

**FEDERAL REGISTER: 59 FR 43414 (August 23, 1994)**

DEPARTMENT OF THE INTERIOR

AGENCY: Bureau of Indian Affairs (BIA); Office of Surface Mining Reclamation and Enforcement (OSM)

25 CFR Parts 200 and 216; 30 CFR Parts 710, 715, 716, 717, and 750

Surface Coal Mining and Reclamation Operations; Initial Regulatory Program for Indian Lands; Part III

ACTION: Final rule.

**SUMMARY:** The Bureau of Indian Affairs (BIA) and the Office of Surface Mining Reclamation and Enforcement (OSM) are amending their regulations to remove the current initial program for Indian lands and revise the existing initial program for non-Indian lands to apply to Indian lands. These amendments enable operators on Indian lands initial program sites, in appropriate circumstances, to reclaim to the latest technical and environmental standards of the permanent program, eliminate inconsistencies between the Indian and non-Indian lands initial programs, ensure equal treatment of operators on Indian and non-Indian lands, and clarify regulatory and compliance ambiguities. This rule also amends the permanent program for Indian lands to reflect the foregoing amendments and revises related information collection provisions.

EFFECTIVE DATE: September 22, 1994.

FOR FURTHER INFORMATION CONTACT: Billie E. Clark, Jr., Branch of Federal and Indian Programs, Office of Surface Mining Reclamation and Enforcement, U.S. Department of the Interior, Brooks Towers, 1020 15th Street, Denver, CO 80202; Telephone: 303-844-2829.

**SUPPLEMENTARY INFORMATION:**

- I. Background
- II. Discussion of Final Rule
- III. Response to Comments
- IV. Procedural Matters

**I. BACKGROUND**

**A. THE PROPOSED RULE**

On March 22, 1993, the Bureau of Indian Affairs (BIA) and the Office of Surface Mining Reclamation and Enforcement (OSM) of the U.S. Department of the Interior published in the Federal Register at *58 FR 15404* a proposed rule to remove the Indian lands initial program at 25 CFR Part 216, Subpart B, and amend the non-Indian lands initial program at 30 CFR Chapter VII, Subchapter B, to cover Indian lands. OSM also proposed to make conforming revisions in the Indian lands permanent program and to revise related information collection provisions.

In the notice, OSM and BIA stated that the proposed rule would, among other things:

(1) Require operators on initial program Indian lands to adhere to the initial program performance standards at 30 CFR Chapter VII, Subchapter B;

(2) Allow such operators to avail themselves of 30 CFR 710.11(e), under which they could choose to meet either the initial program performance standards at 30 CFR Chapter VII, Subchapter B, or counterpart permanent program performance standards at 30 CFR Chapter VII, Subchapter K;

(3) Thereby allow such operators to reclaim to the latest technical and environmental standards of the permanent program; and

(4) Eliminate inconsistencies between the Indian and non-Indian lands initial programs, ensure equal treatment of surface coal mine operators on Indian and non-Indian lands, and clarify regulatory and compliance ambiguities.

The proposed rule provided a public comment period and offered to hold a public hearing. The public comment period closed on April 21, 1993. Two requests for a public hearing were received but later withdrawn, and no hearing was held.

## **B. HISTORY OF AFFECTED PROVISIONS**

The Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act), Pub. L. 95-87, as amended, 30 U.S.C. Sections 1201-1328, provides for initial and permanent programs for the regulation by the Secretary of the Interior (the Secretary) of surface coal mining and reclamation operations on Indian lands. The Indian lands initial program is codified in the Federal regulations at 25 CFR Part 216, Subpart B (42 FR 63395, December 16, 1977 and 47 FR 13326, March 30, 1982). The Indian lands permanent program is codified at 30 CFR Part 750 (49 FR 38462, September 28, 1984). SMCRA also provides for initial and permanent programs for the regulation of surface coal mining and reclamation operations on non-Indian lands. The initial program for non-Indian lands is codified in the Federal regulations at 30 CFR Chapter VII, Subchapter B (42 FR 62639, December 13, 1977). Permanent program performance standards for non-Indian lands are codified at 30 CFR Chapter VII, Subchapter K.

As first promulgated, the performance standards of the Indian lands initial program at 25 CFR Part 216, Subpart B, were nearly identical to those of the non-Indian lands initial program at 30 CFR Parts 715 and 716. However, there were differences. The most important difference was that the Indian lands initial program included provisions at 25 CFR 216.112 through 216.114 for tribal involvement in inspection, enforcement, and civil penalty proceedings. Also, the Indian lands initial program did not include provisions, as found in the non-Indian lands initial program at 30 CFR 715.19, governing the use of explosives. Furthermore, except for the provisions governing steep-slope mining at 25 CFR 216.111, the Indian lands initial program did not include special performance standards comparable to those for non-Indian lands at 30 CFR Part 716.

On September 28, 1984 (49 FR 38462), OSM published a rule that, among other things, amended the Indian lands initial program to remove the tribal involvement provisions at 25 CFR 216.112 through 216.114. In the preamble to that rule, OSM stated that those provisions were superseded by the permanent program provisions at 30 CFR Parts 842, 843, and 845. Specific provisions to protect Indian interests were also included in 30 CFR Part 750. See e.g. 30 CFR 750.18. OSM determined that having one set of uniform rules made administration of the Act simpler and more efficient and that the change would cause no undue hardship on non-complying operators (49 FR 38464, September 28, 1984). Hence, the major reason for having separate Indian and non-Indian lands initial programs was eliminated.

On February 14, 1991 (56 FR 6224), OSM amended the non-Indian lands initial program to add a new provision—namely, 30 CFR 710.11(e)—that allows operators on non-Indian lands to meet any counterpart permanent program performance standard at 30 CFR Chapter VII, Subchapter K, in lieu of the initial program performance standard at 30 CFR Chapter VII, Subchapter B. Changes to the Indian lands initial program were deemed to be outside the scope of that rulemaking (56 FR 6224, 6226, February 14, 1991). Thus, while operators of non-Indian lands had the option to meet counterpart permanent program standards in lieu of initial program standards, operators on Indian lands did not have that option.

Although 30 CFR 710.11(e) did not apply to initial program Indian lands, the basis and purpose for the promulgation of that provision are applicable to Indian lands. In explaining that new provision (56 FR 6224, February 14, 1991), OSM stated:

The Permanent Program rules [require] the latest technical and environmental standards for interpretation of the Act and are the result of more than ten years of experience in implementing the Act. They include many program revisions mandated by courts. However, in cases where the Initial Program performance standards continue to apply, Regulatory Authorities must require operators to comply with all of the earlier standards, even when compliance with Permanent Program standards would ensure implementation of [the Act] or would result in reclamation superior to that which would be achieved under the Initial Program standards.

OSM then described five examples of initial program performance standards that were outdated or for which compliance was impractical. Most of those examples are equally germane to Indian lands.

The Indian lands initial program applies to any person who conducts surface coal mining and reclamation operations on Indian lands on or after December 16, 1977. Although the Indian lands permanent program has been in effect since

September 28, 1984, operators on all initial program sites must continue to comply with the Indian lands initial program performance standards, even though compliance with counterpart permanent program performance standards would ensure implementation of the Act and could result in superior reclamation. At the present time, there is only one interim program mine in operation on Indian lands. Interim program sites include sites at which surface coal mining operations were complete prior to June 28, 1985 (eight months following the effective date of the Indian lands permanent program) and to surface coal mining operations operating under an interim authorization pending issuance of a permanent program permit (See 30 CFR 750.11(c)). This rulemaking affects only such sites.

## **II. DISCUSSION OF FINAL RULE**

This rule moves the Indian lands initial program regulations at 25 CFR Part 216.100(b), into a new section, but would not change its substance. Part 216, Subpart B would be deleted as proposed. The rule also amends the permanent program for Indian lands at 30 CFR 750.16 to reflect the foregoing changes. The rule also amends the information collection statements at 30 CFR 716.10, 717.10, and 750.10.

These amendments, among other things, allow operators on Indian lands initial program sites to avail themselves of the provisions of 30 CFR 710.11(e), under which operators may choose to meet either the initial program performance standards at 30 CFR Chapter VII, Subchapter B, or counterpart permanent program performance standards at 30 CFR Chapter VII, Subchapter K.

### **REMOVAL OF 25 CFR PART 216, SUBPART B**

25 CFR section 216.100(b) provides that the requirements of 25 CFR part 216, Subpart B shall be incorporated in all existing and new contracts entered into for coal mining on Indian lands. Although OSM proposed to delete 25 CFR Part 216, Subpart B, OSM has decided to retain the contents of section 216.100(b) by redesignating the section as section 200.12 Contract Term Incorporation, and making a technical revision to reflect the fact that the requirements of Subpart B have been replaced by 30 CFR Part 750. This change reflects the fact that the requirement of 25 CFR section 216.100(b) would not be addressed by the amendments to 30 CFR Chapter VII. Accordingly, the existing requirement of 25 CFR section 216.100(b) is being redesignated without substantive change.

As discussed above, prior to this rule 25 CFR Part 216, Subpart B, comprised the Indian lands initial program. Although 25 CFR Part 216, Subpart B, appears in the BIA regulations at 25 CFR Chapter I, the OSM Director is responsible for administering the Indian lands initial program under the general guidance of the Assistant Secretary for Land and Minerals Management.

The performance standards of 30 CFR Chapter VII, Subchapter B, do not place any additional unreasonable burdens on operators on Indian lands initial program sites about and beyond those found in 25 CFR Part 216, Subpart B. The changes will actually give OSM and operators more flexibility while ensuring compliance with the Act.

### **AMENDMENTS TO 30 CFR**

As discussed below, the amendments to 30 CFR 710.11(b), 715.11, and 750.16 make the non-Indian lands initial program at 30 CFR Chapter VII, Subchapter B, applicable to Indian lands.

#### **SECTION 710.11(b) - APPLICABILITY**

The "Applicability" provisions at 30 CFR 710.11(b) are amended to make the initial program regulations at 30 CFR Chapter VII, Subchapter B, applicable to Indian lands. Specifically, it requires any person who conducts surface coal mining and reclamation operations on Indian lands on or after December 16, 1977, in accordance with 30 CFR 750.11(c), to meet the performance standards of 30 CFR Chapter VII, Subchapter B. This change would, by implication, amend any provision of 30 CFR Chapter VII, Subchapter B, containing a reference to the State as the regulatory authority, to the extent that such reference would be construed as also referring to OSM as the regulatory authority on Indian lands.

This change affects operators on Indian lands initial program sites in three principal ways:

**a. PERMANENT PROGRAM PERFORMANCE STANDARDS IN LIEU OF INITIAL PROGRAM PERFORMANCE STANDARDS**

The change to 30 CFR 710.11(b) allows operators on Indian lands initial program sites to avail themselves of the provisions of 30 CFR 710.11(e), under which they may choose to meet either the initial program performance standards at 30 CFR Chapter VII, Subchapter B, or counterpart permanent program performance standards at 30 CFR Chapter VII, Subchapter K. Prior to this rulemaking, operators on non-Indian lands were able to avail themselves of section 710.11(e) while operators on Indian lands were not. With this rulemaking, operators on Indian lands may now avail themselves of section 710.11(e). This resolves an inequity. Without the change to section 710.11(b), operators on Indian lands initial program sites could be placed at a competitive and economic disadvantage when compared with operators on non-Indian land, because of performance standards that have been determined to be unnecessary for implementation of SMCRA. Thus, the change to section 710.11(b) eliminates inconsistencies between the current Indian and non-Indian lands initial programs and ensures equal treatment of operators on Indian and non-Indian lands.

This rulemaking will have no cumulative negative environmental effect. Allowing operators to choose compliance with the permanent program performance standards will ensure compliance with the Act. The permanent program performance standards represent the latest technical and environmental standards for interpretation of the Act, and are the result of more than fifteen years of experience in implementing the Act. The permanent program performance standards also include revisions mandated by courts. Hence, the Act will be complied with and environmental impacts will be fully analyzed and considered before final decisions are reached.

**b. FREQUENCY OF INSPECTING PONDS THAT DO NOT MEET MINE SAFETY AND HEALTH ADMINISTRATION CRITERIA**

The Indian lands initial program at 25 CFR 216.108(e) required that ponds not meeting the size or other criteria of the Mine Safety and Health Administration regulation at 30 CFR 77.216(a) be examined on a weekly basis. In comparison, the non-Indian lands initial program at 30 CFR 715.17(e)(20) allows the regulatory authority to approve a reduction in the number of examinations of these ponds to four times per year. The change to 30 CFR 710.11(b) makes 30 CFR 715.17(e)(20) applicable to Indian lands and, consequently, allows OSM, the regulatory authority for Indian lands, to approve a reduction in the number of examinations of these ponds to four times per year. This change eliminates a competitive and economic disadvantage placed on Indian land operators by reducing the cost to the operator associated with such examinations.

**c. USE OF EXPLOSIVES**

Section 710(c) of the Act does not specifically require operators on Indian lands initial program sites to comply with subsection 515(b)(15) of the Act concerning the use of explosives. Therefore, the Indian lands initial program promulgated on December 16, 1977 (*42 FR 63395*) did not include provisions governing the use of explosives. In comparison, section 502(c) of the Act requires operators on non-Indian lands initial program sites to comply with subsection 515(b)(15) of the Act. Consequently, the non-Indian lands initial program at 30 CFR 715.19 includes provisions governing the use of explosives.

By this rulemaking, 30 CFR 710.11(b) is modified and the provisions at 30 CFR 715.19 governing the use of explosives are made applicable to Indian lands initial program sites. Section 710(d) of the Act, however, requires surface coal mine operators on Indian lands, on which such operations are conducted on and after thirty months from August 3, 1977, to comply with all of subsection 515 of the Act, including subsection 515(b)(15). Furthermore, section 710(d) of the Act requires that after the applicable thirty month period, all of the requirements of subsection 515 of the Act must be incorporated in existing and new leases issued for coal on Indian lands. The changes to 30 CFR 710.11(b) in this rulemaking are effective after the applicable 30-month period when operators on Indian lands must comply with all of the requirements of section 515 of the Act, including those concerning explosives. Therefore, 30 CFR 715.19 is made applicable to Indian lands.

## **SECTION 715.11 - GENERAL OBLIGATIONS**

Part 715 of 30 CFR contains general initial program performance standards and includes regulations governing restoration of disturbed areas to suitable postmining land use, backfilling and grading, off-site disposal of spoil and waste materials, topsoil handling, protection of the hydrologic system, construction, inspection, and maintenance of dams, use of explosives, and revegetation. The focus of 30 CFR Part 715 is on lands regulated by the States. The "General obligations" section of this part is modified by adding a new paragraph to clarify that the general performance standards of this part are also applicable to Indian lands. Specifically, paragraph (d) is added to 30 CFR 715.11. OSM had proposed to add a new subparagraph 30 CFR 715.11(d)(1) which specifically clarified that OSM is the regulatory authority for surface coal mining and reclamation operations conducted on Indian lands initial program sites. This has been OSM's position for a number of years (See, e.g., OSM's preambles on September 28, 1984, and May 22, 1989 (*54 FR 22182*)). OSM has decided not to include this provision in the final rule because it is not necessary. Although such a clarification would have been useful when this program was codified in 25 CFR, such a clarification is unnecessary once the program is codified under 30 CFR, because the provisions of 30 CFR already define "regulatory authority" and specify what entities perform that role. Thus, the decision not to adopt this provision is not intended to be a substantive change from the existing rule or from the proposed rule. The issue of who may act as the regulatory authority under SMCRA on Indian lands is currently the subject of litigation [*Hopi Indian Tribe v. Secretary of the Interior*, No. 89-2055-JGP (D.D.C.); *Navajo Nation v. Babbitt*, No. 89-2066-JGP (D.D.C.) (consolidated)]. OSM anticipates the issue will be resolved in the context of that litigation.

OSM proposed a new subparagraph 30 CFR 715.11(d)(2). This provision is being renumbered and adopted. 30 CFR 715.11(d)(1). This subparagraph establishes minimum requirements for mine maps. The maps must show as of December 16, 1977, the lands where coal had not yet been removed, and the lands and structures that had been used or disturbed by a surface coal mining operation. This provision essentially duplicates 25 CFR 216.102(b). This is necessary since the effective date of the initial program for Indian lands is December 16, 1977, as opposed to May 3, 1978, for non-Indian lands, and operators still must supply the subject mine maps to OSM.

Subpart B of 25 CFR Part 216 generally requires coordination and consultation with tribes, much the same as 30 CFR Part 715 requires coordination and consultation with States and local governments. Since Subpart B of 25 CFR Part 216 is removed under this rulemaking, OSM proposed to add a provision at 30 CFR 715.11(d)(3) that requires notification of and consultation with tribal governments to the same extent as is required for State and local governments. The provision is being renumbered and adopted as 30 CFR 715.11(d). This provision reflects the important role of tribal governments in the initial program for Indian lands.

The last sentence of 30 CFR 715.11(d)(2) requires OSM to coordinate with the BIA with respect to special requirements relating to the protection of noncoal resources and the Bureau of Land Management (BLM) with respect to the requirements relating to the development, production and recovery of mineral resources. This sentence has been added to the final rulemaking to specifically recognize the responsibilities that the BIA and the BLM have on Indian lands. It essentially establishes the same requirement for the initial program as exists in 30 CFR 750.6 for the permanent program.

## **SECTIONS 716.1 THROUGH 716.10 - SPECIAL PERFORMANCE STANDARDS**

30 CFR Chapter VII, Subchapter B, includes provisions governing general obligations (section 716.1), steep-slope mining (section 716.2), mountain-top removal (section 716.3), special bituminous coal mines (section 716.4), anthracite coal mines (section 716.5), coal mines in Alaska (section 716.6), prime farmland (section 716.7), and information collection (section 716.10). The only counterpart to these regulations under 25 CFR Part 216, Subpart B, was the regulations governing steep-slope mining (section 216.111), which duplicates only a portion of the regulations covering steep-slope mining at 30 CFR 716.2. Under the changes made today, the additional requirements of 30 CFR Chapter VII, Subchapter B, also govern operations on Indian lands initial program sites, as applicable.

## **SECTION 750.16 - PERFORMANCE STANDARDS**

30 CFR 750.16 is modified to reflect that operators on Indian lands initial program site must comply with the provisions of 30 CFR Chapter VII, Subchapter B. This is necessary since 25 CFR Part 216, Subpart B is removed by this rulemaking.

### **III. RESPONSE TO COMMENTS**

Comments on the proposed rule were received from four entities: two tribal governments and two members of the coal industry. The proposal to allow operators to meet counterpart permanent program performance standards in lieu of meeting initial program standards was generally supported by all of the commenters. One commenter said that it favored the proposed rule since the rule would place operators on Indian lands on the same footing as operators on non-Indian lands. However, some commenters suggested that the final rule be modified to reflect specific concerns. Responses to comments on specific issues follow.

#### **A. COMBINING INITIAL AND PERMANENT PROGRAM PERFORMANCE STANDARDS**

As provided in 30 CFR 710.11(e), for surface coal mining and reclamation operations on Indian lands initial program sites this rule allows operators to meet either the initial or the counterpart permanent program performance standards. One commenter asked whether an operator on Indian lands initial program sites could, for a performance standard applicable to a specific activity, meet part of the initial program performance standard and, for the remainder of that standard, meet the permanent program performance standard.

For example, under this rule, Indian lands initial program operations would be subject to the initial program performance standard at 30 CFR 715.19 governing the use of explosives. The counterpart permanent program performance standard is found at 30 CFR 816.61 through 816.68. The requirements of that portion of the initial program standard at 30 CFR 715.19(c) (1) and (2) are different than the counterpart requirements at 30 CFR 816.64(c) (2) and (3) about what an operator must identify in a blasting schedule. The commenter asked whether an operator could meet the permanent program requirements for those two subsections but meet the initial program requirements for the remainder of the performance standard.

The answer is no. While 30 CFR 710.11(e) allows an operator to meet either the initial or the counterpart permanent program performance standard, the operator may not pick and choose selective portions of a comprehensive standard applicable to a particular activity. In the commenter's example, 30 CFR 715.19 contains a comprehensive performance standard governing the use of explosives. Consequently, under 30 CFR 710.11(e), an operator could choose to meet all of the initial program performance standard at section 715.19 or, in the alternative, all of the permanent program performance standard governing the use of explosives at 30 CFR 816.61 through 816.68.

The approach suggested by the commenter would be impracticable to administer and could result in incomplete compliance with the minimum requirements of both the initial and permanent program performance standards. Each operator who elects to meet a permanent program performance standard in lieu of an initial program standard, is responsible for initially determining the extent of the counterpart initial and permanent program standards. OSM will in all cases have the final say regarding the validity of that determination.

#### **B. EFFECT OF RULE ON PREVIOUSLY APPROVED ACTIVITIES**

One commenter was concerned that this rule would necessitate additional review and approval of activities that previously were approved under 25 CFR Part 216, Subpart B. The commenter's concern is unfounded. This rule does not negate any previous approvals given by OSM under the initial program.

One commenter suggested that this rulemaking will lower standards on initial program sites, since some of the permanent program performance standards are less stringent than the initial program performance standards. The commenter stated that the rule change appears to be only for the convenience of the operators and that alone is not a sufficient reason to lower the standards. Recognizing that both programs meet the requirements of the Act, the commenter was also concerned that the rulemaking may result in a cumulative negative effect on tribal lands. The commenter requested that the rule be modified to require OSM to make a finding that compliance with the permanent program performance standards, as opposed to the initial program performance standards, will have no negative effect and/or will not negatively impact the overall environment.

OSM disagrees. This rulemaking is expected to have no cumulative negative effect on tribal lands, for several reasons. Allowing operators to choose compliance with the permanent program performance standards will not be a problem

because such compliance would constitute full compliance with the Act. The permanent program performance standards represent the latest technical and environmental standards for interpretation of the Act, and are the result of more than fifteen years of experience in implementing the Act. The permanent program performance standards also include revisions mandated by courts. Operators opting to meet the permanent program standards would be meeting requirements that satisfy the Act. OSM's approval would be required if on an initial program site an operator wished to initiate under permanent program standards an activity that under the initial program requires regulatory authority approval, or if the operator wishes to apply permanent program standards to an activity approved under the initial program; and OSM would be required to ensure compliance with the Act and the National Environmental Policy Act of 1969 (NEPA). Hence, the Act will be complied with and environmental impacts will be fully analyzed and considered before a final decision is reached.

### **C. OSM COORDINATION WITH OTHER AGENCIES**

One commenter opposed allowing operators the right to choose permanent program performance standards over initial program performance standards without a tribe being given the opportunity to comment on and/or oppose such action. The commenter stated that the government must support the Federal policy of self-determination for tribes. Therefore, a tribe should be consulted and informed of any and all consequences of operators choosing initial program performance standards over permanent program performance standards. The commenter also stated that the tribes were not being treated as an equal to the States. A State, as the regulatory authority under the Act, can choose not to adopt this rule change in its program but a tribe, since OSM is the regulatory authority under the Act, does not have this same option. In addition, a State could adopt a more restrictive rule that would require operators to follow notice and consultation procedures before using a permanent program performance standards on an initial program site. Hence, the commenter requested that the rule provide notice and consultation with tribes and that the operator on Indian lands initial program sites obtain prior approval from the tribes before using a permanent program performance standard in lieu of an initial program performance standard.

OSM agrees that the tribes will not be able to act as State regulatory authorities may. This is consistent with SMCRA section 710, under which OSM is the regulatory authority for Indian lands. Under section 710, tribes are not authorized to act as the regulatory authority on Indian lands, so tribes may not take the same actions as may be taken by State regulatory authorities under State primacy.

However, OSM disagrees with the commenter's concerns about consultation with tribes. As noted above, if an operator on an Indian lands initial program site chooses to utilize a permanent program performance standard in lieu of an initial program performance standard, and prior approval is required under the initial program for the activity or the operator is proposing modification of a previously approved activity, then the operator must obtain prior approval from OSM prior to conducting such activity. Prior to OSM taking action, tribes as well as other agencies will be consulted with as provided for under this final rule at 30 CFR 715.11(d)(2). Thus, the final rule requires appropriate consultation with tribes.

One commenter suggested that 30 CFR 750.6(a)(3) be amended to give tribal authorities the option of participating in inspections conducted by OSM in order to assist the tribes in their development of regulatory expertise and to prepare the tribes to assume enforcement authority once appropriate legislation is enacted.

In response to this comment, OSM states that the development of tribal regulatory expertise is beyond the scope of this rulemaking. However, it should be noted that as a routine practice OSM invites tribal and other agency officials to accompany inspectors during all Indian mine inspections.

One commenter requested that OSM consult directly with the tribal governments instead of going through the BIA. The commenter suggested that 30 CFR 750.6(d) be modified to reflect this request. The same commenter stated that tribal governments should be consulted in the same manner as State regulatory agencies, whether or not the tribes have their own regulatory programs under SMCRA.

In response to this comment, OSM states that modifying coordination procedures for the permanent program is beyond the scope of this rulemaking. However, it should be recognized that OSM consults directly with tribal governments concerning permanent program matters as required at 30 CFR 750.6(a)(4). In order to ensure that tribal concerns are fully addressed OSM consults with tribal governments on all permitting actions.

## **D. TRIBAL AND STATE LAWS**

One commenter stated that tribes may undertake their own regulatory program, independent of SMCRA. The same commenter proposed that 30 CFR 715.11(a) be amended to require compliance with tribal laws and regulations for coal mining operations on Indian lands and that the provisions of 30 CFR Part 715 that refer to State and local agencies be amended to include tribal agencies. The commenter further requested that the rules reflect that if there is a conflict between State or local laws and tribal laws, with regard to surface coal mining and reclamation operations on Indian lands, that tribal law should control.

In response to this comment, OSM notes that this rulemaking neither addresses the laws and regulatory programs that tribal governments have enacted, or may enact, nor the conflicts which may exist between tribal laws and State and local laws over the regulation of surface coal mining operations on Indian lands and would not affect the applicability of such tribal laws and regulations. Hence, the concerns raised by the commenter are beyond the scope of this rulemaking. The Tribes have raised this issue in the case of *Hopi Indian Tribe v. Secretary of the Interior*, supra, and it may be addressed in that proceeding.

## **IV. PROCEDURAL MATTERS**

### **Federal Paperwork Reduction Act**

This rule does not contain collections of information which require approval by the Office of Management and Budget under *44 U.S.C. 3501* et seq.

### **Executive Order 12866, Regulatory Planning and Review**

This rule was not subject to Office of Management and Budget Review under Executive Order 12866.

### **Regulatory Flexibility Act**

The U.S. Department of the Interior (DOI) certifies that this document would not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act, *5 U.S.C. 601* et seq. This determination is based on the fact the rule would permit an operator to comply with either initial program rules or permanent program rules. All seven existing mines on Indian lands in the states of Arizona, New Mexico, and Montana would be affected.

### **Executive Order 12778, Civil Justice Reform**

This rule has been reviewed under the applicable standards of Section 2(b)(2) of Executive Order 12778, Civil Justice Reform (*56 FR 55195*). In general, the requirements of Section 2(b)(2) of Executive Order 12778 are covered by the preamble discussion of this rule. Additional remarks follow concerning individual elements of the Executive Order:

#### **A. What is the preemptive effect, if any, to be given to the regulation?**

The rule will have no preemptive effect, since it merely substitutes one set of Federal standards for another set, and no State performance standards or other requirements apply.

#### **B. What is the effect on existing Federal law or regulation, if any, including all provisions repealed or modified?**

This rule modifies the implementation of SMCRA as described herein, and is not intended to modify the implementation of any other Federal statute. The preceding discussion of this rule specifies the Federal regulatory provisions that are affected by this rule.

#### **C. Does the rule provide a clear and certain legal standard for affected conduct rather than a general standard, while promoting simplification and burden reduction?**

The standards established by this rule are as clear and certain as practicable, given the complexity of the topics covered and the mandates of SMCRA. As noted above, the rule will simplify the regulatory process by establishing one set of initial program regulatory provisions for all surface coal mining operations. The rule would also allow surface coal mining operations to choose to comply with permanent program standards which are in some cases less stringent than initial program standards, where OSM has determined that less stringent permanent program standards fully ensure compliance with SMCRA.

D. What is the retroactive effective, if any, to be given to the regulation?

This rule is not intended to have retroactive effect.

E. Are administrative proceedings required before parties may file suit in court? Which proceedings apply? Is the exhaustion of administrative remedies required?

No administrative proceedings are required before parties may file suit in court challenging the provisions of this rule under section 526(a) of SMCRA, *30 U.S.C. 1276(a)*.

Prior to any judicial challenge to the application of the rule, however, administrative procedures must be exhausted. Applicable administrative procedures may be found at 43 CFR Part 4.

F. Does the rule define key terms, either explicitly or by reference to other regulations or statutes that explicitly define those items?

Terms which are important to the understanding of this rule are set forth in 30 CFR 700.5, 701.5 and 750.5.

G. Does the rule address other important issues affecting clarity and general draftsmanship of regulations set forth by the Attorney General, with the concurrence of the Director of the Office of Management and Budget, that are determined to be in accordance with the purposes of the Executive Order?

The Attorney General and the Director of the Office of Management and Budget have not issued any guidance on this requirement.

#### National Environmental Policy Act

OSM has prepared a final environmental assessment (EA), and has made a finding that the proposed rule would not significantly affect the quality of the human environment under section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), *42 U.S.C. 4332(2)(C)*. A finding of no significant impact (FONSI) has been approved in accordance with OSM procedures under NEPA. The EA is on file in the OSM Administrative Record at the address specified previously (see ADDRESSES).

#### Authors

The principal authors of this proposed rule are Billie E. Clark, Federal and Indian Permitting Branch, Office of Surface Mining Reclamation and Enforcement, Denver, Colorado, and John S. Retrum, Office of the Field Solicitor, U.S. Department of the Interior, Denver, Colorado. Telephone: 303-844-2829 and 303-231-5350, respectively.

#### LIST OF SUBJECTS

##### 25 CFR Part 200

Environmental protection, Indian lands, Mineral resources, Mines.

##### 25 CFR Part 216

Environmental protection, Indian lands, Mineral resources, Mines.

##### 30 CFR Part 710

Law enforcement, Public health, Reporting and recordkeeping requirements, Safety, Surface mining, Underground mining.

##### 30 CFR Part 715

Environmental protection, Reporting and recordkeeping requirements, Surface mining, Underground mining.

##### 30 CFR Part 716

Special performance standards, Steep-slope mining, Mountaintop removal, Bituminous coal mines, Prime farmlands.

30 CFR Part 717

Environmental protection, Reporting and recordkeeping requirements, Underground mining.

30 CFR Part 750

Indian lands, Intergovernmental relations, Reporting and recordkeeping requirements, Surface mining, Underground mining.

Dated: July 18, 1994.

Bob Armstrong, Assistant Secretary, Land and Minerals Management.

August 5, 1994.

Ada E. Deer, Assistant Secretary, Indian Affairs.

Accordingly, 25 CFR parts 200 and 216 and 30 CFR parts 710, 715, 716, 717, and 750 are amended as set forth below:

**25 CFR CHAPTER I**

**PART 200 - TERMS AND CONDITIONS: COAL LEASES**

1. The authority citation for Part 200 continues to read as follows:

Authority: Pub. L. 95-87 (*30 U.S.C. 1201 et seq.*), as amended.

2. Section 200.12 is added to read as follows:

**SECTION 200.12 -- CONTRACT TERM INCORPORATION.**

The requirements of 30 CFR Part 750 shall be incorporated in all existing and new contracts entered into for coal mining on Indian lands.

**PART 216 - SURFACE EXPLORATION, MINING, AND RECLAMATION OF LANDS**

3. The authority citation for Part 216 continues to read as follows:

Authority: 34 Stat. 539, 35 Stat. 312; *25 U.S.C. 355 NT*; 35 Stat. 781; *25 U.S.C. 396*; Section 1, 49 Stat. 1250; *25 U.S.C. 473a*; 49 Stat. 1967, *25 U.S.C. 501, 502*; 52 Stat. 347, *25 U.S.C. 396 a-f*; *5 U.S.C. 301*.

**Subpart B-[Removed]**

4. Subpart B-Coal Operations, consisting of Sections 216.100-216.111, is removed in its entirety.

**30 CFR CHAPTER VII**

**PART 710-INITIAL REGULATORY PROGRAM**

5. The authority citation for Part 710 continues to read as follows:

Authority: *30 U.S.C. 1201 et seq.*, as amended, and Pub. L. 100-34.

6. In Section 710.11, paragraph (b) is revised to read as follows:

**SECTION 710.11 -- APPLICABILITY.**

\* \* \* \* \*

(b) Operations on Indian lands. Any person who conducts surface coal mining and reclamation operations on Indian lands on or after December 16, 1977, in accordance with section 750.11(c) of this chapter, or who was otherwise subject to 25 CFR Part 216, Subpart B prior to September 22, 1994; shall comply with the performance standards of this subchapter.

\* \* \* \* \*

**PART 715 - GENERAL PERFORMANCE STANDARDS**

7. The authority citation for Part 715 continues to read as follows:

Authority: Pub. L. 95-87 (*30 U.S.C. 1201 et seq.*).

8. In Section 715.11, paragraph (d) is added to read as follows:

**SECTION 715.11 -- GENERAL OBLIGATIONS.**

\* \* \* \* \*

(d) Indian lands.

(1) Mine maps. Any person conducting surface coal mining and reclamation operations on Indian lands under this part shall submit no fewer than 7 copies of an accurate map of the mine and authorized mining areas at a scale of 1:6000 or larger. The map shall show, as of December 16, 1977, the lands where coal has not yet been removed and the lands and structures that have been used or disturbed to facilitate surface coal mining operations.

(2) Consultation with tribal governments. Any requirement in this part for consultation with or notification to State and local governments shall be interpreted as requiring, in like manner, consultation with or notification to tribal governments. OSM shall consult with the Bureau of Indian Affairs with respect to special requirements relating to the protection of noncoal resources and with the Bureau of Land Management with respect to the requirements relating to the development, production, and recovery of mineral resources on Indian lands.

**PART 716 - SPECIAL PERFORMANCE STANDARDS**

9. The authority citation for Part 716 continues to read as follows:

Authority: Sections 201, 501, 527 and 529, Pub. L. 95-87, 91 Stat. 445 (*30 U.S.C. 1201*).

10. Section 716.10 is revised to read as follows:

**SECTION 716.10 -- INFORMATION COLLECTION.**

The Office of Management and Budget has determined that the information collection requirements contained in 30 CFR part 716 do not require approval under the Paperwork Reduction Act.

**PART 717 - UNDERGROUND MINING GENERAL PERFORMANCE STANDARDS**

11. The authority citation for Part 717 continues to read as follows:

Authority: Sections 201 and 501, Pub. L. 95-87, 91 Stat. 445 (*30 U.S.C. 1201*).

12. Section 717.10 is revised to read as follows:

**SECTION 717.10 -- INFORMATION COLLECTION.**

The Office of Management and Budget has determined that the information collection requirements contained in 30 CFR part 717 do not require approval under the Paperwork Reduction Act.

**PART 750 - REQUIREMENTS FOR SURFACE COAL MINING AND RECLAMATION OPERATIONS ON INDIAN LANDS**

13. The authority citation for Part 750 continues to read as follows:

Authority: Pub. L. 95-87 (*30 U.S.C. 1201 et seq.*, as amended); and Pub. L. 100-34.

14. Section 750.10 is revised to read as follows:

**SECTION 750.10 -- INFORMATION COLLECTION.**

The Office of Management and Budget has determined that the information collection requirements contained in 30 CFR part 750 do not require approval under the Paperwork Reduction Act.

15. In Section 750.16, the second sentence is revised to read as follows:

**SECTION 750.16 -- PERFORMANCE STANDARDS.**

\* \* \* Prior to that time, the person conducting surface coal mining and reclamation operations shall adhere to the performance standards of 30 CFR Chapter VII, Subchapter B.