



WILDEARTH GUARDIANS
POWDER RIVER BASIN RESOURCE COUNCIL
SIERRA CLUB

189 IBLA 274

Decided February 7, 2017



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Interior Board of Land Appeals
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IBLA 2014-263 & 283

Decided February 7, 2017

Appeal from a decision by the District Manager of the Wyoming High Plains District Office of the Bureau of Land Management authorizing the modification of a coal lease. WYW-177903.

Cases consolidated; set aside and remanded.

1. Administrative Procedure: Consolidation

Under the Board's regulations, we may consolidate appeals at our own initiative if the facts or legal issues pending before us in each case are the same or similar.

2. Administrative Procedure: Decisions;
Bureau of Land Management: Delegation of Authority

If a decision is not issued by a BLM employee with delegated authority to issue it, then the decision does not bind the Department. If a purported decision has no legal effect, then the Board properly sets it aside and remands it for further action. Opining on the merits of an unauthorized BLM decision would constitute an advisory opinion, which the Board will not issue.

3. Administrative Procedure: Decisions;
Bureau of Land Management: Delegation of Authority

A delegation of authority to issue a NEPA document is not a delegation of authority to make the decision that the NEPA document supports. A decision record is neither a NEPA document nor part of the NEPA document preparation process. Because a decision record is not a NEPA document, the authority to issue a decision record must be

exercised consistent with delegations governing the substance of the decision, not the delegations governing the NEPA document preparation process.

APPEARANCES: Samantha Ruscavage-Barz, Esq., Santa Fe, New Mexico, for WildEarth Guardians; Shannon Anderson, Esq., Sheridan, Wyoming, for Powder River Basin Resource Council and Sierra Club; Andrew C. Emerich, Esq., Greenwood Village, Colorado, for Antelope Coal LLC; James Kaste, Esq., Cheyenne, Wyoming, for State of Wyoming; 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 RIECHEL

WildEarth Guardians, Powder River Basin Resource Council (PRBRC), and Sierra Club (Appellants) appeal a Decision Record (DR) issued by the District Manager of the Wyoming High Plains District Office of the Bureau of Land Management (BLM). In the DR, BLM authorized the modification of coal lease WYW-177093 to add 857 acres to the lease, which is located in Wyoming in the Powder River Basin.

For a BLM decision to bind the Department of the Interior, it must be issued by a BLM employee with delegated authority to issue it. If a decision is not issued by an employee with delegated authority, the decision has no legal effect. The BLM Wyoming State Director delegated the authority to approve coal lease modifications to the Deputy State Director, but not to any subordinate officials. Any delegations of authority to those subordinate officials to issue National Environmental Policy Act (NEPA) documents supporting coal lease modifications would not equate to a delegation to those officials to approve the coal lease modification that the NEPA document supports. Because the District Manager did not have delegated authority to approve coal lease modifications, BLM's DR has no legal effect. We therefore set aside the DR and remand for further action consistent with this decision.

Background

Antelope Coal LLC filed an application in November 2012 to modify Federal coal lease WYW-177903.¹ In its application, Antelope Coal sought to add 857 acres to

¹ Lease By Modification for Federal Coal Lease WYW-177903, West Antelope II South Tract (Nov. 29, 2012) (Lease by Modification); Decision Record (DR) at unpaginated (unp.) 1.

its lease.² These acres are adjacent to the Antelope Mine and would add 15,751,000 tons of coal to the lease, adding 6 months of reserves for the mine.³

BLM prepared an Environmental Assessment (EA) to identify potential environmental impacts related to Antelope Coal's proposed lease modification.⁴ On August 15, 2014, the District Manager for BLM's High Plains District Office issued a Finding of No Significant Impact (FONSI) and a DR documenting her "decision to approve the lease modification to WYW-177903 to include tracts of unleased federal coal."⁵

In two separate appeals, WildEarth Guardians in one appeal and PRBRC and Sierra Club in another, Appellants challenged the DR, arguing that the EA supporting the DR is inadequate.⁶ We granted motions by Antelope Coal and the State of Wyoming to intervene in the appeals.⁷ In light of a May 2016 Board decision in another case filed by WildEarth Guardians,⁸ we issued an Order to Show Cause directing BLM to show that the DR was issued by a BLM employee with delegated authority.⁹ Because we resolve this appeal based on the absence of authority for the District Manager to approve the lease modification, we do not address Appellants' arguments about the adequacy of the EA.

We Consolidate the Two Appeals Because They Have the Same Facts and Legal Issues

Under the Board's regulations, we may consolidate appeals at our own initiative if the facts or legal issues pending before us in each case are the same or similar.¹⁰ Because the facts and legal issues in the two appeals docketed as IBLA 2014-263 and IBLA 2014-283 are the same, we consolidate them for disposition.

² Lease by Modification at 1; DR at unpag. 1.

³ Lease by Modification at 1, 4; DR at unpag. 3; Antelope Coal LLC's Answer in IBLA 2014-283 at 6.

⁴ Environmental Assessment (EA) WY-060-EA13-147, West Antelope II South Lease Modification (March 2014).

⁵ DR at unpag. 1; *see also id.* at 5 ("I approve the decision to modify lease WYW-177903 by an addition of an 856.61-acre tract.").

⁶ Notice of Appeal of WildEarth Guardians (Sept. 5, 2014); Notice of Appeal of PRBRC and Sierra Club (Sept. 12, 2014).

⁷ Order (Oct. 16, 2014).

⁸ *WildEarth Guardians*, 187 IBLA 349 (2016).

⁹ Order (Sept. 12, 2016).

¹⁰ 43 C.F.R. § 4.404.

Delegations of Authority to Approve Coal Lease Modifications

The Mineral Leasing Act authorizes the Secretary of the Interior to issue coal leases, in her discretion, upon request by any qualified applicant.¹¹ The Mineral Leasing Act also authorizes the Secretary of the Interior to approve modifications of coal leases “by including additional coal lands or coal deposits contiguous or cornering to those embraced in the lease.”¹² The regulations implementing the Mineral Leasing Act empower an “authorized officer” to act for the Secretary.¹³ “Authorized officer” is defined as “any employee of the [BLM] delegated the authority to perform the duty described in the section in which the term is used.”¹⁴ To determine which BLM employees have authority to approve and modify coal leases, we consult the Department’s and BLM’s written delegations of authority.¹⁵

The Secretary has delegated her authority to implement the Mineral Leasing Act to the Assistant Secretary – Land and Minerals Management.¹⁶ The Assistant Secretary, in turn, delegated her authority to implement the Mineral Leasing Act to the Director of BLM.¹⁷

Delegations from the Director of BLM to other BLM employees are documented in the BLM Manual, which reflects that the BLM Director delegated his authority to

¹¹ 30 U.S.C. § 201(a)(1) (2012); *see also* 43 C.F.R. Subpart 3425 (Leasing on Application).

¹² 30 U.S.C. § 203(a)(1) (2012); *see also* 43 C.F.R. Subpart 3432 (Lease Modifications).

¹³ *See, e.g.*, 43 C.F.R. §§ 3425.1-8, 3425.3(a), 3432.2(a).

¹⁴ 43 C.F.R. § 3400.0-5(b).

¹⁵ *See* 200 Departmental Manual (DM) 1.3 (delegations from the Secretary are issued in the Delegation Series of the DM), 2.3 (“Redelegations of authority within a bureau or office will be issued as part of the bureau or office directives system.”) (effective Aug. 22, 2001); BLM Manual Section 1203, Delegation of Authority (Internal) (Nov. 16, 2006).

¹⁶ 209 DM 7.1 (effective June 28, 2001).

¹⁷ 235 DM 1.1K (effective Oct. 5, 2009).

approve coal lease modifications to the State Directors.¹⁸ Delegations from the State Director are documented in State Office supplements to the BLM Manual.¹⁹

In the Wyoming State Office Supplement to the BLM Manual, the Wyoming State Director delegated the authority to approve coal lease modifications to the Deputy State Director, Division of Minerals and Lands, and indicated that the authority may not be re-delegated below that office.²⁰ Consequently, BLM district and field managers, who are subordinate to the Deputy State Director, do not have delegated authority to approve coal lease modifications.²¹

*The High Plains District Manager Does Not Have Delegated Authority
to Approve Coal Lease Modifications*

The District Manager for the BLM High Plains District Office signed the DR for the West Antelope II South coal lease modification, WYW-177903. In the DR, the District Manager states, “[I]t is my decision to approve the lease modification to WYW-177903 to include tracts of unleased federal coal.”²² The DR provides the rationale for her decision and procedures to appeal it.²³ The District Manager’s signature appears under a statement that she agrees with the Assistant District Manager’s recommendation and approves the decision to modify the lease by an addition of an 856.61-acre tract.²⁴

[1] The DR is plainly a decision to approve a lease modification. But the decision was not signed by a BLM employee with delegated authority to approve lease modifications—either the Wyoming State Director or the Deputy State Director for Minerals and Lands. If a decision is not issued by an employee with delegated

¹⁸ BLM Manual Section 1203, Appendix (App.) 1 at 67 (submitted by WildEarth Guardians as Exhibit (Ex.) A to its Response to Order to Show Cause and Related BLM/Antelope Coal Filings).

¹⁹ BLM Manual Section 1203 at .22.

²⁰ Wyoming State Office, BLM Manual Supplement 1203, (Wyoming Delegation of Authority), App. 1 at 89 (Change 1 May 2010) (submitted by WildEarth Guardians as Ex. B to its Response to Order to Show Cause and Related BLM/Antelope Coal Filings); *see id.* at .41C.1.b (a small box in the “Authority Delegated to” column “indicates that the authority may **not** be re-delegated below the designated official”).

²¹ *Id.*, App. 1 at 89.

²² DR at unpag. 1.

²³ *Id.* at unpag. 3-4.

²⁴ *Id.* at unpag. 5.

authority to issue it, then the action does not bind the Department and is not properly considered a decision of the BLM.²⁵ The purported decision therefore has no legal effect, and the Board properly sets it aside and remands it for further action.²⁶

BLM defends the District Manager's authority to approve coal lease modifications by referring us to the BLM delegations of authority for issuing documents implementing NEPA.²⁷ BLM argues that the Wyoming State Director delegated authority to District Managers to sign all decision records as part of the NEPA delegations.²⁸ BLM explains that this delegation, when considered in conjunction with the delegation to the State Director and Deputy State Director for Minerals and Lands to approve coal lease modifications,

mean[s] that a District Manager was delegated the authority to sign records of decision and decision records for coal leasing and lease modification actions while the underlying lease itself would be signed by the State Director or Deputy State Director, consistent with the District or Field Manager's record of decision or decision record.^[29]

BLM provides an authority chart and instruction memoranda (IMs) issued by the Wyoming State Office in support of its argument that District Managers may sign decision records for coal lease modifications.³⁰

²⁵ See BLM Manual Section 1203, Glossary of Terms (defining "authority" as "[t]he ability to make the final, binding decision or to take specific action, or both, as an official representing the United States Government. Such authorities have a legal basis in statute or regulation.").

²⁶ *WildEarth Guardians*, 187 IBLA at 353.

²⁷ 42 U.S.C. §§ 4321-4370h (2012).

²⁸ BLM's Response to Order to Show Cause at 4 (citing Wyoming Delegation of Authority, App. 1 at 46 (delegating authority to "[p]ublish, file, and approve draft and final environmental impact statements and associate records of decisions" to district managers)).

²⁹ *Id.* at 4-5.

³⁰ *Id.* at 5-6 (comparison chart titled Completing Coal Program NEPA Under BLM Wyoming 1203 Manual (4/2010) (Ex. 4 to BLM's Response to Order to Show Cause); Instruction Memorandum (IM) No. WY-2013-040, Wyoming Coal Lease-by-Application (LBA) Processing Responsibilities (July 8, 2013) (Ex. 5 to BLM's Response to Order to Show Cause); and IM No. WY 2014-027, Update of Review Procedures for Environmental Documents (May 23, 2014) (Ex. 6 to BLM's Response to Order to Show Cause)).

One of the documents cited by BLM is a Wyoming BLM IM titled “Wyoming Coal Lease-by-Application (LBA) Processing Responsibilities.”³¹ In this document, the BLM Wyoming State Office presents a summary of the process and responsibilities for adjudicating Federal coal leases-by-application filed in Wyoming.³² The IM explains that district office staff is responsible for preparing the NEPA documents for a coal lease-by-application, specifying that “[a] NEPA analysis is completed on any proposed LBA before a decision is made to lease or not lease the tract.”³³ The IM also states as follows: “The [Record of Decision (ROD)] is written by the [district staff] and is signed by the District Manager.”³⁴ Although the IM does not mention DRs, because DRs are analogous to RODs—a ROD documents a BLM decision following preparation of an environmental impact statement (EIS) and a DR documents a BLM decision following preparation of an EA³⁵—this statement in the IM is fairly interpreted to apply to DRs, too. The other IM BLM cites, titled “Update of Review Procedures for Environmental Documents,” sets forth the State Director’s goals for the quality of NEPA documents.³⁶ This IM also suggests that district managers have authority to make decisions through RODs and DRs, but it is not specific to the coal leasing context.³⁷

The flaw in BLM’s argument, and reflected in the Wyoming IMs, is that BLM conflates decisions authorizing coal lease modifications with the NEPA documentation *supporting* such decisions. Decisions authorizing an action and NEPA documentation supporting those decisions have discrete purposes. One of the purposes of the NEPA process is to gather and analyze information to support decision making.³⁸ Only after the NEPA process is complete may the authorized official make its decision. As the

³¹ IM No. WY-2013-040.

³² *Id.* at 1; *see also id.*, Attachment (Att.) at 1.

³³ *Id.*, Att. at 4.

³⁴ *Id.*, Att. at 5.

³⁵ *See* 40 C.F.R. § 1505.2 (“[ROD] in cases requiring environmental impact statements”); BLM NEPA Handbook H-1790-1 at 84 (Jan. 2008) (“BLM has chosen to use the “decision record” (DR) to document the decision regarding the action for which the EA was completed.”).

³⁶ IM No. WY 2014-027 at 1.

³⁷ *Id.* at 1-2 (informing District Managers that they are responsible for ensuring that “environmental documents”—defined in the IM to include DRs—contain “[t]he rationale for the decision made by the Authorizing Officer (AO) in the ROD or DR.”).

³⁸ *See* 40 C.F.R. § 1500.1(c) (“The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment.”).

Council on Environmental Quality stated in its regulations implementing NEPA, “NEPA procedures must insure that environmental information is available to public officials and citizens *before decisions are made* and before actions are taken.”³⁹ Consistent with this direction, BLM’s NEPA Handbook explains that “BLM has chosen to use the ‘decision record’ (DR) to document the decision regarding the action for which the EA was completed.”⁴⁰ The decision-maker signs and dates the DR, which is “the authorizing document” for the action.⁴¹

[2] A delegation of authority to issue a NEPA document is not a delegation of authority to issue the DR that the NEPA document supports. A DR is neither a NEPA document nor part of the NEPA document preparation process.⁴² Because the DR is not a NEPA document, the authority to issue a DR must be exercised consistent with delegations governing the substance of the decision, not the delegations governing the NEPA document preparation process. And for decisions to approve coal lease modifications, the Wyoming State Office Supplement to BLM’s delegation manual specifies that the authority to make such decisions may not be redelegated below the Deputy State Director.⁴³ This delegation cannot be modified by an IM,⁴⁴ and the IMs BLM cites do not purport to do so.⁴⁵ Because BLM has not demonstrated that the

³⁹ 40 C.F.R. § 1500.1(b) (emphasis added).

⁴⁰ BLM NEPA Handbook H-1790-1 at 84 (Jan. 2008).

⁴¹ *Id.* at 83 (“The FONSI is not the authorizing document for the action: the decision record is the authorizing document.”), 85 (“The decision-maker must sign and date the DR.”).

⁴² *See* 40 C.F.R. § 1508.10 (Council on Environmental Quality’s NEPA regulation defining “environmental document” as including EAs, environmental impact statements, FONSI, and notices of intent); 43 C.F.R. § 46.325 (stating that “the environmental assessment process” concludes with a FONSI, a notice of intent to prepare an EIS, or no further action).

⁴³ Wyoming Delegation of Authority, App. 1 at 89.

⁴⁴ *Id.* at .22 (“Written documentation of a Wyoming delegation of authority must be made in the form of an amendment to Appendix 1 using a Form 1203-2.”); *see also* 200 DM 2.3 (“Redelegations of authority within a bureau or office will be issued as part of the bureau or office directives system.”); BLM Manual Section 1203 at .22 (“Written documentation of a delegation of authority must be in the form of an amendment to the Index to this Manual Section (see Appendix 1), or to the Index of a State Manual Supplement to the BLM Manual Section 1203.”).

⁴⁵ IM No. WY 2014-027 at 8 (“Manual/Handbook Sections Impacted. BLM Handbook 1790-1 [BLM’s NEPA Handbook].”); IM No. WY-2013-040 at 2 (“Manual/Handbook Sections Affected: None.”).

District Manager possessed the requisite authority to authorize a coal lease modification, the DR is not properly considered a decision of the BLM.⁴⁶ Because the DR is not a BLM decision, it has no legal effect and cannot be appealed to the Board.⁴⁷

BLM notes that the lease itself will be signed by the State Director or Deputy State Director, suggesting that BLM's action will be consistent with the delegations for coal lease modification decisions.⁴⁸ But once the decision is made to modify a coal lease through a DR, execution of the document implementing that decision is merely ministerial. BLM itself refers to the State Director's or Deputy State Director's signature on the lease as an "administrative step" and emphasizes that the District Manager is the official who makes the decision:

The other administrative steps involved in offering a tract for lease or modification [after the District Manager issues a decision to offer the lease modification tract] are not subject to appeal [These] administrative requirements of issuing the coal lease modification ... in no way call into question the District Manager's threshold decision to offer the lease modification[.]^[49]

BLM points to cases in which the High Plains District Manager's authority to modify coal leases was not challenged,⁵⁰ and both BLM and Antelope Coal note that WildEarth Guardians did not challenge the District Manager's authority in its statements of reasons.⁵¹ However, as WildEarth Guardians observes, no prior Board ruling expressly determined whether the High Plains District Manager has delegated authority to approve coal lease modifications.⁵² Furthermore, if the District Manager does not have delegated authority, then the DR is not properly considered a decision of

⁴⁶ *WildEarth Guardians*, 187 IBLA at 353; BLM Manual Section 1203, Glossary of Terms (defining "authority").

⁴⁷ 43 C.F.R. §§ 4.1(b)(2), 4.410(a).

⁴⁸ BLM's Response to Order to Show Cause at 5.

⁴⁹ *Id.* at 6-7; *see also id.* at 5 ("[T]he underlying lease itself would be signed by the State Director or Deputy State Director, consistent with the District or Field Manager's record of decision or decision record.").

⁵⁰ *Id.* at 7-9.

⁵¹ *Id.* at 4-9; Antelope Coal LLC's Response to Show Cause Order at 1-2.

⁵² Response to Order to Show Cause and Related BLM/Antelope Coal Filings at 4.

the BLM, and we do not have jurisdiction over this appeal.⁵³ Jurisdictional issues may be raised at any time in a proceeding and cannot be waived.⁵⁴

Based on BLM's delegations of authority, we find that the District Manager was not authorized to approve the coal lease modification in the DR. The purported decision therefore has no legal effect, and the Board properly sets it aside and remands it for further action by those with delegated authority to act.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior,⁵⁵ we set aside and remand BLM's DR for further action consistent with this opinion.

_____/s/_____
Silvia M. Riechel
Administrative Judge

I concur:

_____/s/_____
James K. Jackson
Administrative Judge

⁵³ 43 C.F.R. §§ 4.1(b)(2), 4.410(a).

⁵⁴ *UOS Energy, LLC*, 176 IBLA 286, 291 (2009); *Hopi Tribe v. Office of Surface Mining Reclamation and Enforcement*, 103 IBLA 44, 47 (1988).

⁵⁵ 43 C.F.R. § 4.1.