United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

IN REPLY REFER TO:

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Memorandum

To: Director, Office of Surface Mining Reclamation and Enforcement

From: Solicitor

Subject: Funding to States and Indian Tribes Under the Surface Mining Control and Reclamation Act of 1977, as Amended by the Tax Relief and Health Care Act of 2006

INTRODUCTION

On August 3, 1977, the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act) was signed into law. One of the purposes of SMCRA is to "promote the reclamation of mined areas left without adequate reclamation prior to the enactment of this Act and which continue, in their unreclaimed condition, to substantially degrade the quality of the environment, prevent or damage the beneficial use of land or water resources, or endanger the health or safety of the public." 30 U.S.C. § 1202(h). These areas are known as abandoned mine lands (AML). In order to fund the reclamation of AML sites, SMCRA mandates that a reclamation fee be assessed on current coal production. The revenues generated by this reclamation fee, and from certain other sources, are transferred into the Abandoned Mine Reclamation Fund (Fund), which is a trust fund "created on the books of Treasury," but administered by the Secretary of the Interior.[1] 30 U.S.C. § 1231(a). On December 20, 2006, the Tax Relief and Health Care Act of 2006 (2006 Amendments) reauthorized the AML program and made significant amendments to SMCRA. Pub. L. No. 109-432, 120 Stat. 2922 (2006). The Office of Surface Mining Reclamation and Enforcement (OSM) is currently developing policies and regulations to implement the 2006 Amendments. In that regard, you have asked for our opinion on three issues.

Issue 1: May OSM use grants to make the payments to States and Indian tribes required by section 411(h) of SMCRA, as amended, 30 U.S.C. § 1240a(h)?

Yes; in fact, OSM is required to use grant agreements to make the section 411(h) payments.

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[1] Even though the Fund is a special fund on Treasury books, when this memorandum refers to Treasury funds, it is referring to moneys from the general Treasury that are not otherwise appropriated.

A. Background

SMCRA "establishes a program of cooperative federalism that allows the States, within limits established by federal minimum standards, to enact and administer their own regulatory programs, structured to meet their own particular needs." *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 289 (1981). OSM is required to make certain annual payments to States and Indian tribes from the Fund so that they can administer their AML programs. 30 U.S.C. §§ 1231 and 1232. SMCRA specifies that these payments are to be made in the form of grants. 30 U.S.C. §§ 1231(f) and 1232(g). These grants are made both to "certified" States and Indian tribes and "uncertified" States and Indian tribes.[2] The amount of the grant from the Fund given to each eligible State and Indian tribe is determined by using a formula.

A brief description of SMCRA's funding formula is necessary as background to the question you have posed. First, all States and Indian tribes with eligible lands and waters are allocated "50 percent of the reclamation fees collected annually in any State or on Indian lands. . . ." 30 U.S.C. §§ 1232(g)(1) (States) and (g)(2) (Indian tribes). These moneys are referred to as "State or Tribal share" funds. Second, uncertified States and Indian tribes are authorized to receive sixty percent of the moneys remaining in the Fund after the State and Tribal share allocations are made. These moneys include "historic coal share" funds that are allocated using "a formula based on the amount of coal historically produced in the State or from the Indian lands concerned prior to August 3, 1977." 30 U.S.C. § 1232(g)(5). After all of the State or Tribal share and historic coal share allocations are calculated, the Secretary of the Interior may use the remaining moneys in the Fund directly or through grants for other designated AML purposes. 30 U.S.C. § 1232(g)(3). These moneys make up the "Secretary's share" of the Fund. A portion of the Secretary's share must be used as "minimum program make up" funds to ensure an annual grant of "not less than" a specified amount to each eligible State. 30 U.S.C. §§ 1231(d)(1), 1232(g)(3) and 1232(g)(8)(A).

Prior to the 2006 Amendments, SMCRA allocated the fees collected, albeit in varying percentages, into these four shares—State or Tribal share, historic coal share, minimum program make up share, and the Secretary's share.[3] 30 U.S.C. § 1232(g) (2005). However, the Secretary was only authorized to pay the amount of the allocations that were appropriated annually by Congress. 30 U.S.C. § 1231(d) (2005). Typically, the amounts actually appropriated by Congress were less than the amounts allocated. As a result, the Fund began to accrue an allocated but unappropriated balance. As of 2006, the unappropriated State and Tribal share balance in the Fund totaled about $1.2 billion.

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[2] States and Indian tribes become certified once they reclaim all eligible lands and waters adversely affected by coal mining practices in their State or Indian lands as described in section 403(a). 30 U.S.C. § 1240a(a). Even though SMCRA is primarily designed to reclaim AML problems caused by coal mining, in particular circumstances SMCRA allows some Fund moneys to be expended for noncoal reclamation even before a State or Indian tribe becomes certified. *See* 30 U.S.C. § 409.

[3] In addition to these allocations, another allocation of 20 percent of amount in the Fund not allocated to the State and Tribal shares was designated to go to the Secretary of Agriculture for the Rural Abandoned Mine Program. 30 U.S.C. § 1232(g)(2) (2005). The Amendments eliminated this allocation.

These allocated, but unappropriated, State and Tribal share moneys in the Fund are commonly referred to as the "prior unappropriated State or Tribal share balance."

In 2006, Congress decided to provide for the distribution of an amount equal to the "prior unappropriated balance." Accordingly, the 2006 Amendments direct the Secretary[4] to pay uncertified and certified States and Indian tribes an amount equal to the State or Indian tribe's prior unappropriated State or Tribal share balance in seven annual installments. 30 U.S.C. § 1240a(h)(1). Significantly, the moneys are to be paid from the general Treasury and not from the moneys in the Fund itself. These payments from the general Treasury are referred to as "prior balance replacement funds." The moneys that constitute the prior unappropriated State and Tribal share balances will remain in the Fund and be reallocated to the historic coal share to be distributed to uncertified States and Indian tribes in fiscal year 2023 and thereafter. 30 U.S.C. §§ 1231(f)(2)(B), 1231(f)(3)(A)(i), and 1240a(h)(4).

In addition to specifying a source other than the Fund from which to pay States and Indian tribes an amount equal to their prior unappropriated State and Tribal share balances, the 2006 Amendments separate most future Fund payments from the annual appropriations process.[5] This change prevents the accrual of another unappropriated balance of State and Tribal shares in the future. The 2006 Amendments also prohibit certified States and Indian tribes from receiving their annual State or Tribal share portion of the Fund in the future, and instead provide them with a new permanent appropriation from the general Treasury in an amount equivalent to what they would have been able to receive as their State or Tribal share.[6] 30 U.S.C. §§ 1231(f)(3)(B) and 1240a(h)(2). These funds are known as "certified in lieu" funds. For uncertified States and Indian tribes, the 2006 Amendments provide a permanent appropriation of the moneys in the Fund to pay the full amount of the annual State or Tribal share.[7]

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[4] Although SMCRA refers to the Secretary, SMCRA gives the Director of OSM the responsibility to "administer the program for the purchase and reclamation of abandoned and unreclaimed mined areas pursuant to title IV . . . ." 30 U.S.C. § 1211(c)(4). The Secretary has further delegated all authority "with respect to [SMCRA] and amendments thereto" to the Director of OSM. 216 Departmental Manual (DM) 1.1.

[5] Moneys distributed from the Secretary's share of the Fund are still subject to annual appropriations, *except* for those funds used for the minimum program make up under section 402(g)(8)(A). 30 U.S.C. § 1231(d)(1).

[6] The first year certified in lieu funds are allocated is fiscal year 2008. 30 U.S.C. § 1240a(h)(2)(A). Because collections based on coal production during the last quarter of fiscal year 2008 are not received by OSM until fiscal year 2009, certified States and Indian tribes will not receive distributions of these funds until that time. 30 U.S.C. § 1240a(h)(3)(A). Moreover, section 401(f)(3)(B) prohibits certified States and Indian tribes from receiving State or Tribal share funds. 30 U.S.C. § 1231(f)(3)(B). Thus, for Fiscal Year 2008, certified States and Tribes will receive neither State or Tribal share funds allocated in Fiscal Year 2007 nor certified in lieu payments.

[7] The 2006 Amendments also provide for increased amounts to be distributed from the historic coal share and minimum program make up funds. 30 U.S.C. §§ 1231 and 1232(g).

B. Analysis

As noted above, prior to the enactment of the 2006 Amendments, SMCRA required OSM to make payments from the Fund in the form of grants. By contrast, section 411(h) simply directs OSM to make "payments" to or "pay" States and Indian tribes out of general Treasury moneys when distributing prior balance replacement funds and certified in lieu funds.[8] 30 U.S.C. §§ 1240a(h)(1) and (h)(2). Because OSM is not specifically directed to make these payments in the form of grants, you have asked whether OSM may nonetheless do so. For the three reasons described below, I conclude that OSM must do so. While SMCRA itself does not mandate (or prohibit) a particular method for distributing section 411(h) payments, federal law makes clear that these funds must be distributed in grants via grant agreements.

"Payment" is not a defined term in SMCRA; where it is used in SMCRA other than in section 411(h), it often means or refers to grants. For example, a comparison of sections 411(h)(3)(A) and 401(d) indicates that the word "payments" includes grants. Section 411(h)(3)(A) states that "payments to States or Indian tribes under this subsection shall be made without regard to any limitation in section 401(d) *and concurrently with payments to States under that section.*" 30 U.S.C. § 1240a(h)(3)(A) (emphasis added). All payments from the Fund under section 401(d) are, and historically have been, made in grants. Thus, SCMRA explicitly uses "payment" as a generic term that includes the outlay of money through grants.[9] Moreover, there is nothing in the legislative history of the 2006 Amendments to indicate that by using the word "payments," Congress intended to change the way that OSM has been distributing funds under SMCRA for the last 30 years.

"Payment" is not a term of art that has a specific meaning. "Payment" is a broad term that simply means the "[p]erformance of an obligation, [usually] by the delivery of money" or the "money or other valuable thing so delivered in satisfaction of an obligation." BLACK'S LAW DICTIONARY 1150 (7th ed. 1999). Thus, the use of the term "payment" does not mandate a particular means of disbursing funds. In fact, a survey of relevant law indicates that it can and has been used to denote the distribution of funds as

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[8] In addition, section 402(i)(2) requires the Secretary of the Treasury to transfer funds to the Secretary of the Interior to "pay" amounts under section 411h). 30 U.S.C. § 1232(i)(2).

[9] I note that the IMCC and the NAAMLP, organizations made up of representatives from States and Indian tribes with SMCRA programs, have generally accepted this analysis. *See* Letter from John Husted, President, NAAMLP, and Gregory E. Conrad, Executive Director, IMCC, to Brent Wahlquist, Acting Director, OSM (May 21, 2007). Although the NAAMLP and the IMCC would prefer that OSM choose a different method of distribution, they have conceded that SMCRA does not specify a payment mechanism to be used to distribute section 411(h) funds. *Id.* ("[T]he new law does not directly address this matter and therefore the Secretary has the discretion to design a payment mechanism that meets the needs of the states and tribes." They have also recognized that section 411(h) payments could be "accomplished through a traditional grant process . . . .").

grants.[10] As "payment" does not have a specific meaning, OSM would have discretion to interpret it to mean "grant."

Federal law mandates that payments of the type required by section 411(h) be made in grants using a grant agreement. The Federal Grant and Cooperative Agreement Act (FGCAA) characterizes the relationship between executive agencies and recipients of government contracts or assistance and prescribes criteria by which agencies are required to select the appropriate legal instrument to reflect that relationship. 31 U.S.C. § 6301. The FGCAA states:

> An executive agency *shall* use a grant agreement as the legal instrument reflecting a relationship between the United States Government and a State, a local government, or other recipient *when*—
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> > (1) *the principal purpose of the relationship is to transfer a thing of value to the State* or local government or other recipient *to carry out a public purpose of support or stimulation authorized by a law of the United States* instead of acquiring (by purchase, lease, or barter) property or services for the direct benefit or use of the United States Government; and
> >
> > (2) *substantial involvement is not expected between the executive agency and the State*, local government, or other recipient *when carrying out the activity contemplated in the agreement.*

31 U.S.C. § 6304 (emphasis added). The FGCAA does not define "grant" *per se*, but rather defines "grant agreement" as an agreement under which all types of financial assistance are provided by the federal government, except direct payments to individuals, subsidies, loans, loan guarantees, or insurance. 31 U.S.C. § 6302(2). Such other types of assistance must be authorized specifically by statute.

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[10] Under the Coastal Impact Assistance Program (CIAP), the Minerals Management Service (MMS) uses grants to make "[p]ayments to producing States and coastal political subdivisions." 43 U.S.C. § 1356a(b); Coastal Impact Assistance Program Guidelines, 71 Fed. Reg. 57564 (Sept. 29, 2006) ("All funds shall be disbursed through a grant process."). Similarly, the Department of Labor uses grants "for payment to the New York State Workers Compensation Review Board, for the processing of claims related to the [September 11, 2001] terrorist attacks . . . ." Department of Defense and Emergency Supplemental Appropriations for Recovery from and Response to Terrorist Attacks on the U.S. Act, 2002, Pub. L. No. 107-117, Division B, Chapter 8, 115 Stat. 2230, 2312 (2002); B-303927, 2005 U.S. Comp. Gen. LEXIS 98 (June 7, 2005) ("The Department determined that it should distribute the funds to the Board by means of a grant."). While there are a limited number of statutes under which the Secretary of the Interior makes payments using direct disbursements rather than grants, such programs are rare and typically involve "revenue sharing" where Congress has not provided the federal government an oversight role regarding the State's use of the funds. *See, e.g.,* Payment in Lieu of Taxes Act (PILT), 31 U.S.C. § 6902(a); Mineral Leasing Act of 1920, 30 U.S.C. §§ 181-287; Outer Continental Shelf Lands Act, 43 U.S.C. § 1331 *et seq.* (specifically 43 U.S.C. § 1337(g)).

Section 411(h) payments clearly meet the grant criteria set forth in the FGCAA. Undoubtedly, the money paid to the States and Indian tribes constitutes a "transfer" of a "thing of value" to a State. As prescribed by SMCRA, "a law of the United States," the payments are to be used "to carry out a public purpose of support or stimulation," either coal reclamation under section 403 or "for the purposes established by the State legislature or tribal council of the Indian tribe, with priority given for addressing the impacts of mineral development." 30 U.S.C. § 1240a(h)(1)(D). Furthermore, OSM does not have "substantial involvement" with the State or Indian tribe's performance of the reclamation or other activities for which the funds are to be used.

Grant agreements are not required in situations where assistance is provided through direct payments to individuals, subsidies, loans, loan guarantees, or insurance. 31 U.S.C. § 6302(2). The section 411(h) payments to States and Indian tribes clearly do not fall within any of those categories. In addition, the Office of Management and Budget (OMB) may "exempt a transaction or program of an executive agency" from the requirements of the FGCAA. 31 U.S.C. § 6307(2). OMB has not exempted these section 411(h) payments from the grant agreement requirement of the FGCAA. As the payments required by section 411(h) fit into the two criteria set forth at 31 U.S.C. § 6304 and do not fit within any of the exceptions, the FGCAA requires that a grant agreement must be used to reflect the relationship between the Secretary and the States or Indian tribes who are receiving the payments.

Moreover, section 411(h) payments fall within the definition of a "grant" in the Intergovernmental Cooperation Act (ICA), which governs the flow of funds in the administration of grants to States. The ICA requires, among other things, that executive agencies, such as Interior, minimize the time between when grant proceeds are transferred from the U.S. Treasury and the time the State expends those funds. 31 U.S.C. § 6503(j). The ICA defines "grant" in such a manner that it would apply to section 411(h) payments. 31 U.S.C. § 6501(4). According to the ICA, a grant:

> (A) . . . *means money*, or property provided instead of money, *that is paid or provided by the United States Government under a fixed annual or total authorization, to a State*, to a local government, or to a beneficiary *under a plan or program administered by a State* or a local government *that is subject to approval by an executive agency*, if the authorization—
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> (ii) *specifies directly, or establishes by means of a formula, the amount that may be provided to the State* or local government, *or the amount to be allotted for use in each State by the State*, local government, and beneficiaries.

31 U.S.C. § 6501(4) (emphasis added).

While the ICA is not determinative of the appropriate mechanism for transferring funds under a legislatively authorized program such as SMCRA, I note that it both