



INTERIOR BOARD OF INDIAN APPEALS

Wind River Alliance v. Rocky Mountain Regional Director, Bureau of Indian Affairs

52 IBIA 224 (11/05/2010)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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ARLINGTON, VA 22203

WIND RIVER ALLIANCE,)	Order Dismissing Appeal
Appellant,)	
)	
v.)	
)	Docket No. IBIA 09-33-A
ROCKY MOUNTAIN REGIONAL)	
DIRECTOR, BUREAU OF)	
INDIAN AFFAIRS,)	
Appellee.)	November 5, 2010

The Wind River Alliance (Appellant)¹ appealed to the Board of Indian Appeals (Board) from a Record of Decision (ROD)² of the Rocky Mountain Regional Director (Regional Director), Bureau of Indian Affairs (BIA). In the ROD, the Regional Director selected and approved “Alternative B (Existing Leases)” (Selected Alternative) in the Final Environmental Impact Statement (FEIS) for the Riverton Dome Coal Bed Natural Gas and Conventional Gas Development Project. Under the Selected Alternative, Devon Energy Production Company (Devon) would, subject to additional site-specific permit and authorization requirements,³ drill between 70 and 151 coal bed natural gas (CBNG) wells and up to 20 additional conventional gas wells on Devon’s existing leases with the Eastern

¹ Appellant identifies itself as a non-profit organization dedicated to the health and protection of the Wind River watershed. Although not entirely clear from the notice of appeal, it appears that Appellant’s members may include members of the Northern Arapaho Tribe who reside in the affected area, and for purposes of deciding this appeal, we assume that to be the case.

² The ROD was approved by the Regional Director on November 20, 2008.

³ The ROD is not the final approval for actions associated with the Selected Alternative. According to the ROD, “[p]rior to issuing any permit or authorization to implement these activities on BIA-administered lands, BIA and [the Bureau of Land Management] must conduct site-specific analysis on each well and associated facilities for [National Environmental Policy Act (NEPA)] compliance. . . . NEPA review for those permits and authorizations would be tiered from this EIS.” ROD at 7.

Shoshone and Northern Arapaho Tribes (Tribes) within the Riverton Dome Field, located on the Wind River Indian Reservation (Reservation) in Wyoming.

Appellant raises five objections to the ROD: (1) there is no effective emergency response plan for energy production in the area of Riverton Dome and Beaver Creek;⁴ (2) the ROD and FEIS contain an inadequate definition of health and safety and an unacceptable emergency response plan for pipeline hazards; (3) the FEIS disregards tribal jurisdiction and sovereignty; (4) jurisdictional authority for issuing permits for evaporation ponds needs to be clarified; and (5) in the FEIS, BIA improperly defended the use of the 1984 land management plan for the Reservation; BIA needs to develop a basin-wide environmental impact statement (EIS) and management plan that includes CBNG development needs before CBNG production can be initiated in the project area.

Appellant failed to raise the first, second, and fifth arguments during the comment periods on the draft EIS and FEIS, and therefore we decline to consider them based on the Board's well-established general rule that an appellant may not raise an issue for the first time on appeal to the Board. Appellant's third and fourth arguments assert rights of the Tribes — not those of Appellant — and we also decline to consider those arguments because Appellant does not have standing to assert the Tribe's rights.

Factual Background

In 2005, Devon proposed to drill CBNG wells and additional conventional gas wells on its leases of tribal land in the existing Riverton Dome Field on the Reservation. Oil and gas development has occurred in the Riverton Dome Field since 1948 and there are currently 54 producing oil and gas wells in the Riverton Dome Project Area and 10 CBNG wells that BIA approved in 2005 as part of a pilot project to determine if commercial quantities of CBNG were present. ROD at 1.

BIA issued a notice of intent to prepare an EIS under NEPA, *see* 42 U.S.C. § 4332(2)(C), solicited scoping comments, and in 2007 published a Draft EIS (DEIS) for public comment. *See* Administrative Record (AR) 4 - 11. The DEIS identified and evaluated three alternatives, including Devon's proposed action (Alternative A). Devon's proposed action was a maximum development scenario, under which between 163 CBNG wells (at 80-acre spacing) and 326 CBNG wells (at 40-acre spacing) could be drilled, plus up to 20 conventional gas wells. Alternative B ("Existing Leases") included between 70

⁴ The Beaver Creek production field is south of the Riverton Dome project area.

CBNG wells (at 80-acre spacing) and 151 CBNG wells (at 40-acre spacing),⁵ plus up to 20 conventional wells, using Devon's existing leases with the Tribes. Under both Alternatives A and B, additional pipelines, roads, and facilities would be constructed, and existing evaporation ponds would be used (in addition to disposal wells) for disposal of produced water. Under Alternative C ("No Action"), no wells would be drilled on the tribal leases, but up to 24 wells would be developed on private fee land through individual permits authorized by the State of Wyoming. The DEIS set forth health and safety measures that subsequently carried over to the FEIS and ROD. *See* AR 11a, DEIS at pp. 3-146, 4-87.

Appellant participated in the public scoping meetings and commented orally and in writing on the DEIS. Among the comments that Appellant made on the DEIS was that it failed to recognize the role of the General Councils of the Eastern Shoshone and Northern Arapaho Tribes. Appellant commented that because each General Council consists of all adult members of each respective tribe, tribal sovereignty resided within each member and thus tribal members' status for involvement in the NEPA process was greater than the general public, and their right to involvement in the process should be recognized as such. AR 14h at 1-2. Appellant also commented that the Tribes had jurisdiction to issue permits for surface water use within the Reservation, "including permits for water storage, such as water in evaporation ponds." *Id.* at 2. Appellant did not comment on whether Devon had an effective emergency response plan or whether the DEIS should address the existence or adequacy of such a plan. Nor did Appellant comment on whether the DEIS had an adequate definition of health and safety, or otherwise adequately addressed pipeline safety issues, or whether the DEIS was flawed in some respect by referring to, and finding the Project in conformance with, land management objectives included in a 1984 Environmental Assessment (EA) for Land Management Activities on the Reservation.

The FEIS was completed in August of 2008 and notice of availability and opportunity for comment was published in September of 2008. *See* AR 18. Only Devon submitted a comment. The Regional Director then issued the ROD on November 20, 2008. The Regional Director selected and approved Alternative B which, as discussed above, would use Devon's existing leases with the Tribes. The Regional Director found that the Selected Alternative would result in approximately 43% less surface disturbance than the maximum development alternative proposed by Devon, and would result in reduced potential for human health impacts to the nearby Beaver Creek Housing

⁵ Under both Alternatives A and B, the initial spacing for each new well drilled would be 80-acre spacing, but if 80-acre spacing would not efficiently drain the reservoir, 40-acre spacing would be used. Thus, the anticipated number of actual wells was between the 40-acre-based number and the 80-acre-based number.

community because development would occur at a greater distance from the community. The Regional Director identified the No Action Alternative as the environmentally preferable alternative because it would have the least impact on the natural and physical environment, but he concluded that it would not result in beneficial economic impact to the Tribes and their members. ROD at 11.

Appellant appealed the ROD to the Board, and raised the five arguments summarized above. The Regional Director and Devon filed answer briefs, arguing that Appellant's appeal should be dismissed because Appellant was raising some issues for the first time on appeal and because Appellant lacked standing to raise the remaining issues. In the alternative, both the Regional Director and Devon defend the ROD on the merits. Appellant did not file a reply brief, and thus has presented no arguments on the procedural and standing objections raised by the Regional Director and Devon.

Discussion

I. Arguments Raised for the First Time on Appeal

The Board has a well-established general rule that it will not consider arguments or issues raised for the first time on appeal to the Board. *See Bunney v. Pacific Regional Director*, 49 IBIA 26, 33 (2009), and cases cited therein. This rule is based on the regulatory provision limiting the Board's scope of review to those issues that were before the Regional Director, *see* 43 C.F.R. § 4.318,⁶ and on the principle that a party who did not afford BIA an opportunity to respond to an issue should not be allowed, on appeal, to challenge BIA's decision as defective for failing to address that issue.

We conclude that Appellant's first, second, and fifth arguments are raised for the first time on appeal to the Board and that no basis exists for us to depart from the general rule that such arguments will not be considered by the Board. We explain our reasoning with respect to each argument.

Appellant argues that a post-ROD incident involving a valve failure in a conventional gas development field south of the Riverton Dome project area "brought to light that there is no effective emergency management response plan in place for energy production in the

⁶ Section 4.318 provides that except to correct a manifest injustice or error where appropriate, the Board's scope of review is limited to those issues that were before the BIA official.

area of Riverton Dome and Beaver Creek.” Notice of Appeal at 2.⁷ Appellant did not comment on emergency response measures during the public involvement and comment periods for the EIS, although both the DEIS and FEIS discussed impacts from the project that could result in increased demand for emergency response, *see* FEIS, Executive Summary at ES-12, and thus nothing precluded Appellant from commenting on the sufficiency of emergency response plans.

Although a post-ROD incident that occurs before a ROD becomes final (i.e., during the appeal period) might, under appropriate circumstances, justify departure from the Board’s rule precluding an appellant from raising an argument for the first time on appeal, no such circumstances are present here. Both the Regional Director and Devon raised procedural objections to the Board’s consideration of this argument, and Appellant failed to respond, and thus has made no argument that an exception to the Board’s general rule is warranted.

Appellant next argues that the FEIS and ROD contain an “inadequate definition of health and safety.” Notice of Appeal at 3. Although it is not entirely clear what Appellant means by an “inadequate definition,” it is clear that this issue was not first presented to BIA, and thus we decline to consider this argument as well. In support of its argument, Appellant quotes two “bullets” in the Mitigation Measures portion of the ROD, and then contends that the FEIS discussion of pipeline hazards “dismisses emergency response” by characterizing the risk of potential pipeline accidents as relatively low. *Id.* But the FEIS discussion of pipeline hazards is identical to the discussion contained in the DEIS, neither of which received comments from Appellant. Because this issue was not raised to BIA, we decline to consider it on appeal.⁸

⁷ Appellant acknowledges that the incident in question was quickly resolved by isolating and shutting in the offending well within an hour, that Devon staff were sent to the area to test for dangerous levels of gas, and that local radio stations and authorities (although not tribal) were contacted. Appellant contends, however, that many residents apparently did not get the word and were worried by the “lingering smell of gas.” *Id.* at 2.

⁸ To the extent that Appellant intends to argue that the ROD itself departs from the FEIS and that the two bullets on health and safety in the Mitigation Measures attachment was intended to fully capture health and safety issues, Appellant may not be precluded from raising the issue on appeal, but we would reject the argument on the merits. The two bullets clearly were not intended to reflect all of the consideration that was given to, or measures to be implemented for, health and safety. *See, e.g.*, FEIS § 4.16 (Health and Safety).

Appellant also contends that in the FEIS, BIA should not have “defended” the use of the 1984 EA for Land Management Activities on the Reservation, and that BIA needs to develop a basin-wide EIS and management plan that includes CBNG development before CBNG production can be initiated in the project area. Appellant did not raise this issue below, but in making this argument to the Board, Appellant refers to BIA’s response to a comment made by another group, the Wyoming Outdoor Council (WOC). But WOC’s comment was limited to contending that the 1984 EA was not a proper environmental analysis for the 2005 pilot project. WOC did not contend that the DEIS was somehow defective because the 1984 EA purportedly was outdated. Thus, even assuming that Appellant may bootstrap itself to WOC’s comment for purposes of raising WOC’s issue on appeal, Appellant is not raising WOC’s issue. Appellant is raising a new and distinct issue regarding the relationship between the FEIS and the 1984 EA. Because Appellant’s argument is raised for the first time on appeal, we decline to consider it.

II. Appellant Lacks Standing to Assert Tribal Sovereignty and Jurisdictional Interests

Appellant’s two additional arguments — that the FEIS and ROD disregard tribal jurisdiction and sovereignty and that issues of jurisdictional permitting authority for evaporation ponds must be clarified — invoke tribal interests. An appellant’s right of appeal to the Board is dependent upon a showing that its own legally cognizable interests have been adversely affected. *See* 25 C.F.R. § 2.2 (definitions of “appellant” and “interested party”); *see also* *Cheyenne River Sioux Tribe v. Acting Great Plains Regional Director*, 41 IBIA 308, 311 (2005) (a party must assert its own rights and interests, and cannot rest its claim of relief upon the rights or interests of others). Thus, neither Appellant nor its members have standing to assert tribal interests through these two arguments.

By averring that several members of the Northern Arapaho General Council support Appellant’s appeal, and by arguing that tribal sovereignty resides in the Tribes’ members, Appellant may be implying that its standing to raise these claims is derived from and through those tribal members.⁹ But individual tribal members do not have standing to assert tribal claims or interests. *See Bullcreek v. Western Regional Director*, 40 IBIA 191, 194-95 (2004), and cases cited therein. And the fact that a tribe may have a general council form of government, in which each adult tribal member is a member of the council, does not change that result. *See id.* at 195 (status as a member of a general council composed of all adult tribal members does not imbue the individual with greater status than that of an

⁹ Both Devon and the Regional Director seek dismissal of the appeal with respect to these arguments based on lack of standing, and as previously noted, Appellant did not file a reply brief.

individual tribal member). In the present case, several individuals identifying themselves as members of the Northern Arapaho General Council have signed Appellant's appeal to indicate their support, but Appellant presents no evidence that the General Council as a whole has taken action to join the appeal. Therefore, we conclude that Appellant lacks standing to raise these two additional arguments that seek to assert tribal interests.

Conclusion

Three of Appellant's arguments challenging the ROD are raised for the first time on appeal and thus are not properly before the Board. Appellant lacks standing to raise the two remaining arguments because they seek to assert tribal interests, rather than Appellant's own interests.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Board dismisses this appeal.¹⁰

I concur:

// original signed
Steven K. Linscheid
Chief Administrative Judge

// original signed
Debora G. Luther
Administrative Judge

¹⁰ Even if we were to consider any of these issues to be properly raised in this appeal, we would reject them on the merits because Appellant has failed to demonstrate any error or inadequate analysis in the ROD or FEIS and would not meet its burden of proof and the standard of review for reviewing an EIS. *See generally* *Voices for Rural Living v. Acting Pacific Regional Director*, 49 IBIA 222, 239 (2009) (standard of review for NEPA documents); *County of Colusa v. Pacific Regional Director*, 38 IBIA 274, 281-82 (2003) (same).