NOTE: This disposition is nonprecedential.

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Office of Hearings and Appeals
Interior Board of Land Appeals
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January 11, 2016

IBLA 2014-274, *ET AL.*	)	DV-2012-2-R & DV-2012-4-R
	)	
BLACK MESA COAL´TÍON &	)	Surface Mining
THE FORGOTTEN PEOPLE	)	
	)	Cases Consolidated;
	)	Petitions for Discretionary Review
	)	Dismissed; ALJ Order Affirmed

ORDER

The Black Mesa Coal´tíon (BMC) and The Forgotten People (TFP) have filed petitions for discretionary review of a July 31, 2014, Order issued by Administrative Law Judge (ALJ) Andrew S. Pearlstein. ALJ Pearlstein's Order dismissed requests for administrative review (RFR) of a January 6, 2012, decision of the Office of Surface Mining Reclamation and Enforcement (OSM) approving the application by the Peabody Western Coal Company (Peabody) for renewal of the existing surface coal mining permit, No. AZ-0001-D (Permit), for the Kayenta Mine (Mine). The Mine, which is situated on Indian lands in northeastern Arizona, within the Navajo and Hopi Indian Reservations, has operated since 1973, and currently provides coal, by rail, to the Navajo Generating Station. *See Peabody Coal Co. v. OSM*, 123 IBLA 195, 197 (1992); ALJ Order, dated Oct. 24, 2012, at 4.

Because they arise from the same facts and raise common questions of fact and law, pursuant to 43 C.F.R. § 4.1113, we hereby consolidate the two petitions for discretionary review for final disposition by the Board.[1] For the reasons explained

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[1] BMC's petition for discretionary review was styled as a notice of appeal filed pursuant to 43 C.F.R. § 4.1271(a). The cited regulation, however, is not applicable in this case. Rather, the regulations at 43 C.F.R. §§ 4.1360 through 4.1369 govern exclusively the disposition of RFRs of OSM decisions approving or disapproving applications for, *inter alia*, permit renewals. These regulations provide that the exclusive remedy for challenging an ALJ order disposing an RFR is to file a petition

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below, we dismiss the petitions for discretionary review and affirm ALJ Pearlstein's order.

Factual and Procedural Background

On February 26, 2010, Peabody submitted an application to OSM for renewal of its coal mining permit for the Mine, which was set to expire on July 6, 2010. *See* ALJ Order, dated Oct. 24, 2012, at 7. The permit renewal application was filed more than 120 days before the expiration of the existing permit, as required by section 506(d)(3) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1256(d)(3) (2012), and 30 C.F.R. § 774.15(b). In its application, and consistent with SMCRA and its implementing regulations, Peabody proposed to continue mining operations in the existing permit area for a 5-year term, from July 6, 2010, to July 6, 2015; Peabody did not seek to expand the permit area or change the mining and reclamation plan. *See* ALJ Order, dated Oct. 24, 2012, at 7.[2]

On January 6, 2012, OSM issued a decision approving Peabody's application for renewal of the permit, for a 5-year term beginning on July 6, 2010, based on its conclusion that all of the statutory and regulatory criteria for permit renewal had been satisfied. *See* 30 U.S.C. § 1256(d)(1) (2012) and 30 C.F.R. § 774.15(c)(1).[3]

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for discretionary review. *See* 43 C.F.R. § 4.1369(a). We therefore construe the "appeal" by BMC as a petition for discretionary review. *See The Hopi Tribe v. OSM*, 107 IBLA 329, 330-31 (1989).

[2] Under SMCRA, permits are issued for a term not to exceed five years, and permit renewals are for a term not to exceed the period of the original permit. *See* 30 U.S.C. § 1256(b) and (d)(3) (2012); 30 C.F.R. §§ 773.19(c) and 774.19(d).

[3] SMCRA and the implementing regulations provide that OSM "shall" approve a complete and accurate application for permit renewal unless it finds, in writing, that: (1) the terms and conditions of the existing permit are not being satisfactorily met; (2) the present surface coal mining operations are not in compliance with the environmental protection standards of SMCRA and the regulatory program; (3) the requested renewal substantially jeopardizes the operator's ability to comply with SMCRA and the regulatory program; (4) the operator has not provided evidence of the required insurance; (5) the operator has not provided evidence that any required performance bond will continue in full force and effect for the proposed renewal

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OSM's decision was supported by an environmental assessment and finding of no significant impact prepared in accordance with the regulations implementing the National Environmental Policy Act of 1969 (NEPA), 40 U.S.C. §§ 4321-4370h (2012). *See* 40 C.F.R. Parts 1500-1508 and 43 C.F.R. Part 46. In February 2012, three separate RFRs of OSM's decision were filed by Black Mesa Trust (BMT); To' Nizhoni Ani, Black Mesa Water Coalition, Diné Citizens Against Ruining Our Environment, Center for Biological Diversity, and the Sierra Club (collectively, TNA); and TFP.[4] The RFRs alleged violations of SMCRA's permit renewal requirements, and the requirements of NEPA and Section 106 of the National Historic Preservation Act, 16 U.S.C. § 470f (2012).

After extensive briefing by the parties, ALJ Pearlstein issued an order on October 24, 2012, denying the parties' respective motions for summary decision, but partially granting Peabody's motion to dismiss TFP's RFR. *See* ALJ Order, dated Oct. 24, 2012. ALJ Pearlstein's disposition of Peabody's motion to dismiss resulted in the dismissal of 21 of the 62 claims identified by the ALJ as raised by TNA and TFP, leaving the remaining claims for possible further adjudication.[5] *Id.* at 42-44. In discussing the potential disputed factual issues related to these remaining claims that might, absent a settlement, warrant a hearing, ALJ Pearlstein noted that such issues were "considered only potential issues for hearing, because it remains to be seen if the Petitioners will go forward to produce substantial evidence in support of their positions." *Id.* at 45. The judge directed the parties to file a statement indicating

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period; or (6) the applicant has not provided any revised information required by OSM. 30 U.S.C. § 1256(d)(1) (2012); 30 C.F.R. § 774.15(c)(1).

[4] Under the Board's regulations, at 43 C.F.R. §§ 4.1361 and 4.1362(a), an RFR of an OSM decision may be filed with the Hearings Division by "[t]he applicant, permittee, or any person having an interest which is or may be adversely affected" by the decision. The RFRs filed by BMT, TNA, and TFP were docketed by the Departmental Cases Hearings Division, Office of Hearings and Appeals (OHA), respectively, as DV-2012-2-R, DV-2012-3-R, and DV-2012-4-R.

[5] The ALJ categorized the remaining claims as falling into nine categories: (1) hydrologic impacts; (2) preservation of historic and cultural resources; (3) reclamation; (4) reclamation bond; (5) local air quality; (6) cumulative health impacts; (7) relocation; (8) NEPA alternatives; and (9) NEPA significance. *See* ALJ Order, dated Oct. 24, 2012, at 42-44.

whether they wished to attempt to resolve the matter through alternative dispute resolution (ADR). *Id.* at 46. The judge further stated that if the parties did not agree to an ADR process, he would then direct the parties "to provide preliminary offers of proof," including "a list of anticipated expert and lay witnesses, a list of anticipated exhibits, and brief statements of [the] nature of anticipated testimony for each witness," in order to "gauge the potential length and scope of the administrative hearing." *Id.*

TNA, OSM, Peabody, and the Salt River Project Agricultural Improvement and Power District (SRP)[6] thereafter entered into settlement negotiations, and on April 24, 2014, entered into a settlement agreement resolving all of TNA's claims. *See* ALJ Order, dated July 31, 2014, at 2. In a May 9, 2014, Order, ALJ Pearlstein dismissed TNA's RFR and approved the settlement agreement, stating that it constituted "a fair, reasonable, and adequate settlement of TNA's claims."[7] ALJ Order, dated May 9, 2014 (Request for Review of TNA Dismissed), at 1.

After ALJ Pearlstein's May 2014 Order, therefore, only the RFRs filed by BMT and TFP remained pending. In a separate May 9, 2014, Order, the judge directed BMT and TFP to show cause why their RFRs should not be dismissed, and, to the extent a party still requested an evidentiary hearing, to provide "a preliminary substantive offer of proof with respect to each specific issue they seek to litigate, including a showing that those issues are not sufficiently resolved by the Settlement Agreement signed by the other parties." ALJ Order, dated May 9, 2014 (Responses Scheduled to Show Cause), at 2.

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[6] SRP, which operates the Navajo Generating Station, intervened in the proceeding before Judge Pearlstein, but has not sought to intervene in the pending consolidated case before the Board.

[7] Prior to the April 2014 settlement agreement, in May 2012, Peabody filed a new application for a significant permit revision that OSM deemed to be administratively complete on Mar. 5, 2014. *See* ALJ Order, dated July 31, 2014, at 12. On May 16, 2014, the Department of the Interior published in the *Federal Register* a notice of intent to prepare an environmental impact statement and notice of public scoping meetings concerning Peabody's comprehensive proposal to revise the permit and authorize operations at the mine through Dec. 22, 2044. *See* 79 Fed. Reg. 28546 (May 16, 2014).

BMT and TFP both responded to ALJ Pearlstein's Order, objecting to dismissal of their RFRs, and stating that an evidentiary hearing or further proceedings should be scheduled to address their claims. *See* BMT Response to Order to Show Cause, dated May 29, 2014; TFP Response to Order to Show Cause, dated May 29, 2014. In its Response, TFP made a substantive offer of proof, alleging facts and offering evidence as to each of the remaining issues before the judge. *See* TFP Response to Order to Show Cause, dated May 29, 2014, at 3-13. It also identified anticipated expert and lay witnesses, provided brief statements summarizing the nature of anticipated testimony, and identified anticipated exhibits. *Id.* Peabody and OSM concurred in dismissal of the pending RFRs, and opposed any further proceedings.[8]

On July 31, 2014, ALJ Pearlstein issued the order now the subject of the petitions for discretionary review, denying BMT's and TFP's requests for an evidentiary hearing and dismissing their RFRs. In the order, the judge held that BMT and TFP had failed to establish, with allegations of fact and supporting evidence, that there were any disputed issues of fact that, if proven, would justify overturning OSM's decision to renew the permit, and thus warranted a hearing and final resolution by the judge. *See* ALJ Order, dated July 31, 2014, at 10 (TFP), 12-13 (BMT). For example, ALJ Pearlstein found that TFP's offer of proof regarding water quality issues was "cursory and vague"; its offer of proof regarding cultural resources was similarly vague, and did not contradict any information in OSM's environmental analysis; and its offer of proof regarding air quality and health effects did not "provide any specific facts or cite any evidence . . . that could support convening an evidentiary hearing." *Id.* at 7-9. The judge concluded:

> Neither the Forgotten People nor BMT have provided an adequate offer of proof to support convening an evidentiary hearing on any issue at this juncture. . . . As a practical matter, any remaining disputes among the parties will have to be resolved in the context of the review of OSM's upcoming decisions on the permit renewals for [Peabody's] Kayenta Mine Complex and the 2013 Significant Permit Revision.

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[8] On June 23, 2014, TFP also asked the judge to facilitate settlement negotiations between TFP, OSM, Peabody, and SRP. OSM, Peabody, and SRP opposed the request. ALJ Pearlstein's July 2014 Order dismissing TFP's RFR also denied TFP's request to resume settlement negotiations, given the opposition by the other parties. *See* ALJ Order, dated July 31, 2014, at 10 ("Unfortunately, there is no reason to believe that resuming ADR or settlement negotiations at this stage of this proceeding would be fruitful.").

Id. at 13-14. ALJ Pearlstein therefore dismissed both RFRs, "bringing this proceeding to an end." *Id.* at 14.

In accordance with the regulation at 43 C.F.R. § 4.1369, BMC and TFP each filed with the Board petitions for discretionary review of ALJ Pearlstein's July 2014 order, respectively, on August 29, and September 2, 2014.[9] Under our regulation at 43 C.F.R. § 4.1369(d), the deadline for Board action on BMC's and TFP's petitions for discretionary review was 60 days following the deadline for filing responses to each petition, which was the conclusion of the last 20-day period for filing a response by any of the other parties to the proceeding, which began upon each party's receipt of the petition. *See* 43 C.F.R. § 4.1369(c). We do not know when OSM, Peabody, and SRP received each petition, and thus cannot calculate exactly the deadline for Board action. However, because BMC and TFP sent their petitions, by first class mail, in August 2014, it is clear that the deadline has long since passed. Nevertheless, the Board is still vested with jurisdiction to resolve the merits of the petitions; we find nothing in SMCRA or the Department's regulations that precludes us from doing so. *See Pacific Coast Coal Company v. OSM*, 158 IBLA 115, 117 n.1 (2003); *Peabody Coal Co. v. OSM*, 123 IBLA at 206 n.9.

We note that following the filing of the petitions for discretionary review of Judge Pearlstein's July 2014 Order, Peabody timely filed a new application for renewal of its permit, proposing the continuation of mining operations in the existing permit area for a 5-year term from July 6, 2015, to July 6, 2020. By letter dated June 29, 2015, OSM informed Peabody that, in view of the agency's need to conduct NEPA and other review of the new permit renewal application, Peabody "may continue mining and reclamation operations under the current permit until OSM[] makes a decision on the permit renewal application." Letter to Peabody from Manager, Indian Program Branch, Program Support Division, Western Region, OSM, dated June 29, 2015, at 2.

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[9] BMT did not file a petition for discretionary review of Judge Pearlstein's July 2014 Order dismissing its RFR. Thus, to the extent it concerned BMT, the July 2014 Order is administratively final for the Department and no longer subject to review by the Board. *See, e.g., West Virginia Highlands Conservancy, Inc.*, 166 IBLA 39, 44 (2005); *Turner Brothers Inc. v. OSM,* 102 IBLA 111, 121 (1988).

Analysis

A. BMC's Petition for Discretionary Review

Only those who are eligible to practice before the Department, as identified in 43 C.F.R. § 1.3, are entitled to practice before this Board. That regulation requires that a person practicing before the Board must be an attorney or, if not an attorney, may represent an organization only if she is an officer or full-time employee of the organization. *See Native Ecosystems Council*, 185 IBLA 268, 271 (2015); *Building & Construction Trades Council of Northern Nevada*, 139 IBLA 115, 116 (1997). When an appeal is filed by a person who is not eligible to represent an appellant under 43 C.F.R. § 1.3, the appeal is properly dismissed. *See, e.g., Native Ecosystems Council*, 185 IBLA at 272; *Wilderness Watch*, 168 IBLA 16, 30-32 (2006). The rule is the same in a proceeding such as here, where what is before the Board is a petition for discretionary review. *See* 43 C.F.R. § 4.1103(a) ("[T]he Board may determine the eligibility of persons to practice before OHA in any proceeding under [SMCRA] . . . pursuant to 43 CFR [P]art 1") and (b) ("If . . . the Board determines that any person is not qualified to practice before OHA, . . . the Board shall disqualify the person"). The burden of demonstrating that the person seeking to represent a party before the Board is qualified under 43 C.F.R. § 1.3 rests with the person filing the pleading. *See Resource Associates of Alaska*, 114 IBLA 216, 218-19 (1990).

Here, BMC's petition for discretionary review was signed by Jennafer Waggoner-Yellowhorse, who describes herself only as a "Defrocked Plaintiff" and a "TNA Settlement Objector." BMC Petition at unpaginated (unp.) 3. She does not describe the nature, purposes, or membership of BMC, or identify her affiliation with BMC. Nor is there any evidence in the text of the petition that it was filed on behalf of BMC; the only indication that Waggoner-Yellowhorse filed the petition on behalf of BMC is the fact that the bottom of each page of the petition references BMC. However, the only other filing by Waggoner-Yellowhorse with the Board—a letter dated September 26, 2014, and captioned "Black Mesa Coal'tion's Request for Clarification & Time Extension"—clearly indicated Waggoner-Yellowhorse's intent to act on behalf of BMC.[10]

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[10] In its petition for discretionary review, and again in its Sept. 16, 2014, filing, BMC requested an extension of time to file a brief in support of its petition. Although BMC has yet to file such a brief, it has had since the latter half of 2014 to do so. We therefore deny the request.

There is no evidence, however, that Waggoner-Yellowhorse is an attorney at law or otherwise qualified, under 43 C.F.R. § 1.3, to bring the petition on behalf of BMC. Moreover, the regulation does not allow her to practice before the Board as an "agent" or an individual performing a service for a client other than as an attorney at law. *See UOS Energy, LLC*, 176 IBLA 286, 294 n.8 (2009); *Gail Schmardebeck*, 142 IBLA 160, 161-62 (1998); *Robert G. Young*, 87 IBLA 249, 250 (1985). We therefore dismiss the petition to the extent it was brought on behalf of BMC.

We also find that even though 43 C.F.R. § 1.3 permits an individual to bring a petition on her own behalf, Waggoner-Yellowhorse does not have standing to do so. The regulation at 43 C.F.R. § 4.1369(a) provides that "[a]ny party aggrieved by a decision of an [ALJ] may file a petition for discretionary review with the Board." Waggoner-Yellowhorse, however, fails to allege in her petition that she is "aggrieved" or adversely affected by ALJ Pearlstein's July 2014 Order. Nor could she have done so. The order dismissed the RFRs filed by BMT and TFP, and Waggoner-Yellowhorse cannot be aggrieved or adversely affected by a final disposition of pending challenges by different parties. *See Western Aggregates, LLC*, 174 IBLA 280, 287-88 (2008). In addition, we have held that "tribal membership does not confer standing on an individual Indian challenging an OSM permitting decision that adversely affects only the rights or interests of the tribe." *Yazzie v. OSM*, 185 IBLA 243, 249 (2015). Here, because Waggoner-Yellowhorse has made no attempt to demonstrate that she is adversely affected by the order dismissing BMT's and TFP's RFRs, she has no standing to seek discretionary review. Accordingly, we dismiss her petition for discretionary review.

B. *TFP's Petition for Discretionary Review*[11]

In its petition, TFP first argues that it was not a party to the settlement agreement reached by TNA, OSM, SRP, and Peabody and that "material issues related to the health, safety and well[-]being of residents living in and around the permit area have not been addressed nor can be adequately represented by the parties to the settlement agreement." TFP Petition at 1. In particular, TFP states that the settlement agreement focuses on OSM's adjudication of Peabody's new application for significant permit revision and therefore does not address "the immediate and on-

[11] Although the renewed permit expired at the end of its 5-year term on July 6, 2015, as we have noted, Peabody continues to operate under the terms of the permit pending completion of OSM's NEPA process. We therefore think it is appropriate to address the merits of TFP's petition for discretionary review.

going adverse effects" of ongoing mining activities. *Id.* at 2-3. TFP then alleges five specific errors in the NEPA analysis supporting OSM's decision approving Peabody's permit renewal application. First, TFP argues that OSM failed to address the impacts of the mine on springs and wells, including aquifer drawdown resulting in "the appearance of sinkholes, dropped rocks and cracks in canyon walls, dried up wells, the formation of sinkholes, damage to structures due to subsidence, and dropped rocks." *Id.* at 3. As a result, TFP says its members have had to haul water and "have received reports of arsenic and uranium contamination in wells." *Id.* Second, TFP argues that OSM's environmental assessment did not take into account many of the prehistoric and Navajo sites within the permit area requiring protection under the Native American Graves Protection and Repatriation Act (NAGPRA). *Id.* at 4. Third, TFP argues that OSM failed to address air quality issues from the mine, including "significant amounts of coal dust," that are adversely affecting the health of local residents. *Id.* Fourth, TFP claims that OSM failed to analyze the impacts to the health of tribal members resulting from water contamination from the mine. *Id.* at 5. Finally, TFP argues that OSM did not analyze the impacts to tribal members required to relocate, or "threatened with relocation," due to mining activities. *Id.*

Our regulations require that a petition for discretionary review "set forth specifically the alleged errors in the decision, with supporting argument." 43 C.F.R. § 4.1369(b). Here, the decision that is the subject of TFP's petition is ALJ Pearlstein's July 31, 2014, order dismissing its RFR. However, TFP's petition does not identify any errors in ALJ Pearlstein's analysis or decision. Rather, it restates allegations related to OSM's NEPA analysis made by TFP in its filings before ALJ Pearlstein. For this reason, TFP has not met its burden to show error in the ALJ's decision and we must dismiss its petition for discretionary review. Moreover, we can find no error in ALJ Pearlstein's determinations that the allegations made in TFP's filings and petition are anecdotal, vague, and insufficient to contradict the information in OSM's environmental assessment, and fail to show any error in the NEPA analysis supporting OSM's decision to renew the mine permit. *See* ALJ Order, dated July 31, 2014, at 7-10.

As a final matter, at the end of its petition, TFP "requests a hearing on this matter." TFP Petition at 5. Because we conclude that TFP has failed to carry its burden to show error in ALJ Pearlstein's decision, we decline to exercise our discretion under 43 C.F.R. § 4.1101(b) to order a hearing, and therefore deny TFP's request.

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 petitions for discretionary review by the Black Mesa Coal´tíon and/or Jennafer Waggoner-Yellowhorse and The Forgotten People are dismissed, and ALJ Pearlstein's order is affirmed.

/s/
Amy B. Sosin
Administrative Judge

I concur:

/s/
Christina S. Kalavritinos
Administrative Judge