

THERMAL ENERGY CO.

IBLA 93-331, 93-332

Decided May 24, 1996

Appeals from decisions of the New Mexico State Office, Bureau of Land Management, rejecting preference right coal lease applications NMNM 8128 and NMNM 8130.

Set aside and remanded.

1. Administrative Procedure: Adjudication— Administrative Procedure: Administrative Review—Appeals: Generally—Coal Leases and Permits: Applications—Coal Leases and Permits: Leases—Intervention—Rules of Practice: Appeals

IBLA is not limited to considering issues raised by the parties to an appeal. IBLA has plenary authority to review de novo all official actions unless the scope of appellate review by or on behalf of the Secretary has been diminished or constrained by the Secretary in a duly promulgated regulation or by Congress through enacted law. IBLA does not follow a rule of precluding intervenors from raising issues not discussed in the agency's decision or raised by an appellant.

2. Coal Leases and Permits: Applications—Coal Leases and Permits: Leases—Res Judicata

IBLA is not limited by the doctrine of administrative finality from considering ~~issues that IBLA had authority to consider in the presence of an application for a preference right lease.~~ IBLA has authority to consider the presence of an application for a preference right lease as a compelling legal reason for reviewing its decision to issue it.

3. Coal Leases and Permits: Applications—Coal Leases and Permits: Leases

The standard for the level of detail of information an applicant must submit under 43 CFR 3430.4-1(d) is sufficient information to show a reasonable factual basis that commercial quantities of coal exist in the area of the lease applied for.

4. Coal Leases and Permits: Applications–Coal Leases and Permits: Leases

A contract for sale is not necessary to prove revenues under 43 CFR 3430.4-1(d)(1).

5. Coal Leases and Permits: Applications–Coal Leases and Permits: Leases

Under 43 CFR 3430.1-2, an applicant must present sufficient evidence to show that there is a reasonable expectation that the revenues from the sale of the coal will exceed the costs of developing the mine, and extracting, removing, and marketing the coal. The "prudent person" and "marketability" standards are objective standards. The applicant must prove that a prudent person would expend further time and means to develop a mine. Evidence of marketability of the coal is necessary.

6. Coal Leases and Permits: Applications–Coal Leases and Permits: Leases

For BLM to make a commercial quantities determination for a combined mining venture, comparable quantity and quality data for Federal and non-Federal coal in the combined mining venture are necessary. It is reasonable for BLM to require an applicant to provide such data about non-Federal lands within a combined mining venture that are relevant to a commercial quantities determination.

7. Coal Leases and Permits: Applications–Coal Leases and Permits: Leases

If the applicant for a preference right lease has submitted timely some, but not all, of the information required in 43 CFR 3430.4-1, the authorized officer shall request additional information and shall specify the information required.

8. Coal Leases and Permits: Applications–Coal Leases and Permits: Leases

A coal preference right lease applicant that completed its exploration and submitted an application before the Department revised the governing regulations in 1976 and thereafter must comply with the requirements of the revised regulations.

APPEARANCES: Brandt Andersson, Esq., San Francisco, California, for Thermal Energy Co.; Paul E. Frye, Esq., and Lisa M. Enfield, Esq., Albuquerque, New Mexico, for the Navajo Nation; Arthur Arguedas, Esq., Office of the Field Solicitor, Santa Fe, New Mexico, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

I. Introduction

Thermal Energy Company (Thermal) has appealed two separate March 23, 1993, decisions of the State Director, New Mexico State Office, Bureau of Land Management (BLM), rejecting preference right coal lease applications (PRLA's) NMNM 8128 and NMNM 8130. ^{1/}

BLM's decisions state that Thermal "failed to meet the requirements of 43 CFR 3430.5-1(a)(3) and 43 CFR 3430.2-1(a)(2), and has failed to show commercial quantities on the applied for lands as per 43 CFR 3430.5-1(a)(1)" ^{2/}; that Thermal "did not provide adequate responses to [several] requested items" in BLM Intent to Reject Application notices dated June 15, 1989; and that Thermal's revised Final Showing "did not demonstrate commercial quantities * * * and did not provide the additional information requested." BLM's decisions conclude:

^{1/} The Navajo Nation's motion for leave to intervene in this appeal was granted, over Thermal's objection, by order dated Nov. 9, 1993.

^{2/} 43 CFR 3430.2-1(a)(2) provides:

"All preference right coal lease applications shall have contained or shall have been supplemented by the timely submission of:

"(a) Information on the quantity and quality of the coal resources discovered within the boundaries of the prospecting permit area, including an average proximate analysis, sulfur content and BTU content of the coal, and all supporting geological and geophysical data used to develop the required information.

* * * * *

"(2) Coal quality data shall include, at a minimum, an average proximate analysis, sulfur content, and BTU content of the coal in each bed to be mined. Also, all supporting geological and geophysical data used to develop the required information shall be submitted."

43 CFR 3430.5-1(a)(3) provides that "[t]he authorized officer shall reject the application if * * * [t]he applicant otherwise failed to meet statutory or regulatory requirements."

43 CFR 3430.5-1(a)(1) provides that "[t]he authorized officer shall reject the application if * * * [t]he applicant fails to show that coal exists in commercial quantities on the applied for lands."

Therefore, in accordance with 43 CFR 3430.5-1(a)(1), [each application] is hereby rejected for failure to demonstrate that coal exists in commercial quantities on the applied for lands, and for failure to meet the other Final Showing requirements set forth by statute and regulation as specified in our Decision of December 2, 1987, our Notice of June 15, 1989, and in this Decision.

II. Factual and Procedural Background

BLM issued coal prospecting permit NMNM 8128 covering approximately 4,498 acres in secs. 8-10, 15, 17, 22, 25-27, 34, and 35, T. 21 N., R. 8 W., New Mexico Principal Meridian, San Juan County, New Mexico, and permit NMNM 8130 covering approximately 3,053 acres in secs. 5-8, T. 20 N., R. 7 W., and secs. 1-3 and 12, T. 20 N., R. 8 W., to Leland A. Hodges effective July 1, 1969, for 2 years under the authority of the Mineral Leasing Act of 1920, 30 U.S.C. § 201(b) (1970). ^{3/} BLM accepted a partial relinquishment of acreage in NMNM 8130 on July 23, 1970. The remaining acreage totals approximately 2,133 acres. Assignments to Thermal were approved by BLM on March 26, 1971, and Thermal's applications to extend the permits for 2 years were granted by BLM on December 1, 1971.

In January 1972, Thermal requested issuance of preference right coal leases for the area covered by the permits. Thermal stated: "We have drilled 92 exploration holes on NM 8128 [and 32 holes on NMNM 8130] and we have heretofore furnished you with copies of the logs showing the depths and thicknesses of the coal seams we discovered. We have determined that [each] permit contains commercial quantities of coal."

In response to these and other PRLA's from Thermal, in March 1972 BLM asked the U.S. Geological Survey (USGS) Regional Mining Engineer to issue a report and recommendations. Meanwhile, Thermal assigned half of its interest in the permits to Peabody Coal Company (Peabody). ^{4/} After amending its regulations in May 1976, BLM issued a June 29, 1976, decision requiring Thermal and Peabody to submit additional information in support of their PRLA's. BLM granted extensions of time for filing this information, which was filed in February 1977. BLM forwarded it to USGS in September 1977.

^{3/} Originally in section 2 of the Mineral Leasing Act of 1920, section 201(b) was redesignated section 201(b)(1) and substitute language was provided by section 4, P.L. 94-377, the Federal Coal Leasing Amendments Act of 1976.

^{4/} These assignments, executed on Nov. 2, 1971, were approved by BLM on Sept. 24, 1985. On May 23, 1988, BLM approved assignments of Peabody's undivided 50-percent interest back to Thermal.

In November 1977 BLM asked USGS whether it felt the initial showing information met the requirements of 43 CFR 3521.1-1 (1976). 5/ USGS responded that it did. 6/

In July 1979 BLM amended its regulations again. 7/ In September 1979 BLM asked USGS if NMNM 8128 and NMNM 8130 complied with the new regulations governing initial showings and, if not, what additional evidence was required. USGS' November 29, 1979, response specified information omitted from the initial showings for each permit that USGS needed to determine the adequacy of the showings. 8/ In addition, USGS recommended BLM confirm that no drilling had taken place on specified areas of three sections in NMNM 8128. On February 7, 1980, after a December 1979 meeting with Peabody officials concerning deficiencies in seven Peabody-Thermal PRLA's, BLM issued a decision requiring additional information from Thermal, including the information for NMNM 8128 and NMNM 8130 that USGS had specified. Peabody submitted additional information for these PRLA's on June 10 and October 24, 1980. On March 24, 1981, USGS said Thermal satisfied the initial showing requirements.

BLM amended 43 CFR Part 3430 again in 1982 and in 1987. 9/ On June 5, 1987, BLM sent Thermal a notice of intent to request Final Showings under 43 CFR 3430.4-1 (1982). 10/ On December 2, 1987, BLM issued decisions

5/ Under the 1976 regulations, the initial showing requirements were contained in 43 CFR 3521.1-1(b). Under that regulation, "[c]oal quality data submittals shall include, as a minimum, an average proximate analysis and BTU content for coal beds * * *." 43 CFR 3521.1-1(b) (1976). In a Nov. 23, 1977, memorandum, the BLM State Director asked the USGS Area Mining Supervisor whether the initial showing information met the requirements of the regulation, stating: "We feel that for the purpose of this determination it would be sufficient if there is at least some information provided on each item required in the regulation."

6/ In its Nov. 29, 1977, memorandum concerning NMNM 11670 and six other Thermal PRLA's, USGS stated: "The information submitted regarding the quantity and quality of coal discovered within the permits is adequate for our purpose under the initial showing requirement."

7/ 44 FR 42584, 42628 (July 19, 1979).

8/ The information listed in USGS' Nov. 29, 1979, memorandum as omitted was: "topography map showing natural drainage pattern; brief description of [proposed] measures to prevent or control fire hazards to public health and safety; drill hole map showing all drill hole locations; [and] fixed carbon and volatile percentages are not shown on the proximate analysis of the four (4) core holes" (emphasis in original).

9/ 47 FR 33114, 33143 (July 30, 1982); 52 FR 25794, 25798 (July 8, 1987). The 1987 amendments were the last. The regulations as they appear in the current CFR volumes contain the regulations, as amended through 1987.

10/ This notice stated in part:

"In your response to the request for final showings you must, among other requirements, describe the combined mining venture within which your

requiring Thermal to submit information required for a Final Showing for NMNM 8128 and NMNM 8130. Thermal filed its response to these decisions on May 2, 1988.

On June 15, 1989, BLM issued notices to Thermal that it intended to reject NMNM 8128 and NMNM 8130 because Thermal

failed to show that coal exists in commercial quantities * * * as per 43 CFR 3430.5-1[a](1) [and] failed to meet the statutory and regulatory requirements in accordance with 43 CFR 3430.5-1[a](3). The submission did not show the detailed information as required by 43 CFR 3430.4, and as requested in our Final Showing dated December 2, 1987.

The notices enumerated several deficiencies in the information Thermal had submitted. 11/ On October 16, 1989, Thermal submitted a revised Final Showing.

After Thermal submitted its revised Final Showing on October 16, 1989, the New Mexico State Office requested by memorandum dated November 22, 1989, that the Albuquerque District Manager review it for the sufficiency of the geologic, environmental, and economic data. 12/ This request was

fn. 10 (continued)

PRLAs would be included if you intend to mine your PRLA in conjunction with * * * an operation which aggregates several coal tracts together. * * *

We also hereby give notice that we intend to use a set of detailed guidelines as a part of the packet that will be sent to you with the request for final showing. * * * The commercial quantities determination process * * * described in those guidelines is quite rigorous; involving, among other work, a discounted cash flow (DCF) analysis and an environmental compliance cost assessment."

11/ Thermal requested BLM to withdraw this notice and issue a request for further information under 43 CFR 3430.4-2. On July 19, 1989, BLM denied this request and extended the time for response to the June 15 notice until Oct. 16, 1989. Thermal appealed the June 15 notice and BLM dismissed the appeal as a protest on Aug. 10, 1989. Thermal appealed the Aug. 10, 1989, decision to us and BLM requested a remand so that it could consider Thermal's response to the June 15 notice, submitted on Oct. 16, 1989. We granted BLM's request, set aside its Aug. 10, 1989, decision, and remanded the case files by order dated Jan. 23, 1990 (IBLA 89-647).

12/ This memorandum stated in part:

"1. Is the geologic data complete? Is the information derived from drill holes legally obtained before the expiration of the prospecting permit?

* * * * *

referred to the Farmington Resource Area Manager, who prepared a Geologic and Environmental Review (GER) on February 19, 1990.

The GER stated that a "geologic review" was also prepared. ^{13/} The "geologic review" stated that Thermal's revised Final Showing relied heavily on its 1977 Initial Showing and answered most of BLM's May 1989 questions concerning the specifics of the identified reserve base and the proposed mine. It also addressed the remaining questions for each of the three PRLA's (NMNM 8128, NMNM 8130, and NMNM 11670) in some detail and concluded with a summary of additional information for BLM to request. ^{14/} The Farmington Resource Area Manager's GER for the District Office stated on page 2 that "the attached summary report [i.e., the "geologic review"]

fn. 12 (continued)

"3. Is the economic data sufficient to determine commercial quantities? Please include a printout from a preliminary run of the Electric Power Research Institute (EPRI) mine cost model in your report.

"[Your] report should also describe any omissions in the revised Final Showing. Please specify any additional information which may be required, so we can notify the applicant accordingly."

^{13/} The GER states that a "geologic review was * * * prepared which summarizes the results of the draft geologic data adequacy reports prepared for the three PRLA's."

The "geologic review" referred to in this Feb. 19 memorandum is not in the record of these appeals, so we have had to take official notice of the copy in the record of IBLA 93-105, Thermal's appeal of BLM's rejection of PRLA NMNM 11670. The "geologic review" is a memorandum apparently dated Feb. 15, 1990, from the Area Manager to the District Manager entitled "Summary Review of Thermal Energy Company Final Showing Geologic Data Adequacy," stating in part:

"Prior to issuing a request for additional information [the June 15, 1989, Intent to Reject Application notices], a detailed geologic report was prepared for each of the PRLA's in order to more clearly define the information required for each tract. These reports were submitted to [the District Manager] during the fall of 1988 and copies bearing the comments of your staff were received in this office in April or May 1989. The present summary report should be understood to incorporate those earlier detailed reports by reference."

The "earlier detailed reports" for NMNM 8128 and NMNM 8130 are not included in the record of these appeals, although a September 1988 "Geologic Data Adequacy Report PRLA NM-11670" is included in the record for IBLA 93-105.

^{14/} The summary included:

"1. Any separate seam 1 coal analyses from within NM-8128.

"2. Any coal analyses on any of the tracts for which fixed carbon and volatile matter were determined. Any complete proximate analyses.

"3. What coal reserves are included in each PRLA in each seam to be mined? Reserves should be delineated as- NM-8128, seam 1, XX tons, etc." ("Summary Review of Thermal Energy Company Final Showing Geologic Data Adequacy," supra note 13, at 5 (emphasis in original)).

details the deficiencies in the three PRLA's" and translated its summary as follows: "The inadequacies in data submitted since the issuance of the permit are * * *: (1) No separate seam 1 coal analysis in NM-8128; (2) No complete proximate analyses determined for any of the tracts; (3) No seam by seam reserve breakdown by tract." (Emphasis in original.)

In its February 27, 1990, report to the State Office, the District Office carried this language forward: "The geologic data is incomplete in that separate Seam One coal analysis in NM-8128 is not presented. Complete proximate analyses have not been determined for any of the tracts. * * * Also, there is no seam by seam reserve breakdown by tract." The District Office added that some of the data "may not have been legally obtained due to lack of approval to commence drilling." In response to the question whether the economic data was sufficient, the February 27, 1990, report stated: "The data provided in the final showing relating to economics is not sufficient to determine commercial quantities. Information on the number of acres that will be mined, the average coal thickness by seam and the average overburden thickness is lacking. What year is "year one" for this proposed mine?" The report also asked what the recovery factor and the in-place coal density for the entire combined mining venture (CMV) were. The report attached the "geologic review" and the environmental report and addressed a request to the State Office that, if these attachments "indicate questions which we have not listed above, please include them in your request" to the permittee for more information.

An additional concern was raised in the Farmington Resource Area Manager's "geologic review":

Finally, two other considerations in the [revised Final Showing] were noted. * * * The second concern is the hypothetical mine-mouth power plant. This is treated in the [revised Final Showing] as a fait accompli to such an extent that we felt that it might escape notice that such a plant is not, as far as we know, planned or even proposed by anyone. Any request for additional information should require the submittal of clear, good-faith evidence that such a plant will be built, by whom, and what measures have been taken to secure the site, power-line rights-of-way, etc. [15]

This was translated in the Area Manager's GER as one of the "inadequacies in data submitted since the issuance of the permit": "(7) No apparent basis for the proposed on-site power plant on which the CMV [combined mining venture] hypothetical market is predicated" (GER at 2).

15/ "Summary Review of Thermal Energy Company Final Showing Geologic Data Adequacy," supra note 13, at 4-5.

In his February 27, 1990, report to the Deputy State Director, the Assistant District Manager stated:

In addition to the above, we need the following information.

* * * * *

2. This is the first indication that Thermal was considering building a power plant. Has any action been initiated to permit such a plant? What is the time frame to build and begin operating this plant? Studies on the proposed power plant and regional utilities are mentioned in page 6.36 of the final showing; we need copies of these studies.

Although its November 22, 1989, memorandum, supra note 12, indicated it would notify Thermal of any additional information required, and despite BLM's documented misgivings about the adequacy of the information on the specific points noted above, the New Mexico State Office evidently decided not to request further information from Thermal, and issued its March 23, 1993, decisions.

III. BLM's Decisions

BLM's decisions state that Thermal did not provide adequate responses to the following items requested in the December 2, 1987, decisions and listed in the June 15, 1989, Notices of Intent to Reject Application:

1. The quantity and quality of estimated recoverable reserves that reflect current mining technology and economics within the PRLA area, including the raw and interpreted data from holes drilled under the terms of valid permits.

* * * * *

3. Estimated annual revenues, including:

a. Price of the coal when sold, both delivered price and freight on board mine price.

b. The rationale for price estimates, i.e., whether based on contract prices or comparison with comparable coal currently being sold or on expectations of future prices.

c. The location and type of expected purchasers of the coal.

d. The expected use of the coal.

4. Estimated annual costs, including:

* * * * *

d. Transportation method and cost projections, including any costs which the applicant expects to bear.

The decisions stated that Thermal did not provide the "additional information requested below":

1. The PRLA specific reserves and coal quality information;
2. information on what criteria was used to identify coal as minable reserves;
3. geologic information, including reserves, logs, and coal quality data, on all leases or properties within the Combined Mining Venture; and
4. property lines, PRLA boundaries, environmental conflicts, facilities, and sequencing.

The decisions stated that the revised Final Showing did not provide complete proximate analyses for NMNM 8128 and NMNM 8130, defined as "the determination, by prescribed methods, of moisture, volatile matter, fixed carbon (by difference) and ash."

For NMNM 8128, the decision stated: "Also, there was no separate seam 1 coal analysis."

The decisions stated that the revised Final Showing

did not demonstrate commercial quantities * * *. Commercial quantities, as defined in 43 CFR 3430.1-2(b), require that the applicant present sufficient evidence to show that there is a reasonable expectation that revenues for the sale of the coal exceeds the cost of developing the mine, and extracting, removing, transporting, and marketing the coal. There is no rationale provided to substantiate the existence of a mine mouth power plant or the future construction of one. There is also no discussion as to the location and type of expected purchasers of the coal or the expected use of the coal. Without justification of the assertion that there is, or will be, a mine mouth power plant, there needs to be transportation and marketing costs included in the Final Showing. These also were not provided.

IV. Parties' Arguments on Appeal

In its statement of reasons (SOR), Thermal states that it is "baffled by the BLM claims, because all required information is quite plainly present in Thermal's submissions":

We have prepared a table of the individual BLM claims and the specific location in the Final Showing or the Initial Showing at

which each item can be found. Information Provided by Thermal Energy Co., see Table 1, below. The Board may see for itself that the information has been submitted.

(SOR at 13).

Thermal argues that the evaluation of its showing of marketability should be based on conditions at the time its prospecting permits expired, not on "current mining technology and economics," as stated in the first item of BLM's decisions (SOR at 15-16). Citing Yankee Gulch Joint Venture v. BLM, 113 IBLA 106, 131 (1990), Thermal states it need only show that, "based upon the mineralization exposed and reasonable geologic projections, a person of ordinary prudence would expend labor and means with the reasonable expectation that a profitable mine might be developed" (emphasis in original). Even if BLM's "incorrect present marketability standard" is employed, Thermal states, under Yankee Gulch Thermal need not "substantiate the existence of a mine mouth power plant or the future construction of one." "The BLM cannot reasonably demand a level of certainty of profit or even of mining technique which their own delays make unreasonable," Thermal states (SOR at 21).

Thermal argues that if the information it submitted was not complete, then under 43 CFR 3430.4-2(a) or 3430.5-1(c)(1) BLM is required to request additional information and specify the information required (SOR at 25). Without such a request, BLM's decisions are improper, Thermal argues.

Thermal requests an evidentiary hearing "[i]f, after consideration of the * * * [BLM] reply * * * there are any material facts actually in dispute. * * * Specifically, Thermal requests a hearing should any geologic or economic facts relating to the 1973 or 1993 potential for profitable San Juan Basin coal production be questioned."

In its Answer, BLM responds that no hearing is necessary:

BLM has rejected Thermal's applications for two reasons. First, Thermal failed to provide the Final Showing information required by regulation and by the June 15, 1989 "show cause" notice, a violation of 43 CFR 3430.5-1(a)(3) for which no hearing is required. The Agency believes that rejection should be sustained without a hearing as the final decision of the Department for this violation of the regulations.

Second, the applications were rejected pursuant to 43 CFR 3430.5-1(a)(1) for failure to show commercial quantities. BLM acknowledges that Thermal may be entitled to a hearing pursuant to 43 CFR 3430.5-2(b) on this basis for the BLM decision[s], but only if IBLA were to determine that Thermal had in fact satisfied BLM's "show cause/Final Showing" demands. [Emphasis in original.]

(BLM Answer at 2, note 1). BLM says it agrees that Thermal need only submit data and expectations that warrant a "reasonable" level of confidence. "The standard of review – especially for assumptions as to the future – is not 'convincing' or 'certain'" (BLM Answer at 4 (emphasis in original)). However,

Thermal's PRLA's have not been rejected because the data that Thermal has provided fails to meet an unreasonably high standard of review or level of proof. Thermal simply has refused to provide significant evidence of its expectation of revenue, of costs of extraction and transportation, and of anticipated operations or schedules or sequences. [Emphasis in original.]

Id.

BLM "believes that coal PRLAs are to be evaluated based on current federal regulations," citing Eugene Stevens, 126 IBLA 357 (1993), which, BLM says, "indicates that 1976 (and subsequent) PRLA regulations govern the adjudication of pending coal PRLAs" (BLM Answer at 5-6). In BLM's view, the regulations in 43 CFR Part 3430

all look to the future, not to conditions that might have existed when each PRLA prospecting permit was in effect some twenty years ago. Clearly[,] the regulations require judgments to be made at the present time, using present-day data. That present-day data is to be used to support reasonable expectations about costs that a coal lessee would incur in the future, if there is a mine.

Id. at 7-8. It would be illogical and meaningless to interpret the 43 CFR 3430.4-1(d) Final Showing requirements as calling for revenues and costs as of the time the prospecting permits expired, BLM argues, because the costs are based in part on proposed lease terms that are not developed until long after the permits expire. Even if Thermal's PRLA's were to be evaluated under 1973 conditions, they would be rejected because neither railroad nor mine-mouth power plant existed then or was developed thereafter. Id. at 9-10. BLM believes that Yankee Gulch is inapposite because the definitions involved in that case differ from those applicable to coal PRLA's. Id. at 11-13.

BLM argues it need not have issued a request for information under 43 CFR 3430.4-2(a) because Thermal "provided no cost/revenue information and no transportation or power plant information to BLM despite repeated BLM requests" (BLM Answer at 13). It asserts it has been unable to evaluate Thermal's PRLA's because Thermal did not provide the information required by 43 CFR 3430.4-1(d) and because BLM could not develop such information itself. Even if BLM were required to request information, BLM asserts it did so in its June 1989 notices of intent to reject the applications. Id. at 15-16.

BLM sets forth why the information Thermal provided concerning the costs of producing the coal, including transportation and power plant information, is "grossly deficient." Id. at 17-20.

The Navajo Nation's Answer presents additional reasons for affirming BLM's decisions; these "relate to the Navajo title, use and occupancy of the land sought by Thermal, and the invalidity of Thermal's prospecting permits" (Navajo Answer at 2). According to the Navajo Nation, Navajos have occupied the area covered by NMNM 8128 and NMNM 8130 for hundreds of years, and this occupancy has long been protected by Departmental regulations. Id. at 3-6. Several allotments to Navajos were approved in the area in 1908 and 1909. Other lands in the area were withdrawn for Indian use by Public Land Order No. (PLO) 2198. Id. at 7-8.

The Navajo Nation asserts that the prospecting permits are void as to lands occupied by Navajos because these lands were not subject to entry or appropriation by others, citing 43 CFR 2013.9-3 (1969). Id. at 11. It argues that the allotments in the area were not restored to the public domain when the reservation was opened in 1908 and these lands are therefore not subject to the Mineral Leasing Act (Id. at 11-12); that the coal under these lands was not reserved to the United States, so prospecting permits could not be issued for these lands (Id. at 13-14); and that PLO 2198 land is likewise not subject to prospecting under the Mineral Leasing Act. Id. at 14.

The Navajo Nation also submits that the prospecting permits are void because Leland Hodges did not provide the information required under 43 CFR 3131.2(e) (1968). Id. at 15. It argues also that the permits are a nullity because oil and gas wells had been drilled on the lands and the lands were therefore not "unclaimed, undeveloped" lands for which prospecting permits could be issued under the Mineral Leasing Act. Id. at 15-17.

Finally, the Navajo Nation argues that, with occupied lands, allotments, and PLO 2198 lands subtracted from the areas covered by NMNM 8128 and NMNM 8130, the remaining lands are not contiguous as required for prospecting permits under 43 CFR 3131.1(b) (1969) and are therefore void. Id. at 18.

The Navajo Nation agrees with BLM that Thermal cannot show commercial quantities of coal "because Thermal has no way to transport the coal to market, and must therefore predicate its marketability on a non-existent mine-mouth power plant." Id. at 19. "[T]here was no power plant in the area in 1973 and there is none now * * *." Id. at 20. Similarly, "[t]here was no railroad to haul coal from the area in 1973 and there is none now. * * * No reasonable person would predicate a major investment for a coal mine in the area upon a non-existent rail line which was defeated after years of litigation." Id. at 21. "Presented with only the new speculation of Thermal that it could sell to a hypothetical power plant, BLM was eminently justified in rejecting Thermal's PRLAs under 43 C.F.R. § 3430.5-1(a)." Id. at 22.

Thermal's Reply to the Navajo Nation's Answer argues that it is improper for an intervenor to raise an issue not addressed in BLM's decisions or in dispute between BLM and Thermal, *i.e.*, the validity of the prospecting permits (Reply at 3-5), and that, in any event, because the Navajo Nation did not appeal BLM's decisions to issue the permits in 1969, the permits are final and we do not have jurisdiction to consider the Navajo Nation's challenges now. *Id.* at 5-10. Nor, according to Thermal, may the Navajo Nation belatedly contest a final decision in an appeal of a second proceeding directly related to the first. Thermal disagrees with the Navajo Nation's argument distinguishing the definition of "valuable deposit" in Yankee Gulch from the definition of "commercial quantities" in this case and argues that Yankee Gulch is "the controlling precedent for the timing of the determination of commercial quantities." *Id.* at 13. Finally, Thermal states:

The Navajo Nation and the BLM make only one substantive argument regarding insufficient information, and that involves marketability and transportation. * * * They argue that a railroad or mine-mouth power plant must exist or substantial steps must have been taken toward construction, in order to justify a reasonable expectation of profit. * * * That position, however, conflicts with BLM regulations, BLM procedures, and logic. Because of the extraordinary delays and uncertainties the BLM has introduced into its processing of PRLAs, applicants such as Thermal have been unable to enter into agreements to develop transportation and commercial markets before the leases are granted.

(Reply at 14-15). "The facts of the past two decades belie these attempts to shift the blame for excessive processing delays to Thermal. * * * [N]umerous PRLAs in the area held by other companies have been languishing at the BLM awaiting resolution since the early 1970s." *Id.* at 16-17.

BLM did not respond to either the Navajo Nation's Answer or Thermal's Reply.

The Navajo Nation responds that we may consider Indian issues not raised by BLM, and that the doctrine of administrative finality does not preclude us from considering challenges based on the fact that the prospecting permits were null and void ab initio and the lands are not subject to leasing under the Mineral Leasing Act.

V. Discussion

A. Arguments Raised by Intervenor

[1] We have often stated that we are not limited to considering issues raised by the parties to an appeal. United States v. Angeline Galbraith, 134 IBLA 75, 82 n.3, 102 I.D. ___, ___ (1995). We have plenary authority to review de novo all official actions unless the scope of appellate review by or on behalf of the Secretary has been diminished

or constrained by the Secretary in a duly promulgated regulation or by the Congress through enacted law. United States Fish & Wildlife Service, 72 IBLA 218, 220-21 (1983). Although we have on occasion chosen to limit the scope of our decision to the issues raised by appellant when an intervenor has sought to introduce other issues (Red Rock 4-Wheelers, 75 IBLA 140, 141 n.2 (1983)), we do not think it either necessary or wise to follow a rule of precluding intervenors from raising issues not discussed in the agency's decision or raised by an appellant, as Thermal suggests. As a matter of practice, we do not discourage intervenors or limit their arguments. See Bear River Land & Grazing v. BLM, 132 IBLA 110, 113-14 (1995); The Pittsburg & Midway Coal Mining Co. v. OSM, 115 IBLA 148, 157-60 (1990); N. L. Baroid Petroleum Services, 60 IBLA 90, 92 (1981); United States v. United States Pumice Co., 37 IBLA 153, 160-61 (1978). Such a rule would be especially unfortunate when the issues involve not merely the exercise of an agency's discretion, but its fundamental authority. Thermal says that "BLM has never suggested in this or previous proceedings that its issuance of prospecting permits * * * 24 1/2 years ago was improper" (Reply at 4). The Navajo Nation suggests that the reason BLM would not have raised such objections is that the New Mexico State Director favored preference right lease applicants over Navajo occupants (Navajo Answer at 6). 16/

B. Administrative Finality

[2] Nor are we limited by the doctrine of administrative finality from considering whether BLM had authority to issue these prospecting permits in the first place. As a general rule, the doctrine of administrative

16/ In response to a Feb. 20, 1979, memorandum from the State Director requesting the deletion of 43 CFR 2091.5 (1978), which required BLM authorized officers to ascertain whether any public lands in their districts were occupied by Indians and to suspend all applications made by others than the Indian occupants on lands in the possession of Indians who have made improvements on them, the Director of BLM stated:

"The * * * troublesome situation in our view is the conflict between existing occupancies, the preference rights lease applications (PRLA), and coal leases, which have been issued on lands encumbered by unauthorized occupancies. We agree that the PRLA's and coal leases may have been issued in error and that attempts to remove the Indian occupants may place us in a difficult position in a court suit. * * * [W]e do not believe that removal of 43 CFR 2091.5 from the regulations will simplify this problem. The occupancies occurred and the leases and PRLA's were allowed when the statement was contained in the regulations. As such the statement would apply to those occupancies, thereby possibly causing some problems with the validity of the leases and the PRLA's."

(Navajo Answer, Exh. 1: Memorandum of Oct. 22, 1979, from Director, BLM, to State Director, New Mexico, entitled "43 CFR 2091.5").

finality – the administrative counterpart of the principle of res judicata – precludes reconsideration of a decision of an agency official when a party, or his predecessor-in-interest, had an opportunity to obtain review within the Department and no appeal was taken, or an appeal was taken and the decision was affirmed. Edward N. O'Leary, 132 IBLA 337, 343 (1995).

The rule is not absolute, because decisions by administrative officials, as well as those of this Board, are made exercising authority delegated by the Secretary of the Interior. The Secretary, and those exercising his authority, may review a matter previously decided and correct or reverse an erroneous decision. See Gabbs Exploration Co. v. Udall, 315 F.2d 37, 40 (D.C. Cir. 1963). * * * Reexamination of a decision which has become final is available only upon a showing of compelling legal or equitable reasons, such as violation of basic rights of the parties or the need to prevent an injustice.

Turner Brothers, Inc. v. OSMRE, 102 IBLA 111, 121 (1988). The Secretary of the Interior "is not estopped by the principles of res judicata or finality of administrative action from correcting or reversing an erroneous decision by his subordinates or predecessors in interest." Ideal Basic Industries, Inc. v. Morton, 542 F.2d 1364, 1368 (9th Cir. 1976). "It necessarily follows that this Board, in exercising the Secretary's review authority, is not required to accept as precedent erroneous decisions made by the Secretary's subordinates." Pathfinder Mines Corp., 70 IBLA 264, 278, 90 I.D. 10, 18 (1983), aff'd, Pathfinder Mines Corp. v. Clark, 620 F. Supp. 336 (D. Ariz. 1985); aff'd, Pathfinder Mines Corp. v. Hodel, 811 F.2d 1288 (9th Cir. 1987). In our view, if BLM lacked authority to issue the prospecting permits, that would constitute a compelling legal reason for reviewing its decisions to issue them. We do not reach the issues raised by the Navajo Nation, however, because we find we must set aside BLM's decisions in any event.

C. Level of Detail Required for Final Showing Information

As noted above, 43 CFR 3430.5-1(a)(3) provides that "[t]he authorized officer shall reject the application if * * * [t]he applicant otherwise failed to meet statutory or regulatory requirements." ^{17/} The current regulatory requirement BLM says Thermal has failed to meet is 43 CFR 3430.4-1(d), which provides in part:

^{17/} This language resulted from the 1982 amendments to the regulations. In its 1979 version, this regulation read: "if * * * the applicant otherwise failed to meet mandatory statutory or regulatory requirements, including those relating to acreage limitations, qualifications to hold leases, timely payment of rent or procedural requirements." 43 CFR 3430.5-1(a)(3) (1979).

[T]he applicant shall submit the following information

(1) Estimated revenues;

(2) The proposed means of meeting the proposed lease terms and special conditions and the estimated costs that a prudent person would consider before deciding to operate the proposed mine, including but not limited to, the cost of developing the mine, removing the coal, processing the coal to make it salable, transporting the coal, paying applicable royalties and taxes, and complying with applicable laws and regulations, the proposed lease terms, and special stipulations; and

(3) If the applicant intends to mine the deposit in the lands covered by a preference right lease application as part of a logical mining unit, the applicant shall include the estimated costs and revenue of the combined mining venture.

[3] When the Department adopted the 1976 regulations calling for an applicant to submit a Final Showing after receiving the proposed lease terms, the regulations required that information be submitted in sufficient detail to enable BLM to ascertain whether the showing has a reasonable factual basis and supports the assertion that commercial quantities of coal have been found. 43 CFR 3521.1-1(e) (1976). The language of 43 CFR 3521.1-1(e) (1976) was carried forward into the 1979 revisions of the coal management regulations. 43 CFR 3430.4-1(d) (1979). ^{18/} The deletion of section 3430.4-1(d) by the 1982 amendments appears to have been inadvertent. ^{19/} In any event, we believe its language states the correct standard for the level of detail an applicant

^{18/} 44 FR 16800, 16804, 16828 (Mar. 19, 1979, proposed rulemaking); 44 FR 42584, 42597, 42630 (July 19, 1979, final rulemaking). The 1979 regulation added language requiring that the information submitted be sufficiently detailed to determine whether the applicant's showing "reflects a consideration of all factors required by this section." Thus, as revised in 1979 the regulation stated:

"(d) The information submitted by the applicant shall be sufficiently detailed to determine whether the applicant's showing (1) has a reasonable factual basis, (2) supports the applicant's assertion that the proposed lease contains commercial quantities of coal, and (3) reflects a consideration of all factors required by this section."

^{19/} The preamble to the proposed rules explained that "[s]ections 3430.4-1(c)(3) and 3430.4-1(d) would be modified to clarify the language." 46 FR 61399 (Dec. 16, 1981). The language actually clarified was in subparagraph (c)(3) and paragraph (e), however, although paragraph (e) was designated (d) and paragraph (d) itself disappeared. 46 FR 61414 (Dec. 16, 1981); 47 FR 33143 (July 30, 1982). It was not restored in the 1987 amendments. 52 FR 25799 (July 8, 1987).

must submit under the current 43 CFR 3430.4-1(d): an applicant must submit sufficient information to show a reasonable factual basis that commercial quantities of coal exist in the area of the lease applied for.

D. Adequacy of Information Submitted

To the extent they are available in the record, we have examined the sources Thermal has referred to in support of its argument that it has supplied all the information that BLM's decisions either request or say Thermal has failed to supply.

1. Quantity and Quality of Estimated Recoverable Reserves

In its December 2, 1987, "Request for Final Showing" decisions, BLM required Thermal to submit the "quantity and quality of estimated recoverable reserves." In the accompanying "Commercial Quantities Guidelines: Surface Recoverable Coal," Bureau of Land Management, New Mexico State Office, December 1987 (Commercial Quantities Guidelines), BLM stated that an applicant must discuss "coal quality and quantity by bed for those beds that are economic to mine." After Thermal submitted its first Final Showing report in May 1988, the BLM Farmington Resource Area sent a memorandum dated May 4, 1989, to the District Office identifying discrepancies between its own reserve calculations and those in the initial showing and the Final Showing. It also found that "[g]eologic data and coal reserves were not included." ^{20/} BLM's June 15, 1989, Intent to Reject Application notices therefore stated that the Final Showing "does not show the geologic data and reserves" and "does not analyze reserves for this individual PRLA."

As set forth above, BLM's decisions state that Thermal "did not provide adequate responses to BLM's request for information about the quantity and quality of estimated recoverable reserves that reflect current mining technology and economics within the PRLA area, including the raw and interpreted data from holes drilled under the terms of valid permits." This portion of BLM's decision concerning NMNM 8128 is based on the language in the Area Manager's GER for the District Manager and in the Assistant District Manager's February 27, 1990, report to the Deputy State Director that there was no separate seam 1 coal analysis in NMNM 8128.

Thermal states that quantity and quality of estimated recoverable reserves are specifically discussed in the October 16, 1989, Final Showing at 3.1-3.6 (SOR at T-1). ^{21/} "The information in the Final Showing is a distillation and summary of the extensive detailed information contained

^{20/} It is not clear how BLM found discrepancies with Final Showing reserve calculations if coal reserves were not included in the Final Showing.

^{21/} In accordance with 43 CFR 3430.4-1(g), Thermal has not waived its right to keep information in its initial and Final Showings confidential (SOR at 6, note 1). "[I]nformation presented in this Statement of Reasons is nonproprietary," Thermal states. Id. Accordingly, we limit our discussion to material contained in Thermal's pleadings and provide only the additional information necessary to understand that material. As indicated

in the February 1977 Initial Showing ("IS"). IS, Exh. II (quantity); IS, Exh. V (quality)." Id. 22/

Table 3-2 in the Final Showing does present data on the percentages of moisture, ash, sulfur, and the BTU per pound of the number 1 seam in NMNM 8128. Indeed, the Farmington Resource Area Manager's "geologic review" that was attached to the GER acknowledges this, but questions the accuracy of that data:

The coal quality data for NM-8128 (Table 3-2) do not correspond precisely to the data originally submitted. Moreover, there is no analysis specifically reported for seam 1 in any of the earlier submittals, but one is given in the final showing. None of the sulfur or BTU values from analyses within 8128 are as low nor are any ash values as high as the ones reported for seam 1. One is forced to conclude that the seam 1 analysis is hypothetical, as is admittedly the case for all the analyses given for NM-11670 and two of the state coal leases. * * * In any request for additional information, we should ask for a hard copy of all seam 1 original analysis reports. There is no evidence in the earlier submittals that such an analysis was ever run, and no verbiage to the effect that "everything [that] was in the 1977 Initial Showing or earlier submittals" should be accepted.

("Summary Review of Thermal Energy Company Final Showing Geologic Data Adequacy," supra note 13, at 2).

Thus, it appears Thermal did respond to BLM's request for information on quality of estimated recoverable reserves in NMNM 8128 but that BLM did not find the response credible. Because the record does not contain a copy of the Initial Showing, we cannot ascertain the basis of BLM's conclusion that Thermal's seam 1 analysis is "hypothetical," and we cannot confirm that there is "no evidence in the earlier submittals that such an analysis [of seam 1] was ever run." 23/ The Final Showing does state that coal

fn. 21 (continued)

in the preceding text, what Thermal refers to as the "Final Showing" is actually a second and revised Final Showing; it is the report entitled "Preference Right Lease Application Numbers NM 8128, NM 8130, and NM 11670, San Juan and McKinley Counties, New Mexico, Final Showing," dated Oct. 13, 1989, and filed Oct. 16, 1989.

BLM did not provide a complete copy of the Final Showing as part of the record of these appeals. We have had to take official notice of the copy in the record of IBLA 93-105.

22/ BLM did not provide a copy of the Initial Showing as part of the record of these appeals, and there is no copy in the record of IBLA 93-105.

23/ Although we do not find an explicit statement in the Final Showing that everything in the Initial Showing should be accepted, we find several statements that the Final Showing was based on the Initial Showing. See, e.g., Final Showing at 3.2-3.4.

analyses were conducted; what the "geologic review" says is that BLM should ask for hard copies of them.

The portion of BLM's decisions stating that Thermal did not provide adequate responses to BLM's request for information about the quantity of estimated recoverable reserves was apparently based on the statement in the Area Manager's GER that the Final Showing contained no seam-by-seam reserve breakdown by tract. Although the December 1987 BLM Commercial Quantities Guidelines specify that an applicant must discuss "coal quality and quantity by bed for those beds that are economic to mine (emphasis added)," BLM's June 1989 Intent to Reject Application notices requested analysis of coal tonnage by individual PRLA, not by bed or seam. The information on coal quantity in the Final Showing, Table 3-1, was accordingly presented as minable reserves by PRLA number and is based on the Initial Showing (Final Showing at 3.1-3.2). The "geologic review" recommended that a request for additional information should require reserves to be broken out on a seam-by-seam basis because of the concern that no analysis had been done for seams 1 and 3. 24/

In response to the statement in BLM's decisions that it did not provide "raw and interpreted data from holes drilled under the terms of valid permits," Thermal states that the Initial Survey contains detailed data from drilling performed under the prospecting permits and there is no requirement to re-submit such data as part of the Final Showing (SOR at T-1, 14). BLM concedes that Thermal was not required to submit information for the Final Showing that it had already submitted for the Initial Showing (BLM Answer at 4, note 2).

2. Complete Proximate Analyses

BLM's decisions state that Thermal did not provide "a complete proximate analysis for the * * * tract as required by 43 CFR 3430.2-1(a)(2) * * * defined as the determination, by prescribed methods, of moisture, volatile matter, fixed carbon (by difference) and ash." This statement is based on the comments in the Farmington Resource Area Manager's GER and the Assistant District Manager's February 27, 1990, report discussed above. The 1976 regulations required that "[c]oal quality data submittals shall include, as a minimum, an average proximate analysis and BTU content for coal beds * * *." 43 CFR 3521.1-1(b) (1976) (see note 5, supra). The 1979 revision of the regulations added a requirement that coal quality data include sulfur content and that the data be provided for each bed to be mined. 43 CFR 3430.2-1(a)(2) (1979). Meanwhile, the analyses in Thermal's 1977 initial showing were conducted using a "short" proximate analysis and did not obtain results for fixed carbon and volatile matter (Final Showing at 3.4-3.6).

24/ "Summary Review of Thermal Energy Company Final Showing Geologic Data Adequacy," supra note 13, at 3.

As mentioned above (see note 8, *supra*), USGS' November 1979 response to BLM's memorandum asking whether the initial showings complied with the 1979 revisions to the regulations noted that "fixed carbon and volatile percentages were not shown on the proximate analysis of the four core holes" in NMNM 8128 and NMNM 8130. Peabody submitted additional information for these PRLA's on June 10 and October 24, 1980, and on that basis USGS declared that the initial showings complied with the 1979 regulations. 25/

BLM's December 1987 Request for Final Showing decisions asked for the "quantity and quality of estimated recoverable reserves that reflect current mining technology and economics"; the decisions did not specifically request complete proximate analyses or fixed carbon and volatile percentages. The Farmington Resource Area Manager's "geologic review" stated: "As we noted in our previous report, none of the analyses for this PRLA [NMNM 8128] are complete proximate analyses. Fixed carbon and volatiles were never reported in any analysis." "Summary Review of Thermal Energy Company Final Showing Geologic Data Adequacy," *supra* note 13, at 2. 26/ However, this concern was not reflected in BLM's June 1989 Intent to Reject Application notices. The notices stated Thermal's first Final Showing did not include "PRLA[-]specific reserves and coal quality information" or "coal quality data * * * on all leases or properties within the CMV" 27/ but did not state that complete proximate analyses were required.

Thermal states that its Final Showing provides full proximate analysis in Table 3-2 and the ranges for volatile matter and fixed carbon in the text (SOR at T-3). The text does state that a limited number of the analyses conducted for the Initial Showing indicated fixed carbon and volatile matter ranges for seams 1 and 2 (Final Showing at 3.6). Table 3-2 does not cover these constituents, however.

25/ Neither the June 10 nor the Oct. 24, 1980, submission is included in the record of these appeals, or in the record for IBLA 93-105, so we cannot determine whether these submissions contained fixed carbon and volatile percentages data.

26/ The "geologic review" makes the same comment concerning NMNM 8130. *Id.* at 3. As noted above, in footnote 13, the previous report referred

to is not in the record. The "geologic review" points out that the definition of proximate analysis in several sources is the one contained in BLM's decisions, *i.e.*, "the determination, by prescribed methods, of moisture, volatile matter, fixed carbon (by difference) and ash." See, *e.g.*, A Dictionary of Mining, Mineral, & Related Terms, U.S. Department of the Interior, 1968, at 872.

27/ The "CMV" referred to is the "Gallo Wash CMV," *i.e.*, "combined mining venture" (see BLM Manual 3430, Rel. 3-172 (Aug. 8, 1987), Glossary of Terms), which consists of the three named PRLA's, combined with four New Mexico State coal mining leases held by Thermal, that Thermal intends to surface mine (Oct. 13, 1989, Final Showing at 1.2, 1.12, Table 1-1, and Figure 1-2).

The Farmington Area Manager's "geologic review" states: "[W]e believe that determinations of volatile matter and fixed carbon are vital to determine 'commercial quantities', because one cannot establish coal rank or burn characteristics or specify suitable uses or burning equipment (markets) without these facts." 28/

Thermal observes that the USGS compiled full proximate analysis data for the beds in the CMV in 1973, and that the State of New Mexico performed 66 full proximate analyses on samples from the CMV coal beds in 1985 and submitted them to BLM (SOR at T-3; Exh. M; Exh. J). 29/ It is not clear whether BLM did not request complete proximate analyses or fixed carbon and volatile matter data because it was aware of these analyses. It is clear that it did not specify that Thermal was to provide these data.

3. Estimated Annual Revenues and Costs

BLM's decisions stated that Thermal did not provide an adequate response to its request for estimated annual revenues, including the price of the coal when sold; the rationale for price estimates, *i.e.*, whether based on contract prices or comparison with comparable coal currently being sold, or on expectations of future prices; the location and type of expected purchasers of the coal; and the expected use of the coal. 30/

Thermal states that estimated annual revenues are included in Table 6-23 of the Final Showing, Project Cash Flow, at 6.41-6.43. The price of the coal and the rationale for the estimated price are discussed in the Economic Evaluation section (Final Showing at 6.1). "The delays experienced in leasing the PRLAs preclude contracting for the coal, so estimated

28/ "Summary Review of Thermal Energy Company Final Showing Geologic Data Adequacy," *supra* note 13, at 3.

29/ Exhibit M does not appear in the administrative record for either of these appeals, or in the record for IBLA 93-105. It is a memorandum dated Dec. 12, 1973, from E. D. Patterson, Geologist, to Area Mining Supervisor, Southern Rocky Mountain Area, USGS, entitled "Preference Right Coal Lease Application NM 8128, 8130, 8715 & 11670, Peabody Coal Co. - Thermal Energy Co." It states that "[a] summary of 20 analys[es] of coal taken from the application area zone" shows volatiles at 36.78 percent and fixed carbon at 33.81% as received. Exhibit J is a May 1986 report by the New Mexico Research and Development Institute entitled "Quality Assessment of Strippable Coals in New Mexico, Year I, Phase II, Fruitland and Cleary Coals in the San Juan Basin of Northwestern New Mexico." Table 4 of the report, referred to at T-3 in Thermal's SOR, shows a mean of 31.39 percent volatile materials and 33.82 percent fixed carbon from 66 sample analyses of coal as received.

30/ Later the decisions state: "There is also no discussion as to the location and type of expected purchasers of the coal or the expected use of the coal (Mar. 23, 1993, Decisions at 2 (emphasis added)).

selling price is based on comparable coal currently being sold," Thermal states (SOR at T-1). The location and type of expected purchasers is discussed in the Final Showing at 4.4: "The purchaser (a mine-mouth power plant) and its location (section, township, and range) are identified within the section [of the Final Showing] on the Location and Description of Mine Facilities, because it will be located in close proximity to the mine facilities" (SOR at T-1). "Because of the long delays in processing the lease applications, commitments from specific power plant operators cannot be obtained until the lease has been granted" (SOR at T-1). The expected use of the coal is that it will be burned to generate electricity (SOR at T-2).

As a related matter, in response to the statement in BLM's decisions that Thermal had failed to provide "estimated annual costs, including * * * [t]ransportation method and cost projections, including any costs which the applicant expects to bear," Thermal states:

The transportation method is consistent with a mine-mouth power plant, i.e. transport by truck from the mine to the truck dump hopper at the power plant. FS [Final Showing] at 4.4, 6.16. Because the only transport costs are haulage costs incurred on the CMV, and these are considered part of the mine operation costs, no separate transport costs are identified. FS at 6.16. The capital and operating costs of haul trucks and roads are quantified as part of the mine development and operational costs. FS at 6.4-6.11, 6[.].14.

(SOR at T-2). Thermal argues that until it has leases it cannot enter into agreements to develop transportation and commercial markets. "Getting commitments from buyers and other participants in the market without any reliable indication of when a lease may be issued is nearly impossible" (SOR at 21).

BLM argues that "the burden is on Thermal to prove that the coal is marketable. Thermal has failed in that burden. Thermal cannot meet that burden by suggesting that it hopes that some third party will build a railroad or a power plant near the PRLAs, all at no cost to Thermal" (BLM Answer at 3). BLM adds:

The Star Lake Railroad right-of-way was litigated vigorously for years, to the final result that no railroad will cross the tribal lands that separate Thermal's PRLAs from the main line of the Santa Fe railroad. The Dine Power Plant project – a mine mouth generating station near Thermal's PRLAs – also was evaluated for years by a serious and capable business consortium that included the Navajo Tribe and Public Service Company of New Mexico and others. That project also has been abandoned. For Thermal to toss out the id

rail or – on the other hand – that maybe it will build a mine mouth power plant to avoid transportation costs warrants no significant consideration. Those matters have been studied and litigated to clear negative conclusions by serious developers.

(Answer at 9).

"The most blatant deficiencies in the information submitted by Thermal are those related to the costs of producing coal from its PRLAs, including the cost of transporting the coal to market," BLM states (Answer at 17). "Thermal's transportation and power plant information are the only two areas of deficiency that will be discussed in this brief." *Id.* "[T]ruck transportation costs money," BLM observes, adding that the Final Showing pages referenced in Thermal's SOR "give no cost information of any consequence," and that the cost data Thermal has presented "is not really 'data' at all – just an idea" (Answer at 18-19).

BLM states that "the Final Showing 'data' on the power plant to which Thermal intends to sell its coal is less extensive than the data that Thermal has provided on transportation costs" (Answer at 19). Referring to the statement on page 4.2 of the Final Showing that Thermal's mine would feed four generating units planned to come on line at 2-year intervals over a 7-year period, BLM repeats the statement in its decisions: "There is no rationale provided to substantiate the existence of a mine mouth power plant or the future construction of one." *Id.* at 20.

[4] When it adopted the 1976 regulations, the Department stated, in response to a comment inquiring whether a contract for sale was necessary to prove revenues under 43 CFR 3521.1-1(c)(1) (1976) (now 3430.4-1(d)(1)), that it

recognize[d] that in many instances a contract to sell coal cannot be signed until after a lease is awarded. While an executed contract will usually be the best evidence of revenues, estimated revenues may be based on factors such as price received for similar coal, evidence of existing markets or the applicant's best judgment of future markets. Lack of a contract will not disqualify a permittee from receiving a lease.

41 FR 18845, 18846 (May 7, 1976). Thus, it is not necessary for Thermal to show "commitments from specific power plant operators" or "commitments from buyers and other participants in the market" in order to prove revenues. And it is acceptable that Thermal has been "unable to enter into agreements to develop transportation and commercial markets before the leases are granted." BLM recognized this as well. Its June 15, 1989, Intent to Reject Application notices requested a rationale for price estimates, whether based on contract prices "or comparison with comparable coal currently being sold, or on expectations of future prices."

[5] In response to the statement in BLM's decisions, Thermal states that under Yankee Gulch, *supra*, it does not need to substantiate the existence of or future construction of a mine-mouth power plant. Yankee Gulch involved the definition of "valuable deposit" that was adopted along with the definition of "commercial quantities" in the 1976 regulations. As set forth in 43 CFR 3520.1-1(c) (1976):

(c) Standards to determine "valuable deposit" and "commercial quantities."

A permittee has discovered commercial quantities of coal or a valuable deposit of one of the other permit minerals if the mineral deposit discovered under the permit is of such a character and quantity that a prudent person would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. The permittee must present sufficient evidence to show that there is a reasonable expectation that his revenues from the sale of the mineral will exceed his costs of developing the mine, and extracting, removing, and marketing the mineral.

In the comments accompanying the 1976 regulations the Department made clear it was adopting the prudent person test developed under the Mining Law of 1872. 41 FR 2648 (Jan. 19, 1976). It quoted the U.S. Supreme Court's decision in United States v. Coleman, 390 U.S. 599, 603 (1968), pointing out that "the prudent-man test and the marketability test are not distinct standards, but are complementary in that the latter is a refinement of the former." 41 FR 18845 (May 7, 1976).

In Yankee Gulch we stated:

The "prudent person" test and "marketability" test require a showing that "as a present fact, considering historic price and cost factors and assuming that they will continue, there is a reasonable likelihood of success that a paying mine can be developed." In re Pacific Coast Molybdenum, 75 IBLA 16, 29, 90 I.D. 352, 360 (1983). Actual successful exploitation need not be shown. The applicant need only show that there is a reasonable potential for success. See Barrows v. Hickel, 447 F.2d 80, 82 (9th Cir. 1971). Therefore, the preference right lease applicant is not required to show that mineral of sufficient quantity and quality has been exposed to demonstrate that a profitable mining operation can be developed. The applicant need only show that, based upon the mineralization exposed and reasonable geologic projections, a person of ordinary prudence would expend labor and means with the reasonable expectation that a profitable mine might be developed. Barton v. Morton, 498 F.2d 288 (9th Cir. 1974). [Emphasis in original.]

Yankee Gulch, *supra* at 131. As discussed above, an applicant must provide information "in sufficient detail to enable BLM to ascertain whether the showing has a reasonable factual basis and supports the assertion that commercial quantities of coal have been found." In this context, the question is whether Thermal has provided sufficient information to show that a prudent person would invest further time and means to develop a mine.

Thermal's Final Showing states that it is "assumed for this evaluation" that mining would be conducted as part of a mine-mouth power plant operation (Final Showing at 6.16; *see id.* at 4.2). The project cash flow also "assumes" that all the coal will be sold to a power plant located "adjacent" to the mine, the costs of which are not included in the cash flow for the mine. *Id.* at 6.35. The Final Showing states that Thermal has contracted for "a number of" studies of the "technical and economic merits of increased generating capacity of the region" and provides a brief summary of their conclusions. *Id.* at 6.35-6.36. The executive summary, introduction, and conclusions (marked confidential) of one of these, a 1988 study of the technical feasibility and the ranges of delivered power costs for the development of the Pueblo Pintado Minemouth Plant, are offered as an exhibit (SOR, Exh. N). Another study reportedly shows that the generating capacity of the four 250 megawatt power plants Thermal anticipates its mine would supply amounts to less than 5 percent of the reserve capacity that utilities in the region would need to maintain a minimum margin above anticipated peak load demand projected to 1997 (Final Showing at 6.36). The Final Showing states that "discussions are under way" between Thermal and several utilities. *Id.* The Final Showing concludes that a prudent person would be justified in the expenditure of his labor and means with a reasonable prospect of success in developing a profitable mine within the 10-year term of the lease. Based on the estimated coal price, costs, and cash flow, the Final Showing concludes the mine would have a sufficient profit to meet possible changes in economic conditions. *Id.* at 7.1.

Although the Final Showing conclusions appear promising, we cannot find that Thermal has presented sufficient evidence that a prudent person would expend further time and means to develop a mine on these leases. The Final Showing acknowledges that its evaluation is based on an assumption that a mine-mouth power plant would be built. An assumption, without supporting evidence, is not "a reasonable factual basis." The Final Showing states that Thermal was in discussion with several utilities about such a project. The stage of the discussions is not specified. The excerpts of the Pueblo Pintado generation and transmission system study Thermal included as an exhibit to its SOR state that the study established the cost of generating and transmitting power from New Mexico to the West Coast. The excerpts do not indicate what these costs are, so it is not clear how the estimated price of coal in the Final Showing relates to the cost of coal in the study. The excerpts do indicate that the generating capacity that was the subject of the study was different than the four 250 megawatt power plants assumed by the Final Showing. The relationship between the Pueblo Pintado project and the Dine Power Plant project, described in BLM's Answer as being "near Thermal's PRLAs," is not clear.

Perhaps the study would show whether the abandonment of the Dine Power Plant project is a sound basis for BLM to conclude that no mine-mouth power plant project is reasonable.

In any event, we think Thermal's argument that it does not need to substantiate the existence of or future construction of a mine-mouth power plant relies too much on the statement in Yankee Gulch that a PRLA applicant need only show that a person of ordinary prudence would expend labor and means with the reasonable expectation that a profitable mine might be developed. That statement explains how certain the expectation of profitability may be. It does not remove the requirement that the applicant show that the coal is marketable. We also said in Yankee Gulch:

The "prudent person" and "marketability" standards are objective standards. The applicant must prove that a prudent person would expend further time and means to develop a mine—it is not enough that the applicant wishes to. Foresyth, 100 IBLA 185, 209-10 (1987). See Fresh v. Udall, 228 F. Supp. 738 (D. Colo. 1964); United States v. White, 72 I.D. 522 (1965). It is also true, however, that prior failure to develop a mine because of a lack of funding or lack of either development or marketing expertise should not be the sole basis for determining that a "prudent person" would not invest further time or means to develop the mine. It is assumed that the "prudent person" has the funding and the expertise to properly develop the mine and market the product.

113 IBLA at 131, n.15.

Although the Department has recognized that lack of a contract showing revenues will not disqualify a permittee from receiving a lease, evidence of marketability is necessary. The kind and amount of evidence that will suffice to establish that a prudent person would expend further time and means to develop a mine will depend on the circumstances of the case. One example of adequate evidence of marketability is United States v. Foresyth, supra at 228-34. Perhaps the studies referred to in the Final Showing would provide comparable evidence of existing markets. These were the studies the Assistant District Manager said in his February 27, 1990, report to the Deputy State Director that BLM needed. As noted above, the "geologic review" suggested that a "request for additional information should require the submittal of clear, good-faith evidence that such a plant will be built, by whom, and what measures have been taken to secure the site, power-line rights-of-way, etc." 31/ Although this degree of

31/ Text at note 15, supra. The record for IBLA 93-105 contains a copy of a May 1990 inquiry to BLM from E.B. LaRue, Jr., about applying for a right-of-way from sec. 6, T. 22 N., R. 11 W., San Juan County, New Mexico, to the Adelanto substation near Los Angeles, California, and a copy of a September 1990 conversation record between LaRue and BLM concerning a

certainty might not be possible in advance of lease issuance, if Thermal is depending on construction of a mine-mouth power plant by a third party to show that its coal is marketable, then evidence that there is a reasonable prospect such a plant would be profitable using the product purchased from the mine at the rate and purchase price stated by the permittee would be required in order for Thermal to "support * * * the assertion that commercial quantities of coal have been found."

4. PRLA Specific Reserves and Coal Quality Information

BLM's decisions also stated that Thermal did not provide "the additional information requested below," including "PRLA specific reserves and coal quality information." As discussed above, BLM's June 1989 Intent to Reject Application notices requested analysis of coal tonnage by PRLA, and Thermal's revised Final Showing provided that information in Table 3-1. Table 3-2 of the Final Showing presents a summary of coal quality data by PRLA and seam. It is not clear what additional information BLM wants.

5. Information on Criteria Used to Identify Coal As Minable Reserves

BLM's decisions also stated that Thermal did not provide information on what criteria were used to identify coal as minable reserves. Thermal states that this information was provided on page 3.1 of its Final Showing: "[S]eams of not less than 3 feet, to a depth of 150 feet, maximum stripping ratio of 10 to 1, 1770 pounds per acre-foot, and a 90% recovery factor" (SOR at T-2). It is not clear what additional information BLM wants.

6. Geologic Information on All Leases or Properties within the CMV

BLM's decisions also stated Thermal did not provide geologic information, including reserves, logs, and coal quality data, on all leases or properties within the CMV. Thermal states that the minable reserves for all PRLA's and State leases that make up the CMV are shown in Table 3-1 of the Final Showing. However, Thermal states, there is no requirement in the regulations, the BLM Manual, or the Commercial Quantities Guidelines for submission of the specific geologic data identified in this item for Thermal's State leases within the CMV (SOR at T-2).

BLM's December 1987 Request for Final Showing decisions stated that if the coal within the PRLA was to be committed to a CMV, "then the applicant must provide reserve estimates for the entire CMV." The accompanying Commercial Quantities Guidelines stated that an applicant intending to mine the PRLA as part of a CMV "should include a description of the CMV" including "estimated revenues and costs of the CMV." ^{32/} Based on the Farmington

fn. 31 (continued)

right-of-way for roads, transmission lines, and microwave sites west of California from a power plant to be built in San Juan County in "late 1997 or early 1998."

^{32/} The decisions (and the Guidelines) also require the applicant to establish that the boundaries of the CMV include areas within a conceptual

Resource Area's May 4, 1989, evaluation of Thermal's first Final Showing, BLM's June 1989 Intent to Reject Application notices stated that Thermal did not include "[g]eologic information, including reserves, logs, and coal quality data, on all leases or properties within the CMV."

[6] A CMV is "a mixture of unmined Federal and non-Federal coal which could be mined as an economic unit" (BLM Manual, Section 3430, Glossary of Terms). The BLM Manual Handbook states that a

determination of the economics of development of the PRLA will include the data submitted by the applicant for the [CMV]. This allows the PRLA to be considered as part of a combined mining venture and enables the applicant to take advantage of a larger scale mining operation and the associated economies of scale.

(BLM Manual, H-3430-1, Chapter V.D., Rel. 3-173 (Aug. 8, 1987)). For BLM to make a commercial quantities determination for a CMV, comparable quantity and quality data for Federal and non-Federal coal in the CMV are necessary. It is therefore reasonable for BLM to require an applicant to provide such data about non-Federal lands within a CMV that are relevant to a commercial quantities determination.

7. Property Lines, PRLA Boundaries, Environmental Conflicts, Facilities, and Sequencing

BLM's decisions state that Thermal did not provide information about property lines, PRLA boundaries, environmental conflicts, facilities, and sequencing. Based on the Farmington Resource Area's May 4, 1989, memorandum stating that conceptual mine plans must show this information, BLM's Intent to Reject Application notices stated that Thermal's first Final Showing did not include it. Thermal states:

Property descriptions are provided in Exhibit II of the Initial Showing. The map enclosed with the Final Showing displays with sufficient accuracy the property lines and PRLA boundaries. It also shows a year-by-year sequencing of the mining operation. Sequencing is also described in the text. FS at 4.1-4.4, Table 4-1. The section on Environmental Resources describes impacts and mitigations in nine environmental categories; environmental conflicts (or the lack of them) are identified through-out the section, along with mitigations. FS at 5.1-5.11. Facilities are described in the section on Location and Description of Mine Facilities and costs of facilities are identified in a table in the Mining Costs section. FS at 4.4-4.5, 6.1-6.3, Table 6-1.

(SOR at T-3). It is not clear what additional information BLM wants.

fn. 32 (continued)

mine plan that is reasonable and to demonstrate that it has or can gain control of all recoverable coal with the CMV.

E. Request for Additional Information

BLM argues in its Answer that "[i]n the face of Thermal's refusal to provide the basic information necessary for further BLM analysis and processing, BLM was not required to seek information once again" under 43 CFR 3430.4-2(a) (Answer at 13). "Thermal knows that its coal holdings are not marketable now, and they never have been," BLM states (Answer at 2). "For this reason Thermal does nothing but stonewall every BLM effort to extract the information that Thermal is required to produce." Id. If we find that Thermal

submitted sufficient information to comply with BLM's proper demands, then BLM believes it would be appropriate for IBLA to determine whether or not commercial quantities of coal exist on Thermal's tracts. BLM does not believe that it would be helpful or appropriate to remand the matter to BLM for further review of the existing written record. [Emphasis in original.]

Id. BLM asks us "to sustain the BLM rejection decision[s]. Alternatively, BLM asks IBLA to issue a final decision granting or denying [the applications]. BLM believes that its processing of Thermal's PRLAs is complete" (Answer at 20).

We believe the discussion above makes plain both that BLM's processing of Thermal's applications is not complete and that the existing record is not complete enough for either BLM or us to determine whether Thermal has found coal in commercial quantities.

As we recite at the conclusion of section II above, in February 1990 both the Farmington Area Manager and the Assistant District Manager provided the Deputy State Director for Mineral Resources several suggestions for further information to request from Thermal based on a review of Thermal's revised Final Showing. It is possible that the change in phrasing from "additional information to request" (in the Area Manager's "geologic review") to "geologic data is incomplete" and "data provided * * * relating to economics is not sufficient" (in the Assistant District Manager's February 27, 1990, report to the Deputy State Director) misled the State Director, although this seems unlikely because the Area Manager's "geologic review" was attached to the Assistant District Manager's February 27, 1990, report. In any event, in the State Director's March 1993 decisions what had been seen as information to be sought and incomplete data became information not provided by Thermal upon request by BLM. And by the time BLM prepared its Answer, Thermal had refused repeatedly to provide it and had been stonewalling.

The record does not support this view of events. As is evident from our review of the adequacy of the information submitted in section V.D. above, in several instances the information BLM's decisions say was not provided was in fact provided. In some instances, the information submitted in response to BLM's requests led BLM to want further – or more

specific – information. In some instances, the information submitted was inadequate. And in some instances, the information had not even been requested.

[7] BLM's Answer states:

Thermal hints that the Company might actually have some information to give to BLM after all these years, but Thermal will only disclose this information if BLM asks in a particular fashion. The burden to provide information is on Thermal, not BLM. BLM is under no obligation to play games with Thermal.

(Answer at 5). It is true that BLM is under no such obligation. But neither is Thermal obliged to guess what information BLM might need.

BLM requested a Final Showing in December 1987. Thermal submitted one in May 1988. BLM found several aspects of it inadequate and issued Intent to Reject Application notices in June 1989 specifying the inadequacies and giving Thermal 60 days to show cause why its applications should not be rejected based on Thermal's failure to provide a satisfactory Final Showing. In our view, in June 1989 BLM should have issued a Request for Additional Information decision. 43 CFR 3430.4-2(a) provides: "If the applicant for a preference right lease has submitted timely, some, but not all of the information required in § 3430.4-1 of this title, the authorized officer shall request additional information and shall specify the information required." (Emphasis supplied.) The BLM Manual states that "[a]n authorized officer who determines that an applicant's data are either unreasonable or inadequate should request additional information from the applicant" (BLM Manual H-3430-1, Chapter VI.C (emphasis supplied)). ^{33/} Because it specified the inadequacies of Thermal's first Final Showing in its June 1989 Intent to Reject Application notice, BLM believes it did not need to ask for additional information again. However, BLM's analysis showed that Thermal's revised Final Showing answered most of BLM's questions about the first Final Showing, but left some questions remaining. Because these questions concern data that are "essential to independently verify and calculate the commercial viability of a mining operation," see note 33, supra, it is incumbent on BLM under 43 CFR 3430.4-2(a) to "specify the information required" in a request for additional information. If the

^{33/} The BLM Manual states that "reasonable data are those which are usual or characteristic for a particular mining method and related conditions." It further provides: "Adequate data are those which are essential to independently verify and calculate the viability of a mining operation; that is, has the applicant submitted all the information requested in the final showing?" (BLM Manual H-3430-1, Chapter VI.C., Final Showing Analysis, Rel. 3-173 (Aug. 8, 1987)).

additional information raises further questions that would enable it to make a commercial quantities determination, then BLM should ask again for additional information and specify what it needs so that it can make its decision.

BLM need not be concerned that this is an endlessly iterative procedure, or that it is violating its policy against doing the applicant's work for it. ^{34/} When BLM has all the information it needs to determine whether or not a prudent person would expend further time and means to develop a mine, it will then be able to issue a decision granting or denying the application. It is incumbent upon BLM to ensure that its decision is supported by a rational basis and that such basis is stated in the written decision, as well as being demonstrated in the administrative record accompanying the decision. Eddleman Community Property Trust, 106 IBLA 376, 377 (1989); Roger K. Ogden, 77 IBLA 4, 7, 90 I.D. 481, 483 (1983). The recipient of a BLM decision is entitled to a reasoned and factual explanation providing a basis for understanding and accepting the decision or, alternatively, for appealing and disputing it before the Board. Larry Brown & Associates, 133 IBLA 202 (1995).

In this case it is apparent BLM does not have all the information it needs. From BLM's analyses in the record it appears that information includes: (1) any separate seam 1 coal analyses from within NMNM 8128; (2) any coal analyses on any of the tracts for which fixed carbon and volatile matter were determined and any complete proximate analyses – if these are needed in light of the contents of exhibits J and M of Thermal's SOR; (3) what coal reserves are included in each PRLA in each seam to be mined – reserves should be delineated as NMNM 8128, seam 1, XX tons, etc.; (4) whether some of the data was illegally obtained due to lack of approval to commence drilling, and what consequences ensue if it was illegally obtained; (5) the number of acres that will be mined; (6) the average coal thickness by seam; (7) the average overburden thickness; (8) what year

^{34/} "In analyzing an applicant's final showing for commercial quantities, the BLM may use any available coal and geologic data. Such data, however, shall not be used by the BLM to enhance the applicant's position with respect to satisfying the commercial quantities test. If an applicant fails to submit available data/information in their final showing that would enrich their position with respect to commercial quantities, BLM is not to volunteer or use this information in its determination of commercial quantities. BLM cannot assist the applicant in assembling a final showing, unless the applicant is aware of and requests from the BLM coal and geologic or other information of a specific nature. Of utmost importance is that BLM is not doing the work required of the applicant" (BLM Manual H-3430-1, Chapter VI.A., Final Showing Analysis, Rel. 3-173 (Aug. 8, 1987) (emphasis in original)).

is "year one" for this proposed mine; (9) what the recovery factor is; ^{35/} (10) what the in-place coal density for the entire CMV is; (11) whether the state leases are still in effect; (12) the basis for the proposed mine-mouth power plant market for the coal; and (13) the studies mentioned on page 6.36 of the revised Final Showing. BLM should issue a request for additional information specifying this and any other information it needs to make a commercial quantities determination.

Before it does so, however, we direct BLM to consider and issue decisions on whether the prospecting permits were properly issued, so that the parties do not waste their resources on commercial quantities determinations only to learn that leases cannot be issued in any event because the lands were not subject to prospecting under the Mineral Leasing Act or the permits were void. 43 CFR 3430.5-1(b)(1). See note 16, supra.

F. Present Costs and Prices Govern

[8] It remains only to say that our decisions have concluded that a coal preference right lease applicant that completed its exploration and submitted an application before the Department revised the governing regulations in 1976 and thereafter must comply with the requirements of the revised regulations. Kin-Ark Corp., 45 IBLA 159, 87 I.D. 14 (1980); Eugene Stevens, 126 IBLA 357 (1993). See also Utah International, Inc. v. Andrus, 488 F. Supp. 962, 969 (D. Utah 1979). These decisions are consistent with the Department's statement when it adopted the regulations in 1976 that it believed that prices and costs "should not be frozen at the time the application for lease is filed" and that it would consider "price changes that occur before a final Departmental decision is made." ^{36/}

^{35/} The revised Final Showing at 3.1 states a 90-percent recovery factor was one of the criteria for identifying minable reserves.
^{36/} "Request for clarification of time to determine prices and costs * * * 3521.1-1(c). The proposed regulations did not state whether the prices and costs should be determined as of the time of application, time of decision, or some other time. While the Mineral Leasing Act clearly limits the time to collect information on the physical property of the coal deposit to the term of the prospecting permit, no such limitation appears for prices and costs. The basic purpose of the prudent person test is to give an indication of whether a particular lease can be developed. In view of the purpose of the test, the Department believes that prices and costs should not be frozen at the time that the application for lease is filed. The Department will administer the regulations to consider, where appropriate, price changes that occur before a final Departmental decision is made. Expected prices and costs over the life of the deposit may be considered." 41 FR 18845-46 (May 7, 1976).

In the companion case, we held that Thermal may do additional testing for the limited purpose of obtaining the evidence required by post-1972 regulatory changes establishing necessary proof of discovery of commercial quantities. Thermal Energy Co., 135 IBLA ____, ____ (1996). This ensures that any determination that an applicant has or has not discovered commercial quantities of coal is made using evidence that is applicable to the conditions at the time of the determination. The amount and type of information a permittee would gather to estimate the quantity and quality of coal necessary for a viable mine when applying the laws and regulations in effect at the conclusion of prospecting in 1972 may not be the same as the permittee would gather to estimate quantity and quality of coal necessary for a viable mine operated in compliance with laws and regulations now in effect. ^{37/}

Therefore, in accordance with the authority delegated to the Interior Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, BLM's March 23, 1993, decisions are set aside and the cases are remanded for action consistent with this decision.

Will A. Irwin
Administrative Judge

I concur.

David L. Hughes
Administrative Judge

^{37/} It would not be fair, for example, for BLM to reject an application because the applicant had not conducted certain chemical tests on coal recovered from drill holes when those tests were not necessary to prove discovery when the prospecting permit was in effect. The applicant should be afforded an opportunity to drill additional holes to get the coal needed to run the additional tests.

