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43 CFR Parts 3400, 3470, and 3480
Logical Mining Units in General, LMU Application Procedures, LMU Approval Criteria, LMU Diligence, and LMU Operations Administration; Final Rule

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DEPARTMENT OF THE INTERIOR

Bureau of Land Management

43 CFR Parts 3400, 3470, and 3480

[WO–320–1320–02–24–1A]

RIN 1004–AD12

Logical Mining Units in General; LMU Application Procedures; LMU Approval Criteria; LMU Diligence; and Administration of LMU Operations

AGENCY: Bureau of Land Management, Interior.

ACTION: Final rule.

SUMMARY: The Bureau of Land Management (BLM) is amending the regulations that pertain to formation and administration of logical mining units (LMUs) by limiting the inclusion in an LMU of Federal coal leases that have not produced commercial quantities of coal in the first 8 years of their 10-year diligent development periods, setting forth the factors BLM will consider in reviewing an LMU application, and narrowing the range of possible starting dates for an LMU's 40-year mine-out period. BLM is also modifying the definition of "producing" to limit the circumstances in which it considers a Federal coal lease "producing" and the leaseholder thereby qualified to acquire additional Mineral Leasing Act leases and limit the aggregate duration of temporary interruptions in coal severance. BLM is taking this action to ensure that LMUs are approved and administered only for the purpose of developing Federal coal reserves consistent with the goals of the Federal Coal Leasing Amendments Act. This action will prevent the use of LMUs to extend the diligent development period of a Federal coal lease unless the operator or lessee demonstrates measurable and prudent progress toward production of the Federal coal reserves. BLM is also implementing a ruling by the Federal District Court for the District of Columbia that struck down a provision allowing extension of the 3-year submission requirement for resource recovery and protection plans.

DATES: This rule is effective September 19, 1997.

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SUPPLEMENTARY INFORMATION:

I. Background

II. Discussion of Final Rule and Response to Comments

III. Procedural Matters

I. Background

The Mineral Leasing Act of 1920 (MLA) gives the Secretary of the Interior authority to offer lands containing deposits of coal owned by the United States for leasing and award leases (30 U.S.C. 201(a)(1)). The Secretary is also authorized to prescribe necessary and proper rules and regulations to carry out the purposes of MLA (30 U.S.C. 189). Due to concern about the number of Federal coal leases that were being held and not developed, Congress amended MLA by passing the Federal Coal Leasing Amendments Act of 1976 (FCLAA), Pub. L. 94–377. To discourage the speculative holding of Federal coal leases and encourage the development of leased coal, FCLAA established production requirements for leases and consequences for lessees when those requirements are not met. Section 7(a) of MLA, as amended by FCLAA, requires that a lessee produce coal in "commercial quantities" within 10 years of a lease's issuance or, for a lease issued before the August 4, 1976 enactment of FCLAA, within 10 years after the lease becomes subject to section 7 (30 U.S.C. 207(a)). Section 7(b) of MLA, as amended by FCLAA, requires each lease to be subject to the conditions of diligent development and continued operation, except where operations under the lease are interrupted by strikes, the elements, or casualties not attributable to the lessee (30 U.S.C. 207(b)). BLM has interpreted the reference to a condition of diligent development in section 7(b) to be satisfied by compliance with the obligation to produce in commercial quantities within 10 years in section 7(a). BLM's regulations define "commercial quantities" as one percent of a lease's recoverable coal reserves (43 CFR 3480.0–5(a)(6)). If a lease does not achieve commercial production within the 10 years provided in section 7(a) of MLA, as amended, the lease terminates.

The BLM regulations implementing the "continued operation" requirement of section 7(b) of MLA, as amended by FCLAA, require a lessee to annually produce an average of one percent of the recoverable reserve base after the lease has achieved diligent development (43 CFR 3480.0–5(a)(8) and 3483.1(a)). Alternately, the lessee may apply for a suspension of the continued operation requirement on the basis of payment of advance royalty (43 CFR 3483.4) or on the basis of strikes, the elements or casualties not attributable to the lessee (43 CFR 3483.3) See 30 U.S.C. 207(b).

Section 2(a)(2)(A) of MLA, as amended by FCLAA, requires that holders of coal leases be disqualified from receiving additional mineral leases under MLA if the lessee has held and continues to hold coal leases for more than 10 years (not counting years prior to passage of FCLAA on August 4, 1976) without producing coal in commercial quantities (30 U.S.C. 201(a)(2)(A)), except as provided in 30 U.S.C. 207(b). Pub. L. 99–190 extended the effective date of section 2(a)(2)(A) of MLA to December 31, 1986. The effect of the reference to section 207(b) is to create two exceptions to the producing requirement. One is for strikes, the elements, or casualties not attributable to the lessee, and the other is when continued operation is suspended by the payment of advance royalties.

Section 2(d) of MLA, as amended by FCLAA, also authorizes the formation of LMUs (30 U.S.C. 202a). An LMU is an area of land in which the coal resources can be developed in an efficient, economical, and orderly manner with due regard to conservation of the coal reserves and other resources. An LMU may consist of one or more Federal leaseholds and may include intervening or adjacent lands in which the United States does not own the coal resources. All the lands in an LMU must be contiguous, under the effective control of a single operator, and able to be developed and operated as a single mining operation. Consolidation of leases into an LMU will only take place after a public hearing, if requested by any person who may be adversely affected. The Secretary of the Interior may approve an LMU if he determines that formation of the LMU enhances maximum economic recovery of the Federal coal reserve.

An LMU is commonly used when the geologic characteristics of a coal deposit cross lease or ownership boundaries. A logical and efficient mining sequence in such cases would also span the lease or ownership boundaries. An LMU fosters maximum economic recovery and conservation of Federal coal reserves by facilitating a logical mining sequence in terms of the coal deposit or deposits as a whole, rather than within only a specific lease or property boundary. In areas where the coal ownership pattern is disjointed, such as the checkerboard land-ownership patterns in the western United States, an operator may develop several contiguous coal tracts owned by or leased from different entities as a single mining operation. Without the LMU, a mine operator would, in most

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cases, have to develop the oldest Federal coal lease first, regardless of the geology of the deposit or the most logical development plan, simply to comply with the diligent development requirements of section 7(b) of MLA. Inefficient mining sequences do not contribute to the goals of maximum economic recovery of Federal coal reserves and conservation of the resource. For this reason, section 2(d)(3) of MLA authorizes the Secretary to construe diligent development, continued operation and production occurring on one lease in the LMU as occurring on all of the Federal leases in the LMU (30 U.S.C. 202a(3)).

LMUs are an important part of the Federal Coal Management Program. As of September 30, 1996, BLM has approved 49 LMUs, which include 180 of the 389 outstanding Federal coal leases. While LMUs are a critical tool to efficiently manage Federal coal resources, BLM has determined that, in some circumstances, forming LMUs under the existing regulations could have the effect of circumventing lease-specific production requirements mandated by FCLAA. BLM's existing LMU regulations at 43 CFR 3480.0–5(13)(ii) provide that the 10-year diligent development requirement for an LMU begins on the effective date of the Federal coal lease that was most recently issued or readjusted after passage of FCLAA, but preceding approval of the LMU. The existing regulations at 43 CFR 3475.6(b) provide that the LMU diligence requirements supersede lease-specific diligence requirements for the duration of the LMU. Therefore, an operator holding a lease that is about to terminate for failure to meet diligent development could effectively extend the diligent development period for the lease by forming an LMU that combines the older lease with a newer lease. BLM believes that forming an LMU for the sole purpose of extending the diligent development period of a lease, without evidence that the lessee is prudently pursuing development of a mine, is contrary to the intent of MLA, as amended by FCLAA.

In addition, BLM's existing regulations at 43 CFR 3472.1–2(e)(6)(ii)(E) provide that the holder of a lease in an LMU meets the production requirements of section 2(a)(2)(A) of MLA, as amended, whenever the LMU is meeting the diligent development or continued operation requirements specified in the LMU stipulations of approval. Thus, the holder of a non-producing lease could avoid the section 2(a)(2)(A) prohibition on obtaining additional leases by forming an LMU, even if the LMU is not actually producing any coal, as long as the LMU stipulations are being met. Forming an LMU supersedes the lease-specific diligence requirement and starts a new 10-year diligence period for the LMU as a whole. A non-producing LMU can be considered to be in compliance with its diligent development requirement until the end of its 10-year diligence period. It is only when the diligent development period ends without the LMU having achieved production of commercial quantities that it would be considered out of compliance. Such an outcome frustrates the intent of FCLAA by nullifying the penalty provided in section 2(a)(2)(A) of MLA for holding a lease without producing any coal.

Out of concern for abuse of the regulations, BLM published an advance notice of proposed rulemaking (ANPR) in the **Federal Register** on December 10, 1993 (58 FR 64919), notifying the public that BLM was considering revising the regulations relating to LMUs for coal operations. The ANPR solicited public comments to assist in the preparation of proposed regulatory changes that would place greater emphasis on the stewardship of Federal coal resources and ensure that they are developed in an efficient, economical, and orderly manner with due regard to the conservation of coal reserves and other resources. BLM received 17 comments on the ANPR. Based on its analysis of the issues and the comments received, BLM determined that:

(1) the existing regulations that allow LMU diligent development requirements to supersede lease-specific diligence implement the intent of Congress in enacting the LMU provisions of FCLAA;

(2) tying the beginning of an LMU's diligent development period to the effective date of the most recent Federal lease remains appropriate;

(3) the current procedure of allowing an LMU to be effective as early as the date that a complete LMU application is submitted should be continued;

(4) the regulations should not be amended to require that at least one Federal lease in an LMU be producing;

(5) where a proposed LMU would include a lease that has not met diligent development requirements within 8 years after its issuance, it is appropriate to require that at least some part of the proposed LMU be covered by a pending administratively complete application or an approved application for a Surface Mining Control and Reclamation Act (SMCRA) permit in order for BLM to approve the LMU; and

(6) the definition of "producing" at 43 CFR 3400.0–5(rr)(6) needs some clarification to minimize the opportunity to circumvent the intent of section 2(a)(2)(A) of MLA.

A complete summary and analysis of the comments on the ANPR is in the preamble to the proposed rule published on December 28, 1994 (59 FR 66874).

During 1993 and early 1994, the General Accounting Office (GAO) was conducting an investigation of BLM's coal leasing program. In September 1994, GAO published a report of their findings entitled, "Mineral Resources: Federal Coal-Leasing Program Needs Strengthening" (GAO/RCED–94–10). The GAO report focused on two actual cases, one involving a large non-producing lease that was combined with a much smaller, more recently issued lease to form an LMU just before the larger lease would have terminated for lack of diligence. The other case involved a holder of a non-producing lease included in an LMU that was idle (not producing coal) and that had not yet produced sufficient quantities of coal to meet the commercial quantities requirement for the LMU. The lease holder applied for and obtained a number of other MLA leases while the LMU was not producing coal. To address these situations, GAO recommended BLM amend existing regulations to (1) ensure that lessees holding pre-FCLAA leases will not be issued mineral leases under MLA unless they have met the coal production requirements that FCLAA added to MLA and (2) provide criteria that BLM can use to determine whether the formation of an LMU is consistent with FCLAA's goals of discouraging speculation and encouraging the development of Federal coal leases. GAO also recommended that, for each LMU approved, BLM document how the approved LMU meets these regulatory criteria (GAO/RCED–94–10, p. 32).

Subsequently, BLM published the LMU proposed rule in the **Federal Register** on December 28, 1994 (59 FR 66874). Comments were accepted through March 29, 1995. BLM received comments from 14 entities as follows: Coal industry groups submitted 10 comments, 1 comment was from a State governor, 2 comments were from environmental groups, and 1 comment was from an individual. As discussed in the next part of the preamble to this final rule, BLM gave full consideration to all comments received. Any substantive changes in the final rule from what was proposed are identified in the following detailed discussion of the final rule.

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II. Discussion of Final Rule and Response to Comments

A. Legal Basis for the Final Rule

Under the MLA, as amended by FCLAA, the Secretary of the Interior has the authority to "prescribe necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purposes of [the law]" (30 U.S.C. 189). Under the Federal Land Policy and Management Act of 1976 (FLPMA), the Secretary, "with respect to public lands, shall promulgate rules and regulations to carry out the purposes of this Act and of other laws applicable to the public lands" (43 U.S.C. 1740). For the reasons set forth below, BLM believes that this final rule is consistent with the letter and intent of sections 2 (a), (b), (d) and 7 of MLA (30 U.S.C. 201, 202a, and 207), as well as the general purposes of MLA, FCLAA, and FLPMA.

With the enactment of FCLAA, the regulations governing the Federal coal program must implement the express intent of Congress to discourage speculation in Federal coal leases. This intent is embodied within 30 U.S.C. 201 and 207. Also, see H.R. Rep. No. 94–681, 94th Cong., 1st Sess., 14–15 (1975). The twin goals of encouraging development of Federal coal resources and limiting speculation are not mutually exclusive. When Federal coal leases are obtained and held for long periods without production, or without legitimate steps toward production, the efficient, economic and orderly development of the resource is precluded. When those who are interested in simply holding leases are discouraged from doing so, or are encouraged to relinquish their leases, to the extent that others have an opportunity to develop those properties, the development goal is met. BLM's goal, and challenge, in this rule is to establish some prudent constraints on lease holders that will be disincentives to speculation, and at the same time, to avoid imposing the kind of constraints that will be disincentives to development and production, taking into account the dynamic nature of the coal industry.

There is no question that under BLM's current coal management regulations the proportion of Federal leases actually producing coal has increased. At the time that FCLAA was passed 20 years ago, only about 10 percent of Federal coal leases were producing. Currently, the figure is close to 35 percent. BLM believes, however, that the aggregate proportion of producing leases is not determinative in deciding whether changes to the regulations are necessary. Each lease or LMU represents a specific set of unique facts and circumstances owing to the geology of the coal deposit, the qualities and characteristics of the coal, the proximity to the transportation network, the existence of markets, and many other technical and socio-economic factors. Decisions of lessees whether to form an LMU and decisions by BLM approving LMUs are made on a case-by-case basis. BLM has to look at the outcomes of individual cases to see whether its regulations are working properly.

Two recent cases shed light on whether our regulations are working the way they were intended to work. These are the two cases described in the GAO report, discussed above. In the Rocky Butte case, one month before a large non-producing lease was scheduled to terminate, it was combined with a newer small lease into an LMU, extending the diligence date for 10 more years. In the Clovis Point case, the holder of a non-producing lease that had been held for more than 10 years was found to be qualified under section 2(a)(2)(A) to obtain additional leases by virtue of the fact that the non-producing lease had been included in an LMU that was in compliance with the LMU stipulations of approval. Thus, in the first case, application of the statutory penalty for failure to achieve diligent development (termination of the lease) was stymied by LMU formation that extended the diligent development period. In the second case, the statutory penalty for failure to produce coal from leases (disqualification from obtaining additional leases) was stymied by LMU formation that applied the LMU diligence requirements as established by the LMU stipulations of approval to all leases in the LMU.

BLM believes that the outcomes of these two cases are not consistent with the spirit and intent of FCLAA. Because its current regulations do not prevent this type of outcome from occurring again in the future, BLM believes that its regulations should be changed. The final rule adopted today is consistent with the view that BLM must prevent outcomes such as those described above from happening again. As described in the section-by-section analysis that follows, BLM is adopting provisions that are focused on preventing specific kinds of results while avoiding, to the extent possible and foreseeable, unintended negative impacts on legitimate producers of Federal coal. Based on BLM's analysis of the issues involved, taking into account the purposes of the statutes and the administrative record of this rulemaking, including comments received, this final rule is a proper and reasonable interpretation of the MLA, as amended.

B. General Comments

Several comments expressed support for the overall thrust of the rules and BLM's effort to clarify and tighten up the current Federal coal leasing LMU regulations. One commenter was concerned by BLM's past practice of issuing new MLA leases to a lessee who is not in compliance with section 2(a)(2)(A) of MLA and concluded that this practice must stop. Another comment expressed agreement with the recommendation from the GAO report that the Secretary of the Interior cease issuing additional MLA leases to companies that are not qualified under FCLAA. BLM believes that this rule will significantly reduce the chance that a lessee could abuse section 2(a)(2)(A) of MLA, as amended by FCLAA, by obtaining additional MLA leases.

However, most comments, submitted by members of the coal industry, were not supportive of the proposed rule. Specific concerns or comments are addressed in the analysis of each respective topic or subsection. These comments generally requested that the proposed rule be withdrawn. BLM remains committed to encouraging diligent development of Federal coal and reducing the potential for speculation. However, after comprehensive review of all comments, BLM has made some changes to the proposed rule. Those changes are discussed in detail below.

Several comments expressed concern that BLM had not established a clear need for the proposed rule change. Several other comments expressed an opinion that the current regulations were entirely adequate and there was no need for the proposed regulatory changes. However, as outlined in the GAO report discussed above, there remains a potential for abuse of the current regulations that is not consistent with FCLAA's goal of discouraging speculation and encouraging diligent development of Federal coal.

Several comments addressed the relationship of the proposed rule to the intent of FCLAA. One comment said that the proposed rule is not compatible with FCLAA's intent to reduce the possibility of speculation. One comment noted the marked increase in the number of Federal coal leases actually producing coal since enactment of FCLAA as evidence of the effectiveness of the current regulations and FCLAA to reduce speculation. Another comment asserted that the intent of FCLAA was confined to preventing the holding of a

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lease without development, and so long as the lease or LMU had been developed, the intent of FCLAA was satisfied. Another comment said that there is no evidence to indicate that the speculative concerns of Congress have not been adequately resolved by FCLAA. BLM agrees that FCLAA has reduced the potential for speculation with Federal coal reserves. However, questions concerning the effectiveness of FCLAA are beyond the scope of this rulemaking. This rulemaking addresses only the effectiveness of the regulations to discourage speculation and encourage production as intended by FCLAA. As mentioned above, the overall percentage of leases that are producing is not determinative as to whether the regulations should be changed. BLM disagrees with the comment that if a lease or LMU had been developed, FCLAA is satisfied. FCLAA contains specific requirements that must be satisfied before compliance with FCLAA is achieved. BLM concurs with the GAO findings that there are weaknesses in the current regulations that need to be addressed.

One comment discussed the relationship between diligent development and speculation. The comment said that the apparent extension of the diligence period when an older lease is combined with a younger lease in an LMU is not speculation as addressed by FCLAA because formation of an LMU often involves tradeoffs such as the 40-year mine-out requirement and inclusion of non-Federal coal reserves in determining commercial quantities. BLM agrees that for leaseholders who are producing or plan to produce Federal coal, there are some tradeoffs associated with LMU formation. However, for those who are apparently holding leases without any current intention of producing coal, imposition of the 40-year mine-out period and increasing the commercial quantities amount are not tradeoffs. Clearly, if you have no current intention of mining the coal and are holding a lease for the purpose of selling it at a profit, you are not going to be greatly concerned about how much time you have to mine the coal or the amount of coal you must mine each year. You are more concerned, however, about being able to hold the lease for 10 more years by including it in an LMU. To the speculator, the advantage of substituting a new diligence period vastly outweighs any drawbacks associated with the obligation to mine the larger reserves of the LMU in 40 years.

Several comments expressed concern that the proposed rule would restrict the flexibility the lessee has under the current regulations. One comment noted that "these unyielding requirements call for more flexibility, not less." Another comment said "the Federal regulations must provide sufficient flexibility to allow * * * mak[ing] legitimate business decisions while still protecting the public interest in the coal resources owned by the United States." Another comment noted that arbitrary limits in the proposed rule ignore the current practical realities confronted by the lessee/operator. As addressed in analysis of specific sections, some of the "unyielding requirements" of the proposed rule have been modified to provide some additional flexibility. However, such flexibility must be within the limits established by the statute. BLM believes the final regulations achieve a careful balance between discouraging speculation while at the same time encouraging diligent development.

Several comments expressed concern that the GAO report is, in part, a supporting document for this rulemaking. One comment questioned using the conclusions of the GAO to support the proposed rule because the Department of the Interior's official response to the GAO is not consistent with the conclusions of the GAO report. In addition, the comment was concerned that the GAO report has not been subject to public review and comment sufficient to warrant its serving as the primary basis for the proposal. Another comment asserted, "We have concluded that this GAO criticism was ill-advised and unfounded, and it appears to have been designed to fulfill a political agenda adverse to the interests of * * * federal coal development." This comment continued, "We urge BLM not to depend upon the GAO Report to justify these new regulations, because it cannot withstand the light of a full independent review."

The GAO report has been included in the Administrative Record as support for this rule. Commenters were free to dispute the foundations or conclusions of the report. BLM has considered both the substance of the report and criticisms by commenters in formulating this rule. Also, this final rule is consistent with the response to GAO from the Assistant Secretary, Land and Minerals Management, dated April 12, 1994. In the response to GAO, the Assistant Secretary noted that "BLM's interpretation (of FCLAA) was a matter of policy formulated by previous Administrations that met the letter of the law but that appeared not to be in concert with the major goal of FCLAA, which was to reduce speculation." See GAO/RCED–94–10, p. 77. The response also stated that "the policy could be amended prospectively at any time by following the normal notice and comment rulemaking process." *Id.* BLM considers the final rule to be within the scope of MLA, as amended by FCLAA, and BLM's rulemaking authorities.

One comment asserted that "defin[ing] 'producing' in a manner designed to punish a company which has properly suspended mining because of poor market conditions" could have "takings" implications. BLM does not agree that the rule "punishes" companies, nor that it has takings implications. Under the commenter's scenario, if BLM defined "producing" in such a way that a particular company was disqualified from obtaining additional leases, no taking would occur. BLM's action would preclude the company from obtaining additional leases but would not deprive the company from the full enjoyment of any rights it already possesses under existing leases. A lease holder does not have a contractual or property interest in acquiring additional leases at some future time. See *Natural Resources Defense Council* v. *Jamison,* 815 F.Supp. 454, 470 (1992). To suggest that a compensable claim arises from an action that precludes one from obtaining additional rights extends the concept of takings beyond the scope of current judicial interpretation.

The same commenter went on to assert that any action "which could result in the taking of leases from competent mine operators * * * could in turn represent a taking of potential royalties and tax revenues from [State and local governments]." BLM disagrees. Although each takings claim has to be decided on its own merits, BLM believes that the rights attendant to a coal lease are conditioned on compliance with the law and regulations. When noncompliance occurs, BLM has the authority to impose the penalties provided for by MLA. In some cases, BLM has no discretion regarding the nature of the penalty. For example, MLA provides that "[a]ny lease which is not producing in commercial quantities at the end of ten years shall be terminated" (30 U.S.C. 207). As to the question of whether State or local governments have a "right" to the revenue stream associated with a particular lease, the commenter construes a possible diminishment of future revenues as a compensable taking. BLM does not agree that States have such a claim. Under 30 U.S.C. 191, the Secretary has an obligation to pay an appropriate share of the money received

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as a result of the production of coal. The obligation does not arise until the Secretary receives the money; no obligation to the States exists to maintain the revenue stream associated with Federal mineral leasing. Moreover, any impacts of these rules on revenue streams is purely speculative.

Finally, the same commenter went on to assert that a regulation that "would limit the leasing of new federal coal or limit the number of potentially qualified bidders for new federal coal represents a 'taking of potential bonus bid revenues' from [the State] which would otherwise be available." BLM disagrees. As discussed in response to the commenter's first assertion, the courts have interpreted the Fifth Amendment prohibition on uncompensated takings as being based on a deprivation or limitation of rights that a person already possesses. Takings are not based on a potential deprivation or limitation of rights that a person may or may not possess at some time in the future. In summary, BLM does not believe that the regulations adopted today have takings implications.

Several comments expressed concern that the generally negative response to the ANPR appeared to be ignored by BLM. The volume of opposing comments does not, in and of itself, overshadow BLM's responsibility to implement FCLAA. BLM believes the final rule properly takes into account the views of commenters in implementing the statutory requirements of FCLAA and MLA.

One comment said BLM failed to describe the need for the changes or how the rule will reduce speculation. The final rule discourages speculation in a number of ways. For example, the previous open-ended definition of the term "producing" allowed speculative holding of coal leases without limit on the nature or duration of mine shutdowns. BLM believes holding a Federal lease for an extended period while both the lease and the LMU which contains the lease fail to produce coal in sufficient quantities to meet diligence requirements is speculation that Congress intended to reduce by enactment of FCLAA. The promise of future severance of coal, as evidenced by the presence of mining equipment with the capability of severing coal, is not an acceptable substitute for the actual severance of coal without an objective standard to assure that severance recommences. In addition, this rule discourages the formation of LMUs created to allow speculative holding of non-producing coal leases. Regulations that allow formation of an LMU consisting of an older Federal coal lease that is close to termination for failure to meet diligence requirements with other coal reserves which also have not produced coal, without any evidence of prudent progress of developing a mine on either area, circumvent sections 7(a) and 2(a)(2)(A) of MLA and allow speculation. Chapter 2 of the GAO report provides a detailed discussion of the relationship between speculation and formation of an LMU. The detailed analysis of each section of the final rule provides additional information concerning how the final rule will specifically serve to reduce the potential for speculation.

One comment expressed concern that Executive Order 12988 of February 11, 1994, entitled "Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations," must be considered and implemented in any final rule. This Executive Order requires that each Federal agency make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high or adverse human health or environmental effects of its programs, policies, and activities on minority populations and low income populations in the United States. As discussed below, BLM believes that this final rule complies with Executive Order 12988.

A logical mining unit can be formed only after a Federal coal lease has been issued. BLM must comply with all applicable environmental and procedural requirements, which include many opportunities for public comment and collection of environmental data, before the lease is issued. This final rule does not alter the lease issuance process. The logical mining unit itself cannot be approved without providing ample opportunity for public comments and, if requested, a public hearing (43 CFR 3481.2). The mining operation must have a SMCRA mining permit before mining operations can begin (30 U.S.C. 1256(a)). Exploration operations, permitted through BLM, must also comply with established procedures to safeguard the environment. Once mining operations begin, the lessee/operator is generally required to continuously monitor the environment in and around the mine for potential adverse effects. These provisions for public participation and environmental protection adequately ensure consideration of impacts on minority or low-income communities. Thus, BLM believes that there are ample requirements and safeguards already in place to assure compliance with Executive Order 12988.

One commenter said that the proposed regulations were "at odds with the President's Regulatory Reinvention Initiative." This comment said that the proposed regulation cut against the initiative's objectives to eliminate or revise obsolete regulations and seek the views of the regulated community. BLM does not agree with this comment. This final rule revises the regulations to comply with the letter and intent of MLA, as amended by FCLAA, after inviting comment and informing the regulated community of our intentions. BLM published an ANPR and a proposed rule providing the regulated community ample opportunity to provide input into the regulatory process. These regulations are written to implement the MLA, as amended by FCLAA, and have been modified in response to comments from the regulated community. BLM believes that the regulations comply with the President's regulatory reinvention initiative which requires "sensible regulations without sacrificing rational and necessary protection."

In the proposal, BLM indicated that the changes to the definition of "producing" would take effect 30 days after the final rule is published. BLM specifically solicited comments on whether a longer phase-in period, such as 6 months, is necessary (59 FR 66877). One commenter was concerned that under the proposed rule, BLM would not consider suspension of operations due to loss of a contract or lack of a market for coal to be a qualifying temporary suspension. The commenter proposed that "the rule take effect a minimum of six months after the final rule is published to allow [the lessee/operator] to come into compliance with these proposed changes."

As discussed in more detail later in this preamble, the final rule that BLM is adopting today differs from this aspect of the proposal in important ways. The final rule allows qualifying temporary interruptions in coal severance up to one year in aggregate length in the immediately preceding five-consecutive-year period. See final § 3481.4–4. Under the final rule, an operation could temporarily interrupt coal severance for the period specified in final § 3481.4–4 due to loss of contract or lack of market without being disqualified from obtaining additional leases. See final § 3481.4–2(c). The final rule provides lessees/operators significantly more flexibility with regard to temporary interruptions in coal severance than the proposal, which, as the commenter points out, would have excluded suspensions for loss of

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contract or lack of market and limited qualifying suspensions to three months in length. These changes address the commenter's concern, and BLM does not believe it is also necessary to extend the period of time between the publication of the final rule and its effective date. Thus, the regulations BLM is adopting today take effect in 30 days.

One commenter objected to the statement in the proposed rule preamble that BLM intended to apply the regulations governing approval of LMUs, under 43 CFR part 3480, subpart 3487, to all LMU applications that were pending or submitted after the date of the proposed rule. The commenter argued that implementation of the rules in this manner would constitute "an unlawful retroactive application of changes in regulations." BLM does not agree that these rules will have retroactive effect. Once the rules become effective 30 days after being published in the **Federal Register**, they govern all subsequent decisions by BLM concerning approval of LMU applications regardless of whether the applications are pending on the effective date of the final rule or submitted after that date. BLM applies the regulations that are in effect at the time it makes the decision on the application. See *Bradley* v. *School Board of City of Richmond,* 416 U.S. 696 (1974), cited with approval in *Illinois South Project, Inc.* v. *Hodel,* 844 F.2d 1286, 1289 (7th Cir. 1988). The fact that an LMU application may have been submitted prior to the change in the regulation does not entitle the applicant to have BLM act on the application on the basis of rules no longer in effect. See *Hunter* v. *Morton,* 529 F.2d 645, 649 (10th Cir. 1976); *Hannifin* v. *Morton,* 444 F.2d 200, 203 (10th Cir. 1971). In response to the comment, however, BLM has decided not to reconsider decisions made after the date of the proposed rule, but before the effective date of these rules.

C. Section-by-Section Analysis of Final Rule and Specific Comments

Part 3400—Coal Management: General

Subpart 3400—Introduction: General. *Section 3400.0–5 Definitions.* The prefatory clause previously stated "As used in this part," and could be interpreted to mean that the definitions listed in § 3400.0–5 applied only to part 3400, and were not applicable to all of the regulations in 43 CFR group 3400, which includes parts 3400, 3410, 3420, 3430, 3440, 3450, 3460, 3470, and 3480. BLM proposed to change the clause to read, "As used in this group," to clarify that the definitions in section 3400.0–5 apply to all of the regulations in Group 3400—Coal Management. BLM is adopting the change to the prefatory clause for the list of definitions at 43 CFR 3400.0–5 as proposed.

One comment expressed concern that the change in the prefatory clause from "part" to "group" could extend the definition of "producing" at § 3400.0–5(rr)(6), for section (2)(a)(2)(A) of MLA, to include "continued operations" under section 7 of MLA. However, the prefatory clause at § 3400.0–5(rr) specifically limits this paragraph to, "For the purposes of section 2(a)(2)(A) of the Act." Thus, BLM does not intend the change in the prefatory clause at § 3400.0–5 to extend the definition of "producing" under § 3400.0–5(rr)(6) to considerations of "continued operations" under section 7 of the MLA, which is defined at 43 CFR 3480.0–5(a)(8).

Section 3400.0–5(rr)(6) Definition of producing. Under the previous definition of *producing,* BLM considered a lease to be producing, for the purposes of lessee qualification under section 2(a)(2)(A) of MLA, whenever coal was actually being severed, or the lessee was operating a mine in accordance with standard industry operating practices. The previous rule also provided an allowance for "temporary suspension" of coal severance for reasons that are beyond the reasonable control of the mine operator or lessee. The definition contained several examples of circumstances under which BLM allowed a non-disqualifying "temporary suspension," including, but not limited to, factors such as dragline or other equipment movement, breakdown, or repair; overburden removal; sale of coal from stockpiles; vacations and holidays; orders of governmental authorities; coal buyer's operations of its power plants that require the coal buyer to stop taking coal shipments for a limited duration of time; or severed coal being processed, loaded, or transported from the point of severance to the point of sale. Although the definition stated that it is limited to circumstances beyond the reasonable control of the operator/lessee, several of the examples described circumstances within the operator's control. Thus the rule contained no effective limit on either the type or duration of temporary interruptions under which a mine would be considered "producing."

The definition of "producing" primarily has relevance for operations that have not yet achieved diligent development, that is, have not produced in commercial quantities within ten years. Operations that have achieved diligence and are subject to continued operation cannot be disqualified from receiving additional leases under the definition of "producing" while they remain in compliance with the continued operation requirements. See final § 3472.1–2(e)(6)(D).

BLM proposed that the definition of "producing" at section 3400.0–5(rr)(6) be changed to limit the circumstances under which BLM would consider a Federal coal lessee qualified to obtain additional MLA leases. BLM proposed to eliminate the provision that allowed the lease to be considered producing, for the purposes of section 2(a)(2)(A) of MLA, if a mine were operating on the lease or LMU in accordance with standard industry operation practices and proposed limiting temporary suspensions to 3 months. In the proposal, BLM indicated that it believes that the definition had potential for abuse. A lessee could claim that it is producing in accordance with standard industry practices even though, for reasons that are within its control, coal has not been produced from the lease for many years. This result would not serve the purpose of FCLAA to prevent speculation. Several comments expressed support for this aspect of the proposal. Several other comments indicated that removal of the "standard industry operating practices" clause from the rule would unduly constrain the ability of BLM to effectively administer the coal program and would not recognize site-specific needs of smaller mines. One comment said that standard industry operating practices must continue as the standard by which BLM makes many of its management decisions.

The final rule eliminates the "standard industry operating practices" clause and provides that *producing* means actually severing coal. Under the final rule, BLM also considers a lease producing when the operator/lessee is processing or loading severed coal or transporting it from the point of severance to the point of sale, or coal severance is temporarily interrupted in accordance with 43 CFR 3481.4–1 through 4–4. BLM continues to believe that the open-ended "standard industry operating practices" and "temporary suspension" clauses of the previous rule could be interpreted to extend the definition of "producing" beyond the scope of FCLAA. "Standard industry operating practices" and unlimited "temporary" suspensions could include things that are clearly outside the range of what is contemplated under FCLAA, such as an open-ended discretionary mine closure.

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As discussed later in this preamble in connection with final §§ 3481.4–1 through 3481.4–4, BLM is providing the flexibility requested by commenters by allowing temporary interruptions not exceeding an aggregate of 1 year in the 5-consecutive-year period immediately preceding the date of BLM's determination of lessee qualifications under 43 CFR 3472.1–2. This provision allows operators more flexibility to temporarily interrupt coal severance without penalty under section 2(a)(2)(A) than would have been provided under the proposal, which would have limited the length of a "temporary suspension" to 3 months. The final rule also provides flexibility by not limiting a temporary interruption in coal severance to circumstances beyond the control of the lessee/operator.

By its own terms, section 7(b) provides an exception for interruptions caused by "strikes, the elements, or casualties not attributable to the lessee." To the extent that a temporary interruption is caused by a circumstance that meets the standards of section 7(b), BLM has recognized in the final rule that section 7(b) does not afford BLM with the authority to limit that type of interruption to either a 3-month or 1-year period. Therefore, that type of interruption will not lead to disqualification under section 2(a)(2)(A). See the preamble discussion of § 3481.4 below.

However, certain of the circumstances listed in the proposal or this final rule as non-disqualifying temporary suspensions do not fall within the section 7(b) exception because they are not "casualties not attributable to the lessee." Some are not "casualties" and some are not beyond the lessee's control.

Nevertheless, BLM continues to believe that such temporary suspensions should not lead to a disqualification under section 2(a)(2)(A). By not defining the term "producing," Congress was silent as to whether and the degree to which temporary interruptions in coal severance should disqualify a lessee from receiving additional leases under section 2(a)(2)(A). BLM has attempted to determine what is reasonable and has so provided in this final rule. See section 3481.4, discussed below. This final rule eliminates the confusing and unnecessary requirement that temporary interruptions be beyond the control of the operator.

As discussed above, BLM's previous rules allowed a lease that is not actually severing coal to be considered "producing" when severed coal is being processed, loaded, or transported from the point of severance to the point of sale. BLM proposed to retain this provision and received no comments that specifically addressed this issue. BLM is adopting this provision in the final rule. BLM recognizes that the mining operation consists of more than just the mechanical severance of coal. Coal, once severed, requires processing and transportation prior to it having value to the coal consumer. Severance, processing, and transportation of coal are equally important to the success of the lease or LMU in meeting the producing requirements under section 2(a)(2)(A) of the MLA.

Both BLM's previous rule and the proposal contained definitions of the term "producing" that would have delineated the circumstances under which a lease could be considered "producing" for purposes of section 2(a)(2)(A) even though coal severance was temporarily suspended. BLM believes that these provisions are regulatory in nature and do not belong in a definition. Therefore, BLM has moved the provisions governing what in the previous rule was a temporary suspension to final §§ 3481.4–1 through 3481.4–4 and included a cross-reference to those sections in the definition of "producing." Please refer to that portion of this preamble for a complete discussion of comments received on that subject, which BLM has designated "temporary interruption in coal severance" in the final rule. Thus, the provision that BLM is adopting today simply lists the three circumstances under which a lease may be considered producing: (1) When coal is being severed (that is, being physically removed from the working face to another location); (2) when severed coal is being processed, loaded, or transported from the point of severance to the point of sale; and (3) when coal severance is interrupted in accordance with 43 CFR 3481.4–1 through 3481.4–4.

The proposal would have added a provision that, for the purposes of the definition of "producing," the term "operator/lessee" has the meaning set forth in 43 CFR 3480.0–5(a)(28). This was an incorrect cross reference; the term "operator/lessee" is actually found at 43 CFR 3480.0–5(a)(27). BLM received no comments concerning this section of the proposed rule. However, in the interest of simplifying its regulations, BLM has decided that it is not necessary to incorporate this cross reference into the final rule. The term "operator" is defined at § 3400.0–5(cc).

Part 3470—Coal Management Provisions and Limitations

Subpart 3472—Lease Qualification Requirements. *Section 3472.1–2 Special leasing qualifications.* Section 3472.1–2 sets forth special qualifications that applicants must meet in order to obtain leases. Subparagraph (e)(1)(i) implements section 2(a)(2)(A) of MLA and establishes the general prohibition on issuance of new leases to those who have held a Federal coal lease for 10 years and who are not producing coal from the lease deposits in commercial quantities. The previous provision set forth exceptions to the prohibition, including those in "paragraph (e) (4) or (5) of this section." BLM proposed to revise subparagraph (e)(1)(i) by making some grammatical corrections and adding a clarifying reference to paragraph (e)(6) as an exception to the prohibition. Several comments generally supported the proposed rule. BLM is adopting this provision in the final rule as proposed. Final § 3472.1–2(e)(1)(i) contains a reference to the exception provisions of part 3480. The reference is intended to include suspensions approved under 43 CFR 3483.3 and final § 3481.4–4. See the preamble to § 3481.4–4 below.

BLM also proposed changes to paragraph (e)(6), which contains exceptions to the prohibition on issuing new leases to holders of non-producing leases. In BLM's previous rules, paragraph (e)(6)(ii)(D) established an exception from section 2(a)(2)(A) for leases "producing in compliance with the diligent development and continued operation provisions of part 3480." Paragraph (e)(6)(ii)(E) established a corresponding exception for leases contained in an LMU, if the LMU is producing "in accordance with the logical mining unit stipulations of approval." As explained in the proposed rule preamble, these two provisions allowed a lease or LMU to be considered in compliance with the producing requirement of section 2(a)(2)(A) during the diligent development period, even though the lessee may have held the lease for more than 10 years without producing coal (59 FR 66877). This is exactly the type of abuse identified in the GAO report. See GAO/RCED–94–10, pp. 24–25. BLM believes that a policy which allows a non-producing lease in a non-producing LMU to satisfy the "producing" requirement of section 2(a)(2)(A) because it complies with the diligent development requirements undermines the anti-speculation goal of FCLAA and implementation of section 2(a)(2)(A).

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For these reasons, BLM proposed to change paragraph (e)(6)(ii)(D) to provide that, in order to protect a lessee from disqualification under section 2(a)(2)(A), a lease must be producing, or a lease that has met its diligent development requirements must be in compliance with its continued operation requirements. Similarly, BLM proposed to change paragraph (e)(6)(ii)(E) to provide that, in order to protect a lessee from disqualification, an LMU must be producing, or be in compliance with its continued operation requirements, in addition to complying with the LMU approval stipulations. BLM is adopting both provisions in the final rule as proposed, with the exception of one editorial change prompted by a comment (discussed below).

One comment suggested that the rule should be written in a more direct style. The comment suggested replacing the phrase "has produced in satisfaction of" to "currently in compliance with" in both paragraph (D) and (E). BLM agrees that the suggested change improves the clarity of the rule and recognizes that continued operation is based on a rolling 3-year period, for which an operator may be in compliance, but the necessary production may not yet have occurred. An operator has the flexibility to satisfy continued operation by producing a total of 3 percent of the recoverable coal reserves within 3 years, regardless of when production occurs during that 3-year period. Thus, the duration of coal severance is not relevant to meeting the continued operation requirement as long as the operator meets the production requirement on average. Such production satisfies both the continued operation and section 2(a)(2)(A) production requirements. The final rule does not affect the operator's flexibility in meeting the continued operation requirement, where a degree of flexibility is appropriate once diligent development has been achieved. The comment is adopted, and the final rule requires leases and LMUs to be producing, or currently in compliance with the lease-specific or LMU continued operation requirements.

Under final § 3472.1–2(e)(6)(ii)(E), if a Federal lease that is included in an LMU and has been held for more than 10 years is producing or is in compliance with its continued operation requirement, the lessee would remain qualified under section 2(a)(2)(A) of MLA. If a Federal lease that is included in an LMU and has been held for more than 10 years is not producing or is not in compliance with continued operation, but the LMU is producing or is in compliance with its continued operation requirement, the lessee remains qualified under section 2(a)(2)(A) of MLA. However, if a Federal lease that is included in an LMU and has been held for more than 10 years is not producing and is not in compliance with its continued operation requirement, and the LMU is not producing and is not in compliance with its continued operation requirement, the lessee would be disqualified under section (2)(a)(2)(A) of MLA.

One comment disagreed with "BLM's assertion that for an LMU with a pre-FCLAA lease, [LMU] compliance with [diligent development] is inadequate for lease compliance with the "producing" requirement of Section 2(a)(2)(A)." BLM did not accept this comment. As discussed above, if compliance with the diligent development requirement of section 7 were to be construed as satisfying the requirements of section 2(a)(2)(A), the holding period for readjusted leases could be stretched for an additional 10 years before actual production would have to begin. This is because the diligent development period of the LMU supersedes the lease-specific diligent development period.

One comment noted the Department had previously considered FCLAA to be silent concerning the interplay between section 2(a)(2)(A) and 2(d) of the MLA and concluded that "the agency's attempt at legislative revisionism, by inserting FCLAA's anti-speculation purposes, remains unpersuasive." BLM believes that, where a statute does not directly speak to an issue, the agency that has been delegated rulemaking authority, BLM in this case, has the discretion to adopt a reasonable interpretation that is consistent with the purposes of the statute. Under the discretionary authority granted in section 2(d)(3) of MLA (30 U.S.C. 202a(3)), BLM chose, as a matter of policy, to provide by regulation that production from anywhere within an LMU should be construed as occurring on all Federal leases in the LMU for purposes of diligent development and continuous operation. BLM also chose, as a matter of policy, to provide by regulation that a lessee producing in accordance with the LMU stipulations was not disqualified under section 2(a)(2)(A). For the reasons described above, BLM is now changing its interpretation with regard to section 2(a)(2)(A) to better serve the anti-speculation goals of FCLAA. BLM believes it has articulated a reasonable explanation for why it is doing so. This action is within BLM's discretionary rulemaking authority under MLA as amended and contains a sufficient basis and purpose as required by the Administrative Procedure Act (5 U.S.C. 553).

Part 3480—Coal Exploration and Mining Operations Rules

Subpart 3480—Coal Exploration and Mining Operations Rules: General. *Section 3480.0–5 Definitions.* The proposed rule would have added a new term, "Logical mining unit recoverable coal reserve exhaustion period," which would have been defined as the period of time beginning upon approval of the LMU resource recovery and protection plan and ending when all the recoverable coal reserves are mined out, but not more than 40 years. BLM has decided not to include the definition in the final rule. Based on comments, BLM is adopting a final rule that differs from the proposal with regard to the beginning of the 40-year period for mining out the LMU. The final rule provides flexibility in beginning the 40-year period, because BLM has concluded that a definition that specifies a single beginning point for the 40-year period is not appropriate. See the preamble discussion below concerning § 3487.1 of the final rule.

Subpart 3481—General Provisions. *Section 3481.4 Temporary interruption in coal severance.* As discussed above, BLM also proposed to change the definition of "producing" to allow temporary suspension of operations for reasons beyond the control of the lessee/operator without disqualifying the lease holder from receiving new leases. The proposed rule would have restricted a "temporary suspension" to not more than 3 months in length and provided a list of qualifying circumstances similar to those included in the previous rule. BLM has decided that the provisions relating to "temporary suspension," which has been renamed "temporary interruption in coal severance" in the final rule, are regulatory in nature and should not be included in a definition. Thus, in the final rule adopted today, these provisions are located at final § 3481.4, including §§ 3481.4–1 through 3481.4–4.

Some commenters confused a "temporary suspension" for the purposes of determining lessee qualifications under section 2(a)(2)(A) of MLA with lease suspensions authorized under section 7(b) of MLA (30 U.S.C. 207(b)). BLM believes that some of the confusion may have resulted from the proposed "temporary suspension" provision which combined administrative exceptions to the definition of "producing" with elements of the section 7(b) suspension criteria.

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The comments make it evident that using the same or similar terminology for different circumstances is confusing. Therefore, in the final rule, BLM uses the term "temporary interruption in coal severance" to refer to periods when a lease or LMU is not severing coal, but the lease holder is still considered to be producing and thus qualified under section 2(a)(2)(A) of MLA to receive additional leases.

Section 3481.4–1 Can I temporarily interrupt coal severance and still be qualified as producing? Final § 3481.4–1 provides that an interruption in coal severance allows a lessee/operator to temporarily halt the extraction of coal for a limited period of time without jeopardizing the lessee/operator's qualifications under section (2)(a)(2)(A) of MLA to receive additional leases. During the period of an interruption in coal severance, BLM still considers a lease or LMU to be producing so as not to preclude the lessee/operator from receiving a new or transferred lease. This section corresponds to the first sentence of proposed § 3400.0–5(rr)(6)(ii)(A), but without the proposed 3-month limit and the restriction to reasons beyond the reasonable control of the operator/lessee. The time limit for temporary interruptions in coal severance is prescribed in final § 3481.4–4 (discussed below).

BLM decided not to restrict temporary interruptions in coal severance to circumstances beyond the reasonable control of the lessee/operator. BLM believes that proposed § 3400.0–5(rr)(6)(ii)(A) was confusing in that it included in the examples of circumstances beyond the lessee/operator's control things that could be within the control of the lessee/operator. For example, equipment movement, overburden removal, and vacations would all appear to be, generally, within a lessee/operator's control.

To remedy the confusion, the final rule allows temporary interruptions in coal severance for any reason, up to the 1-year limit. See final § 3481.4–4. As discussed below, BLM believes that limiting the aggregate duration of interruptions is a much clearer and more effective way to regulate than limiting the types or causes of interruptions. If adopted, the proposal might have resulted in disagreements over whether or not an interruption was caused by a factor beyond an operator's control. Such disagreements are difficult to resolve and rarely increase understanding of, or compliance with, a regulation.

Because the term "producing" in section 2(a)(2)(A) of MLA, as amended, (30 U.S.C. 201(a)(2)(A)) is not defined in the statute, BLM has the authority under MLA (30 U.S.C. 189), the MLA for Acquired Lands (30 U.S.C. 359), and FLPMA (43 U.S.C. 1733 and 1740) to adopt a provision defining the term, provided we establish a reasonable connection between the provision and the purposes of the statutes. In this case, the final rule fosters maximum economic recovery of Federal coal reserves and facilitates development of coal reserves in an efficient, economical, and orderly manner by giving operators the flexibility to temporarily interrupt coal severance as necessary due to the unique and dynamic circumstances of each coal mining operation. In addition, the final rule limits abuse through the aggregate time limit. See the preamble discussion of final § 3481.4–4 below. Readers should note that some of the circumstances beyond a lessee/operator's control correspond to the "casualties not attributable to the lessee" set forth in section 7(b) of MLA (30 U.S.C. 207(b)). As discussed above, to the extent that an operation is forced to temporarily interrupt coal severance due to casualties not attributable to the lessee, BLM has additional authority under section 7(b) of MLA to consider the interruption a non-disqualifying event under section 2(a)(2)(A)'s producing requirement.

Section 3481.4–2 What are some examples of circumstances that qualify for a temporary interruption of coal severance? Final § 3481.4–2 provides some examples of circumstances that qualify for an interruption in coal severance, including movement, failure, or repair of major equipment, such as draglines or longwalls; overburden removal; adverse weather; employee absences; inability to sever coal due to orders issued by governmental authorities for cessation or relocation of the coal severance operations; and inability to sell or distribute coal severed from the lease or LMU out of or away from the lease or LMU. This section corresponds to proposed §§ 3400.0–5(rr)(6) (ii) and (iii). The final rule differs from the proposal in that we added "adverse weather" to the list of qualifying circumstances based on the fact that coal operations sometimes have to temporarily interrupt operations in the winter. We also substituted the term "employee absences" in the final rule for "vacations and holidays" in the proposal in the belief that a more inclusive term is preferable. For example, "employee absences" takes into account situations where employee illness is a factor.

In response to BLM's request in the proposed rule, several commenters suggested additional circumstances in which an interruption in coal severance could be allowed. These additional circumstances included fires, explosions, storms, floods, boycotts, court orders, damage to support facilities or systems, interruptions in coal transportation, strikes, material shortages, and interruptions in delivery of coal initiated by the coal customer. Several comments stated that any attempt to exhaustively list all potential exceptions to "producing" is misplaced. One comment suggested that the rule appeared to rely on "events" while there might be "conditions" that could be the basis of an interruption to operations.

BLM agrees that a list of potential exceptions to "producing" can never capture all possible qualifying circumstances. Rather than attempting to establish an exhaustive list of events or conditions that justify a temporary interruption, BLM has decided to adopt in principle the proposed approach by limiting the duration of interruptions. Limiting the duration of interruptions in coal severance is a reliable means that eliminates the complexities of interpretation, is not excessively burdensome, and captures all possible circumstances. Administratively, BLM believes it to be more efficient to regulate the duration of the interruption in coal severance rather than listing all the possible combinations of qualifying criteria. Thus, the final rule simply lists several examples of qualifying circumstances, all of which are subject to the limit established by final § 3481.4–4, discussed below, except for temporary interruptions of less than 14-day duration and section 7(b) suspensions.

Several comments on proposed § 3400.0–5(rr)(6)(ii)(A), which would have included "dragline or other equipment movement," requested that BLM also include examples of underground mining equipment and methods. BLM believes that it would be cumbersome to provide examples applicable to every mining method and all varieties of mining equipment. However, BLM has modified the list of example methods and equipment in corresponding final § 3481.4–2(a) to include examples of both surface (draglines) and underground (longwall) mining equipment. Thus, the item in the proposed rule that read "dragline or other equipment movement, breakdown, or repair" is changed to "movement, failure, or repair of major equipment, such as draglines or longwalls * * *." The term "major equipment" includes draglines, longwalls, haulage trucks, and conveyor belts, the failure of which

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would directly impede coal severance. Dozers, graders, and utility trucks are not examples of major equipment.

Many comments expressed opposition to proposed § 3400.0–5(rr)(6)(ii)(B), which would have added a provision to exclude a lack or loss of market and a lack or loss of a contract as qualifying circumstances for an interruption of coal severance. BLM included this provision in the proposal to address abuses such as maintaining a lease in non-producing status while waiting for a market to develop or for a contract to be negotiated. The comments asserted that the proposed rule would force a lessee/operator to capitulate to a buyer's demands, which could result in the potential bypass of Federal coal reserves. For simplicity and streamlining and based on the commenter's concerns, BLM has decided not to include the proposed provision in this final rule. BLM believes the limit on the duration of interruptions will curb any abuse. BLM continues to believe, however, that loss of a coal contract or market does not constitute a "casualty" that would qualify for a suspension under section 7(b) of MLA, as amended. Thus, an operator who stops severing coal because of the loss of a contract or market can qualify as "producing" subject to the 1 year in 5 aggregate maximum for temporary interruptions, but would not be entitled to a section 7(b) suspension for loss of a coal contract or market.

Section 3400.0–5(rr)(6)(iii) of the proposal would have included orders by governmental agencies for suspension of coal severance for reasons that are beyond the control and not the fault of the lessee/operator as an example of a qualifying circumstance for an interruption in coal severance. One comment indicated that the proposed rule had a narrow definition and could tend to defeat the purpose for which it was intended. For example, orders of government authorities to relocate coal severance can have as much impact on a lease or LMU as orders for suspension of coal severance. In response to this comment, BLM has added to final § 3481.4–2(b) a provision for cessation or relocation of coal severance operations due to governmental order. We substitute the term "cessation" in the final rule for the proposed "suspension" to avoid any possible confusion with suspensions authorized under 43 CFR 3483.3.

One commenter objected to language in proposed § 3400.0–5(rr)(6)(iii) that would have allowed a non-disqualifying suspension ordered by governmental authorities for reasons beyond the control of the lessee/operator and *not the fault of the [lessee /operator]* (Emphasis added). The commenter asserted that the proposal would invite needless disputes over what was, or was not, the fault of the lessee/operator. BLM agrees and has deleted the reference to reasons beyond the reasonable control and not the fault of the operator/lessee from final § 3481.4–2(b).

Section 3481.4–3 Does a temporary interruption in coal severance affect the diligence requirements applicable to my lease or LMU? Final § 3481.4–3 specifies that an interruption in coal severance does not change the diligence requirements of 43 CFR subpart 3483 applicable to a lease or LMU. There was confusion among the commenters concerning the distinction between an interruption in coal severance under the proposed definition of "producing" and the lease suspension provisions located at 43 CFR 3483.3. BLM is including this section in the final rule to clarify that a qualifying interruption in coal severance, which maintains eligibility to receive future leases, does not affect the diligence requirements of a lease or LMU. Such interruptions do not constitute suspensions under 43 CFR 3483.3, which implements sections 7(b) and 39 of MLA (30 U.S.C. 207(b) and 209). A lessee who seeks such a suspension or extension of lease terms must apply to BLM for approval.

Section 3481.4–4 What is the aggregate amount of time I can temporarily interrupt coal severance and have BLM consider my lease or LMU producing? Based on commenter opposition to the proposed 3-month limit on temporary interruptions, BLM has modified the final rule to provide substantially more flexibility to operators, but without being completely open-ended, as was the previous rule. BLM believes that the approach selected in the final rule appropriately balances the legitimate operational needs of lessees with the goal of curbing abuse of the exception from the requirement to sever coal. Thus, final § 3481.4–4 adopts a provision that limits the aggregate of all interruptions in coal severance to 1 year in the 5-consecutive-year period immediately preceding the date of BLM's determination of lessee qualifications under 43 CFR 3472.1–2, except that BLM will not count any interruption that is 14 days or less in duration or any suspension approved by BLM pursuant to section 7(b) of MLA (30 U.S.C. 207(b)). In other words, if BLM were looking, on June 30, 1997, at the eligibility of a particular lease holder who is reliant upon the temporary interruption provision, we would look at the aggregate of interruptions between July 1, 1992, and June 30, 1997. If the aggregate of interruptions during that period exceeded 365 days, not counting interruptions of 14 days or less or approved section 7(b) suspensions, the lease holder would not be qualified to obtain additional leases. With each passing day, the 5-year period that BLM looks at rolls forward.

In the proposed rule, BLM stated that section 7(b) provides an exception from the diligent development requirements (59 FR 66876). However, the last sentence of section 7(b) makes it clear that the section 7(b) exceptions do not apply to the requirement to produce commercial quantities at the end of ten years in section 7(a). Thus the rule implementing the section 7(b) exceptions provides an opportunity to seek a suspension of the continuous operation requirement, but does not mention a suspension of the diligent development requirements. See 43 CFR § 3483.3(a). Therefore when the proposed rule preamble suggested that an operator/lessee could seek a force majeure exception under section 7(b) for temporary suspensions of greater than three months in accordance with 43 CFR § 3483.3, that statement was accurate under the previous regulations only for operations which have achieved diligent development and are in a continuous operation mode, and for circumstances which would qualify under section 7(b).

Although the section 7(b) exception from producing requirement in section 2(a)(2)(A) applies to leases which have not achieved diligent development, no existing regulatory provision implements the statutory provision. Thus, we are adopting in the final rule a conforming provision at § 3481.4–4(b)(3) to recognize that MLA, as amended, provides a force majeure exception to the section 2(a)(2)(A) producing requirement (30 U.S.C. 201(a)(2)(A)) for operations that are subject to diligent development. In circumstances that meet the force majeure exceptions described in section 7(b) of MLA, BLM will approve suspensions for operations subject to diligent development for the purpose of compliance with section 2(a)(2)(A).

Most of the commenters were concerned about the proposed 3-month limitation for temporary suspensions and the circumstances under which a temporary suspension could be authorized. To adequately address the volume and detail of the comments received, the comments applicable to these topics are discussed individually below.

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Many comments took issue with the 3-month limit on the duration of a temporary suspension in proposed § 3400.0–5(rr)(6)(ii)(A). Most of these comments considered a 3-month period to be too brief. Several comments noted that the duration of most qualifying conditions could be longer than 3 months, for example, the time to repair a damaged steam turbine or the time needed to negotiate alternative sales agreements. Several comments said they thought the 3-month duration was arbitrary and would serve little useful purpose, suggesting instead to retain the former provision which did not limit the duration. Another comment stated that the word "temporary" speaks for itself, thereby eliminating the need for a specified duration. One comment was concerned about how frequently 3-month temporary suspensions could be granted and if such suspensions could be granted for consecutive 3-month periods. One comment suggested as an alternative that a temporary suspension could continue until the end of the next continued operation year.

BLM believes the duration of an interruption in coal severance must be explicitly limited to preclude abuse. BLM recognizes that in the normal course of business, a lessee/operator may be confronted with circumstances in which prudent business practice demands a cessation of coal production for an abbreviated period. It is in the best interest of both the lessee/operator and BLM to work together to ensure prudent resource management is maintained through periods when coal is not produced. However, BLM's experience has shown, as documented by the GAO report discussed above, that allowance of an interruption in coal severance for an unspecified duration will not necessarily achieve the intent of FCLAA. BLM believes that the duration of any interruption in coal severance must be limited to reduce opportunities for abuse and speculation.

The comment that suggested allowing extension of an interruption in coal severance until the end of the next continued operation year assumes that the lease or LMU is subject to continued operation. As discussed earlier in this preamble in connection with § 3472.1–2, the holder of a lease subject to continued operation will not be disqualified from obtaining additional leases if the lease is producing or in compliance with the continued operation requirements. Thus, a standard for temporary interruptions based on continued operation year would not be applicable to the type of situation identified in the GAO report, that is, where the holder of a non-producing lease subject to diligent development obtains additional leases. Extending the duration of an interruption in coal severance must also be considered in light of the explicit production requirements of section 2(a)(2)(A) of MLA and the goals of FCLAA to deter speculation. However, in response to the comments, BLM considers it reasonable to allow the aggregate length of temporary interruptions in coal severance to exceed 3 months. Thus, final § 3481.4–4 adopts a maximum aggregate for temporary interruptions in coal severance of not more than 1 year in the 5-consecutive-year period immediately preceding the date of BLM's determination of lessee qualifications under 43 CFR 3472.1–2.

One comment on the proposed rule expressed concern that the proposed rule did not explicitly establish if the proposed 3-month limit would be applied for each qualified event, or only once within the lease term, or if a lessee/operator could receive consecutive 3-month interruptions for an indefinite period. BLM agrees that the proposed rule inadequately defined when and how the 3-month limit would be applied. This concern is addressed in the final rule at § 3481.4–4(a) which provides that the lessee/operator may interrupt coal severance for up to 1 year, in aggregate, during the immediately preceding 5-consecutive-year period. BLM believes that allowing an aggregate of 1 year of interrupted coal severance in the immediately preceding 5-consecutive-year period will provide a needed balance between operating flexibility for the lessee/operator as well as enforcement of FCLAA's anti-speculative intent. A quantifiable standard for temporary interruptions in coal severance eliminates the need for an exhaustive listing of qualified events. BLM believes that simple and predictable criteria are the only way to provide consistent and uniform outcomes. The workload associated with tracking the aggregate days of interrupted coal severance is negligible when compared to the workload that would be associated with determining if each temporary interruption in coal severance is a qualified event or not. Additional discussion of qualified events is located under the portion of the preamble associated with final § 3481.4–2.

Final § 3481.4–4(b)(1) provides that BLM will not count any interruption in coal severance that is 14 days or less in duration. BLM added this provision to the final rule for the convenience of the regulated community and ease of administration. BLM is primarily concerned with interruptions that evince speculative intent, not in short-term stoppages of a few days duration. Also, it would be onerous for BLM and lessee/operators to track each time production ceased for a day or two. It would be difficult for BLM to maintain records of this information and to enforce this requirement. BLM believes not regulating interruptions of 14 days or less achieves a reasonable balance between discouraging speculation and avoiding an administrative burden. Also, BLM expects that this provision will allow lessee/operators to take into account vacations and holidays. The previous rule and the proposed rule both addressed vacations and holidays by including them in the list of circumstances allowing temporary suspension of production.

Final § 3481.4–4(b)(2) provides that BLM will not count any suspension granted under 43 CFR 3483.3 toward the aggregate of temporary interruptions in coal severance. The referenced provision is the one that implements the section 7(b) of MLA exception from continued operation for strikes, the elements, and casualties not attributable to the lessee. Final § 3481.4–4(b)(3) provides that BLM will not count toward the aggregate of temporary interruptions any BLM-approved suspension of the 43 CFR 3472.1–2(e)(1) requirement for reasons of strikes, the elements, or casualties not attributable to the lessee before diligent development is achieved. This provision implements the section 7(b) of MLA exception from diligent development. A suspension granted under this provision is for the limited purpose of implementing section 2(a)(2)(A) and does not affect the section 7(a) requirement to produce commercial quantities in 10 years. BLM added these provisions to the final rule in recognition of the fact that the so-called force majeure exceptions contained in section 7(b) are open ended and cannot be limited by BLM's regulatory provisions applicable to temporary interruptions in coal severance.

Subpart 3483—Diligence Requirements. *Section 3483.3 Suspension of continued operation or operations and production.* BLM's previous rules allowed extension of the deadline for submission of a resource recovery and protection plan (R2P2) beyond 3 years. In *Natural Resources Defense Council* v. *Jamison,* 815 F. Supp. 454 (D.D.C. 1992), the court held that the requirement to submit an R2P2 within 3 years is an unambiguous deadline that cannot be extended. Consequently, BLM proposed to eliminate this provision. BLM also

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proposed some minor edits for clarity of expression. BLM is adopting the provisions as proposed.

Several comments supported removal of the provision for extending the time for submitting an R2P2 beyond 3 years. One comment suggested an editorial change in the last sentence of proposed § 3483.3(a). The comment suggested changing the word "and" to "or" so that the last sentence would read, "The authorized officer, if he or she determines an application to be in the public interest, may approve the application *or* terminate suspensions that have been or may be granted." (Emphasis added.) This comment is adopted in the final rule.

Subpart 3487—Logical Mining Unit. *Section 3487.1 Logical mining units.* Paragraph (e) of this section contains the stipulations required for the approval of a proposed LMU. Paragraph (e)(6) is the stipulation that sets the beginning of the 40-year period in which the coal reserves of the LMU must be mined. This provision is derived from section 2(d)(2) of MLA, which provides in pertinent part that "the reserves of the entire unit will be mined within *a period established by the Secretary* which shall not be more than forty years" (30 U.S.C. 202a(2)). (Emphasis added.) Because MLA does not specify when the 40-year period starts, BLM has the discretion to establish a reasonable starting date(s). BLM's previous regulations provided that the 40-year period begins on the date that coal is first produced from the LMU, after LMU approval, as determined during the first royalty reporting period after such date. See 43 CFR 3487.1(e)(6) (1995). The proposed rule would have begun the 40-year period when the R2P2 for the LMU is approved. BLM explained that this change would encourage diligent development of Federal coal reserves because the lessee/operator is "free to start" mining operations after LMU approval (59 FR 66878, Dec. 28, 1994).

As discussed in the preamble of the proposed rule, the MLA states that the mine-out period that the Secretary establishes must be part of the approved "mining plan" and cannot exceed 40 years. See 30 U.S.C. 202a(2). BLM interprets "mining plan" to mean the "operation and reclamation plan" required under 30 U.S.C. 207(c), which the implementing regulations at 43 CFR Part 3482 call the resource recovery and protection plan, or "R2P2." This plan, which the lessee must submit within 3 years after a lease or LMU is approved, provides a detailed description of how the lessee/operator will mine the coal and reclaim the land. Because this plan is customarily approved concurrently with, or subsequent to, the mining permit issued under the Surface Mining Control and Reclamation Act (SMCRA), the lessee/operator can proceed with development operations after the date of R2P2 and permit approval. See 30 CFR 746.13. Although MLA does not state expressly when the mine-out period should start, BLM believes that in situations where R2P2 approval for the LMU precedes coal production on the LMU, it best serves the purposes of MLA to begin the 40-year LMU mine-out period on the date of R2P2 approval to encourage diligent development of Federal coal reserves. Otherwise, in the absence of such a provision, the lessee/operator could delay the beginning of the 40-year LMU mine-out period.

BLM is adopting in the final rule a provision that sets the beginning of the 40-year period at the effective date of the LMU, if any portion of the LMU is then producing. If not, then the beginning date is either the date of approval of the R2P2 for the LMU or, if coal production begins before R2P2 approval, the date coal production begins after LMU approval. This approach takes into account the three coal-production scenarios that are possible at the time of LMU formation and effectively continues the previous rule in situations where coal production precedes approval of the R2P2. First, if coal production is occurring within the area covered by the LMU when the LMU is formed, it is reasonable to begin the 40-year mine-out period on the date of LMU approval. Second, if coal is not being produced anywhere within the LMU at the time it is approved, the 40-year mine-out period begins when the R2P2 for the LMU is approved. In the third scenario, it is possible that the LMU could begin to produce coal before the R2P2 for the LMU is approved. For example, production could occur from a lease in the LMU that has an approved lease-specific R2P2 or from non-Federal resources within the LMU under a separate SMCRA permit. The final rule takes into account this scenario by providing that the 40-year mine-out period begins on the date coal production begins after LMU approval. Final § 3487.1(e)(6) does not affect the beginning date of the 40-year mine-out period for LMUs approved before the effective date of this final rule.

Several comments said the 40-year mine-out provision for an LMU should be flexible to allow, upon reasonable justification, mine-out periods longer than 40 years. BLM does not agree. Amended section 2(d)(2) of MLA explicitly limits the period for mining all recoverable coal reserves in an LMU to not more than 40 years. See 30 U.S.C. 202a(2). BLM does not have the authority to change statutory provisions through notice and comment rulemaking.

Many comments opposed beginning the 40-year mine-out period for an LMU upon the approval date of the R2P2 for the LMU. Several comments asserted it is not correct to assume that a lessee is "free to start" mining operation after the R2P2 is approved just because the R2P2 is approved in connection with the SMCRA permit. Other commenters opposed the proposal because the R2P2 is a proposed action for the leasehold rather than being explicitly tied to the actual commencement of mining operations which could be several years later.

BLM does not agree with these comments. Under existing rules, which define the mining plan as the R2P2, approval of the mining plan by the Assistant Secretary constitutes approval under section 7(c) of MLA for a lessee to enter and disturb the leasehold (30 U.S.C. 207(c)). The SMCRA permit is an authorization to enter the permit area and commence mining operations (30 U.S.C. 1256). BLM recognizes that pre-production activities consume a certain amount of time. However, given the amount of time and effort needed to obtain a permit, its limited term, and the fact that it will self-terminate if no activity occurs within 3 years of issuance (30 CFR 773.19(e)), there are a number of incentives to expedite pre-production activities and begin production once a permit is issued. From BLM's perspective, the portion of the 40-year mine-out period that will elapse during the pre-production phase is small in relation to the total length of the 40-year period. BLM believes that this provision is fully in accord with the statutory requirement to encourage diligent development (30 U.S.C. 202a(2)).

Several other comments said that absent explicit evidence to the contrary, beginning the LMU recovery period based on the R2P2 approval date is contrary to the statutory requirement of FCLAA that an LMU must promote the efficient, economical, and orderly development of the resource. BLM does not agree. The law provides that, "[an LMU] is an area of land in which the coal resources *can be developed* in an efficient, economical, and orderly manner as a unit with due regard to conservation of coal reserves and other resources." (Emphasis added.) See 30 U.S.C. 202(a)(1). The 1976 amendments to MLA (FCLAA) were intended to address the problem of Federal leases being held for speculative purposes

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without any production occurring. BLM believes that starting the 40-year mine-out period upon R2P2 approval, which can occur several years after LMU approval, will spur efficient, economical, and orderly development without allowing undesirable speculation. Without such a provision, lessee/operators can continue to delay the beginning of production without penalty as long as the diligent development and section 2(a)(2)(A) requirements are satisfied. Beginning the 40-year period upon R2P2 approval will provide an appropriate incentive to commence production.

One comment expressed concern about a situation where an existing mining operation that has an approved lease-specific R2P2 is included in an LMU. The commenter inquired whether the 40-year mine-out period would begin when the lease-specific R2P2 was approved or when the LMU R2P2 was approved, even though the LMU R2P2 is not required to be submitted until up to 3 years after the LMU approval. Under the proposed rule, the 40-year mine-out period would have begun upon approval of the LMU R2P2. The R2P2 does not have to be submitted for 3 years and may not be approved for an additional time period. To extend the mine-out period by that amount of time for an LMU that is already producing would not contribute to the goal of encouraging diligent development. For the above reason and to ensure compliance with 30 U.S.C. 202a(2), the final rule provides that if any portion of the LMU is producing when the LMU is approved, the 40-year mine-out period begins on the effective date of the LMU.

The final rule also addresses the situation where a lease that is included in an LMU and has an approved lease-specific R2P2 begins production after LMU approval, but prior to LMU R2P2 approval. In this case, the final rule provides that the 40-year mine-out period begins on the date coal is first produced from an approved LMU in advance of LMU R2P2 approval.

Several comments expressed concern that the proposed rule did not address whether the change in the beginning date for the LMU 40-year mine-out period would be applied to LMUs that have already been approved. In the December 28, 1994, proposed rule (59 FR 66878), BLM indicated that the proposed rule would apply to all LMU applications that were under review on December 28, 1994, and all LMU applications received after December 28, 1994. However, since the final rule BLM is adopting today differs from the proposal, BLM has decided that the rules adopted today should apply prospectively. That is, any decisions on pending LMU applications that BLM makes after the effective date of these rules will be based on the rules adopted today regardless of when the LMU application was submitted. Any decisions BLM has made or makes prior to the effective date of the rules adopted today will be based on the rules in effect on the date the decision is made. Thus, this final rule does not affect the beginning date of the 40-year mine-out period for LMUs approved before the effective date of this rule.

Several comments asserted that changing the beginning date of the LMU 40-year mine-out period unduly constrains and restricts the flexibility of the LMU lessee/operator. BLM does not agree with this characterization of the rule. Section 2(d)(2) of MLA, as amended, requires the Secretary to establish the 40-year mine-out period (30 U.S.C. 202a(2)). This final rule establishes the beginning of the 40-year period and provides a degree of flexibility by accounting for the various scenarios under which coal production may occur in an LMU. This provision is in contrast to the former regulation which tied the beginning to initiation of coal production, essentially allowing the lessee/operator total control over setting the beginning point.

Section 3487.1(f) Criteria for approving the establishment of an LMU. BLM's previous regulations provided that, "The authorized officer shall, except for good cause stated in a decision disapproving the application, approve an LMU if it meets the following criteria * * *." See 43 CFR 3487.1(f) (1995). The proposed rule would have changed the obligatory "shall" to the permissive "may" while retaining the requirement for putting the decision on the LMU application in writing. See proposed § 3487.1 (f) and (g). As discussed below, BLM is adopting the word "may" and the requirement for a written decision in final §§ 3487.1 (f) and (g) respectively.

There were many comments that opposed changing the criteria for approving an LMU from "The authorized officer shall, except for good cause stated in a decision disapproving the application, approve * * *" in the previous rule to "The authorized officer may approve * * *." The comments generally perceived the change as allowing the authorized officer (BLM) or special interest groups the opportunity to delay approval of an LMU for any reason. One comment said that an entity that is willing and able to absorb the significant expense necessary to initiate a coal mining operation to develop Federal coal resources should be granted the presumption that BLM would approve an LMU application unless good cause is documented for not approving the application. Several commenters were concerned that the rule would be prone to abuse in that an LMU could be denied for any arbitrary reason however unjustified. One comment concluded that the MLA does not support this rule, and the applicant should not bear the burden of showing that a proposed LMU complies with the statutory requirements. One comment said, "the focus of approval determinations has always been upon the ability of the applicant to meet the criteria specified within the regulations, and this has constituted demonstration of the lack of a good cause to disapprove the application."

BLM believes that the final rule is fully consistent with the statute. Section 2(d) of FCLAA (30 U.S.C. 202a(1)) states that, "The Secretary, upon determining that maximum economic recovery of the coal deposit or deposits is served thereby, *may* approve the consolidation of coal leases into a logical mining unit." (Emphasis added.) Use of the word "may" gives the Secretary broad discretion to determine whether the public interest would be served by approval of an LMU. The legislative history of FCLAA shows no Congressional intent to create a presumption in favor of approving an LMU. See 122 Cong. Rec. 507–8 (Jan. 21, 1976). Thus, MLA does not require that the Secretary approve an LMU.

BLM believes that the concern about abuse of the rule is misplaced. Final § 3487.1(f)(2) sets forth factors that BLM will consider in determining whether a proposed LMU meets the statutory requirements. Any potential for abuse is checked by the requirement in final § 3487.1(g) for BLM to make a written statement of the reasons for its decision concerning an LMU application. As with any BLM decision, it cannot be arbitrary. In addition, aggrieved persons may seek administrative review from the Interior Board of Land Appeals. Thus, the rule provides an appropriate balancing of BLM's and an applicant's interests. The applicant's responsibility to provide sufficient justification that the LMU application conforms to the requirements of MLA and applicable regulation is balanced by BLM's obligation to state and explain, in writing, the reasons for the decision on the LMU application.

Section 3487.1(f)(2). BLM's previous rules provided that an LMU would be approved if mining operations on the LMU will achieve maximum economic recovery of Federal recoverable coal reserves within the LMU. See 43 CFR

3487.1(f)(2) (1995). Paragraph (f)(2) also provided that a single operation may include a series of excavations. Proposed § 3487.1(f)(2) (i)–(vii) would have listed seven specific factors BLM would consider in determining if an LMU application meets the statutory requirements: (1) the amount of coal reserves recoverable from the LMU, compared with the amount recoverable if each lease were developed individually; (2) the mining sequence; (3) the potential for independent development of each lease proposed to be included in the LMU; (4) the advantages of developing and operating the LMU as a unit; (5) the potential for inclusion of the leases in question into another LMU; (6) the availability of transportation and access facilities; and (7) other factors that the authorized officer finds relevant to achievement of maximum economic recovery in an efficient, economical, and orderly manner.

In the final rule, we are adopting the seven criteria, with minor editorial changes, in a slightly revised form that indicates the relationship of the criteria to the statutory requirements. Thus, the final rule provides that in determining whether the proposed LMU will meet the requirement to achieve maximum economic recovery of Federal coal reserves, BLM, as appropriate, will consider the amount of coal reserves recoverable from the proposed LMU compared to the amount recoverable if each lease were developed individually and any other factors BLM finds relevant to this requirement.

In determining whether the proposed LMU meets the requirement to facilitate development of coal reserves in an efficient, economical, and orderly manner, BLM, as appropriate, will consider the potential for independent development of each lease proposed to be included in the LMU, the potential for inclusion of the leases in question in another LMU, the availability and utilization of transportation and access facilities for development of the LMU as a whole compared to development of each lease separately, the mining sequence for the LMU as a whole compared to development of each lease separately, and any other factors BLM finds relevant to this requirement.

Finally, in determining whether the proposed LMU meets the requirement to provide due regard to conservation of coal reserves and other resources, BLM, as appropriate, will consider the effects of developing and operating the LMU as a unit and any other factors BLM finds relevant to this requirement. BLM believes that by explicitly linking the factors we will consider with the statutory requirements each LMU must meet, the regulated community will have a better understanding of what an LMU application must demonstrate.

One of the factors that BLM will consider in determining whether a proposed LMU meets the requirement to provide due regard to conservation of coal reserves and other resources is the *effects* of developing and operating the LMU as a unit. See final § 3487.1(f)(2)(iii)(A). This language is a change from proposed § 3487.1(f)(2)(iv), which would have given consideration to the *advantages* of developing and operating the LMU as a unit. (Emphasis added.) BLM made this change due to a concern that considering only the advantages of developing and operating the LMU as a unit would unduly, and perhaps unwisely, narrow the scope of review of the LMU application. BLM believes that it is appropriate to consider both the advantages and disadvantages of developing and operating the LMU as a unit, as well as any associated impacts.

One commenter supported establishment of specific criteria for approval of an LMU application, but was concerned that the proposed LMU application approval criteria were confined to geologic and engineering considerations. The commenter favored criteria that would relate to the statutory requirement that the LMU should provide "due regard to the conservation of coal reserves and other resources," particularly water resources. BLM does not necessarily agree that the proposed criteria were confined to geologic and engineering considerations. However, final § 3487.1(f)(2)(iii) clarifies BLM's position that we will consider the conservation of coal reserves and other resources. In addition, the substitution of "effects" for "advantages" in final § 3487.1(f)(2)(iii)(A), as discussed above, addresses the commenter's concern. Further, in response to this comment, the final rule organizes the factors BLM will consider before approving a proposed LMU according to the statutory criteria the LMU must meet.

Some comments asserted that the LMU approval criteria should be confined to the statutory criteria. Several comments were concerned that the proposed criteria do not appear to be related to, nor serve implementation of, the statutory criteria. One comment said BLM failed to adequately explain how the proposed approval criteria related to the statutory criteria. In response to these comments, BLM changed the organization of the final rule to indicate the relationship between the statutory criteria and the factors used in determining that proposed LMUs will meet them. The final rule groups the factors according to the applicable statutory criteria. BLM has not changed the statutory criteria that each LMU must meet. We have merely identified factors that we will use in determining whether LMU applications meet the criteria. For example, in determining whether a proposed LMU will facilitate efficient, economical, and orderly development of the coal reserves, it is entirely appropriate to consider the potential for independent development of each lease proposed for inclusion in the LMU. If a lease is not likely to be mined unless included in the proposed LMU, that is, the lease will be bypassed, then it would make sense in this case to include it in the proposed LMU.

Several commenters took issue with the proposed additional criteria for approval of an LMU application. One commenter said BLM lacked good cause to change the LMU application criteria. Other comments said the proposed criteria were unwarranted and of little use for approval of an LMU application. As discussed earlier in this preamble, BLM believes that there is a need to establish guidance for approving the establishment of LMUs. This is one of the specific recommendations of the GAO report. The seven factors provide guidance to the regulated community for preparing LMU applications and to BLM officials for analyzing them. This guidance will help to ensure that LMUs are only approved after demonstrating they will meet the statutory criteria and will help to ensure that LMUs are not formed merely for the purpose of allowing the leaseholder to continue to hold the lease without any coal production, an outcome that conflicts with the anti-speculative intent of FCLAA.

Section 3487.1(f)(6). Under the proposed rule, BLM would have added a new provision to limit the circumstances under which a lease that is nearing the end of its diligent development period may be included in an LMU. Proposed § 3487.1(f)(7) would have required that a Federal coal lease that has not met its diligent development requirement prior to the end of the eighth lease year can only be included in an LMU if either a portion of the LMU is included in a SMCRA permit or a portion of the LMU is included in an administratively complete SMCRA application. This provision corresponds to final § 3487.1(f)(6), which differs from the proposal only by clarifying that a portion of the LMU must be included in a SMCRA permit or administratively complete permit application at the time the LMU application is submitted.

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Although several comments indicated support for the 8-year requirement as proposed, BLM received many comments opposed to the proposed rule. Most of the comments said the rule effectively reduced the diligence period for a lease from 10 years to 8 years. Several comments said the proposed rule would reduce the incentive to develop new mines on Federal lands. Some comments said BLM had not offered sufficient justification for this rule.

BLM does not agree with these opposing comments. The final rule does not set an absolute barrier to inclusion in an LMU for leases where 8 years of the diligent development period have elapsed. Leases in the ninth and tenth years of their diligent development periods are still eligible for inclusion in an LMU if a portion of the area to be covered by the LMU is included in a SMCRA permit or administratively complete permit application. As explained in the proposed rule preamble, under the current regulations, an LMU's 10-year diligent development period starts on the effective date of either the LMU or the most recent Federal lease, depending on the age and status of the leases to be included in the LMU. This provision gives a lessee/operator holding an older lease that is about to be terminated for failure to produce in commercial quantities an opportunity to postpone the lease termination date by applying for an LMU that combines the older lease with a more recently issued one. This situation occurred in the Rocky Butte case described in the GAO report. In this way, FCLAA's goal of preventing speculation in Federal coal reserves can be frustrated. A lease proposed to be included in an LMU that is nearing the end of its diligent development period without having produced in commercial quantities is likely to have been included in an LMU application merely for the purpose of delaying the leases's termination, and not for achieving efficient, economical, and orderly development of coal, and thus does not satisfy one of the statutory criteria for approval of an LMU.

To address this opportunity for frustration and circumvention of FCLAA's goals, BLM is adopting at final § 3487.1(f)(6) the provision limiting eligibility for inclusion in an LMU as proposed, with minor editorial changes, including a change that clarifies that the SMCRA permit must be in place or SMCRA permit application must have been submitted at the time the lessee submits the LMU application. BLM believes that the requirement to have a SMCRA permit or have applied for one is a significant indication that the LMU applicant is pursuing coal development in good faith.

One comment said this rule would impose an additional restriction on leases that are proposed to be included in a LMU in that the lease must demonstrate production in commercial quantities by the eighth diligent development year to qualify for inclusion in an LMU. BLM does not agree. The final rule does not affect the diligent development period of a Federal coal lease, which remains 10 years. The rule requires a lessee to demonstrate minimal progress toward development of the lease within the statutorily required diligence period as a condition for inclusion in an LMU after the eighth year of the lease. Significant flexibility remains for the lessee/operator in that only a portion of the LMU needs to be covered by an administratively complete SMCRA permit application or approved SMCRA permit. All leases proposed to be included in an LMU need not meet this requirement, but at least a portion of the area proposed to be included in the LMU must meet the requirement to obtain BLM's approval for the LMU. BLM believes this rule implements the anti-speculative intent of FCLAA and comports with the language of section 2(d) of MLA, as amended (30 U.S.C. 202a), which, as discussed above, affords BLM discretion in deciding whether to approve an LMU. This exercise of discretion is being codified in regulations to ensure consistent application and to inform the public of BLM policy. BLM has exercised its discretion and chosen to exclude from LMU those leases where there has not been sufficient progress to suggest a good-faith intention to timely achieve diligence. The benefits provided by formation of an LMU (for example, sheltering a lease from lease-specific diligence requirements) should only be approved upon demonstrating that the lessee is prudently working toward developing commercial quantities of coal. The rule only limits a lease's eligibility to be included in an LMU based on activity within the LMU boundary and does not affect lease-specific requirements.

One comment suggested an alternative to the proposed requirement that a portion of the LMU be covered by an approved SMCRA permit or an administratively complete SMCRA permit application. The commenter suggested that some portion of the LMU be covered by a SMCRA permit application submitted prior to expiration of the diligent development period. BLM did not accept this comment because we believe that adoption of this suggestion could create an unmanageable situation. An LMU must be approved prior to the expiration of the diligent development period because a lease will be terminated at the end of the period if it has not produced commercial quantities. Thus, a situation could be created where BLM would be faced with a decision to approve an LMU based on the expectation that a SMCRA permit application will be submitted, determined administratively complete, and approved by the regulatory authority some time in the future, but before the expiration of the diligent development period. If all these things did not occur, BLM might be faced with retroactively invalidating the LMU.

We also note that submittal of an administratively complete permit application for a portion of the LMU under consideration is not excessively burdensome. The SMCRA regulations at 30 CFR 701.5 limit the amount of information for an administratively complete application to that information necessary to initiate processing and public review. This standard is distinct from the higher standard for permit approval, which must be based on a "complete and accurate" application. See 30 CFR 773.15(c)(1).

Section 3487.1(g). As discussed above in the preamble to § 3487.1(f), BLM is adopting a provision that the authorized officer will state in writing the reasons for the decision on an LMU application.

One commenter suggested adding at the end of the sentence after the word "application," the following clause: "including how the decision meets regulatory criteria." BLM did not accept this comment and is adopting the provision as proposed. Stating the reasons for a decision is contingent upon establishing the relationship between the facts of an LMU application and the statutory and regulatory criteria. BLM believes such a requirement is implicit in the rule as written.

Section 3487.1(h)(4). Proposed § 3480.0–5(a)(21) would have included a definition for "logical mining unit recoverable coal reserves exhaustion period." In the proposed rule preamble, BLM stated that the term would better reflect the requirement in MLA that the maximum mine-out period allowed for each LMU is 40 years (59 FR 66878). However, BLM is not adopting this definition in the final rule. We believe that the phrase "40-year period in which the reserves of the entire LMU must be mined" is clearer and more descriptive. It is self-explanatory and eliminates the need for a separate definition. Moreover, it is the same

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phrase used in FCLAA. See 30 U.S.C. 202a(2). Therefore, the final rule for this section has been modified to substitute the term "40-year period in which the reserves of the entire LMU must be mined" for the term "logical mining unit recoverable coal reserves exhaustion period." The cross reference to § 3487.1(e)(6), which was proposed to be eliminated, is retained in the final rule.

III. Procedural Matters

National Environmental Policy Act

BLM has prepared an environmental assessment (EA) and has found that the final rule does not constitute a major Federal action significantly affecting the quality of the human environment under section 102(2)(C) of the National Environmental Policy Act of 1969, 42 U.S.C. 4332(2)(C). BLM has placed the EA and the Finding of No Significant Impact (FONSI) on file in the BLM Administrative Record. BLM invites the public to review these documents by contacting the individual identified under **FOR FURTHER INFORMATION CONTACT**.

Paperwork Reduction Act

This rule does not contain information collection requirements that the Office of Management and Budget must approve under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*

Regulatory Flexibility Act

Congress enacted the Regulatory Flexibility Act (RFA) of 1980, 5 U.S.C. 601 *et seq.*, to ensure that Government regulations do not unnecessarily or disproportionately burden small entities. The RFA requires a regulatory flexibility analysis if a rule would have a significant economic impact, either detrimental or beneficial, on a substantial number of small entities. BLM anticipates that this final rule will have no significant impact on small entities. Historically, due to the substantial capital investment requirements for lease acquisition and mine development, LMUs have not been within the purview of small entities. The size standard established by the Small Business Administration for small entities engaged in coal mining, including surface, underground, and anthracite operations, is 500 employees (61 FR 3280, Jan. 31, 1996). However, BLM currently has one pending LMU application from a small entity. Analysis of this LMU application indicates that the final rule will have no effect on the outcome of the review process for this proposed LMU. Therefore, BLM has determined under the RFA that this final rule would not have a significant economic impact on a substantial number of small entities.

Unfunded Mandates Reform Act

BLM has determined that this final rule will not result in any unfunded mandate to State, local, or tribal governments in the aggregate, or to the private sector, of $100 million or more in any one year.

Executive Order 12612

The final rule will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, BLM has determined that this final rule does not have sufficient federalism implications to warrant preparation of a Federalism Assessment.

Executive Order 12630 (Takings)

As discussed in the foregoing preamble, the final rule does not represent a government action that is likely to interfere significantly with constitutionally protected property rights. Therefore, the Department of the Interior has determined that the rule would not cause a taking of private property or require further discussion of takings implications under this Executive Order.

Executive Order 12866 (Regulatory Planning and Review)

According to the criteria listed in section 3(f) of Executive Order 12866, BLM has determined that the final rule is not a significant regulatory action. As such, the final rule is not subject to Office of Management and Budget review under section 6(a)(3) of the order.

Executive Order 12988 (Civil Justice Reform)

The Department of the Interior has determined that this rule meets the applicable standards provided in sections 3(a) and 3(b)(2) of Executive Order 12988.

Authors

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List of Subjects

43 CFR Part 3400

Administrative practice and procedure, Coal, Government contracts, Intergovernmental relations, Mines, Public land-mineral resources.

43 CFR Part 3470

Coal, Government contracts, Mineral royalties, Mines, Public lands-mineral resources, Reporting and recordkeeping requirements, Surety bonds.

43 CFR Part 3480

Government contracts, Intergovernmental relations, Mineral royalties, Mines, Public lands-mineral resources, Reporting and recordkeeping requirements.

Dated: August 12, 1997.

Bob Armstrong,

Assistant Secretary—Land and Minerals Management.

For the reasons set forth in the preamble, BLM is amending 43 CFR parts 3400, 3470, and 3480 as set forth below:

PART 3400—COAL MANAGEMENT: GENERAL

1. Revise the authority citation for part 3400 to read as follows:

Authority: 30 U.S.C. 189, 359, 1211, 1251, 1266, and 1273; and 43 U.S.C. 1461, 1733, and 1740.

2. Amend § 3400.0–5 by revising the introductory text and paragraph (rr)(6) to read as follows:

§ 3400.0–5 Definitions.

As used in this group:

* * * * *

(rr) * * *

(6) *Producing* means actually severing coal. A lease is also considered producing when:

(i) The operator/lessee is processing or loading severed coal, or transporting it from the point of severance to the point of sale; or

(ii) Coal severance is temporarily interrupted in accordance with §§ 3481.4–1 through 4–4 of this chapter.

PART 3470—COAL MANAGEMENT PROVISIONS AND LIMITATIONS

3. Revise the authority citation for part 3470 to read as follows:

Authority: 30 U.S.C. 189 and 359 and 43 U.S.C. 1733 and 1740.

Subpart 3472—Lease Qualification Requirements

4. Amend § 3472.1–2(e) by revising paragraphs (e)(1)(i), (e)(6)(ii)(D), and (e)(6)(ii)(E) to read as follows:

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§ 3472.1–2 Special leasing qualifications.

* * * * *

(e)(1)(i) On or after December 31, 1986, no lease shall be issued and no existing lease shall be transferred to any entity that holds and has held for 10 years any lease from which the entity is not producing coal in commercial quantities, except as authorized under the advance royalty or suspension provisions of part 3480 of this chapter, or paragraph (e) (4), (5), or (6) of this section.

* * * * *

(6)(i) * * *

(ii) * * *

(D) Producing, or currently in compliance with the continued operation requirements of part 3480 of this chapter, for leases that began their first production of coal—

(*1*) On or after August 4, 1976; and

(*2*) After becoming subject to the diligence provisions of part 3480 of this chapter;

(E) Contained in an approved logical mining unit that is:

(*1*) Producing or currently in compliance with the LMU continued operation requirements of part 3480 of this chapter; and

(*2*) In compliance with the logical mining unit stipulations of approval under § 3487.1(e) and (f) of this chapter; or

* * * * *

PART 3480—COAL EXPLORATION AND MINING OPERATIONS RULES

5. Revise the authority citation for part 3480 to read as follows:

Authority: 30 U.S.C. 189, 359, 1211, 1251, 1266, and 1273; and 43 U.S.C. 1461, 1733, and 1740.

Subpart 3481—General Provisions

6. Amend subpart 3481 by adding new §§ 3481.4 through 3481.4–4 to read as follows:

§ 3481.4 Temporary interruption in coal severance.

§ 3481.4–1 Can I temporarily interrupt coal severance and still be qualified as producing?

Yes, a temporary interruption in coal severance allows you (the lessee/operator) to halt the extraction of coal for a limited period of time without jeopardizing your qualifications under section (2)(a)(2)(A) of MLA to receive additional leases. During the period of a temporary interruption in coal severance, BLM still considers your lease or LMU to be producing so as not to preclude you from receiving a new or transferred lease.

§ 3481.4–2 What are some examples of circumstances that qualify for a temporary interruption of coal severance?

(a) Movement, failure, or repair of major equipment, such as draglines or longwalls; overburden removal; adverse weather; employee absences;

(b) Inability to sever coal due to orders issued by governmental authorities for cessation or relocation of the coal severance operations; and

(c) Inability to sell or distribute coal severed from the lease or LMU out of or away from the lease or LMU.

§ 3481.4–3 Does a temporary interruption in coal severance affect the diligence requirements applicable to my lease or LMU?

No, a temporary interruption in coal severance covered by §§ 3481.4–1 to 3481.4–4 does not change the diligence requirements of subpart 3483 applicable to your lease or LMU.

§ 3481.4–4 What is the aggregate amount of time I can temporarily interrupt coal severance and have BLM consider my lease or LMU producing?

(a) If you (the lessee/operator) want BLM to consider your lease or LMU to be producing, the aggregate of all temporary interruptions in coal severance from your lease or LMU must not exceed 1 year in the 5-consecutive-year period immediately preceding the date of BLM's determination of lessee qualifications under § 3472.1–2 of this chapter.

(b) BLM will not count toward the aggregate interruption limit described in paragraph (a) of this section:

(1) Any interruption in coal severance that is 14 days or less in duration;

(2) Any suspension granted under § 3483.3 of this part; and

(3) Any BLM-approved suspension of the requirements of § 3472.1–2(e)(1) of this part for reasons of strikes, the elements, or casualties not attributable to the operator/lessee before diligent development is achieved.

Subpart 3483—Diligence Requirements

7. Amend § 3483.3 by revising the heading and paragraphs (a) introductory text and (a)(1) to read as follows:

§ 3483.3 Suspension of continued operation or operations and production.

(a) Applications for suspensions of continued operation must be filed in triplicate in the office of the authorized officer. The authorized officer, if he or she determines an application to be in the public interest, may approve the application or terminate suspensions that have been or may be granted.

(1) The authorized officer must suspend the requirement for continued operation by the period of time he or she determines that strikes, the elements, or casualties not attributable to the operator/lessee have interrupted operations under the Federal coal lease or LMU.

* * * * *

Subpart 3487—Logical Mining Unit

8. Amend § 3487.1 by revising paragraphs (e)(6), (f) introductory text, and (f)(2); redesignating existing paragraphs (g) and (h) as (h) and (i), respectively; adding new paragraphs (f)(6) and (g); and revising newly redesignated paragraph (h)(4) to read as follows:

§ 3487.1 Logical mining units.

* * * * *

(e) * * *

(6) Beginning the 40-year period in which the reserves of the entire LMU must be mined, on one of the following dates—

(i) The effective date of the LMU, if any portion of the LMU is producing on that date;

(ii) The date of approval of the resource recovery and protection plan for the LMU if no portion of the LMU is producing on the effective date of the LMU; or

(iii) The date coal is first produced from any portion of the LMU, if the LMU begins production after the effective date of the LMU but prior to approval of the resource recovery and protection plan for the LMU.

* * * * *

(f) The authorized officer may approve an LMU if it meets the following criteria:

(1) * * *

(2) The LMU application demonstrates that mining operations on the LMU, which may consist of a series of excavations, will:

(i) Achieve maximum economic recovery of Federal recoverable coal reserves within the LMU. In determining whether the proposed LMU meets this requirement, BLM, as appropriate, will consider:

(A) The amount of coal reserves recoverable from the proposed LMU compared to the amount recoverable if each lease were developed individually; and

(B) Any other factors BLM finds relevant to this requirement;

(ii) Facilitate development of the coal reserves in an efficient, economical, and orderly manner. In determining whether the proposed LMU meets this requirement, BLM, as appropriate, will consider:

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(A) The potential for independent development of each lease proposed to be included in the LMU;

(B) The potential for inclusion of the leases in question in another LMU;

(C) The availability and utilization of transportation and access facilities for development of the LMU as a whole compared to development of each lease separately;

(D) The mining sequence for the LMU as a whole compared to development of each lease separately; and

(E) Any other factors BLM finds relevant to this requirement; and

(iii) Provide due regard to conservation of coal reserves and other resources. In determining whether the proposed LMU meets this requirement, BLM, as appropriate, will consider:

(A) The effects of developing and operating the LMU as a unit; and

(B) Any other factors BLM finds relevant to this requirement.

* * * * *

(6) A lease that has not produced commercial quantities of coal during the first 8 years of its diligent development period can be included in an LMU only if at the time the LMU application is submitted:

(i) A portion of the LMU under consideration is included in a SMCRA permit approved under 30 U.S.C. 1256; or,

(ii) A portion of the LMU under consideration is included in an administratively complete application for a SMCRA permit.

(g) The authorized officer will state in writing the reasons for the decision on an LMU application.

(h) * * *

(4) The authorized officer will not extend the 40-year period in which the reserves of the entire LMU must be mined, as specified at paragraph (e)(6) of this section, because of the enlargement of an LMU or because of the modification of a resource recovery and protection plan.

* * * * *

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