

FEDERAL REGISTER: 54 FR 22182 (May 22, 1989)

DEPARTMENT OF INTERIOR

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

25 CFR Parts 200 and [30 CFR Part] 750

Surface Coal Mining and Reclamation Operations; Federal Program for Indian Lands

ACTION: Final rule.

SUMMARY: The Office of Surface Mining Reclamation and Enforcement (OSMRE) and the Bureau of Indian Affairs (BIA) of the United States Department of the Interior (DOI) are adopting a final rule clarifying and revising the regulatory and leasing requirements for surface coal mining and reclamation operations on Indian lands. Those changes respond to settlement agreements reached in United States District Court for the District of Columbia concerning OSMRE's Federal program for Indian lands. The rule establishes the Secretary of the Interior (the Secretary) as the exclusive regulatory authority for surface coal mining operations on Indian lands, and clarifies the jurisdictional status under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act) of Indian allotments and tribal fee lands located outside the boundaries of Federal Indian reservations. The final rule also deletes the permit application information requirement concerning the American Indian Religious Freedom Act and clarifies and recodifies the procedures for incorporating the requirements of SMCRA, including tribe-requested terms and conditions, into existing and new leases for coal on Indian lands.

EFFECTIVE DATE: June 21, 1989.

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SUPPLEMENTARY INFORMATION:

- I. Background
- II. Discussion of Final Rule and Responses to Public Comments on Proposed Rule
- III. Procedural Matters

I. BACKGROUND

The Surface Mining Control and Reclamation Act of 1977, Pub. L. 95-87, *30 U.S.C. 1201* et seq., provides statutory authority for the development of regulations for surface coal mining operations. Section 710(d) requires compliance "[o]n and after thirty months from the enactment of this Act," with requirements at least as stringent as those imposed by sections 507, 508, 509, 510, 515, 516, 517, and 519 of SMCRA, for all surface coal mining operations on Indian lands. It also directs the Secretary of the Interior to incorporate the requirements of such provisions in all existing and new leases issued for coal on Indian lands. Section 710(e) further requires the Secretary to include and enforce in all post-SMCRA leases of coal on Indian lands, such terms and conditions as may be requested by the Indian tribe in such leases.

On September 28, 1984, the Secretary issued a final rule implementing the requirements of sections 710(d) and 710(e) of SMCRA (*49 FR 38462*). A new subchapter, Subchapter E -- Indian Lands Program, was added to 30 CFR Chapter VII and included Part 750 -- Requirements For Surface Coal Mining And Reclamation Operations On Indian Lands, and Part 755 -- Tribal-Federal Intergovernmental Agreements.

The final Indian lands rules were subsequently challenged by the State of New Mexico (*New Mexico v. DOI*, Civil No. 84-3572 (D.D.C.)), (hereafter, "New Mexico") and the National Coal Association/American Mining Congress (NCA/AMC) (*NCA v. DOI*, Civil No. 84-3586 (D.D.C.)), (hereafter, "NCA/AMC"). Both challenges were settled in U.S. District Court in August 1985 under separate agreements in which OSMRE agreed to undertake certain rulemaking actions concerning the Federal program for Indian lands.

On August 21, 1987, OSMRE published a notice in the Federal Register suspending the final rule at 30 CFR 750.20(a) pursuant to the NCA/AMC settlement agreement (*52 FR 31621*).

On February 10, 1988, OSMRE published a proposed rule to clarify and amend the preamble and regulations for the Indian lands program in accordance with the terms of the New Mexico and NCA/AMC agreements (53 FR 3992). The notice announced a 60-day comment period ending on April 20, 1988, and public hearings to be held upon request in Washington, DC and Denver, Colorado. A public hearing was requested and held in Denver on April 13, 1988, during which OSMRE received requests for an extension of the public comment period. The comment period on the proposed rule was reopened until May 12, 1988, in response to the requests received at the public hearing. The notice reopening the public comment period was published in the Federal Register on April 27, 1988 (53 FR 15064).

II. DISCUSSION OF FINAL RULE AND RESPONSE TO PUBLIC COMMENTS ON PROPOSED RULE

During the comment period, OSMRE received comments from three Indian tribes, an energy resource tribal organization, a national coal industry trade organization, and a coal company. OSMRE has reviewed each comment carefully and has considered the commenters' suggestions and remarks in preparing the final rule.

Many of the comments received were general in nature and others went beyond the scope of the proposed rulemaking. These general comments and concerns are addressed in the section that follows. Comments of a more specific nature on the proposed rule are discussed in the section-by-section analysis portion of the preamble.

A. GENERAL COMMENTS

OSMRE published the proposed rule pursuant to the provisions of the NCA/AMC and New Mexico settlement agreements. One commenter expressed support for the rules as proposed and urged OSMRE to move forward expeditiously with the final rule.

Several commenters contended that the Secretary failed to consult with the Indian tribes prior to entering into the settlement agreements in New Mexico and NCA/AMC and variously maintained that the agreements and the proposed regulations are violative of Federal law including SMCRA, Federal policy promoting tribal self-government, Federal fiduciary and trust responsibilities, tribal sovereignty, and the tribes' right to due process. One commenter recommended that, if necessary, OSMRE should move to vacate or modify the agreements so that they comport with Federal law. Another commenter opposed the proposed regulations as an effort to circumvent tribal aspirations to regulate mining activities on their lands and recommended renewed efforts by the Secretary to develop enabling legislation, pursuant to section 710 of SMCRA, authorizing tribal assumption of primacy. This commenter further recommended that OSMRE meet with other DOI agencies to examine, as a whole, legislation and Congressional intent regarding tribal sovereignty and self-determination. Another commenter contended that promulgation of the final rule would only result in further litigation and recommended alternatively that OSMRE meet with the affected tribes, companies, and States to discuss, and attempt to resolve, the issues of concern. One tribal commenter posed a series of questions regarding OSMRE's consultations with the tribe and industry, and within DOI, during settlement negotiations and the rulemaking process.

OSMRE considers those comments which address the propriety of the manner in which the Secretary entered the settlement agreements, or the substance of the settlement agreements, irrelevant to this rulemaking, in that they do not specifically discuss the merits of the proposal itself. Similarly, comments which address efforts to develop legislation pursuant to section 710 are beyond the scope of this rulemaking. This rulemaking is consistent with SMCRA and other applicable Federal law and does not affect existing Federal law or policy regarding tribal self-government, Federal fiduciary and trust responsibilities, tribal sovereignty, and the tribes' right to due process. The commenter's belief that promulgation of this rule might result in litigation does not address the merits of the rulemaking and is not an appropriate factor to be considered in development of the final rule.

Two commenters raised issues concerning the jurisdictional status of the Crow Ceded Area in Montana and asserted their views regarding tribal authority to regulate on tribal lands. One of the commenters expressed opposition to OSMRE's settlement agreement with the State of Montana and Westmoreland Resources, Inc., regarding regulation of surface coal mining on the Crow Ceded Area.

As stated herein, OSMRE is the exclusive regulatory authority on Indian lands under SMCRA. Review of the complex issues surrounding the jurisdictional status of the Crow Ceded Area and the settlement agreement referenced by the

commenter are more properly dealt with under the terms of the settlement agreement and Memorandum of Understanding.

Another commenter posed a question regarding the future of Title V funding for the tribes, with or without adoption of the proposed regulations.

OSMRE considers this comment beyond the scope of this rulemaking.

B. CLARIFICATION AND COMMENTS

CLARIFICATION OF REGULATORY AUTHORITY ON INDIAN LANDS

The rule at 30 CFR 750.6(a) designates OSMRE as the regulatory authority on Indian lands. Pursuant to the New Mexico and NCA/AMC settlements, OSMRE published a proposed clarification of this rule stating that OSMRE is, and will remain, the sole regulatory authority of surface coal mining operations on Indian lands in Arizona and New Mexico until legislation is enacted authorizing Indian tribes to assume regulatory primacy and the tribes elect to do so.

Three commenters objected to the proposed clarification as inconsistent with the Indian tribes' inherent sovereign power to regulate activities on lands under their jurisdiction, citing Federal Indian law, Federal policy promoting tribal self-government, and various court decisions to support their position. Two of the commenters also cited section 710(h) of SMCRA (*30 U.S.C. section 1300(h)*), wherein it states that "nothing in this Act shall change the existing jurisdictional status of Indian Lands," as confirmation of Congressional intent to preserve tribal governmental authority to regulate surface mining activities on tribal lands.

OSMRE disagrees in part. Pending Congressional enactment of additional legislation pursuant to section 710(a) of SMCRA, OSMRE interprets SMCRA to provide that the Indian tribes are not authorized by SMCRA to act as the regulatory authority for surface coal mining on Indian lands concerning matters which are regulated under SMCRA. This rulemaking does not discuss or affect the extent to which the Indian tribes may have residual or inherent authority to regulate any aspect or impacts of surface coal mining operations. Whether such authority exists is beyond the scope of this rulemaking. A more detailed discussion of the Secretary's regulatory authority on Indian lands can be found in the preamble to the September 28, 1984, final Indian lands rule (*49 FR 38462 et seq.*).

OSMRE also rejects the commenters' interpretation of section 710(h) of SMCRA. Section 710(a) mandates the enactment of enabling legislation as a prerequisite to tribal assumption of full regulatory authority under the Act. OSMRE does not interpret section 710(h) as impairing the Secretary's authority to act as regulatory authority for surface coal mining operations on Indian lands and to implement the requirements of sections 710 (c), (d), (e), and (f).

One commenter objected to the proposal on the grounds that it would preclude OSMRE from delegating SMCRA responsibilities to Indian tribes until and unless section 710 legislation is adopted, and suggested that the tribes could assume concurrent regulatory jurisdiction with OSMRE without enactment of such legislation. Another commenter suggested that the Indian tribes could regulate surface coal mining activities on their lands through contractual arrangements with the Secretary.

OSMRE disagrees that section 710 legislation is unnecessary for tribal assumption of surface mining regulatory duties, for the reasons stated earlier in this preamble that section 710(a) specifically requires the enactment of enabling legislation for the assumption of tribal regulatory authority under SMCRA concerning surface coal mining operations on Indian lands. Furthermore, section 710 does not authorize delegation of the Secretary's regulatory authority under SMCRA concerning Indian lands. OSMRE notes that this position is supported by the fact that Congress found it necessary to enact specific legislation authorizing the tribes to assume Title IV functions under SMCRA. (Pub. L. 100-71, *30 U.S.C. 1235*, as amended.) Because of the wide range of regulatory responsibilities under Title V, it is reasonable to assume that Congress would find it even more necessary to enact specific legislation authorizing the tribes to assume regulatory functions under Title V of SMCRA. This rulemaking does not address the question of what OSMRE might do if other appropriate legislation were to authorize such delegation, in whole or in part. OSMRE therefore does not consider this rulemaking action the proper forum for discussing the plausibility and merits of the potential regulatory arrangements posed by the commenters.

One of the commenters objected to the proposed clarification as discriminatory under the Fifth Amendment, claiming that the designation of OSMRE as the sole regulatory authority only in the States of Arizona and New Mexico intentionally targeted specific Indian tribes for adverse treatment. This commenter also questioned the origin of, and basis for, the proposal.

OSMRE disagrees that this action is discriminatory in intent or in effect. The clarification is intended to resolve any ambiguity regarding surface mining regulatory jurisdiction on Indian lands in the two States where this question has been specifically at issue in the New Mexico and NCA/AMC challenges, namely Arizona and New Mexico. OSMRE does acknowledge, however, that the clarification could be misinterpreted by the public as confining the agency's regulatory jurisdiction on Indian lands exclusively to those two States and hereby further clarifies that OSMRE's exclusive regulatory authority extends to all surface coal mining operations, or portions thereof, located on Indian lands as defined in section 701 of SMCRA. OSMRE's regulatory jurisdiction on Indian lands is based on and authorized by section 710 of SMCRA.

One commenter opposed the proposed clarification as incongruent with tribal and agency efforts to develop tribal capabilities to regulate surface coal mining operations on their lands, citing OSMRE's own findings regarding the partial regulatory abilities of two of the coal-producing tribes as evidence of the progress and success of such efforts. (It should be noted that the findings cited by the commenter are contained in an OSMRE report entitled Study On Tribal Capability To Assume Regulatory Primacy which was released in final form in February 1988. The report examined and evaluated the capabilities of the three coal-producing tribes [Crow, Hopi, and Navajo] to assume potential or hypothetical surface coal mining regulatory duties on Indian lands, in order to determine the success and future direction of Title V funding cooperative agreements with the three tribes.) This commenter further contended that the proposal was neither required by law, nor compatible with the Administration's Indian policy. Another commenter maintained that OSMRE had overlooked the intent of legislation such as the Indian Self-Determination and Education Assistance Act of 1975, 25 *U.S.C. 450* et seq., in developing agency regulations and policy, and that the Secretary had violated the self-determination policy by negotiating and entering into settlement agreements "that affect the Tribe's vital interests on surface mining."

OSMRE disagrees with these comments. Regardless of the tribes' abilities to regulate surface coal mining activities on their lands, and regardless of previous or ongoing efforts to develop those abilities, OSMRE is and will continue to be the sole regulatory authority on Indian lands pending enactment of section 710 legislation and tribal assumption of primacy. Section 710 requires the Secretary to ensure compliance with SMCRA on Indian lands. Consistent with this mandate, the clarification emphasizes that OSMRE is the sole designated regulatory authority on Indian lands. OSMRE recognizes that greater tribal self-determination is an important policy goal of the Department and this Administration consistent with the provisions of the Indian Self-Determination and Education Assistance Act, as amended. However, the attainment of that goal must be compatible with the existing statutory requirements governing mineral development on Indian lands, including the Secretary's obligation under section 710 of SMCRA to regulate surface coal mining operations on such lands. OSMRE notes that the Indian Self-Determination and Education Assistance Act was recently amended by the Indian Self-Determination and Education Assistance Act Amendments of 1988, Pub. L. 100-472, but considers the implementation and interpretation of that legislation outside the scope of this rulemaking.

One commenter opposed the designation of OSMRE as the sole regulatory authority on Indian lands on the grounds that it would exclude the tribes from the regulatory process and could deprive them of the ability to impose revenue-generating taxes on surface coal mining activities conducted on reservation lands.

OSMRE disagrees with this comment. As the regulatory authority on Indian lands, OSMRE is required by its own regulations at 30 CFR Part 750 to include the affected Indian tribes in the permitting and inspection and enforcement processes. OSMRE must consult with the affected tribe regarding special requirements relating to the protection of non-coal resources of the area affected by surface coal mining and reclamation operations, and assure operator compliance with such special requirements, pursuant to 30 CFR 750.6. The regulations at 30 CFR 750.18 provide for tribal participation in the inspection and enforcement process on Indian lands. Clarifying that OSMRE is the SMCRA regulatory authority on Indian lands in no way affects the tribes' authority to levy taxes on coal mining operations located on lands under their jurisdiction.

CLARIFICATION OF JURISDICTIONAL STATUS OF ALLOTTED LANDS

The February 10, 1988, proposed rulemaking included a clarification regarding the jurisdictional status of individual Indian allotments located outside the boundaries of Federal Indian reservations. The clarification was published pursuant to the New Mexico and NCA/AMC settlement agreements to amend a misstatement contained in the September 28, 1984, preamble to 30 CFR Part 750 wherein the applicability of the Federal program for Indian lands was described as including "all lands within the exterior boundaries of Indian reservations, allotted lands, and all lands where either the surface or minerals are held in trust for or supervised by an Indian tribe or individual Indians" (emphasis added) (49 FR 38463).

As explained in the preamble to the February 10, 1988, proposed rule, the inclusion of lands outside the reservation and not held in trust for or supervised by an Indian tribe was unintentional and was subsequently recognized by OSMRE to exceed the scope of the statutory definition of "Indian lands" in section 701(9) of SMCRA. Thus, OSMRE wishes to clarify that for purposes of surface coal mining regulatory jurisdiction, off-reservation allotted lands are included in the SMCRA definition of Indian lands only if an interest in the surface or mineral estate is held in trust for or supervised by an Indian tribe.

Two commenters maintained that OSMRE should await the outcome of pending litigation involving jurisdictional issues on Indian lands before publishing a final clarification regarding surface coal mining regulatory jurisdiction on trust allotments. One of the commenters specifically cited two cases (*Energy and Minerals Dept. v. U.S. Dept. of the Interior*, 820 F.2d 441 (D.C. Cir. 1987) (hereafter, "Energy and Minerals") which was remanded in part to the District Court for the District of New Mexico; and *Pittsburgh & Midway Coal Mining Co. v. OSMRE and Navajo Tribe*, IBLA No. 87-577, (hereafter, "Pittsburgh & Midway", which is fully briefed and awaiting a decision by the Interior Board of Land Appeals), and contended that "the issue of whether any allotments held in trust for either tribes or individual Indians can be excluded from 'Indian lands' is squarely at issue" in those two cases.

OSMRE disagrees that the final clarification should be indefinitely delayed pending the issuance of final administrative or court decisions in the referenced case. The Energy and Minerals case concerns a reservation boundary dispute, and does not involve interpretation of SMCRA. The clarification is fully consistent with the position taken by OSMRE in the Pittsburgh & Midway case as to what constitutes Indian lands for purposes of surface coal mining regulation, and is also consistent with the statutory definition of "Indian lands" at section 701(9) of SMCRA. Furthermore, the clarification is necessary to resolve any remaining ambiguity concerning the applicability of the Federal program for Indian lands to individual Indian allotments that may have resulted from the inaccurate statement contained in the 1984 preamble to 30 CFR Part 750. OSMRE believes that it is more appropriate that this jurisdictional issue be addressed by rulemaking, which provides opportunity for widespread public participation and the fullest practical discussion of issues, rather than by quasi-judicial proceedings in which only parties and intervenors have standing and which apply only to the lands and facts at issue in the proceeding. This rulemaking is intended in part to provide guidance to IBLA concerning the application and interpretation of the SMCRA definition of Indian lands.

Two commenters opposed the clarification, alleging that, if adopted, the clarification would unlawfully allow State regulation on Indian trust allotments. One of the commenters cited section 710(h) of SMCRA, which states "[t]hat nothing in this Act shall change the existing jurisdictional status of Indian Lands," as clear evidence of Congressional intent to preclude State control of Indians and Indian lands. The commenter further cited the decision rendered in *Montana v. Clark* (749 F.2d 740 (D.C. Cir. 1984), cert. den. 474 U.S. 919 (1985)), (hereafter, "Montana") as evidence that trust allotments must be considered as Indian lands under SMCRA. Montana involved a challenge to OSMRE's regulations at 30 CFR 872.11(b)(3), which implement the provisions of section 402(g) of SMCRA concerning the allocation of abandoned mine land monies collected in States and Indian reservations.

The commenter maintained that the Montana court, in upholding the substitution of the term "Indian lands" for "Indian reservation" in the challenged regulation, equated the term "Indian lands" with all lands in which Indians have an interest. Thus, the commenter reasoned that off-reservation trust allotments plainly qualify as Indian lands.

OSMRE disagrees that the clarification would unlawfully allow State regulation of surface coal mining operations on Indian allotments. Section 710 applies to "Indian lands," and given the definition of Indian lands at section 701(9), is applicable to lands owned by or held in trust for individual Indians only if an interest in those lands is also held in trust for or supervised by an Indian tribe. SMCRA does not preclude State regulation of surface coal mining operations located on

off-reservation individual trust allotments if those allotments are not held in trust for or supervised by a tribe, because such allotments would not be considered Indian lands under the Act.

OSMRE disagrees with the commenter's interpretation of the Montana decision and views it as a misconstrued reading of the court's holding. The commenter claims that the court, in reaching its decision, equated the term "Indian lands" with the phrase "all lands in which Indians have an interest." This is not correct. In examining the legislative history of SMCRA, the court found "overwhelming evidence" of Congressional intent to temporarily "postpone determining the locus of regulatory authority over all lands in which Indians have an interest." *Montana v. Clark, supra, 749 F.2d at 752* (emphasis added). The court explicitly recognized that an exhaustive treatment of SMCRA jurisdiction for the variety of off-reservation land ownership patterns involving Indian interests was intentionally set aside by Congress for future consideration. The court did not address the issue of whether off-reservation trust allotments are Indian lands for purposes of SMCRA regulation.

One commenter maintained that all lands allotted to members of a specified tribe must be considered "Indian lands" pursuant to SMCRA for several additional reasons. The commenter gave incomplete or incorrect citations to State statutory provisions and cited several court cases for the proposition that both New Mexico and Arizona have expressly disclaimed all jurisdiction over such trust lands. The commenter further maintained that "as a purely factual matter," all such allotments are and have been supervised by the tribe, and that the tribe is acquiring and will continue to acquire interests in the allotments under the amended Indian Land Consolidation Act, 25 U.S.C. 2201 et seq. Finally, the commenter stated that thousands of such allotments are within reservation boundaries and/or are categorized by BIA as "reservation allotments."

OSMRE considers the comment regarding the States' complete renunciation of jurisdiction over all trust allotments as unsupported and irrelevant to the merits of this rulemaking. None of the materials which were cited with sufficient specificity that they could be located, supported the cited proposition. All of the referenced State cases concerned reservation lands, which are included in the SMCRA definition of Indian lands. Therefore, none of these cases support the comment insofar as it refers to lands not included in the SMCRA definition. Even if such renunciation by a State had taken place, other procedures for dealing with any such hypothetical situation are set forth in 30 CFR, including parts 732, 733, and 736. Renunciation per se could not serve as a basis for treating such lands as Indian lands.

OSMRE also has no evidence to support the commenter's assertion that all individual Indian allotments are and have been supervised by the tribe, nor has the commenter provided any information supporting this statement. However, OSMRE recognizes that tribal supervision of allotments may be shown to exist in some cases, and the clarification is consistent with that premise. The determination of tribal supervision over off-reservation lands will be made on a case-by-case basis.

Finally, the commenter's claim that many allotments are within reservation boundaries and/or categorized as "reservation allotments" is vague and unclear. OSMRE has consistently interpreted and continues to interpret SMCRA section 701(9) to provide that any lands located within the recognized boundaries of a Federal Indian reservation are Indian lands under SMCRA. The commenter provides no information as to the number, extent, or geographic location of "reservation allotments" which are located outside the recognized boundaries of Federal Indian reservations, nor is the term "reservation allotments" defined or described. Thus, any attempt by OSMRE to determine the validity or relevance of this comment would be purely speculative.

One commenter objected to the clarification on the grounds that it "suggests that any mineral interests underlying tribal trust surface ownership would be subject to tribal surface regulation," and that it does not explain the meaning of the phrase "supervised by" [an Indian tribe] as that term is used in SMCRA and the implementing regulations. The commenter recommended that OSMRE limit the definition of "Indian lands" to "recognized reservation lands and those lands held in trust for a tribe by the United States that do not overlie non-Indian ownership of minerals," and exclude any fee lands, including split estates. The commenter maintained that, absent express Federal delegation, Indian tribes lack inherent authority to regulate activities outside reservation boundaries, including the assertion of SMCRA regulatory jurisdiction over off-reservation fee lands. The commenter apprised OSMRE of pending litigation challenging tribal jurisdiction for taxation purposes in off-reservation areas, and suggested that OSMRE consider the consequences of the clarification in light of a Bureau of Land Management (BLM) land exchange proposal designed to consolidate tribal trust lands in New Mexico. The commenter contended that defining "Indian lands" so as to subject private fee minerals to eventual Indian regulatory control might constitute a "taking without compensation." Finally, as a matter of information,

the commenter cited pending litigation involving tribal claims that certain lands located outside the tribe's recognized reservation boundaries are part of the reservation proper (*Blatchford v. Sullivan*, Tenth Circuit Court of Appeals Case No. 87-1547), (hereafter, "Blatchford").

OSMRE rejects the commenter's proposed definition of "Indian lands" as overly restrictive and inconsistent with SMCRA. With respect to off-reservation areas, the statutory definition at section 701(9) of SMCRA includes "all lands including mineral interests held in trust for or supervised by an Indian tribe." It is OSMRE's position that the SMCRA definition encompasses not only the unsevered tribal trust estates included in the commenter's proposed definition, but also severed tribal trust lands, and lands supervised by a tribe.

OSMRE regards the comments concerning the ongoing legal challenges to tribal regulatory and taxation powers outside reservation boundaries, and concerning BLM's land exchange proposal, as irrelevant. This rulemaking does not encompass such issues or proposals, but merely seeks to clarify the geographic extent of OSMRE's regulatory jurisdiction under SMCRA concerning Indian lands. This clarification provides that off-reservation allotments are included in the SMCRA definition of Indian lands only if an interest in the surface or mineral estate is held in trust for or supervised by an Indian tribe. The Blatchford case cited by the commenter involves the issue of whether a particular area is part of the Navajo Reservation. The resolution of that case would not affect this rulemaking since the case has nothing to do with allotments.

OSMRE regards the comments concerning tribal surface regulation and possible compensable takings if the definition were applied by a hypothetical tribal regulatory authority at some unspecified future time, to be irrelevant to this rulemaking. The purpose of defining Indian lands is to clarify how this term will be applied by OSMRE as the sole regulatory authority under SMCRA. OSMRE cannot speculate as to when or under what specific legislative language Indian tribes may eventually assume regulatory responsibility if section 710(a) legislation is passed.

OSMRE notes the comment that the meaning of the phrase "supervised by" [an Indian tribe] should be clarified. However, a dispositive policy concerning the concept of tribal supervision of individual trust allotments and other forms of tribal interests in land would have to encompass a highly complex set of potential issues and fact patterns, and is beyond the scope and purpose of this rulemaking. As stated earlier in this preamble, OSMRE will make such determinations on a case-by-case basis if and when the need arises.

C. SPECIFIC REGULATORY CHANGES AND COMMENTS

25 CFR PART 200

SECTION 200.11 - INCORPORATION OF COAL LEASE TERMS AND CONDITIONS

In the February 1988 rulemaking proposal, OSMRE proposed to amend the regulations at 30 CFR 750.20 (a) and (b) concerning the incorporation of coal lease terms and conditions on Indian lands. Upon review, it has been jointly decided by OSMRE and BIA to transfer the rules from OSMRE's regulatory program at 30 CFR Chapter VII to BIA's regulatory program at 25 CFR Chapter I, Subchapter I. The regulations at 25 CFR Chapter I, Subchapter I govern leasing and development of energy and mineral resources on Indian lands and place primary responsibility for approval and management of prospecting and leasing activities with BIA. Thus, the recodification of the rules implements existing Departmental organization and performance of responsibilities concerning Indian lands, because it reflects the lead role of BIA in the approval and amendment of coal leases on Indian lands.

In the proposed rule, the regulations at 30 CFR 750.20 (a) and (b) were contained within a section entitled "Incorporation of coal lease terms and conditions." The rules have been recodified within 25 CFR Subchapter I and a new part has been added as follows: Part 200 -- Terms and Conditions: Coal Leases. The rules have been redesignated as 25 CFR 200.11 (a) and (b) under the section heading "Incorporation of coal lease terms and conditions."

The regulations at 25 CFR 200.11 (a) and (b) implement sections 710 (d) and (e) of SMCRA, respectively, wherein the Secretary is directed to incorporate the requirements of the applicable provisions of SMCRA, and tribe-requested terms and conditions, into leases of coal on Indian lands.

SECTION 200.11(a)

The rule at 25 CFR 200.11(a) (formerly 30 CFR 750.20(a)) provides for the incorporation of the SMCRA-compliance provision into existing and new leases of coal on Indian lands at the time such leases are issued, renewed, renegotiated, or readjusted, as applicable.

One tribal commenter maintained that deferring the inclusion of the proposed lease provision for existing leases until renewal, renegotiation, or readjustment, was contrary to law and Congressional intent in that it further delayed the action beyond the thirty-month time limit specified in SMCRA. The commenter further claimed that the rule change was arbitrary and capricious on the grounds that OSMRE had failed to explain why the new rule was preferable to the previous regulation. The commenter also contended that the rule change constituted a violation of the Secretary's trust responsibility since neither OSMRE nor BIA had consulted with the tribe prior to entering into the settlement agreement where the proposed rule change was first contemplated. Finally, the commenter raised a question regarding the enforceability of SMCRA section 710(d) standards for existing Indian coal leases should the rule change be implemented.

OSMRE disagrees that the rule change is contrary to law and Congressional intent. Section 710(d) of SMCRA provides that "[o]n and after thirty months from the enactment of this Act, all surface coal mining operations on Indian lands shall comply with requirements at least as stringent as those imposed by [applicable provisions of SMCRA] and the Secretary shall incorporate the requirements of such provisions in all existing and new leases issued for coal on Indian lands" (emphasis added). This language does not specify the mechanism by which the requirement is to be implemented with respect to new and existing leases. The Secretary has achieved the required result by applying these provisions by operation of law under 30 CFR Part 750 and, prior to the adoption of Part 750, under SMCRA itself, to all surface coal mining operations on Indian lands (30 CFR 750.11, 750.12, 750.16). Thus, there has been no delay in applying the requirement to all existing operations involving coal leases on Indian lands. The new rule establishes an orderly and equitable process for implementing the Secretary's obligations under section 710(d) to incorporate appropriate provisions in both existing and new leases of coal on Indian lands. Although the required result was already achieved by operation of law, the absence in the previous rule of such a process for incorporating the required provisions had raised questions regarding the equitable impact of the provision and its effect on existing leases of coal on Indian lands. This rule is intended to address those concerns.

OSMRE disagrees with the commenter's assertions that proposal of the rule change was arbitrary and capricious and violated the Secretary's trust responsibilities. OSMRE proposed the rule change pursuant to the NCA/AMC settlement agreement, in response to objections raised by the complainant concerning the unilateral amendment of existing leases.

Non-parties to the agreement, though not involved in the settlement negotiations, were afforded ample opportunity to comment on the proposed rule change through the public comment process.

Finally, the commenter's concern regarding the enforceability of section 710(d) standards for existing leases pending incorporation of the SMCRA-compliance provision into such leases is without merit. OSMRE addressed this issue in the preamble to the proposed rule wherein it stated that all surface coal mining operations on Indian lands are subject to the requirements of section 710 of SMCRA and 30 CFR Part 750 by operation of law. This holds true regardless of whether the leases associated with such operations have been amended to include the SMCRA-compliance provision mandated by section 710(d).

SECTION 200.11(b)

The rule adopted today at 25 CFR 200.11(b) (formerly 30 CFR 750.20(b)) provides for the incorporation of SMCRA-related terms and conditions, as requested in writing by the lessor Indian tribe, into post-SMCRA leases of coal on Indian lands. The rule specifies that these terms and conditions shall be included when such leases are issued, renewed, renegotiated, or readjusted, as applicable.

One commenter objected to the proposed rule change at 25 CFR 200.11(b) as contrary to SMCRA in that it would limit the scope of tribe-requested terms and conditions to SMCRA-related concerns and would allow their incorporation into existing leases only at the time of lease renewal, renegotiation, or readjustment.

OSMRE disagrees that the rule change is contrary to SMCRA. Although section 710(e) does not specifically state that tribe-requested terms and conditions be related to SMCRA, OSMRE believes that section 710(e) was not intended to encompass terms and conditions unrelated to SMCRA, since the mechanisms for incorporating other terms and conditions were in place prior to the enactment of SMCRA. The requirement that section 710(e) terms and conditions be incorporated into existing leases only at specific, predetermined times is beneficial in that it minimizes the likelihood of frequent and unpredictable amendments to existing agreements. OSMRE believes this is necessary to implement section 710(e) in an orderly and reasonable manner with respect to existing contracts and leases. Moreover, the leasing and lease readjustment processes are not the tribes' sole means of ensuring operator compliance with special tribal requirements related to SMCRA. The rules at 30 CFR 750.6 provide an opportunity for the tribes to advise OSMRE and BIA of special requirements relating to the protection of non-coal resources of the area affected by surface coal mining and reclamation operations during the permitting process. As the regulatory authority on Indian lands, OSMRE must assure operator compliance with such special requirements.

One commenter expressed concern that the revised rule could be misinterpreted as restricting lease readjustment solely to SMCRA-related purposes and recommended that the rule be clarified accordingly.

As a point of clarification, the implementation of the rule will in no way affect the tribes' ability to continue to request the inclusion of non-SMCRA-related terms and conditions in new and existing coal leases on Indian lands pursuant to other existing statutes and regulations governing the leasing process on such lands.

One commenter maintained that the revised rule would give the lessee "veto power" over the terms and conditions requested by a tribe, or would force the tribe to compromise on proposed lease amendments.

OSMRE disagrees. Section 710(e) of SMCRA clearly empowers the Secretary to incorporate tribe-requested terms and conditions into leases of coal on Indian lands, and the lessee must comply.

One commenter contended that OSMRE breached its due process and fiduciary trust responsibilities by failing to consult with the tribe prior to entering into the settlement agreement which contained the provision affecting the tribe's rights under section 710(e).

OSMRE considers this comment beyond the scope of this rulemaking, because it concerns general legal and procedural issues relating to a previous action by the Department, rather than the merits of the rule itself. OSMRE reiterates that it has provided full opportunity to comment on the rulemaking implementing the settlement, through the public comment process.

The commenter further claimed that, by limiting the scope and time periods for incorporation of section 710(e) terms and conditions, OSMRE breached its trust duty to assist the tribe in developing its powers of self-government, and impaired the tribe's ability to achieve its section 710(e) objectives and maximize its economic benefits during the lease renegotiation and renewal process.

OSMRE disagrees. The rule change does not affect the Department's commitment to continued development of tribal self-governing powers, nor does it undermine the tribe's ability to negotiate leases for maximum economic gain. All coal lease terms and conditions on Indian lands, including those related to section 710 of SMCRA, are ultimately subject to Secretarial approval, thereby ensuring that tribal economic and environmental interests are protected.

30 CFR PART 750

SECTION 750.12 PERMIT APPLICATIONS

Section 750.12(d)(2) describes the information that must be included in the permit application package (PAP) for a surface coal mining operation on Indian lands in order to assure compliance with Federal laws other than SMCRA. The rule at 30 CFR 750.12(d)(2)(v) is amended by deleting the reference to the American Indian Religious Freedom Act (AIRFA), 42 U.S.C. 1996, as a specific permit application information requirement.

The final rule adopted today continues to require that the permit application contain a description of compliance with Federal laws aimed at protecting cultural resources on Indian lands. The rule change does not eliminate the need for AIRFA compliance for surface coal mining operations on Indian lands, but transfers the primary responsibility from the applicant to OSMRE. This is consistent with AIRFA provisions requiring the various Federal departments and agencies to implement policies and procedures to protect and preserve Native American religious cultural rights and practices. OSMRE fulfills this obligation through the rule at 30 CFR 750.6(a)(4). That provision requires OSMRE to assure operator compliance with appropriate special requirements relating to the protection of non-coal resources of the area affected by surface coal mining and reclamation operations, in consultation with BIA and the affected tribe.

Two commenters objected to the proposed rule change. One commenter claimed that the revised rule would eliminate the need for an applicant to deal directly with the affected tribes regarding the presence or absence of cultural/religious sites and resources on the proposed permit area, and that it would impose no obligation upon OSMRE to resolve AIRFA-related issues. Another commenter acknowledged that while AIRFA compliance is ultimately a Federal responsibility, OSMRE should retain the option of requiring the proposed operator to conduct a survey of religious sites, claiming that the general requirements of 30 CFR 750.6(a)(4) are insufficient to ensure agency compliance with AIRFA.

OSMRE disagrees with the commenters assertions that the existing rule at 30 CFR 750.6(a)(4) is inadequate for purposes of AIRFA compliance and that OSMRE is under no obligation to resolve AIRFA-related issues. The regulation at 30 CFR 750.6(a)(4) is broad in scope, providing for protection of all non-coal resources on Indian lands without exception, including Native American religious sites and resources. The regulation further requires OSMRE to assure operator compliance with special requirements relating to the protection of such resources. This could include operator-conducted surveys of religious sites, and could involve direct communications between the operator and the affected tribe, as necessary to ensure compliance with AIRFA.

One commenter maintained that the rule change could jeopardize the confidentiality of Native American cultural/religious sites and resources by placing sensitive information in the hands of government agencies subject to Freedom of Information Act (FOIA) requests, and urged OSMRE to propose a new rule requiring the applicant to address AIRFA-related issues in the PAP, in consultation with the tribal land owners.

OSMRE regards this comment as irrelevant to whether the proposal should be adopted, because the same concern will exist under this rule or the previous rule. The rule change merely reflects the fact that OSMRE, rather than the applicant, is ultimately responsible for ensuring AIRFA compliance on Indian lands. OSMRE recognizes the sensitive nature of AIRFA-related information and its significance to the Indian tribes. However, the determination as to whether such information would be exempt from disclosure under FOIA, if it were submitted to OSMRE, is not affected by this rulemaking, and is properly addressed outside of this rulemaking action.

III. PROCEDURAL MATTERS

Federal Paperwork Reduction Act

The rule does not contain information collection requirements that require approval by the Office of Management and Budget under *44 U.S.C. 3501* et seq.

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 significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act, *5 U.S.C. 601* et seq. This rule affects a relatively small number of surface coal mining operations. The rule does not distinguish between small and large entities. The economic effects of the proposed rules are estimated to be minor and no incremental economic effects are anticipated as a result of the rule.

National Environmental Policy Act

OSMRE has prepared an environmental assessment (EA) and has made a finding 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)*. The EA is on file in the OSMRE Administrative Record, Room 5131, 1100 L Street NW., Washington, DC.

Author

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LIST OF SUBJECTS

25 CFR Part 200

Environmental protection, Indian lands, Mineral resources, Mines.

30 CFR 750

Indian-lands, Reporting and recordkeeping requirements, Surface mining, Surface Mining Reclamation and Enforcement Office.

Accordingly, 25 CFR Part 200 is added and 30 CFR Part 750 is amended as set forth herein.

Dated: April 21, 1989.

Michael A. Poling, Deputy Assistant Secretary -- Land and Minerals Management.

Dated: April 24, 1989.

W. P. Ragsdale, Assistant Secretary -- Indian Affairs.

1. Part 200 is added to 25 CFR Chapter 1, Subchapter I to read as follows:

PART 200 -- TERMS AND CONDITIONS: COAL LEASES

Section

200.1-200.10 [Reserved]

200.11 Incorporation of Coal Lease Terms and Conditions.

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

SECTIONS 200.1-200.10 [Reserved]

SECTION 200.11 - INCORPORATION OF COAL LEASE TERMS AND CONDITIONS.

(a) All leases of coal on Indian lands, as defined in section 216.101 of this chapter, issued by the Secretary, will include at the time of issuance, renewal, renegotiation, or readjustment, as applicable, the following provision:

The Lessee shall comply with all applicable requirements of the Surface Mining Control and Reclamation Act of 1977, and all regulations promulgated thereunder, including those codified at 30 CFR Part 750.

(b) With respect to leases of coal on Indian lands issued by the Secretary after August 3, 1977, the Secretary shall, at the time of issuance, renewal, renegotiation, or readjustment, as applicable, include and enforce in such leases, terms and conditions related to the Surface Mining Control and Reclamation Act of 1977, as requested by the lessor Indian tribe in writing.

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

2. The authority citation for Part 750 is revised to read as follows:

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

3. Section 750.12 is amended by revising paragraph (d)(2)(v) to read as follows:

SECTION 750.12 - PERMIT APPLICATIONS.

* * * * *

(d) * * *

(2) * * *

(v) A description of compliance with Federal laws aimed at protecting cultural resources on Indian lands.

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SECTION 750.20 [Removed]

4. Section 750.20 is removed.

[FR Doc. 89-12062 Filed 5-19-89; 8:45 am]
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