No. 07-1410

IN THE

Supreme Court of the United States

UNITED STATES,

Petitioner,

v.

NAVAJO NATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

OPPOSITION BRIEF

PAUL E. FRYE
FRYE LAW FIRM, P.C.
10400 Academy Rd. NE
Suite 310
Albuquerque, NM 87111

CARTER G. PHILLIPS*
VIRGINIA A. SEITZ
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

LOUIS DENETSOSIE
ATTORNEY GENERAL
THE NAVAJO NATION
P. O. Box 2010
Window Rock, AZ 86515

Counsel for Respondent

* Counsel of Record

August 4, 2008

QUESTIONS PRESENTED

The Navajo Nation would restate the questions presented as follows:

1. Whether *United States* v. *Navajo Nation*, 537 U.S. 488, 493 (2003), forecloses the court of appeals' holding that the United States was liable for its breach of fiduciary duties in connection with the Navajo coal lease amendments based on treaties, statutes and regulations not addressed by this Court in that case.

2. Whether the court of appeals properly held that the United States is liable to the Navajo Nation for breaches of trust under statutes and regulations that confer upon the Government day-to-day control and supervision over all aspects of Navajo coal leasing and development and that impose specific duties that the Secretary of the Interior violated.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES Page

TABLE OF AUTHORITIES – continued

STATUTES AND REGULATIONS

TABLE OF AUTHORITIES – continued

TABLE OF AUTHORITIES – continued

TABLE OF AUTHORITIES – continued

INTRODUCTION

The Government asks this Court to review an interlocutory Federal Circuit decision involving the application of settled legal principles to a specific network of treaty, statutory and regulatory rights in a unique factual setting. Under this Court's precedents, each Indian breach of trust case turns on the provisions of the particular treaties, statutes and regulations and the individual facts presented. See, *e.g.*, *United States* v. *Mitchell,* 445 U.S. 535 (1980) ("*Mitchell I")*; *United States* v. *Mitchell*, 463 U.S. 206 (1983) ("*Mitchell II*"). This case is no exception. The Federal Circuit's determination that the Government breached compensable trust duties to the Navajo Nation rests on a network of legal provisions specific to the 1964 Navajo coal lease, whose operative provisions are themselves unique.

The Government's contention that the Court has already resolved this case in its entirety in *United States* v. *Navajo Nation*, 537 U.S. 488 (2003) ("*Navajo*") is wrong. This Court did not remand with instructions to dismiss in *Navajo*; it remanded for further proceedings. The Court's decision was expressly cabined, commencing with the following statement: "This case concerns the Indian Mineral Leasing Act of 1938 . . . and the role it assigns to the Secretary of the Interior . . . with respect to coal leases executed by an Indian Tribe and a private lessee." *Id*. at 493. The holding was also similarly limited. *Id.* Thus, in *Navajo*, as in *Mitchell I*, this Court held that a particular federal statute and its implementing regulations did not create a money-mandating fiduciary duty. Both decisions left open the question – answered affirmatively in the decision below and in *Mitchell II* – whether other federal laws might do so.

The judgment below is faithful to this Court's precedents. In *Mitchell II*, this Court determined that fiduciary duties in the management of property held in an express trust arose due to the Government's pervasive supervision of virtually all aspects of the Indian resource. The statutes and regulations in *Mitchell II* provided the "contours" of the federal trust duty. See 463 U.S. at 224. To fill in those contours, this Court looked to general trust law standards in both *Mitchell II* and *United States* v. *White Mountain Apache Tribe*, 537 U.S. 465 (2003) ("*Apache*"). See *Mitchell II*, 463 U.S. at 225 n.29 (supporting fiduciary management duties where the Government assumes control over property belonging to Indians); *Apache*, 537 U.S. at 475 (relying on "elementary trust law" to subject Government to management duties to preserve the trust property although the relevant statute did not "expressly subject the Government to duties of management and conservation"). Federal control over Navajo coal during the relevant time period was at least as pervasive as the control found sufficient to create money-mandating trust duties with respect to the timber resource in *Mitchell II*. And here, the Government breached not only its basic management duties of care, candor and loyalty, but also other duties specifically prescribed by Congress for the protection of Navajo economic interests.

The interlocutory decision in this case is of no importance in future Indian trust disputes. Two of the principal statutes, the Rehabilitation Act and the Indian Lands section of the Surface Mining Control and Reclamation Act of 1977 ("SMCRA"), apply as a practical matter to only three Indian tribes, the Navajo, Hopi and Crow. Key regulations, including the one requiring the Secretary to include non-

environmental terms requested by the tribes in coal lease amendments, are no longer in effect. In 2006, Congress provided an avenue for the tribes to assume the comprehensive control over the entire process of coal surface mining which had been controlled exclusively by the Department from 1984-1987.

At bottom, the Government is arguing that the court below misapplied correctly stated legal principles in an interlocutory decision of no recurring importance. Accordingly, this case does not merit the Court's attention. If this were a petition filed by a private litigant, it would surely be denied. The United States' disappointment that the Court's earlier ruling did not terminate the Navajo's claim provides no warrant for further review.

COUNTER-STATEMENT OF THE CASE

1. Statutory And Regulatory Frame-work.

Navajo coal is held under an express statutory trust. As detailed below, federal statutes and regulations govern Navajo coal "from the creation of its leases to the reclamation of land." *Peabody Coal Co.* v. *State*, 761 P.2d 1094, 1099 (Ariz. Ct. App. 1988).

The federal-Navajo relationship is founded on two treaties, ratified in 1849 and 1868. In the first, the Navajo recognized the federal government's "sole and exclusive right of regulating the trade and intercourse with the said Navajoes"; in return the United States agreed to "so legislate and act as to secure the permanent prosperity and happiness of said Indians." Treaty with the Navajo, arts. 3, 11, Sept. 9, 1849, 9 Stat. 974, 974-75. The coal land at issue was formally included in the Navajo Reservation under the Act of June 14, 1934, ch. 521,

48 Stat. 960. In 1974, Congress confirmed that the "lands described in the Act of June 14, 1934 . . . shall be held in trust by the United States exclusively for the Navajo Tribe." 25 U.S.C. § 640d-9(a).

The Indian Mineral Leasing Act ("IMLA") was passed in 1938. Its "basic purpose" is "to maximize tribal revenues from reservation lands." *Kerr-McGee Corp.* v. *Navajo Tribe of Indians*, 471 U.S. 195, 200 (1985). Like the timber statute in *Mitchell II*, IMLA permits the Indians to convey their resources with Secretarial approval. See 25 U.S.C. §§ 396a, 406(a). However, IMLA proved inadequate to meet the needs of the Navajo.

Appalling conditions on the Navajo Reservation prompted Congress to pass the Navajo and Hopi Rehabilitation Act of 1950, 25 U.S.C. §§ 631-638.[1] That Act "further[s] the purposes of existing treaties with the Navajo Indians," so that the Navajo will "ultimately attain standards of living comparable with those enjoyed by other citizens." *Id.* § 631. The Rehabilitation Act prescribed a *federal* development program for Navajo resources directing the "Secretary of the Interior . . . to undertake . . . a program of basic improvements for the . . . development of the resources of the Navajo." *Id.* The coal lease at issue was approved as the "centerpiece of the resources development program under the Navajo and Hopi Rehabilitation Act." C.A. App. A3575 (Udall testimony).

---

[1] For example, the United States had failed to fulfill its treaty obligation to provide schools for the Navajo. *See* Treaty with the Navajo, art. 6, June 1, 1868 15 Stat. 667, 669; 26 Cong. Rec. 7703 (1894). In 1948, 80% of Navajos were illiterate, living in "abject poverty." *E.g.*, S. Rep. No. 81-550, at 5, 7 (1949).

The Rehabilitation Act included a section "to give the Indians a greater voice in the administration of the long-range program." H.R. Rep. No. 81-963, at 2 (1949). That section requires the Secretary to keep the Navajo Tribal Council informed of plans pertaining to the development program and to "follow [its] recommendations whenever he deems them feasible and consistent with the [Act's] objectives." 25 U.S.C. § 638. The Act offered the Navajo the opportunity to adopt a constitution which "shall authorize the fullest possible participation of the Navajos in the administration of their affairs as approved by the Secretary," *id.* § 636, but the Secretary *rejected* the constitution adopted by the Navajo, in part because it would have given the Tribe control over its mineral leasing. *Proposed Constitution for Navajo Tribe*, 2 Op. Sol. of Dep't of Interior 1641, 1642 (1954).

The Rehabilitation Act has specific provisions concerning federal liability for improvident conveyances of tribal resources. The Act permits the Navajo Nation to convey its fee simple land, stating that "such disposition shall create no liability on the part of the United States." 25 U.S.C. § 635(b). The Secretary is also authorized to transfer tribal trust lands to municipal or tribal corporations organized under state law, "and thereafter the United States shall have no responsibility or liability for . . . the management, use, or disposition of such lands." *Id.* § 635(c). Tellingly, another subsection of the Act requires the Secretary to approve tribal leasing of "natural resources"; that subsection, in contrast to the others, does *not* exempt the United States from liability in connection with such transactions. See *id.* § 635(a).

The Rehabilitation Act contains the additional requirement that the federal development program be "administered in accordance with the provisions of this subchapter and existing laws relating to Indian affairs," *id.* § 632, including regulations implementing other Indian mineral leasing laws. Those regulations impose Secretarial control over mineral lease negotiations, 25 C.F.R. § 211.2 (1987); the size, shape and duration of leases, *id.* §§ 211.8-.10; and the terms of any negotiated lease, *id.* § 211.30. The Department controls coal-resource planning under the Rehabilitation Act, App. 27a, and regulates coal exploration under 25 C.F.R. Part 216 Subpart A (1987), see 25 C.F.R. §§ 216.2(a), 216.6 (1987). These regulations also require approval of any surface mining plans by the United States Geological Survey, include detailed reporting requirements to USGS, and permit USGS to enter the land and cancel leases for noncompliance with the plans. *Id.* §§ 216.7, 216.9, 216.10, 216.12.

The Government has at all relevant times supervised and controlled all aspects of Navajo coal royalty setting, reporting, payments, accounting, and auditing. See *Peabody Coal Co.*, 53 IBLA 261 (1981); *Peabody Coal Co.*, 72 IBLA 337 (1983); *Peabody Coal Co.*, 155 IBLA 83, 94-95 & n.12 (2001) (concerning 1984 royalty adjustment). After the Commission of Fiscal Accountability of the Nation's Energy Resources informed Congress in 1982 that the Government's mineral royalty management system had severe failings and that "'the general problems of verifying production . . . and designing an effective audit program are common to all minerals,'" see 51 Fed. Reg. 8168, 8168 (Mar. 7. 1986) (omission in original) (quoting Commission's Report), Congress required in the Federal Oil and Gas Royalty

Management Act of 1982 ("FOGRMA") that the Secretary report back on "the adequacy of royalty management for coal . . . on . . . Indian lands. . . . [with] proposed legislation if the Secretary determines that such legislation is necessary." FOGRMA § 303, 30 U.S.C. § 1752, hist. notes.

The Secretary reported that new legislation was unnecessary because MMS already had adequate authority. See 51 Fed. Reg. 15,763, 15,764 (Apr. 28, 1986). MMS then implemented the FOGRMA directive for Indian coal by establishing the Auditing and Financial System in 1984, see 49 Fed. Reg. 37,336 (Sept. 21, 1984) (promulgating 30 C.F.R. pts. 212 and 218), and the Production Auditing and Accounting System in 1986, see 51 Fed. Reg. 8168 (promulgating 30 C.F.R. pt. 216). In doing so, the Department "FOGRMA-tize[d] the coal industry" – *i.e.*, treated coal the same as oil and gas regarding royalty collection and management. Brian E. McGee, *Coal Royalty Valuation: The Federal Perspective*, 97 W.Va. L. Rev. 887, 926 (1995) (emphasis omitted); C.A. App. 3435.

Rules proposed in 1986 and finalized in 1989 for calculating Indian mineral royalties reflect additional federal control over Navajo coal royalties during the relevant time period. See 51 Fed. Reg. 4507 (Feb. 5, 1986) (proposing rules); 54 Fed. Reg. 1492 (Jan. 13, 1989) (finalizing rules). These rules "largely continue[d] past practice for coal valuation," 54 Fed. Reg. at 1493 – that is, to seek the "long-term maximum rate of return for . . . Indian leases," 52 Fed. Reg. 1840, 1841 (Jan. 15, 1987), and "to ensure that the trust responsibilities of the United States

with respect to the administration of Indian coal leases are discharged," 30 C.F.R. § 206.250(d) (1989).[2]

The Secretary reserved exclusive authority to adjust the royalty rate under Article VI of the Rehabilitation Act lease. C.A. App. 284. The IMLA form lease had no such provision. See *id.* at 3648-52. After Congress raised the minimum royalty rate for federal surface-mined coal to 12½% in 1976,[3] 30 U.S.C. § 207(a), Secretary Andrus established 12½% as the "absolute minimum" rate for Indian leases, rejecting a lease negotiated by the Navajo for failing to achieve that minimum. C.A. App. 334.

Additional federal control of Navajo coal was added in 1977 in the Indian Lands Section of SMCRA, 30 U.S.C. § 1300. App. 27a-28a. There, the United States confirmed its control over lease terms, see 30 U.S.C. § 1300(c), (d) (unilaterally modifying all Indian coal leases to incorporate environmental terms and conditions), and required the Secretary to enforce in leases after 1977 *other* terms and conditions requested by the tribes, *id.* § 1300(e). That provision was added to assist Indian tribes in their negotiations. App. 39a (citing 123 Cong. Rec. S. 15,575 (1977)). Thus, the relevant rule required that *non-environmental terms* requested by tribes be

---

[2] These "past practices" are also reflected in the Department's Manual and its Coal Leasing Policy on Indian Lands during the relevant period. *See* C.A. App. 238 (130 DM 1.3E (1987)), 244-46 (54 BIAM O, § 604.05 (1984)), 332, 1862-63 (Coal Leasing Policy). These policies elucidate the agency's view of its statutory responsibilities. *See United States* v. *New Mexico*, 438 U.S. 696, 703 n.7 (1978).

[3] The 12½% rate was not the "standard" federal rate at this time, *cf.* Pet. 7; the Department routinely demanded a greater royalty for its more valuable reserves, C.A. App. 3673, 4224.

incorporated in coal leases. 30 C.F.R. § 750.20(b) (1987).[4]

Congress intended that the tribes would ultimately assume full regulatory authority over surface coal mines on Indian lands, 30 U.S.C. § 1300(a), but that authority was not granted until 2006. Tax Relief and Health Care Act of 2006, Pub. L. No. 109-432, § 209, 120 Stat. 2922, 3109 (to be codified at 30 U.S.C. § 1300(j)). During the relevant time period, the tribes had no authority to regulate surface coal mining because, under SMCRA, "[t]he Federal-Indian trust responsibilities for land use decisions . . . on Indian lands remain[ed] with BIA." 49 Fed. Reg. 38,462, 38,469 (Sept. 28, 1984) (promulgating Indian Lands rules).

Under SMCRA regulations promulgated in 1977 and 1984, the Secretary controlled all aspects of Navajo coal exploration, leasing, operations, and reclamation. See 42 Fed. Reg. 63,394 (Dec. 16, 1977) (promulgating 25 C.F.R. pt. 177, redesignated as 25 C.F.R. pt. 216, subpt. B (1987)), 49 Fed. Reg. 38,462 (amending 30 C.F.R. pts. 700, 701, and 710 and promulgating 30 C.F.R. pts. 750 and 755). The regulations establish the federal Office of Surface Mining Reclamation and Enforcement ("OSM") as "the regulatory authority on Indian lands" with broad administrative and enforcement powers; the federal Bureau of Land Management as the agency responsible for approving and enforcing exploration and mining plans on Indian lands and verifying royalty calculations; the federal Mineral Management Service ("MMS") as the agency responsible for royalty collection, audit, and accounting; and the BIA

---

[4] The Government relies on a later rule. Pet. 30. *But see Navajo*, 537 U.S. at 511 n.15.

as the agency charged with consulting with tribes on matters related to this comprehensive federal administrative scheme. 30 C.F.R. § 750.6 (1987). The regulations unilaterally amend Indian coal leases to include SMCRA environmental requirements. *Id.* § 750.20(a) (1987). These regulations were intended to satisfy "the trust responsibilities the Department has to tribes regarding lands subject to regulation." 49 Fed. Reg. at 38,462.

Finally, SMCRA and the general Indian Right-of-Way Act confer federal control over rights-of-way central to coal development on the Navajo Reservation. See 25 U.S.C. §§ 323-328; 25 C.F.R. pt. 169 (1987); 30 C.F.R. §§ 700.5, 700.11(a) (1987); *Hopi Tribe* v. *OSM,* 109 IBLA 374 (1984) (concerning Peabody haul road); C.A. App. 3640-47 (concerning Peabody access road). This Court considered such control in finding federal fiduciary obligations to manage Indian lands and resources in *Mitchell II*, 463 U.S. at 223-26 & nn.29, 31.

In sum, "[v]irtually every stage of the process is under federal control" and the relevant statutes and regulations therefore "give the Federal Government full responsibility to manage Indian resources and land for the benefit of the Indians." *Id.* at 222, 224.

2. Factual Background.

The relevant facts are sordid and undisputed. See App. 123a-132a, 89a-90a, 98a-99a, 3a-7a. They are summarized only briefly.

The coal at issue, leased to Peabody in 1964, is "exceptionally valuable." Vijai N. Rai, Ph.D., Office of Trust Responsibilities, *Report on the Issue of Royalty Rate Adjustment* 5, 8 (1985), C.A. App. 710, 713. As noted, the lease was drafted and approved by the Department as the "centerpiece" of the federal

resource development plan prescribed by the Rehabilitation Act, under personal supervision of the Secretary of the Interior, Stewart Udall. C.A. App. 3575 (Udall declaration), 4262 (declaration of Peabody counsel).

The lease provided an "extremely low royalty rate," App. 123a, "substantially lower . . . than the 12½ percent of gross proceeds rate Congress established in 1977 as the minimum permissible royalty for coal mined on federal lands." *Navajo*, 537 U.S. at 496. But the lease permitted the Secretary, unilaterally, to adjust the royalty rate in 1984. *Id.* at 495. In June of that year, a BIA Area Director, under delegated authority, implemented Article VI and raised the royalty rate to 20% which reflected the value of the coal. *Id.* at 496; App. 125a-126a; C.A. App. 406-36. Peabody and its two customers appealed. *Navajo*, 537 U.S. at 496. After receiving the briefs and reports of the parties, Acting Assistant Secretary John Fritz, the appellate decision maker, commissioned additional federal studies, all of which confirmed the propriety and fairness of the 20% rate. C.A. App. 610-15, 649-714. Fritz invited Peabody to supplement the record with additional cost, revenue, and investment data to substantiate its claim that the 20% rate was unreasonable. *Navajo*, 537 U.S. at 496; C.A. App. 616. Peabody declined to do so, C.A. App. 626.

In June 1985, "the decision document affirming the Area Director's decision awaited Mr. Fritz' signature." App. 127a; *Navajo*, 537 U.S. at 496. However, before Fritz could return from military reserve duty to sign the decision, the Solicitor's Office leaked the decision to Peabody. C.A. App. 725, 1089-90. Peabody hired Stanley Hulett, Interior Secretary Hodel's close personal friend, to influence Hodel *ex*

parte. Hulett met secretly with Hodel, and Hodel agreed to sign a memorandum, *prepared by Peabody's attorneys in the appeal*, instructing Fritz not to raise the royalty rate. App. 127a-128a; C.A. App. 746. The Navajo Nation was not notified of this meeting or the Secretary's instruction. App. 128a.

Rather, the Solicitor's Office originally warned that, if the Navajo learned of the Secretary's action, it would likely transfer the case to the IBIA, and the Secretary "would have to personally assume jurisdiction of the appeal to avoid a decision by the IBIA." C.A. App. 771. Thus, after meetings with Hodel, the Solicitor's Office intentionally misled the Navajo Nation in an August 1985 letter. App. 128a. The Associate Solicitor who signed that letter admitted that it was not candid, C.A. App. 1789, and the letter's drafter acknowledged that it was calculated to conceal the truth, *id.* at 1451-52. The Navajo Nation construed this letter and other odd communications from the Department[5] as a signal that the *merits* of the 20% rate were still being debated within the Department. *Id.* at 2854.

The applicable regulation permitted negotiations only if requested by the tribes and limited them generally to 30 days. See 25 C.F.R. § 211.2 (1987); C.A. App. 2048-49 (PPFs 262-264).[6] The Navajo Nation informed the Secretary that it opposed further negotiations. *E.g.*, C.A. App. 751, 766-67. Nonetheless, the Secretary sent the Nation back into negotiations, furthering the company's "maximum delay" strategy. See *id.* at 452. The Navajo Nation negotiated "unarmed with critical knowledge," App.

---

[5] *See* Pet. 7 n.2.

[6] The Plaintiff's Proposed Findings ("PPFs") cited in this Opposition are all unrefuted.

138a, and "facing severe economic pressures," *id.* at 90a, C.A. App. 4214-19. "[T]he Navajo Nation, arguably already at a competitive disadvantage, could not truly be said to have negotiated from a position of equality with Peabody." App. 138a-139a.

The Navajo endured two more years of negligible royalties and finally capitulated. The facial 12½% royalty rate in the resulting 1987 lease amendments was "well below the rate that had previously been determined appropriate" by the Department. App. 137a-138a. To obtain even that rate, "[t]he Navajo Nation forfeited $33 million in back taxes and $56 million in back royalties," *id.* at 131a, and was forced to limit taxes upheld in *Kerr-McGee Corp.* v. *Navajo Tribe of Indians*, 471 U.S. 195 (1985). Despite the Court of Federal Claims' ("CFC") statement to the contrary, App. 155a, the Navajo Nation had urged repeatedly and demonstrated that the true royalty rate was less than the minimum that Congress had established for federal coal.[7] All major features of the amended leases damaged Navajo interests.[8]

---

[7] *See* C.A. App. 107, 124, 133, 1973 (Mot. for Summ. J. (Dec. 15, 1997)); *id.* at 2046, 2058 (PPFs 247, 315); *id.* at 2771, 2796 (Consolidated Response (June 17, 1998)). The Nation's Rule 59 motion requested the CFC to correct its misstatement, *id.* at 3382-83, but the CFC did not address the matter either then or in response to the Nation's renewed request and further showing on remand, *id.* at 3568, 3673-74; *see also id.* at 3666 (coal conveyed "at substantially less than the Fair Market Value").

[8] The Government touts the increase in royalty rate to 12½% for coal under another lease, Pet. 7, but all observers knew that if the 20% rate were affirmed for the Navajo lease, the rate for the adjacent Navajo and Hopi coal would also rise to 20%. *E.g.*, C.A. App. 740, 1072-73, 1522-23. The bonuses highlighted by the Government, Pet. 7, were "considerably below" bonuses that the United States demands for its own coal. C.A. App. 3673-74,

The lease amendments were, in essence, new leases, bearing no resemblance to the IMLA form lease. App. 42a; compare C.A. App. 793-835 (1987 lease), with *id.* at 3648-52 (form lease). In September 1987, both the Nation and the BIA Area Office requested that the Department review them to determine if they were in the Nation's best interest. *Id*. at 836-37. Review was requested under regulations that required economic analyses of lease amendments, essential to "ensure that Indian owners desiring to have their minerals developed receive at least fair and reasonable renumeration." See 52 Fed. Reg. 31,916, 31,918, 31,930 (promulgating 25 C.F.R. § 211.1(a)), 31,921-22 and 31,933 (promulgating 25 C.F.R. § 211.34) (Aug. 24, 1987). Such review would have shown that the leases were unfair to the Navajo, see, *e.g.*, C.A. App. 2051-56 (PPFs 279, 281-302), and the Department suspended the rules' effective date shortly after the Nation's and BIA's requests, at the behest of "industry" and under the guidance of the Assistant Solicitor who "shepherded" the lease amendments through the Department for Peabody, 52 Fed. Reg. 39,332 (Oct. 21, 1987); C.A. App. 920, 2047 (PPF 254). Six weeks later, Hodel assured Peabody that he would approve the amendments, without a recommendation from any Interior employee. C.A. App. 2056-57 (PPFs 304-306). The merits of the transaction to the Navajo were irrelevant to the Department. *Id.* at 2047, 2051 (PPFs 252-253, 277-278).

Hodel's actions benefitted one of Peabody's customers, the Navajo Generating Station ("NGS"), in the amount of $347,500,000. C.A. App. 736. Because

---

1857. Peabody's agreement in 1987 not to contest tribal taxes was insignificant because this Court had validated them in *Kerr-McGee*.

the Bureau of Reclamation owns a 24.5% interest in NGS, Hodel's actions directly benefited the Government in an amount in excess of $84 million. App. 159a-160a; C.A. App. 1860.

These unrebutted facts show that the Department violated the most basic trust duties of care, loyalty, and candor and that there is "no plausible defense" for the Department's actions here. App. 136a, 139a. "The facts of this case show that the Secretary acted in the best interests of a third party and not in the interests of the beneficiary to whom he owed a fiduciary duty – a classic violation of common law fiduciary obligations." *Id.* at 162a.

3. Prior Proceedings.

The Navajo Nation sued the United States, alleging a breach of trust in its mismanagement of Navajo coal controlled by the United States under a comprehensive federal statutory and regulatory scheme, including IMLA, the Rehabilitation Act, SMCRA, FOGRMA, and associated regulations. C.A. App. 32-42. The CFC unequivocally found that the United States had breached its duties of care, candor and loyalty. *E.g.*, App. 135a-139a, 162a. In its analysis, the CFC focused on only one of the cited statutes, IMLA. *Id.* at 139a-140a ("In order to succeed in litigation in this Court, the plaintiffs must show that IMLA imposes specific fiduciary duties on the government . . . ."); see *id.* at 141a-155a. The CFC held that the United States did not violate any duty mandating compensation under IMLA.

On appeal, the Navajo Nation continued to rely on its network of statutes and regulations, but the Federal Circuit determined that IMLA, by itself, established money-mandating duties that were

violated.[9] App. 95a-98a; see *id.* at 72a. IMLA applies to all tribes and all mineral-leasing activities. This Court thus granted certiorari to address the scope of IMLA, and it reversed. It held "that the Tribe's claim . . . fails, for it does not derive from any liability-imposing provision of the IMLA or its implementing regulations," and "remanded for further proceedings consistent with [its] opinion." *Navajo*, 537 U.S. at 493, 514.

On remand, the court of appeals found that this Court's decision held only that IMLA did not give rise to money-mandating duties and rejected the Government's contention that the remand should be treated as an order of dismissal with prejudice. App. 80a-81a. The court remanded to the CFC to decide "whether, apart from IMLA, section 399, and IMDA," *id.* at 81a, see *supra* n.9, "'a network of other statutes and regulations' imposes 'judicially enforceable fiduciary duties upon the United States' in connection with the Peabody lease and, if so, whether such duties were breached." App. 81a. The Federal Circuit denied the United States' petition for rehearing and rehearing *en banc* and the United States did not seek review by this Court.

On remand, the CFC took additional evidence, including the unrebutted affidavit of Secretary Udall and the reports of economists showing that the Navajo Nation obtained less compensation for its coal in bonuses and royalties than the federal government requires for its own coal. C.A. App. 3575, 3661-12.

---

[9] The court of appeals also found support for its holding in the 1982 Indian Mineral Development Act ("IMDA") and 25 U.S.C. § 399. App. 89a, 95a-98a. The Nation had never relied on § 399, and had cited to IMDA only to contrast its focus on tribal self-determination with IMLA's "basic purpose – to maximize revenues from reservation lands." *Kerr-McGee*, 471 U.S. at 200.

Nonetheless, the CFC held that federal law did "not suffice to establish a money-mandating trust in the area of royalty rates" and again dismissed. App. 69a. The court of appeals reversed, holding on the basis of the array of statutes and regulatory provisions described *supra*, that the Government breached its management duties arising from its comprehensive control over all aspects of Navajo coal leasing and development, and violated specific duties set forth in the Rehabilitation Act and SMCRA. *Id*. at 32a-43a. The Government's petition for rehearing and rehearing *en banc* was denied without dissent.

REASONS FOR DENYING THE PETITION

I. THE DECISION BELOW IS WHOLLY CONSISTENT WITH *NAVAJO*'S REMAND.

The court of appeals carefully considered and rejected the Government's contention that *Navajo*'s remand for further proceedings *precluded* further proceedings to consider statutes and regulations not at issue in *Navajo*. App. 2a; *id*. at 78a-81a. That determination is clearly correct.

As formulated by the Government, the Question Presented in this Court's *Navajo* decision was limited to the scope of the United States' duties under IMLA:

> Whether the court of appeals properly held that the United States is liable to the Navajo Nation for up to $600 million in damages for breach of fiduciary duty in connection with the Secretary's actions concerning an Indian mineral lease, without finding that the Secretary had violated *any specific statutory or regulatory duty established pursuant to the IMLA*. [Petition at i, *United States* v. *Navajo Nation*, No. 01-1375 (filed Mar. 15, 2002) (Emphasis added).]

The Government's decision to craft a limited Question Presented is understandable, because the court of appeals' decision had not addressed any of the other statutes comprising the Navajo Nation's network. As the Government notes, the Nation relied on other statutes and regulations in its briefs, but this Court adhered to its customary practice and addressed only the Question Presented.

The text of the decision removes any doubt. *Navajo* stated first that "[t]his case concerns the Indian Mineral Leasing Act of 1938 (IMLA) . . . and the role it assigns to the Secretary of the Interior . . . with respect to coal leases executed by an Indian Tribe and a private lessee." 537 U.S. at 493. To answer that question, this Court "consider[ed] whether the IMLA and its implementing regulations can fairly be interpreted as mandating compensation for the Government's alleged breach of trust in this case." *Id.* at 506; see *id.* at 507 n.11 ("We rule only on the Government's role in the coal leasing process under the IMLA."). This Court reasoned that "the Secretary's involvement in coal leasing under the IMLA more closely resembles the role provided for the Government by the GAA [General Allotment Act] regarding allotted forest lands" in *Mitchell I*, 445 U.S. 535, *Navajo*, 537 U.S. at 508, and similarly rejected liability for the Secretary's *ex parte* contacts with Peabody because "[n]othing in . . . IMLA's basic provision, or in the IMLA's implementing regulations proscribed" them, 537 U.S. at 513.

The Court's holding is likewise restricted to the IMLA question presented by the Government: "we hold that the Tribe's claim for compensation from the Federal Government fails, for it does not derive from any liability-imposing provision of the IMLA or its

implementing regulations." *Id.* at 493. Finally, this Court remanded for further proceedings. *Id*. at 514.

The Government's argument that the remand for further proceedings actually foreclosed them contradicts basic principles of this Court's jurisprudence. First, this Court does "not decide issues outside the questions presented by the petition for certiorari." *Glover* v. *United States*, 531 U.S. 198, 205 (2001). Moreover, this Court "'decide[s] cases on the grounds raised and considered in the Court of Appeals.'" *Owasso Indep. Sch. Dist. No. 1-011* v. *Falvo*, 534 U.S. 426, 431 (2002). Here, neither the Question Presented nor the prior decision of the Federal Circuit adverted to the other statutes and regulations upon which the Navajo Nation has always based its claim. Thus, *Navajo*'s "remand[] . . . 'for further proceedings'" gave the lower courts full discretion to consider and decide any matters left open by the mandate. *Quern* v. *Jordan*, 440 U.S. 332, 347 n.18 (1979). The Government's contrary argument is based on a single phrase in *Navajo* "we have no warrant from *any relevant statute or regulation*" upon which to base enforceable duties. Pet. 19. That phrase must be read in light of the appellate decision under review (discussing only IMLA, § 399, and IMDA) and the issue before the Court – *i.e.*, "the Indian Mineral Leasing Act of 1938 . . . and the role it assigns to the Secretary." *Navajo* 537 U.S. at 493; see *Sprague* v. *Ticonic Nat'l Bank*, 307 U.S. 161, 168 (1939). The Government's argument ignores not only the relevant context and limited Question Presented, but also the Court's express language confining the issue, the analysis, and the holding to the Government's duties under IMLA.

This Court knows how to remand with instructions that result in dismissal. It "remand[s] with instruc-

tions to dismiss, with prejudice." See *City of Cuyahoga Falls* v. *Buckeye Cmty. Hope Found.*, 538 U.S. 188, 199-200 (2003); *Deakins* v. *Monaghan*, 484 U.S. 193, 204 (1988). *Navajo* did not take this course. Rather, this case has followed precisely the same course as that in *Mitchell I* and *Mitchell II*, with the courts first concluding that a particular statute – in *Mitchell I*, the General Allotment Act, and in *Navajo,* IMLA – did not create money-mandating trust duties, but thereafter recognizing that an additional network of federal laws *did*. Nothing in *Navajo* precluded the Federal Circuit from following this path.

II. THE DECISION BELOW FAITHFULLY APPLIES GOVERNING PRECEDENT.

The Government next argues that the analysis in the decision below is inconsistent with *Navajo* and the *Mitchell* cases in two respects. First, the Government contends that the Federal Circuit did not require the Navajo to "'allege a violation of a specific rights-creating or duty-imposing statute or regulation,'" and instead authorized money damages solely for a violation of "'common-law trust duties.'" Pet. 22. Second, the Government claims that the court's conclusion that federal laws impose money-mandating obligations on the United States is wrong. *Id.* at 28. The first argument misunderstands the decision below, which correctly states and faithfully follows this Court's precedent. The second argument is that the Federal Circuit misapplied the governing legal standard. It is both wrong and plainly not worthy of this Court's review.

1. The Government's first argument is based on a mischaracterization of the decision below. The court of appeals set out this Court's pathmarking precedents in great detail and accurately recited the legal framework for determining whether federal law

mandates a right of recovery in damages. App. 10a-15a. The court recognized that "[t]here must be 'specific rights-creating or duty-imposing statutory or regulatory prescriptions.'" *Id.* at 24a, 37a.

In arguing that the court ignored this requirement and instead authorized damages based solely on violations of common-law trust duties, Pet. 23, the Government focuses on the part of the Federal Circuit's opinion addressing the relationship between statutory and regulatory prescriptions and the common law of trusts. See App. 37a-38a. Review of the opinion, however, reveals an accurate description of the relevant roles of each set of legal rules in determining the Government's liability for damages.

Specifically, the court properly understood *Apache* to permit the general trust law to be used to infer a remedy in damages for breach of fiduciary duty. App. 37a (quoting *Apache*, 537 U.S. at 477); accord *Mitchell II*, 463 U.S. at 226. The Government concedes this point. Pet. 25-26. But the Government insists that the *only* duties that the Government must perform in the Indian trust context are those *expressly* set forth in a statute or regulation. As the Federal Circuit correctly held, this Court rejected that argument in *Apache*.

In *Apache*, the relevant statute failed to "expressly subject the Government to duties of management and conservation." 537 U.S. at 475. Nonetheless, this Court decided that

> the fact that the property occupied by the United States is expressly subject to a trust supports a fair inference that an obligation to preserve the property improvements was incumbent on the United States as trustee. *This is so because elementary trust law, after all, confirms the*

> *commonsense assumption that a fiduciary actually administering trust property may not allow it to fall into ruin on his watch.* [*Id.* (emphasis added).]

The Court cited the Bogert trust treatise, the *Restatement (Second) of Trusts*, and *United States* v. *Mason*, 412 U.S. 391 (1973), for the proposition that the federal trustee must administer trust assets it controls with care and skill, even though that duty is not set forth in any statute or regulation. 537 U.S. at 475.

The Government also misreads *Mitchell II*. Here, as in *Mitchell II*, the property is held in an express trust established by Congress, 25 U.S.C. § 640d-9(a), and the trust has all of the hallmarks of a conventional fiduciary relationship, see *Mitchell II*, 463 U.S. at 225; *Apache*, 537 U.S. at 473. Here, too, the Department exercised literally daily supervision over all aspects of the trust resource and virtually every stage of the process was under federal control, including royalty rates.[10] *Mitchell II*, 463 U.S. at 222; App. 16a, 27a-34a. In this setting, the relevant statutes and regulations "establish fiduciary obligations of the Government in the management and operation of Indian lands and resources." *Mitchell II*, 463 U.S. at 226; accord *Apache*, 537 U.S. at 475. The statutes and regulations establish the "contours" of those management duties. *Mitchell II*, 463 U.S. at 224.

---

[10] The court of appeals properly rejected the Government's position that it could exert plenary control over the determination of the increased royalty rate and then disclaim liability for exercising such control. App. 15a-16a; *see Mitchell II*, 463 U.S. at 225.

The Government incorrectly asserts that *Mitchell II* found liability based only on violations of "a *specific* duty separately set forth in one of the statutes or regulations governing federal Indian timber management." Pet. 25. Not so. No statute or regulation expressly required the Government to seek fair value for Indian timber or establish a road system to permit profitable exploitation or obtain more than the minimum rate of return on monies collected and invested by the United States. However, after considering the purposes of the comprehensive statutory scheme and the Government's control over rights-of-way and proceeds from timber sales, this Court affirmed liability for the Government's failure to undertake these acts. See *Mitchell II*, 463 U.S. at 228, *aff'g Mitchell* v. *United States*, 664 F.2d 265, 267, 273 (Ct. Cl. 1981).

Further, *Apache* eliminates any doubt as to whether violations of general trust law standards may be compensable even if the operative statute and regulations do not expressly delineate the acts required to fulfill the trust duties. See also *Varity Corp.* v. *Howe*, 516 U.S. 489, 504 (1996) ("If the fiduciary duty applied to nothing more than activities already controlled by other specific legal duties, it would serve no purpose.").

The Federal Circuit's discussion of *Apache* reveals its full understanding of the relationship between specific rights-creating and duty-imposing language and common law principles. It did not rely on government duties "in other areas" to "impose[ ] new and additional duties" on the Government. Pet. 26 (emphasis omitted). It relied, in part, on common-law trust standards to measure the Government's performance of its management duties under comprehensive statutes and regulations that govern every

aspect of coal development and leasing on Navajo trust land.

The key distinction between *Mitchell I* and *Mitchell II* (and, indeed, *Navajo* and *Mitchell II*), is that the former involved only a "'bare'" or "'limited'" trust with no federal responsibility to manage the trust resource, while the latter involved "statutes and regulations specifically addressing the management of [the trust resource] on allotted lands." See *Apache*, 537 U.S. at 473-74. As *Mitchell II* requires, the Federal Circuit assessed the degree of authorized or mandated federal control over Navajo coal lands, including their leasing and exploitation, and concluded that the Government exercised comprehensive control over all aspects of that resource. App. 24a-34a. Specifically, the court observed that the Government planned the Navajo's coal development from the outset under the Rehabilitation Act, *id*. at 27a; approved the original lease which established both the royalty rate and the exclusive means by which it would be adjusted, see *id*. at 3a-6a; C.A. App. 4262; controlled the royalty adjustment process and negotiation by contract, regulation and in reality, see App. 3a-4a, 32a-33a; 25 C.F.R. § 211.2 (1987); C.A. App. 284; controlled coal mining operations, App. 27a-29a; controlled collection and management of royalties, *id*. at 29a-31a; and controlled the content of the Navajo's coal leases, *id*. at 31a-33a. The Federal Circuit also found that the Government "exercise[d] actual control over the terms and conditions of coal mining leases, including those already in existence," rejecting the Government's contention that there can

be no liability here in the absence of specific control over coal *leasing*. *Id*. at 33a.[11]

In addition, the court below properly relied on the Rehabilitation Act as providing a "'fair inference'" of liability for the Secretary's approval of leases of Navajo minerals. App. 33a-34a; see *Apache*, 537 U.S. at 472-73. As the court pointed out, while Congress expressly exempted the Government from liability for certain Navajo transactions in subsections (b) and (c) of § 635, subsection (a) contains no such exemption, giving rise to a fair inference that the Government is liable for wrongful approval of such leases. App. 33a-34a.

The Government's pervasive control is intended to benefit the Navajo. App. 34a-36a. As in *Mitchell II*, the comprehensive control embodied in the relevant statutes and regulations can "'fairly be interpreted as mandating compensation by the Federal Government for violations of its fiduciary responsibilities in the management of Indian property.'" *Id*. at 13a (quoting *Mitchell II*, 463 U.S. at 228). Federal law provides the "contours" of those management duties, and general trust law helps to determine their nature and scope. See *Mitchell II*, 463 U.S. at 224-26 & n.30; *Apache*, 537 U.S. at 475; *Faragher* v. *City of Boca Raton,* 524 U.S. 775, 788 (1998) (distinguishing "contours" from "definite rules").

The Circuit proceeded as this Court instructed. First, it examined the relevant federal laws to

---

[11] The Government attacks the lower court's statement in dicta that Government control of the Navajo's coal resources generally would support the Tribe's claim even if the Government had not exercised specific control over leasing, relying on a rule of statutory construction. Pet. 27-28. This overreading of dicta is not worthy of review.

identify specific "rights-creating [and] duty-imposing" provisions. Then it applied common-law trust principles to fill in the contours of the Government's management duties, concluding quite properly that the Government is held to standards of care,[12] loyalty,[13] and candor[14] in its administration of Navajo coal. It concluded, as did the CFC, that the Government had breached these basic fiduciary duties. App. 42a. The Government's view that the Federal Circuit misunderstood the relevant legal framework is wrong.

2. Finally, the Government argues that even if the Federal Circuit correctly stated the applicable legal standards, it misapplied them here. The Government likely files numerous oppositions every year urging this Court to deny petitions that make such an assertion, and this Court consistently denies these petitions. In all events, the Government is wrong.

The Government seeks to undermine the Federal Circuit's decision first by ignoring the broad bases for the court's finding of a full fiduciary relationship concerning Navajo coal, and then segregating each statutory provision and regulation to minimize the cumulative evidence of comprehensive federal control

---

[12] *See Apache*, 537 U.S. at 475; *Mason*, 412 U.S. at 398.

[13] *See Seminole Nation* v. *United States*, 316 U.S. 286, 297 n.12 (1942) (trustee's duty of loyalty must be enforced with uncompromising rigidity).

[14] "A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior." *Seminole*, 316 U.S. at 297 n.12 (internal quotation marks omitted); *accord Varity Corp.*, 516 U.S. at 506 ("'[L]ying is inconsistent with the duty of loyalty owed by all fiduciaries . . . .'").

and authority. However, it is clear that the Government controls or supervises every facet of Navajo coal development "from the creation of its leases to the reclamation of land." *Peabody Coal*, 761 P.2d at 1099.

The two treaties establish the foundation of the trust relationship, and regulations under IMLA, at issue in *Navajo*, set a floor for Indian coal royalties. Although these regulations were "designed to protect the Indians," *Montana* v. *Blackfeet Tribe of Indians*, 471 U.S. 759, 764 (1985), conditions on the Navajo reservation required that the federal government assume a more robust role with respect to Navajo resources. Congress passed the Rehabilitation Act in response. This Act directed the *Secretary* to undertake "a program of basic improvements for the conservation and development of the resources of the Navajo." 25 U.S.C. § 631. The leasing here was accomplished under that Act. App. 62a; C.A. App. 3575. Indeed, as Secretary Udall testified, the leases at issue were the "centerpiece" of the Act's resource development program. C.A. App. 3575.

Moreover, as noted, the Rehabilitation Act requires the Secretary to approve leases of natural resources held in trust for the Navajo. App. 33a-34a (citing 25 U.S.C. § 635(a)). In context, that section demonstrates that the Government is liable for breach of fiduciary obligation in connection with such approvals, because the *other* two subsections of § 635 expressly *exempt* the United States from liability for other transactions, while the subsection mandating secretarial approval of mineral leases does not. As the court of appeals noted, "[t]he government does not dispute the Nation's interpretation [of § 635], and we agree that government liability from the approval of such leases is a 'fair interpretation.'" App. 34a.

The Government was acting as trustee in exercising its lease approval function. As Secretary Udall explained, in

> planning and decision making [for the Peabody lease and related development], I acted in the capacity as trustee for the Indians, as I understood the law to require, and I believed then and do believe now that such trusteeship was of paramount importance in the Department of the Interior's implementation of the development program under the . . . Rehabilitation Act. [C.A. App. 3575.]

This is the Department's consistent interpretation of the Act. See *First Mesa Consol. Vills.* v. *Phoenix Area Dir.*, 26 IBIA 18, 27-28 & n.14 (1994) (pursuant to the Rehabilitation Act, the "BIA must perform its lease approval function in a manner consistent with the trust responsibility of the United States for the management of tribal lands"). This interpretation, and not the Government's present litigation posture, is entitled to considerable deference. See *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965).

The Rehabilitation Act also required that the Secretary "follow" the Nation's recommendations when feasible and that the Tribe be "'kept informed and afforded opportunity to consider from their inception plans pertaining to the program authorized,' including the 'program of basic improvements for the conservation and development of the resources of the Navajo . . . Indians.'" App. 38a (quoting 25 U.S.C. §§ 631, 638). The Peabody lease at issue was plainly part of that resource development program, and the Government had a duty to keep the Navajo informed of relevant developments. Both the Rehabilitation Act and SMCRA independently mandated that the Secretary effect the Tribe's

requests and recommendations regarding the resource development program, 25 U.S.C. § 638; 30 U.S.C. § 1300(e); 30 C.F.R. § 750.20(b) (1987), but the Secretary rejected the Navajo Nation's request and recommendation that the royalty rate be adjusted to 20%, although that figure was found to be proper by all federal studies. These provisions essentially codify the Secretary's trust duties of candor and loyalty to the Navajo in this limited context, and they were undeniably violated. See App. 38a-42a.[15]

The Government contends that the Rehabilitation Act does not create money-mandating duties because certain of its programs were almost completed around 1964, the year that the original Peabody lease was approved. Pet. 28-29. This position is contrary to the consistent position of the Department, see C.A. App. 3575; *First Mesa*, 26 IBIA at 27-28 & n.14, and to the natural reading of the Act itself. Although the Act's programs related to federal expenditures for schools, roads, and other infrastructure were financed and thus complete in the early 1960s, see S. Rep. No. 93-11, at 1 (1973), the same was not true of the Act's general provisions relating to resource development, including lease approval. Critically, although Congress has amended or repealed several provisions of the Act, those governing Navajo resource conveyances (§§ 631, 635) and the Secretary's duties of candor and loyalty (§ 638) remain intact.

---

[15] Likewise, under 30 C.F.R. § 750.6(d) (1987), the BIA was charged with "[c]onsulting directly with . . . Indian minerals owners . . . in matters relating to surface coal mining and reclamation operations on Indian lands" but the Department's secrecy and misinformation campaign precluded compliance with this regulatory duty, also. *See* C.A. App. 771, 773, 784, 1027, 4214-19.

The Government also incorrectly suggests that the lease was subject only to IMLA and that the Circuit's reliance on the Rehabilitation Act is misplaced. It selectively cites an excerpt from the Navajo Nation's Rule 59 motion filed in 2000 when proceedings were focused on IMLA. Pet. 31. Subsequently, the CFC, on remand for further proceedings, properly accepted additional evidence and argument. See *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 258-59 (1895). That evidence included testimony from former Secretary Udall and Peabody's counsel demonstrating that the lease was drafted and approved by the Department of the Interior under the Rehabilitation Act, C.A. App. 3575, 4261-62; *Austin* v. *Andrus*, 638 F.2d 113, 114 (9th Cir. 1981), and bore no resemblance to the Interior form lease required under IMLA. See *supra* at 4-5; App. 62a (describing lease as centerpiece of Rehabilitation Act programs).

In sum, the Federal Circuit's determination that federal law imposed money-mandating duties on the United States in connection with coal leasing approval is correct.

III. THIS CASE HAS LITTLE CONSEQUENCE FOR ANY OTHER CASE.

This case arises from events occurring almost a quarter-century ago under a regulatory scheme that had limited application and has been completely changed since that time. Recurrence of the issue presented is impossible.

First, one of the key statutes, the Rehabilitation Act applies to only two tribes, the Navajo and Hopi, and another, SMCRA, applies only to these two tribes and one other, since the fourth tribe having strippable coal has decided not to allow coal mining on its lands. See, *e.g.*, H.R. Rep. No. 95-218, at 84

(1977) (reflecting only four coal-leasing tribes); Act of Oct. 9, 1980, Pub. L. No. 96-401, 94 Stat. 1701 (cancelling all coal leases on Northern Cheyenne Reservation).

Second, the Department has amended the regulation in effect from 1984-1987 that mandated inclusion of non-economic terms in coal leases requested by tribes. See 54 Fed. Reg. 22,182, 22,187 (May 22, 1989) (amending 30 C.F.R. § 750.20(b) (1987)).

Third, after 30 years of comprehensive federal regulation of surface coal mining on Indian lands, Congress recently authorized the tribes to undertake full responsibility. Tax Relief and Health Care Act of 2006, Pub. L. No. 109-432, § 209, 119 Stat. at 3019 (to be codified at 30 U.S.C. § 1300(j)).

Fourth, the Department completely overhauled the regulations under Indian mineral leasing statutes in 1996. 61 Fed. Reg. 35,634 (July 8, 1996) (promulgating 25 C.F.R. pt. 211). And, in 2005 "Congress authorized the most significant change in the way energy resources can be developed since . . . [IMDA] [in the] Indian Tribal Energy Development and Self-Determination Act," 25 U.S.C. §§ 3501-3506 ("ITEDSDA"). *Cohen's Handbook of Federal Indian Law*, 2007 Supp. at 114 (Nell J. Newton ed. 2005), (footnotes omitted). The ITEDSDA permits any tribe to lease its minerals *without* federal approval once the tribe enters into an energy resource agreement with the Secretary under 25 U.S.C. § 3504(e). Congress specifically addressed the Secretary's trust duties there. See 25 U.S.C. § 3504(e)(6). This highlights the contrasting federal approval requirements that existed when the Peabody lease was negotiated. See *id.* §§ 396a; 635(a).

The facts here simply cannot recur. They concern a royalty adjustment term not found in any other Indian mineral lease (including the Hopi lease at issue in its tag-along case, see Pet. 32) and complicated circumstances arising out of Peabody's appeal of the BIA's royalty adjustment decision under that lease term. These peculiar facts include a warning by the Solicitor's Office of what would happen if the Navajo learned of the Secretary's collusion with Peabody and his "'march or die'" instruction not to raise the royalty rate. C.A. App. 771; App. 128a. They include the Department's intentional deception of the Navajo leadership.

The notion that imposing liability in this case will leave the BIA unsure of what may or may not be permissible conduct (Pet. 32-33) is silly. Neither then nor today can the Department plausibly claim doubt as to the propriety of the Secretary "meet[ing] secretly with parties having interests adverse to those of the trust beneficiary, adopt[ing] the third parties' desired course of action in lieu of action favorable to the beneficiary, and then mislead[ing] the beneficiary concerning these events." App. 136a. Everyone involved knew the Department was breaching its trust; that is why the Department painstakingly concealed the facts not just from the Navajo Nation, but even from the BIA. *Id.* at 128a-129a, 138a-139a; C.A. App. 771, 773, 784 (BIA Area Director "**NOT**" to be told of status of appeal), 2823 (only time in Area Director's career that he was refused such a status report).

This Court established the governing principles in Indian trust cases in the *Mitchell* cases in the early 1980s and recently explicated and refined the law in the companion *Navajo* and *Apache* cases. The court of appeals correctly stated the law established by this

Court. App. 10a-14a, 24a. The Court of Federal Claims understands the limited reach of the decision below. See *Samish Indian Nation* v. *United States,* 82 Fed. Cl. 54, 65-66 (2008).[16] This Court has denied review in similar cases.[17] The issue presented here will not recur. The interlocutory nature of the decision, which counsels against review, reinforces that certiorari should be denied. See *VMI* v. *United States*, 508 U.S. 946 (1993) (Scalia, J., respecting denial of petition for writ of certiorari); *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam).

---

[16] The Government claims that the decision below will significantly expand the United States' trust responsibilities, citing *Wolfchild* v. *United States*, 78 Fed. Cl. 472 (2007), *appeal pending*, No. 2008-5018 (Fed. Cir.), as an exemplar. Pet. 32. Nothing in *Wolfchild* supports the Government's characterization. The CFC cited the decision below solely to support the settled proposition that a fiduciary relationship normally exists where the Government has control or supervision over tribal monies or properties. *See* 78 Fed. Cl. at 483 n.15.

[17] *See United States* v. *Shoshone Indian Tribe*, 544 U.S. 973 (2005); *Eastern Shoshone Tribe* v. *United States*, 544 U.S. 973 (2005).

CONCLUSION

The petition should be denied.

Respectfully submitted,

PAUL E. FRYE
FRYE LAW FIRM, P.C.
10400 Academy Rd. NE
Suite 310
Albuquerque, NM 87111

CARTER G. PHILLIPS*
VIRGINIA A. SEITZ
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

LOUIS DENETSOSIE
ATTORNEY GENERAL
THE NAVAJO NATION
P. O. Box 2010
Window Rock, AZ 86515

Counsel for Respondent

August 4, 2008

*Counsel of Record

ADDENDA

ADDENDUM A

25 U.S.C. § 631. Basic program for conservation and development of resources; projects; appropriations

In order to further the purposes of existing treaties with the Navajo Indians, to provide facilities, employment, and services essential in combating hunger, disease, poverty, and demoralization among the members of the Navajo and Hopi Tribes, to make available the resources of their reservations for use in promoting a self-supporting economy and self-reliant communities, and to lay a stable foundation on which these Indians can engage in diversified economic activities and ultimately attain standards of living comparable with those enjoyed by other citizens, the Secretary of the Interior is authorized and directed to undertake, within the limits of the funds from time to time appropriated pursuant to this subchapter, a program of basic improvements for the conservation and development of the resources of the Navajo and Hopi Indians, the more productive employment of their manpower, and the supplying of means to be used in their rehabilitation, whether on or off the Navajo and Hopi Indian Reservations. Such program shall include the following projects for which capital expenditures in the amount shown after each project listed in the following subsections and totaling $108,570,000 are authorized to be appropriated:

(1) Soil and water conservation and range improvement work, $10,000,000.

(2) Completion and extension of existing irrigation projects, and completion of the investigation to determine the feasibility of the proposed San Juan-Shiprock irrigation project, $9,000,000.

(3) Surveys and studies of timber, coal, mineral, and other physical and human resources, $500,000.

(4) Development of industrial and business enterprises, $1,000,000.

(5) Development of opportunities for off-reservation employment and resettlement and assistance in adjustments related thereto, $3,500,000.

(6) Relocation and resettlement of Navajo and Hopi Indians (Colorado River Indian Reservation), $5,750,000.

(7) Roads and trails, $40,000,000; of which not less than $20,000,000 shall be (A) available for contract authority for such construction and improvement of the roads designated as route 1 and route 3 on the Navajo and Hopi Indian Reservations as may be necessary to bring the portion of such roads located in any State up to at least the secondary road standards in effect in such State, and (B) in addition to any amounts expended on such roads under the $20,000,000 authorization provided under this clause prior to amendment.

(8) Telephone and radio communication systems, $250,000.

(9) Agency, institutional, and domestic water supply, $2,500,000.

(10) Establishment of a revolving loan fund, $5,000,000.

(11) Hospital buildings and equipment, and other health conservation measures, $4,750,000.

(12) School buildings and equipment, and other educational measures, $25,000,000.

(13) Housing and necessary facilities and equipment, $820,000.

(14) Common service facilities, $500,000.

Funds so appropriated shall be available for administration, investigations, plans, construction, and all other objects necessary for or appropriate to the carrying out of the provisions of this subchapter. Such further sums as may be necessary for or appropriate to the annual operation and maintenance of the projects herein enumerated are also authorized to be appropriated. Funds appropriated under these authorizations shall be in addition to funds made available for use on the Navajo and Hopi Reservations, or with respect to Indians of the Navajo Tribes, out of appropriations heretofore or hereafter granted for the benefit, care, or assistance of Indians in general, or made pursuant to other authorizations now in effect.

25 U.S.C. § 632. Character and extent of administration; time limit; reports on use of funds

The foregoing program shall be administered in accordance with the provisions of this subchapter and existing laws relating to Indian affairs, shall include such facilities and services as are requisite for or incidental to the effectuation of the projects herein enumerated, shall apply sustained-yield principles to the administration of all renewable resources, and shall be prosecuted in a manner which will provide for completion of the program, so far as practicable, within ten years from April 19, 1950. An account of the progress being had in the rehabilitation of the Navajo and Hopi Indians, and of the use made of the funds appropriated to that end under this subchapter, shall be included in each annual report of the work of the Department of the Interior submitted to the Congress during the period covered by the foregoing program.

25 U.S.C. § 633. Preference in employment; on-the-job training

Navajo and Hopi Indians shall be given, whenever practicable, preference in employment on all projects undertaken pursuant to this subchapter, and, in furtherance of this policy may be given employment on such projects without regard to the provisions of the civil-service and classification laws. To the fullest extent possible, Indian workers on such projects shall receive on-the-job training in order to enable them to become qualified for more skilled employment.

25 U.S.C. § 634. Loans to Tribes or individual members; loan fund

The Secretary of the Interior is authorized, under such regulations as he may prescribe, to make loans from the loan fund authorized by section 631 of this title to the Navajo Tribe, or any member or association of members thereof, or to the Hopi Tribe, or any member or association of members thereof, for such productive purposes as, in his judgment, will tend to promote the better utilization of the manpower and resources of the Navajo or Hopi Indians. Sums collected in repayment of such loans and sums collected as interest or other charges thereon shall be credited to the loan fund, and shall be available for the purpose for which the fund was established.

25 U.S.C. § 635. Disposition of lands

(a) Lease of restricted lands; renewals

Any restricted Indian lands owned by the Navajo Tribe, members thereof, or associations of such members, or by the Hopi Tribe, members thereof, or associations of such members, may be leased by the Indian owners, with the approval of the Secretary of

the Interior, for public, religious, educational, recreational, or business purposes, including the development or utilization of natural resources in connection with operations under such leases. All leases so granted shall be for a term of not to exceed twenty-five years, but may include provisions authorizing their renewal for an additional term of not to exceed twenty-five years, and shall be made under such regulations as may be prescribed by the Secretary. Restricted allotments of deceased Indians may be leased under this section, for the benefit of their heirs or devisees, in the circumstances and by the persons prescribed in section 380 of this title. Nothing contained in this section shall be construed to repeal or affect any authority to lease restricted Indian lands conferred by or pursuant to any other provision of law.

(b) Lease, sale, or other disposition of lands owned in fee simple by Navajo Tribe

Notwithstanding any other provision of law, land owned in fee simple by the Navajo Tribe may be leased, sold, or otherwise disposed of by the sole authority of the Navajo Tribal Council, in any manner that similar land in the State in which such land is situated may be leased, sold, or otherwise disposed of by private landowners, and such disposition shall create no liability on the part of the United States.

(c) Transfer of unallotted lands to tribally owned or municipal corporations

The Secretary of the Interior is authorized to transfer, upon request of the Navajo Tribal Council, to any corporation owned by the tribe and organized pursuant to State law, or to any municipal corporation organized under State law, legal title to

or a leasehold interest in any unallotted lands held for the Navajo Indian Tribe, and thereafter the United States shall have no responsibility or liability for, but on request of the tribe shall render advice and assistance in, the management, use, or disposition of such lands.

25 U.S.C. § 636. Adoption of constitution by Navajo Tribe; method; contents

In order to facilitate the fullest possible participation by the Navajo Tribe in the program authorized by this subchapter, the members of the tribe shall have the right to adopt a tribal constitution in the manner herein prescribed. Such constitution may provide for the exercise by the Navajo Tribe of any powers vested in the tribe or any organ thereof by existing law, together with such additional powers as the members of the tribe may, with the approval of the Secretary of the Interior, deem proper to include therein. Such constitution shall be formulated by the Navajo Tribal Council at any regular meeting, distributed in printed form to the Navajo people for consideration, and adopted by secret ballot of the adult members of the Navajo Tribe in an election held under such regulations as the Secretary may prescribe, at which a majority of the qualified votes cast favor such adoption. The constitution shall authorize the fullest possible participation of the Navajos in the administration of their affairs as approved by the Secretary of the Interior and shall become effective when approved by the Secretary. The constitution may be amended from time to time in the same manner as herein provided for its adoption, and the Secretary of the Interior shall approve any amendment which in the opinion of the Secretary of the Interior advances the development of the Navajo people toward the fullest realization and exercise of

the rights, privileges, duties, and responsibilities of American citizenship.

25 U.S.C. § 637. Use of Navajo tribal funds

Notwithstanding any other provision of existing law, the tribal funds now on deposit or hereafter placed to the credit of the Navajo Tribe of Indians in the United States Treasury shall be available for such purposes as may be designated by the Navajo Tribal Council and approved by the Secretary of the Interior.

25 U.S.C. § 638. Participation by Tribal Councils; recommendations

The Tribal Councils of the Navajo and Hopi Tribes and the Indian communities affected shall be kept informed and afforded opportunity to consider from their inception plans pertaining to the program authorized by this subchapter. In the administration of the program, the Secretary of the Interior shall consider the recommendations of the tribal councils and shall follow such recommendations whenever he deems them feasible and consistent with the objectives of this subchapter.

25 U.S.C. § 639. Repealed. Pub. L. No. 104-193, tit. I, § 110(u), 110 Stat. 2175 (Aug. 22, 1996).

25 U.S.C. § 640. Repealed. Pub. L. No. 93-531, § 26, 88 Stat. 1723 (Dec. 22, 1974).

ADDENDUM B

30 U.S.C. § 1300. Indian lands

(a) Study of regulation of surface mining; consultation with tribe; proposed legislation

The Secretary is directed to study the question of the regulation of surface mining on Indian lands which will achieve the purpose of this chapter and recognize the special jurisdictional status of these lands. In carrying out this study the Secretary shall consult with Indian tribes. The study report shall include proposed legislation designed to allow Indian tribes to elect to assume full regulatory authority over the administration and enforcement of regulation of surface mining of coal on Indian lands.

(b) Submittal of study to Congress

The study report required by subsection (a) of this section together with drafts of proposed legislation and the view of each Indian tribe which would be affected shall be submitted to the Congress as soon as possible but not later than January 1, 1978.

(c) Compliance with interim environmental protection standards of this chapter

On and after one hundred and thirty-five days from August 3, 1977, all surface coal mining operations on Indian lands shall comply with requirements at least as stringent as those imposed by subsections (b)(2), (b)(3), (b)(5), (b)(10), (b)(13), (b)(19), and (d) of section 1265 of this title and the Secretary shall incorporate the requirements of such provisions in all existing and new leases issued for coal on Indian lands.

(d) Compliance with permanent environmental protection standards of this chapter

On and after thirty months from August 3, 1977, all surface coal mining operations on Indian lands shall comply with requirements at least as stringent as those imposed by sections 1257, 1258, 1259, 1260, 1265, 1266, 1267, and 1269 of this title and the Secretary shall incorporate the requirements of such provisions in all existing and new leases issued for coal on Indian lands.

(e) Inclusion and enforcement of terms and conditions of leases

With respect to leases issued after August 3, 1977, the Secretary shall include and enforce terms and conditions in addition to those required by subsections (c) and (d) of this section as may be requested by the Indian tribe in such leases.

(f) Approval of changes in terms and conditions of leases

Any change required by subsection (c) or (d) of this section in the terms and conditions of any coal lease on Indian lands existing on August 3, 1977, shall require the approval of the Secretary.

(g) Participation of tribes

The Secretary shall provide for adequate participation by the various Indian tribes affected in the study authorized in this section and not more than $700,000 of the funds authorized in section 1302(a) of this title shall be reserved for this purpose.

(h) Jurisdictional status

The Secretary shall analyze and make recommendations regarding the jurisdictional status of Indian Lands[18] outside the exterior boundaries of Indian

---

[18] So in original. Probably should be "lands".

reservations: *Provided*, That nothing in this chapter shall change the existing jurisdictional status of Indian Lands[1].

(i) Grants

The Secretary shall make grants to the Navajo, Hopi, Northern Cheyenne, and Crow tribes to assist such tribes in developing regulations and programs for regulating surface coal mining and reclamation operations on Indian lands. Grants made under this subsection shall be used to establish an office of surface mining regulation for each such tribe. Each such office shall—

(1) develop tribal regulations and program policies with respect to surface mining;

(2) assist the Office of Surface Mining Reclamation and Enforcement established by section 1211 of this title in the inspection and enforcement of surface mining activities on Indian lands, including, but not limited to, permitting, mine plan review, and bond release; and

(3) sponsor employment training and education in the area of mining and mineral resources.

* * * *

ADDENDUM C

25 C.F.R. PT. 211 (1987)

PART 211—LEASING OF TRIBAL LANDS FOR MINING

AUTHORITY: Secs. 16, 17. 48 Stat. 987, 988, sec. 9, 49 Stat. 1968, sec. 4. 52 Stat. 348; 25 U.S.C. 396d, 476, 477, 509. Interpret or apply secs. 1, 2, 49 Stat. 1250: 48 U.S.C. 358a. 362, unless otherwise noted.

SOURCE: 22 FR 10588, Dec. 24, 1957, unless otherwise noted. Redesignated at 47 FR 13327. Mar. 30, 1982.

§ 211.1 Definitions.

(a) The term "superintendent" in this part refers to the superintendent or other officer of the Bureau of Indian Affairs or of the Government who may have jurisdiction over the lands involved.

(b) The term "supervisor" in this part refers to a representative of the Secretary of the Interior, under direction of the United States Geological Survey, authorized and empowered to supervise and direct operations under oil and gas or other mining leases, to furnish scientific and technical information and advice, to ascertain and record the amount and value of production, and to determine and record rentals and royalties due and paid.

CROSS REFERENCE: For rules and regulations of the Geological Survey, see 30 CFR Chapter II.

§ 211.1a Existing permits or leases on minerals acquired for the Ute Indian Tribe of the Uintah and Ouray Reservation, Utah, and the Pueblos of Zia and Jemez, New Mexico.

By the Act of July 14, 1956 (70 Stat. 546), title to the minerals underlying certain lands in Utah was vested in the United States in trust for the Ute Indian Tribe of the Uintah and Ouray Reservation and by the Act of August 2, 1956 (70 Stat. 941), title to certain land in New Mexico and the improvements thereon was declared to be in the United States of America in trust for the Pueblos of Zia and Jemez, subject to valid and existing rights. Existing mineral prospecting permits and mining leases on these lands issued pursuant to 43 CFR and all action on the permits and leases shall be administered by the Secretary of the Interior or his authorized representative in accordance with the regulations set forth in Title 43 of the Code of Federal Regulations, except as follows:

(a) Appeals from administrative action shall be made pursuant to applicable regulations set forth in this title.

(b) Payments or reports required by the leases, permits, or regulations in 43 CFR shall be made to the Superintendent having jurisdiction over the land involved instead of the officer of the Bureau of Land Management designated in Title 43 of the Code of Federal Regulations.

[25 FR 12408, Dec. 3, 1960. Redesignated at 47 FR 13327, Mar. 30, 1982]

§ 211.2 Leases to be made by tribes.

Indian tribes, bands or groups may, with the approval of the Secretary of the Interior or his authorized representative, lease their land for mining purposes. No oil and gas lease shall be approved unless it has first been offered at an advertised sale in accordance with § 211.3. Leases for minerals other than oil and gas shall be advertised for bids as prescribed in § 211.3 unless the Commissioner grants to the Indian owners written permission to negotiate for a lease. Negotiated leases, accompanied by proper bond and other supporting papers, shall be filed with the Superintendent of the appropriate Indian Agency within 30 days after such permission shall have been granted by the Commissioner to negotiate the lease. The appropriate Area Director is authorized in proper cases to grant a reasonable extension of this period prior to its expiration. The right is reserved to the Secretary of the Interior to direct that negotiated leases be rejected and that they be advertised for bids. All leases shall be approved by the Secretary of the Interior or his duly authorized representative.

[23 FR 9393. Dec. 4, 1958. Redesignated at 47 FR 13327, Mar. 30, 1982]

§ 211.3 Sale of oil and gas leases.

(a) At such times and in such manner as he may deem appropriate, after being authorized by the tribal council or other authorized representative of the tribe, the superintendent shall publish notices at least thirty days prior to the sale, unless a shorter period is authorized by the Commis sioner of Indian Affairs, that oil and gas leases on specific tracts, each of which shall be in a reasonably compact body, will be offered to the highest responsible bidder for a bonus consideration, in addition to stipulated rentals

and royalties. Each bid must be accompanied by a cashier's check, certified check or postal money order, payable to the payee designated in the invitation to bid, in an amount not less than 25 percent of the bonus bid. Within 30 days after notification of being the successful bidder, said bidder must remit the balance of the bonus, the first year's rental, and his share of the advertising costs, and shall file with the superintendent the lease in completed form. The superin tendent may, for good and sufficient reasons, extend the time for the com pletion and submission of the lease form, but no extension shall be granted for remitting the balance of moneys due. If the successful bidder fails to pay the full consideration within said period, or fails to file the completed lease within said period or extension thereof, or if the lease is disapproved through no fault of the lessor or the Department of the Interior, 25 percent of the bonus bid will be forfeited for the use and benefit of the Indian lessor.

(b) All notices or advertisements of sales of oil and gas leases shall reserve to the Secretary of the Interior the right to reject all bids when in his judgment the interests of the Indians will be best served by so doing, and that if no satisfactory bid is received, or if the accepted bidder fails to complete the lease, or if the Secretary of the Interior shall determine that it is unwise in the interests of the Indians to accept the highest bid, the Secre tary may readvertise such lease for sale, or if deemed advisable, with the consent of the tribal council or other governing tribal authorities, a lease may be made by private negotiations. The successful bidder or bidders will be required to pay his or their share of the advertising costs. Amounts received from unsuccessful bidders will be returned; but when no

bid is accepted on a tract, the costs of advertising will be assessed against the applicant who requested that said tract be advertised.

[22 FR 10588, Dec. 24. 1957, as amended at 23 FR 7068, Sept. 12, 1958. Redesignated at 47 FR 13327, Mar. 30. 1982]

§ 211.3a Leases for subsurface storage of oil or gas.

(a) The Secretary of the Interior, or his authorized representative, may approve, subject to obtaining the prior consent of the Indian owners, storage leases, or modifications, amendments, or extensions of oil and gas or other mining leases, on tribal lands subject to lease under the Act of May 11, 1938 (52 Stat. 347; 25 U.S.C. 396a), and on allotted lands subject to lease under the Act of March 3, 1909 (35 Stat. 783; 25 U.S.C. 396), to provide for the subsurface storage of oil or gas, irrespective of the lands from which production is initially obtained. The storage lease, or modification, amendment, or extension, shall provide for the payment of such storage fee or rental on such oil or gas as may be determined adequate in each case, or, in lieu thereof, for a royalty other than that prescribed in the oil and gas lease when such stored oil and gas is produced in conjunction with oil or gas not previously produced.

(b) The Secretary of the Interior or his authorized representative may approve, subject to obtaining the prior consent of the Indian owners, a provision in an oil and gas lease, under which storage of oil and gas is authorized, for continuance of the lease at least for the period of such storage use and so long thereafter as oil or gas not previously produced is produced in paying quantities.

(c) Applications for subsurface storage of oil or gas shall be filed in triplicate with the oil and gas

supervisor and shall disclose the ownership of the lands involved, the parties in interest, the storage fee, rental, or royalty offered to be paid for such storage, and all essential information showing the necessity for such project. Enough copies of the final agreement signed by the Indian owners and other parties in interest shall be submitted for the approval of the Secretary, or his authorized representative, to permit retention of five copies by the Department after approval.

[25 FR 9836. Oct. 14. 1960. Redesignated at 47 FR 13327, Mar. 30, 1982]

§ 211.4 Government employees cannot acquire leases.

No lease, assignment thereof, or interest therein will be approved to any employee or employees of the United States Government whether connected with the Bureau of Indian Affairs or otherwise, and no employee of the Interior Department shall be permitted to acquire any interest in any mineral lease covering restricted Indian lands by ownership of stock in corporations having such leases or in any other manner.

(R.S. 2078; 25 U.S.C. 68)

§ 211.5 Corporations and corporate information.

If the applicant for a lease is a corporation, it shall file evidence of authority of its officers to execute papers; and with Its first application it shall also file a certified copy of its articles of incorporation, and, if foreign to the State in which the lands are located, evidence showing compliance with the corporation laws thereof. Statements of changes in officers and stockholders shall be furnished by a corporation lessee to the superintendent January 1 of each year,

and at such other times as may be requested. Whenever deemed advisable in any case the superintendent may require a corporation applicant or lessee to file:

(a) Lists of officers, principal stockholders, and directors, with post-office addresses and number of shares held by each.

(b) A sworn statement of the proper officer showing:

(1) The total number of shares of the capital stock actually issued and the amount of cash paid into the treasury on each share sold; or, if paid In property, the kind, quantity, and value of the same paid per share.

(2) Of the stock sold, how much remains unpaid and subject to assessment.

(3) The amount of cash the company has in its treasury and elsewhere.

(4) The property, exclusive of cash, owned by the company and its value.

(5) The total indebtedness of the company and the nature of its obligations.

(6) Whether the applicant or any person controlling, controlled by or under common control with the applicant has filed any registration statement, application for registration, prospectus or offering sheet with the Securities and Exchange Commission pursuant to the Securities Act of 1933 or the Securities Exchange Act of 1934 or said Commission's rules and regulations under said acts; if so, under what provisions of said acts or rules and regulations; and what disposition of any such statement, application, prospectus or offering sheet has been made.

(c) Affidavits of individual stockholders, setting forth in what corporations or with what persons, firms, or associations such individual stockholders are interested in mining leases on restricted lands within the State, and whether they hold such interests for themselves or in trust.

CROSS REFERMNCE: For rules and regulations of the Securities and Exchange Commission, see 17 CFR Chapter I.

§ 211.6 Bonds.

(a) Lessee shall furnish with each lease a bond (Form 5-154b), and an assignee of a lease shall furnish with each assignment a bond (Form 5-154m), with an acceptable company authorized to act as sole surety, or with two or more personal sureties and a deposit as collateral security of any public-debt obligations of the United States guaranteed as to principal and interest by the United States, equal to the full amount of such bonds, or other collateral satisfactory to the Secretary of the Interior, or show ownership of unencumbered real estate of the value equal to twice the amount of the bonds. Lessee may file a bond on Form 5-154a without sureties and a deposit as collateral security of Government bonds equal in value to the full amount of the bond. Lease bonds shall not be less than the following amounts:

For less than 80 acres	$1,000
For 80 acres and less than 120 acres	1,500
For 120 acres and not more than 160 acres	2.000
For each additional 40 acres, or part thereof, above 160 acres	500

Provided, That for leases for minerals other than oil and gas the Secretary of the Interior or his authorized representative with the consent of the

Indian landowner may authorize a bond for a lesser amount if, in his opinion, the circumstances warrant and the interests of the Indian landowners are fully protected: *Provided* further, That a lessee may file one bond (Form 5-154f), in the sum of $15,000 for all leases of minerals, in any one State and which may also include leases on that part of an Indian reservation extending into State contiguous thereto, to which the lessee may become a party: *And provided further*, That the total acreage covered by the bond shall not exceed 10,240 acres.

(b) In lieu of the bonds required under paragraph (a) of this section, a lessee may furnish a bond (Form 5-156) in the sum of $75,000 for full nationwide coverage with an acceptable company authorized to act as sole surety to cover all oil and gas leases and oil and gas prospecting permits without geographic or acreage limitation to which the lessee or permittee is or may become a party.

(c) The right is specifically reserved to increase the amount of bonds and the collateral security prescribed in paragraph (a) of this section in any particular case when the officer in charge deems it proper to do so. The nationwide bond may be increased at any time in the discretion of the Secretary of the Interior.

[22 FR 10588. Dec. 24, 1957, as amended at 26 FR 164, Jan. 10, 1961. Redesignated at 47 FR 13327, Mar. 30. 1982]

§ 211.7 Lessees to furnish additional information.

The superintendent may, either before or after approval of a lease, call for any additional information desired to carry out the regulations in this part. If a lessee shall fail to furnish the papers necessary to put his lease and bond in proper form for

consideratlon, the superintendent shall forward such lease for disapproval.

§ 211.8 Lands to be in compact body.

The area covered by a lease shall be in a reasonably compact body and shall conform to the system of public-land surveys, except that leases covering lode ground may consist of one or more adjoining parallelograms 1,500 feet in length by 600 feet in width, as provided by the United States mining laws. No lease under the regulations in this part shall convey any extralateral rights, and no coal lease shall have a length exceeding 1 mile along the out-crop.

§ 211.9 Acreage limitation.

A lessee may acquire more than one lease but no single lease shall be granted for mining purposes on Indian tribal or restricted Indian lands, exclusive of Osage and Quapaw lands, in excess of the following acreage except where the rule of approximation applies:

(a) For oil and gas and all other minerals, except coal, 2,560 acres.

(b) (1) For coal, a lease shall ordinarily be limited to 2,560 acres. The Commissioner may, however, upon application, approve the combining of leases held by one or more lessees, or approve the issuance of a single lease for more than 2,560 acres in a reasonably compact form, if he shall find that the approval of such larger acreage is in the interest of the lessor and is necessary to permit the establishment or construction of thermal electric power plans or other industrial facilities on or near the reservation. He may prescribe provisions in such larger leases to require relinquishment of acreage in the event of failure to construct facilities, or may require advance

rental or minimum royalty payments on a part of the acreage as a condition for combining leases or issuance of a single lease in excess of 2,560 acres.

(2) The Commissioner, with the consent of the lessor, may alter, change, or modify the development and producing requirements of the several leases and provide that operations and production on one lease shall be deemed to satisfy the development and producing requirements as to each lease combined.

§ 211.10 Term of leases.

Mining leases may be made for a specified term not to exceed ten years from the date of approval by the Secretary of the Interior, or his authorized representative, and as much longer as the substances specified in the lease are produced in paying quantities.

§ 211.11 Government reserves right to buy minerals produced.

In time of war or other public emergency all of the executive departments of the United States Government shall have the option to purchase at the posted market price on the date of sale all or any part of the substance or substances produced under any lease.

RENTS AND ROYALTIES

§ 211.12 Manner of payments.

(a) Except where otherwise provided by the terms of leases where the tribes are organized under the act of June 18, 1934 (48 Stat. 984; 25 U.S.C. 461-479), all rents and other payments due under leases which have been or may be approved by the Secretary of the Interior shall be paid to the superintendent or to such other person as may be designated by the Secretary

of the Interior, for the benefit of the lessors. Except advance payments for the first year which shall be sent direct to the superintendent at the time of filing leases, payments of rental and royalty under leases shall be transmitted through the supervisor, shall be accompanied by a statement by the lessee, in triplicate, showing the specific items of rental or royalty that the remittance is intended to cover, and shall be made at such time or times as the lease provides.

(b) In the event of the discovery of minerals in paying quantities all advance payments shall be allowed as credit on stipulated royalties for the year for which such advance payments have been made. No refund will be made under oil, gas, or other mining leases, in the event that royalty from production is not sufficient to equal the advance payment, nor will any part of the moneys so paid be refunded to the lessee because of any subsequent surrender or cancellation of the lease, nor shall the lessee be relieved from the obligation to pay said advance rental annually when it becomes due, by reason of any subsequent surrender or cancellation of the lease.

§ 211.13 Rates of rentals and royalties under oil and gas leases.

(a) The lessee shall pay, beginning with the date of approval of oil and gas leases by the Secretary of the Interior, a rental of $1.25 per acre per annum in advance during the continuance thereof, together with a royalty of 12 /2 percent of the value or amount of all oil, gas, and/or natural gasoline, and/or all other hydrocarbon substances produced and saved from the land leased, save and except oil, and/or gas used by the lessee for development and operation purposes on the lease, which oil or gas shall be royalty free. A

higher rate of royalty may be fixed by the Secretary of the Interior or his authorized representative, prior to the advertisement of land for oil and gas leases. During the period of supervision, "value" for the purposes of the lease may, in the discretion of the Secretary of the Interior, be calculated on the basis of the highest price paid or offered (whether calculated on the basis of short or actual volume) at the time of production for the major portion of the oil of the same gravity, and gas, and/or natural gasoline, and/or all other hydrocarbon substances produced and sold from the field where the leased lands are situated, and the actual volume of the marketable product less the content of foreign substances as determined by the supervisor. The actual amount realized by the lessee from the sale of said products may, in the discretion of the Secretary of the Interior, be deemed mere evidence of or conclusive evidence of such value. When paid in value, such royalties shall be due and payable monthly on the last day of the calendar month following the calendar month in which produced; when royalty on oil produced is paid in kind, such royalty oil shall be delivered in tanks provided by the lessee on the premises where produced without cost to the lessor unless otherwise agreed to by the parties thereto, at such time as may be required by the lessor. The lessee shall not be required to hold such royalty oil in storage longer than 30 days after the end of the calendar month in which said oil is produced. The lessee shall be in no manner responsible or held liable for loss or destruction of such oil in storage by causes beyond the lessee's control. In determining the value for royalty purposes of products, such as natural gasoline, that are derived from treatment of gas, a reasonable allowance for the cost of manufacture shall be made, such allowance to be two-thirds of the

value of the marketable product unless otherwise determined by the Secretary of the Interior on application of the lessee or on his own initiative, and that royalty will be computed on the value of gas or casing-head gas, or on the products thereof (such as residue gas, natural gasoline, propane, butane, etc.), whichever is the greater.

(b) If the leased premises produce gas in excess of the lessee's requirements for the development and operation of said premises, then the lessor may use sufficient gas, free of charge, for any desired school or other buildings belonging to the tribe, by making his own connections to a regulator installed, connected to the well and maintained by the lessee, and the lessee shall not be required to pay royalty on gas so used. The use of such gas shall be at the lessor's risk at all times.

§ 211.14 Annual rentals and expenditures for development on leases other than oil and gas.

(a) Unless otherwise authorized by the Secretary or his authorized representative (1) a lease for minerals other than oil and gas shall provide for a yearly development expenditure of not less than $10 per acre and (2) all such leases shall provide for a rental payment of not less than $1 for each acre or fraction of an acre payable on or before the first day of each lease year.

(b) Within 20 days after the lease year, an itemized statement, in duplicate, of the expenditure for development under a lease for minerals other than oil and gas shall be filed with the Superintendent. The lessee must certify the statement under oath.

§ 211.14a Suspension of operations and production on leases for minerals other than oil and gas.

The Secretary of the Interior or his authorized representative, after obtaining the consent of the tribe, may authorize suspension of operating and producing requirements on mining leases for minerals other than oil and gas whenever during the primary term of the leases, it is considered that marketing facilities are inadequate or economic conditions unsatisfactory. Applications by lessees for relief from all operating and producing requirements on such mineral leases shall be filed in triplicate, in the office of the Regional Mining Supervisor of the Geological Survey and a copy thereof filed with the Superintendent. Complete information must be furnished showing the necessity for such relief. Suspension of operations and production shall not relieve the lessee from the obligations of continued payment of the annual rental or the minimum royalty.

[24 FR 9510, Nov. 26, 1959. Redesignated at 47 FR 13327, Mar. 30. 1982]

§ 211.15 Royalty rates for minerals other than oil and gas.

Unless otherwise authorized by the Commissioner of Indian Affairs, the minimum rates for minerals other than oil and gas shall be as follows:

(a) For substances other than gold, silver, copper, lead, zinc, tungsten, coal, asphaltum and allied substances, oil, and gas, the lessee shall pay quarterly or as otherwise provided in the lease, a royalty of not less than 10 percent of the value, at the nearest shipping point, of all ores, metals, or minerals marketed.

(b) For gold and silver the lessee shall pay quarterly or as otherwise provided in the lease, a royalty of not less than 10 percent to be computed on the value of bullion as shown by mint returns after deducting forwarding charges to the point of sale; and for copper, lead, zinc, and tungsten, a royalty of not less than 10 percent to be computed on the value of ores and concentrates as shown by reduction returns after deducting freight charges to the point of sale. Duplicate returns shall be filed by the lessee with the Superintendent within 10 days after the ending of the quarter or other period specified in the lease within which such returns are made: *Provided, however*, That the lessee shall pay a royalty of not less than 10 percent of the value of the ore or concentrates sold at the mine unless otherwise provided in the lease.

(c) For coal the lessee shall pay quarterly or as otherwise provided in the lease, a royalty of not less than 10 cents per ton of 2,000 pounds of mine run, or coal as taken from the mine, including what is commonly called "slack".

(d) For asphaltum and allied substances the lessee shall pay quarterly or as otherwise provided in the lease, a royalty of not less than 10 cents per ton of 2,000 pounds on crude material or not less than 60 cents per ton on refined substances.

§ 211.16 Time of making royalty payments.

Royalty payments under producing oil and gas leases shall be made monthly on or before the last day of the calendar month following the calendar month for which such payment is to be made.

§ 211.17 Division orders.

(a) Lessees may make arrangements with the purchasers of oil for the payment of the royalties to

the superintendent by such purchasers, but such arrangement, if made, shall not operate to relieve a lessee from responsibility should the purchaser fail or refuse to pay royalties when due. Where lessees avail themselves of this privilege, division orders permitting the pipe line companies or other purchasers of the oil to withhold the royalty interest shall be executed and forwarded to the supervisor for approval, as pipe line companies are not permitted to accept or run oil from leased Indian lands until after the approval of a division order showing that the lessee has a lease regularly approved and in effect. When the lessee company runs its own oil, it shall execute an intra-company division order and forward it to the supervisor for his consideration. The right is reserved for the supervisor to cancel a division order at any time or require the pipe line company to discontinue to run the oil of any lessee who fails to operate the lease properly or otherwise violates the provisions of the lease, of the regulations in this part, or of the operating regulations.

(b) When oil is taken by authority of a division order, the lessee or his representative shall be actually present when the oil is gauged and records are made of the temperature, gravity, and impurities. The lessee will be held responsible for the correctness and the correct recording and reporting of all of the foregoing measurements; which, except lowest gauge, shall be made at the time the oil is turned into the pipe line. Failure of the lessee to perform properly these duties will subject the division order to revocation.

CROSS REFERENCE: For oil and gas operating regulations of the Geological Survey, see 30 CFR Part 221.

§ 211.18 Inspection of premises, books and accounts.

Lessees shall agree to allow the lessors and their agents or any authorized representative of the Interior Department to enter, from time to time, upon and into all parts of the leased premises for the purpose of inspection, and shall further agree to keep a full and correct account of all operations and make reports thereof, as required by the regulations of the Department governing operations on public and restricted Indian lands; and their books and records, showing manner of operations and persons interested, shall be open at all times for examination of such officers of the Department as shall be instructed in writing by the Secretary of the Interior or authorized by regulations to make such examination.

§ 211.19 Diligence and prevention of waste.

The lessee shall exercise diligence in drilling and operating wells for oil and gas on the leased lands while such products can be secured in paying quantities; carry on all operations in a good and workmanlike manner in accordance with approved methods and practice, having due regard for the prevention of waste of oil or gas developed on the land, or the entrance of water through wells drilled by the lessee to the productive sands or oil or gas-bearing strata to the destruction or injury of the oil or gas deposits, the preservation and conservation of the property for future productive operations, and to the health and safety of workmen and employees; plug securely all wells before abandoning the same and to shut off effectually all water from the oil or gas-bearing strata; not drill any well within 200 feet of any house or barn on the premises without the lessor's written consent approved by the superintendent; carry out at his expense all reasonable

orders and requirements of the supervisor relative to prevention of waste, and preservation of the property and the health and safety of workmen; bury all pipelines crossing tillable lands below plow depth unless other arrangements therefor are made with the superintendent; pay the lessor all damages to crops, buildings, and other improvements of the lessor occasioned by the lessee's operations: *Provided*, That the lessee shall not be held responsible for delays or casualties occasioned by causes beyond the lessee's control.

§ 211.20 Permission to start operations.

(a) No operations will be permitted on any lease before it it approved by the Secretary of the Interior.

(b) Written permission must be secured from the supervisor before any operations are started on the leased premises. After such permission is secured the operations must be in accordance with the operating regulations promulgated by the Secretary of the Interior. Copies of the regulations in this -part may be secured from either the supervisor or the superintendent and no operations shall be attempted without a study of the operating regulations.

§ 211.21 Restrictions on operations.

(a) Oil and gas leases issued under the provisions of the regulations in this part shall be subject to imposition by the Secretary of the Interior of such restrictions as to time or times for the drilling of wells and as to the production from any well or wells as in his judgment may be necessary or proper for the protection of the natural resources of the leased land and in the interest of the lessor. In the exercise of his judgment the Secretary of the Interior may take into consideration, among other things, the Federal laws. State laws, regulations by competent Federal or State

authorities, lawful agreements among operators regulating either drilling or production, or both, and any regulatory action desired by tribal authorities.

(b) All such leases shall be subject to any cooperative or unit development plan affecting the leased lands that may be required by the Secretary of the Interior, but no lease shall be included in any cooperative or unit plan without prior approval of the Secretary of the Interior and consent of the Indian tribe affected.

§ 211.22 Penalties.

Failure of the lessee to comply with any provisions of the lease, of the operating regulations, of the regulations in this part, order of the superintendent or his representative, or of the orders of the supervisor or his representative, shall subject the lease to cancellation by the Secretary of the Interior or the lessee to a penalty of not more than $500 per day for each and every day the terms of the lease, the regulations, or such orders are violated; or to both such penalty and cancellation: *Provided*, That the lessee shall be entitled to notice and hearing, within 30 days after such notice, with respect to the terms of the lease, regulations, or orders violated, which hearing shall be held by the supervisor, whose findings shall be conclusive unless an appeal be taken to the Secretary of the Interior within 30 days after notice of the supervisor's decision, and the decision of the Secretary of the Interior upon appeal shall be conclusive.

§ 211.23 Mines to be timbered properly.

In mining operations the lessee shall keep the mine well and sufficiently timbered at all points where necessary, in accordance with good mining practice, and in such manner as may be necessary to the

proper preservation of the leased property and safety of the workmen.

§ 211.24 Surrender of leased premises in good condition.

On expiration of the term of a lease, or when a lease is surrendered, the lessee shall deliver to the Government the leased ground with the mine workings in good order and condition, and bondsmen will be held for such delivery in good order and condition, unless relieved by the Secretary of the Interior for cause. It shall, however, be stipulated that the machinery necessary to operate the mine is the property of the lessee, but that it may be removed by him only after the condition of the property has been ascertained by inspection by the Secretary of the Interior or his authorized agents, to be in satisfactory condition.

§ 211.25 Fees.

Unless otherwise authorized by the Secretary of the Interior or his authorized representative, each lease, mining permit, sublease, or assignment shall be accompanied at the time of filing by a fee of $10. Such fee will not be required on sand and gravel permits issued to States, counties, or other municipal bodies.

(Sec. 1, 41 Stat. 415, as amended: 25 U.S.C. 413)

[24 FR 7949. Oct. 2. 1959. Redesignated at 47 FR 13327, Mar. 30, 1982]

§ 211.26 Assignments and overriding royalties.

(a) Approved leases or any interest therein may be assigned or transferred only with the approval of the Secretary of the Interior, and to procure such approval the assignee must be qualified to hold such lease under existing rules and regulations and shall

furnish a satisfactory bond conditioned for the faithful performance of the covenants and conditions thereof: *Provided*, That in order for such assignment to receive favorable consideration the lessee shall assign either his whole interest or an undivided interest in the whole lease.

(b) No lease or interest therein or the use of such lease shall be assigned, sublet, or transferred, directly or indirectly by working or drilling contract, or otherwise, without the consent of the Secretary of the Interior.

(c) Assignments of leases, and stipulations modifying the terms of existing leases, which stipulations are also subject to the approval of the Secretary of the Interior, shall be filed with the superintendent within 30 days after the date of execution.

(d) Agreements creating overriding royalties or payments out of production on oil and gas leases shall not be considered as interests in the leases as such term is used in this section. Agreements creating overriding royalties or payments out of production are hereby authorized and the approval of the Department of the Interior or any agency thereof shall not be required with respect thereto, but such agreements shall be subject to the condition that nothing in any such agreement shall be construed as modifying any of the obligations of the lessee, including, but not limited to, obligations for diligent development and operation, protection against drainage, compliance with oil and gas operating regulations (30 CFR Part 221), and the requirement for departmental approval before abandonment of any well. All such obligations are to remain in full force and effect, the same as if free of any such royalties or payments. The existence of agreements creating over-riding royalties or payments out of

production, whether or not actually paid, shall not be considered as justification for the approval of abandonment of any well. Nothing in this paragraph revokes the requirement for approval of assignments and other instruments which is required in this section, but any overriding royalties or payments out of production created by the terms of such assignments or instruments shall be subject to the condition stated above. Agreements creating overriding royalties or payments out of production need not be filed with the Superintendent unless incorporated in assignments or instruments required to be filed pursuant to this section.

[22 FR 10588, Dec. 24, 1957. as amended at 23 FR 9738, Dec. 18. 1958. Redesignated at 47 FR 13327. Mar. 30. 1982]

§ 211.27 Cancellation.

(a) When, in the opinion of the Secretary of the Interior, the lessee has violated any of the terms and conditions of a lease or of the applicable regulations, the Secretary of the Interior shall have the right at any time after 30 days' notice to the lessee specifying the terms and conditions violated, and after a hearing, if the lessee shall so request within 30 days after issuance of the notice, to declare such lease null and void, and the lessor shall then be entitled and authorized to take immediate possession of the land.

(b) On the following conditions, the lessee may, on approval of the Secretary of the Interior, surrender a lease or any part of it:

(1) That he make application for cancellation to the superintendent having jurisdiction over the land.

(2) That he pay a surrender fee of $1 at the time the application is made.

(3) That he pay all royalties and rentals due to the date of such application.

(4) That he make a satisfactory showing that full provision has been made for conservation and protection of the property and that all wells, drilled on the portion of the lease surrendered, have been properly abandoned.

(5) If the lease has been recorded, that he file, with his application, a recorded release of the acreage covered by the application.

(6) If the application is for the cancellation of the entire lease or the entire undivided portion, that he surrender the lease: *Provided*, That where the application is made by an assignee to whom no copy of the lease was delivered, he will be required to surrender only his copy of the assignment.

(7) If the lease (or portion being surrendered or canceled) is owned in undivided interests by more than one party, then all parties shall join in' the application for cancellation.

(8) That all required fees and papers must be in the mail or received on or before the date upon which rents and royalties become due, in order for the lessee and his surety to be relieved from liability for the payment of such royalties and rentals.-

(9) If there has been a contest respecting a lease or leases, the approved, the disapproved, or the canceled parts thereof will be held in the office of the superintendent for 5 days after the Department's decision has been promulgated, by mail or delivery, and will not be delivered, if within that period a motion for review and reconsideration be filed, until such motion is passed upon by the Department.

(10) In the event oil or gas is being drained from the leased premises by wells not covered by a lease; the lease, or any part of it, may be surrendered, only on such terms and conditions as the Secretary of the Interior may determine to be reasonable and equitable.

(c) No part of any advance rental shall be refunded to the lessee nor shall he be relieved, by reason of any subsequent surrender or cancellation of the lease, from the obligation to pay said advance rental when it becomes due.

§ 211.27a Prospecting permits.

With the consent of the tribal authorities the superintendent may issue permits to prospect for minerals other than oil and gas upon tribal lands. Such permits must describe the area to be prospected and definitely state the period of time within which such work is permitted. No ores shall be removed from the reservation under such permits, except samples for assay and experimental purposes. A prospecting permit will not give the permittee any preference right to a lease, unless specifically so stated in the permit, and all permits granting a preference right to a lease must comply with all the laws and regulations applicable to mineral leases on tribal Indian lands.

§ 211.28 Effective date of regulations.

The regulations in this part shall become effective and in full force from and after the date of approval, and shall be subject to change or alteration at any time by the Secretary of the Interior: Provided, That no regulations made after the approval of any lease shall operate to affect the term of the lease, rate of royalty, rental, or acreage unless agreed to by both parties to the lease. All former regulations governing

the leasing of tribal lands for mining purposes are superseded by the regulations in this part.

§ 211.29 Exemption of leases made by organized tribes.

The regulations in this part may be superseded by the provisions of any tribal constitution, bylaw or charter issued pursuant to the Indian Reorganization Act of June 18, 1934 (48 Stat. 984; 25 U.S.C. 461-479), the Alaska Act of May 1, 1936 (49 Stat. 1250; 48 U.S.C. 362, 258a), or the Oklahoma Indian Welfare Act of June 26, 1936 (49 Stat. 1967; 25 U.S.C., and Sup., 501-509), or by ordinance, resolution or other action authorized under such constitution, bylaw or charter. The regulations in this part, in so far as they are not so superseded, shall apply to leases made by organized tribes if the validity of the lease depends upon the approval of the Secretary of the Interior.

§ 211.30 Forms.

Leases, assignments, and other Instruments shall be on forms prescribed by the Secretary of the Interior or his authorized representative and may be obtained from the superintendent or other officer having jurisdiction over the lands.

[24 FR 7949, Oct. 2, 1959. Redesignated at 47 PR 13327. Mar. 30. 1982]

25 C.F.R. PT. 216 SUBPT. A (1987)

PART 216—SURFACE EXPLORATION, MINING, AND RECLAMATION OF LANDS

Subpart A—General Provisions

SOURCE: 34 FR 813, Jan. 18, 1969, unless otherwise noted. Redesignated at 42 FR 63394, Dec. 16, 1977;

and further redesignated at 47 FR 13327, Mar. 30, 1982.

§ 216.1 Purpose.

It is the policy of this Department to encourage the development of the mineral resources underlying Indian lands where mining is authorized. However, interest of the Indian owners and the public at large requires that, with respect to the exploration for, and the surface mining of, such minerals, adequate measures be taken to avoid, minimize, or correct damage to the environment-land, water, and air-and to avoid, minimize, or correct hazards to the public health and safety. The regulations in this part prescribe procedures to that end.

§ 216.2 Scope.

(a) Except as provided in paragraph (b) of this section, the regulations in this part provide for the protection and conservation of nonmineral resources during operations for the discovery, development, surface mining, and onsite processing of minerals under permits or leases issued pursuant to statutes pertaining to Indian lands including but not limited to the following statutes or amendments thereto:

The Act of June 28, 1906 (34 Stat. 539);

The Act of May 27, 1908 (35 Stat. 312);

The Act of March 3. 1909 (35 Stat. 781. 25 U.S.C. 396);

The Act of May 1. 1936 (49 Stat. 1250);

The Act of June 26. 1936 (49 Stat. 1967);

The Act of May 11, 1939 (52 Stat. 347. 25 U.S.C. 396a-f, and 5 U.S.C. 301).

(b) The regulations in this part do not cover the exploration for oil and gas or the issuance of leases, or operations thereunder, nor minerals underlying lands, the surface of which is not owned by the owner of the minerals.

(c) The regulations in this part shall apply only to permits or leases issued subsequent to the date on which these regulations become effective and which are subject to the approval of the Secretary of the Interior or his designated representative.

§ 216.3 Definitions.

As used in the regulations in the part:

(a) "Superintendent" means the superintendent or other officer of the Bureau of Indian Affairs having jurisdiction under delegated authority, over the lands involved.

(b) "Mining supervisor" means the Regional Mining Supervisor, or his authorized representative, of the Geological Survey authorized as provided in 30 CFR 211.3 and 231.2 to supervise operations on the land covered by a permit or lease.

(c) "Overburden" means all the earth and other materials which lie above a natural deposit of minerals and such earth and other materials after removal from their natural state in the process of mining.

(d) "Area of land to be affected" or "area of land affected" means the area of land from which overburden is to be or has been removed and upon which the overburden or waste is to be or has been deposited, and includes all lands affected by the construction of new roads or the improvement or use of existing roads to gain access to an operation and for haulage.

(e) "Operation" means all of the premises, facilities, roads, and equipment used in the process of determining the location, composition or quality of a mineral deposit, or in developing, extracting, or onsite processing of a mineral deposit in a designated area.

(f) "Method of operation" means the method or manner by which a cut or open pit is made, the overburden is placed or handled, water is controlled or affected and other acts performed by the operator in the process of exploring or uncovering and removing or onsite processing of a mineral deposit.

(g) "Holder" or "operator" means the permittee or lessee designated in a permit or lease.

(h) "Reclamation" means measures undertaken to bring about the necessary reconditioning or restoration of land or water that has been affected by exploration or mineral development, mining or onsite processing operations, and waste disposal, in ways which will prevent or control onsite and offsite damage to the environment.

§ 216.4 Technical examination of prospective surface exploration and mining operations.

(a) (1) In connection with an application for a permit or lease, the superintendent shall make, or cause to be made, a technical examination of the prospective effects of the proposed exploration or surface mining operations upon the environment. The technical examination shall take into consideration the need for the preservation and protection of other resources, including cultural, recreational, scenic, historic, and ecological values; and control of erosion, flooding, and pollution of water; the isolation of toxic materials; the prevention of air pollution; the reclamation by revegetation, replacement of soil or by

other means, of lands affected by the exploration or mining operations; the prevention of slides; the protection of fish and wildlife and their habitat; and the prevention of hazards to public health and safety.

(2) A technical examination of an area should be made with the recognition that actual potential mining sites and mining operations vary widely with respect to topography, climate, surrounding land uses, proximity to densely used areas, and other environmental influences and that mining and reclamation requirements should provide sufficient flexibility to permit adjustment to local conditions.

(b) Based upon the technical examination, the superintendent shall formulate the general requirements which the applicant must meet for the protection of nonmineral resources during the conduct of exploration or mining operations and for the reclamation of lands or waters affected by exploration or mining operations. The general requirements shall be made known in writing to the applicant before the issuance of a permit or lease and upon acceptance thereof by the applicant, shall be incorporated in the permit or lease.

(c) In each instance in which an application is made the mining supervisor shall participate in the technical examination and in the formulation of the general requirements.

(d) The superintendent may prohibit or otherwise restrict operations on any part of an area whenever it is determined that such part of the area described in an application for a permit or lease is such that previous experience under similar conditions has shown that operations cannot feasibly be conducted by any known methods or measures to avoid—

(1) Rock or landslides which would be a hazard to human lives or endanger or destroy private or public property; or

(2) Substantial deposition of sediment and silt into streams, lakes, reservoirs; or

(3) A lowering of water quality below standards established by the appropriate State water pollution control agency, or by the Secretary of the In- terior, or his authorized representative; or

(4) A lowering of the quality of waters whose quality exceeds that required by the established standards—unless and until it has been affirmatively demonstrated to the Secretary of the Interior, or his authorized representative, that such lowering of quality is necessary to economic and social development and will not preclude any assigned uses made of such waters; or

(5) The destruction of key wildlife habitat or important scenic, historical, or other natural or cultural features.

(e) If, on the basis of a technical examination, the superintendent determines that there is a likelihood that there will be a lowering of water quality as described in paragraphs (d) (3) and (4) of this section caused by the operation, no lease or permit shall be issued until after consultation with the Federal Water Pollution Control Administration and a finding by the Administration that the proposed operation would not be in violation of the Federal Water Pollution Control Act, as amended (33 U.S.C. 466 et seq.), or of Executive Order No. 11288 (31 FR 9261). Where a permit or lease is involved the Superintendent's determination shall be made in consultation with the mining supervisor.

§ 216.5 Basis for denial of a permit or lease.

An application for a permit or lease to conduct exploratory or mining operations may be denied any applicant who has forfeited a required bond because of failure to comply with a mining plan. However, a permit or lease may not be denied an applicant because of the forfeiture of a bond if the lands disturbed under his previous permit or lease have subsequently been reclaimed without cost to the lessor or the United States.

§ 216.6 Approval of exploration plan.

(a) Before commencing any surface disturbing operations to explore, test or prospect for minerals, the operator shall file with the mining supervisor a plan for the proposed exploration operations. The mining supervisor shall consult with the superintendent with respect to the surface protection and reclamation aspects before approving said plan.

(b) Depending upon the size and nature of the operation and the requirements established pursuant to § 216.4 the mining supervisor may require that the exploration plan submitted by the operator include any or all of the following:

(1) A description of the area within which exploration is to be conducted;

(2) Two copies of a suitable map or aerial photograph showing topographic, cultural and drainage features;

(3) A statement of proposed exploration methods; i.e., drilling, trenching, etc., and the location of primary support roads and facilities;

(4) A description of measures to be taken to prevent or control fire, soil erosion, pollution of surface and

ground water, damage to fish and wildlife or other natural resources, and hazards to public health and safety both during and upon abandonment of exploration activities.

(c) The mining supervisor shall promptly review the exploration plan submitted to him by the operator and shall indicate to the operator any changes, additions, or amendments necessary to meet the requirements formulated pursuant to § 216.4, the provisions of these regulations, and the terms of the permit.

(d) The operator shall comply with the provisions of an approved exploration plan. The mining supervisor may, with respect to such a plan, exercise the authority provided by paragraphs (f) and (g) of § 216.7 respecting a mining plan.

§ 216.7 Approval of mining plan.

(a) Before surface mining operations may commence under any permit or lease, the operator must file a mining plan with the mining supervisor and obtain his approval of the plan. The mining supervisor shall consult with the superintendent with respect to the surface protection and reclamation aspects before approving said plan.

(b) Depending on the size and nature of the operation and the requirements established pursuant to § 216.4 the mining supervisor may require that the mining plan submitted by the operator include any or all of the following:

(1) A description of the location and area to be affected by the operations;

(2) Two copies of a suitable map, or aerial photograph showing the topog- raphy, the area covered by the permit or lease, the name and location of major

topographic and cultural features, and the drainage plan away from the area affected;

(3) A statement of proposed methods of operating, including a description of proposed roads or vehicular trails; the size and location of structures and facilities to be built;

(4) An estimate of the quantity of water to be used and pollutants that are expected to enter any receiving waters;

(5) A design for the necessary impoundment, treatment or control of all runoff water and drainage from workings so as to reduce soil erosion and sedimentation and to prevent the pollution of receiving waters;

(6) A description of measures to be taken to prevent or control fire, soil erosion, pollution of surface and ground water, damage to fish and wildlife, and hazards to public health and safety; and

(7) A statement of the proposed manner and time of performance of work to reclaim areas disturbed by the holder's operation.

(c) In those instances in which the permit or lease requires the revegetation of an area of land to be affected, the mining plan shall show:

(1) Proposed methods of preparation and fertilizing the soil prior to replanting;

(2) Types and mixtures of shrubs, trees, or tree seedlings, grasses or legumes to be planted; and

(3) Types and methods of planting, including the amount of grasses or legumes per acre, or the number and spacing of trees, or tree seedlings, or combinations of grasses and trees.

d) In those instances in which the permit or lease requires regrading and backfilling, the mining plan shall show the proposed methods and the timing of grading and backfilling of areas of land to be affected by the operation.

(e) The mining supervisor shall review the mining plan submitted to him by the operator and shall promptly indicate to the operator any changes, additions, or amendments necessary to meet the requirements formulated pursuant to § 216.4, the provisions of these regulations and the terms of the permit or lease. The operator shall comply with the provisions of an approved mining plan.

(f) A mining plan may be changed by mutual consent of the mining supervisor and the operator at any time to adjust to changed conditions or to correct any oversight. To obtain approval of a change or supplemental plan, the operator shall submit a written statement of the proposed changes or supplement and the justification for the changes proposed. The mining supervisor shall promptly notify the operator that he consents to the proposed changes or supplement, or in the event he does not consent, he shall specify the modifications thereto under which the proposed changes or supplement would be acceptable. After mutual acceptance of a change of a plan, the operator shall not depart therefrom without further approval.

(g) If circumstances warrant or if development of a mining plan for the entire operation is dependent upon unknown factors which cannot or will not be determined except during the progress of the operations, a partial plan may be approved and supplemented from time to time. The operator shall not, however, perform any operation except under an approved plan.

§ 216.8 Performance bond.

(a) Upon approval of an exploration plan or mining plan, the operator shall be required to file a suitable performance bond of not less than $2,000 with satisfactory surety, payable to the Secretary of the Interior, and the bond shall be conditioned upon the faithful compliance with applicable regulations, the terms and conditions of the permit, lease, or contract, and the exploration or mining plan as approved, amended or supplemented. The bond shall be in an amount sufficient to satisfy the reclamation requirements established pursuant to an approved exploration or mining plan, or an approved partial or supplemental plan. In determining the amount of the bond consideration shall be given to the character and nature of the reclamation requirements and the estimated costs of reclamation in the event that the operator forfeits his performance bond. In lieu of a surety bond an operator may elect to deposit cash or negotiable bonds of the U.S. government. The cash deposit or the market value of such securities shall be equal at least to the required sum of the bond.

(b) In a particular instance where the circumstances are such as to warrant an exception, the amount of the bond for a particular operation may be reduced to less than the required minimum of $2,000.

(c) The superintendent shall set the amount of a bond and take the necessary action for an increase or for a complete or partial release of a bond. He shall take action with respect to bonds for leases or permits only after consultation with the mining supervisor.

§ 216.9 Reports.

(a) Within 30 days after the end of each calendar year, or if operations cease before the end of a calendar year, within 30 days after the cessation of

operations, the operator shall submit an operations report to the mining supervisor containing the following information:

(1) An identification of the permit or lease and the location of the operation.

(2) A description of the operations performed during the period of time for which the report is filed.

(3) An identification of the area of land affected by the operations and a description of the manner in which the land has been affected.

(4) A statement as to the number of acres disturbed by the operations and the number of acres which were reclaimed during the period of time.

(5) A description of the method utilized for reclamation and the results thereof.

(6) A statement and description of reclamation work remaining to be done.

(b) Upon completion of such grading and backfilling as may be required by an approved exploration or mining plan, the operator shall make a report thereon to the mining supervisor and request inspection for approval. Whenever it is determined by such inspection that backfilling and grading have been carried out in accordance with the established requirements and approved exploration or mining plan, the superintendent shall issue a release of an appropriate amount of the performance bond for the area graded and backfilled. Appropriate amounts of the bond shall be retained to assure that satisfactory planting, if required, is carried out.

(c) (1) Whenever planting is required by an approved exploration or mining plan, the operator shall

file a report with the superintendent whenever such planting is completed. The report shall—

(i) Identify the permit or lease;

(ii) Show the type of planting or seeding, including mixtures and amounts;

(iii) Show the date of planting or seeding;

(iv) Identify or describe the areas of the lands which have been planted;

(v) Contain such other information as may be relevant.

(2) The superintendent, as soon as possible after the completion of the first full growing season, shall make an inspection and evaluation of the vegetative cover and planting to determine if a satisfactory growth has been established.

(3) If it is determined that a satisfactory vegetative cover has been established and is likely to continue to grow, any remaining portion of the surety bond may be released if all requirements have been met by the operator.

(d) (1) Not less than 30 days prior to cessation or abandonment of operations, the operator shall report to the mining supervisor his intention to cease or abandon operations, together with a statement of the exact number of acres of land affected by his operations, the extent of reclamation accomplished and other relevant information.

(2) Upon receipt of such report an inspection shall be made to determine whether operations have been carried out in accordance with the approved exploration or mining plan.

§ 216.10 Inspection: Notice of noncompliance: Revocation.

(a) The mining supervisor and superintendent shall have the right to enter upon the lands under a permit or lease, at any reasonable time, for the purpose of inspection or investigation to determine whether the terms and conditions of the permit or lease and the requirements of the exploration or mining plan have been complied with.

(b) If the mining supervisor determines that an operator has failed to comply with the terms and conditions of a permit or lease, or with the requirements of an exploration or mining plan, or with the provisions of applicable regulations, the superintendent shall serve a notice of noncompliance upon the operator by delivery in person to him or his agent or by certified or registered mail addressed to the operator at his last known address.

(c) A notice of noncompliance shall specify in what respects the operator has failed to comply with the terms and conditions of a permit or lease or the requirements of an exploration or mining plan, or the provisions of applicable regulations, and shall specify the action which must be taken to correct the noncompliance and the time limits within which such action must be taken.

(d) Failure of the operator to take action in accordance with the notice of noncompliance shall be grounds for suspension by the mining supervisor of operations or for the initiation of action for the cancellation of the permit or lease and for forfeiture of the surety bond required under § 216.8.

§ 216.11 Appeals.

An applicant, permittee, lessee, or lessor aggrieved by a decision or order of a mining supervisor or superintendent may appeal such decision or order. An appeal from a decision or order of a superintendent shall be made pursuant to 25 CFR Part 2. An appeal from a decision or order of a mining supervisor shall be made pursuant to 30 CFR Parts 211 and 231.

§ 216.12 Consultation.

A superintendent shall consult with the Indian landowner with respect to actions he proposes to take under §§ 216.4, 216.6, 216.7, 216.9, and 216.10.

ADDENDUM D

25 C.F.R. PT. 216 SUBPT. B (1987)

PART 216—SURFACE EXPLORATION, MINING, AND RECLAMATION OF LANDS

SUBPART B—COAL OPERATIONS

AUTHORITY: Secs. 201, 501, Pub. L. 95-87, 91 Stat. 445 (30 U.S.C. 1201) (25 U.S.C. 396d).

SOURCE: 42 FR 63395, Dec. 16, 1977, unless otherwise noted. Redesignated at 47 FR 13327, Mar. 30, 1982.

§ 216.100 Applicability.

(a) The performance standards in this subpart shall apply to each coal mining operation on Indian lands on or after December 16, 1977, and shall remain applicable to each operation until OSM issues or denies a permit in accordance with 30 CFR Part 750.

(b) The requirements of this subpart shall be incorporated in all existing and new contracts entered into for coal mining on Indian lands.

[42 FR 63395, Dec. 16, 1977. Redesignated at 47 FR 13327, Mar. 30, 1982 and amended at 49 FR 38476, Sept. 28, 1984]

§ 216.101 Definitions.

As used throughout the regulations in this subpart, except where otherwise indicated:

Acid drainage means water with a pH of less than 6.0 discharged from active or abandoned mines and from areas affected by coal mining operations.

Acid-forming materials means earth materials that contain sulfide mineral or other materials which, if

exposed to air, water, or weathering processes, will cause acids that may create acid drainage.

Act means the Surface Mining Control and Reclamation Act of 1977, (Pub. L. 95-87).

Alluvial valley floors means unconsolidated stream-laid deposits holding streams where water availability is sufficent for subirrigation or flood irrigation agricultural activities but does not include upland areas which are generally overlain by a thin veneer of colluvial deposits composed chiefly of debris from sheet erosion, deposits by unconcentrated runoff or slope wash, together with talus, other mass movement accumulation and windblown deposits.

Approximate original contour means that surface configuration achieved by backfilling and grading of the mined area so that the reclaimed area, including any terracing or access roads, closely resembles the general surface configuration of the land prior to mining and blends into and complements the drainage pattern of the surrounding terrain, with all highwalls and spoil piles eliminated; water impoundments may be permitted where the regulatory authority determines that they are in compliance with § 216.108.

Aquifer means a zone, stratum, or group of strata that can store and transmit water in sufficient quantities for a specific use.

Auger mining means a method of mining coal at a cliff or highwall by drilling holes laterally into an exposed coal seam from the highwall and transporting the coal along an auger bit to the surface.

Coal means combustible carbonaceous rock, classified as anthracite, bituminous, subbituminous, or lignite by A.S.T.M. designation 0-388-666.

Combustible material means organic material that is capable of burning either by fire or through a chemical process (oxidation) accompanied by the evolution of heat and a significant temperature rise.

Compaction means the reduction of pore spaces among the particles of soil or rock, generally done by running heavy equipment over the earth materials.

Director means the Director, Office of Surface Mining Reclamation and Enforcement, or his representative.

Disturbed area means those lands that have been affected by surface coal mining and reclamation operations.

Diversion means a channel embankment, or other manmade structure constructed for the purpose of diverting water from one area to another.

Downslope means the land surface between a valley floor and the projected outcrop of the lowest coalbed being mined along each highwall.

Embankment means an artificial deposit of material that is raised above the natural surface of the land and used to contain, divert, or store water, support roads or railways, or other similar purposes.

Essential hydrologic functions means, with respect to alluvial valley floors, the role of the valley floor in collecting, storing, and regulating the natural flow of surface water and ground water, and in providing a place for irrigated and subirrigated farming, by reason of its position in the landscape and the characteristics of its underlying material.

Flood irrigation means irrigation through natural overflow or the temporary diversion of high flows in which the entire surface of the soil is covered by a sheet of water.

Ground water means subsurface water that fills available openings in rock or soil materials such that they may be considered water-saturated.

Highwall means the face of exposed overburden and coal in an open cut of a surface or underground coal mine.

Hydrologic balance means the relationship between the quality and quantity of inflow to, outflow from, and storage in a hydrologic unit such as a drainage basin, aquifer, soil zone, lake, or reservoir. It encompasses the quantity and quality relationships between precipitation, runoff, evaporation, and the change in ground and surface water storage.

Hydrologic regime means the entire state of water movement in a given area. It is a function of the climate, and includes the phenomena by which water first occurs as atmospheric water vapor passes into a liquid or solid form and falls as precipitation, moves thence along or into the ground surface, and returns to the atmosphere as vapor by means of evaporation and transpiration.

Imminent danger to the health and safety of the public means the existence of any condition, or practice, or any violation of a permit or other requirement of the Act in a surface coal mining and reclamation operation, which condition, practice, or violation could reasonably be expected to cause substantial physical harm to persons outside the permit area before such condition, practice, or violation can be abated. A reasonable expectation of death or serious injury before abatement exists if a

rational person, subjected to the same condition or practice giving rise to the peril, would not expose himself or herself to the danger during the time necessary for abatement.

Impoundment means a closed basin formed naturally or artificially built, which is dammed or excavated for the retention of water, sediment, or waste.

Indian lands means all lands, including mineral interest, within the exterior boundaries of any Federal Indian reservation, notwithstanding the issuance of any patent, and including rights-of-way, and all lands including mineral interests held in trust for or supervised by an Indian tribe.

Indian Tribe means any Indian Tribe, band, group or community having a governing body recognized by the Secretary.

Intermittent or perennial stream means a stream or part of a stream that flows continuously during all (perennial) or for at least one month (intermittent) of the calendar year as a result of groundwater discharge or surface runoff. The term does not include an ephemeral stream which is one that flows for less than one month of a calendar year and only in direct response to precipitation in the immediate watershed and whose channel bottom is always above the local water table.

Leachate means a liquid that has percolated through soil, rock, or waste and has extracted dissolved or suspended materials.

Noxious plants means species that have been included on official State lists of noxious plants for the State in which the operation occurs.

Office means the Office of Surface Mining Reclamation and Enforcement established under Title II of the Act.

Operator means any person, partnership or corporation engaged in coal mining who removes or intends to remove more than 250 tons of coal from the earth by mining within 12 consecutive calendar months in any one location.

Outslope means the exposed area sloping away from a bench or terrace being constructed as a part of a surface coal mining and reclamation operation.

Overburden means material of any nature, consolidated or unconsolidated, that overlies a coal deposit, excluding topsoil.

Permit means an approval by the Secretary of the Interior to conduct surface coal mining and reclamation operations on Indian lands.

Permittee means a person holding a permit to conduct surface coal mining and reclamation operations on Indian lands.

Person means an individual, partnership, association, society, joint stock company, firm, company, corporation, or other business organization.

Productivity means the vegetative yield produced by a unit area for a unit of time.

Recharge capacity means the ability of the soils and underlying materials to allow precipitation and runoff to infiltrate and reach the zone of saturation.

Recurrence interval means the precipitation event expected to occur, on the average, once in a specified interval. For example, the 10-year 24-hour precipitation event would be that 24-hour precipitation event expected to be exceeded on the average once in 10

years. Magnitude of such events are as defined by the National Weather Service Technical Paper No. 40, "Rainfall Frequency Atlas of the U.S.," May 1961, and subsequent amendments or equivalent regional or rainfall probability information developed there from.

Regulatory Authority means the Secretary.

Roads means access and haul roads constructed, used, reconstructed, improved, or maintained for use in surface coal mining and reclamation operations, including use by coal-hauling vehicles leading to transfer, processing, or storage areas. The term includes any such road used and not graded to approximate original contour within 45 days of construction other than temporary roads used for topsoil removal and coal haulage roads within the pit area. Roads maintained with public funds such as all Federal, State, tribal, and county roads are excluded.

Runoff means precipitation that flows overland before entering a defined stream channel and becoming stream flow.

Safety factor means the ratio of the available shear strength to the developed shear stress on a potential surface of sliding determined by accepted engineering practice.

Secretary means the Secretary of the Interior or his representative.

Sediment means undissolved organic and inorganic material transported or deposited by water.

Sedimentation pond means any natural or artificial structure or depression used to remove sediment from water and store sediment or other debris.

Significant imminent environmental harm to land, air or waste resources is determined as follows:

(i) An environmental harm is any adverse impact on land, air, or water resources, including plant and animal life.

(ii) An environmental harm is imminent if a condition, practice or violation exists which (a) is causing such harm or (b) may reasonably be expected to cause such harm at any time before the end of the reasonable abatement time that would be set under § 216.123(b) of these regulations.

(iii) An environmental harm is significant if that harm is appreciable and not immediately reparable.

Slope means average inclination of a surface, measured from the horizontal. Normally expressed as a unit of vertical distance to a given number of units of horizontal distance (eg., l*v* to 5h=20 percent=11.3 degrees).

Soil horizons means contrasting layers of soil lying one below the other, parallel or nearly parallel to the land surface soil. It is the part of the soil in which basis of field characteristics and laboratory data. The three major soil horizons are—

(1) *A horizon.* The uppermost layer in the soil profile often called the surface soil. It is the part of the soil in which organic matter is most abundant, and where leaching of soluble or suspended particles is the greatest.

(2) *B horizon.* The layer immediately beneath the A horizon and often called the subsoil. This middle layer commonly contains more clay, iron, or aluminum than the A or C horizons.

(3) *C horizon.* The deepest layer of the soil profile. It consists of loose material or weathered rock that is relatively unaffected by biologic activity. Spoil means overburden that has been removed during surface mining. Stabilize means any method used to control movement of soil, spoil piles, or areas of disturbed earth and includes increasing bearing capacity, increasing shear strength, draining, compacting, or revegetating.

Subirrigation means irrigation of plants with water delivered to the roots from underneath.

Surface Coal Mining Operations means: (a) Activities conducted on the surface of lands in connection with a surface coal mine and surface impacts incident to an underground coal mine. Such activities include excavation for the purpose of obtaining coal including such common methods as contour, strip, auger, mountaintop removal, box cut, open pit, and area mining, the uses of explosives and blasting, and in situ distillation or retorting, leaching or other chemical or physical processing, and the cleaning, concentrating, or other processing or preparation, loading of coal for commerce at or near the mine site: *Provided, however*, That such activities do not include the extraction of coal incidental to the extraction of other minerals where coal does not exceed 16% per centum of the tonnage of minerals removed for purposes of commercial use or sale, or coal exploration; and (b) the areas upon which such activities occur or where such activities disturb the natural land suface. Such areas shall also include any adjacent land, the use of which is incidental to any such activities, all lands affected by the construction of new roads or the improvement or use of existing roads to gain access to the site of such activities and for haulage and excavation, workings, impound-

ments, dams, ventilation shafts, entryways, refuse banks, dumps, stockpiles, overburden piles, spoil banks, culm banks, tailings, holes or depressions, repair areas, storage areas, processing areas, shipping areas and other areas upon which are sited structures, facilities, or other property or material on the surface, resulting from or incident to such activities.

Surface coal mining and reclamation operations means surface coal mining operations and all activities necessary and incidental to the reclamation of such operations. This term includes the term "surface coal mining operations."

Surface water means water, either flowing or standing, on the surface of the earth.

Suspended solids means organic or inorganic materials carried or held in suspension in water that will remain on a 0.45 micron filter.

Ton means 2,000 pounds avoirdupois (.90718 metric ton).

Toxic-forming materials means earth materials or wastes which, if acted upon by air, water, weathering, or microbiological processes, are likely to produce chemical or physical conditions in soils or water that are detrimental to biota or uses of water.

Toxic-mine drainage means water that is discharged from active or abandoned mines and from other areas affected by coal mining operations and which contains a substance which through chemical action or physical effects is likely to kill, injure, or impair biota commonly present in the area that might be exposed to it.

Valley fill and head-of-hollow fill means a structure consisting of any materials other than waste placed

so as to encroach upon or obstruct to any degree any natural stream channel other than those minor channels located on highland areas where overland flow in natural rills and gullies is the predominant form of runoff. Such fills are normally constructed in the uppermost portion of a V-shaped valley in order to reduce the upstream drainage area (head-of-hollow fills). Fills located further downstream (valley fills) must have larger diversion structures to minimize infiltration. Both fills are characterized by rock underdrains and are constructed in compacted lifts from the toe to the upper surface in a manner to promote stability.

Waste means earth materials, which are combustible, physically unstable, or acid-forming or toxic-forming, wasted or otherwise separated from product coal and are slurried or otherwise transported from coal processing facilities or preparation plants after physical or chemical processing, cleaning, or concentrating of coal.

Water table means upper surface of a zone of saturation, where the body of ground water is not confined by an overlying impermeable zone.

§ 216.102 General obligations.

(a) *Authorizations to operate.* A copy of all current permits, licenses, approved plans or other authorizations operate the mine shall be available for inspection at or near the mine site.

(b) *Mine maps.* Any person conducting surface coal mining and reclamation operations on and after Dec. 16, 1977, shall submit two copies of an accurate map of the mine and permit area at a scale of 1:6000 or larger. The maps shall show as of Dec. 16, 1977, the lands from which coal has not yet been removed, and the lands and structures which have been used or

disturbed to facilitate mining. One copy of the mine map shall be submitted to the appropriate agency of the local governing Indian Tribe, and one copy shall be submitted to the appropriate Regional Director, OSM, before March 16, 1978.

§ 216.103 Signs and markers.

(a) *Specifications.* All signs required to be posted shall be of a standard design that can be seen and read easily and shall be made of durable material. The signs and other markers shall be maintained during all operations to which they pertain and shall conform to local ordinances and codes.

(b) *Mine and permit identification signs.* Signs identifying the mine area shall be displayed at all points of access to the permit area from public roads and highways. Signs shall show the name, business address, and telephone number of the permittee and identification numbers of current mining and reclamation permits or other authorizations to operate. Such signs shall not be removed until after release of all bonds.

(c) *Perimeter markers.* The perimeter of the permit area shall be clearly marked by durable and easily recoginzed markers, or by other means approved by the regulatory authority.

(d) *Buffer zone markers.* Buffer zones as defined in § 216.108 shall be marked in a manner consistent with the perimeter markers along the interior boundary of the buffer zone.

(e) *Blasting signs.* If blasting is necessary to conduct surface coal mining operations, signs reading "Blasting Area" shall be displayed conspicuously at the edge of blasting areas along access and haul roads within the mine property. Signs reading

"Blasting Area" and explaining the blasting warning and all-clear signals shall be posted at all entrances to the permit area.

(f) *Topsoil markers.* Where topsoil or other vegetation-supporting material is segregated and stockpiled according to § 216.107(c), the stockpiled material shall be marked. Markers shall remain in place until the material is removed.

§ 216.104 Postmining use of land.

(a) *General.* All disturbed areas shall be restored in a timely manner (1) to conditions that are capable of supporting the uses which they were capable of supporting before any mining, or (2) to higher or better uses achievable under criteria and procedures of paragraph (d) of this section.

(b) *Determining premining use of land.* The premining uses of land to which the postmining land use is compared shall be those uses which the land previously supported if the land had not been previously mined and had been properly managed.

(1) The postmining land use for land that has been previously mined and not reclaimed shall be judged on the basis of the highest and best use that can be achieved and is compatible with surrounding areas.

(2) The postmining land use for land that has received improper management shall be judged on the basis of the premining use of surrounding lands that have received proper management.

(3) If the premining use of the land was changed within 5 years of the beginning of mining, the comparison of postmining use to premining use shall include a comparison with the historic use of the land as well as its use immediately preceding mining.

(c) *Land-use categories.* Land use is categorized in the following groups. Change from one to another land use category in premining to postmining constitutes an alternate land use and the permittee shall meet the requirements of paragraph (d) of this section and all other applicable environmental protection performance standards of this part.

(1) *Heavy industry.* Manufacturing facilities, powerplants, airports or similar facilities.

(2) *Light industry and commercial services.* Office buildings, stores, parking facilities, apartment houses, motels, hotels, or similar facilities.

(3) *Public services.* Schools, hospitals, churches, libraries, water-treatment facilities, solid-waste disposal facilities, public parks and recreation facilities, major transmission lines, major pipelines, highways, underground and surface utilities, and other servicing structures and appurtenances.

(4) *Residential.* Single- and multiple-family housing (other than apartment houses) with necessary support facilities. Support facilities may include commercial services incorporated in and comprising less than 5 percent of the total land area of housing capacity, associated open space, and minor vehicle parking and recreation facilities supporting the housing.

(5) *Cropland.* Land used primarily for the production of cultivated and close-growing crops for harvest alone or in association with sod crops. Land used for facilities in support of farming operations are included.

(6) *Rangeland.* Includes rangelands and forest lands which support a cover of herbaceous or scrubby vegetation suitable for grazing or browsing use.

(7) *Hayland or pasture.* Land used primarily for the long-term production of adapted, domesticated forage plants to be grazed by livestock or cut and cured for livestock feed.

(8) *Forest land.* Land with at least a 25 percent tree canopy or land at least 10 percent stocked by forest trees of any size, including land formerly having had such tree cover and that will be naturally or artificially reforested.

(9) *Impoundments of water.* Land used for storing water for beneficial uses such as stock ponds, irrigation, fire protection, recreation, or water supply.

(10) *Fish and wildlife habitat and recreation lands.* Wetlands fish and wildlife habitat, and areas managed primarily for fish and wildlife or recreation.

(11) *Combined uses.* Any appropriate combination of land uses where one land use is designated as they primary land use and one or more other land uses are designated as secondary land uses.

(d) *Criteria for approving alternative postmining use of land.* An alternative postmining land use shall be approved by the regulatory authority, after consultation with the landowner or the land-management agency on Federal lands, if the following criteria are met.

(1) The proposed land use is compatible with adjacent land use and, where applicable, with existing Tribal and Federal land use policies and plans.

A written statement of the views of the authorities with statutory responsibilities for land use policies and plans shall accompany the request for approval. The permittee shall obtain any required approval of Tribal or Federal land management agencies, includ-

ing any necessary zoning or other changes necessarily required for the final land use.

(2) Specific plans have been prepared which show the feasibility of the proposed land use as related to needs, projected land use trends, and markets and that include a schedule showing how the proposed use will be developed and achieved within a reasonable timne after mining and be sustained. The regulatory authority may require appropriate demonstrations to show that the planned procedures are feasible, reasonable, and integrated with mining and reclamation, and that the plans will result in successful reclamation.

(3) Provision of any necessary public facilities is assured as evidenced by letters of commitment from parties other than the permittee, as appropriate, to provide them in a manner compatible with the permittee's plans.

(4) Specific and feasible plans for financing attainment and maintenance of the postmining land use including letters of commitment from parties other than the permittee as approprate, if the postmining land use to be developed by such parties.

(5) The plans are designed under the general supervision of a regiatered professional engineer, or other appropriate professional, who will ensure that the plans conform to applicable accepted standards for adequate accepted standards for adequate land stability, drainage, and vegetative cover, and aesthetic design appropriate for the postmining use of the site.

(6) The proposed use or uses will neither present actual or probable hazard to public health or safety nor will they pose any actual or probable threat of water flow diminution or pollution.

(7) The use or uses will not involve unreasonable delays in reclamation.

(8) Necessary approval of measures to prevent or mitigate adverse effects on fish and wildlife has been obtained from the regulatory authority and appropriate Tribal and Federal fish and wildlife management agencies.

(9) Proposals to change premining land uses of range, fish and wildlife habitat, forest land, hayland, or pasture to a postmining cropland use, where the cropland would require continuous maintenance such as seeding, plowing, cultivation, fertilization, or other simiar practices to be practicable or to comply with applicable Federal and Tribal laws, shall be reviewed by the regulatory authority to assure that:

(i) There is a firm written commitment by the permittee or by the landowner or land manager to provide sufficient crop management after release of applicable performance bonds to assure that the proposed postmining cropland use remains practical and reasonable;

(ii) There is sufficient water available and committee to maintain crop production; and

(iii) Topsoil quality and depth are shown to be sufficient to support the proposed use.

(10) The regulatory authority has provided by public notice not less than 45 days nor more than 60 days for interested citizens and Tribal and Federal agencies to review and comment on the proposed land use.

§ 216.105 Backfilling and grading.

In order to achieve the approximate original contour, the permittee shall, except as provided in

this section, transport, backfill, compact (where advisable to ensure stability or to prevent leaching of toxic materials), and grade all spoil material to eliminate all highwalls, spoil piles, and depressions. Cut-and-fill terraces may be used only in those situations expressly identified in this section. The postmining graded slopes must approximate the premining natural slopes in the area as defined in paragraph (a) of this section.

(a) *Slope measurements.* (1) To determine the natural slopes of the area before mining, sufficient slopes to adequately represent the land surface configuration, and as approved by the regulatory authority in accordance with site conditions, must be accurately measured and recorded. Each measurement shall consist of an angle of inclination along the prevailing slope extending 100 linear feet above and below or beyond the coal outcrop or the area to be disturbed; or, where this is impractical, at locations specified by the regulatory authority. Where the area has been previously mined, the measurements shall extend at least 100 feet beyond the limits of mining disturbances as determined by the regulatory authority to be representative of the premining configuration of the land. Slope measurements shall take into account natural variations in slope so as to provide accurate representation of the range of natural slopes and shall reflect geomorphic differences of the area to be disturbed. Slope measurements may be made from topographic maps showing contour lines, having sufficient detail and accuracy consistent with the submitted mining and reclamation plan.

(2) After the disturbed area has been graded, the final graded slopes shall be measured at the beginning and end of lines established on the

prevailing slope at locations representative of premining slope conditions and approved by the regulatory authority. These measurements must not be made so as to allow unacceptably steep slopes to be constructed.

(b) *Final graded slopes.* (1) The final graded slopes shall not exceed either the approximate premining slopes as determined according to paragraph (a)(1) of this section and approved by the regulatory authority or any lesser slope specified by the regulatory authority based on consideration of soil, climate, or other characteristics of the surrounding area. Postmining final graded slopes need not be uniform. The requirements of this paragraph may be modified by the regulatory authority where the mining is reaffecting previously mined lands that have not been restored to the standards of this section and sufficient spoil is not available to return to the slope determined according to paragraph (a)(1) of this section. Where such modifications are approved, the permittee shall, as a minimum, be required to:

(i) Retain all overburden and spoil on the solid portion of existing or new benches; and

(ii) Backfill and grade to the most moderate slope possible to eliminate the highwall which does not exceed the angle of repose or such lesser slopes as is necessary to assure stability.

(2) On approval by the regulatory authority and in order to conserve soil moisture, ensure stability, and control erosion on final graded slopes, cut-and-fill terraces may be allowed if the terraces are compatible with the post-mining land use approved under § 216.104, and are appropriate substitutes for construction of lower grades on the reclaimed lands. The terraces shall meet the following requirements:

(i) The width of the individual terrace bench shall not exceed 20 feet unless specifically approved by the regulatory authority as necessary for stability, erosion control, or roads included in the approved postmining land use plan.

(ii) The vertical distance between terraces shall be as specified by the regulatory authority to prevent excessive erosion and to provide long-term stability.

(iii) The slope of the terrace outslope shall not exceed l*v*:2*h* (50 percent). Outslopes which exceed l*v*:2*h* (50 percent) may be approved if they have a minimum static safety factor of more than 1.5 and provide adequate control over erosion and closely resemble the surface configuration of the land prior to mining. In no case may highwalls be left as part of terraces.

(iv) Culverts and underground rock drains shall be used on the terrace only when approved by the regulatory authority.

(3) All operations on steep slopes of 20 degrees or more or on such lesser slopes as the regulatory authority defines as a *steep slope* shall meet the provisions of ? 216.111 of this part.

(c) *Mountaintop removal.* The requirements of this paragraph shall apply to surface mining operations which remove entire coal seams in the upper part of a mountain, ridge, or hill by removing all of the overburden, and where the requirements for achieving the approximate original contour of this section cannot be met. Final graded top plateau slopes on the mined area shall be less than l*v*:5*h* so as to create a level plateau or gently rolling configuration and the outslopes of the plateau shall not exceed l*v*:2*h*, except where engineering data substantiates and the regulatory authority finds that

a minimum static safety factor of 1.5 (or higher factors specified by the regulatory authority) will be attained. Although the area need not be restored to approximate original contour, all highwalls, spoil piles, and depressions except as provided in paragraphs (d) and (e) of this section shall be eliminated.

(d) *Small depressions.* The requirement of this section to achieve approximate original contour does not prohibit construction of small depressions if they are approved by the regulatory authority to minimize erosion, conserve soil moisture or promote revegetation. These depressions shall be compatible with the approved post-mining land use and shall not be inappropriate substitutes for construction of lower grades on the reclaimed lands. Depressions approved under this section shall have a holding capacity of less than 1 cubic yard of water or, if it is necessary that they be larger, shall not restrict normal access throughout the area or constitute a hazard. Large, permanent impoundments shall be governed by paragraph (e) of this section and by § 216.108.

(e) *Permanent impoundments.* Permanent impoundments may be retained in mined and reclaimed areas provided all highwalls are eliminated by grading to appropriate contour and the provisions for postmining land use (§ 216.104) and protection of the hydrologic balance (216.108) are met. No impoundments shall be constructed on top of areas in which excess materials are deposited pursuant to § 216.106 of this part. Impoundments shall not be used to meet the requirements of paragraph (j) of this section.

(f) *Definition of thin and thick restored overburden.* The thin overburden provisions of paragraph (g) of this section may apply only where the final thickness

is less than 0.8 of the initial thickness. The thick overburden provisions of paragraph (h) of this section may apply only where the final thickness is greater than 1.2 of the initial thickness. Initial thickness is the sum of the overburden thickness and coal thickness. Final thickness is the product of the overburden thickness times the bulking factor to be determined for each mine area. The provisions of paragraphs (g) and (h) of this section apply only when operations cannot be carried out to comply with the requirements of paragraph (a) of this section to achieve the approximate original contour.

(g) *Thin overburden.* In surface coal mining operations carried out continuously in the same limited pit area for more than 1 year from the day coal-removal operations begin and where the volume of all available spoil and suitable waste materials is demonstrated to be insufficient to achieve approximate original contour, surface coal mining operations shall be conducted to meet, at a minimum, the following standards:

(1) Transport, backfill, and grade, using all available spoil and suitable waste materials from the entire mine area, to attain the lowest practicable stable grade, which may not exceed the angle of repose, and to provide adequate drainage and long-term stability of the regraded areas.

(2) Eliminate highwalls by grading or backfilling to stable slopes not exceeding l*v*:2*h* (50 percent), or such lesser slopes as the regulatory authority may specify to reduce erosion, maintain the hydrologic balance, or allow the approved postmining land use.

(3) Transport, backfill, grade, and revegetate to achieve an ecologically sound land use compatible

with the prevailing land use in unmined areas surrounding the permit area.

(4) Transport, backfill, and grade to ensure the impoundments are constructed only where it has been demonstrated to the regulatory authority's satisfaction that all requirements of § 216.108 have been met and that the impoundments have been approved by the regulatory authority as meeting the requirements of this part and all other applicable Federal and Tribal regulations.

(h) *Thick overburden.* In surface coal mining operations where the volume of spoil is demonstrated to be more than sufficient to achieve the approximate original contour surface coal mining operations shall be conducted to meet at a minimum the following standards:

(1) Transport, backfill, and grade all spoil and wastes not required to achieve approximate original contour in the surface mining area to the lowest practicable grade.

(2) Deposit, backfill, and grade excess spoil and wastes only within the permit area and dispose of such materials in conformance with this part.

(3) Transport, backfill, and grade excess spoil and wastes to maintain the hydrologic balance in accordance with this part and to provide long-term stability.

(4) Transport, backfill, grade and revegetate wastes and excess spoil to achieve an ecologically sound land use compatible with the prevailing land uses in unmined areas surrounding the permit area.

(5) Eliminate all highwalls and depressions except as stated in paragraph (e) of this section by backfilling with spoil and suitable waste materials.

(i) *Regrading or stabilizing rills and gullies.* When rills or gullies deeper than 9 inches form in areas that have been regraded and the topsoil replaced but vegetation has not yet been established, the permittee shall fill, grade, or otherwise stabilize the rills and gullies and reseed or replant the areas according to § 216.110. The regulatory authority shall specify that rills or gullies of lesser size be stabilized if the rills or gullies will be disruptive to the approved postmining land use or may result in additional erosion and sedimentation.

(j) *Covering coal and acid-forming, toxic-forming, combustible, and other waste materials; stabilizing backfilled materials; and using waste material for fill*— (1) *Cover.* All exposed coal seams remaining after mining and any acid-forming, toxic-forming, combustible materials, or any other waste materials identified by the regulatory authority that are exposed, used, or produced during mining shall be covered with a minimum of 4 feet of nontoxic and noncombustible material; or, if necessary, treated to neutralize toxicity in order to prevent water pollution and sustained combustion, and to minimize adverse effects on plant growth and land uses. Where necessary to protect against upward migration of salts, exposure by erosion, to provide an adequate depth for plant growth, or to otherwise meet local conditions, the regulatory authority shall specify thicker amounts of cover using non-toxic material. Acid-forming or toxic-forming material shall not be buried or stored in proximity to a drainage course so as to cause or pose a threat of water pollution or otherwise violate the provisions of § 216.108 of this part.

(2) *Stabilization.* Backfilled materials shall be selectively placed and compacted wherever necessary

to prevent leaching of toxic-forming materials into surface or subsurface waters in accordance with ? 216.108 and wherever necessary to ensure the stability of the backfilled materials. The method of compacting material and the design specifications shall be approved by the regulatory authority before the toxic materials are covered.

(3) *Use of waste materials as fill.* Before waste materials from a coal preparation or conversion facility or from other activities conducted outside the permit area such as municipal wastes are used for fill material, it must be demonstrated to the regulatory authority by hydrogeological means and chemical and physical analyses that use of these materials will not adversely affect water quality, water flow, and vegetation; will not present hazards to public health and safety; and will not cause instability in the backfilled area.

(k) *Grading along the contour.* All final grading, preparation of overburden before replaceent of topsoil, and placement of topsoil, in accordance with § 216.107, shall be done along the contour to minimize subsequent erosion and instability. If such grading, preparation or placement along the contour would be hazardous to equipment operators then grading, preparation or placement in a direction other than generally parallel to the contour may be used. In all cases, grading, preparation or placement shall be conducted in a manner which minimizes erosion and provides a surface for replacement of topsoil which will minimize slippage.

§ 216.106 Disposal of spoil and waste materials in areas other than the mine workings or excavations.

(a) Disposal of spoil in other than valley or head-of-hollow fills. Spoil not required to achieve the approximate original contour shall be transported to and placed in a controlled (engineered) manner in disposal areas other than the mine workings or excavations only if all the following conditions, in addition to the other requirements of this part, are met:

(1) The disposal areas shall be within the permit area, and they must be approved by the regulatory authority as suitable for construction of fills in accordance with the requirements of this paragraph;

(2) The disposal areas shall be located on the most moderate sloping and naturally stable areas available as approved by the regulatory authority. Where possible, fill materials suitable for disposal shall be placed upon or above a natural terrace, bench, or berm if such placement provides additional stability and prevents mass movement;

(3) The fill shall be designed using recognized professional standards, certified by a registered professional engineer, and approved by the regulatory authority;

(4) Where the slope in the disposal area exceeds l*v*:2.8*h* (36 percent), or such lesser slope designated by the regulatory authority based on local conditions, measures such as keyway cuts (excavations to stable bedrock) or rock toe buttresses shall be constructed to stabilize the fill.

(5) The disposal area does not contain springs, natural water courses or wet weather seeps unless

lateral drains are constructed from the wet areas to the underdrains in such a manner that infiltration of the water into the spoil pile will be prevented.

(6) All organic material shall be removed from the disposal area and the topsoil must be removed and segregated pursuant to § 216.107 before the material is placed in the disposal area. However, if approved by the regulatory authority, organic material may be used as mulch or may be included in the topsoil.

(7) The spoil shall be transported and placed in a controlled manner, concurrently compacted as necessary to ensure mass stability and prevent mass movement, covered, and graded to allow surface and subsurface drainage to be compatible with the natural surroundings, and to ensure long-term stability. The final configuration of the fill must be suitable for postmining land uses approved in accordance with § 216.104. Terraces shall not be constructed unless approved by the regulatory authority.

(8) If any portion of the fill interrupts, obstructs, or encroaches upon any natural drainage channel, the entire fill is classified as a valley or head-or-hollow fill and must be designed and constructed in accordance with the requirements of paragraph (b) of this section.

(9) The fill shall be inspected for stability by a registered engineer or qualified professional specialist during critical construction periods to assure removal of all organic material and topsoil, placement of under-drainage systems, and proper construction of terraces according to the approved plan. The registered engineer or other qualified professional specialist shall provide a certified report after each inspection that the fill has been constructed as

specified in the design approved by the regulatory authority.

(b) *Disposal of spoil in valley or head-of-hollow fills.* Waste material must not be disposed of in valley or head-of-hollow fills. Spoil to be disposed of in natural valleys must be placed in accordance with the following requirements:

(1) The disposal areas shall be within the permit area, and they must be approved by the regulatory authority as suitable for construction of fills in accordance with the requirements of paragraph (b) of this section.

(2) The disposal site shall be near the ridge top of a valley selected to increase the stability of the fill and to reduce the drainage area above the fill. Where possible, spoil shall be placed above a natural terrace, bench, or berm, if such placement provides additional stability and prevents mass movement.

(3) The fill shall be designed using recognized professional standards, certified by a registered professional engineer and approved by the regulatory authority.

(4) All organic material shall be removed from the dispoal area and the topsoil must be removed and segregated pursuant to § 216.107 of this part before the material is placed in the disposal area. However, if approved by the regulatory authority, organic material may be used as mulch or may be included in the topsoil.

(5) Where the slope in the disposal area exceeds l*v*:2.8*h* (36 percent), or such lesser slope designated by the regulatory authority based on local conditions, measures such as keyway cuts (excavations to stable

bedrock) or rock toe buttresses shall be constructed to stabilize the fill.

(6) A system of under drains constructed of durable rock shall be installed along the natural drainage system shall extend from the toe to the head of the fill and contain lateral drains to each area of potential drainage or seepage. In constructing the underdrains, no more than 10 percent of the rock may be less than 12 inches in size and no single rock may be larger than 25 percent of the width of the drain. No rock shall be used in underdrains if it tends to easily disintegrate and thereby clog the drain or if it is acid-forming or toxic-forming. The minimum size of the main underdrain shall be:

Total amount of fill material	Predominant type of fill material	Minimum size of drain in feet	
		Width	Height
Less than 1,000,000 yd^3.	Sandstone	10	4
Do	Shale	16	8
More than 1.000,000 yd^3	Sandstone	16	8
Do	Shale	16	8

(7) Spoil shall be transported and placed in a controlled manner and concurrently compacted as specified by the regulatory authority in lifts that are less than 4 feet thick in order to achieve the densities designed to ensure mass stability, to prevent mass movement, to avoid contamination of the rock underdrain and to prevent formation of voids. The final configuration of the fill must be suitable for postmining land uses approved in accordance with § 216.104.

(8) Terraces shall be constructed to stabilize the face of the fill. The outslope of each terrace shall not

exceed 50 feet in length and the width of the terrace shall not be less than 20 feet.

(9) The tops of the fill and each terrace shall be graded no steeper than l*v*:20*h* (5 percent) and shall be constructed to drain surface water to the sides of the fill where stabilized surface channels shall be established off the fill to carry drainage away from the fill. Drainage shall not be directed over the outslope of the fill unless approved by the regulatory authority.

(10) All surface drainage from the undisturbed area above the fill shall be diverted away from the fill by approved structures leading into water courses.

(11) The outslope of the fill shall not exceed l*v*:2*h* (50 percent). The regulatory authority may require a flatter slope.

(12) The fill shall be inspected for stability by a registered engineer or qualified professional specialist during critical construction periods and at least quarterly throughout construction to assure removal of all organic material and topsoil, placement of under drainage systems, and proper construction of terraces according to the approved plan. The registered engineer or other qualified professional specialist shall provide a certified report, after each inspection that the fill has been constructed as specified in the design approved by the regulatory authority.

§ 216.107 Topsoil handling.

To prevent topsoil from being contaminated by spoil or waste materials, the permittee shall remove the topsoil as a separate operation from areas to be disturbed. Topsoil shall be immediately redistributed according to the requirements of paragraph (b) of this

section on areas graded to the approved postmining configuration. The topsoil shall be segregated, stockpiled, and protected from wind and water erosion and from contaminants which lessen its capability to support vegetation if sufficient graded areas are not immediately available for redistribution.

(a) *Topsoil removal.* All topsoil to be salvaged shall be removed before any drilling for blasting, mining, or other surface disturbance.

(1) All topsoil shall be removed unless use of alternative materials is approved by the regulatory authority in accordance with paragraph (a)(4) of this section. Where the removal of topsoil results in erosion that may cause air or water pollution, the regulatory authority shall limit the size of the area from which topsoil may be removed at any one time and specify methods of treatment to control erosion of exposed overburden.

(2) All of the A horizon of the topsoil as identified by soil surveys shall be removed according to paragraph (a) of this section and then replaced on disturbed areas as the surface soil layers. Where the A horizon is less than 6 inches, a 6-inch layer that includes the A horizon and the unconsolidated material immediately below the A horizon (or all unconsolidated material if the total available is less than 6 inches) shall be removed and the mixture segregated and replaced as the surface soil layer.

(3) Where necessary to obtain soil productivity consistent with postmining land use, the regulatory authority may require that the B horizon or portions of the C horizon or other underlying layers demonstrated to have comparable quality for root development be segregated and replaced as subsoil.

(4) Selected overburden materials may be used instead of, or as a supplement to, topsoil where the resulting soil medium is equal to or more suitable for vegetation, and if all the following requirements are met:

(i) The permittee demonstrates that the selected overburden materials or an overburden-topsoil mixture is more suitable for restoring land capability and productivity by the results of chemical and physical analyses. These analyses shall include determinations of pH, percent organic material, nitrogen, phosphorus, potassium, texture class and water-holding capacity, and such other analyses as required by the regulatory authority. The regulatory authority also may require that results of field-site trials or greenhouse tests be used to demonstrate the feasibility of using such overburden materials.

(ii) The chemical and physical analyses and the results of field-site trials and greenhouse tests are accompanied by a certification from a qualified soil scientist or agronomist.

(iii) The alternative material is removed, segregated, and replaced in conformance with this section.

(b) *Topsoil redistribution.* (1) After final grading and before the topsoil is replaced, regraded land shall be sacrificed or otherwise treated to eliminate slippage surfaces and to promote root penetration.

(2) Topsoil shall be redistributed in a manner that—

(i) Achieves an approximate uniform thickness consistent with the postmining land uses.

(ii) Prevents excess compaction of the spoil and topsoil; and

(iii) Protects the topsoil from wind and water erosion before it is seeded and planted.

(c) *Topsoil storage.* If the permit allows storage of topsoil, the stockpiled topsoil shall be placed on a stable area within the permit area where it will not be disturbed or be exposed to excessive water, wind erosion, or contaminants which lessen its capability to support vegetation before it can be redistributed on terrain graded to final contour. Stockpiles shall be selectively placed and protected from wind and water erosion, unnecessary compaction, and contamination by undesirable materials either by a vegetative cover as defined in § 216.110(g) or by other methods demonstrated to provide equal protection such as snow fences, chemical binders, and mulching. Unless approved by the regulatory authority, stockpiled topsoil shall not be moved until required for redistribution on a disturbed area.

(d) *Nutrients and soil amendments.* Nutrients and soil amendments in the amounts and analyses as determined by soil tests shall be applied to the surface soil layer so that it will support the postmining requirements of § 216.104 and the revegetation requirements of § 216.110.

§ 216.108 Protection of the hydrologic system.

The permittee shall plan and conduct coal mining and reclamation operations to minimize disturbance to the prevailing hydrologic balance in order to prevent long-term adverse changes in the hydrologic balance that could result from surface coal mining and reclamation operations, both on- and off-site. Changes in water quality and quantity, in the depth to ground water, and in location of surface water drainage channels shall be minimized such that postmining land use of the disturbed land is not

adversely affected and applicable Federal and Tribal statutes and regulations are not violated. The permittee shall conduct operations so as to minimize water pollution and shall, where necessary, use treatment methods to control water pollution. The permittee shall emphasize surface coal mining and reclamation practices that will prevent or minimize water pollution and changes in flows in preference to the use of water treatment facilities. Practices to control and minimize pollution include, but are not limited to, stabilizing disturbed areas through grading, diverting runoff, achieving quick growing stands of temporary vegetation, lining drainage channels with rock or vegetation, mulching, sealing acid-forming and toxic-forming materials, and selectively placing waste materials in backfill areas. If pollution can be controlled only by treatment the permittee shall operate and maintain the necessary water-treatment facilities for as long as treatment is required.

(a) *Water quality standards and effluent limitations.* All surface drainage from the disturbed area, including disturbed areas that have been graded, seeded, or planted shall be passed through a sedimentation pond or a series of sedimentation ponds before leaving the permit area. Sedimentation ponds shall be retained until drainage from the disturbed area have met the water quality requirements of this section and the revegetation requirements of § 216.110 have been met. The regulatory authority may grant exemptions from this requirement only when the disturbed drainage area within the total disturbed area is small if the permittee shows that sedimentation ponds are not necessary to meet the effluent limitations of this paragraph and to maintain water quality in

downstream receiving waters. For purpose of this section only, disturbed area shall not include those areas in which only diversion ditches, sedimentation ponds, or roads are installed in accordance with this section and the upstream area is not otherwise disturbed by the permittee. Sedimentation ponds required by this paragraph shall be constructed in accordance with paragraph (e) of this section in appropriate locations prior to any mining in the affected drainage area in order to control sedimentation or otherwise treat water in accordance with this paragraph. Discharges from areas disturbed by surface coal mining and reclamation operations must meet all applicable Federal and Tribal laws and regulations and, at a minimum, the following numerical of effluent limitations:

EFFLUENT LIMITATIONS

[In milligrams per liter, (mg/I) except for pH]

Effluent charactensics	Maximum allowable[1]	Average of daily values for 30 consecutive discharge days[1]
Iron, total	7.0	3.5
Manganese, total	4.0	2.0
Total suspended solids[2]	70.0	35.0
pH[3]	Within the range 6.0 to 9.0.	

[1] Based on representative sampling.

[2] In Arizona. Colorado, Montana. New Mexico, North Dakota, South Dakota, Utah. and Wyoming. total suspended solids limitations will be determined on a case-by-case basis, but they must not be greater than 45 mg/I (maximum allowable) and 30 mg/I (average of daily value for 30 consecutive discharge days) based on a representative sampling.

[3] Where the application of neutralization and sedimentation treatment technology results in inability to comply with the manganese limitations set forth. the regulatory authority may allow the pH level in the discharge to exceed to a small extent the upper limit of 9.0 in order that the manganese limitations will be achieved.

(1) Any overflow or other discharge of surface water from the disturbed area within the permit area demonstrated by the permittee to result from a precipitation event larger than a 10-year, 24-hour frequency event will not be subject to the effluent limitations of paragraph (a) of this section.

(2) The permittee shall install, operate, and maintain adequate facilities to treat any water discharged from the disturbed area that violates applicable Federal or Tribal laws or regulations or the limitations of paragraph (a) of this section. If the pH of waters to be discharged from the disturbed area is normally less than 6.0, an automatic lime feeder or other neutralization process approved by the regulatory authority shall be installed, operated, and maintained. If the regulatory authority finds (i) that small and infrequent treatment requirements to meet applicable standards do not necessitate use of an automatic neutralization process, and (ii) that the mine normally produces less than 500 tons of coal per day, then the regulatory authority may approve the use of a manual system if the permittee ensures consistent and timely treatment.

(b) *Surface-water monitoring*. (1) The permittee shall submit for approval by the regulatory authority a surface-water monitoring program which meets the following requirements:

(i) Provides adequate monitoring of all discharge from the disturbed area.

(ii) Provides adequate data to describe the likely daily and seasonal variation in discharges from the disturbed area in terms of water flow, pH, total iron, total manganese, and total suspended solids and, if requested by the regulatory authority, and other parameter characteristic of the discharge.

(iii) Provides monitoring at appropriate frequencies to measure normal and abnormal variations in concentrations.

(iv) Provides an analytical quality control system including standard methods of analysis such as those specified in 40 CFR Part 136.

(v) Provides a regular report of all measurements to the regulatory authority within 60 days of sample collection unless violations of permit conditions occur in which case the regulatory authority shall be notified immediately after receipt of analytical results by the permittee. If the discharge is subject to regulation by a Federal permit issued in compliance with the Federal Water Pollution Control Act Amendment of 1972 (33 U.S.C. 1251-1378), a copy of the completed reporting form supplied to meet the permit requirements may be submitted to the regulatory authority to satisfy the reporting requirements, if the data meet the sampling frequency and other requirements of this paragraph.

(2) After disturbed areas have been regraded and stabilized in accordance with this part, the permittee shall monitor surface water flow and quality. Data from this monitoring shall be used to demonstrate that the quality and quantity of runoff without treatment will be consistent with the requirement of this section to minimize disturbance to the prevailing

hydrologic balance and with the requirements of this part to attain the approved postmining land use. These data shall provide a basis for approval by the regulatory authority for removal of water quality or flow control systems and for determining when the requirements of this section are met. The regulatory authority shall determine the nature of data, frequency of collection, and reporting requirements.

(3) Equipment, structures, and other measures necessary to accurately measure and sample the quality and quantity of surface water discharges from the disturbed area of the permit area shall be properly installed, maintained, and operated and shall be removed when no longer required.

(c) *Diversion and conveyance of overland flow away from disturbed areas.* In order to minimize erosion and to prevent or remove water from contacting toxic-producing deposits, overland flow from undisturbed areas may, if required or approved by the regulatory authority, be diverted away from disturbed areas by means of temporary or permanent diversion structures. The following requirements shall be met:

(1) Temporary diversion structures are those used during mining and reclamation. When no longer needed, these structures shall be removed and the area reclaimed. Temporary diversion structures shall be constructed to safely pass the peak runoff from a precipitation event with a 10-year recurrence interval, or a larger event as specified by the regulatory authority.

(2) Permanent diversion structures are those remaining after mining and reclamation and approved for retention by the regulatory authority and other appropriate Tribal and Federal agencies. To protect fills and property and to avoid danger to public

health and safety, permanent diversion structures shall be constructed to safely pass the peak runoff from a precipitation event with a 100-year recurrence interval, or a larger event as specified by the regulatory authority. Permanent diversion structures shall be constructed with gently sloping banks that are stabilized by vegetation. Asphalt, concrete, or other similar linings shall not be used unless specifically required to prevent seepage or to provide stability and are approved by the regulatory authority.

(3) Diversions shall be designed, constructed, and maintained in a manner to prevent additional contributions of suspended solids to streamflow or to runoff outside the permit area to the extent possible, using the best technology currently available. In no event shall such contributions be in excess of requirements set by applicable Tribal or Federal law. Appropriate sediment control measures for these diversions shall include, but not be limited to, maintenances of appropriate gradients, channel lining, revegetation, roughness structures, and detention basins.

(d) *Stream channel diversions.* (1) Flow from perennial and intermittent streams within the permit area may be diverted only when the diversions are approved by the regulatory authority and they are in compliance with tribal and Federal statutes and regulations. When streamflow is allowed to be diverted, the new stream channel shall be designed and constructed to meet the following requirements:

(i) The average stream gradient shall be maintained and the channel designed, constructed, and maintained to remain stable and to prevent additional contributions of suspended solids to streamflow, or to runoff outside the permit area to

the extent possible, using the best technology currently available. In no event shall such contributions be in excess of requirements set by applicable Tribal or Federal law. Erosion control structures such as channel lining structures, retention basins, and artificial channel roughness structures shall be used only when approved by the regulatory agency for temporary diversions where necessary or for permanent diversions where they are stable and will require only infrequent maintenance.

(ii) Channel, bank, and flood-plain configurations shall be adequate to safely pass the peak runoff of a precipitation event with a 10-year recurrence interval for temporary diversions and a 100-year recurrence interval for permanent diversions, or larger events as specified by the regulatory authority.

(iii) Fish and wildlife habitat and water and vegetation of significant value for wildlife shall be protected in consultation with appropriate Tribal and Federal fish and wildlife management agencies.

(2) All temporary diversion structures shall be removed and the affected land regraded and revegetated consistent with the requirements of §§ 216.105 and 216.110. At the time such diversions are removed, the permittee shall ensure that downstream water treatment facilities previously protected by the diversion are modified or removed to prevent overtopping or failure of the facilities.

(3) *Buffer zone.* No land within 100 feet of an intermittent or perennial stream shall be disturbed by surface coal mining and reclamation operations unless the regulatory authority specifically authorizes surface coal mining and reclamation operations through such a stream. The area not to be disturbed

shall be designated a buffer zone and marked as specified in § 216.103.

(e) *Sediment control measures.* Appropriate sediment control measures shall be designed, constructed, and maintained to prevent additional contributions of sediment to stream flow or to runoff outside the permit area to the extent possible, using the best technology currently available. Sediment control measures may include, but not limited to, sedimentation ponds, diversion structures, sediment traps, straw dikes, riprap, check dams, vegetative filters, dugout ponds, and chemical treatment. Sedimentation ponds may be used individually or in a series and shall (either individually of in series) meet the following criteria:

(1) Sedimentation ponds must provide at least a 24-hour detention time and a surface area of at least 1 square foot for each 50 gallons per day of inflow for runoff entering the pond(s) that results from a 10-year, 24-hour precipitation event. Runoff diverted, in accordance with paragraphs (c) and (d) of this section, away from disturbed drainage areas need not be considered in sedimentation pond design. Required sedimentation pond surface area and detention time may be accordingly reduced by the appropriate use of chemical treatment measures such as flocculation and coagulation if approved by the regulatory authority.

(2) An additional sediment storage volume must be provided equal to 0.2 acre-feet for each acre of disturbed area within the upstream drainage area. Upon approval of the regulatory authority, the sediment storage volume may be reduced in an amount, as demonstrated by the permittee equal to the sediment removed by other appropriate sediment control measures.

(3) Ponds may be of the permanent pool or self-dewatering type. Dewatering-type ponds shall use siphon or other dewatering methods approved by the regulatory authority to prevent discharges of pollutants within the design flow.

(4) Spillway systems shall be properly located to maximize the distances from the point of inflow into the pond to maximize detention times. Spillway systems shall be provided to safely discharge the peak runoff from a precipitation event with a 25-year recurrence interval, or larger event as specified by the regulatory authority.

(5) Sediment shall be removed from sedimentation ponds when the volume of sediment accumulates to 80 percent of the sediment storage volume required. Sediment removal shall be done in a manner that minimizes adverse effects on surface waters due to its chemical and physical characteristics, on infiltration, on vegetation, and on surface and ground water quality. Sediment that has been removed from sedimentation ponds and that meets the requirements for topsoil may be redistributed over graded areas in accordance with § 216.107.

(6) If a sedimentation pond has an embankment that is more than 20 feet in height, as measured from the upstream toe of the embankment to the crest of the emergency spillway, or has a storage volume of 20 acre-feet or more, the following additional requirements shall be met:

(i) An appropriate combination of principal and emergency spillways shall be provided to safely discharge the runoff resulting from a 100-year, 6-hour precipitation event, or larger event as specified by the regulatory authority.

(ii) Ponds shall be designed and constructed with an acceptable static safety factor of at least 1.5 of maximum design flood elevation of the pool to ensure embankment slope stability.

(iii) The minimum top width of the embankment shall not be less than the quotient of H+35/5 where H is the height of the embankment as measured from the upstream toe of the top of the embankment.

(iv) Ponds shall have appropriate barriers to control seepage along conduits that extend through the embankment.

(7) All pounds shall be designed and inspected under the supervision of, and certified after construction by a registered professional engineer.

(8) All ponds, including those not meeting the size or other criteria of 30 CFR 77.216(a), shall be examined for structural weakness, erosion, and other hazardous conditions in accordance with the inspection requirements contained in 30 CFR 77.216-3.

(9) All ponds shall be removed and the affected land regarded and revegetated consistent with the requirements of §§ 216.105 and 216.110, unless the regulatory authority approves retention of the ponds pursuant to paragraph (k) of this section.

(f) *Discharge structures.* Discharges from sedimentation ponds and diversions shall be controlled, where necessary, using energy dissipators, surge ponds, and other devices to reduce erosion and prevent deepening or enlargement of stream channels and to minimize disturbances to the hydrologic balance.

(g) *Acid and toxic materials.* Drainage from acid-forming and toxic-forming mine waste materials and soils into ground and surface water shall be avoided by:

(1) Identifying, burying, and treating where necessary, spoil or other materials that, in the judgment of the regulatory authority, will be toxic to vegetation or that will adversely affect water quality if not treated or buried. Such material shall be disposed of in accordance with the provision of § 216.105(j);

(2) Preventing or removing water from contact with toxic-producing deposits;

(3) Burying or otherwise treating all toxic or harmful materials within 30 days, if such materials are subject to wind and water erosion, or within a lesser period designated by the regulatory authority. If storage of such materials is approved, the materials shall be placed on impermeable material and protected from erosion and contact with surface water. Coal waste ponds and other coal waste materials shall be maintained according to § 216.108(g)(4), and § 216.109 shall apply;

(4) Burying or otherwise treating waste materials from coal preparation plants no later than 90 days after the cessation of the filling of the disposal area. Burial or treatment shall be in accordance with § 216.105(j);

(5) Casing, sealing or otherwise managing boreholes, shafts, wells, and auger holes or other more or less horizontal holes to prevent pollution of surface or ground water and to prevent mixing of ground waters of significantly different quality. All boreholes that are within the permit area but are outside the surface coal mining area or which extend beneath the coal to be mined and into water bearing strata shall be plugged permanently in a manner approved by the regulatory authority, unless the boreholes have been approved for use in monitoring.

(6) Taking such other actions as required by the regulatory authority.

(h) *Ground water*—(l) *Recharge capacity of reclaimed lands.* The disturbed area shall be reclaimed to restore approximate premining recharge capacity through restoration of the capability of the reclaimed areas as a whole to transmit water to the ground water system. The recharge capacity should be restored to support the approved postmining land use and to minimize disturbances to the prevailing hydrologic balance at the mined area and in associated offsite areas. The permittee shall be responsible for monitoring according to paragraph (h)(3) of this section to ensure operations conform to this requirement.

(2) *Ground water systems.* Backfilled materials shall be placed to minimize adverse effects on ground water flow and quality, to minimize offsite effects, and to support the approved postmining land use. The permittee shall be responsible for performing monitoring according to paragraph (h)(3) of this section to ensure operations conform to this requirement.

(3) *Monitoring.* Ground water levels, infiltration rates, subsurface flow and storage characteristics, and the quality of ground water shall be monitored in a manner approved by the regulatory authority to determine the effects of surface coal mining and reclamation operations on the recharge capacity of reclaimed lands and on the quantity and quality of water in ground water systems at the mine area and in associated offsite areas. When operations are conducted in such a manner that may affect the ground water system, ground water levels and ground water quality shall be periodically monitored using wells that can adequately reflect changes in

ground water quantity and quality resulting from such operations. Sufficient water wells must be used by the permittee. The regulatory authority may require drilling and development of additional wells if needed to adequately monitor the ground-water system. As specified and approved by the regulatory authority, additional hydrologic tests, such as infiltration tests and aquifer tests must be undertaken by the permittee to demonstrate compliance with paragraphs (h) (1) and (2) of this section.

(i) *Water rights and replacement.* The permittee shall replace the water supply of an owner of interest in real property who obtains all or part of his supply of water for domestic, agricultural, industrial, or other legitimate use from an underground or surface source where such supply has been affected by contamination, diminution or interruption proximately resulting from surface coal mine operation by the permittee.

(j) *Alluvial valley floors west of the 100th meridian west longitude.* (1) Surface coal mining operations conducted in or adjacent to alluvial valley Bureau of Indian Affairs, Interior floors shall be planned and conducted so as to preserve the essential hydrologic functions of these alluvial valley floors throughout the mining and reclamation process. These functions shall be preserved by maintaining or reestablishing those hydrologic and biologic characteristics of the alluvial valley floor that are necessary to support the functions. The permittee shall provide information to the regulatory authority as required in paragraph (j)(3) of this section to allow identification of essential hydrologic functions and demonstrate that the functions will be preserved. The characteristics of an

alluvial valley floor to be considered include, but are not limited to:

(i) The longitudinal profile (gradient), cross-sectional shape, and other channel characteristics of streams that have formed within the alluvial valley floor and that provide for maintenance of the prevailing conditions of surface flow;

(ii) Aquifers (including capillary zones and perched water zones) and confining beds within the mined area which provide for storage, transmission, and regulation of natural ground water and surface water that supply the alluvial valley floors;

(iii) Quantity and quality of surface and ground water that supply alluvial valley floors;

(iv) Depth to and seasonal fluctuations of ground water beneath alluvial valley floors;

(v) Configuration and stability of the land surface in the flood plain and adjacent low terraces in alluvial valley floors as they allow or facilitate irrigation with flood waters or subirrigation and maintain erosional equilibrium; and

(vi) Moisture-holding capacity of soils (or plant growth medium) within the alluvial valley floors, and physical and chemical characteristics of the subsoil which provide for sustained vegetation growth or cover through dry months.

(2) Surface coal mining operations located west of the 100th meridian west longitude shall not interrupt, discontinue, or preclude farming on alluvial valley floors and shall not materially damage the quantity or quality of surface or ground water that supplies these valley floors unless the premining land use has been undeveloped rangeland which is not significant to farming on the alluvial valley floors or

unless the area of affected alluvial valley floor is small and provides negligible support for the production from one or more farms. This paragraph (j)(2) of this section does not apply to those surface coal mining operations that:

(i) Were in production in the year preceding August 3, 1977, were located in or adjacent to an alluvial valley floor, and produced coal in commercial quantities during the year preceding August 3, 1977; or

(ii) Had specific permit approval by the Bureau of Indian Affairs before August 3, 1977, to conduct surface coal mining operations for an area within an alluvial valley floor.

(3) (i) Before surface mining and reclamation operations authorized under paragraph (j)(2) of this section may be issued a new, revised or amended permit, the permittee shall submit, for regulatory authority approval, detailed surveys and baseline data to establish standards against which the requirements of paragraph (j)(1) of this section may be measured and from which the degree of material damage to the quantity and quality of surface and ground water that supply the alluvial valley floors may be assessed. The surveys and data shall include:

(A) A map, at a scale determined by the regulatory authority, showing the location and configuration of the alluvial valley floor;

(B) Baseline data covering a full water year for each of the hydrologic functions identified in paragraph (j)(1) of this section;

(C) Plans showing how the operation will avoid, during mining and reclamation, interruption, discontinuance, or preclusion of farming on the alluvial

valley floors and will not materially damage the quantity or quality of water in surface and ground water systems that supply such valley floors;

(D) Historic land use data for the proposed permit area and for farms to be affected; and

(E) Such other data as the regulatory authority may require.

(ii) Surface mining operations which qualify for the exceptions in paragraph (j)(2) of this section are not required to submit the plans prescribed in paragraph (j)(3)(i)(C) of this section.

(k) *Permanent impoundments.* The permittee may construct, if authorized by the regulatory agency pursuant to this paragraph and § 216.104 permanent water impoundments on mining sites as a part of reclamation activities only when they are adequately demonstrated to be in compliance with §§ 216.104 and 216.105 in addition to the following requirements:

(1) The size of the impoundment is adequate for its intended purposes.

(2) The impoundment dam construction is designed to achieve necessary stability with an adequate margin of safety compatible with that of structures constructed under Pub. L. 83-566 (16 U.S.C. 1006).

(3) The quality of the impounded water will be suitable on a permanent basis for its intended use and discharges from the impoundment will not degrade the quality of receiving waters below the water quality standards established pursuant to applicable Federal and Tribal law.

(4) The level of water will be reasonably stable.

(5) Final grading will comply with the provisions of § 216.105 and will provide adequate safety and access for proposed water users.

(6) Water impoundements will not result in the diminution of the quality or quantity of water used by adjacent or surrounding landowners for agricultural, industrial, recreational, or domestic uses.

(l) *Hydrologic impact of roads*—(1) *General.* Access and haul roads and associated bridges, culverts, ditches, and road rights-of-way shall be constructed, maintained, and reclaimed to prevent additional contributions of suspended solids to streamflow, or to runoff outside the permit area to the extent possible, using the best technology currently available. In no event shall the contributions be in excess of requirements set by applicable Tribal or Federal law. All access and haul roads shall be removed and the land affected regraded and revegetated consistent with the requirements of § 216.105 and § 216.110 unless retention of a road is approved as part of a postmining land use under § 216.104 as being necessary to support the postmining land use or necessary to adequately control erosion and the necessary maintenance is assured.

(2) *Construction.* (i) All roads, insofar as possible, shall be located on ridges or on the available flater and more stable slopes to minimize erosion. Stream fords are prohibited unless they are specifically approved by the regulatory authority as temporary routes across dry streams that will not adversely affect sedimentation and that will not be used for coal haulage. Other stream crossing shall be made using bridges, culverts or other structure designed and constructed to meet the requirements of this paragraph. Roads shall not be located in active stream channels nor shall they be constructed or

maintained in a manner that increases erosion or causes significant sedimentation or flooding. However, nothing in this paragraph will be construed to prohibit relocation of stream channels in accordance with paragraph (d) of this section.

(ii) In order to minimize erosion and subsequent disturbances of the hydrologic balance, roads shall be constructed in compliance with the following grade restrictions or other grades determined by the regulatory authority to be necessary to control erosion:

(A) The overall sustained grade shall not exceed l*v*:10*h* (10 percent).

(B) The maximum grade greater than 10 percent shall not exceed l*v*:6.5*h* (15 percent) for more than 300 feet.

(C) There shall not be more than 300 feet of grade exceeding 10 percent within each 1,000 feet.

(iii) All access and haul roads shall be adequately drained using structures such as, but not limited to, ditches, water barriers, cross drains, and ditch relief drains. For access and haul roads that are to be maintained for more than 1 year, water-control structures shall be designed with a discharge capacity capable of passing the peak runoff from a 10-year, 24-hour precipitation event. Drainage pipe and culverts shall be constructed to avoid plugging or collapse and erosion at inlets and outlets. Drainage ditches shall be provided at the toe of all cut slopes formed by construction of roads. Trash racks and debris basins shall be installed in the drainage ditches wherever debris from the drainage area could impair the functions of drainage and sediment control structures. Ditch relief and cross drains shall be spaced according to grade. Effluent limitations of

paragraph (a) of this section shall not apply to drainage from access and haul roads located outside the disturbed area as defined in this section unless otherwise specified by the regulatory authority.

(iv) Access and haul roads shall be surfaced with durable material. Toxic- or acid-forming substances shall not be used. Vegetation may be cleared only for the essential width necessary for road and associated ditch construction and to serve traffic needs.

(3) *Maintenance.* (i) Access and haul roads shall be routinely maintained by means such as, but not limited to, wetting, scraping or surfacing.

(ii) Ditches, culverts, drains, trash racks, debris basins and other structures serving to drain access and haul roads shall not be restricted or blocked in any manner that impedes drainage or adversley affects the intended purpose of the structure.

(m) *Hydrologic impacts of other transport facilities.* Railroad loops, spurs, sidings and other transport facilities shall be constructed, maintained and reclaimed to control diminution or degradation of water quality and quantity and to prevent additional contributions of suspended solids to streamflow, or runoff outside the permit area to the extent possible, using the best technology currently available. In no event shall contributions be in excess of requirements set by applicable Tribal or Federal law.

(n) *Discharge of waters into underground mines.* Surface and ground waters shall not be discharged or diverted into underground mine workings.

§ 216.109 Dams constructed of or impounding waste material.

(a) *General.* No waste material shall be used in or impounded by existing or new dams without the

approval of the regulatory authority. The permittee shall design, locate, construct, operate, maintain, modify, and abandon or remove all dams (used either temporarily or permanently) constructed of waste materials, in accordance with the requirements of this section.

(b) *Construction of dams.* (1) Waste shall not be used in the construction of dams unless demonstrated through appropriate engineering analysis, to have no adverse effect on stability.

(2) Plans for dams subject to this section and also including those dams that do not meet the size of other criteria of 30 CFR 77.216(a), shall be approved by the regulatory authority before construction and shall contain the minimum plan requirements established by the Mining Enforcement and Safety Administration pursuant to 30 CFR 77.216-2.

(3) Construction requirements are as follows: (i) Design shall be based on the flood from the probable maximum precipitation event unless the permittee shows that the failure of the impounding structure would not cause loss of life or severely damage property or the environment, in which case, depending on site conditions, a design based on a precipitation event of no less than 100-year frequency may be approved by the regulatory authority.

(ii) The design freeboard distance between the lowest point on the embankment crest and the maximum water elevation shall be at least 3 feet to avoid overtopping by wind and wave action.

(iii) Dams shall have minimum safety factors as follows:

Case	Loading condition	Min. safety factor
I	End of construction	1.3
II	Partial pool with steady seepage saturation.	1.5
III	Steady seepage from spillway or decant crest.	1.5
IV	Earthquake (cases II and III with seismic loading).	1.0

(iv) The dam, foundation, and abutments shall be stable under all conditions of construction and operation of the impoundment. Sufficient foundation investigations and laboratory testing shall be performed to determine the factors of safety of the dam for all loading conditions in paragraph (b)(3)(iii) of this section and for all increments of construction.

(v) Seepage through the dam, foundation, and abutments shall be controlled to prevent excessive uplift pressures, internal erosion, sloughing, removal of material by solution, or erosion of material by loss into cracks, joints, and cavities. This may require the use of impervious blankets, previous drainage zones or blankets, toe drains, relief wells, or dental concreting of jointed rock surface in contact with embankment materials.

(vi) Allowances shall be made for settlement of the dams and the foundation so that the freeboard will be maintained.

(vii) Impoundments created by dams of waste materials shall be subject to a minimum drawdown criteria that allows the facility to be evacuated by spillways or decants of 90 percent of the volume of water stored during the design precipitation event within 10 days.

(viii) During construction of dams subject to this section, the structures shall be periodically inspected

by a registered professional engineer to ensure construction according to the approved design. On completion of construction, the structure shall be certified by a registered professional engineer experienced in the field of dam construction as having been constructed in accordance with accepted professional practice and the approved design.

(ix) A permanent identification marker, at least 6 feet high that shows the dam number assigned pursuant to 30 CFR 77.216-1 and the name of the person operating or controlling the dam, shall be located on or immediately adjacent to each dam within 30 days of certification of design pursuant to this section.

(4) All dams, including those not meeting the size of other criteria of 30 CFR 77.216(a), shall be routinely in spected by a registered professional engineer, or someone under the supervision of a registered professional engineer, in accordance with Mining Enforcement and Safety Administration regulations pursuant to 30 CFR 77.216-3.

(5) All dams shall be routinely maintained. Vegetative growth shall be cut where necessary to facilitate inspection and repairs. Ditches and spillways shall be cleaned. Any combustible materials present on the surface, other than that used for surface stability such as mulch or dry vegetation, shall be removed and any other appropriate maintenance procedures followed.

(6) All dams subject to this section shall be certified annually as having been constructed and modified in accordance with current prudent engineering practices to minimize the possibility of failures. Any changes in the geometry of the impounding structure shall be highlighted and included in the annual

certification report. These certifications shall include a report on existing and required monitoring procedures and instrumentation, the average and maximum depths and elevations of any impounded waters over the past year, existing storage capacity of impounding structures, any fires occurring in the material over the past year and any other aspects of the structures affecting their stability.

(7) Any enlargements, reductions in size, reconstruction or other modification of the dams shall be approved by the regulatory authority before construction begins.

(8) All dams shall be removed and the disturbed areas regraded, revegetated, and stabilized before the release of bond unless the regulatory authority approve retention of such dams as being compatible with an approved postmining land use (§ 216.104).

§ 216.110 Revegetation.

(a) *General.* (1) The permittee shall establish on all land that has been disturbed, a diverse, effective, and permanent vegetative cover of species native to the area of disturbed land or species that will support the planned postmining uses of the land approved according to ? 216.104.

(2) Revegetation shall be carried out in a manner that encourages a prompt vegetative cover and recovery of productivity levels compatible with approved land uses. The vegetative cover shall be capable of stabilizing the soil surface with respect to erosion. All disturbed lands, except water areas and surface areas of roads that are approved as a part of the postmining land use, shall be seeded or planted to achieve a vegetative cover of the same seasonal variety native to the area of disturbed land. If both the pre- and postmining land use is intensive

agriculture, planting the crops normally grown will meet the requirement. Vegetative cover will be considered of the same seasonal variety when it consists of a mixture of species of equal or superior utility for the intended land use when compared with the utility of naturally occurring vegetation during each season of the year.

(b) *Use of introduced species.* Introduced species may be substituted for native species only of appropriate field trials have demonstrated that the introduced species are of equal or superior utility for the approved postmining land use, or are necessary to achieve a quick, temporary, and stabilizing cover. Such species substitution shall be approved by the regulatory authority. Introduced species shall meet applicable Tribal and Federal seed or introduced species statutes, and shall not include poisonous or potentially toxic species.

(c) *Timing of revegetation.* Seeding and planting of disturbed areas shall be conducted during the first normal period for favorable planting conditions after final preparation. The normal period for favorable planting shall be that planting time generally accepted locally for the type of plant materials selected to meet specific site conditions and climate. Any disturbed areas, except water areas and surface areas of roads that are approved under § 216.104 as part of the postmining land use, which have been graded shall be seeded with a temporary cover of small grains, grasses, or legumes to control erosion until an adequate permanent cover is established. When rills or gullies, that would preclude the successful establishment of vegetation or the achievement of the postmining land use, form in regraded topsoil and overburden materials as specified in § 216.105, additional regrading or other

stabilization practices will be required before seeding and planting.

(d) *Mulching.* Mulch shall be used on all regraded and topsoiled areas to control erosion, to promote germination of seeds, and to increase the moisture retention of the soil. Mulch shall be anchored to the soil surface where appropriate, to ensure effective protection of the soil and vegetation. Mulch means vegetation residues or other suitable materials that aid in soil stabilization and soil moisture conservation, thus providing micro-climatic conditions suitable for germination and growth, and do not interfere with the postmining use of the land. Annual grains such as oats, rye and wheat may be used instead of mulch when it is shown to the satisfaction of the regulatory authority that the substituted grains will provide adequate stability and that they will later be replaced by species approved for the postmining use.

(e) *Methods of revegetation.* 1) The permittee shall use technical publications or the results of laboratory and field tests approved by the regulatory authority to determine the varieties, species, seeding rates, and soil amendment practices essential for establishment and self-regeneration of vegetation. The regulatory authority shall approve species selection and planting plans.

(2) Where hayland, pasture, or range is to be the postmining land use, the species of grasses, legumes, browse, trees, or forbs for seeding or planting and their pattern of distribution shall be selected by the permittee to provide a diverse, effective, and permanent vegetative cover with the seasonal variety, succession, distribution, and regenerative capabilities native to the area. Livestock grazing will not be allowed on reclaimed land until the seedlings

are established and can sustain managed grazing. The regulatory authority, in consultation with the permittee and the landowner or in concurrence with the governmental land-managing agency having jurisdiction over the surface, shall determine when the revegetated area is ready for livestock grazing.

(3) Where forest is to be the postmining land use, the permittee shall plant trees adapted for local site conditions and climate. Trees shall be planted in combination with an herbaceous cover of grains, grasses, legumes, forbs, or woody plants to provide a diverse, effective, and permanent vegetation cover with the seasonal variety, succession, and regeneration capabilities native to the area.

(4) Where wildlife habitat is to be included in the postmining land use, the permittee shall consult with appropriate Tribal and Federal wildlife and land management agencies and shall select those species that will fulfill the needs of wildlife, including food, water, cover, and space. Plant groupings and water resources shall be spaced and distributed to fulfill the requirements of wildlife.

(f) *Standards for measuring success of revegatation.* (1) Success of revegetation shall be measured on the basis of reference areas approved by the regulatory authority. Reference areas mean land units of varying size and shape identified and maintained under appropriate management for the purpose of measuring ground cover, productivity and species diversity that are produced naturally. The reference areas must be representative of geology, soils, slope, aspect, and vegetation in the permit area. Management of the reference area shall be comparable to that which will be required for the approved postmining land use of the area to be mined. The regulatory authority shall approve the estimating

techniques that will be used to determine the degree of success in the revegetated area.

(2) The ground cover of living plants on the revegetated area shall be equal to the ground cover of living plants of the approved reference area for a minimum of two growing seasons. The ground cover shall not be considered equal if it is less than 90 percent of the ground cover of the reference area for any significant portion of the mined area. Exceptions may be authorized by the regulatory authority for:

(i) Previously mined areas that were not reclaimed to the standards required by this part prior to the effective date of these regulations. The ground cover of living plants for such areas shall not be less than required to control erosion, and in no case less than that existing before redisturbance;

(ii) Areas to be developed immediately for industrial or residential use. The ground cover of living plants shall not be less than required to control erosion. As used in this paragraph, immediately means less than 2 years after regrading has been completed for the area to be used; and

(iii) Areas to be used for agricultural cropland purposes. Success in revegatation of crop land shall be determined on the basis of crop production from the mined area compared to the reference area. Crop production from the mined area shall be equal to that of the approved reference area for a minimum of two growing seasons. Production shall not be considered equal if it is less than 90 percent of the production of the reference area for any significant portion of the mined area.

(3) Species diversity, distribution, seasonal variety, and vigor shall be evaluated on the basis of the results which could reasonably be expected using the

methods of revegetation approved under paragraph (e) of this section.

(g) *Seeding of stockpiled topsoil.* Topsoil stockpiled in compliance with § 216.107 must be seeded or planted with an effective cover of nonnoxious, quick growing annual and perennial plants during the first normal period for favorable planting conditions or protected by other approved measures as specified in § 216.107.

§ 216.111 Steep-slope mining.

(a) The permitee conducting surface coal mining and reclamation operations on natural slopes that exceed 20 degrees, or on lesser slopes that require measures to protect the area from disturbance, as determined by the regulatory authority after consideration of soils, climate, the method of operation, geology, and other regional characteristics, shall meet the following performance standards. The standards of this section do not apply where mining is done on a flat or gently rolling terrain with an occasional steep slope through which the mining proceeds and leaves a plain or predominantly flat area; or where the mining removes entire coal seams running through the upper fraction of a mountain, ridge, or hill by removing all of the overburden and creating a level plateau or gently rolling contour.

(1) Spoil, waste materials or debris, including that from clearing and grubbing, and abandoned or disabled equipment, shall not be placed or allowed to remain on the downslope.

(2) The highwall shall be completely covered with spoil and the disturbed area graded to comply with the provisions of § 216.105 of this part. Land above the highwall shall not be disturbed unless the regulatory authority finds that the disturbance will

facilitate compliance with the requirements of this section.

(3) Material in excess of that required to meet the provisions of § 216.105 of this part shall be disposed of in accordance with the requirements of § 216.106 of this part.

(4) Woody materials may be buried in the backfilled area only when burial does not cause, or add to, instability of the backfill. Woody materials may be chipped and distributed through the backfill when approved by the regulatory authority.

30 CFR PT. 750 (1987)

PART 750—REQUIREMENTS FOR SURFACE COAL MINING AND RECLAMATION OPERATIONS ON INDIAN LANDS

AUTHORITY: 30 U.S.C. 1201-1328: 5 U.S.C. 301.

SOURCE: 49 FR 38477, Sept. 28, 1984, unless otherwise noted.

§ 750.1 Scope.

This subchapter provides for the regulation of surface coal mining and reclamation operations on Indian lands and constitutes the Federal program for Indian lands.

§ 750.5 Definitions.

For purposes of regulating surface coal mining operations on Indian lands, the following terms, when used in this subchapter or in parts referenced by this subchapter, have the following meanings:

BIA means the Bureau of Indian Affairs of the U.S. Department of the Interior.

BLM means the Bureau of Land Management of the U.S. Department of the Interior.

Federal program means the Federal program for Indian lands.

Indian mineral owner means (1) any individual Indian or Alaska native who owns land or mineral interests in land the title to which is held in trust by the United States or is subject to a restriction against alienation imposed by the United States, or (2) any Indian tribe, band, native, pueblo, community, rancheria, colony, or other group which owns land or mineral interest in land the title to which is held in trust by the United States or is subject to a restriction against alienation imposed by the United States. This definition does not include owners of lands patented to a village or regional corporation pursuant to the Alaska Native Claims Settlement Act, Pub. L. 92-203.

Local government agencies means, in addition to county, city or township governments, Indian tribal governments.

Minerals agreement means any joint venture, operating, production sharing, service, managerial, lease or other agreements, or any amendment, supplement to or modification of such agreement, providing for the exploration for, or extraction, processing, or the development of coal, or providing for the sale or other disposition of the production or products of such coal resources.

MMS means the Minerals Management Service of the U.S. Department of the Interior.

Regulatory authority means the Office of Surface Mining.

§ 750.6 Responsibilities.

(a) OSM shall: (1) Be the regulatory authority on Indian lands;

(2) After consultation with the Bureau of Indian Affairs and, as applicable, with the Bureau of Land Management, conditionally approve, approve, or disapprove applications for permits, permit renewals, or permit revisions for surface coal mining operations on Indian lands, and applications for the transfer, sale or assignment of such permit rights on Indian lands;

(3) Conduct inspection and enforcement activities with respect to surface coal mining and reclamation operations on Indian lands;

(4) Consult with the BIA and the affected tribe with respect to 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;

(5) Consult with the Bureau of Land Management concerning requirements relating to the development, production and recovery of mineral resources on Indian lands;

(6) Approve environmental protection performance bonds and liability insurance required for surface coal mining and reclamation operations on Indian lands but not the production royalty bond; and

(7) Ensure compliance with the requirements of the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*, with respect to permitting actions for surface coal mining and reclamation operations on Indian lands.

(b) The Bureau of Land Management is responsible for: (1) Receiving, reviewing, and conditionally ap-

proving, approving or disapproving coal exploration plans and mining plans, as provided in 25 CFR Chapter I or in specific Indian mineral agreements;

(2) Administering, and conducting inspection and enforcement for, coal exploration operations on Indian lands;

(3) Administering mining contract, lease or mineral agreement terms and conditions, as provided for in 25 CFR Chapter I or in specific Indian mineral agreements; and

(4) Administering and conducting inspections and enforcement of terms and conditions of contracts, leases or mineral agreements for coal mining operations, including production verification and inspection of operations for that purpose.

(c) The Minerals Management Service is responsible for collecting and accounting for royalties and other income from Indian mineral agreements except for annual rentals.

(d) The Bureau of Indian Affairs is responsible for: (1) Consulting directly with and providing representation for Indian mineral owners and other Indian land owners in matters relating to surface coal mining and reclamation operations on Indian lands;

(2) After consultation with the affected tribe, reviewing and making recommendations to OSM concerning permit applications, renewals, revisions or transfers of permits, permit rights or performance bonds; and

(3) After consultation with the affected tribe, reviewing mining plans and making recommendations to the Bureau of Land Management pursuant to 25 CFR 216.7.

§ 750.10 Information collection.

The information collection requirements of this part do not require approval from the Office of Management and Budget under 44 U.S.C. 3507 because there are expected to be less than 10 respondents annually.

§ 750.11 Permits.

(a) No person shall conduct surface coal mining and reclamation operations on Indian lands after eight months following the effective date of this subchapter unless that person has first obtained a permit pursuant to this part.

(b) Any person conducting surface coal mining and reclamation operations on lands subject to this part shall comply with the terms and conditions of the permit, the requirements of this subchapter, and the Act.

(c) Surface coal mining and reclamation operations authorized prior to the effective date of this subchapter may be conducted beyond the eight-month period specified in paragraph (a) of this section if the following conditions are present: (1) An application for a permit to conduct those operations under this part has been made within two months of the implementation of the Federal program for Indian lands;

(2) OSM has not yet rendered an initial administrative decision approving or disapproving the permit application; and

(3) Those operations are conducted in compliance with all terms and conditions of the lease or minerals agreement, the existing authorization to mine, the requirements of the Act, and the requirements of 25 CFR Chapter I.

(d) Whenever surface coal mining and reclamation operations are proposed to include both Indian lands and non-Indian lands, OSM will use reasonable efforts to ensure that reviews of the permit applications will be conducted cooperatively and concurrently by OSM and the regulatory authority responsible for the non-Indian lands.

§ 750.12 Permit applications.

(a) Each application for a permit, permit revision, or permit renewal to conduct surface coal mining and reclamation operations on land subject to this part shall be accompanied by a fee made payable to the United States. The amount or method of calculation of the fees shall be determined by the Director.

(b) Unless specified otherwise by the regulatory authority, each person submitting a permit application shall file no less than seven copies of the complete permit application package with OSM. OSM will ensure that the affected tribes, the Bureau of Indian Affairs, and when applicable, the Bureau of Land Management receive copies of the application.

(c)(1) The following requirements of Subchapter G of this chapter shall govern the processing of permit applications on Indian lands except as specified in paragraph (c)(2) or (c)(3) of this section.

(i) Part 773;

(ii) Part 774;

(iii) Part 775;

(iv) Part 777;

(v) Part 778;

(vi) Part 779;

(vii) Part 780;

(viii) Part 783;

(ix) Part 784; and

(x) Part 785;

(2) The following provisions of Subchapter G are not applicable to permitting on Indian lands:

(i) Part 772;

(ii) Sections 773.11, 773.15(c)(3), 777.17;

(iii) Section 778.16 (a) and (b); and

(iv) Sections 785.11, 785.12;

(3) *Special requirements.* (i) Approval of a transfer, assignment, or sale of rights granted under a permit shall not be construed as approval of a transfer or assignment of a leasehold interest. Leasehold interests may be transferred or assigned only in accordance with 25 CFR Parts 211 and 212.

(ii) The following additional requirements are applicable to permit revisions:

(A) Applications for revisions pursuant to ? 774.13(b) of this chapter shall contain the same information on the proposed revised operation as if the revised operation had been proposed as part of the initial operation permitted under this part.

(B) OSM shall determine if the application for revision is complete and if the proposed revision is significant. OSM shall consider the following factors as well as other relevant factors in determining the significance of a proposed revision: (1) Changes in production or recoverability of the coal resource; (2) the environmental effects; (3) the public interest in the operation, or likely interest in the proposed revision; and (4) possible adverse impacts from the

proposed revision on fish or wildlife, endangered species, bald or golden eagles or cultural resources.

(C) Significant revisions shall be processed as if they are new applications in accordance with Parts 773 and 775 of this chapter. Other revisions shall be reviewed to determine if the findings which were made in issuing the original permit are still valid.

(iii) Any section in this chapter which provides for consultation with, or notification to, State and local governments shall be interpreted as requiring in like manner consultation with, or notification to, tribal governments.

(d) The permit application package shall also contain:

(1) The mining plan required to be submitted by 25 CFR 216.7 or 43 CFR Part 3480, as applicable.

(2) The following information to assure compliance with Federal laws other than the Act:

(i) The description of the proposed surface coal mining and reclamation operation with respect to: (A) Increases in employment, population, and revenues to public and private entities; and (B) the ability of public and private entities to provide goods and services necessary to support surface coal mining and reclamation operations.

(ii) An evaluation of impacts to the scenic and aesthetic resources, including noise on the surrounding area, due to the proposed surface coal mining and reclamation operation.

(iii) A statement, including maps and ownership data as appropriate, of any cultural or historical site listed on the National Register of Historic Places

within the permit and adjacent areas of the proposed surface coal mining and reclamation operation.

(iv) A statement of the classes of properties of potential significance within the disturbed area, and a plan for the identification and treatment, in accordance with 36 CFR Part 800, of properties significant and listed, or eligible for listing, on the National Register of Historic Places within the permit area of the proposed surface coal mining and reclamation operation.

(v) A description of compliance with the American Indian Religious Freedor Act, and other Federal laws aimed at protecting cultural resources on Indian lands.

(vi) A description of the probable changes in air quality resulting from the surface coal mining operation and any necessary measures to comply, with prevention of significant deterioration limitations, or other Federal laws for air quality protection.

(vii) A description of the location, acreage and condition of important habitats of selected indicator species located within the permit and adjacent areas of the proposed surface coal mining and reclamation operation.

(viii) A description of active and inactive nests and prey areas of any bald or golden eagles located within the permit and adjacent areas of the proposed surface coal mining and reclamation operations.

(ix) A description and special studies, if required, of all threatened and endangered species and their critical habitats located within the permit and adjacent areas of the proposed surface coal mining and reclamation operations.

§ 750.13 Small operator assistance.

Part 795 of this chapter is applicable on Indian lands.

§ 750.14 Lands designated unsuitable for mining by Act of Congress.

Part 761 of this chapter is applicable on Indian lands.

§ 750.15 Coal exploration.

Coal exploration operations on Indian lands shall be conducted in accordance with 25 CFR Part 216 and 43 CFR Part 3480, whichever is applicable.

§ 750.16 Performance standards.

After OSM issues a permit under this part, a person conducting surface coal mining operations on Indian lands shall do so in accordance with Parts 816, 817, 819, 822, 823, 824, 827, and 828 of this chapter. Prior to that time, the person conducting surface coal mining operations shall adhere to the performance standards of 25 CFR Part 216, Subpart B.

§ 750.17 Bonding.

Subchapter J of this title is applicable on Indian lands.

§ 750.18 Inspection and enforcement.

(a) Parts 842, 843 and 845 of this chapter and the hearings and appeals procedures of 43 CFR Part 4 are applicable on Indian lands.

(b) OSM shah furnish copies of notices and orders to mineral owners or surface owners on whose land the surface coal mining operation takes place. OSM may furnish copies of notices and orders to any other person having an interest in the surface coal mining and reclamation operation or the permit area.

(c) BLM shall furnish copies of notices and orders to mineral owners or surface owners on whose land coal exploration operations take place and pursuant to 25 CFR 216.7 and 43 CFR Part 3480, where applicable, to any mineral owner or surface owner, or to any person having an interest in the coal mining operation.

(d) Whenever an authorized representative of the Secretary decides to conduct an inspection of any coal mining operations or any premises in which any records to be maintained are located, the appropriate representative of the local governing Indian tribe shall be notified and be invited to accompany the Secretary's representative on such an inspection.

(e) No provision in this chapter shall be interpreted as replacing or superseding any other remedies of the Indian mineral owners, as set forth in a contract or otherwise available at law.

(f) Appropriate officials of the local governing Indian tribe shall be notified of any hearings or conferences conducted regarding civil penalties and shall be invited to attend.

§ 750.19 Certification of blasters.

A person seeking to conduct blasting operations on Indian lands shall comply with the requirements of §§ 816.61(c) and 817.61(c) and Part 955 of this chapter.

[51 FR 19461, May 29, 1986]

§ 750.20 Adoption of Indian coal lease terms.

(a) All leases of coal on Indian lands are amended to include the following:

The Lessee shall comply with all applicable requirements of the Surface Mining Control and Reclam-

ation Act of 1977, and all regulations promulgated thereunder, including those codified at 30 CFR Part 750.

(b) With respect to leases issued after August 3, 1977, the Secretary shall also include and enforce in such leases terms and conditions which are requested in writing by the Indian tribe whose interest is affected by such leases.