



COALEX STATE INQUIRY REPORT - 208

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TOPIC: EXTENSION OF CONDITIONS ON FEDERAL COAL LEASE TO STATE'S PERMIT OF PRIVATELY-OWNED SURFACE (Includes COALEX REPORT - 154)

INQUIRY: An operator is mining federally-owned coal under privately-owned surface. The Wyoming regulatory authority wants to place the same conditions on the state mining permit that exist on the federal coal lease. Please locate any OSM or Bureau of Land Management (BLM) materials which discuss this issue.

SEARCH RESULTS: Research was conducted using the COALEX Library, other materials available in LEXIS and existing COALEX Reports. The Secretary, in the preamble to the 1983 Federal Lands Program Final Rule, stated the relationship between conditions added on the Federally-approved mining plan and the incorporation of these conditions into the State-issued permits.

48 FR 6912 (FEBRUARY 16, 1983). Final rule. Federal Lands Program.

"OSM has adopted, as proposed, revised sec. 740.13(c)(1), 'Permit terms and conditions,' which provides that any applicable requirements of other Federal laws and regulations, including the Mineral Leasing Act, must be reflected in the terms and conditions for permits."

...

"One commenter asked OSM to clarify whether it is the State's responsibility to incorporate the terms of the lease and other requirements of the MLA [Mineral Leasing Act of 1920] and other Federal laws in the SMCRA permit and, if so, who would enforce such terms and requirements. While States with cooperative agreements may independently review and approve permit applications on Federal lands, these regulations prohibit the commencement of operations that are subject to mining plan approval until the Secretary has approved such plan. In order to ensure compliance with non-SMCRA matters (e.g., MLA, NEPA, lease terms and stipulations, etc.) the Secretary may impose additional requirements for mining in his approval of the mining plan. OSM will rely on the States with cooperative agreements to assist in enforcing these additional requirements as part of the State's inspection and enforcement program. Each cooperative



agreement will detail how these responsibilities will be handled since the precise roles of OSM and the States will vary from State-to-State."

[Also see discussion of this rule, below.]

The Federal Register preambles and other relevant materials identified discuss Federal versus State responsibilities under SMCRA, the Mineral Leasing Act (MLA) and other Federal land management acts, and the responsibilities of other agencies, particularly BLM. Copies of the items listed below are attached.

EXISTING COALEX REPORTS

COALEX STATE INQUIRY REPORT No. 154, "State permitting on federal lands" (January, 1990).

This report discusses the state's right to issue permits for coal mining operations which were conducted on federal lands prior to the approval of the state SMCRA regulatory program. The Interior administrative decisions and the Federal Register preambles relevant to the issues here are listed below.

REGULATORY HISTORY

MARCH 13, 1979 (44 FR 14902). Permanent Program Final Preamble -- Final Rule.

a. Subchapter A, Part 700 -- General. Sec. 700.4 Responsibilities and 700.5 Definitions.
[Excerpts]

"Other commenters recommended a change in the definition [of Federal lands] to exempt private lands overlying federally owned coal rights. Exemption of privately owned surface was suggested in order to clarify Congressional intent that the private surface be controlled by the owner. Congress considered and provided protection for surface owners in Section 714 of the Act. An exemption for private surface would be a departure from the statutory definition. If private surface overlying Federal coal were exempted from the Federal lands definition then, arguably, the lands would fall under a State program and the State would serve as the regulatory authority over the extraction of Federal coal. This would be an unauthorized result, particularly, when under Section 714 of the Act the Federal Government would be leasing the coal under the Mineral Lands Leasing Act of 1920, as amended."

b. Chapter VII, Subchapter D. Part 740 -- General Requirements for Surface Coal Mining and Reclamation of Federal Lands.

This part provided general definitions and administrative responsibilities for surface coal mining and reclamation operations on Federal lands. "The major objective of the Subchapter is to ensure that coal exploration and surface coal mining and reclamation operations, involving Federal lands and Federal coal interests, comply with the spirit and intent of the Act."



Under Section 740.2 [Objectives], the Secretary discussed responsibilities under the Mineral Leasing Act, the Federal Coal Leasing Amendments Act of August 4, 1967 and SMCRA with regard to coal exploration.

c. Chapter VII, Subchapter D. Part 741 -- Permits

"Part 741 provides for application, revision, renewal and cancellation of permits to conduct surface coal mining operations on Federal lands. Its purpose is also to ensure that surface coal mining and reclamation operations on Federal lands are conducted only after the Department has determined that reclamation as required by the Act is feasible."

One of the proposed rules "specified that wherever surface coal mining operations involved both Federal and private lands, the operations on private lands must be conducted in accordance with the requirements of Part 741. The intent of this Paragraph is to afford protection of Federal lands from surface coal mining activities on private lands, where such operations involve both Federal and private ownerships." The alternative adopted as final rule section 741.11(b) [General Obligations] "would require, as a condition of departmental approval to begin or continue operations on Federal lands, operations on intermingled non-Federal lands to be conducted in a manner which will not preclude compliance with the performance standards in Subchapter K on Federal lands."

Under section 741.12 [Relation of Permit to Mining Plan], the Secretary analyzed the interdependent relationship of the mining permit and reclamation plan requirements of SMCRA and the operations reclamation plan provisions of the MLA: SMCRA prohibits the Secretary from delegating responsibility for approval or disapproval of operations and reclamation plans to the States. "Therefore, the Office must recognize and incorporate the mandates of the Mineral Leasing Act of 1920, as amended into the Federal lands program required by the Act. A mining permit cannot be issued without an approved operation and reclamation plan....a surface coal mining and reclamation permit required by Section 506 of the Act cannot be issued unless the Secretary has approved an operations and reclamation (mining and operations) plan required by the Mineral Leasing Act of 1920, as amended. Conversely, an approved operations and reclamation plan does not constitute authority to commence surface mining and reclamation operations."

[NOTE: This section was removed in the revisions of February 16, 1983. Portions of the sections were incorporated into section 740. See below.]

d. Chapter VII, Subchapter D. Part 745 -- State-Federal Cooperative Agreements.

"The objective of this Part is to provide for uniform application of environmental and reclamation standards to surface coal mining operations within a State through the exercise of regulatory authority by the State."

The basic purpose of a cooperative agreement is "to reduce duality of administration and enforcement."



In discussing a commenter's suggestion to delete portions of 745.13 [Authority Reserved by the Secretary], the Secretary stated that the provisions of 745.13(k) do not "ignore the right of a State to regulate its end use of private surface or preclude the imposition of more stringent State statutes. The provisions of this paragraph only apply to Federal lands. Where such interest involve only Federal minerals, end use of land surface must be in accord with State land use policies and procedures as required by the Federal Coal Leasing Amendments Act. Further, Section 505(a) and (b) of the Act provide for the application and enforcement of existing, more stringent States laws."

SEPTEMBER 28, 1979 (44 FR 56272). Proposed rule.

This notice, enclosed for background, proposed amendments to 701.11 and 741.11, concerning the schedule for operator compliance with permanent program performance standards on Federal lands.

DECEMBER 31, 1979 (44 FR 77440). Final rule.

This rule amended 701.11 and 741.11 by postponing the effective date for operator compliance with the permanent program on Federal lands until the date of approval of a State program.

JUNE 9, 1982 (47 FR 25092). Proposed rule. Federal Lands Program. [Included as part of Report No. 154.]

These amendments were proposed to more clearly delineate the roles of the Federal government and the States in regulating surface mining operations on Federal lands.

[See discussion of Final rule, below.]

FEBRUARY 16, 1983 (48 FR 6912). Final rule. Federal Lands Program. [Included as part of Report No. 154.]

These final rules provided States with a greater responsibility for administering the requirements of SMCRA on Federal lands and revised the process for review and approval of mining plans by the Secretary. The Secretary's approval of mining plans was required only where leased Federal coal was involved.

1. Applicability of State and Federal Programs on Federal Lands. Requirements of State programs approved by the Secretary are incorporated into the Federal lands program for each State. This ensures that the Federal lands provisions are applicable both on and off non-Federal lands within the State. [This is the explanation given for the reference to "uniform standards" in the March 13, 1979 preamble to Part 745 -- see above.]

2. Permit Application and Mining Plan Review and Approval. "OSM proposed to separate permit approval from mining plan approval by providing that States with cooperative agreements would independently review and approve SMCRA permits, while the Secretary would retain



responsibility for approval of mining plans as required under the Mineral Leasing Act and section 523(c) of SMCRA", as well as retaining other non-delegable responsibilities. Where there is leased Federal coal, the operator must file a resource recovery and protection plan (RRPP) within three years of leasing. BLM retained responsibility for reviewing the RRPP and providing its recommendation to OSM. OSM was responsible for preparing a decision document for the Secretary that recommended approval, conditional approval or disapproval of the mining plan. "The State could issue the SMCRA permit following completion of its review of the permit application, although actual commencement of mining would have to await Secretarial approval of the mining plan.... Where there are inconsistencies, the Secretary reserves the right to require the operator to comply with any additional conditions or requirements of the approved mining plan."

As a result of these revisions, Parts 741, 742, 743 and 744 were removed; portions of these Parts were incorporated into Part 740.

APRIL 1, 1983 (48 FR 13984). Final rule; corrections. Federal Lands Program.

Corrections to the February 16th rule.

IN RE: PERMANENT SURFACE MINING REGULATION LITIGATION, 21 ERC 1193, 14 ELR 20617 (D DC July 6, 1984), amended August 30, 1984.*

The court ruled that the February 16, 1983 regulations inappropriately limited the applicability of the Federal lands program by excluding lands containing unleased Federal coal beneath State or private surface. In addition, the court found that rendering a decision on the operation and reclamation plan portions of the permit application is the responsibility of the Secretary and may not be delegated to the States.

*Also see IN RE: PERMANENT SURFACE MINING REGULATION LITIGATION, 22 ERC 1557 (D C March 22, 1985) and NATIONAL WILDLIFE FEDERATION v HODEL, 839 F 2d 694 (DC Cir January 29, 1988).

MAY 31, 1989 (54 FR 23388). Proposed rule. Federal Lands Program.

OSM proposed to revise paragraph (d) of section 740.4 [Responsibilities] which described the responsibilities of BLM for exploration on Federal lands where BLM has regulatory jurisdiction pursuant to 43 CFR Group 3400.

In accordance with the District Court decision, section 740.11 [Applicability] would be revised "to provide that upon approval or promulgation of a regulatory program for a State, that program and 30 CFR Subchapter D shall apply to surface coal mining and reclamation operations taking place on any Federal lands... This means that where surface coal mining operations occur on lands where the surface, the minerals, or both, are federally owned, the Federal lands program will apply."



MARCH 13, 1990 (55 FR 9400). Final rule. Federal Lands Program.

OSM did not adopt the proposed revisions to 740.4(d). The revisions may be reconsidered in conjunction to revisions under consideration by BLM to its rules on the same subject.

The wording of the applicability section 740.11(d) was changed from the proposed text to make the paragraph "more explicit". OSM, in responding to commenters, reaffirmed that the Federal lands program at 30 CFR Part 740 "applies to unleased coal under non-Federal surface."

JULY 12, 1991 (56 FR 32002). BLM Proposed rule. 43 CFR Group 3400: Coal Management -- General; Coal Management Provisions and Limitations; Coal Exploration and Mining Operations, etc.

These proposed rules would revise provisions of the operations-related portions of the existing Federal Coal Management Program regulations relating to lease management, mining operations, etc. on leased Federal coal.

43 CFR Part 3480 -- Coal Exploration and Mining Operations. Subpart 3481 General Provisions.

These proposed rules state that BLM would be responsible for administering all exploration operations on unleased Federal lands and on leased Federal lands outside the area of an approved SMCRA permit. "Under SMCRA, the regulatory authority would retain the responsibility for exploration for non-Federal coal contained in an approved SMCRA permit area and assume all SMCRA responsibility for exploration for Federal coal within the area of an approved SMCRA permit."

WYOMING-FEDERAL COOPERATIVE AGREEMENT

46 FR 9065 (JANUARY 28, 1981). Final rule. Operations on Federal Lands Under the Permanent Program; State-Federal Cooperative Agreements; Wyoming. Final rule.

"Article III [Scope] provides that the laws, regulations, terms and conditions of the State program are applicable to Federal lands in Wyoming, except as otherwise stated in the agreement, the Act, 30 CFR 745.13 ('Authority reserved by the Secretary.') or other applicable laws."

...

"One commenter argued that the Department has incorrectly interpreted...its jurisdiction over Federal lands to include privately-owned surface overlying federally-owned coal. This commenter believed that this interpretation thwarts the Congressional intent that the States have the primary responsibility for regulation of surface coal mining. The Secretary has rejected this comment for two reasons. First, similar comments were received, considered and rejected during the development of the permanent regulatory program...See, 44 FR 14911, 14973, March 13, 1979. The Secretary is not aware of any action presently pending before any Federal court in which this interpretation of "Federal lands" is under challenge. Second, this interpretation of



Federal lands has in no way thwarted the Secretary from agreeing, pursuant to the cooperative agreement, to provide for State regulation of surface coal mining on Federal lands in the State."

51 FR 45082 (DECEMBER 16, 1986). State-Federal Cooperative Agreements; Wyoming. Final rule.

"Consistent with the July 6, 1984 district court decision (see above), this cooperative agreement delegated greater responsibility for regulating surface coal mining and reclamation operations of Federal lands to the State regulatory authority, with the Secretary retaining the 'non-delegable responsibilities under the Mineral Leasing Act.'

...

"Article III [Scope] was revised to clarify the proper jurisdiction for appeals of orders and decisions from their respective agencies: orders and decisions issued by the State 'shall be appealed as provided for by State law', those issued by OSM "shall be appealed to the Department's Office of Hearings and Appeals."

OSM DIRECTIVES

OSM DIRECTIVE: Subject No. REG-31, Transmittal No. 584, "Preparation of Mining Plan Decision Documents" (Issued October 24, 1989).

This directive establishes the procedures for preparing and processing the mining plan decision documents for surface coal mining operations on lands containing leased Federal coal.

According to the MLA the Secretary of Interior must approve, approve with conditions, or disapprove these mining plans.

Although BLM has responsibility for implementation of the MLA, OSM prepares the documentation for the Assistant Secretary, Land and Minerals Management who has responsibility for making the approval decision.

"Two key approvals are required to conduct surface coal mining operations on Federal leases. One is approval of the SMCRA permit application by the regulatory authority and the other is the Assistant Secretarial approval of the mining plan. Actions and documentation necessitated by mining plan approval are to reflect the distinction between SMCRA permitting and mining plan approval."

OSM DIRECTIVE: Subject No. REG-34, Transmittal No. 591, "Processing Applications for Federal Permits" (Issued January 9, 1990).

"This directive outlines the basic procedures for the review and processing of applications for new permits for surface coal mining operations where [OSM] is the regulatory authority."

...

"Where OSM issues a permit on Federal lands in a State with an approved regulatory program,



the [Federal permitting entity] shall apply the approved State program counterparts to the Federal regulations cited in this directive to reach decisions on permit applications."

OHA DECISIONS

NATURAL RESOURCES DEFENSE COUNCIL, INC. v OSM, WEST ELK COAL CO., INTERVENOR, 94 IBLA 269, IBLA 83-757 (IBSMA 81-83) (1986, amends 1985 decision). [Included from COALEX Report No. 154]

West Elk contended that the Board no longer had jurisdiction over the mine in question and that the "Federal permit upon which this case [was] premised [was] moot due to the cooperative agreement" between DOI and State of Colorado: at the time of the original permit issuance both a federal and a state permit were necessary, with the cooperative agreement in force, only a state permit was necessary to mine. The Board ruled that a "cooperative agreement does not vest the state with complete control over mining on Federal lands." The state is responsible for "approving or disapproving the mining permit, but the Secretary retains authority to approve or disapprove the operation and reclamation plan component of the application."

OLD BEN COAL CO. v OSM, 109 IBLA 362, IBLA 88-8 (June 23, 1989).

The Board ruled it was proper for OSM to condition approval of an underground mining permit on compliance with State regulations in force at the time (governing subsidence damage control).

ATTACHMENTS

- A. COALEX STATE INQUIRY REPORT No. 154, "State permitting on federal lands" (January, 1990).
- B. MARCH 13, 1979 (44 FR 14902). Permanent Program Final Preamble -- Final Rule.
 - a. Subchapter A, Part 700 -- General. Sec. 700.4 Responsibilities and 700.5 Definitions. [Excerpts]
 - b. Chapter VII, Subchapter D. Part 740 -- General Requirements for Surface Coal Mining and Reclamation of Federal Lands.
 - c. Chapter VII, Subchapter D. Part 741 -- Permits
 - d. Chapter VII, Subchapter D. Part 745 -- State-Federal Cooperative Agreements.
- C. SEPTEMBER 28, 1979 (44 FR 56272). Proposed rule.
- D. DECEMBER 31, 1979 (44 FR 77440). Final rule.
- E. APRIL 1, 1983 (48 FR 13984). Final rule; corrections. Federal Lands Program.
- F. MAY 31, 1989 (54 FR 23388). Proposed rule. Federal Lands Program.
- G. MARCH 13, 1990 (55 FR 9400). Final rule. Federal Lands Program.
- H. JULY 12, 1991 (56 FR 32002). BLM Proposed rule. 43 CFR Group 3400: Coal Management -- General; Coal Management Provisions and Limitations; Coal Exploration and Mining Operations, etc.
- I. IN RE: PERMANENT SURFACE MINING REGULATION LITIGATION, 21 ERC 1193, 14 ELR 20617 (D DC July 6, 1984), amended August 30, 1984.



OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT
U.S. Department of the Interior

- J. IN RE: PERMANENT SURFACE MINING REGULATION LITIGATION, 22 ERC 1557 (D C March 22, 1985).
- K. NATIONAL WILDLIFE FEDERATION v HODEL, 839 F 2d 694 (DC Cir January 29, 1988).
- L. 46 FR 9065 (January 28, 1981). Final rule. Operations on Federal Lands Under the Permanent Program; State-Federal Cooperative Agreements; Wyoming. Final rule.
- M. 51 FR 45082 (DECEMBER 16, 1986). State-Federal Cooperative Agreements; Wyoming. Final rule.
- N. OSM DIRECTIVE: Subject No. REG-31, Transmittal No. 584, "Preparation of Mining Plan Decision Documents" (Issued October 24, 1989).
- O. OSM DIRECTIVE: Subject No. REG-34, Transmittal No. 591, "Processing Applications for Federal Permits" (Issued January 9, 1990).
- P. OLD BEN COAL CO. v OSM, 109 IBLA 362, IBLA 88-8 (June 23, 1989).