82–4–226, MCA, subsections (2), (3), (5), and (6) (SMCRA Section 512 and 30 CFR Part 732), coal exploration (''prospecting'') permits and notices of intent; and

82–4–227, MCA, subsections (1), (2), (3), (7), (8), and (9) (SMCRA Section 510), permit approval/denial.

Because the proposed revisions to these previously-approved statutory provisions are nonsubstantive in nature, the Director finds that these proposed Montana statutes are no less effective in meeting SMCRA's requirements than the Federal regulations and no less stringent than SMCRA. The Director approves these proposed statutes.

2. Unintentional Substantive Revision to 82–4–227, MCA, subsection (10)

Montana proposed a revision to 82–4–227(10), MCA, that the State labels, and presumably intended, as a nonsubstantive grammatical change. The provision is proposed to be revised, in part, as follows:

> A permit or major permit revision for a strip- or underground-coal-mining operation may not be issued unless the applicant has affirmatively demonstrated by its coal conservation plan that no failure to conserve coal will not occur.

The last part of this proposal, by requiring the conservation plan to demonstrate that no failure to conserve coal will not occur, would require the conservation plans to demonstrate that all such failures will occur. Such a revision would reverse the meaning of the existing provision, which requires the conservation plan to demonstrate that no failure to conserve coal will occur.

This proposed requirement would contradict one purpose of the Montana statute as stated at MCA 82–4–202(g): ''[i]t is the declared policy of this state and its people to * * * prevent the failure to conserve coal.'' For this reason, OSM believes that the proposal represents an unintended grammatical error, and that Montana either (1) meant to delete the word ''no'' in the phrase ''* * * that no failure to conserve coal * * *'' or (2) did not mean to add the word ''not'' in the phrase ''* * * failure to conserve coal will not occur.'' Based on this believe, the Director is approving the proposed provision, with the understanding that the coal conservation plan must affirmatively demonstrate that failure to conserve coal will be prevented. The Director is also requiring Montana to further revise this provision to clarify this intent.

3. MCA 82–4–224, Consent or Waiver by Surface Owner

Montana proposes to repeal statutory Section 82–4–224, MCA, which provides that:

> [I]n those instances in which the surface owner is not the owner of the mineral estate proposed to be mined by strip-mining operations, the application for a permit shall include the written consent or a waiver by the owner or owners of the surface lands involved to enter and commence strip-mining operations on such land, except that nothing in this section applies when the mineral estate is owned by the federal government in fee or in trust for an Indian tribe.

Montana proposes this action (effective October 1, 1993) in accordance with a decision in the case of *Western Energy Co.* v. *Genie Land Co.,* 227 Mont. 74, 737 P.2d 478 (1987). In that case the Montana Supreme Court found the statutory section, and any rules adopted for the implementation thereof, to be unconstitutional and in violation of the Montana constitution, in that it permitted a taking without due process, permitted the taking of private property without just compensation, and permitted the impairment of the obligation of a contract. This statutory provision was originally approved as a counterpart provision to Section 510(b)(6) of SMCRA (45 FR 21560; April 1, 1980; see Administrative Record No. MT–1, Appendix C).

While Montana has repealed this statutory provision, it continues to provide regulations at ARM 26.4.303(15) and 26.4.405(6)(k) that impose requirements which are substantively equivalent to those imposed by Section 510(b)(6) of SMCRA. SMCRA Section 510(b)(6) requires that in cases where the private mineral estate has been severed from the private surface estate, no permit shall be approved unless the application demonstrates, and the regulatory authority finds, that the applicant has submitted to the regulatory authority either (1) the written consent of the surface owner to coal extraction by surface mining, (2) a conveyance that expressly grants or reserves the right to coal extraction by surface mining, or (3) if the conveyance does not expressly grant the right to coal extraction by surface mining, the surface-subsurface legal relationship shall be determined in accordance with State law.

In cases where the mineral and surface estates are severed, ARM 26.4.303(15) requires each application to contain either (1) a written consent by the surface owner to mineral extraction by strip mining, (2) a conveyance that expressly grants or reserves the right to mineral extraction by strip mining, or (3) if the conveyance does not expressly grant the right to mineral extraction by strip mining, documentation that under Montana law the applicant has the legal right to mineral extraction by strip mining. In those same cases (where the mineral and surface estates are severed), ARM 26.4.405(6)(k) provides that the Department of State Lands (DSL) may not approve a permit unless the application demonstrates, and DSL's findings confirm, that the applicant has submitted the documentation required by ARM 26.4.303.

In its letter of January 19, 1994 (Administrative Record No. MT–11–18), OSM requested that Montana address (1) whether it intended, in response to the Montana Supreme Court decision discussed above, to propose the repeal of ARM 26.4.303(15) and 26.4.405(6)(k), and (2) whether Montana retained the statutory authority to promulgate and enforce those regulations, given the repeal of 82–4–224, MCA.

In its response of July 28, 1994, (Administrative Record No. MT–11–19), DSL's Chief Legal Counsel states that the statutory authority for ARM 26.4.303(15) lies in 82–4–222(1)(d), MCA, which requires that a permit application state the source of the applicant's legal right to mine the mineral on the land affected by the permit. Montana further states that the statutory authority for ARM 26.4.405(6)(k) lies in 82–4–231(4), MCA; that provision requires DSL to determine whether each application is administratively complete, which means, among other things, that it contains information addressing each application requirement in 82–4–222, MCA, and the rules implementing that section. Montana further states that since neither of the two regulatory provisions is based on the repealed statutory section (82–4–224, MCA), Montana has no plans to repeal those regulatory provisions.

In its review of this proposed amendment, OSM noted that the Montana program also contains, at MCA 82–4–203(35) and (36), statutory definitions of ''waiver'' and ''written consent,'' and found no use of these terms other than in the repealed section 82–4–224, MCA. In its January 19, 1994, letter (Administrative Record No. MT–11–18), OSM requested that Montana address the meaning of these terms in the absence of the repealed provision. In its July 28, 1994, response (Administrative Record No. MT–11–19), DSL's Chief Legal Counsel states that these statutory definitions no longer serve any purpose within the statute, but that their presence poses no