



POWDER RIVER BASIN RESOURCE COUNCIL

185 IBLA 262

Decided April 10, 2015



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 2013-73 & 2013-74

Decided April 10, 2015

Appeal from two decisions of the Deputy State Director, Minerals and Lands, Wyoming State Office, Bureau of Land Management (BLM), pursuant to State Director Review, affirming approval by the Buffalo Field Office, BLM, of separate applications for permit to drill. SDR Nos. WY-2013-05, WY-2013-07.

Affirmed.

1. Administrative Practice—Administrative Review:
Generally—Administrative Review; Burden of
Proof—Appeals: Generally

In an appeal from a decision on State Director Review (SDR), appellant's burden to affirmatively demonstrate error in the decision on appeal is not satisfied when appellant has merely reiterated its arguments made in comments or in a protest, and considered on SDR, as if there were no decision addressing those points. In such cases, BLM's decision may be affirmed in summary fashion.

APPEARANCES: Shannon Anderson, Esq., Sheridan, Wyoming, for appellant; Jack D. Palma, Esq., Cheyenne, Wyoming and Hadassah M. Reimer, Esq., Jackson, Wyoming, for Lance Oil & Gas Co.; Philip C. Lowe, Esq., Office of the Solicitor, Rocky Mountain Region, U.S Department of the Interior, Denver, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE KALAVRITINOS

Powder River Basin Resource Council (Powder River) appeals from separate decisions of the Deputy State Director, Minerals and Lands, Wyoming State Office, Bureau of Land Management (BLM), issued November 29 and December 5, 2012, pursuant to State Director Review (SDR), affirming approval by the Buffalo Field Office, BLM, of the Lance Oil and Gas Company's (Lance) separate applications for

permits to drill (APDs) for the Mufasa Fed 4479-11-31H (Mufasa Fed 11-31H) and Simba Fed 4478-20-44SX-H (Simba Fed 20-44H) wells. Powder River appeals on the grounds that the EAs failed adequately to meet the requirements of Section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(2)(C) (2012). The Board consolidated the appeals *sua sponte* by Order dated January 23, 2013, and Powder River files a single Statement of Reasons (SOR).¹ As explained below, we conclude that Powder River has not carried its burden to demonstrate error in the SDR decisions, and, therefore, affirm BLM's decision.

Background

On May 31, 2011, Lance submitted to BLM a Notice of Staking for the Mufasa Fed 11-31H well, and did likewise for the Simba Fed 20-44H well, on June 3, 2011. The Mufasa well was proposed as a horizontal conventional oil and gas well targeting the Sussex formation at a depth of approximately 9,200 feet and utilizing hydraulic fracturing within the target zone to stimulate production. The Simba well involved a similar proposal, except its targeted depth was 14,000 feet. In consultation with BLM, Lance relocated the proposed site of each well to mitigate resource conflicts. The proposed wells were renamed Mufasa Fed 11-31H and Simba 20-44H, respectively.² Lance filed APDs for both wells on December 12, 2011.

The Buffalo Field Office prepared EAs for each APD, WY-070-EA12-061 (Simba) and WY-070-EA12-062 (Mufasa). BLM issued a decision record (DR) and finding of no significant impact (FONSI) for the Simba well APD on March 19, 2012, and a DR and FONSI for the Mufasa well APD on April 20, 2012. Powder River sought SDR of each decision. On May 23, 2012, the Wyoming State Office, BLM, held a joint oral presentation for the SDRs. BLM issued separate SDR decisions, affirming each respective BLM decision to approve the APD. In both cases, the deciding official, the Deputy State Director, Minerals and Lands, concluded as follows:

- *Tiering.* BLM properly tiered the EA to the 2003 Powder River Basin Resource Management Plan Environmental Impact Statement (PRB EIS) for guidance on managing BLM administered oil and gas activities. BLM reasonably incorporated data and impact analysis from other site-specific EAs for projects nearby.

¹ Under the same order, the Board granted intervenor status to Lance.

² The Mufasa well is situated within the SW $\frac{1}{4}$ NE $\frac{1}{4}$, sec. 11, T. 47 N., R. 79 W., Sixth Principal Meridian, Johnson County, Wyoming, and the boundaries of Oil and Gas Lease WYW 145636. The Simba well is situated within the NW $\frac{1}{4}$ NE $\frac{1}{4}$, sec. 20, T. 47 N., R. 78 W., Sixth Principal Meridian, Johnson County, Wyoming, and the boundaries of Oil and Gas Lease WYW 146889.

- *Drilling and Operations.* BLM properly analyzed and disclosed the impacts of drilling those deep, horizontal wells. BLM's consideration of the probable surface area disturbance was in accordance with the PRB EIS's analysis. BLM applied timing restrictions to mitigate anticipated impacts from drilling operations. BLM disclosed and adequately discussed the differences in spacing and depth of the wells from the PRB EIS analysis. BLM disclosed and analyzed water usage for drilling and adequately addressed the potential impacts, with mitigation measures. The volumes and composition of chemicals to be used in hydraulic fracturing are regulated by the State; use of local sand sources for hydraulic fracturing is not anticipated. BLM considered flowback and produced water, noting that a water disposal plan must receive future authorization but only after a water quality analysis. Under the PRB EIS and the EAs, BLM thoroughly reviewed the impacts related to air quality, traffic, wildlife, and infrastructures and production facilities. As for alleged induced seismicity, there is no evidence to support the potential for impacts from the hydraulic fracturing of a single well. BLM adequately reviewed the potential for impact to area socio-economics.

- *Reasonable Alternatives.* BLM properly considered reasonable alternatives under NEPA: a no-action alternative, the proposed action, and a modification of the proposed action to provide added protections for migratory birds. BLM approved the proposed action, with specified mitigation measures or conditions of approval (COAs), to minimize potential impacts to air quality, water quality, and surface disturbance, and require compliance with rules and regulations related to water and air quality, groundwater quality, potential soils contamination and inspections. See Appendix C in each EA for COAs and Master Multi-Point Surface Use and Operations Plan. Powder River failed to identify an alternative that meets the purpose and need of the proposed action, was technically and economically feasible, and should have been considered.

- *Separate NEPA Analyses, Cumulative Impacts.* The decision to perform independent environmental reviews of the two APDs was appropriate, since the actions are unconnected, located miles apart and share no infrastructures or time deadlines, and in both instances, BLM considered cumulative impacts on the overall regional development.

Upon analysis and determination of each issue, the Deputy State Director affirmed the Buffalo Field Office Manager's decision to issue an APD for each well, finding that Powder River had not shown that either environmental analysis failed to

consider a substantial environmental question of material significant to the proposed actions.³ Powder River timely appealed.

Analysis of Powder River's Appeal

In its SOR, Powder River challenges each issue determined in the SDR decision: BLM cannot lawfully tier to the 2003 PRB EIS for its NEPA analysis of these APDs; the EAs fail to adequately consider impacts of drilling the deep, horizontal wells; and BLM violated NEPA by failing to consider reasonable alternatives and mitigation measures. Powder River again argues that BLM's EAs failed to fully and adequately consider impacts caused by drilling, timing, wildlife, water consumption, hydraulic fracturing chemical use, fluid disposal impacts, seismicity, sand use, flaring emissions, truck traffic, inspections, and enforcement activities, as well as cumulative effects. However, it has failed to show error on SDR.

[1] Only generally asserting error in the SDR decisions, Powder River proffers no data or analysis to show error in the SDR decision.⁴ Its repeated assertions of error constitute a mere difference of opinion, not a showing that BLM failed to properly assess potential environmental impacts from the actions, as required by NEPA. Powder River's litany of perceived shortcomings and omissions in the EAs do not discharge its burden of affirmatively demonstrating error in the SDR decision on appeal. *See Western Watersheds Project*, 184 IBLA 106, 121 (2013) and cases cited.

³ Lance represents that, since approval of the APDs, it has drilled both wells vertically. Answer at 5.

⁴ When reviewing a BLM decision to proceed with a proposed project based upon an EA and FONSI, it is the Board's obligation to determine whether BLM has taken a "hard look" at the potentially significant environmental consequences of the project, and its decision is supported by an administrative record that establishes that a careful review of environmental impacts has been made, all relevant areas of environmental concern have been identified, and BLM has made a convincing case that no significant impact will result, or that any such impact will be eliminated or reduced to insignificance by the adoption of appropriate mitigation measures. *Southern Utah Wilderness Alliance*, 182 IBLA 377, 386 (2012); *Powder River Basin Resource Council*, 180 IBLA 1, 47-48 (2010). However, the burden rests upon a party challenging a BLM decision to approve a proposed action based upon an EA/FONSI that the analysis was premised on a clear error of law or demonstrable error of fact or that the analysis failed to consider a substantial environmental question of material significance to the proposed action. *Western Watersheds Project*, 183 IBLA 297, 319 (2013); *Harriet Natter*, 181 IBLA 72, 84 (2011).

Moreover, we have often held that the requirement to affirmatively demonstrate error in the decision on appeal is not satisfied when an appellant “has merely reiterated the arguments considered by the [decisionmaker below], as if there were no decision . . . addressing those points.” *In Re Mill Creek Salvage Timber Sale*, 121 IBLA 360, 361-62 (1991) (quoting *Shell Offshore, Inc.*, 116 IBLA 246, 250 (1990)). An appellant cannot prevail simply by repeating the arguments made in comments or in a protest. *Western Watersheds Project*, 184 IBLA at 121; *In Re Mill Creek*, 121 IBLA at 362. In such cases, BLM’s decision may be affirmed in summary fashion. *Western Watersheds Project*, 183 IBLA at 316; *Powder River Basin Resource Council*, 183 IBLA at 89-90; *In Re North Trail Timber Sale*, 169 IBLA 258, 261-62 (2006). Such an outcome is justified here, because all of Powder River’s arguments on appeal were thoroughly discussed and answered in the SDR decision. Powder River’s challenge on appeal does not analyze how the SDR decision errs in addressing Powder River’s assertions under NEPA.

In an appeal from a decision on SDR, appellant’s burden to affirmatively demonstrate error in the decision on appeal is not satisfied when appellant has merely reiterated its arguments made in comments or in a protest, and considered on SDR, as if there were no decision addressing those points. In such cases, BLM’s decision may be affirmed in summary fashion.

Having thoroughly examined each of Powder River’s arguments and the pleadings of all parties in this appeal, we conclude that Powder River has not preponderated in showing that the SDR decision did not err in upholding BLM’s review of potential environmental impacts under section 102(2)(C) of NEPA.

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/
Christina S. Kalavritinos
Administrative Judge

I concur:

_____/s/
James K. Jackson
Administrative Judge