

Garrett L. Davey, CO Atty # 49900 (*Admission by Pro Hac Vice*)
Brad A. Bartlett, CO Atty # 32816 (*Admission by Pro Hac Vice pending*)
P.O. Box 1186
Littleton, CO 80160-1186
Phone: 970.799.6145
Email: brad@bartlettlawpractice.com
Email: garrett@daveylawoffice.com

Nathaniel Shoaff, CA Atty # 256641 (*Admission by Pro Hac Vice pending*)
Sierra Club Environmental Law Program
2101 Webster Street, Suite 1300
Oakland, CA 94612
Phone: 415.977.5610
Email: nathaniel.shoaff@sierraclub.org

Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

To' Nizhoni Ani, Black Mesa Water Coalition,)
Diné Citizens Against Ruining Our)
Environment (CARE), and Sierra Club,)
Plaintiffs,) No. _____
v.)
United States Department of Interior,) **COMPLAINT FOR**
United States Office of Surface Mining) **DECLARATORY AND**
Reclamation and Enforcement,) **INJUNCTIVE RELIEF**
Defendants.)

)

DATED this 14 day of July, 2018

s/ Garrett L. Davey
Garrett L. Davey
Attorney for Plaintiffs

INTRODUCTION

1. To' Nizhoni Ani, Black Mesa Water Coalition, Diné Citizens Against Ruining Our Environment (“CARE”), and Sierra Club (hereinafter, “Plaintiffs” or “To’ Nizhoni Ani”) file this Complaint seeking judicial review of regulatory decisions by the U.S. Department of Interior (“Interior”) and its sub-agency, the Office of Surface Mining, Reclamation and Enforcement (“OSM”) (collectively, “Defendants”) regarding operation of Peabody Western Coal Company’s (“Peabody’s”) Kayenta Coal Mine that fail to lawfully permit or analyze permanent closure of the mine that will cease active mining operations on or before December 22, 2019.

2. The Kayenta Coal Mine is an approximately 44,000 acre strip mine operation located on Navajo Nation lands in northeastern Arizona.

3. Plaintiffs in this matter are organizations comprised of tribal members from the Navajo and Hopi Nations directly impacted by the nearly half-century-year-old Kayenta Coal Mine operation, as well as a national conservation organization with broad membership in the affected region.

4. Many tribal members within these organizations have family that lived in the Kayenta Coal Mine area prior to strip mining over 50-years ago, and seek to return to their homeland now that the Kayenta Coal Mine is slated for permanent closure.

5. Plaintiffs bring this challenge in order to ensure that, prior to mine closure eighteen months from now, Defendants lawfully permit, plan for, and analyze the timing, procedures and cost of permanent closure and reclamation of mined lands and waters at the Kayenta Coal Mine back to their “pre-mine” condition.

6. The Kayenta Coal Mine is the sole provider of coal to the Navajo Generating Station (“NGS”), a 2,250 megawatts (“MW”) coal-fired power plant located on tribal land in northeastern Arizona.

7. The Navajo Generating Station is the lone commercial user and sole purchaser of coal from the Kayenta Coal Mine.

8. The Navajo Generating Station will permanently cease coal combustion operations on or before December 22, 2019.

9. The Kayenta Coal Mine will permanently cease mining for coal on or before December 22, 2019.

10. As set forward herein, Plaintiffs seek judicial review of OSM’s October 3, 2017 decision to renew an operating permit for PWCC’s Kayenta Coal Mine, Permit AZ-0001F, OSM Project Number NN.AZ001E.0037 (hereinafter, “Renewal Permit”) until July 5, 2020 without accounting for changes or revisions to Peabody’s Kayenta Coal Mine operation in the form of permanent mine closure on or before December 22, 2019.

11. Additionally, Plaintiffs seek judicial review of OSM’s related Environmental Assessment (“Renewal EA”) and Finding of No Significant Impact

(“FONSI”) prepared pursuant to the National Environmental Policy Act (“NEPA”) on the grounds that the documents fail to analyze the environmental impacts of permanent mine closure on reclamation of the Kayenta Coal Mine—including the connected action of closure of NGS.

12. Finally, Plaintiffs seek judicial review of an administrative order (May 18, 2018) (hereinafter the “Order”) from the Hearings Division of the Office of Hearings and Appeals within U.S. Department of Interior (hereinafter, “Hearings Division”) upholding OSM’s decision to renew Peabody’s operating permit for five (5) years without addressing permanent mine closure.

13. As relief, Plaintiffs ask the Court to vacate and remand OSM’s Renewal Permit back to the agency with instructions that OSM: 1) lawfully address permanent closure of the Kayenta Coal Mine on or before December 22, 2019 as required by the Surface Mining Control and Reclamation Act (“SMCRA”); 2) process permanent closure of the Kayenta Coal Mine as a revision to Peabody’s mine operation.

14. Plaintiffs also ask the Court to remand OSM’s Renewal EA and vacate the FONSI on the basis that: 1) permanent closure of the Kayenta Coal Mine and NGS on or before December 22, 2019 are connected actions under NEPA; and, 2) OSM failed to take the required “hard look” at the impacts of permanent closure of the Kayenta Coal Mine on reclamation of mined lands and waters post-closure on December 22, 2019, as required by NEPA.

15. Finally, and because the Hearing Division's Order was untimely, Plaintiffs ask the Court to declare that the Hearing Division's Order is non-binding and carries no authority or weight in the present matter.

16. As set forward herein, the relief requested may be issued on the grounds that OSM: (1) violated SMCRA and its supporting regulations; (2) violated the NEPA and its supporting regulations; and (3) violated the Administrative Procedures Act ("APA") by taking actions and making findings and conclusions that are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

17. Unless so ordered by this Court, Defendants will not carry out their substantive and procedural duties under SMCRA and NEPA.

JURISDICTION AND VENUE

18. Plaintiffs repeat and incorporate by reference the allegations in the above paragraphs and all paragraphs of this complaint.

19. This Court has jurisdiction over this matter under SMCRA and its supporting regulations.

20. Any party aggrieved by a decision from Interior's Hearing's Division may seek judicial review in accordance with 30 U.S.C. § 1276(a)(2). 43 C.F.R. § 4.1369.

21. SMCRA's supporting regulations allow for judicial review for "any person with an interest which is or may be adversely affected and who has participated in the administrative hearings as an objector . . . if:

The person is aggrieved by the decision of the hearing authority in the administrative hearing conducted pursuant to 775.11 of this chapter; or (2) The hearing authority for administrative review under 775.11 of this chapter fails to act within the applicable time limits specific in the Act, this chapter, or the regulatory program.”

30 C.F.R. § 775.13(1).

22. Additionally, this court has jurisdiction over this matter under the APA.

23. The APA provides a right of review for persons or parties aggrieved or adversely affected by agency action. 7 U.S.C. §§ 702, 704; 43 C.F.R. § 4.403.

24. Venue is proper in this district under 30 U.S.C. § 1276(a)(2) (providing for judicial review of an administrative order in the U.S. District Court for the district in which the surface coal mining operation is located) and 30 C.F.R. § 775.13(c) (“the action of the hearing authority is subject to judicial review by the U.S. District Court for the district where the surface coal mining and reclamation operation is”).

25. Venue is also proper in this district under 28 U.S.C. § 1391 because a substantial part of the events or omissions giving rise to the claims have occurred, or a substantial part of property that is subject to this action is situated in this judicial district.

PARTIES

26. Plaintiff TO' NIZHONI ANI (“TNA”), which translates from Navajo into English as “Beautiful Water Speaks,” is a non-profit organization comprised of tribal members who live on or near Black Mesa, the epicenter of Peabody’s

strip mining operation, as well as neighboring communities like Pinion, Forest Lake, and Big Mountain.

27. 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 members are directly affected by OSM's Renewal Permit.

28. TNA and its members actively participated in all agency proceedings below, including submitting detailed comments on OSM's Renewal Permit, EA and FONSI, attending agency open houses and meetings, and administratively appealing OSM's decision to the U.S. Department of Interior's Hearing Division.

29. TNA has exhausted all administrative remedies.

30. TNA's contact information is as follows:

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

31. Plaintiff BLACK MESA WATER COALITION ("BMWC") is a non-profit, non-governmental organization formed in 2001 by Navajo and Hopi tribal members. BMWC is dedicated to addressing issues of water depletion and natural resource exploitation caused by strip mining for coal, and the building of sustainable, healthy and livable Navajo and Hopi communities on Black Mesa.

32. BMWC has a four (4) person staff and a six (6) member board of directors, representing an intergenerational, multi-cultural range of perspectives.

BMWC's board is comprised of 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 and water for future generations, particularly in areas around Peabody's coal strip mining operations. BMWC has and is working to build community awareness and youth involvement on and around Peabody's Kayenta Coal Mine, organizing events in an effort to elevate community voices, and working to build solution pathways through a Navajo Green Jobs program.

33. BMWC and its members actively participated in all agency proceedings below, including submitting comments on OSM's Renewal Permit, EA and FONSI, attending agency open houses and meetings, and administratively appealing OSM's decision to the U.S. Department of Interior's Hearing Division.

34. BMWC has exhausted all administrative remedies.

35. BMWC's contact information is as follows:

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

36. Plaintiff DINÉ 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 of who live in the Black Mesa region. Many members of the organization have and will be directly impacted by the

mining operation as approved by OSM. 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.

37. Diné C.A.R.E. and its members actively participated in all agency proceedings below including submitting comments on OSM's Renewal Permit, EA and FONSI, attending agency open houses and meetings, and administratively appealing OSM's decision to the U.S. Department of Interior's Hearing Division.

38. Diné C.A.R.E. has exhausted all administrative remedies.

39. Diné C.A.R.E.'s contact information is as follows:

Diné CARE
63 Box 263
Winslow, AZ 86047

40. Plaintiff the SIERRA CLUB is one of the oldest, largest, and most influential grassroots non-profit environmental organizations in the United States. Since 1892, the Sierra Club has worked to protect communities, wild places, and the planet itself. Since 2000, the Sierra Club has worked on issues surrounding the Kayenta Coal Mine. Sierra Club has 3 million members and supporters nationwide who work to promote clean energy, safeguard the health of our communities, protect wildlife, and preserve our remaining wild places through grassroots activism, public education, lobbying, and legal action.

41. In Arizona, Sierra Club has over 16,000 members, many of whom

live on or around Black Mesa and have been and will continue to be directly affected by OSM's Permit Renewal decision for the Kayenta Coal Mine. It is a priority of the Sierra Club to support Navajo and Hopi communities in their efforts to ensure meaningful and timely reclamation of strip mine activities at Black Mesa. Renewal of Kayenta Coal Mine operations without addressing permanent mine closure during the permitting period directly affects many Sierra Club members in Arizona.

42. Sierra Club and its regional members actively participated in all agency proceedings below including submitting comments on OSM's Renewal Permit, EA and FONSI, attending agency open houses and meetings, and administratively appealing OSM's decision to the U.S. Department of Interior's Hearing Division

43. The Sierra Club has exhausted all administrative remedies.

44. The Sierra Club's contact information is as follows:

The Sierra Club
2101 Webster Street, Suite 1300
Oakland, CA 94612

45. Defendants failure to lawfully permit or analyze permanent closure of Peabody's Kayenta Coal Mine operation is causing, and will continue to cause direct, immediate, and irreparable injury to Plaintiffs and their members' interests, including, but not limited to, their future use and enjoyment of mined lands and waters post-closure of the Kayenta Coal Mine on or before December 22, 2019.

46. Unless relief is granted, the interests of Plaintiffs will not be protected.

47. Unless the relief prayed for herein is granted, Plaintiffs and their members will continue to suffer ongoing and irreparable harm and injury to their interests.

48. Defendant OFFICE OF SURFACE MINING CONTROL RECLAMATION AND ENFORCEMENT is a sub-agency within U.S. Department of Interior with regulatory jurisdiction over Peabody's Kayenta Coal Mine. OSM is directly responsible for permitting for the Kayenta Coal Mine under SMCRA and ensuring compliance with NEPA.

49. OSM approved the Renewal Permit, EA and FONSI challenged herein.

50. Defendant U.S. DEPARTMENT OF INTERIOR is a federal executive department of the U.S. government. OSM, the U.S. Bureau of Reclamation and the U.S. Bureau of Indian Affairs are sub-agencies within Interior.

51. The Hearings Division is located within Interior and conducts hearings and decides appeals from decisions of the bureaus and offices of the U.S. Department of Interior. The Hearings Division issued an Order upholding OSM's decision to renew Peabody's operating permit for five (5) years without addressing permanent mine closure during the permitting period.

52. Interior's sub-agency U.S. Bureau of Reclamation holds a 24.3 percent interest in NGS.

STATEMENT OF FACTS

I. Background

53. Peabody has been conducting mining and reclamation activities within the permit boundary of the Kayenta Coal Mine since 1973.

54. Coal from the Kayenta Coal Mine is sold exclusively to NGS.

55. NGS combusts coal from the Kayenta Coal Mine to generate electricity.

56. But for coal combustion operations at NGS coal mining operations at the Kayenta Coal Mine would not be necessary.

57. Coal produced at the Kayenta Coal Mine is transported to NGS via an approximately 83-mile dedicated rail line.

58. NGS is located on the Navajo Nation near Page, Arizona.

59. At full capacity, NGS generates 2,250 MW of energy and burns up to 25,000 tons of coal per day.

60. The permit area for the Kayenta Mine consists of approximately 44,073 acres.

61. The Kayenta Coal Mine is located on Navajo and Hopi Nation lands. Coal from the Kayenta Coal Mine is leased from the Navajo Nation and Hopi Tribe.

62. Kayenta Coal Mine operations are regulated by OSM.

63. Kayenta Coal Mine operations are authorized by OSM under a permanent Indian Lands Program, Life-of-Mine Permit issued in 1990 (“LOM Permit”).

64. The LOM permit authorizes coal mine operations at the Kayenta Coal Mine.

65. The LOM permit approved by OSM for the Kayenta Mine (Permit AZ-001C) in 1990 was renewable at five-year intervals.

66. In 1995, OSM renewed Permit AZ-0001C and converted it into permit AZ-0001D. The operating permit was renewed again in 2000 and 2005.

67. On January 6, 2012, OSM again renewed Peabody's operating permit.

68. On February 16, 2012, Plaintiffs administratively appealed OSM's January 6, 2012 renewal to the Hearings Division.

69. In April 2014, Plaintiffs entered into a settlement agreement with OSM, Peabody, and the Salt River Project, one of the owners of the NGS power plant. Among other things, OSM agreed to conduct an analysis of the environmental impacts of the NGS – Kayenta Mine Complex in a single Environmental Impact Statement and to update the Kayenta Mine Complex Cumulative Hydrology Impact Assessment (“CHIA”).

70. In 2012, Peabody submitted to OSM a significant permit revision application for the Kayenta Coal Mine that proposed extending the life of the mine for an additional 25 years, from December 23, 2019, through December 22, 2044 (hereinafter, “NGS-KMC Project”).

71. The potential environmental impacts of the NGS-KMC Project were analyzed in a draft Environmental Impact Statement released in December 2016.

72. The NGS-KMC Project was suspended in light of the NGS owners'

decision to close NGS in December of 2019.

II. NGS Retirement

73. The U.S. Bureau of Reclamation, a sub-agency within Interior, has an ownership interest in NGS. The U.S. Bureau of Reclamation has a 24.3 percent ownership interest in NGS.

74. NGS is located on lands leased from the Navajo Nation. The lease was executed in 1969 (hereinafter, “1969 Lease”).

75. The 1969 Lease term is fifty (50) years with an option to extend the lease for a period of up to twenty-five (25) years.

76. The 1969 Lease expires on December 22, 2019.

77. The 1969 Lease authorizes current NGS operations through December 22, 2019. The 1969 Lease provides a 1-year period until December 22, 2020 for retirement of NGS facilities.

78. Without an extension of the 1969 Lease, NGS would likely cease coal-combustion operations by December 2017 so that retirement could be completed by the end of 2019 or in 2020.

79. Without an extension of the 1969 Lease, the Kayenta Coal Mine would likely cease mine operations by December 2017.

80. In February of 2017, the owners and operators of NGS announced that they did not intend to operate NGS after December 22, 2019.

81. In November of 2017 the U.S. Bureau of Reclamation and the U.S. Bureau of Indian Affairs approved a 35-year extension lease for NGS (hereinafter,

“2017 Extension Lease”).

82. The 2017 Extension Lease provides for a 5-year retirement process beginning on December 23, 2019, and provides access for an additional 30 years for remediation and long-term monitoring of the plant site and ash disposal area, through 2054.

83. The environmental impacts of the 2017 Extension Lease were analyzed in the *Environmental Assessment for the Navajo Generating Station Extension Lease* (November 2017) (“Extension Lease EA”) prepared for U.S. Bureau of Reclamation and U.S. Bureau of Indian Affairs.

84. But for the 2017 Extension Lease, NGS would cease coal combustion before December 22, 2019.

85. But for the 2017 Extension Lease, the Kayenta Coal Mine would cease coal mining before December 22, 2019.

III. Renewal of Peabody’s Mine Operations

86. On February 26, 2015 Peabody submitted an application to renew Permit AZ-0001E (hereinafter, “renewal application”).

87. Peabody’s renewal application did not identify any changes to Peabody’s mine operation.

88. Peabody’s renewal application did not indicate that coal mining would cease on or before December 22, 2019.

89. Peabody’s renewal application assumed coal mining would continue through July 6, 2020.

90. Peabody’s renewal application assumed coal mining would continue through the five (5) year Renewal Permit period.

91. In February of 2017, the owners and operators of NGS announced that they did not intend to operate NGS after December 22, 2019.

92. In 2017, OSM was notified that Peabody would cease coal mining at the Kayenta Coal Mine on or before December 22, 2019.

93. Prior to approving the Renewal Permit, OSM was notified that Peabody would cease coal mining at the Kayenta Coal Mine on or before December 22, 2019.

94. In April of 2017, Peabody contacted participants in NGS, including U.S. Bureau of Reclamation, regarding responsibility for the funding and payment of liabilities associated with mine closure.

95. Upon information and belief, participants in NGS are responsible for all or a portion of the reclamation costs at the Kayenta Coal Mine.

96. In 2017, Golder Associates was hired by Peabody to produce interim and final reclamation cost studies for the Kayenta Coal Mine (hereinafter, “Golder reclamation cost studies”).

97. The Golder reclamation cost studies were shared with the Salt River Project.

98. The Golder reclamation cost studies were not shared with OSM.

99. OSM analyzed the environmental impacts of Peabody’s renewal application in the *Kayenta Mine SMCRA Permit AZ-0001E Renewal Draft*

Environmental Assessment Navajo County, Arizona (August 17, 2017) (“Renewal EA”).

100. The Renewal EA and an unsigned Finding of No Significant Impact (“FONSI”) were released for public comment in September 2017.

101. The Renewal EA evaluated two alternatives: the preferred action and Alternative 2, no action – disapproval of the permit renewal.

102. The Renewal EA did not analyze or disclose the Golder reclamation cost studies.

103. The Renewal EA did not analyze or disclose NGS owners’ liability for all or a portion of the reclamation costs at the Kayenta Coal Mine.

104. Plaintiffs submitted detailed comments on the Renewal EA and FONSI during OSM’s public comment deadline.

105. On October 3, 2017, OSM issued an approval letter to Peabody authorizing the company to continue mining operations through July 6, 2020.

106. OSM’s Renewal Permit authorizes continued mine operations in coal resource areas N-9, J-19, and J-21, and reclamation activities in CRA N-11.

107. OSM’s Renewal Permit assumes no changes to Peabody’s mine operation.

108. Mine closure will occur prior to the expiration of the five (5) year Renewal Permit period on July 6, 2020.

109. Coal mining will cease prior to the expiration of the five (5) year Renewal Permit period on July 6, 2020.

110. OSM's Renewal Permit authorizes closure of the Kayenta Mine on or before December 22, 2019.

111. OSM's Renewal Permit authorizes cessation of coal mining during the Renewal Permit period that expires on July 6, 2020.

112. Closure of the Kayenta Coal Mine on or before December 22, 2019 constitutes a change to Peabody's mine operation.

113. Cessation of coal production at the Kayenta Coal Mine on or before December 22, 2019 constitutes a change to Peabody's mine operation.

114. OSM's Renewal Permit authorizes Peabody to continue mining for coal at a rate of eight (8) metric tons of coal per year through July 6, 2020.

115. OSM's Renewal Permit authorizes Peabody to cease mining for coal at a rate of zero (0) metric tons of coal per year on or before December 22, 2019.

116. No further permits are necessary from OSM for Peabody to cease coal mining at the Kayenta Coal Mine on or before December 22, 2019.

117. OSM approved the Renewal Permit on October 3, 2017.

Order from the Hearings Division

118. On November 1, 2017, Plaintiffs timely filed a petition with the Hearings Division to review OSM's decision to grant the Renewal Permit.

119. OSM, the Salt River Project and Peabody were parties to the administrative proceedings.

120. The parties participated in expedited briefing beginning with the filing of dispositive motions on December 20, 2017, and concluding with the filing

of replies to dispositive motions on January 25, 2018.

121. By agreement of the parties, a hearing was to be held by on or before February 7, 2018.

122. The ALJ assigned to the appeal declined to hold a hearing on or before February 7, 2018.

123. On May 8, 2018, the ALJ issued the Order granting summary judgment in favor of OSM and against Plaintiffs.

CLAIMS FOR RELIEF

CLAIM ONE

Violation of the Surface Mining Control and Reclamation Act: OSM violated SMCRA by arbitrarily and capriciously authorizing a Renewal Permit for Peabody's Kayenta Coal Mine without accounting for changes or revisions to the mine operation in the form of permanent mine closure during the permit period.

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

125. Peabody will cease coal mining at the Kayenta Coal Mine on or before December 22, 2019.

126. Because coal mine operation and related coal production will end during the five (5) year Permit Renewal period, OSM's decision to renew as "unchanged" Peabody's mine operation until July 6, 2020 was arbitrary, capricious, contrary to law, and abuse of discretion.

127. Any changes to coal mine operations must be processed as a permit revision. 30 C.F.R. § 774.15(b)(4).

128. Peabody's cessation of operations merits treatment as a significant permit revision under SMCRA and its implementing regulations. *See* 30 C.F.R. §§ 774.13, 750.12; *see also* 30 C.F.R. § 746.18.

129. Under OSM's Indian Lands Program, 30 C.F.R. §§ 750-56, OSM shall consider the following factors in determining whether a permit application constitutes a significant revision: "(1) changes in production or recoverability of the coal resource; (2) the environmental effects; (3) the public interest in the proposed revision; and (4) possible adverse impacts from the proposed revision on fish or wildlife, endangered species, bald or golden eagles, or cultural resources." 30 C.F.R. § 750.12(c)(3)(ii)(B); *see also* 30 C.F.R. § 746.18 (permit revisions constitute mining plan modifications if there is "any change in the location or amount of coal to be mined").

130. Under OSM's Indian Lands Program, the Agency reviews a significant permit revision as if new application. 30 C.F.R. 775.12(c).

131. Closure of the Kayenta Coal Mine on or before December 22, 2019 constitutes a change to Peabody's mine operation.

132. Reduction in coal production of coal from eight (8) metric tons of coal per year to zero on or before December 22, 2019 constitutes a change to Peabody's mine operation.

133. Upon information and belief, OSM was notified prior to October 3, 2018 that Peabody would cease coal mining at the Kayenta Coal Mine on or before December 22, 2019.

134. OSM approved a five (5) year Permit Renewal for Peabody's Kayenta Coal Mine until July 6, 2020 without accounting for changes in Peabody's operation. Specifically, OSM's Permit Renewal failed to account for permanent cessation of coal production on or before December 22, 2019.

135. OSM failed to determine whether a reduction in coal production from eight (8) metric tons of coal per year to zero on or before December 22, 2019 constitutes a significant revision to Peabody's operation.

136. OSM's decision to renew as "unchanged" Peabody's mine operations without addressing permanent mine closure during the permitting period violated SMCRA and was arbitrary and capricious, an abuse of discretion, and not otherwise in accordance with the law, in violation of the APA. 5 U.S.C. § 706(2)(A).

ALLEGATION TWO

Violation of the National Environmental Policy Act: OSM violated NEPA by failing to analyze connected actions.

137. Plaintiffs repeat and incorporate by reference the allegations in the above paragraphs and all paragraphs of this petition for review.

138. NEPA's implementing regulations require agencies to analyze connected actions to determine which proposals shall be the subject of a particular statement. 40 C.F.R. §§ 1502.4, 1508.25(a)(1).

139. "Connected actions" are actions that "are closely related" to the action under review because the actions: "(i) Automatically trigger the other

actions which may require environmental impact statements. (ii) Cannot or will not proceed unless other actions are taken previously or simultaneously. (iii) Are interdependent parts of a larger action and depend on the larger action for their justification.” 40 C.F.R. § 1508.25(a)(1).

140. The Kayenta Mine supplies coal to the Navajo Generating Station.

141. NGS is the sole commercial customer for Kayenta Mine coal.

142. Upon information and belief, participants in NGS are responsible for all or a portion of the reclamation costs at the Kayenta Coal Mine.

143. Upon shutdown of the NGS, there would be no economically viable market for Kayenta Mine coal.

144. Upon shutdown of NGS, the Kayenta Mine will cease coal production.

145. Retirement of NGS will result in the cessation of mine operations at the Kayenta Mine.

146. Absent a lease extension approved by Defendant U.S. Department of Interior, NGS would have closed in December of 2017.

147. In November of 2017, the U.S. Bureau of Reclamation and the U.S. Bureau of Indian Affairs approved a 35-year extension lease for NGS (hereinafter, “2017 Extension Lease”).

148. But for the 2017 Extension Lease, NGS would have ceased coal combustion in December of 2017.

149. But for the 2017 Extension Lease, the Kayenta Coal Mine would

have ceased coal mining in December of 2017.

150. In issuing Renewal Permit, OSM failed to analyze the permanent closure of the Kayenta Coal Mine and NGS on or before December 22, 2019 as connected actions under NEPA and its implementing regulations. OSM's actions and are arbitrary, capricious, and otherwise not in accordance with the law, in violation of the APA. 5 U.S.C. § 706(2)(A); 42 U.S.C. § 4332.

ALLEGATION THREE

Violation of the National Environmental Policy Act: OSM violated NEPA by failing to take the required “hard look” at the impacts of permanent mine closure on reclamation of the Kayenta Coal Mine post-closure.

151. Plaintiffs repeat and incorporate by reference the allegations in the above paragraphs and all paragraphs of this Petition for Review.

152. NEPA requires federal agencies to conduct a “hard look” at the direct, indirect and cumulative environmental impacts of a proposed action prior to taking the action. 42 U.S.C. § 4332.

153. Further, NEPA requires federal agencies to adopt a broad scope when evaluating the environmental impacts of a proposed action. 30 C.F.R. § 1508.25.

154. OSM’s *Kayenta Mine SMCRA Permit AZ-0001E Renewal Draft Environmental Assessment Navajo County, Arizona* (August 17, 2017) (“Renewal EA”) failed to take a “hard look” at the environmental impacts of permanent mine closure on reclamation activities at the Kayenta Coal Mine post-closure.

155. OSM’s Renewal EA fails to take the required hard look at cessation

of mine operations, transition to reclamation operations, and conversion of mined lands and waters to a post-mining land use after retirement of NGS on December 22, 2019.

156. Absent from the OSM's Renewal EA is: 1) a detailed description of how the proposed post-mining land use is to be achieved post-closure; 2) the necessary support activities which may be needed to achieve the proposed land use post-closure; 3) a detailed estimated timetable for the accomplishment of each major step in the reclamation plan post-closure; and, 4) a detailed estimate of reclamation costs and liabilities.

157. Further, OSM's Renewal EA fails to analyze or assess: 1) barriers to bond release post-closure; 2) a detailed schedule and time frame for achievement of each step in the reclamation process post-closure; and, 3) a detailed schedule and explanation for achieving bond release post-closure.

158. The Renewal EA also fails to analyze or disclose the Golder reclamation cost studies.

159. Additionally, the Renewal EA fails to analyze or disclose NGS owners' liability for all or a portion of the reclamation costs at the Kayenta Coal Mine.

160. OSM's analytical deficiencies under NEPA stem in whole or in part from the limited scope of the agency's NEPA analysis. Specifically, the scope of the Renewal EA is unlawfully narrow and limited the five (5) year Renewal Permit term.

161. In issuing Renewal Permit, OSM failed to take the required hard look at the environmental impacts of permanent mine closure on reclamation of the Kayenta Coal Mine post-closure. OSM's actions are arbitrary, capricious, and otherwise not in accordance with the law, in violation of the APA. 5 U.S.C. § 706(2)(A); 42 U.S.C. § 4332.

ALLEGATION FOUR

Violation of the Surface Mining Control and Reclamation Act: The Hearings Division violated SMCRA by failing to act within the thirty (30) day time limit for issuing a decision on appeal.

1. Plaintiffs repeat and incorporate by reference the allegations in the above paragraphs and all paragraphs of this petition for review.
2. Under SMCRA, any person with an interest that is or may be adversely affected by OSM's approval of a permit application may request a hearing on the reasons for the final determination. 5 U.S.C. § 1264(c).
3. The regulatory authority shall hold a hearing within 30 days of such a request. 5 U.S.C. § 1264(c).
4. Unless all parties agree in writing to an extension or waiver, the Administrative Law Judge ("ALJ") assigned to the hearing by the Hearings Division shall issue a written decision in accordance with 43 C.F.R. § 4.1127 within 30 days of the date the hearing record is closed by the ALJ. 43 C.F.R. § 4.1368.
5. Plaintiffs filed a Petition for Review of OSM's Renewal Permit with the Hearings Division on November 1, 2017.

6. Parties participated in expedited briefing beginning with the filing of dispositive motions on December 20, 2017, and concluding with the filing of replies to dispositive motions on January 25, 2018.

7. By agreement of the parties, a hearing was to be held by on or before February 7, 2018.

8. The ALJ assigned to the appeal declined to hold a hearing.

9. On May 8, 2018, over 90 days after the date on which the hearing was to be held, the ALJ issued an Order upholding OSM's Renewal Permit.

10. The ALJ's failure to meet the 30-day deadline for rendering a decision on appeal is arbitrary, capricious, and contrary to law. As a consequence, the Hearing Division's Order on appeal is non-binding and carries no authority or weight.

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the U.S. District Court for the District of Arizona provide the following relief:

1. Find and declare that OSM violated SMCRA, NEPA, and the APA in issuing the October 3, 2017 Kayenta Coal Mine Renewal Permit and related EA and FONSI;

2. Vacate and remand the Renewal Permit back to OSM;

3. Vacate the FONSI and remand the Renewal EA back to OSM;

3. Order OSM to process permanent mine closure as a permit revision;

4. Order OSM to analyze Federal actions related to closure of NGS and

the Kayenta Coal Mine as connected actions in a single NEPA document;

5. Order OSM to conduct the required hard look under NEPA at reclamation of the Kayenta Coal Mine post-closure;

5. Find and declare that the ALJ assigned to the matter below by the Hearings Division violated SMCRA by failing to issue a written decision within 30 days of the date scheduled for a hearing;

6. Grant Plaintiffs their costs of litigation including reasonable attorney fees as provided by SMCRA and the Equal Access to Justice Act; and,

7. Grant Plaintiffs such additional and further relief as the Court may deem just and proper.

RESPECTFULLY SUBMITTED on July 14, 2018.

s/ Garrett L. Davey

Garrett L. Davey, CO Atty # 49900 (*admission by Pro Hac Vice*)

Brad A. Bartlett, CO Atty # 32816 (*admission by Pro Hac Vice pending*)

P.O. Box 1186

Littleton, CO 80160-1186

Phone: 970.799.6145

Email: brad@bartlettlawpractice.com

Email: garrett@daveylawoffice.com

Nathaniel Shoaff, CA Atty # 256641 (*Admission by Pro Hac Vice pending*)

Sierra Club Environmental Law Program

2101 Webster Street, Suite 1300

Oakland, CA 94612

Phone: 415.977.5610

Email: nathaniel.shoaff@sierraclub.org

Attorneys for Plaintiffs