

**§ 756.20 Approval of amendments to the Crow Tribe's abandoned mine land reclamation plan.**

Revisions to the following provisions of the Crow Tribe's Abandoned Mine Land Reclamation Plan, as submitted to OSM on the date specified, are approved.

9. Section 756.21 is added to read as follows:

**§ 765.21 Required amendments to the Crow Tribe's abandoned mine land reclamation plan.**

Pursuant to 30 CFR 884.15, the Crow Tribe is required to submit to OSM by the date specified either a proposed amendment or a reasonable timetable, which is consistent with the Crow Tribe's established administrative and legislative procedures, for submitting an amendment to the Crow Tribe plan.

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**30 CFR Part 906**

[SPATS No. CO-001-FOR]

**Colorado Regulatory Program**

**AGENCY:** Office of Surface Mining Reclamation and Enforcement (OSM), Interior.

**ACTION:** Final rule; approval of amendment and removal of condition of program approval.

**SUMMARY:** The Secretary of Interior is announcing the approval of an amendment to the Colorado regulatory program (hereinafter referred to as the "Colorado program") under the Surface Mining Control and Reclamation Act of 1977 (SMCRA) and the removal of the remaining condition of program approval. The Colorado revisions pertain to the recovery of costs and expenses, including attorney's fees, incurred in connection with administrative and judicial review proceedings under the Colorado program. The amendment revised the Colorado program to be consistent with SMCRA and the corresponding Federal regulations.

**EFFECTIVE DATE:** February 21, 1996.

**FOR FURTHER INFORMATION CONTACT:** James F. Fulton, Telephone: (303) 672-5524.

**SUPPLEMENTARY INFORMATION:****I. Background on the Colorado Program**

On December 15, 1980, the Secretary of the Interior conditionally approved the Colorado program. General background information on the Colorado program, including the

Secretary's findings, the disposition of comments, and the conditions of approval of the Colorado program can be found in the December 15, 1980, Federal Register (45 FR 82173). Subsequent actions concerning Colorado's program and program amendments can be found at 30 CFR 906.11, 906.15, 906.16, and 906.30.

**II. Proposed Amendment**

By letter dated November 20, 1995, Colorado submitted a proposed amendment to its program (administrative record No. CO-675) pursuant to SMCRA (30 U.S.C. 1201 *et seq.*). Colorado submitted the proposed amendment in response to the condition of program approval at 30 CFR 906.11(mm). Colorado proposed to revise 2 CCR 407-2, Rules 5.03.6 and 5.03.6(4)(e), concerning costs, expenses, and attorney's fees.

OSM announced receipt of the proposed amendment in the December 7, 1995, Federal Register (60 FR 62789), provided an opportunity for a public hearing or meeting on its substantive adequacy, and invited public comment on its adequacy (administrative record No. CO-675-2). Because no one requested a public hearing or meeting, none was held. The public comment period ended on January 8, 1996.

**III. Secretary's Findings**

As discussed below, the Secretary, in accordance with SMCRA and 30 CFR 732.15 and 732.17, finds that the proposed program amendment submitted by Colorado on November 20, 1995, is no less effective than the corresponding Federal regulations and no less stringent than SMCRA. Accordingly, the Secretary approves the proposed amendment.

**1. Rule 5.03.6, Awarding of Costs, Expenses, and Attorney Fees Incurred in Seeking an Award**

Existing Rule 5.03.6 authorizes the Colorado Mined Land Reclamation Board (Board), under certain circumstances, to assess and award costs, expenses, and attorney fees to parties of Board proceedings resulting in Board decisions and orders or to parties of administrative proceedings under the Colorado Surface Coal Mining Reclamation Act. In response to the condition of original program approval at 30 CFR 906.11(mm)(1)(ii) (finding No. 4(k), 45 FR 82173, 82194, December 15, 1980), Colorado proposed to revise Rule 5.03.6 to specify that the costs, expenses, and attorney fees to be awarded to a requesting party are those incurred by the party seeking the award.

Section 525(e) of SMCRA allows for an award of a sum equal to the aggregate amount of all costs, expenses, and attorney fees determined by the Secretary of the Interior to have been reasonably incurred by a person for or in connection with his participation in administrative proceedings. In addition, the Federal regulations at 43 CFR 4.1295(b) require that an award may include all costs and expenses, including attorneys' fees and expert witness fees, reasonably incurred in seeking the award.

Proposed Rule 5.03.6 differs from 43 CFR 4.1295(b) only in that it does not specifically address expert witness fees. However, this is not a substantive difference because the "costs and expenses" requirement of the proposed rule includes such fees. For this reason, the Secretary finds that Colorado's proposed revision to Rule 5.03.6, which requires that awarded costs, expenses, and attorney fees be restricted to those incurred by the requesting party in seeking the award, is no less stringent than section 525(e) of SMCRA, and no less effective than the corresponding requirement of the corresponding Federal regulation at 43 CFR 4.1295(b). The Secretary approves the revised rule and removes the condition of original program approval codified at 30 CFR 906.11(mm)(1)(ii).

**2. Rule 5.03.6(4), Awarding Costs, Expenses, and Attorney Fees From the Division to Administrative Proceeding Participants Other Than the Permittee**

In response to the condition of original program approval at 30 CFR 906.11(mm)(2) (finding No. 4(k), 45 FR 82173, 82194, December 15, 1980), Colorado proposed to add newly-created paragraph (e) to Rule 5.03.6(4), which would allow appropriate costs and expenses, including attorneys' fees, to be awarded from the Colorado Department of Natural Resources, Division of Minerals and Geology (Division) to participants, other than the permittee or his representative, in "administrative proceedings" under the Colorado Surface Coal Mining Reclamation Act (Act).

The corresponding Federal regulation at 43 CFR 4.1294(b) allows appropriate costs and expenses, including attorneys' fees, to be awarded from OSM to participants, other than a permittee or his representative, in "any proceeding" under SMCRA. "Any proceeding" includes both administrative and judicial proceedings.

Proposed Rule 5.03.6(4)(e) differs from 43 CFR 4.1294(b) in that it restricts the awarding of costs, expenses, and attorneys' fees to those incurred in

administrative proceedings, rather than to those incurred in both administrative and judicial proceedings. However, Colorado's statutory language at section 34-33-128(4) of the Act, concerning judicial review, allows the court, at the request of any party to a proceeding under that section, to assess such costs and expenses against any party as the court deems just and proper. Therefore, proposed Rule 5.03.6(4)(e) and section 34-33-128(4) of the Act, taken together, allow for appropriate costs and expenses, including attorneys' fees, to be awarded from the Division to participants in both administrative and judicial proceedings under the Act.

For this reason, the Secretary finds that proposed Rule 5.03.6(4)(e), when considered along with section 34-33-128(4) of the Act, is consistent with and no less effective than the Federal regulation at 43 CFR 4.1294(b). The Secretary approves the revised rule and removes the condition of original program approval codified at 30 CFR 906.11(mm)(2).

### *3. No Colorado Counterpart Rules, Awarding Costs, Expenses, and Attorney Fees From the Division to Administrative Proceeding Participants Other Than the Permittee*

On November 12, 1993 (administrative record No. CO-582), Colorado requested that OSM conduct an informal review regarding the sufficiency of Colorado's rules in addressing condition 30 CFR 906.11(mm). In a letter dated December 22, 1993 (administrative record No. CO-599), OSM notified Colorado that, upon further review and analysis, OSM determined that conditions 30 CFR 906.11(1) (i) and (iii) are invalid and not applicable to the Colorado program. For the reasons discussed below, the Secretary is now removing the conditions of original program approval codified at 30 CFR 906.11(mm)(1) (i) and (iii) that it placed on the Colorado program on December 15, 1980 (finding No. 4(k), 45 FR 82173, 82194).

a. *Awarding the costs and expenses regarding alleged discriminatory acts.* At 30 CFR 906.11(mm)(1)(i), OSM required Colorado to "submit \* \* \* fully implemented regulations containing provisions for \* \* \* [c]osts and expenses regarding discriminatory acts, pursuant to 30 CFR Part 830, as in 43 CFR 4.1294(a)(2)."

However, State programs are not required to include counterparts to the employee protection provisions of 30 CFR Part 865 (formerly Part 830) and, as such, there is no need for a State provision allowing the award of costs and expenses incurred in connection

with proceedings pursuant to these rules. Accordingly, the lack of a State counterpart provision in the Colorado permanent program to the Federal regulation at 43 CFR 4.1294 regarding employee protection is not inconsistent with the Federal regulatory program. For this reason, the Secretary removes the condition of original program approval codified at 30 CFR 906.11(mm)(1)(i).

b. *Right to appeal costs and expenses awarded in an administrative proceeding.* At 30 CFR 906.11(mm)(1)(iii), OSM required Colorado to "submit \* \* \* fully implemented regulations containing provisions for \* \* \* the administrative appeal of a decision as in 43 CFR 4.1296."

OSM has determined that condition 30 CFR 906.11(mm)(1)(iii) is inappropriate and not applicable to the Colorado permanent program because of the differences that exists between the Colorado and Federal administrative review processes. The Federal administrative review process consists of two tiers of review, which are set forth at section 525(e) of SMCRA. They consist of review by the Secretary of the Interior, and review under 43 CFR 4.1290 through 4.1296 of the Federal regulations, which consists of review of the Secretary of the Interior's decisions by either the Interior Board of Land Appeals (IBLA) or an administrative law judge. Conversely, the only level of administrative review and only administrative review body under the Colorado program, which is set forth at Rule 5.03.6, is the Colorado Mined Land Reclamation Board (Board). Thus, a State program counterpart to 43 CFR 4.1296 is unnecessary. For this reason, the Secretary removes the condition of original program approval codified at 30 CFR 906.11(mm)(1)(iii).

### *IV. Summary and Disposition of Comments*

Following are summaries of all substantive written comments on the proposed amendment that were received by OSM, and OSM's responses to them.

#### *1. Public Comments*

OSM invited public comments on the proposed amendment, but none were received.

#### *2. Federal Agency Comments*

Pursuant to 732.17(h)(11)(i), OSM solicited comments on the proposed amendment from various Federal agencies with an actual or potential interest in the Colorado program.

The U.S. Forest Service responded on December 15, 1995, that it had no comments on the proposed amendment (administrative record No. CO-675-3).

The U.S. Natural Resources Conservation Service responded on December 20 and 21, 1995, that it had no comments on the proposed amendment (administrative record No. CO-675-4).

The U.S. Army Corps of Engineers responded on December 27, 1995, that it had found the proposed amendment to be satisfactory (administrative record No. CO-675-5).

### *3. Environmental Protection Agency (EPA) Concurrence and Comments*

Pursuant to 30 CFR 732.17(h)(11)(ii), OSM is required to solicit the written concurrence of EPA with respect to those provisions of the proposed program amendment that relate to air or water quality standards promulgated under the authority of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or the Clean Air Act (42 U.S.C. 7401 *et seq.*).

None of the revisions that Colorado proposed to make in its amendment pertain to air or water quality standards. Therefore, OSM did not request EPA's concurrence.

Pursuant to 732.17(h)(11)(i), OSM solicited comments on the proposed amendment from EPA (administrative record No. CO-675-1). It did not respond to OSM's request.

### *4. State Historic Preservation Officer (SHPO) and the Advisory Council on Historic Preservation (ACHP)*

Pursuant to 30 CFR 732.17(h)(4), OSM solicited comments on the proposed amendment from the SHPO and ACHP (administrative record No. CO-675-1). Neither SHPO nor ACHP responded to OSM's request.

### *V. Secretary's Decision*

Based on the above findings, the Secretary approves Colorado's proposed amendment as submitted on November 20, 1995. Because this amendment fully satisfies the requirements of the condition of program approval at 30 CFR 906.11(mm), the Secretary is also removing this condition.

The Secretary, as discussed in: finding No. 1, approves Rule 5.03.6, concerning awarding of costs, expenses, and attorney fees incurred in seeking an award and removes the condition of program approval at 30 CFR 906.11(mm)(1)(ii); and finding No. 2, approves Rule 5.03.6(4)(e), awarding costs, expenses, and attorney fees from the Division to administrative proceeding participants other than the permittee and removes the condition of

program approval at 30 CFR 906.11(mm)(2); and finding No. 3, removes the conditions of program approval at 30 CFR 906.11(mm)(l) (i) and (iii) because there are no requirements for State counterparts to the Federal regulations concerning (1) costs and expenses regarding discriminatory acts and (2) the administrative review process.

The Secretary approves the rules as proposed by Colorado with the provision that they be fully promulgated in identical form to the rules submitted to and reviewed by OSM and the public.

The Federal regulations at 30 CFR Part 906.11 and 906.15, codifying decisions concerning the Colorado program, are being amended to implement this decision. This final rule is being made effective immediately to expedite the State program amendment process and to encourage States to bring their programs into conformity with the Federal standards without undue delay. Consistency of State and Federal standards is required by SMCRA.

## VI. Procedural Determinations

### 1. Executive Order 12866

This rule is exempted from review by the Office of Management and Budget (OMB) under Executive Order 12866 (Regulatory Planning and Review).

### 2. Executive Order 12778

The Department of the Interior has conducted the reviews required by section 2 of Executive Order 12778 (Civil Justice Reform) and has determined that this rule meets the applicable standards of subsections (a) and (b) of that section. However, these standards are not applicable to the actual language of State regulatory programs and program amendments since each such program is drafted and promulgated by a specific State, not by OSM. Under sections 503 and 505 of SMCRA (30 U.S.C. 1253 and 1255) and the Federal regulations at 30 CFR 730.11, 732.15, and 732.17(h)(10), decisions on proposed State regulatory programs and program amendments submitted by the States must be based solely on a determination of whether the submittal is consistent with SMCRA and its implementing Federal regulations and whether the other requirements of 30 CFR Parts 730, 731, and 732 have been met.

### 3. National Environmental Policy Act

No environmental impact statement is required for this rule since section 702(d) of SMCRA (30 U.S.C. 1292(d)) provides that agency decisions on proposed State regulatory program

provisions do not constitute major Federal actions within the meaning of section 102(2)(C) of the National Environmental Policy Act (42 U.S.C. 4332(2)(C)).

### 4. Paperwork Reduction Act

This rule does not contain information collection requirements that require approval by OMB under the Paperwork Reduction Act (44 U.S.C. 3507 *et seq.*).

### 5. Regulatory Flexibility Act

The Department of the Interior has determined that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The State submittal that is the subject of this rule is based upon counterpart Federal regulations for which an economic analysis was prepared and certification made that such regulations would not have a significant economic effect upon a substantial number of small entities. Accordingly, this rule will ensure that existing requirements previously promulgated by OSM will be implemented by the State. In making the determination as to whether this rule would have a significant economic impact, the Department relied upon the data and assumptions for the counterpart Federal regulations.

### List of Subjects in 30 CFR Part 906

Intergovernmental relations, Surface mining, Underground mining.

Dated: February 13, 1996.  
Bob Armstrong,  
*Assistant Secretary, Land and Minerals Management.*

For the reasons set out in the preamble, Title 30, chapter VII, subchapter T, part 906 of the Code of Federal Regulations is amended as set forth below:

## PART 906—COLORADO

1. The authority citation for part 906 continues to read as follows:

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

### § 906.11 [Removed]

2. Section 906.11 is removed.

3. Section 906.15 is amended by adding paragraph (t) to read as follows:

### § 906.15 Approval of regulatory program amendments.

\* \* \* \* \*

(t) The following rules, as submitted to OSM on November 20, 1995, are approved effective February 21, 1996:

Awarding of costs, expenses, and attorney fees incurred in seeking an award—Rule 5.03.6;

Awarding costs, expenses, and attorney fees from the Division of Minerals and Geology to administrative proceeding participants other than the permittee—Rule 5.03.6(4)(e).

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## 30 CFR Part 948

### West Virginia Regulatory Program

**AGENCY:** Office of Surface Mining Reclamation and Enforcement (OSM), Interior.

**ACTION:** Final rule; Approval of amendment.

**SUMMARY:** OSM is approving with certain exceptions an amendment to the West Virginia permanent regulatory program under the Surface Mining Control and Reclamation Act of 1977 (SMCRA). The amendment contains revisions to the West Virginia Surface Coal Mining and Reclamation Act (WVSCMRA) and the West Virginia Surface Mining Reclamation Regulations. The amendment is intended to make the West Virginia program consistent with SMCRA and the corresponding Federal regulations. Additional amendments will be required to bring the West Virginia program into full compliance with SMCRA.

The statutory revisions pertain to reorganization of the State regulatory authority, extension of the State Abandoned Mine Lands and Reclamation Act, definitions, surface mine reclamation inspector qualifications, approval to remove more than 250 tons of coal during prospecting, permit transfers, permit fees, premium payments for the Workers' Compensation Fund, Small Operator Assistance Program (SOAP), hydrologic protection, blasting schedules, preblast surveys, termination of underground mining permits, excess spoil fills, variances from approximate original contour, citizen complaint investigations, issuance of notices of violation, abatement times for notices of violation, civil penalty assessments for cessation orders that are abated within twenty-four hours, permit suspension or revocation, temporary relief, burden of proof, disclosure of ownership and control information, reinstatement of right to mine, permit renewal requirements, extensions to permitted areas, surface mining activities not subject to the Act, National Pollutant Discharge Elimination system (NPDES) permitting requirements, removal of