

**UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF HEARINGS AND APPEALS
DEPARTMENTAL CASES HEARINGS DIVISION**

TÓ NIZHÓNÍ ÁNÍ and SAN JUAN
CITIZENS ALLIANCE,
Petitioners,

v.

OFFICE OF SURFACE MINING RECLAMATION
AND ENFORCEMENT,
Respondent,

and

NAVAJO TRANSITIONAL ENERGY COMPANY, LLC,
Permittee.

Docket No. _____
Mine: Navajo Mine, No Name Permit Area
Permit No. NM-0043A
OSMRE Project No. NM-0043A.7613

**REQUEST FOR REVIEW OF OSMRE’S APPROVAL OF THE NO NAME PERMIT
APPLICATION AND ISSUANCE OF PERMIT NM-0043A
(43 C.F.R. §§ 4.1360–4.1369)**

Pursuant to 30 U.S.C. § 1264(c) and 43 C.F.R. §§ 4.1360 through 4.1369, Tó Nizhóní Ání (“TNA”) and San Juan Citizens Alliance (“SJCA”) (collectively “Petitioners”) request review of the decision of the Office of Surface Mining Reclamation and Enforcement (“OSMRE”) approving Navajo Transitional Energy Company, LLC’s (“NTEC’s”) No Name Permit application and issuing Federal Permit NM-0043A (“Request”). OSMRE announced that decision by letter dated August 31, 2026, signed by Mychal Yellowman, Manager, Indian and Washington Programs Branch, OSMRE Western Region.

I. WHO MAY FILE

Any “applicant, permittee, or any person having an interest which is or may be adversely affected by a decision of OSMRE set forth in § 4.1360” may file a request for review. 43 C.F.R. § 4.1361. Tó Nizhóní Ání is a Navajo nonprofit community organization whose mission is to preserve and protect Navajo Water for future generations. TNA’s primary work is educating and advocating for the environment – land, water, air, and for the future of Diné communities across the Navajo Nation. TNA’s Just Transition initiative is focused on transitioning the Navajo Nation to renewable energy and sustainable economic development, ensuring coal mine clean up and strengthening economic diversity. Tó Nizhóní Ání is working to bring power back to Diné communities impacted by coal. San Juan Citizens Alliance is a grassroots environmental organization dedicated to social, economic, and environmental justice in the San Juan Basin and organizes basin residents to protect the water, air, land, rural character, and unique quality of life in the basin while embracing the diversity of the region’s people, economy, and ecology. San Juan Citizens Alliance is incorporated and headquartered in Durango, Colorado. San Juan Citizens Alliance has more than 1,000 members and thousands of supporters in New Mexico and Colorado. San Juan Citizens Alliance has offices in Durango, CO, and Farmington, NM, and undertakes substantial work in each of those states. San Juan Citizens Alliance members live and work in proximity to Four Corners Power Plant and Navajo Mine with a direct interest in what happens with coal facilities in the region. As described herein, in the comments submitted, and in the administrative record, both TNA and SJCA have interests which are or may be adversely affected by the decision subject to this appeal.

Participation as an objector. TNA and SJCA each participated in the administrative proceedings as objectors. OSMRE convened an informal conference on the No Name permit

application at the Tíís Tsoh Sííkaad (Burnham) Chapter House on January 29, 2026. ROD at 21. TNA and SJCA appeared at that conference and objected to the application. OSMRE’s own findings confirm the character of the proceeding: “On January 29, 2026, OSMRE held an informal conference on the proposed No Name SMCRA Permit.” Exhibit F at 3. TNA and SJCA then submitted written comments and objections to OSMRE on February 27, 2026, addressed to Flynn Dickinson, Navajo Mine Team Leader, OSMRE Western Region Indian Lands Program, attached as Exhibits A and B and incorporated by reference.

TNA’s and SJCA’s participation establishes the right to seek review. Section 1264(f) confers the right to appeal on “[a]ny applicant or any person with an interest which is or may be adversely affected who has participated in the administrative proceedings *as an objector*, and who is aggrieved by the decision of the regulatory authority.” 30 U.S.C. § 1264(f) (emphasis added); *accord* 30 C.F.R. § 775.13(a)(1). The statute conditions the right on participation as an objector. It does not condition that right on formal designation as a party, and both TNA and SJCA satisfy it on the conference appearance, on the written objections, and on both together. Section 4.1361 is to the same effect, extending the right to file to “any person having an interest which is or may be adversely affected.”

Party status under § 1264(a). TNA and SJCA are also among the “persons who are parties to the administrative proceedings” within the meaning of 30 U.S.C. § 1264(a). That phrase appears in a sentence that begins “[i]f an informal conference has been held pursuant to section 1263(b) of this title” and that requires a written finding “within the sixty days of said hearings.” The parties to the proceeding are the persons who appeared and participated in the informal conference. TNA and SJCA did. OSMRE itself then treated TNA as a participant in the permitting process: it wrote to the President of the Navajo Nation seeking his input “on whether

the Office of Surface Mining should consider Tó Nizhóní Ání a consulting party for section 106 consultation for the Navajo Transitional Energy Company's No Name Permit application," and on April 28, 2026 the President answered, "I support Tó Nizhóní Ání's request to be treated as a consulting party as part of the Section 106 consultation process." Exhibit E. Having convened the conference, received TNA's and SJCA's objections there and in writing, and initiated a formal consultation with the Navajo Nation about TNA's participation, OSMRE cannot treat TNA or SJCA as anything other than parties to the proceeding. As such, OSMRE was obligated to conclude the proceeding with a written finding within sixty days.

Petitioners' right to seek review does not depend on the resolution of that question. Sections 4.1361 and 1264(f) turn on adverse effect and on participation as an objector, each of which is established independently of § 1264(a). The § 1264(a) point bears on Error H and on the timeliness analysis in Section II.

II. TIMELINESS

This Request is timely. Section 4.1362(a) requires filing "within 30 days after *the applicant or permittee* is notified by OSMRE of the written decision by certified mail or by overnight delivery service." The rule supplies no separate trigger for any other person. The August 31, 2026 decision letter was addressed to NTEC, and its distribution list includes the Navajo Nation Minerals Department, the Bureau of Land Management Farmington Field Office, the Bureau of Indian Affairs Navajo Regional Office, and the Tíís Tsoh Sííkaad and Nenahnezad Chapters, but not TNA, SJCA, or any other party that submitted objections. Nothing in § 4.1362(a) provides for notice to objectors by certified mail or overnight delivery, and the letter does not reflect that any was made.

The record supplies three candidate dates and no way for an objector to know which controls: the Record of Decision was signed August 27, 2026 and states that it is effective on signature, ROD at 29. The permit approval letter is dated August 31, 2026, and states that “[t]he No Name Permit EIS was finalized and published on August 31, 2026” and that “[a]fter finalizing and publishing the No Name Permit EIS, a Record of Decision (ROD) was issued on August 31, 2026, for the OSMRE action of approving NTEC’s proposed SMCRA permit application.” Exhibit C. OSMRE’s Findings state that “the No Name PAP, NM-0043-A, is hereby approved” and are dated August 31, 2026. Exhibit F at 3. The Federal Register notice of availability issued September 1, 2026. On OSMRE’s own account, then, the decision issued on August 31, 2026.

Petitioners file within thirty days of the earliest date on which any trigger could plausibly have run as to them, and preserve the following alternative positions: (a) § 4.1362(a) supplies no trigger applicable to a person other than the applicant or permittee, and the thirty-day period therefore has not commenced as to Petitioners; (b) if a trigger applies, it runs at the earliest from publication of the notice of availability at 91 Fed. Reg. 56204 (Sept. 1, 2026); and (c) any period that expired before Petitioners received notice cannot bar this Request consistent with due process and with 5 U.S.C. § 704.

The contrast with neighboring provisions is instructive. Sections 4.1162(a), 4.1183(b), 4.1282(b), and 4.1391 each supply an express alternative trigger for persons not served. Section 4.1362 does not. Section 4.1362(b) provides only that an untimely filing “shall constitute a waiver of a *hearing*” — not a forfeiture of judicial review — in contrast to §§ 4.1151(c) and 4.1302(b), which specify preclusive consequences in terms, and § 4.1163, which specifies that no preclusion attaches.

III. RESERVATION OF RIGHTS

Petitioners file this Request protectively and reserve the following:

A. This filing is protective and concedes nothing. Petitioners file because the Tenth Circuit has held that the hearing available under 30 U.S.C. § 1264(c), followed by review under 30 U.S.C. § 1276(a)(2), together furnish an adequate remedy that displaces a cause of action under the Administrative Procedure Act. *Citizens for Constitutional Integrity v. United States*, 70 F.4th 1289, 1313–14 (10th Cir. 2023). They file to preserve that remedy, not because they concede it was a precondition to judicial review. Section 1264(c) provides that an adversely affected person “may request” a hearing; 30 C.F.R. §§ 775.11(a) and 775.13 are likewise permissive; and OSMRE’s August 31, 2026 letter states that adversely affected persons “may” appeal. Petitioners do not concede that this filing was required.

B. The decision was final and operative when issued. Filing a request for review “shall not stay the effectiveness of the OSMRE decision pending completion of administrative review.” 43 C.F.R. § 4.1365. Interior’s own rule provides that a decision “in effect . . . pending completion of an appeal is final agency action for the Department.” 43 C.F.R. § 4.21(b)(2). Petitioners preserve the position that, because the decision is operative and final notwithstanding this filing, no agency rule may condition judicial review upon completing this process. 5 U.S.C. § 704; *Darby v. Cisneros*, 509 U.S. 137, 153–54 (1993). Petitioners recognize that *Citizens for Constitutional Integrity* addresses a distinct question — whether an adequate alternative remedy exists under the first sentence of § 704 — and do not concede that it resolves the questions reserved here.

C. The administrative remedy was not reasonably available to Petitioners. To the extent OSMRE contends that this process was an adequate remedy, Petitioners preserve the

position that it was not reasonably available to them. The decision letter's distribution list does not include either Petitioner. The letter states no deadline and cites no filing rule. Section 4.1362(a) starts the thirty-day period on notice given only to the applicant or permittee. *See* Section II, *infra*. A remedy whose clock runs from a notice directed only to the applicant, and that states no deadline to anyone, is not the process the Tenth Circuit described. *Cf. Citizens for Constitutional Integrity*, 70 F.4th at 1314 (plaintiffs there did not "suggest that they lacked reasonable notice of the status of the Mine's permit during the approval process").

D. No election of forum, limitations period, or venue. Petitioners do not concede that filing this Request elects 30 U.S.C. § 1276(a)(2), its thirty-day period, or its venue provision as the exclusive route for any claim, and they reserve all positions concerning the limitations period and venue applicable to claims presented to a court of competent jurisdiction.

E. NEPA claims are reserved. An administrative law judge in this proceeding adjudicates compliance with SMCRA and its implementing regulations. 43 C.F.R. § 4.1366. This forum does not adjudicate the adequacy of the Final Environmental Impact Statement ("EIS") or OSMRE's compliance with the National Environmental Policy Act ("NEPA"). Petitioners expressly reserve all NEPA claims, including claims arising from OSMRE's issuance of a combined Final EIS and Record of Decision effective immediately without circulation of a draft EIS and following a twenty-day scoping period, for presentation to a court of competent jurisdiction. Their omission here is not a waiver.

F. Temporary relief. Petitioners reserve the right to apply for temporary relief under 43 C.F.R. § 4.1367 and 30 U.S.C. §§ 1264(d) and 1276(c) at any time prior to decision.

IV. OSMRE’S FINDINGS AND DETERMINATION FOR APPROVAL STATES CONCLUSIONS, NOT REASONS

The Record of Decision states that the document containing OSMRE’s SMCRA findings is a separate instrument: “In its approval of the No Name SMCRA Permit, OSM will sign its Findings and Determination for Approval for the No Name Permit Application, *which contain the details about OSM’s findings under SMCRA.*” ROD at 22 (emphasis added). The document OSMRE signed on August 31, 2026 is three pages long. Exhibit F. It consists of thirteen numbered findings tracking the categories listed in 30 C.F.R. § 773.15. Apart from a recitation of the Endangered Species Act conservation measures and a paragraph on the Burnham Road relocation, no finding exceeds two sentences. None identifies the information on which it rests. None addresses any objection raised at the January 29, 2026 informal conference or in the written comments, other than a single sentence stating that OSMRE received no comments on the road relocation at the conference “other than one request for clarifying information.” Exhibit F at 3.

That is not what the statute and regulations require. Section 1264(a) requires the written finding to “stat[e] the reasons therefor.” 30 U.S.C. § 1264(a). Section 773.15 permits approval only where the regulatory authority finds each criterion satisfied “on the basis of information set forth in the application or from information otherwise available *that is documented in the approval.*” 30 C.F.R. § 773.15 (emphasis added). A conclusion is not a reason, and a form is not documentation. Where the agency’s stated findings are contradicted by the application they purport to approve, or by the agency’s own Record of Decision, the decision cannot be sustained. 5 U.S.C. § 706(2)(A). Several of the findings are so contradicted, as set out in Errors A, B, G, I, J, and K below.

The document also discloses what the Record of Decision did not. Finding 2 states that the reclamation plan was contained in the application “initially submitted on September 30, 2025, and as revised on October 22, 2025, November 12, 2025, April 17, 2026, July 5, 2026, and July 9, 2026.” Exhibit F at 1. The last two revisions were submitted more than four months after the close of public comment. Petitioners received no notice of any revision and have not seen the application as approved.

The reclamation bond instrument on which permit issuance was conditioned, ROD at 23, has not been made available. Petitioners cannot evaluate the sufficiency of the bond under 30 U.S.C. § 1259 without it.

Petitioners request that the Administrative Law Judge order OSMRE to file the complete administrative record forthwith, including the permit application package as initially submitted and as revised on each of the five dates identified in Finding 2, and the reclamation bond instrument, and to set a schedule permitting amendment thereafter. Petitioners preserve their right to amend once as a matter of right under 43 C.F.R. § 4.1363(c).

V. STATEMENT OF FACTS ENTITLING PETITIONERS TO RELIEF

OSMRE is the regulatory authority for surface coal mining on Indian lands. 30 U.S.C. § 1300; 30 C.F.R. § 750.6(a)(1). The requirements of 30 C.F.R. Parts 773, 774, 775, 777, 778, 779, 780, 783, 784, and 785 govern the processing of permit applications on Indian lands. 30 C.F.R. § 750.12(c)(1).

NTEC submitted the No Name permit application on September 30, 2025. OSMRE published a notice of intent to prepare an environmental impact statement on January 15, 2026, and held a twenty-day scoping period that closed February 4, 2026. OSMRE convened an informal conference at the Tíís Tsoh Sííkaad (Burnham) Chapter House on January 29, 2026, at

which TNA and SJCA appeared and objected. TNA and SJCA submitted written comments and objections on February 27, 2026.

OSMRE signed the Record of Decision on August 27, 2026, stating that it “is effective on signature.” ROD at 29. OSMRE approved the permit application and issued Permit NM-0043A by letter dated August 31, 2026, for a term of August 31, 2026 through August 31, 2031. The letter states that “[a]fter finalizing and publishing the No Name Permit EIS, a Record of Decision (ROD) was issued on August 31, 2026, for the OSMRE action of approving NTEC’s proposed SMCRA permit application.” Exhibit C. The Federal Register notice of availability issued September 1, 2026. 91 Fed. Reg. 56204. No draft environmental impact statement was circulated for public comment.

The Record of Decision states that OSMRE “will sign its Findings and Determination for Approval for the No Name Permit Application, which contain the details about OSM’s findings under SMCRA,” and that “[u]pon receipt of the required reclamation bond instrument, the permit will be issued to the applicant.” ROD at 22–23. On August 31, 2026, OSMRE signed a three-page document titled “Findings – Office of Surface Mining Reclamation and Enforcement (OSMRE) Determination for Approval of a Permit Application Package (PAP) NM-0043-A,” concluding that “the No Name PAP, NM-0043-A, is hereby approved.” Exhibit F at 3. The reclamation bond instrument has not been made available.

OSMRE published notice of “an informal conference/scoping meeting at the Burnham Chapter House on January 29, 2026, in the Tri-City Record on January 14, 2026, and in the Navajo Times on January 15, 2026,” ROD at 21, and held that informal conference under 30 U.S.C. § 1263(b) and 30 C.F.R. § 773.6(c). OSMRE’s Findings state: “On January 29, 2026, OSMRE held an informal conference on the proposed No Name SMCRA Permit.” Exhibit F at

3. OSMRE did not issue a written finding granting or denying the permit within sixty days of the close of that conference. See 30 C.F.R. § 773.7(a).

The permit area encompasses 11,526 acres within Areas 4 South and 5 of NTEC's Navajo Mine Lease 14-20-603-2505, authorizes 9,042 acres of surface disturbance, and authorizes recovery of approximately 502,984,700 tons of coal. OSMRE states that the project would extend the life of the mine to 2136. *Id.* at 56204–05.

The Four Corners Power Plant is the sole destination for Navajo Mine coal. Its owners have scheduled closure for 2031, with the operator publicly stating in August 2025 that it expects to exit coal “no later than 2038.” The permit application identifies no other customer and no means of transporting coal to any other market. Application § 20, Tables 20.1-1, 20.1-2, 20.3-1, 20.3-2.

The application's probable hydrologic consequences analysis predicts that potentiometric levels in the Fruitland Formation coal seams and the Pictured Cliffs Sandstone will require at least 1,000 years to recover to pre-mining conditions, with drawdown exceeding 30 meters in places. Application § 41; § 42. Section 35 of the application states a recovery horizon of 500 years or more. The application is internally inconsistent on this point.

Mining will remove the alluvial aquifer within the permit area along Pinabete Arroyo and will destroy three stock water wells that are primary livestock water sources. The application projects that groundwater contribution to the Chaco River alluvium will be reduced by approximately seven percent. Application § 41; well inventory § 18. The Chaco River alluvium lies outside the permit area.

The application projects that groundwater re-entering the mine backfill after reclamation will carry total dissolved solids of 3,000 to 3,500 mg/L, above livestock use criteria, and

identifies baseline exceedances of fluoride, sulfate, and total dissolved solids in the Pictured Cliffs Sandstone, the alluvium, and the coal units, together with selenium values exceeding relevant wildlife criteria. Application § 41 referencing § 18.

The Pinabete Diversion will reroute a large watershed into No Name Arroyo, which previously drained a far smaller area. Peak flows in No Name Arroyo are projected to more than double during 100-year storm events, accelerating an active headcut of ten to twelve feet, and sediment yields are projected to increase between 180 and 320 percent depending on storm size. Application § 41.

Baseline conditions are extremely arid: evaporation averages approximately 55 inches per year against precipitation of less than 6 inches per year, occurring in a small number of high-intensity events. Application § 41; § 12.

The cultural resource analysis relies on a Class II and Class III inventory conducted between November 1, 2006 and April 16, 2008. ROD at 23. Of the resources evaluated, 162 archaeological sites and traditional cultural properties were determined eligible for or listed in the National Register of Historic Places, of which 152 fall within the current area of potential effects. *Id.* Burial sites have been identified within the proposed mining areas. Application § 11 at 11-1, 11-3, 11-5; § 10 at 10-1.

In its February 27, 2026 comments, under the heading “Request to be Consulting Parties under the NHPA,” TNA “expressly request[ed] that OSMRE include them as consulting parties for the No Name Mine SMCRA permit Application.” Exhibit A. OSMRE thereafter wrote to the President of the Navajo Nation seeking his input on that request. On April 28, 2026, President Buu Nygren responded: “It is important that Navajo individuals and entities that want to participate in this Section 106 consultation process be included. As such[,] I support Tó Nizhóní

Ání’s request to be treated as a consulting party as part of the Section 106 consultation process.” Exhibit E.

OSMRE executed the programmatic agreement on July 8, 2026. ROD at 23. The Record of Decision twice enumerates the Section 106 consulting party participants. Neither list includes TNA, and the two lists are not consistent with each other: “Consulting party participants include representatives from OSM, Navajo Nation, Bureau of Indian Affairs, and NTEC,” ROD at 23; “Section 106 consulting party participants include representatives from OSM, Navajo Nation, and NTEC,” ROD at 24. The Record of Decision mentions TNA once, stating that “[t]he Tó Nizhóní Ání requested to be a consulting party from the public, and OSM continued consultation with that organization,” ROD at 24. It states no determination on the request. It does not mention the April 28, 2026 letter or the consultation that produced it, although it does describe a later letter from the same official dated July 7, 2026 on an unrelated subject. ROD at 24.

The Record of Decision states that “[t]he future identification and evaluation of historic properties within the APE will be completed as specific aspects are refined in the PA,” ROD at 24, and finds “that the Section 106 process is complete,” ROD at 23.

The application proposes relocation of occupied dwellings within Area 5 and realignment of approximately seven miles of Burnham Road. Application § 10 at 10-2 to 10-3. The Tíís Tsoh Sííkaad Chapter has adopted Resolution No. TTS-RES-02-019 opposing the No Name Permit and any expansion of coal mining operations that may threaten the health, environment, and cultural heritage of the community and Navajo Nation lands.

NTEC has represented that it is seeking a jurisdictional determination from the U.S. Army Corps of Engineers, Albuquerque District, regarding potential waters of the United States

within the permit area. Application § 8.2 at 8-1. That determination had not issued when OSMRE approved the permit.

VI. SPECIFIC ERRORS IN OSMRE'S DECISION

A permit application may not be approved unless the applicant affirmatively demonstrates, and the regulatory authority finds in writing on the basis of information in the application or otherwise available, that each criterion of 30 U.S.C. § 1260(b) is satisfied. *See* 30 C.F.R. § 773.15. Those findings must be supported by a rational connection between the facts found and the decision made. 5 U.S.C. § 706(2)(A); *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1574–75 (10th Cir. 1994). OSMRE's decision is arbitrary and capricious where the agency entirely failed to consider an important aspect of the problem, offered an explanation running counter to the evidence, failed to consider relevant factors, or made a clear error of judgment. *New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 704 (10th Cir. 2009).

A. OSMRE approved a permit area and mine life unsupported by any record evidence of need, in violation of 30 U.S.C. § 1260(b)(1) and 5 U.S.C. § 706(2)(A).

OSMRE approved an 11,526-acre permit area authorizing recovery of approximately 503 million tons of coal and extending mine life to 2136. The only identified customer is the Four Corners Power Plant, scheduled to close in 2031 and, on the operator's most recent public statement, no later than 2038. The record identifies no other customer, no transportation means to any other market, and no analysis supporting demand beyond that horizon.

OSMRE could not rationally find the application "accurate and complete" and in compliance with all applicable requirements, 30 U.S.C. § 1260(b)(1), while approving a footprint untethered to any demonstrated need. The error is not cured by the five-year permit term. The boundary determination fixes the area over which renewal rights attach under 30 U.S.C. §

1256(d), and § 1256(d) places the burden on opponents of renewal. The scale of the area approved today therefore carries consequences that the term does not limit.

OSMRE's Findings confirm that the question was never engaged. Finding 1 states in a single sentence that the application "is accurate and complete." Exhibit F at 1. Finding 8 states that "[t]he revision application does not propose an expansion of operations onto any lands not previously approved for disturbance." *Id.* at 2. The opening paragraph of the same document describes "an application for a new permit area" of 11,526 acres authorizing 9,041 acres of new disturbance. *Id.* at 1. A finding that the application proposes no expansion onto new lands, made in a document approving more than nine thousand acres of new disturbance, is not a finding. It is a form completed without reference to the application before the agency, and it is the only finding OSMRE made on the accuracy and completeness of the application. The approval letter makes the same slip from the other direction, closing with an invitation to direct questions "regarding the permit renewal application approval." Exhibit C. The application was neither a revision nor a renewal.

To the extent OSMRE relied on federal energy policy as a reason not to deny the application, that reliance confirms the exercise of discretion and triggers the obligation to explain why a permit area of this scale is warranted on this record. To the extent OSMRE maintains that its role was ministerial, the policy rationale cannot supply the missing justification. *SEC v. Chenery Corp.*, 332 U.S. 194 (1947).

B. OSMRE could not lawfully find that the operation was designed to prevent material damage to the hydrologic balance outside the permit area. 30 U.S.C. § 1260(b)(3); 30 C.F.R. § 773.15.

30 U.S.C. § 1260(b)(3) forbids approval absent a written finding that the cumulative hydrologic impact assessment has been made and "the proposed operation thereof has been

designed to prevent material damage to the hydrologic balance outside the permit area.” The application’s own projections defeat that finding.

The projected reduction of approximately seven percent in groundwater contribution to the Chaco River alluvium is, by definition, an effect outside the permit area. The projected recovery horizon of at least 1,000 years for potentiometric levels in the Fruitland coals and the Pictured Cliffs Sandstone cannot be reconciled with a finding that material damage has been prevented, and the application contradicts itself by stating a 500-year horizon in Section 35. Removal of the Pinabete alluvial aquifer within the permit area interrupts downstream flow.

OSMRE’s finding on this criterion is one sentence: the operations “have been designed to prevent material damage to the hydrologic balance outside the permit area.” Exhibit F at 2 (Finding 5). It identifies no information, addresses none of the projections described above, and does not mention the Chaco River alluvium, the Pinabete alluvial aquifer, or the recovery horizon. An agency may not satisfy § 1260(b)(3) by deferring the question to adaptive monitoring, and it may not satisfy it by restating the statutory standard as a conclusion. The statute requires the finding, with reasons, before approval.

C. The probable hydrologic consequences determination and cumulative hydrologic impact assessment are inadequate. 30 C.F.R. §§ 780.21, 784.14, 773.15.

The probable hydrologic consequences (“PHC”) determination must assess the operation’s impact on the hydrologic balance and inform both the hydrologic reclamation plan and the monitoring plans. 30 C.F.R. § 780.21. Where the PHC indicates that adverse impacts may occur, supplemental information must be provided to evaluate those consequences and to plan remedial and reclamation activities. *Id.* The application identifies adverse impacts — aquifer removal, multi-century drawdown, elevated total dissolved solids, and baseline

exceedances of fluoride, sulfate, and selenium — without the supplemental analysis the regulation requires.

The internal inconsistency between the 500-year and 1,000-year recovery projections is not a technical disagreement. It goes to whether OSMRE had before it the accurate information § 1260(b)(1) requires. OSMRE was obligated to require a corrected submittal.

The PHC and cumulative hydrologic impact assessment (“CHIA”) also assume a stationary climate over a period the permit itself extends past 2130. Recharge, storm intensity, drought frequency, and evapotranspiration are the drivers of every hydrologic conclusion in the application, and each is assumed constant. Against baseline conditions of roughly 55 inches of annual evaporation and under six inches of precipitation, that assumption is not rational.

D. OSMRE failed to require an enforceable water replacement plan. 30 U.S.C. § 1307; 30 C.F.R. §§ 816.41, 817.41.

Three stock water wells serving as primary livestock water sources will be destroyed. The operator’s commitment to provide replacement water is contingent on successful reclamation and is not reduced to a concrete, enforceable obligation with a defined source, quantity, quality, delivery point, and duration commensurate with impacts projected to last centuries. Section 1307 requires replacement of water supplies affected by surface coal mining operations. A promise conditioned on the success of the very reclamation whose feasibility is at issue is not a plan.

E. OSMRE approved an operation projected to degrade water quality. 30 U.S.C. § 1265(b)(10); 30 C.F.R. §§ 816.41, 817.41.

Total dissolved solids in backfill groundwater are projected at 3,000 to 3,500 mg/L, above livestock use criteria, from salt flushing of disturbed spoil. Baseline data show exceedances of fluoride, sulfate, and total dissolved solids across multiple units and selenium values exceeding relevant wildlife criteria. OSMRE’s conclusion that offsite effects will be

minor rests on modeling assumptions and dilution expectations that were not tested against the non-stationary conditions the permit term contemplates.

F. OSMRE approved a stream diversion without the findings the performance standards require. 30 U.S.C. § 1265(b)(10); 30 C.F.R. §§ 816.43, 816.45.

The Pinabete Diversion reroutes a watershed several times larger than No Name Arroyo's existing drainage into that channel. Projected consequences include peak flows more than doubling in 100-year storm events, acceleration of an existing ten- to twelve-foot headcut, increased bank erosion, and sediment yield increases of 180 to 320 percent. A diversion must be designed to prevent additional contributions of suspended solids outside the permit area and to comply with applicable performance standards. The record does not support a finding that this one does.

G. The performance bond does not cover the reclamation obligations the application itself projects. 30 U.S.C. § 1259; 30 C.F.R. Part 800, § 800.14.

The bond must be sufficient to allow a third-party contractor to complete the approved reclamation plan in the event of forfeiture, with the amount reflecting the probable difficulty of reclamation given topography, geology, hydrology, and revegetation potential. 30 U.S.C. § 1259; 30 C.F.R. § 800.14. The bond here does not account for long-term groundwater monitoring commensurate with a 1,000-year recovery horizon, for water treatment or supply replacement over that horizon, for channel reconstruction and headcut maintenance following the diversion, or for cost escalation over a mine life extending past 2130.

Bond release may not occur until the operator demonstrates that the hydrologic balance has been protected and water quality supports the approved postmining land use. 30 C.F.R. §§ 816.41, 817.41. A bond calculated without reference to those obligations cannot satisfy § 1259. And no finding on the bond exists in the decision documents Petitioners have seen. The Findings

contain no determination of the bond amount or its adequacy; Finding 7 addresses reclamation fees under 30 C.F.R. Chapter VII, Subchapter R — the abandoned mine land fee — not the performance bond § 1259 requires. Exhibit F at 2.

H. OSMRE held the informal conference on one application and approved another, severing the link between the conference and the decision that 30 U.S.C. § 1264(a) requires. 30 U.S.C. §§ 1263(b), 1264(a); 30 C.F.R. §§ 773.6(c), 773.7(a).

SMCRA fixes the order of public participation on a permit application. The applicant advertises the application when it is submitted. 30 U.S.C. § 1263(a). Objections may be filed within the advertisement period, and any objector may request an informal conference, which the regulatory authority holds “within a reasonable time” thereafter. *Id.* § 1263(b); 30 C.F.R. § 773.6(c). The regulatory authority then reviews “an application for a permit . . . ; written comments and objections submitted; and records of any informal conference or hearing held *on the application* and issue[s] a written decision.” 30 C.F.R. § 773.7(a) (emphasis added). Where a conference has been held, that decision must issue “within the sixty days of said hearings.” 30 U.S.C. § 1264(a); *accord* 30 C.F.R. § 773.7(a). The sixty-day rule ties the decision to the conference. Whatever else it requires, it requires that the two concern the same application: the conference is held on the application, and the decision follows closely enough that the application objectors were heard on is the application the regulatory authority acts on.

OSMRE held the conference on January 29, 2026, as a combined “informal conference/scoping meeting” at the outset of its environmental review. ROD at 21; Exhibit F at 3 (“On January 29, 2026, OSMRE held an informal conference on the proposed No Name SMCRA Permit.”). The Final EIS did not yet exist. The 2026 CHIA had not been prepared. And the application itself was revised on April 17, July 5, and July 9, 2026 — three times after the conference — before OSMRE approved it on August 31, 2026. Exhibit F at 1. The record

discloses no further notice and no further conference. The objections Petitioners presented on January 29 and in writing on February 27 were directed to an application that had been superseded three times by the time OSMRE acted on it.

Timing. Sixty days from January 29, 2026 expired on or about March 30, 2026. OSMRE did not sign the Record of Decision until August 27, 2026, and did not approve the permit until August 31, 2026.

What Petitioners do not contend. Petitioners do not contend that the delay divested OSMRE of authority to act. A statutory deadline directed at agency action is ordinarily read as directory rather than jurisdictional, and the agency does not lose power to act by missing it. *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 158–63 (2003); *Brock v. Pierce County*, 476 U.S. 253, 260 (1986). Nor do Petitioners contend that OSMRE should have decided a permit of this scale within sixty days of a January conference. The review that produced this decision was already too compressed for what it purported to evaluate, and that is a separate problem. The point here is different. The sixty-day rule exists to keep the conference and the decision together, so that the application objectors are heard on is the application the regulatory authority decides. OSMRE separated the two by seven months and three revisions. The missed deadline is the measure of that separation, not the injury; the injury is to the public participation that § 1263(b) exists to ensure.

The failure to act within the statutory period independently establishes the right to review. Congress specified a consequence for missed SMCRA deadlines. Section 1264(f) confers the right to appeal on a person who participated as an objector and is aggrieved by the decision, “or *if the regulatory authority fails to act within the time limits specified in this*

chapter.” 30 U.S.C. § 1264(f) (emphasis added); *accord* 30 C.F.R. § 775.13(a)(2). That is a second and independent basis for Petitioners’ right to bring this Request.

OSMRE cannot take the benefit of the conference and disclaim its consequences.

OSMRE relies on the January 29 proceeding as the § 1263(b) informal conference the statute requires. ROD at 21; Exhibit F at 3. Either it was that conference, in which case § 1264(a) and § 773.7(a) attached to it and OSMRE both missed the deadline and materially revised the application afterward without the participation those provisions secure; or it was not, in which case no informal conference has been held on this application at all. On neither reading did OSMRE comply with § 1263(b).

I. OSMRE’s Section 106 compliance rests on a programmatic agreement it was not entitled to use and executed without the consultation Part 800 requires. 54 U.S.C. § 306108; 36 C.F.R. Part 800; 30 C.F.R. § 779.12.

OSMRE must make a reasonable and good faith effort to identify historic properties, evaluate eligibility, assess effects, and consult on avoidance, minimization, and mitigation before approving an undertaking. 36 C.F.R. §§ 800.4–800.6. The identification effort here rests on a Class II and Class III inventory conducted between November 1, 2006 and April 16, 2008 — eighteen years before approval — in an actively eroding landscape that the application itself projects will erode further, with headcut advance and sediment yields increasing by 180 to 320 percent. OSMRE was required to obtain additional surveys where existing information is outdated or incomplete. 30 C.F.R. § 779.12; *see* 36 C.F.R. § 800.4(b)(1). It did not.

The programmatic agreement route was not justified. A programmatic agreement is available only in the five circumstances enumerated at 36 C.F.R. § 800.14(b)(1). The Record of Decision cites “36 CFR Part 800.14(b)” — evidently § 800.14(b) — without identifying which circumstance OSMRE invoked. ROD at 24. To the extent OSMRE relies on § 800.14(b)(1)(ii),

which applies “[w]hen effects on historic properties cannot be fully determined prior to approval of an undertaking,” that circumstance cannot be manufactured by the agency’s own failure to update an eighteen-year-old inventory. The effects could have been determined; OSMRE did not determine them.

OSMRE solicited the Navajo Nation’s position on TNA’s participation, received it, and made no determination the record discloses. Section 800.3(f)(3) required OSMRE to “consider all written requests of individuals and organizations to participate as consulting parties and, in consultation with the SHPO/THPO and any Indian tribe upon whose tribal lands an undertaking occurs or affects historic properties, determine which should be consulting parties.” 36 C.F.R. § 800.3(f)(3).

TNA made the written request. Its February 27, 2026 comments contain a section headed “Request to be Consulting Parties under the NHPA” and “expressly request that OSMRE include them as consulting parties for the No Name Mine SMCRA permit Application.” Exhibit A. OSMRE then undertook the consultation the rule requires, writing to the President of the Navajo Nation — the tribe upon whose lands this undertaking occurs — to seek “input on whether the Office of Surface Mining should consider Tó Nizhóní Ání a consulting party for section 106 consultation for the Navajo Transitional Energy Company’s No Name Permit application.” On April 28, 2026, the President answered: “It is important that Navajo individuals and entities that want to participate in this Section 106 consultation process be included. As such[,] I support Tó Nizhóní Ání’s request to be treated as a consulting party as part of the Section 106 consultation process.” Exhibit E.

However, OSMRE executed the programmatic agreement on July 8, 2026 — ten weeks after the President’s letter — among “representatives from OSM, Navajo Nation, Bureau of

Indian Affairs, and NTEC.” ROD at 23. TNA is not among them. The Record of Decision enumerates the consulting party participants a second time, again without TNA and inconsistently with the first list: “Section 106 consulting party participants include representatives from OSM, Navajo Nation, and NTEC.” ROD at 24. TNA appears once in the entire Record of Decision, in a sentence that states that TNA “requested to be a consulting party from the public, and OSM continued consultation with that organization.” ROD at 24. No determination on the request appears anywhere in the decision. Neither does the April 28, 2026 letter, or the OSMRE correspondence that prompted it, although the Record of Decision does describe a later letter from the same official, dated July 7, 2026, on an unrelated subject. *Id.*

Two independent legal errors result. **First**, § 800.3(f)(3) commits the determination to the agency and requires it to be made. The decision documents do not reflect a determination. An agency must disclose in the record it certifies the basis of the action it took; a determination that was made but never recorded is not lawful under the APA. 5 U.S.C. § 706(2)(A). **Second**, the Record of Decision twice describes the participants in the Section 106 consultation and in the executed programmatic agreement, and TNA appears in neither description. ROD at 23, 24. If OSMRE granted the request, its own decision document misdescribes who the consulting parties were. If it did not, the request was resolved against TNA without the determination the rule requires and without any explanation of why the Navajo Nation’s stated position was not adhered to. Either way the decision cannot be sustained on the record as it stands.

Nor can the defect be cured by pointing to correspondence. Circulating a draft agreement for comment, soliciting input, or “continu[ing] consultation with that organization,” ROD at 24, is not the determination § 800.3(f)(3) requires, and it does not confer what consulting party status confers: the right to consult on the identification and evaluation of historic properties, 36 C.F.R.

§ 800.4; on the assessment of effects, *id.* § 800.5; and on the development and evaluation of “alternatives or modifications to the undertaking that could avoid, minimize, or mitigate adverse effects,” *id.* § 800.6(a). Those rights attach on designation. OSMRE’s decision documents do not show that TNA ever received them.

The omission is compounded by gaps in the Record of Decision. The ROD does not mention the April 28, 2026 letter, or the OSMRE correspondence that prompted it, though it describes a later letter from the same official on an unrelated subject. ROD at 24. An agency that solicits the position of the tribe upon whose lands the undertaking occurs, on a question the regulation commits to tribal consultation, must at a minimum show in its decision that it took that position into account. *See Seminole Nation v. United States*, 316 U.S. 286, 296–97 (1942). The finding that “the Section 106 process is complete,” ROD at 23, rests on a record that does not disclose what OSMRE decided, when, or why.

The Findings add a contradiction of their own. Finding 3(c) states that the operations are “[n]ot on any lands where mining will adversely affect any publicly owned park or places included in the National Register of Historic Places.” Exhibit F at 1. Finding 11 states that “[t]he permit area contains historic properties or potential historic properties” and that “adverse effects to formally-determined or potential historic properties must be resolved” under the programmatic agreement. *Id.* at 3. The Record of Decision counts 162 sites determined eligible for or listed in the National Register. ROD at 23. Finding 3(c) cannot be reconciled with Finding 11 or with the Record of Decision without an explanation the document does not contain, and 30 C.F.R. § 761.11(c) permits mining that would adversely affect a National Register place only where the regulatory authority and the agency with jurisdiction “jointly approve” it. No such approval is identified.

J. OSMRE approved mining affecting identified burial sites without satisfying 30 C.F.R. § 761.11 and NAGPRA.

Burial sites have been identified within the proposed mining areas. Surface coal mining operations are prohibited within 100 feet of a cemetery. 30 C.F.R. § 761.11(g); *see* 30 U.S.C. § 1272(e). The application’s proposal to remove and relocate burials was not assessed under that prohibition, and the permit contains no enforceable inadvertent-discovery, stop-work, and repatriation protocol consistent with the Native American Graves Protection and Repatriation Act (“NAGPRA”), 25 U.S.C. §§ 3001–3013, and 43 C.F.R. Part 10.

OSMRE’s finding on the point is a single clause: the operations are “[n]ot within 100 feet, measured horizontally, of a cemetery.” Exhibit F at 2 (Finding 3(g)). Under OSMRE’s own regulations, “[c]emetery means any area of land where human bodies are interred.” 30 C.F.R. § 761.5. The application identifies burial sites within the areas to be mined and proposes to remove and relocate them. A finding that mining will not occur within 100 feet of a cemetery, made on an application that proposes to mine through interments, either misreads the application or applies a definition of cemetery that the regulation does not contain. Section 761.11(g) permits mining within the buffer only where “the cemetery is relocated in accordance with all applicable laws and regulations.” OSMRE made no finding that any relocation would comply with NAGPRA or with any other applicable law, and Finding 3(g) does not acknowledge that a relocation is proposed.

K. OSMRE failed to require a plan minimizing social impacts, including relocation of residents and realignment of Burnham Road. 30 U.S.C. §§ 1202(a), 1202(f).

The application proposes relocating occupied dwellings within Area 5 and realigning approximately seven miles of Burnham Road without a plan to minimize or mitigate those impacts. SMCRA’s declared purpose includes protecting society from the adverse effects of

surface coal mining operations. Approving relocation of residents to enable mining whose market basis ends in 2031 or 2038 is not a rational exercise of that mandate. OSMRE's obligations are heightened here by the United States' trust responsibility to the Navajo Nation and its members. *See Seminole Nation v. United States*, 316 U.S. 286, 296–97 (1942).

OSMRE found that the operations are “[n]ot to be conducted within 300 feet, measured horizontally, of any occupied dwelling.” Exhibit F at 1 (Finding 3(e)). The application proposes to relocate occupied dwellings within Area 5. The finding is true only if the residents are removed first. Section 761.11(e) permits mining within the buffer only on a written waiver from the owner that “clarif[ies] that the owner and signator had the legal right to deny mining and knowingly waived that right.” The Findings do not state that any waiver was obtained, from whom, or on what terms, and do not acknowledge that residents will be displaced to make the finding true.

L. OSMRE could not find that reclamation as required by SMCRA can be accomplished. 30 U.S.C. §§ 1260(b)(2), 1265(b)(2)–(3), (b)(19)–(20).

Revegetation success criteria and reclamation sequencing assume precipitation and temperature regimes consistent with historical baselines. For lands that will not be disturbed until well into the next century, seed mix viability, soil moisture retention, and long-term productivity cannot be predicted on those assumptions. A finding that reclamation “can be accomplished” under § 1260(b)(2) for disturbance occurring in 2080, 2100, or 2136 is not supportable on this record.

M. OSMRE approved the permit while a Clean Water Act jurisdictional determination remained pending.

NTEC represented that it had sought a jurisdictional determination from the U.S. Army Corps of Engineers regarding potential waters of the United States within the permit area.

OSMRE approved the permit before that determination issued, without addressing whether and how Clean Water Act requirements would apply to the diversion and associated construction.

VII. STATEMENT REGARDING EVIDENTIARY HEARING

Petitioners waive an evidentiary hearing. 43 C.F.R. § 4.1363(a)(4). The errors identified above turn on the adequacy of the record before the agency at the time of the permit approval.

VIII. REQUEST FOR SPECIFIC RELIEF

Petitioners request that the Administrative Law Judge:

1. Vacate OSMRE's August 31, 2026 decision approving the No Name permit application and issuing Permit NM-0043A;
2. In the alternative, remand the decision to OSMRE with instructions to (a) limit the permit area to coal reasonably mineable within a demonstrated market horizon ending no later than 2038; (b) require a corrected and internally consistent probable hydrologic consequences determination and cumulative hydrologic impact assessment addressing non-stationary climate conditions; (c) require an enforceable water supply replacement plan under 30 U.S.C. § 1307 with a defined source, quantity, quality, and duration; (d) require a revised bond calculation accounting for long-term monitoring, water treatment and replacement, channel and headcut maintenance, and cost escalation over the authorized mine life; (e) complete Section 106 identification, evaluation, and consultation before any approval, including current surveys of the area of potential effects, an express determination on TNA's consulting party request under 36 C.F.R. § 800.3(f)(3), and reconsideration of the programmatic agreement with TNA's participation; (f) require a plan minimizing and mitigating impacts from relocation of residents and realignment of Burnham Road; (g) provide public notice of the permit application package

as revised and hold an informal conference under 30 U.S.C. § 1263(b) on the application as revised before any further decision on it; and (h) prohibit any disturbance of, or removal of human remains from, any identified burial site unless and until OSMRE makes a written finding that the proposed relocation complies with 30 C.F.R. § 761.11(g), with NAGPRA, and with 43 C.F.R. Part 10, and the permit incorporates an enforceable inadvertent-discovery, stop-work, and repatriation protocol;

3. Order OSMRE to file forthwith the reclamation bond instrument and the complete administrative record, including the permit application package as initially submitted and as revised on October 22, 2025, November 12, 2025, April 17, 2026, July 5, 2026, and July 9, 2026, and grant Petitioners leave to amend this Request within a reasonable period after production;

4. Order that no ground-disturbing activity occur within the No Name Permit area pending completion of this review and any judicial review; and

5. Grant such other relief as is just and proper, including costs and expenses and attorney fees under 30 U.S.C. § 1275(e) and 43 C.F.R. §§ 4.1290–4.1296.

IX. OTHER RELEVANT INFORMATION

43 C.F.R. § 4.1363(a)(5). Petitioners attach and incorporate: Exhibit A, Tó Nizhóní Ání comments and objections dated February 27, 2026; Exhibit B, comments and objections of the Western Environmental Law Center on behalf of Diné Citizens Against Ruining our Environment and San Juan Citizens Alliance dated February 27, 2026; Exhibit C, OSMRE approval letter dated August 31, 2026; Exhibit D, Tíís Tsoh Sííkaad Chapter Resolution No. TTS-RES-02-019; Exhibit E, letter of Dr. Buu Nygren, President of the Navajo Nation, to Mychal Yellowman, OSMRE, dated April 28, 2026, supporting Tó Nizhóní Ání’s request to be

treated as a consulting party; and Exhibit F, OSMRE, Findings – Determination for Approval of a Permit Application Package (PAP) NM-0043-A, dated August 31, 2026.

Petitioners request that OSMRE file the administrative record, including the permit application package as initially submitted and as revised on each of the five dates identified in Finding 2 of Exhibit F, any “SMCRA decision document” referenced in the August 31, 2026 approval letter other than Exhibit F, the reclamation bond instrument referenced at ROD 23, the 2026 cumulative hydrologic impact assessment, the scoping and informal conference record for the January 29, 2026 proceeding, and all Section 106 correspondence, including OSMRE’s correspondence to the President of the Navajo Nation seeking input on TNA’s consulting party request, any determination made on that request, all correspondence between OSMRE and TNA concerning Section 106 or the programmatic agreement, and the programmatic agreement executed July 8, 2026 with its Attachments C and D.

Respectfully submitted this 30th day of September, 2026.



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San Juan Citizens Alliance*

CERTIFICATE OF SERVICE

I certify that on September 30, 2026, I filed the foregoing Request for Review, with exhibits, with the Departmental Cases Hearings Division through Bison File & Serve, and concurrently served a copy, with exhibits, by first-class mail, postage prepaid, in accordance with 43 C.F.R. § 4.1109(a), on:

Regional Solicitor, Rocky Mountain Region, U.S. Department of the Interior, 755 Parfet Street, Suite 151, Lakewood, CO 80215, being the office of the Office of the Solicitor designated in the OHA Standing Order on Contact Information for the challenge of permitting decisions affecting mining operations located on Indian lands within New Mexico;

Navajo Transitional Energy Company, LLC, attn. Joshua Johns, P.O. Box 958, Shiprock, Navajo Nation (New Mexico) 87420, as applicant and permittee and a statutory party under 43 C.F.R. § 4.1105(a)(2); and

OSMRE Western Region, attn. Mychal Yellowman and Flynn Dickinson, P.O. Box 25065, Lakewood, CO 80225-0065.



Jeffrey C. Parsons