

**BEFORE THE HEARINGS DIVISION  
OFFICE OF HEARINGS AND APPEALS  
U.S. DEPARTMENT OF INTERIOR  
801 NORTH QUINCY STREET  
ARLINGTON, VIRGINIA 22203**

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IN RE )  
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PEABODY WESTERN COAL COMPANY'S ) Appeal No. \_\_\_\_\_  
SIGNIFICANT PERMIT REVISION )  
PERMIT NO. AZ-0001D )  
OSM PROJECT NO. AZ-0001-E-P-01 )  
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**REQUEST FOR REVIEW**

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## INTRODUCTION

1. This request for review of Peabody Western Coal Company's ("Peabody") Significant Permit Revision, Permit No. AZ-0001D, OSM Project Number AZ-001E-P-01 (hereinafter, Permit Revision) is timely filed before the Hearings Division, Office of Hearings and Appeals, U.S. Department of Interior (hereinafter, Hearings Division) pursuant to the requirements of 30 U.S.C. § 1264(c); 30 C.F.R. §§ 775.11(a) (describing procedures for administrative review hearings); 750.12(c)(1)(iii) (applying those procedures to permits on Indian lands); and, 43 C.F.R. §4.1363 (setting forward appeal procedures).

2. On December 22, 2008, the Office of Surface Mining, Reclamation and Enforcement ("OSM") issued a Record of Decision ("ROD") which included a life-of-mine ("LOM") permit for Peabody. The ROD and LOM permit approved the creation of a 62,930 acre program permit area by adding the 18,857 acre program area for the Black Mesa mine (including surface facilities and coal reserves) to the 44,073 acre Kayenta mine.

3. The Kayenta mine currently supplies coal to the Navajo Generating Station in Arizona. Currently, the Kayenta mine provides all of the coal needed by the Navajo Generating Station through 2026.

4. The Black Mesa mine historically supplied coal to the Mohave Generating Station in Nevada. Due to closure of the Mohave Generating Station in 2005, the Black Mesa mine has not been in operation since January of 2006. OSM's approval of the LOM permit authorizes Peabody to renew mining of coal at the Black Mesa mine. Approximately 5,950 acres of mineable coal remain at the Black Mesa mine.

5. The LOM permit is based on the premise that Peabody's Black Mesa mine will not resume supplying coal to the now closed Mohave Generating Station. In issuance of the LOM permit by OSM, neither OSM nor Peabody identified a purchaser or end user of Black Mesa coal. Upon information and belief, Peabody does not have a purchaser or end user of coal from the Black Mesa mine. No underlying purpose and need has been identified for approving renewed coal mining operations at the Black Mesa mine.

6. The present request for review is timely filed within thirty (30) days of OSM's issuance of the ROD and LOM permit on December 22, 2008.

7. Black Mesa Water Coalition, Diné C.A.R.E., Dine Hataalii Association, Inc., To Nizhoni Ani, Diné Alliance, C-Aquifer for Diné, Sierra Club, Center for Biological Diversity and Natural Resources Defense Council (hereinafter "Appellants") ask that Hearing Division declare unlawful, set aside and enjoin the implementation of OSM's ROD and LOM permit revision granted to Peabody. Such relief should be issued on the grounds that OSM: (1) violated the Surface Mining Control and Reclamation Act ("SMCRA") and its supporting regulations; (2) violated the National Environmental Policy Act ("NEPA") and its supporting regulations; (3) violated the National Historic Preservation Act ("NHPA") and its supporting regulations; (4) violated the Religious Freedom Restoration Act ("RFRA"); (5) violated the Endangered Species Act ("ESA") and its supporting regulations; and (6) violated the Administrative Procedures Act ("APA") by taking actions and making findings and conclusions that are arbitrary, capricious, abusive of discretion, or otherwise not in accordance with law.

8. Appellants respectfully submit that the procedural violations of Federal law alleged herein are sufficient to invalidate OSM's LOM permit and ROD. However, Appellants have

alleged and are prepared to fully prosecute, if necessary, the substantive violations of Federal law alleged below.

### **APPELLANTS**

9. Appellant BLACK MESA WATER COALITION (“BMWC”) is a non-profit, non-governmental organization formed in 2001 by inter-tribal, inter-ethnic people youth dedicated to addressing issues of water depletion, natural resource exploitation and health promotion within Navajo and Hopi communities. BMWC’s mission is to empower tribal people while building healthy and sustainable communities. BMWC has a 4 person staff and a 6 member board of directors, representing an intergenerational, multi-cultural range of perspectives. BMWC’s board is largely Navajo citizens from the Black Mesa region. BMWC has and continues to work organizing Navajo and Hopi communities for the protection of tribal lands, water and future generations, particularly around the Black Mesa/Kayenta coal mining operations. BMWC has and is working to build community awareness and youth involvement on and around Peabody's Black Mesa Project, organizing events in an effort to elevate community voices, and working to build solution pathways through a Navajo Green Jobs program. BMWC submitted comments on the DEIS in coalition with other groups as well as by way of individual staff members. BMWC also organized community participation and awareness in and around OSM’s NEPA process.

BMWC’s contact information is as follows:

Black Mesa Water Coalition  
P.O. Box 613  
Flagstaff, AZ 86002

10. Appellant DINE CITIZENS AGAINST RUINING OUR ENVIRONMENT (“Diné C.A.R.E.”) was founded in 1988 and is a nonprofit, environmental organization based within the

Navajo Nation homeland, which rests between mountains in Colorado, New Mexico and Arizona. Diné C.A.R.E. is comprised of all tribal members. Many Diné C.A.R.E. members live in the Black Mesa region that is the subject of this challenge. Many of these members have been or will be directly impacted by the mining operation approved by OSM. Diné C.A.R.E. participated in public hearings regarding OSM's Black Mesa project and submitted written and oral comments. Diné C.A.R.E. has established a reputation for educating, organizing and advocating for their tribal community, medicine and traditional people, and indigenous youth and elders in an effort to empower tribal members to organize, speak out and determine their own destinies. C.A.R.E.'s contact information is:

Diné CARE  
63 Box 263  
Winslow, AZ 86047

11. Appellant DINE HATAALII ASSOCIATION, INC. ("DHA") has 24 board members; two from each of the six Navajo agencies. DHA comments on matters of Navajo custom and is renowned and prominent Diné (Navajo) men and women who act and speak with authority and authenticity on matters of traditional healing and Navajo custom. DHA has attended and participated in the discussions surrounding the protection of the Black Mesa life-of-mine issues and raised concerns related to the interconnectedness of land, water, air, and global warming issues and the deliberate destruction and desecration of Navajo natural resources by outside corporate interests. DHA participated in public hearings OSM's Black Mesa project and submitted written and oral comments. DHA's contact information is as follows:

Diné Hataalii Association, Inc.  
POB 0326 - Dzil Nizhoni Acres, Unit 33

Lukachukai, AZ. 86507-0326

12. TO' NIZHONI ANI ("TNA") was founded in 2001 and is comprised of all Black Mesa residents and in particular members who live in Pinion, Forest Lake, Big Mountain. TNA provides community education on the Black Mesa mine and mobilizes the Black Mesa community in advocacy for sustainable economic development. TNA's mission is consistent with the philosophy of traditional Diné and seeks a more sustainable future. TNA participated in public hearings OSM's Black Mesa project and submitted written and oral comments. TNA board members helped to translate EIS meetings with OSM and Navajo Nation government representatives on the Black Mesa Project. TNA submitted comments on the Black Mesa Project and a resolution with a list of names from Black Mesa on this issue. TNA also did public education with the communities of Black Mesa. DHA's contact information is as follows:

To' Nizhoni Ani  
P.O. Box 657  
Kykotsmovi, AZ 86039

13. Appellant DINE ALLIANCE is an organization of Diné (Navajo) people from the Black Mesa area that have been adversely impacted by Public Law 93-531 - the Relocation Act. Over 10,000 Diné have been relocated from their ancestral lands and homes to make way for Peabody's coal mining interests. Diné Alliance has been working to elevate the voices of those Diné impacted by relocation from the Black Mesa for over 30 years. Diné Alliance has been appealing to Federal offices and officials as well as to the United Nations. Members of Diné Alliance submitted comments during the OSM process as individuals. Diné Alliance's contact information is as follows:

Dine Alliance

P.O. Box 810  
Pinion, AZ 86510

14. C-AQUIFER FOR DINE is a grassroots organization from the directly impacted community of Leupp , AZ. C-Aquifer for Diné members are made up mostly of elderly grazing permit holders who are dedicated to preserving and protecting their water resources for their future generations. Coconino Aquifer has been and continues to be targeted to furnish pristine water to transport slurred coal to the now closed Mohave Generation Station via 273-miles pipeline with out local resident's permission and support. C-Aquifer for Diné conducted public education against the Black Mesa Project. C-Aquifer for Diné Did radio shows on KTNN Navajo radio station and organized with the Hopi Traditionalists to make sure they were at the public hearings throughout the Navajo Nation. C-Aquifer for Diné believe that a corporate industry to slurry coal via pipeline is not the answer to economical growth and sustainability. C-Aquifer for Diné has been submitting and participating in the NEPA process to oppose the Black Mesa Project. C-Aquifer for Diné believe water is life and very sacred and that without water, there is no life. C-Aquifer for Diné's contact information is:

C-Aquifer for Dine'  
PO Box 5527  
Leupp, AZ 86035

15. Appellant the SIERRA CLUB has 1.3 million members and supporter who work for a safe and healthy community in which to live, smart energy solutions to combat global warming and an enduring legacy for America's wild places. Since 1892, the Sierra Club has been working to protect communities, wild places, and the planet itself. Sierra Club is the oldest, largest, and most influential grassroots environmental organization in the United States. A national board of directors sets national policy and state chapters organize executive committees of local leaders to

set local policies. In Arizona, Sierra Club has over 11,000 members with over 150 members living on or around Black Mesa. It has been a priority of the Sierra Club nationally and locally to support Navajo and Hopi communities in their efforts to protect the N Aquifer and stop irresponsible coal mining. The Sierra Club has worked since 2000 specifically on issues surrounding the Black Mesa and Kayenta Mines. Sierra Club has submitted scoping and DEIS comments to OSM on the Black Mesa Project as well as held informal conferences with OSM officials to discuss concerns with the Black Mesa Project. Sierra Club has consulted with Navajo and Hopi tribal leaders on the various impacts from the Black Mesa Project as well. Many Sierra Club members in Arizona are directly impacted by the proposed project. The Sierra Club's contact information is as follows:

The Sierra Club  
85 Second Street, 2nd Floor  
San Francisco, CA 94105

16. Appellant CENTER FOR BIOLOGICAL DIVERSITY ("Center") is a non-profit 501(c)(3) corporation with offices in Arizona, New Mexico, California, Nevada, Oregon, Alaska, Illinois, Minnesota, Vermont, and Washington, D.C. The Center works through science, law, and policy to secure a future for all species, great or small, hovering on the brink of extinction. The Center has over 180,000 members and online activist throughout the United States and the world. The Center is actively involved in species and habitat protection issues worldwide, including throughout the western United States. The Center, its employees, and its members use the lands in and near the Black Mesa Complex for recreational, scientific, aesthetic, and commercial purposes. They also derive recreational, scientific, aesthetic, and commercial benefits from these lands through wildlife observation, study, and photography. The Center and

its members have an interest in preserving the possibility of such activities in the future. As such, the Center and its members have an interest in helping to ensure their continued use and enjoyment of these lands. The Center submitted comments on the draft EIS for the Black Mesa Project during both public comment periods. The Center's contact information is as follows:

Center for Biological Diversity  
P.O. Box 710  
Tucson, Arizona 85702

17. NATURAL RESOURCE DEFENSE COUNCIL, INC. ("NRDC") is a national environmental advocacy group organized as a not-for-profit membership corporation under the laws of the State of New York. NRDC is dedicated to the preservation, protection, and defense of the environment and actively pursues effective implementation and enforcement of environmental rules and regulations, and the reduction of environmental impacts resource extraction and use on behalf of its members. NRDC has over 600,000 members nationwide, many of whom reside in the State of Arizona. Our Board Members are dedicated to the protection and preservation of the environment. Over a decade ago, NRDC began working with our Hopi and Navajo partners to protect Black Mesa and underlying aquifers from the harmful impacts of coal mining. Throughout the current permitting process, NRDC participated by submitting written and oral comments on the permit and environmental review thereof. NRDC produced two reports, *Drawdown* and *Drawdown: An Update*, which analyzed the impacts of water withdrawals from the Navajo Aquifer and reviewed the modeling relied upon by the Office of Surface Mining. NRDC's contact information is as follows:

Natural Resources Defense Council  
40 West 20th Street  
New York, NY 10011

## STATEMENT OF FACTS

18. On December 22, 2008, OSM issued a ROD and LOM permit to Peabody which approved the creation of a 62,930 acre program permit area by adding the 18,857 acre program area for the Black Mesa mine (including surface facilities and coal reserves) to the 44073 Kayenta mine.

19. OSM's ROD and LOM permit were based on a permit application submitted to OSM by Peabody on July 22, 2008.

20. The permit area for the Black Mesa Complex is located in northeastern Arizona on Black Mesa, south of Kayenta, Arizona. The permit area is on Hope and Navajo tribal lands and encompasses an area of 101.3 square miles, or 65,387 acres. The Navajo Tribe has exclusive surface and mineral interests for approximately 24,858 acres in the northern portion of the lease area. In the remaining 40,000+ acres of the permit area, the Hopi and Navajo tribes have joint and equal interests in the mineral resources that underlie the land surface.

21. Since 1970, coal mined at the Black Mesa mine has been shipped approximately 273 miles to the Mohave Generating Station near Bullhead City, Arizona via a coal slurry pipeline. The Mohave Generating Station permanently closed in December 2005. The Black Mesa mine ceased mining operations in December 2005.

22. Coal produced at the Kayenta Mine has been transported approximately 83 miles to the Navajo Generating Station near Page, Arizona via an electric railroad. The Navajo Generating Station is operated by the Salt River Project and consumes seven to eight million tons of coal annually.

23. OSM published a Draft Environmental Impact Statement (“DEIS”) in November of 2006. The DEIS analyzes Peabody’s revised permit application submitted to OSM on February 17, 2004. The DEIS identified the purpose and need for the Black Mesa Project as: (1) continuing the supply of coal from the Kayenta mining operation to the Navajo Generating Station; and (2) supply coal from the Black Mesa mining operation to the Mohave Generating Station.

24. The DEIS evaluated three alternatives: Alternative A (agencies’ preferred alternative)—approval of the LOM Revision and all components associated with coal supply to the Mohave Generating Station; Alternative B—conditional approval of the LOM revision without approval of the Black Mesa Mining operations, coal-slurry pipeline, and C Aquifer water-supply system; Alternative C—disapproval of the LOM revision.

25. In November 2008, OSM published a Final Environmental Impact Statement (“FEIS”). Upon information and belief, the FEIS is based upon and analyzes Peabody’s revised permit application submitted to OSM on July 2, 2008. The FEIS states that, based on Peabody’s revised permit application, the purpose and need for the Black Mesa Project to Supply coal to the Mohave Generating Station no longer exists.

26. Peabody’s July 2, 2008 revised permit application eliminated the need to adopt and further evaluate the agency’s preferred alternative (Alternative A). OSM’s FEIS evaluates in detail two alternatives: Alternative B—conditional approval of the LOM revision without approval of the Black Mesa Mining operations, coal-slurry pipeline, and C Aquifer water-supply system; Alternative C—disapproval of the LOM revision.

27. Additional facts necessary to support Appellants' allegations of error are alleged below.

## ALLEGATIONS OF ERROR

### ALLEGATION ONE

**Violation of the Surface Mining Control and Reclamation Act: OSM failed to process Peabody's permit application as required by SMCRA and in a manner which would have allowed for meaningful public participation and review of any changes and amendments to the LOM application submitted by Peabody.**

28. Appellants repeat and incorporate by reference the allegations in the above paragraphs and all paragraphs of this request for review.

29. Upon submission of an administratively complete application, SMCRA's public participation requirements mandate: (1) public notice; (2) public availability of any completed application; and, (3) notification to local governments/other agencies. *See e.g.* 30 C.F.R. §776. Additionally, the administratively complete application shall include hydrologic information set forward by SMCRA's implementing regulations. *See e.g.* 30 C.F.R. §780.21.

30. Upon information and belief, Peabody's LOM permit application did not become administratively complete until July 2, 2008 when Peabody submitted a significantly amended/revised permit application to OSM.

31. Upon information and belief, Peabody's July 2008 amendment to its permit application, among other things, removed all proposed plans and activities that supported supplying coal to the Mohave Generating Station including, but not limited to, a new coal-haul road, construction of a new coal-washing facility, coal production from the Black Mesa mining operation for the Mohave Generating Station, water for slurry transportation of coal and coal washing, the reconstruction of 273-mile long coal-delivery slurry pipeline from the Black Mesa

mining operation to the Mohave Generating Station, a new water supply system, including a 108-mile-long water-supply pipeline and a well field near Leupp, Arizona, to obtain water from the Coconino aquifer (C aquifer) and to convey the water to the Black Mesa Complex for use in the coal slurry and other –mine-related purposes.

32. Upon information and belief, Peabody’s July 2, 2008 application contained new information on ground and surface water conditions at Black Mesa. Upon information and belief, Peabody’s July 2, 2008 application contained new hydrological information.

33. In December 2008, the Western Region Office of OSM posted to its website a Cumulative Hydrologic Impact Assessment of the Peabody Western Coal Company Black Mesa Complex (hereinafter, “CHIA”). Upon information and belief, OSM’s CHIA relies, in whole or in part, on new information contained in Peabody’s July 2, 2008 permit application.

34. Peabody’s July 2, 2008 LOM permit application has never been made public. On November 14, 2008, Appellants submitted a Freedom of Information Act (“FOIA”) requesting, other things, release of July 2, 2008 LOM permit application. OSM responded on January 5, 2008 denying Appellants’ FOIA request and release of Peabody’s LOM application.

35. On July 7, 2009, Appellants requested in writing an informal conference on Peabody’s July 2, 2008 LOM permit application and pursuant to 30 C.F.R. §773.6. On October 2, 2008, Appellants followed-up with the agency in writing. OSM did not respond to Appellants’ request for public participation in OSM’s permitting process.

36. OSM has violated SMCRA in issuance of its ROD, LOM permit and CHIA by improperly excluding the public from its decision-making, improperly issuing agency findings

which ignore or fail to consider public input and best available information, and by failing to comply with SMCRA's public participation requirements.

## ALLEGATION TWO

**Violation of the Surface Mining Control and Reclamation Act: OSM has violated SMCRA by failing to properly assess hydrologic information and minimize the disturbance to the prevailing hydrologic balance at the mine-site and in associated offsite areas.**

37. Appellants repeat and incorporate by reference the allegations in the above paragraphs and all paragraphs of this request for review.

38. An application for a permit revision shall include hydrologic information set forward by SMCRA's implementing regulations. *See generally*, 30 C.F.R. §780.21. Additionally, "[t]he permit application shall be submitted in a manner satisfactory to the regulatory authority and shall contain, among other things...a determination of the probable hydrologic consequences of the mining and reclamation operations, both on and off the mine site..." 30 U.S.C. §1257(b)(11).

39. In issuance of a permit, the regulatory authority must "find in writing" that that "the assessment of probable cumulative impact of all anticipated mining in the area on the hydrologic balance...has been designed to prevent material damage to hydrologic balance outside the permit area." *See*, 30 U.S.C. §1260(b)(3). The regulatory authority must also find that the operation would "not materially damage the quantity or quality of water in surface or underground water systems" that supply water to alluvial valley floors. *See*, 30 U.S.C. §1260(b)(5).

40. With regard to cumulative hydrologic impacts, "[t]he regulatory authority shall provide an assessment of the probable cumulative hydrologic impacts (CHIA) of the proposed operation and all anticipated mining upon surface- and ground-water systems in the cumulative impact area." 30 C.F.R. § 780.21(g)(1)(emphasis supplied). Moreover, the CHIA must, "be

sufficient to determine, for purposes of permit approval, whether the proposed operation has been designed to prevent material damage to the hydrologic balance outside the permit area” *Id.*

CHIA

41. In December 2008, the Western Region Office of OSM posted to its website a Cumulative Hydrologic Impact Assessment of the Peabody Western Coal Company Black Mesa Complex (hereinafter, “CHIA”). The CHIA was not signed by the agency or authorized agency personnel. The CHIA does not provide a list of agency personnel that prepared or reviewed the CHIA. Upon information and belief, that CHIA was not reviewed or prepared by an OSM hydrologist.

42. The CHIA is not dated. Upon information and belief, the CHIA was not prepared by OSM. Upon information and belief, the CHIA was prepared by the URS Corporation. Upon information and belief the CHIA was prepared by Peabody.

43. OSM’s CHIA relies, in whole or in part, on new information contained in Peabody’s July 2, 2008 permit application that has never been made public.

44. OSM ignores and fails to analyze information provided to the agency by Appellants including, but not limited to: (1) current USGS monitoring data; (2) the most extensively peer reviewed model of the N-aquifer, the USFS Black Mesa model; and, (3) drawdown reports provided by Appellant Natural Resource Defense Counsel and hydrologist Levine Fricke, Inc.

45. OSM’s CHIA appears to rely exclusively on data and models provided by Peabody and/or URS.

46. On February 6, 2007, Appellants requested that OSM release a CHIA in draft form. OSM ignored Appellants request. OSM's CHIA was not released for public review or comment in either in draft or final form.

47. Upon information and belief, Peabody's July 2, 2008 permit application does not contain a determination of probable hydrologic consequences ("PSC") for the entire Black Mesa mine complex including, but not limited to, the Kayenta mine. Upon information and belief, Peabody's July 2, 2008 permit application does not contain a determination of PSC for past, present and future reclamation operations for both the Black Mesa and Kayenta mines.

48. OSM failed to evaluate how, if at all, Peabody has meet the material damage criteria set forward in the agency's April 1989 CHIA.

### **ALLEGATION THREE**

***Violation of the Surface Mining Control and Reclamation Act: OSM has violated SMCRA by failing minimize the disturbance to the prevailing hydrologic balance at the mine-site and in associated offsite areas.***

49. Appellants repeat and incorporate by reference the allegations in the above paragraphs and all paragraphs of this request for review.

50. SMCRA's environmental protection performance standards mandate, among other things, that all surface coal mining and reclamation operations "minimize the disturbances to the prevailing hydrologic balance at the mine-site and in associated offsite areas and to the quality and quantity of water in surface and ground water systems both during and after surface coal mining operations..." See, 30 U.S.C. §1265(b)(10).

51. In issuance of a permit, the regulatory authority must "find in writing" that that "the assessment of probable cumulative impact of all anticipated mining in the area on the hydrologic balance... has been designed to prevent material damage to hydrologic balance outside the permit

area.” *See*, 30 U.S.C. §1260(b)(3). The regulatory authority must also find that the operation would “not materially damage the quantity or quality of water in surface or underground water systems” that supply water to alluvial valley floors. *See*, 30 U.S.C. §1260(b)(5).

52. The operator of a coal mine is also under a mandatory duty to replace the water supply that has been affected by “contamination, diminution, or interruption...” 30 U.S.C. §1307(b).

### Surface Waters

53. Peabody’s operation is not designed to prevent material damage to surface waters. Upon information and belief, Peabody has constructed over 150 earthen embankments or impoundments to control discharge of polluted water into surface washes. Upon information and belief, a total of 51 of these impoundments are proposed to be permanent (left as part of the postmining landscape).

54. Upon information and belief, surface water reclamation is not covered by Peabody’s reclamation bond.

55. Upon information and belief, in issuance of a LOM permit to Peabody, OSM did not analyze or evaluate water quality at all of the impoundments within the Black Mesa mine complex.

56. Upon information and belief, an undisclosed number of impoundments are currently seeping water and discharging pollution that exceed U.S. Environmental Protection Agency (“EPA”) and Navajo Nation water quality standards. Upon information and belief, an undisclosed number of impoundments are currently in violation of National Pollution Discharge Elimination System (“NPDES”) permitted discharge levels.

57. Discharge from Peabody's impoundments is currently causing impairment and material damage to the quality of surface waters in the Black Mesa region. Peabody's impoundments are not designed to minimize disturbance to the prevailing hydrologic balance. Discharge from Peabody's impoundments is adversely affecting downstream water. OSM has failed to require that Peabody replace any contaminated water.

58. Peabody's impoundments substantially impair and reduce surface water runoff. Peabody's impoundments hold back water that otherwise would flow into alluvium. Peabody's impoundments are causing material damage to water quantity. OSM conservatively estimates that Peabody's impoundments currently reduce total mean annual surface runoff in Moenkopi Wash by 24 percent. Upon information and belief, Peabody's impoundments currently reduce total mean annual surface runoff in other surface waters.

59. Peabody's impoundments make it impossible to restore the recharge capacity surface waters of the mined area to pre-mining conditions. OSM has failed to require that Peabody replace any impounded surface water.

Ground Water (N-Aquifer)

60. Peabody's operation is not designed to prevent material damage to ground water and in particular the N-Aquifer. Almost forty years of intensive pumping and permanent removal of groundwater by Peabody make it impossible to restore the recharge capacity of ground water of the mined area to pre-mining conditions. Before extensive pumping of the N-Aquifer began in the late-1960's, the hydrologic system was in equilibrium, or steady state, meaning that the recharge (inflow) roughly equaled the outflow (from springs and base flow in washes), and aquifer storage remained roughly constant. ).

61. Upon information and belief, ground water reclamation of the N-aquifer is not covered by Peabody's reclamation bond.

62. All of the communities within the Black Mesa region including but not limited to Kayenta, Shonto, Cow Springs, Forest Lake, Rocky Ride, Moenkop, Hotsvilla and Tuba City, rely primarily on the N-Aquifer for municipal and domestic use.

63. Upon information and belief, Peabody historically pumped an average of approximately 4,000-6,000 acre-feet of water annually from the N-aquifer between 1969 to 2005. Upon information and belief, Peabody reduced its pumping to approximately 1,200 acre-feet per year in 2006 and 2007.

64. Upon information and belief, six USGS N-Aquifer monitor wells—labeled BM-1 through BM-6—were installed in the early 1970's to monitor drawdown related to N-Aquifer pumping. Upon information and belief, wells BM-6, BM-5, BM-3 and BM-2 indicate impacts from Peabody groundwater pumping. Upon information and belief, BM-1 and BM-4 are located outside of the confined area of the N-Aquifer.

65. Upon information and belief, as of December 31, 2005, USGS wells BM-6, BM-5, BM-3 and BM-2 demonstrated drawdown of the N-Aquifer of 160, 90, 100, and 85 feet, respectively. Upon information and belief, this drawdown is due to Peabody's groundwater pumping.

66. Upon information and belief, in issuing a LOM permit OSM did not review or evaluate well data from the six USGS N-Aquifer monitor wells 2006, 2007 and 2008. Upon information and belief, this data shows that the N-Aquifer groundwater levels continue to decline and have not recovered.

67. Upon information and belief, OSM's LOM permit authorizes Peabody to continue to drawdown the N-Aquifer at a rate of approximately 1,200 acre-feet per year until the year 2025.

68. Peabody's drawdown of the N-Aquifer is currently causing impairment and material damage to the N-Aquifer. Peabody's groundwater pumping is not designed to minimize disturbance to the prevailing hydrologic balance. Peabody's groundwater pumping is adversely affecting downstream water and springs.

69. Upon information and belief, Peabody's groundwater pumping has made it impossible to restore the recharge capacity of the N-Aquifer to pre-mining conditions. Upon information and belief, OSM has failed to require that Peabody replace any groundwater permanently removed from the N-Aquifer. Upon information and belief, reclamation of the N-Aquifer is not covered by Peabody's reclamation bond.

70. In sum, OSM has violated SMCRA in issuance of its ROD, LOM permit and CHIA by improperly by failing to properly assess hydrologic information and minimize the disturbance to the prevailing hydrologic balance at the mine-site and in associated offsite areas.

#### **ALLEGATION FOUR**

***Violation of the Surface Mining Control and Reclamation Act: OSM has violated SMCRA by failing to properly insure that reclamation efforts are proceeding in an environmentally sound manner and as contemporaneously as practicable.***

71. Appellants repeat and incorporate by reference the allegations in the above paragraphs and all paragraphs of this request for review.

72. SMRCA requires that in issuance of any permit OSM insure that all reclamation efforts precede in an environmentally sound manner and as contemporaneously as practicable. 30 U.S.C. §1265(b)(16). Additionally, and among other things, each reclamation plan is required to have a detailed description of the measures to be taken during mining and

reclamation to ensure that the quality and quantity of surface and ground water systems are protected from “adverse effects.” 30 U.S.C. §1258(a)(13).

73. Upon information and belief, mining operations at the Black Mesa mine ceased in December 2005.

74. Upon information and belief, in issuance of a LOM permit, OSM failed to ensure and/or evaluate Peabody’s compliance with the operator’s reclamation plan for the Black Mesa mine. Upon information and belief, Peabody is not meeting reclamation plan requirements for the Black Mesa mine.

75. Upon information and belief, in issuance of a LOM permit, OSM failed to ensure and/or evaluate Peabody’s compliance with the operator’s reclamation plan for the Kayenta mine. Upon information and belief, Peabody is not meeting reclamation plan requirements for the Kayenta mine.

#### **ALLEGATION FIVE**

**Violation of the Surface Mining Control and Reclamation Act: *OSM has violated SMCRA by failing to ensure that the reclamation bond is sufficient to assure completion of the reclamation plan.***

76. Appellants repeat and incorporate by reference the allegations in the above paragraphs and all paragraphs of this Request for review.

77. SMCRA requires that the reclamation bond be “sufficient to assure the completion of the reclamation plan if the work had to be performed by the regulatory authority.” 30 U.S.C. § 1259(a); 30 C.F.R. § 800.14(b).

78. Upon information and belief, Peabody’s reclamation bond is not sufficient to ensure the protection of the quality and quantity of surface and ground water systems, both on- and off-site, from the adverse effects of Peabody’s mining and reclamation process.

## ALLEGATION SIX

### **Violation of the National Environmental Policy Act: OSM has violated NEPA and Executive Order 12898 by failing to address environmental justice requirements.**

79. Appellants repeat and incorporate by reference the allegations in the above paragraphs and all paragraphs of this request for review.

80. Executive Order 12898 (hereinafter “EO 12898”) requires, “[t]o the greatest extent practicable and permitted by law, and consistent with the principles set forth in the report on the National Performance Review, [that] each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States...” 59 Fed. Reg. 7629 (Feb. 16, 1994).

81. Under EO 12898, each federal agency shall: (1) identify and address the disproportionately high and adverse human health, environmental, social, and economic effects of agency programs and policies on communities of color and low-income; and (2) develop policies, programs, procedures, and activities to ensure that these specific impacted communities are meaningfully involved in environmental decision-making. *See* 59 Fed. Reg. 7629 (Feb. 16, 1994) at §§ 1-101, 3-3, and 4-401.

82. The EO’s environmental justice requirements mirror NEPA’s “hard look” and mitigation requirements. *Compare* 40 C.F.R. §1508.20.

83. Guidance promulgated by the Council on Environmental Quality (“CEQ”) clarify the responsibilities on the federal agency to comply with EO 12898 in the context of NEPA compliance, including: consideration of “the interrelated cultural, social, occupational, historical,

or economic factors that may amplify the natural and physical environmental effects of the proposed agency action”; development of “effective public participation strategies”; assurance of “meaningful community representation in the process”; and assurance of “tribal representation in the process in a manner that is consistent with the government-to-government relationship between the United States and tribal governments, the federal government’s trust responsibility to federally-recognized tribes, and any treaty rights.” CEQ, Environmental Justice: Guidance under the NEPA 15-16 (1997).

84. OSM’s environmental-justice analysis fails to identify and address the environmental impacts required under EO 12898 and CEQ regulations, despite repeated requests in written comments and testimony that provided the basis for such analysis.

85. OSM’s EIS fails to address the interrelated cultural, social, and historical factors that amplify the natural and physical environmental effects of the proposed agency action, including, but not limited to, impacts to: the historical and expected impacts to sacred Hopi springs and washes; Black Mesa, the mountain, as a whole; cultural resources, sacred and ceremonial sites, and prehistoric human burials; and traditional stories and ceremonial and clan traditions.

86. OSM failed to identify and incorporate effective public participation strategies that would allow meaningful participation, including, but not limited to: inadequate translation; improper distribution; inaccurate translation of video presentation; inadequate time for review of the complex and technical EIS; comment releases and deadlines that coincided with spiritual observances or national holidays; hearings that were timed to precluded participation; flawed format for public hearings; and failure to identify proposed action.

87. OSM failed to engage tribal representation in the process in a manner that is

consistent with the government-to-government relationship between the United States and tribal governments. 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.

88. OSM fail to consider its trust responsibility to federally-recognized tribes. The permit was reviewed and issued during a time of turmoil in the Hopi Tribal Council and chairman and, as a result, the Hopi Tribe was not capable of meaningful participation in the permitting process.

#### **ALLEGATION SEVEN**

**Violation of the National Environmental Policy Act: *OSM has violated NEPA by failing to comply with requirements for use of third party contractors and consultants.***

89. Appellants repeat and incorporate by reference the allegations in the above paragraphs and all paragraphs of this request for review.

90. NEPA's implementing regulations set forward requirements for use by agencies of third-party contractors in preparation of Environmental Impact Statements. *See e.g.* 40 C.F.R. §1506.5; *see also* 46 Fed. Reg. 18026 (March 23, 1981)(Question 16).

91. Upon information and belief, the URS Corporation prepared the Black Mesa EIS for OSM. Upon information and belief, URS and OSM did not exercise the necessary steps for preparation of the Black Mesa EIS by a third-party contractor. Upon information and belief, URS is a third-party contractor. Upon information and belief, URS improperly prepared the EIS for OSM.

## ALLEGATION EIGHT

### **Violation of the National Environmental Policy Act: OSM has violated NEPA by failing to identify a new underlying purpose and need and relevant alternatives.**

92. Appellants repeat and incorporate by reference the allegations in the above paragraphs and all paragraphs of this request for review.

93. NEPA's implementing regulations require that the agency identify an underlying purpose and need which the agency is responding in proposing the alternatives including the proposed action. 40 C.F.R. 1502.13.

94. NEPA's implementing regulations also require that "[i]f a draft statement is so inadequate as to preclude meaningful analysis, the agency shall prepare and circulate a revised draft of the appropriate portion." *See* 40 C.F.R. § 1509.(a). Additionally, "[i]f an agency has made a substantial change in a proposed action that is relevant to environmental concerns, or if there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed ... impacts, a supplemental EIS must be prepared for an old EIS so that the agency has the best possible information to make any necessary substantive changes in its decisions regarding the proposal." 46 Fed. Reg. 18026, 18036 (March 23, 1981).

95. NEPA also requires an agency to "rigorously explore and objectively evaluate all reasonable alternatives." 40 C.F.R. §1502.14. Courts have held that the reasonableness of the range of alternatives is dictated by the nature and scope of the proposed action and that a reasonable range of alternatives must include more than simply an analysis of the proposed action and no-action.

96. In this case, the DEIS for Black Mesa and Peabody's LOM permit was premised on the purpose and need to "(1) continue supplying coal from the Kayenta mining operation to the

Navajo Generating Station...and (2) continued supplying coal from the Black Mesa mining operation to the Mohave Generating Station....” DEIS, ES-1.

97. On July 2, 2008, Peabody amended its LOM application and substantially changed the purpose and need of the proposed action. Peabody’s amended application eliminated OSM’s preferred alternative in the DEIS, Alternative A.

98. In their July 7, 2008 supplemental comments, Appellants provided additionally alternatives to the agency.

99. OSM failed to supplement or revise its analysis to address the amended LOM application. OSM failed to identify a new purpose and need based on the amended LOM application. OSM failed to identify relevant alternatives based on the amended LOM application. OSM failed to evaluate a reasonable range of alternatives including, but not limited to, alternatives submitted by Appellants.

#### **ALLEGATION NINE**

**Violation of the National Environmental Policy Act: *OSM has violated NEPA by failing to take a hard look at information provided by Appellants and available from other agencies and government entities.***

100. Appellants repeat and incorporate by reference the allegations in the above paragraphs and all paragraphs of this request for review.

101. NEPA’s implementing regulations require agencies to, among other things, “insure” the “scientific integrity” of the discussions and analyses in environmental impact statements, and that the information presented in environmental impact statement is “of high quality” and that environmental impact statements contain “[a]ccurate scientific analys[e]s.” 40 C.F.R. §§ 1500.1(b), 1502.24.

102. NEPA implementing regulations require that an EIS “provide full and fair

discussion of significant environmental impacts” to “inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment.” 40 C.F.R. § 1502.1.

103. Upon information and belief, OSM failed to take a hard look at the relocation of tribal members from the Black Mesa lease area including, but not limited to, relinquishment of customary use and grazing areas, and homesites.

104. Upon information and belief, Peabody’s mining and reclamation operations have and will continue to materially damage ground and surface water quality and quantity in the Black Mesa region.

105. OSM ignored and failed to analyze water information cited for or provided to the agency by Appellants including, but not limited to: (1) current USGS monitoring data; (2) the most extensively peer reviewed model of the N-aquifer, the USFS Black Mesa model; and, (3) drawdown reports provided by Appellant Natural Resource Defense Counsel and hydrologist Levine Fricke, Inc.

106. Upon information and belief, Peabody’s mining and reclamation operations have and will continue to result in the equivalent of approximately 200 million tons of carbon dioxide being added to the Earth’s atmosphere from the mining, transport, and combustion of coal, without any capture or sequestration of that carbon dioxide.

107. Upon information and belief, the total greenhouse gas emissions resulting from all effects of the LOM revision was not quantified by the OSM. In addition to millions of tons of greenhouse gases, coal-fired power plants like the Navajo Generating Station and Mohave Generating Station emit mercury, selenium, and other toxins, as well as many air pollutants like

sulfur dioxide (SO<sub>2</sub>), nitrous oxide (NO<sub>x</sub>), carbon monoxide (CO), volatile organic compounds (VOC), sulfuric acid (H<sub>2</sub>SO<sub>4</sub>), lead, and hydrogen fluoride. These effects were not disclosed in the EIS.

108. OSM ignored and failed to analyze climate information cited for or provided to the agency by Appellants including, but not limited to: (1) recent Intergovernmental Panel on Climate Change (“IPCC”) studies on climate change; (2) recent National Snow and Ice Data Center (“NSIDC”) reports on diminishing Arctic sea ice; and, (3) recent information from climate scientists including, but not limited to, Dr. James Hansen. OSM has failed to disclose rudimentary and pertinent information relating to the existing and projected effects of climate change, including the consequences of failing to phase out coal use.

#### **ALLEGATION TEN**

**Violation of the Endangered Species Act: *OSM has violated the ESA by failing to consider and analyze the impacts to threatened and endangered species.***

109. Appellants repeat and incorporate by reference the allegations in the above paragraphs and all paragraphs of this request for review.

110. In issuance of a LOM permit to Peabody, OSM failed to consider and analyze the direct, indirect, and the cumulative effects to the Colorado pikeminnow, razorback sucker, humpback chub, bonytail and other species due to decreased water availability and river flows from climate-impacted drought, surface and ground water contamination, impoundment and drawdown as wells as related mercury and selenium deposition from the Navajo and Mohave Generating Stations, in combination with similar effects resulting from the Four Corners Power Plant, San Juan Generating Station, and proposed Desert Rock Energy Project, and other activities. OSM’s failure to consider these effects fundamentally undermined its ability ensure

no jeopardy to these four endangered Colorado River fish species, in violation of the Endangered Species Act, 16 U.S.C. § 1536(a)(2); 50 C.F.R. Part 400.

111. In issuance of a LOM permit to Peabody, OSM failed to consider and analyze the changing environmental baseline conditions and cumulative impacts for the Mexican spotted owl, Southwestern willow flycatcher, and other species resulting from mining and reclamation activities and the current and projected impacts of climate change in the arid American Southwest, in violation of the Endangered Species Act, 16 U.S.C. § 1536(a)(2); 50 C.F.R. Part 400.

112. By failing to consider the effects of the LOM permit to the recovery, not just survival, of threatened and endangered species, OSM violated the Endangered Species Act, 16 U.S.C. § 1536(a)(2); 50 C.F.R. Part 400.

#### ALLEGATION ELEVEN

**Violation of the Religious Freedom Restoration Act: *OSM has violated the RFRA by placing a substantial burden on the free exercise of religion.***

113. Appellants repeat and incorporate by reference the allegations in the above paragraphs and all paragraphs of this request for review.

114. The Religious Freedom Restoration Act (“RFRA”) provides that the federal government may not “substantially burden a person’s exercise of religion...” 42 U.S.C.S. § 2000bb(1)(b).

115. Mining areas within the Black Mesa Complex contain several recorded and unrecorded cultural resources, sacred and ceremonial sites, and prehistoric human burials that are included in or eligible for inclusion in the National Register, including all of Black Mesa (known as *Nayavuwaltsa* to the Hopi and *Dziljiiin* to the Navajo) which is considered a significant

traditional cultural resource because of its role in traditional stories and ceremonial and clan traditions. These sites are used in the exercise of religion by the Hopi and Navajo people. *See, e.g.,* FEIS, p. 3-101. FEIS, App. M, p. M-103-123.

116. To Hopi people, Black Mesa is shaped like a cupped hand, inside which is a vast coal reserve and pristine water – placed there to sustain generations of Hopi people. Black Mesa is a Hopi shrine, a temple.

117. To Navajo people, the entire Black Mesa region represents a female goddess lying by her male mate, the Chuska Mountains. Both Mountains are alive, ruling over different forms of earth life within the sacred Dineh (Navajo) landscape of Dine'tah within the four sacred mountains. To Navajo people, all life is divided into female and male, each with its special purpose of keeping life in balance and maintaining order in the Universe. Black Mesa is a female mountain, and keeper of water and water creations. She has her head at Navajo Mountain, her upper body is the main portion of northern Black Mesa, her arms are around the Shonto wash, and in one hand she holds a cane Aghaala' (tall black rock near Kayenta), in the other she holds a Navajo wedding basket, and her feet extend out at Balakai mesa near Dilkon.

118. The sacred and ceremonial sites, including the plateau known as Black Mesa, are relied upon by the Hopi and Navajo people in the exercise of their religion.

119. The sacred and ceremonial sites have been damaged or destroyed by the mining activities on Black Mesa and will be further damaged or harmed by expected mining activities under the permit issued by OSM.

120. This damage and harm has substantially burdened the Hopi and Navajo people's exercise of religion.

121. Mining activities on Black Mesa rely on water withdrawals from the Navajo Aquifer, which feeds sacred and ceremonial springs, washes and areas to the Hopi and Navajo people. These sacred and ceremonial springs, washes, and areas are used in the exercise of religion by the Hopi and Navajo people.

122. The sacred and ceremonial springs, washes, and areas have been damaged or destroyed by the historical water withdrawals and will be further damaged or harmed by anticipated future water withdrawals from the Navajo Aquifer. This damage and harm has substantially burdened the Hopi and Navajo people's exercise of religion.

123. In issuing the life-of-mine permit to Peabody for areas covered in the permit and allowing associated water withdrawals from the Navajo Aquifer, OSM is substantially burdening the Hopi and Navajo people's exercise of religion without a compelling governmental interest or using the least restrictive means.

#### **ALLEGATION TWELVE**

**Violation of the National Historic Preservation Act: *OSM has violated the NHPA by failing to protect cultural resources, sacred and ceremonial sites and human burials.***

124. Appellants repeat and incorporate by reference the allegations in the above paragraphs and all paragraphs of this request for review.

125. Under Section 106 of the National Historic Preservation Act, OSM "shall, . . . prior to the issuance of any license [or permit], . . . take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register." 16 U.S.C. § 470f.

126. Under 36 CFR § 800.16(y), an "undertaking means a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including

those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; and those requiring a Federal permit, license or approval.” 36 CFR § 800.16(y).

127. Under 36 CFR § 800.14(b), an agency official, as an alternative to Section 106 compliance, may “negotiate a programmatic agreement to govern the implementation of a particular program or the resolution of adverse effects from certain complex project situations or multiple undertakings.” 36 CFR § 800.14(b).

128. In complying with Section 106, the federal agency “shall seek and consider the views of the public in a manner that reflects the nature and complexity of the undertaking and its effects on historic properties, the likely interest of the public in effects on historic properties ... and the relationship of the Federal involvement to the undertaking.” 36 CFR § 800.2(d)(1). In addition, the federal agency must “provide the public with information about the undertaking and its effects on historic properties and seek public comment and input.” 36 CFR § 800.2(d)(2).

129. In complying with Section 106, the federal agency “shall afford the Advisory Council on Historic Preservation ... a reasonable opportunity to comment with regard to such undertaking.” 16 U.S.C. § 470f.

130. OSM is a federal agency as defined in 5 U.S.C. § 551 and, therefore, under 36 CFR § 800.16(y), is the agency responsible for ensuring compliance with § 106.

131. OSM’s issuance of Peabody’s life-of-mine permit application, permit number AZ-0001D is a federal permit required to comply with § 106.

132. Mining areas within the Black Mesa Complex contain several recorded and unrecorded cultural resources, sacred and ceremonial sites, and prehistoric human burials that are included in or eligible for inclusion in the National Register, including all of Black Mesa (known

as *Nayavuwaltsa* to the Hopi and *Dzilijiin* to the Navajo) which is considered a significant traditional cultural resource because of its role in traditional stories and ceremonial and clan traditions. *See, e.g.*, FEIS, p. 3-101. FEIS, App. M, p. M-103-123.

133. In comments submitted on the EIS, the public requested that OSM initiate a §106 process or, in the alternative, prepare a Section 106 Programmatic Agreement for the proposed project. FEIS, App. M, p. M-110-111.

134. In response to comments, OSM states that “a Programmatic Agreement is not needed under Alternative B, which is the proposed project and preferred alternative in the Final EIS.” FEIS, App. M, p. M-110-111. Nor has OSM complied with the provisions outlined in Section 106.

135. As a result of OSM’s failure to comply with Section 106, or an alternative complete a Programmatic Agreement, prior to permit approval on the life-of-mine permit application, OSM has violated the consultation provisions of 16 U.S.C. § 470f, including, but not limited to, the failure to: involve the public under 36 CFR § 800.2(d)(1); provide the public with information about the undertaking and its effects on historic properties and seek public comment and input under 36 CFR § 800.2(d)(2); provide the Advisory Council on Historic Preservation a reasonable opportunity to comment with regard to such undertaking under 16 U.S.C. § 470f; identify adverse effects of the mining permit under 36 CFR § 800.5; and resolve adverse effects under 36 CFR § 800.6.

### **REQUEST FOR HEARING**

136. Pursuant to 43 C.F.R. §1362, Appellants respectfully request an evidentiary hearing.

137. In an effort to avoid protracted discovery, Appellants respectfully request that OSM be directed to file an Administrative Record with its responsive pleading.

### **REQUEST FOR RELIEF**

WHEREFORE, Appellants respectfully request that the Hearing Division provide the following relief:

1. Find and declare that OSM violated Surface Mining Control and Reclamation Act (“SMCRA”), National Environmental Policy Act (“NEPA”), Endangered Species Act (“ESA”), Religious Freedom and Restoration Act (“RFRA”), National Historic Preservation Act (“NHPA”) and/or Administrative Procedures Act (“APA”) in issuing the December 22, 2008 LOM permit, ROD and CHIA;
2. Enjoin implementation of the LOM permit and ROD;
3. Void OSM’s LOM permit, ROD and CHIA;
4. Grant Appellants their costs of litigation, including reasonable attorney fees as provided by SMCRA and the Equal Access to Justice Act, 28 U.S.C. § 2412; and
10. Grant Appellants such additional and further relief as the Hearing Division may deem just and proper.

RESPECTFULLY SUBMITTED on January 20, 2009.

*/s/ Brad A. Bartlett*

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