



POWDER RIVER BASIN RESOURCE COUNCIL

180 IBLA 119

Decided November 2, 2010



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

POWDER RIVER BASIN RESOURCE COUNCIL

IBLA 2010-130

Decided November 2, 2010

Appeal from a decision of the Wyoming State Director, Bureau of Land Management, authorizing the offering of two proposed Federal coal leases in the Powder River Basin, Wyoming. WYW163340; WYW177903.

Decision affirmed.

1. Environmental Quality: Environmental Statements–National Environmental Policy Act of 1969: Environmental Statements–National Environmental Policy Act of 1969: Environmental Impact Statement–Coal Leases

An appellant challenging BLM’s Decision to approve the competitive leasing of Federal coal, following preparation of an environmental impact statement under section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(2)(C) (2006), must carry its burden to demonstrate by a preponderance of the evidence, with objective proof, that BLM failed to adequately consider a substantial environmental question of material significance to the proposed action, or otherwise failed to abide by section 102(2)(C) of NEPA.

2. Environmental Quality: Environmental Statements–National Environmental Policy Act of 1969: Environmental Statements–National Environmental Policy Act of 1969: Environmental Impact Statement–Coal Leases

Under section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(2)(C) (2006), BLM is required to consider the potential direct, indirect, and cumulative effects of its actions. NEPA does not require BLM to evaluate the potential environmental consequences resulting from noncompliance with Federal and State permitting requirements or assume that

violations of Federal and State standards will inevitably occur.”

3. Environmental Quality: Environmental Statements–National Environmental Policy Act of 1969: Environmental Statements–National Environmental Policy Act of 1969: Environmental Impact Statement–Coal Leases

BLM’s environmental analysis under section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(2)(C) (2006), declining to posit a precise correlation between specific climatological changes or the environmental impacts thereof attributable to projected greenhouse gas emissions from the particular project, does not fall short of NEPA’s “hard look” requirement for promoting informed decisionmaking, where evidence in the record as to the state of the science confirms the speculative nature of such impacts.

APPEARANCES: Shannon Anderson, Esq., Sheridan, Wyoming, and Brad A. Bartlett, Esq., Durango, Colorado, for Appellant; Patrick R. Day, Esq., Andrew C. Emrich, Esq., Cheyenne, Wyoming, and Christopher L. Colclasure, Esq., Denver, Colorado, for Intervenor, Antelope Coal LLC.; Affie Ellis, Esq., James Kaste, Esq., Cheyenne, Wyoming, for the State of Wyoming; Mary L. Frontczak, Esq., St. Louis, Missouri, Peter S. Glaser, Esq., Michael H. Higgins, Esq., Matthew W. Dukes, Esq., Washington, D.C., George A. Somerville, Esq., Richmond, Virginia, for Amicus Curiae, Peabody Energy Company; Andrew C. Emrich, Esq., Cheyenne, Wyoming, Andrew A. Irvine, Esq., Jackson, Wyoming, and Christopher L. Colclasure, Esq., Denver, Colorado for Amicus Curiae, Wyoming Mining Association; Philip C. Lowe, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Lakewood, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE KALAVRITINOS

Powder River Basin Resource Council (Powder River) has appealed from a March 25, 2010, Record of Decision (ROD or Decision) of the State Director, Wyoming State Office, Bureau of Land Management (BLM), deciding, pursuant to the Mineral Leasing Act (MLA), 30 U.S.C. §§ 181-287 (2006), to offer for competitive lease sale two tracts of public land containing Federal coal in northeastern Wyoming, 50 miles from Douglas, Wyoming, within the Powder River Basin (PRB or Basin),

WYW163340 (West Antelope (WA) II North Parcel) and WYW1177903 (WAI South Parcel).¹

For the reasons that follow, we conclude that Powder River has not carried its burden to demonstrate that BLM failed to comply with section 102(2)(C) of the National Environmental Policy Act (NEPA), 43 U.S.C. § 4332(2)(C) (2006) or Section 184(a) of the MLA, 30 U.S.C. § 184(a) (2006), and, accordingly, we affirm BLM's decision.

I. Background

On April 6, 2005, Antelope filed an application to lease approximately 4,746.23 acres of public land containing Federal sub-bituminous coal deposits.² Antelope applied pursuant to BLM's leasing-by-application (LBA or leasing on

¹ WildEarth Guardians, Sierra Club, and Defenders of Wildlife (collectively, WildEarth) jointly filed an appeal of the same Decision, docketed as IBLA 2010-129. By Orders dated May 21, 2010, we granted motions to intervene in IBLA 2010-129 and 2010-130 by the State of Wyoming and Antelope Coal LLC (Antelope) (formerly, Antelope Coal Company), a subsidiary of Cloud Peak Energy, Inc. (Cloud Peak). WildEarth Guardians filed a "Notice of Voluntary Dismissal" of IBLA 2010-129 and, by Order dated July 1, 2010, the Board dismissed their administrative appeal. The Wyoming Mining Association (WMA), a trade organization that represents 12 coal production companies, including Cloud Peak, also moved to intervene in IBLA 2010-129 and 2010-130. By Order dated July 2, 2010, the Board denied the request but granted WMA amicus curiae status in IBLA 2010-130. On July 12, 2010, Peabody Energy Company (Peabody) requested leave to participate as an amicus curiae. The motion is hereby granted.

² Antelope's original application was serialized as WYW-163340. BLM modified the tract applied for, increasing its size and breaking it into two tracts on either side of the Campbell/Converse County line (WAI North and WAI South), and the tracts serialized, respectively, as WYW-163340 and WYW-177903. The WAI North parcel was expected to be of competitive interest to more than one mine. See ROD at 6. The WAI North parcel (2,837.63 acres) would encompass lands entirely in T. 41 N., R. 71 W., Sixth Principal Meridian, Campbell County, and the WAI South parcel (1,908.6 acres) would encompass lands entirely in T. 40 N., R. 71 W., Sixth Principal Meridian, Converse County, Wyoming. Most of the lands at issue are public lands under BLM's jurisdiction and are split estate lands, with the surface estate privately owned and the mineral estate Federally-owned. The remaining lands are Federal surface/mineral estate lands, under the jurisdiction of the Forest Service, U.S. Department of Agriculture.

application) regulations at 43 C.F.R. Subpart 3425.³ The tracts are adjacent to the Antelope Mine (Mine), an ongoing surface coal mining operation operated by Antelope, that produces up to 42 million tons of coal per year. The two tracts are expected to contain a total of approximately 406.5 million tons of mineable coal (350.2 (WAI North) and 56.3 (WAI South)). Several Federal and State agencies are responsible for permitting and regulating the different aspects of the coal mining operation currently taking place at the Mine, just as they would if Antelope were to be the successful high bidder in the competitive leases authorized by the Decision and then mined the WAI tracts.⁴

Once BLM started to evaluate the LBA application, as recommended by the RCT, it began assessing the likely environmental impacts of the proposed action and

³ The two WAI tracts are within the decertified Powder River Coal Production Region (CPR), Wyoming, which makes them available for LBA under 43 C.F.R. Subpart 3425, rather than by the regional leasing process under 43 C.F.R. Subpart 3420. See 43 C.F.R. § 3425.1-5; see also ROD at 3; ROD, Appendix (App.) 1 at Figure 1 (General Location Map with Federal Coal Leases and LBA Tracts). The CPR was decertified by BLM, in 1990, as recommended by the Powder River Regional Coal Team (RCT). See 55 Fed. Reg. 784 (Jan. 9, 1990); *Powder River Basin Resource Council*, 124 IBLA 83, 85 (1992). In decertifying the lands, the Director agreed with RCT to limit leasing on application, *inter alia*, to maintenance tracts that would continue or extend the life of an existing mine, subject to oversight by RCT. *Id.*

⁴ The Wyoming Department of Environmental Quality (WDEQ) regulates surface coal mining operations and reclamation on Federal and non-Federal lands in Wyoming, under the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. §§ 1201-1328 (2006), pursuant to a cooperative agreement with the Office of Surface Mining Reclamation and Enforcement (OSM), U.S. Department of the Interior. It also regulates emissions in Wyoming, subject to the oversight of the Environmental Protection Agency (EPA), under the Clean Air Act, 42 U.S.C. §§ 7401-7671q (2006).

If Antelope is the successful qualified high bidder at the two proposed lease sales, WDEQ must approve a permit revision, and the Assistant Secretary, Land and Minerals Management, U.S. Department of the Interior, must approve an MLA mining plan revision before the company can begin mining the tracts. See ROD at 2, 4-5. Importantly, at that time, mitigation measures specific to the current operation at the Mine would be revised to include mitigation measures specific to mining the WAI tracts. *Id.*; see also, ROD at 18-19; Final Environmental Impact Statement (FEIS) at 1-11 to 1-12, 2-8 to 2-14, Table 2-1, 3-3 to 3-4; State of Wyoming's Answer at 5, 7, 11, 13-19.

alternatives.⁵ The WDEQ, OSM, and the Forest Service served as cooperating agencies in the preparation of the Draft EIS for the WAI Coal Lease Application, pursuant to section 102(2)(C) NEPA, 42 U.S.C. § 4332(2)(C) (2006). BLM published a notice of availability and opportunity to comment on the Draft EIS on March 17, 2008. 73 Fed. Reg. 7555; 73 Fed. Reg. 14267. The March 2008 notice also notified the public of a hearing concerning the proposed sale. Powder River participated in that hearing, and also submitted a comment letter detailing its concerns relating to the DEIS. See Powder River Comment Letter on Draft EIS, dated Mar. 31, 2008, FEIS at App. J (Comments on DEIS). The letter enumerated eight concerns with the Draft EIS. BLM reprinted that letter in the FEIS and specifically addressed each enumerated complaint in written responses. Response to Comment Letter 11, Powder River, FEIS at App. J (Responses to Comments on DEIS). Relevant to this appeal were its comments on greenhouse gas (GHG) emissions and global climate change. In response, BLM drew Powder River's attention to specific tables and narrative sections where the issues it raised are addressed. Responses to DEIS Comments at unpaginated (unp.) 4 (citing DEIS at 3.5.1.21, Table 3-10, 4.2.4, 3.17.5.1, and 4.2.12.7. Regarding global climate change and GHG emissions, BLM notified Powder River that it had revised its analysis to include estimates of CO₂ that have resulted from the use of the coal mined from the PRB and also from the Mine. It explained that the FEIS estimates anthropogenic methane releases from such mining, recognizes the current uncertainty regarding the possible regulation of GHG emissions, and includes available information about the status of regulatory initiatives. Moreover, it discloses the relationship of the proposed leasing action to coal supply and possible impacts from historic global warming, including sea level changes, differential temperature change, and changes to vegetation and habitat. *Id.* at unp. 3.

BLM filed the FEIS with EPA on December 19, 2008, and provided the opportunity for public comment. 73 Fed. Reg. 77687. The FEIS considered the following alternatives:

- 1) Proposed Action (Original Tract): the proposed competitive leasing, in a single sale, of approximately 4,108.6 acres, with about 408.4 million tons of mineable coal, in the WAI tract;
- 2) Alternative 1 (Modified Tract): the competitive leasing, in a single sale, of a single tract, composed of the Original Tract and an additional 2,200.58 acres of adjacent Federal coal;
- 3) Alternative 2 (Preferred Alternative): the competitive leasing of two tracts, each in a separate sale, together consisting of the Modified Tract and an additional 639 acres of adjacent Federal coal, with about

⁵ BLM published notice of a 60-day scoping period on Oct. 17, 2006. 71 Fed. Reg. 61064.

409.9 million tons of mineable coal, in order to increase competitive interest in leasing, to allow for more efficient recovery of Federal coal and greater administrative efficiency, since the tracts are located in different counties; and

4) Alternative 3 (Environmentally Preferable Alternative): a no action alternative, under which Antelope's LBA application would be rejected and the WAI tracts would not be offered for competitive leasing.^{6,7}

To assess the likely impacts under each action alternative, BLM assumed that Antelope would be the successful bidder and that the tracts would extend the life of the Mine by up to 13 years, if it maintained a production rate of 36 to 42 million tons of coal per year, using generally the same methodology, machinery, and facilities that it currently uses to recover coal at the existing Mine. FEIS at 3-32, 4-109. BLM assumed that mining the WAI tracts would begin as soon as the current coal reserves of the Mine are depleted, in about 2018, and continue until 2031. FEIS at 2-6, 4-108. Chapter 3 of the FEIS includes an extensive analysis of the affected environment and environmental consequences of leasing *and* mining for each of the 19 resource sub-chapters under the Proposed Action and Alternatives. FEIS at 3-1 to 3-175. Section 3.18.2 contains estimates of GHG emissions resulting from the specific mine operations at the Mine, and projects those emissions for a typical year of operations at the Mine if the WAI lands were leased and mined by Antelope. *Id.* at 3-174-75; Table 3-20.

Chapter 4 examines the cumulative impacts occurring as a result of existing development in the PRB and considers how those impacts would change if the WAI tracts were leased and mined and other projected development in the area were to occur. It incorporates in the discussion information presented in a then ongoing, regional technical study of past, present, and future development activities in the PRB, called the PRB Coal Review, and summarizes the predicted cumulative impacts to air, water, socioeconomic, and other resources presented in the three PRB Coal Review Task reports. In response to comments received on the DEIS from commenters, including Powder River, BLM included an estimate of GHG emissions and by-products generated by burning coal to produce electricity in section 4.2.13,

⁶ The Forest Service, which administers the 237.2 acres included in the WAI South parcel that are within the Thunder Basin National Grassland, consented to leasing these lands, in a July 9, 2009, ROD.

⁷ BLM briefly considered leasing the proposed LBA tract to an entity other than Antelope, resulting in development of a new mine (Alternative 4), and also delaying the leasing of the proposed LBA tract to take advantage of higher coal prices (Alternative 5).

and discussed the current scientific thought on global climate change in 4.2.13.1. FEIS at 4-99 to 4-116.

Powder River and others submitted comments on the FEIS and BLM responded, posting its responses on the BLM website. Administrative Record (A.R.) Binder WAI Mass Comments, Cultural, ROD, WYW-163340, Copy 1 and A.R. Binder 2, WAI Record (Responses to FEIS Comments). Powder River raised a number of first-time suggestions of alternatives and mitigation that it believed would reduce impacts from mining.

The State Director approved Alternative 2 in the March 2010 ROD, authorizing leasing in two competitive lease sales a total of 4,746.23 acres of Federal land in the two WAI tracts to help “meet the national coal demand that is expected to exist until at least 2035.” ROD at 6; 75 Fed. Reg. 16502 (Apr. 1, 2010). The ROD noted that accepting Antelope’s lease application would provide the public with cost-efficient low sulfur power, enable coal-fired power plants to meet Clean Air Act requirements, reduce the nation’s dependence on foreign sources of energy, and be economically advantageous for local communities, the State of Wyoming, and the United States. ROD at 7-10, 18.⁸ Addressing potential impacts to climate change, the ROD recognizes that “[c]oal-fired power plant emissions include [GHGs], which contribute to global warming and mercury, which can have adverse health effects to both humans and other animals.” *Id.* at 19. It further recognizes that if the Federal coal included in the WAI tracts is leased, mined at currently permitted levels, and used to generate electricity by a coal-fired power plant, GHGs and mercury emissions attributable to the Antelope Mine would be extended for 9-11 years, but also recognizes, as does the FEIS, that the degree of coal burning for electric generation is affected by market demand (anticipated in studies to remain at similar levels throughout the life of the WAI leases), and future regulatory action impacting technology, costs, and methods.⁹ *Id.* at 20; see FEIS at 3-173 to 3-175, 4-99 to 4-111, 4-114. Given the availability of coal from other domestic sources, including higher-sulphur coals, the State Director stated, “selection of the No Action Alternative would not reduce production of coal in total, or from the Antelope Mine over the next 11 years.” ROD at 19.

Powder River appealed timely from the March 2010 ROD, challenging the Decision as violative of section 102(2)(C) of NEPA. It asserts that BLM failed to

⁸ The State Director also determined that the Decision conformed to the management guidance of the applicable land use plans, the December 2007 Casper and April 2001 Buffalo Resource Management Plans (RMP). ROD at 10, 16.

⁹ It states that the Mine is expected to continue to compete well in the national coal market, even in the event of decreasing demand and/or rising prices. ROD at 20.

consider adequately the potential environmental impacts from alleged violations of contemporaneous reclamation requirements at the Mine, provided an inadequate analysis of the impact of the Decision on global climate change, and failed to consider mitigation and alternatives that they requested on appeal and in their comments on the FEIS. Appellant also demands that BLM ensure compliance with the coal acreage limitation requirements of the MLA. Having thoroughly examined each of appellant's arguments and the pleadings of the several parties in this appeal, we conclude that Powder River has not preponderated in showing that BLM violated section 102(2)(C) of NEPA in the course of its review of potential environmental impacts or otherwise acted contrary to applicable law.

II. Analysis

A. Mineral Leasing Act

Appellant briefly and generally alleges that "BLM failed to ensure compliance with" (Powder River Reply at 20) Section 184(a) of the Mineral Leasing Act, 30 U.S.C. § 184(a) (2006), and implementing regulations that place limitations on the amount of acres of Federal coal leases in any one state (75,000 acres) and nationwide (150,000 acres) that an applicant for a coal lease or bidder at a sale may "take, hold, own, or control at one time." 43 C.F.R. § 3472.1-3; *see also* 43 C.F.R. § 3472.1-2. Though it "believes that the nominating company in this case holds or controls aggregated coal leases in excess of the acreages allowed," Powder River provides no evidence supporting this belief. SOR at 26; *see also* Powder River Reply at 20-21.

BLM states that neither Antelope, nor its parent company, Cloud Peak, would meet or exceed those limitations with the proposed addition of 4,746.23 acres contained in the WAI parcels. BLM Answer at 6-7. Antelope asserts that neither it nor its parent company would "take, hold, own or control" Federal coal lease acreage in excess of applicable limits if Antelope successfully bids on both tracts.¹⁰ Antelope Answer at 54. Powder River's unsubstantiated allegation cannot carry its burden to prove a violation of the MLA.

¹⁰ More specifically, BLM states that Cloud Peak's total (including the holdings of Antelope and two other subsidiaries, Cordero Mining LLC and Caballo Coal LLC) now total 46,170 acres, well below the limitations provided for in the MLA and implementing regulations at 43 C.F.R. § 3472.1-2. Antelope states that, if it successfully bids on both WAI tracts, Cloud Peak will own a total of 34,201.53 acres in Wyoming and 46,167.11 acres nationally. Regardless, with or without adding 4,746.23 more acres to 46,170 acres, Antelope and Cloud Peak will be well below the prescribed statutory limitation, and appellant has not shown otherwise.

B. NEPA

1. Standard of Review

Powder River introduces and summarizes its appeal as follows: “BLM’s failure to comply with its duties under [NEPA] has resulted in a situation where many of the impacts from leasing and subsequent mining of the [WAIL] tracts are not adequately analyzed and in turn not properly prevented or mitigated.” SOR at 2. We begin our analysis of these claims with the statute, and describe the legal framework for evaluating Powder River’s challenges to BLM’s NEPA compliance as we have on a number of occasions. *See generally Bristlecone Alliance*, 179 IBLA 51, 59-61 (2010).

Section 102(2)(C) of NEPA requires a Federal agency to prepare a “detailed statement” addressing the potential environmental impacts of a proposed action and alternatives thereto in the case of any major Federal action that “significantly affect[s] the quality of the human environment” 42 U.S.C. § 4332(2)(C) (2006). It is well established that the statute does not mandate the particular substantive results of agency decisionmaking, but rather imposes procedural obligations on the agency, which require that the agency *and* the public be fully informed of the environmental consequences when the agency exercises its substantive discretion to approve a proposed action: “If the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs, [in deciding to go forward with the proposed action].”¹¹ *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). As we stated in *Oregon Natural Resources Council*, 116 IBLA 355, 361 n.6 (1990):

[Section 102(2)(C) of NEPA] does not direct that BLM take any particular action in a given set of circumstances and, specifically, does not prohibit action where environmental degradation will inevitably result. Rather, it merely mandates that whatever action BLM decides upon be initiated only after a full consideration of the environmental impact of such action.

The EIS must contain “a ‘reasonably thorough discussion of the significant aspects of the probable environmental consequences’” of the proposed action and

¹¹ *See also* 40 C.F.R. § 1500.1(b) and (c); *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 558 (1978); *Natural Resources Defense Council v. Hodel*, 819 F.2d 927, 929 (9th Cir. 1987); *Calvert Cliffs’ Coordinating Committee, Inc. v. United States Atomic Energy Commission*, 449 F.2d 1109, 1114 (D.C. Cir. 1971); *Forest Conservation Council v. Espy*, 835 F. Supp. 1202, 1212 (D. Idaho 1993), *aff’d*, 42 F.3d 1399 (9th Cir. 1994).

alternatives thereto. *State of California v. Block*, 690 F.2d 753, 761 (9th Cir. 1982) (quoting *Trout Unlimited v. Morton*, 509 F.2d 1276, 1283 (9th Cir. 1974)). The adequacy of an EIS must be judged by whether it constituted a “detailed statement” that took a “hard look” at all of the potential significant environmental consequences of the proposed action and reasonable alternatives thereto, considering all relevant matters of environmental concern. *Center for Biological Diversity*, 162 IBLA 268, 275 (2004) (quoting 42 U.S.C. § 4332(2)(C) (2006), and *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976)), and cases cited. We employ a “rule of reason” to determine whether an EIS reflects a “hard look” that promotes informed decisionmaking. *County of Suffolk v. Secretary of Interior*, 562 F.2d 1368, 1375 (2d Cir. 1977), *cert. denied*, 434 U.S. 1064 (1978); *Northern Alaska Environmental Center*, 153 IBLA 253, 256 (2000).¹²

[1] As an appellant challenging a BLM Decision following preparation of an EIS, Powder River must carry its burden to demonstrate by a preponderance of the evidence, with objective proof, that BLM failed to adequately consider a substantial environmental question of material significance to the proposed action, or otherwise failed to abide by section 102(2)(C) of NEPA. *Concerned Citizens for Nuclear Safety*, 175 IBLA 142, 150 (2008); *Rural Alliance for Military Accountability*, 163 IBLA 131, 135 (2004); *Colorado Environmental Coalition*, 142 IBLA 49, 52 (1997). Powder River must make an “affirmative showing that BLM failed to consider a substantial environmental question of material significance,” and cannot simply “pick apart a record with alleged errors and disagreements. . . .” *Arizona Zoological Society*, 167 IBLA 347, 357-58 (2006) (quoting *In re Stratton Hog Timber Sale*, 160 IBLA 329, 332 (2004)).

In assessing significant impacts, BLM properly relies on the professional opinion of its technical experts, concerning matters within the realm of their expertise, which is reasonable and supported by record evidence. Thus, in challenging BLM’s reliance on its technical experts, Powder River must demonstrate, by a preponderance of the evidence, a material error in the data, methodology, analysis, or conclusion of the experts. See *Bristlecone Alliance*, 179 IBLA at 60;

¹² The court in *County of Suffolk* stated:

[A]n EIS need not be exhaustive to the point of discussing all possible details bearing on the proposed action but will be upheld as adequate if it has been compiled in good faith and sets forth sufficient information to enable the decisionmaker to consider fully the environmental factors involved and to make a reasoned decision after balancing the risks of harm to the environment against the benefits to be derived from the proposed action, as well as to make a reasoned choice between alternatives.

562 F.2d at 1375.

Powder River Basin Resource Council, 180 IBLA 32, 48 (2010); *Fred E. Payne*, 159 IBLA 69, 77-78 (2003). A mere difference of opinion, even of expert opinion, will not suffice to show that BLM failed to fully comprehend the nature, scope, or magnitude of the significant impacts. *Fred E. Payne*, 159 IBLA at 78; see *Concerned Citizens for Nuclear Safety*, 175 IBLA at 154 (“Mere differences of opinion about the likelihood or significance of environmental impacts provide no basis for overturning BLM’s decision.”).

2. *BLM Adequately Analyzed Direct, Indirect, and Cumulative Impacts*

a. *The FEIS Adequately Considers Impacts to Land, Surface Water and Groundwater and Did Not Violate NEPA in Failing to Require Correction of Alleged Noncompliance with Reclamation Requirements*

Powder River alleges that the Mine has violated contemporaneous reclamation requirements¹³ (SOR at 6-8, 16-19), and that BLM did not adequately address impacts from alleged reclamation violations “at not only the Antelope mine, but coal mines throughout the PRB.” Powder River Reply at 4. Appellant also claims that BLM failed to consider a reasonable range of alternatives by not considering the options of not leasing or deferring leasing until alleged reclamation violations at the Mine are corrected. SOR at 4-16.

Responding to appellant’s challenge, BLM, the State, and Antelope each lay out the general State and Federal regulatory frameworks within which mining and reclamation is permitted, monitored, and otherwise regulated in Wyoming. They explain that WDEQ has the primary authority to regulate and monitor reclamation and OSM retains oversight authority. BLM’s Answer at 7-10; State’s Answer at 13-19; Antelope’s Answer at 20-23; see also *supra* note 4. They aver that reclamation issues will be further analyzed during their review of mining permit applications and reclamation plan submissions if leases are awarded, that WDEQ will establish schedules for reclamation activities, such as backfilling and grading, and that, if a permittee fails to comply with these obligations, WDEQ will identify such noncompliance as a permit violation. BLM’s Answer at 9; see also State’s Answer

¹³ The concept of contemporaneous reclamation emanates from Section 102 of SMCRA, 30 U.S.C. § 1202 (2006), which articulates one of SMCRA’s goals as “assur[ing] that adequate procedures are undertaken to reclaim surface areas as contemporaneously as possible with surface coal mining operations.” SMCRA establishes general performance standards applicable to all coal mining and reclamation operations, including the obligation to “insure that all reclamation efforts proceed in an environmentally sound manner and as contemporaneously as practicable with the surface coal mining operations.” 30 U.S.C. § 1265(b)(16); see also 30 C.F.R. § 816.100.

at 16; Antelope Answer at 12.

Our review of the FEIS discloses lengthy discussions of the current state of mining and post-mining reclamation in the PRB. BLM recognizes that “disturbances associated with the majority of the past, present, and projected activities have resulted or would result in the alteration of the surface topography,” specifically describing the expected effect on the topography of removing overburden on the WAI tracts. FEIS at 4-27; *see also* FEIS at 3-8 to 3-9, Table 3-2. It states that the topographic configuration would be developed and approved as part of the required revision to the mining and reclamation plan for the Mine. Table 3-1 shows a comparison of existing and proposed Mine disturbance area and mining operations. *Id.* at 3-4, Table 3-1. The FEIS explains that reclamation under the Proposed Action “would occur contemporaneously with mining on adjacent lands, *i.e.* reclamation would begin after an area is mined.” FEIS at 3-87. The time between topsoil stripping and reseeding is estimated to range from two to four years (longer for stockpiles, haul roads, and other facilities), and that the time to restore shrubs, including sage brush, to their premining density levels is estimated to be between 20 to 100 years. *Id.* at 3-88. It provides a comprehensive analysis of numerous other matters related to reclamation, including impacts on surface and groundwater, vegetation patterns, species diversity, the control of noxious weeds, wetlands, various categories of wildlife, land use and land productivity, and visual resources. *Id.* at 3-52 to 3-144. It reports specifically on the vegetation type per acre in the Mine area, and the type and extent of ground disturbance at the Mine according to the 2005 Annual Report for the Mine (*i.e.*, the mine had disturbed a total of 5,581.4 acres, 27% of which (1,522.5 acres) were occupied by permanent or temporary facilities, 41% of which (2,266.1 acres) were occupied by mined and unreclaimed areas, and 32% of which (1,7792.8 acres) were occupied by reclaimed areas. *Id.*

Identifying a time lag or gap between mining and reclamation, the FEIS examines the total acreage of land in the three PRB subregions and basin-wide, projected to be disturbed and reclaimed through the year 2020. It shows a gap between land disturbance and reclamation that narrows with time. FEIS at 4-10 to 4-11, Table 4-2; FEIS at 4-26 to 4-29, Table 4-9; *see also* Response to FEIS Comments at 10. Chapter 4 also specifically identifies and analyzes impacts to surface and groundwater quantity and quality, and describes cumulative impacts associated with the Decision.

Powder River faults BLM for not considering impacts from Antelope’s alleged current violations of requirements to reclaim land and hydrological resources. SOR at 9-18. It contends that BLM must analyze impacts of leasing coal on WAI tracts that it believes will be disturbed and not reclaimed in a timely manner. SOR at 9-11. It also alleges that NEPA requires BLM to consider deferring leasing until Antelope is in compliance with the law. BLM states that it is not aware of any violations of law at

the Mine, and notes that “both OSM and WDEQ served as cooperating agencies in the preparation of the [WA]II EIS and did not provide any information regarding noncompliance, or indicate in any way that additional leasing should not proceed because of the applicant’s failure to complete planned reclamation activities.” BLM’s Answer at 9-10. Addressing appellant’s contention that “BLM’s EIS fails to analyze whether or not [Wyoming’s Land Quality Regulations, Ch. 3 § 2(h)] requirements are currently being met at the Antelope Mine and for purposes of proceeding with additional leasing,” SOR at 17, BLM asserts that the State regulations that Powder River cites “apply to post mining reclamation,” and that Powder River “provides no objective data to show that ongoing mining operations at the [WAI] mine are not in compliance with Wyoming’s land quality regulations.” BLM’s Answer at 13.

Although the FEIS accurately describes the regulatory framework and the respective jurisdictions of State and Federal agencies responsible for regulating mining and reclamation at the Mine, it does not, as appellant alleges, impermissibly avoid undertaking a full and proper environmental analysis of the coal leasing proposal. To the contrary, our review of the record shows that the FEIS reflects BLM’s own analysis of the likely impacts of leasing and mining, including the need for and timing of reclamation. The FEIS identifies significant potential adverse environmental effects of the proposed action on resources and provides projected timelines for resource restoration, clearly disclosing a gap in the PRB between mining and reclamation. Powder River does not clearly identify any relevant aspect of the affected environment or any significant impacts that BLM failed to include in its FEIS. It has made no affirmative showing of missing information regarding any reclamation or permitting violations that have been identified by the State.¹⁴ We thus conclude that Powder River’s claim does not rise to the level of identifying a substantial environmental question of material significance that BLM failed to consider, as required by section 102(2)(C) of NEPA. *Concerned Citizens for Nuclear Safety*, 175 IBLA at 150; *Rural Alliance for Military Accountability*, 163 IBLA at 135; *Colorado Environmental Coalition*, 142 IBLA at 52.

[2] Powder River expresses its dissatisfaction with the rate of reclamation in the entire basin and specifically at the mine, and its concern that reclamation associated with the Mine extension will violate WDEQ reclamation requirements in

¹⁴ Powder River cites the percentage of land that has been released from final bonding requirements as evidence of Antelope’s violation of reclamation requirements at the Mine. BLM states that bond release may occur over phases based on tasks ranging from replacing backfill, grading to approved contours, or replacing topsoil and permanent seeding, and that, since these intermediate steps are occurring at the Mine, a percentage assessment of lands released from final bonding is not an accurate assessment of “contemporaneous” reclamation and does not support appellant’s claims. BLM Answer at 9.

the future. It cites no data indicating that the Mine is currently in violation of law or that Antelope would fail to comply with Federal and State law in operating and reclaiming the WAI extension. As we recently advised the same appellant, “BLM need not evaluate the potential environmental consequences resulting from noncompliance with Federal and State permitting requirements or assume that violations of Federal and State standards will inevitably occur.” *Powder River Basin Resource Council*, 180 IBLA at 57.

b. Powder River Has Not Preponderated in Showing that BLM Failed in a Duty to Analyze Impacts to Global Climate Change

Powder River alleges that BLM failed in its duty under NEPA to disclose that GHG emissions that likely would be “caused by leasing, and in turn mining and burning” of the coal excised from the WAI tracts “will be a significant contribution to” climate change impacts. SOR at 21. It claims that BLM must “fully account for all indirect [GHG] emissions that will result from its proposed [F]ederal action,” and “once that inventory is complete, BLM should connect those emissions with specific climate change impacts that will be caused, at least in part, by the release of that amount of greenhouse gases.” *Id.*

BLM was required, by Council on Environmental Quality (CEQ) regulations, to consider the potential indirect effects of leasing the WAI tracts, which are those effects generally “caused by the [proposed] action,” and which are “later in time or farther removed in distance, but . . . still reasonably foreseeable.” 40 C.F.R. § 1508.8; *see* 40 C.F.R. §§ 1502.16, 1508.25; *e.g.*, *Center for Biological Diversity*, 162 IBLA at 284. It also was required to consider the potential cumulative effects of leasing the WAI tracts, resulting from the incremental impact of the proposed action “when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions.” 40 C.F.R. § 1508.7; *see* 40 C.F.R. § 1508.25.¹⁵ BLM, however, is not required under NEPA or CEQ regulations¹⁶ to consider the impacts of a proposed

¹⁵ We note that in Section 3.a. of Secretarial Order No. 3289, dated Sept. 14, 2009, and amended Feb. 22, 2010, BLM is instructed by the Secretary to “consider and analyze potential climate change impacts when . . . making major decisions regarding potential use of resources under the Department’s purview.”

¹⁶ Draft guidance issued by CEQ explains that “[r]esearch on climate change impacts is an *emerging and rapidly evolving area of science*,” and thus, [i]n accordance with NEPA’s rule of reason and standards for obtaining information regarding reasonably foreseeable significant adverse effects on the human environment, action agencies need not undertake

(continued...)

action together with speculative, or not reasonably foreseeable impacts of future actions. *See, e.g., California Wilderness Coalition*, 176 IBLA 93, 107-08 (2008).¹⁷

BLM assumed that coal mined from the WAI tracts, like coal from other mines in the area, will be burned in coal-fired power plants to generate electricity. FEIS at 4-99. It then estimated the likely emissions of CO₂ and other GHGs from plants burning coal from the Mine and other coal mines in the Basin. *Id.* at 3-173 to 3-175, Table 3-20, 4-100 to 4-110, § 4.2.14.

In the cumulative impacts chapter, BLM assessed the current state of knowledge regarding the likely consequences of GHG emissions in terms of global climate change, recognizing that, while scientific opinion generally was of the view that such emissions contribute to climate change, not much is known, as a scientific fact, regarding the nature, scope, timing, or magnitude of impacts to climate change or the consequences of climate change attributable to GHG emissions from any

¹⁶ (...continued)

exorbitant research or analysis of projected climate change impacts . . . but may instead summarize and incorporate by reference the relevant scientific literature. *See, e.g.,* 40 C.F.R. §§ 1502.21, 1502.22. Memorandum for Heads of Federal Departments and Agencies from Chair, CEQ, “Draft NEPA Guidance on Consideration of the Effects of Climate Change and Greenhouse Gas Emissions,” dated Feb. 18, 2010 (Draft CEQ Guidance on Climate Change) at 8 (emphasis added) (available at (<http://www.whitehouse.gov/sites/default/files/microsites/ceq/20100218-nepa-consideration-effects-ghg-draft-guidance.pdf>)). It further states:

[I]t is not currently useful for the NEPA analysis to attempt to link specific climatological changes, or the environmental impacts thereof, to the particular project or emissions, as such direct linkage is difficult to isolate and to understand. The estimated level of GHG emissions can serve as a reasonable proxy for assessing potential climate change impacts, and provide decision makers and the public with useful information for a reasoned choice among alternatives.

Id. at 3 (emphasis added).

¹⁷ Antelope contends that “the emission of CO₂ at coal-fired power plants is not an indirect effect of leasing the WAI tracts under NEPA,” because “it does not pass the ‘but for’ standard, much less constitute the reasonably close causal relationship required under NEPA.” Antelope Answer at 36 (quoting *U.S. Department of Transportation v. Public Citizen*, 541 U.S. 752, 767 (2004)). While we recognize the necessity of a “close causal relationship,” we need not engage in debate over causal links, as BLM chose to undertake an extensive analysis in its Dec. 2008 FEIS, as limited by the current state of the science, and it is that analysis we here review.

country or industry (much less a specific facility). FEIS at 4-100 to 101. It explained that the precise level of emissions would be determined by numerous unknown factors, such as where and how the coal would be burned,¹⁸ and future emission limits and technological advances that may be in place at those plants by the time mining at the Mine reaches the WAI tracts in 2018. *Id.* at 4-104 to 4-109. Given the current state of science, BLM determined that it is not possible to reach conclusions as to the extent or significance of the effects on global climate from future emissions of electricity-generating power plants using WAI coal. *Id.* at 4-109; *see also* ROD at 19-20.

Powder River contends that BLM, by so circumscribing its analysis, violated NEPA. Powder River would prefer a “more exhaustive environmental analysis” that it apparently believes is “theoretically possible.” *Northwest Environmental Advocates v. National Marine Fisheries Service*, 460 F.3d 1125, 1139 (9th Cir. 2006). Importantly, however, Powder River offers no data, analysis, or expert opinion regarding whether, when, and to what extent CO₂ emissions generated by the burning of coal mined from the WAI tracts, either alone or together with coal mined from other lands and/or other domestic or international sources of CO₂, will affect global climate change, and resources affected by that global climate change.

[3] We find that BLM’s environmental analysis, declining to posit a precise correlation between specific climatological changes or the environmental impacts thereof attributable to projected GHG emissions from the particular project, does not fall short of NEPA’s “hard look” requirement for promoting informed decisionmaking, where evidence in the record as to the state of the science confirms the speculative nature of such impacts. Powder River did not support its claim that BLM failed in its duty under NEPA to extend its analysis in order to disclose and analyze the world-wide and local consequences resulting from the contribution of emissions from the firing of WAI coal on global climate change.

This accords with our recent ruling in *Bristlecone Alliance*, 179 IBLA 51, 57 (2010), involving approval of a right-of-way and sale of land specifically for the construction and operation of the White Pine Energy Station, a coal-fired power plant in Nevada. There too BLM included in the EIS, developed for the project, an extensive discussion of global climate change, estimating the Station’s incremental contribution to the global carbon dioxide emissions pool. Although the ROD and EIS “reflect[ed] BLM’s cognizance of the global warming debate and the fact that operation of the power plant will add to GHG levels in the project area as well as globally,” BLM’s decision concluded it “was not possible to determine whether or how the Station’s relatively small incremental contribution might translate into physical

¹⁸ The FEIS reports that only 2 percent of coal mined in the Basin is burned in Wyoming, and the rest is shipped nationwide. *See* FEIS at 4-104.

effects on the environment.” *Bristlecone Alliance*, 179 IBLA at 79, 99.¹⁹ On appeal, BLM argued that any climate change effects attributable to the power plant were “barely measurable and speculative. . . .” *Id.* at 57. We agreed, holding that “BLM’s decision, and the extraordinary effort it undertook to analyze the impacts” of the project fully complied with NEPA, as well as the “multiple use” provisions of the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701(a)(7) and 1732(a) (2006). *Id.* at 100.

NEPA does not require BLM to hypothesize as to potential environmental impacts that are too speculative for a meaningful determination of material significance or reasonable foreseeability.²⁰ Such an “analysis” would not serve NEPA’s goal of providing high quality information for informed decisionmaking. See 40 C.F.R. § 1500.1(b) and (c); *Robertson v. Methow Valley Citizens Council*, 490 U.S. at 349, 352. “[W]hether BLM is able to know and quantify precisely the ‘ultimate effects’ of development . . . is a very different question from whether BLM adequately considered and made a reasoned assessment of environmental impacts.” *National Wildlife Federation*, 150 IBLA 385, 396 (1999). We find that BLM prepared a “detailed statement” that took a “hard look” at the reasonably foreseeable significant adverse effects on the human environment from the firing of coal that would be extracted from the WAII mine.²¹

¹⁹ “BLM,” we observed “readily concedes that taking measures to reduce GHG emissions generally is desirable as a long-term public interest objective and is consistent with policy goals articulated by President Obama and by Secretary Salazar.” *Bristlecone Alliance*, 179 IBLA at 99. Nevertheless, in light of the “reality that industry technologies for the generation of geothermal, wind, and solar power are emerging and are currently incapable of supplying the energy that is available through coal-fired power plants,” BLM may decide to “resolve[] the dilemma between the need to reduce GHG emissions, as a present and long-term goal, and the need for a present power source, in favor of approving” a project that is expected to result in GHG emissions. *Id.* at 99-100.

²⁰ In *Coeur d’Alene Audubon Society, Inc.*, 146 IBLA 65, 70 (1998) (citing *Trout Unlimited v. Morton*, 509 F.2d at 1283, we noted the well-established principle “that BLM is not required to consider remote and highly speculative impacts.”

²¹ The difficulty of addressing impacts from GHG emissions on a program-specific basis was recognized by the Eighth Circuit in *Mayo Foundation v. Surface Transportation Board*, 472 F.3d 545, 555-56 (2006) (finding that the Surface Transportation Board had “more than adequately considered the ‘reasonably foreseeable significant adverse effects [of increased coal consumption] on the human environment,” where that Board had determined that “‘the impacts of this project [to construct a new rail line to reach PRB coal mines] on coal consumption and resulting
(continued...)”

3. *BLM Did Not Violate NEPA in Deciding Not to Consider or Require Appellant's Suggested Alternatives and Mitigation Measures*

Appellant contends that NEPA compels BLM “to prevent or mitigate” any adverse impacts and to accomplish this by rejecting the LBA application or, at least, by deferring the decision to allow time for development of more analysis and mitigation to the extent Powder River prescribes.²² SOR at 2.

NEPA, however, is a procedural statute. It does not require agencies to avoid major Federal actions that may cause a significant impact on the human environment; it obligates agencies to undertake an EIS for such major Federal actions to ensure that the decisionmakers’ “selection of an action represents a fully informed decision.” *Bristlecone Alliance*, 179 IBLA at 60 (quoting *Wyoming Outdoor Council*, 176 IBLA 15, 25 (2008) and *In re Bryant Eagle Timber Sale*, 133 IBLA 25, 29 (1995)). In its FEIS and ROD, BLM has taken a hard look at the potential environmental consequences of the proposed WAIL coal lease sales and reasonable alternatives and determined that some of the consequences are anticipated to be significant, as discussed. The fact of significance, however, compels neither rejection nor deferral of the project, as Powder River contends.²³ SOR at 13,14, 18; Comments on FEIS

²¹ (...continued)

air emissions would be small’ on a national and regional basis and that any potential local air quality impacts were speculative and ultimately unforeseeable.”). We think our approach in the present appeal and in *Bristlecone* is also generally consistent with other rulings by Federal courts that have looked at the adequacy of an agency’s consideration of possible global climate change impacts of specific projects. See *Hapner v. Tidwell*, No. 09-35896, 2010 WL 3565255 at *4 (9th Cir. Sept. 15, 2010); *Conservation Northwest v. Rey*, 674 F. Supp.2d 1232, 1253 (W.D. Wash. 2009); *Audubon Naturalist Society of the Central Atlantic States, Inc. v. U.S. Department of Transportation*, 524 F. Supp. 2d 642, 708 (D. Md. 2007); *North Carolina Alliance for Transportation Reform, Inc. v. U.S. Department of Transportation*, Nos. 1:99cv134, 1:08cv570, 2010 WL 1992816, at *19 to *23 (M.D. N.C. May 19, 2010).

We further note that BLM’s approach in the Decision on appeal is consistent with the Draft CEQ Guidance on Climate Change at 3, 8.

²² Powder River also challenges BLM’s selection of alternatives, claiming only after publication of the FEIS, that BLM should have considered other means of electrical energy production and energy efficiency measures to reduce climate change impacts. BLM is not required to consider alternatives that do not accomplish the intended purpose of the project. 40 C.F.R. § 1500.2(e); *Headwaters, Inc. v. BLM*, 914 F.2d 1174, 1180-81 (9th Cir. 1990).

²³ As BLM points out, it did, in fact, consider a No Action Alternative, and briefly (continued...)

at 1-2. The Supreme Court has made it clear that “[i]f the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs,” and in going forward with the proposed action. *Robertson v. Methow Valley Citizens Council*, 490 U.S. at 350; *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 371 (1989) (“NEPA does not work by mandating that agencies achieve particular substantive environmental results.”). Since NEPA does not mandate any specific result, neither can we. See *Wyoming Outdoor Council*, 176 IBLA at 25, and cases cited.

Similarly, NEPA does not require the agency to mitigate impacts identified as significant in the EIS, as appellant also suggests. See, e.g., SOR at 19 (“[I]t is incumbent upon BLM to . . . mitigate the cumulative impacts of dewatering for mining in conjunction with overlapping CBNG development.”). Powder River cites to *Davis v. Mineta*, 302 F.3d 1104 (10th Cir. 2002), to support its claim that “mitigation measures must be mandatory.” SOR at 15. But this reliance is misplaced. There, the issue was whether impacts identified in an EA would be sufficiently mitigated so as to reduce any significant impacts to insignificance, justifying a Finding of No Significant Impact (FONSI). Here, BLM acknowledged significant impacts and analyzed them in the FEIS. See *Robertson v. Methow Valley Citizens Council*, 490 U.S. at 352.

Finally, while NEPA requires the agency to consider impacts and mitigation sufficient to allow an informed decision (*Robertson v. Methow Valley Citizens Council*, 490 U.S. at 352), it does not require BLM to consider all measures or alternative courses of action that might mitigate impacts, as Powder River contends. SOR at 24 (“In order to meet the requirements of NEPA, BLM must consider reasonable mitigation options to reduce the significant environmental consequences resulting

²³ (...continued)

considered deferring leasing under Alternative 5. See BLM Answer at 22. We note too that Powder River had and took the opportunity to participate throughout the long period of development of the DEIS and FEIS, yet did not raise these concerns until commenting on the FEIS. “Persons challenging an agency’s compliance with NEPA must ‘structure their participation so that it . . . alerts the agency to the [parties’] position and contentions,’ in order to allow the agency to give the issue meaningful consideration.” *Department of Transportation v. Public Citizen*, 541 U.S. at 764 (quoting *Vermont Yankee Nuclear Power Corp. v. Natural Resource Defense Council*, 435 U.S. at 553). The Supreme Court held in *Public Citizen* that “[b]ecause respondents did not raise these particular objections to the EA, [the agency] was not given the opportunity to examine any proposed alternatives to determine if they were reasonably available. Respondents have therefore forfeited any objection to the EA on the ground that it failed adequately to discuss potential alternatives to the proposed action.” *Id.* at 764-65. The same is true here.

from venting methane during mining operations.”). Whether demanding “mitigation” or “alternatives,” each of appellant’s arguments founded on the premise that NEPA requires BLM to *implement* a specific action, in addition to undertaking a proper analysis, must fail.²⁴

III. Conclusion

We conclude that Powder River has not demonstrated BLM’s lack of compliance with its substantive and procedural obligations. It has not shown by a preponderance of the evidence that BLM failed to take a “hard look” at the environmental consequences” of the action in violation of NEPA. “That they would prefer that this area of the public land be put to a different use does not demonstrate a failure by BLM to comply with NEPA.” *Coeur D’Alene Audubon Society*, 146 IBLA at 74. Nor has Powder River substantiated its belief that BLM violated the Mineral Leasing Act.

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 State Director’s March 2010 ROD, approving the leasing of the two WAI tracts is affirmed.

_____/s/_____
Christina S. Kalavritinos
Administrative Judge

I concur:

_____/s/_____
James K. Jackson
Administrative Judge

²⁴ As a final note, we do not find that appellant presents new information sufficient to show that the action will ‘affec[t] the quality of the human environment’ *in a significant manner or to a significant extent not already considered,*” necessitating preparation of a supplemental EIS, pursuant to 40 C.F.R. § 1502.9(c)(1). *Marsh v. Oregon Natural Resources Council*, 490 U.S. at 373-74 (emphasis added).