

change is consistent with the addition of a definition for the term "adjudicative proceeding" proposed by Utah in this amendment at UCA 40-10-3(1). As discussed in finding No. 3, the definition of "adjudicative proceeding" as proposed by Utah at UCA 40-10-3(1) does not encompass judicial review.

Use of the term "adjudicative proceeding" in UCA 40-10-22(3)(e) allows Utah to limit the reimbursement of costs and expenses incurred through participation in the proceedings to only proceedings which are adjudicatory in nature. Section 525(e) of SMCRA provides for the award of costs and expenses incurred in connection with "any administrative proceeding." Prior to Utah's adoption of the amendment under consideration in this rulemaking, UCA 40-10-22(3)(e) contained similar language.

Both the Interior Board of Land Appeals (IBLA) and the U.S. District Court for the Utah District declined to delineate the full reach of the phrase "any administrative proceeding" in section 525(e) of SMCRA when presented with an opportunity to do so. *Natural Resources Defense Council, Inc. (NRDC), et al. v. Office of Surface Mining Reclamation and Enforcement (OSM) et al.*, 107 IBLA 339, 365 n. 12 (1989); *Utah International, Inc. v. Department of the Interior*, 643 F. Supp. 819, 825 n. 25 (D. Utah 1986). However, in deciding these cases, both IBLA and the U.S. District Court held that this phrase should not be read literally, but rather must be interpreted in the context of the legislative history of SMCRA and case law concerning attorney fee and expense awards under other statutes. Both opinions contain extensive dicta suggesting that the phrase could or should be read to include only administrative proceedings of an adjudicatory nature, not proceedings that are part of the fact-finding process culminating in an initial agency decision, e.g., informal conferences on permit applications. *NRDC, supra*, at 354-360; *Utah International, supra*, at 820-825.

Furthermore, the Federal regulations at 43 CFR 4.1290 and 4.1291, which implement this section of SMCRA in part, provide for an award of costs and expenses only in connection with administrative proceedings resulting in the issuance of a final order by an administrative law judge or IBLA. The preamble to these regulations notes that the Secretary rejected comments requesting the scope of the rules be expanded to allow the award of costs and expenses in other types of administrative proceedings, such as

rulemaking (4 CFR 34385, August 3, 1978).

Therefore, the Director finds the Utah statutory provision at UCA 40-10-22(3)(e) that allows for award of costs and expenses in connection with an adjudicatory proceeding is not inconsistent with section 525(e) of SMCRA and its implementing regulations, as interpreted by case law. The Director approves the proposed revisions to this statute.

The Director's approval is based upon OSM's interpretation that the term "adjudicatory proceedings," as used at UCA 40-10-22(3)(e) includes all classes of actions in which participants would be eligible for an award of costs and expenses under 43 CFR 4.1290 through 4.1295. The Director notes that, as more case law develops, it may be necessary in the future to further expand the provisions at UCA 40-10-22(3)(e) to include other types of administrative proceedings. In that event, OSM would notify Utah in accordance with 30 CFR Part 732.

16. UCA 40-10-28 (1)(a)(ii) and (2)(a), Recovery of Reclamation Costs and Liens Against Reclaimed Lands

In response to the Director's previous finding that UCA 40-10-28(1)(a)(ii) and 40-10-28(2)(a) were not consistent with sections 407(e) and 408(a) of SMCRA and the Director's deferred decision on these statutory provisions (September 27, 1994; 59 FR 49185, 49187-88; finding Nos. 7 and 9), Utah proposed to add new language to its provisions at UCA 40-10-28(1)(a)(ii) and UCA 40-10-28(2)(a).

Utah proposed at UCA 40-10-28(1)(a)(ii) to require that the sale price of land that is sold to the State or local government for public purposes may not be less than the actual "cost of the purchase of the property by the State plus the" costs of reclaiming the land. This requirement is analogous to and no less stringent than the counterpart Federal provision at section 407(e) of SMCRA, which provides that the sale price of land sold to the State or local government for public purposes may in no case be less than the cost of purchase and reclamation of such land.

Utah also proposed the addition of a new provision at UCA 40-10-28(2)(a) to provide, in addition to other criteria, that a lien will be placed against reclaimed land except where the surface owner "owned the land prior to May 2, 1977." This specific requirement is analogous to and no less stringent than the requirement of section 408(a) of SMCRA, which provides, in part, that no lien shall be filed against the

property of any person who owned the land prior to May 2, 1977.

As discussed above, the revisions proposed by Utah in this amendment at UCA 40-10-28(1)(a)(ii) and 40-10-28(2)(a) are consistent with sections 407(e) and 408(a) of SMCRA. Therefore, the Director approves the proposed revisions to these statutes.

17. UCA 40-10-30, Judicial Review of Orders or Rules

Utah proposed new provisions at UCA 40-10-30 to provide, in part:

(1) [Judicial review of adjudicative proceedings under this chapter is governed by Title 63, Chapter 46b, Administrative Procedures Act, and provisions of this chapter consistent with the Administrative Procedures Act.

(2) [Judicial review of the board's rulemaking procedures and rules adopted under this chapter is governed by Title 63, Chapter 46a, Utah Administrative Rulemaking Act.

(3) [An appeal from an order of the board shall be directly to the Utah Supreme Court and is not a trial de novo. * * *

(4) [An action or appeal involving an order of the board shall be determined as expeditiously as feasible and in accordance with Subsection 78-2-2(3)(e)(iv). The Utah Supreme Court shall determine the issues on both questions of law and fact and shall affirm or set aside the rule or order, enjoin or stay the effective date of agency action, or remand the cause to the board for further proceedings. * * *

(5) [If the board fails to perform any act or duty under this chapter which is not discretionary, the aggrieved person may bring an action in the district court of the county in which the operation or proposed operation is located.

(Italics indicate new language proposed to be added to this statute.) Utah also proposed to delete the requirement at existing UCA 40-10-30(3) that "[r]eview of the adjudication of the district court is by the Supreme Court."

The proposed revisions at UCA 40-10-30 are consistent with the requirements of the counterpart Federal provisions of section 526 of SMCRA. Therefore, the Director finds that the proposed revisions at UCA 40-10-30 are no less stringent than section 526 of SMCRA and approves them.

IV. Summary and Disposition of Comments

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

1. Public Comments

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