



PEABODY WESTERN COAL COMPANY

174 IBLA 325

Decided May 30, 2008



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

PEABODY WESTERN COAL COMPANY

IBLA 2007-168

Decided May 30, 2008

Appeal from a Notice of Noncompliance issued by the Arizona State Office, Bureau of Land Management, determining that blue zero seam coal on Indian leases was wasted. 14-20-0450-5743, 14-20-0603-9910.

Affirmed.

1. Coal Leases and Permits: Generally--Indians: Lands--Indians: Leases and Permits: Generally--Indians: Mineral Resources

An operator/lessee shall conduct coal mining operations involving development, production, resource recovery and protection, and preparation and handling of coal in accordance with the rules of 43 C.F.R. Part 3480, the terms and conditions of the leases, the approved Resource Recovery and Protection Plan, and any orders issued by the authorized officer. 43 C.F.R. § 3481.1(b). The operator/lessee also shall prevent wasting of coal and other resources during exploration, development, and production, and shall adequately protect the recoverable coal reserves and other resources upon abandonment. 43 C.F.R. § 3481.1(c).

2. Coal Leases and Permits: Generally--Indians: Lands--Indians: Leases and Permits: Generally--Indians: Mineral Resources

Where a mine operator with an approved Resource Recovery and Protection Plan does not mine any portion of a mineable coalbed that was scheduled to be mined under the approved Plan, the operator is no longer mining in accordance with its Plan, and will not achieve maximum economic recovery of the coal. To avoid violating the regulations and lease terms, the operator must seek and obtain BLM's approval before actually

bypassing the coal, which may include or require an approved mine plan revision or modification. 43 C.F.R. §§ 3482.1(c)(7) and § 3482.2(b)(2), (c)(2).

3. Coal Leases and Permits: Generally--Indians: Lands--Indians: Leases and Permits: Generally--Indians: Mineral Resources

When appellant bypassed mineable coal without first submitting justification to BLM and obtaining BLM's approval, its action resulted in waste of the coal resource.

APPEARANCES: Scot W. Anderson, Esq., Denver, Colorado, for appellant; Hoke MacMillan, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Phoenix, Arizona, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE PRICE

Peabody Western Coal Company (Peabody) has appealed the March 27, 2007, Notice of Noncompliance (NON) issued by the Arizona State Office, Bureau of Land Management (BLM), charging Peabody with mining through and wasting blue zero seam (or BOX) coal at the Kayenta Mine, which is located on the Black Mesa, for joint leases (14-20-0450-5743 and 14-20-0603-9910) issued by the Navajo Nation/Hopi Tribe (lessors), in northeastern Arizona.¹ Peabody operates the Mine pursuant to Permit No. AZ-0001D, conducting a strip mining operation.

Background

There is little disagreement about the events leading to issuance of the NON. In August 2005, BLM was contacted by the Navajo Nation Minerals Department concerning an allegation that BOX coal was wasted by Peabody. In response, representatives of the lessors, Peabody, and BLM inspected the pit or cut which is identified as J-21, ramp 28. It was observed that a stockpile of low quality coal was large, while a stockpile of high quality coal was small. BLM concluded that Peabody had mined through the BOX coal without extracting that coal, to reach a better quality of coal at a lower level in the pit so that it could blend coal to meet applicable contract specifications.

After the field inspection, BLM reviewed information provided by Peabody pertaining to coal recovery from the BOX coal in previous pits. BLM monitored subsequent mining activities, confirming that Peabody had recovered coal from the

¹ There are seven coal seams in the vicinity of the Kayenta Mine (in descending order): violet, green, blue, red, yellow, brown, and orange.

same seam in several cuts before and after the cut at issue, and that only the coal in the one pit was wasted. In addition, BLM used computer modeling based on actual drill hole data from five holes in the center of the J-21 pit, which showed that the BOX coal was more than 3 feet thick. That drill hole data was provided by Peabody.

BLM issued the NON on the ground that Peabody was required by its approved Coal Resource Recovery and Protection Plan (R2P2) to mine coal that was more than 3 feet thick, and that in July and August 2005, contrary to the terms of its R2P2 and 43 C.F.R. § 3481.1(c), Peabody had mined through the BOX coal in the J-21 pit, near ramp 28 of the Kayenta Mine, instead of recovering the coal and stockpiling it for blending with better quality coal. The NON determined that an estimated 26,000 tons of BOX coal had been mineable and that 21,840 tons would have been recoverable (at an 84% recovery rate) and saleable, and subject to royalty in an amount to be assessed by the Minerals Management Service.

Applicable Law

Pursuant to 43 C.F.R. § 3480.0-6, BLM is responsible for administering the Mineral Leasing Act, 30 U.S.C. § 181 *et seq.* (2000), with respect to coal mining, production, and resource recovery and protection operations on Federal coal leases, and for supervising operations for exploration and development of Federal coal. 43 C.F.R. § 3480.0-6(b). This includes regular inspections to ensure diligent development, continued operation, preparation, handling, product verification, and abandonment operations, and the authority to require compliance with applicable law, all lease terms and conditions, and the R2P2. 43 C.F.R. § 3480.0-6(d)(4) and (5). BLM exercises this authority on leases for Indian coal pursuant to 25 C.F.R. § 211.4, which incorporates 43 C.F.R. Subpart 3480 for Indian leases.²

[1] The operator/lessee shall conduct coal mining operations involving development, production, resource recovery and protection, and preparation and handling of coal in accordance with the rules of 43 C.F.R. Subpart 3480, terms and conditions of the Federal leases or licenses, the approved R2P2, and any orders issued by the authorized officer. 43 C.F.R. § 3481.1(b). The operator/lessee shall also prevent wasting of coal and other resources during exploration, development,

² Indian coal leases are governed by the provisions contained in 25 C.F.R. Chapter I, Subchapter I. *See* 43 C.F.R. Subpart 3480 (“Except as otherwise provided in 25 CFR Chapter I or Indian lands leases, these rules do not apply to operations on Indian lands.”). BLM’s functions under 43 C.F.R. Part 3480 -- Coal Exploration and Mining Operations, including without limitation “resource evaluation, approval of drilling permits, mining and reclamation, production plans, mineral appraisals, inspection and enforcement, and production verification . . . apply to leases and permits approved under this part.” 25 C.F.R. § 211.4.

and production and shall adequately protect the recoverable coal reserves and other resources upon abandonment. 43 C.F.R. § 3481.1(c).

Resource recovery and protection “includes practices to: recover efficiently the recoverable coal reserves subject to these rules; avoid wasting or loss of coal or other resources; prevent damage to or degradation of coal-bearing or mineral-bearing formations; ensure MER [maximum economic recovery] of the Federal [and Indian] coal; and ensure that other resources are protected during exploration, development, and mining, and upon abandonment.” 43 C.F.R. § 3480.0-5(33) (Definitions). An R2P2 therefore is a plan that shows that a proposed operation meets statutory requirements for the life of the mine, and it must be submitted to and approved by BLM before any coal operations can be commenced. 43 C.F.R. §§ 3480.0-5(34) and 3482.1(b). Among other things, an R2P2 must describe the proposed mining operation, including sufficient analyses to determine the quality of the mineable reserve; the methods of mining and/or variation of methods, basic equipment, and mining factors; and the estimated coal reserve base, mineable reserve base, and recoverable coal reserves. 43 C.F.R. § 3482.1(c)(3)(i) through (iii).

An R2P2 also must contain an explanation of how MER is to be achieved. 43 C.F.R. § 3482.1(c)(7); *Pacificorp*, 144 IBLA 54, 60 n.6 (1998). When the authorized officer makes the MER determination and approves the R2P2, the operator must mine the leased Federal coal in accordance with the approved plan. By doing so, the operator achieves MER and, conversely, when the leased coal is not mined in accordance with an approved R2P2, the operator does not achieve MER. *Cyprus Shoshone Coal Corp.*, 143 IBLA 308, 317 (1998). As the Board explained in *Cyprus Shoshone Coal*, MER likely will change in the life of a mine as a result of factors such as volatile sales prices, unforeseen regulatory restrictions or physical conditions such as faulting, less than projected coal seam thickness, or changes in the projection of recoverable coal. A mine plan therefore “should not be and is not cast in concrete with the operator being forever required to conform unerringly with the [MER] established in its original mine plan.” *Id.* The authorized officer properly may require revisions or supplementation of approved plans to meet changed conditions. 43 C.F.R. § 3482.2(b)(2). The operator also may propose modifications to meet changed conditions, in writing, with the justification for doing so. 43 C.F.R. § 3482.2(c)(2). Any modification or revision shall be designed to attain MER, and approval thereof shall be in writing. 43 C.F.R. § 3482.2(a)(2); *Cyprus Shoshone Coal Corp.*, 143 IBLA at 317.

[2] Where an operator with an approved mine plan does not mine (*i.e.*, bypasses or mines through a seam without recovering the coal) any portion of a coalbed that was scheduled to be mined under an approved R2P2, the operator is no longer mining in accordance with that plan, and will not achieve MER. In no event may an operator bypass mineable coal without submitting justification to the

authorized officer and obtaining his or her approval to bypass the coal. 43 C.F.R. § 3482.1(c)(7). Accordingly, to avoid violating the regulations and lease terms, the operator must seek and obtain BLM's approval before actually bypassing the coal, which may include or require an approved mine plan revision or modification. 43 C.F.R. §§ 3482.1(c)(7) and 3482.2(b)(2), (c)(2); *see also* *Cyprus Shoshone Coal Corp.*, 143 IBLA at 317.

The Parties' Arguments

Citing *Cyprus Shoshone Coal Corp.*, 143 IBLA at 316, and 43 C.F.R. § 3482.2(2), Peabody argues that because an approved R2P2 defines MER for a leased coal deposit, it follows that "mine operations consistent with the approved mine plan cannot result in less than [MER]," and thus "those operations by definition cannot be considered a waste of coal." Statement of Reasons (SOR) at 3. It contends that the R2P2 allows "flexibility in designing mine operations," and that it does not establish that Peabody is to mine any coal seam solely because it is at least 3 feet thick. *Id.* at 4. It characterizes the R2P2 as establishing only guidelines, under which it has "discretion to mine through a coal seam with high ash or sulfur content or where seams do not average two to three feet in thickness." *Id.* at 5. Peabody states that it determined not to mine the BOX coal for four reasons: the coal was not recoverable in the July/August 2005 cut at issue, as the prior cut in April/May showed that the coal seam was missing in several places; the BOX coal was "bony"³ and soft," which rendered the coal difficult to clean and recover; it was high in ash; and a visual inspection of the BOX coal in the highwall before the July/August cut "demonstrated that the conditions encountered in the prior cut would also be encountered in the July/August cut," meaning that the BOX coal would be thin and discontinuous. *Id.* at 5-6. Peabody has submitted two affidavits by Randy S. Lehn, a professional engineer (Lehn Affidavit), as well as the affidavit of Robbie Willson, a senior geologist, both of whom state they are familiar with Peabody's decision regarding the BOX coal in pit J-21.

BLM argues that Peabody simply made a business decision to reach the better quality coal weeks sooner than it otherwise would have in order to meet contract requirements. BLM has submitted the declaration of Charles Gaskill (Gaskill Declaration), the BLM geologist who is personally familiar with the facts and circumstances resulting in the NON and who prepared the April 2007 Summary Report underlying the NON (Gaskill Summary Report). *See* Ex. 3 to Answer. BLM counters that the wasted seam was the first below the surface and that it averaged at least 3 feet in thickness, as shown by the drill hole data. It disputes Peabody's

³ *Bone* is a "hard coallike substance high in noncombustible mineral matter." *A Dictionary of Mining, Mineral, and Related Terms*, U.S. Department of the Interior, Bureau of Mines (1968).

characterization of the coal as bony and soft, stating that Peabody's own quality control data showed that the wasted coal was of the same quality as the cuts before and after it, and that ash contamination was no more than 11.42% (Peabody is required to minimize shipments containing 12.5% or more ash). BLM argues that Peabody should have stockpiled the wasted coal for blending. BLM also challenges the assertion that Peabody's visual inspection did or could confirm that the conditions found in the prior cut would exist in the wasted cut, explaining that such a claim is belied by the BOX coal recovered in the five pits that preceded the wasted coal, and by the two that followed it. *Id.* at 4.

In its Reply, Peabody contends that BLM errs in concluding that "the Mined-through Blue Seam was greater than three feet in thickness" based on computer modeling of the drill hole data, and instead insists that physical observation showed that the seam "did not exist in many places, and rarely approached three feet in thickness." Lehn Affidavit (July 2007) ¶ 6. As to BLM's charge that Peabody could have blended the BOX coal with better quality coal, Lehn avers that the BOX coal "simply did not exist in sufficient quantity to allow its recovery. The lack of the Blue Seam in many places and the thinness of the Blue Seam where it did exist, coupled with the poor quality of the thin Blue Seam rendered the Mined-through Blue Seam unrecoverable." *Id.* ¶ 8.

Analysis

As set forth above, if an operator does not mine any portion of a coalbed that was to be mined under its approved R2P2, the operator is no longer mining in accordance with that Plan, and is no longer achieving MER. To avoid violating the regulations and lease terms, the operator must seek and obtain BLM's approval before actually bypassing the coal, which may include or require an approved mine plan revision or modification. 43 C.F.R. §§ 3482.1(c)(7) and 3482.2(b)(2) (changes required by the authorized officer), (c)(2) (changes proposed by operator/lessee). Although Peabody did not seek or obtain authorization from BLM before acting, BLM did not cite or rely on this requirement in the NON or in its Answer on appeal. Peabody claims that no such authorization or plan revision was required because the coal was not mineable, so that its action complied with the terms of its R2P2. We accordingly begin with Chapter 5 of Peabody's approved R2P2, Coal Resource Protection, which states:

During reserve development, all the coal encountered during bore hole drilling is recorded. The correlatable and estimated mineable seams are cored and analyzed regardless of seam thickness. These data are utilized to finally determine mineable reserves. The quality of thin seams as well as their occurrence in the geologic column is considered when determining whether the seam is mineable or nonmineable.

Because of the varying conditions encountered on Black Mesa, it is impossible to specify precise criteria relating to coal recovery in all mining areas. The [BLM] receives copies of PWCC's [Peabody Western Coal Company's or Peabody's] new drilling data after the drilling is completed. . . .

Experience in mining the Black Mesa coal seams has allowed PWCC to formulate certain general guidelines regarding coal recovery. In general, *when a single thin seam is first to occur below the surface*, the guideline PWCC uses is that the seam must *average at least three feet in thickness to be considered mineable*. If a thin seam occurs lower in the mining zone, then the seam must average at least two feet in thickness and have a maximum innerburden to coal ratio of 3:1 to be considered mineable. *Thin seams, which have high ash or sulfur content, may be considered nonmineable due to contract quality constraints*. Due to the above constraints and conditions encountered during coal loading operations, the amount of coal not being recovered is shown in Table 20.

BLM Ex. 1 at 44 (emphasis added). The R2P2 thus establishes two standards applicable to this dispute: first, that an *average* thickness of 3 feet for thin seams that are first to occur below the surface is considered mineable; and second, that a thin seam having a high ash or sulfur content may be considered nonmineable. Peabody has invoked both standards to defend its action. We now consider the evidence to determine whether Peabody has satisfactorily demonstrated that its decision was proper under its approved plan or governing regulations.

By letter dated December 19, 2005, BLM requested specific "information in the form of drill data, core data, geochemical analyses, pictures, blast hole information, or any other type of data which supports Peabody's decision to spoil the BOX coal." Peabody's February 1, 2006, response is revealing. The subject coal seam was described as follows:

The area of coal in question is approximately 2.43 acres. The overburden here is 70 feet, *to uncover a 3.5 foot seam of soft coal*. *Attached is a copy of the notes taken by the quality control department as we mined the pit previous to the activity in question*. All notes indicate that there is very little coal in this area. When questioned about the actual thickness of the seam as recovered, the group stated coal thickness was about two feet. During loading operations extraneous material becomes mixed with the seam resulting in a contaminated product with an ash of 15% dry basis. . . .

Our coal supply agreement stipulates a delivered coal product of 10.6% dry ash with penalties as the ash content goes up, and must minimize all shipments above 12.5%. *At the time this seam was to be mined we did not have any low ash coal available for blending to reach an acceptable product. The high ash stockpiles on June 1, 2005 were approximately 860,000 tons with only 180,000 tons of acceptable saleable coal. . . .*

With stockpiles at these levels it was determined this seam could not be processed to a saleable product at that time.

See Ex. 3-3 (Letter from B. Woodward to BLM) to Answer (emphasis added). The emphasized language in the first paragraph makes it clear that Peabody made its decision regarding the BOX seam in the J-21 pit based on the asserted facts of its experience in the April/May cut that preceded it. The second paragraph frankly strikes us as an unguarded, straightforward explanation of why Peabody decided to mine through the BOX coal in the J-21 pit.

With this response Peabody submitted a map of the area, its Quality Control Department's (QCD's) notes on the conditions encountered in the *previous* pit, and a "GA-11 calculation sheet." *Id.* Those notes are for the period May 2 to May 18, 2005, and they do not clearly portray for the Board, or establish the basis for Peabody's conclusions about, conditions in J-21, the pit that followed.⁴ In any event, those notes, whatever they may convey about the previous pit, cannot defeat the objective evidence of the data from the drill holes in the J-21 pit.

⁴ For example, on May 2, 2005, the notes report for three shifts "uncovering coal," that there was then "no information," and then "uncovering coal." The next day there was "no information." The next entries are May 9 and 10, when coal was being uncovered. The May 9 date has a further entry "60' of coal ready," while the second shift on May 10 also reported: "See rocks and parting in the coal. Told 131 Ray. Need more cleaning on coal HW and spoil side. Coal haul from here." On May 11, the coal is described as "thin here and there." No information regarding the situs of each observation is readily apparent, and Peabody has made no effort to relate these observation points to its drill hole data. Only one entry, for May 18, uses the phrase "trash coal." The May 12 entry for the third shift states: "Almost nothing here. Looks like some coal remove by dragline." See Attachments to Ex. 3-3 (Peabody's Feb. 1, 2006, letter to BLM). These notes are simply not as revealing or persuasive as Peabody believes them to be, even about conditions in the previous pit.

By letter dated March 22, 2006, BLM requested an explanation of how Peabody may have used data from those five drill holes in making its decision.⁵ See Ex. 3-4 to Answer; Gaskill Declaration ¶ 10. BLM also requested an explanation of the two thickness figures cited by Woodward in his February 1, 2006, response, quoted above. In a letter dated May 25, 2006, Lehn acknowledged without details that Peabody had “used” the 5 drill holes, and had also “utilized” information from 14 exploration drill holes in making its decision. These 14 other drill holes appear to be outside the wasted area. Lehn explained Woodward’s statements regarding the 3.5-foot seam of soft coal as nothing more than a statement of “what was supposed to be in the area and that it turned out to be soft,” characterizing his reference to the seam’s thickness as “about two feet” as “generous” in light of the field notes described above. Ex. 3-5 to Answer at 1. Lehn further explained that “[a]s stated in item #3 above, the soft coal would turn out to be much thinner than 3.5 feet. The evidence we used were notes f[rom] field personnel that were at the location in question,” and this evidence consisted of the QCD notes indicating “no coal or trash coal in seven different instances.” *Id.* at 1-2. Lehn stated that the highwall for the next cut was visible, asserting that

[t]he geology indicated a seam pinching in and out in a very inconsistent manner. Some areas had no coal and some had the 3-3.5' indicated in the exploration drill holes. The coal was very soft and difficult to clean in [sic] a consistent basis in the existing pit. Unfortunately, no pictures were taken.

Id. at 2.

We find the characterization of Woodward’s statements unconvincing in light of the rest of the February 1 response and the ambiguities and questions posed by the field notes discussed above. Nor does Peabody’s May 25 reply offer anything in the way of a meaningful explanation of how specifically the objective drill hole data justified its conclusions. Indeed, with one exception, nowhere in the record before us does Peabody ever reconcile its assertions with the drill hole data from the J-21 pit.⁶

⁵ The five drill holes are 16429B, 29290B, 29241B, 1618B, and 29238B, and they were drilled in the centerline of the J-21 pit. A sixth drill hole was discounted because it was too shallow to reach coal. *Id.* at unpaginated 5. Each of the five drill holes indicates that the BOX coal in the J-21 pit was 3 to 3.9 feet thick. These drill holes are the only sources of objective data regarding seam thickness in the record.

⁶ In his affidavit, Willson states that “core holes are drilled every 660 feet, and a bore hole every 330 feet” to delineate the coal reserve at the Kayenta Mine. Willson Affidavit ¶ 4. He avers that despite the drill hole density at the Mine, structural and geological features may go undetected, and states that “modeling based on these drill

(continued...)

That exception relates to one in-pit drill hole, not identified by number, in the pit that immediately preceded the cut at issue. Although “this single data point is in no way sufficient to characterize the entire Mined-through Blue Seam,” Peabody nevertheless relies on it to assert that “this data point shows the thickness of the Blue Seam in the Prior Pit to be 2.8 feet.” Lehn Affidavit (July 2007) ¶ 6. In Peabody’s view, this data was consistent with its visual inspection. *Id.* We do not agree. To the contrary, the drill hole information casts considerable doubt on Peabody’s conclusions with respect to the prior pit: Lehn previously had stated that “[s]ome areas had no coal and some had the 3-3.5' indicated in the exploration drill holes,” Ex. 3-5 to Answer (May 25, 2006, response to BLM), and he also stated that the BOX coal in the prior pit was “typically less than two feet thick.” Lehn Affidavit (May 2007) ¶ 6 (emphasis added). His reliance on information from the prior pit as a basis for refuting the drill hole data from the J-21 pit merely compounds the doubt.

Lehn confirms that Peabody’s position is entirely dependent on information relating to the prior pit. Lehn avers that

PWCC attempted to mine the Blue Seam in the pit mined prior to the pit containing the Mined-through Blue Seam (“the Prior Pit”). If PWCC had known the actual nature of the Blue Seam in the Prior Pit, PWCC would have mine[d]-through the Blue Seam in the Prior Pit. Physical inspection of the Blue Seam in the Prior Pit showed that seam to be very thin (well less than three feet in thickness). Indeed, the Blue Seam did not exist at all in many places in the Prior Pit. Where the Blue Seam did exist, the coal was soft and bony, and was not suitable for recovery.

Lehn Affidavit ¶ 6(c)(i). Peabody did recover the BOX coal in the previous pit, however, and it mined the coal even after it presumably ascertained the poor quality and quantity of the coal, an unrefuted fact that undermines the arguments Peabody pursues on appeal.

As to the allegedly poor quality of the BOX coal, by letter dated September 27, 2006, BLM requested information regarding the quality of the coal in the pit immediately adjacent to and west of pit J-21, which was mined in September 2005.

⁶ (...continued)

hole data may not reflect actual conditions between drill holes.” *Id.* ¶ 6. Willson posits that the BOX coal in pit J-21 may have been “scoured or cut out” by massive sandstone and shale units, and that the erosional effects on the BOX coal “was at a scale that could not be identified with drill hole density.” *Id.* ¶¶ 7, 8. The Willson Affidavit does not provide any basis for discounting as irrelevant the drill hole data from the J-21 pit and computer modeling showing that the BOX coal was 3 to 3.9 feet thick in favor of meager and nonspecific field notes pertaining to the prior pit.

Ex. 3-6 to Answer. The information supplied by Peabody showed that the ash contamination of the September 2005 cut in the J-21 ramp 28 area was 11.42%.

Ex. 3-7 to Answer. The report notably states: “No up-dated core info. Use the last pit cut info.”⁷ *Id.* Peabody challenges BLM’s conclusion that the ash content of the coal in both pits was less than 12.5%, and thus acceptable for blending, on the ground that the 11.42% figure is based on the same single in-pit drill hole, which cannot reliably be used to characterize the entire wasted coal seam. Lehn Affidavit (July 2007) ¶ 7. Lehn contends the coal in the prior pit, “where it existed, had an ash content at best of 15 to 18 percent. Visual inspection of the Blue Seam in the Prior Pit highwall indicated that the Mined-through Blue Seam was likely to have a similar ash content.” *Id.* The fact remains that Peabody relied upon the data from the last pit as evidence of the ash contamination in the September 2005 cut, and that data showed that the ash content was 11.42%, not 15 to 18%. *Id.* It has provided no objective basis for now rejecting the data it supplied in response to BLM’s inquiry.

BLM monitored Peabody’s operation for the rest of 2005 and throughout 2006, during which the BOX coal was recovered from the three pits that succeeded the cut in question, just as it had been recovered from the five pits that preceded the cut in question, confirming that the BOX coal was mineable and averaged at least 3 feet in thickness. Gaskill Summary Report at unpaginated 3-4. Indeed, BLM acknowledged that the pit immediately to the right of the wasted pit was difficult to mine “due to interpreted thickness and quality,” just as Peabody stated it was, but the coal was mined and blended to achieve contract specifications. *Id.* at unpaginated 4. BLM notes, moreover, that in the third quarter of 2005, Peabody mined coal from other seams in the J-19 pit that had a higher percentage of ash contaminant than the percentage Peabody attributed to the BOX coal in pit J-21 by Peabody.⁸ *Id.* at unpaginated 7.

[3] A party challenging a decision rendered by BLM in the exercise of its delegated authority has the affirmative burden of establishing error by a preponderance of the evidence. *See D.J. Laughlin*, 154 IBLA 159, 163-64 (2001); *International Sand and Gravel Corp.*, 153 IBLA 295, 299 (2000); *Kirk Brown*, 151 IBLA 221, 225 (1999); *Pete Zanetti*, 113 IBLA 239, 241 (1990), and cases cited. We are simply not persuaded by Peabody’s arguments. In any case in which “coal is not to be mined or is to be rendered unmineable by the operation,” Peabody was required

⁷ It is unclear whether “last pit” refers to the July/August cut here in question or to a different pit. What is important is that the claim that the ash content of the unrecovered BOX coal in pit J-21 is 11.42% is an inference derived from information that pertained to a different pit.

⁸ Figure 4 of Gaskill’s Summary Report was based on BLM’s computer modeling. Figure 4 showed the percentages of ash contamination from coal seams other than the BOX coal in pit J-19 to be 12.02%, 11.95%, and 9.87%, respectively.

to submit an appropriate justification to the authorized officer for approval before it acted. 43 C.F.R. § 3482.1(c)(7); *Cyprus Shoshone Coal Corp.*, 143 IBLA at 317; see *Utah Power & Light Co.*, 118 IBLA 181, 194-95, 98 I.D. 97, 104-05 (1991). Had it complied with that requirement, BLM properly would have determined and considered in the first instance the facts and contentions urged on appeal that might justify Peabody's conclusions.⁹ Peabody failed to submit a justification for not mining the BOX coal in pit J-21 in advance of its action, however, and consequently its decision to mine through the mineable BOX coal without obtaining BLM's approval to do so was a violation of the regulation and resulted in the waste of the coal resource.

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

_____/s/_____
T. Britt Price
Administrative Judge

I concur:

_____/s/_____
Lisa Hemmer
Administrative Judge

⁹ As is evident from this opinion, we agree with BLM that the information Peabody purportedly relied on does not constitute adequate justification for its decision to bypass the BOX coal.