

Legal backlash directed at OSM over Peabody Western Coal permit

By Carol Berry, Today correspondent

Story Published: Feb 10, 2009

Story Updated: Feb 9, 2009

DENVER – A controversial federal decision enlarging a northeastern Arizona coal mine permit area has been appealed to the Department of the Interior on charges that the Office of Surface Mining Regulation and Enforcement violated six federal laws.

Eight Native and environmental organizations, including the Sierra Club, joined in the request for review that alleges violation of the Surface Mining Control and Reclamation Act, National Environmental Policy Act, National Historic Preservation Act, Religious Freedom Restoration Act, Endangered Species Act and Administrative Procedures Act.

The filing with the Interior's Office of Hearings and Appeals asks that a life-of-mine permit issued Dec. 22 to Peabody Western Coal Co. be invalidated or the organizations are prepared to take the matter to court.

At issue is OSM's decision to issue a permit to Peabody to incorporate parts of the Black Mesa Mine area into adjacent Kayenta Mine's long-term permit, despite objections from some Hopi tribal members concerned about the industrial use of aquifers central to their drinking water supply and traditions, and about non-Hopi control of resources.

Other objections were directed to environmental studies required before OSM's decision to issue the permit and to alleged flaws in OSM's planning process.

Black Mesa Water Coalition, Diné C.A.R.E. (Citizens against Ruining our Environment), Diné Hataalii (traditional healing and cultural leaders) Association Inc., To' Nizhoni Ani (Black Mesa residents/advocates), Diné Alliance, C-Aquifer for Diné, Sierra Club, Center for Biological Diversity, and Natural Resource Defense Council filed the appeal. A separate request for an administrative hearing was filed by about 75 Hopi individuals and supporters.

OSM's approval of the life-of-mine permit on 101 square miles of Hopi and Navajo lands would allow renewed mining of roughly 5,950 acres of remaining coal at Black Mesa, although, according to the request for review, Peabody does not have a purchaser or end user

for the coal and no underlying purpose and need has been identified for the renewed mining.

The Kayenta Mine currently supplies coal to the Navajo Generating Station in Arizona and has adequate coal supplies through 2026, while Black Mesa Mine supplied Nevada's defunct Mohave Generating Station, which is not expected to reopen, according to OSM.

Among allegations are that OSM did not allow for adequate public review of changes made July 2, 2008 to Peabody's original permit application nor did the agency respond to requests under the Freedom of Information Act to review the revisions.

Other charges are that OSM's hydrologic studies and related impact analyses were flawed and based in part on information not made public, and that violation of the Surface Mining Control and Reclamation Act occurred because of failure to minimize potential hydrologic balance damage, including that to the N-Aquifer, the domestic water source for communities on Black Mesa.

The request alleges that OSM violated NEPA by failing to address potential and disproportionate negative impacts to minority and low-income populations through public review shortcomings and by neglecting to take into account effects on sacred, cultural and ceremonial resources.

Impacts to endangered species, religious practices, cultural resources and sacred sites were not adequately assessed, the petitioners contend in requesting both a hearing and an injunction against the permit's use.

OSM's western regional office in Denver did not express an opinion about the filing because, "We consider it litigation, and we won't be commenting on it," said Rick Holbrook, who headed the region's Black Mesa Project environmental impact statement process.

"It's an administrative appeal before an administrative law judge, and we certainly don't comment on the merits of an appeal," he said.

The citizens' separate request for hearing contends that possible mining activities will degrade and deplete area water resources, impacting springs central to Hopi beliefs, "and, if that happens, the United States government will have denied the Hopi people their right to perform their traditional religious and cultural practices."

Petitioners argue negatively impacting water sources and springs on the mesa would violate trust responsibility, traditional Hopi beliefs and rights, the Religious Freedom Restoration Act, the 1848 Treaty of Guadalupe-Hidalgo and federal public policy under the American Indian Religious Freedom Act.

The Black Mesa controversy has occurred during a time of internal tribal strife, with dissension on the Hopi Tribal Council, suspension of a tribal court, factional battles and the resignation of the chairman and vice chairman effective Jan. 1, leaving no clear-cut executive function in place.

"The permit was reviewed and issued during a time of turmoil in the Hopi Tribal Council and chairman that precluded a government-to-government relationship with the tribal government," states the Native and environmental entities' request to Interior for review of OSM's action.

Peabody said government-to-government consultation was conducted through meetings with the Hopi energy team and mining department.

Randy Lehn, Peabody's manager of mine engineering and services on Black Mesa, said Peabody attempted to meet with Ben Nuvamsa, former tribal chairman, but Nuvamsa refused to meet with the coal company, a contention Nuvamsa flatly denies: "They never attempted to meet with me – not once."

In that separate filing, the citizens and supporters contended that defects in the required environmental analysis should have triggered a new environmental impact statement.

They cited the alleged absence of a valid and required no-action alternative plan and other viable alternatives, and said requests for review extension were rebuffed although review periods often coincided with tribal council vacancies, removals or internal controversy.

Find this article at:

<http://www.indiancountrytoday.com/national/39313432.html>

© 1998 - 2008 Indian Country Today. All Rights Reserved