FEDERAL REGISTER: 55 FR 9400 (March 13, 1990)

DEPARTMENT OF THE INTERIOR
AGENCY: Office of Surface Mining Reclamation and Enforcement (OSM)

30 CFR Part 740
Federal Lands Program; Surface Coal Mining and Reclamation Operations

ACTION: Final rule.

SUMMARY: The Office of Surface Mining Reclamation and Enforcement (OSM) of the U.S. Department of the Interior (DOI) is amending a portion of the Federal lands regulations to conform to the July 6, 1984, decision of the U.S. District Court for the District of Columbia. This final rule amends the applicability of the Federal lands program in a manner consistent with the District Court decision.

EFFECTIVE DATE: April 12, 1990.

FOR FURTHER INFORMATION CONTACT: Dr. Fred Block, Office of Surface Mining Reclamation and Enforcement, U.S. Department of the Interior, 1951 Constitution Avenue NW, Washington, DC 20240. Telephone: 202-343-1864 (commercial or FTS).

SUPPLEMENTARY INFORMATION:

I. BACKGROUND

Section 523(a) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA) requires the Secretary to promulgate and implement a Federal lands program applicable to all surface coal mining and reclamation operations taking place pursuant to any Federal law on Federal lands. Under section 523(c) of SMCRA, a State with an approved State program may enter into a cooperative agreement with the Secretary of the Interior (hereinafter referred to as the Secretary) to provide for State regulation of surface coal mining and reclamation operations on Federal lands within the State. Section 523(c) provides, however, that the Secretary may not delegate to the State his responsibilities: (1) To approve mining plans on Federal lands under the Mineral Leasing Act, as amended (MLA), (2) to designate Federal lands as unsuitable for surface coal mining pursuant to section 522 of SMCRA, or (3) to regulate other activities taking place on Federal lands.

On March 13, 1979, the Secretary promulgated the Federal lands program, 30 CFR Chapter VII, Subchapter D *(44 FR 15332-15341).* That program was amended on February 16, 1983 *(48 FR 6912-6941).* A notice correcting certain editorial errors and omissions in the February 16, 1983, rule was published on April 1, 1983 *(48 FR 13984).*

The February 16, 1983, rule was designed to allow States to assume greater responsibility for administering the requirements of SMCRA on Federal lands. That rule established provisions limiting the applicability of the Federal lands program to exclude lands containing unleased Federal coal beneath privately owned surface.

The February 16, 1983, rule was challenged in Round I of In re: Permanent Surface Mining Regulation Litigation (II), Civil Action No. 79-1144 (D.D.C. 1984). The court ruled on the challenge on July 6, 1984, and in an amended order on August 30, 1984.

Among other things, the court ruled, with respect to the applicability of the Federal lands program, 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. Since the court ruling, OSM has been applying the Federal lands program to such lands in accordance with the ruling.

On May 31, 1989, OSM published in the Federal Register *(54 FR 23388)* a proposed rule to revise the applicability of the Federal lands program and to make certain other changes for clarity and consistency with existing requirements concerning the responsibilities of the Bureau of Land Management (BLM).

II. DISCUSSION OF FINAL RULE AND RESPONSE TO PUBLIC COMMENTS

30 CFR PART 740 -- GENERAL REQUIREMENTS FOR SURFACE COAL MINING AND RECLAMATION OPERATIONS ON FEDERAL LANDS

The general requirements for surface coal mining and reclamation operations on Federal lands are described under 30 CFR part 740. As proposed to conform with current BLM terminology, references to BLM regulations at "43 CFR parts 3480-3487" are changed to "43 CFR Group 3400."

SECTION 740.4 -- RESPONSIBILITIES

The proposed rule also contained editorial and organizational changes to Section 740.4(d) that are not adopted in this rulemaking. Section 740.4(d) describes the responsibilities of BLM for exploration on Federal lands where BLM has regulatory jurisdiction pursuant to its implementing regulations. The purpose of the proposed changes was to clarify the responsibilities of BLM with respect to exploration on Federal lands under the regulations at 43 CFR Group 3400. These proposed changes are not adopted at this time, but may be reexamined in light of and in conjunction with proposed changes under consideration by BLM to its rules on the same subject.

SECTION 740.11 -- APPLICABILITY

Section 740.11 contains the applicability provisions of the Federal lands program. Paragraphs (a) (2) and (3) of the September 16, 1983, rule applied the Federal lands program to surface coal mining and reclamation operations on lands containing leased Federal coal and on lands where either the coal to be mined or the surface is owned by the United States, thereby excluding lands containing non-Federal surface and unleased Federal coal. The District Court in In re: Permanent Surface Mining Regulation Litigation (II), Civil Action No. 79-1144 (D.D.C. 1984), ruled that the general exclusion from the Federal lands program of surface coal mining operations on private or State-owned surface overlying unleased Federal coal was inconsistent with SMCRA.

The final applicability section of the Federal lands program provides that upon approval or promulgation of a regulatory program for a State, that program and the Federal lands program (30 CFR Chapter VII, Subchapter D) shall apply to surface coal mining and reclamation operations taking place on any Federal lands as defined in 30 CFR 700.5, and lands (except Indian lands) over leased or unleased Federal minerals. This means that where such operations occur on lands where the surface, the minerals, or both, are Federally owned, the Federal lands program and the approved regulatory program will apply. The final rule has been changed in response to comments to make this applicability explicit.

Five comment letters were received concerning the proposed applicability provisions. Two commenters suggested that the wording of Section 740.11(a)(2) include a definition of the term "Federal lands" to make clear that it means Federal surface and leased or unleased Federal minerals. This rulemaking amends the applicability provision of the Federal lands program regulations consistent with the existing definition of Federal lands at 30 CFR Section 700.5. That definition defines Federal lands as ". . . any land, including mineral interests, owned by the United States, without regard to how the United States acquired ownership of the lands or which agency manages the lands. It does not include Indian lands * * *." The definition of Federal lands recommended by the commenters agrees with the existing definition in 30 CFR 700.5 as Judge Flannery construed it. However, in response to these comments OSM has decided to clarify in the rule language itself that the Federal lands program applies to lands (except Indian lands) over leased or unleased Federal minerals.

One commenter opposed the broadening of the applicability provision to include every mining operation on private and State-owned surface overlying Federal coal. The commenter stated that when the District Court for the District of Columbia ruled on the applicability of the Federal lands program, it explicitly endorsed an "affected by" test to determine the Federal lands program jurisdiction. The commenter said that to apply the Federal lands program in all cases to the surface estate over an unleased Federal coal interest that may never be mined or affected by mining activities would not serve any useful purpose. The commenter suggested that the language of Section 740.11(a)(2) be modified to apply to

surface coal mining and reclamation operations on lands where either the surface or mineral interests owned by the United States will be directly affected by such operations.

The applicability standard adopted by OSM is consistent with the definition of Federal lands in SMCRA section 701(4) and 30 CFR 700.5, and the requirement in SMCRA section 523(a) that the Federal lands program apply to all surface coal mining operations on Federal lands. It is also easy to administer. An "affected by" test would be very difficult to administer. A determination that the Federal interest would or would not be affected would have to be made on a case-by-case basis, and could be subject to different interpretations.

One commenter asked whether it can be assumed that no Federal approval would be required for unleased Federal coal under private or State surface and would States having cooperative agreements under section 523(a) of SMCRA to regulate surface coal mining operations on Federal lands, only be required to consult with OSM and BLM prior to issuing permits to ensure protection of the Federal coal. Another commenter interpreted the proposed language to mean that BLM's responsibility is limited to matters related directly to coal recoverability present or future and that cooperative agreement states should only be required to consult with BLM and OSM prior to taking permitting actions to ensure protection of the Federal coal resource.

To conduct surface coal mining operations on private or State surface overlying unleased Federal coal, an applicant is required to obtain a permit under the Federal lands program at 30 CFR part 740 from OSM, or the State if there is a cooperative agreement which provides for State permitting on such Federal lands. OSM would retain any responsibility not delegated to a State under a cooperative agreement. Section 773.13(a)(3)(ii) requires the regulatory authority to notify those Federal agencies with an interest in the proposed operation, thus affording BLM the opportunity to review and comment on the proposed operation with respect to its responsibilities to ensure protection of the Federal interest. BLM may exercise, if necessary, any authority under Federal law which it administers to protect the Federal interest. The regulatory authority would normally consult with BLM where specified in a cooperative agreement or to ensure protection of the Federal interest. Also, since many State laws cover such split-estate lands and do require the concurrence of the mineral owner, in some cases Federal approval may be required. The regulatory authority in such cases would consult with BLM in accordance with applicable State law.

Another commenter stated that the proposed rules do not address processing procedures for permit and revision applications on Federal lands in States with cooperative agreements where the surface is non-Federal and the Federal coal is unleased. The commenter said that the current rules detail procedures only for leased Federal coal and/or Federal surface.

The Federal lands program at 30 CFR Part 740 applies to unleased coal under non-Federal surface. The applicable permit processing requirements of Section 740.13 apply in such cases just as for any other Federal lands. In States with cooperative agreements, the permit is processed by the State. In States with no cooperative agreement or with a Federal program, OSM issues the permit.

III. PROCEDURAL MATTERS

Federal Paperwork Reduction Act

This rule does not contain collections of information which would 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 would 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 would 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

The proposed rule is part of the Federal lands program, the promulgation of which is exempt under section 702(d) of

SMCRA *(30 U.S.C. 1292*(d)), from compliance with section 102(2)(C) of the National Environmental Policy Act of 1969 *(42 U.S.C. 4332*(2)(C)).

Author

The principal author of this rule is Dr. Fred Block, Branch of Federal and Indian Programs, Office of Surface Mining Reclamation and Enforcement, 1951 Constitution Avenue NW., Washington, DC 20240; Telephone: 202-343-1864 (Commercial or FTS).

LIST OF SUBJECTS IN 30 CFR PART 740

Coal mining, Public lands, Mineral resources, Reporting requirements, Surface mining, Underground mining.

Accordingly, 30 CFR Part 740 is amended as set forth below.

Dated: February 5, 1990.
Dave O'Neal, Assistant Secretary, Land and Minerals Management.

PART 740 -- GENERAL REQUIREMENTS FOR SURFACE COAL MINING AND RECLAMATION OPERATIONS ON FEDERAL LANDS

1. The authority citation for part 740 is revised to read as follows:

Authority: *30 U.S.C. 1201* et seq. and *30 U.S.C. 181* et seq.

2. In 30 CFR Part 740, remove "43 CFR Parts 3480-3487" and "43 CFR Part 3400" and replace them with "43 CFR Group 3400" everywhere they appear except in Section 740.15.

3. In Section 740.11, add "and" at the end of paragraph (a)(1), remove paragraph (a)(3), and revise paragraph (a)(2) to read as follows:

SECTION 740.11 - APPLICABILITY.

(a) * * *

(2) Surface coal mining and reclamation operations taking place on any Federal lands as defined in Section 700.5 of this chapter, and lands (except Indian lands) over leased or unleased Federal minerals.

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SECTION 740.15 [Amended]

4. In Section 740.15, paragraph (d)(1) is amended by removing "43 CFR Parts 3480-3487 and 43 CFR Part 3400" and replacing it with "43 CFR Group 3400".

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