



POWDER RIVER BASIN RESOURCE COUNCIL

183 IBLA 83

Decided December 21, 2012



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 2011-242

Decided December 21, 2012

Appeal from a decision of the Wyoming State Director, Bureau of Land Management, authorizing the offering of a Federal coal lease in the Powder River Basin, Wyoming. WYW 176095.

Affirmed.

1. Administrative Practice--Administrative Review: Generally--
Administrative Review: Burden of Proof--Appeals: Generally

It is an appellant's burden to affirmatively demonstrate error in the decision on appeal. Conclusory allegations, unsupported by objective evidence showing error, do not suffice. The requirement is not met when an appellant merely reiterates the arguments considered by the decision-maker below, as if there were no decision addressing those points. In such cases, the decision may be affirmed in summary fashion.

2. Administrative Practice--Administrative Review:
Generally--Appeals: Generally

When the arguments raised by an appellant have been expressly addressed in other Board decisions or by Federal courts, whether the appellant was a party thereto or not, and the appellant fails to show that those arguments remain viable in the pending appeal, the Board may dispose of such arguments in summary fashion.

3. Federal Land Policy and Management Act of 1976: Mineral Leasing Act: Generally--National Environmental Policy Act of 1969: Generally

Nothing in the Federal Land Policy and Management Act or the Mineral Leasing Act imposes on BLM the

responsibility to regulate and enforce compliance with applicable air quality standards. Where regulation and enforcement is committed to the State, subject to oversight by the U.S. Environmental Protection Agency, BLM properly relies on the State to ensure permitted activities do not exceed or violate any State or Federal air quality standard.

APPEARANCES: Shannon Anderson, Esq., Sheridan, Wyoming, and Brad A. Bartlett, Esq., Durango, Colorado, for the Powder River Basin Resource Council; Mary L. Frontczak, Esq., St. Louis, Missouri, and Peter S. Glaser, Esq., John H. Johnson, Esq., Mack McGuffey, Esq., Michael H. Higgins, Esq., Washington, D.C., for BTU Western Resources, Inc.; James Kaste, Esq., Office of the Attorney General, Cheyenne, Wyoming, for the State of Wyoming; Philip C. Lowe, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Denver, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE PRICE

Powder River Basin Resource Council (Powder River) has appealed from an August 10, 2011, Record of Decision (ROD or Decision) issued by the District Manager, High Plains District Office, Bureau of Land Management (BLM), Casper, Wyoming, approving Coal Lease-by-Application WYW 176095 (LBA or application) pursuant to the Mineral Leasing Act of 1920 (MLA), 30 U.S.C. §§ 181-287 (2006).¹

For the reasons that follow, we conclude that Powder River has not shown error in the ROD or that BLM failed to comply with section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(2)(C) (2006), section 27 of the MLA, 30 U.S.C. § 184(a) (2006), or section 202 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1712 (2006), and affirm BLM's decision.

Background

On September 29, 2006, BTU, a subsidiary of Peabody Energy Corporation (Peabody), in accordance with BLM's regulations at 43 C.F.R. Subpart 3425, filed an application to lease three non-contiguous tracts designated Porcupine North, Porcupine South, and Porcupine East, which are adjacent to the North Antelope Rochelle Mine (Mine) near Wright, Wyoming, in Campbell County. The Mine is

¹ BTU Western Resources, Inc. (BTU), and the State of Wyoming moved to intervene. BTU's motion was granted by order dated Oct. 18, 2011. The State's motion was granted by order dated Dec. 15, 2011.

operated by Powder River Coal, LLC, another Peabody subsidiary.² These Federal coal lands total 5,116 acres and contain an estimated 598 million tons of coal, and are located within the Powder River Federal Coal Region.³ BLM and RCT reviewed BTU's LBA to determine whether the proposed blocks of Federal coal would continue or extend the life of an existing mine and so qualify for leasing as a maintenance tract under 43 C.F.R. Subpart 3425. RCT approved the LBA as submitted. BLM Letter to BTU dated Feb. 9, 2007. BLM identified a study area based on BTU's LBA as submitted, which BLM described as "the maximum area that BLM will evaluate and consider adding to the tract" in BTU's application, and "the minimum area . . . needing environmental baseline and geologic studies, and . . . the basis of the largest tract we would evaluate for lease offer." *Id.*

BTU requested that the study area be expanded to include an additional 1,729.60 acres, bringing the total study area acreage to 10,315.94. Letter from BTU to BLM dated Feb. 15, 2007, at 1, 2. On October 12, 2007, BTU amended the application to increase the LBA size to 8,981.74 acres containing an estimated 1,097 million tons of recoverable coal.

² 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, as they would be if BTU were the successful high bidder in the competitive lease authorized by the ROD. 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. WDEQ also regulates emissions in Wyoming, subject to the oversight of the U.S. Environmental Protection Agency (EPA), under the Clean Air Act (CAA), 42 U.S.C. §§ 7401-7671q (2006).

³ The South Porcupine tract, like the other five tracts analyzed in the Final Environmental Impact Statement (FEIS) underlying the ROD, is within the decertified Powder River Coal Production Region (CPR), Wyoming, which was decertified in January 1990, as recommended by the Powder River Regional Coal Team (RCT), a Federal/State advisory board established to offer recommendations concerning management of Federal coal in the region. *See* 55 Fed. Reg. 784 (Jan. 9, 1990); *Powder River Basin Resource Council*, 124 IBLA 83, 85 (1992). As a result of decertification, the tracts are 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. In decertifying the lands, the Director and RCT agreed to limit leasing on application to, *inter alia*, "maintenance" tracts that would continue or extend the life of an existing mine, subject to oversight by RCT. *Id.*

BLM agreed with the proposed modification, but determined to process the application as two separate maintenance tracts, identified as the North Porcupine (WYW 173408) and the South Porcupine (WYW 176095). Only the latter tract is at issue in this appeal. BLM estimates that, as modified, the 3,243-acre South Porcupine tract, approximately 1,638 acres of which are in the Thunder Basin National Grassland (TBNG) administered by the Forest Service (FS), U.S. Department of Agriculture, contains approximately 404.8 million tons of recoverable coal reserves.⁴ ROD at 1, 15.

BLM initiated the environmental review, determining to prepare an EIS for the leasing of six Federal coal tracts proposed by three operators in the Wright area.⁵ BLM published a notice of intent to prepare the EIS. 72 Fed. Reg. 36,476 (July 3, 2007). OSM, FS, WDEQ, the Wyoming Department of Transportation, and the Converse County Board of Commissioners served as cooperating agencies in preparing the Draft EIS (DEIS) pursuant to section 102(2)(C) of NEPA, 42 U.S.C. § 4332(2)(C) (2006). For the analysis, BLM assumed that BTU would be the successful bidder and that the South Porcupine tract would extend the life of the Mine by approximately 3.3 to 3.6 years, if it maintained a stated production rate using generally the same methodology, machinery, and facilities that it currently uses to recover coal at the existing Mine. ROD at 1, 2, 7, 12. On June 17, 2009, BLM published the Wright Area Coal Lease Applications DEIS, mailed copies to known

⁴ As modified, the tract lies in secs. 7 and 18, T. 41 N., R. 70 W., and secs. 1, 12-14, 23-24, T. 41 N., R. 71 W., Sixth Principal Meridian, Campbell County, Wyoming. FEIS, Executive Summary (ES), Figure ES-7 at ES-9. If BTU is the successful qualified high bidder at the proposed lease sale, 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. At that time, mitigation measures applicable to the current operation at the Mine would be revised to include mitigation measures specifically applicable to mining the South Porcupine tract. *Id.*; see also ROD at 18-19. Not all of the coal in the tract as applied for will be recovered because of the presence of a railroad right-of-way and an associated 100-foot buffer zone that is not suitable for mining. FEIS at ES-13, 2-58.

⁵ In addition to the South Porcupine tract, the other tracts are the North Hilight Field (WYW 164812), the South Hilight Field (WYW 174596), West Hilight Field (WYW 172388), West Jacobs Ranch (WYW 172685), and North Porcupine (WYW 173408). The other mines are the Black Thunder Mine and the Jacobs Ranch Mine. See FEIS Fig. 1-1.

interested parties, and made it available in electronic form on BLM's website.⁶ On June 26, 2009, EPA also published notice of the availability of the DEIS. FEIS, ES-10.

On July 30, 2010, BLM published the FEIS and provided notice to the public and an opportunity to comment. 75 Fed. Reg. 44,978 (July 30, 2010).

On August 10, 2011, BLM's High Plains District Manager approved the decision to offer the South Porcupine tract for lease, and BLM published Notice of the ROD. 76 Fed. Reg. 51,393 (Aug. 18, 2011).

The DEIS considered in depth the two proposed actions for the four LBAs: Alternative 1 (no action); and Alternative 2 (preferred action), adding all or part of the BLM study area to the tracts identified in each LBA or reducing the size of the tracts requested in each LBA. Alternatives 3 (competitively lease one or more of the LBA tracts and develop a new mine) and 4 (delay the sale of one or more of the LBA tracts as applied for to take advantage of higher coal prices and/or allow recovery of coal bed natural gas (CBNG) first, before permitting coal mining) were considered, but not analyzed in detail.⁷ The ROD selected Alternative 2 for the South Porcupine tract, and incorporated by reference the standard coal lease stipulations, as well as special stipulations. ROD at 6. Because the South Porcupine tract includes Federal lands that are within the TBNG, the FS must consent to leasing such lands and may prescribe terms and conditions to which its consent is subject. FS issued its ROD consenting to leasing on July 14, 2011.⁸

Powder River timely appealed.

The Parties' Arguments

Powder River asserts that BLM failed to adequately consider the potential environmental impacts from alleged violations of contemporaneous reclamation

⁶ During the 60-day comment period, 17 written comments and more than 500 e-mail messages conveying comments were received from interested parties. Many of the e-mail messages were obviously organized e-mail campaigns and merely repeated the same content or message.

⁷ Alternative 3 was considered in detail for the West Hilight Field tract only.

⁸ BLM submitted the Administrative Record (AR) in four unnumbered, unpaginated binders labeled simply "South Porcupine WYW 176095" (two are further labeled "Data Reports"), without tables of contents or document separators, which hampers our ability to properly or easily cite the record. The FS ROD is contained in one of the binders, but also may be found at:

http://www.fs.fed.us/nepa/project_content.php?project=27646.

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 air quality standards established by the CAA, as required by section 202 of FLPMA and section 2(a) of MLA, 30 U.S.C. § 201(a)(3)(E) (2006), and with MLA's coal acreage limitation.

BLM contends Powder River here repeats the same arguments, "often verbatim," rejected by the Board in *Powder River Basin Resource Council (PRBRC)*, 180 IBLA 119 (2010), regarding two maintenance tracts adjoining the Antelope Mine in Campbell and Converse Counties. BLM further contends Powder River has neither acknowledged that ruling nor "distinguish[ed] the arguments it now raises about the South Porcupine ROD from those the Board previously addressed." BLM Answer at 7. BLM states that it adequately analyzed the impacts of mining and reclamation (*id.* at 8-13); the potential impacts to groundwater and climate change (*id.* at 13-14); and that the ROD approving the LBA conforms to FLPMA (*id.* at 15-17). BLM thus maintains Powder River has not demonstrated that BLM's ROD violates either NEPA or MLA.

BTU disputes Powder River's standing with respect to the issues of climate change impacts, arguing that neither it nor its affiants are adversely affected because it has not identified the facts necessary to demonstrate a causal relationship between the South Porcupine LBA and the alleged injury, and that Powder River's injury is speculative and remote in time. BTU Answer at 3-5. BTU further argues that Powder River's NEPA claims lack merit, disputing the assertion that there are environmental consequences from the alleged lack of reclamation and absence of a bond release that BLM was required to analyze. *Id.* at 10-18. BTU similarly challenges Powder River's contentions regarding the adequacy of the FEIS relative to groundwater, GHG emissions, climate change, and the range of alternatives, and maintains the FEIS complied with FLPMA and with MLA. *Id.* at 26-29.

The State notes that Powder River "largely repeats verbatim" the same arguments it pursued in its appeal in *PRBRC* and in a subsequent appeal docketed as IBLA 2011-146.⁹ State Answer at 8. The State explains that while this case and *PRBRC* involve different FEISs, they contain substantially similar information and analyses, they relate to the same geographic area, and rely on the same analytical methodology. *Id.* The State therefore urges the Board to summarily dismiss Powder River's repetitive arguments, contending that Powder River "has not identified 'any

⁹ As the State acknowledges, by order dated July 25, 2011, the Board dismissed the latter appeal on the ground of lack of standing for failure to file the notice of appeal in the correct BLM office. The Board therefore did not reach the merits of Powder River's arguments.

particular facts or circumstances’ related to the South Porcupine LBA ‘that compel different reasoning or a different outcome than that reached in’ the West Antelope II appeal,” or ““filed supplemental briefing to address the impact of that decision [in PRBRC],”” quoting *National Wildlife Federation (NWF)*, 170 IBLA 240, 248 (2006). State Answer at 7. The State further argues that there are only two new arguments. Those new arguments are Powder River’s claims that the FEIS did not compare cumulative impacts across alternatives and that FLPMA requires enforcement of air quality standards, both of which the State challenges. *Id.* at 9-12.

Powder River filed a Reply to respond to BLM’s and BTU’s Answers, arguing that it has standing and has made the requisite showing of injury. It reiterated its assertions with respect to the alleged failure to analyze current and projected reclamation status before approving the LBA or consider alternatives and mitigation related to reclamation, and impacts on groundwater and GHG emissions. Powder River notably did not respond to the assertion that many of its arguments had been raised and rejected by this Board or seek leave to do so in a separate pleading.

BLM and BTU each filed a notice of supplemental authority, directing our attention to the July 30, 2012, Memorandum Opinion and Order issued in *WildEarth Guardians v. Salazar*, No. 1:10-cv-01174, 1:11-00037 (CKK) (D.D.C. July 30, 2012) (July 2012 Mem. Opinion), in which the District Court concluded that plaintiffs, WildEarth Guardians and Powder River, lacked standing to raise claims related to climate change and denied their challenges to the adequacy of BLM’s NEPA analysis pertaining to ozone, PM¹⁰, NO_x, hydrologic disturbance, reclamation, and the acreage limits set by the MLA. Powder River did not file a reply to the notices of supplemental authority or seek leave to do so.

Having thoroughly examined the record and the parties’ arguments, for the reasons that follow, we conclude that Powder River has failed to show BLM’s Decision violated NEPA, FLPMA, or the MLA.

Analysis

Appellant’s Burden to Show Error in the Decision

[1] It is an appellant’s burden to affirmatively demonstrate error in the decision on appeal. *NWF*, 170 IBLA at 251; *Great Basin Mine Watch*, 159 IBLA 325, 353 (2003); *Southern Utah Wilderness Alliance*, 158 IBLA 212, 219-20 (2003); *The Ecology Center*, 140 IBLA 269, 271 (1997); *United States v. De Fisher*, 92 IBLA 226, 227 (1986). Conclusory allegations, unsupported by evidence showing error, do not suffice. *See, e.g., J. W. Weaver*, 124 IBLA 29, 31 (1992); *Glanville Farms, Inc. v. BLM*, 122 IBLA at 85; *Shama Minerals*, 119 IBLA 152, 155 (1991), and cases cited. Nor is the requirement to affirmatively demonstrate error in the decision on appeal satisfied when an appellant “merely reiterate[s] the arguments considered by the

[decisionmaker below], as if there were no decision . . . addressing those points.” *Shell Offshore, Inc.*, 116 IBLA 246, 250 (1990). In such cases, BLM’s decision properly may be affirmed in summary fashion. *In re Mill Creek Salvage Timber Sale*, 121 IBLA 360, 361-62 (1991).

BLM’s Decision is In Part Summarily Affirmed

As stated, BLM, BTU, and the State argue that the majority of Powder River’s contentions were directly raised and rejected in *PRBRC*, a contention Powder River has not responded to or even acknowledged. For the reasons set forth below, we believe circumstances and Board precedent required it to do so.

In *PRBRC*, the March 2010 West Antelope II (WAI) ROD concerned Antelope Coal Company’s LBA for two maintenance tracts adjoining its West Antelope Mine in northeastern Wyoming, designated WAI North and WAI South. WAI North is in Campbell County, Wyoming, while WAI South is immediately south of the County line, in adjoining Converse County, not more than 20 miles from Wright and the South Porcupine tract. WAI Coal Lease Application ROD at 1.¹⁰ The WAI tracts and South Porcupine tract are in coal subregion 3, and both will mine the Wyodak-Anderson coal seam. See Fig. 4-4, FEIS for Wright Area at 4-39; compare South Porcupine ROD at 4 with WAI ROD at 4. The same agencies cooperated in reviewing the LBAs and/or preparing the WAI and Wright Area FEISs. The DEIS and FEIS in both cases describe the same Federal, State, and local permitting and regulatory authorities, roles, and hierarchy, identify the same environmental issues, analyze them in practically the same fashion, and contain the same responses to virtually the same substantive public comments and criticisms. Powder River’s arguments in this appeal are those it advanced in *PRBRC*, and those arguments are substantive restatements of its comments on the DEIS and FEIS in both instances.¹¹

The Board in *PRBRC* examined Powder River’s assertions that BLM failed to ensure compliance with the MLA’s state and national limits on leased acreage (*PRBRC*, 180 IBLA at 126); that the FEIS failed to consider impacts from alleged violations of the requirement to reclaim land and hydrological resources (*id.* at

¹⁰ The ROD is available at:

www.blm.gov/wy/st/en/info/NEPA/cfodocs/West_Antelope_II.html (last visited Nov. 19, 2012).

¹¹ Powder River’s comments on the WAI EIS can be found in their entirety at www.blm.gov/wy/st/en/info/NEPA/documents/cfo/West_Antelope_II.html (last viewed Nov. 21, 2012). Its comments on the Wright Coal Area EIS can be found in their entirety at www.blm.gov/wy/st/en/info/NEPA/documents/mpd/Wright-Coal.html (last viewed Nov. 21, 2012).

129-132); that BLM failed to analyze GHG emissions and impacts on global climate change (*id.* at 132-135); and that BLM violated NEPA when it determined not to study Powder River’s suggested alternatives and mitigation measures in detail (*id.* at 136-138).

The Board rejected Powder River’s allegations, finding that 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,” and that Powder River had failed to “clearly identify any relevant aspect of the affected environment or any significant impacts that BLM failed to include in its FEIS” or affirmatively show any “missing information regarding any reclamation or permitting violations that have been identified by the State.” *Id.* at 131. The Board further concluded, as it had previously in *Powder River Basin Resource Council*, 180 IBLA 32, 57 (2010), that “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.” *Id.* at 57.

Powder River, WildEarth Guardians, and others then took those arguments to Federal court, where the District Court concluded plaintiffs lacked standing to challenge impacts associated with GHG emissions and climate change because they were unable to establish an injury to their “uniformly local” recreational, aesthetic, and economic interests as a result of the “diffuse and unpredictable effects of GHG emissions” (July 2012 Mem. Opinion at 10), and ruled against plaintiffs on their remaining NEPA claims with regard to air quality (*id.* at 16-21); the impacts of hydrologic and land disturbance and the alleged lack of contemporaneous reclamation (*id.* at 21-23); failure to comply with the MLA, 30 U.S.C. § 184(a), and NEPA (*id.* at 24-26); failure to comply with FLPMA by ensuring compliance with air quality standards (*id.* at 27); and failure to comply with the Endangered Species Act, 16 U.S.C. § 1536(a)(2) (2006), as implemented by 50 C.F.R. § 402.14, by invoking informal rather than formal consultation with the Fish and Wildlife Service, U.S. Department of the Interior (*id.* at 28-29). Powder River nonetheless pursues these contentions in this appeal as if they had never been considered or rejected by BLM or upon subsequent appellate review.

This is not the first time we have addressed this situation. In *NWF*, 170 IBLA at 248, we considered a second appeal by the same appellant challenging several exploratory CBNG projects in the same general location in the Atlantic Rim Project Area administered by the Rawlins Field Office in Wyoming. Finding that the appellant’s arguments and points in support of them were presented again “in virtually identical form,” we concluded that most were “controlled by the analysis and holdings in *National Wildlife Federation*, 169 IBLA [146,] 152-165 [2006].”

NWF, 170 IBLA at 245. We outlined some of the assertions that had been presented and rejected in the earlier case, finally holding:

If there are any particular facts or circumstances about the . . . projects that compel different reasoning or a different outcome than that reached in *National Wildlife Federation*, *NWF* has not filed supplemental briefing to address the impact of that decision. It did not do so, presumably because there are no such distinguishing facts or circumstances regarding these Pod [sic] activities. We therefore decline to shoulder the burden of a more exhaustive discussion of these EAs when, with one possible exception, *NWF* has not shown why the arguments expressly considered and rejected in the previous decision remain viable in these cases.

Id. at 248-49.

In *Wyoming Outdoor Council*, 172 IBLA 289 (2007), we remarked upon the fact that, in a prior decision involving the same appellants, the Board had

clearly identified the specific instances in which appellants' arguments and proof had failed, concluded they had not carried their burden and, accordingly, affirmed BLM's decision authorizing the October 2003 lease sale. After we decided *Wyoming Outdoor Council*, IBLA 2004-84, we postponed action on the instant appeal to afford appellants an opportunity to file supplemental briefing to address the questions and conclusions set forth in the April 18 Order. They filed nothing further.

172 IBLA at 292-93. Citing *NWF* and other cases, we concluded:

While we understand and appreciate appellants' commitment to their cause and view, they cannot continue to raise the same unsuccessful arguments as if the Board and Federal courts had never considered and ruled on them and expect to prevail. More than once, we have warned that "the right of review provided by this Board is not intended to be a circular promenade in which the parties simply repeat their steps." *Thelbert Watts v. United States*, 148 IBLA 213, 217 (1999); *In Re Mill Creek Salvage Timber Sale*, 121 IBLA 360, 362 (1991); *accord Shell Offshore, Inc.*, 116 IBLA 246, 250 (1990). When, during the pendency of an appeal, the arguments raised by an appellant have been addressed in other Board decisions, or by Federal courts, whether or not the appellant was a party thereto, or in other Board adjudication to which it was a party, and the appellant fails to show that those

arguments remain viable, the Board may dispose of such arguments in summary fashion.

172 IBLA at 294; *see also Biodiversity Conservation Alliance*, 171 IBLA 313, 322 (2007).

[2] Given the proximity of the South Porcupine tracts to the WAI LBA tracts, the mutual mining objectives in the same coal formation, and the overwhelmingly similar substance of the NEPA documents supporting the two RODs because of those circumstances, Powder River was obliged to show why the arguments it repeats here warrant a different treatment or outcome than that in *PRBRC* or *WildEarth Guardians*. When the arguments raised by an appellant have been expressly addressed in other Board decisions or by Federal courts, whether the appellant was a party thereto or not, and the appellant fails to show that those arguments remain viable in the pending appeal and warrant a different outcome, the Board may dispose of such arguments in summary fashion. In such circumstances, Powder River has not discharged its burden to affirmatively demonstrate error in the decision on appeal. BLM's decision is therefore affirmed to the extent Powder River's issues and arguments were considered and rejected in *PRBRC* and rejected in *WildEarth Guardians*.¹²

Powder River's Remaining Arguments Lack Merit

We turn to the two issues that are not clearly among those that have been considered and rejected previously by either the District Court or this Board: the allegations that BLM failed to “properly disclose the impacts from the alternatives considered in detail” (SOR at 23-26), and that it failed to ensure compliance with air quality standards as required by FLPMA (*id.* at 26-27).

Powder River first contends BLM did not “compare the environmental trade-offs that directly result from its actions.” We do not agree. The FEIS examined the cumulative environmental impacts of the proposed action and alternatives in 157

¹² To be clear, those arguments include the principal and related contentions that BLM failed to ensure compliance with the MLA's state and national limits on leased acreage (*WildEarth Guardians*, July 2012 Mem. Opinion at 24-26; *PRBRC*, 180 IBLA at 126); that the FEIS failed to consider impacts from alleged violations of the requirement to reclaim land and hydrological resources (July 2012 Mem. Opinion at 21-23; 180 IBLA at 129-32); that BLM failed to analyze GHG emissions and impacts on global climate change (180 IBLA at 132-35); that BLM violated NEPA when it determined not to study Powder River's suggested alternatives and mitigation measures in detail (180 IBLA at 136-38); and failure to comply with FLPMA by ensuring compliance with air quality standards (July 2012 Mem. Opinion at 27).

pages comprising Chapter 4. That analysis included 40 Tables and 13 Figures to graphically illustrate direct, indirect, and cumulative impacts, supported by several Appendices. While Powder River faults the FEIS for purportedly failing to “include a full consideration of qualitative impacts,” it has not specifically identified those “qualitative impacts” or shown that they are absent, understated, or less than complete. SOR at 24. Powder River’s broad assertions in fact rest on its objection to BLM’s response to a public comment, and on its complaint that BLM did not consider the no action alternative or one of those Powder River prefers, and Powder River’s claims with respect to GHG emissions and climate change. *Id.* at 24-26. The record as a whole is contrary to the argument Powder River makes of BLM’s response to the comment, and, as discussed above, the latter points have been decided in BLM’s favor.

Regarding air quality, Powder River argues:

If BLM is leasing coal, without mitigation measures above and beyond what is required by DEQ air quality permits, and knowing that air quality standards likely will be exceeded, the agency is not meeting its duties to prevent violations of air quality standards. . . . Thus, the BLM must ensure compliance with all air quality standards in existing lease areas prior to conducting any additional leasing. Alternatively, BLM cannot lawfully lease more coal to the mines knowing that air quality violations are likely to occur.

SOR at 27. According to Powder River, BLM’s alleged failure violates 43 C.F.R. § 2920.7(b)(3), which implements section 202 of FLPMA, 43 U.S.C. § 1712(c)(8) (2006), and section 2 of MLA, 30 U.S.C. § 201(a)(3)(E) (2006). FLPMA requires BLM to “provide for compliance with applicable pollution control laws, including State and Federal air, water, noise, or other pollution standards or implementation plans” in developing, maintaining, and revising land use plans. 43 U.S.C. § 1712(c)(8) (2006). MLA similarly provides that each coal lease “shall contain provisions requiring compliance with the Federal Water Pollution Control Act . . . and the [CAA]” 30 U.S.C. § 201(a)(3)(E) (2006).

As an initial matter, it should be noted that we are not in this case concerned with developing, maintaining, or revising a land use plan, nor has a new lease been issued. Section 14 of the coal lease form, Standard Form 3400-12, requires compliance with the CAA. FEIS, Appendix D at D-9. This meets the MLA’s similar obligation to include a provision requiring compliance with the CAA.

[3] More fundamentally, the State correctly observes that FLPMA imposes on BLM only an obligation to “provide for” compliance with applicable air quality standards, not ensure or insure it, and that WDEQ’s Air Quality Division is the entity

that is responsible for regulating and enforcing compliance with such standards. State Answer at 11; FEIS Appendix A at A-1. BLM and BTU agree. BLM Answer at 16-17; BTU Answer at 26. The FEIS clearly explained WDEQ's and BLM's roles in ensuring compliance with State and Federal requirements. See FEIS Appendices A (Federal and State Permitting Requirements and Agencies) and F (Supplemental Air Quality Information).

This Board has previously held that BLM properly may rely on the State, which is subject to oversight by the EPA, to ensure permitted activities do not exceed or violate any State or Federal air quality standard under the CAA, 42 U.S.C. §§ 7401-7671q (2006). See, e.g., *Wyoming Outdoor Council*, 176 IBLA 15, 27 (2008) (“[I]n approving the Project, BLM properly assumed that emissions would be regulated, and, if necessary, controlled so as to satisfy both Federal and State air quality standards”); *id.* at 30 (“In assessing the potential significant environmental impacts in the EIS, BLM properly relied upon the adequacy of State enforcement to ensure that no CAA violation occurs”); see also *WildEarth Guardians*, July 2012 Mem. Opinion at 27 (BLM satisfied its FLPMA obligation “by preparing a lease for the WAI tracts requiring compliance with air and water quality standards”).¹³ We have held, moreover, that “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. Powder River’s claim is properly rejected.

Conclusion

Powder River’s decision has not affirmatively demonstrated error in the ROD or shown a violation of NEPA, FLPMA, or the MLA.

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

¹³ We most recently restated this principle in an unpublished order denying a stay petition involving the South Hilight LBA (WYW 174596) in *WildEarth Guardians*, IBLA 2011-130 (July 19, 2011).

I concur:

_____/s/_____
Christina S. Kalavritinos
Administrative Judge