SPOTTED HAWK DEVELOPMENT, LLC and SHD OIL & GAS, LLC, Appellants,

v.

ACTING GREAT PLAINS REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee.

Order Affirming Decision
Docket No. IBIA 17-023
September 10, 2020

Spotted Hawk Development, LLC and SHD Oil & Gas, LLC (collectively, Appellants or Spotted Hawk), sought review of a November 16, 2016, decision (Decision) of the Acting Great Plains Regional Director (Regional Director), Bureau of Indian Affairs (BIA). The Regional Director denied review of a draft Environmental Assessment (EA) Addendum and a draft Finding of No Significant Impact (FONSI) for an underground injection control (UIC) well,1 to be located on Indian trust land, until Appellants secure a permit from the Three Affiliated Tribes of the Fort Berthold Reservation (Tribe).2 The Tribe opposes BIA review of the draft EA Addendum and FONSI until Appellants obtain a Tribal permit. The Decision concluded that Appellants are required by the terms of their mineral development lease to obtain a water permit from the Tribe and that, until a permit is secured, it is unnecessary for BIA to review the draft EA Addendum and FONSI under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4321 et. seq.

On appeal, Appellants contend that BIA’s decision to defer NEPA review is in error because BIA had a ministerial duty to “process” their NEPA submission; Appellants’ lease permits construction of the well and BIA is bound by the terms of the approved lease; and NEPA compliance is a prerequisite for a Tribal water permit, Tribal consent to a right-of-way amendment, and a Class II UIC well permit from the U.S. Environmental Protection

1 Alternatively described as a “salt water disposal well.”
2 The Tribe is also known as the Mandan, Hidatsa, and Arikara (MHA) Nation.
Agency (EPA). Appellants ask the Board to vacate the Decision and direct BIA to process the draft EA Addendum and FONSI.

We affirm the Decision. Appellants have not met their burden to show that the Regional Director erred or abused her discretion to defer review of Appellants’ NEPA submission. Adoption of an applicant’s EA and FONSI requires a thorough, independent review and exercise of judgment on the part of the agency; it is not a ministerial duty. BIA was not required by statute, regulation, or guidance to review the draft EA Addendum and FONSI upon submission or demand. At the time of the Decision, there was no proposal for a major Federal action pending before BIA that would require it to conduct a NEPA review; Appellants had not applied to BIA for approval of a right-of-way amendment covering the UIC well. Considering that the Tribe had not issued a required Tribal water permit for the UIC well and Appellants had not applied to BIA to amend its right-of-way, we conclude that BIA reasonably deferred review of the draft EA Addendum and FONSI.

Though Appellants have on appeal submitted an application for a right-of-way amendment, to the extent Appellants seek our review of the Regional Director’s alleged inaction related to the application, we decline to do so. The right-of-way regulations in 25 C.F.R. Part 169 contain procedures that Appellants must first follow for prompting action or a decision by a BIA official on such an application.

Background

Appellants and the Tribe executed an oil and gas lease on the Fort Berthold Reservation pursuant to the Indian Mineral Development Act of 1982 (IMDA), 25 U.S.C. §§ 2101-2108, on November 12, 2009, and it was approved by BIA on August 11, 2011.

3 The proposed UIC well would be on the site of the “Old 7 Inch Central Tank Battery,” for which the original EA, FONSI, and right-of-way were issued or approved by BIA.

4 IMDA provides in pertinent part:

Any Indian tribe, subject to the approval of the Secretary and any limitation or provision contained in its constitution or charter, may enter into any joint venture, operating, production sharing, service, managerial, lease or other agreement . . . providing for the exploration for, or extraction, processing, or other development of, oil, gas, uranium, coal, geothermal, or other energy or nonenergy mineral resources . . . in which such Indian tribe owns a beneficial or restricted interest, or providing for the sale or other disposition of the production or products of such mineral resources.

Oil and Gas Lease, Contract No. 7420A42433 (Lease) (Administrative Record (AR) 14). 5
The Lease covers approximately 31,891 Net Mineral Acres held in trust on behalf of the
Tribe and 5,282 Net Mineral Acres held in fee. Id. at 3. The leased property is subdivided
into five Project Blocks, id. at 5, and the Lease requires that Appellants drill at least one well
per Project Block, id. at 10.

Section 8.1 of the Lease provides that, after acquiring a water permit from the Tribe,
the lessee “shall have the right to drill and maintain two injection wells per Project Block.”
Id. at 16. On August 25, 2016, Appellants, through their environmental contractor,
submitted a proposal to BIA “for NEPA compliance review and processing for the siting of
[a] salt water disposal well on the NEPA compliant site of [an] earlier approved project, the
Old 7 Inch Central Tank Battery.” Opening Brief (Br.), Mar. 9, 2017, at 2; see Email from
KLJ Engineering to BIA, Aug. 25, 2016 (AR 11). The proposal was styled as an
addendum to the June 2015 EA6 approved by BIA for the construction of facilities serving
existing well pads on the same site. See [Draft] Environmental Assessment Addendum
(August 2016) (EA Addendum) (AR 11). The original 2015 EA resulted in BIA’s issuance
of a FONSI and approval of a right-of-way, which describes the facilities pad, access road,
utilities, and above-ground appurtenances and flowlines for the tank battery. The draft EA
Addendum stated that BIA would need to grant “authorization” for Appellants to drill a
UIC well. Draft EA Addendum at 3. It also included a draft FONSI for signature by the
Regional Director. See id. 7 The draft FONSI stated that BIA had received “a proposal for
an addendum to [the original EA]” and that “[a]ssociated Federal actions by the BIA
include determinations of impacts and effects regarding environmental resources for
developments on tribal lands.” Id. The submission did not identify what type of
authorization Appellants were seeking from BIA or mention any need for a right-of-way
amendment concerning the UIC well.

On August 30, 2016, BIA emailed Appellants’ environmental contractor and
informed them that the Tribe had “put a moratorium on injection wells as Spotted Hawk is
well aware.” Email from BIA to KLJ Engineering, Aug. 30, 2016, 11:42 AM (AR 10).
BIA directed Appellants to submit a Tribal resolution authorizing the injection well before

5 BIA subsequently approved an amendment to the Lease on January 13, 2013.
Amendment to Lease (AR 13).

6 The original EA is titled “Spotted Hawk Development, LLC; Old 7 Inch Central Tank
Battery and Flow Lines to Three Existing Well Pads; June 2015 Environmental
Assessment.”

7 The draft FONSI can be found behind the cover page of the Draft EA Addendum, before
the table of contents.
BIA would review the draft EA Addendum. *Id.* According to BIA, Tribal authorization for the injection well was necessary pursuant to a resolution passed in 2011 that required Tribal approval of all waste disposal facilities associated with oil and gas production on the reservation. See Email from BIA to KLJ Engineering, Aug. 30, 2016, 2:41 PM (AR 10) (referencing Tribal Resolution No. 11-25-VJB, July 14, 2011, at 2 (AR 5)).

On September 16, 2016, Appellants’ legal counsel submitted a demand for action under 25 C.F.R. § 2.8, which provides a mechanism for appealing from inaction by a BIA official, after the appellant has requested action pursuant to the requirements of § 2.8. Letter from Thomas E. Luebben to Regional Director, Sept. 16, 2016 (AR 9). Appellants argued that Tribal Resolution No. 11-25-VJB was unenforceable because it conflicted with the Tribe’s obligation under the IMDA Lease not to “enact or pass any law, legislation, order, regulation or other rule after the Effective Date of this Lease that would effectively prohibit either Party from exercising their rights.” *Id.* at 2 (citing Section 20 of the Lease). Alternatively, Appellants argued that BIA had misinterpreted the resolution, that it did not institute a moratorium but represented an “Interim Regulation” for the disposal of waste from oil and gas operations, and that Spotted Hawk was in compliance. *Id.* Appellants stated they were already authorized by the Lease to drill salt water disposal wells on the property. See *id.* Appellants contended that BIA had “a legal, ministerial duty to process [Appellants’] NEPA compliance submission,” and that NEPA compliance was a prerequisite for two additional permits that Appellants needed before drilling the well: a water permit from the Tribe as required by the Lease and a Class II UIC well permit from EPA. *Id.* at 2-3.

Anticipating that the Tribe may oppose construction of an injection well and not grant a permit, and considering the agency’s limited resources, see Email from Regional Realty Officer to Regional Environmental Scientist, Oct. 6, 2016, 12:52 PM (AR 8), BIA contacted the Tribe and requested that it state its “intent on [Appellants’] proposal,” Letter from Regional Director to Tribe’s Chairman, Oct. 11, 2016 (AR 7). BIA explained that “[i]t would also assist us with other projects if we had clear intent on underground injection wells on Trust land on the Fort Berthold Reservation.” *Id.* The Tribe responded that “tribal law prohibits [UIC wells] on the Fort Berthold Reservation without a permit” from the Tribe, and requested that BIA “not proceed with reviewing [Spotted Hawk’s] request, or any request for a UIC [well], unless you have a tribal resolution or other authorizing document indicating that Spotted Hawk has received a permit” from the Tribe. Letter from Tribe’s Chairman to Regional Director, Oct. 27, 2016 (AR 6).

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8 Although the Tribal resolution was passed prior to BIA’s approval of the Lease in 2011, the parties to the IMDA Lease made the effective date of the Lease retroactive to December 15, 2008. Lease at 1.
On November 16, 2016, the Regional Director issued the Decision to defer review of Appellants’ NEPA submission. The Decision enclosed the Tribe’s October 27, 2016, letter and advised that, “[a]s per” the Tribe’s request, BIA would “not proceed with reviewing [Spotted Hawk’s] proposal until we have a Tribal Resolution, water permit, or other authorizing document indicating that [Spotted Hawk] has received a permit for the underground injection well from the [Tribe].” Decision at 1 (AR 4). The Regional Director also noted that Section 8.1 of the Lease states in part, “The Tribe[] shall provide and Lessee shall obtain a water permit for each well drilled or converted to a water source or injection well on the Leased Premises.” Id. She found that, “until such a permit is secured,” it was “unnecessary to review any proposal for a[] UIC well.” Id. The Regional Director suggested that if Appellants believed the Tribe’s actions constituted a breach of contract, Appellants could invoke the dispute resolution remedies under Section 18 of the Lease.9 Id.

Appellants appealed to the Board. Notice of Appeal, Dec. 22, 2016; see also Statement of Reasons for Appeal, Jan. 23, 2017. In their opening brief, Appellants contended that BIA’s decision to defer review was in error because BIA had a ministerial duty to “process” the draft EA Addendum and FONSI. Opening Br. at 5-6. They also contended that the Lease permits construction of the well and BIA is bound by the terms of the approved Lease. Id. at 6-10. The Regional Director filed an answer brief asserting that NEPA review is not ministerial; Appellants had not submitted any request for Federal action that would require BIA to conduct a NEPA review, such as an application for a right-of-way amendment; Appellants lack standing to appeal; and, assuming Appellants have standing, the Regional Director’s decision was an appropriate exercise of discretion. Answer Br., Apr. 12, 2017, at 7-14. In reply, Appellants argued that a BIA-issued FONSI was a prerequisite for Appellants to: (1) submit an application to BIA for a right-of-way amendment; (2) submit applications to the Tribe for consent to the right-of-way amendment10 and for a water permit; and (3) receive approval from EPA for a pending application for a Class II UIC well permit. Reply Br., May 17, 2017, at 2, 4-8, 11-12. Appellants further argued that their application to EPA triggered BIA’s obligation to process the draft EA Addendum and that there was no requirement or point for Appellants to obtain a Tribal water permit before obtaining the right-of-way grant. Id. at 2, 4, 6.

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9 Section 18.1.1 of the Lease provides that “[a]ny dispute, claim or controversy arising out of or relating to this Lease, or the breach thereof (a ‘Claim’), shall be settled by binding and final arbitration.” Lease at 23.

10 For a right-of-way across tribal land, the applicant must obtain tribal consent, if the tribe so requires. 25 C.F.R. § 169.107(a). “Record of consent” must be included with an application for a right-of-way.25 C.F.R. § 169.102(b)(5).
The Regional Director filed a motion for leave to file a surreply and a surreply brief explaining that there was no requirement to obtain a FONSI before submitting an application for a right-of-way amendment.\textsuperscript{11} Surreply Br., June 6, 2017, at 2. In addition, the Regional Director found no evidence that the Tribe considers a BIA-issued FONSI to be a prerequisite to an application for Tribal consent to a right-of-way or for a water permit. \textit{Id.} at 3-4. Appellants then submitted an application to BIA for a right-of-way amendment and filed motions with the Board to supplement the record and for leave to file a sur-surreply, enclosing a copy of the application.\textsuperscript{12} Sur-surreply Br., Oct. 24, 2017. Appellants argue that, “to the extent the Board does not believe that BIA is obligated to undertake NEPA compliance for the disposal well in response to either [Appellants’] submission of the EA Addendum, or [the] EPA UIC permit application, BIA’s argument that a ‘triggering’ event is lacking has been rendered moot” by the application for a right-of-way amendment. \textit{Id.} at 4. Appellants maintain that their application to EPA for a UIC well permit requires BIA to comply with NEPA and that they cannot apply for Tribal consent to the right-of-way amendment or for a Tribal water permit without first obtaining a FONSI from BIA. \textit{Id.} at 4-5. By order dated December 11, 2017, the Board granted BIA jurisdiction to consider Appellants’ application for a right-of-way, and took the parties’ motions under advisement.\textsuperscript{13}

Upon taking the case under active consideration, by order dated July 14, 2020, the Board solicited briefing on whether the appeal had become moot. The parties responded that the appeal is not moot because the Regional Director has not begun to process Appellants’ EA Addendum or the application for a right-of-way amendment. Appellants’ Br. on Mootness, Aug. 4, 2020, at 1-2; Appellee’s Br. on Mootness, Aug. 5, 2020. BIA states it “will wait to conduct NEPA review until [Appellants] obtain[] a tribal permit.” Appellee’s Br. on Mootness.

\textsuperscript{11} The surreply also included a declaration from the Regional Realty Officer stating that “applicants for realty transactions may initiate the process by submitting an application that does not include all of the elements listed in § 162.102 [sic],” and that if an applicant submits an incomplete application, “BIA then informs the applicant of what is missing and works with the applicant to complete the right-of-way package for a final determination.” Declaration of Rick Clifford, June 6, 2017.

\textsuperscript{12} The right-of-way application is for an “Amended ROW for Salt Water Disposal for ROW No. FBOG101012 Old 7 Inch Tank Battery.” Supplement to Administrative Record, Oct. 24, 2017. We accept the application as part of the appeal record (but not BIA’s administrative record, as it post-dates the Decision).

\textsuperscript{13} We grant the parties’ motions for leave to file the surreply and sur-surreply briefs, and consider them as relevant to our review of the Decision.
Standard of Review

The Board exercises de novo review over questions of law and the sufficiency of evidence to support a BIA decision. Boire v. Acting Northwest Regional Director, 65 IBIA 34, 38 (2017); Gopher v. Rocky Mountain Regional Director, 60 IBIA 189, 194 (2015). The Board will not substitute its judgment for that of BIA in matters of discretionary decision making, but it will review a regional director’s decision to determine whether it comports with applicable law, is supported by the administrative record, and is not arbitrary and capricious. Boire, 65 IBIA at 38-39; Wing v. Rocky Mountain Regional Director, 60 IBIA 297, 301 (2015). An appellant bears the burden of showing that BIA’s decision was in error or not supported by substantial evidence. Gopher, 60 IBIA at 194, 196.

Discussion

Appellants have not met their burden on appeal to show that BIA erred or abused its discretion in declining to process their draft EA Addendum and FONSI. Adoption of an applicant’s EA and FONSI requires a thorough, independent review and exercise of judgment on the part of the agency, and is not a ministerial duty. Further, in the absence of an application for BIA to undertake a major Federal action, BIA’s obligation to conduct a NEPA review was not triggered. Considering that the Tribe opposed NEPA review pending issuance of a Tribal permit and Appellants had not applied to BIA for a right-of-way amendment, we conclude that BIA reasonably deferred review of the draft EA Addendum and FONSI. That Appellants have, on appeal, submitted an application for a right-of-way amendment to BIA does not show error in the Decision. Any NEPA obligations triggered by the now-pending application, and the propriety of BIA’s execution of those obligations, would be the subject of a separate action. The right-of-way regulations in 25 C.F.R. Part 169 contain procedures that Appellants must first satisfy for compelling action on an application for a right-of-way amendment. Therefore, we affirm the Decision.

I. NEPA Review Is Not Ministerial and Is Not Subject to Strict Timelines on Review

Appellants argue that BIA has a “ministerial duty” to process the draft EA Addendum and FONSI. Opening Br. at 3. Citing BIA’s NEPA Guidebook, Appellants assert that where tribal approval is required, BIA is advised to “consult and cooperate with the tribal government,” but this does not mean that the Tribe “can instruct the BIA to stop the NEPA compliance process when an EA has been submitted for processing, or that the BIA must or should wait for tribal approval.” Id. at 4-5 (discussing NEPA Guidebook,

14 For purposes of this decision we assume that Appellants have standing.
According to Appellants, the “clear implication” of the Guidebook is that even where a proposed action would violate tribal law, “BIA NEPA compliance is to go forward.” *Id.* at 5.

Appellants have not shown that NEPA, its implementing regulations, or the Guidebook impose a duty on BIA to review the draft EA Addendum and FONSI. The Guidebook instructs that, if taking a proposed action might violate a tribal environmental law or ordinance, BIA must prepare an EA even if the action is otherwise “categorically excluded” from the requirement to prepare an EA. 59 IAM 3-H at 6. That guidance does not apply here, as there is no suggestion that a categorical exclusion is available, and it does not support the inference drawn by Appellants that BIA was required to proceed with NEPA review in the absence of a Tribal permit. Relevant here, the Guidebook recognizes that “tribal governments have substantial authority through their retained tribal sovereignty for environmental protection on lands within their jurisdiction,” that “[a]ctivities affecting the environment on Indian lands often require the approval of both the BIA and the tribal government,” and that “[b]ecause of this dual authority, the BIA’s NEPA process should be coordinated with the tribal decision-making process.” *Id.* In this case, BIA coordinated the NEPA process with Appellants and the Tribe and decided not to continue with NEPA review.

BIA’s actions are also consistent with the NEPA regulations. An agency must “provide for cases where actions are planned by private applicants,” so that designated staff are available to advise potential applicants of studies or other information that will foreseeably be required for the later Federal action; the agency shall consult with the applicant and Indian tribe if the agency foresees its own involvement in the proposal; and it shall insure that the NEPA process commences at the earliest possible time. 40 C.F.R. § 1501.2(d)(1)-(3). The regulations reject the imposition of universal time limits on the NEPA process as “too inflexible,” and allow Federal agencies to determine the appropriate time limits for proposed actions. *Id.* § 1501.8. Appellants do not show that the Regional Director erred or abused her discretion in determining, after consultation, that in this case review of the draft EA Addendum and FONSI was premature. While the duty to conduct a NEPA-compliant review is obligatory prior to undertaking a major Federal action or limiting the alternatives for action, see 40 C.F.R. § 1506.1, the timing of the review is an exercise of discretion. BIA is required under NEPA to “take a ‘hard look’ at the environmental consequences” of a proposed action. *Neighbors for Rational Development, Inc. v. Albuquerque Area Director*, 33 IBIA 36, 47 (1998) (citing *Robertson v. Methow Valley*

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15 Council on Environmental Quality (CEQ) regulations for implementing NEPA are found at 40 CFR Parts 1500-1508. Department of the Interior (Department) regulations are found at 43 C.F.R. Part 46.
Citizens Council, 490 U.S. 332, 350 (1989)); see also Voices for Rural Living v. Acting Pacific Regional Director, 49 IBIA 222, 239 (2009). In undertaking an EA and deciding whether to issue a FONSI, BIA must exercise its judgment in analyzing the possible consequences and examining reasonable alternatives to assure that the agency makes a fully informed decision, a duty that cannot fairly be described as simply ministerial. See 49 IBIA at 239. And where an agency permits an applicant to prepare an environmental assessment, the agency must “make its own evaluation of the environmental issues and take responsibility for the scope and content of the environmental assessment.” 40 C.F.R. § 1506.5(b); see also 43 C.F.R. § 46.320(a) (Department regulations require independent review of an applicant’s draft EA). Based on the Tribe’s position that NEPA review should not commence until issuance of a Tribal permit, which permit Appellants do not dispute is required by the Lease prior to construction of the UIC well, and the absence of a proposed major Federal action by BIA, we conclude that BIA reasonably declined to process the draft EA Addendum and FONSI.

II. No Application for a Major Federal Action was Pending Before BIA at the Time of Appellants’ NEPA Submission

An agency’s NEPA obligations are triggered when the agency considers taking a major Federal action, 42 U.S.C. § 4332(c), “with effects that may be major and which are potentially subject to Federal control and responsibility,” 40 C.F.R. § 1508.18 (definition of “Major Federal action”). As the BIA Guidebook explains, “[t]he initial step in the [NEPA] process is determining if there is a Federal action and if the action is subject to NEPA review.” 59 IAM 3-H at 2. As relevant to this appeal, this determination also requires a finding that the proposed action is subject to BIA control. Id. If a proposal is

16 Neither the Regional Director nor do we express any opinion on whether the Tribe is obligated to provide such a permit under the Lease. See Answer Br. at 13. We have held that BIA’s trust duty is to the Indian landowner, that BIA has a duty to refrain from imposing itself in a contract dispute between a complainant and a tribe, and that the Board is not a court of general jurisdiction and does not have authority over disputes between individuals and tribes. See Cabazon Properties, LLC v. Pacific Regional Director, 64 IBIA 27, 32-34 (2016).

17 As a threshold matter, we note that neither the record nor the Decision show that the Regional Director relied on the lack of a proposed Federal action by BIA as a basis for the Decision. This rationale was raised in the Regional Director’s answer brief and Appellants have responded to it. The Board exercises de novo review over questions of law, Boire, 65 IBIA at 38, and may affirm on grounds different from or additional to those relied upon in the decision, see, e.g., Tafiya v. Acting Southwest Regional Director, 46 IBIA 197 (2008) (affirming on other grounds).
subject to BIA control and the action is not categorically excluded from any further environmental review, BIA must prepare an EA to determine the significance of the effects of the proposed action on the environment. See id. at 3, 5. If the analysis shows that the action will have no significant effect, a FONSI is published before proceeding with the decision. Id. at 5.

Appellants agree that a proposed Federal action is required to trigger an agency’s obligation to conduct a NEPA review, but argue that their application for a Class II UIC well permit from the EPA was sufficient to compel BIA to review their NEPA submission because the location of the proposed injection well is on Tribal land, and because BIA has jurisdiction over the land and is therefore “the lead agency for NEPA compliance purposes.” See Reply Br. at 4-5. We disagree. Because the only proposed Federal action at the time of Appellants’ submission of the draft EA Addendum and FONSI was the issuance of the permit by EPA, which is a separate Federal agency not subject to BIA’s control, Appellants’ application for the EPA permit triggered no duty on the part of BIA to review Appellants’ NEPA submission.

Appellants appear to concede this point in submitting an application to BIA to amend their existing right-of-way for construction of the injection well. Appellants argue that “to the extent the Board does not believe that BIA is obligated to undertake NEPA compliance . . . in response to either [the] submission of the EA Addendum, or . . . EPA UIC permit application,” BIA has now been presented with a request for Federal action by submission of Appellants’ right-of-way application, and the Regional Director’s position regarding the lack of a triggering event “has been rendered moot.” Sur-surreply Br. at 4. If anything, Appellants’ application negates their argument that a completed EA and FONSI were required before Appellants could apply to amend the existing right-of-way, and confirms that there was no proposal for a major Federal action pending before BIA at the time the Decision was issued. And without a proposed major Federal action within the control of BIA, Appellants cannot show that BIA was required to process their draft EA Addendum and FONSI when Appellants made their § 2.8 demand. See 59 IAM 3-H at 2 (“The NEPA process analyzes and discloses the significant impacts a proposed action may have on the quality of the human environment.”).

Further, Appellants express only personal “belie[f]” that they cannot submit an application for a Tribal water permit “until it can provide the required NEPA compliance documents.” Reply Br., Attach. (Declaration of Samuel Brown, May 16, 2017, at 8). Appellants apparently have not attempted to apply for a Tribal water permit, much less shown that a BIA-issued FONSI is a prerequisite to obtaining a Tribal water permit, such that the Regional Director’s decision to defer NEPA review effectively precludes Appellants from applying for or obtaining a permit as they contend.
Finally, to the extent that Appellants seek review of alleged inaction by the Regional Director now that they have submitted an application to amend the existing right-of-way, the right-of-way regulations contain procedures that Appellants must first satisfy for compelling action on an application for a right-of-way amendment. See 25 C.F.R. § 169.304. Board review would be premature.

Therefore, we conclude that Appellants have not shown error in the Regional Director’s determination to defer processing of the draft EA Addendum and FONSI, and affirm the Decision.

Conclusion

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 affirms the Regional Director’s November 16, 2016, decision.

I concur:

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Robert E. Hall
Administrative Judge
Thomas A. Blaser
Chief Administrative Judge