



GRAHAM PASS, LLC  
U.S. MAINSTREAM RENEWABLE POWER, INC.

182 IBLA 93

Decided February 22, 2012



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

GRAHAM PASS, LLC  
U.S. MAINSTREAM RENEWABLE POWER, INC.

IBLA 2011-245

Decided February 22, 2012

Appeal from a decision of the District Manager, California Desert District, Bureau of Land Management, rejecting an application for a Type II right-of-way for the placement of temporary meteorological towers on public lands. CACA-050770.

Set aside and remanded.

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

BLM has broad discretionary authority under Title V of FLPMA to approve or disapprove a right-of-way application. A BLM decision, made in the exercise of its discretionary authority, will be overturned by the Board only when it is arbitrary and capricious, and thus not supported on any rational basis. 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, including less stringent alternatives to the decision, and acted on the basis of a rational connection between the facts found and the choice made.

2. Federal Land Policy and Management Act of 1976:  
Rights-of-Way--Rights-of-Way: Applications--  
Rights-of-Way: Nature of Interest Granted

An agency decision, made in the exercise of its discretionary authority, must be supported by a proper administrative record, including a reasoned analysis of

the facts leading to the decision, which provides a rational connection between the facts found and the choice made—in short, a rational basis for its decision. Absent the necessary support in the administrative record for a BLM decision to reject a Type II right-of-way application for the placement of two temporary meteorological towers on public lands, the Board will set aside the decision and remand the case to the agency for compilation of a more complete record and readjudication of the matter.

APPEARANCES: Patrick Maguire, Santa Monica, California, for appellants; Erica L.B. Niebauer, Esq., and Daniel Shillito, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Sacramento, California, for the Bureau of Land Management; Nada Wolff Culver, Esq., Denver, Colorado, for The Wilderness Society and Natural Resources Defense Council, *Amici Curiae*.

#### OPINION BY ADMINISTRATIVE JUDGE ROBERTS

Graham Pass, LLC (Graham Pass), and U.S. Mainstream Renewable Power, Inc. (U.S. Mainstream) (collectively, Graham Pass),<sup>1</sup> have appealed from an August 26, 2011, decision of the District Manager, California Desert District, Bureau of Land Management (BLM), rejecting their application for a Type II right-of-way (ROW), CACA-050770,<sup>2</sup> for the placement of two temporary meteorological (MET) towers on public lands situated on the southern flanks of the Chuckwalla Mountains of Riverside County, California. For the following reasons, we set aside BLM's decision and remand the matter for further action.<sup>3</sup>

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<sup>1</sup> Graham Pass and U.S. Mainstream are both United States entities that are wholly-owned subsidiaries of Mainstream Renewable Power, Ltd., a limited liability company registered in the Republic of Ireland, with U.S. Mainstream managing the assets of Graham Pass on behalf of Mainstream Renewable Power, Ltd. Notice of Appeal and Petition for Stay (NA/Petition) at 3.

<sup>2</sup> BLM's Administrative Record does not contain a copy of the original ROW application. U.S. Mainstream, acting on behalf of Graham Pass, later acquired ROW application CACA-050770 from ADS and other parties. BLM approved assignment of the ROW to Graham Pass by decision dated Apr. 21, 2010.

<sup>3</sup> Graham Pass also requested a stay of the effect of BLM's decision. By order dated Nov. 7, 2011, the Board granted the request for a stay.

*BACKGROUND*

On April 15, 2009, Advanced Development Services, Inc. (ADS), filed an application for an ROW, which would authorize for a 3-year period the construction, maintenance, operation, and termination of three MET towers within a project area encompassing 30,855 acres of remote, sparsely-populated public land in T. 7 S., R. 16 E., and T. 8 S., Rs. 16-18 E., San Bernardino Meridian (SBM), Riverside County, California, pursuant to Title V of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1761-1771 (2006), and its implementing regulations, 43 C.F.R. Part 2800.<sup>4</sup> The three MET towers would cover the western, central, and eastern portions of the project area, and would be situated specifically on public land in secs. 8 and 14, T. 8 S., R. 16 E., and sec. 34, T. 8 S., R. 17 E., SBM, within the larger project area. The “[m]et towers are designed to collect wind speed and directional data [to] be used to determine whether wind resources in the immediate area can support installation of a wind power generating facility.” Graham Pass Wind Project Meteorological Tower Installation Plan of Development (2009 POD), attached to ROW Application, at 1.

In accordance with Instruction Memorandum (IM) No. 2009-043,<sup>5</sup> issued by the Director, BLM, on December 19, 2008, the proposed Type II ROW would encompass not only the three MET towers but also further wind energy testing over

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<sup>4</sup> Graham Pass reports that BLM’s anticipated processing costs of \$34,959 have already been paid to BLM under an executed Cost Reimbursement Agreement. NA/Petition at 3. The “(MASS) Serial Register Page,” dated Oct. 5, 2011, for CACA-050770 reveals that payment was received by BLM on June 1, 2009.

<sup>5</sup> IM No. 2009-043, which established BLM’s wind energy development policy on public lands, was updated by IM No. 2011-061 (Feb. 7, 2011). IM No. 2009-043 was designed to “ensure[] BLM-wide consistency in the processing of right-of-way applications and the management of authorizations for *wind energy site testing and development* on the public lands.” IM No. 2009-043 at 1 (emphasis added). IM No. 2011-061 was aimed at promoting “environmentally responsible *development of . . . wind energy projects* on public lands,” consistent with the protection of areas and resources of national interest, and in coordination with Federal, state, tribal, and local government agencies. IM No. 2011-061 at 1 (emphasis added). It is important to note that “wind energy site testing” applications are quite distinct from applications for “wind energy development projects,” which are the focus of IM No. 2011-061. *See id.* at 2.

a 3-year term, across a larger project area.<sup>6</sup> Under the terms of the IM, the ROW holder would be afforded the opportunity to eventually develop a wind energy development project in that area, subject to BLM's approval of a separate ROW application. The IM provides the following explanation:

The holder of the project area grant retains an interest in the site testing and monitoring project area, but will be required to submit a separate right-of-way application . . . and Plan of Development (POD) to the BLM for review, analysis, and separate approval for any future wind energy development process. *The interest retained by the holder of the project area grant is only an interest to preclude other wind energy right-of-way applicants during the 3-year term of the grant. The lands within the grant area will not be available for other wind energy right-of-way applications.* The holder of the project area grant establishes no right to development and is required to submit a separate right-of-way application of wind energy development to the BLM for analysis, review, and decision. . . .

IM No. 2009-043 at 3 (emphasis added). Thus, the ROW would offer exclusivity during the 3-year wind energy testing phase of operations in the larger project area, but would not offer exclusivity regarding future wind energy development. See NA/Petition at 4 (“Type II application rights, as they pertain to wind assessment and monitoring, provide the applicant with site exclusivity over a specific area for the express purpose of wind resource determination for a limited time.”).

The proposed Type II ROW would authorize Graham Pass to test and monitor wind data for purposes of determining the wind energy resource potential of the areas, and to assess the feasibility of erecting a large-scale wind energy

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<sup>6</sup> IM No. 2009-043 provides for ROW grants covering three types of wind energy projects: (1) site-specific wind energy testing and monitoring sites involving individual MET towers and instrumentation facilities, limited to a term of 3 years (Type I); (2) wind energy testing and monitoring sites situated within a larger testing and monitoring project area, with a term of 3 years that may be renewed (for a term not to exceed 3 years, provided the grantee submits an application for a separate ROW grant and POD for wind energy development in the project area during the initial 3-year term) (Type II); and (3) a long-term commercial wind energy development project with an unlimited term (generally expected to be 30 years) (Type III). See IM No. 2009-043 at 2, 3-5. The proposed ROW grant at issue falls into Type II. See BLM Notes of Mar. 15, 2011, Meeting with Graham Pass and U.S. Fish and Wildlife Service (FWS) (“Mainstream stressed that they were in pursuit of a favorable determination for the Type 2 only at this stage.”).

development project in the larger project area. Should the testing indicate that a large-scale wind energy project is feasible, Graham Pass could then seek BLM's approval to undertake such a project. See NA/Petition at 11 ("There is no application to construct or operate a wind energy project at this time. The project is a proposal to undertake wind resource measurement over a specific area [for a limited time]."); IM No. 2009-043 at 6 (The environmental review of a Type II ROW application "should not address wind energy development facilities, as the installation of wind turbines are not proposed during site testing and monitoring. The environmental review of wind energy development facilities will occur at the point in time when a wind energy development application is submitted."). In approving the action now at issue, BLM would not approve any activity other than installation, maintenance, operation, and termination of the MET towers. Nothing in the grant would be construed as approving, or as guaranteeing, authorization for future wind energy development.

On April 21, 2010, BLM approved an assignment of the Type II ROW application to Graham Pass, subject to all its existing terms and conditions. Graham Pass, in pursuing the pending application, states that the application is intended "only to analyze wind resources and undertake adjunct biological surveys." NA/Petition at 6. Such analysis and survey activity would allow Graham Pass to conduct wind monitoring and testing, as well as to conduct bird and bat acoustic studies for determining the suitability of a utility scale commercial wind farm in the vicinity of the MET towers. *Id.* Graham Pass acknowledges that, even were sufficient wind energy resources discovered, "there is absolutely no guarantee that the Appellants will be able to perfect their Type II grant into a Type III grant that would allow for a wind energy [development] project. *The Appellants do not seek any such guarantees.*" *Id.* (emphasis added).

On September 20, 2010, Graham Pass submitted a Revised POD for its Type II ROW application, seeking approval for only two of the three MET towers (MO3 and MO1), situated, respectively, in secs. 8 and 14, T. 8 S., R. 16 E., SBM. The Revised POD also included a preliminary wind turbine layout for the overall project area.<sup>7</sup>

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<sup>7</sup> Attached to Graham Pass' Revised POD was a 33-page July 2010 *Biological Evaluation and Assessment for the Graham Pass MET Tower Installation Project* (BE/BA) (Attachment D), and a 62-page August 2010 *Class III Cultural Resources Survey for the Proposed Graham Pass Wind Project Meteorological Tower Installation, Riverside County, California* (Attachment E (with appendices)), both of which were prepared on its behalf by SWCA Environmental Consultants of South Pasadena, California.

The August 26, 2011, decision at issue states that the California State Office, BLM, formally requested Graham Pass to replace its Type II ROW application with a Type I ROW application. The California State Office requested the change because the lands sought were within the Chuckwalla Desert Wildlife Management Area (DWMA), most of which had been designated by FWS as critical habitat for the desert tortoise (*Gopherus agassizii*), a Federally-listed threatened and endangered species, and because a Type I application would provide for the site-specific location of the two MET towers for a limited term of 3 years. See Decision at 2. We find no indication in the record that BLM assured Graham Pass that by substituting a Type I for a Type II ROW application, Graham Pass would retain its site exclusivity for wind energy testing for the larger project area.

Nonetheless, Graham Pass submitted a Type I ROW application, CACA-052856, for two MET towers on May 31, 2011. See Decision at 2. In an e-mail to BLM dated April 23, 2011, Graham Pass expressed its concern that the Type II application would lapse during the pendency of the Type I application. See Apr. 23, 2011, e-mail to Greg Miller, Supervisory Projects Manager, Renewable Energy Coordination Office (RECO), BLM, from Claude Mindorff, Vice President, Business Development–USA, U.S. Mainstream. Miller responded that BLM was, in accordance with IM No. 2011-061, actively evaluating current “wind applications for conflicts with the placement of renewable energy applications within or adjacent to special management areas . . . as well as other resource conflicts.” Apr. 26, 2011, e-mail to Mindorff from Miller (emphasis omitted). Miller stated that under IM No. 2011-061, Graham Pass’ Type II ROW application had a high conflict rating, with a low priority processing rating. Miller advised Mindorff that Graham Pass might want to pursue a Type I application instead, adding: “Your Type 2 wind application will be held with the BLM at this time; however, we will not consider it a priority.” *Id.*<sup>8</sup>

Graham Pass inquired regarding the status of its ROW applications on July 11, 2011. The record contains a Note to File dated August 23, 2011, in which Janet Eubanks, RECO Project Manager/Realty Specialist, California Desert District, BLM, reported that she had informed Graham Pass during a phone call that the lands

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<sup>8</sup> In a June 13, 2011, e-mail, Ray Brady, Renewable Energy Policy Team, Washington Office, BLM, informed Tom Pogacnik, Deputy State Director, Natural Resources, California State Office, BLM, that Washington BLM has “no IM in preparation that would limit wind development” in Areas of Critical Environmental Concern (ACECs) or in DWMA’s, and then stated that while IM No. 2011-061 identifies “potential conflict areas,” the “memo[] made it very clear that [it] w[as] limited to wind development applications *and not wind site testing applications.*” (Emphasis added.) Brady then added: “Seems like someone is stre[t]ching the intent of our policies as an excuse to not process[] applications.” *Id.*

covered by the Type I ROW application were “not in the best place and FWS, DoD [the Department of Defense], and BLM were having issues regarding conflicts with Wilderness, Critical Tortoise habitat and the flight zones,” indicating that the matter was unresolved.<sup>9</sup> Almost immediately thereafter, BLM issued the August 26, 2011, decision, rejecting Graham Pass’ Type II ROW application, and leaving the Type I ROW application pending.

In the August 2011 decision, BLM invoked its discretionary authority under 43 C.F.R. § 2804.26(a)(1) to reject an ROW application if “[t]he proposed use is inconsistent with the purpose for which BLM manages the public lands described in [the] application.” In support, BLM specifically cited IM No. 2011-061 and explained that, based upon the screening criteria of the IM, Graham Pass’ Type II ROW application was properly characterized as having “high conflicts,” and thus a “low priority” for approval. Decision at 2. BLM stated: “Applications in high conflict areas are more difficult to process and require a greater level of consultation, analysis, and mitigation to resolve issues and/or may not be feasible to authorize.”<sup>10</sup> *Id.* BLM specifically noted that the application at issue implicated

three of the six listed criteria under the “High Potential for Conflict,” which include 1) applications near or adjacent to lands designated by Congress, the President, or the Secretary [of the Interior or Agriculture] for the protection of sensitive viewshed, resources and values . . . which may be adversely affected by development, 2) applications within designated critical habitat for [F]ederally threatened and/or endangered species if project development is likely to result in the destruction or adverse modification of the critical habitat, and 3) lands currently designated as Visual Resource Management [(VRM)] Class I or Class II.

*Id.*

BLM stated that “granting the Type II ROW application would cause significant impacts to sensitive resources and values that cannot be adequately mitigated,” and

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<sup>9</sup> Based upon the context, it is quite possible that Eubanks meant to refer to the Type II application, not the Type I application.

<sup>10</sup> IM No. 2011-061 at 1-3 identifies three basic categories of screening criteria for wind energy development ROW applications: (1) Low Potential for Conflict—timely or expedited authorizations possible; (2) Medium Potential for Conflict—projects that have resource conflicts that can potentially be resolved; and (3) High Potential for Conflict—more complex projects that will require a greater level of consultation, analysis, and mitigation to resolve issues or may not be feasible to authorize.

would “undermine[] the accomplishments thus far to protect this area from development.” Decision at 3. BLM defined the “sensitive resources and values” in terms of the fact that the larger project area encompassed (1) critical tortoise habitat in the Chuckwalla DWMA; (2) low-level flight training paths used by military jets crossing the adjacent Chocolate Mountain Aerial Gunnery Range; and (3) adjacent and nearby Chuckwalla Mountains and Little Chuckwalla Mountains Wilderness Areas, which were identified as VRM Class I, in a recent Visual Resource Inventory. *See id.* at 1, 2.

#### GRAHAM PASS’ ARGUMENTS ON APPEAL

Graham Pass’ challenge to BLM’s decision, rejecting its Type II ROW application to construct, maintain, operate, and terminate two MET towers on public lands, is exclusively founded on its objection to the fact that, in doing so, BLM has deprived it of the site exclusivity that would normally attend a Type II, rather than a Type I, ROW application and grant: “*To allow the BLM, by their action[,] to cancel site exclusivity, resulting in the rejection of a valid proposal to undertake wind resource and biological surveys is wholly inconsistent with public policy.*” NA/Petition at 12-13 (emphasis added); *see id.* at 9 (“[BLM] cancels site exclusivity even though Appellant is willing and able to undertake studies helpful to the BLM, environmental agencies, the DRECP [California Desert Renewable Energy Conservation Plan] and national energy goals.”). Graham Pass concludes that “[n]o reputable wind energy applicant will undertake the expense of a Type I application *without site exclusivity.*” *Id.* at 9 (emphasis added).

Graham Pass further argues that no land-use plan expressly precludes renewable energy development in the DWMA, being “either silent on, or specifically envision[ing] the potential development of, renewable energy in the[] respective planning areas[.]”<sup>11</sup> NA/Petition at 8. Graham Pass notes that national BLM policies, through IM No. 2009-043 and the Programmatic Environmental Impact Statement (PEIS) (2005), specifically promote the development of renewable energy wind development within DWMA’s and ACECs, when compatible with the values for

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<sup>11</sup> Graham Pass points to the fact that BLM recently approved the installation of two MET towers and one SODAR (Sound Detection and Ranging) unit, under an ROW, “on an adjacent project site . . . with the same potential biological concerns and within the same ACEC and DWMA,” and construction of a telecommunications tower, under another ROW, “on an adjacent mountain (also within the same DWMA).” NA/Petition at 5, 6.

which the DWMA or ACEC was designated.<sup>12</sup> NA/Petition at 8. Graham Pass also states that BLM discloses no specific harm to any aspect of the environment from the construction, maintenance, operation, and termination of the two MET towers, and certainly none that could not be adequately avoided or mitigated.

Graham Pass asserts that BLM's August 2011 decision suffers from material factual errors and is, indeed, manifestly arbitrary and capricious. Graham Pass concludes that BLM's decision must be reversed and the case remanded to BLM for further review. We agree.

### ANALYSIS

[1] BLM has broad discretionary authority under Title V of FLPMA to approve or disapprove FLPMA ROW applications. *Union Telephone Company, Inc.*, 173 IBLA 313, 327 (2008); *Tom Cox*, 142 IBLA 256, 257 (1998). Generally speaking, a BLM decision, made in the exercise of its discretionary authority, will be overturned by the Board only when it is arbitrary and capricious, and thus not supported on any rational basis. *Wiley F. Beaux*, 171 IBLA 58, 66 (2007); *Echo Bay Resort*, 151 IBLA 277, 281 (1999); *John Dittli*, 139 IBLA 68, 77 (1997). 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, including less stringent alternatives to the decision, and acted on the basis of a rational connection between the facts found and the choice made. *Echo Bay Resort*, 151 IBLA at 281. 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).

Under 43 C.F.R. § 2804.26(a), which BLM quotes in direct support of its decision to offer a Type I ROW grant rather than a Type II ROW grant for the two MET towers, BLM may deny an ROW application "if . . . [t]he proposed use is

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<sup>12</sup> The PEIS refers to the June 2005 *Final Programmatic Environmental Impact Statement on Wind Energy Development on BLM-Administered Lands in the Western United States*. Based on the PEIS, Washington BLM issued a Dec. 15, 2005, Record of Decision (ROD), entitled *Implementation of a Wind Energy Development Program and Associated Land Use Plan Amendments*, which "establishes policies and best management practices (BMPs) for the administration of wind energy development activities [in 11 western states, including California,] and establishes minimum requirements for mitigation measures." ROD at 2. Future site-specific projects would, to the extent appropriate, tier to the environmental analysis in the PEIS and the decisions in the ROD.

inconsistent with the purpose for which BLM manages the public lands described in your application.” Decision at 2. This rule is reinforced by BLM’s policy pronouncement, set forth in IM No. 2011-061, and also quoted by BLM in support of its decision, that BLM “may exercise its discretion . . . to reject [an ROW] application” if it is determined that the ‘proposal does not avoid areas where development would cause significant impacts to sensitive resources and values that are the basis for special designations or protections.” Decision at 2 (quoting IM No. 2011-061 at 2).

Based upon our review of the record, we do not find the cited portion of 43 C.F.R. § 2804.26(a) generally applicable to Graham Pass’ Type II ROW application. That regulation authorizes BLM to deny an ROW application where the proposed use is inconsistent with the purpose for which BLM manages “the public lands *described in your application.*” (Emphasis added.) None of the lands described in Graham Pass’ Type II ROW application, *i.e.*, the acreage where the two MET towers now at issue are to be situated, is situated within the Chocolate Mountain Aerial Gunnery Range, or the Chuckwalla or Little Chuckwalla Wilderness Areas, which are described as near or adjacent to the project area.<sup>13</sup> See Decision at 2; Revised POD at 20 (“The Chuckwalla Mountains Wilderness Area is located approximately 3.5 miles (5.6 km) northwest of the closest proposed temporary met tower.”). Even though the two MET towers are to be situated near or adjacent to the Wilderness Areas and the Aerial Gunnery Range, BLM states only that the two towers “may . . . adversely affect” the condition or status of the Wilderness Areas, or “may . . . adversely affect” the Aerial Gunnery Range. Decision at 2; IM No. 2011-061 at 3. However, the record does not provide support for these stated possibilities.

Nowhere do we find any clear statement that the lands sought by Graham Pass for the MET towers are themselves “currently designated as Visual Resource Management Class I or Class II.” Decision at 2; IM No. 2011-061 at 3; *see* Visual Resource Inventory, dated April 2010.<sup>14</sup>

<sup>13</sup> The record confirms that the Wilderness Areas and Aerial Gunnery Range are “lands designated by Congress, the President, or the Secretary [of the Interior or Agriculture] for the protection of sensitive viewsheds, resources and values,” within the meaning of the IM. IM No. 2011-061 at 3.

<sup>14</sup> We also note that, even were they so designated, IM No. 2009-043 provides, at page 1, that “VRM management classes” establish “landscape management objectives,” and are plainly “not intended to be used to exclude or preclude land uses, including opportunities for development of wind energy in areas with high wind energy resource potential,” where measures can be taken to visually integrate the wind energy facility into the landscape setting. See Revised POD at 23 (“Subject to BLM concurrence a Class II may best characterize the proposed site”), 24 (“The visual  
(continued...)”)

The record does show the presence of designated critical tortoise habitat and the remainder of the DWMA within the larger project area. However, nowhere does BLM offer any convincing argument or supporting evidence that construction, maintenance, operation, and termination of the two MET towers is, in BLM's words, likely to "cause significant impacts" to the tortoise or its critical habitat or any other resources or values that formed the basis for designation or protection of the DWMA, or is, in the words of 43 C.F.R. § 2804.26(a), "inconsistent" with the purpose for which BLM manages the critical tortoise habitat or the remainder of the DWMA. Decision at 3. Nor does BLM make any effort to determine whether, even though situated within critical tortoise habitat, the two MET towers are "likely to result in the destruction or adverse modification of that critical habitat," which is deemed necessary, under the IM, to give rise to a high potential for conflict. IM No. 2011-061 at 3.

As detailed at length in its BE/BA, based upon research and field surveys concerning the presence of tortoise habitat at each proposed MET tower site, and analyzing potential impacts of MET tower construction, operation, maintenance, and termination, Graham Pass concluded that

the proposed action may affect, but is not likely to adversely affect, the Mojave population of the desert tortoise or adversely modify its critical habitat. The impacts of the proposed action due to its small size and temporary condition will have insignificant effects to desert tortoise and Critical Habitat in the action area.

Revised POD at 28. These conclusions are not contradicted by BLM or FWS.<sup>15</sup>

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<sup>14</sup> (...continued)

impact of this proposed action to install a met tower for wind monitoring and assessment is not considered adverse because of its remote location, slender design and temporary nature.”).

<sup>15</sup> See 2009 POD at 25 (“All three proposed met tower installations will occur within the Eastern Colorado [Recovery Unit, which encompasses the Chuckwalla] Desert Wildlife Management Area[,] and the Chuckwalla Area of Critical E[nvironment]al Concern. . . . In addition, US Fish & Wildlife Service identifies this area as being critical to the preservation of [F]ederally protected Desert Tortoise species. Installation of met towers is *expected to remain consistent with all allowable management uses within this area.*” (Emphasis added.)); Revised POD at 22 (“Installation of temporary met towers is expected to remain consistent with all allowable management uses within this area”), 26 (“Pursuant to Section 7 of the ESA [Endangered Species Act of 1973, 16 U.S.C. § 1536 (2006)], a Biological Opinion  
(continued...)”)

BLM stated in its decision that even were an ROW area deemed to have “high conflicts,” the ROW application would have a “low priority” for adjudication under IM No. 2011-061, making it “more difficult to process,” since it would require “a greater level of consultation, analysis, and mitigation to resolve issues.” Decision at 2 (emphasis added). Again citing the IM, BLM added that the application “may not be feasible to authorize”; however, BLM did not completely rule out authorization, after the appropriate consultation, analysis, and mitigation. *Id.* In the present case, we find no indication that BLM engaged in the appropriate consultation, analysis, or mitigation, or made any real effort “to process” the Type II ROW application at issue. *Id.* Rather, lumping it together with the overall project, BLM simply rejected the application.

It is quite evident that, in adjudicating Graham Pass’ Type II ROW application for the two MET towers, BLM considered the overall ramifications of development of the entire wind energy development project. See BLM Notes of Graham Pass FWS Meeting dated Mar. 15, 2011 (“[BLM] stated that a Type 3 development had a very limited capability in this area due to the varying issues . . . with the tortoise population, cultural issues, Chuckwalla Bench ACEC.”). In its decision, BLM specifically states that it is authorized to reject an ROW application under the IM where “[the] proposal does not avoid areas where development would cause significant impacts to sensitive resources and values that are the basis for special designations or protections,” and then proceeds to reject Graham Pass’ Type II ROW application based on its “intent to construct, maintain, operate and terminate a commercial wind energy project . . . [which] would cause significant impacts to sensitive resources and values,” thereby “undermin[ing] the accomplishments thus far to protect this area from development.” Decision at 2, 3 (emphasis added). It seems undeniable that

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<sup>15</sup> (...continued)

(BO) was issued by the FWS [in 1997] for the BLM’s California Desert District, which covers small actions in the California deserts”), 27 (“Because less than two acres would be disturbed through implementation of the proposed action, it qualifies for the small projects BO. When issuing the BO, the FWS determined that impacts of small projects would not appreciably diminish the value of Critical Habitat, and would not increase fragmentation of desert tortoise populations.” (Emphasis added.)); BE/BA at 8 (“The BO covers actions that result in less than two acres of footprint disturbance. The BO covers actions that include the disturbance of soils, placement of machinery, exclusion of areas from wildlife use, and construction of permanent structures. The FWS concluded that because projects would disturb small areas, implement mitigation and avoidance measures, and avoid fragmenting desert tortoise habitat, they would not likely jeopardize the continued existence of desert tortoise populations or result in the destruction or adverse modification of designated Critical Habitat.”). (Emphasis added).

“*[the] proposal*” being rejected by BLM is not the two MET towers, but rather the larger “commercial wind energy project,” which has yet to be proposed, let alone analyzed and adjudicated by BLM. However, having concluded that the potential overall project would cause significant impacts to sensitive resources and values, BLM rejected the limited ROW application at issue.

BLM’s rejection of the potential wind energy development project is clearly premature. It is true that the two MET towers may be a harbinger, but they are not necessarily the inevitable precursor, of a wind energy development project. See Graham Pass Meeting Notes dated Mar. 15, 2011, at unpag. 2 (“Mainstream sees the [wind energy development project] potential of this site and our ability to mitigate as [] viable. However, it is our desire at this time to simply measure the wind to determine whether or not the resource and the potential cost implications of this site make it viable for development.”), 5. No matter how promising the project area looks, at the present time, as a potential source of wind energy for serving the Nation’s electrical power needs, much remains to be done to assess the strength and reliability of the wind energy in the area, and thus whether it is an appropriate site for a physically and financially sustainable project. Further, even more must be done to assess whether it is possible, and, if it is possible, how best to harness the available wind energy in a manner compatible with the other resources and values inherent in the area. See 2009 POD at 20. We find no statute, regulation, or policy pronouncement that commits BLM, once it has approved wind energy testing in a larger project area under a Type II ROW, to later approve a wind energy development project.

Nor has BLM presented any convincing argument or supporting evidence demonstrating that, in deciding whether to approve limited wind energy testing in a larger project area, it is required by section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(2)(C) (2006), to address all of the likely environmental impacts of the overall project. However, that is effectively what BLM has done in denying Graham Pass’ Type II ROW application. Without any supporting environmental analysis, BLM concludes that, since it presumes the environmental impacts of the larger project to be unacceptable, it must reject any precursor to the project. While it may ultimately decide that the environmental implications of the larger project are unacceptable, we do not agree that BLM can use such conclusions, at this earlier stage of the planning process, to bar any activity that might lead to the proposal and consideration of the development project at an appropriate later time.

In deciding whether to approve a Type II ROW application, BLM is required by section 102(2)(C) of NEPA to focus solely on the environmental impacts of the two specific MET towers at issue and any other reasonable foreseeable future activity. We

conclude that BLM has not established with any convincing argument or supporting evidence that full wind energy development of the project area is a reasonably foreseeable future activity at the present time. BLM errs in rejecting Graham Pass' Type II ROW application on the basis of undefined environmental impacts of a possible eventual wind energy development project, where there is no evidence that the project is the necessary or even inevitable consequence of the MET towers. The BLM Director stated this point clearly in IM No. 2009-043 at page 6:

The reasonably foreseeable development discussions in the environmental analysis for a site testing and monitoring right-of-way application should focus on anticipated installation of additional wind monitoring facilities during the term of the right-of-way grant. Typically only a small number of wind energy site testing and monitoring authorizations ever lead to actual wind energy development projects. *Therefore, the reasonably foreseeable development discussion should not focus on uncertain future development scenarios.* [Emphasis added.]

[2] At the very least, an agency decision, made in the exercise of its discretionary authority, must be supported by a proper administrative record, including a reasoned analysis of the facts leading to the decision, which provides a rational connection between the facts found and the choice made—in short, a rational basis for its decision. *John L. Stenger*, 175 IBLA 266, 279-80 (2008); *The Navajo Nation*, 152 IBLA 227, 234 (2000), *Viking Resources Corp.*, 77 IBLA 57, 59 (1983), and cases cited. The Board has elaborated on the rationale for this as follows:

[T]he appellant is entitled to a reasoned and factual explanation for [the decision]. Appellant must be given some basis for understanding and accepting the [decision] or alternatively appealing and disputing it before this Board. The explanation provided must be a part of the public record and must be adequate so that this Board [in the exercise of its objective, independent review authority] can determine its correctness if disputed on appeal.

*Southern Union Exploration Co.*, 51 IBLA 89, 92 (1980), and cases cited.

Absent the necessary support in the administrative record for an agency decision, we have long held that it is appropriate to set aside the decision, and remand the case to the agency for compilation of a more complete record and readjudication of the matter. *The Navajo Nation*, 152 IBLA at 234-36; *Viking Resources Corp.*, 77 IBLA at 59, and cases cited. We find that to be the situation here.

Finally, it seems clear that, in deciding whether to approve the Type II ROW application at issue, BLM failed to take into account the longstanding principle that it should consider less stringent alternatives to rejection of an ROW application. *Echo Bay Resort*, 151 IBLA at 281. We will not lightly set aside a decision based on the professional opinion of BLM's experts, concerning matters within the realm of their expertise, even though it represents a subjective judgment based on established facts. *John Dittli*, 139 IBLA at 75. However, the record should reflect a thorough effort by BLM to consider whether appropriate measures to avoid or mitigate undesirable environmental impacts could have been adopted, allowing the ROW to be approved in some manner, and thus its benefits to be achieved in some measure, rather than rejecting outright the entire ROW.

Since we are not persuaded that the administrative record reflects such an effort by BLM, we find ample reason to set aside BLM's decision to reject the ROW application, and remand the case for consideration of less stringent alternatives.

We therefore conclude that the District Manager, in her August 2011 decision, improperly rejected Graham Pass' Type II ROW application.

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 appealed from is set aside and the case is remanded to BLM for further action.

\_\_\_\_\_/s/\_\_\_\_\_  
James F. Roberts  
Administrative Judge

I concur:

\_\_\_\_\_/s/\_\_\_\_\_  
H. Barry Holt  
Chief Administrative Judge