

# Navajo Mine Permit Transfer and Environmental Assessment

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## Responses to Public Comment

**November 2013**



## TABLE OF CONTENTS

<b>Comment Response Summary</b> .....	<b>1</b>
Comment Analysis Process .....	1
Comment Overview .....	1
Changes to the Draft EA.....	3
<b>Comment Responses</b> .....	<b>5</b>
Comments Regarding EA .....	5
Comments Regarding Permit Transfer Application .....	14

## COMMENT RESPONSE SUMMARY

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Consistent with the National Environmental Policy Act, 40 C.F.R. 1503.4(b) and 30 C.F.R.774.13(c), responses included in this report address the substantive comments received on the Navajo Mine Permit Transfer Application and the Environmental Assessment (EA). Each letter and email was read and analyzed to determine if it contained any *substantive* comments. Conclusions on whether or not comments were considered substantive were based on the following definitions:

- Substantive comments include those that challenge the information in the Draft EA or the Navajo Mine Permit Transfer Applications as being inadequate or inaccurate, develop alternatives not considered by the agency, or offer specific information that may have a bearing on the decision.
- Non-substantive comments are those that express opinions or position statements without any accompanying factual basis or rationale to support the opinion.

All comments—substantive or not substantive—and all agency responses, are part of the administrative record for this EA, and have been considered during the decision-making process.

The purpose of this document is to provide responses to *substantive* comments received on the Draft EA and the Navajo Mine Permit Transfer Application.

### Comment Analysis Process

A standardized content analysis process was conducted to analyze the public comments on the Draft EA and the Navajo Mine Permit Transfer Application. Each comment letter or email received was read by OSM and members of the planning team to ensure that all substantive comments were identified.

The comments were not weighted by organizational affiliation or status of respondents, and the number of duplicate comments did not add more bias to one comment more than another. The process was not one of counting votes, and no effort was made to tabulate the exact number of people for, or against any given aspect of the EA. Rather, emphasis was placed on the content of a comment.

### Comment Overview

The first set of public comments was received by OSM during the initial comment period with a submission deadline of June 17, 2013. OSM received 15 public comment submissions by this date. All 15 comment letters or emails were reviewed for occurrences of similarity or replication. Eleven comment letters were based on the same form letter in support of the proposed action. No substantive comments were identified in any of the project support letters. The remaining four comment submissions were unique and reviewed by OSM and members of the interdisciplinary review team for substantive comments. If substantive comments were identified within a letter or email, the resource area of concern or process concern was noted and summarized in the response to comments below.

On June 19, 2013, BHP Navajo Coal Company (BNCC) and NTEC notified the OSM of a delay in the proposed transaction related to the permit transfer application that had been submitted to OSM on May 3, 2013 and further revised in a May 10, 2013 submittal. In response to this unforeseen development, OSM

extended the public comment period on the Permit Transfer Application and the Draft EA, to September 27, 2013.

An additional 33 comment submissions were received by the final submission deadline. Twenty of the submissions were postmarked or dated after the comment submission deadline but were accepted and considered by the OSM. As with the earlier comments, these submissions were all reviewed by OSM and those with substantive comments are included in Table 1 and are addressed in the comment responses included below.

**Table 1. Public Comment Submission Summary**

<b>Commenter</b>	<b>Organization</b>	<b>Date Submitted</b>	<b>Where comments addressed</b>
Clayton Benally		06/13/2013	Letter in support of Navajo Mine Permit Transfer - No Response
George Madrid	GEOMAT, Inc.	06/13/2013	Letter in support of Navajo Mine Permit Transfer - No Response
LaRay Collyer	Fenner Dunlop Engineered Conveyor Solutions	06/13/2013	Letter in support of Navajo Mine Permit Transfer - No Response
Margaret Price	Fenner Dunlop Engineered Conveyor Solutions	06/13/2013	Letter in support of Navajo Mine Permit Transfer - No Response
Mickie Ashbacker	Fenner Dunlop Engineered Conveyor Solutions	06/13/2013	Letter in support of Navajo Mine Permit Transfer - No Response
David Jones	Fenner Dunlop Engineered Conveyor Solutions	06/17/2013	Letter in support of Navajo Mine Permit Transfer - No Response
Marvin Farley		06/13/2013	Letter in support of Navajo Mine Permit Transfer - No Response
Randy Rogers	Farmington Fire and Safety	06/13/2013	Letter in support of Navajo Mine Permit Transfer - No Response
Anthony and Roxanna Simpson	Lucky Ridge, Inc.	06/13/2013	Letter in support of Navajo Mine Permit Transfer - No Response
Preston Smith	Parker's Inc. Office Products	06/14/2013	Letter in support of Navajo Mine Permit Transfer - No Response
Bruce Buchanan Darrell Inskeep Mark Heil Trace Richardson Debi Peterson	Buchanan Consultants, Ltd.	06/17/2013	Letter in support of Navajo Mine Permit Transfer - No Response
Erik Schlenker-Goodrich	Western Environmental Law Center	06/17/2013	Responses 1-14
Vincent Yazzie		06/17/2013	Response 21
Juan Reynosa	Southwest Organizing Project (SWOP)	06/17/2013	Responses 13, 15, 19, and 20
Ms. Lorraine Clauschee		05/20/2013	Responses 13 and 15
Albert Damon	Navajo Nation Division of Economic Development	09/27/2013	Letter in support of Navajo Mine Permit Transfer - Responses 2 and 8
Brent Musslewhite	BHP New Mexico Coal Company	09/27/2013	Response 11

Commenter	Organization	Date Submitted	Where comments addressed
Johnny Naize	Navajo Nation Council	09/27/2013	Letter in support of Navajo Mine Permit Transfer - Responses 2 and 8
Stephen B. Etsitty	Navajo Nation EPA	09/27/2013	Letter in support of Navajo Mine Permit Transfer - Response 10 and 17
William Kelly	NTEC	09/27/2013	Letter in support of Navajo Mine Permit Transfer - Responses 2 and 8
Vincent Yazzie		09/27/2013	Responses 1, 8, 21, 22, and 23
Shiloh Hernandez	WELC	09/27/2013	Responses 1, 2, 4, 19, 11, 16, 17, 18, and 19.
Ambrose Willie, Jr.		09/28/2013	Response 15
Betty Nelson		09/28/2013	Responses 4 and 15
Brian Sloan		09/28/2013	Response 19
Cynthia Dixon		09/28/2013	Response 19
Doreen William		09/28/2013	Responses 1 and 19
Erwin Kee		09/28/2013	Response 15
Garry Jay		09/28/2013	Response 19
Holly Barton		09/28/2013	See EA Page 21
Jean Dick		09/28/2013	Response 19
Lorraine Clauschee		09/28/2013	Responses 13 and 15
Nelson Dick, Sr.		09/28/2013	Response 19
Pertina Yazzie-Jim		09/28/2013	Response 19
Phillip Begay		09/28/2013	Response 15
Shannon Blackhat		09/28/2013	Response 13
Sterling Manuelito		09/28/2013	Response 3
Sarah Natani		09/28/2013	Response 19
Shane Yazzie		09/28/2013	Response 19
Tony and Jean Begay		09/28/2013	Response 4
Tito Gutrevner		09/28/2013	Response 15
Lee Benally		08/23/2013	Responses 15 and 19
Emma Jean Benally		08/23/2013	Response 19
Zahnabaa Naataanii		09/28/2013	Responses 3 and 19
Mary Hatch	Upper Fruitland Chapter	09/30/2013	Chapter Resolution in support of the Navajo Mine Permit Transfer - No Response

## Changes to the Draft EA

The changes to the Draft EA to create this final EA are in response to the following updates in the application or cooperating agency information regarding the permit or transactions or public comments received by OSM.

1. Permit application changes - On August 30, 2013, BNCC revised its May 10, 2013 submittal based on the delay in transaction that was tentatively scheduled to occur on or about July 1, 2013. On September 3, 2013, BNCC further revised its August 30, 2013 submittal to make additional editorial corrections and on October 17, 2013, BNCC further revised the September 3, 2013 material to include additional information. These changes are incorporated in the final EA in Section 2.1.1.1 Transaction Summary and throughout the document where the transaction timing and extent are covered.

2. BIA finding of No Action – In a letter dated August 30, 2013, BIA informed NTEC and BBNMC that no further action was required for BIA to approve the restructuring transaction. This decision is incorporated into the final EA in Chapters 1 and 2 where the decision and action regarding the mine lease agreement were deleted.
3. On October 16, 2013, the Navajo Nation Council approved legislation to allocate \$4.1 million from the Navajo Nation’s Unreserved, Undesignated Fund Balance to fund initial and immediate costs and obligations associated with the completion of negotiations and transactions for the acquisition of Navajo Mine from BHP Billiton (Legislation 0305-13). This information is incorporated into Section 1 Introduction of the Final EA.
4. On October 25, 2013, the NTEC Managing Committee passed Resolution 2013-16 granting a limited waiver of sovereign immunity to OSM and the U.S. government. This resolution served to further clarify the extent of the waiver of sovereign immunity that would be granted to NTEC and these clarifications are incorporated into Section 1.3 Issues Identification of the final EA.
5. OSM’s determination that NTEC would be required to contribute to the Abandoned Mine Land (AML) fund.
6. Public comments received during comment period with a deadline of September 27, 2013. The response to comments and how they were incorporated into the final EA are detailed below.

## COMMENT RESPONSES

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### Comments Regarding EA

**Comment Summary 1:** The Navajo Mine Permit Transfer requires long term continued operation at the Four Corners Power Plant (FCPP) post-2016 and consequently should be considered a connected action analyzed in the EIS covering post-2016 operations at Navajo Mine and the FCPP in a single environmental review.

**Comment Response 1:** According to Section 1508.25(a)1 of the Council on Environmental Quality's (CEQ) regulations, actions are connected if they:

- Automatically trigger other actions that may require environmental impact statements;
- Cannot or will not proceed unless other actions are taken previously or simultaneously; or
- Are interdependent parts of a larger action and depend on the larger action for their justification.

Projects that have "independent utility" are not "connected actions." *Utahns v. U.S. Dep't of Transp.*, 305 F.3d 1152, 1183 (10th Cir. 2002). The crux of the independent utility determination is "whether each of two projects would have taken place with or without the other . . ." *Wilderness Workshop v. U.S. Bureau of Land Mgmt.*, 531 F.3d 1220, 1229 (10th Cir. 2008).

As discussed in the Navajo Mine Permit Transfer EA on page 8, the Proposed Action evaluated in the EA is independent and not connected to the proposed outcomes being evaluated in the EIS, as evidenced by BNCC's most recent permit transfer application dated October 17, 2013 and the October 16, 2013 decision by the Navajo Nation Council to allocate \$4.1 million from the Navajo Nation's Unreserved, Undesignated Fund Balance to fund initial and immediate costs and obligations associated with the completion of negotiations and transactions for the acquisition of Navajo Mine from BHP Billiton (Legislation 0305-13). In other words, the proposed Transaction is progressing regardless of the possible outcomes that will result for the current EIS; and in fact, as detailed in the EA, NTEC and the Navajo Nation stand to financially benefit from the Transaction within the timeframe analyzed in this EA.

Considering that the record of decision for the FCPP and Navajo Mine Energy Project EIS is not anticipated until early 2015, OSM has concluded that the transfer of the Navajo Mine Permit from BNCC to NTEC is an action having independent utility; and can proceed regardless of the outcome of FCPP and Navajo Mine Energy Project EIS.

**Comment Summary 2:** The Navajo Mine Permit transfer is a connected action with cumulative impacts that should be analyzed in the FCPP and Navajo Mine Energy Project EIS. Cumulative impacts associated with the permit transfer have not been adequately analyzed in the Navajo Mine Permit Transfer EA.

**Comment Response 2:** For the reasons described in Comment Response 1, OSM maintains that the transfer of the Navajo Mine Permit from BNCC to NTEC is not a connected action and would proceed regardless of the outcomes post-2016 environmental analysis evaluated by the FCPP and Navajo Mine Energy Project EIS.

In terms of the cumulative analysis completed in the subject EA, the interdisciplinary team (IDT) considered potential changes to the extent or nature of only those impacts associated with Navajo Mine being owned and operated by NTEC rather than by BNCC. As a result of this deliberation, many environmental resources (e.g., physical, biological, and cultural) were eliminated from detailed impact analysis. As explained on page 14 of the EA, the rationale for this determination is based on the assertion that the Navajo Mine permit transfer would not change how the currently permitted mining and reclamation plan would be implemented; and therefore, there would be no change to physical, biological, and cultural effects analyzed by earlier NEPA review. The IDT concluded that only socioeconomic resources and environmental justice considerations warranted detailed analysis in the EA. Cumulative impacts to socioeconomic and environmental justice were analyzed in the Section 4 of the EA—and were expanded in the final EA to include results from a recent socioeconomic impact study of continued operation at Navajo Mine after 2016.

**Comment Summary 3:** OSM failed to review and provide essential information required by NEPA.

**Comment Response 3:** As defined by Section 1508.9 of 40 CFR, CEQ’s Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act an “Environmental assessment” means a concise public document for which a Federal agency is responsible that serves to:

1. Briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact.
2. Aid an agency's compliance with the Act when no environmental impact statement is necessary.
3. Facilitate preparation of a statement when one is necessary, including brief discussions of the need for the proposal, of alternatives as required by section 102(2)(E), of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted.

One commenter alleged that because OSM did not review nor provide the details and terms of the business transaction between BNCC and NTEC, including confidential business documents such as financial profit and loss projections and due diligence investigative reports commissioned by the Navajo Nation, the agencies could not adequately evaluate the potential impacts of the proposed action. OSM’s federal action is to determine the eligibility of the applicant to be transferred the mine permit as defined by 30 CFR 774.17. Confidential and proprietary financial information regarding the “purchase transaction” is not required to be examined by OSM in order to make the decision (see also Response to Comment 9 and Comment 10).

As discussed in Comment Response 2, detailed environmental analysis was limited to socioeconomic and environmental justice considerations as only these resource issues would change due to tribal ownership (NTEC) rather than by BNCC. OSM utilized reasonably available references to predict the potential affects to socioeconomic resources and evaluate environmental justice considerations as a consequence of the approval or denial of the proposed Navajo Mine Permit transfer.

With regard to the public availability of information, see Response to Comment 4. OSM has provided sufficient level of evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact.

**Comment Summary 4:** OSM failed to provide adequate public notice and scoping.

**Comment Response 4:** 30 CFR 774.17 (c) outlines OSM’s public participation requirements for the transfer, assignment, or sale of permit rights:

“Any person having an interest which is or may be adversely affected by a decision on the transfer, assignment, or sale of permit rights, including an official of any Federal, State, or local government agency, may submit written comments on the application to the regulatory authority within a time specified by the regulatory authority.”

Additionally, the CEQ’s Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act requires agencies to “make diligent efforts” in involving the public when implementing NEPA procedures, leaving discretion to the agencies to determine the appropriate level and extent of public participation. As discussed in 43 CFR Section 46.305(a), “The bureau must, to the extent practicable, provide for public notification and public involvement when an environmental assessment is being prepared. However, the methods for providing public notification and opportunities for public involvement are at the discretion of the Responsible Official.” Unlike the requirements for preparing an EIS, scoping is not required for the preparation of an EA. While not required, OSM solicited comment on the Draft EA and Navajo Mine Permit Transfer Application, including opportunity for the public to comment on the scope of issues to be addressed and identification of significant issues related to the proposed action.

Recognizing the actions being evaluated may have effects primarily of local concern, OSM publically noticed the availability of the Navajo Mine Permit transfer application, Draft EA and 30-day opportunity for comment on May 18, 2013 in the Farmington Daily Times on May 18, 19, and 26, 2013 and in the Navajo Times on May 23 and 30, 2013. The announcement of availability and opportunity for comment was also broadcast on KTNN and KNDN public radio stations in English and Diné languages. The radio announcements were broadcast from May 18, 2013—daily for two weeks, then twice a week until June 10, 2013. Copies of the Draft EA and Permit Transfer application were made available at Navajo Nation Minerals Department, Tiis Tsoh Siikaad Chapter House, Nenahnezad Chapter House, Farmington Public Library, OSM Western Region Office, and the OSM Western Region website.

On June 19, 2013, BHP Navajo Coal Company (BNCC) notified the OSM of a delay in the transaction related to the permit transfer application that was submitted to OSM on May 3, 2013 and further revised in a May 10, 2013 submittal. In response to this unforeseen development, OSM notified commenters on July 1, 2013, that it had delayed issuing a decision on the permit transfer application and continued to accept additional comments on the Permit Transfer Application and Draft EA. OSM notified commenters on September 12, 2013, that it had extended the deadline for receiving public comments on the Permit Transfer Application and the Draft EA, to September 27, 2013. An additional 33 comment submissions were received by the final submission deadline. Twenty of the submissions were postmarked or dated after the comment submission deadline but were considered by the OSM.

**Comment Summary 5:** OSM failed to provide adequate agency coordination.

**Comment Response 5:** One commenter alleged that agency coordination was inadequate and the NEPA process was not “meaningful” due to the short timeframe from OSM’s receipt of the Navajo Mine Permit transfer applications to releasing the Draft EA for public comment.

At the request of OSM, the U.S. Department of Interior, Bureau of Indian Affairs (BIA), Bureau of Land Management (BLM), and the Navajo Nation participated as cooperating agencies in the preparation of this EA due to their “special expertise.” Special expertise is defined as statutory responsibility, agency mission, or related program experience (40 CFR 1508.26). As discussed previously in this document, the IDT determined the proposed action is principally administrative in scope. Due the unique tax exemption status of the Navajo Nation, it was determined that the potential for socioeconomic and environmental justice impacts should be evaluated. Analysis was restricted to these resources because as discussed in the EA, the proposed action will not change how mining and reclamation is conducted at the Navajo Mine under Permit NM-0003F. OSM with the assistance of the cooperating agencies and their environmental consultant, including socioeconomic and environmental justice experts, applied the appropriate level of analysis commensurate with the scope and complexity of the action.

**Comment Summary 6:** The environmental consultant assisting OSM in developing the EA may have a potential conflict of interest.

**Comment Response 6:** The environmental consultant assisting OSM in developing the EA submitted a letter to OSM dated June 19, 2013 with a disclosure stating that the company has no financial or other interest in the outcome of the actions being evaluated in the EA. The environmental consultant was selected due to their unique knowledge of the Navajo Mine SMCRA permit and subject leases considered in the EA.

**Comment Summary 7:** The purpose and need statement is “unlawfully narrow” and limits the range of alternatives.

**Comment Response 7:** The action evaluated in the EA is the approval or disapproval of the transfer of the Navajo Permit from BNCC to NTEC. The purpose and need is defined by the submittal by BNCC and receipt by OSM of the supporting eligibility and transfer documentation as required by applicable agency statutes. OSM is the regulatory authority for Indian Lands and carries out its responsibilities over the Navajo Mine permit under its Indian Lands program at 30 CFR Part 750. The Indian Lands program incorporates (30 CFR 750.12) provisions of OSM’s permanent regulatory program for permit processing and permit transfers in 30 CFR Parts 773 and 774. OSM is required to approve or disapprove the transfer material submitted in accordance with the requirements of 30 CFR Parts 773 and 774. Consequently, the purpose and need is not “unlawfully narrow,” but in fact defined by statute or “law.”

The CEQ states that an agency must consider alternatives that are not within their respective jurisdiction if the alternative is “reasonable.” The EA IDT team determined the proposed action being evaluated (transfer the Navajo Permit from BNCC to NTEC) has only two reasonable alternatives that would satisfy the purpose and need; they are to approve the permit transfer or disapprove the permit transfer. While the EA need only consider the proposed action if OSM determines there are no unresolved conflicts about the proposed action with respect to alternative uses of available resources; OSM included a No Action alternative (43 CFR, Section 46.310 (b)).

**Comment Summary 8:** OSM did not adequately analyze potential tribal “sovereign immunity” in the context of applicable and relevant federal environmental laws.

**Comment Response 8:** On October 25, 2013, the NTEC Managing Committee passed Resolution 2013-16 granting a limited waiver of sovereign immunity to OSM and the U.S. government. This resolution is incorporated into the Final EA as Appendix A. The resolution clarifies the nature and extent of sovereign immunity granted to NTEC including waiving immunity for purposes of enforcement of Title V of SMCRA, 30 USC Sec 1251-79 and other federal environmental health and safety laws of general applicability in connection with the transfer of the SMCRA Permit and operation of the Navajo Mine. This limited waiver will provide for OSM and cooperating agencies to engage in administrative reviews and compel performance of SMCRA prescriptions or stop violations of SMCRA proscriptions (including enforcement of fines and penalties by OSM and cooperating agencies) in federal administrative bodies and courts of competent jurisdiction.

**Comment Summary 9:** OSM did not consider the possibility of a conflict of interest being established by the transfer of the Navajo Mine permit to the Navajo Nation.

**Comment Response 9:** The potential for conflict of interest with having the Navajo Nation overseeing management and operations of Navajo Mine are mitigated in several ways:

1. The permit will be held by NTEC, a limited liability company that would be managed by a board of directors. While the Navajo Nation is the sole shareholder of NTEC, the day-to-day operation of the company will be conducted by the NTEC board of directors not the Navajo Nation's government.
2. As the SMCRA permit holder, NTEC will be subject to all of the requirements of a permit holder and the regulations of SMCRA. Therefore, if NTEC is found to be ineligible to hold the Navajo Mine Permit or is in violation of SMCRA (making NTEC ineligible to be a permit holder), the permit could not be transferred to NTEC.
3. As a mine owner and operator, NTEC would be subject to the Nation's environmental laws and regulations, and the Nation would not have any conflict of interest in its regulation because NTEC is treated as a separate entity under Navajo law. The Navajo Nation would have no direct control of the management, operations, or monitoring of Navajo Mine. NTEC in coordination with the contract miner BHP Mine Management Company (MMco.) will be directing the management, operations, and monitoring of the mine and reclamation, in accordance with the approved SMCRA permit administered by OSM. The Navajo Nation EPA (NNEPA) oversees and performs the Nation's regulatory functions concerning the environment, which include lands developed in withdrawn areas and leased lands within the Navajo Reservation. NNEPA assists in the Nation's and the federal government's determination of compliance with the Navajo Nation Environmental Policy Act, NEPA, SMCRA, and others. The NNEPA would have the regulatory authority over NTEC including the authority to issue cease-and-desist orders, notices of violation, compliance orders, civil penalties and fines, or take action in administrative and legal forms via the Nation's Attorney General and the Department of Justice.

**Comment Summary 10:** OSM and BIA have not fulfilled tribal trust responsibilities of the Federal Government to assist the Navajo Nation in an independent appraisal of the financial value and economic viability of the Navajo Mine Permit transfer and the potential risk for liabilities to be assumed by Navajo Nation through NTEC.

**Comment Response 10:** The Secretary of the Interior (Secretary) is charged with acting as the trustee for (Indian Trust Assets) ITAs and administers Federal trust management per the policies set forth in the American Indian Trust Fund Management Reform Act of 1994 (Public Law 103 412, October 25, 1994, 108 Stat. 4239). While all U.S. Department of the Interior agencies abide by the Secretary's trust policies, the BIA is the primary agency that administers trust actions and oversees ITAs. When a tribe or individual Indian approaches the BIA with a proposal to utilize an ITA, the BIA reviews the proposal to ensure appropriate management, development, and protection of that asset. All activities must be performed in a way that considers the economy, environment, and culture.

The Secretary reviewed the mining of coal at the Navajo Mine (BIA Contract No. 14-20-603-2505) and approved the operation on July 26, 1957, as well as all subsequent amendments to lease (BIA Contract No. 14-20-0603-6447, April 1, 1961). This review and subsequent approval fulfilled the Department of Interior's, and thus BIA's, trust responsibility. As discussed below in Chapter 2, NTEC does not propose to change the existing operations performed by BNCC. Furthermore, fundamentally, the Proposed Action constitutes a business transaction that does not affect the value of this ITA for the benefit of the Navajo Nation. The proposed business transaction is not a transfer, sublease, or assignment triggering the BIA's regulatory requirements for approval. Likewise, the terms of the lease, as previously amended with BIA's review and approval do not require additional BIA approval.

Trust responsibilities are further described, and were added to the EA in Section 1.1 on pages 6 and 7.

**Comment Summary 11:** The EA fails to adequately analyze Coal Combustion By-Products (CCBs) issues, particularly how CCB would be handled at the Navajo Mine between 2013 and 2016.

**Comment Response 11:** The Navajo Mine Permit Number NM-0003F does not authorize current or future disposal of CCBs within the mine permit boundary. Issues related to the historic disposal of CCBs at the Navajo Mine are discussed in the EA on page 8. OSM has concluded there are negligible impacts to water resources as a consequence of CCB disposal at the Navajo Mine as evidenced by the most recent cumulative hydrologic impact assessment completed in 2012. Additionally, with regards to the report titled *Preliminary Evaluation of the Potential for Surface Water Quality Impacts From Fly Ash Disposal at the Navajo Mine, New Mexico* by D.A. Zimmerman cited by one commenter as evidence that CCB disposal at Navajo Mine is impacting the San Juan River System; the U.S. EPA in response to public comments on NPDES Permit NN0028193 (dated February 14, 2008) found that the "EPA does not agree that available data demonstrate that pollutant levels are increasing to a statistically significant degree due to discharges associated with the mine site. In conducting this assessment, EPA evaluated the data presented in A Preliminary Evaluation of the Potential for Surface Water Quality Impacts From Fly Ash Disposal at the Navajo Mine, New Mexico by D.A. Zimmerman" (page 2 <http://www.epa.gov/region9/water/npdes/pdf/navajo/navajo-resp-comments-2-14-08-final.pdf>).

**Comment Summary 12:** OSM's reclamation performance bond is not adequate because it does not cover the cost of full remediation of CCBs disposal.

**Comment Response 12:** The Navajo Mine Permit Number NM-0003F does not authorize current or future disposal of CCBs within the mine permit boundary. As discussed previously in this document, the IDT determined the proposed action is principally administrative in scope and will not change how mining and reclamation is conducted at the Navajo Mine under Permit NM-0003F. The bond amount was

last calculated by OSM as \$163 million, an amount determined to be sufficient in accordance with 30 CFR 800.14. The bond amount is based, among other factors, on the cost for full completion of the reclamation plan giving consideration to such factors as topography, hydrology, and revegetation and the probable difficulty of reclamation completion. As discussed in Comment Summary 11, OSM has concluded there are negligible impacts to water resources as a consequence of CCB disposal at the Navajo Mine as evidenced by the most recent cumulative hydrologic impact assessment (CHIA) completed in 2012. Consequently, OSM does currently expect probable difficulty of reclamation including impacts to hydrology and has no reason to require a performance bond that includes the cost of full remediation of CCBs disposal at the Navajo Mine.

**Comment Summary 13:** OSM fails to properly evaluate Environmental Justice issues in the EA.

**Comment Response 13:** The potential environmental justice issues associated with the mine permit transfer analyzed in Section 3.2 of the EA and in Sections 3.11, 4.11 and 5.2.11 of the AIV North Mine Plan Revision EA (AIVN EA), included by reference, discuss disproportionate effects from mining operations to low-income and minority populations as well as special exposures to Native Americans associated with cultural or traditional resource use. The analysis in the AIVN EA concludes that there would be no disproportionate effects to these populations associated with mine operations due to the limited magnitude and geographic range of expected impacts and extensive mitigation and protective measures incorporated in project operation (AIVN EA, page 187). Similarly, there would be minimal disproportionate effects associated with cultural or traditional use of resources because there is no opportunity for special exposures within the mine permit area because there is no public access. As a mitigation measure to allow for ceremonial use in the mine lease area, BNCC maintains a ceremonial hogan.

The EA also recognizes the potential indirect impacts to low income or Native American populations related to the assets and liabilities that the Navajo Nation would assume if NTEC becomes the Navajo Mine permit holder (see EA, page 24). These indirect environmental justice impacts include potential risks that could be transferred to the Navajo Nation as the sole shareholder of NTEC. These risks are either mitigated through permit holder requirements such as the performance bond or uncertain depending on the operating and investment decisions made by NTEC. It is important to note that NTEC was created as part of an energy strategy to benefit Navajo Nation. Therefore, it is likely that the business decisions made by NTEC will benefit the same Navajo/low income or minority populations that are affected by the operations of Navajo Mine. These affected communities have been explicitly recognized as beneficiaries of NTEC becoming the Navajo Mine permit holder by the Navajo Nation.

**Comment Summary 14:** The EA fails to properly evaluate and consider NEPA's significance criteria.

**Comment Response 14:** The significance criteria used for evaluating the socioeconomic and environmental justice impacts are described in the EA on pages 17 and 19. These criteria are based on the 10 significance criteria described at 40 CFR 1508.27 and incorporated into the impact analysis appropriately. For socioeconomics the impact assessment, the measures for direct, indirect, and cumulative impacts were based on changes to employment, wages, and tax payments associated with each alternative. The amount that these measures change between the baseline and the alternatives is used to determine the significance of the impact. The criteria for social impacts are based on the previous indicators as well as the rate and scale of change of employment, income, and tax revenues. As

summarized on pages 20 and 21 of the EA, the change in how tax payments flow would have a small adverse impact to the State of New Mexico and locally and a commensurate beneficial impact to the Navajo Nation. In terms of evaluating significance criteria for environmental justice, refer to page 23 of the EA and Comment Response 13 above.

**Comment Summary 15:** BNCC is responsible for reclamation of Navajo Mine and this clean up should be completed prior to the mine permit transfer.

**Comment Response 15:** As the new permit holder NTEC is assuming responsibility for mine reclamation. OSM requires that NTEC hold a performance bond in an amount sufficient to meet the reclamation requirements as required by 30 CFR 800.14. As discussed in response to Comments 12 and in the EA in Section 1.3 Issues Identification, before the permit transfer can be authorized OSM must confirm that the permit holder provide a performance bond payable to the regulatory authority and conditioned upon the faithful performance of the requirements of SMCRA.

**Comment Summary 16:** OSM should consult with U.S. Fish and Wildlife Service (USFWS) pursuant to Section 7 of the Endangered Species Act because of evidence demonstrating that continued operations of the Navajo Mine and FCPP are negatively affecting and potentially jeopardizing Colorado pikeminnow and Razorback sucker in the San Juan River.

**Comment Response 16:** OSM consulted with the USFWS regarding continued operations at Navajo Mine according to the then, proposed 2012 Area IV North Mine plan revision. For the mine plan revision EA, OSM initiated consultation with the USFWS on March 7, 2005 (Consultation 02-22-04-I-523b). On September 30, 2005, the USFWS concurred with OSM effect determinations and concluded that the effects of the 2004 proposed action are considered “insignificant and discountable.” On May 9, 2011, Ecosphere Environmental Services contacted the USFWS on behalf of OSM to request updated species lists and to identify any agencies issues or concerns related to the 2011 proposed mine plan revision. Mr. George Dennis, Ph.D., USFWS Aquatic Ecosystems Branch Chief responded to the request on May 19, 2011 and included a link to the species list that should be reviewed in preparation of the biological assessment/evaluation document. The email also directed OSM to consider specific species and potential impacts. Mr. Dennis also participated in a site visit with representatives from Ecosphere, the Navajo Nation, and USACE to consider a proposed USACE project related mitigation site associated with the USACE’s Individual Permit action. On December 1, 2011, OSM submitted a Section 7 concurrence request letter to the USFWS and provided the Service with electronic links to the EA and attachments, including the BE. On January 19, 2012, the USFWS again concurred with effect determinations made in the documents and concluded Section 7 consultation for the action. Therefore, since the mine plan will not be changed as a result of the mine permit transfer and there is no need to conduct further consultation. See also Responses to Comment 1 and Comment 2 discussing connected actions.

**Comment Summary 17:** OSM needs to take a “hard look” at the social cost of coal and the associated trust obligations to the Navajo Nation. OSM and BIA have fiduciary responsibility including procedural obligation to disclose relevant information and substantive duties to protect Indian property from environmental damage or destruction. To meet this obligation must carefully consider and disclose to the public financial risks associated with the transfer of the Navajo Mine to the Navajo Nation including the social cost of carbon.

**Comment Response 17:** See Comment Response 10 regarding trust responsibility of the Secretary of the Interior.

**Comment Summary 18:** The EA must consider the indirect effects of coal combustion at FCPP.

**Comment Response 18:** The purpose of the proposed action is for OSM to determine whether NTEC is eligible to receive Mine Permit NM-003F as specified by SMCRA (30 CFR 774.17). Neither SMCRA nor its implementing regulations provide OSM with regulatory authority over the burning of coal, or to impose measures to remedy those effects, when deciding whether to approve or disapprove the proposed mine permit transfer. Therefore, the indirect effects of coal combustion at FCPP do not need to be considered because the proposed action does not change how coal combustion is conducted at FCPP. Direct and indirect air quality impacts from implementation of the mining and reclamation plan at the Navajo Mine were analyzed by OSM in the 2012 AIV North Mine Plan Revision EA. The proposed permit transfer would not change this recent analysis.

**Comment Summary 19:** Several comments expressed concern for potential environmental impacts caused by mine operations such as drought, fugitive dust, damage to livestock and rangeland, climate change, and risks to surface and groundwater from wastewater discharges.

**Comment Response 19:** As a result of cooperating agencies' IDT Team consideration of the environmental setting relative to possible effects of the Proposed Action, many environmental resources and potential effects such as drought, climate change, fugitive dust, and impacts to water resources were eliminated from detailed impact analysis. The rationale for this determination is that the transfer of Permit NM-0003F from BNCC to NTEC would not change how the currently permitted mining and reclamation plan would be implemented, and therefore, there would be no change to the environmental effect previously analyzed under NEPA. Potential environmental effects associated with operation of Navajo Mine under SMCRA Permit NM-0003F according to the current mining and reclamation plan approved by OSM were identified and evaluated in the 2012 AIV North Mine Plan Revision EA. Resources eliminated from detailed impact assessment are described in Table 2 of the EA, including the rationale for not carrying each resource forward to impact analysis. In most cases, resources were eliminated from detailed analysis due to the fact that the ownership transaction would not change how the approved mining and reclamation plan would be implemented because BNCC and NTEC have not sought any permit changes attendant to the proposed permit transfer.

## Comments Regarding Permit Transfer Application

**Comment Summary 20:** The Navajo Mine should be required to obtain an air permit to operate the mine.

**Comment Response 20:** OSM is the regulatory authority for Indian Lands and carries out its responsibilities over the Navajo Mine permit under its Indian Lands program at 30 CFR Part 750. The Indian Lands program incorporates (30 CFR 750.12) provisions of OSM's permanent regulatory program for permit processing and permit transfers in 30 CFR Parts 773 and 774. OSM is required to approve or disapprove the transfer material submitted in accordance with the requirements of 30 CFR Parts 773 and 774. OSM has no authority to require air permits. The regulation and permitting of emissions and air pollution is administered by the Navajo Nation Environmental Protection Agency (EPA) in coordination with the U.S. EPA.

**Comment Summary 21:** NTEC does not have qualified personnel to run the Navajo Mine.

**Comment Response 21:** In accordance with the regulations at 30 CFR 774.17, OSM has completed its review of the Navajo Mine permit (NM-0003-F) transfer application submittals dated May 3, 2013, May 10, 2013, August 30, 2013, September 4, 2013 and October 17, 2013. In letters dated November 1, 2013, OSM notified the applicants (BNCC & NTEC) that its permit application was conditionally approved. Please see the November 1, 2013 letters to BNCC and NTEC for the specific conditions required by OSM at [http://www.wrcc.osmre.gov/Current\\_Initiatives/Navajo\\_Mine/Permit\\_Transfer.shtm](http://www.wrcc.osmre.gov/Current_Initiatives/Navajo_Mine/Permit_Transfer.shtm)

**Comment Summary 22:** NTEC and BNCC have not sought regulatory approval and other requirements as required by 30 CFR 774.17 transfer, assignment, or sale of permit rights.

**Comment Response 22:** See Comment Response 21.

**Comment Summary 23:** The Navajo Mine Permit Transfer is incomplete.

**Comment Response 23:** See Comment Response 21.