use plans to permit solar development consistent with its solar policy.

At the end of May, BLM and DOE issued a "Notice of Intent" to prepare a PEIS for solar energy development on public lands. 73 Fed. Reg. 30,908 (May 29, 2008). The proposed action in the PEIS is "for [DOE and BLM] to develop and implement agency-specific programs that would facilitate environmentally responsible utility-scale solar energy development by establishing environmental policies and mitigation strategies related to solar energy development in six western states (Arizona, California, Colorado, New Mexico, Nevada, and Utah)." *Id.* at 30,909. BLM will use the PEIS to consider whether "to establish a Bureau-wide solar energy development program . . . and to amend land use plans in the six-state study area to adopt the new program" as well as to "identify BLM-administered land . . . that may be environmentally suitable for solar energy development, and land that would be excluded from such development." *Id.* Further, the PEIS will evaluate the necessity of designating additional electricity transmission corridors on BLM lands to facilitate utility-scale solar energy development. *Id.* DOE will use the PEIS to consider "developing a solar energy program of environmental policies and mitigation strategies that would apply to the deployment of solar energy projects that are supported by DOE," and which would "identify for DOE, industry, and stakeholders the best practices for deploying solar energy and ensuring minimal impact to natural and cultural resources on BLM-administered lands or other Federal, State, tribal, or private lands." *Id.* at 30,910.

In the Notice of Intent, BLM and DOE explained that the intention of the PEIS "is not to eliminate the need for site-specific environmental review for individual utility-scale solar energy development proposals." *Id.* However, site-specific reviews "are expected to be tiered to the PEIS and to be more effective and efficient because of the PEIS." *Id.* The Notice of Intent stated that although existing applications would continue to be processed "on a site-specific, case-by-case basis," no new solar energy right-of-way applications would be accepted by BLM until the PEIS has been completed. *Id*. The BLM subsequently modified that policy with the July 2, 2008 announcement that it would continue to accept and process individual applications during preparation of the PEIS. See BLM press release, *available at* http://solareis.anl.gov/ documents/docs/press_release _solar_applic_review_02July08.pdf.

The Notice of Intent invited public participation in the scoping process for the Solar Energy Development PEIS. *Id.* at 30,911. The public scoping period began on May 29, 2008, and was recently extended through July 15, 2008. *Id.* at 30909; *see also* Solar Energy Development PEIS Web site, *available at* http://solareis.anl.gov. Public scoping meetings will be held in eleven cities throughout the affected states. A scoping summary report is expected to be available for public review in late August 2008, and the draft PEIS is scheduled to be issued in spring 2009. Additional information is available on the PEIS Web site: http://solareis.anl.gov/.

Conclusion

The expanded use of the PEIS by BLM and other land-management agencies should streamline the

process of administrative review of proposed geothermal leases, rights-of-way for wind and solar energy development projects, and rights-of-way for energy transmission projects—when projects are located in appropriate areas, as designated in land use or resource management plans. This efficiency will be achieved through the programmatic amendment of the plans, as well as improved interagency coordination procedures, and the completion of broad-scale NEPA analysis at the programmatic level. Adopting broadly-applicable BMPs based on programmatic analysis allows managers to focus on project-specific issues when reviewing individual applications for leases and rights-of-way, saving time and money for both the agency and project applicant.

Consistent with NEPA, the PEIS process provides significant opportunities for public involvement, especially at the scoping stage and after draft reports are made available for review. Stakeholders would be well advised to participate in the process by preparing written comments and attending public hearings to ensure that their concerns are taken into account, addressed by the responsible agency, and included in the record in the event the agency's process or decision is challenged in court.

SECTION OF ENVIRONMENT, ENERGY, AND RESOURCES NEWS

16th Section Fall Meeting to be Held in Phoenix, Arizona

The16th Section Fall Meeting of the ABA Section of Environment, Energy, and Resources will take place on Sept. 17-20, 2008 at the Arizona Biltmore Resort & Spa in Phoenix. The meeting will offer twenty-five CLE sessions, dealing with issues affecting the southwestern U.S. such as water, climate change, and Native American law. Other program topics include biofuels versus food, mining law reform, brownfields restoration, green buildings, renewable energy, and litigation. Several outstanding networking opportunities will be presented at the Heard Museum and the Arizona Biltmore, during the Wednesday Public Service Project, and at an offsite trip to the Salt River Project at Arizona Falls. The Section has negotiated a discounted rate for meeting attendees of $220 single/double occupancy. A limited number of rooms are available to government employees at a rate of $102. Identification is required for the government rate. Please make your reservations early by calling the hotel directly at (602) 955-6600 or (800) 950-0086. Remember to ask for the American Bar Association rooming block to take advantage of the discounted rates. Based upon availability, discounted room rates will only be available until Monday, August 25, 2008.

Break-Out Sessions on Public Land and Resources Issues at the 16th Section Fall Meeting

The Public Land and Resources Committee will sponsor two break-out panel discussions at the Section Fall Meeting. The first panel, scheduled on Thursday afternoon, Sept. 18, 2008, considers carbon capture and storage (CCS) projects on private, public, and Indian lands, including the adequacy of existing legislative authority and funding for CCS, siting, environmental, rights-of-way issues, and other technical and legal questions. Speakers include Dr. Brian McPherson, a USTAR professor at the University of Utah, Department of Civil and Environmental Engineering, presenting the technical aspects of CCS. Dr. McPherson was recently awarded a $67 million grant from the U.S. Department of Energy and leads a six-state regional study of carbon capture. John Tombarri, Vice President North & South American, Schlumberger Carbon Services, Houston, Texas, will provide an industry perspective. Tom Shipps, with the firm of Maynes, Bradford, Shipps & Sheftel LLP, Durango, Colorado, represents the Southern Ute Tribe and will address Indian land policies regarding CCS. Peter Schaumberg, formerly with the Solicitor's Office, U.S. Department of the Interior, now with Beveridge & Diamond, P.C., in Washington, D.C., will address CCS on public lands. The panel moderator is committee vice chair Kim Harb, Director, Policy & Government Affairs, National Ocean Industries Association, Washington, D.C.

The second panel "Natural Resources Hot Topics" is scheduled for Friday, Sept. 19, 2008. The panel will address how management of our country's natural

resources from forestry to mining is coming under increasing scrutiny and discussion. The session will focus on two controversial topics in natural resources laws, forest management and mining law reform. March L. Kesselman, General Counsel, U.S. Dept. of Agriculture and Eric Oberby, U.S. Attorney's Office, Salt Lake City, Utah will moderate the forest management discussion. On the issue of forest management, moderators will address litigation over timber and wildfire policies, including the National Fire Plan and the issue of civil trespass actions. Jim Butler, Parsons, Behle & Latimer, Reno, Nevada, will discuss mining law reform legislation and the Hard Rock Mining and Reclamation Act of 2007 (H.R. 2262) and the Senate's consideration of that bill. The panel moderator is committee vice chair Veronica Larvie, Solicitor's Office, U.S. Department of the Interior, Salt Lake City, Utah.

We look forward to seeing you in Phoenix!

AMERICAN BAR ASSOCIATION
SECTION OF ENVIRONMENT, ENERGY, AND RESOURCES

Calendar of Section Events

16th Section Fall Meeting
Sept. 17-20, 2008
Phoenix, Arizona

The Basic Practice Series—An Introduction to Environmental Law
Sept. 19-20, 2008
Phoenix, Arizona

27th Annual Water Law Conference
Feb. 19-20, 2009
San Diego, California

38th Conference on Environmental Law
March 12-15, 2009
Keystone, Colorado

For more information, see the Section Web site at www.abanet.org/environ or contact the Section at 312/988-5724.

U.S. FISH AND WILDLIFE SERVICE ANNOUNCES PROPOSED DELISTING OF THE MAGUIRE DAISY UNDER THE ENDANGERED SPECIES ACT

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On May 15, 2008, the U.S. Fish and Wildlife Service (FWS) announced a proposed rule to remove the Maguire daisy (*Erigeron maguirei*) from the Federal List of Threatened and Endangered Species. 73 Fed. Reg. 28,410 (Friday, May 16, 2008). FWS found that populations of the Maguire daisy are stable, threats to the species have been addressed, and adequate regulatory mechanisms are in place to ensure that the daisy does not become endangered again. FWS seeks information, data, and comments from the public and other interested parties including government agencies, scientists, Tribes, industry, or any other interested party concerning the proposed rule. FWS is particularly interested in receiving comments on (1) biological data concerning the species; (2) pertinent information concerning present or future threats or lack of threats to this species as well as information on whether sufficient federal or state protection and management would be afforded to the daisy after it is delisted; (3) additional scientific data concerning the range, distribution, and population size of the species; (4) current or planned activities in the subject area and their possible impacts on this species; and (5) the adequacy of FWS' Draft Post-Delisting Monitoring Plan. *Id.*

Description of the Maguire Daisy and the 1995 Recovery Plan

The Maguire daisy is a small daisy with white or pink petals and a member of the sunflower family. The daisy is found in southeastern Utah and ranges from the San Rafael Swell in Emery County, south into Wayne and Garfield counties through the Waterpocket Fold in Capitol Reef National Park. Maguire Daisy, USFWS Mountain-Prairie Region, Endangered Species Program Web site at www.fws.gov/mountain-prairie/species/plants/maguiredaisy. The daisy is mainly found

on the mesas of the Navajo Sandstone formation. The daisy has also been found in narrow, dry rocky, or sandy canyons or wash bottoms of the Wingate, Navajo and Cutler formations as well as in cracks of large boulders and slickrock. 73 Fed. Reg. at 28,411. The largest populations of the Maguire daisy occur primarily within the Coral Reef area of southeastern Utah. One of these populations (Deep Creek) includes a small portion, less than 1 percent of all known plants, on National Forest lands. The other populations of the daisy (Calf Canyon, Coal Wash, Secret Mesa, Link Flats, John's Hole, and Seger's Hole) are managed primarily by the Bureau of Land Management.

On Aug. 15, 1995, FWS approved a recovery plan based on three delisting criteria. The first criterion was to locate and establish additional populations of the daisy. In order to fulfill this criterion, FWS, BLM, the Forest Service, and the National Park Service established an Interagency Rare Plant Agreement, which, in turn, provides for an Interagency Rare Plant Team to direct conservation measures for the Maguire daisy and other listed and sensitive plant species found in central Utah. The agencies have provided funding to survey and monitor the Maguire daisy in its range, regardless of agency boundaries. The second criterion involved establishing formal land management designations for habitat for the long-term protection of the Maguire daisy and other endangered or threatened plants. In order to fulfill this criterion, FWS and its partners will continue to document the presence of the Maguire daisy, or, if necessary, establish formal land management designations that provided for the long-term protection of the Maguire daisy and its habitat. The third criterion concerned protecting the Maguire daisy from loss of individuals and environmental degradation. FWS concluded that the agency has achieved the three delisting criteria. Approximately 97 percent of the known population of the Maguire daisy has been found on lands with formal land management designations, providing for the protection of the loss of individuals and the daisy's natural habitat from environmental degradation. *Id.* at 28,415.

Procedural Background

A species gains protection under the Endangered Species Act (ESA) if FWS formally lists a species as either "endangered" or "threatened." 16 U.S.C. § 1533. A species is "endangered" if it is in danger of extinction throughout all or a "significant portion of its range" and is "threatened" if it is likely to become endangered within the foreseeable future throughout all or a "significant portion of its range." FWS determines "foreseeable future" on a case-by-case basis by evaluating various specific factors such as lifespan, genetics, breeding, population numbers, threat, projection timeframes, and environmental variability. Congress prescribed five criteria for the Secretary of the Interior to consider when determining whether to list, delist, or reclassify a species under the ESA. The criteria are:

1. the present or threatened destruction, modification, or curtailment of the species' habitat or range;
2. overutilization for commercial, recreational, scientific, or educational purposes;
3. disease or predation;
4. the inadequacy of existing regulatory mechanisms;
5. other natural or manmade factors affecting the species' continued existence.

16 U.S.C. § 1533(1)(A)-(E); 50 C.F.R. § 424.11(c)(1)-(5) (1999). Any one of these criteria may support a determination by the Secretary. The Maguire daisy was first listed as an endangered species in September 1985. 50 Fed. Reg. 36,089. In 1994, FWS revised the flower's taxonomy to include another plant variety formerly known as *E. maguirei var. harrisonii.* Since the revision combined the two daisy varieties, *Erigeron maguirei* and *E. maguirei var. harrisonii* into one species, this resulted in an increase in the population numbers for the Maguire daisy. In 1996, FWS proposed to reclassify the species from endangered to threatened and downlisted the plant. Since the daisy's listing, FWS, BLM, the Forest Service, and National Park Service have collaborated to ensure the long-term protection of the Maguire daisy and its natural habitat. Approximately 97 percent of the daisy's habitat is found on federal public lands which have substantive protections for the daisy. In addition, the Interagency Rare Plant Team has developed a joint conservation strategy for the daisy. *See Central Utah Navajo Sandstone Endemics Conservation Agreement (Conservation Strategy) at*

http://mountain-prairie.fws.gov/species/plants/maguiredaisy. The Conservation Strategy establishes procedures for federal agencies to manage the Maguire daisy and other rare plant species. In addition, the Conservation Strategy outlines the particular conservation actions needed to be implemented by these agencies to manage potential threats to the species and encourage the conservation and survival of the species in the foreseeable future. 73 Fed. Reg. at 28,415. *See* U.S. Fish and Wildlife Service, Office of External Affairs, Mountain-Prairie Region, News Release (May 15, 2008) at www.fws.gov.

FWS' Analysis for ESA Delisting of the Maguire Daisy

FWS examined all five delisting factors currently impacting or likely to affect the Maguire daisy in the foreseeable future.

Present or Threatened Destruction, Modification, or Curtailment of the Species' Habitat or Range

FWS analyzed whether there was present or threatened destruction, modification, or curtailment of the habitat or range of the Maguire daisy. When the Maguire daisy was originally listed and later downlisted under the ESA, the main threat to the species was loss of habitat due to grazing, off-road vehicle recreation, and mineral and energy exploration. FWS found that among the twelve known uranium mineral locations only one active mine—The Lucky Strike Mine—still existed within the range of the Maguire daisy. FWS found that although the mine is accessed by using an existing road that entered the population from the south, the mine would not adversely impact substantial portions of the Maguire daisy population in the foreseeable future because the mine was located on the periphery of the daisy's population and was accessed by an existing road. 73 Fed. Reg. at 28,416. Among the remaining eleven mineral exploration sites, six sites never produced any minerals and five sites only produced small levels of mineral output. In addition, FWS found that the daisy would suffer only minimal potential impact from mineral exploration because uranium was limited to certain geologic formations like Moss Back Member or the Mottled Siltstone Unit of the Chinle Formation, while the Maguire daisy's habitat mainly occurred in the Navajo Sandstone formation. Moreover, FWS determined that there would not be any impacts on the Maguire daisy from gypsum mining because the daisy did not occur in geologic formations where commercial gypsum was mined. For instance, one gypsum area that did not produce substantial amounts of the mineral occurred on the periphery of a mapped population of Maguire daisy in Deep Creek, Utah and within the Primitive Management Zone in Capitol Reef, Utah. Even if suitable habitat for the daisy could still be crossed while accessing commercial gypsum, adequate federal regulations were in place to protect the Maguire daisy by limiting access to cross-country hiking or horseback riding on unimproved trails and routes. *Id.*

Furthermore, FWS did not find that oil shale and tar sands exploration and development would pose significant threats to the Maguire daisy. Tar sands are a mixture of oil, sand or clay, water, and extremely heavy crude oil. In order to extract oil shale and tar sands, mineral developers use strip mining along with steam injection and/or solvents to reduce the viscosity of oil. FWS concluded that, in light of where oil shale and tar sand development would occur, impacts on the Maguire daisy would be minor. FWS also concluded that recreational use and flash floods did not present a threat to Maguire daisy populations in the future because adequate land management designations and protections were in place restricting access to motorized off-road vehicle traffic in most areas of the daisy's habitat. *Id.*

Overutilization for Commercial, Recreational, Scientific, or Educational Purposes

FWS next considered whether there was overutilization of the species or its habitat for commercial, recreational, scientific, or educational purposes. FWS found that overutilization was not a current threat to the species, nor likely to adversely affect the species in the future because the Maguire daisy was not a species heavily sought-after or collected in large numbers. Previously, some daisies

were propagated by industry for private use to be sold to rock garden enthusiasts, but such businesses no longer were offering the plants for sale. FWS also did not find unauthorized plant seed collection of the species. *Id.* at 28,418. The Interagency Rare Plant Team in accordance with the Conservation Strategy would continue to monitor for illegal collection activities. *Id.*

Disease or Predation

At the time of listing, the Maguire daisy was found only in rocky areas inaccessible to livestock grazing, and not in canyon bottoms where the plants were originally found in 1940 and 1980. Since the plants could not be relocated in canyon bottoms, several experts held the view that predation on the species by cattle and other livestock had reduced the distribution of the species. Later, FWS modified this view and opined that the daisy's populations were relatively secure from direct impacts from livestock trampling, but there could still be some threats in local areas. FWS found that although movement of cattle was expected to impact a few individual plants, overall the species would not be adversely impacted in the foreseeable future. Even though seven of the nine daisy populations were found in areas allotted to cattle for grazing, these seven populations would be inaccessible to cattle grazing due to terrain conditions. The two remaining populations, Waterpocket Fold and Cattle Reef, however, have a history of cattle moving in the area once every 5 years over the past 100 years. *Id.* at 28,418. The Conservation Strategy requires that FWS continually monitor the population at Cattle Reef for potential impacts as well as identify any problems to the Maguire daisy. In addition, FWS will implement management actions and guidelines that will sustain and conserve the daisy for the future. Moreover, the daisy would not be adversely affected by cattle grazing, because there have been several grazing range improvements in recent years that attracted cattle away from areas where the daisy is found. *Id.*

Inadequacy of Existing Regulatory Mechanisms

FWS found that there was no threat to the Maguire daisy due to the inadequacy of existing regulatory mechanisms. Federal land management agencies have collaborated since the daisy's ESA listing to protect the species and its habitat. Several land management plans, policies, and regulations have been implemented to protect the Maguire daisy and include: (1) Capitol Reef Primitive and Semi-Primitive Management Zones, (2) BLM Wilderness Study Areas (WSAs) and Areas of Critical Environmental Concern (ACECs), and (3) Forest Service semi-private non-motorized designations. In addition, the proposed Fishlake National Forest Management Plan would afford protections to a number of Maguire daisy populations linked together by continuous suitable habitat and within close proximity to each other with the establishment of a botanical area in Billings Pass. FWS also found that the Interagency Rare Plan Team's conservation activities would continue to benefit the Maguire daisy. FWS and its partners would continue to survey and monitor the daisy (and other species) and implement management to ensure the daisy remains stable after delisting. In addition, the Conservation Strategy outlined several procedures that federal agencies must follow to manage the species in the future, such as the implementation of conservation measures to reduce or eliminate potential threats and promote the protection of Maguire daisy and other species. *Id.* at 28,420.

Other Natural or Manmade Factors Affecting the Continued Existence of the Species

Although scientists believed that the genetic variability of the Maguire daisy had become greatly reduced due to the species' small size, geographic separation, and reproductive isolation, FWS found that reduced genetic variability, inbreeding from geographic separation, and reproductive isolation as well as pesticide use did not threaten the Maguire daisy with extinction in all or a significant portion of its range, currently or within the future. *Id.* at 28,420-28,421. FWS concluded that recovery efforts had substantially increased the number and distribution of the Maguire daisy and that the daisy was no longer threatened by a loss of genetic variability. In addition, FWS discovered new sites that provided connectivity to previously-discovered locations of the daisy. *Id.* Short distances separated populations of the daisy found in Capitol Reef and in San Rafael Swell. The daisy was

connected to contiguous habitat in those areas. In addition, pesticide spraying of pear and apple trees occurred in Capitol Reef's Fruita Rural Historic District in order to control the codling moth. Although the spraying of the pesticide, Phosmet could adversely affect the nearby population of the Maguire daisy, studies had shown that the daisy populations near the orchard did not decline in productivity due to pesticide spraying. Therefore, the best scientific data available indicated that the Maguire daisy was not adversely impacted by the spraying of the pesticide. Moreover, FWS found that scientific studies showed that the Maguire daisy had the ability to replace individuals at a rate that compensated for any mortality of the species. *Id.*

Conclusion

In sum, based on its analysis of the above factors, FWS has concluded that the Maguire daisy should be removed from the federal endangered species list because current populations of the daisy were stable, threats to the species appeared to be minor, and adequate regulatory mechanisms indicated that the daisy is and will not likely become endangered or threatened in the foreseeable future. FWS will undertake post-delisting monitoring activities of the daisy for at least 5 years. In addition, FWS has prepared a draft Post-Delisting Monitoring Plan for the Maguire Daisy. The draft Plan will summarize the species' status at the time of delisting, define thresholds for potential monitoring and outcomes and conclusions, record the frequency and duration of monitoring, articulate monitoring and sampling methods, compile data and report procedures and responsibilities, and propose a post-delisting monitoring implementation schedule including timing and responsible parties. *See* Post-Delisting Monitoring Plan for Maguire Daisy (Erigeron maguirei) at www.fws.gov.

CALIFORNIA BECOMES A NEW EMPHASIS AREA FOR LANDSCAPE HABITAT PROTECTION AND RESOURCE MANAGEMENT UNDER THE BUREAU OF LAND MANAGEMENT'S HEALTHY LANDS INITIATIVE

Craig T. Donovan

California has become a new Healthy Lands emphasis area for Fiscal Year 2009 under the Bureau of Land Management's (BLM) Healthy Lands Initiative. Three smaller land conservation programs constitute the California Healthy Lands Initiative: (1) San Joaquin Valley Landscape Initiative, (2) Desert Conservation Area Landscape, and (3) Modoc Plateau Sagebrush Steppe Restoration Initiative program in order to increase productivity, and improve the health of public lands in the western United States. The purpose of the program is to preserve diverse uses and productivity of public and private lands and encourage BLM land managers to establish priorities for public lands on a broad scale, and develop policies and actions to reduce adverse impacts on various resources on public lands. *See* Bureau of Land Management, California Healthy Lands Initiative at www.blm.gov.

Community expansion, wildfires, growing demand for energy resources, expanding recreational uses, and invasive species affect the health of public lands. Often, these pressures adversely impact large landscapes and ecosystems. BLM recognized that a different management focus was needed to meet these challenges and prevent restrictions from being placed on public lands that would directly affect the energy security and quality of life in the United States. *Id.* In order to meet these challenges, BLM will take a landscape-level approach. BLM will conserve wildlife and habitat in order to preserve benefits to communities whose economies are beneficially linked to fish, wildlife, and healthy watersheds. Under the Healthy Lands Initiative, land managers will have flexibility to identify lands where a particular resource may be emphasized to encourage sustained health and balance across a broader landscape or ecosystem. Moreover, BLM will continue to encourage public-private cooperation and incentives as a central part of

the Healthy Lands Initiative. Furthermore, the U.S. Geological Survey and the U.S. Fish and Wildlife Service (FWS) will continue to partner with BLM. *Id.*

The southern San Joaquin Valley in California has undergone extensive land conversion to farming, urban, industrial, and energy production land uses. Kern County, located at the southernmost end of the valley, ranks as the sixth largest county for oil production, fourth largest in agricultural production, and one of the leading counties in population growth. *Id.* Due to the fact that several endangered and threatened species under the Endangered Species Act (ESA) are found within the valley and approximately 90 percent of the lands is developed or converted for other uses, the California State Office of the BLM has developed a Memorandum of Understanding (MOU) with several federal agencies and the public to establish a comprehensive habitat conservation plan (HCP) to protect and conserve endangered or threatened species in the valley. According to the MOU, BLM, and its partners will develop a permitting program integrating federal, state, and local regulatory mechanisms for habitat conservation, compensation, mitigation measures, and cumulative effects. The HCP will conserve 90 percent of preserve lands as habitat, maintain habitat corridors, and require specific compensation actions for each listed species until conservation goals are achieved. In addition, the HCP outlines an oil strategy, describing the regulatory mechanisms and conservation objectives to continue oil and gas activities within endangered species habitats. BLM intends to acquire 3,000 acres of habitat for ESA-listed species in the permitting process in order to offset 1,000 oil wells drilled by the industry in oil fields and habitat where listed species are found over the next years. BLM asserts that the HCP provides a detailed roadmap for the conservation of remaining habitats that will contribute to recovery of listed species in the San Joaquin Valley. *Id.*

In the California Desert Conservation Area (CDCA) Landscape Initiative, BLM would focus on (1) mitigation and restoration of wildlife habitats; and (2) mitigation and preservation of cultural, resource sites, traditional-use areas, and tribal sacred areas in the CDCA that are impacted by siting and development of solar, geothermal, and wind energy facilities. *Id.* The CDCA provides habitat for several species listed as threatened or endangered under the ESA, including the desert tortoise, Peninular Ranges bighorn sheep, desert pupfish, and Coachella fringe-toed lizard. BLM plans to increase the rate of habitat restoration in desert wildlife management areas by closing routes at intersections, removing traces of closed routes to the line of sight, and by directing acquisition in identified habitat linkages essential for recovering CDCA listed species. In addition, the U.S. Geological Survey and FWS will collaborate on the processing of easements for solar, geothermal, and wind energy facilities in the CDCA.

One of the most pressing problems affecting land health in northeast California and northwest Nevada is the encroachment of western juniper in the sagebrush steppe ecosystem. As western juniper encroaches on the sagebrush steppe ecosystem and the tree canopy begins to close, native grasses and shrubs are lost from the ecosystem. The loss of diverse vegetation directly impacts wildlife, resulting in decreasing numbers of key species such as sage-grouse and mule deer. BLM will establish a restoration initiative to reduce the adverse effects of invasive species such as juniper on the sagebrush steppe ecosystem.

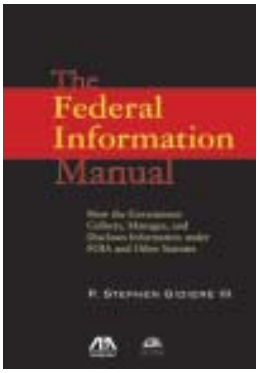
LIKE TO WRITE?

The Public Land and Resources Committee welcomes the participation of members who are interested in preparing this newsletter. If you would like to lend a hand by writing, editing, or identifying authors or article topics, please contact the editor, Craig Donovan, at cdonovan@lawsuites.net.

From ABA Publishing and The Section of Environment, Energy, and Resources

A current and practical guide to FOIA and other laws governing federal information

The Federal Information Manual
How the Government Collects, Manages, and Discloses Information under FOIA and Other Statutes
By P. Stephen Gidiere III



The Federal Information Manual is a complete, all-in-one guide to understanding the complex legal framework that controls the government's collection, management and disclosure of its records. Practical in scope and accessible in its approach, this is an essential resource for anyone who handles requests and disputes concerning access to this vast amount of information. It includes an easy-to-navigate explanation of the Freedom of Information Act (FOIA), the statute most often encountered in this area, and includes practical tools for preparing FOIA requests and responding to information requests from federal agencies.

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