

Comment Set A0001
California Department of Parks and Recreation



State of California • The Resources Agency

Arnold Schwarzenegger, Governor

DEPARTMENT OF PARKS AND RECREATION • P.O. Box 942896 • Sacramento, CA 94296-0001

Ruth Coleman, Director

February 19, 2008

Ms. Billie Blanchard, California Public Utilities Commission
Ms. Lynda Kastoll, Bureau of Land Management
c/o Aspen Environmental Group
235 Montgomery Street, Suite 935
San Francisco, California 94104-3003

Dear Ms. Blanchard and Ms. Kastoll:

Re: **Comments on Sections D.16 and D.17 of the Draft EIR/EIS for the Sunrise Powerlink Project (SCH No. 2006091071)**

The California Department of Parks and Recreation ("Department" or "State Parks") takes this opportunity to provide preliminary comments on the Draft EIR/EIS for the Sunrise Powerlink Project ("Proposed Project"). This correspondence only addresses Policy Consistency and Plan Amendments, sections D.16 and D.17. Further correspondence may be forthcoming, but in the interest of time considerations we are sending these comments now. For convenience, we have attempted to organize the comments by section and page number.

Section D.16.3 (p. D.16-3)

We concur in the conclusion that where there is a substantial inconsistency between the Proposed Project and the management plan applicable to State Parks lands, such plans must undergo amendment to overcome the inconsistencies and allow project approval.

Section D.16.4.2 (p. D.16-36+)

We agree that the presence of the towers and conductors, temporary and permanent roads, motor vehicles and helicopters within wilderness areas would be inconsistent with Public Resources Code section 5093.36(b) and the ABDSP General Plan. It thus exceeds the Appendix G threshold of significance and would require amendment before the Project as proposed could proceed through ABDSP.

Even absent the wilderness area issue, however, the level of inconsistency of the Proposed Project with the ABDSP General Plan is so substantial as to require amendments to the General Plan. Authority to adopt and amend state park general plans rests with the State Park and Recreation Commission ("SPRC"), making the SPRC a responsible agency.

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This level of inconsistency is virtually the same for the ABDSP link alternatives; the partial underground 230 kV ABDSP SR78 to S2 alternative and the Overhead 500 kV ABDSP within existing 100-foot right-of-way alternative. As such, amendment to the ABDSP General Plan would still be required should one of those alternatives be selected.

A0001-1 cont.

Consideration of any amendments could not occur until after a decision by the Public Utilities Commission ("PUC") because the actual route and configuration of the Proposed Project would not be known until that time, although the Planning Division of the Department estimates eight to twelve months from application to the Department for significant amendments to the ABDSP General Plan to consideration of those amendments by the SPRC, even with reliance on an EIR certified by the lead agency. That additional time, of course, would not apply to any alternative route that avoids ABDSP.

Although the applicant has asserted otherwise during Phase I proceedings before the PUC Administrative Law Judge, the 180 day time limit for action mandated by the Permit Streamlining Act does not apply to the consideration of general plan amendments. See *Land Waste Management v. Contra Costa County Board of Supervisors* (1990) 222 Cal.App.3d 950.

Geology Element Goal 1 (p. D.16-37)

We believe the Proposed Project and the ABDSP link alternatives are not consistent with this goal. While APMs and Mitigation Measure G-1a (which appears to simply be a restatement of GEO-APM-1) may reduce the amount of erosion resulting from damage to the desert pavement, the presence of a transmission line with a greatly expanded footprint and eight new miles of access roads is inconsistent with a mandate to preserve this unique geologic feature.

A0001-2

Significant and Sensitive Biota Element Goal 1 (p. D.16-39)

We believe the Proposed Project and the ABDSP link alternatives are not consistent with this Goal. Biota refers to both flora and fauna of the region and a route through ABDSP is inconsistent with many of this Goal's subordinate Guidelines, especially with respect to fauna.

A0001-3

Significant and Sensitive Biota Element Guideline 1a

We agree with the assessment in the Draft EIR/EIS. Many of the Proposed Project impacts relevant to this Guideline are considered Class I. For example, Impact B-7B, direct or indirect loss of Peninsular bighorn sheep or direct loss of habitat is a Class I impact that cannot be mitigated to a level less than significant. This fundamentally conflicts with guidelines that discuss proactive efforts for preservation and recovery. This analysis is equally applicable to the ABDSP link alternatives.

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Significant and Sensitive Biota Element Guideline 1b

We agree with the assessment in the Draft EIR/EIS. Many of the Proposed Project impacts relevant to this Guideline are considered Class I. In particular, impacts to bighorn sheep critical habitat is considered a Class I impact, in part because of its potential effect of an important movement corridor in the Narrows. This fundamentally conflicts with guidelines that discuss proactive efforts for protection and recovery. This analysis is equally applicable to the ABDSP link alternatives.

A0001-3 cont.

Significant and Sensitive Biota Element Guideline 1e (p. D.16-40)

We believe the Proposed Project and ABDSP link alternatives are inconsistent with this Guideline. The presence of a transmission line of the size and scope of the Proposed Project, along with eight new miles of access roads, would preclude or at least make exceedingly difficult any future designations of Natural Preserves. See Cal.Code Regs. tit. 14, §4351 ("No person shall drive, operate, leave, place, land, taxi, takeoff or stop a motor vehicle, motorboat or aircraft within the boundaries of a state wilderness or natural preserve.").

A0001-4

Biological Processes Guideline 1a (p. D.16-41)

We believe the Proposed Project and ABDSP link alternatives are not consistent with the Guideline. The Guideline states that the perpetuation and enhancement of natural processes must be incorporated into future developments. To enhance is to make greater. While APMs may reduce the impact of the Proposed Project, it will not enhance the natural processes shaping the biota of the region.

A0001-5

Cultural Resources Element Guideline 4b (p. D.16-44)

We believe the Proposed Project and ABDSP link alternatives are not consistent with the Guideline. A route through ABDSP will add at least eight miles of new access roads within ABDSP. By its nature, this will potentially increase access into areas of significant archeological and cultural resources. This could conflict with efforts to protect those resources.

A0001-6

Cultural Resources Element Guideline 4c (p. D.16-44)

We believe the Proposed Project and ABDSP link alternatives are inconsistent with this Guideline. The presence of a transmission line of the size and scope of the Proposed Project, along with eight new miles of access roads, would preclude or at least make exceedingly difficult higher levels of protection, including any future designations of Cultural Preserves. See Public Resources Code section 5019.74 ("Within cultural preserves, complete integrity of the cultural resources shall be sought, and no structures or improvements that conflict with that integrity shall be permitted.").

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Infrastructure and Operations Goal 3 (p. D.16-46)

We believe the Proposed Project and ABDSP link alternatives are inconsistent with the Goal. The language of the determination itself leads to this conclusion. "The

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construction of access roads and spur roads associated with the Proposed Project and alternatives would compromise the integrity of park resources...Mitigation Measures...would reduce land scarring and road construction impacts, but impacts to the integrity of park resources would remain." While the consistency determination concludes that it may be consistent because it depends on the interpretation of what constitutes a compromised resource, the consistency determination of Infrastructure and Operations Goal 1 correctly indicates that the Proposed Project will significantly degrade park qualities of solitude and wilderness and thus, by implication, the resources that contribute to those qualities.

A0001-8 cont.

Infrastructure and Operations Guideline 4a (p. D.16-48)

State Parks staff has been involved in the review of the Proposed Project and alternatives and has been engaged in discussions on how to minimize impacts. This Guideline, however, is inapplicable to the Proposed Project because it is not contained within the existing easements. It is applicable to the Overhead 500 kV ABDSP within existing 100-foot right-of-way alternative, but only to the extent there is an existing 100-foot right-of-way through the entirety of ABDSP. State Parks is still conducting its investigation, but there appear to be several areas within ABDSP where right-of-way documents do not specify a width or where there is no recorded easement at all. This may be the subject of further correspondence from State Parks. Consistency of an alternative contained entirely within the existing right-of-way should also not be construed as consistency with the entire ABDSP General Plan.

A0001-9

Infrastructure and Operations Guideline 4b (p. D.16-49)

To the extent that new right-of-way is needed for the Proposed Project or any of the ABDSP link alternatives, that additional right-of-way is in an area not presently developed for the uses contemplated by Guidelines 4b, thus making this Guideline, rather than Guideline 4a, applicable to the Proposed Project. A project of the scope and size of the Proposed Project, however, is not consistent with Guideline 4b. Neither the Proposed Project nor the ABDSP link alternatives result in a net improvement to the environment, nor is it consistent with the General Plan Management Zones through which it would pass. Please see comments below on section D.17.

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Section D.17.2.2

The Project as proposed will require amendment to the ABDSP General Plan for the reasons identified in the Draft EIR/EIS; conflict with established wilderness areas, conflict with the Backcountry Zone designation, and inconsistency with goals and guidelines.

A0001-11

Wilderness. The Draft EIR/EIS correctly notes that the Proposed Project would be inconsistent with Public Resources Code section 5093.36(b) and the ABDSP General

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Plan with respect to wilderness areas. The Draft EIR/EIS indicates that State Parks staff noted that re-designating wilderness areas in a general plan amendment could require 8 to 12 months. This is just an estimate, though, and applies to any major amendments to the ABDSP General Plan, not just changes in wilderness area designations.

A0001-11 cont.

The applicant asserts in its Phase 1 briefing before the Administrative Law Judge that, should the PUC approve a route through ABDSP, the SPRC would be required to act on ABDSP General Plan amendments within 180 days of route approval by the PUC. The 180 day time limit in the Permit Streamlining Act cited by the applicant, however, does not apply to legislative and quasi-legislative actions such as the adoption of general plans and general plan amendments. See *Land Waste Management v. Contra Costa County Board of Supervisors* (1990) 222 Cal.App.3d 950, 956-58.

Backcountry. We agree with the assessment of the Draft EIR/EIS. Conformity with Operations Goal 4 would not, in and of itself, render the Proposed Project consistent with the entire ABDSP General Plan. The level and breadth of inconsistency of the Proposed Project with numerous goals, guidelines and management zone designations of the ABDSP General Plan requires that the General Plan be amended before the Proposed Project could proceed through ABDSP.

The EIR/EIS is also correct in noting that transmission lines are generally inconsistent with the Backcountry Zone designations, although existing transmission lines that predate the creation of ABDSP are grandfathered in as a conforming use in the zone. SDG&E recognized the general inconsistency in its comments on the Preliminary ABDSP General Plan, requesting that the transmission corridors be placed in a different management zone, Focused Use Zone II, a request rejected in the Final ABDSP General Plan. Those comments, along with State Parks' responses, have already been submitted and are available on line at [http://www.parks.ca.gov/pages/21299/files/01-08%20abdsp%20comment%20letters\(1\).pdf](http://www.parks.ca.gov/pages/21299/files/01-08%20abdsp%20comment%20letters(1).pdf).

Goals and Guidelines. Please refer to our comments on section D.16. We note, however, that the inconsistencies identified in section D.16 are irrespective of whether the Proposed Project is placed within a 150' right-of-way or within the existing right-of-way of 100' or less (with the possible exception of Operations Guideline 4a). Thus, amendment to the ABDSP General Plan would be required even for an alternative that stays within the existing right-of-way.

With respect to the last paragraph of section D.17.2.2, the provision of any permit or approval within ABDSP is a subordinate act that must be consistent with the governing management document, in this case the ABDSP General Plan. Granting the approval in a manner inconsistent with the General Plan is what would violate applicable sections

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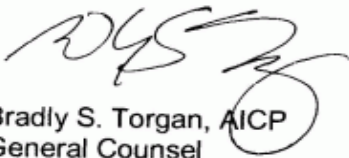
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of the Public Resources Code. See *Lighthouse Field Beach Rescue v. City of Santa Cruz* (2005) 141 Cal.App.4th 1170, 1196, Pub. Res. Code §5002.2.

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Thank you for the opportunity to provide these comments. If you have any questions, I can be reached by email at btorgan@parks.ca.gov or (916) 653-9905.

Sincerely,



Bradly S. Torgan, AICP
General Counsel

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Ruth Coleman, *Director*

April 11, 2008

*Via Electronic and
First Class Mail*

Ms. Billie Blanchard, California Public Utilities Commission
Ms. Lynda Kastol, Bureau of Land Management
c/o Aspen Environmental Group
235 Montgomery Street, Suite 935
San Francisco, California 94104-3003

Dear Ms. Blanchard and Ms. Kastol:

Re: **Comments on the Draft EIR/EIS for the Sunrise Powerlink Project (SCH No. 2006091071)**

The California Department of Parks and Recreation (Department or State Parks) takes this opportunity to provide additional comments on the Draft EIR/EIS for the Sunrise Powerlink Project (Proposed Project). For convenience, we have attempted to organize the comments by section and page number. Comments on sections D.16 and D.17 were previously provided on February 19, 2008.

Section A.2.2 (p.A-6)

We agree with the distillation of the applicant's proposed objectives into more appropriate basic objectives by the lead agencies to which the Proposed Project and alternatives should be measured. Project objectives cannot be so narrowly drawn or interpreted so as to exclude otherwise feasible alternatives.

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Section A.6.3.1 (p.A-21)

We agree with the assessment of the Draft EIR/EIS that amendment to the Anza-Borrego Desert State Park (ABDSP) General Plan would be required for the Proposed Project to proceed through ABDSP because of its expansion into State Wilderness and into the Backcountry Zone outside the existing right of way. Moreover, the overall level of inconsistency of the Proposed Project with the Goals and Guidelines of the ABDSP General Plan requires the plan to be amended before additional right of way could be granted and construction could commence irrespective of expansion into State Wilderness or the Backcountry Zone. Please see the Department's prior comments to sections D.16 and D.17. This applies to not only the Proposed Project, but to the northern route alternatives as well.

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We also note that the applicant has agreed with the assessment that a de-designation of State Wilderness would require an amendment to the General Plan. See Exhibit 1 ("State's Role Over Powerlink Debated," San Diego Union-Tribune, March 27, 2008 [on-line edition; comments of SDG&E COO Michael Niggli] and Exhibit 2 (SDG&E Response to UCAN Discovery Request No. 35, Questions 13-15, February 15, 2008).

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Consideration of amendments to the ABDSP General Plan is at the discretion of the State Park and Recreation Commission (SPRC). As the Draft EIR/EIS notes, and with which the Department concurred in its comment letter of February 19, 2008, this makes the SPRC a responsible agency pursuant to CEQA. The process by which the SPRC would consider amendments to the ABDSP General Plan is generally analogous to a city council or county board of supervisors amending its general plan. Department staff would process a request, develop legally sufficient amendments, and prepare a staff analysis for consideration by the SPRC. The SPRC would then undertake its own public process, including public hearing[s] before final consideration of the amendments. Department staff and the SPRC would rely on the Final EIR/EIS certified by the lead agency as its environmental documentation, but is not bound by any lead agency statements of overriding consideration.

A0001-13 cont.

Consideration of any amendments could not occur until after a decision by the Public Utilities Commission because the actual route and configuration of the Proposed Project would not be known until that time, although the Planning Division of the Department estimates eight to twelve months from (1) application to the Department for significant amendments to the ABDSP General Plan, to (2) consideration of those amendments by the SPRC, even with reliance on an EIR certified by the lead agency. Although the applicant has asserted otherwise in its Phase I briefing, the 180-day time limit for action mandated by the Permit Streamlining Act does not apply to the consideration of General Plan amendments. See *Land Waste Management v. Contra Costa County Board of Supervisors* (1990) 222 Cal.App.3d 950.

As it considers amendments, we also note that the SPRC may look towards its own policies for guidance. Those policies, adopted pursuant to Public Resources Code section 539 for the guidance of the Department in the administration, protection and development of the State Park System, are available on-line at <http://www.parks.ca.gov/pages/843/files/CommissionPolicies9-23-05.pdf>. One policy adopted in 1994, in particular, provides guidance to the Department on the placement of utilities in State Parks:

Utilities shall be placed underground in units of the State Park System. Exceptions may be permitted by the Director where undergrounding is not economically feasible or where the environmental quality of the area is not harmed. All right-of-way grants to utility companies shall require that utilities be placed underground unless, in the opinion of the Director, special conditions prevail which would make this action impractical. Rights of way or easements generally should be for a specified period of time. However, exceptions may be made by the Director where necessary upon his finding that this action would be in the best interests

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of the State Park System. Rights of way or easements may be granted where otherwise appropriate with the provision that the right of way or easement may be moved upon a finding of the Director that their location interferes with future development, and shall be under the terms and conditions in the best interest of the State Park System.

It shall be the objective of the Department of Parks and Recreation ultimately to achieve the undergrounding of all existing above-ground utilities.

A0001-13 Cont.

Section B.2.2 (p.B-6)

At page B-9, the Draft EIR/EIS states "The statutory or recorded easement through the majority of ABDSP is 100 feet, but may be narrower or even non-existent in several areas," a statement with which the Department generally agrees. As such, though, the last line on page B-6 should note a minimum of an additional 50' of right of way would need to be acquired for the Proposed Project. As correctly noted in the Draft EIR/EIS, the right of way discussion, there are several areas through which the existing transmission line runs for which there is either no recorded easement or a recorded grant of right of way that is silent as to width. In those areas, any applicable equitable, statutory or prescriptive principles may only provide for a right to an easement of less than 100' or the right to an easement for something less than a project of the size and scope of that proposed.

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Page B-9

It is not necessarily outside the scope of the CEQA and NEPA process to "verify" the status of the easement because status of the right of way has bearing on the regulatory, legal and technological feasibility of both the Proposed Project and alternatives. If, for example, it is asserted that an alternative has a higher level of feasibility than the Proposed Project because it can be done within an 'existing' 100' right of way, then the existence of a 100' right of way needs to be verified. If the width of the right of way is less than 100' or the scope of the grant of easement does not allow for a project of the magnitude of that proposed, then the feasibility of the alternative is no different than that of the Proposed Project.

A0001-15

Page B-13

The Draft EIR/EIS indicates that SDG&E is now disputing the accuracy of its own most recent 2006 GPS survey of the transmission line. What is the basis of this statement?

A0001-16

The right of way should not be considered to be a uniform 100' throughout the entirety of ABDSP. There are several areas where the right of way may be less than 100' and/or limited by burden rather than width; that is, a right of way exists only for the

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operation and maintenance of a transmission line substantially similar in size and scope to that which currently exists.

A0001-17 cont.

While accurate mapping is difficult, SDG&E has provided a map with four possible routes for the existing transmission lines based on land records and/or various surveys:

- Location based on Sierra Pacific Power Company 1924 survey
- Location based on State Parks records
- Location based on SDG&E 1954 survey
- Location based on SDG&E 2006 GPS survey

A portion of that map is reproduced in the Draft EIR/EIS as Exhibit B-4a.¹ SDG&E has also produced a similar map with two of the line surveys, the 1924 survey and the 2006 survey, with source of land ownership as the map legend. That map is enclosed as Exhibit 3.

The existing route, as identified in each of these different sets of records, passes through land for which no recorded right of way appears to have ever been granted. This is what leads to the conclusion that the right of way is less than 100' in portions of ABDSP and/or exists only for the operation and maintenance of a 69kV or 92kV line. The land ownership records in the Department's possession have already been provided to CPUC, BLM and SDG&E. The areas in question are described below.

Section 16 lands

The existing route passes through what are known as section 16 lands, in particular section 16 T12S R6E. The 2006 survey and State Parks records also put the line through section 16 T12S R7E. Section 16 lands were never under BLM or its predecessor's jurisdiction. Instead, they were granted to the State through a federal granting act, Act of March 3, 1853, 10 Stat. 244. The relevant language is in Section 6 of the Act, "...all public lands in the State of California, whether surveyed or unsurveyed, with the exception of sections sixteen and thirty-six, which shall be and hereby are granted to the State for the purpose of public schools in each township... shall be subject to the preemption laws..."

A 1921 California statute purported to grant a right of way "over the proprietary lands of the state... to the United States for all telegraph, telephone, power or light lines..." (Stats. 1921, Ch. 173, pp. 180-81). This statute, however (codified as Public Resources Code section 8351), was repealed in 1943 and included language that the prior act "does not include, has never included, and was not intended to include lands held by

¹ We request that the entire map be provided as the Exhibit in the Final EIR.

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the State in trust for a particular purpose." (Stats. 1943, Ch. 1124, sec. 3, p. 3067). The land granted in 1853 is held in trust. (*Wyman v. Banvard* (1863) 22 Cal. 524, 530-31; 41 Ops.Cal.Atty.Gen 202). Therefore, no statutory easement exists for the portion of the transmission line through section 16.

Control of section 16 lands generally rests with the State Lands Commission (SLC). The section 16 lands in question, though, passed to State Parks through the predecessor in interest to SLC. As of the acquisition date of these sections, there were no easements of record or reservation of right for electrical transmission lines.

This is not to say, however, that there may not be an equitable right to an easement. It would only, however, be for a 69kV or 92kV transmission line constructed in the 1920's or something reasonably similar. This equitable right to an easement may be less than 100' and, in any case, would be overburdened by an increase to a 500kV transmission line.

Land with a recorded right of way but no recorded width

The Draft EIR/EIS is correct in stating that there are some grants of right of way secured from private parties in the 1920's, for which no width is recorded. Two of these grants are in Grapevine Canyon (in sections 5 and 6, T12S R5E), having been secured by Southern Sierras Power Co. in 1924. The underlying fee, known as the Jasper property, was acquired by the State in 1956.

In the absence of an identifiable intent to a specified width, determination of a right of way width would depend on the particulars of the line design and take into consideration technical and economic factors. At least one court decision from about the time the line was constructed through these areas supports a conclusion that 100' easements from private parties may not have been the standard at that time. In that case, *Pacific Gas & Electric Co. v. Crockett Land & Cattle Co.* (1924), 70 Cal.App. 283, PG&E sought to secure a 30' easement for a 71kV transmission line on 29' tall monopoles with an additional 5' vertical pipe extension. Had 100' been a standard, PG&E would likely have sought that amount.

Irrespective of whether the right of way is 100' or a lesser amount, in these areas, however, a project of the size proposed would impermissibly overburden the easement. This is not to say that an additional grant would not be granted - only that construction could not occur within a 100' right of way without an additional grant from the State.

Because the issue of overburden is most relevant to any alternative that seeks to place 500kV transmission lines in a 100' right of way, the issue is more fully addressed below in the comments on alternatives.

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A0001-17 cont.

Land with no recorded transmission right of way

The mapping based on the 2006 GPS survey, as well as State Parks records, appears to put the transmission line through section 15 T12S R7E. According to the applicant's information, this land was patented to the Southern Pacific Railroad in 1921 from the United States. Relevant here is a portion of the section known as the Haynes property, acquired by the Department in 1981. The Department has no records or indication that a transmission line right of way was ever recorded or that a reservation of right for a transmission line was ever reserved.

The mapping per the 2006 GPS survey and State Parks records also has the existing transmission line passing through section 13 T12S R7E. According to the applicant's information, this land was also patented to the Southern Pacific Railroad in 1921 from the United States. Relevant here are portions of the section known as the Kositch property, acquired by the State in 1982. The Department has no records or indication that a transmission line right of way was ever recorded or that a reservation of right for a transmission line was ever reserved.

Aside from the Kositch property, most of the State Parks property in section 13 T12S R7E through which the existing line passes was acquired from the Anza-Borrego Foundation and Institute (ABFI), a private organization which acquires inholdings for eventual transfer into ABDSP. The relevant acquisitions occurred throughout the 1990's. The Department has no records or indication that as part of these acquisitions, a transmission line right of way was ever recorded or that a reservation of right for a transmission line was ever reserved.

The mapping shows that the existing transmission line may also pass through property known as the Curryer property, acquired by State Parks in 1973. Here, too, the Department has no records or indication that as part of these acquisitions, a transmission line right of way was ever recorded or that a reservation of right for a transmission line was ever reserved.

None of this discussion is to say that the Department disputes the existence of any easement for the existing 69kV/92kV line. That right, however, may be limited to the scope and use that existed at the time the land was acquired by the State. While there is some flexibility in the use of the easement, it may not overburden the underlying fee.

Because the issue of overburden is most relevant to any alternative that seeks to place 500kV transmission lines within a 100' right of way, the issue is more fully addressed below in the comments on alternatives.