

affecting public health, safety, general welfare and property.

In most cases, the implementation of Title IV authority has been delegated to States. Currently, 23 States and 3 Indian Tribes (the Hopi, the Navajo and the Crow) have authority to receive grants from the Fund. They are implementing Title IV reclamation programs in accordance with 30 CFR Subchapter R, and through implementing guidelines published in the **Federal Register** on March 6, 1980 (45 FR 27123), and revised on December 30, 1996 (45 FR 68777). In States and on Indian lands that do not have a Title IV program, reclamation is carried out by OSM.

D. How Is AML Reclamation Funded and How Do States and Indian Tribes Implement Their Programs?

State and Indian Tribal AML programs are funded at 100 percent by OSM from money appropriated annually from the AML Fund. The States and Indian Tribes must submit grant applications in accordance with procedures established by OSM and existing grant regulations found at 30 CFR part 886. They may undertake only projects that are eligible for financing as described in either section 404 or section 411 of SMCRA and that meet the priorities established in section 403 of SMCRA. OSM requires that the State Attorney General or other chief legal officer certify that each reclamation project to be undertaken is an eligible site. Certain environmental, fiscal, administrative, and legal requirements must be in place in order for a program to receive grants for reclamation. An extensive description of these requirements can be found at 30 CFR part 884.

E. What Types of Abandoned Sites Does the Enhancing AML Rule Target?

As discussed in substantial detail in the February 12, 1999, **Federal Register** notice, the Enhancing AML Rule will facilitate the reclamation of certain abandoned mine lands that have little likelihood of being mined by the private sector or being reclaimed under the current Title IV program because of severely limited program funds. 64 FR 7471.

II. Discussion of the Final Rule

We are publishing this rulemaking in response to the D.C. Circuit's remand of our Enhancing AML Reclamation Rule for further explanation as to which government expenses will qualify as government-financing under the rule. We are doing this to address the concern expressed by the court regarding our preamble discussion interpreting the

statutory term "government-financed construction." In our preamble discussion we stated that all expenses incurred by the AML agency such as project design, project solicitation, project management, and project oversight qualify as government financing under the rule. 64 FR 7474. The court found that it was "counter-intuitive" to suggest that Congress intended traditional government functions "such as "oversight" to ensure that a contractor complies with the law, or reviewing and approving proposed Title IV projects—would qualify as government financing. The court continued that even though § 707.5 clearly states that "in kind" payments do not qualify as government-financed construction, our **Federal Register** notice appeared to accept a commenter's suggestion that an agency's administrative expenses were a form of "in kind" payments.

Finally, the court posited a permissible interpretation of the rule under which the traditional oversight and compliance-review functions of an AML agency would not be counted as government financing. The court concluded with two scenarios in which agency expenses would reasonably count as government financing. *KRC v. Norton* at *2. It is our intent to interpret the rule consistently with this interpretation and these two scenarios. Therefore, agency administrative expenses that are traditionally attributed to a particular type of government construction project will not count towards the "government financing" of that project. In other words, the only administrative expenses incurred by a government agency that can count as part of the "government financing" of a project are those expenses that are outside the normal scope of that agency's cost of doing business.

As an example, most AML agencies accomplish reclamation work through contractors. Depending upon an agency's internal procedures, some agencies regularly require the contractor to perform all engineering and design work. Other agencies may regularly hire an outside engineering firm or do the work themselves. Should a government agency that regularly requires the contractor to perform project engineering and design work decide to do such work itself on a specific project, the expense of that project's engineering and design work would qualify towards the "government financing" of that project. This expense qualifies as "government financing" because it is a government expense not regularly attributable to such projects. In contrast, a government agency that regularly does

its own engineering and design work cannot consider those expenses towards qualifying the project as being "government-financed" for they are expenses that the agency regularly attributes to such projects.

Critics of the 1999 Enhancing AML Rule were concerned that if the expenses of traditional government functions such as oversight and project review counted towards "government financing," there might be a large number of government-financed construction projects where the government would do no actual financing towards the physical reclamation of the site. In light of that concern, we reviewed the instances where the 1999 rule has been used to allow for less than 50 percent government financing of approved AML construction projects. Thus far, four projects have been completed in three different states. In each case, a tremendous savings was realized at relatively little cost to the government reclamation authority through the sale of coal whose extraction was an incidental part of the required reclamation. Reclamation that would have otherwise cost the Title IV authorities an estimated \$1.5 million was accomplished at a total cost to those authorities of somewhat less than \$200,000. It is significant that in each case, the AML authority paid substantial monies to the contractor to physically reclaim the site. While OSM anticipates that other projects will be conducted under the Enhancing AML rule, the agency does not expect the number of such projects to be large.

We would next like to take this opportunity to explain what OSM has always intended by the regulatory prohibition in 30 CFR 707.5 against "in kind" payments being counted towards the government financing of "government-financed" construction. This prohibition first appeared in the March 13, 1979, rulemaking and continued substantially unchanged in the 1999 Enhancing AML Reclamation Rule. As discussed above, the 2002 Circuit Court decision noted that the 1999 preamble appeared to accept a commenter's suggestion that qualifying government financing includes "in kind" payments such as administrative expenses incurred by the AML agency in reviewing and approving the project. *Id.* at *2. The cited preamble language response was not, however, intended to address the commenter's suggestion that administrative expenses incurred by the agency in reviewing and approving a project were "in kind" payments. Rather, it was OSM's intent to address commenter's concern that these