



BILL BARRETT CORPORATION

177 IBLA 214

Decided May 15, 2009



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

BILL BARRETT CORPORATION

IBLA 2008-257

Decided May 15, 2009

Appeal from a decision of the Deputy State Director, Wyoming State Office, Bureau of Land Management, dismissing a protest to the issuance of a 2-year coal exploration licence and determining to issue the license. WYW-174201.

Affirmed.

1. Coal Leases and Permits: Generally--Coal Leases and Permits: Permits: Generally

BLM's policy is to allow both coal exploration and/or production on the same lands and at the same time as oil and gas exploration and/or production in a cooperative manner, subject to whatever appropriate restraints are necessary to permit simultaneous operations. BLM must ensure that a coal exploration license will not unreasonably interfere with coal bed natural gas (CBNG) operations on existing oil and gas leases. The Board will affirm a BLM decision to issue a coal exploration license when it has imposed conditions, including a phased approach to exploratory core hole drilling, that will ensure that the limited exploration activities will not unreasonably interfere with CBNG operations on existing oil and gas leases.

2. Coal Leases and Permits: Generally--Coal Leases and Permits: Permits: Generally--National Environmental Policy Act of 1969: Generally--National Environmental Policy Act of 1969: Environmental Statements

The concept of "connected actions" generally arises in determining the scope of an EIS. Connected actions should be discussed in the same EIS if they would:
(i) automatically trigger other actions which may require

an EIS; (ii) cannot or will not proceed unless other actions are undertaken previously or simultaneously; or (iii) are interdependent parts of a larger action and depend on the larger action for their justification. 40 C.F.R. § 1508.25(a). Coal exploration does not automatically trigger development, nor does the issuance of a coal exploration license, without more, constitute an interdependent part of a larger action simply because it may lead to discovery of mineral resources worthy of development, since the proponent may well decide not to pursue development, or, if BLM decides to issue a lease, it would do so only following further environmental review and decisionmaking.

3. Coal Leases and Permits: Generally--Coal Leases and Permits: Permits: Generally--National Environmental Policy Act of 1969: Generally--National Environmental Policy Act of 1969: Environmental Statements

In preparing an EA to determine whether an EIS is required under the National Environmental Policy Act of 1969, 42 U.S.C. § 4332(2)(C) (2000), an agency must take a “hard look” at the proposed action and identify relevant areas of environmental concern so that it can make an informed determination as to whether any impacts are insignificant or can be reduced to insignificance by applying appropriate mitigation measures. In considering whether BLM has taken the requisite hard look at the environmental consequences of a proposed action, this Board will be guided by a rule of reason. An EA need not discuss the merits and drawbacks of the proposal in exhaustive detail. So long as it contains a reasonably thorough discussion of the significant aspects of the probable environmental consequences of the proposed action, the statute’s requirements have been satisfied.

APPEARANCES: James K. Aronstein, Esq., Joel Cantrick, Esq., and Ilona Dotterer, Esq., Denver, Colorado, for appellant; Charles L. Kaiser, Esq., Charles A. Breer, Esq., Denver, Colorado, for BTU Western Resources, Inc.; Kristen C. Guerriero, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Lakewood, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ROBERTS

The Bill Barrett Corporation (BBC) has appealed from an August 12, 2008, decision of the Deputy State Director, Minerals and Lands, Wyoming State Office, Bureau of Land Management (BLM), dismissing its protest to the proposed issuance of a 2-year exploration license, WYW-174201, to BTU Western Resources, Inc. (BTU), a wholly-owned subsidiary of the Peabody Energy Corporation, for unleased coal in the Powder River Basin (PRB), and deciding to issue the license.

BBC filed a petition for a stay of the Deputy State Director's decision, as well as requested a hearing. By order dated January 23, 2009, the Board denied BBC's petition for a stay on the basis that it had failed to demonstrate a likelihood of success on the merits of its appeal. The Board took BBC's request for a hearing under advisement. For the reasons set forth in our January 2009 order, we now affirm the Deputy State Director's decision dismissing BBC's protest and deciding to issue the licence to BTU. We also deny BBC's request for a hearing as moot.

I. BACKGROUND

On February 12, 2007, BTU, which owns and operates the North Antelope/Rochelle Mine (the Mine), the largest surface coal mining operation in North America, filed an application for a coal exploration license, pursuant to section 2(b) of the Mineral Leasing Act, 30 U.S.C. § 201(b) (2006),¹ and its implementing regulations in 43 C.F.R. Part 3410.² The proposed license covers approximately 10,851.13 acres of split-estate land, in two tracts, situated in Ts. 41 and 42 N., Rs. 70 and 71 W., Sixth Principal Meridian, Campbell County, Wyoming,

¹ The Secretary of the Interior is authorized by section 4 of the Federal Coal Leasing Amendments Act of 1975 (FCLAA), Pub. L. No. 94-377, 90 Stat. 1083, 1085, amending section 2 of the Mineral Leasing Act, ch. 85, 41 Stat. 437, 438 (1920), *as amended*, and “under such regulations as he may prescribe,” to issue a coal exploration license to any person for a term of not more than 2 years, and subject to “such reasonable conditions as the Secretary may require, including conditions to insure the protection of the environment[.]” 30 U.S.C. § 201(b)(1) (2006). Such a license does not permit the removal of coal for sale, but does permit the removal of “a reasonable amount of coal . . . for analysis and study.” 30 U.S.C. § 201((b)(2) (2006).

² The application was amended on Mar. 22, 2007, adding 4 core holes and 932.6 acres to the original 44 core holes and 9,918.53 acres. In response to publication of a Notice of Invitation in the *Federal Register* (72 Fed. Reg. 32136 (June 11, 2007)), two companies, Ark Land Company and Rio Tinto Energy America (which also own and operate nearby coal mines), expressed an interest in participating in the coal exploration program. They would share in the costs incurred and the data obtained, and thus would be able to compete in any resulting lease sale.

in the Porcupine Coalbed Natural Gas (CBNG) Field (License Area), adjacent to the Mine. BTU sought approval to drill up to 48 exploratory core holes into the Wyodak-Anderson coal seam, which averages 72 feet thick, underlying that area.

Most of the License Area is subject to a Lease-By-Application (LBA), WYW-173408, filed on September 29, 2006 (amended on October 12, 2007), in which BTU proposed leasing the lands for purposes of expanding its current operations at the Mine, since the Mine was nearing the end of its current coal reserves. BTU stated that “[t]he Porcupine LBA reserves are necessary for BTU to maintain its mining operations.” BTU Opposition at 38.

The exploration license was intended to obtain data regarding the quality, quantity, and availability of coal and other information concerning the geologic and other underlying features of the LBA Area. Based upon such data and information, BLM would determine whether the LBA Area should be opened to competitive coal leasing, and BTU and other potential bidders would determine whether they were interested in competitive leasing. Such information was also required to allow BLM to fulfill its obligation to ensure that no bid was accepted at a competitive lease sale that was less than the fair market value (FMV) of the LBA Area for coal leasing purposes, “as determined by the Department.”³ 43 C.F.R. § 3422.1(c)(1). Issuance of a license would confer on BTU no right to a lease; BTU would have to compete with other bidders, were BLM to decide to go forward with leasing based on information garnered from exploration. 30 U.S.C. § 201(b)(1) (2006).

BTU describes its intended drilling and reclamation operations in the case of each of its core holes. It notes that all holes will be drilled with air, air/foam, or

³ In his Aug. 12, 2008 decision, the Deputy State Director states that the data currently available to BLM is, given its applicable policy, “insufficient” to permit BLM to evaluate the coal resource. Decision at 5. On appeal, BLM indicates that it had intended to hold a competitive lease sale in 2011, but that absent the necessary data this sale date is now questionable. Opposition at 18. BLM notes that it may nevertheless decide to go forward with leasing based on existing data, but that if it does, it might, absent information regarding the FMV of the coal, have to decide to bypass certain coal reserves. *Id.* at 18. Such delay would render the ultimate recovery doubtful, since it may not be economic to later return to mine the reserves. *Id.* at 36.

BLM also submits, as Ex. A attached to its Opposition, a Handbook (H-3070-1), entitled Economic Evaluation of Coal Properties, which, *inter alia*, outlines the data requirements for valuing Federal coal property, specifically economic and geologic/engineering data. The Handbook provides that not all of the data identified therein is necessary to the valuation process. Handbook, II.A., at unpaginated 11. Whether or to what extent the existing data meets this standard is not established in the record.

water. BTU states that it will first drill a 4¾-inch diameter bore hole to a depth of at least 20 feet below the Wyodak-Anderson coal seam (approximately 425 feet deep, on average), permitting it to obtain a complete geophysical log of the coal interval. It expected the drilling time to average from 4 to 10 hours, depending on weather and downhole conditions. *See* Reply Brief and Request for Hearing (Reply) at 16. Logging was expected to occur from less than 1 hour to 4 or more hours after the completion of drilling, depending on the availability of a geophysical contractor, and take approximately 1 hour to complete, whereupon the bore hole would be immediately plugged and abandoned. BTU expected the entire core hole drilling/sampling program to occur over a 77-day period, from October 15 to December 31, 2007.

In order to assess the likely environmental impacts of issuing the proposed coal exploration license, BLM prepared an “Optional Environmental Assessment (EA), FONSI/DR Short Form” (EA) (WYW-070-EA07-126), a three-page document, on July 22, 2008.⁴ In the FONSI/DR, which was set forth in a single paragraph on the last page of the EA, the Assistant Field Manager, Solids, Casper (Wyoming) Field Office, BLM, decided to go forward with issuance of the proposed license to BTU. The Assistant Field Manager concluded that such action conformed to the applicable land use plan (the October 1985 Buffalo Resource Management Plan (RMP), as updated April 2001), and would not result in a significant environmental impact requiring preparation of an EIS.

In addition to considering BTU’s proposed coal exploration license, BLM has been engaged in preparing an EIS (Wright Area Coal EIS) for the purpose of addressing the likely significant environmental impacts of issuing coal leases and undertaking surface coal mining operations in the LBA Area and three other areas of

⁴ The EA, originally prepared on Sept. 18, 2007, was later revised on July 22, 2008, to consider provisions for phased exploration. In promulgating 43 C.F.R. § 3410.2-2, which provides for environmental analysis before issuing a coal exploration license, the Department stated that it was “extremely unlikely” that an environmental impact statement (EIS) would be required, 46 Fed. Reg. 61390, 61392 (Dec. 16, 1981), given the statutory directive that a licensee “may not cause substantial disturbance to the natural land surface,” 30 U.S.C. § 201(b)(2) (2006). *See* 47 Fed. Reg. 33114, 33116 (July 30, 1982); 44 Fed. Reg. 42584, 42587 (July 19, 1979). We also note that the Federal surface estate at issue is administered by the Forest Service, U.S. Department of Agriculture, which deemed the proposed coal exploration to be categorically excluded from preparation of an EIS or EA. *See* Memorandum to BTU from Deputy District Ranger, Douglas Ranger District, Medicine Bow-Routt National Forests and Thunder Basin National Grassland, Forest Service, dated Sept. 6, 2007, at unpaginated 2.

the PRB of Wyoming.⁵ See 72 Fed. Reg. 36476 (July 3, 2007). In its Notice of Intent to prepare an EIS published in the *Federal Register*, BLM stated that among the issues that had been identified when analyzing the impacts of previous Federal coal leasing in the Basin, and which may be considered in the EIS, is “the need for resolution of conflicts between existing and proposed oil and gas development and coal mining on the tracts proposed for coal leasing[.]” *Id.* at 36478.

BBC, which holds numerous Federal oil and gas leases in the vicinity of the License Area and is actively engaged in the production of large volumes of CBNG from 108 oil and gas wells, objected to issuance of a coal exploration license to BTU. Petition at 2. BBC did so initially during an October 4, 2007, meeting with BTU, and later at an October 11, 2007, meeting with BLM, as well as in an October 15, 2007, letter summarizing the October 11 discussion. BBC initially argued that the drilling of core holes would “permanently destroy” CBNG production from its leases, because, owing to the strong negative pressure under which its nearby wells are operated and the “high permeability and porosity of the coal,” “substantial quantities of oxygen” would be “sucked” into and throughout the coal reservoir underlying the License Area and migrate into the CBNG wells, which oxygen could never be purged from the reservoir and the wells. BBC Letter to BLM, dated Oct. 15, 2007, at 1. BBC stated that “the entire CBNG resource would be lost and wasted once the coal exploration program is commenced.” *Id.* at 2. BBC indicated that it would explore with BTU and BLM “possible means” to “minimiz[e] the amount of CBNG production that would be lost as a result of BTU’s coal exploration program,” and to “compensat[e] BBC for CBNG production that is unavoidably lost.” *Id.* at 3.

By letter dated November 2, 2007, BLM requested BBC to submit CBNG well test and production data and other technical information documenting the potential for oxygen contamination of the CBNG wells by nearby coal exploration activity, including its occurrence elsewhere in the PRB, since BLM was not aware of any report of adverse effects in connection with existing coal exploration activities in the PRB where CBNG wells were being produced by vacuum techniques. BLM asked BBC to delineate the expected area/zone of influence surrounding each core hole likely to be contaminated by core hole drilling, and further requested BBC to suggest any remedial action that might be taken to avoid or mitigate any adverse effect. BLM encouraged BBC and BTU to discuss how “to conduct a timely coal exploration program,” while mitigating adverse effects to BBC’s CBNG operations. BLM Letter to BBC, dated Nov. 2, 2007, at 2.

BBC responded to BLM by letter dated December 12, 2007, stating that “[v]irtually the entire CBNG resource in the area would irrevocably be wasted once

⁵ Two of the other areas are adjacent to Ark Land Company’s Black Thunder Mine and the third is adjacent to Jacobs Ranch Coal Company’s Jacobs Ranch Mine. Both mines are not far from BTU’s Mine.

the [drilling and] coring program is commenced.” BBC Letter to BLM, dated Dec. 12, 2007, at 5. BBC stated that, based upon its experience in the Pronghorn CBNG Field, approximately 35 miles north of the Porcupine CBNG Field, it conservatively estimated that oxygen contamination would occur within a 2,000 to 3,000-foot radius around each of BTU’s core holes. BBC placed, at most, 50 of its CBNG wells within 2,000 feet of BTU’s core holes, indicating that these wells were likely to be contaminated and shut down, especially given the strong negative pressure and greater permeability in the case of the Porcupine Field, as compared to the Pronghorn Field. BBC concludes that “much of [its] production of CBNG in the Porcupine [F]ield would be adversely impacted by the drilling of the Subject Core Holes.” Petition at 13.

By letter dated March 4, 2008, BLM responded to BBC, stating that it was unable to confirm the potential for oxygen contamination of CBNG wells by nearby coal exploration in the case of the Porcupine Field. BLM explained that it was “difficult to translate” the circumstances of workover operations in the Pronghorn Field to the circumstances of core hole drilling in the Porcupine Field. BLM Letter to BBC, dated Mar. 4, 2008, at 1. However, because it could not reach a conclusion regarding “any material risk of contamination,” it requested additional evidence involving other incidents during the past 2 years where oxygen contamination had shut down CBNG wells. *Id.* BLM asked that BBC include the reasons for such shutdowns. BLM indicated that it would delay, for a short time, issuing the exploration license in order to incorporate a phased approach to core hole drilling, which would allow BTU to defer further drilling if the initial drilling of the 10 holes most important for coal seam evaluation revealed material adverse effects on BBC’s CBNG wells. It noted that core hole drilling would not begin before July 31, 2008, affording BBC “additional time to recover [coalbed natural] gas reserves.” *Id.*

BBC filed a protest challenging the proposed issuance of the coal exploration license to BTU. BBC basically argued in its original March 17, 2008, letter of protest and in a succeeding April 1, 2008, letter that issuing the coal exploration license was arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with the law because it (1) authorized activities that unreasonably interfered with its CBNG operations, violating the terms of its oil and gas leases, as well as the policy, regulations, and case law of the Department and judicial precedent; (2) served no legitimate purpose since BLM could not legally issue a coal lease for lands encompassed by the license, on the basis that leasing was contrary to the Buffalo RMP; and (3) violated section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(2)(C) (2000), absent preparation of a single EIS that addressed the “connected actions” of issuing both the license and a coal lease authorizing full-scale coal mining operations. BBC stated that it could not envision how BTU could ensure that the likely adverse effects on its CBNG operations and production were adequately mitigated, even by agreeing to indemnify it for all the losses and damages suffered as a consequence of exploration. BBC concluded that

“the only way in which both the CBNG and coal reserves can be fully recovered” and any waste avoided was to engage in “[t]he prior production of the entire CBNG reserves[.]” BBC Letter to BLM, dated Apr. 1, 2008, at 12 n.1, 14 n.2.

BLM requested BBC, by letter dated April 9, 2008, to provide additional technical information documenting the potential for oxygen contamination of CBNG wells by nearby coal exploration. In particular, BLM asked BBC to substantiate its assertion of a “potential zone of influence” embracing at minimum a 2000-foot radius surrounding any core hole. BLM also requested information concerning specific incidents of and reported causes for contamination in the Pronghorn and Porcupine Fields that had occurred in the past 2 years. BLM Letter to BBC, dated Apr. 9, 2008, at 1.

By letter dated May 9, 2008, BBC informed BLM that it could not provide any information regarding specific incidents in the Pronghorn Field in the past 2 years, since it had sold its interest in the Field in March 2006. However, BBC referred to two known incidents in the Porcupine Field, each of which involved a poorly-capped monitoring well found to be drawing in air. BBC further asserted that oxygen contamination that occurred at the Reno Water Well, discussed more fully *infra*, confirmed the minimum 2,000-foot zone of influence, since oxygen caused by drilling the well was detected in two nearby CBNG wells, one located 1,680 feet and the other 2,500 feet from the well.

Further, while asserting that its practical experience should be sufficient to establish the threat of oxygen contamination, BBC informed BLM that it had commissioned a technical study which would shortly be submitted. BBC provided, along with a June 16, 2008, cover letter, a three-page technical report prepared by J. Craig Creel, a petroleum engineer, dated June 13, 2008, entitled “Minimum Safe Drilling Distance, Porcupine CBM Field, Campbell County, Wyoming” (the Creel Report). Creel focused on evidence concerning the Reno Water Well, which was said to confirm general observations and simulated projections of “[s]ignificant well interaction” between wells in the Porcupine Field, with the interaction extending from a CBNG well as far away as 3 miles in a northwest/southeast direction and 1/4-mile in a northeast/southwest direction. Creel Report at 3. He concluded that in order to avoid the “risk of significant oxygen contamination” a core hole should be drilled at least those distances from a CBNG well. *Id.* Given this finding, Creel reported that any one of the 10 initial core holes would contaminate a CBNG well, resulting in the shut-down of production.

By memorandum dated July 22, 2008, the Assistant Field Manager, consistent with the recommendation of the Solids Minerals Group (SMG), Casper Field Office, recommended issuance of the coal exploration license to BTU. He proposed inclusion of a special stipulation providing for phased exploration of the License Area as a way of balancing the need for exploration to establish coal value and BTU’s need to

continue its existing mining operations, and the risk of oxygen contamination of its gas wells. Under the Assistant Field Manager's recommendation, the exploration sites "most critical to establishing coal value would be drilled first and "in the event of demonstrated adverse effects," the drilling of the remaining holes would be deferred. SMG Memorandum at unpaginated 1. The Assistant Field Manager also noted that under sections 5 and 6 of the proposed license, BLM was responsible for protecting valid existing rights, such as those held by BBC. He further stated:

We are aware of no other gas well damage situations which could not be worked out to the satisfaction of the well operator and the licensee. RMG [Reservoir Management Group, Wyoming State Office, BLM] has consulted a neighboring gas operator who has experienced coal exploration intermingled with gas wells under vacuum and completed in the coal seam, and *no damages were identified*.

Id. (emphasis added).

The Assistant Field Manager specifically relied upon two technical reports, attached to his July 22, 2008, memorandum, recommending issuance of the license. One was a report dated July 22, 2008, prepared by Michael Karbs, Assistant Field Manager, on behalf of the SMG, entitled "Report and Evaluation of Bill Barrett Corporation Comments on Coal Exploration License Application WYW-174201" (the Karbs Report); and the other, also dated July 22, 2008, was prepared by Fred Crockett, a BLM petroleum engineer, on behalf of the RMG, entitled "Review of J. Craig Creel Report" (the Crockett Report).

In his report, Karbs noted that RMG's evaluation of the Creel Report disclosed specific facts that were either not addressed or inconsistent with a finding that core hole drilling would cause oxygen contamination in nearby CBNG wells whenever the wells were located within a minimum 2,000-foot zone of influence, on a northwest/southeast axis. However, he also acknowledged that the Reno Water Well situation "suggests a chance of exploration drilling causing oxygen contamination." Karbs Report at unpaginated 4. Given this possibility, he concluded that issuing the license, but providing for phased exploration, was the best course of action. *Id.* at unpaginated 2, 4, 5. His recommendation would place the onus on BTU to decide whether to go forward with exploration, recognizing that BTU would be required to "reasonably accommodate BBC's right to produce gas," and indeed might have to "compensate BBC reasonably for any verified damage." *Id.*

In his report, Crockett acknowledged the "coincidence" between the drilling of the Reno Water Well and the oxygen contamination in two nearby CBNG wells. Crockett Report at unpaginated 2. However, he found the causal relationship was "not proven," especially given that two other nearby CBNG wells situated within the minimum 2,000-foot zone of influence were "not contaminated." *Id.* at unpaginated

4. He noted that, although six CBNG wells were situated within 1.5 miles of the open face of the Mine, and within the minimum 2,000-foot zone of influence, “there does not appear to be oxygen contamination.” *Id.* at unpaginated 2-3. He added: “Considering the low reservoir pressure in the area and the relatively long time the mine face has been open to the atmosphere, the three mile minimum distance suggested by Creel seems to be too large.” *Id.* Although he found the conclusions of the Creel Report to have some merit, Crockett stated that while “[t]he available evidence does not clearly indicate that oxygen contamination is certain or even probable,” there is nevertheless “a chance that oxygen contamination may occur” with the drilling of the 10 initial core holes. *Id.* at unpaginated 4. Even so, he recommended that the license be issued. *Id.*

II. THE DEPUTY STATE DIRECTOR’S DECISION

In his August 2008 decision, the Deputy State Director dismissed BBC’s protest, concluding that it is in the public interest for both BBC’s ongoing CBNG production and for BTU’s proposed coal exploration to “proceed in an optimal manner.” Decision at 3. He concluded that BBC’s assertion that coal exploration would prevent or impair CBNG production “does not appear to be proven with any certainty.” *Id.* at 5. He was not convinced that the evidence introduced to date by BBC was sufficient to demonstrate that the core hole drilling proposed by BTU would halt or impede CBNG production, even where the two occurred in close proximity. He stated: “BLM knows that exploratory drilling has occurred in active CBNG operations throughout the coal field with no complaint of oxygen contamination by CBNG operators.” *Id.* at 3; *see id.* at 2. He noted that the Pronghorn Field, while “somewhat analogous,” exhibited “significantly different conditions” from the Porcupine Field, and that the Reno Water Well was distinguishable from the proposed core holes. *Id.* at 2; *see id.* at 3.

The Deputy State Director stated that BLM recognized BTU’s need to acquire the coal reserves; however, he emphasized that BTU was obligated by section 5 of the license “to reasonably accommodate BBC’s right to produce gas under BBC’s approved operations,” and that should any damage occur to CBNG production, BTU would be required “to compensate BBC reasonably for any verified damage[.]” *Id.* at 5. Section 5 specifically provides that “[v]alid existing rights acquired prior hereto on the lands described herein will not be adversely affected hereby,” and, importantly, that “[o]perations hereunder *shall not unreasonably interfere with or endanger operations under any other authorized use* pursuant to the provisions of any other act.” *Id.* at 4, *quoting* Coal Exploration License, Sec. 5 (emphasis added).

In order to further protect BBC’s operations, the Deputy State Director accepted the Casper Field Office recommendation to require a “phased approach” to coal exploration, under which BTU would first drill the 10 core holes most critical to establishing the FMV of the coal reserves in the LBA Area and provide potential

bidders the “minimum information to act on a lease offer.” *Id.* at 6. He indicated that adopting such measures would further the public interest by allowing both coal exploration and CBNG production to proceed in an optimal manner. *Id.* at 5.

The Deputy State Director decided to issue the license to BTU, subject to the existing provisions and the additional stipulation set forth in the August 2008 decision. *Id.* at 6. He noted that by issuing the license, BLM was affording BTU the option of going forward with core hole drilling, thereby advancing BTU’s aim of acquiring additional coal reserves for the Mine. However, he made clear that BTU “will be obligated to reasonably accommodate BBC’s right to produce gas under BBC’s approved operations, and to compensate BBC reasonably for any verified damage.” *Id.* at 5. BTU would also have the option of waiting until BBC has completed CBNG production, thereby avoiding any adverse effects from core hole drilling. *Id.* at 5.

By letter dated August 25, 2008, BBC proposed two substantial modifications to BLM’s phased approach to core hole drilling: (1) the initial 10 core holes would be drilled with not less than 2 weeks between each core hole, in order that the effects of drilling on nearby CBNG wells might be properly gauged; and (2) core hole drilling, as well as the exploration license, would be discontinued in the event that oxygen contamination, sufficient to trigger the shutdown of one of BBC’s compressors, is detected in the natural gas stream at any of the CBNG wells. BBC Letter to BLM, dated Aug. 25, 2008, at unpaginated 2. BBC recognized that the proposed stipulation would not prevent the adverse effects of a “first incident” of oxygen contamination, since a shutdown would be triggered, but that further adverse effects would be avoided. *Id.* If no adverse effects occurred, the stipulation “would never come into play.” *Id.*

BLM rejected BBC’s additional proposed modification.⁶ BLM stated that while it could not rule out contamination, the available evidence did not clearly indicate that it was certain or even probable. BLM pointed out that the adopted modification had been sufficient in the case of coal exploration in other CBNG producing areas. BLM Letter to BBC, dated Sept. 4, 2008, at 1. In BLM’s view, the proposed modification would unduly prolong the initial core hole drilling program, rendering it practically and economically infeasible. Further, the stipulation was unreasonable, according to BLM, because BBC had provided no justification for imposing a 2-week period after drilling each of the 10 initial holes, rather than a 1-week period, and

⁶ BTU objected to BBC’s additional proposed modification, since it would halt all further exploration were *any* oxygen contamination detected at any CBNG well. BTU noted that it had tried without success at an Aug. 21, 2008, meeting to reach agreement with BBC on how to avoid or mitigate potential adverse effects of its core hole drilling on CBNG production, but remained willing to reach a “legitimate” accommodation in the interests of both parties. BTU Letter to BLM, dated Sept. 2, 2008, at 1.

because “it ignores the fact that BTU has the obligation to mitigate the damage under the stipulations already placed in the proposed license, and by doing so retains the authorization to drill other locations.” *Id.* at 2. Finally, BLM stated that the proposed stipulation would improperly vest in BBC the authority “to grant or preclude exploration drilling.” *Id.*

III. APPEAL AND PETITION FOR STAY

BBC appealed timely from the Deputy State Director’s August 2008 decision, and petitioned for a stay of the effect of the decision during the pendency of its appeal.⁷ BBC believed that core hole drilling in connection with coal exploration, threatened its existing production of CBNG from 108 wells on its oil and gas leases, both inside and outside the License Area because the high permeability and porosity of the coal seam and the strong negative pressure in the nearby CBNG wells would cause the pressurized oxygen to migrate to the CBNG wells and halt CBNG production. *See* Petition at 10; BBC Letter to BLM, dated Oct. 15, 2007, at 2. BBC stated that in order to correct the problem it would have to vent and flow all of the gathering lines leading to the affected compressor, which could consume a significant period of time and result in the irrevocable loss of all of the existing CBNG in the lines at the time of the shutdown. BBC concludes: “[T]he resultant losses and costs to BBC are immense.” *Id.* BBC argued that the phased approach adopted by BLM would not completely avoid unreasonable interference with its CBNG operations, since any one of the 10 initial core holes may cause oxygen contamination sufficient to cause the shutdown of BBC’s CBNG production, with the attendant adverse consequences.

In denying BBC’s petition for a stay, the Board concluded, based upon its preliminary review of the record and the pleadings filed by the parties, that BBC had failed to demonstrate a likelihood of success on the merits of its appeal. *See* 43 C.F.R. § 4.21(b).⁸ For the reasons set forth in our January 23, 2009, order, and for the

⁷ BBC initially filed a Notice of Appeal and a Petition for Stay, and later filed a Reply in response to oppositions to its stay petition filed by BLM, BTU, and the State of Wyoming. BBC later designated its Petition for Stay and Reply as its Statement of Reasons for appeal.

⁸ BBC also filed an action in the U.S. District Court for the District of Columbia challenging BLM’s grant of a coal exploration license to BTU. By Memorandum Opinion dated Mar. 11, 2009, the District Court denied BBC’s motion for a preliminary injunction enjoining BLM from allowing coal exploration under the license to proceed pending resolution of the case on the merits. The District Court’s reasoning, set forth below, is consistent with the Board’s rationale for denying BBC’s request for a stay, and supports the conclusion we now reach on the merits of BBC’s appeal:

(continued...)

additional reasons discussed below, we now rule that BBC has failed to carry its burden to demonstrate, by a preponderance of the evidence, that BLM erred in its decision to issue the coal exploration license to BTU.

III. ANALYSIS

A. Unreasonable Interference with CBNG Operations and Production

[1] BBC's primary argument is that BLM is precluded from issuing a coal exploration license to BTU because "the Subject Core Holes *cannot be drilled without interfering unreasonably* with BBC's operations and production under [its] Senior Oil and Gas Leases." Petition at 25 (emphasis added). BBC argues that such a license would violate the "Senior Oil and Gas Leases and BBC's rights thereunder," which preclude any disposition of the leased lands that would unreasonably interfere with operations under the lease terms. *Id.*

BLM is authorized by section 2(b) of the Mineral Leasing Act, 30 U.S.C. § 201(b) (2006), and its implementing regulation, 43 C.F.R. § 3410.1-1, to issue a coal exploration license for lands "that are subject to leasing," which generally includes all Federal lands, with exceptions not at issue here. *See* 43 C.F.R. § 3400.2. In deciding whether and under what circumstances to dispose of other resources, BLM must ensure that its decision to dispose of coal resources, to the limited extent permitted by the exploration license, will not unreasonably interfere with BBC's CBNG operations.

⁸ (...continued)

The Court finds that the weight of the evidence is, at best, inconclusive as to whether oxygen contamination is likely to occur. While BBC's evidence establishes oxygen contamination is a *possibility*, BLM in its expert judgment, determined, after evaluating BBC's evidence and inquiring into the experiences of similarly situated CBNG operators, that the risk of oxygen contamination "does not appear to be proven with any certainty." (BLM Decision at 2-3). This Court, of course, must give deference to BLM in matters within the agency's technical expertise, particularly where predictive judgments are at issue. . . . Giving BLM that deference, this Court is not persuaded that BLM's judgment was in error. Thus, in the absence of new evidence at this stage establishing that the harm BBC alleges is *likely* to occur, BBC has failed to establish the requisite risk of irreparable harm to warrant a preliminary injunction.

Bill Barrett Corp. v. U.S. Dep't of the Interior, 2009 WL 612466 (D.D.C. Mar. 11, 2009), at 4 (emphasis in original).

BLM properly points out several principles that apply to the decision on appeal. Under 43 C.F.R. § 3000.7, which applies to minerals management on public lands, “[t]he granting of a permit or lease for the prospecting, development or production of deposits of any one mineral *shall not preclude* the issuance of other permits or leases for the same lands for deposits of other minerals with suitable stipulations for simultaneous operation[.]” (Emphasis added.) Further, BLM notes that 43 C.F.R. § 3400.1(b), which specifically applies to coal management, states:

The presence of deposits of other minerals or the issuance of prospecting permits or mineral leases for prospecting, development or production of deposits of other minerals *shall not preclude the granting of an exploration license*, a license to mine or a lease for the exploration, development or production of coal deposits on the same lands with suitable stipulations for simultaneous operations. [Emphasis added.]

BLM’s policy directives do not provide for the production of both coal and oil and gas regardless of any conflict, but rather provide for the simultaneous production of coal and oil and gas in a cooperative manner.⁹ Under 43 C.F.R. § 3400.1(b), neither the mere presence of CBNG nor the issuance of oil and gas leases to BBC for the lands at issue precludes coal exploration. Opposition at 27; *see also* State of Wyoming’s Motion for Leave to File Amicus Brief at 1. BLM sought to balance the competing interests of BBC and BTU, recognizing that there is a *possibility* that, in a given situation, coal exploration may result in some degree of oxygen contamination of proximate CBNG wells. The parties dispute BLM’s determinations in this regard.

1. *Likelihood of Occurrence of Oxygen Contamination*

BBC argues that BLM improperly required it to prove that oxygen contamination of its CBNG wells was “certain” to occur as a consequence of coal exploration. Petition at 3. However, the Deputy State Director’s decision imposed no

⁹ BLM cites a succession of its Instruction Memoranda (IMs), starting with IM No. 2000-081, issued on Feb. 22, 2000, continuing with IM No. 2003-253 on Aug. 21, 2003, and concluding with IM No. 2006-153 on May 11, 2006. The policy is clearly enunciated in IM No. 2000-081 at page 1:

If the [coal and CBM] lessees recover the resources in an optimally cooperative way, they will be able to recover more of the resources than if they produce each resource without regard for the other. Therefore, BLM’s policy will be to encourage agreements between lessees or use BLM authority to minimize loss of publicly-owned resources.

This basic policy was reiterated in the two subsequent IMs. *See also* Buffalo RMP at 10 (“In the Powder River Basin, oil and gas and coal frequently occur in the same place. The public interest is best served by optimizing the development of both resources in an environmentally sound manner.”).

such requirement. He rejected BBC's claims because the evidence supporting them was inconclusive, specifically noting that oxygen contamination had not materialized in the PRB. BTU Opposition at 35. The Deputy State Director did note that BBC's evidence was insufficient to establish that contamination was certain to occur, but he did not require BBC to demonstrate such certainty in order to establish error in BLM's decision to issue the exploration license. *See* Decision at 3. In short, BBC failed to succeed in showing error because it "failed to show by a preponderance of the evidence that oxygen contamination would occur." Opposition at 35. In other words, BBC failed to show that it was more likely that oxygen contamination would occur than not.

Consistent with 43 C.F.R. § 3410.2-2(a), the coal exploration approved in the license issued to BTU is designed to result only in the disturbance "necessary to determine the nature of the overlying strata and the depth, thickness, shape, grade, quantity, quality or hydroponic conditions of the coal deposits" underlying the lands at issue. However, this does not guarantee that drilling core holes into the solid coal will not affect the production of natural gas embedded in the coal deposits. Moreover, as the Board observed in its order denying BBC's stay request, there is considerable evidence that most of the coal exploration to date has occurred without oxygen contamination:

Despite the fact that BBC has been objecting to the proposed exploratory drilling in the License Area since October 2007, the entirety of the credible evidence amassed to date to establish that such drilling will, in fact, result in the oxygen contamination of its nearby CBNG wells in the Porcupine Field still amounts only to BBC's experience with workover operations in the Pronghorn Field and the experience with the drilling operations of the Reno Water Well in the Porcupine Field, both of which appear to contradict the overwhelming experience with exploratory core drilling in oil and gas fields in the Powder River Basin. *See* BLM Opposition at 31 n.9 ("This is the first time the issue of oxygen contamination has been raised to the BLM in the Powder River Basin [despite the fact that] BLM has issued 28 [coal] exploration licenses in the Powder River Basin since January of 2000"); BTU Western Opposition 29 ("The harm BBC fears has simply not been experienced despite the prior drilling of thousands of coal core holes into coal formations where thousands of coalbed [natural] gas wells are operated"); State Opposition at 4 ("The State is unaware of any harm of the nature BBC asserts").

While BBC has offered expert evidence, in the form of Creel's report and affidavits of Tracy Galloway, BBC's Asset Manager for the Powder River Basin and a professional geologist, dated Sept. 12, 2008 (Ex. C attached to Petition), and Oct. 9, 2008 (attached to Reply),

regarding the likelihood of oxygen contamination being caused by the approved exploratory drilling, we have held that BLM is entitled to rely on the opinion of its experts, which are reasonable and supported by record evidence, and that a mere difference of opinion, is not sufficient to overturn BLM's decision. *See Fred E. Payne*, 159 IBLA 69, 77-78 (2003); *Animal Protection Institute of America*, 118 IBLA 63, 76 (1991).

Order, IBLA 2008-257, Jan. 23, 2009, at 8-9; *see* Petition at 17; Attachment to Karbs E-mail, dated Feb. 14, 2008; Opposition at 9-10, 28-29, *citing* E-Mail to Walker from Rain off, dated Nov. 27, 2007 (Ex. 18 attached to Opposition), and King Affidavit, ¶ 4, at 2.

BBC admits that the matter is one of “reasonable prediction,” Petition at 14, and that its contention that oxygen contamination is likely to occur as a consequence of drilling the core holes in the License Area hinges, to a considerable extent, on the circumstances surrounding oxygen contamination of CBNG wells near the Reno Water Well. BBC argues that the Reno Water Well experience provides “compelling, site specific proof that drilling through the coal seam in the Porcupine Field will cause the oxygen contamination of nearby BBC Wells.” Reply at 14. BBC reports that a 10.5-inch diameter water well was drilled in January 2008, using water and air, to a depth of 598 feet, through the Wyodak-Anderson coal seam, and then plugged and abandoned. BBC states that this drilling resulted in oxygen contamination in two of BBC's nearby CBNG wells (34-3-4171 and 21-11-4171), situated 1,680 feet southeast and 2,500 feet west-northwest from the Water Well, although no shut-down occurred since the wells already had been shut in as a precautionary measure. *See* Petition at 15, 19; *see* Reply at 2 (“[T]he only hole actually drilled in the Porcupine Field to date caused oxygen contamination of two BBC Wells”).

BLM distinguishes the Reno Water Well situation from BTU's proposed exploration on the basis that the borehole was larger than that proposed by BTU (10.5 versus 6 inches in diameter) and, importantly, was likely to have been pressurized for “much longer,” forcing air into the exposed coal seam. BLM states that it took 7 hours to ream and set pipe for the Reno Water Well, owing to downhole problems, and the well was drilled on 2 successive days. Opposition at 9; *see id.* at 8, 31-32; Crockett Report at unpaginated 3.

BBC offers evidence regarding the relative lengths of time consumed by drilling a coal core hole versus drilling the Water Well, but it ultimately fails to support its overall conclusion that “the drilling of each Proposed Core Hole can reasonably be expected to result in significantly greater oxygen contamination than occurred in connection with the drilling of the Reno Water Well.” Petition at 20, *quoting* Protest at 20. Moreover, BLM asserts that two other nearby CBNG wells, one as close as 260 feet, were not affected by the Water Well. *See* Decision at 3;

Crockett Report at unpaginated 2. BBC's argument regarding the Water Well at best raises the possibility that contamination *may* be caused by drilling in the vicinity of a CBNG well. BBC admits that contamination will not occur in every case, given the variability of the geologic and other circumstances under the ground, and even admits that "a drillhole will not always impact every CBNG well within its zone of influence." Petition at 19. We conclude that the Reno Water Well does not establish that oxygen contamination of nearby CBNG wells is the inevitable consequence of the core hole drilling at issue.

2. Adequacy of Mitigation Measures

The next issue, equally as important, is whether or not BLM has adopted appropriate measures for protecting the CBNG wells should core hole drilling cause oxygen contamination of such wells. The Board held in its January 23, 2009, order denying BBC's request for a stay that BLM had imposed reasonable restrictions on BTU's core drilling activities, stating:

Nevertheless, BLM has imposed reasonable restrictions on core drilling, designed to avoid or minimize any adverse effects on existing CBNG production. In addition, BTU Western is clearly on notice that, in the event of a breach, it will, in fact, be held liable in damages, and may be directed to shut down operations, in order to rectify the adverse effect or unreasonable interference or endangerment. *See* Decision at 5 ("BTU will be obligated . . . to compensate BBC reasonably for any verified damage"). In addition, even if oxygen contamination is detected during the drilling of the first 10 core holes, BTU Western may discuss with BBC the possibility of having BBC shut down CBNG production near each new core hole, during the limited period of time that drilling occurs, in order to allow both operations to go forward. We note BTU Western has expressly stated on appeal that it has already informed BBC that it is committed to "pay[ing] BBC reasonable compensation for harm it incurs from BTU's core hole drilling, notwithstanding BTU's legal right to conduct approved activities in a reasonable manner." Opposition at 27. [Footnote omitted.]

Order, IBLA 2008-257 (Jan. 23, 2009), at 9.

BLM has, in fact, recognized the possibility that contamination may occur, and has taken appropriate steps to avoid or mitigate adverse effects on CBNG operations and production. As stated by BLM: "Even with the limited evidence provided by the Appellant, BLM decided to implement safeguards to protect BBC in the event that oxygen contamination occurred." Opposition at 35. The exploration license provides, by its terms, that valid existing rights, which clearly include BBC's rights in its oil and gas leases, "will not be adversely affected" by coal exploration, and,

importantly, that coal exploration “shall not unreasonably interfere with or endanger operations under any other authorized use,” which includes operations under BBC’s oil and gas leases. Decision at 4, *quoting* Coal Exploration License, Sec. 5. Further, in section 8, the license provides that BLM may, at any time after due notice, revoke the license and preclude further operations for noncompliance with the terms and conditions of the license. *See* 43 C.F.R. § 3410.3-1(e) (“An exploration license may be cancelled by the authorized [BLM] officer for noncompliance with its terms and conditions [after due notice]”).

In addition, BLM has specifically provided for phased exploration, limiting drilling to only 10 core holes in the initial phase, following which the situation would be assessed and, if CBNG operations and production adversely affected such drilling, BTU could waive or defer further drilling. If BTU decided to go forward with further drilling in those circumstances, it would remain responsible for damages from unreasonably interfering with or endangering BBC’s CBNG production, and it could be subject to cancellation of the license. *See* Karbs E-mail, dated Feb. 23, 2008 (“The license would contain a condition to the effect that all 48 holes are authorized, but they are to be drilled in two phases, the initial ten and then the balance, but after a reasonable time to provide affected parties the opportunity to ask that the remaining holes be deferred, for cause”). (Emphasis added.)

BBC argues that it has “no meaningful protection,” since BTU is not prevented from drilling the core holes, and the drilling will halt BBC’s CBNG production. Petition at 24. It notes that, although BTU will be deemed to have breached the terms of its license, “that will not undo the oxygen contamination or the resultant harm, damages and losses suffered by BBC.” *Id.* BBC clearly argues that meaningful protection will be afforded by the terms of the license only if BLM precludes all coal exploration within the License Area. BBC argues that any compensation from BTU for damages to its CBNG production will only come as a consequence of “costly, complex and lengthy litigation[.]” Petition at 24. We are not prepared at this point to conclude that the remedy available to BBC, in the event of any disruption of CBNG production, is not adequate or that it “will not make BBC whole after the fact.” *Id.* at 25. Further, BTU states on appeal that it has already informed BBC that it is committed to “pay[ing] BBC reasonable compensation for harm it incurs from BTU’s core hole drilling, notwithstanding BTU’s legal right to conduct approved activities in a reasonable manner.” Opposition at 27.¹⁰

¹⁰ In its Memorandum Opinion denying BBC’s motion for preliminary injunction, the District Court found that BBC had failed to establish irreparable harm should oxygen contamination be caused by BTU’s exploratory drilling. The District Court stated:

BBC has not established that the exploratory drilling will irreparably destroy BBC’s ability to produce CBNG. Indeed, BBC has been able to return contaminated wells to production in just over nine days. . . .

(continued...)

The license provisions clearly require BTU to make its best efforts to ensure that no adverse effect and no unreasonable interference or endangerment will occur. Moreover, BTU is on notice that, in the event of a breach, it will in fact be held liable in damages, and may be ordered to shut down operations in order to rectify the adverse effect or unreasonable interference or endangerment. See Decision at 5 (“BTU will be obligated . . . to compensate BBC reasonably for any verified damage.”). These provisions constitute a sufficient deterrent to, and an adequate remedy in the event of, any adverse effects or unreasonable interference or endangerment.

BBC has failed, by a preponderance of the evidence, to demonstrate any error in the data, methodology, analysis, or conclusions of BLM’s experts, which were reasonable and supported by record evidence. We conclude that the expert evidence offered by BBC, in the form of the Creel Report and Galloway’s affidavits, establishes only a difference of opinion regarding the likelihood of oxygen contamination being caused by the approved core hole drilling, which is not sufficient to overturn BLM’s decision. *Fred E. Payne*, 159 IBLA at 77-78; *Animal Protection Institute of America*, 118 IBLA at 76. Even so, BLM has given BBC’s evidence the benefit of the doubt, imposing reasonable restrictions on such drilling that are designed to avoid or minimize any adverse effects on existing CBNG production. BBC has not established that issuance of the coal exploration license to BTU constitutes or will result in unreasonable interference with or endangerment of BBC’s valid existing right to conduct CBNG operations under its oil and gas leases.

B. Legitimate Purpose Served by Issuing License

BBC contends that BLM’s issuance of a coal exploration license to BTU serves no legitimate purpose, and is arbitrary, capricious, and an abuse of discretion, since BLM would be “legally” barred from issuing a coal lease. Petition at 8. BBC asserts that BLM would be barred from issuing a lease for two reasons: (1) BLM may not authorize “[s]urface coal mining” within the LBA Area that would “destroy the reservoir in which the CBNG resides and cause the total and irretrievable venting, loss and waste of the CBNG reserve,” and thus unreasonably interfere with BBC’s rights

¹⁰ (...continued)

Moreover, BBC has not established that corrective or compensatory relief is otherwise unavailable. . . . While BBC cannot pursue compensatory damages under the APA [Administrative Procedure Act], 5 U.S.C. § 702 [(2008)], it may, as it itself has acknowledged, be able to pursue both a breach of contract claim and a takings claim against the United States for unreasonably interfering with BLM’s existing leases. . . .

Bill Barrett Corp. v. U.S. Dep’t of the Interior, 2009 WL 612466, at 14.

under its oil and gas leases; and (2) BLM is required by its RMP to defer coal leasing in producing oil and gas fields unless or until coal development will not interfere with the economic recovery of the oil and gas resources, as determined on a case-by-case basis by BLM. Petition at 8-9. BBC argues that its particular case requires BLM to defer coal leasing until it has extracted all the CBNG resources on its leases.

As discussed, BLM is required to avoid unreasonably interfering with BBC's rights under its existing oil and gas leases, and in managing the public lands, to conform its actions to the directives set forth in its applicable land-use plan. 43 U.S.C. § 1732(a) (2000); 43 C.F.R. §§ 1610.5-3(a), 3420.1-4(a) (“[a coal lease] sale must be compatible with, and subject to, any relevant stipulations, guidelines, and standards set out in th[e] [comprehensive land use] plan”), and 3425.2 (“[t]he decision to hold a lease sale shall be consistent with the appropriate comprehensive land use plan”). The Buffalo RMP provides, at page 11, as follows: “Coal leasing in producing oil and gas fields would be deferred unless or until coal development would not interfere with the economic recovery of the oil and gas resources. This would be determined on a case-by-case basis.”

As to whether BLM can lawfully issue the license, the RMP specifically provides, at page 11, that “[a]ll [F]ederal coal lands ([F]ederal mineral estate for coal retained by the [F]ederal government) are *open to study and exploration*.” (Emphasis added.) We need not presume, one way or the other, how BLM will ultimately act on the entirely separate matter of lease issuance. When BLM is presented with a coal lease application, the information gathered from the exploration license issued to BTU will be relevant to BLM's FMV determination of that lease. We conclude that BBC has not demonstrated that BLM's issuance of the coal exploration license to BTU serves no legitimate purpose, or otherwise is arbitrary, capricious, or an abuse of discretion.

C. Compliance with NEPA

1. Coal Exploration and Development Are Not “Connected Actions” Under 43 C.F.R. § 1508.25

[2] BBC contends that BLM's decision to issue the coal exploration license violates section 102(2)(C) of NEPA because BLM failed to consider, in an EIS, the “[c]onnected actions” of issuing the license and issuing a coal lease, from the standpoint of the likely environmental impacts of coal exploration and development in all or part of the License Area. Petition at 5, *quoting* 40 C.F.R. § 1508.25. In particular, BBC argues that BLM failed to consider the potential for oxygen contamination of nearby CBNG wells and other adverse consequences stemming from drilling exploratory core holes. Petition at 5.

BLM is required by section 102(2)(C) of NEPA and its implementing regulation, 40 C.F.R. § 1508.25, to consider the environmental impacts of a proposed action and any other action that is “connected” to the proposed action, by virtue of the fact that (1) the proposed action “[a]utomatically trigger[s]” the other action; (2) the proposed action “[c]annot or will not proceed unless [the] other action[] [is] taken previously or simultaneously”; or (3) the proposed action and the other action “[a]re interdependent parts of a larger action and depend on the larger action for their justification.” We have recognized that actions that have “independent utility,” where there exists sufficient justification for each of the two actions, such that each may proceed without the other, are generally not connected actions. *See, e.g., Great Basin Mine Watch*, 146 IBLA 248, 251 (1998); *Concerned Citizens for Responsible Mining (On Reconsideration)*, 131 IBLA 257, 266 (1994). Further, the overall purpose of the regulation is to ensure that “closely related” actions which may have cumulatively significant impacts, and “therefore should be discussed in the same [environmental] impact statement,” 40 C.F.R. § 1508.25(a)(1), are not improperly segmented into separate actions, each having less than significant impacts, thus “overlook[ing] or, worse, deliberately ignor[ing]” their cumulatively significant impacts. *Haines Borough Assembly*, 145 IBLA 14, 22 (1998), *citing Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 298 (D.C. Cir. 1987).

BBC argues that issuing the license and the possibility of eventually issuing a coal lease are connected actions because “[t]he proposed LBA could not proceed without the proposed exploration drilling and the exploration drilling would not be conducted but for the proposed LBA.” Petition at 6, *citing Thomas v. Peterson*, 753 F.2d 754 (9th Cir. 1985). BBC recognizes that BLM intends to consider the likely impacts of leasing in a subsequent EIS, but argues that it must, because they are connected, consider the impacts of both actions at the present time, “in a single EIS.” Petition at 6.

In addressing this issue in its January 23, 2009, order, the Board stated:

We have long held that exploration and development, whether concerning coal or other mineral resources on the Federal lands, are not connected actions, within the meaning of 40 C.F.R. § 1508.25. *See, e.g., Western Watersheds Project*, 175 IBLA 237, 253 (2008); *Concerned Citizens for Responsible Mining (On Reconsideration)*, 131 IBLA at 265 (“NEPA does not require that BLM examine the environmental impacts of mine development when it approves a plan for exploration of a mineral property”), 266-67 (1994); *Missouri Coalition for the Environment*, 124 IBLA 211, 217-18 (1992). Generally speaking, exploration does not automatically trigger development, since, even were exploration to uncover mineral resources worthy of exploitation, the proponent may well decide not to pursue development.

While we agree with BBC that the present case is distinguishable from the usual exploration/development cases in the sense that much is already known about the coal resources of the LBA area, the fact remains that BLM has not yet decided to issue a lease, and a lease will not be issued automatically at the completion of the approved exploration operation. Moreover, a lease would be issued only following further environmental review and decisionmaking.

Order, IBLA 2008-257 (Jan. 23, 2009), at 11.

The Board's analysis remains valid. The information gathered from exploration conducted pursuant to BTU's license is expected to assist BLM in determining whether all of the LBA Area is suitable for leasing. Completing the 48 core holes may well disclose coal reserves of a quality or a quantity not suitable for exploitation, or development may simply be rendered economically or technically infeasible by reason of "engineering problems concerning removal, fluctuations in the market price of the commodity, and financial and organizational difficulties [of the mining company]." *Concerned Citizens for Responsible Mining (On Reconsideration)*, 131 IBLA at 267, quoting BLM Answer (IBLA 91-319). Exploration and development are therefore not interdependent parts of a larger action, which both depend on the larger action for their justification. Development and leasing are inextricably intertwined because leasing is required before development can proceed, but leasing and exploration are not so inextricably intertwined, because leasing is not required before exploration occurs and exploration does not necessarily result in leasing. Reply at 29.

BLM will issue a lease for coal development only after further environmental review and decisionmaking. *Missouri Coalition for the Environment*, 124 IBLA at 217. BLM is presently in the process of preparing an EIS for leasing and development. See Reply at 30, citing BLM Opposition at 18 ("BLM has completed the scoping and is in preparation for the EIS addressing the Porcupine LBA"). We therefore conclude that BBC has failed to establish that BLM violated section 102(2)(C) of NEPA by failing to consider, in an EIS, the likely significant environmental effects of issuing both the coal exploration license and a coal lease in all or part of the License Area.

2. BLM Took a "Hard Look" at the Environmental Impacts of Issuing the License

[3] A BLM decision to proceed with a proposed action, based on an EA, will be upheld as being in accord with section 102(2)(C) of NEPA where the record demonstrates that BLM has, considering all relevant matters of environmental concern, taken a "hard look" at potential environmental impacts, and made a convincing case that no significant impact will result or that any such impact will be reduced to insignificance by the adoption of appropriate mitigation measures. *Wyoming Outdoor Council*, 173 IBLA 226, 235 (2007). An appellant seeking to

overcome such a decision must demonstrate, with objective proof, that BLM failed to consider a substantial environmental question of material significance to the proposed action, or otherwise failed to abide by section 102(2)(C) of NEPA. *Id.*

Where, in assessing environmental impacts, BLM properly relies on the professional opinion of its technical experts concerning matters within the realm of their expertise, and that opinion is reasonable and supported by record evidence, an appellant challenging such reliance must demonstrate, by a preponderance of the evidence, error in the data, methodology, analysis, or conclusion of the expert. *Wyoming Outdoor Council*, 173 IBLA at 235. A mere difference of opinion, even expert opinion, will not suffice to show that BLM failed to fully consider the nature or scope of the likely impacts. *Id.*

BBC argues that BLM failed in its EA to consider “even the most basic environmental consequences of drilling the Subject Core Holes,” especially “the issue of oxygen contamination or the impacts of drilling upon CBNG production under the Senior Oil and Gas Leases.” Petition at 7. Contrary to BBC’s argument, the record demonstrates that BLM adequately considered the possibility of oxygen contamination and the resulting adverse effects to BBC’s CBNG production from coal exploration. *See* BLM Opposition at 22; BTU Opposition at 22. While the EA itself is less than two pages long, it incorporated by reference the Karbs Report and the Crockett Report, both of which analyzed in detail the potential consequences identified by BBC, *see* EA at 3, though BLM clearly did not regard the effects to be certain or even likely, for the reasons discussed above. No convincing evidence to the contrary is offered by BBC.

BBC argues that the phased coal exploration is likely to result in the unavoidable loss of a substantial quantity of CBNG, an appreciable “contribut[ion] to global warming since CBNG is a potent greenhouse gas” to support its NEPA challenge. Petition at 7. We appreciate the fact that there are “many unknown variables” which affect the quantity of CBNG that would have to be vented from gathering lines and other damages that can result in the event of any oxygen contamination of its wells. Reply at 20. However, absent any persuasive evidence showing that the cause of any such environmental impacts—oxygen contamination of nearby CBNG gas wells—is likely to occur, we cannot find that the quantity of CBNG likely to be vented is likely to be substantial, or likely to contribute in any appreciable way to global warming. Here, BBC offers no evidence that the amount of gas that would be required to be vented if oxygen contaminated any of its CBNG wells exceeds that which occurs when gas is routinely purged from wells. *See* BTU Opposition at 23. In these circumstances, BBC has not shown that such impacts are other than remote and highly speculative, which BLM is not required to consider. *Coeur d’Alene Audubon Society, Inc.*, 146 IBLA 65, 70 (1998), *citing Trout Unlimited v. Morton*, 509 F.2d 1276, 1283 (9th Cir. 1974). We conclude that BBC has not established that BLM violated section 102(2)(C) of NEPA by failing to consider, in its

EA, the likely adverse effects of issuing a coal exploration license on production from BBC's nearby CBNG wells or other environmental impacts.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision is affirmed and BBC's request for a hearing is denied as moot.

_____/s/_____
James F. Roberts
Administrative Judge

I concur:

_____/s/_____
T. Britt Price
Administrative Judge