WILDEARTH GUARDIANS

183 IBLA 165 Decided February 12, 2013

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

WILDEARTH GUARDIANS

IBLA 2012-149 Decided February 12, 2013

Appeal from a decision of the Wyoming High Plains District Office, Bureau of Land Management, approving a coal lease modification. WYW 172413.

Motion to Dismiss Granted; Appeal Dismissed.

1. Administrative Practice--Administrative Review: Generally--Administrative Practice--Administrative Review: Standing--Appeals: Generally

Where BLM gives notice to the public on its website of its intent to prepare an Environmental Assessment, an appellant who has not taken an action that is the subject of the decision on appeal, is not the object of that decision, and does not attempt to become involved in BLM's decision-making process by proffering or attempting to proffer its views and comments, or by timely requesting an opportunity to participate, is not a party to the case and the appeal is properly dismissed for lack of standing.

APPEARANCES: Samantha Ruscavage-Barz, Esq., Santa Fe, New Mexico, for WildEarth Guardians; Philip Lowe, Esq., Office of the Solicitor, U.S. Department of the Interior, Lakewood, Colorado, for the Bureau of Land Management; Peter S. Glaser, Esq., John Johnson, Esq., Michael H. Higgins, Esq., Washington, D.C., for Intervenors School Creek Coal Resources, LLC, and Peabody School Creek Mining, LLC.

OPINION BY ADMINISTRATIVE JUDGE PRICE

WildEarth Guardians (WildEarth) has appealed from a March 1, 2012, Finding of No Significant Impact (FONSI) and Decision Record (DR) issued by the High Plains District Office (Wyoming), Bureau of Land Management (BLM), approving the

joint application to modify Federal coal lease WYW 172413 (Lease) filed by School Creek Coal Resources, LLC, and Peabody School Creek Mining, LLC (collectively intervenors).[1]

Because we conclude that WildEarth has not shown it is a party to the case, intervenors' motion to dismiss for lack of standing will be granted.

Background

Federal coal lease WYW-172413 encompasses 4,253.763 acres and is located southeast of Wright, Wyoming. It is situated almost entirely within the Medicine Bow Forest for the Thunder Basin National Grasslands and therefore most of the surface estate is administered by the Forest Service, U.S. Department of Agriculture. It is one of four Federal coal leases that constitute the 8,100-acre School Creek Logical Mining Unit (LMU), which is an area within the permitted School Creek Mine (Mine), a surface coal mine operation covering more than 23,080 acres in Campbell County.

The Mine is bordered to the north by the Black Thunder Mine, and the North Antelope Rochelle and Antelope II Mines are located directly south of the Mine, which collectively constitute the largest coal-mining operations in the United States. The Mine is the combination of what was formerly the southern portion of the Black Thunder Mine and the northern part of the Antelope Rochelle Mine.

In December 2011, pursuant to 43 C.F.R. Subpart 3432,[2] intervenors proposed to modify their Lease.[3] Intervenors proposed the addition of a 40.80-acre

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[1] School Creek Coal Resources, LLC, is the lessee, and Peabody School Creek Mining, LLC, is the operator. *See* School Creek Mine Lease Modification Application, Vol. I, dated Dec. 8, 2011 (Lease Mod.), at 3. Both moved to intervene. We granted intervenor status to both by Order dated May 7, 2012.

[2] Pursuant to Section 3 of the Mineral Leasing Act, 30 U.S.C. § 203 (2006), and 43 C.F.R. § 3432.1(a), a coal lessee may apply to modify a lease to include coal lands or coal deposits contiguous to those embraced in a preexisting lease under certain circumstances enumerated in the statute and implementing regulations. This allows a lessee to add more reserves (up to 160 acres) without formal bidding by agreeing to pay the fair market value for the new reserves.

[3] BLM described coal lease modifications as follows:

Lease modifications often ensure the recovery and receipt of fair market

(continued...)

parcel to include a 1.25-acre coal outcropping that contains approximately 135,876 tons of coal with a fair market value of $7,700. The acreage total represents the smallest unit that BLM can lease; the acreage in excess of the 1.25-acre outcropping does not contain Federal coal, but will be disturbed because it is it lies entirely within the Mine's disturbance permit boundary. Environmental Assessment No. DOI-BLM-WY-P070-2012-063-EA (EA) at 2. Without the modification, Federal coal in the outcropping would be bypassed and would not be economically recovered in the future. Lease Mod. at 3. Mining would take place in accordance with the State and Federally-approved permit for the Mine.

On January 11, 2012, BLM posted notice on its website that, pursuant to section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(2)(C) (2006), it was preparing an EA for a proposed modification to the Lease. The notification was available to the public on BLM's Wyoming NEPA Register and showed that the EA was "In Process."[4]

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[3] (...continued)
value of small areas of unleased Federal coal that may be discovered during the mining of an adjacent Federal coal lease. In many cases, BLM must process a modification expeditiously to avoid the bypass of unleased Federal coal. . . . [T]he maximum allowable acreage for lease modifications is a total of 160 acres per lease, regardless of the number of times BLM modifies the lease. Due to variability in exploration data and the coal geology, these small areas of unleased Federal coal are not easily identified with the limited data available when we originally configure a lease. Such areas typically cannot be developed as an independent lease because of their size and configuration. Therefore, incorporation of these areas into an existing coal lease through a coal lease modification facilitates achieving fair market value and maximum economic recovery of Federal coal resources.
67 Fed. Reg. 2618, 2619 (Jan. 18, 2002) (preamble to proposed rule, 43 C.F.R. § 3432.3).

[4] The NEPA Register is available at http://www.wy.blm.gov/nepa/search/nepaDetail.php?log_id=19436 (last visited on Dec. 18, 2012).

BLM posted the completed EA under NEPA documents on its website in February 2012.[5] The completed EA explained that the impacts of adding the 1.25-acre outcropping to intervenors' Lease had been adequately analyzed in a 2009 EA prepared by the Department's Office of Surface Mining Reclamation and Enforcement (OSM) for the Mine's Mining Plan (2009 EA), to which the 2012 EA is tiered. EA at 3. BLM stated that it had "internally scoped [the proposed Lease modification] through the appropriate BLM specialists,"[6] and that "[p]ublic involvement was not needed . . . because the applied for area is within the current mining permit boundary [of the Mine], and the previously approved mining plan disturbance area." *Id.*

The FONSI and DR were signed and posted on February 10 and February 12, 2012, respectively. *See* case file for WYW 172413.

As of February 28, 2012, WildEarth was reviewing the EA. Email Message from WildEarth's Jeremy Nichols to BLM's Teresa Johnson, Environmental Protection Specialist, dated Feb. 28, 2012 (I was "reviewing the EA prepared for the most recent School Creek coal lease modification.").

Apparently in response to WildEarth's questions about the running of the 30-day appeal period posted with the DR and FONSI, BLM re-issued and re-posted them on March 1, 2012, informing site visitors that the "Appeal Period ends March 30, 2012."[7] *See* E-mail Message from Nichols to Johnson acknowledging receipt of additional information dated Mar. 26, 2012 (". . . wouldn't 30 days after March 1 be March 31st?"); E-mail Message from Tamera Hammack, Web Specialist,

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[5] The record before us does not confirm the date when the EA was posted, but WildEarth states that it was Feb. 12, 2012. Reply at 9.

[6] BLM defines "internal scoping" as the "use of BLM and cooperating agency staff to help determine what needs to be analyzed in a NEPA document." BLM NEPA Handbook, H-1790-1 (Rel. 1-1710) (last updated Jan. 2008) (NEPA Handbook), at 39. The NEPA Handbook is available at http://www.blm.gov/pgdata/etc/medialib/blm/wo/Information_Resources_Management/policy/blm_handbook.Par.24487.File.dat/h1790-1-2008-1.pdf (last visited on Oct. 19, 2012).

[7] The page is available at http://www.blm.gov/wy/st/en/info/NEPA/documents/hpd/school_ck.html (last visited on Jan. 28, 2013).

Johnson, dated Feb. 28, 2012 ("The EA has been fixed and reposted and the comment period date added to the page.").[8]

WildEarth did not offer any comments following the January 11, 2012, notice of intent to prepare an EA for the Lease modification. Instead, it timely appealed to the Board, arguing that, contrary to NEPA's requirements, BLM did not allow any public participation in preparing the EA, characterizing it as a major Federal action, and further arguing that there had been no public involvement in the preparation of OSM's 2009 EA to which the School Creek EA was tiered. Statement of Reasons (SOR) at 6-7.

BLM disputes both WildEarth's characterization of the action and its assertion that it violated NEPA's public participation mandates.

In addition to the arguments advanced by BLM, intervenors challenge WildEarth's standing and move to dismiss the appeal on that basis. They argue that WildEarth failed to show that any of its members are injured by the decision on appeal and therefore the organization lacks standing to bring this matter before the Board. Intervenors' Answer at 5.[9] Specifically, intervenors state that WildEarth

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[8] It is not clear from the record whether "the comment period" refers to an opportunity to comment or an erroneous reference to "the appeal period" that ended on Mar. 30, 2012.

[9] Intervenors focus on the standing requirements for seeking judicial review before an Article III court, rather than appellant's standing to seek administrative review. In *Western Watersheds Project v. BLM*, 182 IBLA 1 (2012), this Board recently stated:

> [D]espite the theoretical distinctions between administrative and judicial standing, the differences as a practical matter are difficult to discern. Both focus on the injury to an interest because the courts must find a "case or controversy" and agencies must ensure due process in adjudications, which involves balancing "the private interest that will be affected by the official action" and "the Government's interest, including the function involved and the fiscal and administrative burdens that [an] additional or substitute procedural requirement would entail." *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976). The Department's choice to limit the right of appeal to those who are "adversely affected" satisfies the requirements of due process and serves the interest in administrative economy by avoiding costly adjudications in circumstances where no one has shown actual harm.

(continued...)

cannot be adversely affected by BLM's decision to modify the Lease because the surface estate of the 40.80-acre lot is "*private land that* [WildEarth] *does not use and enjoy*." *Id*. at 7 (emphasis in original).

WildEarth responds that it is adversely affected by BLM's decision because its members use lands around the area described in the application, primarily in the Thunder Basin National Grassland, for recreational, aesthetic, and conservation purposes. *See* SOR at 3, *id*. at Ex. 3 (Declaration of Jeremy Nichols). WildEarth argues that noise, visual, and air pollution caused by mining the area described in the Lease modification application will adversely affect WildEarth's members' use and enjoyment of the surrounding public lands.

WildEarth's Standing to Appeal

As provided in 43 C.F.R. § 4.410, an appellant must show both that it is a "party to a case" and "adversely affected" by the decision at issue. It is the responsibility of the appellant to demonstrate the requisite elements of standing. *See Center for Biological Diversity*, 181 IBLA 325, 338 (2012). In the absence of standing, the Board is without jurisdiction to consider the merits of an appeal. In such circumstances, the appeal must be dismissed. *Laramie Energy II, LLC*, 182 IBLA 317, 325 (2012).

We first dispose of the "adversely affected" element of standing. An appellant must present "colorable allegations of adverse effect and . . . a causal relationship between the action undertaken and the injury alleged." *Santa Fe Northwest Information Council, Inc*., 174 IBLA 93, 103 (2008). Evidence of actual use of lands described in the appealed decision is "the most direct way" to establish adverse effect, but an appellant may also demonstrate adverse effect "'by setting forth interests in resources or in other land or its resources affected by a decision and showing how the decision has caused or is substantially likely to cause injury to those interests.'" *Western Watersheds Project v. BLM*, 182 IBLA at 9 (quoting *Coalition of Concerned National Park [Service] Retirees*, 165 IBLA 79, 84 (2005)). An organization makes the requisite showing by submitting an affidavit, declaration, or other statement by a member or members attesting to the fact that they use the lands and/or resources at issue, or otherwise have a legally cognizable interest that is substantially likely to be injured by the approved action.

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[9] (...continued)
182 IBLA at 7 (footnote omitted).

WildEarth has demonstrated that BLM's decision adversely affects its members' interests to the extent contemplated by Departmental standing requirements. *See Missouri Coalition for the Environment*, 172 IBLA 226, 235-36 (2007) (finding possible adverse effect for birdwatchers where a decision would allow 112 of 1.5 million acres of National Forest to be destroyed).

[1] However, WildEarth must also be a party to the case to have standing. *See David Glynn*, 182 IBLA 70, 73 (2012). An individual or organization becomes a party to a case by taking action that is the subject of the decision on appeal, by being the subject of that decision, or by otherwise participating in the process leading to the decision under appeal. 43 C.F.R. § 4.410(b). WildEarth cannot meet the first two criteria, and therefore its standing must rest upon its participation in the process leading to the DR.

In this case, BLM gave notice to the public of its intent to prepare an EA on January 11, 2012. WildEarth did nothing to become involved in BLM's decision-making process by proffering or attempting to proffer its views and comments or by timely requesting an opportunity to participate that BLM ignored or rejected. Had it submitted any such comments, BLM would have considered them. *See* 43 C.F.R. § 46.305(a)(1). In such circumstances, an appellant is not a party to the case and the appeal is properly dismissed for lack of standing.[10]

In its Reply, WildEarth advances two additional arguments that require only a brief response. It first notes that the EA, FONSI, and DR were originally issued on February 12, 2012, and that it was only after Nichols requested a map by e-mail that BLM reissued the documents. WildEarth thus apparently means to cast doubt on the notice BLM provided to the public before the decision to approve the Lease modification was made. Reply at 2-3. However, regardless of when the EA, FONSI, and DR were posted, notice of intent to prepare the EA was posted a month earlier,

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[10] WildEarth's situation is thus distinguishable from those cases where, despite the appellant's formal expression of interest in participating in the decision-making process, participation was thwarted by BLM. *See, e.g., Lynn Canal Conservation, Inc.*, 169 IBLA 1, 4 (2006); *Predator Project*, 127 IBLA 50, 53 (1993) (finding that, even though it did not actively participate in the process leading to BLM's decision, appellant was a party to the case because it expressly requested leave to participate in that process, but BLM foreclosed the opportunity to do so); *Utah Wilderness Association*, 91 IBLA 124, 129 (1986) (recognizing as a party to the case on appeal an organization that requested in writing the opportunity to comment on the process of adjudicating applications for permits to drill).

and in the absence of any attempt to become a party to the case, WildEarth's contention is properly rejected.

Second, WildEarth argues that the NEPA Register entry "simply provides no information that would give a reasonable person an opportunity to be involved. It contains no contact information, it does not provide basic details regarding the proposed action (e.g., acreage, amount of coal, etc.), and it does not even contain a general solicitation for any comment." *Id.* at 3. This argument is not well-founded.

WildEarth is correct that the initial page of the NEPA Register provides only a list of NEPA actions in each fiscal year, the NEPA document number, start date, BLM program involved, a brief description of the project, the BLM serial number, county, status of the action, and a date. Clicking on a NEPA document number in the Register list takes the viewer to the screen WildEarth copied to submit with its Reply. It shows much of the same information provided on the Register's initial screen, but adds the section, township, and range information to locate a project. However, clicking the link to "NEPA Documents" at the top of the Register screen takes the viewer to the screen where NEPA documents can be retrieved by fiscal year, Field Office, District Office, and other criteria, including the NEPA document at issue in this appeal, with BLM contact information at the left side of the screen. Thus, even assuming the Register page was the only path to finding NEPA information and documents on the website – and it is not – when properly used, the Register page provides a means of access to sufficient information to permit anyone to become acquainted with the content and status of BLM's NEPA activities and to become involved.[11]

[11] BLM's website at http://www.wy.blm.gov/wy/st/en/info/NEPA.html (last visited Jan. 26, 2013) includes a page entitled "National Environmental Policy Act Wyoming." Among other things, it notes that "lists of NEPA documents and other environmental records completed or in preparation" provide "a useful tool to help you get involved." It informs visitors that it is "your responsibility to frequently check this site to ensure that you have the maximum time allowed for comment on a specific NEPA document," and that they may also "contact the Field Office initiating the NEPA document and request to have your name added to a mailing list to ensure that you receive copies of NEPA documents in a timely manner." This web page links to two others: "NEPA Documents," www.blm.gov/wy/st/en/info/NEPA/documents, which lists and includes a hyperlink to completed NEPA documents, and the NEPA Register, which, as discussed, lists and identifies environmental documents that are being prepared and those that have been completed.

Conclusion

In this case, WildEarth did nothing to become involved following the posting on BLM's website of notice of intent to prepare an EA. WildEarth accordingly has not shown that it is a party to the case, and accordingly has no standing to maintain an appeal. *Blue Mountains Biodiversity Project*, 139 IBLA 258, 261 (1997) (appeal dismissed for lack of standing because appellant failed to submit comments during a designated comment period).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, intervenors' motion to dismiss for lack of standing is granted, and appellant's appeal is dismissed.

/s/
T. Britt Price
Administrative Judge

I concur:

/s/
James K. Jackson
Administrative Judge