

U.S. DEPARTMENT OF INTERIOR
OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT
FINDING OF NO SIGNIFICANT IMPACT (FONSI)
FOR
TRANSFER OF NAVAJO MINE
PERMIT NM-0003F

A. Introduction

On April 29, 2013, the Navajo Nation Council enacted legislation to form the Navajo Transitional Energy Company (NTEC), Limited Liability Company (LLC). This legislation was signed into law by Navajo Nation President Ben Shelly on April 30, 2013. NTEC was formed because the Navajo Nation desires to control the mineral rights and operations of Navajo Mine as well as to protect and promote the Navajo Nation's economic and financial self-interests. On May 3, 2013, and as revised on May 10, 2013, the current holder of the SMCRA permit (BNCC) submitted an application to OSM to transfer the permit from NMCC INC. (formerly BNCC) to NMCC, LLC and then from NMCC, LLC to NTEC. The transfer of the permit from NMCC INC. to NMCC, LLC is a transitory step intended to facilitate efficiencies occasioned by the sale of NMCC, LLC to NTEC. The May 10, 2013, permit transfer application was subsequently revised and re-submitted by BNCC on August 30, 2013, and September 3, 2013, with minor edits at the request of OSM and then on October 17, 2013, BNCC revised the application a final time to include additional required information.

The Navajo Mine is located on approximately 33,600 acres of land leased by the Navajo Nation and located entirely within the boundaries of the Navajo Reservation. The mine is located south of the San Juan River at Fruitland, New Mexico and extends south for approximately 25 miles.

OSM is the regulatory authority for mining operations on Indian lands under SMCRA (30 CFR Part 750.6). Therefore, Pursuant to Section 511(b) of the Surface Mining Control and Reclamation Act (SMCRA) of 1977, as amended, 30 USC 1261(b), and 30 C.F.R. 750.12 and 774.17, the transfer of SMCRA Permit NM-0003F from NMCC INC. to NMCC, LLC and then from NMCC, LLC to NTEC requires the prior written approval of OSM. OSM must determine if NMCC, LLC and NTEC are eligible to receive the permit in accordance with applicable regulations and, if so, to authorize NMCC, LLC and then NTEC to engage in surface mining and reclamation operations in accordance with the existing SMCRA permit and the approved mining and reclamation plan. Under SMCRA and its implementing regulations, OSM may allow a permit transfer provided the prospective successor can demonstrate that sufficient bond coverage will remain in place, the applicant fulfills all application requirements defined by 30 C.F.R. 774.17 (b) and the criteria for approval as defined by 30 C.F.R. 774.17 (d) are met.

B. Statement of Environmental Significance of the Proposed Action

The undersigned person has determined that the transfer of the Navajo Mine Permit NM-003F from NMCC INC. to NMCC, LLC and then from NMCC, LLC to NTEC would not have a significant impact on the quality of the human environment under section 102(2) (C) of the National Environmental Protection Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4332(2) (C) and therefore, an environmental impact

statement (EIS) is not required. This finding of no significant impact (FONSI) is based on OSM's environmental impacts analysis of the proposed action within an environmental assessment (EA), which identifies and discusses potential effects that are stated below.

C. Reasons

The FONSI is based on the attached EA that analyzes the potential environmental impacts of transferring the Navajo Mine Permit NM-003F from NMCC INC. to NMCC, LLC and then from NMCC, LLC to NTEC, and which is incorporated by reference. This EA was prepared by a consulting firm, at the direction of OSM. During the development of the draft EA, OSM independently reviewed the document to ensure compliance with 43 CFR Part 46, Subpart D and all relevant provisions of the Council on Environmental Quality (CEQ) regulations, and other program requirements. This independent review of the EA included OSM's evaluation of all environmental issues discussed therein. OSM subsequently adopted the EA and takes full responsibility for the accuracy, scope and the content of this document.

The attached EA considers a reasonable range of alternatives to the proposed action, discusses the potential environmental effects of the proposed action and provides sufficient evidence and analysis for this FONSI.

Based upon OSM's review of the attached EA and the supporting documents, I have determined that the proposed action is not a major federal action that will have a significant effect on the quality of the human environment individually or cumulatively with other actions within the region. No environmental effects meet the definition of significance in context or intensity, as defined within the federal regulations at 40 CFR 1508.27. Therefore, an EIS is not required. This finding is based on the context and intensity of the project as described in the following paragraphs.

Context: NTEC is seeking to purchase all of the interests in BNCC, the owner/operator of the Navajo Mine and holder of both the coal lease and the SMCRA Permit NM-003F, from BHP Billiton. As an integral step in the purchase transaction, the current holder of the SMCRA permit (BNCC) submitted an application to OSM to transfer the permit from NMCC INC. (formerly BNCC) to NMCC, LLC and then from NMCC, LLC to NTEC, a business entity created under the Navajo Nation's LLC Act to own and hold permits necessary to continue the operation of the Navajo Mine in the interest of the Navajo Nation and in accordance with the mine and reclamation plans approved under SMCRA and federal regulations. No operational changes would result and no revision to the mine permit or approved mining and reclamation plan is proposed other than ministerial changes to the ownership information. The approval of the transfer of Navajo Mine Permit NM-003F is a site-specific action involving lands that are entirely within the Navajo Nation. The effects of the action have been analyzed at the local and regional scale and do not have national or international importance.

Intensity: The following discussion is organized around the 10 Significance Criteria described within the federal regulations at 40 CFR 1508.27. The following have been considered in evaluating the severity of impact for this proposal:

1) *Impacts that may be both beneficial and adverse:*

The attached EA has analyzed and disclosed both beneficial and adverse effects of the proposed action. The proposed action will not result in significant beneficial or adverse impacts. The

transfer of the Navajo Mine from NMCC INC. to NMCC, LLC and then from NMCC, LLC to NTEC may have direct and indirect beneficial socioeconomic impacts to the Navajo Nation and possibly direct and indirect adverse socioeconomic impacts to local and regional communities that would likely be small. The potential for direct and indirect impacts to low-income or minority population have been evaluated and determined to be small and potentially beneficial to members of the Navajo Nation and small and potentially adverse to state and local minority population due to reduced state, county and local tax revenue.

2) *The degree to which the proposed action affects public health or safety:*

The EA considers potential changes to the extent or nature of only those impacts associated with the Navajo Mine being owned and operated by NTEC rather than by BNCC. The transfer of the permit from NMCC INC. to NMCC, LLC and then from NMCC, LLC to NTEC would not change how the approved mining and reclamation plan would be implemented because no revisions to the currently approved mining and reclamation plan are proposed. OSM determined only socioeconomic resources and environmental justice are potentially affected by the proposed action. The potential for adverse impacts to public health and safety that are a consequence of mining and reclamation operations at the Navajo Mine have been previously evaluated under NEPA. There would be no changes to implementation and enforcement of public health and safety policies and procedures at Navajo Mine with the transfer of Permit NM-0003F from NMCC INC. to NMCC, LLC and then from NMCC, LLC to NTEC. The proposed action does not affect public health or safety in a significantly adverse or beneficial manner.

As discussed previously, the proposed action has been evaluated for disproportionately high adverse impacts to human health of minority populations and low-income populations. Analysis concluded that while there is a potential for direct adverse impacts to community services (e.g., health services) that are provided to local and state minority communities due to reduced state, county and local tax revenue; these adverse impacts are likely small. Conversely, potential beneficial impacts to Navajo Nation health services due to revenue contributed by NTEC were predicted, but would also likely be small.

3) *Unique characteristics of the geographic area such as proximity to historical or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas:*

There are no park lands, prime farmlands or wild and scenic rivers within the Navajo Mine. The proposed action is principally an administrative action that will not change how the approved mining and reclamation plan is implemented at the Navajo Mine and will not affect local or regional wetlands.

Measures implemented to protect historic or cultural resources are detailed in the existing Programmatic Agreement for the Navajo Mine. These protective measures would not change as a consequence of the proposed action and have been previously evaluated under Section 106 of the National Historic Preservation Act (NHPA); no impacts to historic or cultural resources are predicted.

For the purpose of this finding OSM will consider “ecologically critical areas” to be synonymous with “critical habitat” as defined by the Endangered Species Act of 1973 (ESA).

Potential impacts to “critical habitat” at the Navajo Mine have been previously evaluated in consultations under Section 7 of the ESA. The transfers of the Navajo Mine permit from NMCC INC. to NMCC, LLC and then from NMCC, LLC to NTEC are principally administrative in nature, and will not change how the approved mining and reclamation plan is implemented at the Navajo Mine. Previous consultations under the ESA are applicable and no additional consultation under Section 7 of the ESA is required.

- 4) *The degree to which the effects on the quality of the human environment are likely to be highly controversial:*

The term “controversy” is not equated with the “existence of opposition to a use.” *Northwest Environmental Defense Center v. Bonneville Power Administration*, 117 F.3d 1520, 1536 (9th Cir. 1997), but refers to circumstances where a substantial dispute exists as to the environmental consequences of a proposed action. 43 CFR 46.30. The term “highly controversial” refers to instances in which “a substantial dispute exists as to the size, nature, or effect” of the proposed federal action rather than “the mere existence of opposition” to a proposed federal action. *Hells Canyon Preservation Council v. Jacoby*, 9 F.Supp.2d 1216, 1242 (D. Or. 1998). The proposed action would authorize the transfer of the Navajo Mine permit from NMCC INC. to NMCC, LLC and then from NMCC, LLC to NTEC. The transfers of the Navajo Mine permit from NMCC INC. to NMCC, LLC and then from NMCC, LLC to NTEC are principally administrative in nature, and will not change how the approved mining and reclamation plan is implemented at the Navajo Mine. The effects of surface coal mining and reclamation at the Navajo Mine are well known and documented with over 40 years of operation history. Therefore the “size, nature or effect” of the proposed action are well understood and not “highly controversial”.

- 5) *The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks:*

OSM evaluated the proposed action for potential impacts to socioeconomic resources and environmental justice. Because precise revenue amounts and spending patterns are not known, including applicability of the Black Lung Excise Tax, it cannot be predicted with certainty how these changes would be expressed in changes to federal, state, local and tribal economies. Therefore, OSM concluded that while the predicted impacts to socioeconomic resources and environmental justice are uncertain they are likely to be small and are not considered significant.

The proposed action will not change how the approved mining and reclamation plan is implemented at the Navajo Mine. The effects of surface coal mining and reclamation at the Navajo Mine are well known and documented with over 40 years of operation history. Therefore the effects do not involve unique or unknown risks.

- 6) *The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration:*

The proposed action is the transfer of the approved Navajo Mine permit from NMCC INC. to NMCC, LLC and then from NMCC, LLC to NTEC. The transfer, assignment or sale of a coal mine permit is established by the Surface Control and reclamation Act of 1977 (SMCRA) and is not without precedent nor would represent a decision in principle about a future permit transfer, assignment, or sale. Moreover, the transfer, assignment or sale of a coal mine permit by itself would typically not constitute an action with significant effects.

- 7) *Whether the action is related to other actions with individually insignificant, but cumulatively significant impacts:*

The attached EA contains a cumulative impact analysis which assesses the effects of other past, present and reasonably foreseeable future actions in the region where direct and indirect effects of the proposed action may overlap and combine to form collectively significant effects. As analyzed in the EA, the proposed action is predicted to potentially have direct and indirect beneficial socioeconomic impacts to the Navajo Nation and possibly direct and indirect adverse socioeconomic impacts to local and regional communities that would likely be small. The potential for direct and indirect impacts to low-income or minority population have been evaluated and determined to be small and potentially beneficial to members of the Navajo Nation and small and potentially adverse to state and local minority population due to reduced state, county and local tax revenue. These individual small beneficial and adverse socioeconomic impacts would not incrementally contribute to a significant local or regional cumulative effect. When evaluated against worst-case regional economic predictions the proposed action could have direct and indirect beneficial cumulative impacts to the local and regional socioeconomic environment, but these beneficial cumulative impacts would likely be small.

- 8) *The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing on the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historic resources:*

The transfers of the Navajo Mine permit from NMCC INC. to NMCC, LLC and then from NMCC, LLC to NTEC are principally administrative in nature, and will not change how the approved mining and reclamation plan is implemented at the Navajo Mine. Previous consultations under Section 106 of the National Historic Preservation Act (NHPA) for actions at the Navajo Mine are applicable and no additional consultation under Section 106 of the NHPA is required.

- 9) *The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973:*

The transfers of the Navajo Mine permit from NMCC INC. to NMCC, LLC and then from NMCC, LLC to NTEC are principally administrative in nature, and will not change how the approved mining and reclamation plan is implemented at the Navajo Mine. Previous consultations under the Endangered Species Act of 1973 (ESA) are applicable and no additional consultation under Section 7 of the ESA is required.

10) *Whether the action threatens a violation of Federal, State, local or tribal law or requirements imposed for the protection of the environment:*

As the regulatory authority for mining operations on Indian lands under SMCRA (30 CFR Part 750.6), OSM has concluded the permit transfers (Proposed Action) are in full compliance with Section 511(b) of the Surface Mining Control and Reclamation Act (SMCRA) of 1977, as amended, 30 USC 1261(b), and 30 C.F.R. 750.12 and 774.17.

NMCC, LLC and then NTEC shall assume the liability and reclamation responsibilities of the existing permit and shall conduct the surface coal mining and reclamation operations in full compliance with SMCRA, its regulatory program, and the terms and conditions of the existing permit. NTEC has provided OSM resolution No. 2013-16 affirming NTEC has voluntarily waived their immunity from suit to OSM and the United States Government for enforcement and compliance with Title V of SMCRA, as amended, and United States environmental protection and health and safety laws and regulations of general applicability in connection with Permit NM-003F and the ownership and operation of the Navajo Mine. Accordingly, OSM has determined the action does not threaten a violation of Federal, State, local or tribal law or requirements imposed for the protection of the environment.

Rick Williamson *nov. 1, 2013*

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Date

Rick Williamson

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