

FEDERAL REGISTER: 53 FR 17186 (May 16, 1988)

DEPARTMENT OF THE INTERIOR

AGENCY: Office of Surface Mining Reclamation and Enforcement (OSM)

30 CFR Part 756

Approval of the Abandoned Mine Land Reclamation Plan of the Navajo Nation
Under the Surface Mining Control and Reclamation Act of 1977 (SMCRA).

ACTION: Final rule.

SUMMARY: In 1982, the Navajo Nation (the Tribe) submitted its proposed Abandoned Mine Land Reclamation Plan entitled "Navajo Nation Reclamation Plan" (the Plan) to OSMRE under the Surface Mining Control and Reclamation Act of 1977 (SMCRA). OSMRE published notice of its receipt and requested public comments. The comment period closed on November 28, 1983, and no further action was taken at that time due to the lack of authorizing legislation under section 710 of SMCRA.

On July 11, 1987, legislation was enacted that authorized the Crow, Hopi, and Navajo Tribes to adopt abandoned mine land reclamation programs without prior approval of Tribal surface mining regulatory programs. OSMRE reopened the comment period for consideration of adequacy of the Navajo Tribe's Plan. After consideration of the comments received and revisions the Tribe made to the Plan, the Assistant Secretary for Land and Minerals Management of the Department of the Interior has determined that the Navajo Nation Reclamation Plan meets the requirements of SMCRA and the Secretary's regulations. Accordingly, the Assistant Secretary has approved the Navajo Plan.

This final rule is being made effective May 16, 1988, in order to expedite the granting of abandoned mine land reclamation funds to the Navajo Nation so that it can implement its AMLR Program and undertake Tribal reclamation projects to protect the public health and safety.

EFFECTIVE DATE: 51May 16, 1988.

ADDRESSES: Copies of the full text of the Navajo Plan are available for review during regular business hours at the following locations:

Office of Surface Mining Reclamation and Enforcement, Albuquerque Field Office, 625 Silver Avenue, SW., Suite 310, Albuquerque, NM 87102

Navajo Division of Resources, The Navajo Tribe, Division of Resources Building, Window Rock, AZ 86515

FOR FURTHER INFORMATION CONTACT: Robert H. Hagen, Director of the Albuquerque Field Office, at (505) 766-1486.

SUPPLEMENTARY INFORMATION:

- I. Background
- II. Proposed AMLR Plan
- III. Assistant Secretary's Findings
- IV. Public Comment
- V. Assistant Secretary's Decision
- VI. Procedural Matters

I. BACKGROUND

Title IV of SMCRA establishes an Abandoned Mine Land Reclamation (AMLR) program for the purpose of reclaiming land and water resources adversely affected by past mining. This program is funded by a reclamation fee imposed on coal production. Lands and waters eligible for reclamation under Title IV include those that were mined or were affected by mining and abandoned or inadequately reclaimed prior to August 3, 1977, and for which there is no continuing responsibility for reclamation under State, Federal, or Tribal laws.

Title IV provides for State or Tribal submittal to OSMRE of an AMLR program. The Secretary adopted regulations in 30 CFR Part 870 through 888 that implement Title IV of SMCRA. Under those regulations the Secretary is required to review reclamation plans and solicit and consider comments of State and Federal agencies and the public. Based on such comments and review, the Secretary will determine if a State or Tribe has the ability and necessary legislation to implement the provisions of Title IV. After making such a determination, the Secretary may approve a State or Tribal program and grant the State or Tribe exclusive authority to administer its approved program.

Ordinarily, a State or Tribe must have an approved surface mining regulatory program prior to submittal of an AMLR program to OSMRE as required by section 405 of SMCRA. However, on July 11, 1987, President Reagan signed legislation that authorized the Navajo, Hopi, and Crow Tribes to obtain Abandoned Mine Land Reclamation programs without prior approval of regulatory programs.

States and Indian Tribes are also allowed to request authority to conduct emergency response reclamation activities. Guidelines for AMLR Plan provisions concerning assumption of emergency response authority were published on September 29, 1982, *47 FR 42729* and provide the applicable criteria by which to judge the adequacy of the AMLR Plan provisions. Emergency reclamation activities are set forth in Section 410 of SMCRA. The Navajo Nation's AMLR Plan has requested emergency response authority.

II. PROPOSED AMLR PLAN

The Navajo Tribe submitted a Plan to OSMRE in June 1982. OSMRE conducted a preliminary review at that time, and the Navajo Tribe resubmitted a revised Plan in September 1983. OSMRE requested public comments on the revised draft Plan in the October 28, 1983, Federal Register, *48 FR 49870-49872*. After receipt of comments and the close of the comment period on November 28, 1983, OSMRE took no further action on the Plan pending authorizing legislation under section 710 of SMCRA.

On July 11, 1987, the President signed a supplemental appropriations Bill, Pub. L. 100-71, which authorized the Navajo, Hopi, and Crow Tribes to obtain AMLR programs without prior approval of surface mining regulatory programs as ordinarily required by section 405 of SMCRA. In response to that legislation, OSMRE notified the Navajo Tribe that it would reopen its review of the Tribe's Plan. OSMRE reviewed the Plan in September 1987 and provided the Tribe with suggestions for revising it to meet the requirements of SMCRA. The Tribe made a number of revisions to the Plan, and OSMRE reopened the public comment period in the December 4, 1987, Federal Register, *52 FR 46097-46098*. Public comments were received, and the comment period closed on January 4, 1988, without any requests for a hearing or meeting having been received by OSMRE by that date. The Navajo Tribe revised its Plan in accordance with OSMRE's suggestions.

All of the events described above are documented in the Title IV Administrative Record of the Navajo Tribe. That Administrative Record is available for public review at the Albuquerque, New Mexico, address of OSMRE listed above.

The proposed AMLR Plan would provide authority for the Navajo Nation to conduct a reclamation program on Navajo (Indian) lands as that term is defined in section 701(9) of SMCRA (see reference to "Indian lands" in 30 CFR 872.11(b)(3)). Indian lands occur within and outside traditional Reservation boundaries. Although there may be certain jurisdictional limitations to the Tribe's authority to undertake certain reclamation actions outside the Reservation, the Tribal AMLR Plan presents a variety of reclamation procedures and activities which would allow the Tribe to undertake its reclamation program without violating the jurisdictional rights of other parties.

III. ASSISTANT SECRETARY'S FINDINGS

The Assistant Secretary finds that the Navajo Tribe submitted a Plan for the reclamation of abandoned mine lands pursuant to the provisions of Pub. L. 100-71 and SMCRA. Based on a review of that submission, the Assistant Secretary also finds that:

1. Adequate provisions were made for public comment in the development of the Plan;
2. Views of other Federal agencies having an interest in the Plan were solicited and considered;

3. The Tribe has the legal authority, policies, and administrative structure necessary to carry out the proposal Plan;
4. The proposed Plan meets all the requirements of Subchapter R of 30 CFR Chapter VII regulations and of SMCRA;
5. The proposed Plan meets all the requirements of all applicable Tribal and Federal laws and regulations;

6. The Navajo AMLR Plan has requested authority to assume emergency response authority as set forth in Section 410 of SMCRA. Guidelines for AMLR Plan provisions concerning assumption of emergency response authority were published on September 29, 1982, *47 FR 42729* and provide the applicable criteria by which to judge the adequacy of the proposed Plan. Among the criteria are:

- A legal opinion from the chief legal officer that the designated agency has the authority under Tribal law to conduct the emergency program on Indian lands in accordance with section 410 of SMCRA.

- A description of the policies and procedures to be followed by the designated agency in conducting the reclamation program including:

- The purpose of the emergency reclamation program;
- The coordination of emergency reclamation work;
- Policies and procedures regarding land acquisition;
- Policies and procedures regarding emergency reclamation on private and public land;
- Policies and procedures regarding emergency project rights-of-entry.

- A description of the administrative and managerial structure to be used in conducting the emergency reclamation program including:

- The organization of the designated agency's emergency program;
- A description of the adequacy of staff numbers and technical skills to be committed to the emergency program;
- Administrative procedures for: (a) Investigating and reporting emergency complaints; (b) determining eligibility; (c) obtaining necessary consents or steps for nonconsensual entry; (d) project supervision; and (e) final project inspection;
- The purchasing and procurement systems to be used by the agency which will quickly respond to emergency situations;
- The accounting system to be used by the Tribe;
- The technical capability to design and supervise the emergency work.
- A general description of emergency reclamation activities to be conducted, including known or suspected geographical areas within the State, a map with locations, and a general description of problems occurring.
- A narrative description which supports the Tribe's position that the procedures, personnel, and other proposed aspects of its program give evidence of its abilities to promptly and effectively mitigate the full range of emergency conditions anticipated on Navajo "Indian" lands.

The Navajo Nation's proposed AMLR Plan, including amendments thereto, addresses all Plan requirements specified in 30 CFR 884.13. However, the Tribe's AMLR Plan does not separately and succinctly address the specific criteria

specified in the September 29, 1982, Federal Register notice concerning assumption of emergency response authority. See *47 FR 42729*. Due to this lack of information, the Assistant Secretary is deferring any action on the Navajo Nation's proposal to assume the emergency response authority until additional material can be submitted.

IV. PUBLIC COMMENT

The following comments on the Navajo Nation's Reclamation Plan were received by OSMRE and considered by the Assistant Secretary in making the determination that the Navajo Plan will be approved:

1. One commenter stated that the Notice of Reopening the public comment period does not reflect any limitations upon the Navajo Tribe's implementation of the proposed Plan on off-Reservation areas.

OSMRE responds that the Navajo Plan covers abandoned mine land reclamation on all Navajo Indian lands (see references to "Indian lands" in 30 CFR 872.11(b)(3), 888.11, and page 5 of the Plan). The term "Indian lands" is defined in section 701(9) in SMCRA as meaning "all lands, including mineral interests, within the exterior boundaries of any Federal Indian Reservation, notwithstanding the issuance of any patent, and including rights-of-way, and all lands including mineral interests held in trust for or supervised by an Indian Tribe." Accordingly, Indian AMLR programs are not limited to Reservation boundaries but extend to all Indian lands. The scope of the term "Indian lands" has been expressly discussed in the preamble to OSMRE's AMLR regulations. See *43 FR 49932, 49933, and 49939* (October 25, 1978), and *47 FR 28574, 28580, and 28592* (June 30, 1982).

2. Another commenter stated that OSMRE should specifically limit the applicability of the Tribe's Plan with respect to off-Reservation lands.

OSMRE responds that, as defined in the regulations, an Indian reclamation program encompasses reclamation that occurs on "Indian lands" as that term is defined in section 701(9) of SMCRA (see reference to "Indian lands" in 30 CFR 872.11(b)(3)). Indian lands occur within and outside traditional Reservation boundaries. Accordingly, OSMRE finds that there is no legal basis for further limiting the applicability of the Navajo Tribe's AMLR program.

3. One commenter stated that the Tribal Code and Plan authorizing the Tribe to acquire land by condemnation raises serious questions as to legal authority, asserting that SMCRA was not intended to expand Tribal power over fee landowners. The commenter continued by stating that OSMRE should reject the Code (section 407) and implementing Plan provisions as being beyond Tribal legal authority as applied to off-Reservation land. Moreover, the commenter stated that serious questions as to the legal authority of the Tribe to acquire lands by condemnation arise when fee lands within Reservation boundaries are involved. The commenter added that the Code appears to incorporate a general condemnation provision that exceeds the limited condemnation authority contemplated by section 407 of SMCRA. The commenter concluded that OSMRE should, therefore, reject any assertion by the Tribe of general condemnation authority under the guise of an AMLR Plan.

OSMRE recognizes that there are certain legal limitations to the Navajo Tribe's use of its condemnation authority. Approval of the Tribe's Plan does not create new jurisdictional rights nor should it be perceived as extending existing rights. Condemnation is only one option in abandoned mine land reclamation. If a Tribe lacks the jurisdictional authority to condemn property, then this option obviously would not be available; and it would have to devise other approaches to reclamation. However, Tribal reclamation programs do not attempt to regulate activities; rather, they are concerned with reclaiming lands that have been adversely affected by past mining practices. Reclamation, in this sense, should be viewed as a cooperative effort between landowners and the AMLR agency. The Tribe does not necessarily need the condemnation authority to carry out its approved Plan. If all landowners consented to the reclamation, there would be no need to condemn. If a problem arose concerning jurisdiction, the Tribe has other options, such as contracting with the Federal Government or a State or local agency, to perform the reclamation.

The commenter's concern about an unwarranted extension of jurisdictional rights is unfounded. An AMLR program has a variety of procedures that limit the ability of a State or Tribe to take precipitous action. For example, each State or Tribe undertakes an extensive public education, comment, and review process that includes discussions with all affected landowners prior to the submittal of a reclamation grant request to OSMRE (see 30 CFR 884.13(c)(7) and pages 23 and 24 of the Tribe's Plan). In addition, OSMRE thoroughly reviews all proposed reclamation projects included in State and Tribal grant requests for compliance with the provisions of SMCRA and an approved Plan. Moreover, OSMRE must

specifically approve any requests that involve land acquisition (see section 407(c) of SMCRA). All these procedures allow extensive public review of proposed actions and provide parties who may be opposed to any actions ample time to raise their concerns with the reclamation agency, then OSMRE, and if necessary, ultimately the courts. Accordingly, OSMRE believes that the rights of fee landholders inside and outside the boundaries of the Navajo Reservation are not threatened by the approval of the Tribal Plan and that ample procedures exist by which controversial issues will be adequately aired in public, and reviewed by OSMRE, before reclamation is begun. Therefore, OSMRE believes it is not necessary to change the Navajo Plan concerning this issue.

Concerning the Navajo Code provisions, OSMRE reviewed the Tribal condemnation provisions and found them to be consistent with the provisions of section 407(c) of SMCRA. No changes in the Tribal Plan are, therefore, required.

4. Another commenter stated that section 201(d) of the Code provides that the Tribal department administering the reclamation program "shall be and hereby is clothed with the sovereign immunity from suit enjoyed by the Navajo Nation." The commenter stated that, with limited exceptions, judicial review of Tribal action under the Code is not provided and that effective judicial review, comparable to the Administrative Procedure Act, 5 U.S.C. 701 et seq. (1982), is not available to persons aggrieved by Tribal action.

OSMRE believes that any person who might be aggrieved by Tribal action has the right to seek appropriate protective measures in a court of competent jurisdiction. The AMLR program, however, has a variety of procedures designed to internally resolve problems prior to seeking legal remedies. For example, the Tribal Plan requires extensive public review and scrutiny of proposed projects, including personal contact with local officials and all potentially affected landowners (Navajo AMLR Plan, pages 23-24). In addition, OSMRE reviews each grant request to ensure that the requirements of SMCRA and the implementing regulations are achieved. Finally, the Navajo Tribe is prevented from taking expeditious nonconsensual action (see Navajo AMLR Plan, pages 8-16). Accordingly, OSMRE believes that the Navajo Plan is consistent with the requirements of SMCRA and the Secretary's implementing regulations. OSMRE also believes that the Tribe has provided ample opportunity for public comment and review and that any landowners potentially aggrieved by Navajo reclamation have ample time to raise the jurisdictional issue in a court of competent jurisdiction prior to the actual commencement of reclamation.

5. One commenter asserted that the Tribe's AMLR program is not properly limited to reclamation of lands affected by coal mining. As such, the commenter believed that the Tribe's program exceeds the authority provided in SMCRA.

OSMRE responds that section 409 of SMCRA and 30 CFR Part 875 of the Secretary's regulations provide authority for State and Tribal reclamation programs to use AMLR funds to reclaim lands adversely affected by past noncoal mining activities. Accordingly, no change is required in the Plan (see 47 FR 28574, 28582, June 30, 1982).

6. Another commenter stated that the Notice of Reopening provides no information as to the scope of the proposed Tribal program to put interested persons on notice that Plan approval could affect off-Reservation lands. The commenter also stated that any proposal to approve the Tribe's assertion of authority outside the Reservation raises sensitive and complicated jurisdictional issues and should be the subject of separate proceedings in which the position of the Tribe and OSMRE are stated specifically to allow interested persons full notice and an opportunity to be heard.

OSMRE notes that approval of the Tribe's Plan would provide authority for the Tribe to conduct reclamation activities on Indian or Tribal lands as that term is defined in section 701(9) of SMCRA. Since 1978, OSMRE's regulations have consistently provided that Indian AMLR programs cover "Indian lands," not Indian Reservations (see 43 FR 49932, October 25, 1978, preamble discussion to Part 872 -- comment No. 4 and Part 888 -- comment No. 1; see also 47 FR 28574, June 30, 1982, preamble discussion to Section 872.11(b)(3) and Part 888). Accordingly, OSMRE believes that there has been adequate public notice, that the use of the term "Indian lands or Tribal lands" in the Navajo AMLR Plan is correct, and that no further modification of the Plan is necessary.

7. Another commenter believes that the Tribe's program appears to assert authority over non-Indian mineral interests underlying Tribal or possibly allotted surface ownership. The commenter stated that these split-estate matters should be addressed by OSMRE specifically and that fee lands, including all split-estates, should be excluded from the Tribe's program.

OSMRE stated above that the Tribe's Plan covers reclamation activities on "Indian lands." The definition of Indian lands in section 701(9) of SMCRA covers split-estates. The Tribe's ability or authority to conduct reclamation activities, however, does not create or extend its jurisdictional authority over non-Indian mineral interests or over other off-Reservation lands. The ability to contract and conduct reclamation efforts is not meant to imply new regulatory control over off-Reservation lands.

8. One commenter stated that the Settlement Agreement entered in August 1985 between the U.S. Department of the Interior, the State of New Mexico, and others, in *New Mexico v. U.S. Department of the Interior*, U.S.D.C. No. 84-3572 (D.D.C. 1985), provides that allotted lands outside the boundaries of an Indian Reservation are not considered by the Secretary of the Interior to be "Indian lands" as defined in section 701(9) of SMCRA. The commenter concluded that approval of the Tribe's Plan in its present form would contravene the Settlement Agreement, insofar as the Plan asserts Tribal jurisdiction over all lands, including allotments in the "checkerboard area" to the east and south of the Reservation.

OSMRE responds that in September 1984, the Secretary promulgated regulations establishing a Federal program for the regulation of surface coal mining and reclamation operations on Indian lands. The State of New Mexico challenged a provision in those regulations which provides for the Secretary's exclusive regulatory jurisdiction over surface mining operations on Indian lands. The Navajo Tribe intervened in the New Mexico action, requesting that the Secretary's regulations be upheld. The Tribe also filed a counterclaim against New Mexico seeking a declaratory judgment that certain lands in the State are Indian lands under SMCRA and that New Mexico has no regulatory jurisdiction over surface mining on them. The Secretary and New Mexico ultimately entered into a Settlement Agreement in which New Mexico agreed that the Secretary is the exclusive regulatory authority on Indian lands within the State. The Navajo's counterclaim, however, remained before the District Court. In November 1985, the U.S. District Court for the District of Columbia dismissed the Navajo's counterclaim. In February 1986, the Tribe appealed the decision of the District Court. On June 5, 1987, the U.S. Court of Appeals for the D.C. Circuit affirmed the District Court's dismissal of New Mexico's complaint but returned the Navajo's counterclaim to the District Court with instructions to transfer the case to the district court in New Mexico, which would have authority to decide the jurisdictional issues raised by the Tribe. See *New Mexico ex. rel. Energy and Minerals Department v. U.S. Department of the Interior*, No. 85-6165 (D.C. Cir. June 5, 1987).

By approving the Tribe's AMLR program, the Secretary provides the Navajo Tribe with the exclusive responsibility for reclamation on "Indian lands" consistent with the Settlement Agreement. OSMRE, however, realizes that there is on-going litigation to determine what encompasses the full scope of the term "Indian lands." OSMRE does not believe that such litigation should stop or curtail the Navajo Tribe's AMLR program. OSMRE's approval of the Navajo program covers Navajo "Indian lands" as that term is defined in section 701(9) of SMCRA. If the scope of this term is further defined by future litigation, OSMRE will make the necessary changes in the Navajo AMLR program.

9. Two commenters stated that the Tribal AMLR program contemplates the imposition of Tribal reclamation fees, separate and apart from the Federal reclamation fees described in *30 U.S.C. 1232(a)*, which are not authorized by SMCRA. The commenters concluded that any effort by the Tribe to impose its own reclamation fees exceeds the authority the Secretary is authorized to grant the Tribe under SMCRA.

OSMRE responds that section 402 of the Navajo Tribal Code deals specifically with the transfer of monies from the Abandoned Mine Land Fund administered by the Department of the Interior. Accordingly, the Navajo Plan does not impose a Tribal reclamation fee separate and apart from the Federal reclamation fee described in *30 U.S.C. 1232(a)* nor is it authorized to do so under SMCRA. OSMRE consulted the Navajo Tribe, and the Tribe agrees that the Plan does not authorize an AMLR fee. Accordingly, no change to the Plan is necessary.

10. Another commenter stated that the opinion of the Navajo Tribe Attorney General that appears in the Plan does not conform to the requirements of 30 CFR 884.13(b) and fails to demonstrate the Tribe's authority to conduct its program outside the boundaries of the Reservation. The commenter also stated that the opinion fails to demonstrate that the Tribe has the broad condemnation authority the Code asserts over non-Indian lands. In addition, the commenter noted that the opinion refers to the Navajo Coal Mining Commission as the Tribal agency that will administer the program, whereas the Code provides that a new department, called the Abandoned Mine Lands Reclamation Department, was created to administer the Tribal program. Accordingly, the commenter asserts that the legal opinion is not in conformance with OSMRE's regulations. The commenter stated that the Tribal Chairman's designation and certain administrative and management structures are outdated and should be revised.

OSMRE notes that, since 1982 when the Navajo Plan was first submitted to OSMRE, the Navajo Nation has undergone a number of changes. The Tribe submitted additional material during the comment period to update the Plan that OSMRE reviewed that is the subject of this approval. OSMRE believes the legal opinion meets the requirements of 30 CFR 884.13(b) insofar as it provides that the Tribe has the authority necessary to conduct its reclamation program in conformance with Title IV of SMCRA and the Secretary's implementing regulations. OSMRE recognizes that the Navajo Tribe may lack authority to use certain reclamation options on off-Reservation properties. However, the possible lack of authority to use certain reclamation options does not, and should not, invalidate the Tribe's ability to contract and carry out reclamation activities on such lands. With the consent of the landowners and mineral owners involved, the Tribe certainly has the authority to design, fund, and oversee all reclamation activities on any "Tribal lands." Accordingly, OSMRE believes that the legal opinion is sufficient and that the Tribe does have the authority and ability to conduct reclamation activities on Indian lands.

11. One commenter stated that the Tribe's proposed program appears to create overlapping jurisdictional problems with the State of New Mexico. The commenter stated that New Mexico administers a federally approved AMLR program and undertakes reclamation projects within the geographical area over which the Tribes seeks authority. The commenter believes that this conflict should be addressed specifically in a proper OSMRE notice or proposal so that the State and other interested persons can comment.

OSMRE finds that the State of New Mexico's approved AMLR program does not include "Indian lands." Accordingly, there is no overlap of responsibility between the two programs. Moreover, the coordination provisions of both the Navajo and New Mexico AMLR Plans require coordination of reclamation activities.

12. One commenter objected to provisions on page 30 of the Plan concerning certain Navajo procurement practices. The Navajo Tribe has agreed to delete paragraph No. III C. 2 on page 30 and Appendix 7 and to abide by all applicable Federal and Tribal laws, regulations, and requirements concerning the use of grant funds.

V. ASSISTANT SECRETARY'S DECISION

The Assistant Secretary for Land and Minerals Management, based on the above findings and review and consideration of public comments, is approving under the provisions of 30 CFR 884.14 the Navajo Nation's AMLR Plan as submitted in September 1983, and revised in February 1988. A new Part 756 is being added to 30 CFR Chapter VII, Subchapter E -- Indian Lands Program -- to implement this decision. This approval, however, does not encompass the emergency response authority set forth in section 410 of SMCRA. Action on the emergency response program is being deferred until further documentation, consistent with the findings above, is submitted.

VI. PROCEDURAL MATTERS

1. Executive Order 12291 and the Regulatory Flexibility Act

OSMRE has examined this final rulemaking under Executive Order 12291 and has determined that on November 23, 1987, the Office of Management and Budget granted OSMRE an exemption from sections 3, 4, 7, and 8 of Executive Order No. 12291 for actions directly related to approval or disapproval of State reclamation plans or amendments. Therefore, the action is exempt from preparation of a regulatory impact analysis and regulatory review by OMB.

This rulemaking was examined pursuant to the Regulatory Flexibility Act (*5 U.S.C. 601 et seq.*), and the Department of the Interior determined that the rule will not have significant economic effect on a substantial number of small entities. No burden will be imposed on entities operating in compliance with the Act.

2. Compliance with the National Environmental Policy Act

Furthermore, OSMRE determined that the approval of State and Tribal AMLR plans and amendments is categorically excluded from compliance with the National Environmental Policy Act by the Department of the Interior's Manual, 516 DM 6, Appendix 8, paragraph 8.4B(30).

3. Paperwork Reduction

This rule does not contain information collection requirements which require approval by the Office of Management

and Budget under *44 U.S.C. 3507*.

LIST OF SUBJECTS IN 30 CFR PART 756

Indian lands, Abandoned Mine Land Reclamation Program.

Dated: May 9, 1988.

James E. Cason, Acting Assistant Secretary, Land and Minerals Management.

Accordingly, Part 756 is added to 30 CFR Subchapter E -- Indian Lands Programs to read as follows:

PART 756 -- INDIAN TRIBE ABANDONED MINE LAND RECLAMATION PROGRAMS

Section

756.1 Scope.

756.13 Approval of the Navajo Nation's Abandoned Mine Land Plan.

Authority: *30 U.S.C. 1201* et seq.

SECTION 756.1 - SCOPE.

This part implements the provisions in Public Law 100-71 which authorize the Crow, Hopi, and Navajo Tribes to obtain the Secretary's approval of Abandoned Mine Land Reclamation programs without prior approval of surface mining regulatory programs as ordinarily required by section 405 of SMCRA.

SECTION 756.13 - APPROVAL OF THE NAVAJO NATION'S ABANDONED MINE LAND PLAN.

The Navajo Nation's Abandoned Mine Land Plan as submitted in June, 1982, resubmitted in September, 1983, and amended in February, 1988, is approved. Copies of the approved program are available at:

Office of Surface Mining Reclamation and Enforcement, Albuquerque Field Office, 625 Silver Avenue, SW., Suite 310, Albuquerque, NM 87102

Navajo Division of Resources, The Navajo Tribe, Division of Resources Building, Window Rock, AZ 86515

[FR Doc. 88-10719 Filed 5-13-88; 8:45 am]

BILLING CODE 4310-05-M

??? **FEDERAL REGISTER: 53 FR 16016 (May 4, 1988)**

DEPARTMENT OF THE INTERIOR

AGENCY: Office of Surface Mining Reclamation and Enforcement (OSM)

30 CFR Part 845

Surface Coal Mining and Reclamation Operations; Permanent Program Inspections and Enforcement Procedures; Civil Penalties

ACTION: Final rule.

SUMMARY: The Office of Surface Mining Reclamation and Enforcement (OSMRE) of the United States Department of the Interior (DOI) is amending its regulations to allow OSMRE to use money collected from the payment of Federal civil penalties levied under section 518 of the Surface Mining Control and Reclamation Act of 1977 (the Act) to reclaim lands that have been mined, abandoned, or left inadequately reclaimed, since the passage of the Act and therefore are ineligible for Title IV (Abandoned Mine land Reclamation) funding. This rule is necessary to implement a provision of the Omnibus Continuing Resolution for Fiscal Year 1988.

EFFECTIVE DATE: May 4, 1988.

FOR FURTHER INFORMATION CONTACT: Raymond E. Aufmuth, PG, Office of Surface Mining Reclamation and Enforcement, U.S. Department of the Interior, 1951 Constitution Avenue, NW., Washington, DC 20240; Telephone: 202-343-1514 (Commercial or FTS).

SUPPLEMENTARY INFORMATION:

- I. Background
- II. Discussion of Final Rule
- III. Procedural Matters

I. BACKGROUND

Congress, in the continuing resolution appropriating funds for fiscal year 1988 (Pub. L. 100-202), authorized the Secretary of the Interior to utilize any money collected pursuant to the payment of civil penalties under section 518 of the Act to reclaim lands adversely affected by coal mining practices after August 3, 1977. The continuing resolution provides: "Provided, that notwithstanding any other provision of law, the Secretary of the Interior, pursuant to regulations may utilize directly or through grants to the States in fiscal year 1988, moneys collected pursuant to the assessment of civil penalties under section 518 of the Office of Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1268) (SMCRA) to reclaim lands adversely affected by coal mining practices after August 3, 1977." This rule implements these provisions.

Under this direction, the Secretary is working with the Office of Management and Budget and the Department of the Treasury to set up an appropriate tracking system for funds used to finance reclamation of lands adversely affected by coal mining practices after August 3, 1977. These lands are ineligible for funding under the abandoned mine land program established in Title IV of SMCRA.

SMCRA requires reclamation bonds for all permitted surface coal mining operations. These bonds are intended to cover the cost of reclamation should the permitted entity not be able to complete the required reclamation. However, bonding was not required under the interim regulatory program. In addition, there are instances where "Post-Act" sites have not been fully reclaimed or were inadequately reclaimed. Under this rule, Federal civil penalties collected because of violations of the Act, may be used for reclamation of "Post-Act" sites.

This rule will afford the Secretary the option of accomplishing reclamation of Post-Act sites directly through OSMRE or through grants to the States where appropriate. The allocation of Federal civil penalty money for reclamation parallels a similar practice followed in several States that assign State-collected penalties for reclamation. In fiscal 1987 the total civil penalties collected were \$1,017,847.

Under this rule the selection and mechanism of funding will be at the discretion of the Director, OSMRE. Approved

projects will be conducted either directly by OSMRE or through grants to the States. Projects will be selected for funding on a priority basis and will employ in part the priorities from the Abandoned Mine Reclamation Fund. The highest priority will be emergency projects as that term is defined in 30 CFR 870.5. The next priority will be given to projects which would qualify as priority 1 and then priority 2 as these priorities are described in section 403 of the Act. If there are residual funds, they will be available for Federal bond forfeiture sites. The prioritization of sites using Congressionally described criteria from the Abandoned Mine Reclamation Program is a proven methodology for such disbursement and ensures that the limited funds are allocated to the sites which are most in need of reclamation.

II. DISCUSSION OF FINAL RULE

Taking into consideration the language of the continuing resolution for fiscal year 1988, it is clearly the intent of Congress to allow OSMRE to utilize civil penalty money for the purpose of reclamation of lands adversely affected by coal mining practices after August 3, 1977. Therefore, OSMRE has amended its regulations dealing with civil penalties at 30 CFR Part 845 by adding a new section, 30 CFR 845.21, to address "Use of the civil penalties for reclamation."

Paragraph 845.21(a) authorizes the Director to use money collected pursuant to civil penalties levied under Section 518 of the Act for reclamation of lands adversely affected by coal mining practices after August 3, 1977.

Paragraph 845.21(b) identifies the priorities which will be used to allocate the funds collected. Under Section 845.21(b)(1) top priority will be given to emergency projects as that term is defined in 30 CFR 870.5. This will be followed under Section 845.21(b)(2) by projects which would qualify as priority 1 and then under Section 845.21(b)(3), as priority 2, as these terms are defined in Section 403 of the Act. Although terminology used in the rule is derived from the Abandoned Mine Land Program, the moneys disbursed under Section 845.21 will be used only to reclaim lands adversely affected by coal mining practices after August 3, 1977.

Paragraph 845.21(b)(4) provides that after addressing the priorities set forth in Section 845.21(b)(1) through (b)(3), funds may be made available for reclamation of Federal bond forfeiture sites.

Paragraph 845.21(c) provides the Director some flexibility in the selection process to account for unforeseen circumstances and provides authority to the Director to allocate funds for any other project which constitutes a danger to the environment or to the public health and safety.

III. PROCEDURAL MATTERS

Federal Paperwork Reduction Act

This rule does not contain information collection requirements which require approval by the Office of Management and Budget under *44 U.S.C. 3407*.

Executive Order 12291 and Regulatory Flexibility Act

The DOI has determined that this document is not a major rule under the criteria of Executive Order 12291 (February 17, 1981) and certifies that it will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act, *5 U.S.C. 601* et seq. The rule does not distinguish between small and large entities. These determinations are based on the findings that the regulatory additions in the rule will not change costs to industry or to the Federal, State, or local governments. Furthermore, the rule produces no adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States enterprises to compete with foreign-based enterprises in domestic or export markets.

National Environmental Policy Act

OSMRE has prepared a final environmental assessment (EA), and has determined that the final rule will not significantly affect the quality of the human environment under section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), *42 U.S.C. 4332(2)(C)*. A finding of No Significant Impact has been approved for the final rule in accordance with OSMRE procedures under NEPA. The EA is on file in the OSMRE Administrative Record.

Administrative Procedure Act

This regulation is exempt from the public notice rulemaking requirements of the Administrative Procedure Act pursuant to *5 U.S.C. 553(a)(2)* and *553(b)(3)*. The regulation deals primarily with contracts and grants to benefit the

public. Additionally, the legislation deals solely with monies collected during fiscal year 1988 and therefore it is essential that OSMRE move as rapidly as possible to ensure that reclamation projects are selected and bid before the end of the fiscal year. Similarly, good cause exists to make this rule effective immediately under the authority of 5 U.S.C. 553(d). OSMRE must move rapidly to select and design projects to ensure that the fiscal year 1988 penalty monies are obligated within the fiscal year.

Author

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LIST OF SUBJECTS IN 30 CFR PART 845

Administrative practice procedure, Law enforcement, Penalties, Reporting and recordkeeping requirements, Surface mining, Underground mining.

Dated: March 4, 1988.

J. Steven Griles, Assistant Secretary for Land and Minerals Management.

Accordingly 30 CFR Part 845 is amended as set forth below.

PART 845 -- CIVIL PENALTIES

1. The authority citation for Part 845 is revised to read:

Authority: Pub. L. 95-87, 30 U.S.C. 1201 et seq., Pub. L. 100-34, and Pub. L. 100-202

2. Part 845 is amended by adding Section 845.21 as follows:

SECTION 845.21 USE OF CIVIL PENALTIES FOR RECLAMATION.

(a) The Director of OSMRE may utilize money collected by the United States during fiscal year 1988 pursuant to the assessment of civil penalties under section 518 of the Act for reclamation of lands adversely affected by coal mining practices after August 3, 1977.

(b) The Director may allocate funds at his discretion for reclamation projects on lands within any State or on Federal lands or Indian lands based on the following priorities:

- (1) Emergency projects as defined in Section 870.5 of this chapter;
- (2) Reclamation projects which qualify as priority 1 under section 403 of the Act;
- (3) Reclamation Projects which qualify as priority 2 under section 403 of the Act; and
- (4) Reclamation of Federal bond forfeiture sites.

(c) Notwithstanding paragraph (b) of this section, at his discretion, the Director may allocate funds for any other reclamation project which constitutes a danger to the environment or to the public health and safety.

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