Statement of Loretta Pineda, Director, Division of Reclamation, Mining and Safety, Colorado Department of Natural Resources On Behalf of the National Association of Abandoned Mine Land Programs and the Interstate Mining Compact Commission re Oversight Hearing on *The Effect of the President's FY-2012 Budget and Legislative Proposals for the Office of Surface Mining on Private Sector Job Creation, Domestic Energy Production, State Programs and Deficit Reduction* before the House Energy and Mineral Resources Subcommittee – April 7, 2011

My name is Loretta Pineda and I serve as the Director of the Division of Reclamation, Mining and Safety within the Colorado Department of Natural Resources. I am appearing today on behalf of the National Association of Abandoned Mine Land Programs (NAAMLP) and the Interstate Mining Compact Commission (IMCC). The NAAMLP represents 30 states and tribes with federally approved abandoned mine land reclamation (AML) programs authorized under Title IV of the Surface Mining Control and Reclamation Act (SMCRA). IMCC represents 24 states that are responsible for operating both Title IV AML programs, as well as regulatory programs under Title V for active mining operations. My testimony today will focus primarily on the Title IV program under SMCRA.

Title IV of SMCRA was amended in 2006 and significantly changed how state AML grants are funded. State AML Grants are still based on receipts from a fee on coal production, but beginning in FY 2008, the grants are funded primarily by mandatory appropriations. As a result, the states should receive $498 million in FY 2012. We adamantly oppose the Office of Surface Mining Reclamation and Enforcement's (OSM) proposed budget amount of $313.8 million for State AML grants, a reduction of $184.2 million, and reject the notion that a competitive grant process would improve AML program efficiency. The proposed spending cuts would eliminate funding to states and tribes that have "certified" completion of their highest priority coal reclamation sites. OSM has also proposed a $6.8 million reduction in discretionary spending that would eliminate the federal emergency program under Section 410 of SMCRA. I appreciate the opportunity to testify before the Subcommittee and outline some of the reasons why NAAMLP and IMCC oppose OSM's proposed FY 2012 budget.

SMCRA was passed in 1977 and set national regulatory and reclamation standards for coal mining. The Act also established a Reclamation Fund to work towards eliminating the innumerable health, safety and environmental problems that exist throughout the Nation from the mines that were abandoned prior to the Act. The Fund generates revenue through a fee on current coal production. This fee is collected by OSM and distributed to states and tribes that have federally approved regulatory and AML programs. The promise Congress made in 1977, and with every subsequent amendment to the Act, was that, at a minimum, half the money generated from fees collected by OSM on coal mined within the boundaries of a state or tribe, referred to as "State Share", would be returned for uses described in Title IV of the Act if the state or tribe assumed responsibility for regulating active coal mining operations pursuant to Title V of SMCRA. The 2006 Amendments clarified the scope of what the State Share funds could be used for and reaffirmed the promise made by Congress in 1977.

If a state or tribe was successful in completing reclamation of abandoned coal mines and was able to "certify" under Section 411 of SMCRA, then the State Share funds could be used to address a myriad of other abandoned mine issues as defined under each state or tribes approved Abandoned Mine Reclamation Plan. These Abandoned Mine Reclamation Plans are approved by the Office of Surface Mining and they ensure that the work is in accordance with the intent of SMCRA. Like all abandoned mine reclamation, the work of certified states and tribes eliminates health and safety problems, cleans up the environment, and creates jobs in rural areas impacted by mining.

This reduction proposed by OSM in certified state and tribal AML grants not only breaks the promise of State and Tribal Share funding, but upsets the balance and compromise that was achieved in the comprehensive restructuring of SMCRA accomplished in the 2006 Amendments following more than ten years of discussion and negotiation by all affected parties. The funding reduction is inconsistent with the Administration's stated goals regarding jobs and environmental protection. We therefore respectively ask the Subcommittee to support continued funding for certified states and tribes at the statutory authorized levels, and turn back any efforts to amend SMCRA in this regard.

In addition to the $184.2 million reduction, the proposed FY 2012 budget would terminate the federal AML emergency program, leaving the states and tribes to rely on funds received through their non-emergency AML grant funds. This contradicts the 2006 amendments, which require the states and tribes to maintain "strict compliance" with the non-emergency funding priorities described in Section 403(a), while leaving Section 410, Emergency Powers, unchanged. Section 410 of SMCRA requires OSM to fund the emergency AML program using OSM's "discretionary share" under Section (402)(g)(3)(B), which is entirely separate from state and tribal non-emergency AML grant funding under Sections (402)(g)(1), (g)(2), and (g)(5). SMCRA does not allow states and tribes to administer or fund an AML emergency program from their non-emergency AML grants, although, since 1989, fifteen states have agreed to implement the emergency program *on behalf of OSM contingent upon OSM providing full funding* for the work. As a result, OSM has been able to fulfill their mandated obligation more cost effectively and efficiently. Ten states and 3 tribes continue to rely solely on OSM to operate the emergency program within their jurisdiction.

Regardless of whether a state/tribe or OSM operates the emergency program, only OSM has the authority to "declare" the emergency and clear the way for the expedited procedures to be implemented. In FY 2010, OSM made 153 emergency declarations in Kentucky and Pennsylvania alone, states where OSM had operated the emergency program. In FY 2011, OSM issued guidance to the states that the agency "will no longer declare emergencies." OSM provided no legal or statutory support for its position. Instead, OSM has "transitioned" responsibility for emergencies to the states and tribes with the expectation that they will utilize non-emergency AML funding to address them. OSM will simply "assist the states and tribes with the projects, as needed". Of course, given that OSM has proposed to eliminate <u>all</u> funding for <u>certified</u> states and tribes, it begs the question of how and to what extent OSM will continue to assist these states and tribes.

If Congress allows the elimination of the emergency program, states and tribes will have to adjust to their new role by setting aside a large portion of their non-emergency AML funds so that they can be prepared for any emergency that may arise. Emergency projects come in all shapes and sizes, vary in number from year to year and range in cost from thousands of dollars to millions of dollars. Requiring states and tribes to fund emergencies will result in funds being diverted from other high priority projects and delay certification under Section 411, thereby increasing the backlog of projects on the Abandoned Mine Land Inventory System (AMLIS). For minimum program states and states with small AML programs, large emergency projects will require the states to redirect all or most of their AML resources to address the emergency, thereby delaying other high-priority reclamation. With the loss of stable emergency program funding, minimum program states will have a difficult, if not impossible, time planning, budgeting, and prosecuting the abatement of their high priority AML problems. In a worst-case scenario, a minimum program state would not be able to address a costly emergency in a timely fashion, and would have to "save up" multiple years of funding before even initiating the work to abate the emergency, in the meantime ignoring all other high priority work.

OSM's proposed budget suggests addressing emergencies, and all other projects, as part of a competitive grant process whereby states and tribes compete for funding based on the findings of the proposed AML Advisory Council. OSM believes that a competitive grant process would concentrate funds on the highest priority projects. While a competitive grant process may seem to make sense at first blush, further reflection reveals that the entire premise is faulty and can only undermine and upend the deliberate funding mechanism established by Congress in the 2006 Amendments. Since the inception of SMCRA, high priority problems have always taken precedence over other projects. The focus on high priorities was further clarified in the 2006 Amendments by removing the lower priority problems from the Act and requiring "strict compliance" with high priority funding requirements. OSM already approves projects as meeting the definition of high priority under its current review process and therefore an AML Advisory Council would only add redundancy and bureaucracy instead of improving efficiency.

We have not been privy to the particulars of OSM's legislative proposal, but there are a myriad of potential problems and implications for the entire AML program based on a cursory understanding of what OSM has in mind. They include the following:

- Has anyone alleged or confirmed that the states/tribes are NOT already addressing the highest priority sites? Where have the 2006 Amendments faltered in terms of high priority sites being addressed as envisioned by Congress? What would remain unchanged in the 2006 Amendments under OSM's proposal?
- If the current AML funding formula is scrapped, what amount will be paid out to the non-certified AML states and tribes over the remainder of the program? What does OSM mean by the term "remaining funds" in its proposal? Is it only the AML fees yet to be collected? What happens to the historic share balances in the Fund, including those that were supposed to be re-directed to the Fund based on an equivalent amount of funding being paid to certified states and tribes each

year? Would the "remaining funds" include the unappropriated/prior balance amounts that have not yet been paid out over the seven-year installment period?

- Will this new competitive grant process introduce an additional level of bureaucracy and result in more funds being spent formulating proposals and less on actual AML reclamation? The present funding formula allows states and tribes to undertake long-term strategic planning and efficiently use available funds.
- How long will OSM fund a state's/tribe's administrative costs if it does not successfully compete for a construction grant, even though the state/tribe has eligible high priority projects? How will OSM calculate administrative grant funding levels, especially since salaries and benefits for AML project managers and inspectors predominantly derive from construction funds? Would funding cover current staffing levels? If not, how will OSM determine the funding criteria for administrative program grants?
- How does OSM expect the states and tribes to handle emergency projects under the legislative proposal? Must these projects undergo review by the Advisory Council? Will there be special, expedited procedures? If a state/tribe has to cut back on staff, how does it manage emergencies when they arise? If emergency programs do compete for AML funds, considerable time and effort could be spent preparing these projects for review by the Advisory Council rather than abating the immediate hazard. Again, how can we be assured that emergencies will be addressed expeditiously?
- One of the greatest benefits of reauthorization under the 2006 Amendments to SMCRA was the predictability of funding levels through the end of the AML program. Because state and tribes were provided with hypothetical funding levels from OSM (which to date have proven to be quite accurate), long-term project planning, along with the establishment of appropriate staffing levels and project assignments, could be made accurately and efficiently. How can states/tribes plan for future projects given the inherent uncertainty associated with having to annually bid for AML funds?

Given these uncertainties and the negative implications for the accomplishment of AML work under Title IV of SMCRA, Congress should reject the proposed amendments to SMCRA as being counterproductive to the purposes of SMCRA and an inefficient use of funds. We request that Congress continue mandatory funding for certified states and tribes and provide funding for AML emergencies. Resolutions to this effect adopted by both NAAMLP and IMCC are attached, as is a more comprehensive list of questions concerning the legislative proposal. We ask that they be included in the record of the hearing.

One of the more effective mechanisms for accomplishing AML restoration work is through leveraging or matching other grant programs, such as EPA's 319 program. Until FY 2009, language was always included in OSM's appropriation that encouraged the use of these types of matching funds, particularly for the purpose of environmental restoration related to treatment or abatement of acid mind drainage (AMD) from abandoned mines. This is an ongoing, and often expensive, problem, especially in Appalachia. NAAMLP and IMCC therefore request the Subcommittee to support the inclusion of language in the FY 2012 appropriations bill that would allow the use of

AML funds for any required non-Federal cost-share required by the Federal government for AMD treatment or abatement.

We also urge the Subcommittee to support funding for OSM's training program and TIPS, including moneys for state/tribal travel. These programs are central to the effective implementation of state and tribal AML programs as they provide necessary training and continuing education for state/tribal agency personnel, as well as critical technical assistance. Finally, we support funding for the Watershed Cooperative Agreements in the amount of $1.55 million because it facilitates and enhances state and local partnerships by providing direct financial assistance to watershed organizations for acid mine drainage remediation.

To the extent that the Subcommittee desires to pursue changes to SMCRA to improve or clarify the operation of the AML program, the states and tribes would recommend looking at three areas: 1) the use of unappropriated state and tribal share balances to address noncoal AML and acid mine drainage (AMD) projects; 2) the limited liability protections for noncoal AML work at section 405(l) of SMCRA; and 3) an amendment to Section 413(d) regarding liability under the Clean Water Act for acid mine drainage projects.

The reauthorization of the AML program in 2006 by Congress did not in any way change the provisions that allow AML funds to be used to ameliorate either coal or non-coal mine public health and safety hazards. However, OSM adopted final rules implementing the 2006 Amendments (November 14, 2008 at 73 Fed. Reg. 67576), based on a Departmental Solicitor's Opinion (M-37104), that would prohibit some of this funding from being used to address many of the most serious non-coal AML problems. As a result, NAAMLP and IMCC strongly support H.R. 765, a bill recently introduced by Rep. Pearce of New Mexico that makes minor changes to SMCRA to correct the misinterpretation by the U.S. Department of the Interior. H.R. 765 will return states and tribes to their longstanding role under SMCRA of directing abandoned mine grant funds to the highest priority needs at either coal or non-coal abandoned mines.

NAAMLP and IMCC have worked closely with the Western Governors Association in providing information to quantify the non-coal AML cleanup effort. While the data is seldom comparable between states due to the wide variation in inventory criteria, they do demonstrate that there are large numbers of significant safety and environmental problems associated with inactive and abandoned non-coal mines, and that remediation costs are very large. Some of the types of numbers that have been reported by NAAMLP and IMCC in response to information we have collected for the General Accountability Office (GAO) and others include the following: Number of abandoned mine sites: Alaska – 1,300; Arizona – 80,000; California – 47,000; Colorado – 7,300; Montana – 6,000; Nevada – 16,000; Utah – 17,000 – 20,000; Washington – 3,800; Wyoming – 1,700. Nevada reports over 200,000 mine openings and Minnesota reports over 100,000 acres of abandoned mine lands.

States and Tribes are very familiar with the highest priority non-coal problems within their borders and also have limited reclamation dollars to protect public health and safety or protect the environment from significant harm. States and tribes work closely

with various federal agencies, including the Environmental Protection Agency, the Bureau of Land Management, the U.S. Forest Service, and the U.S. Army Corps of Engineers, all of whom have provided some funding for non-coal mine remediation projects. For states with coal mining, the most consistent source of AML funding has been the Title IV grants received under SMCRA. Section 409 of SMCRA allows states to use these grants at high priority non-coal AML sites. The funding is generally limited to safeguarding hazards to public safety (e.g., closing mine openings) at non-coal sites.

The urgency of advancing this legislation has been heightened, Mr. Chairman, by statements in OSM's proposed budget for Fiscal Year 2012. Therein, OSM is proposing to further restrict the ability of states to expend AML funds on noncoal reclamation projects. This will apparently occur as part of a legislative proposal that the Administration intends to aggressively pursue in the 111th Congress. While the primary focus of that proposal will be the elimination of future AML funding for states and tribes that are certified under Title IV of SMCRA (which we adamantly oppose), OSM's proposal will also substantially restructure the method by which AML funds are distributed to the states in an effort to "direct the available reclamation funds to the highest priority coal AML sites across the Nation."

H.R. 765 would also address a similar restriction on the use of the unappropriated state and tribal share balances for the Acid Mine Drainage (AMD) set-aside program under SMCRA. Congress expanded this program in the 2006 Amendments to allow states and tribes to set-aside up to 30% of their grants funds for treating AMD now and into the future. AMD has ravaged many streams throughout the country, but especially in Appalachia. The states need the ability to set aside as much funding as possible to deal with these problems over the long term. Again, OSM has acted arbitrarily in their interpretation of the reauthorizing language by limiting the types of funds the state may use for the set-aside program. H.R. 765 includes language that would correct this misinterpretation and allow the states to apply the 30% set-aside to their prior balance replacement funds.

In summary:

- Since the inception of SMCRA in 1977 and the approval of state/tribal AML programs in the early 1980's, the states and tribes have been allowed to use their state share distributions under section 402(g)(1) of the AML Trust Fund for high priority noncoal reclamation projects pursuant to section 409 of SMCRA and for the set-aside program for acid mine drainage (AMD) projects.
- In its rules implementing the 2006 Amendments, OSM has stated that these moneys cannot be used for noncoal reclamation or for the 30% AMD set-aside.
- Pursuant to Section 411(h)(1) of the 2006 Amendments, the states and tribes assert that these moneys should also be available for noncoal reclamation under section 409 and for the 30% AMD set-aside. There is nothing in the new law that would preclude this interpretation. Policy and practice over the past 30 years confirm it.

Our second suggested amendment is needed to clarify a further misinterpretation of SMCRA contained in OSM's final rules of November 14, 2008. Section 405(l) of SMCRA provides that, except for acts of gross negligence or intentional misconduct, "no state (or tribe) shall be liable under any provisions of Federal law for any costs or damages as a result of action taken or omitted in the course of carrying out a state abandoned mine reclamation plan approved under this section." In its rules, OSM concluded that because of the language of SMCRA, including the generally unrestricted nature of the Title IV funds provided to certified states and tribes in Sections 411(h)(1) and (2), certified states and tribes can no longer conduct noncoal reclamation or other projects under Title IV of SMCRA (73 Fed. Reg. 67613). Thus, to the extent that certified states and tribes choose to conduct noncoal reclamation, OSM asserts that they do so outside of SMCRA and OSM's regulations, including the limited liability provisions of Section 405(l) of the Act.

This strained reading of the 2006 Amendments is having severe consequences for certified states and tribes conducting AML work pursuant to their otherwise-approved state programs. Without this limited liability protection, these states and tribes potentially subject themselves to liability under the Clean Water Act and CERCLA for their AML reclamation work. Nothing in the 2006 Amendments suggested that there was a desire or intent to remove these liability protections, and without them in place, certified states and tribes will need to potentially reconsider at least some of their more critical AML projects. We therefore recommend that the Subcommittee consider an amendment to SMCRA that would clarify that the 2006 Amendments were not intended to affect the applicability of section 405(l) to AML projects undertaken by certified states and tribes. We would welcome an opportunity to work with you to craft appropriate legislative language to accomplish this.

Finally, we recommend an adjustment to Section 413(d) of SMCRA to clarify that acid mine drainage projects which are eligible for AML funding under Section 404 of the Act, including systems for the control or treatment of AMD, are not subject to the water quality provisions of the Federal Water Pollution Control Act. This amendment is necessary to address a November 8, 2010 decision by the U.S. Court of Appeals for the Fourth Circuit, which decreed that the Clean Water Act's NPDES permitting requirements apply to anyone who discharges pollutants into the waters of the United States, regardless of whether that entity is private or public in nature. More specifically, the court noted that "the statute contains no exceptions for state agencies engaging in reclamation efforts; to the contrary, it explicitly includes them within its scope."

The result of this far-reaching decision by the Fourth Circuit will be to require some, if not all, state AML reclamation projects to obtain NPDES permits before work can commence. This will be particularly problematic for acid mine drainage control and treatment projects where water quality is already significantly degraded and is unlikely to ever meet effluent limitation guidelines under the Clean Water Act. Essentially, efforts by state agencies, and the watershed groups who work cooperatively with the states, will be stymied. In some cases, existing water treatment systems could be turned off and abandoned to the inability to obtain NPDES permits. We do not believe that this result was intended by either Congress or the courts, and thus believe that an immediate

legislative clarification should be pursued. Again, we would welcome the opportunity to work with this Subcommittee to craft appropriate legislative solutions to address this conflict of laws situation.

Over the past 30 years, tens of thousands of acres of abandoned mine lands have been reclaimed, thousands of mine openings have been closed, and safeguards for people, property and the environment have been put in place. Be assured that states and tribes are determined to address the unabated hazards at both coal and non-coal abandoned mines. We are all united to play an important role in achieving the goals and objectives as set forth by Congress when SMCRA was first enacted – including protecting public health and safety, enhancing the environment, providing employment, and adding to the economies of communities impacted by past coal and noncoal mining. Passage of these suggested amendments will further these congressional goals and objectives.

Thank you for the opportunity to testify today. I would be happy to answer any questions you may have.