



ANNUNZIATA GOULD

176 IBLA 48

Decided September 22, 2008



United States Department of the Interior  
Office of Hearings and Appeals  
Interior Board of Land Appeals  
801 N. Quincy St., Suite 300  
Arlington, VA 22203

ANNUNZIATA GOULD

IBLA 2007-263

Decided September 22, 2008

Appeal from a Decision Record granting and authorizing certain rights-of-way, and from a Decision granting an access right-of-way, issued by the Field Manager, Deschutes Resource Area, Prineville, Oregon, District Office, Bureau of Land Management. OR 61170; OR-056-05-066.

Affirmed.

1. National Environmental Policy Act of 1969: Environmental Statements--National Environmental Policy Act of 1969: Finding of No Significant Impact

Public controversy regarding a proposed project does not by itself constitute a substantial dispute regarding size, nature, or effect of a proposed action.

2. National Environmental Policy Act of 1969: Environmental Statements--National Environmental Policy Act of 1969: Finding of No Significant Impact

The National Environmental Policy Act of 1969 does not require an agency to consider impacts of other possible actions that are speculative or hypothetical in evaluating whether the cumulative impacts of the action and other related actions are significant.

3. National Environmental Policy Act of 1969: Environmental Statements--National Environmental Policy Act of 1969: Finding of No Significant Impact

The National Environmental Policy Act of 1969 does not require the consideration of alternatives that are remote and speculative, infeasible, ineffective, inconsistent with the basic policy objectives for the management of the area, or unreasonable under the circumstances.

APPEARANCES: Paul D. Dewey, Esq., Bend, Oregon, for appellant Annunziata Gould; Peter Livingston, Esq., Portland, Oregon, for intervenor Thornburgh Resort Company, LLC; Mariel J. Combs, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Portland, Oregon, for Bureau of Land Management.

#### OPINION BY ADMINISTRATIVE JUDGE HEATH

Annunziata Gould has appealed from a July 16, 2007, Decision Record (DR) of the Deschutes Resource Area Field Manager, Prineville, Oregon, District Office, Bureau of Land Management (BLM), issued in response to a right-of-way (ROW) application filed by Thornburgh Resort Company, LLC (Thornburgh). In that DR, the Field Manager stated that she would grant and authorize certain ROWs for roads, utilities, and signs. Gould has also appealed from a second July 16, 2007, decision of the Field Manager, issued simultaneously with the first decision, granting a road ROW, OR 61170, to Thornburgh that allows the construction of three access roads across BLM-managed public lands and the placement of two signs. BLM analyzed the environmental impacts of Thornburgh's ROW proposals in Environmental Assessment (EA) OR-056-05-066. BLM issued the EA and a Finding of No Significant Impact (FONSI) on January 11, 2007. Gould alleges principally that the decisions contravene section 302(b) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1732(b) (2000), and regulations of the Council on Environmental Quality (CEQ) implementing section 102 of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332 (2000).<sup>1</sup>

#### *Background*

##### A. *Physical Setting*

Thornburgh intends to develop a "destination resort" on approximately 1,970 acres of property it owns or controls located generally west, southwest, and south of Cline Buttes in Deschutes County, Oregon. Cline Buttes and the Thornburgh property are west of Redmond and north of Bend and Tumalo in central Oregon's high desert country. The Thornburgh property consists of two parcels. The northern parcel (about 730 acres), oriented on a north-south axis and situated west of Cline Buttes, constitutes the majority of secs. 17 and 20, T. 15 S., R. 12 E., Willamette Meridian, Deschutes County, Oregon. The southern parcel (about 1,240 acres), oriented on an east-west axis and situated to the south and southwest of Cline Buttes, constitutes most of the southeast quarter of sec. 20, most of secs. 28 and 29, and substantial portions of sec. 30 of the same township. The two parcels touch at two points, the southwest and northeast corners of NW $\frac{1}{4}$ SE $\frac{1}{4}$  sec. 20. A ridge running in

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<sup>1</sup> By Order dated Aug. 30, 2007, this Board granted Thornburgh's motion to intervene.

a generally northeast to southwest direction from Cline Buttes forms a natural separation between the two parcels. The land between the two parcels (including the 40-acre parcel in the NW $\frac{1}{4}$ SE $\frac{1}{4}$  sec. 20, at the southwest and northeast corners of which the parcels touch) is BLM-administered public domain. *See generally* EA OR-056-05-066, dated Jan. 18, 2007, Administrative Record (AR) 57, at 2-3 to 2-4 (Figure 2 map).

Thornburgh's principals call the northern parcel "The Pinnacle at Thornburgh" and the southern parcel "The Tribute at Thornburgh." For convenience, we will follow that pattern and refer to them as "Pinnacle" and "Tribute." The two parcels are surrounded almost completely by BLM-administered public domain lands.<sup>2</sup>

State Highway 126, running essentially east-west between Redmond and Sisters, lies approximately 1 mile north of the northern boundary of Pinnacle. Eagle Drive departs from Highway 126 approximately 1 mile north of Pinnacle (3/4 mile north of Willett's property), runs parallel to Highway 126 for approximately 1/2 mile, then turns to run south along the line between secs. 8 and 9. Eagle Drive ends at Eagle Crest, an existing destination resort whose western boundary lies approximately 1/4 mile east of Pinnacle and which is situated northwest and north of Cline Buttes. A road leading off Eagle Drive, called Willett Way, leads to the Willett property. Barr Road runs south from Highway 126 approximately 1/2 - 3/4 mile west of Pinnacle, briefly through the far westernmost portion of Tribute, and continues south to Tumalo (northwest of Bend). Cline Falls Highway (sometimes called Cline Falls Road) runs in a generally north-northeast direction from north of Tumalo to intersect with Highway 126 west of Redmond and east of Cline Buttes. Cline Falls Highway crosses through Tribute in its far southeastern corner.

#### B. *Applications to Deschutes County and to BLM*

Thornburgh filed an application with Deschutes County for approval of a Conceptual Master Plan for the resort, which was deemed complete on March 18, 2005. Under the Conceptual Master Plan, Thornburgh proposes to build 950 homes, 425 residential overnight units, and 50 hotel rooms, together with 3 golf courses, a lake, a commercial center, etc. Development would occur in 7 phases over some 12 years, with the first 3 phases occurring in Tribute. On November 10, 2005, following extensive public hearings held on July 14, 2005, and August 17, 2005, the Hearings Officer denied the application for failure to satisfy all approval criteria.

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<sup>2</sup> An 80-acre parcel owned by Art Willett in the SE $\frac{1}{4}$ SW $\frac{1}{4}$  and SW $\frac{1}{4}$ SE $\frac{1}{4}$  sec. 8 abuts Pinnacle's northern boundary. A 160-acre parcel owned by the State of Oregon abuts the southern portion of Pinnacle on the east and the northernmost portion of Tribute on the north.

See AR 252 (duplicate at AR 131). Thornburgh appealed to the Deschutes County Board of County Commissioners.

Simultaneously with its application to Deschutes County for approval of the Conceptual Master Plan, Thornburgh filed an application for rights-of-way for access, utilities, and signage with the BLM Prineville District Office on March 9, 2005. AR 365. As originally submitted, the application sought three road ROWs. The first was an access route from Oregon Highway 126 to the northeastern corner of Pinnacle, almost all in sec. 8 and extending a short distance into sec. 17, using part of Eagle Drive, part of Willett Way, part of another existing road, and 670 feet of new road. The second was a connecting roadway in secs. 29 and 30 over an existing unimproved road that would connect the southwest corner of Pinnacle with the western portion of Tribute. The third was a connection over an existing unimproved road running over BLM lands on the ridge in the NW $\frac{1}{4}$ SE $\frac{1}{4}$  sec. 20 (the 40-acre BLM parcel between Pinnacle and Tribute) and on a small segment in the NE $\frac{1}{4}$ NW $\frac{1}{4}$  sec. 29. The road ROW requests also included sewer and water utilities. The application stated that additional utility ROW requests would be made for power, telephone, cable, and gas that could be accommodated within the scope of the ROWs sought in the application. Finally, Thornburgh also requested two 50' x 50' signage ROWs adjacent to Eagle Drive. See AR 365 at 1-3 and maps attached thereto as Exs. 2-5.

In response to a BLM letter dated March 24, 2005, identifying various informational deficiencies in the application, AR 361, Thornburgh supplemented the application on May 11, 2005, and included detailed drawings of the requested ROWs. AR 179 (letter duplicated at AR 353).

C. *NEPA Compliance and Amendments to the ROW Application*

On August 9, 2005, BLM and Thornburgh entered into a "Master Agreement" regarding preparation of an EA or an environmental impact statement (EIS) in compliance with NEPA. The Master Agreement addressed the responsibilities of the parties, the costs to be charged, and procedures to be followed. AR 310 (duplicate at AR 259). The Master Agreement stated:

An Environmental Assessment (EA) is required and will be written for the proposed ROW and, if it is determined by the EA, an Environmental Impact Statement (EIS) will be prepared. The EA/EIS must comply with all the provisions of the National Environmental Policy Act of 1969 (NEPA) and all subsequent regulations implementing this law (see Council on Environmental Quality (CEQ) regulations, 40 C.F.R. Parts 1500-1508 . . . .

AR 310 at 1.

Subsequently, on September 28, 2005, BLM and Thornburgh entered into a Memorandum of Understanding (MOU) to resolve certain issues. AR 268 (duplicate at AR 124) at 1-2. Among other things, Thornburgh agreed to (1) construct and rehabilitate trail systems on the public land surrounding the resort; (2) provide adequate natural visual screening between the resort development and the Tumalo Canal Area of Critical Environmental Concern (ACEC) bordering the western portion of Tribute on the south; and (3) “complete a Wildlife Mitigation Plan that is designed to compensate for adverse impacts to wildlife habitat that would result from development of the Thornburgh Resort.” The plan “will specify mitigation measures that are sufficient to insure there is no net loss of wildlife habitat values as a result of the proposed development.” AR 268 at 5. Various specific contemplated measures focused on the area known as the “Masten Allotment,” an area of public land situated in close proximity to Tribute on the southeast.

Several days later, on October 5, 2005, a BLM Interdisciplinary Team met to discuss several issues, including NEPA compliance. The team leader’s memorandum to the file of that date noted:

I recapped that last meeting where the team thought we should start with an EIS because the team felt that the impacts would be significant. I relayed the discussions we have had with the proponents which stated that we would start with an EA and then if we could not sign a FONSI, we would have to go to an EIS.

AR 265 (duplicate at AR 116) at unpaginated 1.

On November 3, 2005, Thornburgh amended its ROW application to drop the third ROW segment identified above in secs. 20 and 29 (the route over the ridge top). AR 254 (duplicate at AR 97). The same amendment added a request for a new additional road and utility ROW over an existing road known as Bennett Road as an additional southern access to Tribute from the Cline Falls Highway in the S $\frac{1}{2}$ SW $\frac{1}{4}$  sec. 28. (An ROW over this segment for telephone service previously had been granted to Qwest Communications.) *Id.*

On April 19, 2006, Thornburgh again amended its ROW application to request that the southern access to Tribute be changed from the Qwest ROW route to a straight connection from Cline Falls Highway across the southern boundary line of Tribute (which appears from the maps to be the line between the N $\frac{1}{2}$ S $\frac{1}{2}$  and the S $\frac{1}{2}$ S $\frac{1}{2}$  sec. 28) until it meets Bennett Road at approximately the line between sec. 28 and sec. 29. AR 183. *See also* AR 180-182.

On May 12, 2006, the Deschutes County Board of County Commissioners overturned the decision of the Hearing Officer and approved the Conceptual Master

Plan, holding that Thornburgh had satisfied all applicable approval criteria. AR 175 at 93.<sup>3</sup>

D. *The Environmental Assessment*

BLM analyzed the environmental impacts of the proposed action in an EA issued on January 11, 2007. AR 57. A FONSI, signed by the Field Manager and issued with the EA, determined that “[n]o environmental effects meet the definition of significance in context or intensity as defined in 40 CFR 1508.27,” and concluded that the project (*i.e.*, the road and utility ROWs), with mitigation measures, “is not a major federal action and will not significantly affect the quality of the human environment, individually or cumulatively with other actions in the general area.” AR 62 at unpaginated 1.

The EA considered four alternatives for both road access and electric power transmission, one of which (Alternative C) was a no-action alternative. The road ROWs considered under the alternatives A, B, and D were as follows:

1. Highway 126 to Pinnacle:

Under all three alternatives (A, B, and D), the ROW would follow Eagle Drive to Willett Way. Under Alternatives A and D, the ROW would then follow Willett Way for approximately 1,200 feet. Willett Way would be improved and upgraded. Approximately 1,125 feet of new road would be constructed to link Willett Way with the existing dirt road that leads into Pinnacle’s northeast corner. The existing road also would be improved. *See* AR 57 at 2-1 to 2-2, 2-11, and Figs. A-2 and D-2 in Appendix B. This is the route identified in Thornburgh’s amended application.

Under Alternative B, the route from Eagle Drive would follow Willett Way for approximately 1,670 feet (rather than 1,200 feet) to the northeast corner of the Willett property. Approximately 1,470 feet of new road would be constructed going south along the eastern boundary of the Willett property, following an existing dirt track on BLM land, that would enter Pinnacle at its northeastern corner. *See* AR 57 at 2-7.

2. Tribute to Pinnacle:

Under all three alternatives (A, B, and D), the 1,470-foot connection between Tribute and Pinnacle in sec. 30 and along the line between secs. 29 and 30 (following

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<sup>3</sup> On May 31, 2006, Gould filed a notice of intent to appeal to the State of Oregon Land Use Board of Appeals (LUBA). AR 163. Her petition for review before LUBA was filed on Jan. 3, 2007. AR 44.

existing unimproved roads that would be improved) is the same as requested in Thornburgh's application, because it is dictated by existing topography. *See* AR 57 at 2-2, 2-8, 2-11, and Fig. A-4 in Appendix B.

3. Cline Falls Highway to Tribute:

Under Alternative A, the ROW would run approximately 2,130 feet (all of which would be new construction) from Cline Falls Highway west along the section line between secs. 28 and 33 to the southeast corner of sec. 29, where it would enter the Thornburgh property. *See* AR 57 at 2-2 and Fig. A-6 in Appendix B.

Under Alternative B, the ROW would begin at the point where Cline Falls Highway crosses the section line between secs. 28 and 33, from which point 100 feet of new construction would link the Highway with Bennett Road. The ROW would then follow Bennett Road and the Qwest telephone ROW for approximately 2,615 feet in an arc in a westerly and then northwesterly direction to where the road crosses into the Thornburgh property at the line between sec. 28 and sec. 29. (Bennett Road follows the topography, and would be improved.) *See* AR 57 at 2-8 and Fig. B-6 in Appendix B.

Under Alternative D, no ROW would be granted. Instead, access would be along a road that Thornburgh plans to build (under all alternatives) from Cline Falls Highway along its side of the southern boundary of the property in sec. 28. The portion of Bennett Road on BLM land would be removed and the land reclaimed. *See* AR 57 at 2-11 and Fig. A-6 in Appendix B.

Alternatives A, B, and D also considered different routes for electric power transmission to the resort property. Two aerial power lines operated by the Central Electric Cooperative (CEC) currently exist in the vicinity of the planned resort. One runs a straight course essentially parallel to Cline Falls Highway to the southeast of that road. It connects to a substation located east of Cline Buttes. Another line, also connecting to the same substation, runs northwest from the substation around the northern end of Cline Buttes and thence west through Pinnacle and beyond.

Under Alternative A, a new aerial line would be constructed from the point where the CEC line crosses the section line between secs. 27 and 34, continuing west along the sec. line between secs. 28 and 33 to the southeast corner of sec. 29. (After crossing the Cline Falls Highway, this route follows the same route as the Tribute access road ROW under Alternative A.) *See* AR 57 at 2-6.

Under Alternative B, a new 1,515-foot aerial line would be built from the CEC line in sec. 27 northwest to the point where Cline Falls Highway enters Tribute from the east at the line between secs. 27 and 28. The line would then follow Cline Falls

Highway southwest within Tribute property for approximately 900 feet, and then further along the highway across BLM land for approximately 2,630 feet to the line between secs. 28 and 33. From that point, it would follow the road ROW along Bennett Road for approximately 2,615 feet to the line between secs. 28 and 29. From that point, the line would proceed southerly on private resort property to a proposed substation near the southeast corner of sec. 29. *See* AR 57 at 2-9.

Under Alternative D, the first two segments of a new transmission line (1,515 feet and 900 feet) would be the same as under Alternative B. At the point where the 900-foot segment on Tribute property meets the property line in sec. 28, the line would then proceed west, still on the resort's private property, to the line with sec. 29, and from thence southerly to the proposed substation on resort property. *See* AR 57 at 2-12.

All the alternatives considered for road and electric transmission ROWs are shown on Figure 2 of the EA (AR 57 at 2-3 to 2-4).

The EA considered but eliminated from detailed study certain other alternatives. Among these were two ROWs that would upgrade two existing unimproved roads connecting Pinnacle with Barr Road to the west. According to the EA, Deschutes County did not intend to upgrade Barr Road to a standard needed to carry traffic to and from the resort. In addition, using these routes would conflict with BLM management direction for the area. AR 57 at 2-13.

The EA also addressed mitigation measures common to all alternatives. Wildlife mitigation measures included restoring old-growth juniper habitat conditions through thinning and invasive non-native weed control on the basis of three acres rehabilitated for every acre disturbed. AR 57 at 2-14. The EA further stated:

[Because] [t]here would be an increased risk of injury or death [to wildlife] from vehicle collisions, mitigation measures to reduce this risk include road design to slow vehicles and a 25-mile-per-hour speed limit. Smaller, less mobile species such as reptiles and small mammals would likely be the most negatively affected. Drift fences and underpasses for smaller wildlife species in areas likely to be used as crossings, if any are present, would be used to reduce road-related mortality. Closing and replanting approximately 2.1 acres of existing roads and the numerous OHV [off-highway vehicle] trails that cross both public and private land may also reduce road-kill mortality.

*Id.* To mitigate impacts on visual resources, the EA explained:

The juniper woodlands adjacent to the ROWs in the Maston area (portions of ROWs east of Cline Falls Highway) would be thinned to reduce the sharp edge effect that clearing the ROWs would otherwise create. This would soften the visual impact of these linear features from elevated viewpoints on the buttes. However, thinning would not occur between Cline Falls Highway and the power line in order to reduce the visibility of the power line from the road. Thinning should be concentrated away from foreground areas, as viewed from Cline Falls Highway.

. . . [J]uniper thinning would not be emphasized on the portions of the ROWs west of Cline Falls Highway (Alternatives A and B). For this portion of the project area, every effort should be made to retain as many juniper as possible to provide screening, particularly for views from the Tumalo Canal ACEC and for northbound motorists on Cline Falls Highway. Limbing of trees should be done if possible instead of removal. Mitigation would include creating an uneven border along the ROW by leaving some vegetation uncut and by thinning the adjacent juniper trees.

AR 57 at 2-18.

On February 14, 2007, Gould's counsel sent a letter to BLM's Prineville District Office alleging various errors in the EA and urging BLM to prepare an EIS. AR 43. BLM also received comments on the EA from two other individuals and one state agency.<sup>4</sup>

E. *The LUBA Decision on the Conceptual Master Plan and Gould's Appeal*

On an unspecified date before May 22, 2007 (*see* newspaper article at AR 33), LUBA issued a decision generally upholding the Deschutes County approval of the Conceptual Master Plan, remanding to the County one issue regarding overnight lodging accommodations not relevant here. Gould petitioned for judicial review of the LUBA decision before the Oregon Court of Appeals, filing her opening brief in June 2007.

Gould argued, *inter alia*, that under Oregon law (ORS 197.455(1)), destination resorts must be sited on lands zoned for destination resorts. Gould asserted that the access routes sought in the ROW applications are part of the resort and are outside lands zoned as eligible for destination resorts. (It is undisputed that

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<sup>4</sup> Those comments do not appear in the record. However, the Responses to Comment Letters (AR 21, Ex. C attached to the DR) address all the comments.

Pinnacle and Tribute are within lands zoned for destination resorts.) Gould argued that because the land over which the access ROWs would be located is zoned for Exclusive Farm Use (EFU), the resort is not allowable under Oregon law. See excerpts from the June 2007 “Petitioner Gould’s Opening Brief and Excerpt of Record” appended to Gould’s August 15, 2007, Notice of Appeal and Petition for Stay (NOA) in this appeal discussed below, at 6-10.

F. *The Decision Record and ROW Grant*

The Field Manager issued the DR on July 16, 2007. AR 19. She selected Alternative B for all three access road ROWs. AR 19 at 1-2. She further decided to authorize ROWs for utilities and public agencies needing to install facilities or utilities within the road ROW corridors. *Id.* at 2. She selected Alternative D for the aerial electric power transmission line. *Id.* In the discussion of “Rationale for the Decision,” the Field Manager explained that Alternative B for the road ROWs

consolidates existing ROW grants within the same corridor as directed in the UDRMP [Upper Deschutes Resource Management Plan]. This alternative also reduces the acres of new construction on public lands based on road and utility needs for the resort development. This alternative would include rehabilitating 1.8 acres of previously disturbed public land.

*Id.* at 7. With respect to Alternative D for the aerial electric transmission line, the DR stated: “This alternative impacts the least amount of public lands at 1.4 acres.” *Id.*

Mitigation measures required under the DR were similar to those specified in the EA, and included restoring or improving wildlife habitat on three acres of public land for every one acre of land disturbed by ROW developments. AR 19 at 4. Attached to the DR were “Terms, Conditions, and Stipulations” (T&C) to be included in the ROW grants. AR 20, Ex. B. Paragraph y of the T&C required that the ROW holder “shall retain as many junipers as possible to provide screening for the Tumalo Canal ACEC and northbound motorists on Cline Falls Highway. Limbing of the trees would be done, if possible, instead of removal.” AR 20 at 3. Paragraph bb required the ROW holder to “close and replant approximately 2.1 acres of existing roads and OHV trails that cross public lands.” *Id.* Paragraph cc of the T&C further made the ROW holder responsible for “a ratio of 1 acre of impact to 3 acres of wildlife mitigation at a location determined in consultation with BLM.” *Id.* Paragraph ll of the T&C prescribed: “The holder shall thin young juniper to improve approximately 30 acres of old growth juniper woodlands.” *Id.* at 4.

The ROW grants were issued with the DR. AR 14 and 15. The grant included the T&C required under the DR *verbatim*. See AR 15 at 5-6.

G. *Gould's Appeal to this Board*

Gould appealed the DR, the ROW grant, and the FONSI to this Board, and simultaneously requested a stay. Gould filed a Statement of Reasons (SOR) on September 14, 2007. By order dated October 18, 2007, this Board denied Gould's request for a stay, primarily on the ground that Gould had not shown that she would suffer any immediate and irreparable harm if the stay were not granted.

In her appeal, Gould asserts that the DR, ROW grant, and FONSI are in error in the following respects:

1. The planned destination resort is not allowable under Oregon law because the access roads ROWs are not on land zoned for a destination resort. Therefore, granting the ROWs for that use would be an unnecessary or undue degradation of public lands in violation of the last sentence of FLPMA section 302(b) and would violate CEQ's NEPA regulations at 40 C.F.R. § 1508.27(b)(10), among other provisions. *See* SOR at 3-5.

2. BLM violated NEPA requirements in several respects.

a. The EA/FONSI is inadequate (for several reasons) and an EIS is required. SOR at 5-6.

b. BLM failed to analyze cumulative effects. SOR at 6-8.

c. The alternatives considered in the EA are insufficient. SOR at 8-9.

d. The BLM analysis of environmental issues contains factual errors or omissions. SOR at 9-10.

3. The ROW grant was in error in two respects.

a. BLM incorrectly asserts that the ROW route selection was based on a policy of combining or merging ROWs. SOR at 11.

b. BLM improperly granted ROWs to utilities and other parties. SOR at 11.

BLM filed its Answer on October 17, 2007. Thornburgh, as intervenor, filed a response to the SOR (Intervenor's Resp.) on October 17, 2007.

On May 6, 2008, we issued an order arising from a BLM representation to the Board in a different case that the State of Oregon had applied for certain lands within

secs. 20, 29, and 30, T. 15 S., R. 12 E., Willamette Meridian, as indemnity selections under the Enabling Act of February 14, 1858 (11 Stat. 383, 43 U.S.C. §§ 851, 852) and in compliance with the Final Judgment in *State of Oregon v. Bureau of Land Management*, No. 85-646-MA (D. Or. 1991). BLM represented that it had completed all necessary clearance requirements for that selection except for resolution of certain mining claims. BLM further understood it to be the State's plan to lease the property to Thornburgh as part of the resort. The selected land includes the land covered by the ROW for the 1,470-foot connection between Tribute and Pinnacle in sec. 30 and along the line between secs. 29 and 30. The May 6 order instructed the parties to inform the Board "whether any land underlying the third road remains under BLM's jurisdiction, and, if such a conveyance has taken place, the impact the conveyance has on the rights conveyed by the ROW." Order at 2.

BLM's Status Report dated May 22, 2008, in response to the order stated that title to the selected land had been conveyed to the State on April 16, 2008. BLM then stated:

Consequently, the land underlying the third road authorized by BLM's ROW is entirely under Oregon's jurisdiction. The transfer of lands, however, was subject to the "rights for access road purposes as granted to Thornburgh Resort, its successors or assigns, by right-of-way number OR 61170 . . . as to . . . N $\frac{1}{2}$ NW $\frac{1}{4}$ , sec. 29; NE $\frac{1}{4}$ NE $\frac{1}{4}$ , sec. 30, T. 15 S. R. 12 E., W.M., Oregon." *Id.* [State of Oregon Indemnity Selection Clearlist No. 95] at 1. Therefore, Thornburgh retained the rights conveyed by the ROW grant.

BLM Status Report at 2. Thornburgh concurred with BLM's explanation. Clarification of May 23, 2008 Right of Way Status Report, dated May 28, 2008. In short, the conveyance to the State was subject to the ROW.

### *Analysis*

#### I. *The Effect of Oregon Law on the ROW Grant and FLPMA Requirements*

As noted above, Gould argues that the resort is not allowable under Oregon law on the ground that the ROWs are not on land zoned for a destination resort, even though the resort itself is. Gould noted that "a decision is expected soon from the Oregon Court of Appeals on this issue." SOR at 3. That decision was issued in November 2007. *Gould v. Deschutes County*, 216 Or. App. 150, 171 P.3d 1017 (2007). In that case, the Oregon Court of Appeals summarily rejected Gould's argument that the access routes to the resort had to be on land zoned for a destination resort. See 171 P.3d at 1021 n.1. Gould's argument that the resort is

unlawful—and that the ROWs therefore constitute an unnecessary or undue degradation of the public lands in violation of FLPMA—necessarily fails.

## II. *The NEPA Arguments*

The applicable standard to be applied in adjudicating challenges to actions taken on the basis of FONSI and EAs is well established. As we recently reiterated in *Gerald H. Scheid*, 173 IBLA 387 (2008):

A BLM decision to approve an action based on an EA and FONSI will generally be affirmed if BLM has taken a “hard look” at the proposed action, identified relevant areas of environmental concern, and made a convincing case that the environmental impacts are insignificant or that any such impact will be reduced to insignificance by the adoption of appropriate mitigation measures. *Bark*, 167 IBLA 48, 76 (2005); *Armando Fernandez*, 165 IBLA 41, 49 (2005); *Great Basin Mine Watch*, 159 IBLA 324, 352 (2003); *Southern Utah Wilderness Alliance*, 158 IBLA 212, 219 (2003); *Owen Severance*, 118 IBLA 381, 392 (1991).

The Board will ordinarily uphold a BLM determination that a proposed project, with appropriate mitigation measures, will not have a significant impact on the quality of the human environment if the record establishes that a careful review of environmental problems has been made, relevant environmental concerns have been identified, and the final determination is reasonable. *Bark*, 167 IBLA at 76, and cases cited. A party challenging BLM’s decision has the burden of demonstrating with objective proof that the decision is premised on a clear error of law or demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance to the proposed action. *In re North Trail Timber Sale*, 169 IBLA 258, 261 (2006); *Bark*, 167 IBLA at 76, and cases cited; *In Re Stratton Hog Timber Sale*, 160 IBLA 329, 332-33 (2004). Mere differences of opinion provide no basis for reversal. *In re North Trail Timber Sale*, 169 IBLA at 261; *Bark*, 167 IBLA at 76; *Rocky Mountain Trials Association*, 156 IBLA 64, 71 (2001). It is not sufficient for an appellant to simply speculate and request more information or “pick apart a record with alleged errors and disagreements without connecting those allegations to an affirmative showing that BLM failed to consider a substantial environmental question of material significance.” *Bark*, 167 IBLA at 76, quoting *In re Stratton Hog Timber Sale*, 160 IBLA at 332; see also *Edward C. Faulkner*, 164 IBLA 204, 209 (2004).

173 IBLA at 396. *See also, e.g., Biodiversity Conservation Alliance*, 171 IBLA 218, 226 (2007); *Southern Utah Wilderness Alliance*, 159 IBLA 220, 234-235 (2003), and cases cited.

A. *Adequacy of the EA/FONSI and Whether an EIS Is Required*

Gould asserts several arguments for the proposition that BLM was required to prepare an EIS in this case. For convenience, we address them in the same order that Gould raises them.

1. *“Predetermination” to Prepare an EA Rather than an EIS*

First, Gould maintains that the BLM Interdisciplinary Team pre-determined that it would prepare an EA and would not prepare an EIS. She relies on the October 5, 2005, memorandum to the file from the team leader, Janet Hutchison, which simply indicated that BLM intended to “start with an EA,” and then, if it determined that the proposal would result in significant impacts, BLM would “go to an EIS.” AR 116 (duplicate at AR 265).

This does not imply that an EA was preordained to the exclusion of an EIS. One of the principal purposes of an EA is to determine whether an EIS is necessary. As we explained in *James Shaw*, 130 IBLA 105, 112 (1994):

Federal agencies may develop EAs to determine whether the environmental impacts of a given action are significant. 40 C.F.R. §§ 1501.3, 1501.4, 1508.9, 1508.27. The purpose of an EA is to provide sufficient evidence and analysis to determine whether to prepare an EIS. 40 C.F.R. § 1508.9(a)(1); *see Fritiofson v. Alexander*, 772 F.2d 1225, 1236 (5th Cir. 1985). An EA is a concise discussion of relevant issues that either concludes that an EIS is necessary or makes a finding of no significant impact (FONSI). 40 C.F.R. §§ 1508.9, 1508.13. *Sierra Club v. Marsh*, 769 F.2d 868, 870 (1st Cir. 1985).

*See also Susan J. Kayler*, 162 IBLA 245, 250 n.4 (2004); *United States v. E. K. Lehmann Associates of Montana, Inc.*, 161 IBLA 40, 53 n.1 (2004). Moreover, as noted above, the Master Agreement between BLM and Thornburgh specifically provided that an EA would be prepared, and “if it is determined by the EA, an [EIS] will be prepared.” AR 259/310 at 1. Gould’s reliance on the October 2005 memorandum for the proposition that BLM erred in declining to prepare an EIS is misplaced.

## 2. Controversy

Second, Gould asserts that the FONSI wrongly concluded that “[t]here are no known controversial human environmental effects within the project area” (FONSI at 2). SOR at 5-6. Gould maintains that “the proposed resort is highly controversial, and thus access across public lands for this private development is controversial.” *Id.* at 6. One of the criteria in the CEQ regulations for evaluating the intensity of impacts in determining whether impacts are “significant” is “[t]he degree to which the effects on the quality of the human environment are likely to be highly controversial.” 40 C.F.R. § 1508.27(b)(4).

[1] Whether the resort is controversial is a different question from whether the environmental effects of granting the ROWs are controversial within the meaning of the CEQ regulations. As this Board recently observed:

Whether a proposed action is “likely to be highly controversial” under 40 C.F.R. § 1508.27(b)(4) is not a question about the extent of public opposition, but, rather, about whether a substantial dispute exists as to its size, nature, or effect. *Oregon Natural Resources Council*, 116 IBLA 355, 362 (1990), citing *Sierra Club v. U.S. Forest Service*, 843 F.2d 1190, 1193 (9th Cir. 1988); *Glacier-Two Medicine Alliance*, 88 IBLA 133, 143-44 (1985), quoting *Rucker v. Willis*, 484 F.2d 158, 162 (4th Cir. 1973).

*Missouri Coalition for the Environment*, 172 IBLA 226, 249 n.23 (2007). See also, e.g., *Wetlands Action Network v. U.S. Army Corps of Engineers*, 222 F.3d 1105, 1122 (9th Cir. 2000) (“The existence of opposition to a use, however, does not render an action controversial”). In other words, while public controversy regarding a proposed project might reflect controversy regarding environmental effects, public controversy does not by itself constitute a substantial dispute regarding the size, nature, or effect of a proposed action. Gould has not identified a substantial dispute about the size, nature, or effect of granting the ROWs. Her argument does not support requiring an EIS in this case.

## 3. “Unique or Unusual” Effects and Adequacy of Traffic Analysis

Third, Gould argues that BLM wrongly found in the FONSI that the project “is not unique or unusual,” SOR at 6, and asserts instead that the effects are “significant” under 40 C.F.R. § 1508.27(b)(5) because the “number and scale” of the ROWs are unique. *Id.* She argues that the EA and FONSI “fail to adequately address the expected traffic for these ROWs” and that the analysis of projected use levels of the ROWs is “inadequate.” *Id.* She argues that “[t]he only traffic data in the Record is for the PM peak hours, with no analysis of impacts on wildlife.” *Id.*

Whether the EA's analysis of expected traffic and use levels is adequate is not the same question as whether the environmental effects of granting the ROWs are "highly uncertain or involve unique or unknown risks" within the meaning of 40 C.F.R. § 1508.27(b)(5), as Gould seems to suggest, but we will address both issues here. With respect to unique or unknown risks, the FONSI notes that BLM "has implemented similar actions in similar areas," AR 62 at 2, a proposition that Gould does not dispute. Granting ROWs for access to private lands, including large parcels that will be developed, is hardly unique. The FONSI likewise concluded that there are no environmental effects "that are considered to be highly uncertain or involve unique or unknown risks." *Id.* We agree with BLM that the environmental effects of granting these ROWs are not in the realm of the unknown and were reasonably analyzed in the EA.

With regard to the adequacy of the EA's analysis of expected traffic and use levels, the EA stated, AR 57 at 3-3, that a traffic study for the proposed resort was completed in 2005, with specific estimates of both current peak hour traffic and current average daily traffic.<sup>5</sup> The EA then discussed estimated traffic increases on all the relevant roads, both for peak periods and average daily traffic levels that would follow development. *Id.* at 4-2 to 4-3, 4-16. Gould has offered no explanation regarding why these estimates are not reasonable or sound, or why or how the estimated traffic levels should be calculated differently. In the absence of more information and analysis, she has not met her burden of demonstrating with objective proof that the EA and FONSI are based on a demonstrable error of fact in this respect.

The EA then addressed the effects of the estimated increase in traffic on wildlife. It first noted that expected short-term direct effects would include "disruption of patterns of movement through or around the proposed ROWs by species that are sensitive to human disturbance." AR 57 at 4-8. The EA identified the expected impact on special status wildlife species occurring or potentially occurring in the project area (in this case, the Brazilian free-tailed bat, the spotted bat, and the northern sagebrush lizard) as "[i]ncrease in risk to vehicle collisions." *Id.* at 4-9. The EA further explained:

Indirect effects [on wildlife] include the increased risk of injury or death from vehicle collisions, although mitigation measures (road design and a 25-mile-per-hour speed limit) would reduce this risk. Smaller, less mobile species such as reptiles and small mammals likely would be the most negatively affected. Snakes are especially susceptible because they are attracted to the warm, paved surface. The

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<sup>5</sup> Average daily traffic was assumed to be 10 times the peak hourly rate for highways. AR 57 at 3-3. Gould has offered nothing to demonstrate why that assumption is unreasonable or inaccurate.

proposed mitigation includes drift fences and underpasses for smaller wildlife species in areas likely to be used as crossings, if any are present, which should reduce road-related mortality. This would be partially offset by closing and replanting approximately 2.1 acres of existing roads and the numerous OHV trails that cross both public and private land.

*Id.* at 4-11. The EA stated that habitat disturbance “would also be increased over the long term due to increasing traffic on the roads.” *Id.* at 4-13.<sup>6</sup>

We therefore reject Gould’s arguments that the EA contained “no analysis of impacts on wildlife” and that the EA and FONSI fail to adequately analyze the expected traffic and projected use levels for the ROWs. With respect to these arguments, Gould has not met her burden of demonstrating that the FONSI is based on a clear error of law or demonstrable error of fact, or that BLM failed to consider a substantial environmental question of material significance to the proposed action.

#### 4. *Precedent for Future Actions*

Next, Gould maintains that the FONSI does not address whether BLM’s action here may establish a precedent for future action, and there is no basis for a FONSI without such an assessment. SOR at 6. Gould asserts that BLM’s decision here creates a need to upgrade the Cline Falls-Tumalo transmission line. *Id.* One of the criteria in the CEQ regulations for evaluating the intensity of impacts is “[t]he degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.” 40 C.F.R. § 1508.27(b)(6). Specifically, Gould refers to two other proposed destination resorts in central Oregon “which propose to use ROWs across BLM lands.” SOR at 6. She also argues that the decision to grant the ROWs “creates the need for the Cline Falls-Tumalo transmission line to be expanded.” *Id.*<sup>7</sup>

We do not see how the ROW grant in this case is a “precedent” for decisions on ROW requests in connection with other unrelated proposed destination resorts. BLM presumably will evaluate ROW requests in those cases on their own merits under the circumstances they present, governing land use plans, and other

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<sup>6</sup> The EA explained that these effects, analyzed for Alternative A, are very similar under Alternative B, the alternative selected in the DR. AR 57 at 4-14 to 4-15. The EA also addressed the effect of the anticipated increased traffic levels on recreational trail users and livestock grazing. *See id.* at 4-16, 4-23.

<sup>7</sup> The Cline Falls-Tumalo line is the CEC line running essentially parallel to Cline Falls Highway discussed above.

requirements specific to the sites and properties involved. The fact that ROWs have been granted here implies nothing for other ROW requests elsewhere.

With respect to “expansion” of the Cline Falls-Tumalo electric transmission line, BLM cites an e-mail between a Project Manager at CEC and Kameron DeLashmutt, one of Thornburgh’s principals, dated March 5, 2007. Answer at 6, citing AR 38. The Project Manager first noted that Tribute was to be developed first, and that the cost of building underground distribution lines from a north substation (in Pinnacle, fed from another line) would be quite high. In his view, therefore, it made more sense to site the substation in the south (in Tribute) and supply it from the Cline Falls-Tumalo line. The Project Manager then stated: “Depending on the amount of load that this substation [the planned substation in Tribute] will see, an upgrade of the Cline Falls to Tumalo transmission line *may be needed.*” AR 38 at unpaginated 1-2 (emphasis added). At this point, while considerable development in Tribute and Pinnacle is likely to occur, the extent to which the different planned phases of the resort actually will be developed, and the time period in which development will occur, is speculative. Thus, whether the capacity of the Cline Falls-Tumalo line will need to be increased or upgraded is speculative. The grant of the ROWs in this case therefore does not “create the need” for that upgrade, and the BLM action here is not a precedent for future action. Nor has Gould attempted to show that “expanding” the Cline Falls-Tumalo line to a higher capacity, even if it becomes necessary, would result in significant effects. We therefore reject her argument based on 40 C.F.R. § 1508.27(b)(6).

For all of these reasons, Gould has failed to show that BLM erred in not preparing an EIS.

B. *Cumulative Effects*

Gould asserts that the EA and FONSI failed to analyze certain cumulative effects of granting the ROWs. SOR at 6-8. Further, another of the criteria in the CEQ regulations used in evaluating the intensity of impacts to determine whether impacts are “significant” is “[w]hether the action is related to other actions with individually insignificant but cumulatively significant impacts.” 40 C.F.R. § 1508.27(b)(7). Specifically, Gould argues that BLM overlooked the cumulative effects of the ROWs in light of (1) the Cline Buttes Recreation Plan, (2) “in lieu” transfer of lands to the State of Oregon, (3) upgrade of the Cline Falls-Tumalo transmission line, and (4) needed future road access to county property at the south end of the resort. SOR at 7-8.

First, with respect to the Cline Buttes Recreation Plan, BLM points out that the Plan is undergoing its own NEPA analysis (a decision on the Plan not having yet been made), and at the time the Answer was filed (October 2007), BLM was in the process

of formulating alternatives. Thus, the specifics of the Plan were unknown at the time BLM completed the EA in this case in January 2007. Answer at 7. Any discussion of the impacts of the Plan would have been speculative at the time the EA was prepared.

[2] We agree with BLM that NEPA does not require an agency to consider in an EA impacts of other possible actions that are speculative or hypothetical. *See, e.g., Glacier-Two Medicine Alliance*, 88 IBLA at 143 n.7. As this Board held in *G. Jon and Katherine M. Roush*, 112 IBLA 293, 306 (1990):

BLM is only required to consider cumulative impacts which “might be expected.” *In re Long Missouri Timber Sale*, 106 IBLA 83, 86 n.2 (1988). Appellants merely assert that cumulative impacts might occur without offering any evidence as to what these impacts might be or the likelihood of their occurrence. The mere assertion that cumulative impacts will occur as a result of a planned action is not sufficient to require BLM to consider cumulative impacts. *See In re Letz Boogie Timber Sale*, [102 IBLA 137,] 142 n.8 [(1988)]; *In re Blackeye Again Timber Sale*, [98 IBLA 108,] 110-11 [(1987)].

Second, with respect to the State of Oregon’s “in lieu” land selections, BLM attached as Ex. B to its Answer the Declaration of Ronald W. Wortman, the team leader for the BLM team handling the Oregon Division of State Lands request for “in lieu” selections. In brief, the Federal government agreed to provide specific sections of land to the State of Oregon for support of its public schools when it entered the Union. Because certain sections were unavailable, subsequent statutes provided for the State to select other lands in lieu of the unavailable sections. The background is explained in depth in *State of Oregon v. Bureau of Land Management*, 876 F.2d 1149 (9th Cir. 1989). Subsequently, the United States District Court for the District of Oregon held that the State had 5,202.29 acres remaining to be selected. *State of Oregon v. Bureau of Land Management*, No. 85-646-MA (D. Or. 1991) (copy attached to Wortman Declaration). As Wortman explains, the first of two phases of that selection have been completed and the second is in process. BLM and the State are discussing the lands which the State will request and negotiating which lands the State will acquire.

Gould appears to assume that “there are plans for the Thornburgh Resort to obtain BLM lands through the State of Oregon (including transfers identified in the UDRMP).” SOR at 7. Therefore, Gould says, the EA should address those transfers to determine whether the ROWs are even necessary. *Id.* Gould has provided no documentation or evidence in support of this argument. As noted previously, BLM conveyed to the State certain lands between Pinnacle and Tribute, subject to the ROW grant to Thornburgh by BLM. The current record does not reveal whether the State has leased these lands to Thornburgh, and Gould has not offered any evidence

regarding that question. But even if the State has leased the land to Thornburgh, such an action would not eliminate the ROW granted before the State obtained title to the land.<sup>8</sup>

Gould has offered no evidence that indicates that the State has selected, or that BLM has agreed to convey to the State, any lands that would affect the other ROWs at issue here. Nor has Gould shown that the ROWs result in any impacts that would be added to the impacts of any “in lieu” selection by the State. We see no inadequacy in the EA in not addressing such hypothetical future selections and transfers.

Third, Gould asserts that the expansion of CEC’s Cline Falls-Tumalo transmission line “could have very serious cumulative effects on BLM lands all along that extensive Cline Falls-Tumalo transmission line route . . . .” SOR at 7. As explained above, whether the capacity of the Cline Falls-Tumalo line will need to be increased or upgraded (and when such an upgrade would occur should it become necessary) is speculative. Therefore, for the same reasons discussed above, the EA properly did not address effects that are speculative and not reasonably foreseeable. *Missouri Coalition for the Environment*, 172 IBLA at 247.

Fourth, Gould argues that the EA fails to acknowledge future access needs to County property at the south end of the resort “or address the cumulative effects they will cause in combination with the current ROWs.” SOR at 8. BLM correctly observes that Gould has provided no explanation or documentary support for this argument. Answer at 8. Without more, there is no basis for alleging that the EA’s analysis is improper.

### C. *Alternatives*

An EA must include a discussion of alternatives to the proposed action. See 42 U.S.C. § 4332(2)(E) (2000); 40 C.F.R. § 1508.9(b). As we explained in *Defenders of Wildlife*, 152 IBLA 1, 9 (2000):

Under section 102(2)(E) of NEPA, BLM is required to consider a reasonable range of alternatives which includes the no-action alternative. *Southern Utah Wilderness Alliance*, 122 IBLA 334, 338-40 (1992). Thus, BLM is required by section 102(2)(E) of NEPA, as amended, 42 U.S.C. § 4332(2)(E) (1994), to consider “appropriate

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<sup>8</sup> If the State had conveyed to Thornburgh the lands the State obtained in the selection, then the ROW would cease to exist, and questions raised in this appeal regarding it would become moot. However, Gould has offered no evidence that such a conveyance has occurred.

alternatives” to the proposed action, as well as their environmental consequences. *See* 40 C.F.R. §§ 1501.2(c) and 1508.9(b); *City of Aurora v. Hunt*, 749 F.2d 1457, 1466 (10th Cir. 1984); *Howard B. Keck, Jr.*, 124 IBLA 44, 53 (1992), *aff'd*, *Keck v. Hastey*, Civ. No. S92-1670-WBS-PAN (E.D. Cal. Oct. 4, 1993). Such alternatives should include reasonable alternatives to a proposed action, which will accomplish the intended purpose, are technically and economically feasible, and yet have a lesser impact. 40 C.F.R. § 1500.2(e); *Headwaters, Inc. v. BLM*, 914 F.2d 1174, 1180-81 (9th Cir. 1990); *City of Aurora v. Hunt*, 749 F.2d at 1466-67; *Howard B. Keck, Jr.*, 124 IBLA at 53.

[3] NEPA does not require the consideration of alternatives whose implementation is deemed remote and speculative or which are infeasible, ineffective, inconsistent with the basic policy objectives for the management of the area, or unreasonable under the circumstances. *E.g.*, *Headwaters, Inc. v. Bureau of Land Management*, 914 F.2d at 1180, and cases cited.

Gould first asserts that BLM failed to consider the existing Cline Falls to Jordan Road transmission line that crosses through Pinnacle as an alternative to the granting the ROW across BLM land to connect to the Cline Falls-Tumalo line. Gould argues that the line crossing Pinnacle “has the capability to operate at 115-kV” and “has been expanded in capability to operate at 115-kV and that CEC has plans to upgrade the voltage which would give the Cline Falls to Jordan Road lines ‘sufficient capacity to carry most or all of the Thornburgh Resort load, depending on the latest plans.’” SOR at 8, quoting AR 38, the e-mail from the Project Manager at CEC to DeLashmutt dated Mar. 5, 2007. Gould claims that the northern line “has more capacity than the Cline Falls-Tumalo line” and that an upgrade to the northern Cline Falls to Jordan Road line “would not be necessary” because “the increase in capability from 69-kV to 115-kV has already been made.” *Id.* Gould dismisses the CEC Project Manager’s recommendation to supply the initial development of the southern portion of the resort from a southern substation in Tribute connected to the Cline Falls-Tumalo line as having been made “only because it might be cheaper for the developer.” *Id.*

Under the Conceptual Master Plan approved by Deschutes County and upheld in the Oregon Court of Appeals, Tribute is to be developed first. If power were to be supplied to Tribute only from a northern substation in Pinnacle under the Cline Falls to Jordan Road line, an underground distribution line from that substation all the way to the southern part of Tribute — a length of between 2 and 3 miles, depending on the route chosen, and crossing the ridge separating Pinnacle from Tribute<sup>9</sup> — would have to be constructed first. The Project Manager’s observation in the e-mail

<sup>9</sup> *See* the map included as Fig. 2 of the EA, AR 57 at 2-3 to 2-4.

that “[t]he cost of building underground distribution lines from a north substation site to the early phases of the development in the south would be quite high” is an acknowledgment that he expected that doing so probably would be cost-prohibitive, particularly in comparison to a much shorter aerial line.<sup>10</sup> Under the circumstances, it appears that a north substation alternative to provide power to Tribute is not reasonable and likely is not economically feasible. We are unable to conclude that BLM erred in not analyzing it.

Second, Gould asserts that BLM’s road alternative analysis was a “sham” and that no routes other than those Thornburgh specified in its application to the County and ROW application to BLM were considered. SOR at 9. Gould maintains that “it is a charade to suggest the BLM seriously considered alternatives other than what the developer wanted. In fact, the pretense was dropped completely for the connector road between the Tribute and the Pinnacle where only one alternative was considered.” *Id.*

The record shows that BLM considered two alternatives to connect Highway 126 to Pinnacle, and three alternatives to connect Cline Falls Highway to Tribute (plus a no-ROW alternative). These alternatives are clearly mapped on Figure 2 of the EA (AR 57 at 2-3 to 2-4). The only other configuration that BLM could have considered would have been access from Barr Road to the west. As noted previously, BLM eliminated Barr Road alternatives from consideration because Deschutes County did not intend to upgrade Barr Road to a standard needed to carry traffic to and from the resort, and because using these routes would conflict with BLM management direction. AR 57 at 2-13. The County’s decision or policy in that regard is not within BLM’s or Thornburgh’s control, and BLM is not required to consider alternatives that are not feasible.

As also noted previously, the reason that only one route was considered connecting Tribute and Pinnacle was because it was dictated by topography. It is readily apparent from the map included as Fig. 2 in the EA that the Tribute-to-Pinnacle ROW runs over a saddle in the ridge line. It also follows an existing unimproved road.

We do not discern the “sham” or the “charade” that Gould apparently sees, and we find no error in BLM’s consideration and analysis of alternatives.

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<sup>10</sup> Assuming that Pinnacle is developed later, it appears not unlikely that power will be brought to Pinnacle from the Cline Falls to Jordan Road line rather than from a southern substation in Tribute, for the same reasons.

D. *Alleged Factual Errors or Omissions in the EA*

Gould asserts five “factual errors and omissions” in BLM’s analysis of environmental issues. As a result, Gould argues, BLM has “fail[ed] to take the requisite hard look at environmental effects,” SOR at 9, *citing National Parks & Conservation Association v. Babbitt*, 241 F.3d 722, 730 (9th Cir. 2001).

1. *Providing Power Through a Northern Transmission Line*

Gould argues that power from a northern transmission line “should have been considered as a viable alternative” because CEC did not state that it would not provide power from the northern (*i.e.*, Cline Falls to Jordan Road) line. SOR at 9. This repeats one of the alternatives arguments discussed above and need not be addressed further.<sup>11</sup>

2. *Fire Standards for Siting of Roads*

Gould argues that the ROW for access to Tribute from Cline Falls Highway is less than one-half mile from Bennett Road, which also provides access to Tribute from the same road, in violation of section D104.3 of the 2004 Oregon Fire Code. AR 57, Appendix A. That section provides that where two access roads are required, “they shall be placed a distance apart equal to not less than one half of the length of the maximum overall diagonal dimension of the property or area to be served, measured in a straight line between accesses.” Gould argues that the “property or area to be served” extends more than 2 miles east-to-west and approximately 3 miles north-to-south. SOR at 10. This includes both Pinnacle and Tribute.

BLM points out that Gould’s argument focuses only on the primary and secondary access to Tribute, and ignores the northern access road from Highway 126 to Pinnacle, and that when the road ROWs are viewed together, they satisfy the State standard. Answer at 9. BLM is correct.

3. *Impacts of Increased Use of Eagle Drive*

Gould asserts that the EA’s analysis of traffic impacts is inadequate, relying on BLM staff notes dated December 1, 2006. In the notes, the author said:

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<sup>11</sup> We acknowledge that there appears to be no other record support for the statement in the EA at 3-3 that “CEC will not provide power to the proposed resort from this transmission line.” But even if CEC is willing to provide power to Pinnacle from this line at a later date, it does not change the analysis of the reasonableness or viability of providing power to the entire resort only from the northern line.

I question how Eagle Drive is going to safely handle 3 times the current traffic in it's [sic] current configuration. It is way too narrow and winding, and lacks adequate sight lines for trail or road crossings. BLM really needs to look at this as an impact that needs to be mitigated. Mitigation may need to include widening and straightening of Eagle Drive.

AR 87 at unpaginated 4, *quoted at* SOR at 10. BLM points out that the EA stated that under Alternative B (the selected alternative), existing roads, including Eagle Drive, would be widened and paved. Answer at 10, citing AR 57 at 2-7. BLM is correct that this addresses the staff member's concerns. Contrary to Gould's argument, the EA does not "ignore[] these impacts." SOR at 10.

#### 4. *Visual Impacts of Power Lines Along Cline Falls Highway*

Gould asserts that the "61-foot power line poles along the Cline Falls Hwy are going to be a substantially [sic] new eyesore on this route" and that the EA's analysis of the visual impacts of these poles is inadequate. SOR at 10. Gould cites a document in the record titled "Overall Comments," of unknown date and authorship, at AR 75. (The index to the AR ascribes a date of January 8, 2007, to this document.)

The EA described the visual impacts of the new power line under the selected alternative from different points of observation as follows:

The 0.3-mile-long power line on BLM-administered land southeast of the Cline Falls Highway (in Section 27) would not be visible from either of the KOPs [key observation points <sup>12</sup>], except at the junction of the private land and the Cline Falls Highway. It would be noticeable but would not dominate the landscape. . . . Indirect effects of Alternative D include approximately .7 mile of the 1-mile segment on private land that would be visible from the highway in the foreground (photo simulation 4 in Appendix D). This includes approximately 2.5 miles<sup>[13]</sup> of power line that would be built along Cline Falls Highway where it crosses the Thornburgh property. The power line would be a dominant feature in the landscape for this portion of the highway. Portions of the power line in the middleground would cross the face of a hill just north

<sup>12</sup> *I.e.*, when viewed from the Cline Buttes and the Tumalo ACEC. See the paragraph in the EA preceding the above quotation.

<sup>13</sup> It is apparent from the map at Figure 2 of the EA that this is a typographical error and should read ".25 miles."

of the highway on private land. There would be a moderate contrast compared to existing conditions in this area. Approximately .25 mile of power line on private property would be built along the section line between Sections 28 and 29, which is the boundary of the ACEC in this area. This part of the power line would be visible in the foreground from the eastern part of the ACEC. . . . Portions of the power line in Sections 28 and 29 would also be visible as foreground from the proposed road across BLM-administered land in Section 28 (photo simulation 5 in Appendix D).

AR 57 at 4-22 to 4-23. Gould has not offered any explanation of why this analysis of the visual impacts is inaccurate.

### 5. *Analysis of Traffic Impacts on Wildlife and Other Natural Resources*

Gould asserts that the EA did not analyze the impacts of traffic on wildlife and other natural resources. SOR at 10. Contrary to Gould's assertion, BLM correctly notes that the EA addressed the impacts of traffic on wildlife, livestock grazing, mining, and recreational trail use. Answer at 10, *citing* AR 57 at 4-9, 4-11 to 4-14, 4-16, and 4-23 to 4-24. Part of the EA's analysis of impacts on wildlife has been discussed above. Gould has not offered any explanation or analysis of why the discussion of these impacts is inaccurate or how BLM failed to consider a substantial environmental question of material significance regarding wildlife and other natural resources. Moreover, Gould has not asserted any argument to the effect that the mitigation measures described in the EA would not reduce any significant impacts to insignificance.

We therefore conclude that BLM has taken the necessary "hard look" at the proposal to grant the ROWs, has identified the relevant areas of environmental concern, and has made an informed determination as to whether the environmental impact of granting the ROWs is insignificant or will be reduced to insignificance by the mitigation measures described in the EA. BLM has identified the relevant environmental concerns and has made a reasonable final determination. Gould has not carried her burden to show that the FONSI in this case was premised on a clear error of law or demonstrable error of fact or that the analysis failed to consider a substantial environmental question of material significance to the proposed action.

### III. *Alleged Errors in the ROW Grants*

#### A. *Route Selection Based on a Policy of Combining or Merging ROWs*

Gould argues that BLM has not merged the ROWs granted with existing ROWs. She cites the granting of a new ROW for an electric power transmission line

where “there is already an existing transmission line on the property.” SOR at 11. She asserts that the connection between Pinnacle and Tribute is unnecessary because “there is already an agreed upon route to the east of the properties across State of Oregon land.” *Id.* She also complains that in connecting Pinnacle to Highway 126, no existing ROW will be merged with the ROW granted to Thornburgh. *Id.*

Gould’s argument regarding the power line ROW is simply a restatement of her argument that the northern (Cline Falls to Jordan Road) line should be the sole source of power to the resort, and that no new power line ROW should be granted at all. That issue has been addressed previously and need not be further discussed here. Gould has offered no evidence of an “agreed upon route” over the State-owned parcel on the slope of Cline Buttes east of Pinnacle and north of Tribute. Nor does she explain precisely what an “agreed upon route” means.

With regard to the connection between Highway 126 and Pinnacle, BLM observes that “[t]he existing ROW granted to Art Willett may be terminated and consolidated with the new ROW that follows Willett Way.” Answer at 10. BLM also notes that other ROWs are combined. Specifically, the Thornburgh southern access ROW will be consolidated with the Qwest ROW, and part of the ROW granted to the Federal Aviation Administration to maintain a radio facility on the top of Cline Buttes could be terminated (at a later point). These consolidations serve the need to consolidate existing ROWs and ROWs granted to Thornburgh identified in the EA at 1-1.

Gould’s argument seems to be premised on the unspoken notion that a new ROW cannot be granted unless it is combined with an existing ROW. That is neither the law nor agency policy. Gould’s argument fails to show error in BLM’s decision.

B. *Alleged Improper Grant of ROWs to Utilities and Other Parties*

Finally, Gould argues that the DR improperly grants ROWs to utility companies and others. According to Gould, “[s]uch a wholesale grant of ROWs is not appropriate . . . .” SOR at 11. BLM notes in response that “[a]lthough the language of the BLM’s decision may, at first blush, confuse the issue of whether any entity other than Thornburgh is granted a, ROW, the decision makes clear, consistent with the analysis in the EA, that all utility companies must apply for an ROW for their lines.” Answer at 10. BLM is correct. It is clear from the face of the ROW grant that the grant is made only to Thornburgh. AR 15 at 1.

We therefore reject Gould’s arguments based on the ROW grant itself.

*Conclusion*

Gould has not carried her burden to demonstrate, with objective proof, that BLM's committed a clear error of law or demonstrable error of fact, or failed to consider a substantial environmental question of material significance to the proposed action.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is affirmed.

\_\_\_\_\_/s/\_\_\_\_\_  
Geoffrey Heath  
Administrative Judge

I concur:

\_\_\_\_\_/s/\_\_\_\_\_  
Christina S. Kalavritinos  
Administrative Judge