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February 16, 2010

**VIA CERTIFIED MAIL  
RETURN RECEIPT REQUESTED**

Hon. Ken Salazar  
United States Secretary of the Interior  
Department of the Interior  
1849 C Street, NW  
Washington D.C. 20240

**Re: Response of Peabody Energy Company to November 23, 2009 Petition of  
WildEarth Guardians to Recertify the Powder River Basin as a Coal  
Production Region and for Other Relief**

Dear Secretary Salazar:

Peabody Energy Company hereby submits this response to the above-referenced Petition. We believe the Petition is without merit and should be summarily denied. We appreciate your consideration of our response.

Sincerely,



Peter S. Glaser  
Counsel for Peabody Energy Company

cc: Don Simpson, Wyoming State Director, Bureau of Land Management  
Stephanie Connolly, High Plains District Manager, Bureau of Land Management

**UNITED STATES OF AMERICA  
DEPARTMENT OF THE INTERIOR**

**RESPONSE OF PEABODY ENERGY TO  
WILDEARTH GUARDIANS'  
PETITION TO RECERTIFY THE POWDER RIVER BASIN AS A COAL  
PRODUCTION REGION AND FOR OTHER RELIEF**

On November 23, 2009, WildEarth Guardians (“WEG”) submitted a petition to the U.S. Department of the Interior (“DOI”) requesting (a) recertification of the Powder River Basin (“PRB”) as a coal production region under 43 C.F.R. § 3400.5 and (b) establishment of a “carbon fee” for new coal leases and lease interest transfers under the Federal Land Policy and Management Act (“FLPMA”), 43 U.S.C. § 1734(b). As explained below, WEG’s petition is based on misstatements as to the history of the decertification process, the lease by application (“LBA”) regulations of the Bureau of Land Management (“BLM”), codified at 43 C.F.R. § 3425, and the environmental review requirements for LBAs. Moreover, 43 U.S.C. § 1734(b) provides no basis for the carbon fee that WEG asks DOI to impose. Accordingly, WEG’s petition lacks merit and should be denied, and DOI should neither implement a rulemaking proceeding nor request public comment on the petition pursuant to 43 C.F.R. 14.

**I. Identity and Interest of Peabody.**

Peabody is the world’s largest private-sector coal company. Our products fuel approximately 10 percent of America’s and 2 percent of the world’s electricity. Peabody shipped 238 million tons of coal in 2008. The company has 340 electricity generating and industrial customers in nearly 40 states and 19 countries. Peabody companies operate three large surface mines in the Wyoming PRB that produce about 150 million tons per year.

**II. WEG's Petition lacks merit because it is based on an erroneous history of PRB decertification and a misunderstanding of the lease by application regulations.**

WEG questions BLM's reasons for decertifying the PRB and insinuates, without documentation, that BLM's real purpose was to create a special deal for PRB lessees at the expense of the public interest and the environment. WEG's argument, however, is built on a foundation of historical and factual inaccuracies.

**A. BLM's Reasons for Decertification of the PRB in 1990.**

The record clearly shows that BLM decertified the PRB because, at the time, there was little interest in leasing coal on a regional scale and, therefore, no reason to conduct leasing under the cumbersome regional leasing process. On January 9, 1990, BLM published a notice in the *Federal Register* reporting its Director's decision to adopt the recommendation of the PRB Regional Coal Team ("RCT") for full decertification of the PRB. See *Decertification of Powder River Basin Coal Production Region*, 55 Fed. Reg. 784 (Jan. 9, 1990). The Director's decision followed a lengthy administrative process that included both public meetings and opportunities to submit written comments to the PRB RCT. See e.g., *Proposed Decertification of All or a Portion of the Powder River Basin Coal Production Region in Montana and Wyoming*, 54 Fed. Reg. 6339 (Feb 9, 1989); *Powder River Regional Coal Team Activities; Public Meeting Announcement*, 54 Fed. Reg. 19959 (May 9, 1989); *Powder River Regional Coal Team Activities; Public Meeting Announcement*, 54 Fed. Reg. 35941 (Aug. 30, 1989); *Powder River Regional Coal Team Activities; Public Meeting Announcement*, 55 Fed. Reg. 5513 (Feb. 15, 1990). These publications explain the basis for BLM's decision:

[The regional coal activity planning process] is more expensive and time consuming than coal leasing-by-application. Due to the limited leasing potential and soft regional coal market conditions, the RCT has not recommended any regional coal activity planning efforts in the past 5 years. However, a small number of apparently

viable coal leasing interests have been recognized in the region during the past 5 years. These leasing interests have not been pursued because no regional coal activity planning has been pursued.

*See Proposed Decertification of All or a Portion of the Powder River Basin Coal Production Region in Montana and Wyoming*, 54 Fed. Reg. 6339 (Feb. 9, 1989).

Thus, BLM's decision was motivated by a desire to conserve administrative resources in light of weak demand for federal PRB coal and the inactivity of the RCT. As BLM said, "BLM decertified the Federal coal production regions because we do not believe the demand for new Federal coal leases is sufficient to justify regional coal leasing at this time. RCTs will continue to meet on an ad hoc basis to advise BLM on lease-on-application coal sales." *See Public Participation in Coal Leasing, Final Rule*, 64 Fed. Reg. 52239 (Sept. 28, 1999).

**B. Decertification was not a special favor to industry.**

WEG is wrong that decertification resulted in a process that is "driven by coal companies," Pet. at 2, resulting in unjustifiably low lease payments.

**1. The LBA process does not provide for any greater participation by coal companies than the regional leasing process.**

The regional leasing process, codified at 43 C.F.R. § 3420, and the LBA process that superseded it, both involve substantial industry participation at several separate stages of the processes. Thus, the LBA process is not "driven by coal companies"—the LBA process does not afford special consideration to industry as compared with the regional leasing process.

For example, the regional planning process begins with a "call for coal" in which BLM "formally solicit[s] indications of interest and information on coal resource development potential and on other resources which may be affected by coal development for lands in the planning unit. *Industry*, State and local governments and the general public *may submit information on lands that should be considered for coal leasing*, including statements describing

why the lands should be considered.” 43 C.F.R. § 3420.1-2. (Emphasis added.) Industry is also expressly invited to participate in BLM’s land use planning process, after the call for coal:

Only those areas that have development potential may be identified as acceptable for further consideration for leasing. . . *Coal companies*, State and local governments and the general public *are encouraged to submit information to the Bureau of Land Management at any time in connection with such development potential determinations. Coal companies*, State and local governments and members of the general public *may also submit nonconfidential coal geology and economic data during the inventory phase of planning to the surface management agency conducting the land use planning.* Where such information is determined to indicate development potential for an area, the area may be included in the land use planning for evaluation for coal leasing.

43 C.F.R. § 3420.1-4(e)(1). (Emphasis added.)

The regional process also provides for direct industry input in establishing regional coal leasing levels. In making leasing level recommendations to the Secretary, the RCT must incorporate information from several sources, including “the results of the call for coal resource information held under § 3420.1-2” and “the results of the call for expressions of leasing interest held under § 3420.3-2.” 43 C.F.R. § 3420.2(a)(1). In turn, the Secretary’s establishment of leasing levels must reflect “[e]xpressed industry interest in coal development in the region and indications of the demand for coal reserves.” 43 C.F.R. § 3420.2(c)(3). In addition, pursuant to 43 C.F.R. § 3420.3-4, industry has an opportunity to participate in the decision-making process for ranking tracts in terms of relative desirability for coal leasing.

Additionally, WEG incorrectly asserts that industry presently controls coal development in the PRB because of BLM’s decertification of the PRB and its implementation of the LBA framework when it states that: “Not only is the BLM prohibited from limiting coal leasing in the region based on environmental considerations, but *the agency is not allowed to delineate lease boundaries that take into account environmental impacts.*” Pet. at 3. On the contrary, the LBA

regulations expressly provide BLM with power to modify tracts covered by an application: “The authorized officer may add or delete lands from an area covered by an application for any reason he/she determines to be in the public interest.” 43 C.F.R. § 3425.1-9. These public interest concerns would manifestly encompass environmental impacts.<sup>1</sup>

In sum, the regional leasing process provided for significant levels of participation by industry, participation that was concomitant to the LBA process.

## **2. LBA does not diminish competition in favor of existing lessees.**

WEG contends that BLM’s sale of coal under the LBA framework has diminished competition for PRB coal and has thus led to below-market payments by lessees. WEG’s assessment of competition for PRB coal is not accurate, for several reasons.

**First**, contrary to the impression WEG seeks to create, LBA sales are conducted through a competitive process. WEG apparently believes that a coal company can simply submit an application to BLM and, a short time later, purchase the lease as submitted without facing competition from other companies. This portrait does not comport with the applicable regulations or reality. When BLM holds a lease sale in response to an application, that sale must be conducted under the regulations at 43 C.F.R. § 3422, which provide for solicitation and consideration of sealed bids.

Additionally, BLM does not fast-track LBA sales, as WEG implies. Pet. at 1-2. After BLM decertified the PRB in 1990, it stated “[g]enerally, a coal lease application filed under the LBA portion of the regulations (43 CFR part 3425) can be processed to the lease sale stage by

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<sup>1</sup> This regulation also provides that “if an environmental assessment of the modification is required, BLM will solicit and consider public comments on the modified application.” 43 C.F.R. § 3425.1-9. It is worth noting that this requirement was added as a result of a settlement agreement that was reached pursuant to a lawsuit filed against DOI. *Natural Resources Defense Council, Inc. v. Jamison*, 815 F. Supp. 454 (D.D.C. 1992). BLM agreed to establish additional procedures through which the public could participate in the regional coal leasing process and the LBA process. See *Public Participation in Coal Leasing, Final Rule*, 64 Fed. Reg. 52239 (Sept. 28, 1999).

BLM within one and a half to two years, depending on informational and environmental study requirements.” *Powder River Coal Team; Meeting*, 56 Fed. Reg. 37367 (Aug. 6, 1991). In recent years, the processing time has been much longer. For example, on August 20, 2009, BLM published in the *Federal Register* a notice of availability for a final EIS applicable to four LBAs. The underlying applications were submitted to BLM on July 6, 2004, February 10, 2006, March 15, 2006, and September 1, 2006. Thus, it appears that BLM’s processing time is much longer than its estimate in 1991, ranging from two to four years. As such, WEG is incorrect when it refers to LBA sales as “streamlined.”

**Second**, WEG is wrong that the LBA process has led to a diminishment of competition. It is true that, despite the LBA competitive process, there has not been a great deal of competition for leases. But it is not true that there has been a diminishment of competition as compared with regional leasing; to the contrary, there was also not a great deal of actual competition pre-certification. The reason for this apparent lack of competition, both pre- and post-decertification, as detailed in the following section, is that there are a very limited number of coal mining companies with access to the significant level of capital to risk on the development of a major PRB coal lease.

Thus, although the information presented in WEG’s Table 4 is generally accurate, it is incomplete and out of context. Specifically, while not mentioned by WEG, BLM has consistently rejected LBA bids that do not meet the fair market value as determined by BLM. In most of these cases, the tract was re-offered and BLM found that the second bid met the fair market value. One tract, the South Maysdorf Tract, was offered three times before the bid was determined to have met the fair market value. In the case of the Belle Ayr 2000 tract, which is included in Table 4 of the WEG Report, the bid was rejected, a second sale was not held, and the

coal remains unleased. Accordingly, the Belle Ayr 2000 Tract should not be listed as a lease in Table 4 of the WEG report, and the “totals row” should not include the acreage and tons of coal attributed to the Belle Ayr 2000 tract.

Table 1, attached to this response, is a more complete version of the information presented in Table 4 of the WEG report. It highlights the tracts for which more than one sale was held as well as the sales for which there was more than one bidder. BLM did, in effect, receive more than one bid on eight of the 20 tracts that have been leased since decertification. This would mean that 12 of the 20 tracts, or 60%, of the tracts offered since decertification have received only one bid. If one excludes tracts that were reoffered as having received more than one bid, one bid has been received on 85% of the leases issued since decertification (17 out of 20). This compares to the 81.5 percent of tracts that received only one bid between 1975 and decertification. Whether one uses the 60% or 85% figure, neither represents “severely diminished” competition as WEG would have it.

In addition, WEG is incorrect as to the number of times that an applicant has been outbid for a lease sale. There have been two instances, not one, in which the lease applicant was outbid. In the first instance, Arch outbid Kennecott for the Thundercloud lease, as Arch was seeking to expand an existing mine under its ownership, the Black Thunder Mine. The second instance occurred when West Roundup Resources, a subsidiary of Peabody Energy, outbid Arch for the West Roundup Tract. West Roundup Resources proposes to combine the coal included in the West Roundup Tract with coal it already has under lease and open a new mine, the proposed School Creek Mine.

**Third**, WEG’s argument as to the lack of new entrants into the PRB market fails to acknowledge the significant barriers to entry which discourage new entrants from bidding on

LBA sales. The lack of new entrants is explained by the massive investment required for start-up activities, a fact that was true both before and after decertification. Given these barriers to entry, it is implausible to believe—as WEG apparently does—that new competitors can easily enter the market for any lease sale.

There are essentially two scenarios under which a coal mining company would be interested in leasing federal coal reserves. In the first scenario, a coal mining company would be interested in leasing coal to enable that company to start a new mine. Under this scenario, the company would be interested in leasing enough economically mineable coal to justify the expense of obtaining the permits and building the facilities that it would need to mine, transport, and sell the coal. A company acquiring coal for a new, stand-alone mine would:

- Require considerable initial capital expenses to construct new surface facilities (offices, shops, warehouses, power lines, water wells, coal processing facilities, coal loadout facilities, and rail spurs), extensive baseline data collections, and development of new mining and reclamation plans.
- Have to compete for customers with established mines in a competitive market;
- Need to acquire as much as 500 to 600 million tons of coal. BLM economists base this estimate, which has increased with time, on the assumption that a new mine operator would need to construct facilities capable of producing 30 million tons of coal per year in order to take advantage of the economies of scale offered by the coal deposits in the Powder River Basin, and 20 to 30 years of coal reserves would be needed to justify in order to justify the expenses of building the facilities described above.

*See Final Environmental Impact Statement for the South Gillette Area Coal Lease Applications* Chapter 2, at 2-43–2-45 (August 2009). Some of the tracts that have been offered for lease in the Wyoming Powder River Basin, including but not limited to the Thundercloud Tract discussed above, have included sufficient mineable, high quality coal reserves to be of interest to a company interested in opening a new mine, but none of those tracts have attracted interested bidders. The most likely explanation is the barrier to entry discussed above.

In the second scenario, a coal company would be interested in leasing coal to replace coal reserves that have been mined in order to extend operations at an existing mine. That company would be interested in leasing coal it could mine utilizing its existing facilities. In all of the cases where there has been more than one bidder at a PRB federal coal lease sale, both bidders have owned and operated mines with existing adjacent leases and facilities, which could incorporate the new lease into the existing operation. The company acquiring coal for an existing mine has already invested in the facilities described above, has established contracts with customers, and has acquired the required permits.

In summary, the reason that incumbents have been the successful bidders at the lease sales held in the Wyoming Powder River Basin during the last 20 years is that a company with an existing presence can afford to pay a larger bonus bid for the coal than a company that has to construct facilities and obtain contracts. This is a benefit to the United States, not a detriment. This is supported by looking at a proposed leasing action in southeastern Montana where the state is currently considering leasing coal tracts that might be suitable for a new mine start. The bonus bids that are being negotiated by the owners of the coal (private industry and the State of Montana) are much lower than the bonus bids that have been received by the BLM for coal tracts in the Wyoming Powder River Basin. Arch recently signed an agreement with Great Northern Properties which would allow it to mine 731 million tons of coal for a front-end bonus of \$73.1 million, or about 10 cents a ton. Subsequently, the Montana Land Board voted to lease 572 million tons of state-owned coal adjacent to and interspersed with the Great Northern tracts, but set a “relatively high” minimum price to buy the rights to develop the tracts of 25 cents per ton (Billings Gazette, 2009 & 2010).

**C. LBA does not allow BLM to avoid extensive environmental analysis.**

WEG also maintains that decertification allowed BLM to avoid environmental review procedures under the National Environmental Policy Act (“NEPA”), procedures that it wrongly thinks were more stringent in the regional leasing process than in the LBA process. According to WEG, “Importantly, the decertification of the Powder River Basin Coal Production Region is preventing the BLM from fully analyzing and addressing the environmental impacts—in particular the global warming impacts—of coal leasing in the Powder River Basin. Under the ‘Lease by Application’ process, environmental considerations play little, if any, role in coal leasing.” Pet. at 3. WEG’s position, however, is wildly incorrect.

In the first place, leases under the LBA procedure cannot be issued without a full NEPA analysis—either an environmental assessment (“EA”) or full environmental impact statement (“EIS”) as the circumstance warrants. 43 C.F.R. § 3425.3 provides:

Before a lease sale may be held under this subpart, the authorized officer shall prepare an environmental assessment or environmental impact statement of the proposed lease area in accordance with 40 CFR parts 1500 through 1508. BLM will publish a notice in the *Federal Register*, and at least once per week for two consecutive weeks in a newspaper of general circulation in the area of the sale, announcing the availability of the environmental assessment or draft environmental impact statement and the hearing required by § 3425.4(a)(1).

Moreover, the environmental analysis prepared in connection with an LBA is not limited to the tract in question but must consider the cumulative environmental impacts of leasing, mining, and developing coal in the surrounding area. 40 C.F.R. § 1508.25(c) (requiring that direct, indirect, and cumulative impacts all be considered in an EIS); 40 C.F.R. § 1508.25(a)(2) (“Cumulative actions, which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement”). For

example, in notifying the public of the availability of a draft EIS (“DEIS”) prepared for six LBA leases, BLM observed, “[t]he DEIS analyzes and discloses to the public, the direct, indirect, and cumulative environmental impacts associated with leasing six Federal coal tracts in the Wyoming portion of the Powder River Basin.” *Notice of Availability and Notice of Hearing for the Wright Area Coal Draft Environmental Impact Statement that includes Four Federal Lease-by-Applications, WY*, 74 Fed. Reg. 32642 (July 8, 2009).

Similarly, the environmental analysis for an LBA must be carried out in the broader context of BLM’s regional plan. According to 43 C.F.R. § 3425.2, “no lease shall be offered for sale under [the LBA process] *unless the lands have been included in a comprehensive land use plan or a land use analysis*, as required under § 3420.1-4 of this title.” (Emphasis added.) For example, BLM recently published a Notice of Availability for a final EIS prepared for four LBA projects in the South Gillette area of the PRB. *See Notice of Availability for the South Gillette Area Coal Final Environmental Impact Statement that includes Four Federal Lease by Applications, Wyoming*, 74 Fed. Reg. 42092 (Aug. 20, 2009). In the notice, BLM stated, “[t]he Proposed Actions and alternatives for each of the LBAs being considered in the FEIS *are in conformance with* the Approved Resource Management Plan for Public Lands Administered by the Bureau of Land Management Buffalo Field Office (2001).” *Id.* (Emphasis added.) *See also Notice of Availability (NOA) of Final Environmental Impact Statement (FEIS) for the West Hay Creek LBA tract, for Federal coal in the decertified Powder River Federal Coal Production Region, Wyoming*, 69 Fed. Reg. 33936 (June 17, 2004) (“If implemented, the Proposed Action or any of its alternatives considered in the EIS would be in conformance with the ‘Approved Resource Management Plan for Public Lands Administration by the Bureau of Land Management Buffalo Field Office’ (April 2001, amended 2003)”) Thus, environmental analysis

does not occur in a vacuum, but rather in accordance with BLM's comprehensive planning, which is itself subject to NEPA.<sup>2</sup>

Indeed, WEG is wrong in claiming that BLM's environmental analysis under the LBA process does not consider global warming. On the contrary, the DEIS referred to in the preceding paragraph extensively considered greenhouse gas emissions from PRB coal:

The use of the coal after it is mined is not determined at the time of leasing. However, almost all coal that is currently being mined in the Wyoming PRB is being used to generate electricity by coal-fired power plants. A discussion of emissions and by-products that are generated by burning coal to produce electricity is included in Chapter 4, Section 4.2.14, and *a more complete discussion of the current status of global climate change and cumulative considerations is included Section 4.2.14.1.*

*Draft Environmental Impact Statement for the Wright Area Coal Lease Applications*, Chapter 3, at 3-305 (June 2009). Not surprisingly, the "complete discussion" noted in the foregoing excerpt does indeed consider global climate change in relation to the coal to be mined under the applications. Comprised of over 14 pages of text, the discussion is extensive:

In the following analysis, the contribution of the proposed LBAs to cumulative effects on the environment of historic and projected development activity is evaluated. To do this, it is assumed that coal mining will proceed in accordance with permit conditions. It is further assume [sic] that this coal will be sold to coal users in response to forecasts of demand for this coal. Historically these users have been electric utilities in the United States, although there is potential for sales outside the U.S.

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<sup>2</sup> The Record of Decision ("ROD") for the Resource Management Plan / Final Environmental Impact Statement for Buffalo Resource Area was executed by BLM on Oct. 4, 1985. BLM updated this document in April 2001. On November 18, 2008, BLM published in the *Federal Register* a notice of its intent to revise the management plan for the Buffalo Field Office and to prepare an associated EIS. See *Notice of Intent to Revise a Resource Management Plan for the Buffalo Field Office, Wyoming, and Prepare an Associated Environmental Impact Statement*, 73 Fed. Reg. 67542 (Nov. 14, 2008). The extensive environmental analysis that occurs in connection with development of a management plan provides an additional level of NEPA review above and beyond the NEPA analysis that BLM undertakes in response to individual LBAs.

Assuming that all coal produced would be burned to generate electricity, the amount of GHG emissions that could be attributed to coal production that could result from leasing of the proposed LBAs, as well as from the forecast coal production from all coal mines in the Wyoming PRB has been estimated. This was done by relating the portion of coal mined to the total emission of GHG from all coal mined in the U.S. It is assumed that all PRB coal was used for coal fired electric generation as part of the total U.S. use of coal for electric generation. This gives an upper estimate of the GHG resulting from use of the coal that would be produced from the proposed LBAs, and for forecast total PRB coal production.

*Id.* at Chapter 4, at 4-109.

Simply put, BLM's searching analysis renders untenable WEG's assertion that the LBA process prevents consideration of potential climate change impacts associated with coal development in the PRB. The Wright Area DEIS was readily available to WEG at the time it prepared its petition, which suggests that WEG did not conduct due diligence before impugning the scope, content and extent of BLM's environmental analysis.

Finally, a recent letter from the chair of CEQ makes clear that administrative agencies are expected to consider greenhouse gas emissions and climate change as part of their NEPA analysis:

NEPA compels Federal agencies to consider environmental effects before undertaking significant actions or policies. *CEQ sees no basis for excluding greenhouse gas emissions from that consideration.* CEQ believes that it is appropriate and necessary to consider the impact of significant Federal actions on greenhouse gas emissions and the potential for climate change to affect Federal activities evaluated through NEPA[.]<sup>3</sup>

In sum, when BLM considers environmental issues related to a LBA proposal, it is assuredly not "prevent[ed] from...fully analyzing and addressing the environmental impacts—in

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<sup>3</sup> Letter from Nancy H. Hutley, Chair Council on Environmental Quality to Sens. James M. Inhofe and John Barrasso (Dec. 29, 2009), available at [features/documents/2010/01/15/document\\_gw\\_02.pdf](http://features/documents/2010/01/15/document_gw_02.pdf).

particular the global warming impacts—of coal leasing” as WEG mistakenly claims. To the contrary, the environmental analysis considers all the issues that would be considered if the regional leasing process were used.

**D. BLM did not violate regulations in decertifying**

WEG challenges BLM’s basic authority to decertify the PRB, suggesting that decertification is allowed “only” if activity planning is inappropriate, “such as in areas that were determined to be unacceptable for further consideration for leasing through any land use planning prepared consistent with 43 C.F.R. § 3420.1-4.” Pet. at 2-3. WEG does not explain the legal basis for this statement, which is not readily apparent. The regulatory framework clearly contemplates that coal production regions can be changed or altered and that leasing can take place in regions that are not designated as coal production regions. Pursuant to 43 C.F.R. § 3400.5, BLM has discretion to change a coal production region or alter its boundaries: “A coal production region may be changed or its boundaries altered by publication of a notice of change in the *Federal Register*.” Moreover, the LBA process is specifically applicable to areas that are not designated as coal production regions: “A lease sale may be held in response to an application under this subpart if the application covers coal deposits which are outside coal production regions identified under § 3400.5 of this title.” As such, LBA is applicable to the PRB, and has been since the time of decertification.

Finally, WEG’s reference to emergency leasing under 43 C.F.R. § 3424.1-4, Pet. at 3, is inapposite. While WEG is correct that the LBA process may be used under exigent circumstances, the process also applies to decertified areas (as explained above). Indeed, the PRB was the last of six coal producing regions that BLM decertified, so that all coal leasing by BLM is now performed through the LBA process. *See Public Participation in Coal Leasing*, 64

Fed. Reg. 52239, 52240 (Sept. 28, 1999). BLM uses the LBA process in the PRB because it is more administratively efficient than the regional planning process given the level of leasing, and there is nothing unusual or illegal in its doing so.

**III. 43 U.S.C. § 1734(b) provides no basis for a carbon fee.**

WEG states that DOI should establish a “Global Warming Impact Fund,” funded by a “carbon fee” on lessees, to “reimburse BLM for renewable energy development, habitat restoration, and other efforts to address the impact of global warming[.]” Pet. at 2. 43 U.S.C. § 1734(b), which WEG cites as authority for such a carbon fee, however, provides no such authority. Sections 1734(a) and (b) provide for the collection of “fees, charges, and commissions” in connection with leasing. But these “fees, charges, and commissions” are plainly intended to reimburse DOI for its direct administrative and management costs, not the purposes for which WEG seeks money.

The only authority in section 1734 to charge lessees is in § 1734(a). That section provides that the Secretary may “establish reasonable filing and service fees and reasonable charges, and commissions with respect to applications and other documents related to the public lands.” Section 1734(b) authorizes the Secretary to “require a deposit” – in essence, a prepayment – of any payments received under § 1734(a) and to deposit those monies in the U.S. Treasury to reimburse the Department for its costs. Deposits required of lessees are limited to “reasonable costs,” defined to include, but not to be limited to, “the costs of special studies; environmental impact statements; monitoring construction, operation, maintenance, and termination of any authorized facility; or other special activities.”

Plainly, the “reasonable costs” referred to § 1734(b) are actual costs incurred by the Department in processing the lease application and in managing the lease. Nothing in this

language even remotely hints at the expansive interpretation that WEG urges. As the Tenth Circuit noted, “[s]ection 1734 of this Act authorizes the Secretary to establish *reasonable filing fees, service fees and charges to require a deposit of any payments tendered to reimburse the United States for reasonable costs in respect to applications and other documents*. It makes the provision for depositing the money by the Secretary and also defines what constitutes reasonable costs.” *Beaver Bountiful, Enterprise v. Andrus*, 637 F.2d 749, 751 (10<sup>th</sup> Cir. 1980) (emphasis added). *See also Alumet v. Andrus*, 607 F.2d 911, 916 (10th Cir. 1979); *Nevada Power Co. v. Watt*, 711 F.2d 913, 928 (10th Cir. 1983). Moreover, although § 1734(b) states that its list of “reasonable costs” is not exclusive, under the principle of *esjudem generis*, any costs not explicitly included on the § 1734(b) list but nevertheless authorized must be of the same type and kind as those listed.

Thus, § 1734 does not authorize the Secretary to, in effect, levy a tax on lessees to raise revenue for other initiatives (*e.g.*, “renewable energy development, habitat restoration, and other efforts to address the impact of global warming.”). If WEG wants the United States to tax coal leases to pay for renewable energy development of other similar purposes, it must look to Congress to provide that authority, not DOI under existing leasing authority.

**IV. Conclusion.**

For the foregoing reasons, Peabody respectfully requests that the WEG petition be summarily denied.

Dated: February 16, 2010

Respectfully submitted,



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