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**UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF LAND APPEALS**

COP COAL DEVELOPMENT COMPANY,

Appellant.

(August 15, 2014 Decision Approving Minor Modification to Resource and Recovery and Protection Plan (R2P2), North Districts Pillar Panel Revision and Bear/Blind Canyon Seam Access, Castle Valley Mines 4 and 3 (Castle Valley Mining, LLC, Operator))

IBLA 2014-0285

**REPLY TO ANSWERS OF CASTLE
VALLEY MINING LLC AND THE
BUREAU OF LAND MANAGEMENT**

[Oral argument requested]

3482 (UTG 023)
UTU-73342 (LMU)
U-020668 (Lead Coal Lease)

Pursuant to 43 C.F.R. § 4.412, Appellant, C.O.P. Coal Development Company, ("COP"), submits the following Reply to the Answers of Castle Valley Mining, LLC ("CVM") and the United States Department of the Interior, Bureau of Land Management ("BLM") to COP's

Statement of Reasons in the above-captioned appeal (the “SoR”).¹ COP is aware that the Board generally discourages replies, but the BLM and CVM have raised several issues in their Answers that require response.²

I. CVM Failed to Provide the BLM Adequate Justification for Modification of the R2P2, Rendering the BLM Decision Approving those Modifications Arbitrary.

COP does not dispute CVM and BLM’s articulation of an appellant’s general burden to demonstrate, by preponderance of the evidence, that the BLM erred in its decision. The Board articulated that standard in *Utah Trail Machine Association*, 147 IBLA 142, 144 (1999)³ and other cases. But that is not the real issue in this appeal. The issue—and COP’s principal argument—is that CVM failed to honor *its* burden, in the first instance, to provide the BLM with adequate information and data to justify modifying the R2P2 in the first place and to justify abandoning the coal in Panels 5th Left C, 2nd North A, and 3rd North Main.

In its Answer, CVM argues that in order to obtain approval of the modification of the R2P2, it “merely” had to provide the BLM with “appropriate justification.” *CVM’s Answer*, at 3.

¹ Abbreviated terms used herein shall have the same meaning as in COP’s Statement of Reasons.

² COP did not receive a copy of the BLM’s Answer until January 22, 2015. The certificate of service attached to that Answer indicates that it was served by Federal Express on January 12, 2015, but the undersigned counsel did not receive a copy until counsel for the BLM graciously emailed a copy on January 22. Because the issues raised by the BLM and CVM are so intertwined, it made no sense to reply to both Answers separately.

³ CVM correctly points out that the citation to *Utah Trail Machine Association* in COP’s Statement of Reasons is inaccurate. The correct citation is 147 IBLA 142, 144, where the Board indicates that in order to reverse the BLM, it must find “that BLM committed a material error in its factual analysis, or that the decision generally is not supported by a record showing that BLM gave due consideration to all relevant factors, and acted on the basis of a rational connection between the facts found and the choice made.” COP also acknowledges, as established by the Board, that it bears the burden to demonstrate the BLM’s errors, by a preponderance of the evidence.

CVM does not, however, expound on what that term means or what would generally constitute “appropriate justification”—only that they provided it. COP, on the other hand, set forth in its Statement of Reasons the type of information that CVM, as the operator, should have provided to the BLM—but did not—in order to appropriately justify the requested modifications to the mining plan.

As explained in the Statement of Reasons, the BLM’s determination of whether a mining plan or a proposed modification achieves MER is an inherently objective determination:

Maximum economic recovery is achieved when, considering “standard industry operating practices, all profitable portions of a leased Federal coal deposit ... [are] mined...” It is determined by applying “standard industry operating practices” to the coal deposit without regard to the financial or contractual status of an individual operator/lessee. The test is objective and is based on what a ‘prudent man’ would do when faced with mining operation decisions which affect profitability.”... Thus, achievement of maximum economic recovery depends on whether the leased coal deposit is inherently profitable to mine, when considering the physical nature of the deposit affecting the feasibility of mining, the costs of producing, processing and transporting the coal, the quality, quantity, and marketability of the coal, and the anticipated price at which the coal can be sold.

Cypress Shoshone Coal Co., 143 IBLA 308, 315 (1998) (emphasis added) (citations omitted).

The BLM’s determination of MER should therefore be based on objective data about the amount of coal, the physical characteristics of the coal deposit, and the cost to mine, market, and sell the coal.

It is the operator who must provide that information to the BLM—both in the formulation and any proposed modification of a mining plan—with respect to the “projected size, shape, and configuration of the coal deposit....” *Id.* at 316, citing 43 C.F.R. § 3482.1(c)(7). If the operator subsequently chooses to abandon or bypass otherwise recoverable coal, the operator must then

“justify that bypass.” 43 C.F.R. §§ 3482.1(c)(7), 3481.1(b); *see also Cypress Shoshone*, 143 IBLA at 317; *ANR Company, Inc. & C.O.P. Coal Development Co.*, 182 IBLA 248 (2012) (quoting *Cypress*). In considering such a proposed abandonment, the BLM must still, as explained by the Board in *Cypress*, decide whether the abandonment still results in MER—taking into account the “physical nature of the deposit”, feasibility, costs of producing, processing and transporting coal, etc. In other words, the BLM must have reliable data and relevant information on which to base a decision to abandon coal. Otherwise, the BLM’s determination of MER would be based on speculation and conjecture only and would constitute a “failure to consider all relevant factors” or might be considered arbitrary.

Even in denying COP’s Petition for Stay in this appeal, the Board acknowledged that if CVM desires to bypass coal that is defined in the mine plan as “recoverable at a profit,” the “operator/lessee must justify the bypass, demonstrating that the abandoned coal is no longer recoverable at a profit....” *See Order Denying Petition for Stay*, Dated December 15, 2014, IBLA 2014-0285, at 9.

CVM argues that it provided “adequate justification” for the abandonment of the coal in 2nd Left A, based on the data from two drill holes, as well as observations of the face of the panel itself (including a rock parting), the thickness of the seam, its expert’s experience with other panels, and the BLM’s “anticipation” of rock parting. *See CVM’s Answer*, at 17-19. As COP explains in its Statement of Reasons, however, the drill-holes from which the data is derived are each more than 1,000 feet away from the face of the panel. The height of the seam between the face of 2nd North A and the drill holes, which are nearly a quarter of a mile away, is therefore

pure speculation. Even CVM's experts and the BLM inspector's predictions about the thinning seam were based on experience in *other* panels. They were simply predictions. Therefore, the issue is not simply that COP "disagrees" with CVM's or the BLM's conclusions about the thickness of the seam and the feasibility of continued mining; the issue is that under *Cypress*, CVM had a regulatory obligation to provide sufficient data and information to the BLM about the "physical nature of the deposit", costs to mine, feasibility, and related issues. Rhetorically, what if CVM had provided data from drill holes a mile away from the face? Two miles? Ten miles? Would CVM still take the position that it provided adequate data to justify abandoning the coal immediately beyond the face? Yet the principle is the same. The data is so far away that CVM and the BLM are simply guessing at the thickness of the mineable coal immediately beyond the face. COP suggests that the BLM was not justified in allowing the abandonment of potentially thousands of tons of coal based on drill data over three football-fields away. It is COP's position and argument that the data provided by CVM was simply inadequate to carry *its* burden to provide the necessary and accurate information to the BLM about the physical characteristics of the coal deposit in order to justify the bypass. CVM could have tested the isopach closer to the mine face and provided more relevant data. Instead, they chose to give the BLM data from 1000 feet away, interpolating that data to conclude that the seam must shrink rapidly east of the face of the panel, thus warranting abandonment of unknown amounts of coal. The BLM Decision approving that abandonment was arbitrary, again, not just because COP disagrees with it, but because the BLM had insufficient data to give "due consideration to all

relevant factors.” CVM and the BLM were simply speculating about what would happen to the seam beyond the face. That speculation was arbitrary, if not capricious, and should be reversed.⁴

II. After Considering the Facts and Arguments Provided by CVM and the BLM, the Approval of the Abandonment of the Coal in 5th Left C was Premature.

In its Answer, CVM explains that it has appealed the MSHA roof support plan for Panel 5th Left C, in the hope that it can eventually continue mining that panel. *CVM's Answer*, at 15-16. On this, COP and CVM are aligned. COP applauds and supports that appeal and, like CVM, hopes that MSHA will relax its requirements so that CVM can profitably mine that panel.

In the meantime, COP maintains that the BLM should not have approved the abandonment of that coal without more information about the cost to satisfy the requirements and why it was cost-prohibitive for CVM. Further, at this point, in light of the MSHA appeal, the Board should reverse the BLM Decision as to 5th Left C or, at a minimum, condition the approval of CVM's requested modification on MSHA's rejection of CVM's proposed roofing plan.

⁴ COP recognizes that CVM has commenced retreat mining or “pillaring” that area of the Mine, and, as such, the remedies provided by the Board may be limited, at this point. Nonetheless, with respect to the mootness argument, it is well-established in other contexts that an appeal is not moot if the appellate body can provide some alternate relief. *See COP Coal Development Co. v. C.W. Mining Co. (In re: C.W. Mining)*, 641 F.3d 1235, 1239 (10th Cir. 2011). Thus, in this case, the question of whether CVM and the BLM were arbitrary in their decision to abandon the coal in 2nd North A may still be addressed by this Board and remedied in a possible alternative manner. If the Board has some question about the accuracy of the data upon which it relied to allow the abandonment of the coal in 2nd North A, it can remand that decision and allow the parties to provide more relevant data. If that data then proves that the rock parting is not as severe as CVM projects and that sufficient mineable coal lies to the east of the end of 2nd North A, then that coal could still be reached by turning north at the end of the proposed 3rd North A, to extract that coal. *See Rhino Tank Seam Map*, attached to the BLM Decision (which is attached as an Exhibit to the SoR).

The BLM suggests, in its Answer, that it simply allowed CVM to “forgo mining 5th Left C” *pending a decision by MSHA* as to whether they can continue mining. *BLM’s Answer*, at 3. But its Answer misstates the BLM Decision, which does not contain that condition. It simply says “the remaining portion of the panel will be left unmined.” *BLM Decision*. There are no conditions. Thus, as the Decision stands, CVM is free to mine past that panel, and the coal will absolutely be abandoned. The BLM further argues that “[u]ntil MSHA rejects the plan, and CVM requests that BLM approve the *permanent abandonment* of the remaining coal, there is no need to address” other options for mining. *BLM’s Answer*, at 4-5 (emphasis added). COP agrees that the Decision should be dependent upon the outcome of the MSHA appeal, but again, there is nothing in the language of the Decision that indicates such dependence, nor is there an explanation of why the term “left unmined” is anything other than permanent abandonment. Likewise, BLM argues that “[COP’s] last argument, that BLM has failed to consider all the relevant factors, fails because Appellant is again presuming that BLM’s decision allows CVM to “abandon” the remaining coal. That decision has not been made....” *Id.* at 5. The unambiguous language of the Decision states otherwise; if there is a difference between the concept of “left unmined” and “abandoned”, that difference needs clarification. And if the BLM did *not* intend, through the Decision, to permit CVM to permanently abandon that coal, then the Decision should likewise be remanded and modified to clarify that intent.

Similarly, if it is BLM’s intent to make that Decision conditional on the result of the MSHA appeal, the Decision should also be modified to clearly articulate that intent. In its

current form, it does not.⁵ BLM suggests in its Answer that if MSHA approves the appeal and CVM's proposed roof plan, it will *require* CVM to request approval to resume mining. *BLM's Answer*, at 4. CVM has indicated it intends to do that, and COP has no reason to doubt CVM on that count because the coal in that area is valuable and accessible. CVM has filed the MSHA appeal in order to do just that. But nothing in the BLM Decision requires this course of action. Thus, even if MSHA approves CVM's plan, if CVM decides later that it is more economical to bypass that panel, for whatever reason, they now have *carte blanche* to do so. The BLM Decision does not, as the BLM suggests, require CVM to request BLM approval to resume mining that panel in the event that MSHA relents.

At a minimum, the BLM Decision should be modified to make the approval of the proposed abandonment conditional on the outcome of the MSHA appeal of the roofing plan and to clarify the BLM's intent with respect to (a) the abandonment of the coal in 5th Left C.; and (b) CVM's requirements to apply to resume mining that panel if MSHA approves CVM's proposed roofing plan. And even if MSHA does not change its stance on the roof requirements, CVM should be required, at a minimum, to "justify" the abandonment by presenting cost data to support its contention that continuing to mine that panel is not cost effective.⁶

⁵ It is logical that it would not, in light of the timing of the issuance of the BLM Decision versus the filing of the MSHA appeal. Nonetheless, if the intent of the Decision is as BLM suggests, that intent should be clarified now.

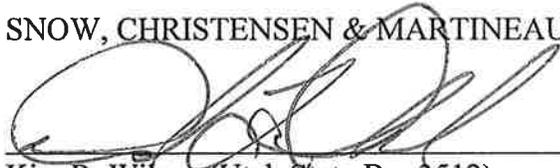
⁶ The BLM suggests, essentially that there is no reason to identify whether there are other options to mine the remaining coal until MSHA rejects CVM's plan and "until CVM requests the permanent abandonment of the remaining coal." *BLM Answer*, at 4-5. COP agrees with the first part of the sentence. Further analysis—and the Decision itself—should be conditioned on how MSHA rules. But from the face of the Decision, CVM has already requested, and the BLM granted, permanent abandonment. Again, if that is not what the BLM intended, the Decision should be adjusted accordingly.

CONCLUSION

Based on the foregoing, as well as the facts and contentions set forth in COP's Statement of Reasons, COP respectfully requests that the Board reverse and remand the August 15, 2014 BLM Decision.⁷

DATED this 5th day of February, 2015.

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⁷ With respect to the issues surrounding 3rd North Main, COP understands CVM's position that it is blending that low ash coal with high ash coal from other parts of the Mine. But COP maintains that this practice is outright high-grading because it leaves COP with only high-ash coal on the periphery. Nonetheless, COP believes it has stated its arguments sufficiently in the Statement of Reasons and need not re-state those arguments in this reply.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that on the 5th day of February, 2015, a true and correct copy of the foregoing was delivered as noted below, in accordance with the applicable rules, to the following:

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