



ANR COMPANY, INC.
C.O.P. COAL DEVELOPMENT CO.

182 IBLA 248

Decided June 21, 2012



United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
801 N. Quincy St., Suite 300
Arlington, VA 22203

ANR COMPANY, INC.
C.O.P. COAL DEVELOPMENT CO.

IBLA 2011-111 & 2011-112

Decided June 21, 2012

Appeal from a decision by the Utah State Office, Bureau of Land Management, approving a Modification of the Resource Recovery and Protection Plan for the Continuous Miner Pillar Panels in the Castle Valley Nos. 3 and 4 Mines within the Bear Canyon Logical Mining Unit. UTU-73342.

Decision affirmed.

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

The procedure for modifying a resource recovery and protection plan for mining coal can be initiated by the authorized officer or by the operator/lessee. When an operator/lessee with an approved resource recovery and protection plan seeks to modify its method of mining from longwall mining to room-and-pillar mining, that modification of the plan must be submitted for approval by BLM, and the operator/lessee must justify the modification by setting out the change in circumstances and showing that the change will achieve the maximum economic recovery of the coal resource. Based on the documents describing the proposed modification, and the justification for the proposed modification, the authorized officer may approve, set conditions for approval, or disapprove the modification. A decision by the authorized officer approving a modification will be affirmed where an appellant fails to demonstrate, by a preponderance of the evidence, error in the decision.

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Davis, Esq., Craig D. Galli, Esq., Sandra A. Snodgrass, Esq., Ryan R. Jibson, Esq., Salt Lake City, Utah, for Castle Valley Mining LLC; John W. Steiger, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Salt Lake City, Utah, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ROBERTS

ANR Company, Inc. (ANR) and C.O.P. Coal Development Company (COP) have separately appealed from and petitioned for a stay¹ of the effect of a January 7, 2011, decision of the Utah State Office (USO), Bureau of Land Management (BLM), notifying Castle Valley Mining LLC (Castle Valley)² that BLM had approved its January 1, 2011, request for modification of the Resource Recovery and Protection Plan (R2P2 Modification) for the Continuous Miner Pillar Panels in the Castle Valley Nos. 3 and 4 Mines within the LMU.³ The R2P2 Modification would allow Castle

¹ The Board docketed ANR's and COP's appeals as IBLA 2011-111 and 2011-112, respectively. At BLM's request, by Order dated Apr. 11, 2011, we consolidated the two appeals. By Order dated June 30, 2011, the Board denied petitions for a stay filed by ANR and COP in these two appeals.

Previously, ANR and COP filed appeals (docketed by the Board as IBLA 2011-32 and 2011-33, respectively) from an Oct. 6, 2010, decision in which BLM granted an application for a Suspension of Operations (SOP) for the 10 coal leases within the Bear Canyon Logical Mining Unit (LMU) subject to the R2P2 Modification. By Order dated June 30, 2011, the Board denied BLM's motion to dismiss IBLA 2011-32 and 2011-33, and affirmed BLM's decision granting the SOP.

² Castle Valley succeeded the C.W. Mining Company, d/b/a Co-Op Mining Company (CWM) as operator of the Mine. Operations at the LMU were interrupted by the involuntary bankruptcy of CWM. *See C.W. Mining Co.*, 422 B.R. 746 (10th Cir. 2010), for the factual background of CWM's bankruptcy and subsequent history of the LMU. By Order dated Apr. 15, 2011, we granted Castle Valley's request to intervene in these appeals. Castle Valley is a subsidiary of Rhino Energy LLC (Rhino Energy).

³ The two mines are said to be "part of a unified operation," which has been referred to as the Castle Valley Mine (formerly, Bear Canyon Mine). BLM Response to Stay Petitions (Response) at 2. It will henceforth be referred to simply as the "Mine."

An LMU consists of "an area of land in which the coal resources can be developed in an efficient, economical, and orderly manner as a unit with due regard to conservation of coal reserves and other resources." 30 U.S.C. § 202a(1) (2006). An LMU is encompassed by one or more Federal leaseholds and intervening or adjacent non-Federal land under the effective control of a single operator, which is

(continued...)

Valley to extract the coal from the Tank Seam of the LMU by room-and-pillar mining⁴ rather than by longwall mining. ANR and COP, who are lessees of Federal coal leases and own private fee interests in the lands subject to the LMU, oppose the R2P2 Modification. For the reasons set forth below, we affirm BLM's decision.

I. BACKGROUND

A. Operating Rights and Responsibilities

The Mine is an underground coal mining operation situated on a total of 13,861.8 acres of public (8,192.7) and private (5,669.1) lands in Ts. 15 and 16 S., Rs. 7 and 8 E., Salt Lake Meridian, Emery, Carbon, and Salt Lake Counties, in the Wasatch Plateau of east-central Utah. The Federal coal is subject to a total of 10 coal leases issued to the predecessors in interest of ANR and COP⁵ on February 8, 1923, November 1, and 23, 1949, April 9, and May 1, 1958, and September 2, 1985,

³ (...continued)

designated in order to promote the maximum economic recovery (MER) of the underlying coal deposit(s). *Id.*; see 43 C.F.R. §§ 3480.0–5(a)(19) and 3487.1(a) and (f); *Cyprus Shoshone Coal Corp.*, 143 IBLA 308, 315-16 (1998). An LMU mine plan must, in all cases, require diligent development, operation, and production such that all of the coal reserves are mined out within 40 years, unless a longer period is deemed necessary to ensure MER or to further the interest of orderly, efficient, or economic development of the coal. See 30 U.S.C. § 202a(2) (2006).

⁴ Room-and-pillar mining consists of mining rooms in the underground workings, leaving substantial pillars for support, followed by retreat mining, during which portions of the pillars are also mined. See R2P2 Modification at 17 (“Future plans envision room and pillar and retreat mining in the Tank Seam”), 18.

⁵ ANR and COP hold/own, respectively, close to 18 and 82% of the Federal leases and 40 and 60% of the private fee interests in the LMU. See ANR Statement of Reasons for Appeal/Petition for Stay (SOR) at 8; COP SOR at 11. COP states that it is the holder of “all of the [F]ederal coal leases being directly affected by the R2P2 [M]odification.” SOR at 11.

The leases are UTSL-025431, UTSL-069985, UTU-020668, UTU-024316, UTU-024318, UTU-038727, UTU-46484, UTU-51923, UTU-61048, and UTU-61049. Ownership of the leases is split between ANR (UTSL-025431, UTSL-069985, and UTU-51923) and COP (UTU-020668, UTU-024316, UTU-024318, UTU-038727, UTU-46484, UTU-61048, and UTU-61049). The Tank Seam, which is now at issue, is situated entirely within COP's leases in the southern portion of the LMU. See Castle Valley Opposition to Petition[s] for Stay (Opposition) at 4, 19; Plate LMU-3 (Tank Seam/B Seam Projected Mining), dated Jan. 1, 2011 (attached to Approved R2P2).

pursuant to the Mineral Leasing Act, 30 U.S.C. §§ 181-287 (2006). All of these Federally-leased lands, along with intervening and adjacent private land, were included in the LMU, thus providing for coordinated mining of all of the lands.⁶

Involuntary bankruptcy proceedings against CWM were initiated by several creditors in the U.S. Bankruptcy Court for the District of Utah on June 8, 2008. Kenneth A. Rushton was appointed the Trustee of CWM's Bankruptcy Estate on November 19, 2008. *See In re C.W. Mining Co.*, No. 08-20105-RKM, Amended Findings of Fact and Conclusions of Law, 2010 WL 3123140 (Bankr. D. Utah Aug. 9, 2010) (2010 Findings and Conclusions). The Bankruptcy Court authorized the Trustee to conduct an auction of the assets of the Mine. The auction took place on June 2, 2010, with Rhino Energy, Castle Valley's parent company, submitting the high bid. *See* 2010 Findings and Conclusions, 2010 WL 3123140, at *4 (Finding #15). On August 9, 2010, the Bankruptcy Court approved the sale of the Mine and its associated assets, which included two coal Operating Agreements (OpAgreements), to Rhino Energy. *See id.* at *3, *4-*5 (Findings ##9, 16-20), *18 (Conclusion #3), *20 (Conclusion #19). Rhino Energy thereafter consummated that sale at a cost of close to \$15 million. *See* Declaration of Corey A. Heaps, Rhino Energy's Vice President/General Manager, dated Apr. 28, 2011 (Heaps Declaration) (Ex. E attached to Opposition), ¶ 3, at 2.

In its 2010 Findings and Conclusions, the Court determined, over objections by ANR and COP, that the Trustee's assumption of the two OpAgreements and his assignment of them to Rhino Energy was appropriate and permissible.⁷ Pursuant to

⁶ Mining operations are also subject to the authority of the Utah Division of Oil, Gas, and Mining (UDOGM), subject to oversight by the Office of Surface Mining Reclamation and Enforcement (OSM) under the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. §§ 1201-1328 (2006). *See* 30 C.F.R. Part 944; 43 C.F.R. §§ 3480.0-4 and 3480.0-6(a). A State surface mining permit was first issued by UDOGM, under the State's equivalent of SMCRA, on Nov. 1, 1985. Most recently, a permit (C/015/0025) was issued by UDOGM to Castle Valley on Dec. 16, 2010, for a term running until Nov. 2, 2015, following the posting of an appropriate reclamation bond. ANR and COP objected to UDOGM's issuance of this permit.

⁷ The Trustee provided to the Court adequate assurances of Rhino Energy's future performance under the OpAgreements, specifically Rhino Energy's ability and motivation to comply with all applicable Federal, State, and local laws; to conduct mining operations so as to maintain all applicable Federal and State mining permits and approvals; and to avoid forfeiture of the Federal coal leases. *See* 2010 Findings

(continued...)

authority granted by the Bankruptcy Court, the Trustee entered into three assignment/assumption agreements with Castle Valley, Rhino Energy's designated affiliate, vesting Castle Valley with CWM's rights and responsibilities under the two OpAgreements.⁸ Thus, upon assignment by the Trustee, the parties to the OpAgreements were ANR and COP, as the fee owners/lessees, and the LMU operator (Rhino Energy or its designated affiliate, Castle Valley). However, the Court concluded that “[n]either COP nor ANR has any veto power or other right of control as to the contents or approval of . . . plans [of operation]” and could not preclude the operator from seeking, or BLM from approving, a modification, or dictate the terms and conditions of a modification. Opposition at 10, 23 (quoting 2010 WL 3123140, at *10 (Finding #41)). In doing so, the Court rejected arguments by ANR and COP that the operator was strictly bound by the OpAgreements to comply with the existing R2P2, and could not seek to modify the R2P2 by changing from longwall to room-and-pillar mining. *Id.*

On September 20, 2010, Castle Valley requested that BLM approve assignment of the two OpAgreements to Castle Valley and to designate Castle Valley as the LMU operator. BLM approved Castle Valley's request for assignment on January 7, 2011. Under the two OpAgreements, Castle Valley, now the operator, is vested with the exclusive authority to operate and control the public and private lands in which ANR and COP hold/own Federal coal leases and private fee interests, including the “exclusive right to, and use of the . . . property for purposes reasonably incident to the mining and removal of coal,” subject to the payment of royalty, for a term of 25 years. ANR OpAgreement dated Sept. 3, 1999 (Ex. B attached to Opposition), at 1; COP OpAgreement dated Mar. 11, 1997 (Ex. A attached to Opposition), at 1.

Castle Valley asserts, without dispute by ANR or COP, that neither of the OpAgreements sets forth “any requirement that specific leases, specific seams, or specific areas within LMU #UTU-73342[] be developed or mined within a specific timeframe, in a specific mining sequence, or using any specific equipment or mining method.” Opposition at 9. Rather, it states that the OpAgreements require only that the operator “diligently and continuously operate” the affected Mine lands “in a good and minerlike manner and in a manner which will result in the ultimate

⁷ (...continued)

and Conclusions, 2010 WL 3123140 at *7 (Finding #26), *9 (Finding #37), *10-*11 (Findings ##46-53), *20 (Conclusions ##12, 13, 16-20).

⁸ The three assignment/assumption agreements are entitled: (1) *Trustee's Assignment and Buyer's Assumption of Coal Operating Agreement with C.O.P. Coal Development Company*, (2) *Trustee's Assignment and Buyer's Assumption of Coal Operating Agreement with ANR Company, Inc.*, and (3) *Trustee's Assignment of Rights Under BLM Logical Mining Unit Decision for Bear Canyon Mine*.

maximum economic recovery [MER] of coal from the property,” in compliance with applicable Federal, State, and local law. *Id.* (quoting ANR OpAgreement, § 5, at 2, and COP OpAgreement, § 5, at 2). Further, Castle Valley is required to conduct mining operations at its own expense, and hold ANR and COP harmless from any liability by reason of its operations. *See* ANR OpAgreement, § 5, at 2-3; COP OpAgreement, § 5, at 2.

B. Proposed R2P2 Modification

On December 14, 2010, Castle Valley filed its request to modify the approved R2P2 and change the mining method in the Tank Seam of the LMU from longwall mining to room-and-pillar mining. Castle Valley reported that the Mine has several minable coal seams, the uppermost of which is the Tank Seam, followed in succession at ever lower depths by the Bear Canyon (or B) Seam, Blind Canyon (or A) Seam, and Hiawatha Seam. Together the Seams comprise the Wild Horse Ridge/Mohrland/Hiawatha Structure in the Blackhawk Formation. *See* R2P2 Modification, dated Jan. 1, 2011, at 6-14, 18. The Tank Seam ranges in thickness from 0 to 9.5' of high quality coal generally having a low-ash and low-sulfur content, and a high-British Thermal Unit (BTU) per pound. *See* Declaration of A. Carl Pollastro, dated Apr. 28, 2011 (Pollastro Declaration) (Ex. C attached to Opposition), ¶ 6, at 6. It is approximately 280' above the Hiawatha Seam, with interburden separating the various coal seams, and is situated, on average, close to 1,300' below the surface. *See id.* at 10 (Figure 2 (Cross Section Showing Coal Seam Locations)), 11-13, 37.

Room-and-pillar mining originally began in the Tank Seam in 2004, but on September 22, 2006, BLM granted CWM's request for an earlier R2P2 modification to authorize longwall mining, which it then used to mine two panels from late 2007 to June 2009. Castle Valley sought the present Modification to change back to room-and-pillar mining because its experience with mining the second of those panels disclosed that longwall mining was “not practical.” R2P2 Modification at 18. Castle Valley explained that the coal in the panel was “too low for productive longwall mining,” owing to the presence of a “sandstone channel” that resulted in the recovery of “[s]ubstantial quantities of poor quality coal.” *Id.* It expected similar results in its third proposed panel, since development gateroad entries for that panel had likewise encountered the sandstone channel. *Id.* Castle Valley noted that room-and-pillar mining would provide more flexibility in mining areas of adverse geologic conditions and would allow the mining of higher quality coal. *Id.*

In his Declaration, Heaps reports that room-and-pillar mining was chosen based on the history of that method being used in the Tank Seam and companion seams. He explains that, in view of the adverse geologic conditions recently

encountered, room-and-pillar mining has the capacity to extract higher quality material than longwall mining, given its ability to avoid the extraction and removal of non-coal rock: “[R]oom-and-pillar mining allows an operator to be more selective and precise in its mining to target specific coal reserves. This flexibility allows an operator to adapt to coal seam thickness unconformities.” Heaps Declaration, ¶ 6, at 4. By way of contrast, he notes that

a longwall [mining] system is commonly used in mines with large coal reserves with uniform thickness and favorable geology. The system is designed to extract large volumes of coal from rectangular blocks of coal that are developed to precise dimensions Due to the size of the longwall equipment, any deviations in coal block widths or seam thicknesses can negatively impact the ability to mine the coal. Longwall systems are not adaptable to areas where sandstone channels are present or areas that contain thinning coal seams due to the limited flexibility of the equipment. When these conditions are encountered, . . . [non-coal] rock is mined to provide clearance for the system⁹ *Mining rock with a longwall system . . . degrades coal quality by diluting the coal with rock which in turn reduces the heat content of the coal which in turn negatively impacts the value of the coal.*

Id. (emphasis added).

BLM notes that geologic conditions “often change in 5 to 100 feet.” Draft BLM Response at 1. BLM explains that while room-and-pillar mining may adjust to adverse geologic conditions within 10' to 20', longwall mining (which is typically 600' long or more) must usually “continue through the adverse geologic condition,” which results in the recovery of lower quality coal. *Id.* at 2. Castle Valley does not seek to change the mining plans or methods for any of the other seams in the LMU. Castle Valley concluded, after analysis, that the proposed mine plan and mining systems, with approval of the R2P2 Modification, will “offer the greatest possible economic recovery of the reserves in the LMU area, given the anticipated mining conditions,” and will, in the end, achieve MER. R2P2 Modification at 43; *see id.* at 36-43. It noted, however, that, “[a]s development and mining of the reserves continue[], the mine plan and associated mining systems will be continuously re-evaluated to ensure [MER].” *Id.* at 43.

⁹ Pollastro states that, “[i]n order to mine from one side of a sandstone channel to the other side of the channel, the rock must be cut in order to allow the mining equipment adequate clearance.” Pollastro Declaration, ¶ 7, at 6.

C. *BLM Decision Approving R2P2 Modification*

In the appealed January 7, 2011, decision, the USO determined that Castle Valley acquired the two OpAgreements and is now the operator of the Castle Valley No. 3 and 4 Mines. Decision at 1; *see* Opposition at 2, 8 (“Castle Valley is currently the operator of the Mine, under Operating Agreements that were deemed by the court to be ‘valid and binding and in full force and effect.’” (quoting 2010 Findings and Conclusions, 2010 WL 3123140, at *20 (Conclusion #20))). It then approved Castle Valley’s R2P2 Modification on the basis that, by “provid[ing] for expanded areas of room-and-pillar mining recovery” and “allow[ing] for development of panels for retreat mining,” it would achieve MER of coal in the LMU. Decision at 2. The USO explained that changing to room-and-pillar mining will result in “a better likelihood of being able to maximize coal recovery” from the Tank Seam, “with the possibility of adding additional continuous miner units” that would “allow the mining of higher quality coal as mining near[s] outcrop and burn areas,” because they “can be more selective an[d] adaptive to the outline of the minable coal thickness.” *Id.* The USO stated further:

Room-and-pillar mining offers more flexibility when seam conditions do not match equipment operating parameters or adverse geological conditions such as sandstone channels, rapid structural changes, or quality deteriorations are encountered. . . . *It is anticipated that the room-and-pillar mining method will be more favorable to extracting the Tank Seam with its variations in geology and seam thickness unconformities.*

Id. (emphasis added).

The USO found that the sandstone intrusion encountered by CWM while mining the Tank Seam “substantially affected minability and coal quality” and that if those “adverse mining conditions would have continued to be encountered with longwall mining in the Tank [S]eam, some 1.4 million fewer tons would have been recovered under the prior R2P2 plan,” which would reduce the recoverable coal base in the LMU from 50.67 million tons under that plan to roughly 49.27 million tons. Decision at 3. Although the “remaining recoverable coal base” was projected at 48.99 million tons under the R2P2 Modification, a difference of 0.3 million tons (49.27 - 48.99 = 0.28), BLM stated this “is well within the accuracy of recoverable tonnage projections based on known geologic mining conditions.” *Id.* The USO also found that the R2P2 Modification was categorically excluded from the environmental review requirements of section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(2)(C) (2006). *See* Decision at 3 (citing 516 Departmental Manual (DM) 11.9.F(8) (5/8/08)). Castle Valley indicates that it

initiated room-and-pillar mining on January 10, 2011, in accordance with the approved R2P2 Modification. *See* Opposition at 13-14, 27-28 (citing Heaps Declaration, ¶¶ 3, 4, 5, 7, 9, at 2-3, 5, 6); *see also* Motion to Intervene dated Apr. 14, 2011, at 3; Decision dated Jan. 13, 2011, at 2.

Before we turn to the merits of the appeals, we note that Castle Valley asserts that the issues raised by Appellants have already been litigated and resolved in proceedings before the Bankruptcy Court, and “as determined by that court, Appellants have no legal or contractual right to contest the content or approval of any modifications to the R2P2.” Opposition at 2. The Court did state that “[n]either COP nor ANR has any veto power or other right of control as to the contents or approval of such plans, but it also stated that it is up to BLM to determine “whether an operator is in compliance with the . . . ‘maximum economic recovery’ requirement[] contained in the Code of Federal Regulations,” and that “*this Court has no jurisdiction over the BLM’s decision[] on that matter.*” 2010 Findings and Conclusions, 2010 WL 3123140, at *10 (Finding #41 and #43) (emphasis added). BLM has the responsibility for determining whether a request by the operator/lessee for an R2P2 Modification will achieve MER, and the Board has the authority to weigh Appellants’ challenges to BLM’s decision, as with challenges advanced by any other interested party. To the extent Castle Valley contends this appeal is barred by res judicata and/or collateral estoppel, it is mistaken, and thus this Board will proceed to apply the applicable statutory and regulatory authority and to address whether the appellant has met its burden to establish error in BLM’s decision by a preponderance of the evidence. *See, e.g., Peabody Western Coal Company*, 174 IBLA 325, 335 (2008), and cases cited.

II. ARGUMENTS ON APPEAL

ANR and COP challenge BLM’s decision on the basis that the R2P2 Modification violates Federal statutes, Departmental regulations, and Board precedent because (1) the adoption of room-and-pillar mining significantly decreases the recoverable coal and thereby “wastes” the coal resources of the LMU, by contrast to continued longwall mining, which they claim is the preferred method to reach the desired MER, and which has long been employed in the case of the Mine; (2) the R2P2 Modification causes “real and unnecessary risks” to operations in the Hiawatha Seam, which are conducted beneath the Tank Seam, rendering the coal resources in the Hiawatha Seam “vulnerable to collapse and loss”; and (3) ANR and COP were denied their due process rights because they were not afforded notice of, and an opportunity to critique, Castle Valley’s draft R2P2 Modification before it was approved by BLM. ANR SOR at 2, 3; COP SOR at 2, 3.

In addition, COP separately argues that BLM's decision violates section 102(2)(C) of NEPA because the R2P2 Modification does not qualify for a categorical exclusion (CX) from the environmental review requirements of the statute. COP SOR at 2; *see id.* ("Clearly, this change [in mining method] is well beyond simply a 'minor modification' or a 'minor variance' to the R2P2, disqualifying it from treatment as a NEPA categorical exclusion.")¹⁰ *Id.* at 2-3.

III. DISCUSSION

A. The R2P2 Modification Meets the Requirement to Achieve MER

[1] The central question involved in this matter is whether the R2P2 Modification sought by Castle Valley will achieve MER of the Federal coal underlying the LMU. To best answer that question, we first place it into the context of what MER and its sister concept, "recoverable coal reserves," mean and how they are determined. The Board extensively discussed both concepts in *Cyprus Shoshone Coal Corp.*, which we here repeat in relevant part:

The term "recoverable" has a legal meaning, and the regulation at 43 C.F.R. § 3480.0-5(a)(32) defines "[r]ecoverable coal reserves" as the "minable reserve base excluding all coal that will be left, such as pillars, fenders, and property barriers." In turn, the "[m]inable reserve base" is defined by 43 C.F.R. § 3480.0-5(a)(23) as "that portion of the coal reserve base which is commercially minable, and includes all coal that will be left, such as coal in pillars, fenders, and property barriers." We have found no applicable law or regulation defining a commercially minable coal reserve, but some guidance is found in Instruction Memorandum (IM) No. 86-323, dated March 18, 1986. In that IM the Acting Director, BLM, stated that the Department will consider coal reserves recoverable when they can be mined from a technical standpoint. For underground mines, factors such as the thickness of the coal seam, the mining height, and the expected percentage of coal to be recovered are considered. . . .

¹⁰ COP argues that BLM approved the R2P2 Modification because it was "largely motivated by Castle Valley Mining's economic difficulties." COP SOR at 2. The objective test in determining whether MER will be achieved is based on "what a 'prudent man' would do when faced with mining operation decisions which affect profitability." *Cyprus Shoshone Coal Corp.*, 143 IBLA at 315 (quoting 47 Fed. Reg. 33154, 33168 (July 30, 1982)). Upon review of the record, we find no evidence that Castle Valley's economic circumstances influenced BLM's decision to approve the R2P2 Modification.

Recoverable coal reserves are identified during the course of approval of the mine plan submitted by the lessee. *See* 43 C.F.R. § 3482.2(a)(3). In the absence of any modification initiated by the authorized officer (43 C.F.R. § 3482.2(b)) or by the lessee (43 C.F.R. § 3482.2(c)), the recoverable coal reserves will be that coal identified in an approved mine plan as the coal that the operator intends to mine.

Maximum economic recovery is achieved when, considering “standard industry operating practices, all profitable portions of a leased Federal coal deposit . . . [are] mined.” 43 C.F.R. § 3480.0-5(a)(21). It is determined by applying “standard industry operating practices” to the coal deposit without regard to the financial or contractual status of an individual operator/lessee. The test is objective and is based on “what a ‘prudent man’ would do when faced with mining operation decisions which affect profitability.” 47 Fed. Reg. 33168 (July 30, 1982); *cf. United States v. Ohio Oil Co.*, 240 F. 996, 1000 (D. Wyo. 1916) (objective standard for determining whether a valuable mineral deposit exists). Thus, achievement of maximum economic recovery depends on whether the leased coal deposit is *inherently* profitable to mine, when considering the physical nature of the deposit affecting the feasibility of mining, the costs of producing, processing and transporting the coal, the quality, quantity, and marketability of the coal, and the anticipated price at which the coal can be sold.

The general performance standards applicable to coal mining operations provide in pertinent part that “[u]pon approval of a [mine plan] . . . , the operator/lessee shall conduct operations to achieve MER of the Federal coal.” 43 C.F.R. § 3484.1(b)(1). Maximum economic recovery is determined after taking into consideration the geologic and other physical conditions found at the leased lands, and, like recoverable coal, it is determined by BLM during the process leading to approval of a mine plan. *See* 43 C.F.R. §§ 3482.2(a)(2) and 3482.1(c).

....

Important to this case is the fact that, for any block of coal, the maximum economic recovery determination is a necessary part of the approval of a mine plan, and must be made before the actual coal mining operations commence. This is necessary because “no [mine plan] or modification thereto shall be approved which . . . is not found

to achieve MER of the Federal coal within . . . [a] Federal lease.” 43 C.F.R. § 3482.2(a)(2). Practically speaking, the initial responsibility for this determination rests with the operator. When conducting a feasibility study and formulating a plan for mining a lease or logical mining unit, the operator will design a plan for the orderly development and diligent extraction of the coal deposit, based upon the projected size, shape, and configuration of the coal deposit, with a mine layout appropriate for a mining method selected by the operator. This process necessarily includes consideration of the orderly sequence of development and how maximum economic recovery will be achieved. If properly formulated, all of these considerations will be reflected in the formal mine plan (i.e., resource recovery and protection plan) tendered to BLM for approval. *See* 43 C.F.R. § 3482.1(c)(7). The “determination of maximum economic recovery shall be made by the authorized officer based on review of the [mine plan].” 43 C.F.R. § 3482.2(a)(2).

It can thus be seen that the process of formulating, submitting, and gaining approval of a mine plan defines maximum economic recovery for a leased coal deposit. The operator must then mine the leased Federal coal in accordance with the approved mine plan, and, by doing so, the operator will, by definition, achieve maximum economic recovery. Conversely, maximum economic recovery will not be achieved if the leased coal is not mined in accordance with an approved mine plan (a violation of 43 C.F.R. § 3484.1(b)(1)).

Maximum economic recovery rarely remains unchanged throughout the life of a mine. The sales price is often dictated by market conditions beyond the producer’s control and can be volatile. Unforeseen regulatory restrictions may be imposed at a later date. Unanticipated faulting may be encountered, the thickness of the coal seam may not be as projected, or the projected recoverable percentage of the coal may be found to be overly optimistic. It can thus be seen that a mine plan should not be and is not cast in concrete with the operator being forever required to conform unerringly with the maximum economic recovery established in its original mine plan. The Department has specifically recognized this fact and provided for modification of the mine plan. 43 C.F.R. § 3482.2. However, as previously noted, the mine plan must be designed to attain maximum economic recovery. This requirement applies to the mine plan initially approved and to any modification of that plan. This fact is clearly set out in 43 C.F.R. § 3482.2(a)(2), which provides that “[n]o [mine plan]

or modification thereto shall be approved which . . . is not found to achieve maximum economic recovery of the Federal coal.” (Emphasis added.)

. . . .

The procedure for modifying a mine plan can be instituted by the authorized officer (43 C.F.R. § 3482.2(b)) or by the operator/lessee (43 C.F.R. § 3482.2(c)). When the proposed modification of the approved mine plan contemplates bypassing recoverable coal (it is not to be mined), the operator or lessee must justify the bypass. *See* 43 C.F.R. § 3482.1(c)(7). To do otherwise would be contrary to the requirement that an operator or lessee conduct underground coal mining operations “in accordance with . . . the approved [mine plan].” 43 C.F.R. § 3481.1(b); *see Utah Power & Light Co.*, 118 IBLA 181, 199-200, 98 I.D. 97, 107 (1991).

As a necessary part of the documents in support of a proposed modified mine plan submitted to BLM for approval, the operator should set out the change in circumstances triggering a change in the maximum economic recovery, such as safety requirements, unanticipated physical occurrences, or unforeseen economic events that render an attempt to mine all or a portion of the recoverable coal uneconomic. In the course of its approval determination, the authorized officer will decide whether maximum economic recovery will be achieved if the coal is mined in accordance with the modified mine plan. 43 C.F.R. § 3482.2(c)(2). Based on the documents describing and setting out justification for the proposed modification, the authorized officer may approve, set conditions for approval, or disapprove the modified mine plan. It would be incorrect for the Department to reject a proposed modified mine plan without cause, and, if we found a decision rejecting a modified mine plan or the conditions for approval of that plan arbitrary, we would have no reservations about reversing that decision. *See, e.g., Pogo Producing Co.*, 138 IBLA 142 (1997); *Ark Land Co.*, 132 IBLA 235 (1995); *Peabody Coal Co.*, 79 IBLA 58 (1984). However, once its mine plan is approved the operator should not deviate from the mine plan without formally submitting a plan modification to BLM.

143 IBLA at 314-18 (footnotes omitted). Having established their context, we will now address the issues raised by appellants in their challenge to the merits of BLM’s decision to approve the R2P2 Modification.

BLM concluded, in the present case, that the recoverable coal reserves identified in the existing R2P2 could not be recovered if longwall mining continued in the Tank Seam, and that to best achieve MER of the new identified (but lower) recoverable coal reserves, it would approve the R2P2 Modification sought by Castle Valley and allow room-and-pillar mining. It then concluded that the room-and-pillar mining method would achieve MER, as it would further the efficient extraction of higher quality coal with no significant decrease in projected recoverable coal reserves. See Decision at 2 (“Full extraction of recoverable coal reserves will enable MER of LMU #UTU-73342 to be achieved.”). On this basis, BLM approved Castle Valley’s R2P2 Modification.

BLM’s determination that adoption of room-and-pillar mining in the Tank Seam will achieve MER was based upon the reasoned professional opinion of its technical experts, as discussed below, concerning matters within the realm of their expertise, based on firsthand knowledge of the geologic and other circumstances affecting the recoverability of coal from the Tank Seam. That opinion, being reasonable and supported by the record, is entitled to considerable deference by the Board. See, e.g., *Fred E. Payne*, 159 IBLA 69, 77-78 (2003); *West Cow Creek Permittees v. BLM*, 142 IBLA 224, 238 (1998).¹¹

Together, Appellants argue that BLM reached an “unsupported conclusion” in its assessment that the change in mining method will still result in the MER of the coal underlying the LMU. ANR SOR at 4; COP SOR at 4. They claim that BLM does not fully appreciate that approval of the R2P2 Modification will result in a “significant decrease” in the recoverable coal reserves underlying the LMU. ANR SOR at 2; COP SOR at 2. COP contends that MER requires a coal seam to be mined even though it entails greater costs and results in the production of lesser quality coal due to the presence of considerable non-coal material, such as sandstone, that must be

¹¹ The expert opinion of BLM’s technical experts will not be overturned except upon a showing that BLM acted arbitrarily and capriciously or contrary to law, or that, by a preponderance of the evidence, it erred as a matter of fact because its methodology was improper, or, although its methodology was proper, it relied on inappropriate or insufficient data, engaged in erroneous calculations or analysis, or reached unjustified conclusions. See *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 378 (1989); *Western American Exploration Co.*, 112 IBLA 317, 318-19 (1990); *American Gilsonite Co.*, 111 IBLA 1, 31-33, 96 I.D. 408, 424-25 (1989). Conclusory allegations of error and/or a mere difference of expert opinion will not suffice to demonstrate that BLM erred, or otherwise justify reversing its determination. *American Gilsonite Co.*, 111 IBLA at 32, 96 I.D. at 424-25. Above all, the party “must show not just that the results of . . . [BLM’s analysis and conclusion] *could be* in error, but that they *are* erroneous.” *West Cow Creek Permittees v. BLM*, 142 IBLA at 238.

mined in the process of extracting the coal. COP SOR at 6. We conclude that COP's argument is at odds with the definition of MER.

BLM and Castle Valley both concluded that “[t]he discovery of the [unexpected] sandstone channel raised an issue as to the viability of longwall mining for the remaining coal reserves in the Tank Seam.” Opposition at 4 (citing *Expert Report of Carl Pollastro and Michael Weigand* (Expert Report), dated Mar. 10, 2009, § III.A. (Value of Current Reserves), at 4).¹² The question of viability arose because it was known, based on mining experience in the Tank Seam, that the sandstone channel likely continued for a considerable linear distance and that there was the potential to find other such channels. Castle Valley asserts that such channels “frequently reduce coal seam thickness,” and require the sandstone to be mined along with the coal in order “to meet longwall equipment clearances, thus decreasing the quality of the coal produced, and lowering the market value of the coal.” Opposition at 5; see Expert Report at 4-5, 11.

Castle Valley asserts that sandstone channels may be avoided during longwall mining only at considerable time and expense. Castle Valley emphasizes that CWM initially mined through the sandstone channel upon encountering it in the Mine, and that in doing so it had experienced “increased costs and decreases in productivity and coal quality.” Opposition at 5; see Expert Report at 8-9, 11, 14, 15. Castle Valley indicates that the coal did not meet “existing contract specifications” because it exceeded the specified ash content and thus fell below the BTU/pound specified in the existing coal supply contracts. The poor quality of the coal led directly to CWM's

¹² Pollastro, the Vice President of Mining Engineering for the Norwest Corp. (Norwest), holds a bachelor's degree in mining engineering from the University of Utah, has worked in the coal mining industry since 1972, and was in charge of Norwest's efforts as the mining advisor and technical expert for the Trustee in CWM's bankruptcy proceeding, and later assisted in Norwest's efforts to prepare the R2P2 Modification on behalf of Castle Valley. See Pollastro Declaration, ¶¶ 1, 2, at 2-3; Expert Report at 18-20; 2010 Findings and Conclusions, 2010 WL 3123140, at *4 (Finding #13). Weigand, Senior Mining Consultant, Norwest Mine Services, Inc., holds a bachelor's degree in geological engineering from the University of Missouri, and has worked in the mining industry since 1973. See Expert Report at 21-22.

Pollastro and Weigand jointly prepared the Expert Report and the *Supplemental Expert Report of Pollastro and Weigand* (Supplemental Expert Report), dated Aug. 28, 2009 (Attachments 1 and 2, respectively, to the Pollastro Declaration), for submission to the Bankruptcy Court on behalf of the Trustee. Those Reports were based upon their inspection of the Mine and analysis of mine maps and data concerning, *inter alia*, coal resources, mining equipment, operating conditions, and coal production and sales. See Pollastro Declaration, ¶¶ 3, 4, at 3-5.

involuntary bankruptcy. See Opposition at 6 (citing Supplemental Expert Report at 3, 4-5, 6 (“A geologic anomaly (sandstone channel) which scoured out a portion of the coal seam . . . contributed . . . to the poor quality indicated”), 7 (Table 3 (Coal Sales Agreements Key Parameters))); see also Expert Report at 6-7, 8, 14.

Of utmost importance is the principle that MER mandates that only portions of a Federally-leased coal deposit that can be *profitably mined* are properly required to be mined, and expressly requires consideration of not only the “quantity” but also the “quality” and “marketability” of the coal. 43 C.F.R. § 3480.0-5(a)(21). In the present case, Castle Valley persuasively disputes COP’s argument that the coal obtained from the area of the sandstone channel is even “salable,” let alone marketable at a profit, and COP offers no contrary evidence. Castle Valley states that Hiawatha Coal Company (HCC), the longwall operator under contract to COP during CWM’s bankruptcy proceedings, “was forced to enter high-ash contracts at [prices] arguably below operation costs, and defaulted on its existing coal sale contracts because it failed to deliver coal at the quality required.” Opposition at 17; see also Supplemental Expert Report at 3. We find ample support for BLM’s conclusion that the coal affected by the sandstone channel in the Tank Seam (1.38 million tons) is properly excluded from the Mine’s recoverable coal reserves and need not be mined to achieve MER, because it cannot be profitably recovered, given the increase in mining costs and decrease in coal quality attributable to that adverse mining condition.

In arguing that the 1.38 million tons of coal are properly included in the recoverable coal reserves and must be mined in order to achieve MER, Appellants cite to their “experience and empiric knowledge of the mine circumstances.” ANR SOR at 2; COP SOR at 2. However, nowhere do Appellants set forth any evidentiary basis for their conclusion that longwall mining would, but that room-and-pillar mining would not, achieve MER. They rely upon the opinion expressed in the April 5, 2011, Declaration of Charles Reynolds (Reynolds Declaration), formerly CWM’s President.¹³

¹³ Reynolds has been directly involved in mining operations and otherwise associated with the Mine since 1991, when he graduated from the University of Utah with a bachelor’s degree in mining engineering. BLM states that Reynolds was also the mine manager for HCC, which for a time took over operations of the Mine after CWM “lost control.” Response at 6-7 (citing Reynolds Declaration, ¶ 4, at 2); see Opposition at 7; Pollastro Declaration, ¶ 4, at 4. BLM questions the reliability of Reynolds’ opinion “because of his financial and personal association with the former operator of the mine, which was essentially forced to give up control.” Response at 10; see *id.* at 6-7. We reject the notion that Reynolds’ opinion is unreliable simply

(continued...)

However, as BLM properly notes, he “offers little or no explanation for his opinion.” Response at 11.

COP asserts that BLM erred in its assessment of the effect of the sandstone channel on the recoverability of coal by longwall mining in Panel 3. See SOR at 6. COP asserts that BLM is mistaken in concluding that the channel “substantially affected minability and coal quality,” arguing that minability was not affected at all, “since the longwall mining mined right through the sandstone channel in Panel 3,” and that the coal in the area of the channel, while of lesser quality, “was still salable.” *Id.* (quoting Decision at 3). However, as BLM properly notes, COP neither presents any evidence supporting its assertions regarding the efficacy of previous longwall mining in Panel 3, nor demonstrates the salability of the coal. See Response at 13. The record includes clear evidence that HCC could not market coal extracted by use of the longwall mining method because of the coal’s poor quality.

COP further argues that BLM mistakenly concluded that with longwall mining there would have been a 10% reduction in recoverable coal reserves in Panels 4 and 5, and that BLM incorrectly assumed that only the sides of Panel 4 would have been mined, leaving “the entire portion of that panel . . . untouched.” SOR at 6. Further, COP contends that BLM erroneously projected the continuation of an adverse geologic condition from Panel 4 into Panel 5, when the condition “was, in fact, disappearing.” SOR at 6, 7. Rather, COP states that with longwall mining there would have been less than a 4% reduction of recovery in Panel 4, and that all of Panel 5 would have been recovered. However, our review of the record shows that COP fails to present any evidence supporting either its conclusion that continued longwall mining in the Tank Seam would have resulted in a diminishment of recoverable coal reserves of only 4, rather than 10%, or that the sandstone channel was “disappearing” and was not likely to continue in the underground workings. See Response at 13.

¹³ (...continued)

because he was associated with a prior operator whose relationship with the Mine ended with its forced bankruptcy.

We note that Appellants purport to find support for their various arguments in “research . . . related to the risks and concerns associated with multiple and/or overlaying room and pillar mining operations in proximate seams,” attached to the Declaration. Reynolds Declaration, ¶ 13, at 3. However, there is no attempt by Reynolds or Appellants to explain in what way that research is relevant to the circumstances of the present case. See *Biodiversity Conservation Alliance*, 171 IBLA 218, 228 (2007) (“Appellants’ references to general scientific literature do not suffice to demonstrate error or deficiency in BLM’s analysis.”).

But even if BLM is correct that the change in the mining method would only reduce the recoverable coal reserves by 0.3 million (or 300,000) tons, COP argues that there would still be a failure to achieve MER. See SOR at 7 (citing *Cyprus Shoshone Coal Corp.*, 143 IBLA 308 (1998) (225,000 tons)). We do not find *Cyprus Shoshone* apposite to the circumstances leading BLM to approve the R2P2 Modification requested by Castle Valley. In *Cyprus Shoshone*, the Board held that a failure by the operator/lessee to mine nearly 225,000 tons of recoverable coal reserves, in accordance with the approved R2P2, constituted a failure to achieve MER. The operator/lessee had not first sought to modify the R2P2 or provided any evidence that it would not have been profitable to mine those by-passed reserves. See 143 IBLA at 319-23. In the present case, however, Castle Valley sought approval for the disputed Modification, and does not propose to mine less than the recoverable coal reserves established in the R2P2. Rather, BLM is lowering, before mining occurs, the Mine's recoverable coal reserves established in the R2P2. Since the record supports BLM's conclusion that 0.3 million tons is within the margin of error for a determination of recoverable coal reserves, we are not persuaded that the failure to provide for the recovery of such coal constitutes a failure to achieve MER.

Together, Appellants also argue that BLM failed to consider mining the room-and-pillar panels starting at the "deepest" point of penetration into the coal deposit. They assert that starting at the deepest point would protect the submain entries, in accordance with standard engineering practices, and that mining the panels off the submain entries as development progresses would not protect the submain entries. They claim that starting at the deepest point of penetration would "reduce the need for additional barrier pillars to be left since the plan modification is treating the submain entries as main entries." ANR SOR at 6, 7, and COP SOR at 10 (citing Reynolds Declaration, ¶¶ 26-28, at 5). Appellants conclude that BLM failed to consider the significant reduction in recoverable coal reserves attributable to "this plan flaw"—a reduction that results from unnecessarily leaving additional barrier pillars. ANR SOR at 7; COP SOR at 10.

BLM responds that Reynolds never asserted that mining panels off the submain entries, as development proceeds into, rather than as development recedes from, the Tank Seam would result in leaving additional barrier pillars, thereby lowering recoverable coal reserves below what the existing R2P2 adopted. See Response at 11. Instead, Reynolds only noted that BLM had failed, despite some concern, to address the "net effects" of mining on the "way in" or on the "way out" of the Tank Seam. Reynolds Declaration, ¶ 26, at 5. He did not himself address the ramifications of either approach or advance any conclusions. Thus, we agree that the Reynolds Declaration does not support Appellants' argument. Absent any contrary expert opinion, Appellants' argument fails to establish error in BLM's assessment of the quantity of recoverable coal reserves in the Tank Seam.

Finally, appellants argue that in approving the R2P2 Modification, BLM failed adequately to ensure that specific regulatory requirements had been satisfied, asserting that BLM neglected to assess the effect of certain design elements on the amount of recoverable coal reserves in the LMU. *See* ANR SOR at 7-8; COP SOR at 10-11. They specifically assert that BLM did not require the design to show the location of “bleeder entries” and how they will be used during retreat mining, as required by 43 C.F.R. § 3482.1(c)(4)(v). They also state that the R2P2 Modification shows, at the same locations, both a “flow-through bleeder system” (in the typical layout) and a “wrap-around bleeder system” (in the panel layout), and that, since adoption of a particular bleeder system will “greatly influence the amount of coal” to be recovered, BLM has not provided for an adequate assessment of recoverable coal reserves. ANR SOR at 7-8, and COP SOR at 10, 11.

As BLM states, under 43 C.F.R. § 3482.1(c)(4)(v), the operator/lessee is required to provide a general layout of the proposed mine, including the location of bleeder entries, but that plan “does not require a detailed layout of the bleeder [entry] system or how the bleeder entries actually will be used during retreat.” Response at 12. Further, as BLM observes, Reynolds did not address the question of whether and how the design of the bleeder entry system in the R2P2 Modification would adversely affect the recovery of coal from the Tank Seam, or indicate that the Modification erred in its assessment of recoverable coal reserves based on a deficiency or error in that design. *See id.* (“Reynolds’ declaration does not say anything about bleeders”). Absent any contrary expert opinion, Appellants’ argument fails to establish any error in BLM’s assessment of the quantity of recoverable coal reserves in the Tank Seam, or, ultimately, of whether MER will be achieved with the change in the mining method.

B. BLM Considered Effects of the R2P2 Modification on the Recovery of Other Coal

Appellants argue that BLM erred in approving the change in mining method in the R2P2 because it failed to consider the resulting “unnecessarily heightened risks to full resource recovery,” and a consequent “potential loss of some, if not all[,] of the reserves contained in the other seams in the LMU.” ANR SOR at 4; COP SOR at 5.

Appellants do not demonstrate that mining coal in the Tank Seam by the room-and-pillar method poses a heightened risk to the Hiawatha Seam over the longwall method. They rely only upon the Reynolds Declaration in attesting to the fact that the “mining industry,” generally speaking, “has proven that in a multiple seam scenario, care must be taken to design the mining method and layout” so that the “overburden pressures” created by mining the seam above “will not adversely impact or endanger mining in the seam below.” ANR SOR at 5, and COP SOR at 8. They assert that “[s]tandard engineering practices require that barriers and panels be

stacked to avoid these pressure locations, and that the main entries be designed to avoid these significant pressures.” ANR SOR at 5; COP SOR at 8 (citing Reynolds Declaration, ¶¶ 13-14, 19-20, 22-28, at 3, 4-5).

Appellants specifically note that excessive pressure will be created by placing the barrier pillars that will be left in the Tank Seam following retreat mining directly above the key development main entries to the Hiawatha Seam. They assert that such placement of barrier pillars, “in several locations, including the access location to over 35 million tons of coal,” will affect “more than half of the total reserves in the existing R2P2.” ANR SOR at 5, 6; COP SOR at 8, 9. They further claim that such placement of barrier pillars will threaten the collapse of the roof of the Hiawatha Seam. They cite to experience in the area adjacent to the Mine, “in circumstances similar to those now forecasted under the BLM Decision,” and then state: “One needs look no further than the Crandall Canyon Mine disaster to appreciate these concerns.” ANR SOR at 5, 6; COP SOR at 8, 9. Based upon this experience, Appellants claim that the roof of the Hiawatha Seam “will not last more than approximately two years under the heightened pressures following retreat mining in the Tank Seam.” ANR SOR at 5; COP SOR at 8 (citing Reynolds Declaration, ¶ 23, at 4).

We do not doubt that a roof collapse in the Hiawatha Seam would be “catastrophic,” endangering miners and causing the loss of up to 35 million tons of recoverable coal. ANR SOR at 6; COP SOR at 9. BLM, however, considered the basic issue of whether mining the Tank Seam poses any risk to the mining and recovery of coal in underlying coal seams. BLM does not deny that barrier pillars will be left in the Tank Seam directly above key development main entries in the Hiawatha Seam, but based on its own expert opinion, BLM disputes Appellants’ assertion that excessive pressure will be placed on the entries and likely lead to a partial or complete collapse of the roof above the Hiawatha Seam, thereby endangering miners or the future recovery of coal from the Tank Seam. *See* Response at 10-11.

Castle Valley offers expert opinion to the effect that the Tank and Hiawatha Seams are separated by approximately 280’ of “competent interburden,” composed mostly of deltaic mudstone and siltstone, and that this overburden is sufficient to protect the mining and recovery of coal in the Hiawatha Seam. Opposition at 20, 21 (citing R2P2 Modification at 10 (Figure 2 (Cross Section Showing Coal Seam Locations)), and Pollastro Declaration, ¶ 8, at 7). Castle Valley notes that, in the case of the nearby Wilberg Mine, across the canyon from the Mine at issue, the Hiawatha Seam was mined without mishap 65-80’ below room-and-pillar mining in the Blind Canyon Seam, despite the passage of “many years,” and that the mining practices at the Wilberg Mine demonstrate the absence of any heightened risk in the present case,

where the interburden approaches 280'. Opposition at 21 (citing Pollastro Declaration, ¶ 8, at 7).

Appellants have failed to demonstrate that the experience with other mines in the area provides a basis for rejecting the R2P2 Modification. In particular, they fail to establish that the present Mine is similar to the Grandall Canyon Mine. Reynolds' attribution of risk seems contingent on the precise nature of mining in the Hiawatha Seam in the Mine, which remains to be determined. See Reynolds Declaration, ¶ 9, at 4. Indeed, the approved R2P2 Modification states that, "[a]s Castle Valley examines mining of the lower seams (including the Hiawatha) in the future, a more detailed review of the impact of Tank [S]eam mining on the lower seams including the Hiawatha will be made." *Id.* at 37. The Modification indicates that, if necessary, adjustments will be made in the mining plan for the Hiawatha Seam. *Id.* Further, final adjustments are still to be made in the mining of the Tank Seam, based upon the required submissions by Castle Valley. Those adjustments will, if necessary, address the threats posed by subsidence. *Id.* BLM adequately considered the risk to mining and potentially lost reserves in the Hiawatha Seam from room-and-pillar mining of the Tank Seam.

C. BLM Did Not Deny Appellants' Substantive and Due Process Rights

Appellants argue that in approving the R2P2 Modification BLM overstepped its authority because (1) Castle Valley had no right to modify the commitment made by the prior LMU operator via the R2P2 Modification without their consent, and, in any event, (2) "Castle Valley . . . only had the authority to control the mining plan during the term of its operating agreement[s] [with appellants]," but yet agreed to undertake mining under the Modification beyond the expiration of the OpAgreements in 2022/2024. ANR SOR at 9, 11. Appellants assert that since they are the holders/owners of Federal lease and private fee interests in all of the coal underlying the LMU, BLM was required to have their consent to the R2P2 Modification. They state that they are "quite vested in the decisions as to mining methods." *Id.* at 11.¹⁴

¹⁴ ANR further states that BLM's approval of the R2P2 Modification will render the remaining coal in the LMU essentially worthless. SOR at 9. In the captioned heading of its discussion, ANR concludes that, by rendering the coal worthless, BLM engaged in an unconstitutional taking of ANR's property. *Id.* We have long held that, as a part of the Executive branch of the Federal government, we lack the authority, delegated to the Judicial branch, to determine the existence of a taking or other matters determinable under the U.S. Constitution. See, e.g., *Rainer Huck*, 168 IBLA 365, 400 (2006).

The Board addressed these very arguments in its previous Order affirming BLM's decision to grant a Suspension of Operations at the Mine requested by Rushton, CWM's Bankruptcy Trustee. ANR and COP there contended that they, as lessees/owners of coal and Federal leases, should have participated in and consented to issuance of the SOP. The Board rejected their argument, stating:

In this case involving an LMU, the control exercised by current operator Castle Valley is required by statute: “[A]ll the lands in a logical mining unit *must be under the control of a single operator*, be able to be developed and operated as a single operation and be contiguous.” (Emphasis added.) 30 U.S.C. § 202a(1) (2006). And, during the course of CWM's bankruptcy proceedings, the bankruptcy court considered in detail the operating agreements assumed by the Trustee and assigned effectively to Castle Valley. With respect to mining plans, the court expressly stated: “Neither COP nor ANR has any veto power or other right of control as to the contents or approval of such plans.” *In re C. W. Mining Co.*, WL 3123140 (Bankr. D. Utah, Aug. 6, 2010) at *10, finding 41.

Order, IBLA 2011-32 & 2011-33 (June 30, 2011), at 4. This holding equally applies to Appellants' current challenge to the R2P2 Modification sought by Castle Valley.

At present, we are only concerned with whether BLM properly exercised its authority under Federal law to approve the R2P2 Modification. Since Castle Valley was the designated operator of the Mine, BLM was required to adjudicate Castle Valley's request for modification of the R2P2. *See Firstland Offshore Exploration Co.*, 149 IBLA 117, 128 (1999) (the designated operator had authority to exercise the rights of all parties to the operating agreement). There is no basis for Appellants' claim that BLM overstepped its authority in approving the R2P2 Modification, or that BLM acted improperly by “unilaterally” amending the OpAgreements. ANR SOR at 9. BLM was bound to review Castle Valley's request for modification of the R2P2 in terms of whether it was necessary for achieving MER. Whether the modification sought by Castle Valley violated any contractual commitments made by the operator to Appellants under the OpAgreements, and the legal consequences of such a violation, are issues concerning private contractual arrangements determinable by State courts as a matter of State law, not a matter for BLM or this Board to decide. *See Jeff Walker*, 133 IBLA 317, 317-19 (1995); *Pat Reed*, 119 IBLA 338, 342-43 (1991); *Petrol Resources Corp.*, 65 IBLA 104, 109 (1982).

Appellants argue that because they are the holders/owners of Federal lease and private fee interests in the coal affected by the R2P2 Modification, BLM violated their due process rights by excluding them from its review of the request for the

Modification. They claim that “the modification was approved without stakeholder input,” and ask the Board to vacate BLM’s decision so that they “can rightfully and fully participate in the BLM’s process.” ANR SOR at 8, 9, 11; COP SOR at 11, 13, 14.

Appellants do not cite, nor do we find, any authority for requiring BLM to seek input from, or otherwise invite the participation of, the Federal lessee/private fee owner in adjudicating a request by the designated operator of the LMU to modify the governing plan for mining coal under the approved R2P2. *See Exxon Co., U.S.A.*, 156 IBLA 387, 400 n.9 (2002); Response at 17-18; Opposition at 25. BLM correctly notes that “Appellants do not cite any authority indicating that they had a right to be involved in BLM’s decision-making process” and that “[n]otably absent [from the regulations] is any requirement that BLM consult with fee coal owners, lessees, or other stakeholders.”). Response at 18. We find no denial of procedural rights under BLM rules or a violation of procedural due process, which is amply satisfied by a right of appeal to the Board. *See, e.g., Christopher L. Mullikin*, 180 IBLA 60, 73 (2010); *Combined Metals Reduction Co.*, 170 IBLA 56, 78 (2006); *Cyprus Shoshone Coal Corp.*, 143 IBLA at 323 n.19.

D. BLM Complied with Section 102(2)(C) of NEPA

COP argues that BLM violated section 102(2)(C) of NEPA in deciding to approve the R2P2 Modification without first addressing the likely environmental impacts of doing so in an environmental assessment or environmental impact statement. In effect, COP challenges BLM’s CX determination. *See* SOR at 12-13. It recognizes that the following CX applies in an appropriate case: “Approval of minor modifications to or minor variances from activities described in an approved underground or surface mine plan for leasable minerals (e.g., change in mining sequence or timing).” BLM NEPA Handbook H-1790-1, Rel. 1-1710 (1/30/2008), at 152; *see* 40 C.F.R. § 1508.4; 43 C.F.R. § 46.205(a).¹⁵ COP argues that the R2P2 Modification is not excluded from NEPA review by this CX because it does not change the sequence or timing of mining “or some other ancillary peripheral mining detail,” but represents a “tectonic shift in the mining method” that will have significant impacts. SOR at 12; *see id.* (“Historically, the surface effects of subsidence from

¹⁵ Prior to the Nov. 14, 2008, promulgation of 43 C.F.R. Part 46, the Department provided for Departmental and BLM CXs, and exceptions thereto, in the DM. *See* 73 Fed. Reg. 61292 (Oct. 15, 2008). The Departmental CXs now appear at 43 C.F.R. § 46.210. *See* 43 C.F.R. § 46.205(b). BLM CXs still appear in the DM (516 DM 11.9 (5/8/08)), as well as the BLM NEPA Handbook H-1790-1, Appendix 4. Exceptions to all of the CXs now appear at 43 C.F.R. § 46.215, as well as in BLM NEPA Handbook H-1790-1, Appendix 5. *See* 46 C.F.R. § 46.205(c).

room-and-pillar mining have been significantly greater than those caused by longwall mining and result in significantly more surface disturbance.”).

We have long recognized the applicability of CXs to obviate the requirement to undertake specific review of the environmental consequences of a proposed action in an EA or EIS, subject to exceptions as explained below:

Under 40 CFR 1508.4, the effect of a categorical exclusion is to eliminate the necessity for preparation of an environmental document for specific fact situations which, because of their nature, *may generally be deemed to have no significant impact on the quality of the human environment*. See *Oregon Natural Desert Association*, 125 IBLA 52, 57-58 (1993); *Utah Chapter Sierra Club*, 120 IBLA 229, 232 (1991). Individual actions, however, may be excepted under certain circumstances, thereby requiring the preparation of an environmental document, but any such exception to a normally excluded action shall occur only under extraordinary circumstances. *Id.*; see 40 CFR 1508.4.

Dineh Alliance v. OSM, 136 IBLA 319, 332 (1996) (emphasis added); see 40 C.F.R. § 1508.4; 43 C.F.R. § 46.205; e.g., *Oregon Natural Desert Association*, 174 IBLA 26, 30-31 (2008); *Colorado Open Space Council*, 73 IBLA 226, 230-31 (1983). A BLM decision that a proposed action is covered by a CX will be affirmed where it is reasonable and supported by the record. See *Oregon Natural Desert Association*, 174 IBLA at 33.

BLM determined that the above-quoted CX was applicable in this case because it predicted “[n]o new surface disturbance” as a consequence of the change to room-and-pillar mining in the Tank Seam. Decision at 3. COP disputes BLM’s prediction based upon a 2006 EA that addressed the potential environmental impacts of longwall mining in the Mine, including those attributable to subsidence, and asserts that room-and-pillar mining is likely to result in subsidence impacts that will entail “significantly more surface disturbance.” SOR at 12. BLM disagrees with COP’s reading of that EA, citing the same discussion in the EA concerning the likely subsidence effects of room-and-pillar mining as compared to longwall mining. BLM based its application of the CX upon the experience of operations in the Mine over the course of many years. See Response at 14-15; EA at 16-19, 21-25.¹⁶

¹⁶ COP provides a copy of the 2006 EA as Ex. 5 to its SOR. It was prepared by OSM and the U.S. Forest Service (FS) for the purpose of addressing CWM’s proposed July 2005 modification of the State surface mining permit to include an additional 7,591.29 acres of Federally- leased and private fee lands where underground mining
(continued...)

In the 2006 EA, OSM/FS stated that, in making subsidence predictions, they “us[ed] a numerical model calibrated with baseline subsidence data from the Bear Canyon Mine and nearby mines on East and Trail Mountains,” noting the “similarities in geology and geometry between the mining plan modification area and the surrounding area.” EA at 21; *see id.* at 25. Using this methodology, OSM/FS specifically determined that, in the case of the initial first-pass mining (or full support mining), where pillars are left behind to support the ground, room-and-pillar mining was not expected to cause any measurable subsidence during mining, or even years later, and, in any event, was “most likely to be a fraction of that produced by equivalent-height longwall mining.” *Id.* at 23. They concluded that subsidence from room-and-pillar mining would “not be visually discernable” and would be “too gradual for casual observation.” *Id.*; *see id.* at 22.

COP offers no expert opinion or supporting evidence to demonstrate that room-and-pillar mining is likely to cause any additional surface disturbance due to subsidence beyond what is already known to occur with mining the Mine. They have not shown that such disturbance is likely to rise to the level of a significant impact. At best, it refers to the fact that room-and-pillar mining has historically caused subsidence, but it does not describe the specific subsidence impacts likely to result from a change in mining method in the present case, or show how they will differ from those already known to occur with longwall mining. On balance, we conclude that the change to room-and-pillar mining requested by Castle Valley amounts to a “minor modification” of the methodology of its mining and that BLM’s application of the noted CX was proper.

We note that even where a CX is applicable, preparation of an EA or EIS may be required if “extraordinary circumstances” are present. “Any action that is normally categorically excluded must be evaluated to determine whether it meets any of the extraordinary circumstances,” and if it does, “further analysis and environmental documents must be prepared for the action.” 43 C.F.R. § 46.205(c)(1). COP has not identified any extraordinary circumstances or shown that BLM failed to undertake a sufficient review to determine whether any exist. *See Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971); *Evelyn Alexander*, 45 IBLA 28, 36-37 (1980) (citing *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926)). Further,

¹⁶ (...continued)

operations will occur. Parts of four Federal leases were at issue, including COP’s lease UTU-61049. *See* EA at 2-3. We note that, under the R2P2 Modification, most of the overlap between mining of the Tank and Hiawatha Seams on Federally-leased land will occur in the case of lease UTU-61049. *See* Plates LMU-3 and LMU-5 (Hiawatha Seam Projected Mining), dated Jan. 1, 2011 (attached to Approved R2P2).

COP provides nothing to indicate that the change in the mine plan at issue may have a significant impact that would take the case out of the noted CX and require BLM to prepare an EA or EIS. We conclude that BLM was fully justified in relying on the CX and that its review complied with NEPA.

IV. CONCLUSION

In summary, Appellants have failed to carry their burden to show, by a preponderance of the evidence, that BLM: erred in determining that room-and-pillar mining will achieve MER; failed adequately to consider the risk posed by room-and-pillar mining to future operations in the underlying Hiawatha Seam; violated Appellants' due process rights; or violated NEPA by issuing a CX and not undertaking a further environmental review. We therefore conclude that BLM properly approved Castle Valley's requested R2P2 Modification.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is affirmed.

_____/s/
James F. Roberts
Administrative Judge

I concur:

_____/s/
James K. Jackson
Administrative Judge