



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
Interior Board of Land Appeals
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July 14, 2009

IBLA 2009-153)	CACA-47658 & CACA-47658-01
)	
BACKCOUNTRY AGAINST DUMPS,)	Electrical Transmission Project
ET AL.	)	Rights-of-Way
)	
)	
	)	Motion to Intervene Granted;
	)	Motion to Dismiss for Untimely
	)	Appeal Denied;
	)	Motions to Dismiss for Lack of
	)	Standing Granted in Part and
	)	Denied in Part;
	)	Petition for Stay Denied;
	)	Motions for Expedited Review Taken
	)	Under Advisement

ORDER

Backcountry Against Dumps (Backcountry) and others have appealed from a January 20, 2009, "Record of Decision for the Sunrise Powerlink Transmission Project and Associated Amendment to the Eastern San Diego County Resource Management Plan" (ROD) issued by the State Director, California, Bureau of Land Management (BLM).¹ Therein, the State Director approved granting, in accordance with Title V of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1761-1771 (2006), two rights-of-way (ROWs), CACA-47658 and CACA-47658-01, to the San Diego Gas & Electric Company (SDG&E) for that portion of the Sunrise Powerlink Transmission Project (SPTP or Project) crossing public

¹ The Board docketed three appeals of the ROD: IBLA 2009-153, filed by Backcountry, Protect Our Community Foundation (POCF), East County Community Action Coalition (ECCAC), and Donna Tisdale (collectively, BAD); IBLA 2009-154, filed by Katheryn Rhodes and Conrad Hartsell; and IBLA 2009-155, filed by the Viejas Band of Kumeyaay Indians. By order dated June 23, 2009, we dismissed IBLA 2009-154 because Rhodes and Hartsell had not shown standing to appeal.

lands. The State Director based the ROD on an October 13, 2008, Final Environmental Impact Report/Environmental Impact Statement (EIR/EIS).²

SDG&E has moved to intervene. That motion is granted. BAD has filed a petition for stay of the ROD. BLM and SDG&E oppose the granting of a stay. SDG&E moves to dismiss the appeal as untimely and for lack of standing to appeal. BLM moves to dismiss the appeal for lack of standing. BAD has responded to the motions, and BLM and SDG&E have moved for expedited review of the merits of all appeals challenging the ROD.

In this order, we deny SDG&E's motion to dismiss the appeal as untimely, deny in part and grant in part SDG&E's and BLM's motions to dismiss for lack of standing to appeal, and deny the petition for stay because BAD has not shown a likelihood that denial of the petition will result in immediate and irreparable harm.

Background

The three major objectives of the Project are: (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 growing economy of the region; and (3) to reduce congestion and the power supply costs of delivering electricity to ratepayers. ROD at 1. SDG&E proposed to construct, operate, maintain, and terminate 500 kV and 230 kV electrical transmission lines a total distance of approximately 150 miles across Federal, State of California, San Diego County, City of San Diego, and private lands in Southern California.³ The transmission lines,

² 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. The California Public Utilities Commission (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.

³ The ROD authorized the granting of an ROW across approximately 49 miles of BLM land, 19 miles of Forest Service land, 2 miles of Department of Defense land, and 0.4 miles of state land, with the remainder of the line crossing lands in various ownerships, including private and local agencies. ROD at 3. The selected route is the
(continued...)

substations, access roads, and other associated facilities would stretch 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.

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)," the Southwest Powerlink, built over 25 years ago; electricity demand has doubled since that line was built; and the City is vulnerable in the event of loss or damage to that line. Opposition at 4. SDG&E also explains that the Project is needed to tap into the "vast renewable energy resources" of Imperial Valley, noting that "[t]here are approximately 8,000 megawatts of renewable energy projects in the queues seeking interconnection to the grid -- most sited in the Imperial Valley," and additional renewable energy projects are being developed with the specific goal of connecting to the Project. *Id.* at 5. It notes that the Project would assist in achieving the aim, mandated by State law or policy, of having renewable energy resources provide 20-percent of all electricity generated in the State by 2010, and 33-percent by 2020. *Id.*

On December 18, 2008, following eight weeks of regulatory hearings, CPUC issued a decision granting permission to build the Project, and approving issuance of a Certificate of Public Convenience and Necessity to SDG&E for the Project.

The State Director approved the Project, to the extent it crosses public land, in the January 2009 ROD.⁴ He adopted the Final Environmentally Superior Southern

³ (...continued)

"Sunrise Powerlink Transmission Project's Final Environmentally Superior Southern Route Alternative as analyzed in the Final EIR/EIS." *Id.* The first 36 miles of the selected route traveling west from the Imperial Valley Substation are to be built on BLM land adjacent to the existing Southwest Powerlink 500 kV line. *Id.*; see Declaration of Jonathan Woldemariam, Technical Project Manager, SDG&E, dated Apr. 6, 2009 (Ex. E attached to Opposition), Ex. 1 (Map of Environmentally Superior Southern Route, dated Apr. 2, 2009).

⁴ 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 amendment of the Eastern San Diego County Resource Management Plan (RMP) in order to afford a one-time exception, allowing the electrical 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

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Route Alternative, subject to, *inter alia*, a comprehensive list of 126 mitigation measures, set forth as Appendix A to the ROD. The State Director concluded that “the measures contained in the Final EIR/EIS, the programmatic agreement regarding the management of cultural resources, and the biological opinion significantly minimize and/or mitigate environmental damage and protect resources.” ROD at 3. Notice of issuance of the ROD was published in the *Federal Register* on February 20, 2009 (74 Fed. Reg. 7916).

BLM granted ROW CACA-47658 for a term of 50 years (subject to renewal), effective February 24, 2009, authorizing SDG&E to construct, operate, maintain, and terminate the 500 kV and 230 kV transmission lines on the public-land portion of the Project.⁵ In accordance with the terms of the ROW, 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. 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.

BAD appealed the ROD and petitioned for a stay, seeking to preclude any resource-disturbing activities, including but not limited to road building, clearing, surveying, and transmission line construction, as well as all contracting activities. BAD argues that it is likely to succeed on the merits of its appeal and satisfies the other criteria for a stay. BLM and SDG&E both oppose any stay.

Motion to Dismiss Appeal as Untimely

In this order, we turn first to the motion filed by SDG&E to dismiss BAD’s appeal as untimely, and deny it.⁶

⁴ (...continued)

amendment is 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).

⁵ BLM also granted a second ROW, CACA-47658-01, to SDG&E, for a term of two years (subject to renewal), effective Feb. 24, 2009, authorizing the use of temporary construction work areas on a total of 214.77 acres of public land.

⁶ BLM and SDG&E both request the Board to summarily dismiss BAD’s appeal, pursuant to 43 C.F.R. § 4.402, because BAD failed to timely file its Statement of Reasons (SOR) within 30 days of the filing of its notice of appeal. See BLM Answer at (continued...)

SDG&E moves for dismissal of the appeal as untimely under 43 C.F.R. § 4.411(a), charging that BAD did not file the appeal within 30 days of the February 20, 2009, *Federal Register* publication of the notice of availability of the ROD. See Answer at 1, 12. The regulation at 43 C.F.R. § 4.411(a) requires an appeal to be filed within 30 days after the date of *Federal Register* publication, where the decision was not otherwise served on the appellant, and, in accordance with longstanding Board precedent, failure to timely file the appeal renders the Board without jurisdiction and requires that the appeal be dismissed. See, e.g., *Friends of the River*, 146 IBLA 157, 161 (1998). Since there is no evidence that BLM served a copy of the ROD on BAD, the 30-day appeal period ended on March 22, 2009, a Sunday. Thus, BAD had until the next business day to file its appeal. See, e.g., *Friends of the River*, 146 IBLA at 161 (citing 43 C.F.R. § 4.22(e)). While its notice of appeal was not filed on March 23, 2009, BAD provides evidence, and SDG&E admits, that BAD sent its notice to BLM on March 23, 2009, by certified mail, return receipt requested, and that BLM received the notice on March 26, 2009. See Answer at 12. Under those circumstances, BAD is entitled to the benefit of the 10-day grace period provided by 43 C.F.R. § 4.401(a), and its appeal is considered timely filed. See *Southern California Sunbelt Developers, Inc.*, 154 IBLA 115, 116-17 (2001); *United States Forest Service*, 124 IBLA 336, 337-39 (1992). SDG&E's motion to dismiss is denied.

Standing to Appeal

We now address the issue of standing to appeal. Both BLM and SDG&E have moved for dismissal of BAD's appeal for lack of standing to appeal, charging that none of appellants, Backcountry, POCF, ECCAC, or Tisdale, is a party to a case or adversely affected by the ROD. BAD has responded, providing declarations from three individuals, including Tisdale, asserting that all appellants have standing to appeal.⁷

⁶ (...continued)

19-20; SDG&E Answer at 13 n.15. Neither BLM nor SDG&E have shown any prejudice. They have each filed extensive answers to the SOR. The requests are denied. See *Tagala v. Gorsuch*, 411 F.2d 589, 590 (9th Cir. 1969); *Red Thunder, Inc.*, 117 IBLA 167, 172-73, 97 I.D. 263, 266 (1990).

⁷ SDG&E objects to BAD's response asserting that BAD should have filed the standing declarations "many months ago." Objection at 1. SDG&E argues that BAD's response and the declarations should be "disregarded." *Id.* While we agree that BAD has unnecessarily protracted adjudication in this matter by not initially providing any evidence in support of standing, we do not believe that SDG&E or BLM has been prejudiced by the delay, and we decline to disregard BAD's filings.

In order to pursue an appeal from and petition for a stay of a BLM decision, an appellant is required to have standing under 43 C.F.R. § 4.410 to appeal from the decision. That regulation, at 43 C.F.R. § 4.410(a), requires that an appellant demonstrate that it is both a “party to a case” and “adversely affected” by the decision, within the meaning of 43 C.F.R. § 4.410(b) and (d). *The Coalition of Concerned National Park [Service] Retirees*, 165 IBLA 79, 81-86 (2005), and cases cited. An appeal must be dismissed if either element is lacking. *Southern Utah Wilderness Alliance*, 140 IBLA 341, 346 (1997); *Mark S. Altman*, 93 IBLA 265, 266 (1986). It is the responsibility of the appellant to demonstrate the requisite elements of standing. *Concerned Citizens for Nuclear Safety*, 175 IBLA 142, 146 (2008).

The regulation at 43 C.F.R. § 4.410(b) provides that an appellant is a “party to a case” when he/she is “one who has taken action that is the subject of the decision on appeal, is the object of that decision, or has otherwise participated in the process leading to the decision under appeal, e.g., . . . by commenting on an environmental document, or by filing a protest to a proposed action.” See, e.g., *The Coalition of Concerned National Park [Service] Retirees*, 165 IBLA at 81-82.

It is clear that none of appellants has taken action that is the subject of the ROD, and they are not the object of the ROD. Thus, in order to be parties to the case, they must show that they “participated in the process leading to the decision under appeal,” i.e., the ROD.

In addition, under 43 C.F.R. § 4.410(d), a party to a case is adversely affected by a decision when that decision has caused or is substantially likely to cause injury to a legally cognizable interest. See, e.g., *The Coalition of Concerned National Park [Service] Retirees*, 165 IBLA at 81-82. When an organization appeals a BLM decision, it must demonstrate that one or more of its members has a legally cognizable interest in the subject matter of the appeal, coinciding with the organization’s purposes, that is or may be negatively affected by the decision. *Id.* at 86-87.

The burden falls upon an appellant seeking to establish standing to appeal to make colorable allegations of an adverse effect, supported by specific facts, sufficient to establish a causal relationship between the approved action and the injury alleged. *The Fund for Animals, Inc.*, 163 IBLA 172, 176 (2004); *Southern Utah Wilderness Alliance*, 127 IBLA 325, 327 (1993); *Colorado Open Space Council*, 109 IBLA 274, 280 (1989). The appellant need not prove that an adverse effect will, in fact, occur as a result of the BLM action. *Donald K. Majors*, 123 IBLA 142, 145 (1992). However, we have long held that the threat of injury and its effect on the appellant must be more than hypothetical. *Missouri Coalition for the Environment*, 124 IBLA 211, 216 (1992); *George Schultz*, 94 IBLA 173, 178 (1986). “Standing will only be recognized where the threat of injury is real and immediate. *Laser, Inc.*, 136 IBLA [271,] 274 [(1996)];

Salmon River Concerned Citizens, 114 IBLA 344, 350 (1990).” *Legal & Safety Employer Research Inc.*, 154 IBLA 167, 172 (2001). “[M]ere speculation that an injury might occur in the future will not suffice.” *Colorado Open Space Council*, 109 IBLA at 280.

In support of their standing to appeal, appellants assert that Backcountry is a community organization comprised of individuals and families residing in the Boulevard region of San Diego County, who are directly affected by approval of the SPTP. They claim that Backcountry is vitally interested in land use planning and management of BLM lands within the planning area, and that it seeks to maintain and enhance the ecological integrity, scenic beauty, wildlife, recreational amenities, watershed values, and groundwater resources of those lands. They contend that Backcountry members use BLM lands for aesthetic, scientific, historic, cultural, recreational, and spiritual enjoyment. They argue that “[t]he development proposed by the SPTP threatens to harm the use and enjoyment of these public resources by [Backcountry’s] members as well as the public at large,” and that Backcountry submitted a protest of the SPTP on November 17, 2008. Notice of Appeal at 3.

POCF, appellants state, is a community organization comprising numerous individuals and families residing in Eastern San Diego County, who are directly affected by the approval of the SPTP. The purpose of POCF, they assert, is the promotion of a safe, reliable, economical, renewable, and environmentally responsible energy future. They claim that POCF’s members use BLM lands for aesthetic, scientific, historic, cultural, recreational, and spiritual enjoyment, and that POCF members “submitted comments throughout the SPTP proceedings.” *Id.*

Appellants represent that ECCAC is a coalition of community groups with the common goal of preserving rural quality of life and natural resources; that ECCAC and its members seek to maintain the ecological integrity, scenic beauty, wildlife, recreational amenities, watershed values, and groundwater resources in Eastern San Diego County; that ECCAC members use BLM lands for aesthetic, scientific, historic, cultural, recreational, and spiritual enjoyment; and that ECCAC members “submitted comments throughout the SPTP proceedings.” *Id.*

According to appellants, Tisdale lives on a ranch two miles west of Boulevard, California; is member of Backcountry, POCF, and an organization called the Boulevard Planning Group; advocates for the preservation of rural areas in Southern California; uses the BLM lands that will be affected by the SPTP for recreational and spiritual activities; and authored multiple letters opposing the Project on behalf of community groups and submitted them to BLM and CPUC. *Id.* at 3-4. Appellants assert that Tisdale’s interests will be adversely affected because the SPTP will

introduce industrial development into McCain Valley and surrounding areas, thereby decreasing her enjoyment of natural resources in the area.

BLM and SDG&E each argue that the record fails to show that any of the appellants participated in the process leading to issuance of the ROD in this case. They assert that a review of commenters on the EIR/EIS process fails to reveal any comments provided on behalf of the three appellant organizations.

BLM and SDG&E recognize that Backcountry submitted a protest to BLM's amendment of the RMP. However, they assert that the amendment process was a separate proceeding leading to issuance of a separate decision, *i.e.*, approval of the amendment, and, therefore, does not support a finding of party to a case status for Backcountry in this case. We disagree. The "decision under appeal" here is BLM's decision to approve the Project, and a necessary part of the process leading to issuance of that decision was action by BLM concerning amendment of the RMP. See ROD at 6 ("The plan amendment is necessary for the issuance of two right-of-way grants . . . to SDG&E"). Moreover, the record shows an integrated process for the RMP amendment and the EIR/EIS, leading to issuance of the ROD, the official title of which is "Record of Decision for the Sunrise Powerlink Transmission Project and Associated Amendment to the Eastern San Diego County Resource Management Plan." (Emphasis added). See Sunrise Powerlink Project CACA-47658, Administrative Record, Document Record, dated Mar. 5, 2009, providing a list of documents, with corresponding dates, comprising the administrative record in this case; see also n.4, *supra*.

The Backcountry protest, filed on November 17, 2008, by counsel for Backcountry, states that it "seeks review of this RMP and the Sunrise Powerlink EIR/EIS for the reasons set forth below." In addition, we note that Tisdale filed a separate letter, dated November 14, 2008, on behalf of Backcountry, objecting to "BLM's selection of the southern route as their preferred project." Letter at 2. She also stated therein that Backcountry's attorney was "filing a separate formal 'protest letter' on the RMP amendment. *Id.* at 1. The record clearly shows that Backcountry participated in the process leading to issuance of the ROD and, therefore, has party to a case status.

The same cannot be said for POCF and ECCAC. Although appellants assert that Tisdale is a member of all three organizations and that Gary C. Hoyt is a member of ECCAC (see Supplemental Memorandum Re Standing (Supplemental Memo) at 2 and attached June 25, 2009, Declarations of Tisdale and Hoyt), Tisdale states in her Declaration that POCF "was officially incorporated in February of 2009" and that ECCAC was "formed in early 2009." Tisdale Declaration at 2. The Final EIR/EIS is dated October 18, 2008, and the ROD being challenged is dated January 20, 2009. There is no evidence that either organization participated in the process leading to

issuance of the ROD. Neither POCF nor ECCAC has established party to a case status, and the appeal must be dismissed as to their interests.

Regarding Tisdale, BLM and SDG&E note that Tisdale filed comments on the Draft EIS and Supplemental Draft EIS and participated in a February 25, 2008, public hearing, but state that she did so as Chair of the Boulevard Planning Group, and that the Boulevard Planning Group is not an appellant herein. *See* BLM Answer at 13-14; SDG&E Answer at 14-15. Tisdale asserts in her Declaration that she participated in the process leading to issuance of the ROD as an individual, citing her "comments at the Pine Valley meeting (February 25, 2008) . . . found in the Final EIS at pages 3-1766 to 1767, attached as Exhibit 1." Tisdale Declaration at 3. She explains that while she listed "some of her affiliations with community groups as an introduction, the comments [she] presented were given on her own behalf." *Id.* The record establishes party to a case status for Tisdale.

The next question is whether Backcountry and Tisdale have shown that they are adversely affected by the ROD. Backcountry asserts that its members, one of whom is Tisdale, use public lands for recreational and other purposes, and that such use would be impaired by the Project. *See* Notice of Appeal at 2-4. In her Declaration, Tisdale asserts that she frequently uses public lands in the vicinity of the proposed ROWs for recreation and other purposes. Declaration at 2. Tisdale's Declaration supports a finding that she, as an individual, and Backcountry, as an organization, are adversely affected by the approval of the ROWs within the meaning of 43 C.F.R. § 4.410(d).

Backcountry and Tisdale have established standing to appeal the ROD. The motions to dismiss for lack of standing, as they relate to them, are denied.

*Petition for Stay
Immediate and Irreparable Harm*

Under 43 C.F.R. § 2801.10(b), a BLM decision granting a FLPMA ROW under 43 C.F.R. Part 2800 remains in effect pending appeal, unless the Board rules otherwise. In determining whether to grant a petition for stay of such a decision, we are guided by 43 C.F.R. § 4.21(b), which provides that an appellant, who petitions for a stay, bears the burden of demonstrating sufficient justification for the stay, satisfying each of the following four criteria: (1) The relative harm to the parties if the stay is granted or denied; (2) the likelihood of the appellant's success on the merits; (3) the likelihood of immediate and irreparable harm if the stay is not granted; and (4) whether the public interest favors granting the stay. *Wyoming Outdoor Council*, 156 IBLA 377, 383 (2002); *London Bridge Broadcasting, Inc.*, 130 IBLA 73, 76 (1994). Failure to satisfy any one of the criteria justifies denial of the petition.

In this case, we deny the petition for stay because there has been no showing of a likelihood of immediate and irreparable harm if a stay is denied.

SDG&E asserts that its pre-construction activities, which involve environmental surveys to determine the potential presence of sensitive species, land surveys to locate property boundaries and potential tower locations,⁸ and geotechnical testing to determine the level of engineering the transmission tower foundations require,⁹ will not result in any immediate and irreparable harm.¹⁰

SDG&E expects to begin construction in June 2010, asserting that construction cannot commence until it has gathered the information necessary for applying to the Forest Service, Marine Corps Air Station Miramar, U.S. Army Corps of Engineers, U.S. Fish and Wildlife Service, and California Department of Fish and Game for appropriate permits authorizing Project activities, and that during that time it will work to ensure that the transmission line is properly sited and designed in such a way so as to avoid or minimize environmental impacts, as required by the mitigation measures adopted in the ROD. In SDG&E's opinion, the Board should be able to resolve the appeal before SDG&E engages in any activity that might entail environmental harm.

Absent persuasive argument and supporting evidence showing a likelihood of immediate and irreparable harm from the denial of a stay of the ROD relating

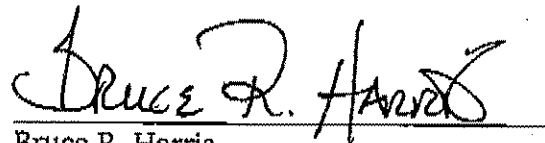
⁸ SDG&E notes that the land surveys involve temporarily placing small wooden stakes, which will be removed when construction begins. Opposition at 17-18 (citing Woldemariam Declaration, ¶17, at 6).

⁹ According to SDG&E, geotechnical testing will involve two methods (seismic refraction and soil sampling) designed to determine the subsurface geologic make-up of proposed foundation sites for transmission towers along the overhead route, to be preceded by environmental surveys to ensure that appropriate sites are selected for testing. Opposition at 19-20 (citing Woldemariam Declaration, ¶¶9, 22, 23, 27-29, at 2-3, 7-8, 9-10).

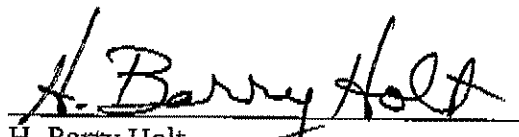
¹⁰ SDG&E states that, while most construction will not begin until 2010, it must initiate the construction of foundations for towers on two segments (10A and 9C) of the Project on public lands in October 2009, since, given the preclusion of any Project activity from January to September of each year in order to protect Peninsular bighorn sheep, it will have to construct these segments over the 3-month period from October to December of each year, for the years 2009 through 2011, in order that it may meet the 2012 in-service date. SDG&E expects little permanent disturbance and no irreparable harm to the environment from such construction, which will involve materials and equipment brought to the sites by helicopter. Opposition at 21-22, 31 n.24.

specifically to approved activity on the public lands in question, we agree with SDG&E's analysis regarding the lack of immediate and irreparable harm from not staying the effect of BLM's approval of the Project. *See generally* SDG&E Opposition at 13-22; *see also* BLM Opposition at 39-41.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, SDG&E's motion to intervene is granted. SDG&E's motion to dismiss BAD's appeal as untimely is denied. The motions to dismiss the appeal for lack of standing are granted in part, as to POCF and ECCAC, and denied in part, as to Backcountry and Tisdale. The petition for a stay is denied. BLM's and SDG&E's motions for expedited review, as they relate to this appeal, are taken under advisement.


Bruce R. Harris
Deputy Chief Administrative Judge

I concur:


H. Barry Holt
Chief Administrative Judge

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