

To: DOI Secretary-designee Deb Haaland
David Hayes, incoming Special Advisor to the President on Climate Policy
Cecilia Martinez, incoming Senior Director for Environmental Justice, CEQ

To: DOI Transition Team
Kevin Washburn; Clara Pratte; Bob Anderson; Bret Birdsong; Janie Hipp;
Amanda Leiter

To: EPA Transition Team
Patrice Simms

Cc: The Honorable Raul Grijalva, Chairman, House Natural Resources Committee;
The Honorable Tom O'Halleran; The Honorable Mark Kelly; The Honorable Kyrsten
Sinema; The Honorable Martin Heinrich; The Honorable Ben Ray Luján

From: Benjamin Nuvamsa, former Hopi Chairman; Nicole Horseherder, Executive Director, Tó Nizhóní Ání; Carol Davis, Executive Director, Diné C.A.R.E.; Vernon Masayesva, former Hopi Chairman and Executive Director, Black Mesa Trust; Herb Yazzie, former Chief Justice of the Navajo Nation Supreme Court; Percy Deal, former Navajo County Supervisor and former Navajo Nation Council Delegate

Date: Jan. 14, 2021

Re: Navajo and Hopi Community Leaders ask for an “all-of-government” approach led by the Interior Department for the Reclamation, Restoration and Revitalization of the Lands, Waters, and Communities Impacted by Coal Mining on Black Mesa

What is required for *both* cultures to survive and prosper is a deepened regard for the *spirit* of laws and trust responsibilities in order to successfully guarantee protection of indigenous peoples' spiritual concerns. Furthermore, beyond scrupulous legal attention to the *letter* of the law, simple justice demands that those in power attend the way these words are understood by their legal charges: those most affected by them.

– *The Honorable Vernon Masayesva, Former Hopi Tribal Chairman and Executive Director of Black Mesa Trust, From the essay [Western Science vs. Native Science](#), January 2021*

I believe that the regulators have never really sought from the people themselves what troubles them most. ... We live in fear that we are going to be left with no water, coal dust, no improved roads and the health problems we have suffered under all these years.

– *The Honorable Herb Yazzie, Former Chief Justice of the Navajo Supreme Court, January 2021*

President-elect Biden has made the issue of environmental justice, overlooked for far too long, a centerpiece of his platform and a central tenet of his policies and practices aimed at accelerating efforts to combat the climate crisis. We trust that the members of his transition team tasked with building the programs that will put the President-elect's priorities into action, you understand how profoundly meaningful this commitment to environmental justice is, and how important it is for his administration to walk the talk. Highlights of the Transition Plan that focus on environmental justice include:

- Rooting out systemic racism in our laws, policies, and institutions;
- Using an inclusive, collaborative and empowering All-of-Government approach;
- Making decisions that are driven by data and science;
- Targeting resources in a way that is consistent with prioritization of environmental and climate justice, and;
- Assessing and addressing risks to communities from the next public health emergency.

These priorities have particular and immediate relevance to the reclamation of now-closed coal mines that sprawl across thousands of acres of Navajo and Hopi lands in northern Arizona. For nearly a half century, our communities and people have borne the direct impacts of operations at Black Mesa Mine and Kayenta Mine. Now that these mines are closed, we are calling on the Biden administration to make them shining examples of how environmental justice policies can be meaningfully enacted by making the cleanup of both mines a priority.

Reclamation on Black Mesa is a distinct endeavor because of tribal land status, the removal of human remains and artifacts, and the sacrifices made by our people to provide Arizona with cheap water and cities across the Southwest with cheap power. Five decades of coal mining have left indelible marks on the Navajo and Hopi, scarring not only our land, but also our water and cultural resources.

Now, after over half a century of mining, deteriorating economics have ended the era of coal on Black Mesa. Navajo Generating Station (NGS) – for nearly five decades the largest coal-burning power plant in the Western U.S. – shuttered its doors on November 18, 2019. Coal for the plant was supplied by Peabody Western Coal Company (Peabody) from Kayenta Mine, which closed on August 26, 2019. Prior to that, Mohave Generating Station shut its operations in December 2005, which forced the closure of Black Mesa Mine. At their peaks, about 12 million tons of coal was mined annually from Black Mesa and Kayenta mines (4 million from the former to power Mohave and about 8 million tons from the latter for NGS).

Considerable time has passed since the closure of both mines, yet neither the Office of Surface Mining, Enforcement and Reclamation (OSMRE), nor Peabody have completed the steps to fully and appropriately reclaim both mine sites as required by the site leases and the Surface Mining, Reclamation and Control Act (SMCRA). Reclamation at Black Mesa Mine is still incomplete 16 years after closure. And the massive scars from the most recent mining at Kayenta still stretch across thousands of acres, with hardly any clean-up work done since it shut down nearly a year and half ago.

Without a serious change in the status quo of federal oversight, the injustices and harm endured by Navajo and Hopi will continue. Without intervention that alters the current course of enforcement, the many families that were forced to move to make way for mining will not be able to return to their ancestral homes. The water they need for survival will not be available. And basic amenities that were lost when mining began will remain inaccessible. Reclamation must mean more than what has already been done; Peabody cannot be allowed to walk away from hundreds of residents without any basic assistance for their survival as a community.

With President-Elect Biden's vision and Secretary Haaland's leadership, it is time for the Department of the Interior to rectify these injustices by living up to its tribal trust responsibilities and legal obligations by bringing together people from across all of its agencies (Bureau of Reclamation; Bureau of Indian Affairs; Bureau of Land Management; Office of Surface Mining,

Reclamation and Enforcement; and the National Park Service), along with the Indian Health Service within the Department of Health and Human Services, the Environmental Protection Agency and the Department of Energy to work cooperatively with community and tribal leaders. This effort must hold Peabody and the utility owners of NGS accountable for the restoration of Black Mesa Mine and Kayenta Mine lands and waters, to address the exploitative legacy of coal mining, and to create a path to a sustainable and sustaining future for the land, water and people that have been affected by decades of coal mining.

We, community leaders from both tribes, jointly request that the Department of the Interior lead an all-of-government approach to support robust reclamation, restoration and revitalization of the lands and waters of Black Mesa that have been scraped, drilled, dug up and dewatered in the name of coal that for decades powered far away western cities and pumped the water that has allowed Arizona to thrive for the past half century.

In the past, the Department of the Interior, Department of Energy, and Environmental Protection Agency, in [a joint statement signed by the secretaries and administrator](#) (Exhibit A), committed to working together to address the impacts of NGS and the mines on tribal communities. It is time to pull together again in a renewed and cooperative all-of-government approach.

Actions Needed

Consistent with President Clinton's November 6, 2000 [Executive Order 13175 on Consultation and Coordination With Indian Tribal Governments](#) and President Obama's November 5, 2009 [Presidential Memorandum on Tribal Consultation](#), ***we ask that the Interior Department work with Navajo and Hopi tribal governments, their members and impacted communities to develop a comprehensive approach to mine reclamation, restoration and revitalization on Black Mesa that includes robust input from impacted people and communities.*** A coordinated, multi-agency approach to these issues is one important way to begin addressing numerous injustices. These are the areas in which coordinated federal interagency action should begin immediately:

Launch a significant permit revision/comprehensive reclamation plan for Kayenta Mine and Black Mesa Mine (Lead DOI Agency: Office of Surface Mining Reclamation and Enforcement. Other Agencies: Bureau of Reclamation, U.S. Geological Survey)

Kayenta Mine ceased mining in August 2019 in advance of the permanent closure of NGS, the power plant for which it was the sole source of coal. Since that time, little to no reclamation has occurred at the mine. In fact, Peabody has submitted formal requests to delay much of the current reclamation work for another two to four years. At Black Mesa Mine, which closed in 2005, the U.S. Bureau of Indian Affairs has determined that reclamation remains "inconsistent and often unacceptable, with considerable acreages remaining as raw ungraded and eroding spoil piles, largely void of vegetation."¹

On June 10, 2020, former Hopi tribal chairmen [Vernon Masayesva and Benjamin Nuvamsa wrote to OSMRE Western Region Director David Berry](#) (Exhibit C) to remind the agency of its trust duty to move toward full reclamation and recovery of the Black

¹ June 9, 2015 letter from the director of the U.S. Bureau of Indian Affairs Navajo Regional Office to Peabody Energy's Environmental Services Director re: Indian Lands Lease Relinquishment Requirements – Mined Land Revegetation Standards. Attached as [Exhibit B](#).

Mesa mined lands. They requested that OSMRE initiate a “significant permit revision” under the Surface Mining, Control and Reclamation Act (SMCRA) that would provide for a comprehensive Environmental Impact Statement (EIS) and full compliance with the National Environmental Policy Act (NEPA). A “significant permit revision” would provide the Hopi Tribe, Navajo Nation and other interested members of the public an opportunity to engage OSMRE over Peabody’s plans to carry out the final reclamation and closure of the mine sites.

A comprehensive approach to mine reclamation is necessary, and it **must** include protection and restoration of the groundwater aquifer from which billions of gallons of water were drawn to support mine operations over the course of more than five decades. The aquifer is the main source of drinking and irrigation water for Navajo and Hopi living on Black Mesa, and mining-related depletions have had a measurable impact on water availability.

OSMRE must ensure that Peabody is held to account for complete and thorough reclamation and restoration of the lands and waters at both Black Mesa and Kayenta Mines. ***We urge DOI, through OSMRE, to work with the Navajo and Hopi tribes and their members to enact a significant permit revision as the agency considers renewal of Peabody’s permit at Kayenta Mine, which expired in July 2020, and to collaboratively develop with community members a comprehensive reclamation plan that addresses all the remaining issues at both mines.***

Convene representatives from the tribes, communities and agencies to facilitate respectful repatriation, reburial or other disposition of Hopi and Navajo ancestral remains and artifacts and restoration of traditional cultural properties (Lead DOI Agency: National Park Service. Other agencies: Office of Surface Mining Reclamation and Enforcement, Bureau of Indian Affairs).

To the Hopi and Navajo, Black Mesa (known as Nayavuwaltsa to the Hopi and Dzilijiiin to the Navajo) is sacred, a defining cultural resource due to its role in our traditional stories and ceremonial and clan traditions. It connects past with present, and under the Native American Graves Protection and Repatriation Act (NAGPRA), the Department of the Interior must consult with the two tribes on how they want the numerous human remains and associated artifacts that were removed for mining activities returned and reinterred. While a major repatriation and re-interment occurred in May 2019 for remains disturbed between 1977 and 1983 (during a massive series of archaeological digs at Black Mesa led by Southern Illinois University-Carbondale), further disturbance of burial and cultural sites at Black Mesa and Kayenta continued in the years since as mining expanded. To date, archaeological surveys have identified roughly 3,000 sites of cultural importance.²

As Hopi and Navajo people, we support reinterment in locations as close as possible to where remains of our ancestors were found and we call on the federal government to provide resources to help facilitate the remaining work on repatriation. Now that Kayenta Mine is closed, we request that a comprehensive consultation, plan and program under NAGPRA and the National Historic Preservation Action be initiated immediately.

² Draft Environmental Impact Statement for Navajo Generating Station-Kayenta Mine Complex Project, Sept. 2016. <https://www.usbr.gov/ngs/docs/NGS-KMC-DEIS-Text.pdf> (Page ES 17-18)

Use authority within DOI and other agencies (e.g., EPA sole source designation) to take action to protect and restore vital water resources.

For 50 years, Peabody Coal pumped thousands of acre-feet a year of pristine drinking water from the main groundwater source on Black Mesa, the Navajo, or N, Aquifer. The N Aquifer is the sole source of potable water for the residents of Black Mesa and surrounding communities; the people of Black Mesa rely on it for both domestic and agricultural purposes, and the springs, seeps and washes that historically have arisen from it are culturally and spiritually central to both Navajo and Hopi beliefs. The lives of the people of Black Mesa and surrounding communities, as well as future generations, depend on the water and its sustainability into the future.

Due to withdrawals from the N Aquifer, Navajo and Hopi wells near the Kayenta and Black Mesa Mines have declined more than 100 feet and the majority of monitored artesian spring discharges have decreased over 50 percent. The N Aquifer and related spring and wash discharge shows continued evidence of declining integrity.^{3,4} yet OSMRE to date has completely dismissed the impacts of a half century of mining on water levels, choosing instead to blame community use for depletions (Exhibit D).⁵

Surface waters on Black Mesa are also vital. Currently, EPA is preparing to reissue Peabody's National Pollution Discharge and Elimination System (NPDES) permit for Kayenta Mine. Our organizations are deeply concerned about how surface waters impacted by a half-century of strip-mining will be fully remediated by Peabody to a pre-mine condition. The comment period for this permit closed on December 23, 2020. [Our organizations](#) and the [Hopi Tribe](#) both provided critical comments while also asking for an extension of time to further review and comment on this proposal.

Water is the foundation to the way of life for the Diné and Hopi people, spiritually, physically and emotionally. Water is life – it is evident throughout our cultures, teachings and ceremonies. For the Hopi, the lack of water in our springs has directly impacted the ceremonies we perform. In addition to the depletion, Hopi also face the dangers of having arsenic in our drinking water at Second Mesa and now First Mesa.

We ask the Interior Department to coordinate the use of its authorities within the Interior Department and with other agencies (e.g., through the designation by EPA of the N Aquifer as sole source aquifer and through strict enforcement of Kayenta Mine's NPDES permit) to take action to restore and protect the Navajo Aquifer, D Aquifer, springs, and surface waters.

³ Groundwater Mining of Black Mesa. Natural Resources Defense Council (NRDC). 2001. <https://www.nrdc.org/sites/default/files/draw.pdf>

⁴ As cited in "A Confluence of Anticolonial Pathways for Indigenous Sacred Site Protection." Ellis, R. and Perry, D. (2020). Journal of Contemporary Water Research & Education, 169: 8-26. <https://onlinelibrary.wiley.com/doi/full/10.1111/j.1936-704X.2020.03329.x>.

⁵ See response from OSMRE to letter from Vernon Masayesva and Ben Nuvamsa. Sept. 25, 2020. Attached as [Exhibit D](#).

Create a DOI-EPA-DOE Just Transition Working Group for Navajo Generating Station/Kayenta-Black Mesa Mines (NGS/Coal Mines Just Transition Working Group) and task it with working with stakeholders to develop a Just Transition Roadmap

We ask the Department of the Interior, EPA, and Department of Energy to establish an [NGS/Coal Mines Working Group](#) to work with stakeholders, including the Navajo Nation, Hopi Tribe, NGS plant owners and former plant owners, Central Arizona Project (CAP), Gila River Indian Community and other Arizona Indian tribes who receive water from CAP, non-Indian CAP water users, tribal members and environmental and community groups.

We recommend the goal of this Working Group be to develop a roadmap for a Just and Equitable Transition for affected communities to post-coal economies. The roadmap should include action recommendations and oversee initial steps to begin implementing key recommendations. It should be consistent with federal trust responsibilities to federally recognized Indian tribes in the region.

Reform OSMRE's oversight of mining on tribal lands so that transparency and access to critical filings and documentation is readily available to members of impacted communities and the general public.

OSMRE is responsible for regulation of coal mining and cleanup activities on Indian lands. Unlike most states, no tribe has received delegation authority to regulate coal mining under SMCRA. OSMRE's Indian lands program provides funds to tribes to assist it in regulating surface coal mining and reclamation but the agency is ultimately responsible for all regulatory decisions affecting tribes, including permit application review, determination of performance bond amounts, inspection and enforcement, bond release, and maintaining a staff to coordinate with the individual tribes and other federal agencies. Approximately 65% of all coal mine lands regulated by OSMRE's Indian Lands Program nationwide are within the Kayenta Mine/Black Mesa Mine complex.⁶

Despite its trust responsibilities to tribes, however, OSMRE is failing in its regulatory responsibilities. Through its oversight of state mining offices such as in Montana, [pending applications and environmental assessments](#) are available to the public online. Such accessibility is not provided to Navajo or Hopi who are looking for information on Black Mesa or Kayenta mines. Anyone wanting to view pending applications or other documentation must do so at OSMRE's office in Denver or at the offices of the Navajo Nation Minerals Department in Window Rock, Arizona, the Hopi Tribe Minerals Department or the Forest Lake Chapter of the Navajo Nation. No public notice of applications for minor permit revisions is provided. For example, OSMRE did not provide public notice of Peabody's "minor" permit revision application to substantially change the permit schedule for final reclamation by delaying 70% of backfilling and grading for two years or more.

We respectfully request the Interior Department to mandate that OSMRE immediately make available online all documentation as required by federal administrative procedures so that our people and communities can more fully

⁶ Source: Office of Surface Mining FY 2021 Budget Justification Green Book p. 57-58, <https://www.doi.gov/sites/doi.gov/files/uploads/fy2021-budget-justification-osmre.pdf>

participate in reclamation decisions that affect their lives, the land and water they depend on, and future generations.

Conclusion

For nearly half a century, coal extracted and electricity generated on lands of Navajo and Hopi were the underpinning of growth and prosperity in the Southwestern United States. The federal government authorized the creation of Navajo Generating Station and Kayenta Mine to provide key resources of water and electricity that fueled the aggressive growth of Phoenix, Las Vegas, Tucson and other cities. Mining and combustion of coal has been outcompeted by less expensive alternatives. The era of coal for Navajo and Hopi has passed, but the nearly 50 years of damage done by mining remains. There is an enormous amount of work to be done to return tens of thousands of acres to pre-mining conditions that will allow Navajo and Hopi communities to once again make use of their land. Many artifacts and ancestral remains still must be repatriated. And the critically important source of groundwater that thousands of Navajo and Hopi depend on for domestic and agricultural use has been severely depleted by industrial use. These impacts and damages must be remedied, and we are putting our trust in the incoming Biden Administration to use its authority to ensure that appropriate policies are enacted and undertaken for a full reclamation, restoration and revitalization of coal-impacted land, water and resources, and that our people are given an opportunity to fully participate in these efforts.

ABOUT THE HOPI AND NAVAJO LEADERS

Benjamin Nuvamsa and **Vernon Masayesva** are both former Chairmen of the Hopi Tribe, a federally recognized American Indian tribe. The chairmen are working in support of their Tribe's interest in ensuring proper consultation with their tribal government, as well as securing meaningful public participation opportunities for tribal citizens related to Peabody Western Coal Company's closure of Kayenta Mine in August 2019.

Nicole Horseherder, Executive Director, Tó Nizhóní Ání., which translates to "Beautiful Water Speaks." 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. Many members of TNA reside on Black Mesa and have families that were displaced and relocated in order to accommodate the Kayenta Mine operation.

Carol Davis, Executive Director, Diné C.A.R.E. Diné C.A.R.E. is a nonprofit Navajo grassroots organization comprising tribal members who work with Navajo communities affected by energy and environmental issues. Diné C.A.R.E.'s mission is to advocate for our traditional teachings by protecting and providing a voice for all life within and beyond the Four Sacred Mountains of the Diné (Navajo).

Percy Deal is a lifelong resident of Black Mesa on the Navajo Nation, where he raises cattle and crops. He is a former Navajo Nation Council Delegate, former Navajo County Supervisor, former Hard Rock Chapter President, and former director of the Navajo Hopi Land Commission.

Herb Yazzie is a resident of Black Mesa and retired Chief Justice of the Navajo Nation. He also served the Navajo Nation as its Attorney General and as its Chief Legislative Counsel and was an attorney for the Yavapai-Apache Nation. He is a veteran, having served a tour in Vietnam as an Army lieutenant. He graduated from Arizona State University College of Law in 1975.