

FILED
U.S. DISTRICT COURT
DISTRICT OF WYOMING

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING**

APR 26 AM 11 22

STEPHAN HARRIS, CLERK
CHEYENNE

POWDER RIVER BASIN RESOURCE
COUNCIL

Plaintiff,

vs.

SALLY JEWELL, in her official capacity as
U.S. Secretary of the Interior, U.S. BUREAU OF
LAND MANAGEMENT, a Federal agency within
U.S. Department of Interior,

Defendents.

**PETITION FOR REVIEW OF
FEDERAL AGENCY ACTION**

Civil Action No. B-CV-90F

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INTRODUCTION

1. Filed pursuant to Local Civil Rule 83.7.2, this petition for review proposes to address a federal agency's approval of multiple "lease by applications" ("LBA") of Federal coal minerals in the Powder River Basin (or "PRB") of Wyoming.

2. Specifically, Plaintiff Powder River Basin Resource Council (Plaintiff or "PRBRC") alleges that the U.S. Secretary of Interior Sally Jewell's and U.S. Bureau of Land Management's (hereinafter, "BLM's") authorization of LBA of the North Hilight, South Hilight, North Porcupine, and South Porcupine tracts violates the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 *et seq.* and the Administrative Procedure Act ("APA"), 5 U.S.C. §§701, *et seq.*

3. BLM is a federal agency within the U.S. Department of Interior and is the agency charged with, among other things, overseeing lease of Federal minerals. The U.S. Secretary of Interior is responsible for oversight of all the actions taken within the Department of Interior, including BLM.

4. On March 1, 2011, the BLM authorized lease of approximately 222.6 million tons of publicly-owned Federal coal on 1,976.69 acres as part of the South Highlight LBA tract. The South Hilight tract includes 1,625.9 acres of National Forest System lands in the Thunder Basin National Grassland ("TBNG") administered by the U.S. Forest Service. The LBA was approved by BLM in the *Record of Decision Environmental Impact Statement for the South Hilight Coal Lease Application (WYW174596)* ("S. Hilight ROD").

5. On August 10, 2011, the BLM authorized lease of approximately 401.8 million tons of publicly-owned Federal coal on 3243 acres as part of the South Porcupine LBA tract. The

South Porcupine tract includes 1,638 acres of National Forest System lands in the TBNG administered by the U.S. Forest Service. The LBA was approved by BLM in the *Record of Decision Environmental Impact Statement for the South Porcupine Coal Lease Application (WYW176095)* (“S. Porcupine ROD”).

6. On October 17, 2011, the BLM authorized lease of approximately 721.1 million tons of publicly-owned Federal coal on 6,364 acres as part of the North Porcupine LBA tract. The North Porcupine tract includes 5,120 acres of National Forest System lands in the TBNG administered by the U.S. Forest Service. The LBA was approved by BLM in the *Record of Decision Environmental Impact Statement for the North Porcupine Coal Lease Application (WYW173408)* (“N. Porcupine ROD”).

7. On February 1, 2012, the BLM authorized lease of approximately 467.5 million tons of publicly-owned Federal coal on 4,529.79 acres as part of the North Hilight LBA tract. The North Hilight tract includes 80.7 acres of National Forest System lands in the TBNG administered by the U.S. Forest Service. The LBA was approved by BLM in the *Record of Decision Environmental Impact Statement for the North Hilight Coal Lease Application (WYW164812)* (“N. Hilight ROD”).

8. The four RODs constitute final agency decisions of the BLM.

9. Lease by application of the South Hilight, North Hilight, South Porcupine and North Porcupine tracts was evaluated pursuant to NEPA in the *Wright Area Coal Lease Applications Environmental Impact Statement* (“EIS”). The Wright Area leases are a group of six leases adjacent to the North Antelope Rochelle and Black Thunder mines in the southern Powder River Basin. Cumulatively, these lease tracts include 2.570 billion tons of Federal in-place coal

reserves underlying just over 18,021 acres of surface lands. The BLM has not issued a decision authorizing LBA for the West Hilight Field and West Jacobs Ranch tracts.

10. Applications for lease of the South and North Porcupine tracts were submitted by BTU, a subsidiary of Peabody Energy Corporation, and would expand the land disturbed by coal-mine operations at the 28,000 acre North Antelope Rochelle Mine. Applications for lease of the South and North Hilight tracts were submitted by Ark Land Company, a wholly owned subsidiary of Arch Coal, Inc., and would expand the land disturbed by coal-mine operations at the 26,000 acre Black Thunder Mine.

11. PRBRC appealed the BLM's North and South Hilight and North and South Porcupine LBA decisions to the U.S. Department of Interior, Office of Hearings and Appeals, Interior Board of Land Appeals in Arlington, Virginia (hereinafter, "IBLA").

12. The IBLA issued multiple decisions affirming the BLM's RODs and denying PRBRC relief on the claims raised on appeal.

13. The IBLA decisions constitute the final agency action of the U.S. Department of Interior.

14. As set forward herein, and prior to authorizing additional leasing, the BLM must: (1) take a hard look at the lack of contemporaneous reclamation at both the Thunder Basin and North Antelope Rochelle mines and within the PRB; (2) take a hard look at critical reclamation reports from its cooperating agencies; (3) analyze compliance with Mineral Leasing Act acreage limitations; (4) meaningfully analyze a reasonable range of alternatives; and, (5) meaningfully analyze reasonable mitigation measures.

15. As set forward herein, in authorizing LBAs for the South and North Hilight and South and North Porcupine tracts, the BLM failed to: (1) take a hard look at the lack of contemporaneous reclamation at both the Thunder Basin and North Antelope Rochelle mines and within the PRB; (2) take a hard look at critical reclamation reports from its cooperating agencies; (3) analyze compliance with Mineral Leasing Act acreage limitations; (4) meaningfully analyze a reasonable range of alternatives; and, (5) meaningfully analyze reasonable mitigation measures.

16. Plaintiff asks that the Court declare unlawful and set aside Defendants' approval of the LBA tracts as set forward in the RODs. Such relief should be issued on the grounds that Defendants: (1) violated NEPA and its supporting regulations by failing to properly and fully analyze and disclose the potential environmental consequences of these major federal actions; (2) violated the APA by taking actions and making findings and conclusions that are arbitrary, capricious, abusive of discretion, or otherwise not in accordance with law.

17. Unless ordered by this Court, Defendants will not carry out the required NEPA scrutiny and analysis before issuance of any future LBA authorizations related to the LBA tracts and PRB. Unless directed by this court, BLM will not conduct a NEPA analysis necessary to identify, disclose, and address: (1) the lack of contemporaneous reclamation at coal mines within the PRB, including the Thunder Basin and North Antelope Rochelle Mines; (2) a reasonable range of alternatives and mitigation options; and, (3) compliance with the MLA.

18. Defendants' failure to carry out NEPA requirements is contrary to law and causes procedural harms which can be remedied by declaratory judgment and injunctive relief that invalidates BLM's authorizations challenged herein and a remand that compels the agency to carry out the NEPA duties that Congress has imposed on this federal agency.

JURISDICTION AND VENUE

19. Plaintiff repeats and incorporates by reference the allegations in the above paragraphs and all paragraphs of this Petition for Review.

20. This Court has jurisdiction to review agency action and to order effective relief sought in this civil action pursuant to 28 U.S.C. §§ 1331 (federal question); 1346 (United States as defendant); 1361 (mandamus); 2201 (declaratory relief); 2202 (injunctive relief); and the Administrative Procedure Act (“APA”), 5 U.S.C. § 701 *et seq.* There is a present and actual controversy between the parties that is ripe for judicial review.

21. Where a federal agency fails to adhere to procedural requirements of the APA or the requirements of reasoned/open/informed agency decision-making such as are set forth in NEPA, the APA explicitly waives sovereign immunity and provides a cause of action that provides for judicial review of the federal agency’s actions and omissions. 5 U.S.C. § 701 *et seq.*

22. The agency decisions at issue in this lawsuit were made by the Federal Bureau of Land Management and the Interior Board of Land Appeals both within the U.S. Department of Interior. Plaintiff properly exhausted its administrative remedies and a substantial part of the events or omissions giving rise to the claims have occurred in this district due to decisions made here. Venue in this Court is therefore proper under 28 U.S.C. § 1391(e).

PARTIES

23. Plaintiff POWDER RIVER BASIN RESOURCE COUNCIL (“PRBRC”) is a member-based conservation group headquartered in Wyoming. The majority of Plaintiff’s approximately 1,000 members live in the PRB. Plaintiff has a long history of involvement working for responsible coal leasing and mining. Plaintiff was formed in 1973 by ranchers and

concerned citizens to address the impacts of strip mining on rural people and communities in the PRB. Since that time, PRBRC has worked for the preservation and enrichment of the area's agricultural heritage and the responsible use of land, mineral, water, and air resources to sustain the livelihood of present and future generations.

24. Plaintiff submitted extensive comments on the draft and final EIS for the Wright Area Coal Lease Applications. Plaintiff also presented oral testimony at a public hearing in Gillette, Wyoming on July 29, 2009 regarding the draft EIS. Thereafter, PRBRC appealed the BLM's decisions to the IBLA.

25. PRBRC members live, work, travel and recreate throughout the PRB near the Thunder Basin and North Antelope Rochelle mines and the other coal mines of the area. For example, PRBRC member Leland Turner has a cattle and sheep ranch approximately fifteen (15) miles from the mine operations. For ranching and recreational purposes, Mr. Turner regularly visits areas that are impacted by current mining operations and areas that will be impacted by the areas proposed to be leased. Mr. Turner has and will be affected by mining activities that contribute to land disturbance, air pollution, groundwater withdrawal, and other impacts. PRBRC members intend to continue to use these lands in the future.

26. BLM's authorizations approving lease additional PRB lease tracts for coal mining are causing, and continue to cause direct, immediate, and irreparable informational and procedural injury to PRBRC's interests by denying the group and its members the right to participate in informed agency decision making and full disclosure under NEPA. Unless relief is granted, the interests of PRBRC and its members will not be protected. Unless the relief prayed for herein is granted, PRBRC and its members will continue to suffer ongoing and irreparable

harm and injury to their interests, including their future use and enjoyment of the South and North Hilight and South and North Porcupine tracts.

27. Granting the requested relief can remedy the injuries to PRBRC by providing the informed decision-making and public participation that Congress, through NEPA, put in place to afford substantive protections to public health and the environment.

28. Defendant BUREAU OF LAND MANAGEMENT (“BLM”) is a federal agency within the U.S. Department of Interior that is directly responsible for carrying out the Department’s NEPA obligations. BLM has oversight over, among other things, lease of Federal coal minerals.

29. Defendant SALLY JEWELL is sued in her official capacity as U.S. Secretary of Interior (“Secretary”). The Secretary is responsible for ensuring that the BLM’s actions, such as authorizing LBA of the South and North Hilight and South and North Porcupine tracts, comply with the requirements of NEPA. The Secretary is also responsible for oversight of all the actions taken within the Department including, but not limited to, any final agency decisions from the IBLA.

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

Violation of the National Environmental Policy Act and the Administrative Procedure Act: Defendants acted arbitrarily and capriciously by failing to take the required hard look at the lack of contemporaneous reclamation at both the Thunder Basin and North Antelope Rochelle Mines and coal operations within the PRB.

30. Plaintiff repeats and incorporates by reference the allegations in the above paragraphs and all paragraphs of this Complaint.

31. NEPA requires federal agencies to take a “hard look” at the environmental

consequences of their actions. 42 U.S.C. § 4332.

32. NEPA's implementing regulations require BLM to analyze, among other things, the ongoing direct and indirect impacts of reclamation efforts at the Thunder Basin and North Antelope Rochelle Mine as well as the ongoing cumulative impacts that continue to occur as a result of a lack of contemporaneous reclamation at coal mines throughout the PRB. *See* 40 C.F.R. §§ 1508.25(a)(2), (3), 1508.25(c)(3), 1508.7.

33. Contemporaneous reclamation promotes environmental protection of land and water resources by minimizing the length of time lands are disturbed, maintaining stable non-eroding mine sites, reducing fugitive dust from un-vegetated areas, and helping to achieve productive end land uses.

34. According to the Federal Office of Surface Mining Reclamation and Enforcement ("OSM"), BLM's sister agency with U.S. Department of Interior and the agency responsible for overseeing surface coal mine operations, achievement of contemporaneous reclamation and post-mining land uses is measured by the acreage released from Phase III bond liability.

35. Performance bonds for coal mining operations in Wyoming are released in three phases as reclamation proceeds. Phase I bond release occurs upon the completion of backfilling and grading of mined areas to their "approximate original contour" and replacement of topsoil. Phase II bond release requires erosion prevention and reseeding of disturbed terrain. Phase III bond release is granted once re-vegetation standards have been met, pre-mining productivity has been re-established, and pre-mining surface and groundwater quality and quantity (including groundwater recharge capacity) have been restored. *See* 30 C.F.R. § 800.40(c); Wyo. Land Quality Regulations Ch. 15 § 5.

36. According to OSM as of 2011, 166,009 acres in the Wyoming portion of the PRB have been disturbed by surface coal mine operations. Of that only, 5,752 (3.4%) of lands have obtained final (Phase III) bond release. In 2011, only 217 acres were released from final (Phase III) bond release whereas 6,496 new acres were disturbed. This is a ratio of 0.03.

37. At the Black Thunder mine, the only reclamation is 418.5 acres of Phase I bond release.

38. At the North Antelope Rochelle mine, the only reclamation is 4,871 acres of Phase I bond release.

39. In this case, BLM is rushing to lease additional energy minerals at the behest of Ark Land Company and BTU without regard for or analysis of the impacts of (non) contemporaneous reclamation at the mines or within the PRB.

40. BLM has a duty under NEPA to analyze environmental, public health and socio-economic impacts that may result from leasing the South and North Hilight and South and North Porcupine for additional coal development--including ongoing and future impacts from continued (non) contemporaneous reclamation at the mines in the PRB.

41. Even though BLM does not authorize mining, it still must, pursuant to NEPA, consider all of the impacts related to mining the coal because these impacts are a logical consequence of issuing additional leases to an existing mine operator which would serve to significantly expand those operations.

42. The agency's EIS is legally inadequate because BLM failed to analyze the direct, indirect, and cumulative impacts from continued (non) contemporaneous reclamation at not only the Thunder Basin and North Antelope Rochelle mines, but mines throughout the PRB, prior to

authorizing release of additional tracts for coal lease and development.

43. The BLM's RODs and the IBLA's affirmance is arbitrary and capricious, an abuse of discretion, and constitutes a failure to act in accordance with law in violation of the APA, 5 U.S.C. § 706(2)(A).

SECOND CLAIM FOR RELIEF

Violation of the National Environmental Policy Act and the Administrative Procedure Act: Defendant acted arbitrarily and capriciously by failing to analyze critical reclamation reports from its cooperating agencies.

44. Plaintiff repeats and incorporates by reference the allegations in the above paragraphs and all paragraphs of this petition for review.

45. NEPA requires federal agencies to take a "hard look" at the environmental consequences of their actions. 42 U.S.C. § 4332.

46. Additionally, NEPA mandates that the lead agency "[u]se the environmental analysis and proposals of cooperating agencies with jurisdiction by law or special expertise, to the maximum extent possible consistent with its responsibility as lead agency." 40 C.F.R. § 1501.6(a)(2); *accord*, 46 Fed. Reg. 18062 (1981) (40 Most Asked Questions Concerning CEQ's NEPA Regulations: "If the lead agency leaves out a significant issue or ignores the advice and expertise of the cooperating agency, the EIS may be found later to be inadequate.").

47. In this case, the BLM ignored numerous reports prepared by the agency's cooperating agencies on the EIS, including OSM and the Wyoming Department of Environmental Quality ("DEQ"). These reports affirmatively demonstrate that, on average, the rate of land disturbance in the PRB is much greater than the rate of reclamation for PRB coal mines.

48. These reports were cited and relied upon by Plaintiff during public comment period and were submitted to the IBLA on appeal.

49. BLM's failure to comply with NEPA and use these reports to the maximum extent possible in analyzing authorization of LBA's for South and North Hilight and South and North Porcupine is arbitrary, capricious, an abuse of discretion, and contrary to law in violation of the APA, 5 U.S.C. §§ 551 *et seq.*, and is subject to judicial review hereunder.

THIRD CLAIM FOR RELIEF

Violation of the National Environmental Policy Act and the Administrative Procedure Act: Defendants acted arbitrarily and capriciously by failing to evaluate whether the BLM's authorization of leasing of additional acreage for coal mining as applied for by BTU and Ark Land Company would violate the Mineral Leasing Act.

50. Plaintiff repeats and incorporates by reference the above paragraphs and all paragraphs of this petition for review.

51. NEPA requires federal agencies to take a "hard look" at the environmental consequences of their actions. 42 U.S.C. § 4332. An EIS is required for all major Federal actions significantly affecting the quality of the human environment. *Id.*

52. "Significantly" as used in the NEPA context requires consideration of both a project's context and intensity. 40 C.F.R. § 105.27. In evaluating a project's "intensity" under NEPA, the agency is required to evaluate "[w]hether the action threatens a violation of Federal, State or local law or requirements imposed for the protection of the environment." *Id.* § 105.27(b)(10).

53. The Mineral Leasing Act ("MLA") and Federal Coal Leasing Act ("FCLAA") requires that the agency ensure that no person or corporation (including subsidiaries thereof) hold or control at one time "coal leases or permits on an aggregated total of more than 75,000 acres in

any one State and in no case greater than an aggregated total of 150,000 acres in the United States.” 30 U.S.C. § 184.

54. The BLM’s EIS is legally inadequate because it failed to analyze and demonstrate compliance with MLA requirements. Specifically, the BLM’s EIS fails to analyze whether granting BTU’s (a subsidiary of Peabody Energy Corporation) and Ark Land Company’s (a subsidiary of Arch Coal, Inc.) applications for leasing additional acreage for coal mining would violate MLA acreage limits.

55. The BLM’s failure to analyze and ensure compliance with MLA acreage limitations in authorization of LBA’s for South and North Hilight and South and North Porcupine is arbitrary, capricious, an abuse of discretion, and contrary to law in violation of the APA, 5 U.S.C. §§ 551 *et seq.*, and is subject to judicial review hereunder.

FOURTH CLAIM FOR RELIEF

Violation of the National Environmental Policy Act and the Administrative Procedure Act: Defendants acted arbitrarily and capriciously by failing to consider a reasonable range of alternatives.

56. Plaintiff repeats and incorporates by reference the allegations in the above paragraphs and all paragraphs of this petition for review.

57. NEPA requires that agencies consider, evaluate and disclose to the public “alternatives” to the proposed action and “study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of resources.” 42 U.S.C. §§4332(2)(C)(iii) & (E).

58. NEPA’s implementing regulations require federal agencies to “rigorously explore and objectively evaluate all reasonable alternatives” to the proposed action. 40 C.F.R. §1502.14.

Additionally, the evaluation of alternatives must constitute a “substantial treatment,” presenting the impacts of the alternatives in comparative form “sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and public.” *Id.*

59. NEPA and its implementing regulations also require BLM to include in EISs “reasonable alternatives” to a proposed action that will avoid or minimize the action’s adverse effects on the quality of the human environment. 42 U.S.C. §§4332(2)(C)(iii), (E); 40 C.F.R. §§1502.2(e), 1502.14, 1508.9(b).

60. Federal agencies have a duty to “[i]nclude reasonable alternatives not within the jurisdiction of the lead agency” in its EIS. 40 C.F.R. § 1502.14(c).

61. NEPA additionally requires that the EIS “specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action.” 40 C.F.R. § 1502.13.

62. The BLM failed to analyze the alternative of delaying lease of additional acreage until reclamation at the Thunder Basin and North Antelope Rochelle mines is complete either in whole or in part. Additionally, the BLM failed to analyze alternatives such as decreasing the amount of coal leased or leasing only one tract of coal per mine, which would limit expansion of mining operations to one direction and allow a greater emphasis on reclamation. These alternatives were suggested by PRBRC during public comment.

63. The BLM also failed to properly disclose the impacts from the alternatives it does consider. The cumulative impacts section of the BLM’s EIS does not consider the “no action” alternative or differentiate between the proposed and preferred alternatives. Additionally, in the lease specific impacts section, BLM combines discussion of impacts of the Proposed Action and

Alternatives 2 and 3.

64. Finally, the BLM unlawfully narrowed the purpose and need so as to foreclose evaluation of reasonable alternatives. In this case, the BLM formulated alternatives based on the stated purpose and need of “continued extraction of coal [which] is essential in order to meet the nation’s energy needs.” However, the lease applicant’s parent companies, Peabody Energy and Arch Coal, have stated their desire and intent to export PRB coal to China from their Powder River Basin mines, including the North Antelope-Rochelle coal mine.

65. BLM’s failure to comply with NEPA and properly evaluate reasonable alternatives is arbitrary, capricious, an abuse of discretion, and contrary to law in violation of the APA, 5 U.S.C. §§ 551 *et seq.*, and is subject to judicial review hereunder.

FIFTH CLAIM FOR RELIEF

Violation of the National Environmental Policy Act and the Administrative Procedure Act: Defendants acted arbitrarily and capriciously by failing to consider reasonable mitigation measures.

66. Plaintiff repeats and incorporates by reference the allegations in the above paragraphs and all paragraphs of this petition for review

67. Federal agencies are required to develop, discuss in detail, and identify the likely environmental consequences of proposed mitigation measures. *See* 40 C.F.R. § 1508.25(b); 40 C.F.R. § 1502.14(f); 40 C.F.R. § 1502.16(h); 40 C.F.R. § 1505.2(c). Mitigation includes, but is not limited to, avoiding, minimizing, rectifying, or compensating for adverse project impacts to the environment. *See* 40 C.F.R. §1508.20.

68. The BLM failed to analyze reasonable mitigation measures in the form of lease stipulations that would prevent mining associated with the lease tract until the mine achieves a

certain level of final bond release of previously mined lands (30%, 50%, or 75% for example). These measures were suggested by PRBRC during public comment.

69. With regard to ground and surface water depletion and contamination, the BLM failed to analyze aquifer recharge capacity, engineering techniques that would be used to restore the aquifer, post-mining water quality conditions (in comparison to pre-mining conditions), and the timetable and costs associated with restoration activities.

70. Further, while BLM acknowledges that impacts to water resources will be substantial, irreparable and likely exacerbated by the leasing of additional coal tracts, BLM failed to analyze meaningful mitigation measures necessary to protect water resources in the PRB.

71. BLM's failure to comply with NEPA and properly evaluate reasonable mitigation measures is arbitrary, capricious, an abuse of discretion, and contrary to law in violation of the APA, 5 U.S.C. §§ 551 *et seq.*, and is subject to judicial review hereunder.

VII. PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court enter judgment providing the following relief:

1. Declare that Defendants violated the National Environmental Policy Act ("NEPA") and Administrative Procedure Act ("APA") in approving the South and North Hilight and South and North Porcupine tracts;
3. Declare that issuance of all such future authorizations shall comply with NEPA;
3. Enjoin implementation of lease of the South and North Hilight and South and North Porcupine tracts until such time as BLM has complied with NEPA;
4. Void Defendants' actions in issuing the South and North Hilight and South and North

Porcupine tracts;

5. Grant Plaintiff their costs of litigation, including reasonable attorney fees as provided by the Equal Access to Justice Act, 28 U.S.C. § 2412; and
6. Grant Plaintiff such additional and further relief as the Court may deem just and proper.

RESPECTFULLY SUBMITTED on April 25th, 2013.



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