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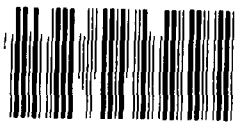
United States General Accounting Office

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

May 1986

SURFACE MINING

Issues Associated With Indian Assumption of Regulatory Authority



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

Resources, Community, and
Economic Development Division
B-221171

May 30, 1986

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

Dear Mr Chairman:

In response to 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 As agreed with your office, we focused our review on three areas: (1) the issues affecting Indian assumption of regulatory authority over surface coal mining operations (often referred to as primacy), (2) the Department of the Interior's proposal to reallocate abandoned mine land reclamation (commonly known as AML) funds currently set aside for Indian tribes, and (3) Interior's Office of Surface Mining Reclamation and Enforcement's (OSMRE's) management of cooperative agreements with the Indian tribes On May 13, 1986, we briefed your staff on the results of our work. This report formally transmits the information presented during the briefing on the first two areas. We will be reporting on the third area in a separate document

The information contained in this report was obtained largely from interviews with federal and state officials who were most directly involved with the regulation of mining operations on Indian lands and with the three Indian tribes on whose lands coal mining is currently taking place. We also examined OSMRE reclamation project inventories and lists of needed reclamation efforts prepared by the tribes to assess the impact that reallocation of AML funds could have on reclamation activities on Indian lands. (The scope and methodology for this study are explained in detail in app. I.)

Background

Indian tribes own and control an estimated 15 percent of the nation's coal resources, including one-third of the low-sulphur strippable coal in the western United States. In 1984, 20.5 million tons of coal were produced from the five active coal mines located on Crow lands in Montana and Navajo and Hopi lands in Arizona and New Mexico. However, unlike states, which could assume regulatory authority over coal mining operations within their borders after obtaining OSMRE approval of a state regulatory program, the Surface Mining Control and Reclamation Act of

1977 (SMCRA) required the Indian tribes to await congressional enactment of specific Indian legislation before assuming primacy. In the meantime, the federal government, under SMCRA, regulates coal mining operations on Indian lands.

As the initial step toward legislatively granting Indian primacy, SMCRA directed the Secretary of the Interior to study the regulation of surface mining on Indian lands and to prepare a report containing proposed legislation designed to allow Indian tribes to assume full regulatory authority. In particular, SMCRA required this report to make recommendations regarding the special jurisdictional status of Indian lands outside the boundaries of the reservations 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 policy issue was to present definitional alternatives from which the Congress could choose. To date, legislation to allow the tribes to assume primacy has not been enacted.

In order to mitigate the adverse effects of abusive mining practices occurring before SMCRA's enactment, the act additionally established an AML Fund to be administered by the Secretary of the Interior. Reclamation fees, deposited annually by all coal mining operators, represent the largest deposits into this fund. SMCRA mandates that 50 percent of the funds collected on Indian lands be allocated to the Indian tribe to address the adverse surface effects of mining on Indian lands The allocation is made by the Secretary, pursuant to an approved abandoned mine reclamation program. However, an abandoned mine reclamation program cannot be approved unless the tribe has obtained primacy through an approved regulatory program The remaining 50 percent of the funds as well as any funds not spent by the tribes within 3 years of allocation may be claimed and spent by the Secretary wherever needed in order to meet the purposes of the act.

Issues Affecting Indian Assumption of Primary Regulatory Authority

We identified four issues that could affect future legislative efforts to grant primacy to Indian tribes These issues concern (1) disputes over the definition of Indian lands outside the boundaries of the reservations and the states' historical regulatory role on these lands, (2) multiple regulatory authorities for mines that span federal, Indian, and state lands, (3) the adequacy of tribal judicial systems to enforce SMCRA requirements, and (4) the ability of the tribes to impartially regulate coal mining operations in which they have vested interests.

Concerning the first issue, jurisdictional disputes are ongoing in Montana and New Mexico over who has authority to regulate coal mining operations on Crow, Navajo, and Hopi lands. While these two states recognize OSMRE's authority to regulate mining activities within the boundaries of reservations, they dispute the authority claimed by OSMRE to regulate mining on lands with Indian interests off the reservations. SMCRA grants OSMRE the authority to regulate all coal mining on Indian lands and provides a definition of what those lands encompass. The states and OSMRE, however, interpret that definition differently, as they do the legal significance of the states' historical regulatory presence on these lands. Attempts to resolve this dispute through litigation have been unsuccessful.

With respect to the second issue, even if the jurisdictional disputes over the authority to regulate coal mining on Indian lands are resolved, coal operators may still face multiple regulatory authorities at a given mine site. This can occur because mine sites are so large that they often span federal, Indian, and state lands and because land and mineral ownership patterns on mines with Indian interests vary widely.

Third, as with the states, once Indian tribes are granted primacy and begin regulating coal operations on their lands, legal challenges to regulatory actions are likely. Such challenges will place a new burden on the Indian judicial system—one that it may not be equipped to handle. In particular, under the Indian Civil Rights Act, Indian tribes lack sufficient legal authority to conduct the kind of enforcement program mandated by SMCRA. In addition, coal operators have expressed concern that the tribal court systems may not be able to deal with the complex regulatory issues that could be raised as part of any litigation stemming from SMCRA-related enforcement actions. This view is contested by tribal representatives, however, who state that their judicial systems are fully capable of handling such issues

Finally, by virtue of their status as tribal members, it may be difficult for Indian regulators to impartially regulate coal operations on their lands. Indian tribes receive a share of all revenues generated by the sale of coal mined on their lands. Coal royalties and related income represents a significant share of total tribal income. Further, for two tribes, coal operations provide an important source of employment in depressed tribal economies. Thus, when the tribes are granted the authority to regulate coal mining operations, they would have a financial incentive for less vigorously enforcing regulations that might reduce coal production. Private coal operators suggest that, in addition, Indian

regulators could have an incentive to enforce regulations more strictly against private mining operations than against future Indian-owned operations, thereby placing the private operators at an economic disadvantage. On the other hand, tribal officials said conflicts of interest would not affect their willingness to vigorously enforce SMCRA In support of their view, representatives of the Navajo tribe asserted that the tribe is effectively regulating a tribal pesticide production enterprise under a cooperative agreement with the Environmental Protection Agency.

Each of the four issues is discussed in detail in appendix II.

Interior Proposal to Reallocate Tribal AML Funds

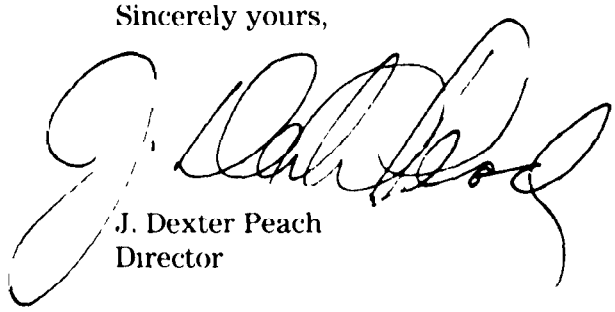
In the absence of legislation allowing Indian tribes to assume regulatory control over coal mining and reclamation operations on their lands, OSMRE has proposed reallocating AML funds currently set aside for the tribes. The funds have been derived from coal mining on Indian lands and held for tribal use when primacy was obtained. Because the tribes have not obtained primacy, OSMRE is now proposing to remove the funds from the "Indian account" and place them into the Secretary of the Interior's discretionary account for distribution as the Secretary sees fit.

Our review verified that Interior has the legal authority under SMCRA to reallocate any AML funds not used by a state or Indian tribe within 3 years of the initial allocation Thus, if it chooses to do so, Interior may, in February 1987, proceed with its plan to reallocate into its discretionary account the $24 million set aside for use on Indian lands through fiscal year 1983 While no legal bar to such action exists, it nevertheless may adversely affect the tribes' ability to mitigate the effects of past mining abuses on Indian lands, particularly those related to non-coal mining. (This issue is addressed in detail in app. III.)

We discussed the matters in this report with agency program officials and have included their comments where appropriate. However, as the Chairman requested, we did not request official agency comments on a draft of this report.

We are providing copies of the report to the Secretary of the Interior and to the Directors of OSMRE and the Office of Management and Budget. In addition, we will send copies to interested parties upon request.

Sincerely yours,



J. Dexter Peach
Director

Contents

Abbreviations

AML	abandoned mine land
CERT	Council of Energy Resource Tribes
EPA	Environmental Protection Agency
GAO	General Accounting Office
MOU	memorandum of understanding
NOV	notice of violation
OSMRE	Office of Surface Mining Reclamation and Enforcement
RCED	Resources, Community, and Economic Development Division
SMCRA	Surface Mining Control and Reclamation Act of 1977

Background, Scope, and Methodology

Twenty-five Indian tribes located in 11 predominantly western states own and control coal resources. According to the Bureau of Land Management, these resources total 710 billion tons and represent the largest block of nonfederally owned coal in the United States. They amount to an estimated 15 percent of the nation's total coal resources and one-third of the low-sulphur strippable coal in the western United States. Of the 25 tribes with coal resources, only 3—the Navajo, Crow, and Hopi—have active mining operations These operations are conducted at five mine sites in Arizona, Montana, and New Mexico. In 1984, the last year for which data are available, 20.5 million tons of coal were produced from these mines, representing 2.3 percent of the total U S coal production for that year. According to records of the four coal companies currently mining on Indian lands, recoverable reserves currently under lease on this land total over 2 2 billion tons

Regulation of Coal Mining Operations

Unlike states, which can assume regulatory authority over coal mining operations within their borders upon obtaining OSMRE approval of a state regulatory program, the Surface Mining Control and Reclamation Act of 1977 (SMCRA), Public Law 95-87 (30 U.S.C. 1201, et seq.), requires the Indian tribes to await congressional enactment of specific Indian legislation before assuming primacy (primary regulatory authority). In the meantime, under SMCRA, the federal government regulates coal mining operations on Indian lands. SMCRA defines Indian lands as

> " all lands, including mineral interests, within the exterior boundaries of any Federal Indian reservation, notwithstanding the issuance of any patent, and including rights-of-way, and all lands including mineral interests held in trust for or supervised by an Indian tribe "

As the first step in the primacy granting process, SMCRA directed the Secretary of the Interior to "study the question of the regulation of surface mining on Indian lands." As part of this study, SMCRA required the Secretary of the Interior to "analyze and make recommendations regarding the jurisdictional status of Indian lands outside the exterior boundaries of Indian reservations," and in the resulting report to propose legislation designed to allow Indian tribes to assume full regulatory authority.

The Secretary's report, submitted to the Congress in February 1984, did not make specific legislative recommendations on the jurisdictional status of off-reservation Indian lands. Interior decided instead that the most appropriate course of action on this delicate policy issue was to present a number of definitional options from which the Congress could

choose Accordingly, Interior presented six definitional options, ranging from narrowly defining Indian lands as those on-reservation areas where the surface and/or mineral estate is controlled by the tribe, to broadly defining Indian lands as all on- and off-reservation areas where the tribes have some legal control of the surface or mineral estate. The report, however, questioned whether certain off-reservation lands—such as tribal-owned lands—meet the act's definition of Indian lands because the term "supervised by" as used in the act has no generally accepted meaning

In 1984 the Office of Surface Mining Reclamation and Enforcement (OSMRE)—the responsible agency within the Department of the Interior—also published regulations governing coal regulatory and reclamation activities on Indian lands until legislation was passed. These regulations asserted an operating definition of Indian lands that gave Interior exclusive authority to regulate all mining operations on reservations as well as those lands with Indian interest in either the land surface or mineral rights

Abandoned Mine Land Program

To promote the reclamation of mined areas left without adequate reclamation prior to the enactment of SMCRA, Congress established an Abandoned Mine Reclamation Fund (commonly called the AML Fund) to be administered by the Secretary of the Interior Reclamation fees, paid quarterly by all operators of coal mining operations, represent the largest deposits into this fund—generally 35 cents per ton of coal produced by surface mining and 15 cents per ton of coal produced by underground mining

Under SMCRA, 50 percent of the funds collected in any state or on Indian lands are allocated to the state or Indian tribe. The allocation is made by the Secretary pursuant to an approved abandoned mine reclamation program. However, an abandoned mine reclamation program cannot be approved unless the state or Indian tribe has obtained primacy through an approved regulatory program. The remaining 50 percent of the funds—as well as any funds not spent by the states or tribes within 3 years of allocation—may be claimed and spent by the Secretary wherever needed in order to meet the purposes of the act.

Expenditures from the AML Fund are to reflect the priorities set out in SMCRA in the following order:

"(1) the protection of public health, safety, general welfare, and property from extreme danger of adverse effects of coal mining practices,

(2) the protection of public health, safety, and general welfare from adverse effects of coal mining practices,

(3) the restoration of land and water resources and the environment previously degraded by adverse effects of coal mining practices including measures for conservation and development of soil, water (excluding channelization), woodland, fish and wildlife, recreation resources, and agricultural productivity,

(4) research and demonstration projects relating to the development of surface mining reclamation and water quality control program methods and techniques;

(5) the protection, repair, replacement, construction, or enhancement of public facilities such as utilities, roads, recreation, and conservation facilities adversely affected by coal mining practices, and

(6) the development of publicly owned land adversely affected by coal mining practices including land acquired as provided in the act for recreation and historic purposes, conservation, and reclamation purposes and open space benefits "

In addition, at the request of the governor of the state or the chairman of the tribe, the Secretary can authorize state or tribal regulatory authorities to reclaim non-coal underground or surface mines that could endanger life and property, constitute a hazard to public health and safety, or degrade the environment.

Because the Indian tribes have not obtained primacy, the Secretary was not obligated under the act to allocate or set aside the Indian share of the AML Fund. However, under its own regulations, Interior has chosen to set aside the collections from mining on Indian lands (as defined by Interior) for use by the Indians when primacy is granted. The U.S. Court of Appeals for the District of Columbia Circuit in a suit brought by the state of Montana on AML distribution ruled in November 1984 that this allocation procedure was consistent with the intent of SMCRA even though the Crow tribe did not yet have an approved AML program and could not yet receive the funds. Funds set aside by Interior for the three Indian tribes with active mining operations from fiscal year (FY) 1978 through 1985 are as follows:

Table I.1: Interior's Allocation of Funds for Indian Tribes With Active Mining Operations

Dollars in millions

Tribe	Allocation			Total
	Thru FY 83	FY 84	FY 85	
Navajo	$18 9	$4 0	$3 7	$26 6
Crow	3 8	0 4	0 4	4 6
Hopi	1 3	0 3	0 4	2 0
Total	**$24.0**	**$4.7**	**$4.5**	**$33.2**

Interior has not set aside funds for any other tribe.

Scope and Methodology

As requested by the Chairman, House Committee on Interior and Insular Affairs, on June 19, 1985, this review focuses on the issues affecting Indian assumption of regulatory authority over surface coal-mining operations (primacy) and the Department of the Interior's proposal to reallocate AML funds currently set aside for the Indian tribes.

Our work was performed between April 1985 and March 1986. We reviewed SMCRA and its legislative history, OSMRE regulations implementing the act, and the record of hearings held in 1984 on two legislative proposals to provide Indian primacy We also interviewed officials from those organizations that would be most affected by the granting of primacy, as well as the reallocation of AML funds, to obtain their perspective on the issues. These officials included OSMRE personnel both at headquarters and at the two field offices having Indian lands within their geographic areas (Albuquerque, New Mexico, and Casper, Wyoming); representatives of four coal companies currently mining on Indian lands; officials of the Joint Committee of the National Coal Association and American Mining Congress, members of 10 tribes with the most significant coal resources on their lands; representatives of the Council of Energy Resource Tribes (CERT);[1] and government officials from the states in which coal mining on Indian lands is taking place (New Mexico, Montana, and Arizona). Finally, we examined OSMRE reclamation project inventories and lists of needed reclamation efforts prepared by the tribes to assess the impact that reallocation of AML funds could have on reclamation activities on Indian lands

[1]CERT is a coalition of 40 American Indian tribes whose purpose is to help member tribes prudently manage their energy resources

Issues Affecting Future Legislative Initiatives to Grant Primacy to Indian Tribes

Disputes Over Regulatory Jurisdiction

Several jurisdictional disputes are ongoing between OSMRE, the tribes, and state governments over who has the authority to regulate coal mining operations involving "Indian lands" outside the boundaries of the reservations. Disagreement over how to precisely define these lands and the significance of the states' historical regulatory presence on these lands is at the heart of the disputes. Attempts to resolve this issue through litigation have been unsuccessful.

Varying Interpretations of "Indian Lands" Cloud Question of Jurisdictional Authority

Under SMCRA, state regulatory authority does not extend to federal or Indian lands. Nevertheless, Montana and New Mexico claim jurisdictional authority over "Indian lands" located outside the exterior boundaries of the reservations. The states' claims are based on their interpretation of the act's definition of Indian lands and their historical regulatory presence on these lands. OSMRE does not accept the states' interpretation. While OSMRE and the states have attempted to minimize the regulatory impact of their dispute, officials of two coal companies we interviewed contend that having two regulators increases their costs of doing business and adds to the already confusing regulatory structure on Indian lands. For example, one company said that travel costs are increased because they have to travel to the OSMRE office in Denver, Colorado, and to the state office in Santa Fe, New Mexico. In addition, more time is needed to respond to questions from both the state and OSMRE on permit revisions.

OSMRE and the states of New Mexico and Montana claim jurisdictional authority over the same off-reservation Indian coal lands in each state due to differing interpretations of SMCRA's "Indian lands" definition. Specifically, Montana surface mining officials contend that the state is the appropriate regulatory authority because, in their view, SMCRA requires the land to include an Indian interest in both the surface and mineral estate to be considered Indian land and thereby regulated by the tribes or OSMRE before Indian primacy. While New Mexico has not officially taken a stand on the definition, the director of the state regulatory authority told us that he believes off-reservation lands should have both Indian surface and mineral interest to be considered Indian lands. OSMRE's current position, on the other hand, is that it will regulate all lands where either the surface or minerals are held in trust for, or supervised by, an Indian tribe. Further complicating the issue is the question of whether lands that have been leased to the coal companies by the tribes should be considered as having an Indian interest for purposes of regulation under SMCRA. According to the director of New Mexico's Mining and Minerals Division, the tribe relinquishes control of

the surface estate under these lease agreements for periods as long as 99 years

Under the states' interpretation, virtually no Indian land outside the exterior boundaries of the reservations would exist In New Mexico, the tribal interest in off-reservation mines with Indian interests is primarily limited to ownership of the surface, with only 2 percent of this area also having an Indian mineral interest. Montana surface mining officials claim that the Absaloka coal mine (the only Montana mine with Indian mineral interests) located on the Ceded Strip off the Crow reservation is not Indian land because the Crow tribe does not control the surface in the mining area Most of the coal underlying the surface of this mine is held in trust by the federal government for the Crow tribe whereas most of the surface is controlled by the coal company, and a small section of the permit area includes state surface and state coal.

Adding to this jurisdictional debate is the uncertainty surrounding what is meant by the term "supervised by an Indian tribe" as used in the SMCRA definition As pointed out by the Secretary in his report to the Congress, this term has no generally accepted meaning Crow and Navajo officials commented that interpretations can range from requiring total control of the land by a tribe to lands where the tribe provides services such as child welfare, family counseling, land lease assistance, or grazing land inspections. For example, a Navajo legal representative told us that under tribal criminal law, Indians living off the reservation are still subject to tribal law and can be considered supervised by a tribe He said the land they live on could also be considered as "supervised by an Indian tribe." State and coal company officials claim the term "supervised by" is so broad that any tribe could purchase lands off the reservation and call them Indian lands by applying the term "supervised by " The Deputy Secretary of New Mexico's Energy and Minerals Department told us, however, that the state would not accept such tribal actions to "create" Indian lands.

Even if the states accept OSMRE's definition of "Indian lands," state officials argue that the states will retain jurisdiction over certain mines by virtue of their pre-SMCRA permits on the mines. These permits, they said, establish the states' existing jurisdictional authority under section 710(h) of SMCRA This section of the act states that "nothing in this Act shall change the existing jurisdictional status of Indian lands." Prior to SMCRA, the states had issued state permits on Indian lands and were regulating mining on them. New Mexico was regulating mining both on and off the Navajo reservation, and Montana off the Crow reservation in the

Ceded Strip After SMCRA was enacted, these states continued to regulate mining on these lands under state permits.

We do not agree that section 710(h) grants the states the authority to regulate Indian lands by virtue of their pre-SMCRA state permits This section, in our opinion, merely limits the scope of federal authority over Indian lands to the purposes of the act. In other words, SMCRA is not to supersede existing jurisdictional authorities over Indian lands for activities outside the scope of SMCRA.

Although both the states and OSMRE claim jurisdiction over off-reservation Indian lands, we could not determine the extent of instances where both the federal and state governments were exercising regulatory control over the same lands According to the director of New Mexico's state regulatory authority, state inspectors are continuing to inspect off-reservation lands that include Indian interests as part of their overall mine inspection responsibilities and are instructed to cite violations of mining regulations, i.e., issuing notices of violations (NOVs). He said that the state tries to avoid duplication with OSMRE as much as possible; hence, if OSMRE issues an NOV for the same violation, the state would vacate its NOV. In Montana, the Absaloka mine is permitted by the state and by OSMRE. The OSMRE permit, however, only covers what it considers to be the Indian lands portion of the mine; in contrast state officials said that the state permit covers the entire mine with the performance bond payable to both the state and OSMRE In addition, Montana and OSMRE were participating in joint inspections of the mine. During calendar years 1983 through 1985, 34 joint inspections were conducted in which the state issued two NOVs and OSMRE issued none

According to coal company officials in Montana and New Mexico, having two regulators on mines in areas of disputed regulatory jurisdiction has been an unnecessary burden that has led to confusion, frustration, and extra costs to the companies. These officials said that they are faced with (1) two sets of reactions on mine plan applications and revisions, often requiring additional time and travel to resolve sometimes divergent review comments, (2) often differing mining standards because the state regulatory program standards are more stringent than the federal standards, and (3) additional costs associated with coordinating their activities with two separate regulators.

Litigation Has Not Resolved the Problem of Indian Lands Definition

In separate litigation, the states of New Mexico and Montana contested, in federal district court, the Secretary's 1984 regulations governing coal mining on Indian lands. The states objected to the regulations identifying Interior as the exclusive regulator over surface coal mining and reclamation activities on "Indian lands." In both cases, out-of-court settlement agreements were reached In neither case, however, did the settlement agreements put to rest the question what is Indian land?

Until 1985 the state of New Mexico claimed jurisdiction over all mining activities on Indian lands in the state, both on and off the reservations, on the basis of the state's interpretation of section 710(h) of SMCRA In November 1984 the state filed suit against the Department of the Interior requesting the U.S. District Court for the District of Columbia to review Interior's authority to promulgate SMCRA regulations for Indian lands in the state. In a July 1985 settlement agreement, the state agreed not to contest the position of the Secretary of the Interior that the Secretary is the exclusive regulatory authority with respect to surface coal mining operations on Indian lands within the state. As part of the settlement, Interior agreed to revise the regulations to show that lands outside the boundaries of reservations allotted to individual Indians would not be considered "Indian lands" for purposes of SMCRA. However, although the state has taken no formal position, the deputy director of New Mexico's Department of Energy and Minerals said that off-reservation lands may not be Indian lands according to SMCRA because they do not contain both Indian surface and Indian mineral interests, or because the lands are not supervised by a tribe

The state of Montana filed a similar suit in the U.S. District Court for the District of Columbia in November 1984. In an August 1985 joint motion for dismissal, the state and Interior Department agreed to enter into a memorandum of understanding (MOU) to provide for

> " effective regulation of surface coal mining and reclamation operations on lands on the Crow Ceded Strip in Montana in a manner that achieves the regulatory purposes of the Surface Mining Control and Reclamation Act of 1977, fosters State-Federal cooperation and eliminates unnecessary burdens, intragovernmental overlap and duplicative regulation "

The parties agreed to preserve their rights to disagree on whether the Ceded Strip is "Indian lands" as defined in SMCRA and whether the federal government or the state has authority over these lands. Under the MOU the state was given lead responsibility for permit application review and inspections, with the stipulation that nothing in the MOU ".

shall be construed as delegating to the State of Montana the Secretary's responsibilities for the regulation of surface coal mining and reclamation operations."

As of April 1986, the method of regulation under the MOU is still being finalized. According to the assistant director of OSMRE's Western Field Operations Office, OSMRE and the state are developing procedures for regulating the mine operations according to the provisions of the MOU. He said that the Crow tribe would also be involved in this process In the meantime, Montana and OSMRE are conducting joint inspections of the mine.

Regulatory Problems in Areas of Mixed Ownership

Even if jurisdictional disputes related to the Indian lands definition are resolved, coal operators might still have to deal with multiple regulatory authorities in situations where individual mine sites span agreed-upon federal, Indian, and state regulatory jurisdictions. Such situations can be expected to occur largely because of the unique, mixed surface and mineral ownership patterns inherent in Western coal mining This regulatory structure problem could be worsened by proposals to grant Indian tribes partial regulatory authority as an interim step to full primacy.

Coal Ownership Patterns Could Generate Excessive Regulatory Burden

Surface coal mines in the West are extremely large, those mines with Indian interests are no exception. The five active mine sites with Hopi, Navajo, and Crow interests in Montana, Arizona, and New Mexico cover an average of almost 24,000 permitted acres. This compares with the typical site in states such as Tennessee and Kentucky, which cover about 50 acres. Because of their huge size, individual mines can span the regulatory jurisdictions of OSMRE, the states, and, if primacy is granted, various tribes.

The situation is further complicated because the land surface and mineral rights on individual mine sites are owned by different individuals or groups. Varying types of Indian interests in either surface or mineral rights are interspersed among other non-Indian interests on the same mine. The Indian interests include allotments held in trust by the federal government for individual Indians, lands held in trust for tribes, tribal owned lands directly supervised by tribes, lands ceded by the federal government and returned to the tribes, etc. In New Mexico and Montana (the states containing the vast majority of these lands), the three active mines and three proposed mines involving off-reservation lands with Indian interests are on lands with mixed surface and mineral ownership.

In fact less than 2 percent of the land area covered by these mines is under Indian control of both the surface area and mineral interest. The remainder have some combination of Indian and non-Indian ownership. In these situations, OSMRE (or the Indian tribes after primacy is granted) would regulate portions of the mines while the respective states would regulate the other portions.

The regulatory structure that can emerge from such ownership patterns is best illustrated by the 17,490-acre McKinley mine in New Mexico This mine is partially located on the Navajo reservation and partially off it. Under SMCRA, OSMRE (and potentially in the future, the Navajo) has regulatory jurisdiction over the northern portion lying within the confines of the reservation. The southern portion is off the reservation Here, ownership of the surface is split between Indian interests, the state of New Mexico, and private individuals or companies, ownership of the coal is split between New Mexico, the federal government, and private individuals or companies. The result is an ownership pattern resembling a checkerboard of Indian lands interspersed among lands owned by others.

Only one mine, the Absaloka, is operating in Montana on Indian lands. The surface of this mine is partially owned by the state and partially by a private coal company. Ownership of the coal interests, on the other hand, is split between the Crow tribe and the state.

In situations such as these, the coal operator is faced with a confused regulatory environment For the same mine site the operator must undergo multiple permit reviews, contend with multiple inspections, and comply with multiple regulatory standards.

OSMRE and state officials, including the directors of OSMRE's Western Technical Center and New Mexico's Mining and Minerals Division, recognize the need to take action to avoid multiple regulation at the same mine New Mexico state officials presented a recommendation to OSMRE in November 1985 to resolve jurisdictional problems resulting from mixed ownership patterns. The state proposed that a joint regulatory commission be established to regulate the mines, to be comprised of OSMRE, state, and tribal officials. However, the tribal officials, who would assume a regulatory role under primacy, objected to this arrangement.

According to the director of OSMRE's Albuquerque field office, OSMRE headquarters personnel have begun working on other potential options

for minimizing dual regulation in these mixed ownership situations For example, one option being explored is the designation of one regulatory authority on the basis of who owned the majority ownership of the mine surface. However, he said, if the majority of the surface is private and therefore under the control of the state, some method of guaranteeing that tribal interests are protected would have to be put in place

Partial Primacy Proposals May Further Confuse Regulatory Structure

Instead of granting Indian tribes full authority over coal mining regulation, OSMRE has suggested that as part of future legislation tribes be given the option of assuming control over the regulatory process in incremental steps (partial primacy). According to Interior's February 1984 report to the Congress, this approach may be necessary because if tribes are required to assume responsibility for all aspects of the regulatory process at once, they may not qualify As OSMRE's report to the Congress states.

"Under a partial program, tribes could develop a program for permitting, for example, while not administering an inspection and enforcement program Alternatively, partial programs could involve joint administration by the OSM and the tribe on all regulatory aspects, with OSM involvement decreasing as tribal capability increased "

According to the senior environmental engineer, CERT, partial primacy allows needed flexibility whereby tribes assume only those regulatory duties in which they are competent, while giving the tribe time to obtain necessary expertise He told us that under partial primacy, some tribes that either have limited coal mining operations on their lands or few technical resources to draw upon would be allowed an active participatory role in the regulatory effort Although representatives from each of the tribes we contacted desired full regulatory authority over surface coal mining operations on their lands, most said that they would like the option of phasing in their efforts through assumption of partial programs.

While possibly a valid approach to transitioning from federal to Indian regulatory authority, the concept of partial primacy is not founded in SMCRA. Although no comparable language exists for the tribes, SMCRA authorizes a state to assume primacy only if it submits, and obtains OSMRE approval of, a plan for a complete program covering all aspects of surface coal mining regulation. There is no provision for partial primacy either for the state or the tribes Under these circumstances, coal company officials are not quite sure how partial programs would work

Coal industry representatives we spoke with expressed their concern about the impact of partial primacy on their operations. According to officials of three of the four coal companies we contacted, partial primacy would serve to complicate an already confusing regulatory situation on Indian lands. They believed it would result in overlapping and duplicative regulatory efforts by OSMRE and the tribes. According to one coal company official, this would place coal mining operations on Indian lands at an economic disadvantage in relation to operations on non-Indian lands. While OSMRE supports partial primacy, its report to the Congress lends credence to this by stating that under partial primacy

"... operators would be responsible to two regulatory agencies. The increased burden on operators would depend on the degree of duplication of responsibilities between the two agencies."

Adequacy of Tribal Judicial Systems

Tribal judicial systems may not be able to handle the additional duties that would be associated with the assumption of regulatory responsibility for implementing SMCRA on Indian lands. Concerns in this area center on the tribes' limited legal authority to fully enforce SMCRA's requirements. In addition, private coal companies conducting mining operations on Indian lands contend that tribal courts are not sophisticated enough to deal with the complex regulatory issues that would arise.

Insufficient Legal Authority

The Indian Civil Rights Act of 1968 strictly limits the authority of Indian tribes to enforce Indian or federal laws on their lands. Because of these limitations, if granted primacy today, Indian tribes would not be able to enforce SMCRA in a fashion consistent with the act's requirements. Accordingly, as part of any legislation granting to the tribes regulatory authority over coal mining operations, the enforcement authority in the Indian Civil Rights Act may have to be changed to make it consistent with the demands of SMCRA.

Under SMCRA any state wishing to obtain primacy must submit a plan demonstrating its capability to carry out the act's purposes and provisions. In particular, the proposed program must include a state law that provides civil and criminal sanctions for violations by coal operators that are no less stringent than those set forth in SMCRA. In this connection, SMCRA authorizes imposition of civil penalties of up to $5,000 for each violation and criminal penalties of up to $10,000, imprisonment up to 1 year, or both. While SMCRA does not specifically state that the same

federal standards should apply in the granting of primacy to the tribes, it seems reasonable that the Congress would want to apply the same standards in any legislation authorizing tribal primacy.

In this regard, the Indian Civil Rights Act limits tribal enforcement authority to levels below SMCRA standards. The act allows tribes to assess, for any violation of law, criminal penalties of not more than $50(and imprisonment of not more than 6 months. Moreover, these sanctions can be exercised only against Indians Also, the civil jurisdiction of the tribes over non-Indians is questionable. Thus non-Indian coal companies would not be subject to tribal criminal enforcement control and may be subject to only limited tribal civil enforcement. We believe it is essential that if, under primacy, the tribes will be expected to assume full responsibility for enforcing SMCRA provisions on their lands, they be provided the necessary enforcement authority

Questions About Court System Adequacy

In addition to shortcomings in tribal enforcement authority, the Joint Committee of the National Coal Association and American Mining Congress and officials with the four coal companies currently mining on lands with Indian interests expressed several general concerns about the adequacy of tribal court systems to fairly and competently enforce the law Most significantly, they contend that tribal court systems are not sophisticated enough to deal with the complex issues that would be raised in litigation involving SMCRA enforcement. In support of their view, they point out that formal Indian court systems have not been in place very long (e.g , the Crow tribe system was established in 1976). Further, tribal courts' experience is generally limited to domestic disputes, probate matters, juvenile problems, and local ordinance violations. Finally, the officials note that tribal courts often lack legally trained judges (less than half of the judges in the Navajo, Hopi, and Crow judicial systems are licensed attorneys) and that many are not courts of record. Consequently, these courts may not be constrained by legal safeguards or requirements for consistency.

The officials also feared that many tribal courts could have inherent conflicts of interest that might prevent the coal companies from receiving a fair and objective hearing in a case they might bring before the court They note that in many tribes, judges are appointed by and serve at the pleasure of the tribal chairman or tribal council. Thus, the companies argue, in some cases, tribal political judgments could affect the legal judgments made by the court. Moreover, judges may face community pressure to make popular judgments.

Because of their concerns over the court systems' adequacy and fairness, the coal companies argue that any legislation granting Indian primacy should permit so called de novo ("over again") review of tribal court system decisions. Under a de novo review provision, an appeal of a tribal court decision would result in a new trial in a federal district court. Thus the original tribal court proceeding would have little effect. Given their misgivings about tribal court system capabilities, the coal companies believe such a provision is essential to ensuring fair and competent administration of SMCRA on Indian lands.

Together with the Department of the Interior, the tribes oppose inclusion of de novo review in Indian primacy legislation The Indian tribes argue that, while only recently created, their court systems are adequate to handle the additional burden of SMCRA-related enforcement cases. Interior's Deputy Assistant Secretary for Land and Minerals, in testimony before the Senate Select Committee on Indian Affairs in August 1984, pointed out further that de novo review would introduce unnecessary delays in the judicial process and thereby frustrate prompt enforcement efforts.

During this review we were not able to conclusively resolve the issue of tribal court system capabilities. It is clear, however, that a difference of opinion exists between the potential future regulators (the tribes) and those to be regulated (the coal companies).

Regulatory Conflicts of Interest

Because tribes and tribal members have a direct or indirect financial interest in mining operations on their lands, there may be a conflict of interest when tribes are granted primary regulatory authority over these mining operations. Accordingly, the tribes may be reluctant to vigorously enforce SMCRA requirements. Private coal companies are also concerned that if the tribes begin to operate their own coal mines, the tribal regulatory authority may not enforce mining regulations equally. Tribal officials, however, disagree with this contention and state that adequate checks and balances are in place to prevent this.

Questions About How Well Tribes Will Enforce SMCRA Requirements

Sections 201(f) and 517(g) of SMCRA state that no OSMRE or state employee performing any regulatory function or duty under the act shall have a direct or indirect financial interest in any underground or surface coal mining operation. No comparable provision of the act addresses Indians. All things being equal, it seems reasonable that the Congress would want the same sort of safeguard in place for mining on

Indian lands as it put in place elsewhere. However, because Indian tribes and tribe members have a financial interest in the coal resources on their lands and hence benefit from associated coal operations, it may be difficult to provide comparable safeguards if Indians are to be given the opportunity to regulate coal mining on their lands.

At the outset, coal royalties and related income derived from coal operations on tribal lands provide an important source of income to the three tribes with active coal mines. The importance of coal-related income (defined as royalties, advanced royalties, and rents) to total tribal income is demonstrated in the table below. The figures, obtained from tribal financial managers, are for fiscal year 1985.

Table II.1: Coal-Related Income as a Percentage of Total Tribal Income

Dollars in Millions

Tribe	Coal-related income	Total tribal income	Percentage of tribal income provided by coal
Navajo	$14 8	$75 9	19
Hopi	3 3	5 8	57
Crow	1 9	3 1	61

As the figures demonstrate, all three tribal governments are dependent on coal income for a significant share of their tribal income. For the Hopi and Navajo tribes, the royalty and related income is placed in the tribal account in the U.S. Treasury and used to operate the tribal government. The Crow tribe divides its coal income between the tribal government and individual members. About 20 percent of the income goes into the tribal account and, like the Navajo and Hopi, is used to operate the tribal government. Another 20 percent is invested for future tribal use. The remainder is divided equally among tribe members and disbursed accordingly. In this case, therefore, not only is the tribal government dependent on the coal revenues but the individual tribe members also receive direct payments

In addition to boosting tribal revenues, coal operations for the Navajo and Crow tribes provide a small but important source of vitally needed jobs. Tribal economies are currently severely depressed According to Bureau of Indian Affairs data (December 1984), tribal unemployment rates stand at 52 percent for the Navajo, 64 percent for the Crow, and 48 percent for the Hopi. For the Navajo about 43,000 out of a total 83,000-person labor force are employed. Of these 43,000, more than

1,700 (4 percent) work with coal operations. For the Crow, only 823 out of a 2,291-person labor force are employed, of these, 28 (3 percent) work at the mines.

ndustry Concerns About Unequal Enforcement

Officials from two of the four coal companies currently mining on Indian lands also fear that conflicts of interest could result in discriminatory regulatory practices once primacy is granted to the tribes. Currently no tribes have active coal mining operations of their own. However, the director of the Navajo Coal Mining Commission told us that the Navajo tribe is considering one. Thus, while not an issue today, coal company officials believe that if Indian-owned operations begin competing with private coal companies in the future, the tribal regulatory authority could strictly enforce regulations on private industry and at the same time relax enforcement over tribal enterprises. According to coal company officials, this scenario could place the private operator at a significant economic disadvantage.

Countering Tribal Viewpoint

CERT recognizes that conflicts of interest will be present when tribal members regulate coal mining activities. CERT believes, however, that this will not result in lax or discriminatory enforcement of SMCRA. In this connection, Navajo representatives asserted that adequate checks and balances are in place to prevent such conflicts from affecting regulatory judgments. Specifically, they pointed out that the tribal council and the tribal resource commission oversee mining company operations and tribal regulatory authority activities and thereby ensure that Indian resource development is conducted in an environmentally sound manner. They also cited a precedent where the tribe is effectively regulating a tribal pesticide production enterprise under an agreement with the Environmental Protection Agency (EPA). According to tribal officials, the tribal regulatory authority issued violation notices and fined the tribal enterprise for infractions of EPA standards. EPA Region IX (the region responsible for the agreement with the Navajo) officials, including the Indian affairs coordinator, told us that the Navajo are doing a good job of carrying out their regulatory responsibilities in an aggressive manner. The coordinator said that the tribe, as well as other tribes, are generally concerned with the environment. Consequently, while conceding the possibility of conflicts, tribal officials do not believe these conflicts will impair their regulatory zeal or impartiality.

Proposed Transfer of Tribal AML Funds Will Adversely Affect the Tribes

In the absence of legislation allowing Indian tribes to assume regulatory control over mining and reclamation operations on their lands, OSMRE has proposed reallocating, to the Secretary's AML account, AML funds currently set aside for the tribes. While such a transfer is permitted under SMCRA and Interior regulations, it could significantly impair the tribes' ability to mitigate the adverse effects of past mining practices on their lands, particularly those associated with non-coal mining.

OSMRE Proposal to Reallocate Tribal Share of AML Funds

More than 8 years have gone by since passage of SMCRA without enactment of necessary legislation to allow Indian tribes to assume primacy According to OSMRE's draft A Plan For Action· Office of Surface Mining Reclamation & Enforcement 1986-1987, dated November 25, 1985,

"... because of the limited premining abandoned mine land problems on Indian lands, OSMRE has concluded that, in the absence of Congressional action, that the accumulation of funds in the tribal accounts would be better used to reclaim higher priority abandoned mine lands in other areas."

For purposes of this transfer, OSMRE is using February 1984 as the date of initial AML Fund allocation to the Indian tribes (This date corresponds to the date Interior submitted its legislatively mandated study report to the Congress on the question of regulation of surface mining on Indian lands.)

The Navajo, Hopi, and Crow tribes submitted data on 38 coal-related mining problems for inclusion in OSMRE's National Inventory of Abandoned Mine Land Problems issued in August 1983.[2] This tribal data was revised on the basis of a national standard to provide a basis for comparing problems in one state or tribal jurisdiction with those in another Table III.1 summarizes the results of this standardization process as reported in OSMRE's national AML inventory.

[2]A National Inventory of Abandoned Mine Land Problems An Emphasis On Health, Safety, and General Welfare Impacts, OSM/TR-4/83, August 1983

Table III.1: Problem Areas Identified in OSMRE's 1983 National AML Inventory

	Navajo	Crow	Hopi	Total
Number of problem areas affecting health, safety, and general welfare and presenting extreme danger conditions (priority 1)	0	0	0	0
Number of problem areas affecting health, safety, and general welfare but without extreme danger (priority 2)	5	0	1	6
Number of problem areas with eligible lands and/or eligible water conditions but no priority 1 or 2 conditions (priority 3)	0	6	0	6[a]
Number of problem areas with no priority 1, 2, or 3 conditions	2	21	3	26
Total	**7**	**27**	**4**	**38**

[a]Subsequent to completion of the inventory, OSMRE upgraded each priority 3 project to priority 2

If the tribal share is transferred, OSMRE proposes to continue reclaiming tribal priority 2 abandoned mine sites, using the Secretary's discretionary funds. To date, OSMRE has reclaimed or is in the process of reclaiming 7 of the 12 (the 6 originally designated priority 2 projects plus the 6 priority 3 projects subsequently upgraded to priority 2) Navajo, Hopi, and Crow priority 2 sites listed in OSMRE's national AML inventory. Of the 5 remaining sites, reclamation projects are planned for 4 and 1 problem site will be remined. Of the 26 lower priority sites identified on the inventory, 6 were upgraded to higher priority status Of these, 4 have been reclaimed and reclamation is planned at the other 2 sites. OSMRE surface mining officials do not believe the remaining 20 low priority sites should be reclaimed; they are considered nonproblem areas due to the limited work required. In addition to those sites initially listed on the inventory, OSMRE has aproved 7 other sites as priority 2 projects on Navajo, Crow, and Hopi land not identified on the original inventory Of these, 2 sites are currently under reclamation and 5 are scheduled for reclamation.

We examined the legal basis for OSMRE's proposed reallocation and found that Interior has the authority to withdraw the currently set-aside funds if they are not expended within 3 years of allocation. These funds can subsequently be transferred to the Secretary's discretionary account. This would mean that by February 1987 the Secretary could transfer tribal funds allocated through the end of fiscal year 1983—an amount totaling $24 million. Funds allocated in fiscal years 1984, 1985, and 1986 will not have met the 3-year requirement by February 1987 and would thus not be transferable at that time. OSMRE would have to issue new regulations to be able to transfer all funds accrued to the tribes

through the end of the most recent fiscal year and/or to stop the allocation process, pending tribal primacy.

Transfer of AML Funds Could Significantly Affect Indian Mine Reclamation

If OSMRE follows through on its proposal to begin accessing the AML funds held in the tribal accounts, the tribes could lose $24 million in February 1987. Ultimately, as the 3-year waiting period for collections placed into the fund after fiscal year 1983 lapses, the tribes could lose all of the $33 million set aside to date. According to tribal officials, loss of the AML funds would adversely affect their ability to reclaim abandoned mines, particularly those resulting from non-coal (mainly uranium) mining operations.

We found that OSMRE's National AML Inventory (and subsequent additions) may understate the tribal need for coal reclamation projects. Two tribes are currently updating their coal AML inventories for OSMRE. Although the inventories are not complete, Navajo and Hopi representatives said that the new inventories will include several sites not included in the original national inventory or subsequent updates. Specifically, the Navajo estimate that they may need from $1.9 million to $5.1 million to correct 15 remaining coal sites while the Hopi estimate that an additional $1.1 million is needed to reclaim remaining coal sites. (The Crow tribe is not participating in the update because it has already identified all coal AML problem areas.)

Non-coal reclamation needs may also be significant. Although figures are not available for all tribes, the Navajo estimate that between $23.5 million and $84.3 million will be needed to reclaim non-coal sites, primarily old uranium mines. According to a Crow official, 81 non-coal sites on Crow land need to be reclaimed, primarily gravel pits and old uranium mines. He said that the tribe is currently updating its inventory of these sites

An OSMRE official detailed to work on an assessment of the agency's action plan—the acting chief of the Environmental and Economic Analysis Branch—agrees that transferring the tribal share of the AML Fund would have significant local impact on the tribes. He said that the tribes would not be able to complete lower priority coal projects and important non-coal projects, such as reclamation of abandoned uranium mines. In addition, he noted that the tribes may not be able to fund lower priority projects permitted under SMCRA.

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