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January 5, 2010

ORDER

In re Black Mesa Complex Permit Revision	)	DV 2009-1-PR thru DV 2009-8-PR
	)	
	)	Significant Permit Revision
	)	Permit No. AZ-0001D

NUTUMYA'S NEPA MOTION GRANTED
(Docket No. DV 2009-4-PR)
OSM DECISION VACATED
OTHER PENDING MOTIONS DENIED AS MOOT
OTHER REQUESTS FOR REVIEW DISMISSED AS MOOT
(Docket Nos. DV 2009-1-PR, DV 2009-2-PR, DV 2009-3-PR, DV 2009-5-PR, DV 2009-6-PR, DV 2009-7-PR, DV 2009-8-PR)
HEARING CANCELLED

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I. Introduction

This matter involves the consolidated requests for review originally filed by ten applicants. They seek review of a revised permit allowing Peabody Western Coal Company (Peabody) to operate its Black Mesa and Kayenta mines jointly under a single permit. The mines are located in the northeastern corner of Arizona.

After an initial round of motions two applicants were dismissed and eight now remain. Additionally three parties were added as intervenor-respondents. The following tables summarize the identity of the current parties:

Applicants

Name	Docket No.	Abbreviation
Californians for Renewable Energy	DV 2009-1-PR	CARE
Victor Masayesva, Jr.	DV 2009-2-PR	Masayesva
Black Mesa Water Coalition, *et al.*	DV 2009-3-PR	BMWC
Kendall Nutumya, *et al.*	DV 2009-4-PR	Nutumya
The Forgotten People, Coal Mine Canyon Chapter, Tonalea Chapter, and Leupp Chapter	DV 2009-5-PR thru DV 2009-8-PR	Forgotten People

Respondent and Intervenor-respondents

Name	Abbreviation
Office of Surface Mining Reclamation and Enforcement	OSM
Peabody Western Coal Company	Peabody
Salt River Project Agricultural Improvement and Power Project	Salt River
Hopi Tribe	Hopi Tribe
Navajo Nation	Navajo Nation

The applicants have alleged that the permit should be vacated because OSM has violated several statutes including:

Name	Citation	Abbreviation
Surface Mining Control and Reclamation Act of 1977	30 U.S.C. §§ 1201-1309b (2006)	SMCRA
National Environmental Policy Act	42 U.S.C. §§ 4321-47 (2006)	NEPA
Endangered Species Act	16 U.S.C. §§ 1531-44 (2006)	ESA
American Indian Religious Freedom Act	42 U.S.C. § 1996 (2006)	AIRFA
Religious Freedom Restoration Act of 1993	42 U.S.C. §§ 2000bb thru 2000bb-4) (2006)	RFRA
Clean Water Act	33 U.S.C. §§ 1251-1387 (2006)	CWA

This matter is now before me on nineteen motions for dismissal or summary decision. The following table provides a summary:

Moving Party	Title	Abbreviated Title	Opposing Party
OSM	Respondent's Motion for Dismissal of Claims Raised Under the American Indian Religious Freedom Act	OSM's AIRFA Motion Against Nutumya	Nutumya 2009-4-PR
OSM	Motion for Summary Decision in DV 2009-1-PR on American Indian Religious Freedom Act Claim	OSM's AIRFA Motion Against CARE	CARE 2009-1-PR
OSM	Respondent's Motion for Dismissal of Claims Raised Under the Religious Freedom Restoration Act	OSM's RFRA Motion Against Nutumya	Nutumya 2009-4-PR
OSM	Respondent's Motion for Dismissal of Claims Raised Under the Religious Freedom Restoration Act	OSM's RFRA Motion Against BMWC	BMWC 2009-3-PR
OSM Peabody	Respondent's Motion for Dismissal of Claims Raised Under the Clean Water Act	OSM's CWA Motion	Masayesva 2009-2-PR
OSM	Motion for Summary Decision in DV 2009-5-PR Through DV 2009-8-PR on Claim that OSM Failed to Consider the Legal Status of Existing Mining Authorizations	OSM's Mining Authorization Motion	Forgotten People 2009-5-PR 2009-6-PR 2009-7-PR 2009-8-PR

Moving Party	Title	Abbreviated Title	Opposing Party
OSM Peabody	Motion for Summary Decision in DV 2009-5 Through 2009-PR on Claim Related to Greenhouse Gas Emissions	OSM's Greehouse Gas Motion Against the Forgotten People	Forgotten People 2009-5-PR 2009-6-PR 2009-7-PR 2009-8-PR
OSM	Motion for Summary Decision in DV 2009-5-PR Through DV 2009-8-PR on Claim That OSM Failed to Provide for Meaningful Public Review and Comment	OSM's Public Review Motion	Forgotten People 2009-5-PR 2009-6-PR 2009-7-PR 2009-8-PR
OSM	Respondent's Motion for Dismissal of Public Participation Claims	OSM's Public Participation Motion	BMWC 2009-3
OSM Peabody	Respondent's Motion for Dismissal of Third-Party Contractor Claim	OSM's Third-Party Contractor Motion	BMWC 2009-3-PR
OSM	Motion for Summary Decision in DV 2009-1-PR on National Environmental Policy Act Claims	OSM's NEPA Motion	CARE 2009-1-PR
OSM Peabody	Motion for Summary Decision in DV 2009-1-PR on the Claim that the Subject Permit Does Not Consider Greenhouse Gas Emissions as Regulated Pollutants	OSM's Greenhouse Gas Motion Against CARE	CARE 2009-1-PR

Moving Party	Title	Abbreviated Title	Opposing Party
Peabody	Motion for Summary Decision: Material Damage to the Navajo Aquifer	Peabody's Navajo Aquifer Motion	BMWC 2009-3-PR Nutumya 2009-4-PR Forgotten People 2009-5-PR 2009-6-PR 2009-7-PR 2009-8-PR
Hopi Tribe	Hopi Tribe's Motion for Summary Decision on Claims Related to Alleged Political Instability within Hopi Tribal Government	Hopi Tribe's Political Instability Motion	BMWC 2009-3-PR Nutumya 2009-4-PR Forgotten People 2009-5-PR 2009-6-PR 2009-7-PR 2009-8-PR
Nutumya	Motion for Summary Decision that the Record of Decision Does Not Fully Consider SMCRA § 510(a) for Black Mesa Resources	Nutumya's Section 510(a) Motion	OSM 2009-4-PR
Nutumya	Motion for Summary Disposition Based on OSM's Violations of the National Environmental Policy Act	Nutumya's NEPA Motion	OSM 2009-4-PR

Moving Party	Title	Abbreviated Title	Opposing Party
BMWC	Black Mesa Coalition, *et al.* Motion for Summary Decision for Failure to Process Peabody's Permit as Required by the Surface Mining Control and Reclamation Act ("SMCRA")	BMWC's SMCRA Processing Motion	OSM 2009-3-PR
BMWC	Black Mesa Water Coalition, *et al.* Motion for Summary Decision for Failure to Comply with the National Environmental Policy Act in Connection with the Black Mesa Project	BMWC's NEPA Motion	OSM 2009-3-PR
BMWC	Black Mesa Water Coalition, *et al.* Motion for Summary Decision for Failure to Comply with the Endangered Species Act in Connection with the Black Mesa Project	BMWC's ESA Motion	OSM 2009-3-PR

I have decided to grant Nutumya's NEPA Motion because it demonstrates that OSM violated NEPA by not preparing a supplemental draft environmental impact statement (EIS) when Peabody changed the proposed action. As a result the Final EIS did not consider a reasonable range of alternatives, described the wrong affected environment baseline, and did not achieve the informed decision-making and meaningful public comment required by NEPA. Because the Final EIS does not satisfy NEPA, the decision must be vacated and remanded to OSM for further action. Vacating the OSM decision necessarily renders the other motions moot or unnecessary to decide.

The following sections will first describe the background necessary to understand the significance of Nutumya's motion, then state the burden and standard of proof, and conclude by analyzing the merits of the motion.

II. Background

A. Mine Operations

Peabody has operated the Kayenta and Black Mesa mines as two separate surface coal mining operations on Indian lands since the early 1970's. The Kayenta mining operation has supplied coal to the Navajo Generating Station, near Page, Arizona, since 1973. The coal is transported to the station via an 83-mile-long rail line.

The Black Mesa mining operation supplied coal to the separate Mohave Generating Station, near Laughlin, Nevada, from 1970 until December 2005, when the power plant suspended operations. The coal was transported to this generating station via a 273-mile-long coal-slurry pipeline.

According to OSM, SMCRA provides for a two-phase program to regulate surface coal mining operations on Indian lands: an initial regulatory program and a permanent regulatory program. The permanent program contains more comprehensive performance and reclamation standards than the initial program. The two mines operated under the initial program until 1990 when Peabody applied for a permanent program permit covering both operations.

OSM issued a permanent program permit for only the Kayenta mining operation and has subsequently renewed the permit in 1995, 2000, and 2005. Under the existing permit Peabody is authorized to mine coal through 2026.

At the direction of the Secretary of the Interior, OSM administratively delayed its decision on the Black Mesa mining operation because of concerns by the Hopi Tribe and the Navajo Nation regarding use of Navajo-aquifer (N-aquifer) water for coal-slurry purposes. Because of this administrative delay, Peabody mined coal at the Black Mesa operation under the initial regulatory program until December 2005 when the Mohave Generating Station ceased operations.

From 1970 to December 2005, the Black Mesa and Kayenta mining operations used N-aquifer water at a rate of 4,400 acre-feet per year for coal-slurry, mine-related, and domestic purposes. Starting in 2006, after the Mohave Generating Station suspended operations, the combined mines have used considerably less water, about 1,200 acre-feet per year.

Before the Mohave Generating Station suspended operations, the combined mines produced 13.3 million tons of coal per year (4.8 from Black Mesa and 8.5 from Kayenta). When the Mohave Generating Station went off-line, production reduced to 8.5 million tons from just the Kayenta mining operation.

A.R. 1-02-01-000004 thru -000006 (Record of Decision); Final EIS at ES-3, 2-1 n.1, 2-6 thru 2-7.

B. The Revised Permit and the Draft EIS

Peabody first submitted a permit revision application in February 2004, which sought to revise its existing permanent permit for the Kayenta operations to add the Black Mesa operations under the permanent regulatory program and form the "Black Mesa Complex." It also sought approval of several other projects:

- a new coal-wash plant and associated coal-waste disposal facility; and
- construction, use, and maintenance of a new haul road between mine areas on the southern ends of Peabody's coal leases;
- rebuilding of the 273-mile-long coal-slurry pipeline to the Mohave Generating Station; and
- a new aquifer water-supply system, including a 108-mile long pipeline to convey the water to the mine complex.

As required by the NEPA regulations, OSM published in the Federal Register a notice of intent to prepare an EIS for the Black Mesa Project. OSM then conducted scoping meetings during January and February 2005. OSM advertised these meetings in local newspapers and on local radio stations and received 351 written submissions and recorded 237 speakers.

OSM then issued a Draft EIS in November 2006 and held meetings in northern Arizona and southeast Nevada during January 2007 to receive comments. The Draft EIS identified three alternatives:

A: approve Peabody's application with the construction projects;

B: approve a combined permanent permit for the Kayenta and Black Mesa operations but without the constructions projects and with no coal mining from the Black Mesa operations; and,

C: disapprove Peabody's application, leaving the operations in the status quo.

OSM identified Alternative A as its preferred alternative.

Subsequent to the Draft EIS, and before OSM issued the Final EIS, Peabody revised its application to remove the plans and activities that supported the Mohave Generating Station (i.e., production of coal at the Black Mesa mining operation, construction of a new coal wash plant, construction of a new haul road, rebuilding the coal-slurry pipeline, and development of a new aquifer water-supply system). Peabody also proposed reducing the amount of N-aquifer water usage to 1,236 acre-feet per year. Peabody made these revisions because the Mohave Generation Station suspended operations in December 2005 and it believed that the power plant would not likely reopen as a coal-fired facility.

Peabody's revised application added the 18,857-acre initial program area for the Black Mesa mining operation, including surface facilities and coal reserves, to the 44,073 acres in the existing permanent program area for the Kayenta mining operation, bringing the total acres of the permanent program permit area to 62,930 acres. The permit area would no longer distinguish between the Kayenta mining operation and the Black Mesa mining operation and OSM would consider them as one operation, known as the Black Mesa Complex. The revised application did not change the existing mining methods or the average annual coal production rate of 8.5 million tons for the Kayenta mining operation. The permit would continue to be renewable at 5-year intervals but would not authorize mining of unmined coal reserves in the Black Mesa mining operation area.

OSM announced in the Federal Register that it had changed its preferred alternative from Alterative A, Peabody's original proposal, to Alterative B, Peabody's current proposal, and reopened the comment period on the Draft EIS to allow persons to comment on the change. It did not conduct any additional scoping meetings to supplement the scoping of the original proposal. It only extended the comment period for the Draft EIS. OSM then issued the Final EIS on November 7, 2008, and approved Peabody's revised application on December 22, 2008.

A.R. 1-02-01-000004 thru -000006 (Record of Decision); Final EIS at 2-1 n.1.

C. The Final EIS

1. Purpose and Need

The Final EIS stated that the project's purpose and need was to continue supplying coal from the Kayenta mining operation to the Navajo Generating Station, to revise the life-of mine (LOM) operation and reclamation plans for the permitted Kayenta mining operation, and to incorporate the initial program surface facilities and coal-resource areas of the adjacent Black Mesa mining operation.

> This environmental impact statement (EIS) is being prepared in compliance with the National Environmental Policy Act (NEPA) in order to analyze and disclose the probable effects of the Black Mesa Project in northern Arizona. The purpose of and need for the Black Mesa Project is to continue the supply of coal from Peabody Western Coal Company's (Peabody's) Kayenta mining operation to the Navajo Generating Station near Page, Arizona (Map 1-1). The action proposed by Peabody is to revise the life-of-mine (LOM) operation and reclamation plans for its permitted Kayenta mining operation and, as a part of this revision, to incorporate into these plans the initial program area surface facilities and coal-resource areas of its adjacent Black Mesa mining operations, which previously supplied coal to the Mohave Generating Station in Laughlin, Nevada. This EIS collectively refers to

> the area occupied by the Kayenta mining operation and Black Mesa mining operation as the Black Mesa Complex.

Final EIS at 1-1.

It also pointed out that the purpose and need had changed from the Draft EIS, when the purpose had been to supply coal from the Black Mesa operation to the Mohave Generating Station and approve several projects including a rebuilt coal-slurry pipeline. It further explained that because coal mining from Black Mesa for the Mohave Generating Station was still possible, but unlikely, the Final EIS would continue to analyze its effects.

> Since the Draft EIS was published in November 2006, the purpose of and need for the Black Mesa Project to supply coal to the Mohave Generating Station no longer exists. With this change, Peabody amended its permit revision application, thus causing the change in the statement of purpose and need and reducing the scope of the proposed action. Some of Peabody's LOM revisions and three of the four original proposed actions are no longer proposed.
>
> > • As a part of its LOM revisions, Peabody no longer proposes 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, and water for slurry transportation of coal and coal washing.
> >
> > • Black Mesa Pipeline, Inc. (BMPI) no longer proposes to continue to operate the Black Mesa coal-slurry preparation plant.
> >
> > • BMPI also no longer proposes to reconstruct the 273-mile-long coal-delivery slurry pipeline from the Black Mesa mining operation to the Mohave Generating Station.
> >
> > • The co-owners of the Mohave Generating Station no longer propose to construct 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.

Although these actions are no longer proposed and not part of the preferred alternative, they still could occur under certain circumstances. Alternative A addresses supplying coal to the Mohave Generating Station, which remains permitted for operation. Even though operation was suspended in December 2005, it has not been decommissioned. Although it appears that implementing Alternative A is unlikely, Peabody wishes to proceed in revising its permit to incorporate the surface facilities in the initial program area and coal-resource areas of its adjacent Black Mesa mining operation; that is, Alternative B. Because Alternative A is still possible, albeit unlikely, this EIS continues to analyze its effects.

Id. at 1-1 thru 1-2.

2. Alternatives

The Final EIS identified the same three alternatives as did the draft:

A: approve Peabody's former application with the construction projects;

B: approve Peabody's current application for a combined permanent permit for the Kayenta and Black Mesa operations without the construction projects and with no coal mining from the Black Mesa operations; and,

C: disapprove Peabody's application, leaving the operations in the status quo.

The following sections provide additional detail.

a. Alterative A - Approval of the 2004 LOM Revision and All Components Associated with Coal Supply to the Mohave Generating Station

Under Alternative A, OSM would:

(1) Approve Peabody's LOM permit revision for the Black Mesa Mine Complex (Black Mesa and Kayenta mining operations), including:

- Mining of coal to supply the Mohave Generating Station;
- A new coal-wash plant and associated coal-waste disposal; and
- Construction, use, and maintenance of a new haul road between mine areas on the southern ends of Peabody's coal leases.

(2) Approve BMPI's existing coal-slurry preparation plant and rebuilding the 273-mile-long coal-slurry pipeline to the Mohave Generating Station; and

(3) Approve a new aquifer water-supply system, including a 108-mile-long pipeline to convey the water to the mine complex.

Final EIS at 2-8 (Figure 2-1).

b. Alternative B - Approval of the 2008 LOM Revision (Preferred Alternative)

Under Alternative B, OSM would approve Peabody's LOM permit revision, including incorporation of the Black Mesa mining operation surface facilities and coal deposits into the Kayenta mining operation permit area. This alternative would result in:

- Continued coal mining at the Kayenta mining operation to supply coal to the Navajo Generating Station;
- No coal mining at the Black Mesa mining operation to supply the Mohave Generating Station;
- No construction, use, and maintenance of a new haul road between mine areas on the southern ends of Peabody's coal leases;

- No reconstruction of the coal-slurry pipeline; and
- No construction of the C aquifer water-supply system.

Id.

c. Alternative C - Disapproval of the LOM Revision (No Action Alternative)

Under Alternative C, OSM would disapprove Peabody's life-of-mine permit revision. This alternative would mean:

- No coal mining at the Black Mesa mining operation to supply the Mohave Generating Station;
- Continued coal mining at the Kayenta mining operation to supply coal to the Navajo Generating Station;
- No incorporation of Black Mesa mining operation surface facilities and coal deposits into the Kayenta mining operation permit area;
- No construction, use, and maintenance of a new haul road between mine areas on the southern ends of Peabody's coal leases;
- No reconstruction of the coal-slurry pipeline; and
- No proposed construction of the C aquifer water-supply system.

Id.

d. Alternatives Considered but Eliminated from Detailed Study

The Final EIS also described fourteen other alternatives, or groups of alternatives, that OSM considered but eliminated from detailed analysis because they were not technically or economically feasible, or did not meet the purpose and need for the project. These included using other water sources, a water-return pipeline, alternative coal delivery methods, no coal-washing facility, no mining, a new customer for the Black Mesa coal, and mining where no sacred springs or sites exist. Final EIS at 2-36 thru 2-50.

3. Affected Environment

The Final EIS identified 18 elements of the environment that the proposed alternatives could affect. These included such elements as soil resources, water resources, climate, air quality, fish and wildlife, cultural resources, environmental justice, and Indian trust assets. The document described the existing conditions for each in 165 pages. Final EIS Ch. 3.

4. Environmental Consequences

The Final EIS concluded by describing the effects that each of the three alternative actions could have on each of the 18 affected environmental elements. It also analyzed mitigation measures and cumulative effects. Final EIS Ch. 4.

With this background information the following section will review the burden and standard of proof for Nutumya's allegations.

III. Analysis

A. Burden and Standard of Proof

1. Summary Decision

Departmental regulations provide that an administrative law judge may grant a motion for summary decision if there are no disputed material facts and if the moving party is entitled to a decision as a matter of law:

> (c) An administrative law judge may grant a motion under this section if the record, including the pleadings, depositions, answers to interrogatories, admissions and affidavits, show that –
>
> (1) There is no disputed issue as to any material fact; and

(2) The moving party is entitled to summary decision as a matter of law.

43 C.F.R. § 4.1125.

These regulations do not exactly duplicate Rule 56 of the Federal Rules of Civil Procedure, which provides for summary judgments in federal courts. Nevertheless the regulation and the rule are sufficiently analogous for constructions of Rule 56 to provide useful guidance when interpreting 43 C.F.R. § 4.1125. *Daniel Bros. Coal Co.*, 2 IBSMA 45, 53-54 (1980). Under Rule 56, a court may grant summary judgment when the pleadings, depositions, answers to interrogatories, and admissions, together with affidavits, if any, show there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catreet*, 477 U.S. 317, 322-24 (1986).

The nonmoving party may not rest on mere allegations or denials but must "come forward with 'specific facts showing that there is a genuine issue for trial.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The judge may not weigh the evidence but may only determine whether a genuine factual dispute exists. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

Since neither Nutumya nor OSM has claimed that an issue of material fact exists, and I have found none in the record, I may decide Nutumya's motion on the issues of law it presents.

2. NEPA

Interior Board of Land Appeals precedent holds that "the adequacy of an EIS under section 102(2)(C) of NEPA must be judged by whether it constituted a 'detailed statement' that took a 'hard look' at all of the potential significant environmental consequences of the proposed action and reasonable alternatives thereto, considering all relevant matters of environmental concern." *E.g., Forest Guardians*, 170 IBLA 80, 95 (2006). When exercising statutory authority and undertaking a major federal action having a significant impact on the human environment, an agency must ensure through the NEPA process that it is fully informed of the environmental consequences of its proposed actions. *See id.* "In deciding whether an EIS promotes

informed decisionmaking, it is well settled that a 'rule of reason' will be employed." *Id.* The Board has described the "rule of reason" in the following manner:

> [A]n EIS need not be exhaustive to the point of discussing all possible details bearing on the proposed action but will be upheld as adequate if it has been compiled in good faith and sets forth sufficient information to enable the decisionmaker to consider fully the environmental factors involved and to make a reasoned decision after balancing the risks of harm to the environment against the benefits to be derived from the proposed action, as well as to make a reasoned choice between the alternatives.

Id. (quoting *County of Suffolk v. Sec'y of Interior*, 562 F.2d 1368, 1375 (2d Cir. 1977)).

In other words, an EIS must contain "a 'reasonably thorough discussion of the significant aspects of the probable environmental consequence' of the proposed action and alternatives thereto." *Id.* (quoting *Cal. v. Block*, 690 F.2d 753, 761 (9th Cir. 1982)).

An appellant must carry its burden to demonstrate by a preponderance of the evidence and with objective proof that the agency failed to adequately consider a substantial environmental question of material significance to the proposed action, or otherwise failed to abide by Section 102(2)(C) of NEPA. *Western Exploration Inc.*, 169 IBLA 388, 399 (2006). A mere difference of opinion provides no basis for reversal. *E.g., Underwood Livestock, Inc.*, 165 IBLA 128, 133 (2005).

3. SMCRA

Under the Departmental regulations applicable to proceedings reviewing the approval of an application for permit revision, the applicant bears the burden to present a prima facie case and the ultimate burden of persuasion.

> (d) In a proceeding to review the approval or disapproval of an application for a permit revision . . .
> . . .

> (2) If any other person [i.e., a person other than the permit applicant] is seeking review, that person shall have the burden of going forward to establish a prima facie case and the ultimate burden of persuasion that the application fails in some manner to comply with the applicable requirements of the Act and the regulations.

43 C.F.R. § 4.1366(d)(2).

Having reviewed the burden and standard of proof, I will next address the merits of Nutumya's arguments.

B. NEPA Compliance

1. Nutumya's NEPA Motion

Nutumya's NEPA Motion argues that the Final EIS violated NEPA for three reasons.

- It did not consider a reasonable range of alternatives to the proposed action.
- It did not describe the proper affected (i.e., baseline) environment.
- It did not achieve informed decision-making and meaningful public comment.

OSM and Peabody have both filed memoranda in opposition to the motion. The following analysis will first address the threshold issues raised by OSM and Peabody and then will consider the merits of Nutumya's motion.

2. The Threshold Objections to Nutumya's Motion Do Not Require Denial

a. Standing

Peabody argues that the Nutumya applicants lack standing to challenge NEPA adequacy because they have not demonstrated an injury in fact that is traceable to

OSM's decision. Peabody Opposition to Nutumya NEPA Motion 4-5. Peabody has previously filed a motion to dismiss the Natumya applicants for lack of standing. My March 20, 2009, order on that motion dismissed some 42 of the original 82 applicants. I found that the remaining 40 applicants could petition for review because they are persons "having an interest which is or may be adversely affected" within the meaning of 30 C.F.R. § 700.5. Because the standards for determining who may request review of an OSM decision differ from the standards for judicial standing cited by Peabody, I do not find reason to change my prior conclusion. Therefore I conclude that the Nutumya applicants have sufficient interest to challenge NEPA compliance in this proceeding.

b. List of Undisputed Facts

Peabody next argues that Nutumya failed to provide a list of undisputed facts to support their NEPA allegations. Peabody Opposition to Nutumya NEPA Motion 5-6. Peabody cites no authority requiring such a list and I am aware of none. While such a list may be helpful in presenting a motion for summary decision, the failure to provide a list does not present a ground for denying Nutumya's motion.

c. New Alleged Errors Raised in Nutumya's Motion

Finally OSM, supported by Peabody, argues that Nutumya should be prohibited from arguing (1) that the Final EIS described an improper affected, or baseline, environment or (2) that the Final EIS failed to promote informed decision-making and meaningful public comment, because Nutumya failed to make these claims in its original application for review. OSM Opposition to Nutumya NEPA Motion 16-17; Peabody Opposition to Nutumya NEPA Motion 9. Regulations require a request for review to provide an "explanation of each specific alleged error . . . , including reference to the statutory and regulatory provisions allegedly violated." 43 C.F.R. § 4.1363(a)(2). Any amendments require a motion to be filed with the administrative law judge. *Id.* § 4.1363(c).

Nutumya's request for review does not explicitly state that OSM erred by describing an improper baseline environment. But it does allege throughout several pages that the Final EIS did not comply with NEPA. And in one place Nutumya alleges that "OSM changed little of the language from the Draft EIS to the Final EIS."

Nutumya Request for Review 15. From this statement one can find the genesis of the argument Nutumya now makes: OSM failed to correctly describe the baseline environment because it did not change the description between the time of the Draft and the Final EIS.

Similarly Nutumya's request for review does not explicitly state that the Final EIS failed to promote informed decision-making and meaningful public comment. But this argument can be fairly implied from Nutumya's general allegations that the Final EIS did not comply with NEPA. Nutumya Request for Review 8-12. Therefore I find that Nutumya's request for review alleged NEPA violations sufficient to include the grounds it now relies on for its motion for summary decision.

Moreover neither OSM nor Peabody have shown that they are prejudiced by responding to these arguments. And indeed they have responded to each. OSM Opposition to Nutumya NEPA Motion 17-23; Peabody Opposition to Nutumya NEPA Motion 9-14. Therefore I conclude that Nutumya may rely on these arguments in its motion.

Having considered the threshold issues, I will next address the merits of Nutumya's motion.

3. The Substantially Changed Proposed Action Required a Supplemental Draft EIS or a New NEPA Process

By any measure, substantial changes relevant to environmental concerns occurred to the Black Mesa Project between the time OSM issued its Draft EIS and the time it issued the Final EIS. Peabody changed its application from a permit to operate two mines supplying two generating plants to one mine supplying one generating plant. Coal production reduced from 13.3 million tons to 8.5 million tons per year and water usage dropped from 4,400 acre-feet to 1,200 acre-feet per year. And Peabody eliminated four construction projects: a coal-wash plant, a haul road, a coal-slurry pipeline, and a new aquifer water supply system.

Given this substantial change, Council on Environmental Quality (CEQ) regulations required OSM to at least prepare a supplemental draft EIS.

> [E]nvironmental impact statements shall be prepared in two stages and may be supplemented.
>
> (a) Draft environmental impact statements shall be prepared in accordance with the scope decided upon in the scoping process. . . .
>
> (b) Final environmental impact statements shall respond to comments as required in part 1503 of this chapter. . . .
>
> (c) Agencies:
>
> (1) Shall prepare supplements to either draft or final environmental impact statements if:
>
> (i) The agency makes substantial changes in the proposed action that are relevant to environmental concerns;
>
> (ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.

40 C.F.R. § 1502.9 (emphasis added).

Instead of preparing a supplemental draft EIS, OSM kept the same alternatives for the Final EIS, but changed only the preferred alternative from A (approve a combined permanent program permit for the two mines and two generating plants, with four construction projects) to B (approve a combined permanent program permit for two mine areas but only one operating mine and one generating plant, with no construction projects). The change in the proposed action was both substantial and relevant to environmental concerns. At a minimum, the new proposed action would change the impacts on water resources, soils, vegetation, wildlife, and cultural resources. According to the CEQ regulations, OSM should have prepared and circulated at least a supplemental draft EIS.

A supplemental draft EIS would have allowed OSM to develop and analyze a new set of alternatives to satisfy the changed purpose and need. Instead OSM kept the old alternatives. One of these, Alternative A, could never satisfy the new purpose and need and was no longer feasible because Peabody no longer proposed it or desired to pay for it. Further a supplemental draft EIS would have permitted the public to comment and perhaps suggest additional alternatives.

Because the change was so substantial, OSM may also have considered whether to terminate the NEPA compliance process on Peabody's original application and start anew on Peabody's latest revised application. Since the impacts of the revised application appear to be substantially less than the original application, OSM possibly could even have concluded (by preparing an environmental assessment) that the new proposed action did not significantly affect the environment. Therefore it might have satisfied its NEPA obligations by issuing a finding of no significant impact (FONSI).

The Interior Board of Land Appeals has considered the CEQ regulation requiring supplemental EISs on several occasions. But the cases have applied the second prong of the regulation, requiring supplementation for new circumstances or information, rather than the first prong, requiring supplementation for a new proposed action.

In *William E. Love,* 151 IBLA 309 (2000), the Board considered the situation where the government agency had developed and approved a new alternative for a coal bed methane project that it had not analyzed in the draft EIS. It developed the new alternative in response to public comments on the draft. The CEQ's guidelines contained in its "Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations," specified that a supplemental draft EIS was not required if the new alternative falls "qualitatively within the spectrum of alternatives that were discussed in the draft." 46 Fed. Reg. 18,026, 18,035 (Mar. 23, 1981) (Answer to Question 29b: "How must an agency respond to a comment on a draft EIS that raises a new alternative not previously considered in the draft EIS?"). Relying on this guideline, the Board found that the new alternative lay within the range of alternatives considered in the draft EIS and thus a supplement was not required. *Id.* at 320-21.

Applying this reasoning to the Black Mesa Draft EIS could lead to the conclusion that a supplement was not required because the Final EIS adopted an alternative that was not only within the range of alternatives it previously considered but was indeed identical to an alternative considered in the draft. But in *Love* the proposed action had not changed as it did for the Black Mesa Project. And the CEQ guidelines the Board relied upon dealt with new alternatives and not with a new proposed action. Further the alternatives considered in *Love* did not include one that, as with the Black Mesa Alternative A, did not even satisfy the stated purpose and need. Therefore the *Love* decision does not require acceptance of OSM's Final EIS here.

In another decision, *In re Stratton Hog Timber Sale*, 160 IBLA 329 (2004), the Board considered the situation where the agency had prepared a report that supplemented a prior EA. Relying on the supplemental report, the agency reduced the timber sale considered in the EA by 20 percent. The Board, citing *Love*, inferred that "a 20 percent reduction in the scope of the project and thereby a 20 percent reduction in the scope of the potential impacts should [not] compel another NEPA document." *Id.* at 335 (emphasis in original).

Similar to *Love*, application of this reasoning to the Black Mesa Draft EIS could lead to a conclusion that the new proposed action did not require a supplemental draft EIS because the preferred alternative in the Final EIS (Alternative B - one mine, one generating plant) significantly reduced the impacts from those of the preferred alternative in the Draft EIS (Alternative A - two mines, two generating plants, and four construction projects). But a comparison of one proposed action to the other makes the wrong comparison.

The new proposed action must be compared to the present environmental conditions. In many situations, such as that in *Stratton Hog*, a new proposed action does not also involve new environmental conditions. Thus a new proposed action will usually affect the same environment as did the former proposed action. But in the Black Mesa situation, the new proposed action also involved new environmental conditions because the Mohave Generating Station and the coal-slurry pipeline no longer operated. The comparison here should be made between the new proposed action and the new environmental conditions. Therefore the *Stratton Hog* decision does not require accepting OSM's Final EIS here.

The Supreme Court addressed supplemental EISs in *Marsh v. Or. Natural Res. Council*, 490 U.S. 360 (1989), where it considered whether an agency must prepare a supplemental EIS when new information came to light after initial approval of a project. The Court acknowledged that

> an agency need not supplement an EIS every time new information comes to light after the EIS is finalized. To require otherwise would render agency decisionmaking intractable, always awaiting updated information only to find the new information outdated by the time a decision is made.

Id. at 373.

The Court ultimately concluded that the agency properly decided that the new information did not require a supplemental EIS. Significantly, for purposes of the present analysis, the Court did not address under what circumstances a change in the proposed agency action may require a supplemental EIS.

In *Alaska Wilderness Recreation and Tourism Assoc. v. Morrison*, 67 F.3d 723 (9th Cir. 1995), the court considered whether a government agency needed to supplement previously approved EISs when a 50-year timber sales contract terminated early because a pulp mill had closed. Those EISs had only considered alternatives that met the requirements of the 50-year contract. The court held that cancellation of the 50-year contract required the agency to prepare supplemental EISs.

> While we cannot predict what impact the elimination of the [50-year] contract will have on the Forest Service's ultimate land use decisions, clearly it affects the range of alternatives to be considered. Because consideration of alternatives is "the heart of the environmental impact statement," 40 C.F.R. § 1502.14, we hold that the cancellation of the [50-year] contract, which opened for consideration alternatives which could not be freely reviewed when the [50-year] contract was in force, is an event requiring serious and detailed evaluation by the Forest Service.

Id. at 730.

While *Alaska Wilderness* does not precisely parallel the Black Mesa situation, it teaches important lessons. In *Alaska Wilderness* the 50-year contract had limited the alternatives the agency had originally considered. When that contract terminated, NEPA required the agency to consider a new range of alternatives. *Id.* at 731. Similarly Peabody's original permit application had defined the range of alternatives considered in the Draft EIS. When Peabody changed its application, the transformation of the proposed action required OSM to consider a new range of alternatives.

Of similar import is *Natural Res. Def. Council v. U. S. Forest Serv.*, 421 F.3d 797 (9th Cir. 2005). There the government agency had developed alternatives for a revised forest plan based on admittedly incorrect market demand scenarios. The court held the agency violated NEPA because a purpose of the plan was to meet market demand and the agency failed to examine alternatives that satisfied the new market demand scenarios. Similarly OSM violated NEPA here when it failed to examine alternatives that would satisfy Peabody's new permit application.

4. The Final EIS Did Not Consider a Reasonable Range of Alternatives

Since OSM did not prepare a supplemental draft EIS, the Final EIS failed to analyze a reasonable range of alternatives to the new proposed action. Instead the Final EIS analyzed the same three alternatives the Draft EIS had analyzed for the original proposal. As a result the Final EIS considered one alternative that could never satisfy the new purpose and need (Alternative A), one alternative that did satisfy the purpose and need (Alternative B), and the no action alternative (Alternative C).

Alternative A emerged from the scoping for the Draft EIS as the alternative that would satisfy the original purpose and need. It combined all operations for the two mines and two generating plants under a single permanent program permit, and authorized four construction projects including reconstruction of a coal-slurry pipeline. This alternative could not possibly satisfy the revised purpose and need, which only sought a permit for operation of one mine to supply one generating plant. NEPA requires an analysis of alternatives to the proposed action that would satisfy

the purpose and need for action. Since alternative A does not meet this definition it cannot qualify as a valid alternative.

OSM justified including alternative A in the Final EIS because it is "still possible, albeit unlikely."

> Although these actions [Alternative A] are no longer proposed and not part of the preferred alternative, they still could occur under certain circumstances. Alternative A addresses supplying coal to the Mohave Generating Station, which remains permitted for operation. Although operation of the Mohave Generating Station was suspended in December 2005, it has not been decommissioned. Although it appears that implementing Alternative A is unlikely, Peabody wishes to proceed in revising its permit to incorporate the surface facilities and coal-resource areas in the initial program area of its adjacent Black Mesa mining operation; that is, Alternative B. Because Alternative A is still possible, albeit unlikely, this EIS continues to analyze its effects.

Final EIS at ES-2 (emphasis added).

I do not find this justification reasonable because NEPA does not require analysis of possible but unlikely alternatives. Indeed the courts and the Board have consistently emphasized that alternatives must "accomplish the intended purpose, [be] technically and economically feasible, and yet have a lesser impact. 40 C.F.R. § 1500.2(e)." *Sierra Club Uncompahgre Group*, 152 IBLA 371, 378 (2000). *See Headwaters, Inc. v. BLM*, 914 F.2d 1174, 1180-81 (9th Cir. 1990); *City of Aurora v. Hunt*, 749 F.2d 1457, 1466-67 (10th Cir. 1984); *Defenders of Wildlife*, 152 IBLA 1, 9 (2000); *Larry Thompson*, 151 IBLA 208, 219-20 (1999). Peabody no longer wants to implement this action and it clearly has more environmental impacts than the proposed action. Thus it does not satisfy the definition of a reasonable alternative. While OSM enjoys discretion in choosing the alternatives to analyze, it must make a reasonable choice and I do not find the justification it articulated for choosing Alternative A to be reasonable here.

Eliminating Alternative A leaves only the proposed action (Alternative B) and the no action alternative (Alternative C) as viable alternatives. The courts have

recognized that just these two types of alternatives (the proposed action and the no action) may provide a sufficient range of alternatives in some situations. *See, e.g., Native Ecosystems Council v. U. S. Forest Serv.*, 428 F.3d 1233, 1246 (9th Cir. 2005). Further the Board has required that persons challenging the range of alternatives must identify another alternative that satisfies the purpose and need, is technically feasible, and has a lesser impact. *See Great Basin Mine Watch*, 159 IBLA 324, 354-55 (2003).

Nutumya has suggested an alternative that would incorporate "the surface facilities of the two mining operations without incorporating the mining areas." Nutumya NEPA Motion 19. I have interpreted this as an alternative that places the surface facilities from both the Kayenta and Black Mesa mining operations under a permanent program permit, leaves the Kayenta operations under the permanent program, and rejects any permit (either initial or permanent) for the now idle Black Mesa operation. This alternative could have less environmental consequences, since it would not permit additional mining for the Black Mesa lands. OSM neither considered this alternative nor explained why it should be rejected as "an alternative considered but eliminated from detailed study."

The reason OSM did not consider this alternative, or other possibilities, derives from its failure to prepare a supplemental draft EIS when it made substantial changes in the proposed action. OSM developed the original set of alternatives in response to the original proposed action. Alternatives to this action (involving two mines, two generating plants and four construction projects) would necessarily differ from alternatives to a substantially scaled back action (involving one mine, one generating plant, and no construction projects). Yet OSM considered the same three alternatives for both projects. A supplemental draft EIS, with a substantially scaled back proposed action and elimination of the infeasible Alternative A, should have generated additional alternatives by OSM or an explanation of why none existed. Additional suggestions for alternatives may also have come from public comments to a supplemental draft EIS. But one can only speculate what might have occurred because OSM did not follow the procedure required by the CEQ regulations.

5. The Final EIS Improperly Described the Affected (Baseline) Environment

When the proposed action changed, the affected environment also changed. Mining from the Black Mesa operation stopped in December 2005 when the Mohave Generating Station stopped producing electricity. OSM prepared the Draft EIS the following year in November 2006 when Peabody expected coal and electric production would resume and thus the Draft EIS described the affected environment in its Chapter 3 assuming that both mines and both generating plants would operate.

By the time the proposed action changed in July 2008, OSM and Peabody had concluded that the Mohave Generating Station would not likely resume production. At the time OSM issued the Final EIS in November 2008, the affected environment no longer included the effects from the Black Mesa coal mining operation, the Mohave Generating Station, or the coal-slurry pipeline.

Yet the Final EIS continued to describe the affected environment as if these operations continued. For example it continued to describe the vegetation, wildlife, and land uses along the route of the coal-slurry pipeline. Final EIS at 3-63 thru 3-67 (vegetation), 3-74 thru 3-78 (fish and wildlife), 3-88 thru 3-93 (land uses). And it described water withdrawal from the aquifers (Final EIS at 3-40) and air monitoring data for the years before 2005 (*Id.* at 3-53 (Table 3-13), 3-55 (Table 3-55)) when both mines operated. According to Nutumya, this description provided a skewed baseline against which to analyze the environmental impacts of the proposed action and alternatives. Natumya NEPA Motion 32-35. Because OSM described the baseline when both mines and both generating stations operated, the baseline would necessarily have higher impacts than when only one mine and generating station operated. A comparison of this high baseline (when both mines operated) to the anticipated impacts from the proposed action and alternatives (when only one mine operated) would necessary yield less impact.

Further by continuing to describe the affected environment as if the Black Mesa and Mohave operations continued, the Final EIS created the impression that just the Kayenta and Navajo operations would have much less impact. For example the Executive Summary for the Final EIS described the anticipated consequences of

Alternative B (the proposed action) by comparing it to the environment that existed when the Black Mesa and Mohave operations continued.

> It is anticipated that, under Alternative B, approximately 6,942 acres would be disturbed by mining from 2010 through 2026. The impacts are characterized similarly to those of Alternative A, for an area reduced in size (i.e., about 6,942 acres would be mined [5,467 acres fewer than Alternative A]. . . . The areas in which vegetation would be disturbed would be reduced, ... Fewer cultural resource and traditional cultural resources would be affected. . . . With the reduction in mining, there would be fewer coal-haul roads constructed.

Final EIS at ES-17 (emphasis added).

OSM should have made the comparisons to the environment that existed after Black Mesa and Mohave ceased operation, not while the Black Mesa and Mohave operations continued (as described in Alternative A). By describing the affected or baseline environment as if the Black Mesa and Mohave operations continued, OSM misstated the magnitude of the impact of the proposed project (i.e., the Kayenta and Navajo operations) on the environment. It left the impression that the proposed action would have significantly less impact.

OSM should have compared the impacts of the proposed action (i.e., including the Black Mesa operations under the permanent regularity program) to the conditions existing without the Mohave operations. This would have given the true picture of the impact to the existing environment (i.e., without the Mohave operations). Instead of showing less impact, use of the correct baseline may have shown that the proposed action had more impact. But one does not know because OSM did not perform the correct analysis.

6. The Final EIS Did Not Achieve Informed Decision-making and Meaningful Public Comment

Finally by not issuing a supplemental draft EIS, or starting over with a new NEPA compliance process, OSM denied informed decision-making and meaningful public comment. For example when OSM began the EIS preparation it conducted the

scoping process required by the CEQ regulations. That process resulted in a list of issues raised by the public. Of the issues OSM identified for "actions and alternatives," all nine involved the Mohave Generating Station, its coal-slurry pipeline, or the required water-supply pipeline. Draft EIS 1-12 thru 1-13. Even though Peabody's revised application eliminated each of these projects, the Final EIS continued to list the same nine issues. Final EIS at 1-12. As a result OSM never considered whether the revised application presented new issues.

This failure to revise the scope and significant issue determinations violated CEQ regulations.

> An agency shall revise the determinations made under paragraphs (a) [mandatory actions such as determining the scope and the issues to be analyzed in depth] and (b) [permissive actions such as page and time limits] of this section if substantial changes are made later in the proposed action, or if significant new circumstances or information arise which bear on the proposal or its impacts.

40 C.F.R. § 1501.7 (c) (emphasis added).

But more fundamentally, the process OSM followed here – proceeding directly to a final EIS, after making "substantial changes in the proposed action" – failed to achieve NEPA's purposes.

• It failed 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. Because it copied the alternatives developed for an earlier and now defunct proposed action, it never considered whether different alternatives existed for the substantially changed current proposed action.

• It failed to "provide full and fair discussion of significant environmental impacts." 40 C.F.R. § 1502.1. Because it continued to analyze an unlikely alternative, it failed to focus the discussion on the impacts of the proposed action. Table 2-9 of the Final EIS provides an example of the lack of discussion given to the impacts of the proposed action. This table provides a "summary of impacts by alternative" and

devotes most discussion to the unlikely alternative (Alternative A). The result contains relatively little discussion of the environmental impacts of the new proposed action (Alternative B).

I have also considered the possibility that the Final EIS could be found sufficient if the two alternatives, B and C, are the only alternatives considered and the discussions about Alternative A are ignored. After all, OSM did analyze Alternative B, the proposed action. *See Friends of Marlot Park v. U. S. Dep't of Transp.*, 382 F.3d 1088, 1097 (10th Cir. 2004) (a supplemental EIS not required as long as the selected alternative was fully evaluated). But this possibility must be rejected for several reasons.

• It deprives OSM of potentially developing additional alternatives to B (the new proposed action). OSM did use Alternative C (the no action alternative) for comparison, but it failed to develop additional alternatives. When Alternative A was the proposed action OSM had the benefit of the scoping process to develop issues and alternatives. And while CEQ regulations do not require additional scoping for a supplemental draft EIS (40 C.F.R. § 1502.9(c)(4)), OSM could have developed additional alternatives on its own (or considered and rejected other alternatives) for a supplemental draft. But we do not know the possibilities because OSM did not follow the procedure required by the CEQ regulations (i.e, prepare a supplemental draft EIS). In addition a supplemental draft EIS may have prompted additional alternatives from public comments. OSM could have then considered these in a final EIS.

• It requires comparing Alternative B to a baseline (described in Chapter 3 of the Final EIS as the Affected Environment) developed for the assumption that the mining and slurry transportation of coal would continue from the Black Mesa Operation to the Mohave Generating Station. Because this assumption is no longer valid the Final EIS needed a revised description of the affected environment.

• By continuing to analyze the unlikely Alternative A, the Final EIS bogs down the reader (both the government and the public) in needless analysis, and the environmental impacts of Alternative B do not emerge.

7. Summary

The courts have admonished that the form, content, and preparation of an EIS must foster informed decision making and public participation.

> In reviewing the adequacy of an EIS, we examine whether the EIS's "form, content and preparation foster both informed decision-making and informed public participation." *Colo. Envtl. Coalition v. Dombeck*, 185 F.3d 1162, 1172 (10th Cir.1999) (quotation omitted).

Friends of Marolt Park v. U. S. Dep't of Transp., 382 F.3d 1088, 1095 (10th Cir. 2004).

In this case the form of the Final EIS did not foster informed decision making because it devoted the majority of its information and analysis to an alternative (which included the operation of the Blake Mesa mine, the Mohave Generating Station, and the connecting coal-slurry pipeline) that was not feasible because Peabody did not want to implement it. As a result the form diverted attention from the information and analysis OSM needed for the decision it had to make - whether to approve, conditionally approve, or reject Peabody's application to extend the SMCRA permanent program to the Black Mesa operations. One may have gleaned the needed information and analysis from scattered sections, but it was buried under a mountain of irrelevant data. Similarly the inclusion of irrelevant analysis stifled public participation because it presented the impression that the operation of the Blake Mesa mine, the Mohave Generating Station, and the connecting coal-slurry pipeline was still a viable option.

Further the content of the Final EIS fostered neither informed decision making or public participation because it continued to describe the affected environment as if the Black Mesa mine, the Mohave Generating Station, and the coal-slurry pipeline continued to operate. In fact they had been shut down since 2005 and Peabody did not apply to operate them under its revised application. The Final EIS continued to describe the affected environment as if the pipeline continued to operate and thus failed to provide an accurate description. Without this description neither OSM nor the public could accurately determine the magnitude of the impacts of the proposed action on environmental resources.

Finally the preparation of the Final EIS did not foster informed decision making or public participation because it did not develop a reasonable range of alternatives to the substantially changed proposed action. OSM prepared the Final EIS by first developing alternatives to the original proposed action (which included operation of the Blake Mesa mine, the Mohave Generating Station, and the connecting coal-slurry pipeline) and issuing the Draft EIS analyzing these alternatives. But when Peabody changed the proposed action (by eliminating the operation of the Blake Mesa mine, the Mohave Generating Station, and the connecting coal-slurry pipeline), OSM did not develop new alternatives to the new proposed action, but instead issued the Final EIS with the same set of alternatives. By proceeding directly to a final EIS, without issuing a supplemental draft, OSM deprived itself and the public of the opportunity to develop a reasonable range of alternatives to the new proposed action.

A supplemental draft would have given OSM the opportunity to prepare a new range of alternatives (or explain why none existed) for the new proposed action. Instead OSM used the same alternatives (including one that was not feasible) prepared for the old proposed action. The public should have had the opportunity to comment on alternatives tailored for the new proposed action in a supplemental draft. They could have then suggested additional alternatives that OSM could have analyzed in a final EIS. The process OSM actually used (opening a period to comment on a different preferred alternative chosen from those developed for the original proposed action) eliminated the opportunity for OSM to develop alternatives for the new proposed action which the public could comment on.

In summary the combined effects of these deficiencies in the form, content, and preparation of the Final EIS combined to deprive the public and OSM of the information they needed to participate in and make a decision on Peabody's current application. Because the Final EIS did not comply with NEPA, it cannot support OSM's permit decision, and the permit decision must therefore be vacated and remanded to OSM.

8. Other NEPA Issues

Other pending motions also raise NEPA issues. For example BMWC's NEPA Motion alleges that the Final EIS failed to (1) adequately analyze impacts related to

global warming, (2) consider the impacts of mercury and selenium emissions, and (3) consider the impacts of the National Pollution Discharge Elimination System (NPDES) permit issued by the Environmental Protection Agency. And OSM's NEPA Motion seeks to dismiss CARE's allegations that the Final EIS did not (1) provide a valid purpose and need statement or (2) consider a no action alternative.

I need not address the merits of BMWC's motion because I can grant no additional relief, even if a favorable result could be rendered on its motion. The result it sought – vacatur of the OSM decision – has been granted.

In such circumstances, where no relief can be given, further administrative review is normally moot. Nevertheless an exception applies where an issue exists that is "capable of repetition, yet evading review." *See Colo. Env't Coal.*, 108 IBLA 10, 15-16 (1989). While BMWC may make the same allegations about any new NEPA document that OSM may prepare in the future, such allegations will not escape review because they may be reviewed then in the context of any new NEPA document instead of one that this order holds invalid.

Similar reasoning applies to OSM's NEPA Motion. OSM must prepare different NEPA documentation to support a new decision that replaces the one vacated here. Because CARE may allege different errors about a new NEPA document, review of an invalidated EIS would be premature at this time. Thus the motion is no longer ripe for review.

C. Rulings on the Eighteen Other Motions

The conclusion that OSM relied on an invalid EIS requires that its decision to approve Peabody's permit application be vacated and remanded to OSM. Upon remand, OSM will have discretion to choose a different means to comply with NEPA. It may prepare a supplemental draft EIS, prepare an EA, or choose some other method. Once it has complied with NEPA, it will have discretion to issue a new decision, which could be different from the present one.

As with the NEPA motions discussed above, granting Nutumya's motion renders the other pending motions either moot or not ripe for review. Each applicant sought to vacate OSM's decision, which has now been done. Since I can give no

additional relief, their motions are now moot. And, like the NEPA issues, if the applicants seek to review a future OSM decision, their claims must be reviewed on a new administrative record. Such a record will necessarily differ from the one now before me. Because the applicants may allege different errors about a new OSM decision, a decision on the issues raised in their motions would be premature at this time. Thus their motions are no longer ripe for review.

Similarly the motions of OSM and Peabody are rendered moot by this order because I cannot render the relief they seek, i.e., affirmance of OSM's decision. In addition their motions are no longer ripe for review since they are based on the current administrative record, which supported the vacated decision. Any future review will depend upon a different administrative record and new or different claims of error that applicants may make.

Nevertheless, two of the motions – Peabody's Navajo Aquifer Motion and BMWC's ESA Motion – merit individual comment.

• Peabody's Navajo Aquifer Motion seeks an order confirming the adequacy of OSM's Cumulative Hydrologic Impact Assessment (CHIA). OSM prepared the CHIA as required by SMCRA and based it on information provided by Peabody in its Permit Application Package (PAP). BMWC's application for review has challenged its adequacy. Since the CHIA depends on the PAP, and not on the Final EIS, a conclusion that the Final EIS is inadequate does not necessarily mean that the CHIA is inadequate. Therefore a decision on the adequacy of the CHIA could be made.

Nevertheless I decline to do so for two reasons. First, Peabody may change the PAP on which the current CHIA is based between now and the time OSM issues a new permit decision. After all, the current record shows that Peabody revised the permit application numerous timed in the past (i.e, in 2004, 2005, 2006 and 2008) A.R. 1-02-01-000005 (Record of Decision). Another revision may require OSM to revise the current CHIA. Second, Peabody has tailored its arguments to the errors claimed in BMWC's application for review. If BMWC were to apply for review of a future permit decision based on the CHIA, it may present different claims of error. Therefore addressing the merits of Peabody's Navajo Aquifer Motion will serve no concrete purpose because the circumstances may materially change by the time OSM issues a new decision on the permit application.

• BMWC's ESA Motion seeks an order that OSM's Final Biological Assessment (BA) does not satisfy ESA requirements. Similar to the CHIA, the Final BA is a separate document not dependent on the validity of the Final ESA. But the BA did rely upon information contained in Peabody's permit application. The BA concluded that approval "may affect, but was not likely to adversely affect" threatened or endangered species or their critical habitat.

The same reasons for declining to determine the adequacy of the CHIA also apply for declining to determine the adequacy of the Final BA. Peabody may change its permit application before OSM issues a new decision and BMWC may change its claims of error if it applies to review a new OSM permit decision. In addition, as a result of considering possible new alternatives in an new NEPA document, OSM may choose a different action that would have to be analyzed in a new BA or other ESA document. Therefore addressing the merits of BMWC's ESA Motion will serve no concert purpose because the circumstances may materially differ by the time OSM issues a new decision.

Therefore I will not decide the other eighteen pending motions at this time. They are either moot or not ripe for review.

IV. Conclusion

OSM violated NEPA by not preparing a supplemental draft EIS when Peabody changed the proposed action. As a result the Final EIS did not consider a reasonable range of alternatives to the new proposed action, described the wrong environmental baseline, and did not achieve the informed decision-making and meaningful public comment required by NEPA. Because of the defective Final EIS, OSM's decision to issue a revised permit to Peabody must be vacated and remanded to OSM for further action.

Having considered the motion, the other papers on file, and for good cause, it is ordered that:

1. The Motion by Petitioners, Kendall Nutumya, *et al.*, in Docket No. DV 2009-4-PR, for Summary Disposition Based on OSM's Violations of the National Environmental Policy Act (NEPA), is granted.

2. The Decision, dated December 22, 2008, of the Office of Surface Mining Reclamation and Enforcement, approving the Application for Significant Permit Revision (Project AZ-001-E-P-01)(Permit AZ-001D) filed by Peabody Western Coal Company for the Black Mesa Complex, is vacated.

3. The other pending motions in this consolidated preceding are denied as moot or not ripe for review.

4. The requests for review filed by the following applicants are dismissed as moot.

Californians for Renewable Energy, Docket No.DV 2009-1-PR
Victor Masayesva, Jr., Docket No. DV 2009-2-PR
Black Mesa Water Coalition, *et al.*, Docket No.DV 2009-3-PR
The Forgotten People, Docket No. DV 2009-5-PR
Coal Mine Canyon Chapter, Docket No. DV 2009-6-PR
Tonalea Chapter, Docket No. DV 2009-7-PR
Leupp Chapter, Docket No. DV 2009-8-PR

5. The prehearing conference scheduled for March 9, 2010, and the hearing scheduled for March 16, 2010, are cancelled.

Appeal Rights

Any party aggrieved by this decision may file a petition for discretionary review with the Interior Board of Land Appeals, or seek judicial review, pursuant to the provisions in 43 C.F.R. § 4.1369.

Robert G. Holt
Administrative Law Judge

See page 38 for distribution.

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