COALEX STATE INQUIRY REPORT - 36

March 21, 1985

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TOPIC: AML FUND/STATES 50% ALLOCATION

INQUIRY: Under SMCRA Sec. 402(g)(2), 50% of the AML funds collected within a state with an approved abandoned mine reclamation program are allocated to that state for use by its program. If the funds have not been expended within three years after their allocation, they become available to be used in any eligible area determined by the Secretary.

Since Tennessee does not currently have primacy, under SMCRA Sec. 405(c), the 50% state share is held by the Secretary and has subsequently not been allocated to the state. Question: Is OSM required, while administering= SMCRA within Tennessee, to spend the state's 50% allotment on AML projects within the state? If the money is not expended, does the three year rule apply, thus precluding Tennessee from using the funds for necessary AML projects within its borders?

SEARCH RESULTS:

Sec. 402 of the Surface Mining Control and Reclamation Act of 1977 (SMCRA) provides for the establishment and allocation of an abandoned mine land reclamation fund. Sec. 402(g) provides guidance to the Secretary of the Interior on the allocation of these funds among the various qualifying state and federal programs. Sec. 402(g)(2) states:

"(2) Fifty per centum of the funds collected annually in any State or Indian reservation shall be allocated to that State or Indian reservation by the Secretary pursuant to any approved abandoned mine reclamation program to accomplish the purposes of this title . . . Provided, however, that if funds under this subparagraph (2) have not been expended within three years after their allocation, they shall be available for expenditure in any eligible area as determined by the Secretary." (30 USC Sec. 1232(g)(2))

Understanding the applicability of the proviso in Sec. 402(g) (2), allowing the Secretary to, in effect, withdraw a state's allocation, involves two questions: (1) when do the reclamation funds become "allocated" and "expended" for purposes of that section; and (2) can any events, such as state program withdrawal, have the effect of stopping the time period from running?

Legislative History

The legislative history of the Act indicates that several changes were made in Sec. 402(g) as the various bills moved through Congress in 1976 and 1977. S. 7 and H.R. 25, for example, in

the 94th Congress both set aside a 50% state share, but provided that: if the funds "have not been expended within three years after being paid into the fund, they shall be available for expenditure in any area." (H.R. 25, Sec. 401(e); S. 7, Sec. 401(e). See S. Rep. No. 94-28, 94th Cong., 1st Sess., at 27 (1975))

In the 95th Congress, S. 7 contained similar language as the bills in the 94th Congress. That is, S. 7 provided that the three year period would run from the date the money was "paid into" the fund. H.R. 2, on the other hand, included the language "within three years after allocation". In conference committee, the language of the House bill was adopted. However, none of the House or Senate reports on SMCRA explain the reasons for the adoption of the "allocation" language. (See H.R. Rep. No. 95-218 (1977), S. Rep. No. 95-128 (1977) and S. Conference Rep. No. 95-337 (1977))

In addition to the changes with respect to the running of the three year period, the 95th Congress Conference on SMCRA also considered two other significant issues with respect to Sec. 402(g)(2): whether funds could be used by a state for "energy impact assistance", and whether expenditure of a state's 50% share was mandatory or discretionary on the part of the Secretary. House Conference Rep. No. 95-493 provides the following explanation of the decisions reached:

> "The Conferees intend that 50% of the reclamation fee must be allocated to the State or Indian reservation in which the coal was mined, if there is an approved State or reservation reclamation program. Once all the eligible lands in a State or reservation have been reclaimed, all voids filled, and all tunnels sealed, the Secretary has discretionary authority to allow use of all or part of this 50% for construction of public facilities in communities impacted by coal development. This can only be done if certain specified Federal payments are inadequate to meet the needs." (H.R. Rep. No. 95-493, 95th Cong., 1st Sess., at 98-99 (1977))

Some additional guidance can be found in the Congressional Record from the 95th Congress floor debate on SMCRA. The first significant reference to the provisions of Sec. 402(g)(2) was a letter from Secretary Andrus, setting out the Carter administration's views on S. 7. Secretary Andrus stated that:

> "We recommend that until a State's full regulatory program is approved, allocation of its 50% share of funds not be made and that there be no funding of any State abandoned land program. Until such approval is given, the Secretary should also have authority to withhold expenditures for the Federal abandoned land program for a State under section 305. This would encourage the States to obtain approval for a strong State regulatory program rather than allowing a Federal program to be established for that State. The Secretary should not be prevented, however, from expending unearmarked funds within a State where there was not an approved regulatory program; thus in cases where reclamation work would be urgently needed it could be accomplished." (123 Cong. Rec. S5862 (APRIL 18, 1977). See also similar remarks by Secretary Andrus on H.R. 2, in H. Rep. No. 95-218, 95th Cong., 1st Sess., 154 (1977).)

Congressman Skubitz also provided the following discussion on his views regarding whether the expenditure of the state's 50% share should be mandatory or discretionary:

> "Up to 50% of the funds on an annual basis derived from coal production in a State or Indian reservation may be allocated to the State from which the reclamation funds are derived by the Secretary of the Interior for the implementation of an approved State reclamation program pursuant to section 404.
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> "Now, let me point out that the bill carries the word that up to 50% may be allocated. I want to point out to the Committee that the bill initially provided that it 'shall be allocated.' Make no mistake, when we get into conference, the word may' will be changed to shall' making it mandatory for the Secretary to spend 50% in the States where coal is mined." (123 Cong. Rec. H3733 (APRIL 28, 1977)

Federal Regulations

The terms "allocated" and "expended", as used in Sec. 402(g)(2) of SMCRA, are not defined in the Act. The OSM first defined the terms in the federal regulations establishing the abandoned mine land reclamation program in October, 1978, as follows:

> "Allocate means the administrative identification in the records of the Office of moneys in the Fund for a specific purpose; e.g., identification of moneys for exclusive use by a State.
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> "Expended means that moneys have been paid out by a State or Indian tribe for work that has been accomplished or services rendered." (30 CFR Sec. 872.5; 43 FR 49932 (OCTOBER 25, 1978))

With respect to the State 50% share allocation, this definition has generally been interpreted to man that the State's share becomes "allocated" when the fee is collected and entered on OSM's accounts as coming from a particular State. Administratively, all accounts are closed at the end of business each September 30, the final day of the Federal fiscal year. The system is reconciled and collections are identified by State and Indian lands and officially allocated for State/Indian tribe use at that time. (See 47 FR 28579 (1982))

Commenters on the OSM regulations in 1978 were concerned about the definition of the term "expended", and suggested that "obligated" would be a better term. OSM rejected that suggestion and observed that:

> "such a modification would dilute expend' as used in Section 402(g)(2) of the Act to an almost meaningless term. Experience has shown that such latitude promotes hasty last minute obligations rather than well planned program efforts. The commonly accepted definition of 'expend' is to pay out or distribute. Blacks Law Dictionary definition is 'to pay out, use up, consume' and implies receiving something in return; whereas obligate' is to bind or constrain." (Id. See Comment No. 3, Part 872)

In discussing directly the possibility of withdrawal of allocations under Sec. 402(g)(2), the 1978 preamble went on to note that:

> "Section 402(g)(2) of the Act is quite clear in specifying that 'if funds have not been expended within 3 years after their allocation, they shall be available to expenditure in any eligible area as determined by the Secretary.' Considerable safeguards are included in the

> regulations to protect the States from automatic or indiscriminate withdrawals, i.e. Sec. 872.11(b)(2) provides that 'allocations my be withdrawn' and requires a written finding of fact. Similarly, Sec. 886.18(b) requires a written notice and an opportunity for consultation and remedial action before termination of= a grant. Section 886.18(b) also provides for retention of any portion of a grant required to meet contractual commitments made prior to an effective termination date.
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> "In conformance with the Act, the geographic allocation of Federal expenditures from the fund, including those withdrawn from State allocations and grants, will reflect both the area from which the revenue came and the national program needs. Information regarding such needs is being and will be collected form a wide variety of sources including reports from private citizens, States and the direct data collection efforts of the Office. It must also be emphasized that Federal expenditures are taken from the Abandoned Mine Reclamation Fund; therefore, all the provisions of Part 874, General Reclamation Requirements, apply equally to the Federal Reclamation Program. Projects carried out with the discretionary funds by the Office must also be carried out in accordance with the procedural requirements of Parts 872, 877, 879, and 882 of this subchapter. The regulations, as written, are considered adequate for allocation of 'discretionary' funds." (Id., See Comment No. 7, Part 872, 43 FR 49932 (1978).)

In 1982, OSM reconsidered the AML rules and revised the definition of the term "expended", but not the definition of "allocated". Under the revised definition, "expended" means that moneys have been obligated, encumbered, or committed for work to be accomplished or services to be rendered. The new definition rejected the assertion that the Act limits the work "expended" to mean only "actual expenditure" of funds. (47 FR 28575-76 (June 30, 1982))

In another issue, considered in the same rulemaking, the IMCC, on behalf of member states, petitioned the OSM to revise the three year provision to preserve states' 1978 and 1979 reclamation fee allocations which had not been expended, for an additional 3 years. In rejecting the IMCC petition, the OSM noted that the revision "might contravene the intent of Congress as set forth in Section 402(g)(2) of the Act." In partial response to the IMCC request, however, the OSM did add a new paragraph to Sec. 872.11(b)(2) and (3) of the regulations, to provide that "funds not expended in three years will not be withdrawn from the State/Tribe if the State/Tribe has made reasonable efforts to expend the funds but was unable to do so because of unavoidable delays in program approval." (47 FR 28580 (June 30, 1982))

While withdrawal of allocated funds after three years is in every case discretionary on the part the Secretary, the regulations articulate no other specific conditions under which the Secretary has made a prior commitment not to exercise that discretion.

September 13, 1983, the Secretary withdrew all AMLR funds which had been allocated to the State of Washington but left unexpended for more than three years. The Washington Department of Natural Resources, in response to the withdrawal stated that they "disagreed with the concept that monies collected in a State by the Federal government from coal mining can be withdrawn and used elsewhere at the discretion of the Secretary of the Interior. If a Federal program is in place, such as here in Washington State, OSM should utilize these funds for the benefit of Washington."

Relying on the authority of SMCRA Sec. 402(g)(2) for the withdrawal,, OSM replied that the Secretary explicitly was given the discretionary power to withdraw funds not expended within three years of allocation, and further:

> "To allow funds allocated by an Act of Congress for the specific purpose of abandoned mine land reclamation by States to remain idle because a State has not made reasonable efforts to become eligible for the fund would be incompatible with the Secretary's responsibilities for management of public funds and resources. OSM will be developing a Federal abandoned mine land reclamation program for the State of Washington using available Federal funds to reclaim high priority abandoned mine land sites." (48 FR 41018 (1983))

Again when requested to defer action on the withdrawal, OSM reemphasized the necessity of the State making a "reasonable effort" to assume primacy: "OSM declines to defer action on withdrawal of funds because it believes that the State has not made reasonable efforts to assume primacy over surface mining and thereby become eligible for AMLR grants." (Id.)

Cases and Board Decisions

No relevant cases or Board decisions were found as a result of this search.

ATTACHMENTS:

A. 43 FR 49932 (OCTOBER 25, 1978).
B. 47 FR 28574 (JUNE 30, 1982).
C. Congressional Record extracts.
D. Excerpt, H. Rep. 95-218, 95th Cong., 1st Sess. (1977).
E. Excerpt, S. Rep. 94-28, 94th Cong., 1st Sess. (1975).
F. Notice, Washington State AMLR Fund withdrawal, 48 FR 41018 (1983).