



MACK ENERGY CORPORATION

180 IBLA 291

Decided January 12, 2011



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

MACK ENERGY CORPORATION

IBLA 2010-155

Decided January 12, 2011

Appeal from a decision of the Roswell (New Mexico) Field Office, Bureau of Land Management, offering right-of-way grants for a buried power line. NMNM 124105.

Set aside and remanded.

1. Federal Land Policy and Management Act of 1976: Rights-of-Way--Rights-of-Way: Applications--Rights-of-Way: Federal Land Policy and Management Act of 1976

Under section 501 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761 (2006), a decision to reject or issue a right-of-way is discretionary and will be affirmed where the record shows the decision to be based on a reasoned analysis of the facts involved, made with due regard for the public interest, and where appellant fails to show error in the decision. To successfully challenge a discretionary decision, the burden is upon 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. The Board will set aside a BLM decision requiring an appellant to bury a power line, rather than approving appellant's application to construct an overhead line, when the appellant demonstrates that there is no rational connection between the facts cited by BLM and the decision made.

2. 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

Under section 102(2)(C) of the National Environmental Policy Act of 1969, 42 U.S.C. § 4332(2)(C) (2006), the adequacy of an environmental assessment must be judged by whether it took a “hard look” at the proposed action, and reasonable alternatives thereto, considered all relevant areas of environmental concern, and made a convincing case that the environmental impacts are insignificant or that any such impacts will be reduced to insignificance by the adoption of appropriate mitigation measures. A party challenging BLM’s decision has the burden of demonstrating with objective proof that the decision is premised on a clear error of law or demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance to the proposed action. BLM’s decision to offer a right-of-way for a buried power line, rather than a right-of-way for an overhead power line, will be set aside where BLM’s NEPA analysis fails to support its decision to require burial of the power line.

APPEARANCES: Charles L. Kaiser, Esq., and Charles A. Breer, Esq., Denver, Colorado, for Mack Energy Corporation; Frank Lupo, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Albuquerque, New Mexico, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ROBERTS

Mack Energy Corporation (Mack) has appealed from an April 30, 2010, decision of the Roswell (New Mexico) Field Office, Bureau of Land Management (BLM), offering a right-of-way (ROW) grant for a buried power line to service the “Sam #3 well,” which was drilled to serve as a produced water disposal well for Mack’s oil and gas leases in the area. BLM based its decision to offer the ROW grant, subject to the requirement that the power line be buried, upon the Mack Power Line Right-of-Way Environmental Assessment (ROW EA) (DOI-BLM-NM-P010-2010-34-EA) and related Decision Record (DR), also dated April 30, 2010. In that DR, BLM approved Alternative B, which would require the power line to “be buried at a minimum depth of 38 inches utilizing the most direct route from the originating source.” Administrative Record (AR), Tab 11, at 4.

Mack's application, filed with BLM on December 9, 2009, was for a 20-year ROW grant to construct, operate, maintain, and terminate a three-phase 7.2 Kv overhead distribution power line in secs. 27, 28, 33, and 34, T. 15 S., R. 30 E., New Mexico Principal Meridian (NMPPM), Chaves County, New Mexico. *See* AR, Tab 3, at 23-28.¹ As proposed, the ROW would extend 15,916.10 feet in length, 14,117.9 feet of which would extend across public lands. The ROW would be 30 feet wide, would create up to 9.72 acres of new disturbance, and would include 45 wooden power poles. Statement of Reasons (SOR), Ex. G at 13-20.

Mack argues that BLM's decision to offer an ROW that requires burial of the power line amounts to an improper rejection of its ROW application under Title V of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1761-1771 (2006), and that BLM failed to take a hard look at the potential environmental consequences of its decision, contrary to 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(2)(C) (2006). For the following reasons, we conclude that BLM's decision fails to meet the standards of FLPMA and NEPA. Accordingly, we set aside BLM's decision and remand the matter to BLM for further action.

BACKGROUND

Mack and BLM agree that southeastern New Mexico has seen extensive oil and gas development during the past 40 years. The two townships south of the specific sections where Mack proposes to construct the power line are densely developed with oil and gas leases and overhead utility lines. Statement of Reasons (SOR) at 2; Answer at 2; *see* SOR, Ex. B at B-5 (Special Status Species Proposed Resource Management Plan Amendment/Final Environmental Impact Statement (November 2007) (2007 SSSRMPA/EIS), App. at 10); Answer, Ex. 1 (map of Proposed ROW area). Mack emphasizes that "overhead power lines currently cross much of the area, particularly to the south given the large number of existing oil and gas wells and associated infrastructure." SOR at 2; SOR, Exs. C (BLM map of oil and gas development showing existing power lines) and E (photograph showing development).

Mack's proposed ROW would run in an east-west direction adjacent to an existing high power 345 Kv transmission line and caliche oil and gas road. *See* SOR, Exs. C and F. The area is arid and sandy. Mack states that "[t]he blowing sand has formed sand dunes which may shift considerably over time with the prevailing winds." SOR at 3; *see* SOR, Ex. D (Affidavit of Jerry W. Sherrell (Sherrell Affidavit)) at ¶¶ 7, 8. BLM describes the area as a "shinnery oak-dunal community" because the

¹ BLM designates the documents comprising the AR by numbered Tabs, and also paginates the record in reverse chronological order. Our citations refer to the relevant page number of the document rather than to the number supplied by BLM.

principal vegetation is shinnery oak—a “shin high” oak plant. SOR, Ex. G (ROW EA) at 7. Shinnery oak-dunal communities provide potential habitat for the lesser prairie chicken (LPC) and sand dune lizard (SDL), two special status species.² SOR at 3. In late 2002, Federal and State agencies convened a Working Group of public and private stakeholders to develop a collaborative conservation strategy for the LPC and SDL in BLM’s Roswell and Carlsbad Resource Areas. The mission of the Working Group was to develop a range of actions to enhance and secure populations of LPC and SDL “while protecting other uses of the land.” SOR at 4; SOR, Ex. B at B-4, App. at ii. BLM largely adopted the Working Group’s recommendations for protecting the LPC in amendments to the Roswell and Carlsbad Resource Management Plans (RMPs) with additional conservation measures. See SOR, Ex. I (Record of Decision (ROD)) and Ex. K (Approved SSSRMPA, April 2008) (2008 SSSRMPA).

Of importance to the current appeal, the 2008 SSSRMPA established four management areas for the LPC: the Core Management Area (CMA), the Primary Population Area (PPA), the Sparse and Scattered Population Area (SSPA), and the Isolated Population Area (IPA). See SOR, Ex. J (map of the management areas). The SSSRMPA also designated a 58,000-acre Area of Critical Environmental Concern for the LPC. BLM manages oil and gas development differently in the various areas with more restrictions imposed in areas with active LPC populations. SOR, Ex. K at 6, 10-12. The CMA, which has the most active LPC presence, is the most restrictive and is designated an ROW exclusion zone, while the SSPA allows ROWs and oil and gas development subject to what Mack calls “less restrictive conditions.” SOR at 5; SOR, Ex. K at 6, 10-12. Mack notes that the public lands portion of its ROW will be located in less restrictive SSPA. SOR at 5. BLM states that “active lek sites are located immediately north of the proposed right-of-way.” Answer at 4; see Answer, Ex. 2 (ROD) at Map 1; Ex. 4 (map of LPC Lek Sites). The record shows that the nearest active lek sites are approximately 18 miles to the north of Mack’s proposed ROW. Mack’s Reply at 10; Reply, Ex. V (BLM map showing leks).

BLM’s 2008 SSSRMPA adopted a series of potential measures for mitigating impacts of overhead power lines on LPC. Those mitigation measures, “ranked in order of effectiveness of reducing impacts from power lines,” are as follows:

² Special status species are defined in the *BLM Manual* as follows:

- (1) species listed or proposed for listing under the Endangered Species Act (ESA), [16 U.S.C. §§ 1531-1543 (2006),] and
- (2) species requiring special management consideration to promote their conservation and reduce the likelihood and need for future listing under the ESA, which are designated as Bureau sensitive by the State Director(s). All Federal candidate species, proposed species, and delisted species in the 5 years following delisting will be conserved as Bureau sensitive species.

BLM Manual 6840 Special Status Species Management at .01.

1. Burying new distribution power lines within 2 miles of occupied lesser prairie-chicken habitat (measured from the lek) and in suitable lesser prairie-chicken habitat within 2 miles of an active lek. See Table 2-4, Robel Impact Distances. (See Appendix 2, Monitoring and Implementation.)
2. Using internal combustion engines to power equipment at the well. Such engines will be muffled to 75 db measured at 30 feet from the source.
3. Constructing new power lines in locations which avoid occupied or suitable lesser prairie-chicken habitat.
4. In cases where overhead power lines already exist in occupied or suitable lesser prairie-chicken habitat, new power lines could be constructed immediately adjacent to an existing line but only to the extent of the existing overhead power lines. Where sections of the new power line cannot follow the existing line, it will have to be buried, or mitigated according to the PLRC [power line removal credit] program described above.
5. Constructing all infrastructure supporting development of a well (including roads, power lines and pipelines) within the same corridor.

SOR, Ex. K at 7.

In the EA prepared for Mack's ROW, BLM considered four alternatives: a no action alternative, the proposed action (an overhead power line), Alternative B (a buried power line), and Alternative C (a partially buried, partially overhead power line). SOR, Ex. G at 4-6; 29. BLM also considered but did not analyze two additional alternatives.³ *Id.* at 6.

³ The first alternative not considered in detail would have required burying the line along the same route as the proposed action. BLM notes that "this alternative would have provided mitigation very similar to Alternative B, [but] would have been more costly to Mack due to the considerably greater length." SOR, Ex. G at 6. The second alternative not considered in detail would have moved the proposed action to follow the route of an existing 345 Kv transmission line. "This alternative was eliminated because it was substantially similar to both the proposed action and Alternative C." Answer at 5; see SOR, Ex. G at 6.

In the EA, BLM provided an analysis of the impacts of the alternatives considered on the two candidate species that may be found in the general area of the project area, *i.e.*, the SDL and the LPC. *Id.* at 13-20. The U.S. Fish and Wildlife Service has found both species to be warranted for listing but has been precluded from listing them due to other priorities. *Id.* at 13.

With regard to the SDL, the EA states that “[c]onstruction of the proposed action and alternatives in sand dune complexes that are suitable habitat or occupied habitat could impact local populations of sand dune lizard by reducing the size of habitat available to the species and possibly extirpating sand dune lizards from the location.” *Id.* at 13-14. The EA indicates that “extirpations of local populations of sand dune lizard could be avoided as long as projects are moved out of occupied and/or suitable sand dune lizard habitat.” *Id.* at 14. The EA notes that “there are no known populations within the proposed right-of-way,” but that the “project falls within soil types that are conducive for the sand dune lizard.” The EA concludes that “[i]mpacts to the sand dune lizard would be minimal.” *Id.*

By contrast, with regard to the LPC, the EA states that habitat fragmentation from a project such as Mack’s proposed ROW can negatively impact the LPC population. During the construction phase of the project, “[t]he noise and human activity generated from construction activity could impact the lesser prairie-chicken by reducing the establishment of seasonal ‘booming grounds’ or leks, thus possibly reducing reproductive success in the species.” *Id.* The EA states that “[d]epleted population and the loss of recruitment into the local population would result in an absence of younger male lesser prairie-chickens to replace mature male lesser prairie-chickens once they expire, eventually causing the lek to disband and become inactive.” *Id.* In addition, the EA expresses the concern that “habitat fragmentation caused by development could possibly decrease the habitat available for nesting, brooding and feeding activities.” *Id.* Accordingly, the EA states that approval of any of the alternatives would be subject to a “Timing Limitation Stipulation/Condition of Approval for Lesser Prairie-Chicken” that would disallow oil and gas activities, as well as other activities such as construction and maintenance of power lines, that produce noise or involve human activity, except between 3:00 am and 9:00 pm. *Id.*

As the ROW EA makes clear, BLM anticipates that Mack’s proposed overhead power line would have negative impacts on both the LPC and the SDL.⁴ *Id.* at 15. The overhead line, in conjunction with an existing transmission line, “would double the visual effect (building a visual wall barrier) and provide additional perches for predators.” *Id.* The EA notes that LPC has “evolved to avoid tall structures, which are convenient perches for predators”; that LPC and SDL are less likely to nest near overhead power lines; and that the LPC have a tendency “to place nests and

⁴ This finding conflicts with the EA’s earlier conclusion that the overhead power line would have minimal impacts on the SDL. See EA at 14.

leks away from power lines.” *Id.* at 16-18. BLM states that “[t]his isolation of populations due to habitat fragmentation creates a small population size and inbreeding depression, leading to a greater chance of extirpation,” and that “power lines serve as obstructions that limit chicken movements, which further fragments the landscape.” *Id.* at 18.

BLM concluded that “it is evident that the Proposed Action and Alternative C would have a negative impact on the lesser prairie-chicken.” *Id.* BLM further concluded that Alternative B would allow Mack to meet its purpose, while having the least impact on special status species: “The burial of the power line would alleviate the use of tall structures, avoid[ed] by chickens, while still supplying energy to the location. Disturbance to [the] area would be short-term and usual mitigations would be applied for sand dune lizards (avoiding dunes and installing plugs in the trench to provide escape routes for reptiles).” *Id.* at 53. Thus, in its April 30, 2010, DR, BLM selected Alternative B, stating that it is in conformance with the 1997 Roswell RMP and the 2008 SSSRMPA. With specified mitigation measures, BLM determined that the project would have no significant impact on the quality of the human environment, and so issued a Finding of No Significant Impact (FONSI). *See* AR, Tab 12.

Relevant to our review of Mack’s appeal from BLM’s decision is BLM’s proposal to designate a new “LPC Corridor” that would provide a north-south travel way for the LPC by, *inter alia*, restricting the use of overhead power lines and requiring distribution lines to be buried. SOR at 6-7; *see* SOR, Ex. L (map of the proposed corridor). This LPC Corridor would include substantially all of T. 15 S., R. 30 E., NMPM, where Mack’s ROW would be located. Mack’s Exhibit M, titled “Lesser Prairie Chicken Corridor,” is from BLM’s Roswell Field Office’s website and provides “Questions and Answers About the LPC Corridor.” SOR, Ex. M at 1. In this website posting, BLM stated that “[e]fforts to reduce the need to list the chicken continue,” and that “BLM is considering the need to bury utilities (electric, communications and cable) within the corridor shown on the attached map.” *Id.* BLM explained that “[c]hickens tend to avoid overhead structures,” including “overhead power lines,” which “leads to habitat fragmentation.” *Id.* BLM acknowledged that the corridor was not considered in the 2007 Proposed SSSRMPA/EIS or in the 2008 SSSRMPA, and indicated that the proposal for the LPC Corridor and the impacts of implementing the proposal must be analyzed pursuant to NEPA. *Id.* BLM stated that “[i]f the impacts can be mitigated to a point of insignificance, then development of an environmental assessment is appropriate.” *Id.* at 2. BLM described the procedures involved in the NEPA process and stated that it would accept scoping comments on the proposed LPC Corridor through July 30, 2010.

ANALYSIS

BLM's Decision Is Not Supported by the Record

The central issue in this matter, although the parties do not frame it as such, is whether BLM's decision to approve an ROW for a buried power line, when Mack's application was to construct an overhead power line, is a valid exercise of BLM's discretionary authority under section 501(a) of FLPMA, 43 U.S.C. § 1761(a) (2006). Mack argues that BLM's decision to require a buried power line should be set aside as not supported by the record. For the following reasons, we agree.

[1] Under section 501(a)(4) of FLPMA, a decision to accept or reject an ROW application, or to accept an ROW application with conditions, is discretionary. See, e.g., *Bristlecone Alliance*, 179 IBLA 51, 104 (2010); *Santa Fe Northwest Information Council*, 174 IBLA 93, 104 (2008); *Wiley F. & L'Marie Beaux*, 171 IBLA 58, 66 (2007); *Mark Patrick Heath*, 163 IBLA 381, 388 (2004). The Board will affirm a BLM decision approving or rejecting an ROW application where the record shows that the decision represents a reasoned analysis of the factors involved, made with due regard for the public interest, and where no reason is shown to disturb BLM's decision. *Santa Fe Northwest Information Council*, 174 IBLA at 104; *James Shaw*, 130 IBLA 105, 115 (1984); *Mark Patrick Heath*, 163 IBLA at 388. As we have said, to successfully challenge a discretionary decision,

[t]he burden is upon 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.

International Sand & Gravel Corp., 153 IBLA 293, 299 (2000); see also *Santa Fe Northwest Information Council*, 174 IBLA at 104. Based upon the record before us, we conclude that Mack has met its burden.

Mack acknowledges that the SSSRMPA establishes various limitations on oil and gas development within the planning area, but argues that overhead power lines may nonetheless be appropriate in areas where the SSSRMPA allows ROWs. Mack is correct that the SSSRMPA does not mandate burial of power lines in the study area, but allows operators to construct new power lines in accordance with the third, fourth, and fifth mitigation measures set forth therein. SOR at 9 (quoting Ex. K at 7). Mack argues persuasively that its proposed overhead power line is fully consistent with those three mitigation measures. Mack shows that the power line is not proposed for a location that is "occupied" or "suitable" for LPC habitat. Mack states that the area is not "occupied" because there are no active LPC sites in the ROW area,

and is not “suitable” LPC habitat because it is well within the Robel impact zone of 0.25 miles from the existing 345 Kv transmission line. SOR at 9; *see* SOR, Ex. K (2008 SSSRMPA) at GL-13. According to Mack,

even if the proposed power line were within suitable habitat, the power line still would be permissible under the RMPA because it runs “immediately adjacent to an existing line” for the east-west portion of the right of way and then parallels an existing road (infrastructure corridor) for the distance north to the Sam #3.

SOR at 9.

We agree with Mack that neither BLM’s DR nor the ROW EA “addresses why the mitigation measures provided under the RMPA are not acceptable in these circumstances.” *Id.* The 2008 SSSRMPA ranks the first and second mitigation measures as most effective in reducing impacts from power lines, but their effectiveness may be tangible only if the conditions defined in those measures are present. Mack shows that the effectiveness of the first and second mitigation measures cannot be realized with its power line because the area is neither occupied nor suitable. What the record does show is that the location of Mack’s power line is already marked with existing power lines and that there are no special status species present. The fourth stipulation allows power lines to be constructed overhead “where overhead power lines already exist in occupied or suitable lesser prairie-chicken habitat.” SOR, Ex. K at 7. Assuming for now that the area where Mack proposes to construct its power line is suitable LPC habitat (a proposition that Mack effectively questions, given the infrastructure, including power lines, already present), the fact is that there is an overhead power line already present, and BLM fails to adequately explain why Mack should not be allowed to construct its power line adjacent to the existing one, as allowed by the fourth stipulation. We fail to see the logic in BLM’s argument that a second power line in the area being considered for the LPC Corridor will prevent LPC from crossing into an area that is presently unpopulated by LPC because of existing power lines and other infrastructure.

Citing *Mark Patrick Heath*, 163 IBLA at 388, *John Dittli*, 139 IBLA 68 (1997), and *Eugene V. Vogel*, 52 IBLA 280 (1981), Mack states that “BLM must provide a rational basis for its decision to grant or deny a right of way application, or to impose special stipulations.” SOR at 15. Mack contends that the “essential premise” of the ROW EA, “that an overhead power line would prevent lesser prairie chickens from flying across the power line,” resulting in the isolation and extirpation of LPC populations, is not supported by “even the most basic information.” *Id.* Mack asserts that BLM fails to offer any evidence of LPC being present in the ROW area or “in other areas which would be affected by an alleged inability to travel across Mack’s overhead power line.” *Id.* at 15-16. According to Mack, BLM’s theory makes sense only if LPC “migrate or fly substantial distances from one area to another.” *Id.* at 16.

However, Mack states that the reason BLM provides no evidence that LPC migrate is that LPC do not migrate; nor do they fly substantial distances. Mack states that “[t]he birds generally remain within relatively short distances from the lek where they were born—a concept known as ‘site fidelity.’” *Id.* (citing *Final Report—New Mexico Lesser Prairie-Chicken Project 2000*, prepared by the George Miksch Sutton Avian Research Center, attached as Ex. O to SOR).

Mack questions BLM’s reliance on a study finding that only 1.2% of LPC within 1 mile of a power line cross the line. See SOR, Ex. G at 15. Mack’s challenge, which BLM does not refute, is set forth below:

An existing east/west high voltage overhead transmission line already runs adjacent for much of the same distance Mack’s proposed overhead power line runs. Exhibit F (photograph of existing overhead line). If the study BLM relies upon is correct that lesser prairie chickens almost universally do not cross power lines, then the birds will not cross the existing 345 kv transmission line. While BLM claims that a second power line will “double the visual effect” and create a “visual wall barrier,” BLM’s evidence is that only a small fraction of lesser prairie chickens will cross a single power line. Exhibit G (Right of Way EA at 15). The study on which BLM relies analyzes the effect of single power lines. It does not address BLM’s theory that a second power line creates a greater barrier than a single power line.

In any event, whether a second power line would impose additional limitations is not relevant if as BLM claims a single power line bars nearly all crossings. BLM’s theory does not square with the effects of the existing 345 kv transmission line and fails to acknowledge the vast infrastructure of other existing power lines which lesser prairie chickens would need to cross due to BLM’s longstanding practice of allowing overhead power lines, particularly south of the right of way. Exhibit C (BLM map showing extensive power lines in red). BLM does not explain how lesser prairie chickens could cross those lines assuming the studies it relies on in the Right of Way EA are correct.

At the end of the day, BLM’s theory is that lesser prairie chickens will travel from significant distances through the right of way area but at the same time BLM claims that lesser prairie chickens will not cross power lines. BLM cannot have it both ways. Lesser prairie chickens

cannot simultaneously fly significant distances in southeastern New Mexico and not cross power lines.

SOR at 17.⁵

Equally as dubious are BLM's assertions with regard to where LPC populations are presently located. BLM claims at one point that "active lek sites are located immediately to the north of the proposed right-of-way," Answer at 4, and then later states that in fact "no active LPC leks are in the immediate area." *Id.* at 10. We have reviewed the map attached to BLM's Answer which purports to show active LPC lek sites as of June 2010. Answer, Ex. 4. Mack makes the obvious observation that BLM could not have relied upon this map during preparation of the ROW EA or in issuing the ROW decision since those documents were finalized several months prior to June 2010. *See* Reply at 10. Mack points out that "even assuming BLM's map is accurate and BLM relied upon it at some point, the map shows that most active LPC leks are located more than 30 miles to the north of the area" into which BLM seeks to introduce LPC, and that "just two active leks are located approximately 18 miles to the north of that area." *Id.* With regard to the area south of Mack's proposed power line, where an overhead 345 Kv overhead transmission line and a caliche road already exist, Mack makes the following statement which further undermines BLM's analysis:

The area to the south contains a large number of additional overhead power lines. Mack SOR, Exhibit C (BLM map showing overhead lines in red). That existing development already fragments the potential habitat to the extent BLM is correct that LPCs will not fly through an area with overhead power lines. [Reply, Ex. U, Affidavit of Mindy Paulek, wildlife consultant for Prymorys Environmental Consulting, Inc., Durango, Colorado at ¶ 9] ("Assuming BLM is correct that overhead power lines create movement barriers, then . . . [Mack's] additional and adjacent line would be inconsequential to the existing movement barrier."). Stated another way, fragmentation does not occur when there is already substantial existing development because there is nothing to fragment. The photograph in Exhibit F to Mack's Statement of Reasons additionally shows that the existing 345 kv transmission line is actually eight separate wires. Accordingly, in no way would Mack's new overhead line "double" the existing transmission

⁵ Mack argues that BLM's reliance on the Robel study, showing that LPC will not nest within .25 miles of power lines, is not supported by the record. Mack states that its "overhead power line would not create any additional adverse impact," since it "would be located only a few hundred feet from the existing line—within the existing Robel impact zone." SOR at 18.

or “create a visual wall barrier” as claimed by BLM. BLM Answer at 5; Exhibit G at 15.

Id. at n. 10.

The fundamental problem with BLM’s premise is that the evidence in the record supports Mack’s contention that the average movement distance traveled by LPC is approximately 2 miles. *See* SOR at 16; Reply, Ex. U at ¶ 7. The record shows that LPCs typically travel only a few miles so as to maintain a high degree of “site fidelity.” *See* Reply at 11 (quoting Reply, Ex. U at ¶ 7). Mack’s analysis shows the illogic in BLM’s premise:

Assuming, *arguendo*, that BLM is correct that LPC populations to the north would fly substantial distances to the south, there must be record evidence to show that such migration is possible under the circumstances here. But BLM’s own rationale for not allowing Mack’s proposed overhead power line is that LPCs do not travel through overhead power lines. Environmental Assessment, Exhibit G at 15-18. BLM cannot simultaneously rely on studies to show that LPCs would not fly through overhead power lines and claim that LPCs from the north will travel to the area south of the right of way area. That is so because BLM’s own map (reproduced on the next page with the area to the south to be populated colored in blue and overhead power lines shown in red) shows that LPCs would already have to travel through a maze of overhead power lines to reach the area far to the south. Simply put, BLM cannot have it both ways.

Reply at 12 (footnote omitted).⁶

We conclude that Mack has successfully challenged BLM’s decision to require a buried power line. Mack has demonstrated that BLM’s decision is not supported by

⁶ Mack questions BLM’s statement that “[g]iven the lower height of the proposed power line, as compared to the taller transmission line, BLM reached the reasonable conclusion that Mack’s proposal would have created more readily available raptor perches and potential collision impacts.” Reply at 12 (quoting Answer at 11). Mack correctly asserts that “BLM’s reliance on the relative height of the power poles appears for the first time in BLM’s Answer; the pole height was never discussed in BLM’s environmental assessment or in the right of way decision.” Reply at 12 n. 4. Mack states that “[i]n all events, Mack would be happy to raise the height of the power line poles along the existing 345 kv transmission line if that would satisfy BLM.” *Id.*

the record and that BLM failed to act on the basis of a rational connection between the facts found and the choice made.

BLM's DR and EA Are Deficient Under NEPA

[2] Section 102(2)(C) of NEPA, 42 U.S.C. § 4332(2)(C) (2006) requires Federal agencies to prepare an EIS for a major Federal action significantly affecting the quality of the human environment. In making the threshold determination of whether an EIS is necessary, the agency may prepare an EA documenting its consideration of all relevant matters, and the agency may go forward with the project if the analysis in the EA establishes that the project will not have a significant impact on the human environment. A BLM decision to approve an action based on an EA and FONSI will generally be affirmed if BLM has taken a “hard look” at the proposed action, considered all relevant areas of environmental concern, and made a convincing case that the environmental impacts are insignificant or that any such impact will be reduced to insignificance by the adoption of appropriate mitigation measures. *E.g.*, *Southern Utah Wilderness Alliance*, 166 IBLA 140, 173-74 (2005), and cases cited.

We conclude that BLM did not take the requisite hard look at the safety and economic impacts of requiring Mack to bury the power line. Because we conclude that BLM’s decision requiring Mack to bury the power line is not supported by the record, we set aside BLM’s decision and remand the matter to BLM for further action.

Several factors underlie our conclusion. Mack asserts that BLM’s decision is contrary to law on the basis that BLM’s decision to require a buried power line is an improper implementation of the proposed LPC Corridor before BLM has amended the RMPA. According to Mack, “[i]n February 2010 BLM was forthright in telling Mack directly that BLM wanted Mack to bury the proposed power line as part of BLM’s effort to create a new ‘corridor’ for the lesser prairie-chicken.” SOR at 10; SOR, Ex. D at ¶ 5. BLM’s “entire rationale . . . for requiring Mack to bury the power line confirms the agency’s intent to implement a lesser prairie chicken ‘corridor.’” SOR at 10. Mack contends that “BLM cannot require Mack to bury its power line to implement BLM’s new lesser prairie chicken ‘corridor’ when the new ‘corridor’ has not been incorporated into the governing RMPs, has not been analyzed under NEPA, and may or may not come to pass.” *Id.* at 11. Mack argues that BLM is required to analyze the environmental impacts of adopting the LPC Corridor prior to making any decision to implement the proposed corridor, and that “BLM’s decision on the right-of-way prematurely implements ‘a decision already made’ to create a lesser prairie chicken ‘corridor.’” SOR at 12 (quoting *Metcalf v. Daley*, 214 F.3d 1135, 1142 (9th Cir. 2000), and citing *Center for Native Ecosystems*, 170 IBLA 331, 345 (2006)).

In its Answer, BLM states that Mack is arguing “that the requirement to bury overhead utility lines in this specific instance has unfairly prejudiced the possibility of

a future Resource Management Plan Amendment.” Answer at 13. BLM states: “NEPA requires that while BLM is considering a proposed action, the BLM may not take any action concerning that specific proposed action that would have an adverse environmental impact or limit the choice of reasonable alternatives.” In BLM’s view, the action it took regarding approval of Mack’s ROW, *i.e.*, requiring the power line to be buried, “has not limited the choice of reasonable alternatives relative to the corridor decision,” and “in no way forecloses BLM’s options to require burial (or not to require burial) of future rights-of-way.” Answer at 16.

We think BLM has misunderstood Mack’s argument. Our review of Mack’s discussion of the LPC Corridor makes clear that Mack understood that BLM was proposing an LPC Corridor and that BLM had begun the NEPA review procedures for that proposed action. Mack does not state a concern with whether or not BLM’s options with regard to future implementation of the LPC Corridor will be limited, but objects to implementation of the proposed LPC Corridor by requiring burial of this specific power line before the environmental impacts, including those related to safety and cost, have been analyzed. Mack’s objection is that BLM’s decision requiring a buried power line implements the LPC Corridor before the appropriate NEPA review had taken place. *See* SOR at 11. As a theoretical matter, we see the validity to BLM’s argument that “an ongoing planning process does not foreclose the BLM’s discretion to take action consistent with its current plan.” Answer at 14 (citing *Powder River Basin Resource Council*, 180 IBLA 1 (2010); *Montana Trout Unlimited*, 179 IBLA 159, 172 (2009); and *Sierra Club Legal Defense Fund*, 124 IBLA 130, 140 (1992)). However, a decision made in the context of “an ongoing planning process” must still comply with section 102(2)(C) of NEPA. As discussed below, we conclude that Mack has shown that BLM’s NEPA analysis is deficient with regard to its consideration of safety and cost issues associated with requiring the power line to be buried.

Mack asserts that the ROW EA provides “absolutely no discussion of safety,” but that “all the evidence demonstrates that there is a significant public safety risk associated with burying power lines in this area.” SOR at 12-13 (citing *Powder River Basin Resource Council*, 120 IBLA 47, 56, 58 (1991), and 40 C.F.R. §§ 1508.8 and 1508.27(b)(2)). Mack refers to the fact that the ROW area is characterized by “a ‘severe’ hazard of blowing soil,” and that “previously buried lines in this area have become exposed due to wind erosion and the natural shift of sand over time.” *Id.* at 13; SOR, Ex. D (photographs attached to Sherrell Affidavit). Mack cites the danger posed by a 7.2 Kv power line, which “can result in serious injury or death to a person or animal who makes contact with an exposed line.” SOR at 13. Mack asserts that BLM acknowledged in the 2007 SSSRMPA/EIS that “burying power lines in this area creates a safety concern,” and that this concern explains “in part why BLM decided not to require operators to bury power lines.” *Id.*; SOR, Ex. B at B-9 at AP11-11 (“[B]urying power lines is an option for reducing habitat impacts, not a requirement.”)).

In its Reply, Mack cites *City of Las Vegas, Nevada v. FAA*, 570 F.3d 1109 (9th Cir. 2009), in support for its argument that BLM was required to consider the impacts to safety of its decision to require a buried power line. In that case, the Ninth Circuit stated that under 40 C.F.R. § 1508.27, “in determining whether a federal action would ‘significantly’ affect the environment, the agency should consider ‘the degree to which the proposed action affects public health and safety.’ The agency is therefore *responsible for taking a ‘hard look’ at the project’s effect on safety.*” 570 F.3d at 1115 (emphasis added by Mack). Mack argues that BLM’s decision should be set aside because “BLM failed to adequately consider a substantial question of material significance to the proposed action, or otherwise failed to abide by . . . NEPA.” Reply at 2 (quoting *Bristlecone Alliance*, 179 IBLA 51, 60 (2010)). Mack concludes that public safety is of “material significance” and that BLM did not analyze that question.

Mack supports its argument with “sworn testimony accompanied by photographs showing multiple existing utility lines in the right of way area that had been buried but are now exposed.” Reply at 3; see SOR, Ex. D at ¶ 8, and attached photograph). Mack correctly asserts that BLM does not rebut or contest its claim that “[e]xposed high voltage power lines present a genuine danger to humans, livestock, and wildlife.” Reply at 3. To the contrary, in its SSSRMPA Final EIS, BLM acknowledged that there are safety issues related to burying power lines in dunal areas, and agreed with comments on the Draft EIS that the “[b]urying of electric power lines is a safety issue in sand soils where wind erosion may expose these lines.” Answer, Ex. B at B-9. “BLM is aware of the safety concerns, which is why burying power lines is an option for reducing habitat impacts, not a requirement.” *Id.* As Mack notes, “BLM did no more than mark an ‘X’ representing no impacts to ‘Public Health and Safety’ on the cover sheet of its environmental assessment—a conclusion that flies in the face of that which BLM reached in 2008 when it adopted the LPC resource management plan amendment.” Reply at 3; SOR, Ex. G. Mack is correct that “[i]n its Answer BLM does not address either its lack of analysis or change in position on safety,” but “makes only a single passing reference to safety.” Reply at 4. That “passing reference” is as follows:

BLM was aware of the additional cost requirements of requiring Mack to bury the power line. BLM Case File, tab 8, pg. 38. Armed with this information, the BLM made a reasoned decision that the environmental impacts of the overhead line outweighed any additional cost to Mack or the *purported greater safety risk*.

Reply at 4 (quoting Answer at 16-17) (emphasis added by Mack). We agree with Mack’s critique of BLM’s statement:

With all due respect, BLM’s response makes no sense. *First*, the safety risk is not “purported.” BLM has already conceded that there are safety

issues associated with burying power lines in dunal areas. . . . BLM cannot disavow its prior determination with no explanation. *Second*, BLM does not explain how being “armed” with the cost requirements of burying power lines supports its failure to address safety. The safest option—using overhead power lines—is also the most economic. *Third*, to the extent BLM is claiming that environmental impacts of an overhead power line outweigh the safety risks of a buried line, BLM provides no analysis of how or why that is true. Its Answer constitutes nothing more than counsel’s post-hoc statement intended to cover a substantial gap in BLM’s analysis.

Reply at 4.

Mack further argues that section 102(2)(C) of NEPA required BLM to address the economic impact of requiring its power line to be buried. SOR at 13; *see* SOR, Ex. B at B-2. Mack states that there are substantial economic impacts of its being required to bury the power line. Mack asserts that it received an estimate of \$132,000 to run an overhead power line to the Sam #3 well, and an estimate of \$1,120,499 to run a buried power line. SOR at 13; SOR, Ex. D at ¶ 10. In support of its argument, Mack cites Eric Lai, “Buried Power Lines Not Favored Beyond City Limits,” *Computerworld* (July 19, 2010) (SOR, Ex. N), who states that “[i]n terms of safety, reliability and especially cost, underground lines are the least preferred choice of engineers.” In addition to indirect economic impacts of requiring the power line to be buried, such as potential liability in the event of an injury to people or livestock, Mack argues that the “costs . . . may cause further development to be uneconomical.” SOR at 14; SOR, Ex. D (Sherrell Affidavit ¶ 10) (also citing *Paul Herman*, 146 IBLA 80, 97 (1998)). Mack notes that in the 2007 SSSRMPA, BLM recognized that high costs “mitigate against wide-spread participation” in burying power lines. SOR, Ex. B at B-2. Mack refers to the inadequacy of BLM’s “armed with the information” response, quoted above, as it relates to the cost issue of requiring buried power lines, stating: “Under BLM’s theory it could always justify its analysis of any resource or impact by merely saying it was ‘armed with the information’ and therefore made a ‘reasoned decision.’” Reply at 6. The record makes clear, as Mack asserts, that “BLM said nothing in its environmental assessment or the right of way decision about costs and made no effort to show that ‘the environmental impacts of the overhead line outweighed any additional costs.’” *Id.*

We conclude that Mack has met its burden to show, by a preponderance of the evidence, with objective proof, that “BLM failed to adequately consider a substantial question of material significance to the proposed action.” *Wyoming Outdoor Council*, 176 IBLA 15, 25 (2008), and cases cited. We recognize that BLM may have legitimate objectives in rendering decisions that will support, or be consistent with, an eventual designation of the LPC Corridor. However, that designation has not been made, and, as Mack points out, the environmental consequences of designating that

corridor have not been studied. However, Mack rightly argues that neither the decision on appeal nor the EA prepared to consider the environmental consequences of that decision provides an analysis of the safety and cost impacts of requiring Mack to bury the subject power line.⁷

CONCLUSION

For the reasons given, we conclude that the State Director's decision to require Mack to bury its proposed power line is not supported by the record, as required by section 501 of FLPMA, and is not supported by its NEPA analysis.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision is set aside and the case is remanded for further action consistent herewith.

/s/

James F. Roberts
Administrative Judge

I concur:

/s/

Sara B. Greenberg
Administrative Judge

⁷ Mack argues that BLM's decision is inconsistent with the State of New Mexico's decision authorizing Mack to construct an overhead power line over a substantial part of the ROW. *See* SOR at 14; SOR, Ex. D at ¶ 11. Mack asserts that the DR and ROW EA should have addressed this inconsistency. We agree with BLM that the State's decision does not dictate approval of an overhead power line. *See* Answer at 17. However, the State's decision will add another overhead power line to the immediate area that is already crisscrossed with overhead power lines and will contribute to the very problem that BLM seeks to alleviate by requiring Mack to bury its power line.