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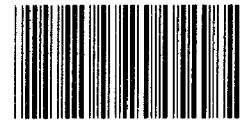
United States General Accounting Office 131526

Report to the Chairman, Committee on
Interior and Insular Affairs,
House of Representatives

October 1986

SURFACE MINING

Regulatory Capability of Indian Tribes Should Be Assessed



131526

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United States
General Accounting Office
Washington, D.C. 20548

Resources, Community, and
Economic Development Division

B-221171

October 6, 1986

The Honorable Morris K. Udall
Chairman, Committee on Interior
and Insular Affairs
House of Representatives

Dear Mr. Chairman:

As a result of your June 19, 1985, request and subsequent discussions with your office, we have reviewed the issues surrounding the regulation of surface coal mining on Indian lands. On May 30, 1986, we issued a report addressing two of your concerns: (1) the issues affecting Indian assumption of regulatory authority for surface coal mining operations on Indian lands—often referred to as primacy, and (2) the Department of the Interior's proposal to reallocate abandoned mine land reclamation funds currently set aside for Indian tribes.¹ This report addresses the remaining issue concerning how successful cooperative agreements between Interior's Office of Surface Mining Reclamation and Enforcement (OSMRE) and the Indian tribes have been in advancing tribal regulatory proficiency.

In summary, we found that Interior monitors the tribes' progress in completing tasks specifically required by the cooperative agreements. However, the agency has not comprehensively assessed whether the tribes' regulatory proficiency has progressed to the point that the tribes could assume primary responsibility for regulating coal mining and reclamation activities on their land—the stated purpose of the agreements. In response to our recommendation, OSMRE has agreed to undertake such an assessment.

We conducted our review from April 1985 to March 1986 at OSMRE headquarters; its Western Technical Center in Denver, Colorado; and its Albuquerque, New Mexico, and Casper, Wyoming, field offices. We reviewed OSMRE's regulations establishing cooperative agreements with the tribes and the agreements entered into with the tribes. To determine how the agreements are monitored, we interviewed OSMRE headquarters, field office, and technical center officials and reviewed tribal progress reports and interagency correspondence. To obtain their views on tribal performance under the agreements, we also talked with representatives

¹Surface Mining: Issues Associated with Indian Assumption of Regulatory Authority (GAO/RCED-86-155, May 30, 1986).

of the Navajo, Crow, and Hopi tribes (the only tribes with cooperative agreements); Council of Energy Resource Tribes officials;² and officials of four coal companies mining on Indian lands. Our work was performed in accordance with generally accepted government auditing standards.

Background

In 1977 the Congress enacted the Surface Mining Control and Reclamation Act (SMCRA) (30 U.S.C. 1201 *et seq.*) to provide uniform minimum environmental and reclamation standards for regulating the surface effects of coal mining activities. Although the Congress directed OSMRE to initially regulate mining on Indian lands, it expected the Indian tribes to eventually assume primary regulatory responsibilities on their lands. As the initial step toward legislatively granting Indian primacy, the act directed the Secretary of the Interior to study the regulation of surface mining on Indian lands and prepare a report containing proposed legislation designed to allow Indian tribes to assume full regulatory authority. In particular, the act required this report to make recommendations on the jurisdictional status of Indian lands outside the boundaries of the reservation. The resulting report issued by the Secretary to the Congress in February 1984 did not make specific legislative recommendations on the jurisdictional status of these off-reservation lands. Instead, Interior decided that the most appropriate role for itself on this delicate issue was to present definitional alternatives from which the Congress could choose. Legislation to allow the tribes to assume primacy has not been enacted and OSMRE has continued as the primary regulator.

To assist Indian tribes in developing the regulatory framework and skills needed to reclaim abandoned mine sites under Title IV of the act and to regulate coal mining operations under Title V, in 1979 OSMRE began entering into cooperative agreements with the Crow (1979), Hopi (1980), and Navajo (1981) tribes. The following table shows the calendar years in which the tribes began receiving periodic funding under the cooperative agreements.

²The Council is a coalition of 40 tribes whose purpose is to help member tribes prudently manage their energy resources.

Table 1.1: Tribal Cooperative Agreements

Tribe	Coverage of the agreement	
	Title IV	Title V
Crow	1979	1982
Hopi	1980	1982
Navajo	1981	1982

Through fiscal year 1985, OSMRE has awarded about \$4.4 million to fund the tribal cooperative agreements.

The cooperative agreements generally contain similar tasks to be undertaken during the annual grant period. Several tasks continue from year to year, while others are directed toward specific products or results. Continuing tasks include

- developing and maintaining a general administration system to manage the regulatory and reclamation program activities (the agreements provide funds for salaries, office equipment and supplies, vehicles, travel, and other expenses normally associated with a regulatory agency's activities);
- assisting OSMRE in mine plan reviews, inspection and enforcement activities, and performance bond release reviews; and
- participating in technical and administrative training courses.

Typical tasks requiring a specific result or product include developing tribal mining laws and regulations, determining the known or suspected eligible lands and waters that require reclamation, developing a tribal abandoned mine land reclamation plan, and writing reports to support implementation of specific reclamation projects.

OSMRE Does Not Assess Progress in Regulatory Skills

OSMRE field offices, responsible for monitoring performance under the cooperative agreements, monitor the tasks performed by the tribes, review the products they submit, and provide oral feedback; but they do not assess the tribal regulatory agency's capability to assume exclusive regulatory responsibility.

OSMRE officials recognize that they do not identify how task completion relates to the goal of increasing tribal regulatory proficiency. As a result, OSMRE is not in a position to determine with any certainty how much tribal proficiency has advanced or identify the specific regulatory skill areas where development still is needed.

Interim and annual progress reports prepared by the tribes are used to monitor tribal performance. These reports summarize each tribe's activities during the period in the context of each agreement task. For example, regarding tribal assistance to OSMRE personnel in performing mine inspections, the reports show the number of inspections in which tribal regulatory officials participated. The reports also identify the number of mine plans reviewed and training courses attended, and the status of required written products, such as the inventory of abandoned mine land sites, specific abandoned mine land project justifications, and mining regulations. In addition to reviewing these reports, OSMRE field offices observe tribal performance during permit reviews and joint mining inspections.

Although OSMRE monitors tribal progress in completing assigned tasks, it has no specific criteria or mechanism for determining the level of skills necessary to assume regulatory authority. Accordingly, it cannot identify and incorporate into the agreements tasks aimed at overcoming specific regulatory deficiencies to achieve the needed proficiency level. Given this situation, the Chief, Division of Permit and Environmental Analysis (the Indian Affairs Liaison for OSMRE) said that the agency cannot determine with confidence the extent to which tribal proficiency has improved under the agreements.

Without such systematic evaluation, judgments about tribal regulatory capabilities in relation to those needed to assume primacy are speculative and vary considerably. On the one hand, OSMRE officials we contacted commented that the tribes have made some progress but are not ready to assume full regulatory control over coal operations. Further, officials of the four coal companies we interviewed expressed the view that the tribes do not have sufficient technical experience and regulatory expertise to assume primacy. On the other hand, Navajo and Hopi coal mining officials told us that they are ready to take over full primacy, whereas a Crow coal mining official said that the tribe could assume a partial regulatory program.

The OSMRE Assistant Director for Program Operations agreed that OSMRE has not conducted a comprehensive evaluation of the tribes' abilities to assume primacy or established criteria for such evaluations. He said that the agency has already reduced funding to the tribes by approximately 26 percent from fiscal year 1985 levels and is proposing further reductions over the next several years. Other OSMRE officials also question the wisdom of continuing current funding particularly for those

tribes that already may be proficient in certain aspects of the regulatory process.

Conclusion

After up to 7 years of cooperative agreements with the tribes, we believe OSMRE should evaluate the program's success in raising the tribes' regulatory proficiency. A comprehensive evaluation of the tribes' current regulatory capabilities would enable OSMRE to determine whether future agreements are needed and, if they are needed, the tasks that should be included. In conducting this evaluation, OSMRE should first establish criteria upon which tribal proficiency can be assessed.

Recommendation

GAO recommends that the Secretary of the Interior require the Director, OSMRE, to assess the current tribal regulatory capabilities to determine their readiness for assuming primacy. In those areas where the tribes are judged not ready, the specific weaknesses should be identified. Future cooperative agreements should be directed toward improving specific regulatory deficiencies identified and evaluating the tribes' performance in correcting those deficiencies.

Agency Comments

Interior commented that OSMRE agrees with the recommendation and will initiate a study in fiscal year 1987 to assess tribal regulatory capability. Interior also suggested certain technical modifications to the report, which have been made where appropriate. (See app. I.)

As arranged with your office, unless you publicly announce its contents earlier, we plan no further distribution of this report until 30 days from the date of the report. At that time, we will send copies to the Secretary of the Interior, the Director of the Office of Management and Budget, and other interested persons, and make copies available to others upon request.

Sincerely yours,



J. Dexter Peach
Assistant Comptroller General

Comments From the Department of the Interior

Note: GAO comments supplementing those in the report text appear at the end of this appendix.



United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

AUG 25 1986

Honorable J. Dexter Peach
Director, United States
General Accounting Office
Washington, D.C. 20548

Dear Mr. Peach:

We are pleased to comment on the U.S. General Accounting Office (GAO) draft report entitled, "Surface Mining: Regulatory Capability of Indian Tribes Should Be Assessed" (GAO/RCED-86-171).

The Office of Surface Mining Reclamation and Enforcement (OSMRE) agrees with the recommendation that an assessment be made of the current tribal regulatory capabilities to determine their readiness for assuming primacy. OSMRE will initiate such a study to make an assessment of tribal regulatory capability in Fiscal Year 1987.

We have enclosed for your information comments on the report findings that we believe more accurately supports OSMRE's current position and corrects facts misquoted in the report. The Department appreciates this opportunity to comment on the draft report.

Sincerely,

A handwritten signature in cursive script that reads "James E. Cason".

ACTING Assistant Secretary for Land
and Minerals Management

Enclosure

Enclosure

Surface Mining
Regulatory Capability of Indian Tribes
Should Be Assessed
GAO/RCED-86-171

Now on p. 2.

1. GAO Draft Report--Page 3, first paragraph, first sentence:

"Because the tribes did not possess skills to assume their own regulatory program, in 1979 OSMRE began entering into cooperative agreements with three Indian tribes--the Crow, Hopi, and Navajo--to assist them in developing the regulatory framework and skills needed to reclaim abandoned mine sites under Title IV of the Act, and to regulate coal mining operations under Title V..."

OSMRE Comment

See comment 1.

This suggests that OSMRE had formerly evaluated the tribes' regulatory capabilities with respect to surface coal mining operations at that time and found them deficient. Technically, the tribes lacked the statutory authority to assume primacy regardless of their capability to do so, a situation which still holds true today.

Now on p. 2.

2. GAO Draft Report--Page 3, first full paragraph, second sentence:

"...The following table shows the years in which the tribes began receiving annual grants under the cooperative agreements..."

OSMRE Comment

See comment 2.

This sentence is technically incorrect in that the Indian tribes do not receive grants, annual or otherwise. Grants and cooperative agreements represent two distinct types of funding arrangements, with the level of involvement and monitoring on the part of the funding agency being much greater under cooperative agreements. Thus, this sentence should be revised to indicate that the tribes receive periodic funding, rather than annual grants, under their cooperative agreements.

In addition, this sentence should be revised to indicate whether the data in Table 1.1 is based on the fiscal year or calendar year.

3. GAO Draft Report--Page 3, Table 1.1:

OSMRE Comment

See comment 3.

The date which appears under the "Title V" column for the Navajo tribe is incorrect and should be changed to "1984" if based on the fiscal year, or to "1983" if based on the calendar year.

Appendix I
Comments From the Department of
the Interior

4. GAO Draft Report--Page 3, first full paragraph, last sentence:

"...Through fiscal year 1985, OSMRE has provided about \$4.6 million to fund the tribal cooperative agreements."

OSMRE Comment

This figure is incorrect based on the records of OSMRE's Division of Grants Administration which indicate that \$4,095,340 has been awarded to the three Indian tribes during fiscal years 1979-1985 under Title IV (State/Indian reclamation program) and Title V (regulatory program). An additional \$1,650,500 has been awarded to the tribes through cooperative agreements under the Abandoned Mine Lands Federal Reclamation Program (Title IV) for emergency and high-priority non-emergency projects. Thus, total funding to Indian tribes through cooperative agreements for Titles IV and V is \$5,745,840 through fiscal year 1985.

See comment 4.

Now on p. 4.

5. GAO Draft Report--Page 5, first full paragraph, third sentence:

"...Instead, Western Technical Center and Field Office officials said that the agreement tasks are basically those that the tribes want to perform."

OSMRE Comment

OSMRE disagrees that the tasks performed under cooperative agreements are "basically those that the tribes want to perform" and recommends this statement be deleted. OSMRE funds only those programs and training objectives necessary to develop the tribes' proficiency to administer the Title IV and Title V programs.

See comment 5.

Now on p. 4.

6. GAO Draft Report--Page 5, first full paragraph, last sentence:

"...Given this situation, the Chief, Division of Permit and Environmental Analysis (the OSMRE Headquarters official responsible for cooperative agreements) said that the agency can not determine with confidence the extent to which tribal proficiency has improved under the agreements."

OSMRE Comment

The above statement is inaccurate. The Chief, Division of Permit and Environmental Analysis, has been designated as the Indian Affairs Liaison for OSMRE. He serves as the contact person within the agency for coordination with other units within the Department of the Interior with lead responsibility for Indian Affairs. However, approval authority for cooperative agreements with the tribes for Title IV (State/Indian reclamation program) and Title V is currently with the Deputy Director for Administration and Finance in OSMRE Headquarters. This authority will be delegated to OSMRE's Field Office Directors on October 1, 1986. Approval authority for cooperative agreements with the tribes for Title IV Federal Reclamation program projects is with OSMRE's Director for

See comment 6.

Appendix I
Comments From the Department of
the Interior

amounts greater than \$100,000, and with the Assistant Director for Western Field Operations for awards of less than \$100,000. Once approved, cooperative agreements with the tribes are monitored primarily by OSMRE's Western Technical Center and Field Office personnel, rather than the Chief, Division of Permit and Environmental Analysis.

Now on p. 4.

7. GAO Draft Report--Page 6, first paragraph, first and second sentence:

"The OSMRE Assistant Director for Program Operations agreed that OSMRE has not evaluated the tribes' abilities to assume primacy or established criteria for such evaluations. He said that the agency is considering reducing its financial commitment to cooperative agreements with the tribes."

OSMRE Comment

These sentences should be revised to indicate that, although the Assistant Director for Program Operations agrees that OSMRE has not conducted a comprehensive evaluation of the tribes' abilities to assume primacy, informal monitoring has been done in the past by OSMRE's Western Technical Center and Field Office personnel. The second sentence concerning possible reductions in OSMRE's financial commitment to cooperative agreements, should be revised to state that OSMRE has already reduced funding to the tribes by approximately 26 percent from fiscal year 1985 levels, and is proposing further reductions over the next several years. These reductions are based on substantially lower workload projections for the tribes with respect to their involvement in OSMRE's regulatory responsibilities on Indian lands.

See comment 7.

8. GAO Draft Report--Page 6 - Conclusion and Recommendation:

OSMRE Comment

OSMRE agrees with the recommendation that an assessment be made of the current tribal regulatory capabilities to determine their readiness for assuming primacy. A comprehensive study is planned for Fiscal Year 1987.

Now on p. 5.

The following are GAO's comments on the Department of the Interior's letter dated August 25, 1986.

GAO Comments

1. Report revised.
2. Report revised.
3. No change needed. The date (1982) in our report is correct. In this regard, we found that OSMRE's Division of Grants Administration's records on which its comment was based were incomplete in that they did not contain information on cooperative agreement C5110099, which became effective May 5, 1982. OSMRE's Albuquerque Field Office confirmed the substance of the 1982 agreement.
4. We corrected a computational error, which reduced the \$4.6 million figure to \$4.4 million. We discussed our calculations with the Division of Grants Administration, which had cited about \$4.1 million as the correct figure, and found that the Division's records were incomplete in that they did not have information on two cooperative agreements (\$272,500). We reached agreement with the Division that \$4.4 million awarded through fiscal year 1985 was correct. The \$1.6 million figure refers to cooperative agreements to construct reclamation projects under Title IV of SMCRA and are not included in this report.
5. Deleted sentence. Although the statement was made by the Assistant Director, OSMRE Western Field Operations; the Director, OSMRE Western Technical Center; and the Supervisory Regulatory Program Specialist, OSMRE Casper Field Office, its deletion does not detract from the point being made.
6. Report revised.
7. The OSMRE Assistant Director for Program Operations agreed on July 21, 1986, that the statement in the draft report concerning comprehensive evaluations was accurate. Regarding the statement on decreased funding for cooperative agreements, we have added information to the report that states that OSMRE reduced funding to the tribes by about 26 percent from fiscal year 1985 levels.

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