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Western Regional Coordinating Center  
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RE: Black Mesa Project Draft Environmental Impact Statement Comments

Dear Mr. Winterringer:

This letter contains the comments of the Attorney General of the State of California that the Office of Surface Mining Reclamation and Enforcement's (OSM) Draft Environmental Impact Statement (DEIS) for the expansion of surface coal mining operations at the Black Mesa Complex fails to comply with the National Environmental Policy Act (NEPA).

The Attorney General submits these comments pursuant to his independent power and duty to protect the natural resources of the State from pollution, impairment, or destruction in furtherance of the public interest. *See* Cal. Const. art. V, § 13; Cal. Gov. Code §§ 12511, 12600-12; *D'Amico v. Bd. of Med. Exam'rs*, 11 Cal.3d 1, 14-15 (1974). These comments are made on behalf of the Attorney General and not on behalf of any other California agency or office.

These comments are not an exhaustive discussion of all issues raised by the DEIS, but focus on the failure of OSM to conduct an adequate analysis of the reasonably foreseeable consequences of the coal mining and electricity generation resulting from the Black Mesa project. Specifically, the DEIS fails to properly examine the contribution of greenhouse gas emissions to global warming, a severe threat to California's natural resources, climate, and economy.

## I. Introduction

Peabody Western Coal Company (Peabody) submitted a permit application to OSM, seeking to expand surface coal mining operations at the Black Mesa Complex in northern Arizona and southern Nevada. The Black Mesa project would resume mining operations at the Black Mesa mine until 2026, increase annual coal production from the mine to 6.35 million tons, and permit the reconstruction of a coal-slurry pipeline from the Black Mesa mine to the Mohave Generating Station in Nevada.

The Black Mesa mine shut down its operations in December 2005, after its sole customer – the Mohave Generating Station – was suspended from further generation activities for failing to install air pollution control technologies. Although the Mohave Generating Station at this point remains closed, OSM proposes to permit a significant increase in coal production at Black Mesa and to build a pipeline between the two operations. Clearly, although the Mohave Generating Station is currently not operational, the DEIS implicitly assumes that it will be permitted to reopen and will utilize the coal from Black Mesa. Consequently, this project would prolong our country's reliance on dirty coal-fired electricity, with its concomitant contribution to global warming.

The United States is the largest emitter of greenhouse gases in the world, and our emissions are now 15 percent greater than they were in 1990. Joseph P. Tomain and Richard D. Cudahy, *Energy Law*, at 250-51 (Thomson-West, 2004); *see also* Energy Information Administration, *Emissions of Greenhouse Gases in the United States*, Ch. 2, "Carbon Dioxide Emissions," Report No. DOE/EIA-0573 (2005) (demonstrating that U.S. carbon dioxide emissions have increased approximately 1.2 percent each year for the past fifteen years). Energy-related activities, and particularly emissions from fossil fuel combustion, serve as the primary source of greenhouse gases, including carbon dioxide. U.S. Greenhouse Gas Inventory Reports, *Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990-2004*, Ch. 3, p. 1 (2006). Coal burning plants are the largest U.S. source of carbon dioxide pollution, producing 2.5 billion tons a year.<sup>1/</sup>

Available scientific evidence indicates that global warming has already affected a diverse set of physical and biological systems throughout the world. Examples of observed changes include "shrinkage of glaciers, thawing of permafrost, later freezing and earlier break-up of ice on rivers and lakes, lengthening of mid- to high-latitude growing seasons, . . . shifts of plant and animal ranges, declines of some plant and animal populations, and earlier flowering of trees, emergence of insects, and egg-laying in birds." Intergovernmental Panel on Climate Change,

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1. Coal combustion also causes three other sources of serious air pollution: sulfur oxide, nitrogen oxide, and particulate matter. According to the U.S. Environmental Protection Agency, when the Mohave Generating Station was operational, it was the largest source of sulfur dioxide pollution in the West, contributing significantly to visibility impairment at the Grand Canyon National Park. U.S. EPA Final MOHAVE Report Fact Sheet, *available at* <http://www.epa.gov/region09/air/mohave/mofact.html>.

*Climate Change 2001: Impacts, Adaptation, and Vulnerability, Summary for Policy Makers*, Ch. 2, p. 3.

Although the Black Mesa DEIS includes a cursory discussion of the global warming trend, it fails to analyze adequately the effects of the proposed coal mining and coal-fired generation on climate change. The DEIS acknowledges that scientists know “with virtual certainty” that human activities are changing the composition of the earth’s atmosphere, and that atmospheric buildup of carbon dioxide and other greenhouse gases is largely the result of activities such as the burning of fossil fuels. DEIS, Ch. 3, Affected Environment, at 45. The DEIS also concedes that a warming trend has occurred during the 20<sup>th</sup> century, that the major greenhouse gases emitted by human activities remain in the atmosphere for periods ranging from decades to centuries, and that increasing greenhouse gas concentrations tend to warm the planet. *Id.* Nonetheless, the DEIS maintains – without any substantive analysis – that emissions resulting from the Black Mesa Project are “too small to allow calculation of any measurable impacts of the project on global climate change.” DEIS, Ch. 4, Environmental Consequences, at 40. Inexplicably, and erroneously, the Black Mesa DEIS concludes that the project will not directly or indirectly impact global warming. *Id.* at 40, 164.

## **II. The DEIS Does Not Adequately Consider the Reasonably Foreseeable Significant Adverse Impacts of the Black Mesa Project on Global Warming.**

NEPA requires that federal agencies consider “any adverse environmental effects” of their “major . . . actions.” 42 U.S.C. § 4332(2)(C). NEPA assigns the Council on Environmental Quality (CEQ) the task of ensuring that federal agencies meet their obligations under the Act. 40 C.F.R. § 1500.3. Regulations issued by CEQ, which are binding on federal agencies, explain that the agencies must consider both direct and indirect effects. 40 C.F.R. § 1502.16. Direct effects are effects caused by an action occurring at the same time and place, while indirect effects are later in time or farther removed in distance, but are still reasonably foreseeable. 40 C.F.R. §§ 1508.8(a)-(b). Indirect effects may include effects on air and water and other natural systems, including ecosystems. 40 C.F.R. § 1508.8(b). The language regarding indirect effects “leaves little doubt that . . . degradation in air quality [] is indeed something that must be addressed in an EIS if it is ‘reasonably foreseeable.’” *Mid States Coalition for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 549 (8th Cir. 2003). An environmental effect is reasonably foreseeable if it is “sufficiently likely to occur that a person of ordinary prudence would take it into account in reaching a decision.” *Id.* (quoting *Sierra Club v. Marsh*, 976 F.2d 763, 767 (1st Cir. 1992)).

Although increased carbon dioxide emissions and the resulting difficulty in reducing overall emissions contributing to global warming are reasonably foreseeable results of the Black Mesa project, the DEIS fails to adequately consider these significant environmental effects. According to OSM, the Mohave Generating Station produced 10.7 million tons of carbon dioxide in 2004, or about 0.4 percent of the total amount of carbon dioxide produced by electrical generation in the United States. DEIS, Ch. 3, Affected Environment, at 46. OSM predicts that, if the power plant resumes operations, carbon dioxide emissions would increase by about 12 percent -- reaching 11.9 million tons per year -- “since the future capacity factor of [the station] is assumed to be higher than its recent historic baseline.” DEIS, Ch. 4, Environmental

Consequences, at 162-63. Consequently, if the project is approved and the Black Mesa coal is mined and burned for electrical generation, approximately 200 million tons of carbon dioxide will be released into the atmosphere over the next seventeen years. This would account for approximately 0.5 percent<sup>2</sup> of electricity-generated carbon dioxide emissions nationwide. *Id.* at 163. In light of the significant carbon dioxide emissions produced by the United States, the federal government cannot assume that 0.5 percent is insubstantial. It is also worth noting that these increased emissions will likely need to be offset in the future to reduce the United States' emissions overall.

Rather than evaluating the reasonably foreseeable consequences of emitting nearly 12 million tons of carbon dioxide into the atmosphere annually, the DEIS simply asserts that these figures are “negligible when compared to total greenhouse gases produced in the United States.” *Id.* at 40. As discussed below, OSM did not provide any modeling data or scientific evidence to support this claim. In this regard, the DEIS is reminiscent of the EIS which was rejected in *Mid States*. In that case, the Eighth Circuit criticized the Surface Transportation Board for failing to utilize commonly accepted computer models that could be used to forecast the effects of the project on consumption of coal. 345 F.3d at 550. Only after the Board utilized a program that enabled it not just to forecast coal supply and demand, but to quantify environmental impacts, did the court conclude that the problems with the EIS had been cured. *Mayo Foundation v. Surface Transp. Bd.*, 472 F.3d 545, 555 (8th Cir. 2006).

### **III. In Contravention of NEPA, the DEIS Fails to Substantiate Its Claims With Scientific Data.**

NEPA imposes no substantive requirements, but rather requires agencies to take a “hard look” at the environmental consequences of its actions before going forward. *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976); *Ecology Center, Inc. v. Austin*, 430 F.3d 1057, 1062 (9th Cir. 2005). A hard look includes all foreseeable direct and indirect impacts, and should discuss adverse impacts in a manner that does not improperly minimize negative side effects. *Northern Alaska Envtl. Ctr. v. Kempthorne*, 457 F.3d 969, 975 (9th Cir. 2006).

In meeting its obligation to take a hard look at the environmental effects of a project, “[a]n agency must set forth a reasoned explanation for its decision and cannot simply assert that its decision will have an insignificant effect on the environment.” *Marble Mountain Audubon Soc’y v. Rice*, 914 F.2d 179, 182 (9th Cir. 1990). It may not make conclusory statements in an EIS “without any apparent study or supporting documentation.” *Id.* While an agency’s choice of methodology is entitled to deference, a conclusion “predicated on an unverified hypothesis” is considered arbitrary and capricious. *Ecology Center, Inc.*, 430 F.3d at 1064.

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2. The DEIS incorrectly states that emissions from Mohave “would represent less than 0.05 percent of the 2004 emissions produced by electrical generation in the United States.” DEIS, Ch. 4, Environmental Consequences, at 163. However, based on the table provided on the same page, it is evident that OSM misplaced the decimal point, and the correct percentage is 0.5.

OSM has failed to provide adequate study or documentation to support its conclusion that 0.5 percent of nationwide emissions should be considered negligible. Indeed, it seems probable that the emission of 200 million tons of carbon dioxide into the atmosphere in less than twenty years would have significant impacts, at the very least in terms of increasing the difficulty of overall emission offsets. OSM, by simply declaring that the effect as compared to the rest of the world is so small as to be insignificant, has not provided an adequate basis for its conclusion. “Because ‘speculation is . . . implicit in NEPA, [] we must reject any attempt by agencies to shirk their responsibilities under NEPA by labeling any and all discussion of future environmental effects as ‘crystal ball inquiry.’” *Selkirk Conservation Alliance v. Forsgren*, 336 F.3d 944, 962 (9th Cir. 2003) (quoting *Scientists’ Inst. for Pub. Info., Inc. v. Atomic Energy Comm’n*, 481 F.2d 1079, 1092 (D.C. Cir. 1973)).

An agency bears the responsibility of providing adequately supported data in part to enable the public to evaluate the impact of the project. In *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1150 (9th Cir. 1998), the court stated that “allowing the [agency] to rely on expert opinion without hard data either vitiates a plaintiff’s ability to challenge an agency action or results in the courts second guessing an agency’s scientific conclusions.” Because either result is unacceptable, the court held that NEPA requires that the public receive the underlying environmental data upon which the agency’s action is based. *Id.*

The DEIS, in relying on conclusory statements without substantiating evidence, has precluded the public from adequately evaluating the impact of the Black Mesa project. For instance, it states that it is not scientifically possible to know the impact of the project on global warming. DEIS, Ch. 4, Environmental Consequences, at 40. Yet in the next breath it concludes that the contribution of greenhouse gases from Black Mesa would be negligible when compared to the total amount of greenhouse gases produced in the United States. *Id.* There is a vast difference between concluding that effects are unknowable, and that they are insignificant. Without any scientific data to support OSM’s pronouncements, the public cannot adequately evaluate these contradictory statements.

#### **IV. Because the Mohave Generating Station and the Black Mesa Mining Operation are Interdependent, the DEIS Should Have Considered the Impacts of Reopening Mohave More Thoroughly, Including an Analysis of Alternatives to Coal-Fired Electricity.**

Although it is well-settled that NEPA requires agencies to evaluate the consequences of connected and cumulative actions, OSM has improperly failed to do so here.<sup>3/</sup> 40 C.F.R. §

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3. Connected and cumulative actions must be discussed in a single NEPA document. Actions are connected if they (i) automatically trigger 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). Actions are cumulative when, if viewed with other proposed actions, they have cumulatively significant impacts. 40 C.F.R. § 1508.25(a)(2).

1508.25. According to the DEIS, “the Black Mesa Project is necessary for the Mohave Generating Station to resume operations.” DEIS, Preface, at 1. Indeed, the stated purpose of the Black Mesa Project is to “supply coal from the Black Mesa mining operation to the Mohave Generating Station in Laughlin, Nevada.” *Id.* There is no question that the two projects are economically dependent: the Mohave Generating Station, when operational, was the sole customer of Black Mesa. They are also physically dependent: the proposal under consideration would reconstruct a coal-slurry pipeline from Black Mesa directly to the now-closed Mohave Generating Station. *Id.* The proposal for increased mining at Black Mesa implicitly assumes that Mohave will reopen, and that it will continue to operate as a coal-fired electricity generation plant. Yet, despite the clearly connected nature of the two operations, the DEIS specifically excludes the Station from analysis in the DEIS, stating that “reconstruction of the Mohave Generating Station is not a part of the Black Mesa Project and is not analyzed in this EIS.” *Id.*

While an agency must be given considerable discretion in defining the scope of an EIS, the circumstances here warrant discussion of both Mohave and Black Mesa in a single document. *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 893-94 (9th Cir. 2002) (“[a]lthough federal agencies are given considerable discretion to define the scope of NEPA review, connected, cumulative, and similar actions must be considered together to prevent an agency from dividing a project into multiple actions, each of which individually has an insignificant environmental impact, but which collectively have a substantial impact.”).

The courts apply an “independent utility” test to determine whether multiple actions are connected such that an agency must consider them in a single EIS: “Where each of two projects would have taken place with or without the other, each has ‘independent utility’ and the two are not considered independent actions.” *Id.* at 894. Here, it is clear that the Black Mesa mining operation and reopening of the Mohave Generating Station do not have independent utility. They are inextricably intertwined, and consequently they should be considered connected and cumulative actions within the meaning of the CEQ regulations. As a result, the DEIS should have described the adverse environmental impacts of reopening the Mohave Generating Station.

In addition, and perhaps more importantly, the DEIS should have considered alternatives to the increased use of coal-fired electricity that will result from the project as a whole. For example, the DEIS contains no analysis of less-polluting alternatives to the expanded use of dirtier coal-fired electricity, such as conservation, renewable energy sources, a different mix of power, or carbon dioxide control technology, to name a few. Rather, the DEIS explicitly declined to address these alternatives, stating, “[b]ecause this EIS is a response to Peabody’s application to revise the mining plans for Kayenta and Black Mesa mining operations, these concerns [regarding energy conservation and the development of alternative energy sources] are outside the scope of this EIS.” DEIS, Ch. 2, Alternatives, at 48.

With respect to analysis of alternatives, the DEIS states, without any supporting documentation, that if the Mohave Generating Station failed to reopen, “CO<sub>2</sub> emissions likely would increase from other base-load generating stations in the area.” DEIS, Ch. 4, Environmental Consequences, at 163. This statement could lead the public to assume that there is no alternative to utilizing a coal-burning generation plant. Yet, upon closure of the Mohave

Generating Station, the California Public Utilities Commission requested a study report to consider alternative generation sources to serve Mohave's customers, including solar, wind, and other renewable resources such as biomass or photovoltaics, in addition to natural gas-fired combination cycle technology and increased conservation. Thus, despite the implications of the DEIS, it is entirely possible that more environmentally sound alternatives to coal could be utilized, with the result that greenhouse gas emissions and global warming would be comparatively lower.

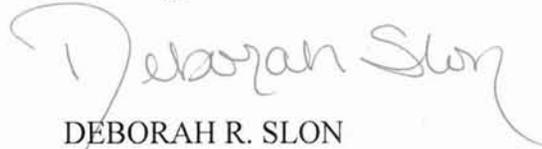
Consideration of alternatives "is the heart of the environmental impact statement." 40 C.F.R. § 1502.14. "An agency must look at every reasonable alternative, with the range dictated by the nature and scope of the proposed action." *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1520 (9th Cir. 1992) (internal citation omitted). An agency may not improperly narrow the scope of its proposed action in order to exclude consideration of reasonable alternatives, thereby changing the nature of the project. *Border Power Plant Working Group v. Dept. of Energy*, 260 F. Supp. 2d 997, 1030 (S.D. Cal. 2003) (noting that failure to examine secondary or indirect effects would be at odds with the purpose of the alternatives analysis and thus would be considered arbitrary.) By refusing to address the issues surrounding the possible reopening of the Mohave Generating Station, this DEIS improperly narrowed the scope of analysis, in contravention of NEPA.

## V. Conclusion

OSM has not adequately substantiated its claim that the Black Mesa project will have insignificant effects on global warming. The Black Mesa DEIS violates NEPA by failing to take a hard look at the reasonably foreseeable consequences of coal mining and electric generation on global warming, and by instead drawing unsubstantiated conclusions regarding the effects of the project on climate change. It also violates NEPA by refusing to consider the effects and alternatives of reopening the Mohave Generating Station.

We appreciate your consideration of these comments.

Sincerely,



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For EDMUND G. BROWN JR.  
Attorney General