



BACKCOUNTRY AGAINST DUMPS, *ET AL.*

179 IBLA 148

Decided May 14, 2010



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

BACKCOUNTRY AGAINST DUMPS, *ET AL.*

IBLA 2009-153

Decided May 14, 2010

Appeal from a Record of Decision of the State Director, California, Bureau of Land Management, approving the granting of two electrical transmission project rights-of-way and related activity on public lands. CACA-47658 & CACA-47658-01.

Affirmed.

1. Environmental Quality: Environmental Statements--Federal Land Policy and Management Act of 1976: Rights-of-Way--National Environmental Policy Act of 1969: Environmental Statements--Rights-of-Way: Applications

BLM properly grants a right-of-way for an electrical transmission line and related activity, following preparation of an environmental impact statement, where, in accordance with section 102(2)(C) of the National Environmental Policy Act of 1969, it has taken a hard look at the potential significant environmental consequences of doing so, and reasonable alternatives thereto. BLM's decision will be affirmed where the appellant does not demonstrate, with objective proof, that BLM failed to consider a substantial environmental problem of material significance to the proposed action.

2. Federal Land Policy and Management Act of 1976: Rights-of-Way--Rights-of-Way: Applications--Rights-of-Way: Conditions and Limitations

BLM exercises broad discretionary authority, under Title V of the Federal Land Policy and Management Act of 1976, in granting a right-of-way for an electrical transmission line. To overturn such a decision, the burden is on an appellant to demonstrate, by a preponderance of the evidence, that BLM committed a material error in its factual analysis or that the decision

generally is not supported by a record showing that BLM gave due consideration to all relevant factors, and acted on the basis of a rational connection between the facts found and the choice made.

3. Endangered Species Act of 1973: Generally--Endangered Species Act of 1973: Consultation

Where BLM prepares a biological assessment and consults with the U.S. Fish and Wildlife Service with regard to threatened and endangered species present in the area subject to electrical transmission rights-of-way and related activity, and FWS prepares a biological opinion concluding, *inter alia*, that the proposed action is not likely to jeopardize the continued existence of a threatened and endangered species, BLM has met its obligations under section 7 of the Endangered Species Act of 1973.

4. National Historic Preservation Act: Generally--National Historic Preservation Act: Applicability

In approving rights-of-way for electrical transmission lines and related activity, BLM may adopt a phased approach to compliance with section 106 of the National Historic Preservation Act, as long as no surface disturbing activity will occur until after the section 106 process is complete.

APPEARANCES: Stephan C. Volker, Esq., Joshua A.H. Harris, Esq., and Bridget A. Roberts, Esq., Oakland, California, for Backcountry Against Dumps, *et al.*; Sean P. Krispinsky, Esq., Janice M. Schneider, Esq., Damon P. Mamalakis, Esq., Patricia Guerrero, Esq., and Elizabeth Johnson Klein, Esq., Washington, D.C., and Michael R. Niggli, Chief Operating Officer, San Diego Gas & Electric Co., San Diego, California, for San Diego Gas & Electric Co.; Erica L.B. Niebauer, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Sacramento, California, and James Wesley Abbott, Acting State Director, California State Office, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE M^cDANIEL

Backcountry Against Dumps (Backcountry) and others have appealed from a January 20, 2009, Record of Decision (ROD) for the Sunrise Powerlink Transmission Project and Associated Amendment to the applicable 2008 Eastern San Diego County

Resource Management Plan (RMP) of the State Director, California, Bureau of Land Management (BLM).¹ The ROD approved granting two rights-of-way (ROWs), CACA-47658 and CACA-47658-01, across public lands to the San Diego Gas & Electric Company (SDG&E) for the Sunrise Powerlink Transmission Project (SPTP or Project), under Title V of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1761-1771 (2006). It was based on an October 13, 2008, Final Environmental Impact Report (EIR) and Environmental Impact Statement (EIS) (combined: EIR/EIS).²

Because Backcountry has failed to establish any error of law or fact in the ROD, we will affirm BLM's decision to approve the granting of ROWs to SDG&E for an electrical transmission line and related activity for the SPTP.³

¹ The appeal, docketed as IBLA 2009-153, was filed by Backcountry, Protect Our Community Foundation (POCF), East County Community Action Coalition (ECCAC), and Donna Tisdale. By order dated July 14, 2009, we dismissed POCF and ECCAC from the appeal for lack of standing. Backcountry is a community organization comprised of individuals and families, including Tisdale, who "resid[e] in the Boulevard region of Eastern San Diego County." Notice of Appeal at 2. We will, henceforth, refer to the remaining two appellants, collectively, as "Backcountry." In our July 14 order, we granted San Diego Gas & Electric Company's motion to intervene.

By orders dated June 23, and July 20, 2009, we dismissed two other appeals challenging the ROD, filed by Katheryn Rhodes and Conrad Hartsell (collectively, Rhodes) (IBLA 2009-154) and the Viejas Band of Kumeyaay Indians (Viejas), a Federally recognized Indian tribe (IBLA 2009-155).

² The EIR/EIS was a joint document that sought to comply with the Federal and State environmental review requirements of, respectively, section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(2)(C) (2006) (EIS), and the California Environmental Quality Act (CEQA), Cal. Pub. Res. Code, §§ 21000-21177 (West 2009) (EIR).

³ BLM's January 2009 decision to approve the Project has been in effect since issuance, by reason of 43 C.F.R. § 2801.10(b), and the Board's July 14, 2009, order denying Backcountry's petition to stay. On Feb. 17, 2010, Backcountry and others filed a Complaint for Declaratory and Injunctive Relief concerning the Project in U.S. District Court for the Eastern District of California. So far as we are aware, no court hearing or action on the complaint has occurred.

I. Background

A. Proposed Project

SDG&E originally proposed to construct, operate, maintain, and terminate three electrical transmission lines, a 500 kilovolt (kV) transmission line and two 230 kV transmission lines, for a total distance of approximately 150 miles across Federal, State, San Diego County, City of San Diego, and private lands in southern California. The transmission lines, substations, access roads, and other associated facilities would run from SDG&E's Imperial Valley Substation, near the City of El Centro, in Imperial County, within the Imperial Valley, westward through San Diego County to the City of San Diego. The Project, as first proposed, was to follow a northern route, ending at the existing Penasquitos Substation near the coast of California, and would involve the construction of one new substation (Central East). As finally approved, the Project will follow a southern route, terminating at the existing Sycamore Substation, over 12 miles further inland, and will involve the construction of one new substation (Modified Route D Alternative Substation) approximately 93 miles from the starting point of the Project. *See* ROD at 3.

The overall project was intended by SDG&E to accomplish the following three major objectives:

- (1) to bring renewable energy resources to San Diego County from Imperial County by providing access to remote areas with the potential for significant development of renewable energy sources; (2) to improve electric reliability within the San Diego area by providing additional [electrical] transmission during peak loading and for the region's growing economy; [and] (3) . . . to reduce congestion and power supply costs of delivering electricity to ratepayers.

ROD at 1; *see* EIR/EIS at ES-23 to ES-24; SDG&E Motion to Intervene and Opposition to Request for Stay (Opposition) at 1, 4; SDG&E Answer at 1.

SDG&E explains that the City of San Diego, the Nation's eighth largest city, "is connected to the state power grid by only one major line (500 kV) built over 25 years ago (the Southwest Powerlink [Transmission Line])," rendering the City vulnerable in the event of loss or damage to that line. Opposition at 4. It also notes that electricity demand has doubled since the Southwest Powerlink line was built, resulting in a determination that "the [San Diego] area has a projected reliability deficit in as early as 2010." *Id.*; *see id.* at 28; SDG&E Motion to Strike at 24-27; SDG&E Answer at 8 (citing Declaration of Jan Strack, Grid Planning, Regulatory and Economics Manager, ¶7, at 3 (California Public Utilities Commission (CPUC) finds reliability deficit as of 2014, if not sooner)); Statement of Reasons (SOR) at 21. SDG&E states that,

considering these circumstances, the Board of Governors of California Independent System Operator (CAISO),⁴ “unanimously approved” the Project on August 4, 2006, in order to help relieve congestion where generated electricity exceeds the capacity of the transmission system. Opposition at 4.

SDG&E also explains that the Project is needed to reduce reliance on fossil fuel-generated electricity, by tapping into the “vast renewable energy resources” of Imperial Valley. Opposition at 5; *see id.* at 26; SDG&E Motion to Strike at 28; EIR/EIS at 2-31 to 2-39. SDG&E notes that the Project would assist in achieving the aim, mandated by State law or policy, of having renewable energy resources provide 20% of all electricity generated in the State by 2010, and 33% by 2020. *See* Opposition at 5. It further states that it has committed, as a matter of policy, to contract for the transmission of 33% renewable energy by 2020, by “purchas[ing] electricity from renewable resource energy sources *before* purchasing energy from fossil fuel based producers” and other means. Opposition at 25 (citing Declaration of Mike McClenahan, Director of Procurement and Portfolio Design for SDG&E, ¶7, at 2); *see* SDG&E Motion to Strike at 22; SDG&E Answer at 9-10 (citing McClenahan Declaration, ¶11, at 3-4). “The CPUC Decision states that it will hold SDG&E to these commitments.” SDG&E Answer at 10; *see* CPUC Decision at 173, 263-65.

On November 2, 2005, as amended August 3, 2007, SDG&E filed an application for an ROW for portions of the Project on public lands administered by BLM. The 500 kV line and the two 230 kV transmission lines would traverse, respectively, a total of approximately 31.4 and 1.2 miles of public land in Imperial and San Diego Counties. *See* EIR/EIS at ES-13 to ES-15. SDG&E also submitted an application (06-08-010) on December 14, 2005, as amended August 4, 2006, to CPUC for a Certificate and permission to build the Project.

Much of the proposed SPTP transmission line (approximately 140.9 miles) would consist of overhead lines strung 700 to 1,600 feet, between approximately 800 50- to 160-foot-tall lattice steel towers, and a series of tubular steel poles, steel H-frame structures, or wood/steel overhead-to-underground transition structures. *See* EIR/EIS at B-29, B-42 (Table B-1 (Proposed Structure Configuration)), B-51. At each site, an area (approximately 100 by 100 feet) would generally be cleared for construction of a tower or pole from materials transported to the site by truck, using a concrete foundation consisting of one to four 4- to 10-foot-diameter holes drilled into the ground 10 to 40 feet. *See id.* at B-51 to B-53. The tower or pole would be hoisted into position by a truck-mounted crane. Following erection of the towers and poles, the transmission line would be strung, and then pulled and tensioned, using pulling sites, of 1 to 2 acres, situated every 1 to 4 miles along the ROW. *See id.* at

⁴ SDG&E states that CAISO is “a not-for-profit public-benefit corporation . . . operating [most] of California’s high-voltage wholesale power grid.” Answer at 8.

B-53. In the case of the 9.1 miles of underground line, trenches approximately 3 to 7 feet wide and 6 feet deep would be dug, duct banks and vaults installed, the trenches backfilled and compacted, and the transmission line run. *See id.* at B-54 to B-56.

Prior to construction of the transmission line, staging areas for construction material and equipment would be created at intervals along the route, each consisting of a 4- to 15-acre area cleared of vegetation and, if necessary, graded with a layer of rock, to create an all-weather surface. *See EIR/EIS* at B-69. Access to tower/pole sites would be afforded, where possible, by existing roads and the creation of a total of over 102 miles of new roads generally 14 feet wide in the Project area. *See id.* at B-48 to B-49. Temporary roads and work areas would be removed, and the disturbed lands restored following construction of the transmission line, and all permanent roads would be gated to restrict vehicular access to authorized personnel. *See id.* at B-49, B-69.

B. Environmental Impact Report/Environmental Impact Statement

In order to assess the potential environmental impacts of constructing, operating, maintaining, and terminating the new electrical transmission line, associated facilities, and alternatives thereto, BLM and CPUC⁵ prepared a Draft EIR/EIS on January 3, 2008, after extensive public scoping beginning on August 31, 2006. 71 Fed. Reg. 51848 (Aug. 31, 2006). The Draft EIR/EIS specifically considered 27 alternatives, including 22 alternative route segments along the proposed Project route for the transmission line, as well as 2 non-transmission-line alternatives,⁶ incorporating components of the Lake Elsinore Advanced Pumped Storage (LEAPS) Project, and a No Project/No Action alternative.⁷ *See EIR/EIS* at

⁵ BLM acted as the lead agency in the preparation of the EIS, with the assistance of the Cleveland National Forest, Forest Service, U.S. Department of Agriculture; the Marine Corps Air Station Miramar, U.S. Department of Defense; and the Bureau of Indian Affairs, U.S. Department of the Interior, acting as cooperating agencies. CPUC acted as the lead agency in the preparation of the EIR, with the assistance of the Anza-Borrego Desert State Park, California Department of Parks and Recreation, acting as a cooperating agency.

⁶ These alternatives would involve the generation of electricity near the City of San Diego (the In-Area Renewable Generation Alternative and the In-Area All-Source Generation Alternative).

⁷ BLM also briefly addressed, but eliminated from detailed consideration, 70 other alternatives because they did not meet basic Project objectives, were not feasible for technical, economic, or other reasons, and/or did not substantially lessen or avoid

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ES-38. These alternatives primarily consisted of (1) the proposed and other northern routes, which would take a more northerly course west of the Imperial Valley Substation; (2) southern routes, which would take a more southerly course west of the Imperial Valley Substation; and (3) electrical generation system alternatives near the City of San Diego, requiring much shorter transmission lines.

BLM and CPUC also prepared a Recirculated Draft EIR/Supplemental Draft EIR/EIS on July 11, 2008, in order to address significant new information received during a 90-day public comment period on the Draft EIR/EIS. Following the submission of numerous public comments during a 45-day public comment period on the Supplemental Draft EIR/EIS, a Final EIR/EIS was issued on October 13, 2008.⁸

In the course of their environmental review, BLM and CPUC compared the various route segment alternatives, north and south of the proposed route, and, as a result, derived a composite Environmentally Superior Northern Route Alternative and a composite Environmentally Superior Southern Route Alternative. These were then compared with the LEAPS Transmission-Only Alternative to determine a Best Overall Transmission Alternative, which was compared with two non-transmission-line alternatives in order to determine an overall Environmentally Superior Alternative. See EIR/EIS at ES-42 to ES-43.

In the EIR/EIS, BLM and CPUC declared a Final Environmentally Superior Southern Route Alternative, involving a total of approximately 123 miles of transmission line (114.5 miles overhead and 8.3 miles underground) to be their

⁷ (...continued)

any significant environmental effects of the proposed Project. See EIR/EIS at ES-39 to ES-40.

⁸ The EIR/EIS was deemed to consist of the Draft EIR/EIS and Supplemental Draft EIR/EIS, as revised in response to comments. See EIR/EIS at ES-2 to ES-3. The revised Draft EIR/EIS consists of 12 sections (labeled A through L), and the revised Supplemental Draft EIR/EIS consists of 5 sections (labeled 1 through 5). We will generally cite to the "EIR/EIS," which will include citing to the revised Draft EIR/EIS since it is denoted as the Final EIR/EIS. However, we will cite to the Supplemental Draft EIR/EIS, in the case of the revised Supplemental Draft EIR/EIS, since it is not denoted as the Final EIR/EIS. We will also cite to the 14 appendices of the EIR/EIS and the 2 appendices of the Supplemental Draft EIR/EIS, each of which is generally paginated with the prefix "App.," followed by the number of the appendix and the page number (e.g., "Ap.1-1").

Preferred Alternative.⁹ See EIR/EIS at ES-5, ES-8, H-2. This alternative would involve one 500 kV and two 230 kV transmission lines that would traverse, respectively, a total of approximately 46.53 and 2.31 miles of public land in Imperial County and San Diego County. See ROD at 3; Declaration of Jonathan Woldemariam, Technical Project Manager for SDG&E's Project, ¶4, at 1-2, Ex. 1 (Map of Environmentally Superior Southern Route, dated Apr. 2, 2009). Of the nearly 49 miles across public lands, the first 36 miles of the Project route, traveling west from the Imperial Valley Substation and through Imperial County and into San Diego County, would cross public lands "generally parallel[ing] the existing Southwest Powerlink 500 kV line." SDG&E Answer at 12; see ROD at 1, 3, 20; EIR/EIS at ES-6. The SPTP and Southwest Powerlink lines would be "separated by an average of 400 feet." EIR/EIS at E.1.14-1; see *id.* at E.1.1-2, Ap.1-187; ROD at 7, 20. The first 36 miles would also generally parallel U.S. Interstate 8. SDG&E Answer at 2; see EIR/EIS at E.1.1-1, E.1.1-2, E.1.14-1. The Project would involve erecting a total of approximately 245 transmission towers, as well as constructing helicopter pads, each encompassing approximately 0.43 acres, and access roads, encompassing a total of approximately 42.16 acres, on public lands.

BLM and CPUC concluded that the proposed Project would result in 52 significant, unmitigable impacts on the human environment (*see* ROD at 14) and, by comparison, that the Preferred Alternative would result in 41 significant, unmitigable impacts. EIR/EIS at ES-6, ES-30 to ES-36.

C. Compliance with Endangered Species Act

BLM consulted with the U.S. Fish and Wildlife Service (FWS), regarding adverse effects to plant and animal species listed as threatened and endangered (T&E) under the Endangered Species Act of 1973 (ESA), 16 U.S.C. §§ 1531-1543 (2006). See Biological Opinion (BiOp), dated Jan. 16, 2009, at 4. Consultation concerned two T&E plant and eight T&E wildlife species known to occur along the Preferred Route and their proposed and designated critical habitat.¹⁰ *Id.* at 3-4.

⁹ Herein, we will refer to the Final Environmentally Superior Southern Route Alternative as the "Preferred Alternative," and to the route adopted in the Preferred Alternative as the "Preferred Route" or the "Selected Route." One of the principal advantages of the Preferred Route is that, unlike the originally proposed and other northern routes, it would entirely avoid crossing the Anza-Borrego Desert State Park. See ROD at 13.

¹⁰ The list includes: San Bernardino Bluegrass (*Poa atropurpurea*), San Diego Thornmint (*Acanthomintha ilicifolia*), Laguna Mountains Skipper (*Pyrgus ruralis lagunae*), Quino Checkerspot Butterfly (QCB) (*Euphydryas editha quino*), Arroyo
(continued...)

The proposed and designated critical habitat principally at issue is for PBS and QCB. See Biological Assessment (BA), dated Oct. 2008, at 95, 98, 105, 107, 114, 126, 128; BiOp at 3. Request for Stay (Request) at 2. The Preferred Route runs a total of close to 13 miles across designated critical habitat for PBS, where it appears to exactly follow the existing Southwest Powerlink transmission line along Interstate 8 near the Imperial and San Diego County line, and would temporarily and permanently disturb, respectively, a total of 113 and 30.6 acres of such habitat. See 66 Fed. Reg. 8650, 8668 (Feb. 1, 2001); 74 Fed. Reg. 17288 (Apr. 14, 2009); EIR/EIS at ES-12 (Fig. ES-4); BA at 141, Fig. 16. West of the County line, the Preferred Route crosses very little of the critical habitat in San Diego County.

Critical habitat for the QCB was originally designated effective May 15, 2002, in Riverside and San Diego Counties, California. See 67 Fed. Reg. 18356 (Apr. 15, 2002). It was substantially revised, effective July 17, 2009, reducing the total acreage from approximately 171,605 acres to approximately 44,299 acres. See 74 Fed. Reg. 28776 (June 17, 2009). The route, which runs a total of about 5 miles across the designated critical habitat, would temporarily and permanently disturb, respectively, a total of 39.7 and 15.6 acres of such habitat. See BA at 96, Fig. 9.

In accordance with FWS protocol, BLM provided for avoiding, minimizing, and offsetting the adverse effects of crossing designated PBS and QCB critical habitat by, *inter alia*, completing field surveys, prior to any construction activities; prohibiting any construction activities during 9 months of every year (January through September) (in the case of the PBS); avoiding the siting of any temporary or permanent impacts within 0.6 miles of any known or newly discovered occurrences (in the case of the QCB); restoring temporarily disturbed habitat; and compensating for the loss of any critical habitat on a temporary or permanent basis, by requiring SDG&E to acquire and preserve suitable habitat for PBS and QCB in the vicinity of the lost habitat. See BA at 19, 26-28, 31-33; BiOp at 96-99, 140-41; ROD at D-14 to D-15, D-18 to D-20, D-64.

On November 5, 2008, BLM provided to FWS a BA dated October 2008, prepared by SDG&E and approved by BLM. BLM concluded that the Preferred Route was likely to adversely affect 10 T&E species and their designated critical habitat, requiring formal consultation with FWS. See BA at 1, 87. On January 16, 2009, FWS issued a BiOp (FWS-2008BO423-2009-F0097), concluding that the Project was likely to adversely affect 6 of the 10 T&E species (San Diego Thornmint, QCB, Arroyo Toad,

¹⁰ (...continued)

Toad (*Bufo californicus*), Southwestern Willow Flycatcher (*Empidonax traillii extimus*), Least Bell's Vireo (*Vireo bellii pusillus*), Coastal California Gnatcatcher (*Poliioptila californica californica*), Peninsular Bighorn Sheep (PBS) (*Ovis canadensis nelsoni*), and Stephens' Kangaroo Rat (*Dipodomys stephensi*). BiOp at 3.

Least Bell's Vireo, Coastal California Gnatcatcher, and PBS), and their designated critical habitat, but not the remaining 4 T&E species (San Bernardino Bluegrass, Laguna Mountains Skipper, Southwestern Willow Flycatcher, and Stephens' Kangaroo Rat), or their designated critical habitat. *See* BiOp at 3. However, it concluded that, given compliance with various requirements, including pre-construction surveys, post-construction monitoring, avoidance/minimization measures, and compensatory measures, the Project would not jeopardize the continued existence of any of the adversely affected species, or destroy or adversely modify their designated critical habitat. *See id.* at 2, 61, 72, 75, 85-86, 102-03, 115-16, 146, App. A & B.¹¹

D. Compliance with National Historic Preservation Act

BLM also initiated formal consultation with the State Historic Preservation Officer (SHPO) on March 13, 2007, in compliance with the requirements of the National Historic Preservation Act (NHPA), 16 U.S.C. §§ 470-470x-6 (2006).¹² On December 23, 2008, BLM and the SHPO, along with other signatories, entered into a Programmatic Agreement (PA) pursuant to 36 C.F.R. § 800.14(b), adopting a phased approach to compliance with section 106 of NHPA, 16 U.S.C. § 470 f (2006), pursuant to 36 C.F.R. §§ 800.4(b)(2), 800.5(a)(3), and 800.6(b) and (c), which would be concluded "prior to any Notice to Proceed and specific project implementation." PA at 2; *see* ROD at 9; EIR/EIS at D.7-14.¹³

¹¹ As part of the BiOp, FWS also issued an Incidental Take Statement (ITS) concluding that Project construction, but not operations and maintenance, would generally result in an incidental taking of QCB, PBS, Arroyo Toad, Least Bell's Vireo, and Coastal California Gnatcatcher. *See* BiOp at 146-49. FWS stated that the incidental taking was not prohibited by sections 4(d) and 9(a) of the ESA, 16 U.S.C. §§ 1533(d) and 1538(a) (2006), given compliance with reasonable and prudent measures and associated terms and conditions, identified or to be identified during the siting of transmission towers and related construction activity. FWS established incidental take thresholds that were not to be exceeded in the case of Project construction. No incidental taking was permitted in the case of Project operations and maintenance.

¹² By letter dated Oct. 2, 2008, the Advisory Council on Historic Preservation (ACHP) declined a Sept. 12, 2008, invitation to participate in the consultation.

¹³ Such compliance would involve preparation and implementation by BLM, in consultation with the SHPO and other signatories to the PA, of an "Historic Properties Management Plan" (HPMP), which would, *inter alia*, establish the Area of Potential Effect (APE) for the selected route alternative and outline procedures for completing the identification and evaluation of historic properties within the APE, for assessing the effects of the undertaking on historic properties, and for avoiding or minimizing
(continued...)

E. CPUC Decision

On December 18, 2008, following 8 weeks of regulatory hearings, CPUC issued a final decision granting permission to build the Project, and approving issuance of a Certificate to SDG&E for the Project. It adopted the Preferred Alternative, based on the substantial benefits to be derived from providing “a more robust southern California transmission system, long-term improvement of California’s aging energy infrastructure, and insurance against unexpected high load growth in SDG&E’s service area.” CPUC Decision at 270. The CPUC determined that the Preferred Alternative would facilitate the achievement of renewable procurement goals within a reasonable period of time, with the greatest economic benefits and the lowest environmental cost, and would outweigh the significant unavoidable impacts of going forward with construction, maintenance, and operation of the Project.

F. BLM Record of Decision

In the January 2009 ROD, the State Director approved the Project, to the extent it crosses BLM-administered public land.¹⁴ See ROD at 1, 5. He adopted the Preferred Alternative, concluding that it met all of the Project objectives, including facilitation of renewable energy development in Imperial Valley, and was “technically, legally and regulatorily feasible.” *Id.* at 12; see *id.* at 1, 3, 11-14. The State Director deemed the Preferred Alternative to be environmentally preferable, because it was shorter than the Final Environmentally Superior Northern Route Alternative; would be located, for the most part, “in close proximity to other proposed and existing electrical transmission lines within existing utility corridors”; and would share access roads and otherwise minimize surface disturbance. *Id.* at 13. He also noted that, while the Preferred Alternative would have significant and

¹³ (...continued)

such effects, prior to any Project construction. PA at 2, 5-7. The HPMP was to be prepared following selection of a route alternative in the EIR/EIS, and thus after adoption of the ROD, but “prior to issuance of any Notice to Proceed and the onset of approved activity related to the implementation of the Undertaking on [F]ederal lands.” *Id.* at 6; see *id.* at 7.

¹⁴ The ROD contained two decisions, each dated Jan. 20, 2009. The first approved the granting of the two ROWs for the Project, and was appealable to the Board. See ROD at 7-8. The second approved the amendment of the applicable RMP, to include a one-time exception, allowing the transmission line and associated facilities to deviate from a designated utility corridor on public lands. See *id.* at 6. The decision to approve the RMP amendment was not subject to review by the Board. See 43 C.F.R. § 1610.5-2; *Rainer Huck*, 168 IBLA 365, 396 (2006); *Oregon Natural Resources Council Action*, 148 IBLA 186, 190 (1999).

unmitigable impacts to biological resources, visual resources, wilderness and recreation, agricultural resources, cultural resources, noise, air quality, and fire and fuels management, “all of the other major alternatives considered would also have significant and unmitigable impacts.” *Id.* at 14.

Adoption of the Preferred Alternative was made subject to a comprehensive list of 126 mitigation measures, set forth as Appendix A to the ROD, as well as those set forth in FWS’ BiOp and BLM/SHPO’s PA. *See* ROD at 3, 7, 8; BLM Answer at 29. The State Director concluded that these mitigation measures will “significantly minimize and/or mitigate environmental damage and protect resources.” ROD at 3; *see id.* at 26.

BLM granted ROW CACA-47658 for a term of 50 years (subject to renewal), effective February 24, 2009. The ROW authorizes SDG&E to construct, operate, maintain, and terminate the three 500 kV and 230 kV electrical transmission lines on the public-land portion of the Project.¹⁵ The ROW provides that actual construction of the transmission line and associated facilities must await BLM’s issuance of a Notice to Proceed or other written authorization. ROW (CACA-47658), § 4.i., at 3. Such authorization will not be issued if BLM finds that SDG&E “has failed to comply with any applicable local, state, and Federal ordinances, regulations, statutes, and laws,” and, thereafter, any “construction, operation, and maintenance” of the Project must remain in compliance. *Id.*, §§ 4.i. and 4.m., at 3, 4. Further, construction, operation, maintenance, and termination of the ROW is to be in conformance with a Plan of Development, “which shall incorporate the Sunrise Powerlink Record of Decision (ROD), Programmatic Agreement for management of cultural resources, the USFWS Biological Opinion, and other documents and/or permits as determined by the [BLM] Authorized Officer.” *Id.*, § 4.d.(2), at 2. Finally, noncompliance with any term or condition of the ROW “will be grounds for an immediate temporary suspension of activities if it constitutes a threat to public health and safety or the environment.” *Id.*, § 4.q., at 4.

SDG&E states that it now expects to have the Project constructed and in-service by June 2012. In order to fully undertake the work necessary to ensure that the transmission line is properly sited and designed, as required by the mitigation measures, SDG&E indicates that it will need to procure structures, materials, and equipment, and to apply for other appropriate permits for the Project. SDG&E does not expect to begin substantial construction until June 2010.

¹⁵ BLM also granted to SDG&E a second ROW, CACA-47658-01, for a term of 2 years (subject to renewal), effective Feb. 24, 2009, authorizing the use of temporary work areas encompassing a total of 214.77 acres of public land, in connection with construction of the public-land portion of the Project. Such areas would be reclaimed to BLM’s satisfaction within 120 days after construction of the transmission line.

Opposition at 2, 14-15; *see id.* at 6 n.9, 13-15 (citing Woldemariam Declaration, ¶¶8-9, 11-12, at 2-3), 20 (citing Woldemariam Declaration at ¶30, at 10); SDG&E Motion to Strike at 6-7 (citing Supplemental Woldemariam Declaration, dated May 20, 2009 (Ex. A attached to Motion to Strike), ¶23, at 6).

G. Appeal

Backcountry challenges BLM's approval of the Project on several bases. The process leading to issuance of the EIR/EIS violates section 102(2)(C) of NEPA, 42 U.S.C. § 4332(2)(C) (2006), Backcountry argues, because the EIR/EIS does not contain an accurate and clear description of the Selected Route and its impacts (SOR at 23-26); fails to establish a need for the Project (SOR at 27-29); and does not adequately address the environmental impacts of the Project (SOR at 29-52). Backcountry asserts that approval of the Preferred Alternative violates sections 504 and 505 of FLPMA, 43 U.S.C. § 1764 and 1765 (2006), because it will not limit the environmental damage of the Project (SOR at 43-47). According to Backcountry, BLM failed to comply with section 7 of the ESA, 16 U.S.C. § 1536(a)(2) (2006), because the BA prepared by BLM was inadequate and served to undermine BLM's consultation with FWS regarding T&E species and their habitat (SOR at 47-52). Finally, Backcountry claims that BLM's approval of the ROWs violates section 106 of the NHPA, 16 U.S.C. § 470f (2006), because BLM failed to comply with the public participation requirements of the statute (SOR at 53-55). We address Backcountry's arguments below, and conclude that Backcountry has failed to meet its burden to demonstrate that BLM violated NEPA, FLPMA, ESA, or NHPA.

II. Analysis

A. National Environmental Policy Act of 1969

1. Standard of Review

[1] Section 102(2)(C) of NEPA requires a Federal agency to prepare a "detailed statement" addressing the potential environmental impacts of a proposed action and alternatives thereto in the case of any major Federal action that "significantly affect[s] the quality of the human environment." 42 U.S.C. § 4332(2)(C) (2006). It is well established that the statute does not mandate the particular substantive results of agency decisionmaking, but rather imposes procedural obligations on the agency, which require that the agency *and* the public be fully informed of the environmental consequences when the agency exercises its substantive discretion to approve a proposed action. "If the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs, [in deciding to go forward with the proposed action]."

Robertson v. Methow

Valley Citizens Council, 490 U.S. 332, 350 (1989). As we stated in *Oregon Natural Resources Council*, 116 IBLA 355, 361 n.6 (1990):

[Section 102(2)(C) of NEPA] does not direct that BLM take any particular action in a given set of circumstances and, specifically, does not prohibit action where environmental degradation will inevitably result. Rather, it merely mandates that whatever action BLM decides upon be initiated only after a full consideration of the environmental impact of such action.

The adequacy of an EIS must be judged by whether it constitutes a “detailed statement” that took a “hard look” at all of the potential significant environmental consequences of the proposed action and reasonable alternatives thereto, considering all relevant matters of environmental concern. *Center for Biological Diversity*, 162 IBLA 268, 275 (2004) (quoting 42 U.S.C. § 4332(2)(C) (2006), and *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976)), and cases cited. The EIS must contain “a ‘reasonably thorough discussion of the significant aspects of the probable environmental consequences’” of the proposed action and alternatives thereto. *State of California v. Block*, 690 F.2d 753, 761 (9th Cir. 1982) (quoting *Trout Unlimited v. Morton*, 509 F.2d 1276, 1283 (9th Cir. 1974)). In deciding whether an EIS adequately addresses the environmental consequences of a proposed action so that the decision-maker may be fully informed, a “rule of reason” will be employed. *County of Suffolk v. Secretary of Interior*, 562 F.2d 1368, 1375 (2d Cir. 1977); *Northern Alaska Environmental Center*, 153 IBLA 253, 256 (2000).

An appellant challenging a BLM decision to approve construction and operation of an electrical transmission line and related activity, following preparation of an EIS, must carry its burden to demonstrate by a preponderance of the evidence, with objective proof, that BLM failed to adequately consider a substantial environmental question of material significance to the proposed action, or otherwise failed to abide by section 102(2)(C) of NEPA. *Concerned Citizens for Nuclear Safety*, 175 IBLA 142, 150 (2008); *Rural Alliance for Military Accountability*, 163 IBLA 131, 135 (2004); *Colorado Environmental Coalition*, 142 IBLA 49, 52 (1997). The appellant must make an “affirmative showing that BLM failed to consider a substantial environmental question of material significance,” and cannot simply “pick apart a record with alleged errors and disagreements.” *Arizona Zoological Society*, 167 IBLA 347, 357-58 (2006) (quoting *In re Stratton Hog Timber Sale*, 160 IBLA 329, 332 (2004)).

Where, in assessing significant impacts, BLM properly relies on the professional opinion of its technical experts concerning matters within the realm of their expertise, which is reasonable and supported by record evidence, an appellant challenging such reliance must demonstrate, by a preponderance of the evidence,

error in the data, methodology, analysis, or conclusion of the experts. *Fred E. Payne*, 159 IBLA 69, 77-78 (2003). A mere difference of opinion, even of expert opinion, will not suffice to show that BLM failed to fully comprehend the nature or scope of the significant impacts. *Id.* at 78; see *Concerned Citizens for Nuclear Safety*, 175 IBLA at 154 (“Mere differences of opinion about the likelihood or significance of environmental impacts provide no basis for overturning BLM’s decision”).

2. Clarity of EIR/EIS

First, Backcountry contends BLM violated section 102(2)(C) of NEPA because the EIR/EIS is “fundamentally confused.” SOR at 23. In Backcountry’s view, the EIR/EIS fails to provide decisionmakers and the public with a clear understanding of the Project by clearly and concisely describing the route ultimately selected by BLM, and the particular impacts of that route, as required by 40 C.F.R. § 1502.1, but erroneously refers throughout to the “proposed action,” which was ultimately rejected. *Id.*

We disagree. The record shows that BLM prepared the EIR/EIS using clear language and that its environmental analysis is readily understandable and amenable to proper consideration by the appropriate governmental agencies and by the public. See 40 C.F.R. § 1502.8; e.g., *Oregon Environmental Council v. Kunzman*, 817 F.2d 484, 493-94 (1987). BLM has complied with 40 C.F.R. § 1502.10, which specifies that the agency must provide a “clear presentation of the alternatives including the proposed action,” but may use “any appropriate format.” It is clear that the Selected Route for the Project, *i.e.*, the Preferred Alternative, is a composite of various segments of other alternatives, each of which is identified and described in the EIR/EIS. See EIR/EIS at ES-5 to ES-6, ES-8, ES-12, ES-12 (Fig. ES-4), ES-64 to ES-74; Supplemental Draft EIR/EIS at 5-4 to 5-6; ROD at 3; BLM Answer at 35; SDG&E Answer at 2-5.

In general, the process of identifying the Preferred Alternative was fairly straightforward. BLM identified an Interstate 8 Alternative, which essentially followed the Interstate westerly from the Imperial Valley Substation, linking up with the “last leg of the [Final] Environmental[ly] Superior Northern Route Alternative,” and three other southern route alternatives (BCD Alternative, Route D Alternative, and Modified Route D Alternative) that would afford alternatives for “major sections of the Interstate 8 Alternative.” EIR/EIS at ES-64. The Interstate 8 Alternative and its alternatives each spawned a number of revisions or options “that would alter small sections of the alternatives in order to address issues specific to the alternative.”¹⁶ *Id.*

¹⁶ The Interstate 8 Alternative, involved 10 route options (Buckman Springs Underground, West Buckman Springs, South Buckman Springs, Campo North,

(continued...)

Comparing all these alternatives and their revisions/options resulted in identification of the Preferred Alternative which “combine[d] parts of the Interstate 8 Alternative and its options with the other southern route alternatives and their options.” *Id.*; see ROD at 4-5, n.1; EIR/EIS at ES-45.

In accordance with 40 C.F.R. § 1502.14, BLM then denoted the Preferred Alternative as the preferred alternative in the EIR/EIS, and it was ultimately the Selected Route in the ROD. See EIR/EIS at ES-8, H-2; ROD at 3. BLM further notes that “[a]ll alternatives are summarized and compared in DEIR/EIS Section H, Comparison of Alternatives, including all of the alternative routings[.]” Answer at 35. It also states that “[m]aps depicting the locations of the various alternative transmission routings, including right-of-way corridors, tower locations, roads, pulling sites, etc. are included in the EIS in Appendix 11.” *Id.*; see ROD at 8.

Two uncertainties appear to be of primary concern to Backcountry: (1) SDG&E will attempt to secure easements allowing it to use the Interstate 8 Alternative where it goes from the McCain Valley Road, across the Campo Reservation, to the eastern end of the Modified Route D Alternative, thereby eliminating most of the BCD Alternative Revision and BCD South Option Revision; and (2) SDG&E intends to use the Modified Route D Alternative and then the Interstate 8 Alternative, placing part of the transmission line underground, beneath the eastern end of Alpine Boulevard, where it parallels Interstate 8, south of the Viejas Reservation, thereby eliminating the Star Valley Option. See SOR at 24-25. Neither of these scenarios are certain to transpire, facts that were fully disclosed in the EIR/EIS.¹⁷ Both the Interstate 8 Alternative and the Modified Route D Alternative were discussed in the EIR/EIS, and were considered to be environmentally

¹⁶ (...continued)

Chocolate Canyon, Chocolate Canyon Option Revision, Jacumba SWPL Breakaway Point Reroute, Highway 67 Hansen Quarry Reroute, High Meadows Reroute, and SWPL Archaeological Site Reroute). See EIR/EIS at C-52 to C-54, E.1.1-1, E.1.1-4 to E.1.1-8, E.1.1-11; ROD at 20-22. The BCD Alternative had 3 route options (BCD Alternative Revision, BCD South Option, and BCD South Option Revision); the Route D Alternative did not have any route options; and the Modified Route D Alternative had 5 route options (Star Valley Option, Star Valley Option Revision, Cameron Reroute, Western Modified Route D Alternative Reroute, and Pacific Crest Trail Reroute). See EIR/EIS at ES-38, ES-41 (Figure ES-10 (Alternatives Retained)), ES-43 to ES-44, C-55, C-57 to C-59, E.2.1-1 to E.2.1-3, E.4.1-1 to E.4.1-5, E.4.1-7; ROD at 22-25. These alternatives and revisions/options were considered in the Draft EIR/EIS or the Supplemental Draft EIR/EIS.

¹⁷ See EIR/EIS at ES-5 to ES-6, n.2, ES-12 (Fig. ES-4), H-2, H-117 to H-118; Supplemental Draft EIR/EIS at 5-4 to 5-5.

preferable.¹⁸ We find nothing violative of NEPA where the selected route consists of a particular route that will be replaced by a more preferable route should that route become available in the future, and the impacts of both routes are fully disclosed in the EIR/EIS.

Backcountry argues that the EIR/EIS prevents BLM and the public from “comprehend[ing] the nature and scope of the project’s environmental impacts.” SOR at 25. Backcountry complains that the EIR/EIS “does not contain a summary of the impacts of the *selected* project”; that “the analyses of the impacts of the selected route are scattered throughout the EIS,” including the Draft EIR/EIS, Supplemental Draft EIR/EIS, and Final EIR/EIS; and that such scattering is “impermissibl[e].” SOR at 25-26. However, Backcountry points to no requirement in section 102(2)(C) of NEPA or its implementing regulations that specifically requires BLM, having identified a preferred action comprised of parts of various alternatives separately considered in the EIR/EIS, to summarize in one place all impacts of the various parts before deciding whether to approve that preferred option. We find that the EIR/EIS clearly identified and described the Selected Route and, in clearly denoted sections, it thoroughly analyzed the potential significant impacts of the proposed action and alternatives thereto, which were compiled to create the Preferred Alternative ultimately selected in the ROD.

As SDG&E properly notes, “[t]o ‘discern a complete picture of the impacts of the selected route,’ the reader need only review the relatively short Executive Summary for a description of the [Final] Environmentally Superior Southern Route Alternative and then review the sections of the EIS that provide the impact analysis.” Answer at 24 (quoting SOR at 25). We are not convinced that a comprehensive summary of all of the impacts of the entire Selected Route, while helpful, is required where all of these impacts are already fully and accurately discussed in connection with each of the segments that make up the selected route. *See, e.g., County of Bergen v. Dole*, 620 F. Supp. 1009, 1021, 1035-37, 1059-60 (D. N.J. 1985), *aff’d*, 800 F.2d 1130 (3rd Cir. 1986).

Backcountry has not satisfied its burden to demonstrate that the EIR/EIS ignores, overlooks, or errs in its consideration of any specific likely impact. It is not sufficient to simply allege that the EIR/EIS, by its nature, generally failed to consider or to adequately consider likely impacts because the discussion of impacts is spread throughout the EIR/EIS. Thus, we conclude that, from the standpoint of the various resource impacts, the EIR/EIS provided an adequate basis for comparing the relative merits of the Selected Route, drawn from the discussion of the various segments

¹⁸ *See* EIR/EIS at E.1.1-11 (Fig. E.1.1-1, Fig. E.1.1-2b (MPs I8-23 to 48), and Fig. E.1.1-2d (MPs I8-72 to 92.7)), E.1.2-1 to E.1.15-38, E.4.1-7 (Fig. E.4.1-1a and Fig. E.4.1-1d (MPs MRD-22 to 36.3)), E.4.2-1 to E.4.15-17; ROD at 4-5.

making up that route, with the merits of the corresponding segments not adopted. See EIR/EIS at ES-78 to ES-83, H-1 to H-2, H-78 to H-118.

3. Purpose and Need for Project

Backcountry argues that BLM violated section 102(2)(C) of NEPA by failing to “show *any* need for the project” (“current conditions making the project necessary”), or to “support its . . . purpose with scientifically verifiable evidence.” SOR at 27.

BLM is required, by 40 C.F.R. § 1502.13, to include in an EIS a “statement” that “shall briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action.” The purpose and need are defined by the ROW applicant, not BLM. See *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 199 (D.C. Cir.), cert. denied, 502 U.S. 994 (1991) (“An agency cannot redefine the goals of the [applicant’s] proposal”); *Oregon Chapter Sierra Club*, 176 IBLA 336, 349 (2009). Further, the statement of purpose and need is required since it defines the range of alternatives to be considered in the EIS. See *Northern Alaska Environmental Center*, 153 IBLA at 263-64.

Backcountry argues that NEPA’s implementing regulations require that the purpose and need must be supported by scientifically verifiable evidence, which it finds lacking. SOR at 28; see *id.* 27-29. The regulations cited by Backcountry, 40 C.F.R. §§ 1502.1 and 1502.24, pertain to the analysis of environmental impacts of the proposed action and alternatives, not the statement of purpose and need. See *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d at 199; *Oregon Chapter Sierra Club*, 176 IBLA at 349. In pertinent part, the EIS must only “specify” the purpose and need, and do so in a “brief” manner. 40 C.F.R. § 1502.13. There is no requirement that the statement of purpose and need be objectively verifiable or supported by scientifically verifiable evidence, or that the EIS must *prove* that a project serves a particular purpose or there exists a particular need for the project. See *County of Bergen v. Dole*, 620 F. Supp. at 1041-43, 1058-59.

Here, the purpose and need for the project is discussed in the Draft EIR/EIS, which states that “[t]he need for this project . . . is not *evaluated* in the EIR/EIS and is not *determined* within the context of the environmental review process.” EIR/EIS at 2-70 (emphasis added). The EIR/EIS states that the Project is intended to meet the need for additional electricity in the City of San Diego on a reliable basis at a reduced cost, capable of withstanding anticipated increases in demand and decreases in supply. See EIR/EIS at A-5 to A-7; ES-23; BLM Answer at 38. The “problem that the project will rectify” is the absence of an adequate supply of electricity to reliably meet future demand in the City by 2014, if not sooner, which was identified by SDG&E and fully reviewed and approved by CPUC. SOR at 27. The fact that such demand is

only projected, based on likely future circumstances, does not render the purpose or need for the Project any less real, or worthy of being met.

Backcountry offers evidence disputing the likelihood of such demand. However, we regard such evidence as reflecting a difference of opinion regarding whether there exists a need for the Project.¹⁹ The fact that the expected demand may be satisfied by means other than the proposed SPTP, which are defined as alternatives in the EIR/EIS, does not detract from the fact that the EIR/EIS identifies a need. Thus, the fact that such demand may be met by energy savings and local energy generation, using renewable and/or non-renewable sources, and not requiring the proposed SPTP, does not undercut, but rather supports, the existence of a need for the Project. *See Powers Declaration*, ¶¶15-22, at 9-11. Nothing offered by Backcountry undermines the fact that the EIR/EIS provides *a statement briefly specifying both the purpose and need for the Project*, in compliance with 40 C.F.R. § 1502.13.

4. Adequacy of Environmental Analysis

Backcountry contends that BLM violated section 102(2)(C) of NEPA because it failed to adequately address the likely impacts of the Project, specifically referring to growth-inducing impacts, increased risk of wildfires, biological impacts, climate change, impacts to viewsheds, impacts to the rural character and quality of life of areas traversed by the transmission line, impacts to wilderness and associated recreational resources, impacts associated with increased public access, and impacts to groundwater. As we discuss below, we find no NEPA violation.

Backcountry argues that BLM failed to address the growth-inducing impacts likely to result from increased electrical transmission capacity in southern California, such as the “construction of power generation plants,” both renewable and non-renewable, and “development that would utilize the power,” all of which will then impact the surrounding areas. SOR at 29-30. BLM was required, by NEPA’s implementing regulations, to consider the potential indirect effects of the Project, which are those generally “caused by the action,” and which are “later in time or farther removed in distance, but . . . still reasonably foreseeable.” 40 C.F.R. § 1508.8; *see* 40 C.F.R. § 1508.25. They include “growth inducing effects and other

¹⁹ Backcountry offers, along with its SOR, the Apr. 27, 2009, Declaration of Bill Powers, a registered professional mechanical engineer with extensive experience in electrical generation systems and regional energy planning. Powers disputes BLM’s conclusion that the SPTP is needed to meet electrical demand in the City by 2010. *See Powers’ Declaration*, ¶¶5, 6, 9-13, at 4, 5-8. Powers’ conclusions were rejected by CPUC, CAISO, and BLM, and their analysis stands unrebutted by Backcountry. *See SDG&E Motion to Strike* at 24-27.

effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.” 40 C.F.R. § 1508.8.

BLM’s consideration of growth-inducing impacts of the proposed Project was limited to the effects associated with Sempra Generation’s La Rumorosa wind energy project, Stirling Energy Systems’ solar project, and the Esmeralda geothermal project, because they were the only future power generation increases that were reasonably expected to result from the Project. *See* EIR/EIS at F-28 to F-31, 3-1620 to 3-1621. BLM did not consider effects associated with community development of urban and rural areas that were likely to be caused by the Project’s added transmission capacity, since the Project, by itself, was not expected to cause an increase in community development: “Growth in the Proposed Project areas is expected to occur with or without implementation of the Proposed Project.” *Id.* at F-31; *see id.* at F-30. Backcountry has failed to show that any power generation plants, not considered by BLM, would be built or that any urban or rural development would occur as a consequence of the Project, and thus should have been addressed in the EIR/EIS.

Contrary to Backcountry’s argument, we find that BLM adequately considered the likely increased risk of wildfires associated with the proposed route, including segments of the Selected Route, and other component routes that comprise the SPTP, *e.g.*, the risk associated with construction, operation, and maintenance of the transmission line,²⁰ potential wind farm development,²¹ and the hazard posed to aerial wildfire fighting by the overhead transmission line.²² Backcountry does not offer any argument or supporting evidence disclosing a particular impact attributable to the increased risk of wildfires that are likely to result from the Project, any wind farms that may be developed along the route, or the hazard to aerial wildfire fighting efforts posed by the transmission line that the EIR/EIS should have, but failed to discuss. *See* SOR at 31.

Backcountry argues that BLM did not clearly identify the likely biological impacts of the Interstate 8 Alternative on four special status species, the PBS, QCB, Golden eagle, and Arroyo toad, especially since the actual route has yet to be designed and sited, and did not analyze the likely impacts of other segments of the

²⁰ *See* EIR/EIS at 2-49 to 2-58, D.15-64, E.1.15-18 to E.1.15-32, E.2.15-1 to E.2.15-13, E.4.15-7 to E.4.15-16.

²¹ *See* EIR/EIS at E.5-12 to E.5-22, E.5-251 to E.5-256, 3-703 to 3-704; Supplemental Draft EIR/EIS at 2-158 to 2-164; SOR at 43.

²² *See* EIR/EIS at D.15-64 to D.15-65, E.1.15-21, E.1.15-25 to E.1.15-26, E.2.15-4, E.2.15-8, E.4.15-9, E.4.15-14 to E.4.15-15.

Selected Route on those species.²³ See SOR at 34-35. The record shows otherwise. BLM considered the likely impacts to the four species along the Interstate 8 Alternative and the likely presence of the four species along the BCD Alternative and the Modified Route D Alternative, and it addressed the likely impacts to such species. BLM ultimately decided to adopt the Preferred Route, composed of these various segments, fully aware that there would be significant unavoidable impacts to biological resources. See ROD at 14. Backcountry does not offer any argument or supporting evidence disclosing a particular impact to any of the four special status species likely to occur as a consequence of the Project that the EIR/EIS should have, but failed, to discuss.

We find no deficiency in the environmental analysis resulting from BLM's reliance on a preliminary project design, based on the likely design and siting of the towers/poles and transmission line across the Project area, with the specific impacts to be fully realized only once the line is actually designed and sited. Nor do we find a violation of NEPA in the proposal to determine the exact placement of the towers and poles and other project details at the time of actual construction of the transmission line. Backcountry has not identified any such deficiency. The ROD makes clear that final design and siting will take place only after the conclusion of surveys, in accordance with specific criteria and coordinated with appropriate mitigation to avoid, minimize, or offset any adverse environmental impacts to all special status species, including the four named species. See ROD at D-14 to D-15, D-18 to D-21, D-23 to D-24, D-26; EIR/EIS at ES-79, 2-76 to 2-78; *County of Bergen v. Dole*, 620 F. Supp. at 1061. Backcountry offers no argument or supporting evidence that such efforts will not ensure that no significant impact not already addressed in the EIR/EIS is likely to occur.

Backcountry argues that BLM failed to adequately address greenhouse gas (GHG) emissions associated with "fossil-fueled plants whose power the project may transmit," and the resulting effect on global climate change. SOR at 36. While renewable energy resources, which may be transmitted by the SPTP line, are in the process of being developed or planned, we find no indication that particular fossil-fuel electrical generating plants are planned or even proposed. Thus, the EIR/EIS was not required to address the GHG emissions that are likely to be produced by new plants, or any corresponding effect on global climate change. See CPUC Decision at 7-8 (expressing its agreement with this finding); *Bristlecone Alliance*, 179 IBLA 51, 81-88 (2010). In the local area, BLM expected the SPTP to reduce the generation of electricity by fossil-fuel plants, and consequently GHG emissions, given its ability to transmit renewable energy, but admitted that it could not reliably predict the extent to which the SPTP line would carry renewable, versus

²³ The Golden eagle is not a designated T&E species. See 50 C.F.R. § 17.11; EIR/EIS at E.1.2-11.

fossil-fuel, generated electricity. See EIR/EIS at D.11-50 to D.11-52, 2-45. BLM predicted an overall net increase in GHG emissions, attributable to the increased emissions of construction, operation, and maintenance of the Project, offset by the decreased emissions of fossil-fuel power plants. See *id.* at D.11-47 to D.11-55, E.1.11-3, E.2.11-3, E.4.11-3 to E.4.11-5, 2-44 to 2-46. Although Backcountry speculates that new fossil-fuel power plants “may” be built, it offers no supporting evidence identifying any proposed or planned increase in fossil-fuel energy development that may take advantage of the new transmission line or any convincing argument establishing error or deficiency in BLM’s GHG emissions analysis. SOR at 36, 43-45; Request at 16; see *Bristlecone Alliance*, 179 IBLA at 81-88.

Backcountry argues that BLM failed to adequately address the visual impacts of the Selected Route, rather than the proposed route, given that the Selected Route is “miles away and has far different elevations, topographic features, and visual impacts.” SOR at 38. However, it is again important to note that the Selected Route is a composite route, composed of various segments whose visual impacts were addressed elsewhere in the EIR/EIS. See EIR/EIS at E.1.3-1 to E.1.3-24, E.1.3-27 to E.1.3-47, E.2.3-1 to E.2.3-16, E.4.3-1 to E.4.3-12, E.4.3-16 to E.4.3-23. We disagree with Backcountry’s claim that BLM’s analysis does not constitute a “thorough, clear, and concise discussion of visual impacts of the chosen route,” and find no NEPA deficiency simply because the EIR/EIS did not discuss the route “as a whole,” rather than as constituent segments. SOR at 38. BLM ultimately adopted the Preferred Route, composed of these various segments, fully aware that there would be a significant unavoidable impact to visual resources. See ROD at 14. Backcountry offers no argument or supporting evidence disclosing a particular visual impact likely to result from the Project that the EIR/EIS should have discussed, but failed to do so.

Backcountry argues that BLM failed to adequately address impacts to the rural character and quality of life of areas traversed by the SPTP line because the EIR/EIS focused on the impacts of the proposed route, noting that “most” of the Selected Route does not run near an existing transmission line, and “will dramatically degrade the rural character and quality of life in backcountry communities.” SOR at 39-40. In looking at the ROD, however, it is clear that much of the Selected Route runs near an existing transmission line, which certainly already detracts from the rural character and quality of life. See ROD at 13; EIR/EIS at Appendix 11C (Maps). Further, the EIR/EIS adequately addressed likely impacts to the rural character and quality of life of the Selected Route in its discussion and photographs of impacts of the proposed route, which contains segments of the Selected Route, and the remaining segments of the Selected Route discussed elsewhere in the EIR/EIS.²⁴ In

²⁴ See EIR/EIS at D.3-11 to D.3-15, D.3-39 to D.3-51, D.5-1 to D.5-3, D.5-24 to D.5-28, D.6-5 to D.6-6, D.6-15 to D.6-21, D.14-2 to D.14-5, D.14-19 to D.14-29,

(continued...)

addressing the impacts to visual resources, wilderness and recreational resources, agricultural resources, and the socioeconomic characteristics of the lands traversed by the transmission line, BLM confirms the rural character and quality of life of that area. Backcountry provides no convincing argument or supporting evidence demonstrating that BLM's analysis regarding rural values was in error or deficient. It certainly presents nothing to support its allegation that the SPTP, which predominantly constitutes a single transmission line strung across the landscape, between widely-spaced towers/poles, will result in the "industrialization" of all or part of Eastern San Diego County. Request at 14.

Backcountry argues that BLM failed to adequately address impacts to wilderness and associated recreational use likely to result from "industrial-scale development in a naturally pristine landscape." SOR at 40. In the EIR/EIS, BLM adequately addressed the likely impacts to wilderness and associated recreational use of the Selected Route in its discussion of impacts of the proposed route, which contains segments of the Selected Route, and separate discussion of the remaining segments of the Selected Route. See EIR/EIS at D.5-1 to D.5-3, D.5-24 to D.5-28, E.1.5-1 to E.1.5-15, E.2.5-1 to E.2.5-5, E.4.5-1 to E.4.5-7. BLM also provided for mitigating adverse impacts to wilderness and associated recreational use owing to the temporary loss of access during construction activities, and the permanent changes to the landscape occasioned by the Project. See ROD at D-34 to D-36. Backcountry provides no convincing argument or supporting evidence demonstrating that the SPTP is likely to affect wilderness and associated recreational use in ways not addressed in the EIR/EIS, or that BLM erred in its analysis.

Backcountry argues that BLM failed to adequately address impacts associated with public access to "remote areas" adjacent to the transmission line caused by new roads built for use in connection with ongoing maintenance of the line. SOR at 41. Backcountry asserts that gates used to deny access to new roads would be "routinely circumvent[ed]" by off-road vehicle (ORV) users. *Id.* BLM acknowledged the possibility that ORV users will gain unauthorized access to public lands by way of Project roads, and provided, where appropriate, for gating, signing, and increasing law enforcement patrols. See EIR/EIS at B-49, E.1.5-7, E.2.5-3 to E.2.5-4, E.4.5-5, 3-306, 3-377, 3-1605, Ap.12-3, Ap.12-14; ROD at D-2, D-7. Backcountry offers no evidence that there is likely to be any significant impact arising from ORV or other

²⁴ (...continued)

E.1.3-1 to E.1.3-25, E.1.3-27 to E.1.3-47, E.1.5-1 to E.1.5-15, E.1.6-1 to E.1.6-16, E.1.14-1 to E.1.14-10, E.2.3-1 to E.2.3-16, E.2.5-1 to E.2.5-5, E.2.6-1 to E.2.6-8, E.2.14-1 to E.2.14-7, E.4.3-1 to E.4.3-12, E.4.3-16 to E.4.3-23, E.4.5-1 to E.4.5-7, E.4.6-1 to E.4.6-10, E.4.14-1 to E.4.14-6, E.4.14-9 to E.4.14-13.

public use of the new roads that BLM failed to adequately address in the EIR/EIS. Nor does Backcountry offer any evidence that the new roads remaining after construction of the Project are likely to result in a “dramatic” increase in public use of “previously inaccessible areas[.]” Request at 15.

Finally, Backcountry argues that BLM failed to adequately address adverse impacts to groundwater from increased energy and other development caused by the Project that will obtain water from the underground basins crossed by the transmission line. SOR at 41-42; Request at 15. To the contrary, however, we conclude that BLM adequately addressed the likely impacts to surface and groundwater from increased energy development and other associated development along the Selected Route, to the extent it is caused by, connected to, or cumulative of the Project, within the meaning of 40 C.F.R. §§ 1508.7, 1508.8, and 1508.25. *See Defenders of Wildlife*, 156 IBLA 1, 6-9 (2000); EIR/EIS at D.12-71 to D.12-83, G-130 to G-131, G-136 to G-138, G-151 to G-152, G-154. Backcountry offers no evidence to show any likely significant impact to groundwater that is not adequately addressed in the EIR/EIS. Backcountry fails to identify any energy or related development that BLM should have considered, or how such development was likely to result in any significant impact to groundwater not adequately addressed.

In general, in order to establish a violation of section 102(2)(C) of NEPA, it is insufficient to simply assert that the EIR/EIS failed to adequately address a likely significant impact to some general aspect of the human environment, without specifying the particular impact, and, above all, offering some objective proof that the impact is reasonably likely to occur. *Concerned Citizens for Nuclear Safety*, 175 IBLA at 150. In this respect, Backcountry failed to successfully challenge the EIR/EIS.

5. *Connected Actions*

Backcountry contends that BLM violated section 102(2)(C) of NEPA because it failed to consider the likely impacts of connected actions, specifically the “McCain Valley wind farm projects,” including the Crestwood (or Kumeyaay) Wind Project and the Iberdrola Pacific Wind Project. SOR at 43.

BLM is required by section 102(2)(C) of NEPA and its implementing regulation, 40 C.F.R. § 1508.25, to consider the environmental impacts of a proposed action and any other action that is “connected” to the proposed action, by virtue of the fact that (1) the proposed action automatically triggers the other action; (2) the proposed action cannot or will not proceed unless the other action is taken previously or simultaneously; or (3) the proposed action and the other action are interdependent parts of a larger action and depend on the larger action for their

justification. However, actions that have “independent utility,” *i.e.*, where there exists sufficient justification for each action such that it may proceed without the other, are generally not connected actions. *See, e.g., Great Basin Mine Watch*, 146 IBLA 248, 251 (1998); *Concerned Citizens for Responsible Mining (On Reconsideration)*, 131 IBLA 257, 266 (1994). Moreover, as SDG&E properly asserts in its Opposition at 65, “future, hypothetical projects” will not be considered connected actions; and an EIS “need only focus on the impact of the particular proposal at issue and *other pending or recently approved proposals that might be connected to or act cumulatively with the proposal at issue.*” *National Wildlife Federation v. Federal Energy Regulatory Commission*, 912 F.2d 1471, 1478 (D.C. Cir. 1990) (emphasis added, invoking *Kleppe v. Sierra Club*, 427 U.S. at 410 n. 20).

BLM did not regard any of the McCain Valley wind farm projects, including Crestwood and Iberdrola, as connected actions within the meaning of 40 C.F.R. § 1508.25. *See Answer at 58-60; EIR/EIS at 2-32, 2-36 to 2-39.* The Crestwood project has already been built and, while the Iberdrola project is planned, it is proposed for connection to the existing Boulevard-Crestwood 69kV transmission line or 500 kV Southwest Powerlink line, rather than the SPTP line. *See EIR/EIS at G-78.* As BLM and SDG&E correctly note, Backcountry cites to “no actual proposal” for a wind farm. In neither case is there any indication that the SPTP automatically triggered the project, that the SPTP can or will not proceed unless the project is developed, or that the SPTP and the project are interdependent parts of any larger action. *See SDG&E Opposition at 66 (“[T]hese projects can take place regardless of whether Sunrise [Powerlink] is built”). SDG&E Opposition at 65; see BLM Answer at 60; SDG&E Answer at 51; EIR/EIS at 2-32, 2-36 to 2-39; Request at 16.*

In any event, the most salient aspect of any of these projects is that they would be located in the McCain Valley, just north of the Selected Route of the SPTP line, where it parallels the existing Southwest Powerlink line. The McCain Valley wind farm projects are expected by BLM, absent the SPTP, to be connected to that line. *See EIR/EIS at ES-12 (Fig. ES-4), 2-36 to 2-37, E.5-12 to E.5-13.* Because the record reflects that “Imperial Valley renewable energy” can be delivered over the existing Southwest Powerlink line, we are persuaded that the SPTP line and the wind farm projects may proceed without each other, and thus have independent utility. Powers Declaration, ¶14, at 8. Further, the SPTP line affords additional transmission capability for renewable energy projects in Imperial County, which appear to be dependent on such capacity, and will likely proceed absent the McCain Valley wind farm projects. Also, there is no evidence that the SPTP line and the wind farm projects are interdependent parts of a larger action. The fact that energy from these projects, and other renewable energy projects, may be transmitted over the SPTP line

to the City of San Diego, making them generally part of the overall effort to provide the City with renewable energy, does not mean that they are connected actions.

The overall purpose of the regulation is to ensure that “closely related” actions which may have cumulatively significant impacts, and “therefore should be discussed in the same [EIS],” 40 C.F.R. § 1508.25(a)(1), are not improperly segmented into separate actions, each having less than significant impacts, thus “overlook[ing] or, worse, deliberately ignor[ing]” their *cumulatively significant impacts*. *Haines Borough Assembly*, 145 IBLA 14, 22 (1998) (citing *Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 298 (D.C. Cir. 1987)). Backcountry recognizes, however, that the EIR/EIS did consider the contribution of the McCain Valley wind farm projects, specifically the Crestwood and Iberdrola projects, to the cumulative effects of the SPTP. See SOR at 44; EIR/EIS at G-73, G-78, G-87, G-105, G-114 to G-117, G-119 to G-120, G-150 to G-155, 3-702 to 3-703. Backcountry offers no argument or evidence that any cumulative impact is likely to be ignored or overlooked were the SPTP line and any of the identified wind farm projects to be considered separately. SOR at 44.

Since Backcountry has failed to establish that there is any “pending or recently approved proposal[]” for any McCain Valley wind farm project, we conclude that those projects are not connected actions within the meaning of 40 C.F.R. § 1508.25(a)(1) that BLM was required to consider in the EIR/EIS. *National Wildlife Federation v. Federal Energy Regulatory Commission*, 912 F.2d at 1478; see also, e.g., *Missouri Coalition for the Environment*, 172 IBLA 226, 247 (2007); *Concerned Citizens for Responsible Mining (On Reconsideration)*, 131 IBLA at 265-66; *Southern Utah Wilderness Alliance*, 122 IBLA 165, 168-69 (1992).

6. Cumulative Impacts

Backcountry contends BLM violated section 102(2)(C) of NEPA by failing to consider the cumulative impacts of the Project together with “Sempra’s cross border transmission line,” new substations along the SPTP line, McCain Valley wind farm projects, “large-scale solar and geothermal energy projects,” and “expansion of LNG [liquified natural gas]-based energy development in Mexico.” SOR at 47, 48. It asserts that BLM merely catalogues impacts, rather than offering “some quantified or detailed information” regarding such impacts. *Id.* at 46 (quoting *Klamath-Siskiyou Wildlands Center v. BLM*, 387 F.3d 989, 993 (9th Cir. 2004)).

BLM is required by section 102(2)(C) of NEPA and its implementing regulations to consider the potential cumulative impacts of a proposed action. 40 C.F.R. § 1508.25; see, e.g., *Muckleshoot Indian Tribe v. U.S. Forest Service*, 177 F.3d 800, 809-10 (9th Cir. 1999); *Howard B. Keck, Jr.*, 124 IBLA 44, 53 (1992), *aff’d*, *Keck*

v. Haste, No. S92-1670-WBS-PAN (E.D. Cal. Oct. 4, 1993). Such impacts are those which result from the incremental impact of the proposed action “when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions.” 40 C.F.R. § 1508.7. BLM is not required to consider the cumulative impacts of a proposed action and *speculative*, or not reasonably foreseeable, future actions. *See, e.g., California Wilderness Coalition*, 176 IBLA 93, 107-08 (2008).

BLM considered likely cumulative impacts in the EIR/EIS, including the impacts of Sempra Energy’s cross border transmission line (connecting the La Rumorosa wind project to the Southwest Powerlink transmission line), the new Jacumba substation (located at the connection of the cross border line and Southwest Powerlink lines), and the Crestwood and Iberdrola wind farm projects in the McCain Valley. *See, e.g., EIR/EIS at G-73, G-78, G-87, G-105, G-108 to G-155; SDG&E Answer at 55-56, n.33 (“The Jacumba[] substation is the only contemplated new substation”)*.

Backcountry refers to a number of other projects or activities that may be facilitated by the SPTP as being physically linked to the SPTP transmission line because they will generate electricity that may be carried by the line. However, it fails to offer any argument or supporting evidence demonstrating that, owing to geographic proximity or any other factor, there is likely to be *an interaction between the Project and any other reasonably foreseeable future projects or activities* that is likely to result in a specific cumulative impact that BLM failed to address. *Wyoming Outdoor Council*, 147 IBLA 105, 109 (1998). In order to demonstrate a deficiency in BLM’s cumulative impacts analysis, “it is not sufficient merely to note the existence of other . . . projects . . . without concretely identifying the adverse impacts caused by such other . . . projects to which the action being scrutinized will add.” *National Wildlife Federation*, 150 IBLA at 399. Because this is precisely what Backcountry has done (*see SOR at 47-49; Request at 17*), we conclude that it has failed to establish, by convincing argument or supporting evidence, that BLM failed to adequately address the likely cumulative impacts of the Project, together with other reasonably foreseeable future projects or activities.

7. Reasonable Range of Alternatives

Backcountry contends that BLM violated section 102(2)(C) of NEPA because it failed to consider a reasonable range of alternatives to the proposed action. It argues that BLM should have considered two alternatives, one that would transmit a specified percentage of renewable energy and another that would place the entire 123-mile length of the transmission line underground. *See SOR at 49*.

BLM is required by section 102(2)(C) of NEPA and its implementing regulations to rigorously explore and objectively evaluate all *reasonable* alternatives to the proposed action. Reasonable alternatives are those that will accomplish the intended purpose, are technically and economically feasible, and yet have a lesser or no impact, by virtue of avoiding or minimizing the adverse effects of the proposal. 42 U.S.C. § 4332(2)(C) (2006); 40 C.F.R. §§ 1500.2, 1501.2, 1502.1, and 1502.14.

The Project was basically intended to transmit electrical power to the City of San Diego from Imperial County and elsewhere, thereby serving the future needs of the City at a reduced cost. While the aim of the Project was also to generally “promot[e]” the development of “renewable energy” sources in the County, and it was reasonably expected that renewable energy would be developed as a consequence of building the SPTP transmission line, the Project was not intended to transmit a particular type of energy. SOR at 49; *see* EIR/EIS at D.11-50 to D.11-52, 2-31 to 2-39, 2-42 to 2-43, 2-45. BLM, therefore, properly declined to consider the alternative of specifying the renewable energy generated component of electricity transmitted by the Project, since it did not serve one of the specific purposes of the proposed action. *See, e.g., Northern Alaska Environmental Center*, 153 IBLA at 263-64.

Nor was BLM required to consider an alternative whereby the entire 123-mile-long transmission line would be placed underground. BLM briefly considered such an alternative, eliminating it from detailed consideration. *See* EIR/EIS at Ap.1-266 to Ap.1-267 (All Underground 230 kV or 500 kV Alternative). It did so because the alternative was considered neither technically nor economically feasible, noting that it had found no example in the past where such an alternative had been deemed to be viable. *See* EIR/EIS at Ap.1-266 to Ap.1-267, 4-624, 4-627. While Backcountry considers BLM’s determination to be “conclusory” and without any “evidentiary support,” it offers no evidence rebutting BLM’s determination. SOR at 51. BLM satisfied the requirement by “briefly discuss[ing] the reasons” for eliminating this alternative from detailed study. 40 C.F.R. § 1502.14; *see, e.g., Save Medicine Lake Coalition*, 156 IBLA 219, 246 (2002), *aff’d sub nom., Pit River Tribe v. BLM*, 306 F. Supp.2d 929 (E.D. Cal. 2004), *rev’d on other grounds*, 469 F.3d 768 (9th Cir. 2006); *Defenders of Wildlife*, 152 IBLA at 9. Thus, Backcountry failed to show that BLM did not consider any reasonable alternative to the proposed Project.

8. Impacts to Cleveland National Forest

Backcountry contends that BLM violated section 102(2)(C) of NEPA because it failed to adequately consider the likely impacts of the Project on the Cleveland National Forest given that the Selected Route crosses approximately 19 miles of the

National Forest. Deviations from the “conservation goals and requirements” of the applicable Land Management Plan (LMP) may require a “major amendment” of the LMP. SOR at 51; *see id.* at 51-55. However, the ultimate determination of whether the Project requires amendment of the Forest Service’s LMP before the Project is approved is within the province of the Forest Service, and beyond the authority of this Board. *See Missouri Coalition for the Environment*, 172 IBLA at 237; *Colorado Environmental Coalition*, 125 IBLA 210, 218-20 (1993). Our review extends to whether BLM has properly discharged its independent NEPA responsibility to consider the environmental impacts of the Project, including the issue of LMP conformance. *Colorado Environmental Coalition*, 125 IBLA at 220-22.

The EIR/EIS fully addressed the question of whether and to what extent the Project deviates from the LMP concerning, *inter alia*, land use zones standards for sensitive species, fire prevention, riparian conservation, and heritage resources, possible conflicts between the proposed action and its alternatives, and the objectives of Federal land use plans, such as the LMP, as required by 40 C.F.R. § 1502.16. In addition, considerable effort was made by BLM and CPUC, in consultation with SDG&E and the Forest Service, to route the SPTP, which basically skirts the edges of the National Forest, so as to avoid areas of the National Forest incompatible with an electrical transmission line and/or access roads. Through this effort, BLM and CPUC sought to ensure conformance with the LMP and to avoid or minimize adverse impacts on National Forest lands and resources. *See* ROD at 12-13, 22-23; EIR/EIS at ES-12 (Fig. ES-4), E.2.1-2, E.2.1-3 (Fig. E.2.1-3), E.4.1-1, E.4.1-5, App. 12; Supplemental Draft EIR/EIS at 3-23 to 3-26, 3-32 to 3-34, 3-36 to 3-38; SDG&E Answer at 42-50. Further, the EIR/EIS addressed likely impacts in light of conformance with the LMP. We conclude that Backcountry has failed to establish that BLM did not properly consider any aspect of the Project situated on National Forest lands, in light of LMP requirements, or any environmental impacts resulting from deviation from the LMP that should have been considered in the EIR/EIS. *See* BLM Answer at 72-77.

B. Federal Land Policy and Management Act of 1976

[2] BLM exercises broad discretionary authority under Title V of FLPMA, 43 U.S.C. §§ 1761-1771 (2006), to grant ROWs, including ROWs for systems generating, transmitting, or distributing electric energy, and to establish the appropriate terms and conditions for ROW grants. A BLM decision approving or rejecting an ROW application will ordinarily be affirmed by the Board when the record shows it to be a reasoned analysis of the factors involved with due regard for the public interest. *See, e.g., Union Telephone Company, Inc.*, 173 IBLA 313, 327 (2008); *Tom Cox*, 142 IBLA 256, 257-58 (1998). To overturn such a decision, the

burden is on an appellant to demonstrate, by a preponderance of the evidence, that BLM committed a material error in its factual analysis, or that the decision generally is not supported by a record showing that BLM gave due consideration to all relevant factors, and acted on the basis of a rational connection between the facts found and the choice made. *Santa Fe Northwest Information Council, Inc.*, 174 IBLA 93, 104 (2008); *Echo Bay Resort*, 151 IBLA 277, 281 (1999). This burden is not satisfied simply by expressions of disagreement with BLM's analysis or conclusion. *Tom Cox*, 142 IBLA at 258; *Larry Griffin*, 126 IBLA 304, 308 (1993).

Backcountry contends that in approving the Project BLM failed to follow sections 504 and 505 of FLPMA, 43 U.S.C. §§ 1764 and 1765 (2006), which require that an ROW be designed "to limit to the extent feasible the damage of the proposed project[.]" SOR at 56. It again asserts that BLM should have: (1) required that "a certain percentage" of the SPTP line capacity be committed to the transmission of electricity generated by renewable energy sources to ensure that the environmental degradation serves a "greater good"; (2) required most, if not all, of the SPTP line be placed underground to reduce environmental impacts; and (3) adopted a non-transmission-line alternative that would generate renewable energy closer to the City of San Diego and avoid all of the impacts of the SPTP line to "desert resources." SOR at 57; *see id.* at 57-58. Backcountry notes that BLM is not permitted "to ignore options that would minimize environmental degradation because of the costs to private parties and difficulty in implementation." SOR at 56 (quoting *Trout Unlimited v. U.S. Department of Agriculture*, 320 F. Supp.2d 1090, 1108 (D. Colo. 2004)).

BLM concluded that both alternatives for generation closer to the San Diego area (the New In-Area All-Source Generation Alternative and the New In-Area Renewable Generation Alternative) were "environmentally superior to all of the transmission alternatives evaluated in the EIR/EIS because the impacts of both of these alternatives would be confined to specific areas and, in the case of the New In-Area All-Source Generation Alternative, would create impacts in more developed areas." ROD at 13. However, BLM determined that neither alternative would satisfy all of the Project objectives, and would not reduce the congestion in the system for delivering electricity to the City of San Diego or the costs of supplying electricity to SDG&E ratepayers. *Id.*; *see* EIR/EIS at 2-2 to 2-19, Ap.1-270 to Ap.1-307. Backcountry fails to demonstrate any error in BLM's rejection of these two alternatives.

BLM will be deemed to have satisfied FLPMA's multiple-use management obligation, even where its approval of a project may result in adverse environmental impacts, when the decision constitutes a rational exercise of BLM's authority.

See *Biodiversity Conservation Alliance*, 174 IBLA 1, 5-8 (2008). While the SPTP was designed to facilitate renewable energy development, BLM declined to specify the percentage of renewable energy carried since it could not predict the extent to which such development would occur and when such energy would be available for transport. See, e.g., EIR/EIS at 2-45. It also declined to require that the line be placed entirely underground, given the prohibitive costs. See, e.g., EIR/EIS at Ap.1-266. BLM thus provides a rational basis for its decisions, and Backcountry fails to offer any reason to conclude that BLM acted in an arbitrary or capricious fashion.

Backcountry further argues that BLM failed to abide by section 503 of FLPMA, 43 U.S.C. § 1763 (2006), which requires that ROWs on public lands be “co-located to the extent feasible,” by not co-locating the SPTP line in the existing Southwest Powerlink ROW. SOR at 59. However, under section 503, BLM is not required to co-locate separate facilities in a common ROW, but may do so as an exercise of its discretionary authority. See *Northern Alaska Environmental Center*, 153 IBLA at 272; *Paul Herman*, 146 IBLA 80, 105 (1998). The applicable regulation, 43 C.F.R. § 2802.10(b), provides that “[s]afety and other considerations may limit the extent to which you may share a right-of-way.”

Here, the SPTP is essentially to be co-located with the Southwest Powerlink line on public lands along its first 36 miles. See ROD at 1. Further, the record is clear that BLM briefly considered co-locating the SPTP line with the Southwest Powerlink line, either in whole or in part, beyond the point where the SPTP line diverges from the Interstate 8 Alternative, near the San Diego/Imperial County line.²⁵ See EIR/EIS at Ap.1-183, Ap.1-184 (Fig. Ap.1-27c (Southwest Powerlink Alternatives Eliminated)), Ap.1-212 to Ap.1-214, Ap.1-218 to Ap.1-219, Ap.1-235 to Ap.1-237. However, BLM declined this alternative because it would not further the Project aim of promoting reliable electrical service, since a wildfire occurring along the line would disrupt electrical transmission by both lines to the City of San Diego. BLM recognized that co-locating the SPTP would cause the line to pass through a residential area, “requir[ing] [the] condemnation of numerous parcels of private land.” EIR/EIS at Ap.1-213; see Ap.1-183, Ap.1-185, Ap.1-186, Ap.1-213 to Ap.1-214, Ap.1-219, Ap.1-235 to Ap.1-237. In order to avoid wildfire risks further west and the La Posta, Manzanita, and Campo Indian Reservations, the SPTP line

²⁵ BLM rejected routes along other utility corridors that conflicted with residential communities. See EIR/EIS at Ap.1-215 to Ap.1-219, Ap.1-235 to Ap.1-237.

follows a northward course along the proposed Jacumba SWPL Breakaway Point Reroute, using the BCD Alternative and BCD South Option Revision.²⁶ Backcountry fails to show any error in BLM's decision not to adopt the alternative of further co-locating the SPTP line with the Southwest Powerlink line.

C. Endangered Species Act of 1973

[3] Section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2) (2006), imposes a substantive obligation on BLM to ensure that its actions are not likely to jeopardize T&E species. See, e.g., *Natural Resources Defense Council v. Houston*, 146 F.3d 1118, 1127 (9th Cir. 1998). To assist BLM in complying with its substantive obligation, section 7 of the ESA and its implementing regulations (50 C.F.R. Part 402) adopt consultation mechanisms, including early consultation, preparation of BAs, informal consultation, and formal consultation. *Forest Guardians*, 170 IBLA 253, 259-61 (2006).

Where a listed species may be present in the area of a proposed action, BLM must prepare a BA, which may occur as part of a NEPA review to “evaluate the potential effects of the action on listed . . . species and designated . . . critical habitat and determine whether any such species or habitat are likely to be adversely affected by the action.” 50 C.F.R. § 402.12(a); see 16 U.S.C. § 1536(c)(1) (2006); 50 C.F.R. § 402.12(f); *Enos v. Marsh*, 769 F.2d 1363, 1368 (9th Cir. 1985); *Native Ecosystems Council*, 160 IBLA 288, 298 (2004). When it is determined, based on the BA, that a proposed action may affect, and is likely to adversely affect, a listed species, section 7(a)(2) of the ESA requires BLM to formally consult with FWS in order to ensure that such action is not likely to jeopardize the continued existence of the species or destroy or adversely modify its critical habitat.²⁷ 50 C.F.R. § 402.14(a); *Natural Resources Defense Council v. Houston*, 146 F.3d at 1125; *Enos v. Marsh*, 769 F.2d at 1368; *Umpqua Watersheds, Inc.*, 158 IBLA 62, 81 (2002). Consultation must be based on the “best scientific and commercial data available.” 16 U.S.C.

²⁶ The Campo Indian Tribe would not authorize the crossing of its tribal lands, which extended all the way south to the Southwest Powerlink line along the United States/Mexico border. See SDG&E Answer at 3; EIR/EIS at ES-12 (Fig. ES-4).

²⁷ Formal consultation is not required when BLM determines, with FWS concurrence, either through informal consultation or submission of a BA, that the proposed action may affect, but is not likely to adversely affect, a listed species. 50 C.F.R. §§ 402.12(k), 402.13(a), and 402.14(b)(1); *Natural Resources Defense Council v. Houston*, 146 F.3d at 1126; *In Re Big Deal Timber Sale*, 165 IBLA 18, 32 (2005).

§ 1536(a)(2) (2006); *see* 50 C.F.R. § 402.14(d); *The Sierra Club*, 104 IBLA 76, 87-89 (1988). Formal consultation concludes with issuance by FWS of a BiOp containing its determination as to whether the proposed action is likely to jeopardize the continued existence of the species or destroy or adversely modify its critical habitat. In the case of a jeopardy determination, the BiOp may include “reasonable and prudent alternatives” that BLM may take to avoid violating its substantive obligation. 16 U.S.C. § 1536(b)(4) (2006); 50 C.F.R. §§ 402.14(g), (h), and (l)(1), and 402.15(a). Despite issuance of a BiOp, the ultimate burden remains with BLM to decide whether approval of the proposed action violates the substantive obligations of section 7(a)(2) of the ESA. *See Defenders of Wildlife v. Administrator, E.P.A.*, 882 F.2d 1294, 1300 (8th Cir. 1989).

A no-jeopardy BiOp must include an ITS, pursuant to section 7(b)(4) of the ESA, 16 U.S.C. § 1536(b)(4) (2006), when FWS determines that the proposed action is likely to result in the taking of a T&E species, otherwise prohibited by sections 4(d) and 9(a) of the ESA, but the taking is incidental to, and not the intended consequence of, the action. *See* 50 C.F.R. §§ 402.02 (“*Incidental take*”), 402.14(g) and (i). BLM may go forward with the action, despite the taking, where FWS concludes, in the ITS, that the incidental taking, as well as the proposed action, are not violative of section 7(a)(2) of the ESA. *See* 16 U.S.C. § 1536(b)(4) (2006); 50 C.F.R. § 402.14(i); *Defenders of Wildlife v. Administrator, E.P.A.*, 882 F.2d at 1300; *Missouri Coalition for the Environment*, 172 IBLA at 251; *Headwaters, Inc.*, 122 IBLA 362, 365-66 (1992).

On appeal, Backcountry argues that FWS’ BiOp, including its ITSs, is “arbitrary and capricious and therefore inadequate to satisfy the requirements of the ESA” because it fails to analyze the biological impacts of the entire Project. SOR at 65. Yet, Backcountry acknowledges in its SOR that the Board is “not empowered to review and set aside an action by an agency *other than BLM*,” and thus cannot adjudicate the legal adequacy of FWS’ BiOp. SOR at 61 (emphasis added); *see id.* at 65-69, 75-76. While we may certainly review the adequacy of BLM’s consultation with FWS, we have no jurisdiction to adjudicate the validity of FWS’ BiOp or the ITSs. *Lewis v. BLM*, 173 IBLA 284, 297 n.19 (2008); *Sierra Club*, 156 IBLA 144, 165 (2002), *aff’d*, No. 06-55006 (9th Cir. Sept. 20, 2007); *Blake v. BLM*, 145 IBLA 154, 162 (1998); *Lundgren v. BLM*, 126 IBLA 238, 247-48 (1993). We are only concerned with whether *BLM* has met its responsibilities under the ESA. *See Sierra Club*, 156 IBLA at 165, 168.

Backcountry challenges the adequacy of the BA, arguing that BLM violated section 7 of the ESA because the BA did not include a proper description and the likely effects of the proposed action or provide an adequate environmental baseline.

SOR at 69-75. BLM responds correctly that “[t]he Board does not have the authority to review merits arguments about the adequacy of . . . the BA upon which [a BiOp] . . . is based.” Answer at 85. Here, in compliance with the ESA, BLM considered T&E species to be present, prepared a BA to assess whether they may be affected, determined that the proposed action is likely to adversely affect T&E species, provided the BA to FWS, and formally consulted with that agency. FWS responded with a BiOp that the proposed action is not likely to jeopardize the continued existence of a T&E species or destroy or adversely modify its critical habitat. Under these circumstances, we conclude that the Board’s authority does not extend to determining whether BLM’s BA is adequate for purposes of meeting its obligation to consult with FWS under section 7 of the ESA. In this case, the BiOp was based upon a BA that was the subject of consultation with FWS. We conclude that these measures constitute compliance under the ESA. *Defenders of Wildlife*, 169 IBLA 117, 128-29, 132-33 (2006); *see also Lundgren v. BLM*, 126 IBLA at 247.

Backcountry acknowledges that, in issuing its BiOp, FWS determined, that “the information it gained through consultation with BLM and through the SPTP NEPA process was sufficient to render an opinion with regard to the impacts of BLM’s grant of a right-of-way to SDG&E.” SOR at 64. It was FWS’ responsibility to ensure that it had sufficient information to render a BiOp, which it did. *See* BiOp at 2 (“[FWS] has determined . . . that existing information, and that gained through the consultation and NEPA/CEQA processes, are sufficient to render jeopardy determinations on the six listed species known to occur along the proposed transmission line [ROW] and within the greater action area”). At that point, BLM was concerned with whether FWS’ BiOp was adequate for allowing BLM to go forward with the Project without jeopardizing the continued existence of a T&E species or destroying or adversely modifying its critical habitat. We conclude that Backcountry has failed to show that BLM has violated its substantive obligation under section 7(a)(2) of the ESA.

D. National Historic Preservation Act

[4] Section 106 of the NHPA, 16 U.S.C. § 470f (2006), requires a Federal agency to consider the effects of its undertakings or actions on historic properties included, or eligible for inclusion, on the National Register of Historic Places. Prior to approving a proposed undertaking, the agency must make a reasonable and good faith effort to identify all historic properties within the area potentially affected, determine whether identified properties are eligible for inclusion on the National Register, assess the effects of the undertaking upon any eligible historic properties found, determine whether the effect will be adverse, and avoid or mitigate any adverse effects. *See* 36 C.F.R. §§ 800.4 through 800.6; *Muckleshoot Indian Tribe v. U.S. Forest Service*, 177 F.3d at 805. The agency must engage in such efforts in

consultation with the SHPO or, in the case of Indian tribal lands, the Trust Historic Preservation Officer, and the ACHP. *See, e.g.*, 36 C.F.R. §§ 800.2(a)(4), (b), and (c), 800.3(c), 800.4, 800.5, and 800.6.

Where the proposed undertaking involves a complex project involving corridors or large land areas, the agency may, under 36 C.F.R. §§ 800.4(b)(2), 800.5(a)(3), and 800.6(b) and (c), use a phased process for complying with its NHPA duties, in accordance with a PA executed pursuant to 36 C.F.R. § 800.14(b), even after the decision is made to approve the undertaking, “where no surface-disturbing activity is to occur until the section 106 process is completed.”²⁸ *The Mandan, Hidatsa, and Arikara Nation (The Mandan Nation)*, 164 IBLA 343, 354 (2005); *see Mid States Coalition for Progress v. Surface Transportation Board*, 345 F.3d 520, 553-55 (8th Cir. 2003); *Deborah Reichman*, 173 IBLA 149, 161-62 (2007).

Although Backcountry does not challenge BLM’s authority to defer final NHPA section 106 compliance through use of a PA, it contends that BLM violated the public participation requirements of section 106 of the NHPA and its implementing regulations by failing, prior to execution of the PA, to “notify the public of its intent to develop a PA and involve the public in the development of its terms. 36 C.F.R. § 800.14(b)(2)(iv).”²⁹ Request at 31; *see* SOR at 78. It points out that “public input”

²⁸ Such a phased process must initially establish “the likely presence of historic properties” within the area potentially affected by the undertaking “through background research, consultation and an appropriate level of field investigation[.]” 36 C.F.R. § 800.4(b)(2). Backcountry asserts that BLM failed to establish the likely presence of historic properties along the selected route of the SPTP transmission line, prior to approval of the Project. *See* SOR at 77. However, BLM assessed the presence of historic properties generally along the proposed and alternative routes, using record materials and field investigations. *See* EIR/EIS at D.7-1 to D.7-5, D.7-8 to D.7-13, E.1.7-1 to E.1.7-2, E.2.7-1, E.4.7-1, App. 9B; BLM Answer at 98. It also consulted with the SHPO and with Native American tribes concerning traditional cultural properties. *See* ROD at 9; EIR/EIS at ES-26, App. 9C. Concerning site-specific field surveys, BLM intends to use a phased approach to further section 106 compliance concerning the Selected Route, as provided for in the PA, which is the main target of Backcountry’s allegations of error on appeal.

²⁹ The cited regulation pertains to the development of PAs “for agency programs,” 36 C.F.R. § 800.14(b)(2), as does 36 C.F.R. § 800.14(b)(2)(ii) (requiring public participation “appropriate to the subject matter and the scope of the program”).

(continued...)

is “essential to informed Federal decisionmaking in the [section] 106 process,” and that the agency “shall seek and consider the views of the public in a manner that reflects the nature and complexity of the undertaking and its effects on historic properties.” SOR at 77 (quoting 36 C.F.R. § 800.2(d)(1)).

Backcountry acknowledges that in the January 2008 Draft EIR/EIS BLM stated that due to the complexity of the proposed action, it “inten[ded] to create and adopt a PA” in order to implement a phased approach to the identification and evaluation of historic properties, in accordance with 36 C.F.R. § 800.4(b)(2). SOR at 78; *see* EIR/EIS at D.7-14, D.7-23. However, Backcountry argues that the notation in the Draft EIR/EIS was not sufficient since it was “barely over one page of text buried within the more than 7,500 pages” of the Draft EIR/EIS, insufficient to “fairly alert the public []or present an adequate opportunity for public comment or involvement.” SOR at 78. In addition, though the EIR/EIS at D.7-14 more specifically notified the public of BLM’s intention to use a phased approach, Backcountry still objects, noting that the EIR/EIS was issued two months before the PA was created, in October 2008, and that the PA “was *never circulated* to the public.” SOR at 78. However, the draft EIR/EIS notice was issued in January 2008, well before adoption of the PA in December 2008, and the notice in the EIR/EIS was 2 months before the PA was reached. It is sufficient that the public had notice, in the Draft and Final EIR/EIS, that BLM intended to adopt a PA that “specifically provided for” “defer[ring] final identification and evaluation of historic properties,” as required by 36 C.F.R. § 800.4(b)(2). We conclude that the notice provided adequate time for Backcountry and other members of the public to comment on BLM’s announced intention to prepare a PA, and to address its contents.

Moreover, we find that public input regarding the undertaking and its effects on historic properties was thoroughly considered during the NEPA environmental review process – a valid means of satisfying the section 106 obligation to afford an opportunity for public comment and participation. *See* 36 C.F.R. §§ 800.2(d)(3) and 800.8; *Mid States Coalition for Progress v. Surface Transportation Board*, 345 F.3d at 553; *The Mandan Nation*, 164 IBLA at 356-57; SOR at 78. Thus, we conclude that BLM provided adequate notice and opportunity for public participation in the identification and evaluation of historic properties in compliance with section 106 of the NHPA in the course of preparing the EIR/EIS at issue. *See* 36 C.F.R. § 800.8.

²⁹ (...continued)

They do not pertain to the development of PAs “for complex or multiple undertakings,” provided for in 36 C.F.R. § 800.14(b)(3).

We, therefore, conclude that Backcountry has failed to establish that, in approving the Project, BLM violated section 102(2)(C) of NEPA, FLPMA, section 7 of the ESA, or section 106 of the NHPA.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, BLM's January 2009 ROD is affirmed.

_____/s/_____
R. Bryan McDaniel
Administrative Judge

I concur:

_____/s/_____
James F. Roberts
Administrative Judge