No. 11-1004

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IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DINÉ CITIZENS AGAINST RUINING OUR ENVIRONMENT & SAN JUAN CITIZENS ALLIANCE, Plaintiffs/Appellees,

v.

AL KLEIN, Western Regional Director, Office of Surface Mining Reclamation and Enforcement, & OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT, Defendants, and

ARIZONA PUBLIC SERVICE and BHP NAVAJO COAL COMPANY, Intervenors/Appellants.

On Appeal from the United States District Court, District of Colorado, the Honorable Senior Judge John L. Kane presiding

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APPELLEES' RESPONSE BRIEF

Oral Argument Requested

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CORPORATE DISCLOSURE STATEMENT

The Plaintiffs/Appellees are non-profit corporations and have no parent companies, subsidiaries or affiliates that have issued shares to the public.

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Counsel for Appellees is not aware of any prior or related appeals.

JURISDICTION

Appellees Diné Citizens Against Ruining Our Environment and San Juan Citizens Alliance (collectively "Diné CARE") believe that the Court has no jurisdiction over this appeal based on the lack of a final appealable order as addressed in argument below. Beyond that, Diné CARE concurs in Appellant BHP Navajo Coal Company's ("BNCC's") statement of jurisdiction.

STATEMENT OF THE ISSUES PRESENTED

Issue 1: Whether the district court's Remand Order is a final order within the meaning of 28 U.S.C. § 1291 which can be appealed by BNCC?

Issue 2: Whether the district court's Jurisdiction Order properly determined that the court had jurisdiction to hear Diné CARE's National Environmental Policy Act ("NEPA") claims under the Administrative Procedures Act ("APA"), and that procedures under Surface Mining Control and Reclamation Act ("SMCRA") did not bar judicial review?

Issue 3: Whether the district court's Remand Order properly determined that OSM's authorization of the 2005 Permit Revision for Area IV North of the Navajo Mine violated NEPA, and so properly remanded this matter back to the Federal agency for further proceedings?

STATEMENT OF THE CASE

Diné CARE challenged, under NEPA and the APA, the Federal Office of Surface Mining Reclamation and Enforcement's ("OSM") use of a 14 page Environmental Assessment ("EA") and a one page Finding of No Significant Impact ("FONSI") in 2005 to assess the impacts of a significant mine permit revision (hereinafter, "2005 Permit Revision"), which expanded the Navajo Mine operated by BNCC by approximately 3,800 acres and allowed appellant BNCC to conduct mining operations in an area known as "Area IV North."

On December September 9, 2011 and after extensive briefing, Senior District Court Judge John L. Kane issued an order denying motions to dismiss from OSM, BNCC, and Intervenor Arizona Public

Service. *See* Order on Motions to Dismiss (hereinafter "Jurisdiction Order"), Aplt. App.[1] 673-701.

On October 10, 2010, and after merits briefing on an administrative record submitted by OSM, supplemental briefing, and oral argument, Judge Kane issued a memorandum opinion that vacated OSM's approval of the 2005 Permit Revision authorizing mine expansion and remanded the matter back to the agency for further proceedings and to address six NEPA issues on remand. Memorandum Opinion and Order (hereinafter, "Remand Order"), Aplt. App. 1643-1688. BNCC now appeals both these orders, even though OSM is now conducting these remand proceedings which may produce the permit that BNCC seeks.

STATEMENT OF FACTS

A. Background

BNCC operates the Navajo Mine, a large open pit coal mine operation, on reserved tribal lands in northwestern New Mexico pursuant to a long-standing lease with the Navajo Nation. Aplt App.

[1] "Aplt. App." refers to BNCC's appendix. Diné CARE's appendix is noted as "Aplee. Supp. App."

1645-1646. OSM has permitting and other authority over BNCC's mine operations pursuant to the Surface Mining Control and Reclamation Act ("SMCRA"), 30 U.S.C. § 1201 *et seq*. *Id.* Intervenor APS operates the Four Corners Power Plant, which is supplied with coal from the Navajo Mine by contract through 2016. *See* Aplt. App. 1645.

OSM has never prepared or been a cooperating agency in development of an Environmental Impact Statement ("EIS") pursuant to the requirements of NEPA analyzing the impacts of the Navajo Mine. *Id.* Instead, OSM, in approving mine operations since 1989, has either categorically excluded BNCC's operation from NEPA analysis or issued limited-scope, no-comment EA/FONSIs. Aplt. App. 1646.

In September 2004, OSM's Western Regional office in Denver approved BNCC's application to renew its existing permit to conduct mining and related operations at the Navajo Mine (hereinafter, "2004 Permit Renewal"). Aplt. App. 674. OSM did not conduct a NEPA analysis of the environmental impacts of its 2004 permit renewal decision, based on its determination that the permit renewal was categorically exempt from NEPA review. *See id.* "Operations permitted by OSM through the 2004 renewal include the permanent disposal of fly

ash, scrubber sludge, bottom ash and other solid waste, referred to as 'Coal Combustion Waste' or 'CCW,' from APS's Four Corners Power Plant in mined out coal pits in the permit area." *Id.* The area subject to the 2004 mine permit renewal is approximately 13,430 acres and the permit renewal approves BHP's Navajo Mine operations through September 2009. Aplee. Supp. App. 6087-6089.

In December 2004, BHP submitted a significant permit revision application to OSM in which it requested a revision to its Navajo Mine permit to allow it to expand mining operations into a 3,800 acre area known as "Area IV North." BNCC's proposal included, among other things, a request to relocate a public road, the Burnham Road, to facilitate mining activities in this area. Aplt. App. 675. Numerous Navajo Nation tribal members live in the Area IV North and have customary use and grazing rights. Aplt. App. 718-719. Additionally, 73 historical and cultural sites, 34 of which are considered eligible for nomination to the National Register of Historic Places, as well as hundreds of "in-use" sacred sites, traditional cultural properties, and Navajo gravesites are scattered throughout Area IV North. Aplt. App. 1825-1826.

OSM's Western Regional office in Denver approved BNCC's permit revision application on October 7, 2005 (hereinafter, "2005 Permit Revision"). Aplt. App. 1757. OSM's Decision Document included a FONSI, in which the agency reported its conclusion that the proposed expansion of the mine into Area IV North would not have a significant impact on the quality of the human environment and thus no EIS was required under NEPA. Aplt. App. 1768. This FONSI determination was based on a 14 page EA that was also included in the Decision Document (hereinafter jointly referenced as "EA/FONSI"). Aplt. App. 1769-1782.

OSM imposed two conditions of relevance in its 2005 decision approving the requested permit revision. Aplt. App. 1765-1767. One was that BNCC complete a thorough ethnographic study of Area IV North and develop, approve and implement mitigation/data recovery plans for the area, before causing any disturbance there. *Id.* The second 2005 permit condition required BNCC to follow OSM's regulatory procedures for relocating a public road before any disturbance of the existing Burnham Road. *Id.*

The agency did not provide public notice of the availability of OSM's EA/FONSI and the EA/FONSI was not made public at the time of issuance. *See* Aplt. App. 1768-1782. Additionally, the agency provided no public notice, hearing or any other means to publicly review or comment upon OSM's EA/FONSI. *Id.* OSM's failure to make the 2005 EA/FONSI public was part of an ongoing pattern and practice of the agency of failing to make any EA/FONSI prepared for the mine operation public. Aplt. App. 1004.

Because the permitting documents were not publicly available, Appellee San Juan Citizens Alliance submitted a Freedom of Information Act ("FOIA") request to the agency. Complaint, ¶109 (Aplt. App. 116); OSM's Answer, ¶109 (Aplee. Supp. App. 6070). Thereafter, OSM provided a staggered and partial release of documents related to OSM's 2005 permit revision. *Id.*

Appellees' complaint was filed on July 13, 2007 and was amended on December 27, 2007. Aplt. App. 89-132. Appellees brought seven claims for relief under NEPA and the APA: six related to the EA/FONSI for the 2005 Permit Revision, and one related to the categorical exclusion from NEPA for the 2004 Permit Renewal. Aplt. App. 119-131.

B. Appellees' Interests & Standing

Appellees are public interest organizations with members that have direct interests in the health of the land, air and water surrounding the Navajo mine, and in ensuring compliance with NEPA's procedural mandates which protect their interests in enjoying a healthy environment around the Navajo mine. For instance, Dailan Jake Long is member of Appellee Diné CARE, which is an organization "comprised of all tribal members many of whom, like [him], live in the [Navajo] mine area . . .." Aplee. Supp. App. 6034. As Mr. Long states:

> [I and my family] are directly impacted by the daily fugitive dust, ground disturbance, explosions, and large amounts of industrial traffic from the mine. I have witnessed community members homes vibrate from mine detonations and my family has experienced significant decreases in livestock numbers over the course of four years because vegetation will not grow in reclaimed land area and within close proximity of the mine. Further, members of my immediate family now experience respiratory problems which they attribute to inhalation of dusts from the mine.

Aplee. Supp. App. 6035 ¶ 4. Diné CARE member Lucy A. Willie expresses similar impacts from the Navajo mine, and explains how the coal ash that gets deposited in the mine pollutes both the air and groundwater around her home. Aplee. Supp. App. 6041 ¶ 8.

Many members of Diné CARE who live or graze livestock on lands within mine permit area are elderly, only speak Navajo, and so when OSM fails to carry out adequate public notice of its actions regarding the Navajo mine, it is especially harmful to their interests. Aplee. Supp. App. 6034-6042. Many members have lived on this land their entire life and have family members that have lived on this land for multiple generations. *Id.* Many members do not have phones, electricity or running water, and many members have lineal ancestors buried on this land. *Id.*

The district court accordingly found that Appellees suffered injury in fact from the challenged action, that these injuries were caused by OSM's actions and inactions, and that these injuries can be redressed through remanded NEPA proceedings as requested by Appellees. Aplt. App. 1650-1654. For these reasons, the district court found, and Appellees have, standing.

C. Requirements of NEPA

NEPA, 42 U.S.C. § 4332, and its implementing regulations, 40 C.F.R. §§ 1500-1508, "direct all federal agencies to [] 'comply with certain procedures before taking any action or making any decision that

could 'significantly affect the quality of the human environment.'" *Colorado Environmental Coalition v. Dombeck*, 185 F.3d 1162, 1171 (10th Cir. 1999), citing 42 U.S.C. § 4332(2)(C). "The purpose behind this requirement is to ensure that the agencies will 'take a 'hard look' at the environmental consequences of proposed actions utilizing public comment and the best available scientific information.'" *Id.* (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989); *see also Holy Cross Wilderness Fund v. Madigan*, 960 F.2d 1515, 1521 (10th Cir. 1992); 40 C.F.R. § 1500.1.

The NEPA process must "'analyze not only the direct impacts of a proposed action, but also the indirect and cumulative impacts of 'past, present, and reasonable foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions."" *Custer County Action Ass'n v. Garvey*, 256 F.3d 1024, 1035 (10th Cir. 2001) (citations omitted). An agency cannot define "the project's purpose in terms so unreasonably narrow as to make the [NEPA analysis] 'a foreordained formality.'" *City of Bridgeton v. FAA*, 212 F.3d 448, 458 (8th Cir. 2000) (citations omitted).

D. The District Court's Jurisdiction Order

On December September 9, 2009, the district court issued an order denying motions to dismiss by OSM and Intervenors BNCC and Arizona Public Service. Jurisdiction Order, Aplt. App. 673-701.

The district court's Jurisdiction Order resolved, in Diné CARE's favor, most of OSM and Intervenors' arguments that Appellees' claims should be dismissed for lack of subject matter jurisdiction, failure to exhaust administrative remedies, laches, statute of limitations, ripeness, lack of an indispensable party, and venue. *Id.*

The district court' s Jurisdiction Order did, however, dismiss without prejudice a "portion of Plaintiffs' Sixth Claim for Relief (duty to supplement under NEPA) that relates to the Burnham Road realignment and Cumulative Hydrologic Impacts Analysis." Aplt. App. 701.

E. The District Court's Remand Order

On October 10, 2010, the district court issued its Remand Order vacating OSM's approval of the 2005 Permit Revision and denying as moot Appellees' challenge to the 2004 Permit Renewal. Aplt. App.

1643-1688. Additionally, the Court's Remand Order directed OSM on remand to:

1. Address the presumption that approval of the 2005 Permit Revision Application is a type of action for which an EIS is normally prepared;

2. Consider the environmental effects of the Burnham Road Realignment in connection with its analysis of the 2005 Permit Revision Application;

3. Include a meaningful discussion of all reasonable alternatives, including approving the 2005 Permit Revision Application with conditions;

4. Discuss the specific mitigation measures proposed in the ethnographic studies in determining the severity of the effects that BHP's 2005 Permit Revision Application will have on scientific, historic, and cultural resources in Area IV North;

5. Include in their revised EA a discussion of CCW to the extent it is mentioned in the 2005 Permit Revision Application; and

6. Provide meaningful public notice, including but not limited to publication in the Navajo Times and airing advertisements in both English and Navajo on local Navajo radio stations, for all future actions related to its permitting responsibilities at the Navajo Mine.

Aplt. App. 1687-1688.

F. OSM's NEPA Process for Area IV on Remand

OSM has begun a new NEPA process for Area IV North on remand. On February 15, 2011, BNCC submitted a revised mine plan

to OSM to mine in Area IV North. Attachment A-1.[2] In addition to mining in Area IV North, BNCC proposes to relocate 5 miles of Burnham Road through the area, obtain a Clean Water Act Section 404 Individual Permit for discharge of dredged or fill material into waters of the U.S. in the project area, and modify its existing Resource Recovery and Protection Plan. *Id.*

OSM has now hosted two public workshops on April 13 and 14, 2011. Attachment A-1. Public notice of the workshops included legal notices in the 3 newspapers, posters in 13 Chapter Houses, and radio announcements in the Navajo language on two radio stations. Attachment A-2.

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[2] Diné CARE has attached four documents to this brief which were not before the district court. The first two post-date the district court's judgment and go to Diné CARE's argument re lack of appealable final order; the second two pre-date the judgment but post-date the parties' briefing and go to BNCC's argument re mootness. *See Morganroth & Morganroth v. DeLorean*, 213 F.3d 1301, 1309 (10th Cir.2000) ("Of course it is proper for a party to provide additional facts when that party has an objectively reasonable, good faith argument that subsequent events have rendered the controversy moot. Indeed, we depend on the parties for such information, and it is axiomatic that subsequent events will not be reflected in the district court record."). Note that while Attachment A-4 has an "effective date" of 9/25/09, that is a retroactive effective date as it was signed on 9/7/10. Attachment A-4 at 2.

Additionally, OSM is currently preparing an EA for this project. Attachment A-1. Once it is completed OSM intends to make the environmental analysis available to the public for comment on OSM's web page, in the local Chapter Houses, and other public locations. Attachment A-2.

SUMMARY OF THE ARGUMENT

The Court has no jurisdiction over BNCC's appeal because district court remand orders to federal agencies are not considered "final" and appealable unless the agency pursues appeal. Accordingly, BNCC's appeal should be dismissed.

In the alternative, and should the Court reach BNCC's arguments, the district court's orders should be affirmed. The district court did not err in determining that the court had subject matter jurisdiction to decide Diné CARE's claims that OSM violated NEPA in approving the mine expansion with the EA/FONSI. The EA/FONSI was not made available to the Diné CARE during the SMCRA permitting process such that they could have raised their objections in that process. Additionally, this and other courts have been clear that NEPA claims

arise under an APA cause of action, not SMCRA, and exhaustion under OSM's administrative review provisions is not mandatory.

Similarly, the district court properly determined that OSM's authorization of the 2005 Permit Revision and related 14 page EA and 1 page FONSI violated NEPA and remanded this matter back to OSM for further proceedings.

ARGUMENT

I. Standard of Review

Diné CARE partially concurs with BNCC's statements of the appellate standard of review, which initially state that the *de novo* standard generally applies, except for review of the district court's laches and exhaustion rulings, which are reviewed for an abuse of discretion. *See* BNCC Brf. at 20, 23, 32; s*ee also Massengale v. Board of Examiners*, 30 F.3d 1325, 1328 (10th Cir. 1994) (exhaustion), *Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324, 1338 (10th Cir. 1982) (laches).

However, BNCC makes the inconsistent (and incorrect) argument in the body of its brief that this Court reviews the district court's rulings on the merits of the NEPA claims for an abuse of discretion. *See* BNCC Brf. at 36-37, citing *Winter v. NRDC, Inc.*, 555 U.S. 7 (2008) and

Rio Grande Silvery Minnow v. Bureau of Reclamation, 601 F.3d 1096 (10th Cir. 2010). As much as Diné CARE, as appellees, would like to take advantage of a deferential appellate standard of review, "'in reviewing a district court's review of an agency decision, the identical standard of review is employed at both levels; and once appealed, the district court's decision is accorded no particular deference.'" *Exxon Mobil Corp. v. Norton*, 346 F.3d 1244, 1248 (10th Cir. 2003) (citations omitted). In contrast, the passage from *Winter* cited by BNCC did not involve the merits, but rather the district court's exercise of its equity jurisdiction in issuing an injunction (555 U.S. at 44), and the cited passage from *Rio Grande Silvery Minnow* involved the discretionary practice of vacatur-after-mootness (601 F.3d at 1129-30).

II. This Court Lacks Jurisdiction over BNCC's Appeal

The Court has no jurisdiction over BNCC's appeal because district court remand orders to federal agencies are not considered "final" for the purposes of appealability unless the agency pursues appeal. Because OSM is not pursuing appeal, the district court's order and judgment remanding permit issuance to the Federal agency is not a "final" reviewable order.

The purported "final" district court order appealed by BNCC is an order of the district court remanding the agency decision back to OSM with specific instructions for the agency in completing a new environmental review process. Remand Order, Aplt. App. 1687-1688. Both this Court and other Courts of Appeals have been clear that such a remand order is not a final appealable order. An exception for *agency* appeals of such orders would have been applicable here had OSM maintained its appeal. But now that OSM has dismissed its appeal, appellate jurisdiction based on this exception is no longer viable, as private parties cannot stand in the shoes of an agency to take advantage of the exception, even where it originally intervened on the side of the agency.

"It is black letter law that a district court's remand order is not normally 'final' for purposes of appeal under 28 U.S.C. § 1291." *N.C. Fisheries Ass'n v. Gutierrez*, 550 F.3d 16, 19 (D.C. Cir. 2008). This is because rather than fully resolving the dispute, a remand order "simply turns it back for further proceedings by the agency, after which it may well return [to court] again." *American Haw. Cruises v. Skinner*, 893 F.2d 1400, 1403 (D.C. Cir. 1990). Consequently, remand orders

generally cannot be appealed. *Southern Utah Wilderness Alliance v. Kempthorne*, 525 F.3d 966, 970 (10th Cir 2008) (*Southern Utah III*) ("As we explained in *Trout Unlimited v. United States Dept. of Agric.*, 441 F.3d 1214, 1218 (10th Cir.2006), '[u]nder § 1291, remand by a district court to an administrative agency for further proceedings [as occurred here] is ordinarily not appealable because it is not a final decision.'"); *see also* 15B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure* § 3914.32, at text acc. n.s 11 & 12. (2008 ed.) ("The general rule is that a remand is not appealable as a final decision, even if the court of appeals fears that the remand was ill-advised.").

There is a limited exception to the general rule of non-appealability "where the *agency* to which the case is remanded seeks to appeal and it would have no opportunity to appeal after the proceedings on remand." *Occidental Petroleum Corp. v. SEC*, 873 F.2d 325, 330 (D.C. Cir. 1989) (emphasis added); *see also Wright &Miller* § 3914.32 at 240 n.19 (citing cases in which agency was allowed to appeal remand order). But BNCC is a private party, and cannot take advantage of this exception, even though it originally intervened on the side of the

agency. *Southern Utah III*, 525 F.3d at 970 (while "review at this point [might] present[] issues of urgency and importance to their individual business interests," intervenors' interests do not constitute the kind of "urgent and important" issues warranting an exception to the agency remand non-finality rule);[3] *Smoke v. Norton*, 252 F.3d 468, 472 n.1 (D.C. Cir. 2001) (Henderson, J., concurring) (intervenors "do not succeed to the agency's right to appeal which is unique to itself"); *NAACP v. U.S. Sugar Corp.*, 84 F.3d 1432, 1436 (D.C. Cir. 1996) ("*Occidental* rule does not apply" to intervenors, even if on side of agency); *Friends of Animals v. Salazar*, D.C. Cir No 09-5292 (order dated May 18, 2010, at 2, granting plaintiff's and government's motion to dismiss in case analogous to here where only intervenor-defendant appealed agency remand order).

[3] While the "urgent and important" language might be considered a separate exception to the general rule in addition to the agency appeal exception, as indicated by the Court in *Southern Utah III* the same result is reached in a case such as this, even where important issues of federal law might be at stake. It should also be noted that BNCC is currently in the process of securing alternative coal mining rights, and the Four Corners Power Plant, the sole user of Area IV North coal, will not suffer any lack of coal supply during the agency remand. *See* Attachment A-1; *see also* Aplt. App. 1771 (where OSM finds that BNCC has sufficient coal reserves under its 2004 Permit Renewal to fulfill its contract with the coal plant which expires in 2016).

Accordingly, the Court's jurisdiction over BNCC's appeal was extinguished when OSM withdrew its appeal, and BNCC's appeal should be dismissed.

III. The District Court Properly Determined that it Had Jurisdiction Over Diné CARE's NEPA Claims under the APA, and that SMCRA did Not Bar Judicial Review

BNCC challenges the district court's subject matter jurisdiction to decide Diné CARE's claims that OSM violated NEPA in approving the mine expansion with an EA/FONSI, on the grounds that Diné CARE could have participated in the SMCRA permitting, appeals, and/or judicial review proceedings. BNCC Brf. at 23. The Court should reject this argument, because the EA/FONSI were not made available to the Diné CARE during the SMCRA permitting process such that they could have raised their objections in that process, because this and other courts have been clear that NEPA claims arise under an APA cause of action, not SMCRA, and because exhaustion under OSM's administrative review provisions is not mandatory.

A. Plaintiffs Had No Opportunity to Present their Objections in the OSM Process and were Not Required to Do So

BNCC's argument (Brf. at 2-23) that Diné CARE's NEPA claims are not justiciable because Diné CARE should have participated in the OSM permitting process entirely misses the mark, because there was no way for its members to comment on the challenged EA/FONSI in either draft or final form. *See* Remand Order, Aplt. App. 1681-1684.[4] Thus, it was impossible for Diné CARE to raise their NEPA claims before the agency. Further, even if they could have raised their objections, they would not have been required to do so.

While BNCC relies on *Dep't of Transportation v. Public Citizen*, 451 U.S. 75 (2004), that case involved plaintiffs' failure to raise certain objections to a Federal agency during the agency's official public comment period on an EA. *Id*. at 764. There was no draft EA released for a public comment period here. *See New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 708 (10th Cir. 2009) ("A public

[4] There is no dispute that Diné CARE had to resort to the FOIA in order to obtain information related to the 2005 Permit Revision (including the FONSI/EA) from OSM. *See e.g.* Complaint, ¶109, Aplt. App. 116; *compare* OSM's Answer, ¶109 (admitted), Aplee. Supp. App. 6070.

comment period is beneficial only to the extent that the public has meaningful information on which to comment.").

Further, even if Diné CARE could have meaningfully raised NEPA issues in the OSM permitting process and had failed to do so, non-statutory exhaustion arguments as raised by BNCC "are prudential in nature," and "subject to numerous exceptions." *Forest Guardians v. United States Forest Serv.*, ___ F.3d ___, 2011 WL 1498873 at *5 (10th Cir. 2011) (*citing, inter alia, McCarthy v. Madigan*, 503 U.S. 140, 144 (1992) ("[W]here Congress has not clearly required exhaustion, sound judicial discretion governs."); *see also McKart v. United States*, 395 U.S. 185, 193 (1969). The district court found that OSM's notice under SMCRA failed to provide sufficient notice of availability of the EA/FONSI necessary to inform the population most affected by OSM's decision and comply with NEPA. Remand Order, Aplt. App. 1682-1684 (noting that the population is "primarily rural, speaks English on a limited basis, and relies upon tribal news sources."). Accordingly, the district court did not abuse is discretion in refusing BNCC's invitation to require Diné CARE to participate in an ill-publicized process where it was not provided with a draft EA to review and comment upon.

B. SMCRA Does Not Bar Judicial Review of Diné CARE's NEPA Claims Under the APA

BNCC argues that Diné CARE's NEPA claims arose under SMCRA's citizen suit provision and are barred under the APA, and that Diné CARE was further required to participate in SMCRA's administrative review process. BNCC Brf. at 23-29. However, BNCC's argument runs afoul of both SMCRA and a large body of judicial precedent, including that of this Court.

The APA explicitly waives sovereign immunity and provides a cause of action that provides for judicial review of a federal agency's actions and omissions. *See* 5 U.S.C. § 701 *et seq*. As stated by this Court:

> Section 701 of the APA provides that agency action is subject to judicial review *except where there is a statutory prohibition on review or where agency action is committed to agency discretion as a matter of law*. 5 U.S.C. § 701(a)(1),(2), *construed in Thomas Brooks Chartered, v. Burnett*, 920 F.2d 634, 641-42 (10th Cir. 1990).

Olenhouse v. Commodity Credit Corp., 42 F.3d 1560, 1572 (1994) (emphasis added). There is no statutory prohibition that is applicable here. In fact, the judicial review provision of SMCRA itself states that only SMCRA claims may be raised under it: a person "may commence a

civil action on his own behalf to compel compliance with *this chapter* ….” 30 U.S.C. § 1270(a) (emphasis added). *See also Ohio River Valley Envtl. Coalition, Inc. v. Kempthorne*, 473 F.3d 94, 101 (4th Cir. 2006) (finding that under SMCRA, “Congress explicitly disclaimed any intent to supersede or preempt statutes with potentially overlapping provisions,” *citing* SMCRA at 30 U.S.C. § 1292(a)).[5]

Thus, this case is squarely governed by *Bennett v. Spear*, where the Supreme Court held that while a particular Endangered Species Act claim was not covered by that statute’s citizen suit provision, it could be brought under the APA. 520 U.S. 154, 175 (1997) (“Nothing in the ESA's citizen-suit provision expressly precludes review under the APA, nor do we detect anything in the statutory scheme suggesting a purpose to do so.”). The same is even truer here, where Diné CARE raises claims under NEPA, not SMCRA.

BNCC further argues that Diné CARE should have availed itself of the SMCRA provision for administrative review. BNCC Brf. at 24,

[5] Nor is NEPA compliance committed to agency discretion by law. Department of Interior regulations make clear that OSM “shall” “[e]nsure compliance with the requirements of [NEPA] with respect to permitting actions for surface coal mining and reclamation operations on Indian lands.” *See e.g.*, 30 C.F.R. § 750.6(a)(7).

citing 30 U.S.C. § 1264(c) & 30 C.F.R. § 775.11. However, "Plaintiffs' complaint . . . specifically alleges violations of NEPA, not SMCRA, and the Court is unaware of any requirement that exhaustion of SMCRA remedies is a condition precedent to recovery under NEPA." *Save Our Cumberland Mts. v. Norton*, 297 F. Supp. 2d 1042, 1047 n. 2 (E.D. Tenn. 2003).

As the Supreme Court explained in *Darby v. Cisneros*, the APA limits the authority of courts or agencies to impose exhaustion requirements as a prerequisite to judicial review. 509 U.S. 137, 154 (1993). "[W]here the APA applies, an appeal to 'superior agency authority' is a prerequisite to judicial review *only* (1) when expressly required by statute or (2) when an agency rule requires appeal before review and the administrative action is made in operative pending that review." *Id.* (emphasis in original).

There is no statutory exhaustion requirement here. Both SMCRA (and even the OSM regulations regarding administrative review of SMCRA permitting decisions themselves) merely state that persons with an interest or affected by the decision "may" request an administrative hearing. *See* 30 U.S.C. §1264(c); 30 C.F.R. §775.11(a);

accord 30 U.S.C. § 1264(f); 30 C.F.R. §775.13 (judicial review); *see also* Jurisdiction Order, Aplt. App. 684-685, 687 (collecting cases that "may appeal" language does not impose requirement that administrative remedies be exhausted under *Darby*). Further, neither SMCRA nor OSM regulations automatically render the agency's SMCRA (or NEPA) decisions inoperable pending appeal. *See* 30 U.S.C. §1264(c); 30 C.F.R. §775.11(a).

Accordingly, the district court did not abuse its discretion when denying BNCC's request to dismiss this NEPA suit because Diné CARE did not participate in the SMCRA process, as "[c]ourts are not free to impose an exhaustion requirement as a rule of judicial administration where the agency action has already become 'final' under [the APA]." *Darby*, 509 U.S. at 154.[6]

[6] While some courts have required exhaustion of SMCRA procedures before judicial review of SMCRA *enforcement and cessation of operation orders*, as SMCRA contains a *statutory exhaustion requirement* over such claims, it is undisputed that no such claims are at issue here. *See, e.g., Southern Ohio Coal Co. v. OSMRE,* 20 F.3d 1418, 1425 (6th Cir. 1994).

C. The District Court Properly Determined that SMCRA's Statute of Limitations is Inapplicable

Despite the fact that Diné CARE's claims were brought under NEPA and the APA, BNCC argues that the applicable statute of limitations is found in SMCRA. Further, BNCC asks this Court to disregard its own binding precedent on this issue and adopt a broad reading of a decision from the Ninth Circuit. BNCC Brf. at 29-30. These arguments should be rejected.

Relying on established precedent of this Court, the district court properly determined that SMCRA's statute of limitations "do not apply to Plaintiffs' claims alleging OSM failed to comply with NEPA's procedural environmental review and public notice and participation requirements." Jurisdiction Order, Aplt. App. 689, applying *Park County Resource Council, Inc. v. U.S. Dept. of Agriculture*, 817 F.2d 609 (10th Cir. 1987), *overruled on the other grounds by Village of Los Ranchos de Albuquerque v. Marsh*, 956 F.2d 970 (10th Cir. 1992). As noted by *Park County*, applying individual statutes' time limitations to NEPA challenges would undermine NEPA's purpose of protecting the human environment from federal action and would result in an "arbitrary and inconsistent approach to NEPA claims." *Park County*,

817 F.2d at 616-17; *accord Southern Utah Wilderness Alliance v. BLM,* 2008 WL 5245492 (D. Ut. 2008).

BNCC asks this Court to overrule this precedent (which of course a panel may not do) and adopt a broad reading of the Ninth Circuit's decision in *Turtle Island Restoration Network v. U.S. Department of Commerce*, 438 F.3d 937 (9th Cir. 2006), which held that the Magnuson Act's 30-day statute of limitations barred plaintiffs' challenge, under NEPA and other laws, to regulations re-opening the swordfish fishery promulgated by the Secretary of the Department of Commerce. However, by the Ninth Circuit's own admission the decision "applies only to a very specific class of claims-those that clearly challenge regulations promulgated under the Magnuson Act" and that "many claims [are] left untouched" by the Court's decision. *Id.* at 948-949.

Importantly, the Ninth Circuit's decision narrowed but did not overrule *Jones v. Gordon*, 792 F.2d 821 (9th Cir. 1986). In that case, and similar to this case, plaintiffs challenged the issuance by the National Marine Fisheries Service ("NMFS") of a permit that authorized Sea World to capture killer whales. The plaintiffs alleged that the NMFS's issuance of the permit without prior preparation of an

EIS violated NEPA. The Ninth Circuit rejected Sea World's claim that plaintiffs' challenge, brought six months after the permit's issuance, was time-barred by the sixty-day statute of limitations found in the Marine Mammal Protection Act. Because plaintiff's "action did not seek review of the terms and conditions of the Service's permit . . . [but] instead alleged that the Service, by not preparing an environmental impact statement, had violated the procedural requirements of NEPA," the sixty-day statute of limitation did not apply since the Act's citizen suit provision only applied to "terms and conditions" of a permit, and the APA established jurisdiction for the action. *Id*. at 824. Likewise here and as already discussed, the SMCRA citizen suit provision only applies to SMCRA claims, and so its statute of limitations cannot apply to the NEPA claims at issue here.

D. The District Court Properly Rejected BNCC's Latches Defense

BNCC argues that the doctrine of laches supports a finding that Diné CARE's challenge is time barred. BNCC Brf. at 32-34; *compare* Jurisdiction Order, Aplt. App. 684-690. However, the district court did not abuse its discretion in rejecting BNCC's argument.

"An environmental action may be barred by the equitable defense of laches if (1) there has been an unreasonable delay in bringing suit, and (2) the party asserting the defense has been prejudiced by the delay." *Park County*, 817 F.2d at 617 ("'Laches must be invoked sparingly in environmental cases because ordinarily the plaintiff will not be the only victim of alleged environmental damage.'") (citation omitted). The question of whether laches bars an action depends on the "facts and circumstances of each case" and is "primarily left to the discretion of the trial court …." *Jicarilla Apache Tribe*, 687 F.2d at 1338.

BNCC provides no record evidence to counter the district court's finding that Diné CARE's NEPA suit was not unreasonably delayed. In this case, OSM failed to notify and inform the population most affected by OSM's decision and failed to provide notice in either draft or final form of the agency's EA/FONSI. *See* Remand Order, Aplt. App. 1681-1684; *compare Jicarilla Apache*, 687 F.2d at 1338 (where tribe provided testimony of actual notice of "approval of the lease sales at the time of the sales"). Further, Diné CARE's necessary use of FOIA to obtain

OSM's decision documents constituted reasonable due diligence under the circumstances. *See* Aplt. App. 116.

In light of these facts, the district court found that "[a] two-year delay in bringing suit is not *per se* unreasonable" and that BNCC's claim of prejudice is "so general that it would not satisfy this element in any event." Jurisdiction Order, Aplt. App. 690 (noting that the *Park County* court found that a nearly two-year delay was not unreasonable under the circumstances); *see Citizens for Environmental Quality v. United States*, 731 F. Supp. 970, 993 (D. Colo. 1989) (rejecting laches argument where movant made "no showing of prejudice"); *see also* Aplt. App. 1771 (OSM finding that BNCC has sufficient coal reserves under its 2004 Permit Renewal to continue until 2016).

In sum, BNCC cannot show that the district court abused its discretion in rejecting BNCC's laches argument.

E. The District Court Properly Determined that Diné CARE's Challenge to the EA/FONSI was Not Moot

For its final jurisdictional argument, BNCC claims that a Permit Renewal submitted by BNCC in 2009 (hereinafter "2009 Permit Renewal") and issued by OSM after oral argument on August 25, 2010, but before issuance of the district court's Memorandum Opinion and

Order on October 28, 2010, mooted Diné CARE's NEPA challenge. BNCC's Opening Brief at 34-36; *compare* Remand Order, Aplt. App. 1654-1657. BNCC is in error.

The district court properly determined that OSM's NEPA violations relating to OSM's 2004 Permit Renewal were mooted by the 2009 Permit *Renewal*, but that OSM's NEPA violations related to the OSM's 2005 Permit *Revision* and EA/FONSI were ongoing and were not superseded or replaced by the renewal. Remand Order, Aplt. App. 1654-1657.

Under the standard set forward by this Court to determine whether a claim remains live for review, courts must "ascertain what type of relief [plaintiffs] seek, and whether [the court] can, at this juncture, afford them meaningful relief." *Rio Grande Silvery Minnow,* 601 F.3d at 1111 (citation omitted). In that case, plaintiffs challenged two biological opinions ("BO") under the Endangered Species Act ("ESA"), which the Court found moot based on the federal agency's issuance of a third BO which "superseded both them" and "establishe[d] a new regulatory framework under which the propriety of [the agency's] actions must be judged." *Id*. at 1111. Further, the relief sought by

plaintiffs, consultation between federal agencies, had occurred with issuance of the third BO and therefore plaintiffs were "not able to point to some concrete ongoing injury." *Id*. (citation omitted).

In this case, the 2005 Permit Revision was *not* superseded by the 2010 Permit Renewal. The 2010 Permit Renewal authorizes *only* "those surface coal mining and reclamation operations described in the application for this permit approved by the [] (OSM) *on September 22, 1994*." Renewal Permit (2010) ¶2 (emphasis added) (Attachment A-4). Thus, by its own terms, the 2010 permit renewal does not cover the 2005 Permit Revision.

Similarly, the 2010 Permit Renewal covers *an identical amount of acreage* as the 2004 Permit Renewal and thus, by its own terms, does *not* include the 3,800 acre Area IV North. *See* Renewal Permit (2004) at ¶2, Aplee. Supp. App. 6087 ("The permit area of the mine consists of 13,430 acres…"); *compare* Permit Renewal (2010) at ¶2 (Attachment A-4) ("The permit area of the mine consists of 13,430 acres ….") .

Second, and even if the 2010 Permit Renewal had covered the Area IV North mine acreage, the 2010 Permit Renewal does not establish a new regulatory framework or "provide sufficient legal basis

for the mining operations in Area IV North." Remand Order, Aplt. App. 1657.

The 2005 Permit *Revision*, and *not* the 2010 Permit *Renewal*, authorized mining in Area IV North and has binding legal effect. Further, and unlike permit renewals which expire every five (5) years, OSM's 2005 Permit Revision did not expire by its own terms. *See* Aplt. App. 1765-1767. Additionally, mining operations conducted by BNCC pursuant to the 2005 Permit Revision were ongoing and had not ceased. *See Rio Grande Silvery Minnow*, 1096 F.3d at 1115 (where ongoing violations exist and declaratory relief remains available, mootness does not exist).

For this reason, the court correctly determined that "[i]f as requested by Plaintiffs, I void OSM's actions in approving BNCC's 2005 Permit Revision [ ] and remand to Defendants to fulfill their duties under NEPA, there will be real, tangible effects. Mining operations in Area IV North will necessarily cease." Remand Order, Aplt. App. 1657. In fact, this is exactly what happened on remand. Following the court's order, BNCC to "stopped all work associated with Area IV North and the Burnham Road relocation." Attachment A-1 at 3. However, mining

operations at the rest of the mine continued as normal under the 2010 Permit Renewal.

Finally, BNCC's 2010 Renewal Permit did not remedy OSM's ongoing NEPA violations. OSM's issuance of the BNCC's 2010 Renewal Permit was "categorically excluded" from NEPA analysis and OSM has provided no NEPA analysis subsequent to the 2005 EA/FONSI at issue in the present case that could potentially moot the 2005 EA/FONSI. Attachment A-3 at 3.

For the reasons set forward above, BNCC's argument that the 2010 Permit Renewal mooted Diné CARE's NEPA challenge should be rejected.

IV. The District Court Properly Determined that OSM's Authorization of the 2005 Permit Revision Violated NEPA

The district court properly determined that OSM's authorization of the 2005 Permit Revision and related EA/FONSI violated NEPA, remanding this matter back to OSM for further proceedings.

Judicial review of agency NEPA decisions is made under the standard of review of the judicial review provision of the APA, 5 U.S.C. § 701 *et seq*. *Colorado Farm Bureau Fed'n v. United States Forest Serv.*, 220 F.3d 1171, 1173 (10th Cir. 2000). The APA instructs that

federal agency action must be set aside if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "without observation of procedure required by law." 5 U.S.C. §§706(2)(A) & (D). "These standards require the reviewing court to engage in a 'substantial inquiry.' … An agency's decision is entitled to a presumption of regularity, 'but that presumption is not to shield [the agency's] action from a thorough, probing, in-depth review.'" *Olenhouse,*, 42 F.3d at 1574, *quoting Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971).

When reviewing an EA/FONSI to determine whether an EIS should have been prepared, a court must determine whether the agency acted arbitrarily and capriciously in concluding that the proposed action "will not have a significant effect on the human environment." *Utah Shared Access Alliance v. United States Forest Serv.*, 288 F.3d 1205, 1213 (10th Cir. 2002). In other words, a court's review of an EA/FONSI has a "substantive component as well as a component of determining whether the agency followed procedural prerequisites." *Id.* If a plaintiff demonstrates substantively that the agency's conclusion of

non-significant effect on the environment represents a "clear error of judgment," then the agency's conclusion must be reversed. *Id.*

The Court should note that BNCC did not challenge two aspects of the district court's Remand Order, which ordered OSM to address on remand coal combustion waste (Aplt. App. 1681) and cultural resource information obtained by the agency after approval of the 2005 Permit Revision and EA/FONSI (Aplt. App. 1687). For this reason, those aspects of the district court's Remand Order are not before the Court on appeal and are not addressed in this brief.

A. The District Court Properly Remanded the 2005 Permit Revision to OSM to Address the Presumption of Whether Approval Requires an EIS

BNCC argues that it was error for the district court to order OSM to address on remand the regulatory presumption that the 2005 Permit Revision approval required an EIS, because the district court's Remand Order failed to accord appropriate agency deference, was based on a "misinterpretation" of OSM's NEPA guidelines, and inappropriately "rejected" prior NEPA analysis. BNCC Brf. at 37-42; *compare* Remand Order, Aplt. App. 1663-1668. BNCC is in error.

Based on its examination of three guidelines contained in a U.S. Department of Interior manual, the district court determined that OSM failed to adequately evaluate and apply the presumption that an EIS will normally be prepared if the three criteria are met. Remand Order, Aplt. App. 1665-1668. Thereafter, the district court remanded this issue back to OSM in order to provide the agency "an opportunity to reassess its position in light of this ruling." *Id*. at 1668.

First, the district court did not fail to accord deference to the agency or misinterpret OSM guidelines. The court stated expressly that the "plain language" of the guidelines is controlling and that "OSM's interpretation and application" of the guidelines is due "substantial deference." Remand Order, Aplt. App. at 1665. Other than bare allegation, BNCC provides nothing to substantiate its argument that OSM was not provided substantial deference or that OSM guidelines were somehow "misinterpreted" by the court. "An agency's interpretation of its own regulations may well be entitled to 'substantial deference'; but it nevertheless will be set aside if it is the product of a

decision-making process deemed arbitrary or capricious, or if it lacks factual support." *Olenhouse,* 42 F.3d at 1575-1576.[7]

Second, BNCC's argument that the district court "misapplied the first of the three criteria" "[i]n concluding that the prior environmental review documents were inadequate" is wrong. *See* BNCC Brf. at 39. The district court did not "reject" prior analysis, but instead found that prior NEPA analysis cited by OSM "fail[ed] to adequately analyze the specific mining activity" proposed for Area IV North and that "none of the EIS's were conducted as part of a tiered NEPA analysis." Remand Order, Aplt. App. 1667. Thereafter, the district court ordered OSM to address this issue on remand.

The district court's finding was supported by the record. OSM's administrative record was embellished with "NEPA documents" for projects with no articulated relevance or connection to the mining area

[7] Similarly, by misapplying *Kleppe v. Sierra Club*¸427 U.S. 390, 412 (1976) which dealt with an agency's refusal to prepare one comprehensive EIS for an entire region, BNCC alleges that the district court somehow failed to accord deference to OSM's decision regarding the "scope of the EA …." BNCC Brf. at 37-38. However, the district court's Remand Order did not deal with the "region" covered by OSM's 2005 EA. Regardless, the standard under the APA is whether the agency's action was "arbitrary and capricious," not one of absolute deference to the agency. *Kleppe* at 412.

under review by the court. Of the three EISs submitted by OSM as part of the administrative record, only the 1976 "WESCO" EIS contained any reference to mining in Area IV North. Remand Order, Aplt. App. 1667 (*citing* Aplt. App. 2107, 2112). However, the WESCO EIS, which was prepared by the Bureau of Reclamation (and did not include OSM), evaluated a proposed coal gasification project that was never constructed and therefore had no relevance to BNCC's revision in 2005.

Additionally, and importantly, OSM's administrative record contained no underlying EIS prepared by OSM analyzing the impacts of the Navajo Mine itself. In other words, there never was an EIS addressing mine conditions at an early stage to be supplemented with an EA at this stage. *See* 40 C.F.R. § 1508.28 (defining "tiering" under NEPA); *Park County*, 817 F.2d at 624 (discussing tiering).[8]

In sum, BNCC's argument that the district court erred by failing to accord appropriate agency deference, by "misinterpreting" "OSM's

[8] BNCC's reliance on a twenty-one year old EA from 1989 is unavailing. Tiering is only authorized from an EIS. 40 C.F.R. §1508.28. Further, and other than simply noting that mining may occur at some point in Area IV North, the 1989 EA does not adequately analyze the impacts of mining activities in this area as required by OSM guidelines. *See* Remand Order, Aplt. App. 1664.

NEPA guidelines," and inappropriately "rejecting" prior NEPA analysis should be rejected.

B. The District Court Properly Remanded the 2005 Permit Revision to OSM to Address the Environmental Effects of the Burnham Road Realignment in Connection With its Analysis of the 2005 Permit Revision

BNCC argues that it was error for the district court to order OSM to address on remand the environmental effects of the Burnham Road Realignment in connection with mining in Area IV North, based on BNCC's claim that Burnham Road relocation has a "separate purpose." BNCC Brf. at 43-47; *compare* Remand Order, Aplt. App. 1668-1670. BNCC is wrong.

In order to allow for meaningful discussion of the potential environmental effects of a proposed action, NEPA requires agencies to consider all "connected actions" in a single EIS. NEPA's implementing regulations define "connected actions" as actions that "are closely related" to the action under review because the actions: "(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." *Utahns for Better Transp. v. United States Dep't of Transp.*, 305 F.3d 1152, 1182 (10th Cir. 2002) (*citing* 40 C.F.R. § 1508.25(a)(1)).

The district court found that the 2005 EA unambiguously stated that without approval of the 2005 Permit Revision and authorization of mining in Area IV North, "'[t]he Burnham Road would not be moved and improved and the 50 additional acres would not be disturbed.'" Remand Order, Aplt. App. 1670 (quoting Aplt. App. 1781, emphasis supplied by the court).[9] Specifically, relocation of Burnham Road was a "permit condition" or pre-condition to mining in Area IV North and was therefore a connected action under NEPA. Jurisdiction Order, Aplt. App. 674; *see also* OSM's Findings and Approval of the Permit Revision Application, ¶12 (Aplt. App. 1767). For this reason, the court ordered OSM to consider on remand "the environmental effects of the Burnham Road Realignment in connection with its analysis of BNCC's 2005 Permit Revision Application." Remand Order, Aplt. App. 1670.

[9] Contrary to BNCC's allegation, there is nothing in the 2005 EA that establishes that BNCC "was proposing to realign the road to access reserves in Area III …." *See* BNCC Brf. at 43 (no citation provided).

On appeal, BNCC argues for the first time that Burnham Road has a "separate purpose," to "provide safe access to the Burnham Chapter." BNCC Brf. at 45. Because BNCC failed to raise this new factual argument before the district court, it has forfeited its ability to raise this theory on appeal. *Compare* Aplt. App. 968-969. "Propounding new arguments on appeal in an attempt to prompt us to reverse the trial court undermines important judicial values." *United States v. Jarvis*, 499 F.3d 1196, 1201 (10th Cir. 2007) (*quoting Tele-Communications, Inc. v. Comm'r*, 104 F.3d 1229, 1233 (10th Cir. 1997)).

But even if this argument were considered, while "safe access" might be a side benefit of the road, as discussed above the realignment would not have taken place but for the mine expansion. *See Wilderness Workshop v. U.S. BLM*, 531 F.3d 1220, 1229 (10th Cir. 2008) (the crux of the "independent utility" determination is "whether each of the two projects would have taken place with or without the other"). BNCC points to nothing in the record to counter the district court's factual finding or to indicate that BNCC was somehow planning to relocate Burnham Road for purposes unrelated to (and therefore independent of) its mining operation, as required by OSM.

BNCC also argues that Burnham Road relocation "did not evade review" because it was alluded to in separate NEPA documents. BNCC Brf. at 46-47. BNCC's argument misses the point. Analyzing the impacts of the road relocation and mining in Area IV North in a single NEPA document was necessary to "prevent agencies from minimizing the potential environmental consequences of a proposed action (and thus short-circuiting NEPA review) by segmenting or isolating an individual action that, by itself, may not have a significant environmental consequence." *See Citizens to Save Our Canyons v. U.S. Forest Service*, 297 F.3d 1012, 1029 (10th Cir. 2002). In this case, it was necessary in order for OSM to determine whether the cumulatively significant impacts of both of these actions required an EIS. 40 C.F.R. § 1508.27(b)(7).

Finally, OSM has now announced its intention to analyze Burnham Road realignment in connection with BNCC's revised proposal to mine in Area IV North. *See* Attachment A-1. This highlights why the Court should dismiss this appeal for lack of finality as addressed above- a ruling by the Court now would simply interrupt this process, a process that may yet yield the mining approval sought by

BNCC. If it does not, then BNCC will be free to challenge that decision, along with the district court's decision requiring the two actions to be analyzed together. *See* Argument Section II, *supra*.

For these reasons, BNCC's argument, that the district court erred in ordering OSM to address the environmental effects of the Burnham Road Realignment in connection with mining in Area IV North as a connected action on remand, should be rejected.

C. The District Court Properly Remanded the 2005 Permit Revision to OSM for a Meaningful Discussion of all Reasonable Alternatives

BNCC argues that it was error for the district court to order OSM to provide a meaningful discussion of all reasonable alternatives (including approval of the permit with conditions) on remand. BNCC Brf. at 48-56; *compare* Remand Order, Aplt. App. 1670-1674. BNCC is wrong.

The requirement that agencies consider alternatives to the action under review is "the heart of the environmental impact statement." *Fuel Safe Washington v. Fed. Energy Regulatory Comm'n*, 389 F.3d 1313, 1323 (10th Cir. 2004). This requirement applies to EAs as well. 40 C.F.R. § 1508.9(b). As a consequence, NEPA's implementing

regulations require agencies to "[r]igorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated." 40 C.F.R. § 1502.14(a). The evaluation of alternatives must constitute a "substantial treatment," presenting the impacts of the alternatives in comparative form "sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and public." *Id.*

The district court found that OSM analyzed "only alternatives that would approve or disapprove the 2005 Permit Revision in their EA." Remand Order, Aplt. App. 1672. Additionally, the court found that OSM approved the 2005 Permit Revision with permit conditions which were never considered in the EA. *Id.*; *see also* Jurisdiction Order, Aplt. App. 675 (noting two conditions of relevance: completion of a thorough ethnographic study and cultural mitigation/data recovery plan; and relocation of a public road).

For this reason, the court held that OSM's adoption of permit conditions, not considered or rigorously evaluated as alternatives, does not fulfill the agency's NEPA obligations. Thereafter, the court

remanded the EA back to OSM to "include a meaningful discussion of all reasonable alternatives—including approval with conditions." Remand Order, Aplt. App. 1674.

On appeal, BNCC argues, without citation, that OSM's conditions were "necessarily included" in the "spectrum" of alternatives between approval and disapproval. BNCC Brf. at 50. BNCC's statement is not supported by the EA or the record before the Court. There was no "spectrum" of alternatives considered by the agency, only two. *See* 2005 EA, Aplt. App. 1774 (identifying exactly two alternatives for analysis in the EA). Additionally, OSM's adoption of permit conditions "disproves the agency's claim that it has no *authority* to consider other alternatives" during the NEPA process. *See Save Our Cumberland Mts. v. Kempthorne*, 453 F.3d 334, 343 (6th Cir. 2006) (emphasis in original).

Second, BNCC argues that because of its "detail," BNCC's proposed mine plan submitted under SMCRA acted as a substitute for meaningful alternatives analysis under NEPA. BNCC Brf. at 51. However, OSM's NEPA duties are independent of OSM's SMCRA obligations. 30 C.F.R. § 750.6(a)(7); *see also Save Our Cumberland Mountains*, 453 F.3d at 342 (SMCRA does not suspend NEPA duties).

For this reason, OSM was under a separate obligation to fulfill its NEPA obligations to "[r]igorously explore and objectively evaluate all reasonable alternatives" and could not simply rely on a mine plan proposed by BNCC to comply with its NEPA obligations. 40 C.F.R. § 1502.14(a).

Third, BNCC argues that the alternatives advanced by Diné CARE "are adequately covered by existing permit conditions …." BNCC Brf. at 52. Assuming *arguendo* BNCC's statement is correct, the mere existence of permit conditions does not satisfy OSM's continuing duty to comply with NEPA. *See* 30 C.F.R. § 750.6(a)(7); *Greater Yellowstone v. Flowers*, 359 F.3d 1257, 1277 (10th Cir. 2004) ("An agency's obligation to consider reasonable alternatives is 'operative even if the agency finds no significant impact.'") (citation omitted).

Regardless, OSM's permit conditions do not "satisfy" the reasonable alternatives that Diné CARE suggested should be considered, and therefore the agency's failure to consider these alternatives cannot be said to be mere "harmless error." Because there was no alternative that addressed protection of the 73 historical and cultural sites, 34 of which are considered eligible for nomination to the

National Register of Historic Places, as well as hundreds of "in-use" sacred sites, traditional cultural properties, and Navajo gravesites scattered throughout Area IV North (Aplt. App. 1825-1826), there is no permit condition that halts destruction of these areas.

Similarly, and because there was no alternative that addressed unresolved conflicts related to direct impacts to tribal members and their use rights in Area IV North, there is no permit condition protecting these interests. *See* Aplt. App. 1765-1767. Finally, and because there was no alternative that analyzed halting coal combustion waste ("CCW") disposal in Area IV North, there is no permit condition protecting water resources from CCW disposal. *Id.*[10]

In sum, BNCC's argument that the district court erred in ordering OSM to provide a meaningful discussion of all reasonable alternatives (and in particular, approval of the permit with conditions) on remand should be rejected.

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[10] BNCC provides no citation to the record for the company's claim that CCW was not authorized in Area IV North. *See* Remand Order, Aplt. App. 1680-1681 (where the court remands this issue to the agency to explain whether CCW was authorized by the 2005 Permit Revision application).

D. The District Court Properly Remanded the 2005 Permit Revision to OSM to take a "Hard Look" at Mitigation of Impacts to Scientific, Cultural, and Historic Resources

BNCC argues that it was error for the district court to remand OSM's 2005 Permit Revision back to the agency to take a hard look at mitigation of the hundreds of scientific, cultural, and historic resources in Area IV North. BNCC Brf. at 56-58; *compare* Remand Order, Aplt. App. at 1676-1679. BNCC is wrong.

NEPA directs all federal agencies to comply with certain procedures before taking any action or making any decision that could "significantly affect the quality of the human environment." *Colorado Environmental Coalition*, 185 F.3d at 1171. "The purpose behind this requirement is to ensure that the agencies will 'take a 'hard look' at the environmental consequences of proposed actions utilizing public comment and the best available scientific information.'" *Id*. (*citing Robertson*, 490 U.S. at 350). Additionally, NEPA requires an agency to include a discussion of possible mitigation measures. *Holy Cross Wilderness Fund*, 960 F.2d at 1522.

In addition to examination of mitigation measures to meet the "hard look" mandate, in some circumstances mandatory mitigation

measures may allow an agency to rely upon an EA instead of an EIS. However, where an agency relies on a "mitigated EA," "[m]itigation measures may be relied upon to make a finding of no significant impact only if they are imposed by statute or regulation, or submitted by an applicant or agency as part of the original proposal." *Davis v. Mineta*, 302 F.3d. 1104, 1125 (10th Cir. 2002).

In this case, there are 73 historical and cultural sites, 34 of which are considered eligible for nomination to the National Register of Historic Places, as well as hundreds of "in-use" sacred sites, traditional cultural properties, and Navajo gravesites scattered throughout Area IV North. Aplt. App. 1825-1826. For this reason, OSM was required to consider the degree to which approval of mining in Area IV North "would adversely affect these resources in determining whether an EIS was required." Remand Order, Aplt. App. 1677. Additionally, noting that mitigation measures could be relied on in issuing a FONSI, the district court found that "there were no detailed mitigation plans upon which OSM could have relied in making its finding of no significant impact." *Id*. at 1679. Thereafter, the court remanded this matter back

to OSM to consider "specific mitigation measures" to protect these important areas. *Id*.

Because the EA did not consider any mitigation measures for cultural resources, OSM failed to take the required "hard look" at impacts and potential ameliorative measures. *See e.g. Robertson*, 490 U.S. at 352 ("[O]mission of a reasonably complete discussion of possible mitigation measures would undermine the 'actionforcing' function of NEPA."). Therefore, OSM's FONSI was arbitrary and capricious.

Finally, BNCC asserts without citation that OSM has now "partnered" with it and the Navajo Nation "to ensure that cultural resources are protected." BNCC Brf. at 57-58. But such *post hoc* informal agreements of course do not provide a substitute for NEPA compliance and the formal protections for cultural resources that mitigation measures analyzed under NEPA would provide. Likewise, because no mandatory mitigation measures were adopted, let alone binding mitigation, the FONSI cannot be relied upon to avoid preparation of an EIS based on the impacts to cultural resources. *See Davis*, 302 F.3d. at 1125.

In sum, BNCC's argument that the district court erred in remanding this matter to OSM to take a hard look at mitigation measures for scientific, cultural, and historic resources should be rejected.

E. The District Court Properly Remanded the 2005 Permit Revision to OSM to Provide "Meaningful Notice"

BNCC argues that it was error for the district court to remand OSM's 2005 Permit Revision back to the agency to provide "meaningful notice" of the agency's NEPA actions related to Area IV North. BNCC Brf. at 58-61; *compare* Remand Order, Aplt. App. 1681-1684. BNCC is wrong.

One of NEPA's primary purposes is to "insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken." 40 C.F.R. § 1500.1(b). NEPA procedures "ensure[] that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process." *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 97 (1983); *see also Southern Utah Wilderness Alliance v.*

Norton, 301 F.3d 1217, 1237 (10th Cir. 2002), *rev'd and remanded on other grounds*, 542 U.S. 55 (2004).

Based on a review of the case on the whole, the district court found that OSM's approval of the 2005 Permit Revision "was a type of action for which an EIS would normally be prepared" and therefore OSM was required under NEPA to make its FONSI available for public review for 30 days before making its final determination. Remand Order, Aplt. App. 1682-1683 (*discussing* 40 C.F.R. 1501.4(e)(2)). Further, and based on the unique facts of the case and the court's review of non-binding environmental justice policies, the court required OSM to tailor its public notice on remand to be consistent with the notice procedures already in use by the agency. *Id*. at 1683-1684.

BNCC argues without citation to the record that the district court incorrectly concluded that the 2005 Permit Revision was one that normally would require preparation of EIS, and therefore required a 30-day public notice of the FONSI on remand. BNCC Brf. at 59. The court's determination that the 2005 Permit Revision presumptively required an EIS was fully substantiated by the court's Remand Order

and BNCC fails to identify any part of the court's analysis that did not lend itself to this finding.[11]

Second, relying on Ninth Circuit case law, BNCC argues that the district court impermissibly held OSM to a "higher than required standard" on remand. BNCC Brf. at 60. However, the court simply directed OSM on remand to provide "meaningful notice, similar to that provided in advance of its approval" of BNCC's 2010 Permit Renewal. Remand Order, Aplt. App. 1684. In other words, the court directed OSM to employ notice procedures "similar" to those already in use by the agency to comply with its NEPA duties.

Finally, OSM already appears to be utilizing these notice procedures on remand, as OSM has begun to tailor its public notice of the revised plan to mine in Area IV North to account for the unique characteristics of the local population most affected by actions at the Navajo Mine. Attachment A-1. This is yet another practical reason why this appeal should be dismissed for lack of finality rather than be

[11] Because the Remand Order "correctly stated" the law (BNCC Brf. at 59), the court's order does not impose any additional legal requirements and certainly does not lead to the requirement that agencies "must circulate the thousands of FONSIs prepared each year." *See* BNCC Brf. at 59 n.9.

allowed to interrupt an ongoing process. *See* Argument Section II, *supra*. Instead, any further court proceedings should await a decision by OSM on remand, which BNCC may or may not disagree with and challenge.

In sum, BNCC's argument that the district court erred in remanding OSM's 2005 Permit Revision back to the agency to provide "meaningful notice" of the agency's NEPA actions should be rejected.

CONCLUSION

For these reasons, this appeal should be dismissed, or alternatively, the district court's orders should be affirmed**.**

REASON FOR REQUESTING ORAL ARGUMENT

This case addresses a matter of great public interest involving development on Indian lands, involving many issues, and so deserves the attention and study that oral argument provides.

Respectfully submitted this 16th day of May, 2011.

/s/Matt Kenna
Matt Kenna, CO Bar No. 22159
Public Interest Envtl. Law
679 E. 2nd Ave., Suite 11B
Durango, CO 81301
(970) 385-6941
matt@kenna.net

/s/Brad Bartlett
Brad Bartlett CO Bar No. 32816
Travis Stills, CO Bar No. 27509
Energy Minerals Law Center
1911 Main Avenue, Suite 238
Durango, Colorado 81301
Phone: (970) 247-9334
brad.bartlett@frontier.net

APPELLEES' ATTACHMENT INDEX

Attachment A-1	2011 Area IV North Notice documents
Attachment A-2	2011 Email communication from OSM
Attachment A-3	2010 Permit Renewal Cover Letter
Attachment A-4	Renewal Permit (2010)

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION

I certify that this brief is proportionally spaced, using a 14-point Century Schoolbook font. It contains 10,719 words, which complies with the requirements of Fed. R. App. P. 32(a).

/s/Matt Kenna
Matt Kenna

CERTIFICATE OF DIGITAL SUBMISSION

The digital copy of this document is an exact copy of the written document, and all required privacy redactions have been made. It has been scanned for viruses using Symantec AntiVirus version 10.1.5.5000, updated on May 15, 2011, and is free of viruses according to the program.

/s/Matt Kenna
Matt Kenna

CERTIFICATE OF SERVICE

I certify that I electronically filed this brief with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system on May 16, 2011. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

I further certify that I will serve one copy of Appellees' Supplemental Appendix, on the following counsel of record by First-Class, U.S. Mail on May 16, 2011.

William C. Scott
Walter E. Stern
Deana M. Bennett
Post Office Box 2168
Bank of America Centre
500 Fourth Street NW, Suite 1000
Albuquerque, New Mexico 87103-2168

/s/Matt Kenna
Matt Kenna

ATTACHMENT A-1

bhpbilliton
resourcing the future

BHP Billiton Limited
BHP Navajo Coal Company
PO Box 1717
16 Miles South of Fruitland on CR 6675
Fruitland, New Mexico 87416 USA
Tel +1 505 598 4200 Fax +1 505 598 4300
bhpbilliton.com

06 April 2011

Dear Interested Parties,

BHP Navajo Coal Company (BNCC) is informing interested parties and company employees about the upcoming Public Workshops regarding the proposed Navajo Mine Area IV North mine plan submitted to the Office of Surface Mining Reclamation and Enforcement (OSM) by BNCC, and related permitting activities. Obtaining approval to mine in Area IV North and securing related federal approvals is critical in meeting BNCC's contractual obligations to supply coal to the Four Corners Power Plant through July 6, 2016.

The purpose of these workshops is to inform the public about the proposed mine plan and related matters, and to give interested parties an opportunity to provide oral or written comments on the proposed mine plan and related permitting.

Your voice is a critical part to the process, whether you are an opponent or are a supporter. BNCC believes its permitting, mining and reclamation plans are beneficial to the local communities, its employees, and to the Navajo Nation. If you want your voice heard, there are two opportunities to do so at either of the following workshops:

- Workshop 1 – April 13, 2011 at Tiis Tsoh Sikaad (Burnham) Chapter House from 10 a.m. to 12 p.m.
- Workshop 2 – April 14, 2011 at the Nenahnezad Chapter House from 4 p.m. to 6 p.m.

The attached fact sheet provides additional information about the project and the importance of public participation.

BNCC appreciates your effort in supporting the Area IV North Mine Plan public participation process.

Sincerely,

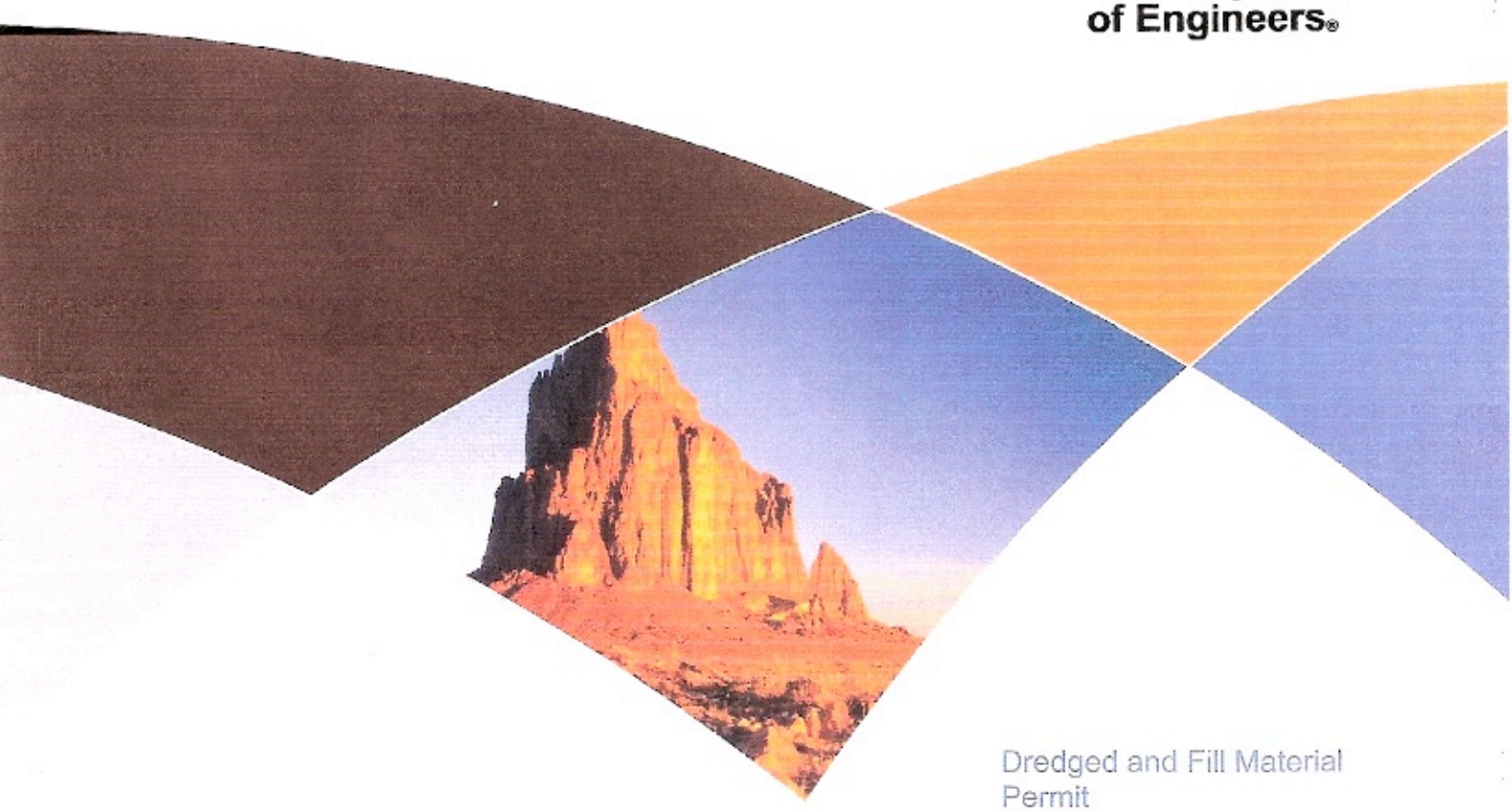
BNCC Management

Navajo Mine Area IV North Mine Plan Revision

Fact Sheet

APRIL 2011

US Army Corps of Engineers®



What is being proposed?

Mine Plan Revision

On February 15, 2011, BHP Navajo Coal Company (BNCC) submitted a revised mine plan to the Office of Surface Mining Reclamation and Enforcement (OSM) proposing to disturb approximately 830 acres of Area IV North to meet BNCC's contractual obligation to supply coal to Four Corners Power Plant through July 6, 2016.

Public Road Relocation

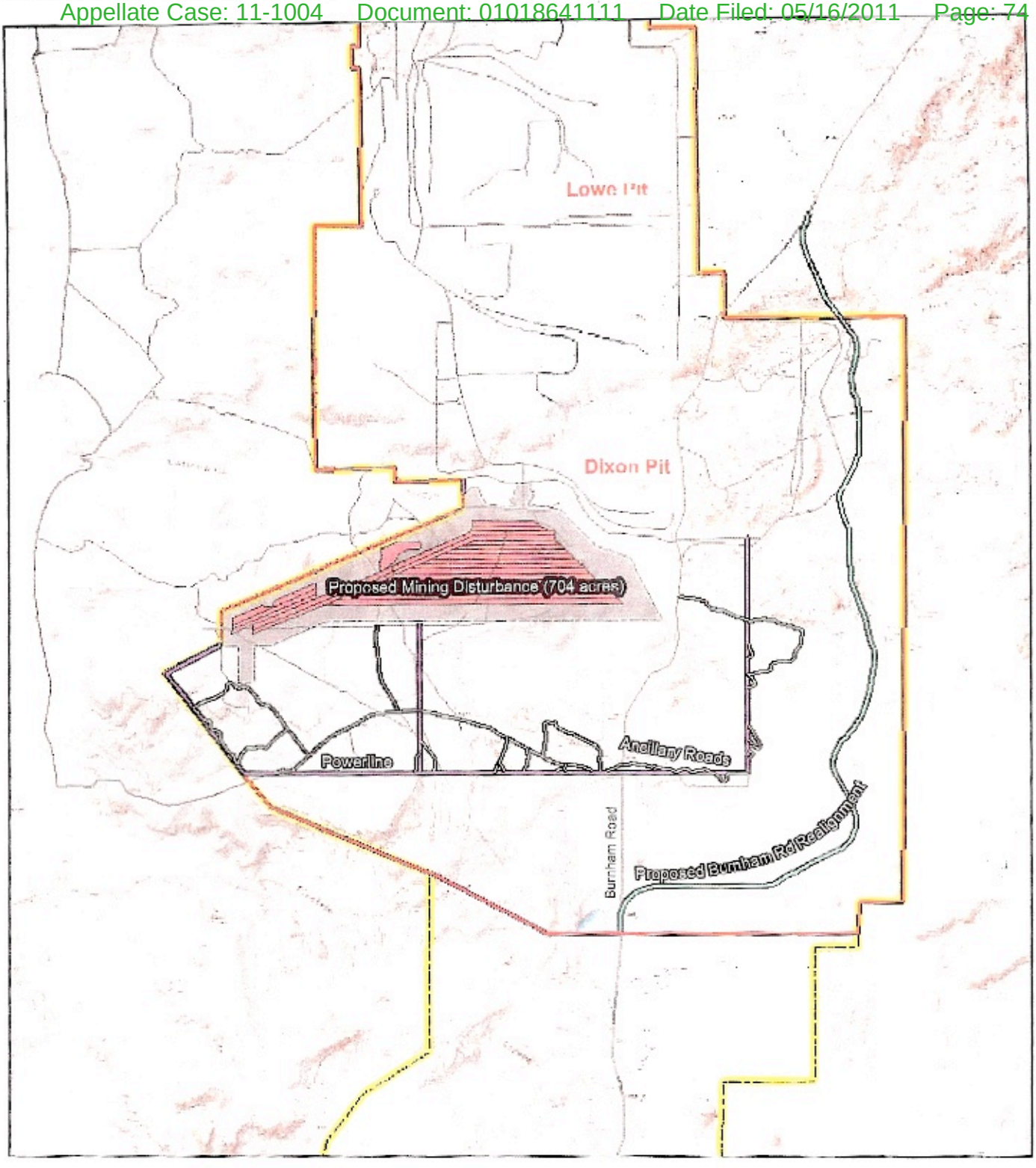
BNCC proposes to relocate approximately five miles of the Burnham Road (BIA Road 3005; also known as Navajo Road N-5082) to the eastern portion of the Mine Lease. The Burnham Road is a public road that provides, among other things, access for local residents to the Tiis Tsoh Sikaad (Burnham) Chapter House. The road relocation is necessary due to the close proximity of the road to the current mining operations and to improve safety and access for local residents and others using the Burnham Road for local and through traffic. This proposal will be reviewed by OSM and the Bureau of Indian Affairs (BIA).

Dredged and Fill Material Permit

BNCC proposes to obtain a Clean Water Act Section 404 Individual Permit for discharges of dredged or fill material into waters of the United States within the proposed project area. The permit application is currently being prepared for submission to the U.S. Army Corps of Engineers (USACE) for review.

Resource Recovery and Protection Plan

BNCC proposes a modification to the existing Resource Recovery and Protection Plan to update timing for coal extraction within the portion of Area IV North proposed for pre-2016 mining. This minor modification will be submitted to the Bureau of Land Management (BLM) for review.



Coal Lease Boundary
SMCRA Permit Boundary
Proposed Coal Production
Proposed Mining Disturbance
Powerline
Burnham Rd Realignment
Ancillary Road
Navajo Mine Road

0 0.25 0.5 1
Miles

1:50,000

BHP Navajo Coal Company

SMCRA Project Area Map

SAN JUAN COUNTY, NEW MEXICO

Date: 4/1/2011

What is the history of the project?

In December 2004, BNCC submitted an application to OSM to revise its approved mining plan to include mining coal in Area IV North—a 3,800 acrea area. BNCC also proposed to relocate approximately five miles of the Burnham Road to facilitate mining activities and to improve safety and access for local residents and others using the Burnham Road.

In October 2005, OSM approved BNCC's mine plan revision based on the review of its associated Environmental Assessment (EA). BNCC began development of Area IV North to prepare for mining activities. The development included construction work on several infrastructure projects, such as roads, soil stockpiles, powerlines, ponds, and fencing.

In July 2007, Dine CARE and San Juan Citizens Alliance filed a civil suit against OSM in the U.S. District Court for the District of Colorado challenging the approval of BNCC's revised mine plan. The suit claimed that OSM failed to comply with the procedural requirements of the National Environmental Policy Act (NEPA).

In September 2007, BNCC submitted another application to OSM proposing to permanently relocate approximately five miles of Burnham Road. A separate EA was developed for the Burnham Road relocation in June 2008. In June 2010, OSM approved BNCC's proposal to relocate the Burnham Road.

In October 2010, the U.S. District Court for Colorado vacated OSM's approval of the 2005 Area IV North permit revision and ruled that the Burnham Road relocation project was a connected action to the 2005 Area IV North mine plan revision.

Following the Court's order, BNCC stopped all work associated with Area IV North and the Burnham Road relocation.

What is happening now?

OSM will be hosting two public workshops on April 13 and 14, 2011 to seek input from interested parties on the proposed project.

A third-party contractor, Ecosphere Environmental Services, is currently preparing an EA for this project. The EA is expected to be completed in June 2011.

What is an Environmental Assessment (EA)?

An EA is part of the NEPA process. NEPA is an environmental law that established a policy for promoting the enhancement of the environment and set up procedural requirements for all federal agencies. An EA is a public document that serves to:

- Briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement (EIS) or a finding of no significant impact (FONSI)
- Aid in the agency's compliance with NEPA when no EIS is necessary
- Facilitate the preparation of an EIS when one is necessary

The EA will consist of a description of the need for the action, of the alternatives to the proposed action and of the environmental impacts of the proposed action and alternatives. From this EA, OSM will make a determination of whether the proposed action will have a significant impact on the human environment. The public has an important role in the NEPA process and OSM is providing an opportunity for public participation in the process by holding two public workshops. Upon completion, the EA will be available for public review and comment.

What is the purpose of the public workshops?

The purpose of workshops is to inform the public about the proposed Area IV North mine plan revision at Navajo Mine. This meeting also provides an opportunity for public involvement, where the public is invited to give oral or written comments on the proposal.

When are the Public Workshops?

Workshop 1: April 13, 2011 from 10:00 a.m. to 12:00 p.m. at Tiis Tsoh Sikaad (Burnham) Chapter House, located on N-5 east of Highway 491

Workshop 2: April 14, 2011 from 4:00 p.m. to 6.00 p.m. at Nenahnezad Chapter House, located off County Road 6675

The workshop will be set up in a poster-style session with a brief PowerPoint presentation given by OSM and the USACE. A translator fluent in both English and Navajo, and a court reporter will be available to receive and record any verbal comments individual members of the public may wish to provide. Comments provided at the workshops will be submitted directly to the court reporter on an individual basis. Written comments will also be received.

Workshop Agenda

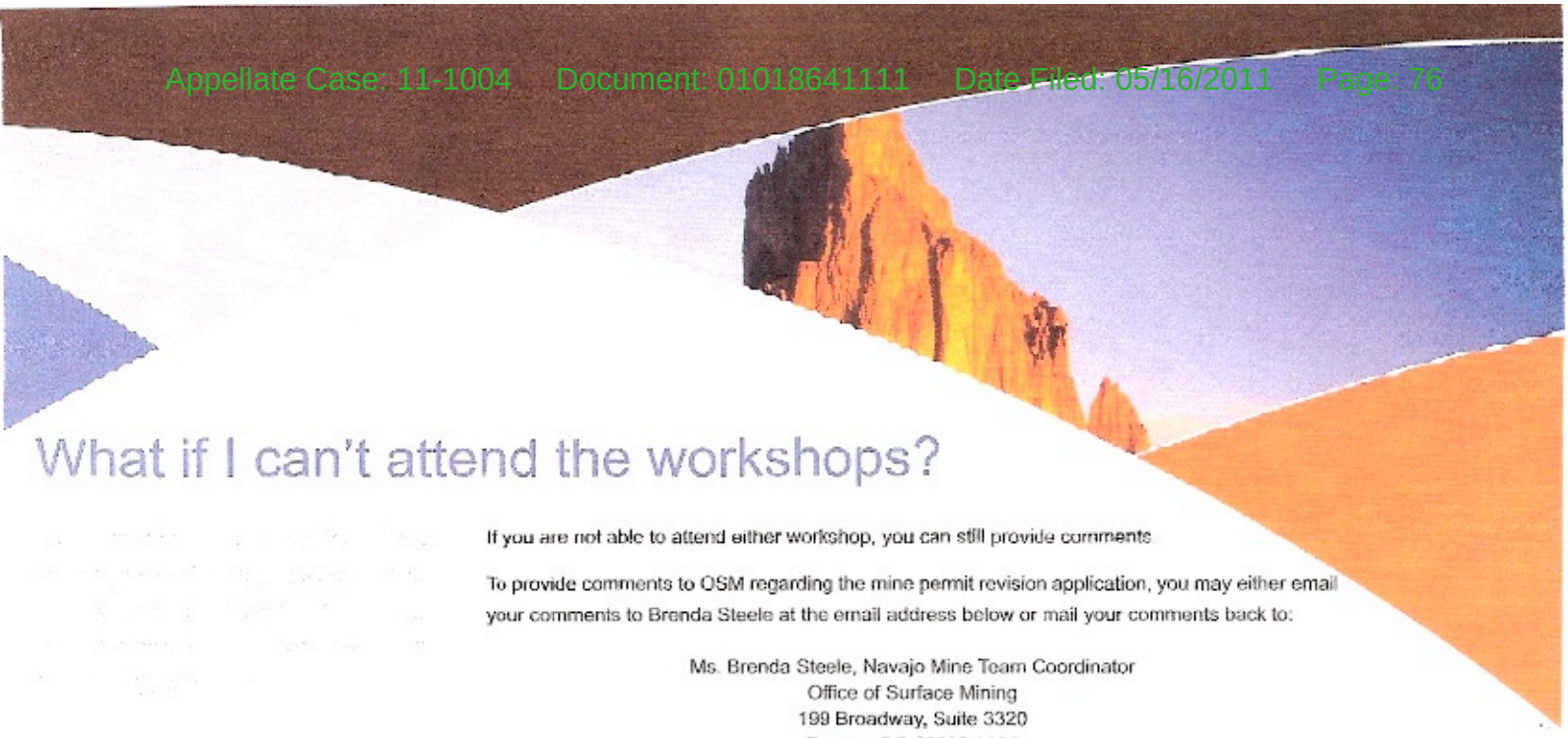
Item 1: Arrive at Chapter House and sign in (approx 15 mins.)

Item 2: Welcome and Introduction (OSM) (approx 10 mins.)

Item 3: Presentation by OSM and USACE (approx 30 mins.)

Item 4: Public to visit poster stations to ask questions and provide comments to the court reporter (approx 1 hr.)

Item 5: Public workshop ends



What if I can't attend the workshops?

If you are not able to attend either workshop, you can still provide comments.

To provide comments to OSM regarding the mine permit revision application, you may either email your comments to Brenda Steele at the email address below or mail your comments back to:

Ms. Brenda Steele, Navajo Mine Team Coordinator
Office of Surface Mining
199 Broadway, Suite 3320
Denver, CO 80202-3050

Comments are due to OSM by May 17, 2011.

To provide comments to the USACE regarding the Individual Permit application, you may review a copy of the public notice online at http://www.spa.usace.army.mil/reg/publicnotice.asp. Comments may be submitted by email or regular mail; for mailing information, please see the USACE public notice webpage. For more information about the Individual Permit application and review process, you may also contact the USACE project manager, Deanna Cummings, at (505) 342-3280 or email to deanna.l.cummings@usace.army.mil.

Office of Surface Mining Reclamation and Enforcement

Western Region
Attn: Brenda Steele
1999 Broadway, Suite 3320
Denver, CO 80202-3050

P Billiton Limited
P Navajo Coal Company
Box 1717
itland, New Mexico 87416

San Juan Citizens Alliance
108 North Behrend, Suite I
Farmington, NM 81302

ATTACHMENT A-2

On 4/21/2011 6:59 PM, Anna Frazier wrote:

---------- Forwarded message ----------
From: **Postle, Bob** <BPostle@osmre.gov>
Date: Thu, Apr 21, 2011 at 5:42 PM
Subject: RE: Letter re Area IV mine Expansion & Burnham Road
To: "frazierannm@gmail.com" <frazierannm@gmail.com>
Cc: "Steele, Brenda" <BSteele@osmre.gov>

Ms. Frazier,

In answer to the questions you submitted to Brenda Steele, OSM has the following responses.

(1) Did OSM provide public notice of these workshops, and if so, where and how?

Response: Yes, OSM provided public notice of the workshops using legal notices in the 3 newspapers, posters in 13 Chapter Houses, and radio announcements in the Navajo language on two radio stations.

(2) What is the legal basis for the workshops? NEPA? SMCRA? Judge Kane's Order?

Response: The DOI NEPA regulations provide for public notification and public involvement when an environmental assessment is being prepared. The methods for providing public notification and opportunities for public involvement are at the discretion of the Responsible Bureau Official.

(3) What is the status of BHP's Permit No. NM-0003-I-40, OSM Project Number NM-0003-F-I-40 which previously approved relocation of Burnham Road?

Response: OSM Project Number NM-0003-F-I-40 which previously approved relocation of Burnham Road is currently under appeal to DOI Office of Hearings and Appeals. Construction of the road relocation has not begun and is currently prohibited.

(4) Who else will be participating from Federal Agencies? U.S. Fish and Wildlife Service?

Response: The Bureau of Land Management and the Bureau of Indian Affairs, along with the Navajo Nation Surface Mining Program, will participate in the workshops.

(5) Is OSM planning to have its environmental analysis (aka NEPA analysis) available at these meetings?

Response: No

(6) If OSM is not planning to have its NEPA analysis available at the workshops, when will it be available? Will there be public comment on the NEPA analysis?

Response: Once it is completed OSM intends to make the environmental analysis available to the public for comment on OSM's web page, in the local Chapter Houses and other public locations.

Public meetings?

Response: OSM does not intend to hold additional public meetings after its EA is released.

(7) How do we obtain a physical copy (either electronic or in hard copy) of BHP's current operating permit?

Response: A copy of BHP Navajo Coal Company's currently approved permit application is available for review at the Farmington Public Library, OSM's Denver, Albuquerque and Farmington Offices and at the Navajo Nation Surface Mining Program office. These locations are listed in the legal notice for the revision application. In addition, OSM has posted a copy of the currently approved permit application on the OSM Western Region web page under Current Initiatives – Navajo Mine.

Thank you for your interest.

Bob Postle
Manager, Program Support Division
Western Region
Office of Surface Mining Reclamation & Enforcement
bpostle@osmre.gov
Denver Phone: 303-293-5041
Cell Phone: 303-501-4379
Denver Fax: 303-293-5032

--
Anna M. Frazier, Dine' CARE
HC-63, PMB 6113
Winslow, AZ 86047
928-401-0382 (ofc. & home)
email: frazierannm@gmail.com

ATTACHMENT A-3

United States Department of the Interior

OFFICE OF SURFACE MINING
Reclamation and Enforcement
Western Region Office
1999 Broadway, Suite 3320
Denver, CO 80202-3050

September 3, 2010

MEMORANDUM

TO: Elaine Ramsey
Chief, Indian Programs Branch

FROM: Brenda A. Steele, Team Leader Brenda A. Steele
Navajo Mine Team

SUBJECT: Renewal of Federal Permit NM-0003F for BHP Navajo Coal Company's Navajo Mine, OSM Project No. NM-0003-F-N-01

The Navajo Mine Team recommends approval, with conditions, of the BHP Navajo Coal Company's (BNCC's) permit renewal application and issuance of Federal Permit No. NM-0003F for the Navajo Mine. A permit renewal application decision document and the Permit NM-0003F document, including three special permit conditions are attached for your signature. Navajo Mine is located within the Navajo Reservation in northwest New Mexico about 15-20 miles southwest of Farmington.

BNCC's renewal application dated May 13, 2009 was received by us on May 21, 2009 (OSM ID No. 09/05/21-02). We notified BNCC that the renewal application was administratively complete on June 10, 2009. BNCC published a public notice that the complete renewal application was available for public review and comment in the Farmington Daily and the Navajo Times. The public notice was published once per week beginning June 18 and ending July 9. We requested comments from State, Federal and local governments by letters dated July 13, 2009.

An Informal Conference was scheduled in conjunction with the renewal notice because of the ongoing controversy related to the Navajo Mine from local citizens groups. The conference was advertised as part of the public notice for the renewal on July 2 and July 9, 2009 and it was also advertised as a public service announcement on several local Navajo and FM radio stations. The Informal Conference was held at the Nenahnezad Chapter House on August 11, 2009 from 6:00 – 9:00 PM. Five people spoke at the meeting and OSM was presented 44 individual comment postcards by one of the speakers. A copy of the meeting transcript, a summation of the postcard comments and our response to the meeting and postcard comments are included in the decision document. (See Tab 8)

We received two requests for a thirty day extension of the comment period until September 6,

2009 from the Energy Minerals Law Center and the Burnham Chapter. OSM did extend the comment period from August 6, 2009 to August 11, 2009, the day of the informal conference. The Burnham Chapter also requested that an informal conference be held at their Chapter house in addition to Nenahnezad. OSM responded to the Burnham Chapter that the Nenahnezad Chapter was selected for the Informal Conference because the majority of the Navajo Mine is within the Nenahnezad Chapter area and the Chapter house has a larger meeting space and is more easily accessible to the public at large. Copies of the two letters and the OSM's response letters are included in the decision document. (See Tab 8)

OSM received written comments via electronic mail from the San Juan Citizens Alliance. A copy of their written comments and our responses are included in the decision document. (See Tab 8)

We encountered an administrative delay in making a decision to renew the permit on September 25, 2009 because of accuracy problems with the Informal Conference transcript and the determination by management that the Categorical Exclusion Determination needed to be expanded with an emphasis on adequately explaining that no extraordinary circumstances existed that would impact the renewal. However, BNCC had met all of the renewal application requirements and procedures in accordance with 30 CFR 774.15(b). Therefore, in a letter dated September 25, 2009, BNCC was informed that they may continue mining under the current permit until OSM made a decision on the renewal.

We have completed our review of the updated renewal application and have found it to be complete and accurate. Our technical review of ownership and control identified a number of inconsistencies that have been corrected and BNCC provided an updated Table 11-25 as requested. Copies of the technical reviews are attached. (See Tab 6)

Based on the permit renewal application, the currently-approved permit application, a review of the current and historical record of compliance by the permittee, and inspection of the current operations, we have determined:

(i) The terms and conditions of the existing permit are being satisfactorily met;

(ii) The present surface coal mining and reclamation operations comply with the environmental protection standards of the Surface Mining Control and Reclamation Act of 1977, as amended, and the Indian Lands Program (30 CFR Chapter VII, Subchapter E);

(iii) The requested renewal does not jeopardize the operator's continuing ability to comply with the Act and the regulatory program on the existing permit areas;

(iv) The operator has provided evidence of having liability insurance or self-insurance as required in Section 800.60 of this Chapter;

(v) The operator has provided evidence that the performance bond required to be in effect

for the operation will continue in full force and effect for the proposed period of renewal, and no additional bond is required for the renewal; and

(vi) The application for renewal of the current permit is complete and accurate and includes all additional revised or updated information required by us.

(vii) The application indicates that the applicant has added a new partner, officer, principal, principal shareholder, director, or person with a similar ownership or control function required to be listed in the application pursuant to 30 CFR 778.13(c). However, no surface coal mining and reclamation operation owned or controlled by such new person is currently in violation of SMCRA, or any State or Federal law, rule or regulation pertaining to air or water environmental protection except as provided in 30 CFR 773.15(b)(1)(i) and (ii).

We recommend that you make a categorical exclusion determination for further environmental documentation under the National Environmental Policy Act of 1969 (NEPA) in accordance with the Department of the Interior Departmental Manual, 516 DM 6, Appendix 8, Section 8.4B (11). The approval of the permit renewal application would not change the environmental impacts described in any previous environmental documents and reports. A categorical exclusion determination is attached. (See Tab 4)

The current permit, NM-0003F, contains six special conditions. Three special permit conditions were satisfied during the present permit term. Violation Appeal of N94-0920-352-001 and Violation Appeal of N97-020-352-002 have been abated. An annual bond adjustment is no longer required because BNCC has adequately revised how their reclamation costs are calculated.

The following three special permit conditions are part of the renewed permit:

1. ARCHEOLOGY: The permittee shall not disturb any lands within 150 feet of all identified and unmitigated archaeological sites until such a time as the Navajo Nation issues a permit for their excavation and mitigation and all of the required data collection and mitigation measures are completed.

2. BLOCK "A" SOIL RESOURCES: Prior to the disturbance of Block "A" the permittee shall submit the completed soil profile descriptions for each of the separate areas in Block "A". The soil profile descriptions shall also include calculations of the total volume of suitable topdressing materials available within each individual block.

3. VIOLATION APPEAL: Permit NM-000F is issued conditioned upon the diligent efforts to pursue a direct administrative or judicial appeal to contest the validity of Federal Notice of Violation N09-020-190-001 issued by OSM's Albuquerque Area Office to BHP Navajo Coal Company's Navajo Mine under Federal permit NM-0003F. If judicial review authority affirms the violation, the permittee shall submit proof, that the violation has been abated or is in the process of being abated to the satisfaction of the issuing Regulatory Authority.

We have determined the bond amount should be about $154,220,000. BNCC's current bond is $155,000,000. An updated Certificate of Liability Insurance (ID 1275218) was provided and was found to be adequate.

ATTACHMENT A-4

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

INDIAN LANDS PROGRAM FOR THE NAVAJO NATION
PERMIT FOR SURFACE COAL MINING OPERATIONS

Permit Number:	NM-0003F	Permit Effective Date:	09/25/2009
Permit Term:	5 years	Permit Expiration Date:	09/25/2014

Permittee: BHP Navajo Coal Company
P.O. Box 1717
Fruitland, New Mexico 87416

Operation Name: Navajo Mine

General Location: San Juan County, New Mexico
Navajo Tribal Coal Lease 14-20-603-2505

The permit area is within the following unsurveyed townships and sections of the New Mexico Principal Meridian and is more particularly shown on the permit area maps included in the approved permit application as Exhibit 1-4, Sheets 1 through 7:

T. 29 N., R. 15 W.
Section 30, 31, 32

T. 29 N., R. 16 W.
Section 25, 36

T. 28 N., R. 15 W.
Section 7, 8, 9, 16, 17, 18, 19, 20, 21, 28, 29, 30, 31, 32

T. 28 N., R. 16 W.
Section 25, 26, 34, 35, 36

T. 27 N., R. 15 W.
Section 6, 31

T. 27 N., R. 16 W.
Section 1, 2, 3, 4, 9, 10, 11, 12, 15, 22, 23, 25, 26, 27, 34, 35, 36

T. 26 N., R. 15 W.
Section 6, 7, 18

T. 26 N., R. 16 W.
Section 1, 2, 3, 9, 10, 11, 12, 13, 14, 15, 16

1. STATUTES AND REGULATIONS - This permit is issued pursuant to the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. §§ 1201, *et seq.*, and the Indian Lands Program, 30 CFR Part 750. This permit is subject to all applicable laws and regulations that are now or hereafter in force, even though not specifically referenced herein.

2. AUTHORIZATION - This permit authorizes those surface coal mining and reclamation operations described in the application for this permit approved by the Office of Surface Mining Reclamation and Enforcement (OSM) on September 22, 1994 except to the extent directed otherwise in this permit. The approved permit application is incorporated by reference into this permit. The permit area for the Navajo Mine consists of approximately 13,430 acres, as shown on the location maps included in the approved permit application, Exhibit 1-4, Sheets 1 through 7.

   In approving the application for this permit OSM granted no variances.

3. CONDITIONS - The standard permit conditions at 30 CFR § 773.17 and the terms and conditions of Navajo Tribal Coal Lease 14-20-603-2505 are incorporated by reference into this permit. This permit also includes special conditions specified in Attachment A, including certain continuing special conditions from Permit Nos. NM-0003A, NM-0003B, NM-0003C, NM-0003D and NM-0003E.

   The terms and conditions of this permit are binding on the permittee, its officers, directors, employees, agents, contractors, and subcontractors, and the officers, directors, and employees of its agents, contractors, and subcontractors.

4. INITIATION OF OPERATIONS - This permit will terminate if the permittee has not begun the surface coal mining operations covered by this permit within 3 years of its effective date. OSM may grant a reasonable extension of time for the commencement of operations in accordance with 30 CFR § 773.19(e).

5. RENEWAL - This permit may be renewed in accordance with 30 CFR § 774.15. An application for renewal shall be filed with OSM at least 120 days before the expiration date of this permit.

6. REVISION - (a) OSM may order reasonable revision of this permit at any time in accordance with 30 CFR § 774.11. (b) OSM may revise this permit upon application from the permittee in accordance with 30 CFR §§ 774.13 and 750.12(c)(3)(ii).

7. TRANSFER, ASSIGNMENT, OR SALE - This permit may be transferred or assigned, or the rights granted herein may be sold, in accordance with 30 CFR §§ 774.17 and 750.12(c)(3)(i). No transfer, assignment, or sale of rights granted by this permit shall be made without the prior written approval of OSM.

8. SUSPENSION, RESCISSION, OR REVOCATION - This permit may be suspended, rescinded, or revoked by OSM in accordance with 30 CFR § 773.21 or 30 CFR Chapter VII, Subchapter L.

9. HISTORIC AND PREHISTORIC RESOURCES PROTECTION - If previously unidentified historic resources, prehistoric resources, or traditional cultural properties including burials are discovered during the course of surface coal mining and reclamation operations under this permit, the permittee shall ensure that the resources are not disturbed until authorization to do so is provided by OSM. Upon discovery of any such resources, the permittee shall immediately notify OSM of their nature and location. The permittee shall take the action specified by OSM to protect the resources.

10. APPEALS - The permittee may appeal any decision or action of any official of OSM under this permit in accordance with the applicable provisions of 30 CFR §§ 773.24(d)(2)(ii), 842.15(d), 843.16, 845.19, and 846.17(b), 30 CFR Part 775, and 43 CFR Part 4.

Issued by: Elaine Ramsey Date: 9/7/2010

Chief, Indian Programs Branch
Western Regional Coordinating Center
Office of Surface Mining Reclamation and Enforcement

Attachment A
SPECIAL PERMIT CONDITIONS
September 25, 2009

ARCHEOLOGY: The permittee shall not disturb any lands within 150 feet of all identified and unmitigated archaeological sites until such a time as the Navajo Nation issues a permit for their excavation and mitigation and all of the required data collection and mitigation measures are completed.

BLOCK "A" SOIL RESOURCES: Prior to the disturbance of Block "A" the permittee shall submit the completed soil profile descriptions for each of the separate areas in Block "A". The soil profile descriptions shall also include calculations of the total volume of suitable topdressing materials available within each individual block.

VIOLATION APPEAL: Permit NM-000F is issued conditioned upon the diligent efforts to pursue a direct administrative or judicial appeal to contest the validity of Federal Notice of Violation N09-020-190-001 issued by OSM's Albuquerque Area Office to BHP Navajo Coal Company's Navajo Mine under Federal permit NM-0003F. If judicial review authority affirms the violation, the permittee shall submit proof, that the violation has been abated or is in the process of being abated to the satisfaction of the issuing Regulatory Authority.