

VIA CERTIFIED MAIL

June 10, 2020

Mr. David Berry, Director
Office of the Regional Director
Office of Surface Mining and Reclamation and Enforcement
Western Region
1999 Broadway, Suite 3320
Denver, CO 80202-3050

Dear Mr. Berry,

In the spirit of environmental, social and economic justice, and on behalf of the Hopi people, we write to ask that you treat the closure nearly nine (9) months ago of Peabody Western Coal Company's (Peabody) Kayenta Mine as a "**significant permit revision**" under Section 511 (a)(2) of the Surface Mining Control and Reclamation Act (SMCRA). 30 U.S.C. § 1261(a)(2). The process for reviewing and acting upon this revision must also include preparation of an Environmental Impact Statement (EIS) and full compliance with the National Environmental Policy Act (NEPA) and its implementing regulations.

As you know, in early 2019, Peabody announced its intent to close the Kayenta Mine by October of that year. Now more than one year later and more than eight months after mine production has ceased, Peabody has failed to lay out a clear, substantive plan for the safe closure and reclamation of the Kayenta Mine and the remaining Black Mesa Mine lands as required by SMCRA. See <https://www.eenews.net/energywire/2019/02/07/stories/1060119893>.

The cessation of coal production at Kayenta has had a significant adverse impact on the economic health and well-being of the Hopi Tribe; and was not contemplated when the Kayenta mine permit was last renewed in 2015. In fact, even though prior to approving the Renewal Permit in October 2017, Peabody notified OSM that it would cease coal mining at Kayenta in 2019. The permit renewal was approved anyway, with no modifications addressing the cessation of mining and the onset of reclamation work. The permanent halt to mining activities should have triggered a fundamental shift

toward reclamation and closure. Yet, Peabody seems a long way from completing – or even starting – its reclamation work, having utterly failed to meet its legal obligation to reclaim both the Kayenta and Black Mesa mines “as contemporaneously as practicable” with mining.

A comprehensive environmental impact assessment process would at least ensure a thorough assessment of reclamation activities, a realistic but aggressive timetable for carrying them out, and alternative approaches to reclamation. Just as importantly, it would afford the Hopi Tribe and other interested members of the public an opportunity to engage the Office of Surface Mining Reclamation and Enforcement (OSMRE) over Peabody’s plans to carry out final reclamation and closure of the mine site.

Our concern about public participation is not hypothetical. Already, the Hopi Tribe has been denied the opportunity to comment on and object to Peabody’s revised reclamation schedule due to OSMRE’s treatment of this revision as “minor.” Yet, in that supposedly minor revision, Peabody proposes to delay reclamation for five years, and it does not intend even to begin backfilling and grading on more than 70% of the disturbed land until 2022 or later. This is unacceptable and a flagrant violation of SMCRA’s requirement that Peabody “insure that all reclamation efforts proceed in an environmentally sound manner and *as contemporaneously as practicable with the surface coal mining operations....*” 30 U.S.C. § 1265(b).

The Kayenta Mine has been closed for more than eight (8) months. Black Mesa Mine (BMM) has been closed since 2005, prior to closure, BMM was operating on an interim program permit. And yet Peabody has effectively ignored its contemporaneous reclamation obligation on these sites. We cannot understand why OSMRE has failed to recognize this fact and demand a reclamation schedule that is in line with SMCRA’s requirements. But it illustrates why affording the Hopi Tribe and other interested parties’ fair opportunities for civic engagement is so important.

Peabody is also currently in violation of 30 C.F.R. §780.18(b)(1). This provision requires Peabody to provide “[a] detailed timetable for the completion of each major step in the reclamation plan.” Yet Peabody has offered no clear plan or detailed timetable for: (1) backfilling and grading; (2) protection and restoration of the hydrologic balance for surface and groundwater resources (30 CFR §780.21 & 816.41-42); and (3) redistribution of topsoil or approved topsoil substitutes (30 CFR §8165.22(d)). Moreover, we have special concerns about several specific matters, including:

1. The restoration of springs, some of which are used for religious ceremonial purposes;
2. The restoration of water which flowed through Moenkopi Wash and was the main source of irrigation for Moenkopi fields. Moenkopi Wash is now dry due to the construction of over 165 impoundment dams on Peabody's leasehold under the Nation-Wide permit in violation of Section 404 of Clean Water Act, which requires Individual Permit;
3. Ameliorating the high levels of arsenic in deep wells at First and Second Mesa villages due to over-drafting of billions of gallons of water from the Navajo Aquifer for mining uses over the past half century;
4. The construction of a facility to store all archaeological artifacts and remains of our ancestors who settled on Black Mesa over 1,000 years ago that were recovered during mining; and
5. An alternatives analysis, a review, and reconsideration of the post-mining land use to consider options that might better address the dire economic condition facing the Hopi Tribe as a result of the closure of the Kayenta Mine.

A comprehensive environmental impact assessment that addresses Peabody's plans for reclaiming and closing the Kayenta Mine would provide the Hopi Tribe and the Hopi people, and others with an opportunity to engage with OSMRE on these and other issues that might be raised by interested parties.

Peabody's lack of transparency regarding its plans are further revealed by its failure to release the "final reclamation cost valuation" for the Kayenta Mine that it prepared in early 2017. As it currently stands, neither we, nor the Hopi Tribe have any way of assessing whether Peabody's secret cost estimate adequately reflects Peabody's full reclamation costs at the Kayenta Mine. We do know, however, that these costs will be significant as they must include the restoration of the hydrologic balance of our people's water resources (including the Navajo Aquifer) to their pre-mining condition. All of this can be addressed in the environmental impact assessment that we are requesting and requiring.

We also want to express our deep concern that Peabody's reclamation bond will not prove sufficient to restore the quality and quantity of Black Mesa's water resources, including the Navajo Aquifer that our villages depend upon. The adequacy of Peabody's bonds is a critical issue for the Hopi people that must be reviewed during the impact assessment process.

Finally, OSMRE appears to be in violation of the National Historic Preservation Act (NHPA) for its failure to consult with the Cultural Preservation Office (CPO), or the equivalent of a Tribal Historic Preservation Office (THPO), over “historic properties” that have been adversely affected during the reclamation process at the Black Mesa and Kayenta mines.

As OSMRE surely knows, the mine site is host to many historic and cultural sites protected under the NHPA; and OSMRE has a legal obligation to make reasonable and good faith effort to identify those sites and to work with us to ensure their protection. While the Hopi Tribe may not have a veto over OSMRE’s approval of a reclamation plan, it certainly has the right to consult with OSMRE; and if they cannot agree on an appropriate plan to avoid or reduce adverse effects, to enlist the assistance of the Advisory Council on Historic Preservation to help reach an appropriate agreement. See 36 C.F.R. §§ 800.4 and 800.5.

If OSMRE is serious about its legal obligation to address these critical issues and protect the Hopi Tribe and other affected parties from the adverse impacts from Peabody’s activities at the Kayenta and Black Mesa mine sites, then it must recognize that Peabody’s permanent cessation of coal production at Kayenta, by statutory mandate, requires a significant permit revision under SMCRA. Indeed, Kayenta’s closure in 2019 represented a stark change from Peabody’s public statement that it expected to produce coal at Kayenta and “generate significant economic benefits for tribal communities from 2020-2044.” The loss of these economic benefits and alternative closure strategies that might help secure the Hopi Tribe’s financial future are therefore, fair subjects for review during the impact assessment process. See <https://mscupsppegrs01.blob.core.windows.net/mmfiles/files/factsheets/kayenta.pdf>.

It is our view that the designation of a significant permit revision at Kayenta is NOT discretionary. It is required in light of the halt to production at the mine. OSMRE can demonstrate its respect for the people of Black Mesa and the Hopi Tribe, and ensure that the Hopi Tribe and others will have a fair opportunity to participate in the key decisions that will impact our land and water resources long after Peabody is gone, by designating Kayenta’s closure as a significant permit revision.

We believe that after 50 years of sacrifice, we are entitled to that respect. If OSMRE chooses to deny this request, we and the Hopi Tribe will pursue other avenues to ensure that our views are given the respect that we are due. But our strong preference is to have OSMRE accept our request and move forward promptly with the environmental impact assessment process.

Respectfully submitted,

Benjamin H. Nuvamsa
Former Chairman, Hopi Tribe

Vernon Masayesva
Former Chairman, Hopi Tribe

Cc: Honorable Timothy L. Nuvangyaoma, Chairman, Hopi Tribe
Honorable Clark Tenakhongva, Vice Chairman, Hopi Tribe
Honorable Jonathan Nez, President, Navajo Nation
Honorable Myron Lizer, Vice President Navajo Nation
Honorable Tara Sweeney, Assistant Secretary – Indian Affairs
Hopi Tribal Council Secretary, Hopi Tribe
Hopi – Tewa Villages