POWDER RIVER BASIN RESOURCE COUNCIL

183 IBLA 242 Decided March 14, 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

POWDER RIVER BASIN RESOURCE COUNCIL

IBLA 2012-109 Decided March 14, 2013

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 164812.

Affirmed.

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

2. National Environmental Policy Act of 1969: Generally

Agencies enjoy considerable discretion in defining the purpose of, and need for, a proposed project. When BLM is asked to approve an application or permit, it should consider the needs and goals of the parties involved in the application or permit, as well as the public interest. The needs and goals of the parties involved in the application or permit may be described as background information, but this description is not to be confused with BLM's purpose and need for action. It is BLM's purpose and need for action that determines the range of alternatives and provides a basis for the selection of an alternative in a decision. Inadequacy in a statement of the purpose and need for action on appellant's coal Lease by Application is not shown by raising the possibility that appellant may also export some of the coal to be mined under the

application. Such an allegation does not establish a violation of NEPA.

APPEARANCES: Shannon Anderson, Esq., Sheridan, Wyoming, and Brad A. Bartlett, Esq., Durango, Colorado, for the Powder River Basin Resource Council; Michael Drysdale, Esq., and William Prince, Esq., Minneapolis, Minnesota, for Ark Land Company; Mary L. Frontczak, Esq., St. Louis, Missouri, and Peter S. Glaser, Esq., John H. Johnson, Esq., Carroll W. McGuffey, III, Esq., Washington, D.C., for Peabody Energy Corporation; 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 a February 1, 2012, Record of Decision (ROD) issued by the District Manager, High Plains (Wyoming) District Office, Bureau of Land Management (BLM), authorizing a competitive lease sale for Federal coal tract WYW 164812.[1] The ROD was based on a July 2010 Environmental Impact Statement (EIS) prepared pursuant to section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(2)(C) (2006). For the reasons that follow, we conclude that Powder River has not shown error in the ROD or that BLM failed to comply with NEPA and other relevant statutes and regulations.

Background

On October 7, 2005, Ark Land, a subsidiary of Arch Coal, Inc., filed an application proposing to lease Federal coal reserves in two maintenance tracts adjacent to the Black Thunder Mine (Mine) in Campbell County, Wyoming.[2] BLM

[1] Ark Land Company (Ark Land) and the State of Wyoming (State) separately filed motions to intervene. Peabody Energy Corporation (Peabody) moved for leave to file an *amicus curiae* brief. The motions were granted by Order dated Apr. 2, 2012.

[2] The North Hilight tract 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 tract became available for leasing by application (LBA) under 43 C.F.R. Subpart 3425, rather than by the

(continued...)

reviewed the application to determine whether the proposed tracts would continue or extend the life of an existing mine and thus qualify for leasing as a maintenance tract under 43 C.F.R. Subpart 3425. BLM determined to process the application as two separate tracts, the North and South Hilight Fields, though our review concerns only the North Hilight Field tract, serialized as WYW 164812. Once the decision to lease this tract was made, a competitive lease sale was to follow. ROD at 1. As applied for, the North Hilight Field tract embraced 2,613.50 acres containing approximately 263.4 million tons of recoverable coal,[3] located in the Powder River Federal Coal Region.

In accordance with its obligations under NEPA, BLM undertook the appropriate environmental review. On July 3, 2007, BLM published in the *Federal Register* a notice of intent to prepare an EIS to analyze the potential impacts of issuing leases for six Federal coal maintenance tracts proposed by three operators in the Wright area, including the subject North Hilight Field.[4] 72 Fed. Reg. 36,476 (July 3, 2007). The Office of Surface Mining Reclamation and Enforcement, Department of the Interior; Forest Service (FS), Department of Agriculture; Wyoming Department of Environmental Quality; Wyoming Department of Transportation; and the Converse County Board of Commissioners served as cooperating agencies in preparing the Draft EIS (DEIS). On June 17, 2009, BLM published the Wright Area Coal Lease Applications DEIS, mailed copies to known interested parties, and made it available in electronic form on BLM's website. On July 30, 2010, BLM published the FEIS and provided notice to the public. 75 Fed. Reg. 44,978 (July 30, 2010).

For the analysis, BLM assumed that Ark Land would be the successful bidder and that coal from the North Hilight Field tract would be mined, processed, and sold pursuant to existing Mine operations. ROD at 13. The DEIS included an alternative tract configuration that added approximately 1,916.29 acres of adjacent lands

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[2] (...continued)
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.*

[3] The tract sought in the application embraces lands within sec. 19, T. 44 N., R. 70 W., and secs. 23, 24, and 26, T. 44 N., R. 71 W., Sixth Principal Meridian, Campbell County, Wyoming. ROD, Appendix 1, Fig. 2.

[4] The other tracts are South Hilight Field (WYW 174596), West Hilight Field (WYW 172388), West Jacobs Ranch (WYW 172685), South Porcupine (WYW 176095), and North Porcupine (WYW 173408). The other mines are the North Antelope Rochelle Mine and the Jacobs Ranch Mine. *See* Final EIS (FEIS) Fig. ES-1; *see also* FEIS at ES-1 to ES-10.

containing Federal coal reserves.[5] ROD at 2. BLM considered the proposed application, a no action alternative, the reconfigured tract alternative, a new mine alternative, and a delayed sale alternative. ROD at 13-16. On February 1, 2012, the High Plains District Manager, BLM, approved offering the North Hilight Field tract of 4,525.87 acres under the reconfigured alternative.[6] BLM published Notice of the ROD. 77 Fed. Reg. 5,568 (Feb. 3, 2012). Powder River timely appealed.

The Parties' Arguments

Powder River claims BLM failed to adequately consider the potential environmental impacts from alleged violations of contemporaneous reclamation requirements at the Mine, failed to properly assess mitigation measures and alternatives, including those that it advocated in its comments during the environmental review, and did not address compliance with the statutory coal acreage limitations. Powder River further argues that leasing will vitiate the purpose and need for action on the LBA because Ark Land has indicated an interest in exporting coal.

BLM, Ark Land, the State, and Peabody contend Powder River's arguments are those considered at length and rejected by the Board in *Powder River Basin Resource Council* (*PRBRC I*), 180 IBLA 119 (2010). That case involved two LBA maintenance tracts partially within Campbell County and adjacent to the Antelope Mine, which were analyzed in the West Antelope II (WAII) Coal Lease Application FEIS. There, Powder River asserted BLM had failed to ensure compliance with state and national limits on leased acreage (*PRBRC I*, 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 129-32); that BLM failed to analyze greenhouse gas (GHG) emissions and impacts on global climate change (*id.* at 132-35); and that BLM violated NEPA when it determined not to study Powder River's suggested alternatives and mitigation measures in detail (*id.* at 136-38).

Powder River and others took their arguments to court. In Memorandum Opinion and Order in *WildEarth Guardians v. Salazar*, 880 F. Supp. 2d 77 (D.D.C. July 30, 2012), the District Court concluded that plaintiffs, WildEarth Guardians and Powder River, lacked standing to raise claims related to climate change and denied

[5] The added lands are in secs. 20, 21, and 22, T. 44 N., R. 70 W., SPM. ROD, Appendix 1, Fig. 3; *see also* ROD at 15. Approximately 80.7 acres are within the Thunder Basin National Grassland administered by FS.

[6] On Nov. 23, 2011, FS issued its own ROD regarding the 80.7 acres of grassland it manages. BLM notes that FS' prescribed terms and conditions are included in Appendix 2 to BLM's ROD. ROD at 2.

their challenges to the adequacy of BLM's NEPA analysis pertaining to ozone, PM^{10}, NO_x, hydrologic disturbance, the lack of completed reclamation, and acreage limitations. Powder River did not explain or distinguish *PRBRC I* or *WildEarth Guardians v. Salazar*, or seek leave to do so in any of its pending appeals.

Discussion

After briefing in this appeal had been completed, the Board reached another of Powder River's challenges to coal leasing in the Powder River Basin. The Board issued its decision in Powder River's appeal of the ROD for the South Porcupine (WYW 176095) LBA tract analyzed in the Wright Area Coal Lease Applications EIS. *Powder River Basin Resource Council* (*PRBRC II*), 183 IBLA 83 (2012). In *PRBRC II*, Powder River pursued the same arguments summarized above and disposed of in *PRBRC I* and *WildEarth Guardians v. Salazar*, but added two new arguments – *i.e.*, that BLM failed to "'compare the environmental trade-offs,'" and failed to "'provide for compliance with applicable pollution control laws.'" *PRBRC II*, 183 IBLA at 93, 94. BLM, intervenor BTU Western Resources, Inc., and the State again argued Powder River had failed to show why *PRBRC I* did not control the outcome.

[1] The parties are correct that, with the exception of a single new argument, Powder River's statement of reasons (SOR) is substantively the same as those submitted in *PRBRC I* and *II*. *See* BLM Answer at 7; Ark Land Answer at 1; State's Answer at 2.[7] As this Board has stated innumerable times, an appellant bears the burden of affirmatively demonstrating error in the decision on appeal. The requirement to affirmatively demonstrate error in the decision on appeal is not satisfied when an appellant merely reiterates the arguments previously considered by the decisionmaker, as if there were no decision addressing those points. *PRBRC II*, 183 IBLA at 89-90. 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.

Thus, in *PRBRC II* the Board held:

> Given the proximity of the South Porcupine tracts to the WAII LBA tracts [considered in *PRBRC I*], 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

[7] The parties note, however, that this argument is presented in the appeal filed by Powder River docketed as IBLA 2012-37 (North Porcupine tract).

> repeats here warrant a different treatment or outcome than that in *PRBRC*[*I*] 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*[*I*] and rejected in *WildEarth Guardians*.

PRBRC II, 183 IBLA at 93; *see also* cases cited at 183 IBLA 91-93.

As stated, Powder River has not sought leave to respond to the renewed assertion that most of its arguments have been raised and rejected by this Board. Moreover, the instant LBA was analyzed in the same EIS that was before us in *PRBRC II*, a fact that only underscores Powder River's failure to discharge its burden on appeal. After reviewing Powder River's arguments in light of the record here and those advanced in the earlier cases, we conclude that, with one exception, they are properly denied summarily.[8]

Powder River's Remaining Argument Lacks Merit

The one new issue presented by Powder River is the claim that BLM violated NEPA because the stated purpose and need for the proposed action, to meet the nation's energy needs, would be undermined because Arch Coal's Chief Executive

[8] To be clear, those arguments include the principal and related contentions that BLM failed to ensure compliance with section 27 of the Mineral Leasing Act of 1920, 30 U.S.C. § 184(a) (2006), which establishes state and national limits on leased acreage (*WildEarth Guardians*, 880 F. Supp. 2d at 92-94; *PRBRC I*, 180 IBLA at 126); that the FEIS failed to consider impacts from alleged violations of the requirement to reclaim land and hydrological resources (*WildEarth Guardians*, 880 F. Supp. 2d at 91-92; *PRBRC I*, 180 IBLA at 129-32); that BLM failed to analyze GHG emissions and impacts on global climate change (*PRBRC I*, 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 (*PRBRC I*, 180 IBLA at 136-38); that BLM failed to comply with section 202 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1712 (2006), by ensuring compliance with air quality standards (*WildEarth Guardians*, 880 F. Supp. 2d at 94); and failure to compare environmental trade-offs (*PRBRC II*, 183 IBLA at 93-94).

Officer has publicly announced a desire or intention to supply coal to Asia, as shown by copies of news releases Powder River submitted on appeal. SOR at 23. Powder River reasons that leasing additional coal-bearing acreage therefore will neither meet American energy needs nor reduce American dependence on foreign sources of energy. *Id.* at 24.

BLM responds that Powder River has incorrectly characterized the purpose and need for the EIS, stating that it has "twice explained in responses to PRBRC's comments on the draft and final EIS, the purpose and need is to respond to applications to lease coal, not just to meet the nation's energy needs." BLM Answer at 8. BLM further argues that Arch Coal's desire or intention to export coal, assuming it is the successful high bidder, is not the same as exporting all the coal that might be mined, and does not demonstrate that Powder River Basin coal will not meet American needs.

Ark Land also assails Powder River's argument on the ground that it was "not previously raised to the BLM, incompletely characterizes the project Purpose and Need, is unsupported with objective evidence of significance, and is self-contradictory with PRBRC's prior submissions to the BLM." Ark Land's Answer at 2. More specifically, Ark Land contends that Powder River had previously complained that BLM was leasing too much coal in a declining market; that revenue generation is an objective that was expressly stated in the EIS; that reliance on news reports is speculative and, in any event, those news reports discussed a potential export of *de minimis* quantities of coal; and that Powder River has not shown that the potential export of Powder River Basin coal is significant to either purpose or need for the project. *Id.* at 3-4.

[2] "Agencies enjoy 'considerable discretion' to define the purpose and need of a project." *Nat'l. Parks Conservation Ass'n v. Kaiser Eagle Mountain (National Parks)*, 586 F.3d 735, 746 (9th Cir. 2009) (quoting *Friends of Southeast's Future v. Morrison*, 152 F.3d 1059, 1066 (9th Cir. 1998)). The DEIS and FEIS explained the role of coal as the "cornerstone of the nation's central power configuration," noted that "Wyoming coal is used to generate electricity in 36 other states," acknowledged the statutory obligation of "Federal agencies to undertake efforts to ensure energy efficiency and production of secure, affordable, and reliable domestic energy," as well as the public benefits of the "extensive revenue from lease bonuses, rentals, and royalty payments," and stated BLM's need to "manage the use, occupancy, and development of public lands through leases and permits" and make a decision on the requested LBA. FEIS at 1-16 through 1-17.

These statements fully accord with the Department's regulation governing the subject:

> (a) *Statement of purpose and need.* In accordance with 40 CFR 1502.13, the statement of purpose and need briefly indicates the underlying purpose and need to which the bureau is responding.
>
> (1) In some instances it may be appropriate for the bureau to describe its "purpose" and its "need" as distinct aspects. The "need" for the action may be described as the underlying problem or opportunity to which the agency is responding with the action. The "purpose" may refer to the goal or objective that the bureau is trying to achieve, and should be stated to the extent possible, in terms of desired outcomes.
>
> (2) When a bureau is asked to approve an application or permit, the bureau should consider the needs and goals of the parties involved in the application or permit as well as the public interest. The needs and goals of the parties involved in the application or permit may be described as background information. However, this description must not be confused with the bureau's purpose and need for action. It is the bureau's purpose and need for action that will determine the range of alternatives and provide a basis for the selection of an alternative in a decision.

43 C.F.R. § 46.420, Terms used in an environmental impact statement.

No inadequacy in the EIS's statement of the purpose and need for action on Ark Land's coal LBA is shown by raising the possibility that Ark Land may also export some of the coal to be mined under the LBA. Nor does such an allegation establish a violation of NEPA. Powder River's argument to the contrary is rejected for lack of merit. *Bristlecone Alliance*, 179 IBLA 51, 61-65 (2010).

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

/s/
T. Britt Price
Administrative Judge

I concur:

/s/
Christina S. Kalavritinos
Administrative Judge