

**FEDERAL REGISTER: 48 FR 41387 (September 15, 1983)**

DEPARTMENT OF THE INTERIOR

AGENCY: Office of Surface Mining Reclamation and Enforcement, Interior.

30 CFR Part 934

Surface Coal Mining and Reclamation Operations on Federal Lands Under the Permanent Program; State-Federal Cooperative Agreements; North Dakota

ACTION: Final rule.

**SUMMARY:** This final rule completes the administrative process for the adoption of a cooperative agreement between the Department of the Interior and the State of North Dakota for the regulation of surface coal mining and reclamation operations on Federal lands in North Dakota under the permanent regulatory program. Such a cooperative agreement is provided for by section 523(c) of the Surface Mining Control and Reclamation Act of 1977.

EFFECTIVE DATE: September 15, 1983.

ADDRESSES: Copies of the request by the State of North Dakota for the permanent program cooperative agreement, related information required under 30 CFR Part 745, and the complete administrative record of this rulemaking are available for public inspection Monday through Friday, 8:30 a.m. to 5:00 p.m., excluding holidays, at the following address: Administrative Record R&I-07, Office of Surface Mining, Room 5315, 1100 L Street, NW., Washington, D.C. 20005.

FOR FURTHER INFORMATION CONTACT: Len Richeson, Office of Surface Mining, South Interior Building, 1951 Constitution Avenue, NW., Washington, D.C. 20240, Phone (202) 343-5866.

**SUPPLEMENTARY INFORMATION:**

This preamble is divided into five parts in order to assist understanding of the process by which the Secretary decided to enter into a permanent program cooperative agreement with the Governor of the State of North Dakota. The notice is divided as follows:

- I. Background
- II. Director's Findings
- III. Approval of the Cooperative Agreement
- IV. Summary of the Cooperative Agreement and Disposition of Comments
- V. Procedural Matters

**I. BACKGROUND**

*A. The State of North Dakota's Request.* The purpose of this final rulemaking is to adopt a permanent program cooperative agreement between the Department of the Interior and the State of North Dakota which will give North Dakota primacy in the administration of its approved permanent regulatory program on Federal Lands in North Dakota. The State of North Dakota requested the cooperative agreement on November 14, 1980. Section 523(c) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act), 30 U.S.C. 1201 *et seq.*, allows for the State and the Secretary to enter into a permanent program cooperative agreement if the State has, as North Dakota does, an approved State Program for the regulation of surface coal mining and reclamation operations on non-Federal and non-Indian lands. *See* 30 CFR 934.10.

Permanent program cooperative agreements are authorized by the first sentence of section 523(c) which provides that "[a]ny State *with an approved State program* may elect to enter into a cooperative agreement with the Secretary to provide for State regulation of surface coal mining and reclamation operations on Federal lands within the State, provided the Secretary determines in writing that such State has the necessary personnel and funding to fully implement such a cooperative agreement in accordance with the provisions of this Act." 30 U.S.C. 1273(c) (emphasis added). The procedures for States to elect to enter into permanent program cooperative agreements are found in 30 CFR 745.

The Secretary's regulations at 30 CFR 745.11(b)(1) through (3) require that certain information be submitted with a request for a permanent program cooperative agreement, if the information has not previously been submitted in the State Program. The State of North Dakota submitted a proposed permanent program cooperative agreement and the supporting information required by 30 CFR 745.11(b) on November 14, 1980. Most of the information relating to the budget, staffing, organization and duties of the State regulatory authority, the North Dakota Public Service Commission (Commission), was described as appearing in volume 1 of North Dakota's Proposed Permanent Coal Program Text. *See* 30 CFR 745.11(b)(1). In addition, a written certification from the chief legal officer of the Commission concluded that no State statutory, regulatory or other legal constraint exists which would limit the capability of the Commission to fully comply with section 523(c) of the Act, as implemented by 30 CFR Part 745. *See* 30 CFR 745.11(b)(3).

*B. Federal Rulemaking.* On June 21, 1982, the Office of Surface Mining (OSM) published a notice of proposed rulemaking and public hearing (47 FR 26769) on the proposed cooperative agreement. A public hearing was held on August 10, 1982, in Bismarck, North Dakota. Final revisions of the text based on comments received at the public hearing and on written comments received during the public comment period are discussed in Part IV, Summary of the Cooperative Agreement and Disposition of Comments.

## **II. DIRECTOR'S FINDINGS**

Under 30 CFR 745.11(f), the Director, OSM, must make the following three findings before recommending to the Secretary that the Department of the Interior enter into a cooperative agreement with a State.

Finding No. 1: The Director finds that the State of North Dakota has an approved State Program which was conditionally approved by the Assistant Secretary on December 9, 1980. It became effective upon publication in the Federal Register on December 15, 1980, 45 FR 82214.

Finding No. 2: The Director finds that the State regulatory authority has sufficient budget, equipment and personnel to enforce fully the State's statutes and regulations for the regulation of surface coal mining and reclamation operations on Federal lands in North Dakota. The Director makes this finding based on information obtained in the processing of grants to the State of North Dakota.

Finding No. 3: The Director finds that the State of North Dakota has the legal authority to administer the cooperative agreement. This finding is made based on written certification of the chief legal officer of the Commission and conditional approval of the State's permanent regulatory program.

These findings were reported to the Secretary in a decision memorandum dated July 15, 1983, in which the Director, Office of Surface Mining (Director) recommended approval of the cooperative agreement.

## **III. APPROVAL OF THE COOPERATIVE AGREEMENT**

Based upon the conditional approval of the North Dakota State Program, the administrative record of this rulemaking, including written and oral comments and the public hearing, and the findings and recommendations of the Director, the Secretary decided to approve a permanent program cooperative agreement for the State of North Dakota. The cooperative agreement was signed on August 11, 1983, by the Secretary of the Interior and on August 30, 1983, by the Governor of the State of North Dakota and the members of the Commission. By its terms, the agreement becomes effective upon publication as final rulemaking in the Federal Register.

## **IV. SUMMARY OF THE COOPERATIVE AGREEMENT AND DISPOSITION OF COMMENTS**

Each Article of the agreement is summarized below, along with the Department's disposition of any comments received. Unless indicated otherwise, the text is the same as that in the proposed rule except for minor editorial changes.

### ***Article I: Introduction and Purpose***

This Article sets forth the legal authority for the cooperative agreement which is contained in section 523(c) of the Act. The purposes of the cooperative agreement are also listed.

One comment was received concerning the provision in Article I.B. which states that the purpose of the cooperative agreement is to ". . . (3) provide uniform and effective application of the State and Federal Lands Programs on all non-Indian lands in North Dakota." The commenter stated that the provisions of section 523(c) of the Act simply allow a

State having an approved State Program to enter into a cooperative agreement with the Secretary to provide for State regulation of surface coal mining and reclamation operations on Federal lands within the State. The commenter said that section 523(c) does not require a State to implement both the State Program and a Federal Lands Program on State land upon entering into a cooperative agreement, and that such a requirement would be counter-productive to the intent and purpose of section 523(c).

OSM agrees with the comment and has modified the final rule by deleting the phrase "and Federal Lands." The phrase now reads ". . . (3) provide uniform and effective application of the State Program on all non-Indian lands in North Dakota." It should be understood, however, that there are other requirements which apply to Federal lands in addition to the requirements contained in the State Program. These additional requirements, discussed further on, are not eliminated or superseded by application of the State Program to Federal lands.

### ***Article II: Effective Date***

This Article provides that the cooperative agreement is effective following signing by the Secretary, the Governor, and the Commission, and upon publication as a final rule in the Federal Register. It will remain in effect until terminated as provided in Article X.

On the effective date of the cooperative agreement, authority passes to the State, including authority to process permit applications filed prior to the effective date of the cooperative agreement. OSM will continue to assist in the processing of permit applications pending on the effective date of this cooperative agreement in order to assure an orderly transition. The level of assistance necessary will be determined by the State and OSM. Existing Federally issued permits transfer "as is" to being State permits; the State can process revisions as needed to meet State Program requirements.

One commenter requested that the cooperative agreement not be promulgated until after the promulgation of the Federal lands regulations, 30 CFR 740-746, proposed on June 9, 1982 (47 FR 25092). The commenter stated that the provisions in the cooperative agreement are so inextricably related to the language used in the proposed Federal lands regulations that it would be an ineffective use of resources to finalize the cooperative agreement before promulgating the Federal lands regulations.

In response to the commenter, the Federal lands regulations were published in the Federal Register on February 16, 1983 (48 FR 6912) and became effective on March 18, 1983.

### ***Article III: Scope***

Article III provides that, in accordance with the Federal lands program in 30 CFR Part 740, the laws, rules, terms and conditions of North Dakota's State Program are applicable to Federal lands in North Dakota except as otherwise stated in the cooperative agreement, the Act, 30 CFR 745.13, or other applicable laws or regulations. This provision is consistent with the Federal lands program (30 CFR 740.11(a)) in adopting the North Dakota State Program as substantive Federal law enforceable by the State and the United States on Federal lands in North Dakota. This provision would also specifically implement section 523(a) of the Act, which provides that "(w)here Federal lands in a State with an approved State Program are involved, the Federal lands program shall, at a minimum, include the requirements of the approved State program." 30 U.S.C. 1273(a). Excluded from the scope of the Agreement are the authorities and responsibilities reserved for the Secretary pursuant to the Act and 30 CFR 745.13.

Language has been added to Article III which allows the State, when acting as the regulatory authority, to have its appealable decisions and orders reviewed by the State reviewing authority, which is the Commission. Decisions and orders issued by non-secretarial officials of the Department are still appealable to the Department's Office of Hearings and Appeals.

Comments were received on the provision in Article III which states that "(t)his Agreement makes the laws, rules, terms, and conditions of North Dakota's Permanent State Program applicable to Federal lands. . . ." The commenter stated that the cooperative agreement should not be finalized without specifically mentioning that the State Program was conditionally approved and that there are minor deficiencies in the State Program which must be corrected.

OSM has not accepted this comment. OSM believes that the reference in Article III to the conditions of the State Program is sufficient acknowledgement that the approval of the State Program was conditioned upon the State correcting

certain deficiencies in its program which were identified when the program was conditionally approved. *See* 45 FR 82245, December 15, 1980, and 30 CFR 934.11.

The same commenter suggested that Article III should clearly state that the thirteen deficiencies in North Dakota's program shall not apply to the cooperative agreement; rather, the recommended remedies to these deficiencies, as delineated in the conditional approval should apply. In the absence of this clarification, the commenter recommended that the cooperative agreement not be finalized until North Dakota satisfied the conditions.

OSM declines to adopt the comment. Conditional approval of a state program is provided for by 30 CFR 732.13(i). The Secretary may conditionally approve a State Program where the program is found to have minor deficiencies, provided:

- (1) The deficiencies are of such a size and nature so as to render no part of a proposed State Program incomplete;
- (2) The State has initiated and is actively proceeding with steps to correct the deficiencies;
- (3) The State agrees in writing to correct such deficiencies within a time established and stated in the conditional approval; and
- (4) The conditionally approved State Program shall terminate if the deficiencies have not been corrected by the date set forth in the Secretary's decision under paragraph (i)(3) of 30 CFR 732.13.

Prior to conditionally approving the North Dakota State Program, OSM determined that the deficiencies were of such a size and nature as to render no part of the North Dakota Program incomplete and that they would not directly affect environmental performance at coal mines. Further, the State agreed to remedy the deficiencies and is actively doing so. Given the above, and the fact that OSM has retained the right to conduct inspections on Federal lands without prior notice to the State, OSM is confident that there are adequate safeguards and, therefore, that there is no need to modify the State Program as it applies to Federal lands.

#### ***Article IV: Requirements for Cooperative Agreement***

This Article mutually binds the Commission and the Secretary to the provisions of the cooperative agreement and the conditions and requirements contained in Article IV. The responsible agency in the State of North Dakota for purposes of administering this cooperative agreement is the Commission, which has and must continue to have authority under State law to carry out the cooperative agreement.

Article IV also provides that the State may be reimbursed pursuant to section 705(c) of the Act if the cooperative agreement has been implemented and if necessary funds have been appropriated to OSM by Congress. Section 705(c) of the Act provides that a State with a cooperative agreement may receive an increase in its annual grant for the development, administration and enforcement of a State Program on Federal lands by an amount which the Secretary determines is approximately equal to the amount the Federal government would have expended to regulate surface coal mining and reclamation operations on the Federal lands within the State. *See* 30 U.S.C. 1295(c). The reference in section 705(c) to section 523(d) is obviously a typographical error. The correct reference is section 523(c). The regulations implementing section 705(c) appear at 30 CFR 735.16 through 735.26. If adequate funds have not been appropriated, OSM and the Commission will meet to decide on appropriate measures to insure that mining operations are regulated in accordance with the State Program.

The Article also deals with reports and records, personnel, the use of equipment and laboratories and permit application fees.

Paragraph D of Article IV requires the State to make annual reports to OSM with respect to compliance with this agreement. Paragraph D also provides for a general exchange of information developed under the agreement, unless such an exchange is prohibited by Federal law.

Paragraph E of Article IV requires the Commission to maintain the necessary personnel to fully implement this agreement.

Paragraph F of Article IV requires the Commission to ensure itself of access to the necessary equipment, laboratories, and other facilities to perform inspections and other analyses required to carry out the requirements of the agreement.

Paragraph G of Article V provides that the amount of fees charged to permit applicants be determined in accordance with North Dakota's approved State program. These fees and civil penalties collected will be retained by the State and used in accordance with Federal requirements for the disposal of program income received from Federal grant recipients. Federal guidelines for the disposal of program income are found in OMB Circular No. A-102 (Uniform Requirements for Assistance to State and Local Governments), Attachment E (Program Income).

One comment was received concerning the provisions in Article IV.C. pertaining to funding and personnel. The commenter suggested that the cooperative agreement was in violation of section 523(c) of the Act. Section 523(c) provides that the Secretary may approve a cooperative agreement with the State" \* \* \* provided the Secretary determines in writing that such State has the necessary personnel and funding to fully implement such a cooperative agreement \* \* \* ." The commenter suggested that the Secretary must make this finding before he enters into the cooperative agreement.

OSM disagrees. Section 705(c) of the Act allows the Secretary to increase the grant to the State by an amount which he determines is approximately equal to the amount the Federal government would have expended to do the work which the State will perform under the cooperative agreement. OSM believes that by signing the cooperative agreement, the Secretary is agreeing to fund the State for the work that is contemplated by the cooperative agreement. This constitutes knowledge by the Secretary of sufficient funding and personnel as required by section 523(c). If, as the commenter suggested, the State were required to have the funds appropriated by its legislature and personnel hired by the State before the Secretary, Governor, and the Commission sign the cooperative agreement, this would result in the State having to appropriate funds and hire staff for the mere possibility of a cooperative agreement. This would be an unreasonable interpretation of the Act.

The same commenter also suggested that the public must be allowed to comment on the adequacy of funds given to the State for the implementation of the cooperative agreement.

OSM declines to adopt the suggestion. OSM does not believe that every decision it makes in connection with a cooperative agreement must be made in a public forum simply because a cooperative agreement is promulgated as a rule. At all times, the requirements of the Act and the cooperative agreement will be complied with. This, however, does not mean that the agency's deliberative process must be open to public participation prior to decision. In addition, as noted above, OSM has agreed in Article IV to increase the State's grant by an amount equal to that which OSM would have spent in regulating surface coal mining on Federal lands in North Dakota. This should constitute adequate funding.

#### ***Article V: Policies and Procedures for Review of a Permit Application Package or an Application for a Permit Renewal or Revision***

Under this Article, an operator on Federal lands will be required by the Commission and the Secretary to submit a permit application package or an application for a permit renewal or revision in an appropriate number of copies to the Commission and OSM. The term "permit application package," used throughout the cooperative agreement beginning in this Article, is defined at 30 CFR 740.5. It includes the requirements of the Mineral Leasing Act of 1920, implemented by the 30 CFR Part 211 regulations, and the requirements of the Act for a surface coal mining permit, implemented by 30 CFR Part 740. The permit application package is to be in the form required by the Commission and to contain any supplemental information, such as data pertaining to the life of the mine, which may be required by the Department of the Interior. At a minimum, the permit application package must include the necessary information for the Commission and the Department, acting within their statutory authority, to make a determination of compliance with the State Program, applicable terms and conditions of the Federal coal lease, and applicable requirements of other Federal laws and regulations.

Paragraphs 1 through 6 of Article V.B. describe the procedures for the cooperative review and analysis of permit application packages on Federal lands in North Dakota. The Cooperative agreement identifies the Commission as primarily responsible for the analysis, review, and approval of the permit application. In assuming primary responsibility, the Commission will prepare a technical-environmental analysis of the permit application which will form the basis for the Commission's decision on whether to approve or disapprove the permit application. OSM will assist in the preparation of this analysis as requested. The Commission will also be the primary point of contact for operators on behalf of both the State and the Department. All joint State-Federal or Federal determinations except those concerned exclusively with the 30 CFR Part 211 regulations will be channeled to the operator through the Commission. This, however, will not preclude the Secretary from contacting the operator independently of the State to carry out his statutory responsibilities.

OSM, at the request of the Commission, will assist as possible in the review of the permit application and provide technical assistance to the Commission. Copies of any correspondence with the applicant, as well as any information OSM receives from the applicant will be provided to the Commission. OSM will coordinate with all appropriate Federal agencies to ensure timely funneling of analyses and conclusions to the Commission. OSM will also prepare the decision document on the mining plan for the Secretary's consideration. This decision document will include: a technical-environmental analysis of the proposed mining operation, prepared by the State; all other written findings required by the approved State Program; a NEPA compliance document, prepared by OSM based on the technical-environmental analysis prepared by the State; and concurrences from appropriate Federal agencies.

The Secretary is required to review and approve the elements of the permit application package relating to the Mineral Leasing Act and other elements such as cultural resources, post-mining use of Federal land, and Federal compliance with the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321, *et seq.*, which are required by Federal law and cannot be delegated to the Commission. Even though the permit is issued by the Commission, mining may not commence until the Secretary approves the mining plan and these other elements of the permit application package. If a permit is issued prior to Secretarial approval, the Commission reserves the right to modify or rescind the permit to conform with the Secretary's decision.

OSM has modified Article V.B., paragraph 6 to indicate that OSM will prepare the decision document for the Secretary. As originally proposed, the Commission was to have prepared a draft decision document, transmit it to OSM for comment, and then prepare the final decision document after reviewing OSM's comments. The revised procedure is in accord with the system for decision document preparation used in other States with cooperative agreements. OSM preparation of the decision document will essentially consist of incorporating the NEPA compliance document with documents prepared by other Federal agencies and by the Commission. Paragraph 6 has also been modified to clarify that the Commission will issue the permit required by section 506 of the Federal Act in accordance with its approved State Program.

Paragraph 7 of this Article is included in the cooperative agreement pursuant to North Dakota Administrative Code 69-05.2-10-06, which deals with the issuance of permits, permit renewals, and permit revisions for surface disturbances associated with surface coal mining and reclamation operations on lands where the surface state is non-Federal and non-Indian and the mineral estate is Federal and unleased. The Secretary's conditional approval of the State Program on December 15, 1980 (45 FR 82214), stated that this provision of the State Act was not included in the conditional approval but would be considered later in the promulgation of a State-Federal cooperative agreement.

Paragraph 7 provides that the Commission may approve and issue permits, permit renewals, and permit revisions for surface disturbances associated with surface coal mining and reclamation operations, and disturbance of the surface may commence without need for an approved mining plan on lands where: (a) The surface estate is non-Federal and non-Indian; (b) the mineral estate is Federal and any Federal coal is unleased; (c) the Commission consults with the Bureau of Land Management through OSM in order to insure that actions are not taken which would substantially and adversely affect the Federal mineral estate; and (d) the proposed surface disturbances are planned to support surface coal mining and reclamation operations on adjacent non-Federal lands and this is specified in the permit, permit renewal, or permit revision.

Paragraphs 8 and 9 of this Article deal with the issuance of permit renewals and revisions. The paragraphs specify that the Commission will issue all permit renewals or revisions in consultation with OSM, where necessary. This includes authority to issue permit renewals or revisions for permits issued when the Department was the regulatory authority. Permit revisions or renewals found to be an alteration to the existing mining plan will have to be reviewed according to the procedures specified in this Article for permit application packages.

Paragraph 10 deals with the resolution of differences which may develop during the review of permit application packages. The paragraph specifies that when agreement cannot be reached on the final actions to be taken by the Commission and the Department, the matter will be referred to the Governor and the Secretary for resolution.

Several comments were received concerning this Article. One commenter objected to the permit application package concept and stated that the cooperative agreement should not combine the requirements of OSM's regulations with those in 30 CFR Part 211. The commenter suggested that the cooperative agreement deal exclusively with the requirements of the Federal Act.

OSM declines to adopt this suggestion because it is necessary to define for a potential operator the entire package of materials that he or she must submit. The permit application package concept will not result in confusion of either the components of the permit application package or the distinct review and concurrent approval responsibilities of, among

others, the State, the Bureau of Land Management, OSM and the Secretary. It merely defines what a potential operator must submit. The two key components of a permit application package for proposed mining of leased Federal coal -- the permit application and the resource recovery and protection plan -- will be processed by the regulatory authority and the Bureau of Land Management, respectively.

One commenter questioned the authority for allowing the Commission to be the primary authority for the analysis, review and approval of permits, permit revisions or permit renewals. The commenter pointed out that 30 CFR Part 741 specifies that both the Commission and OSM have concurrent responsibility for approval of permits, permit revisions, and permit renewals, and suggested that this requirement be followed in the cooperative agreement. The commenter stated that if the Commission were allowed to approve permits, appeals would then have to be filed with the State and not with the Department's Office of Hearings and Appeals.

OSM has declined to adopt the suggestion and has retained the concept of having the Commission approve the permit. Since the proposed cooperative agreement was published in the Federal Register on June 21, 1982, the Federal lands regulations have been revised. *See* 48 FR 6912, February 16, 1983. Unlike the previous Federal lands regulations in 30 CFR Part 741 which required approval of permits by OSM and the State, the revised regulations allow States with cooperative agreements to process SMCRA permits and approve or disapprove permits for surface coal mining and reclamation operations on Federal lands. The cooperative agreement is consistent with the revised Federal lands regulations.

One commenter wanted assurance that the Commission, when approving permits, would require the operator to control wastes that could degrade water quality in National Park areas and control emissions so that air quality is not deteriorated.

The Secretary believes that the air and water protection requirements of North Dakota's approved State Program are fully adequate to protect both the water and air quality, in accordance with the requirements of the Federal Act.

One commenter suggested that Article V be restructured to more clearly delineate the respective responsibilities of the Commission, OSM, and the Bureau of Land Management and to clarify the permit-mining plan approval process.

OSM has reviewed the language in Article V, and believes that it delineates the responsibilities as clearly as is possible given the complex interrelationship between the permit and the mining plan. As was explained above, under the cooperative agreement the Commission will issue the permit while the Secretary will approve the mining plan. The permit and the mining plan are distinct documents although they are based on some common elements. The approval of the permit by the Commission is based on the Commission's review of those elements of the permit application package required by the approved State Program. The approval of the mining plan is based on the decision document prepared by OSM. The decision document will include: a technical-environmental analysis of the proposed mining operation prepared by the State; all other written findings required by the approved State Program; a NEPA compliance document, prepared by OSM based on the technical-environmental analysis prepared by the State; and concurrences from appropriate Federal agencies. Under the cooperative agreement, the Secretary need not review or concur with the Commission's decision to approve the permit since authority for permit approval has been delegated to the State. The Secretary intends to rely on the State's implementation of the requirements and standards of the approved State Program. The Secretary will review those elements of the decision document for which responsibility has not been delegated to the State to the degree needed to insure that his decision for approval or disapproval of the mining plan is based on accurate and complete information.

The same commenter believed that the cooperative agreement required the permit to be issued before the mining plan is approved by the Secretary and suggested that they be issued as contemporaneously as possible.

OSM disagrees with the commenter's interpretation of the cooperative agreement but agrees that the permit and the mining plan should be approved as contemporaneously as possible. It is the intent of the cooperative agreement that the permit and mining plan be approved by the Commission and the Secretary respectively, as contemporaneously as possible. However, because of the time required to prepare a NEPA compliance document, it is possible for the permit to be issued by the Commission before the mining plan is approved by the Secretary.

The same commenter stated that the exact information required to be submitted in order to have a complete permit application package and to comply with the laws, Executive Orders, and regulations listed in Appendix A is unclear. The commenter requested more specificity. The commenter suggested that the informational requirements of the State Program comprise an exhaustive listing of all information needed to be met by the operator for a permit and if there are

additional informational requirements under other Federal laws they should be incorporated into State law and regulations rather than appearing independently in the cooperative agreement.

OSM does not agree. More specific data as to the informational requirements can be obtained by referring to the Federal lands regulations. *See* 30 CFR 740.13(b). Since there are requirements for mining on Federal lands in addition to the requirements in the State Program, it is necessary to specify these in the cooperative agreement. Such requirements cannot be incorporated into the State Program because they are based on Federal responsibilities which the State would have no authority to enforce.

One comment was received concerning the requirement that the permit application package contain sufficient information for the Commission and the Secretary to make a determination of compliance with the laws and regulations listed in Article V.A. The commenter questioned the Commission's statutory authority to make a determination of compliance with either the 30 CFR Part 211 regulations or the requirements listed in Appendix A.

OSM agrees that the Commission's authority is limited to approval of the permit under its State Program and notes that the Secretary's approval authority is also limited in that he can take no action under North Dakota's laws and regulations. To clarify this, the phrase "acting within their statutory" authority has been added to the last sentence of the section. Under the cooperative agreement, the Commission is not responsible for determining compliance with the 30 CFR Part 211 regulations, the terms of the Federal coal lease, or the laws listed in Appendix A. That is the responsibility of the Department, and the cooperative agreement does not intend or purport to change that.

One commenter requested clarification concerning the statement in the preamble to the proposed rule that responsibility for post-mining land use remains with the Department.

Departmental responsibility for post-mining land use is limited to those situations where the surface of the mining operation is Federally owned. The Department is not responsible for post-mining land use when the surface is privately owned.

As originally proposed, paragraph 7(c) stated that the Commission would "consult with OSM." This has been changed to "consults with the Bureau of Land Management through OSM" to insure that the proper consultation requirements with the Bureau of Land Management are carried out.

One commenter approved of the provisions of paragraph 7, but requested clarification concerning the word "adjacent" in paragraph 7(d), which refers to "proposed surface disturbances which are planned to support surface coal mining and reclamation operations on adjacent non-Federal lands." The commenter stated that the word "adjacent" can mean either "near or close" or "adjoining." The commenter suggested that the word should be interpreted as having the former meaning because of the nature of operations in the State resulting from the land ownership patterns.

OSM agrees with the comment and intends the word "adjacent" to mean "near or close to" when the mining operation should logically be considered as an integrated whole.

One commenter questioned the authority for the provision in Article V.B.7. allowing the State to issue permits without the need for an approved mining plan.

An approved mining plan is required by the Mineral Leasing Act of 1920 if the coal to be mined is leased Federal coal. Because the coal to be mined in paragraph 7 is not Federally-owned, there is no need for a mining plan.

As originally proposed, paragraph 9 specified that only permit revisions which were "a significant alteration or addition to the approved mining plan" need be reviewed according to the procedures for review of permit application packages" specified in Article V. Insignificant alterations to the existing mining plan were to be reviewed and approved or disapproved by the Commission. The final rule has been changed to be consistent with the revised Federal lands regulations in 30 CFR Part 740. The final rule provides that the Commission will inform OSM or the Federal land management agency of each permit revision request for surface coal mining and reclamation operations on Federal lands.

With respect to permit revision requests for surface coal mining and reclamation operations on Federal lands containing leased Federal coal, the Commission will approve such requests. However, before any operations pursuant to any request can commence, the Secretary must: (1) Determine whether the revision request constitutes a mining plan modification, and (2) approve the mining plan modification where necessary. Permit revision requests on Federal lands not containing leased Federal coal can be approved by the Commission in consultation with the Federal land management agency. Thus, the final rule insures that the Secretary's responsibilities for the approval of mining plan modifications are preserved on Federal lands containing leased Federal coal, and that proper coordination with the Federal land management agency occurs on other Federal lands.

One comment was received concerning the language in paragraphs 8 and 9 wherein it is stated that the Commission may issue permit renewals and revisions for permits approved by the Secretary "prior to the effective date of this Agreement." The commenter suggested that the phrase "prior to the effective date of this Agreement" be deleted.

OSM has adopted the comment. Paragraphs 8 and 9 have been modified by deleting the phrase "prior to the effective date of this Agreement." The language was deleted in order to eliminate any doubt that the Commission has the authority to issue permit revisions and permit renewals for permits issued by the Department including those issued after the effective date of the cooperative agreement should the occasion arise.

One comment was received concerning paragraph 10 which deals with the resolution of differences. The paragraph specifies that when the Commission and OSM cannot resolve differences that develop during permit application package review or cannot agree on the final actions to be taken by the Commission and the Department, the matter will be referred to the Governor and the Secretary. The commenter suggested that the paragraph be changed to require that decision-making by the Secretary and the Governor be concurrent, particularly in disputes arising during the permit approval process.

OSM assumes that the intent of the comment is to require concurrent approval of permits. As was previously stated, the Commission can approve permits without the concurrence of the Department. This is the procedure the Department believes was intended by the Act when it granted the Secretary authority to enter into cooperative agreements. Consequently the Department declines to adopt the suggestion.

#### ***Article VI: Inspections***

This Article specifies that the Commission must conduct inspections on Federal lands and prepare and file inspection reports in accordance with its approved Program.

Administrative provisions of this Article include designation of the Commission as the primary point of contact with the operator, and a provision for notice to the State prior to a Federal inspection following a citizen complaint, if circumstances and time permit. This Article preserves the right of the Department to conduct inspections of surface coal mining and reclamation operations on Federal lands without prior notice to the Commission, to evaluate the manner in which the cooperative agreement is being carried out and to insure that performance and reclamation standards are being met.

The right of Federal and State agencies to conduct inspections for purposes outside the scope of this cooperative agreement is not affected. In particular, this Article preserves the Department's obligation and authority to conduct inspections pursuant to 30 CFR Part 842 and 30 CFR 740.17 as 30 CFR 740.17 relates to obligations under laws other than the Federal Act.

This Article also provides that personnel of the State and the Department will be mutually available to serve as witnesses in enforcement actions taken by either party.

One commenter stated that this Article should be rewritten because it designates the Commission as the primary inspection authority but gives OSM substantial authority to conduct inspections. The commenter stated that this perpetuates the duality of administration which the cooperative agreement is intended to eliminate and, further, that it dilutes the authority being transferred to the State. The commenter suggested that the Article be rewritten so that the inspection role of OSM would be limited to that of an evaluator or auditor.

After reviewing the language in the Article, OSM declines to adopt the suggestion although OSM generally agrees with the commenter's view of the role of OSM in inspections. If the language were modified as suggested to limit OSM's role to that of an evaluator or auditor, the language would be far too restrictive. As now written, the language clearly indicates that the Commission will be the lead inspection authority. OSM's principal role is that of an evaluator. For oversight and emergency situations, however, OSM must have immediate and unrestricted access to mining operations. This access is insured by the more flexible language.

#### ***Article VII: Enforcement***

Article VII sets forth the enforcement obligations and authorities of OSM and the Commission. The Commission has primary enforcement authority on Federal lands, in accordance with the requirements of the cooperative agreement and the approved State Program. The Article also specifies that the parties will consult prior to revoking or suspending a

permit. The Secretary's obligation to enforce violations of Federal law other than the Act is preserved, as is OSM's authority to take enforcement action to comply with 30 CFR Parts 843 and 845. In taking such action, OSM will apply the performance standards contained in the approved State Program, but will use the Federal procedures and penalty system.

One commenter stated that this Article should be rewritten because it designates the Commission as the primary enforcement authority but reserves substantial authority for OSM. The commenter stated that this perpetuates the duality of administration which the cooperative agreement is intended to eliminate and, further, that it dilutes the authority being transferred to the State. The commenter suggested that the Article be rewritten so that the role of OSM would be limited to that of an evaluator or auditor.

OSM disagrees. The intent of the Article is to make the Commission the primary enforcement authority, with OSM's principal role being that of an evaluator or auditor. The language in the final rule was purposely left flexible in order to insure that OSM may take enforcement action if the necessity arises.

#### ***Article VIII: Bonds***

Under this Article, the Commission will require each operator to submit a single performance bond, payable to the State and the United States, to meet both Federal and State requirements. The Commission must obtain the consent of the Department prior to releasing or forfeiting an operator's performance bond for surface coal mining and reclamation operations on Federal lands containing leased Federal coal. For surface coal mining and reclamation operations on other Federal lands, the cooperative agreement provides for the Federal land management agency to concur in the bond release.

In addition to a performance bond, an operator is required to furnish a lease bond and a lessee protection bond. Bonding requirements of the Mineral Leasing Act and other Federal laws appear at 30 CFR 740.15 and 43 CFR Subpart 3474.

The final rule has been modified to specify that if the cooperative agreement is terminated, the bond will continue in effect, and to the extent that Federal lands are involved, will be payable to the United States. In the situation of a mine on intermingled Federal and non-Federal lands, this approach will allow both the State and the Federal Government to collect under the bond without requiring the consent of the other party. The proposed rule was silent on this point.

No comments were received on this Article.

#### ***Article IX: Designation of Lands as Unsuitable***

This Article describes the roles of the Commission and OSM in the review and processing of petitions to designate lands as unsuitable for surface coal mining operations on adjacent Federal and non-Federal lands. The authority to designate Federal lands as unsuitable is reserved to the Secretary or his designated representative. *See* 30 CFR 745.13. Petitions for designation on Federal lands must be filed in accordance with 30 CFR Part 769.

One commenter was concerned with the possibility of mining within units of the National Park System in North Dakota and stated that this Article should specify that units of the National Park System in North Dakota are closed to mining, and, further, that they should be designated as unsuitable for mining.

OSM believes it is unnecessary to modify the Article in view of section 522(e) of the Act, the requirements of 30 CFR 761.11, and the approved State program. The Act, OSM regulations, and the State program contain requirements that ensure the protection of Federal lands within units of the National Park System in North Dakota.

#### ***Article X: Termination of Cooperative Agreement***

Proposed Article X specified three ways in which the cooperative agreement could be terminated: (1) By the Commission upon written notice to the Secretary; (2) by the Secretary after public notice, public hearing, and opportunity for the State to take remedial action; and (3) by operation of law (when the cooperative agreement is no longer authorized by Federal or State law or upon withdrawal of the Secretary's approval of the State Program pursuant to 30 CFR Part 733). The final rule includes a fourth way in which the cooperative agreement can terminate. The agreement can terminate at any time upon mutual agreement by the Secretary and the Commission.

No comments were received on this Article.

#### ***Article XI: Reinstatement of Cooperative Agreement***

Article XI provides for reinstatement of the cooperative agreement upon application by the Commission and the submission of evidence to the Secretary that the Commission can and will comply with all of the provisions of the agreement.

No comments were received concerning this Article.

#### ***Article XII: Amendment of Cooperative Agreement***

Article XII provides that the cooperative agreement may be amended by mutual agreement of the Governor and Secretary in accordance with 30 CFR 745.11.

No comments were received concerning this Article.

#### ***Article XIII: Change in State or Federal Standards***

This Article recognizes that the Secretary or the State may, from time to time, promulgate new or revised performance or reclamation requirements, or enforcement and administration procedures. Such changes are to be made in accordance with 30 CFR Part 732 for changes to the State Program and section 501 of the Act for changes to the Federal lands program. The Article also provides that "OSM and the Commission shall immediately inform each other of any final changes to their respective laws or regulations, as provided in 30 CFR 732."

One commenter suggested that the word "final" be changed to "proposed," and that the Article be reworded to require the public notice and opportunity for comment be afforded before any revisions are implemented.

OSM believes such a change is unnecessary and has declined to adopt the comment. Any amendments to the cooperative agreement will be made through rulemaking which must include public notice and the opportunity for public comment. *See* 30 CFR 745.14. The same is true for amendments to the State Program. *See* 30 CFR 732.17. The provisions in article XIII requiring notice to either party of any "final" change is designed to insure that each party is kept informed of current developments in the substantive rules governing surface coal mining. It does not alter the requirements for public notice and an opportunity to comment during rulemaking.

#### ***Article XIV: Changes in Personnel and Organization***

As required by 30 CFR 745.12, this Article provides that the State and the Department must advise each other of changes in the organization, structure, functions, duties and funds of the offices, departments, divisions, and persons within their organizations which could affect administration or enforcement of the cooperative agreement.

No comments were received concerning this Article.

#### ***Article XV: Reservation of Rights***

Article XV recognizes that the Act, 30 CFR 745.13, and other authorities prohibit the Secretary from delegating certain authorities to the State. Article XV states that the cooperative agreement shall not be construed as waiving or preventing the assertion of any rights not expressly addressed in the cooperative agreement or available to the parties under the authorities cited in Appendix A.

Pursuant to the terms of this Article, the Secretary reserves authority and responsibility for several Mineral Leasing Act functions, including the release of Federal lease bonds and the approval of mining plans on Federal lands. The Secretary also retains authority for the designation of Federal lands as unsuitable for surface coal mining operations and the termination of such designations. Other specific reservations are listed in 30 CFR 745.13.

The Department of the Interior also reserves the authority and responsibility for several specific functions which are an integral part of the permit application review procedures discussed earlier. These items include, but are not limited to, compliance with the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*; compliance with the consultation requirements of the Endangered Species Act of 1973, as amended, 16 U.S.C. 1531 *et seq.*; compliance with section 106 of the National Historic Preservation Act of 1966, 16 U.S.C. 470f; and compliance with Executive Order 11988, Floodplain Management (May 24, 1977) and Executive Order 11990, Protection of Wetlands (May 24, 1977).

### ***Compliance with NEPA***

The Department and its member offices and bureaus must comply with NEPA, its implementing regulations, and the Department's own NEPA guidelines. *See* 40 CFR 1500 *et seq.* (regulations of the Council on Environmental Quality) and 45 FR 27541 (April 23, 1980) (Department of the Interior Notice of Final Revised Procedures). *See* also 45 FR 10043 (February 14, 1980) (Notice of Proposed Revised Instructions for the Office of Surface Mining). These authorities require the Department, prior to a decision on a mining plan on Federal lands, to prepare an environmental assessment or environmental impact statement. The current regulations at 30 CFR 745.13(b) do not allow the Secretary to delegate his NEPA duties to the States. However, the Secretary believes that this regulation does allow States to assist in preparation of NEPA documents (see 40 CFR 1506.2), with final action reserved to the Secretary, so long as the Department is sufficiently involved in the preparation of the NEPA document to form an independent judgment of the environmental impacts of the proposed action.

One commenter stated that the approval by the Secretary of the mining plan does not authorize any disturbance of the land and, therefore, there is no Federal action affecting the environment. Consequently NEPA compliance is not required.

OSM disagrees. The Secretary's action on a mining plan is a Federal action within the meaning of NEPA. Since mining may not commence until after mining plan approval, NEPA compliance is required.

### ***The Endangered Species Act (16 U.S.C. 1536)***

This Federal law requires that the Department take such steps as are necessary to insure that actions authorized, funded, or carried out by Federal departments and agencies do not jeopardize the continued existence of an endangered species, or result in the destruction or modification of a species' critical habitat. 16 U.S.C. 1536. *See* 50 CFR 402 (regulations on inter-agency cooperation under the Endangered Species Act). OSM's regulations at 30 CFR 745.13(m) provide that the Secretary's obligation to consult under section 7(a) of the Endangered Species Act regarding actions on Federal lands may not be delegated to a State.

### ***The National Historic Preservation Act (16 U.S.C. 470f)***

Compliance with section 106 of the National Historic Preservation Act and its implementing regulations (36 CFR 800) is mandatory where the approval of mining on Federal lands may adversely affect sites, buildings, objects or districts which are listed on, or eligible for listing on, the National Register of Historic Places. Compliance is achieved through early consultation with and involvement of State Historic Preservation Officers and, in some cases, consultation with the Advisory Council on Historic Preservation (Council).

OSM and the Department must also comply with Executive Order 11593, "Protection and Enhancement of the Cultural Environment" (May 13, 1971). Executive Order 11593 contains two principal requirements. First, with respect to properties not owned by the Federal government, agencies and departments must establish procedures for consultation with the Council on Federal plans and programs affecting such properties.

Second, the Order requires all Federal agencies and departments to inventory and nominate historic sites, buildings, districts and objects that are on Federal property and that may be eligible for inclusion on the National Register of Historic Places.

Federal agencies must take measures to insure that, in conjunction with proposed undertakings, they fulfill their responsibilities under section 106 of the National Historic Preservation Act of 1974, and that the Council is given an appropriate opportunity to comment on proposed plans.

These responsibilities are reserved to the Secretary under the cooperative agreement since they are not "expressly addressed" (Article XV).

### ***Floodplain Management and Wetland Protection***

The Office of Surface Mining has published a general statement of policy which describes the existing procedural mechanisms for compliance with Executive Order 11988, Floodplain Management (May 24, 1977) and Executive Order 11990, Protection of Wetlands (May 24, 1977). *See* 45 FR 49872 (July 25, 1980). Secretarial approval of surface coal

mining operations on Federal lands is discussed in that Federal Register notice at 45 FR 49872-73. As noted therein, the method and responsibility for compliance with these two Orders is to be a subject of the permanent program cooperative agreements under 30 CFR Part 745.

Since the cooperative agreement with North Dakota does not directly discuss compliance with these Orders, the obligation for compliance with them remains with the Secretary and is not delegated to North Dakota.

**Article XVI: Definitions**

This Article specifies that the terms and phrases used in the cooperative agreement, which are defined in 30 CFR Parts 700, 701, and 740, are to be given the meaning set forth in said definitions. It should be noted that the term "Federal lands" does not include "Indian lands."

No comments were received concerning this Article.

**V. PROCEDURAL MATTERS REQUIRED FOR PROMULGATION OF THIS RULE.**

*1. Executive Order 12291 and Regulatory Flexibility Act*

The Department has determined that this document is not a major rule and does not require a regulatory impact analysis under Executive Order 12291 because promulgation of a State-Federal cooperative agreement between the Department of the Interior and the State of North Dakota will not result in a major increase in costs or prices for consumers; individual industries; Federal, State, or local government agencies, or geographic regions. The cooperative agreement should result in cost savings to the mining industry and lessen the burden of regulatory compliance. Further, the cooperative agreement will not result in significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets. The Department certifies that this document will not have a significant economic effect on a substantial number of small entities and therefore does not require a regulatory flexibility analysis under the Regulatory Flexibility Act, 5 U.S.C. 605(b). This certification was made based on an assessment of the probable impact of the cooperative agreement on small entities within the State. It was concluded that the effect of the cooperative agreement would be to reduce the cost and burden of complying with the Federal lands program found in 30 CFR Chapter VII, Subchapter D. The above findings were made by the Director, OSM and approved by the Assistant Secretary for Energy and Minerals. A copy is on file in the OSM Administrative Record Room, Room 5315, 1100 L Street, Washington, D.C. 20005.

*2. Recordkeeping and Reporting Requirements*

There are recordkeeping and reporting requirements in the proposed rules which are the same as and required by OSM's permanent program regulations. Those regulations required clearance from the Office of Management and Budget under 44 U.S.C. 3507 and were assigned the following clearance numbers:

Location of requirement	OMB clearance No.
Article IV.G (Required by 30 CFR Part 735)	1029-0013
Article V.A (Required by 30 CFR Part 740)	1029-0026
Article V.B (Required by 30 CFR Part 740)	1029-0026
Article VI.A (Required by 30 CFR Part 745)	1029-0028
Article VIII.A (Required by 30 CFR Part 740)	1029-0026

*3. National Environmental Policy Act*

Proceedings relating to adoption of a permanent program cooperative agreement are part of the Secretary's implementation of the Federal lands program pursuant to section 523 of the Act. Such proceedings are, therefore, exempt

under section 702(d) of the Act from the requirements to prepare a detailed statement pursuant to section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)).

#### *4. Justification for Immediate Effective Date*

The Department of the Interior finds, in accordance with section 553(d)(3) of the Administrative Procedure Act (5 U.S.C. 551 *et seq.*), that good cause exists to make this final rule effective upon publication. Immediate implementation will result in the immediate elimination of dual administration of surface coal mining in North Dakota and thus result in efficiency and economy both to the State and the Federal Government as well as to operators. Article II of the proposed cooperative agreement with North Dakota stated that the cooperative agreement would become effective upon publication in the Federal Register as a final rule. No comments were received on this provision and it has been adopted as proposed.

#### **LIST OF SUBJECTS IN 30 CFR PART 934**

Coal mining, Intergovernmental relations, Surface mining, Underground mining.

Accordingly, Part 934 of Chapter VII, Title 30 is amended as set forth herein.

Dated: September 1, 1983.

William P. Pendley,

Deputy Assistant Secretary for Energy and Minerals.

#### **PART 934 -- [AMENDED]**

1. Section 934.30 is added to read as follows:

#### **SECTION 934.30 - STATE-FEDERAL COOPERATIVE AGREEMENT.**

#### **COOPERATIVE AGREEMENT**

This is a Cooperative Agreement (Agreement) between North Dakota (State) acting by and through the North Dakota Public Service Commission (Commission) and the Governor, and the United States Department of the Interior (Interior), acting by and through the Secretary of the Interior (Secretary) and the Office of Surface Mining (OSM).

#### **ARTICLE I: INTRODUCTION AND PURPOSE**

*A. Authority:* This Agreement is authorized by section 523(c) of the Surface Mining Control and Reclamation Act (Federal Act), Pub. L. 95-87, 30 U.S.C. 1273(c), which allows a State with a permanent regulatory program approved under 30 U.S.C. 1253 to elect to enter into an Agreement for the regulation and control of surface coal mining on Federal lands, and by Chapter 38-14.1 of the North Dakota Century Code, Reclamation of Surface Mined Lands (State Act). This Agreement provides for State regulation of surface coal mining and reclamation operations on Federal lands within North Dakota consistent with the State and Federal Acts and the Federal lands program (section 523(a) of the Federal Act and 30 CFR Chapter VII, Subchapter D).

*B. Purpose:* The purpose of the Agreement is to: (1) Foster State-Federal cooperation in the regulation of surface coal mining and reclamation operations; (2) eliminate unnecessary intergovernmental overlap and duplication; and (3) provide uniform and effective application of the State Program on all non-Indian lands in North Dakota.

#### **ARTICLE II: EFFECTIVE DATE**

Following signing by the Secretary, the Governor, and the Commission, the Agreement shall take effect upon publication in the Federal Register as a final rule. This Agreement shall remain in effect until terminated as provided in Article X.

### **ARTICLE III: SCOPE**

In accordance with the Federal lands program in 30 CFR Parts 740-746, the laws, rules, terms, and conditions of North Dakota's Permanent State Program (Program) (conditionally approved effective December 15, 1980, 30 CFR 934.11 or as hereinafter amended in accordance with 30 CFR 732.17) are applicable to Federal lands within North Dakota except as otherwise stated in this Agreement, the Federal Act, 30 CFR 745.13, or other applicable laws or rules and regulations. Orders and decisions issued by the Commission in accordance with the State Program that are reviewable shall be reviewed pursuant to section 38-14.1-30 of the North Dakota Century Code. Orders and decisions issued by the Department that are appealable shall be appealed to the Department of the Interior's Office of Hearings and Appeals.

### **ARTICLE IV: REQUIREMENTS FOR COOPERATIVE AGREEMENT**

The Commission and the Secretary affirm that they will comply with all of the provisions of this Agreement and will continue to meet all the conditions and requirements specified in this Article.

A. *Responsible Administrative Agency:* The Commission is, and shall continue to be, the sole agency responsible for administering this Agreement on behalf of North Dakota on Federal lands throughout the State. OSM shall administer this Agreement on behalf of the Secretary, in accordance with the regulations in 30 CFR Chapter VII.

B. *Authority of State Agency:* The Commission has and shall continue to have authority under State law to carry out this Agreement.

C. *Funds:* The State will devote adequate funds to the administration and enforcement on Federal lands in North Dakota of the requirements contained in the Program. If the State complies with the terms of this Agreement, and if necessary funds have been appropriated, OSM shall reimburse the State as provided in section 705(c) of the Federal Act and 30 CFR 735.16, for costs associated with carrying out responsibilities under this Agreement. The grants procedures established in 30 CFR Part 735 are applicable to funding under this Agreement. Reimbursement shall be in the form of annual grants, and applications for grants shall be processed and grants awarded in a prompt manner.

If sufficient funds have not been appropriated, OSM and the Commission shall promptly meet to decide on appropriate measures that will insure that surface coal mining and reclamation operations are regulated in accordance with the Program.

D. *Reports and Records:* The Commission shall make annual reports to OSM pursuant to 30 CFR 745.12(d), containing information respecting its implementation and administration of the terms of this Agreement. The Commission and OSM shall exchange, upon request, information developed under this Agreement except where prohibited by Federal law. OSM shall provide the Commission with a copy of any final evaluation report concerning State administration and enforcement of this Agreement.

E. *Personnel:* The Commission shall provide the necessary personnel to fully implement this Agreement in accordance with the provisions of the Federal and State Acts and the State Program.

F. *Equipment and Laboratories:* The Commission shall assure itself access to equipment, laboratories, and facilities with which all inspections, investigations, studies, tests, and analyses can be performed and which are necessary to carry out the requirements of this Agreement.

G. *Permit Application Fees and Civil Penalty Assessments:* The amount of the fee accompanying an application for a permit shall be determined in accordance with section 38-14.1-13 of the State Act. All permit fees and civil penalty assessments collected by the State from operators on Federal lands shall be retained by the State and deposited with the State Treasurer. These funds shall be disposed of in accordance with Federal requirements in OMB Circular No. A-102, Attachment E. The financial status report submitted pursuant to 30 CFR 735.26 shall include a report of the amount of permit application fees collected and attributable to Federal lands during the prior Federal fiscal year.

### **ARTICLE V: POLICIES AND PROCEDURES: REVIEW OF A PERMIT APPLICATION PACKAGE OR AN APPLICATION FOR A PERMIT RENEWAL OR REVISION**

A. *Contents of Permit Application Package:* The Commission and the Secretary will require that an operator proposing to mine on Federal land shall submit an identical permit application package in an appropriate number of

copies to the Commission and OSM. Any documentation or information submitted by the operator for the sole purpose of complying with the 3-year requirement of section 7(c) of the Mineral Leasing Act (30 U.S.C. 181 *et seq.* ) will be submitted directly to the Bureau of Land Management, Department of the Interior. The permit application package shall be in the form required by the Commission and include any supplemental information required by the Secretary. The permit application package shall satisfy the requirements of 30 CFR Chapter VII, Subchapter D and shall include the information required by, or necessary for, the Commission and the Secretary, acting within their statutory authority, to make a determination of compliance with:

- (1) Chapter 38-14.1 and Chapter 38-18 of the North Dakota Century Code;
- (2) Article 69-05.2 of the North Dakota Administrative Code (NDAC);
- (3) Applicable terms and conditions of the Federal coal lease;
- (4) Applicable requirements of the Bureau of Land Management's 30 CFR Part 211 regulations pertaining to the Mineral Leasing Act; and
- (5) Applicable requirements of other Federal laws and the Program, including but not limited to those in Appendix A of this Agreement.

**B. Review Procedures:** 1. The Commission shall assume primary responsibility for the analysis, review, and approval of permit applications required by 30 CFR Chapter VII, Subchapter D for surface coal mining on Federal lands in North Dakota. OSM shall, as requested, assist the Commission in this analysis and review.

2. The Commission shall be the primary point of contact for operators regarding the approval of the permit application package, except on matters concerned exclusively with the 30 CFR Part 211 regulations administered by the Bureau of Land Management. The Commission will be responsible for informing the applicant of all joint State-Federal or Federal determinations, except matters concerned exclusively with the 30 CFR Part 211 regulations. The Commission shall send to the Bureau of Land Management all correspondence with the applicant which may have a bearing on decisions regarding Mineral Leasing Act requirements. Except in exigent circumstances, OSM shall generally not independently initiate contacts with applicants regarding completeness or deficiencies of permit application packages with respect to matters which are properly within the jurisdiction of the Commission. The Commission may arrange for an operator to send written communications and documents regarding a permit application package directly to OSM. The Secretary reserves the right to act independently of the Commission to carry out his responsibilities under laws other than the Federal Act. A copy of any independent correspondence with the applicant required to carry out these responsibilities which may have a bearing on decisions regarding the permit application package shall be sent to the State.

3. OSM is responsible for ensuring that any information OSM receives from an applicant regarding the permit application package is sent to the Commission and the Commission will send any information received from the applicant to OSM. OSM shall have access to Commission files for mines on Federal lands. OSM and the Commission shall regularly coordinate with each other during the permit application package review process.

4. OSM shall be responsible for obtaining, in a timely manner, the views of all Federal agencies with jurisdiction or responsibility over a permit application package on Federal lands in North Dakota and for making these views known to the Commission within 90 days of the receipt of the application by OSM. The Commission shall keep OSM informed of findings during the review which bear on the responsibilities of other Federal agencies. OSM shall take appropriate steps to facilitate discussions between the Commission and the concerned agencies wherever desirable to resolve issues or problems identified in the review.

5. Upon receipt of a permit application package, both OSM and the Commission shall each designate its application manager. The application managers shall serve as the primary point of contact between OSM and the Commission throughout the review process and shall be responsible for identifying areas of avoidable duplication of review and analysis, which shall be eliminated where possible. Not later than 15 days after an application has been received, OSM and the Commission shall discuss the application and agree upon a work plan and schedule for the review of the application. OSM shall thereafter inform the Commission of any specific or general areas of concern, including the scope of required environmental analyses under the National Environmental Policy Act, which require special handling or analysis. The Commission shall likewise inform OSM where OSM assistance will be needed to perform any specific or general analysis or prepare any studies or similar work.

6. The Commission shall prepare a technical-environmental analysis on the permit application package. Copies of drafts of this document shall be sent to OSM for review and comment. OSM shall independently evaluate the documents

and inform the Commission within 30 days of any changes that should be made. The Commission shall consider the comments of OSM and send a final technical-environmental analysis to OSM which will form the basis for and be included in the decision document which OSM will prepare for the Secretary's consideration. The Commission shall approve or disapprove the permit application by written decision in accordance with the Program. The Secretary's decision on the mining plan and those other Federal responsibilities which cannot be delegated (including but not limited to those listed in Appendix A) shall be made concurrently with or as soon as possible after the final decision of the Commission on the permit. The permit issued by the Commission shall condition the initiation of surface coal mining operations on Federal lands within the permit area on obtaining mining plan approval from the Secretary. The Commission shall, in the approved permit, reserve the right to amend or rescind its action to conform with action taken, or with terms or conditions imposed, by the Secretary when approving the mining plan. After the Commission makes its decision on the permit, it shall send a notice to the applicant and OSM with a statement of findings and conclusions in support of the action.

7. The Commission may approve and issue permits, permit renewals, and permit revisions for surface disturbances associated with surface coal mining and reclamation operations, and disturbance of the surface may commence without need for an approved mining plan on lands where:

- (a) The surface estate is non-Federal and non-Indian;
- (b) The mineral estate is Federal and is unleased;
- (c) The Commission consults with the Bureau of Land Management through OSM in order to insure that actions are not taken which would substantially and adversely affect the Federal mineral estate; and
- (d) The proposed surface disturbances are planned to support surface coal mining and reclamation operations on adjacent non-Federal lands and this is specified in the permit, permit renewal, or permit revision.

8. Any permit renewal requested pursuant to applicable State laws and rules for a surface coal mining and reclamation operation on Federal lands, and for which a mining plan has been approved by the Secretary, shall be reviewed and approved or disapproved by the Commission in consultation with OSM for Federal responsibility under other laws. The Commission shall inform OSM and BLM of the approval or disapproval of the renewal and provide OSM and BLM with copies of the application documents.

9. The Commission shall inform OSM of each permit revision request with respect to surface coal mining and reclamation operations on Federal lands containing leased Federal coal. For other Federal lands, the Commission shall inform the Federal land management agency of each permit revision request. Surface coal mining and reclamation operations shall not occur pursuant to the revision unless the permit revision request has been approved by the Commission and:

- (a) With respect to Federal lands containing leased Federal coal --
  - (i) The Secretary has determined that the permit revision does not constitute a mining plan modification, or
  - (ii) If the revision does constitute a mining plan modification, the modification has been approved by the Secretary.
- (b) With respect to other Federal lands, the Commission has consulted with the Federal land management agency to ensure that the permit revision is consistent with Federal laws and regulations other than the Act.

10. When the Commission and OSM cannot resolve differences that develop during permit application package review or cannot agree on the final actions to be taken by the Commission and the Department, the matter shall be referred to the Governor and the Secretary for resolution.

#### ***ARTICLE VI: INSPECTIONS***

The Commission shall conduct inspections on Federal lands and prepare and file inspection reports in accordance with the approved Program.

A. *Inspection Reports:* The Commission shall, within 15 days of conducting any inspection on Federal lands, file with OSM an inspection report describing (1) the general conditions of the lands under the permit; (2) whether the operator is complying with applicable performance and reclamation requirements; and (3) the manner in which specific operations are being conducted.

B. *Commission Authority:* The Commission shall be the point of contact and primary inspection authority in dealing

with the operator concerning operations and compliance with the requirements covered by this Agreement, except as described in this Agreement and the Secretary's regulations. Nothing in this Agreement shall prevent inspections by authorized Federal or State agencies for purposes other than those covered by this Agreement.

C. *OSM Authority:* For the purpose of evaluating the manner in which this Agreement is being carried out and to insure that performance and reclamation standards are being met, OSM may conduct inspections of surface coal mining and reclamation operations on Federal lands without prior notice to the Commission. In order to facilitate a joint Federal-State inspection, when OSM is responding to a citizen complaint of an imminent danger to the health or safety of the public or of a significant, imminent environmental harm pursuant to 30 CFR 842.11(b)(1)(i), it will contact the Commission if circumstances and time permit, prior to the Federal inspection. The Department may conduct any inspections necessary to comply with 30 CFR Part 842 and 30 CFR 740.17 (as 30 CFR 740.17 relates to obligations under laws other than the Federal Act). If an inspection is made without Commission inspectors, OSM shall provide the Commission with a copy of the inspection report within 15 days after the inspections.

D. *Witness Availability:* Personnel of the State and the Department shall be mutually available to serve as witnesses in enforcement actions taken by either party.

#### **ARTICLE VII: ENFORCEMENT**

A. *Commission Enforcement:* The Commission shall have primary enforcement authority on Federal lands in accordance with the Program and this Agreement. During any joint inspection by OSM and the Commission, the Commission shall take appropriate enforcement action, including issuance of orders of cessation and notices of violation. OSM and the Commission shall consult prior to issuance of any decision to suspend or revoke a permit.

B. *Notification:* The Commission and OSM shall promptly notify each other of all violations of applicable laws, regulations, orders, approved mining and reclamation plans and permits subject to this Agreement and of all actions taken with respect to such violations.

C. *Secretary's Authority:* (1) This Agreement does not affect or limit the Secretary's authority to enforce violations of laws other than the Federal Act. (2) During any inspection made solely by OSM or any joint inspection where the Commission and OSM fail to agree regarding the propriety of any particular enforcement action, OSM may take any enforcement action necessary to comply with 30 CFR Parts 843 and 845. Such enforcement action shall be based on the substantive standards included in the approved Program and shall be taken using the procedures and penalty system contained in 30 CFR Parts 843 and 845.

#### **ARTICLE VIII: BONDS**

A. *Bond Coverage and Terms:* The Commission and OSM shall require all operators on Federal lands to submit a single performance bond to cover the operator's responsibilities under the Federal Act and the Program, payable to both the United States and North Dakota. The performance bond shall be of sufficient amount to comply with the requirements of both State and Federal law and release of the performance bond shall be conditioned upon compliance with all applicable requirements. If this Agreement is terminated, the bond will continue in effect and to the extent that Federal lands are involved will be payable to the United States.

Submission of a performance bond does not satisfy the requirements for a Federal lease bond required by 43 CFR Subpart 3474 or a lessee protection bond required in addition to a performance bond, in certain circumstances, by section 715 of the Federal Act.

B. *Bond Release:* The Commission shall obtain OSM's concurrence prior to releasing the operator from any performance bonding obligation required under the Program for any Federal lands containing leased Federal coal. For surface coal mining and reclamation operations on other Federal lands, the Commission shall obtain the concurrence of the Federal land management agency prior to releasing the performance bond. The Commission shall advise OSM of any release of and adjustments made to the performance bond.

C. *Forfeiture:* The operator's performance bond shall be subject to forfeiture with the consent of OSM, in accordance with the procedures and requirements of the Program.

## **ARTICLE IX: DESIGNATION OF LANDS AS UNSUITABLE**

The Commission and OSM shall cooperate in the review and processing of petitions to designate lands as unsuitable for surface coal mining operations. When either agency receives a petition which could have an impact on lands the designation of which as unsuitable for mining would be the responsibility of the other agency, the agency shall: (1) Notify the other of its receipt of the petition and of the anticipated schedule for reaching a decision; and (2) request and fully consider data, information and views of the other. The authority to designate Federal lands as unsuitable for mining is reserved to the Secretary or his designated representative.

## **ARTICLE X: TERMINATION OF COOPERATIVE AGREEMENT**

This Agreement may be terminated as follows:

A. *Termination by the State:* The Agreement may be terminated by the Commission upon written notice to the Secretary, specifying the date upon which the Agreement shall be terminated. The date of termination shall not be less than 90 days from the date of the notice.

B. *Termination by the Secretary:* This Agreement may be terminated by the Secretary according to the following procedures:

1. A written notice from the Secretary to the Commission shall specify the grounds upon which he proposes to terminate the Agreement. In addition, a written notice containing the grounds for termination shall be published in the Federal Register affording the Commission and the public a minimum of 30 days for comment.

2. A written notice in the Federal Register and a local newspaper of general circulation shall also specify the date and place within the State of North Dakota where the Commission and the public shall be afforded the opportunity for a hearing. The date of such hearing shall not be less than 30 days from the date of publication in the Federal Register. Prior to the time fixed for public hearing, representatives of the Commission may be permitted to appear and confer in person with representatives of the Secretary and present oral or written statements, and any other documents relative to the proposed termination.

3. The proposed termination hearing shall be conducted by OSM and a record shall be made of the hearing. The Commission shall be entitled to have legal, and technical and other representatives present at the hearing, and may present, either orally or in writing, evidence, information, testimony, documents, records or materials as may be relevant to the issues involved.

4. The Secretary's decision shall be made after the hearing and close of the comment period.

5. A decision to terminate the Agreement may be made if the Secretary finds in writing that:

(a) The Commission has substantially failed to comply with the requirements of the Federal Act, 30 CFR Parts 740-746, the Program, or provisions of this Agreement; or

(b) The Commission has failed to comply with any undertaking by the Commission in this Agreement upon which the approval of the Program, this Agreement, or grants by OSM for administration or enforcement of the Program or this Agreement were based.

6. The Secretary shall send written notice of the decision and findings to the Commission and publish notice of it in the Federal Register.

7. This Agreement shall terminate not less than 60 days after publication of the notice of the decision to terminate in the Federal Register. The Commission may remedy any failure during the 60-day period. If the Secretary determines that the State has taken effective remedial action, the Agreement will not terminate.

C. *Termination by Operation of Law:* This Agreement shall terminate by operation of law under either of the following circumstances:

1. When no longer authorized by Federal law or North Dakota laws and regulations; or

2. Upon termination or withdrawal of the Secretary's approval of the Program pursuant to 30 CFR Part 733.

D. *Mutual Termination:* This Agreement may be terminated at any time upon mutual agreement by the Secretary and the Commission.

#### ***ARTICLE XI: REINSTATEMENT OF COOPERATIVE AGREEMENT***

If this Agreement has been terminated as provided in Article X, it may be reinstated upon application by the Commission and upon its giving evidence satisfactory to the Secretary that the Commission can and will comply with all the provisions of the Agreement and that the Commission has remedied all defects in administration for which this Agreement was terminated.

#### ***ARTICLE XII: AMENDMENTS TO COOPERATIVE AGREEMENT***

This Agreement may be amended by mutual agreement of the Commission and the Secretary. An amendment proposed by one party shall be submitted to the other with a statement of the reasons for such proposed amendment. The amendment shall be adopted or rejected in accordance with the requirements of 30 CFR 745.11. The party to whom the proposed amendment is submitted shall signify its acceptance or rejection of the proposed amendment and if rejected shall state the reason for rejection.

#### ***ARTICLE XIII: CHANGES IN STATE OR FEDERAL STANDARDS***

A. *Time for Change:* The Secretary or the State may from time to time promulgate new Federal or State regulations, including new or revised performance or reclamation requirements or enforcement or administration procedures. OSM and the Commission shall immediately inform each other of any final changes in their respective laws or regulations as provided in 30 CFR Part 732. Each party shall, if it is determined to be necessary to keep this Agreement in force, change or revise its regulations and request necessary legislative action. Such changes shall be made under the procedures of 30 CFR Part 732 for changes to the Program and section 501 of the Federal Act for changes to the Federal lands program.

B. *Copies of Changes:* The State and OSM shall provide each other with copies of any changes to their respective laws, rules, regulations, and standards pertaining to the enforcement and administration of this Agreement.

#### ***ARTICLE XIV: CHANGES IN PERSONNEL AND ORGANIZATION***

The Commission and the Secretary shall, consistent with 30 CFR Part 745, advise each other of changes in the organization, structure, functions, duties, and funds of the offices, departments, divisions, and persons within their organizations which could affect administration and enforcement of this Agreement. Each shall promptly advise the other in writing of changes in key personnel, including the head of a department or division, or changes in the functions or duties of persons occupying the principal offices within the structure of the program. The Commission and OSM shall advise each other in writing of changes in the location of offices, addresses, telephone numbers, and changes in the names, location and telephone numbers of their respective mine inspectors and the area within the State for which such inspectors are responsible.

#### ***ARTICLE XV: RESERVATION OF RIGHTS***

In accordance with 30 CFR 745.13, this Agreement shall not be construed as waiving or preventing the assertion of any rights that have not been expressly addressed in this Agreement that the State or the Secretary may have under other laws or regulations, including but not limited to those listed in Appendix A.

#### ***ARTICLE XVI: DEFINITIONS***

Terms and phrases used in this Agreement which are defined in 30 CFR Part 700, 701 and 740 shall be given the meanings set forth in those definitions.

Approved:  
James G. Watt,  
Secretary of the Interior.  
Dated: August 11, 1983.

Allen I. Olson,

Governor of North Dakota.  
Dated: August 30, 1983.

Bruce Hagen,  
President, North Dakota Public Service Commission.  
Dated: August 30, 1983.

Leo M. Reinbold,  
Commissioner, North Dakota Public Service Commission.  
Dated: August 30, 1983.

Dale Sandstrom,  
Commissioner, North Dakota Public Service Commission.  
Dated: August 30, 1983.

## **APPENDIX A**

1. The Federal Land Policy and Management Act, 43 U.S.C. 1701, *et seq.*, and implementing regulations.
2. The Mineral Leasing Act of 1920, 30 U.S.C. 181, *et seq.*, and implementing regulations including 30 CFR Part 211 *et seq.*
3. The National Environmental Policy Act of 1969, 42 U.S.C. 4321, *et seq.*, and implementing regulations including 40 CFR 1500 *et seq.*
4. The Endangered Species Act, 16 U.S.C. 1531 *et seq.*, and implementing regulations including 50 CFR Part 402.
5. The National Historic Preservation Act of 1966, 16 U.S.C. 470, *et seq.*, and implementing regulations, including 36 CFR Part 800.
6. The Clean Air Act, 42 U.S.C. 7401, *et seq.*, and implementing regulations.
7. The Federal Water Pollution Control Act, 33 U.S.C. 1251, *et seq.*, and implementing regulations.
8. The Resource Conservation and Recovery Act of 1976, 42 U.S.C. 6901 *et seq.*, and implementing regulations.
9. The Reservoir Salvage Act of 1960, amended by the Preservation of Historical and Archaeological Data Act of 1974, 16 U.S.C. 469, *et seq.*
10. Executive Order 11593, Cultural Resource Inventories on Federal Lands.
11. Executive Order 11988 (May 24, 1977), for flood plain protection. Executive Order 11990 (May 24, 1977), for wetlands protections.
12. The Mineral Leasing Act for Acquired Lands, 30 U.S.C. 351, *et seq.*, and implementing regulations.
13. The Stock Raising Homestead Act of 1916, 43 U.S.C. 291, *et seq.*
14. The Constitution of the United States.
15. The Constitution of the State of North Dakota, State law, and rules.

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

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