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RECLAMATION AND ENFORCEMENT
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Subject:

Protecting Historic Properties

Approval:

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Title:

Director

1. Purpose.

This directive sets forth policy and procedures for the Office of Surface Mining Reclamation and Enforcement's (OSMRE) conduct of regulatory activities which may affect historic properties.

2. Definitions.

a. Historic properties or historic resources means any prehistoric or historic district, site, building, structure, or object significant in American history, architecture, archeology, engineering, and culture meeting the criteria found in 36 CFR Part 60, "National Register of Historic Places." Included are properties that have gone through a formal designation process resulting in "listing on" the National Register, as well as properties known to be eligible and those not yet identified and evaluated, but which would be found eligible if evaluated. Properties that meet the criteria are termed "historic properties."

b. State Historic Preservation Officer (SHPO) is the official in each State, Territory, and the District of Columbia designated under the National Historic Preservation Act (16 U.S.C. 470 et seq.) to administer the State historic preservation program. Among other responsibilities, this official maintains comprehensive survey and inventory information on historic properties within his/her jurisdiction.

c. Federal permitting entity is the OSMRE organizational unit with responsibility for receiving and processing applications for renewals and revisions, i.e., the appropriate Eastern or Western Field Operations office.

3. Policy/Procedures.

a. Background. Two major statutes provide for the consideration of historic properties affected by surface coal mining operations. In addition to the specific requirements for the protection of historic properties in the Surface Mining Control and Reclamation Act (SMCRA), Section 106 of the National Historic Preservation Act (NHPA) requires Federal agencies to take into account the effects of their undertakings on historic properties.

While the requirements in Section 106 of NHPA and implementing regulations (36 CFR 800) apply only to Federal or federally assisted undertakings, the requirements in SMCRA apply to all activities authorized by SMCRA. In addition, a State agrees to assist the Secretary of the Interior in fulfilling his Section 106 responsibilities upon accepting a grant to cover a portion of the cost of its regulatory program. In order to ensure that the requirements in SMCRA are implemented at all levels, including where the State has a responsibility for meeting Federal program requirements, OSMRE developed regulations providing specific mechanisms for the consideration of historic properties in the context of SMCRA.

On February 10, 1987 (52 FR 4244), OSMRE promulgated final regulations entitled "Protecting Historic Properties From Surface Coal Mining Operations." These regulations, codified in 30 CFR Parts 731, 732, 761, 772, 773, 779, 780, 783, and 784, require consideration of the effects of permitting actions on historic properties and consultation with appropriate State, Federal and local agencies having responsibility for historic properties.

b. Responsibilities.

(1) The Deputy Director, Operations and Technical Services, has overall responsibility for the policy, procedures and activities associated with the protection of historic properties.

(2) The Assistant Director, Program Policy, is responsible for developing policy and guidance relative to the protection of historic properties. This includes developing standards for the conduct of oversight reviews and evaluations of State programs and developing standardized reporting methods and data collection procedures.

(3) The Assistant Directors, Field Operations are responsible for ensuring that the policies and procedures for the protection of historic properties are applied consistently by Federal permitting entities and for the consistent evaluation of State regulatory authorities (SRAs) in the implementation of their approved programs concerning the protection of historic properties. This includes ensuring that annual evaluations are conducted in a manner that is consistent with national OSMRE policies.

(4) The Federal permitting entities are responsible for compliance with this Directive in all permitting actions.

(5) The Field Office Directors (FODs) are responsible for evaluating States' consideration of historic properties in States with approved programs. FODs should also

encourage States with approved programs to consider the guidance contained in the "Technical Considerations for the Implementation of Historic Property Regulations" cited in this Directive as an effective means of taking into account historic properties in carrying out their programs. FODs must, however, be aware that States cannot be bound by OSMRE to follow such guidance.

(6) The Federal Preservation Officer is responsible for monitoring the implementation of regulatory requirements, including coordinating compliance with the regulations at all levels within OSMRE, evaluating SRA activities, and providing guidance and expertise in historic preservation matters.

c. Procedures. In addition to complying with the requirements in 36 CFR 800 in cases of Federal or federally assisted undertakings, Federal permitting entities shall follow the guidance found in "Technical Considerations for the Implementation of Historic Property Regulations" in carrying out their responsibilities to protect historic properties.

4. Reporting Requirements.

No new reporting requirements are established by this directive.

5. References.

a. "Technical Considerations for the Implementation of Historic Property Regulations."

b. "Oversight of State Programs - Annual Evaluations," Directive REG-8 issued October 9, 1987.

6. Effect on Other Documents.

None.

7. Effective Date.

Upon issuance.

8. Contact.

For additional information, contact Branch of Research and Technical Standards, Division of Technical Services, Office of Surface Mining Reclamation and Enforcement, Department of the Interior, Washington, D.C. 20240; (202) 343-1514.

**Office of Surface Mining Reclamation and Enforcement
Technical Considerations for the Implementation of
Historic Property Regulations**

This document explains the policy and procedures to be followed by OSMRE when acting as the regulatory authority as set forth in regulations protecting historic properties from surface coal mining operations found in 30 CFR Part 731, 732, 761, 772, 773, 779, 780, 783, and 784. Final regulations concerning historic properties were published by the Office of Surface Mining Reclamation and Enforcement (OSMRE) in the Federal Register on February 10, 1987 (52 FR 4244-4263).

A. Identifying and describing historic and archeological resources.

Under 30 CFR 779.12(b)(1) and 783.12(b)(1), each permit application shall describe and identify the "nature of cultural, historic and archeological resources listed or eligible for listing on the National Register of Historic Places and known archeological sites within the proposed permit and adjacent areas. The description shall be based on all available information, including, but not limited to, information from the State Historic Preservation Officer and from local archeological, historical, and cultural preservation agencies."

- (1) Sources of information on National Register eligible properties. Properties must meet the National Register criteria in 36 CFR 60, "National Register of Historic Places" in order to be historic. In order to fulfill the requirement to identify all properties "listed or eligible for listing" in the affected area (see definition of affected area in 30 CFR 701.5), the application must show that credible sources of such information have been contacted and given a reasonable opportunity to provide the information. These sources include the State Historic Preservation Officer and any other officially designated State repository of prehistoric and historic resource information. If these sources do not provide the necessary information within 30 days of an applicant's request, the applicant should document the request and proceed with the application. Additional sources which can be consulted include the following:

- (a) State historical society;
- (b) State archeological survey;
- (c) local and regional museums;
- (d) State archeological society;

- (e) State archeologist;
- (f) university departments of anthropology;
- (g) other State and local archeological and historical groups and individuals; and
- (h) Federal agencies with prehistoric and historic resource information.

(2) Sources of information on "known archeological sites."

Known archeological sites may include both National Register eligible and non-eligible properties. Sources of this information include the State Historic Preservation Officer (SHPO) and any other officially designated State repository of archeological resource information. Other sources which can be consulted are listed above at A(1).

(3) Describing properties. In addition to identifying known National Register eligible properties and known archeological sites, the applicant is required to describe those properties in the application. This requirement can be satisfied by including in the application a copy of any cultural resource report identifying and describing the properties, as long as such report includes the information listed in (3)(a) through (d) of this guidance. If no such report is available, the application should include, at a minimum, the following information on each property:

- (a) name of each property (both common and historic names should be included);
- (b) location of each property (note 30 CFR 769.16(b)(2) regarding confidentiality). An address is generally sufficient. However, in many cases, particularly for archeological properties, locations should be described by Universal Transverse Mercator (UTM) and/or Township/Range/Section references. See 30 CFR 779.24(i) for map requirements;
- (c) brief statement discussing why each historic property is considered eligible for the National Register. For example, an archeological site may be significant "for the information it can produce about the development of prehistoric agriculture in the Lower Mississippi River Basin;" a historic house may be significant "because it was the home of the first governor of the State;" and

- (d) projected impact of the proposed operation on each property.

B. Identification and evaluation of potentially eligible resources.

Under 30 CFR 779.12(b)(2) and 783.12(b)(2), the regulatory authority "may require the applicant to identify and evaluate important historic and archeological resources that may be eligible for listing on the National Register of Historic Places through (i) collection of additional information, (ii) conduct of field investigations, or (iii) other appropriate analyses."

- (1) Information to consider. In determining whether to require the applicant to identify and evaluate resources that may be eligible for the National Register, as authorized in 30 CFR 779.12(b)(2), the permitting entity should consider the following information:
 - (a) information in the application;
 - (b) comments from the SHPO;
 - (c) information based on a review of other permits or applications pertaining to the general area; and
 - (d) any other comments received by the permitting entity.
- (2) Rejection of the SHPO's recommendation. Any decision to reject a recommendation of a SHPO should be clearly documented and justified in the record. A permitting entity's consistent rejection of SHPO recommendations without clear and convincing justification would be inconsistent with Federal program requirements.
- (3) When to require identification. The permitting entity shall require identification and/or evaluation when he or she determines, based on the information in B(1) above, that there is a "substantial likelihood" of the presence of unevaluated properties that may be eligible for the National Register. A determination of "substantial likelihood" may be based on information about resources within the area. Such a determination may also be based on reasoned analyses of the resources in areas similar to the permit area in question. Examples of information that may lead to a "substantial likelihood" determination are:
 - (a) "There are known archeological sites in the area that have not yet been evaluated for National Register eligibility;"

- (b) "Although no survey to locate archeological sites has been conducted in the proposed affected area, several surveys in surrounding counties have shown that type A sites, which are eligible for the National Register, are commonly found on soil type X on ridge tops above the confluence of first and second order streams. Several locations within the proposed affected area contain soil type X and ridge tops overlooking stream confluences, and it is likely that sites eligible for the National Register will be found there;" and
- (c) "Alluvial valley floors served by first order perennial streams are frequently the location of late prehistoric village sites. These sites almost always contain human remains within a burial area, typically in the central plaza of the village. The proposed affected area contains two areas fitting this description; there is a significant likelihood that prehistoric villages containing burials occur there."
- (4) The kind of identification effort necessary. In cases where there is a "substantial likelihood" that unrecorded, potentially eligible properties exist, the permitting entity shall require the applicant to conduct or have conducted appropriate analyses to identify and evaluate such properties. An attachment to these Technical Considerations, The Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation (48 FR 44716; September 29, 1983), provides considerable guidance in conducting studies to identify and evaluate historic properties.
- (5) Determining eligibility for the National Register.
- (a) When determinations of eligibility are necessary. The process of determining properties eligible for the National Register is detailed in 36 CFR 60 (formerly 63), "National Register of Historic Places." In brief, these rules require a Federal agency which is affecting a potentially eligible property to make such determinations, in consultation with the SHPO, in order to consider the effects of the agency's action on eligible properties. In the case of OSMRE, the issuance of a permit to conduct mining operations may adversely affect historic properties either listed on or eligible for the National Register.
- (b) Making determinations. Decisions about the eligibility of properties are made by the permitting

entity in consultation with the SHPO. If he/she is unable to come to an agreement with the SHPO, the property shall be referred by him/her to the Keeper of the National Register, National Park Service, for a final determination.

- (c) National Register criteria and State plan. Permitting entities shall be guided in their consideration of whether specific properties are eligible for the National Register by the criteria found in 36 CFR 60 in conjunction with the Comprehensive Statewide Historic Preservation Plan, available from the SHPO. This plan explains what types of properties are considered important by the State.

C. Taking into account historic properties.

30 CFR 773.15(c)(11) requires, prior to the approval of a permit application or application for significant revision of a permit, a written finding by the regulatory authority that it has "taken into account the effect of the proposed permitting action on properties listed on and eligible for listing on the National Register of Historic Places."

- (1) Supporting a finding. To support such a finding, the permitting entity must be able to demonstrate that:
- (a) the effect of the proposed surface mining operations on properties listed on and eligible for listing on the National Register has been considered;
 - (b) all comments concerning the properties, particularly those from the SHPO, have been considered; and
 - (c) any appropriate conditions in the permit designed to protect historic resources have been made.
- (2) Appropriate permit conditions. 30 CFR 773.15(c)(11) provides that the "finding may be supported in part by inclusion of appropriate permit conditions or changes in the operation plan protecting historic resources,..." Permit conditions or changes in the operation plan to protect historic properties may include preservation treatments or mitigation measures such as:
- (a) reuse of historic properties to meet both the preservation goal and the needs of the applicant;
 - (b) physical stabilization of properties;

- (c) conducting historic, architectural, or engineering documentation in accordance with accepted documentation standards (such as those in the Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation);
 - (d) archeological research to recover and analyze significant data and materials from threatened archeological sites;
 - (e) relocation of structures or objects, when preservation in place is not feasible, to a setting similar to that of the original location;
 - (f) salvage of architectural elements for exhibition or reuse;
 - (g) provision for publication of significant information on archeological sites;
 - (h) recordation and deposition of documentation in an appropriate repository; and
 - (i) curation of artifacts, records, and remains;
- (3) Decision that no additional protection measures are necessary. In addition to the provision for supporting a finding by including appropriate permit conditions or changes in the operation plan protecting historic resources, 30 CFR 773.15(c)(11) provides for a "documented decision that the regulatory authority has determined that no additional protection measures are necessary." Documentation supporting a determination that no additional protection measures are necessary should demonstrate that:
- (a) there is no convincing evidence that currently unknown properties eligible for the National Register exist in the proposed affected area; or,
 - (b) known properties are not eligible for the National Register; or,
 - (c) the proposed mining operations will not have an adverse effect on properties known to be eligible for the National Register; or
 - (d) mitigation of the effects has been satisfactorily completed; or
 - (e) there is no feasible mitigation of effects for known eligible properties.

- (4) Decision that no further identification efforts are necessary. If survey reports, inventories, and other information maintained by the SHPO indicate that the affected area has been adequately surveyed to identify historic properties, and that it can be reliably assumed that no historic properties exist in the area, no further work should be necessary. If available information does not provide convincing evidence that currently unknown properties that may be eligible for the National Register are present in the proposed affected area, no further work should be necessary. Results of any additional information collection, analyses, or other studies that the permitting entity requires the applicant to conduct should be provided to the SHPO for incorporation into State records.

D. Protection of public parks and historic places.

30 CFR 780.31 requires that mining and reclamation plans describe measures to be used to prevent adverse impacts to publicly owned parks and all properties listed on the National Register of Historic Places, or to minimize such impacts if valid existing rights exist or if joint agency authorization is to be obtained.

- (1) Preventing adverse impacts. Generally, any impacts to properties should be considered adverse, unless the SHPO and the permitting entity jointly determine otherwise. It may often be possible to determine that archeological sites will not be adversely impacted, even though they are destroyed by mining operations, through development and implementation of a data recovery plan.
- (2) Minimizing adverse impacts. Where an operator is found to have valid existing rights to conduct mining operations which will result in an adverse impact to a property listed on the National Register of Historic Places, or when the permitting entity and the agency with jurisdiction have agreed that mining can occur, the plan should discuss measures to minimize such impacts. A variety of techniques are available to achieve this purpose. The permitting entity can find more detailed information on such techniques, as well as references to additional sources, in The Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation. The SHPO should also be consulted for advice on appropriate techniques.

E. Prohibitions against mining.

- (1) National Register listed properties. Under 30 CFR 761.11(c), mining is prohibited, except where there are valid existing rights, where it would adversely affect any place included on the National Register of Historic Places, unless jointly approved by the regulatory authority and the Federal, State, or local agency with jurisdiction over the property. 30 CFR 761.12(f)(1) specifies the consultation procedures to be followed when the regulatory authority determines that the proposed surface coal mining operation will adversely affect such listed properties. Permit applications should not be approved if information submitted by the applicant or any other party demonstrates the presence of a National Register listed property, regardless of ownership, unless:
- (a) There is a determination of valid existing rights; or
 - (b) The record demonstrates that the permitting entity and the SHPO agree that the property will not be adversely affected by mining; or
 - (c) The property will be adversely affected by mining and the record demonstrates that the permitting entity and the agency with jurisdiction over the property agree that mining can occur. Agencies with jurisdiction include:
 - (i) for publicly owned properties, the land managing agency, including but not limited to the Bureau of Land Management, U.S. Forest Service, and Bureau of Indian Affairs;
 - (ii) for Indian lands, the tribal government;
 - (iii) for privately owned properties, the agency making the initial determination that the property was historic, such as the SHPO, and any other agency with jurisdiction, such as a local zoning board, County Commission, etc.
- (2) Cemeteries. 30 CFR 761.11(g) prohibits mining within 100 feet, measured horizontally, of any cemetery; cemeteries may be relocated if authorized by applicable State law or regulations. Historic and prehistoric Indian burial areas, such as burial mounds, other mortuary structures, and concentrations of burials in specific locations at or near archeological sites, are considered cemeteries. The permitting entity shall not issue any permits for mining within 100 feet, measured horizontally, of such areas, unless the cemetery has been relocated as provided in

applicable State law or regulations. Information from the SHPO or other commenters that currently unknown cemeteries are likely to be present in the affected area should prompt investigation of the area through appropriate information collection or analyses prior to permit issuance.

F. Professional Qualifications.

Although OSMRE's regulations do not specify the minimum qualifications necessary to carry out the identification, evaluation, and protection responsibilities prescribed in the regulations, the permitting entity should ensure that identification and evaluation efforts are carried out by qualified professionals. The Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation provide specific minimum qualification standards for historians, architectural historians, and archeologists carrying out the activities described in the Standards. Permitting entities should ensure that those ultimately responsible for identifying, evaluating, and protecting properties meet these minimum standards or a reasonable equivalent of academic training and/or experience.



Director, Office of Surface Mining
Reclamation and Enforcement

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