



U.S. DEPARTMENT OF THE  
INTERIOR

OFFICE OF SURFACE MINING  
RECLAMATION AND ENFORCEMENT  
DIRECTIVES SYSTEM

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Subject: Protection of Indian Lands and Indian Trust Resources

Approval:

Title:

Director

1. **PURPOSE.** This directive sets forth Office of Surface Mining Reclamation and Enforcement (OSM) policies and procedures for ensuring that Indian lands and trust resources that may be directly or indirectly affected by surface coal mining and reclamation operations, or by abandoned mine land reclamation, are identified, conserved, and protected. It also provides policy and procedural guidance to ensure that OSM operates within a government-to-government relationship with federally recognized Indian tribes.

2. **SUMMARY.** This directive provides policy and procedural guidance to ensure that OSM identifies, conserves, and protects Indian lands and trust resources during the planning and implementation of Title IV abandoned mine lands (AML) reclamation and Title V regulatory programs, projects, and activities. It also specifies the nature and extent of consultation and coordination that should be initiated by OSM employees when dealing with federally recognized Indian tribes to ensure that OSM fulfills its obligation to operate within a government-to-government relationship with such tribes. The issuance of this directive implements the requirements contained in Chapter 2, Part 512 of the Department of the Interior Manual entitled "Departmental Responsibilities for Indian Trust Resources".

This directive is meant to serve as a reference and resource document for OSM employees to ensure that they are fully aware of the existence and scope of applicable OSM policies and procedures in the performance of their assigned administrative and regulatory duties that may affect Indian lands and trust resources. The directive accomplishes this primarily by augmenting OSM's existing regulations, policies and procedures specifically applicable to Title IV and Title V activities involving such lands and resources with supplemental guidance not currently specified elsewhere in agency guidance documents.

This directive is intended only to improve the internal management of OSM and is not intended to and does not create any right to administrative or judicial review, or any other right or benefit or trust responsibility, substantive or procedural, enforceable by a party against the United States, OSM, its officers or employees, or any other person.

3. **DEFINITIONS.**

a. **Abandoned Mine Reclamation Fund.** A special fund established for the purpose of accumulating revenues designated for reclamation of abandoned mine lands and other activities authorized by Title IV of the Surface Mining Control and Reclamation Act (SMCRA). Refer also to 30 CFR Subchapter R.

b. **Allotted Lands or Individual Allotments.** Former tribally reserved or publicly withdrawn lands held in trust by the United States for individual tribal members, sometimes referred to as "allottees".

c. **Federal Permit.** A permit issued by OSM under SMCRA in its capacity as the regulatory authority on Indian lands as defined at Section 701(9) of SMCRA.

d. **Federal Permitting Entity (FPE).** The OSM organizational unit with responsibility for receiving and processing permit applications and other materials related to Federal permits. For Indian lands, the FPE is OSM's Western Regional Coordinating Center in Denver.

e. **Indian Lands.** 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. Section 701(9) of SMCRA. (Also see definition of "Indian lands" at 30 CFR 700.5).

f. **Indian Tribe.** Any Indian tribe, band, group, or community having a governing body recognized by the Secretary [of the Interior]. (Section 701(10) of SMCRA)

g. **Permit Application.** The documents and other information filed with the regulatory authority under 30 CFR Chapter VII for the issuance of a permit to conduct surface coal mining and reclamation operations.

i. **Tribal Fee Lands.** All lands where the surface and/or mineral interests are owned in fee simple by an Indian tribe but not held in trust for the tribe by the United States Government.

j. **Tribal Trust Lands.** All lands where the surface and/or mineral interests are held in trust for an Indian tribe by the United States Government.

k. **Trust Resources.** Natural resources, land, water, minerals, funds or property, asset, or claim, including any intangible right or interest in any of the foregoing, which is held by the United States in trust for any Indian tribe or Indian individual subject to a restriction on alienation imposed by the United States (25 CFR 272.2(r)).

#### 4. POLICY/PROCEDURES.

a. Policy. The Federal trust responsibility is a legal obligation under which the United States "has charged itself with moral obligations of the highest responsibility and trust" toward Indian tribes (*Seminole Nation v. United States*, 1942). At a minimum, it is a legally enforceable fiduciary obligation on the part of the United States to protect tribal lands, assets, resources, and treaty rights, as well as a duty to carry out the mandates of Federal law with respect to American Indian and Alaska Native tribes (Handbook on American Indians and Alaska Natives, Department of the Interior, 1995). OSM, as the regulatory authority for surface coal mining and reclamation operations located on Indian lands and as a Federal agency of the Department of the Interior, must ensure that the lands and trust resources of federally recognized Indian tribes and their members that may be affected by agency administrative and regulatory actions are identified, conserved and protected. In fulfilling these responsibilities, OSM must operate within a government-to-government relationship with Indian tribes.

##### (1) Protection of Indian Lands and Trust Resources.

OSM's Director is ultimately responsible for being aware of the impact of agency programs, projects, or actions on Indian lands and trust resources, and for issuing procedures and directives to ensure that all OSM personnel are fully aware of their responsibilities as Federal agency employees to identify, protect and conserve such lands and resources. OSM must ensure that any direct or indirect anticipated effects on Indian lands and trust resources of proposed reclamation projects or coal mining operations are explicitly addressed in the associated planning, decision and operational documents for such proposals including, but not limited to: decision documents, environmental assessments, and environmental impact statements. These documents should clearly state the rationale for the agency's recommended decision on the proposal and explain how the decision will be consistent with the Department's and OSM's responsibilities to identify, protect, and conserve trust resources and Indian lands.

OSM's Indian lands responsibilities extend to all lands within the exterior boundaries of Federal Indian reservations and to off-reservation lands including mineral interests held in trust for or supervised by a tribe, including the Crow Ceded Area in Montana. The Ceded Area is adjacent to the Crow Indian Reservation and consists primarily of tribal trust mineral overlain by non-Indian surface, except for two sections of State land per township, including one section of State land in the Absaloka Mine. Although there is no Federal trust responsibility on tribal fee lands, for purposes of SMCRA, such lands are also considered Indian lands. Other lands, such as individual allotments outside the exterior boundaries of a Federal Indian reservation, may be considered Indian lands for purposes of SMCRA regulation if there is sufficient evidence that such lands are supervised by a tribe. If such other lands are not supervised by a tribe, they are subject to State regulation in primacy States. (Also see definition of "Indian lands" at 30 CFR 700.5).

(2) **Government-to-Government Relations.** As required by the Presidential Memorandum of April 29, 1994 entitled "Government-to-Government Relations With Native American Tribal Governments", Federal agencies must, to the greatest extent practicable and to the extent permitted by law, consult with tribal government(s) prior to taking actions that affect federally recognized Indian tribes. Activities which affect Native American tribal rights or trust resources should be implemented in a knowledgeable, sensitive manner respectful of tribal sovereignty. Agencies are required to assess the impact of Federal government plans, projects, programs, and activities on tribal trust resources and assure that tribal government rights and concerns are considered during the development of such plans, projects, programs, and activities. The Presidential memorandum directs agencies to apply the requirements of Executive Order Nos. 12875 ("Enhancing the Intergovernmental Partnership") and 12866 ("Regulatory Planning and Review"), where appropriate, to address specific or unique needs of tribal communities. An advisory memorandum issued on February 24, 1995 by the Assistant Secretary for Indian Affairs provides supplemental guidance to assist the Department's bureaus and offices in the incorporation and implementation of the President's directive into their daily activities and decision-making processes.

OSM must assess early in the planning, development or review of proposed programs, projects, mining operations or other activities, including rulemaking actions, the potential impacts of such proposed activities on Indian lands and trust resources. OSM should avoid actions which negatively impact tribal treaty rights or trust resources. If OSM's evaluation of a proposed activity reveals any potential direct or indirect impacts on Indian lands or trust resources, OSM must consult directly with the federally recognized tribal government with jurisdiction over the Indian lands or trust resources that may be affected. If OSM's evaluation of the proposed activity reveals any potential direct or indirect impacts on tribal trust lands or trust resources, OSM must also consult with the appropriate office of the Bureau of Indian Affairs (BIA) and, if appropriate, the Office of the Solicitor. Agency consultations with tribal governments are to be open and candid so that all interested parties may evaluate for themselves the potential impact of the proposal on Indian lands and trust resources.

(3) **Title IV Reclamation.** OSM's Title IV responsibilities on Indian lands include administering the Federal Reclamation Program on the lands of federally recognized Indian tribes that do not have approved Indian reclamation programs (non-program Indian tribes). Under the Federal Reclamation Program, OSM performs any necessary eligible emergency and non-emergency AML reclamation on the lands of non-program Indian tribes. In addition, OSM is responsible for any emergency reclamation that might be necessary on the lands of the three program tribes (Crow, Hopi and Navajo) established under section 405(k) of SMCRA.

OSM also administers the Abandoned Mine Reclamation fund which was created pursuant to Title IV of SMCRA and is financed by a reclamation fee assessed on every ton of mined coal. The fund is divided into the Tribal/State and Federal shares with each Indian tribe or

State having a federally approved reclamation program entitled to 50 percent of the reclamation fees collected from coal operations within the Indian lands or State. Forty percent of the Federal share of the fund is also allocated to the Tribes/States. The three program tribes receive annual reclamation grants from the Abandoned Mine Reclamation Fund subject to appropriation by Congress.

The Crow, Hopi and Navajo Tribes have exclusive authority under their approved reclamation programs to abate hazards to public health and safety and the environment by reclaiming abandoned coal mines on Indian lands under their jurisdiction. The three program tribes' AML reclamation authority extends to all lands within their respective federal Indian reservation boundaries, tribal fee lands, and any other off-reservation lands where such lands including mineral rights are held in trust for or supervised by the program tribe.

The tribes can also use Tribal share monies to reclaim abandoned noncoal mine sites if the request is made by the Tribal head and the project represents an extreme danger to public health, safety, general welfare or property. Further, once a program tribe certifies that it has addressed the reclamation of all eligible abandoned coal mine projects and OSM's Director or designee concurs, the tribe can then use the full amount of its Tribal share for abandoned noncoal mine land reclamation projects.

OSM conducts oversight of the Crow, Hopi and Navajo Tribe's approved Indian reclamation programs by evaluating the implementation of such programs in the context of Title IV of SMCRA and the implementing regulations at 30 CFR Part 870 *et seq.*, the tribes' respective federally approved reclamation plans, and the Abandoned Mine Land Final Guidelines published in the Federal Register on March 6, 1980 (45 FR 14810). OSM assists the tribes with the implementation of their approved programs as requested by the tribes.

(4) Title V Regulation. SMCRA provides a comprehensive scheme for the regulation of coal mining and the surface effects of underground mining and provides for the assumption of regulatory responsibility (primacy) by States for non-Federal and non-Indian lands within a State when regulatory programs are adopted meeting statutorily established criteria. However, SMCRA does not contain provisions allowing the tribes to assume primacy. In 1984, the Secretary of the Interior reported to Congress on the findings from a study of regulation on Indian lands. Regulations were published that same year giving the Secretary exclusive authority to regulate surface coal mining and reclamation operations on Indian lands until such time as legislation is passed by Congress enabling the tribes to assume primacy.

The Energy Policy Act of 1992 amended SMCRA to add a new section 710(i) which provides that the Secretary shall make grants to the Crow, Hopi, Navajo, and Northern Cheyenne Tribes to assist them in developing regulations and programs for regulating surface coal mining and reclamation operations on Indian lands. Consistent with the Energy Policy Act provisions, OSM plans to issue grants in FY 1996, subject to appropriations, to assist these Tribes in establishing a surface coal mining unit for each Tribe. OSM supports

development of legislation that would allow the Tribes to assume primacy and has met with Tribal representatives in a series of ongoing discussions to determine how best to develop appropriate draft legislation.

As the regulatory authority on Indian lands, OSM is responsible for ensuring that surface coal mining and reclamation operations conducted on such lands are in compliance with the applicable requirements of Title V of SMCRA and the implementing regulations at 30 CFR Chapter VII. The regulatory requirements for surface coal mining and reclamation operations on Indian lands are set forth at 30 CFR Part 750.

The Indian lands regulatory program is composed of two major program elements: permitting, and inspection and enforcement (I&E). OSM's Western Regional Coordinating Center (WRCC) is the Federal permitting entity for active surface mining operations located on Indian lands and is responsible for all permitting actions including the approval or denial of applications for new permits, the processing of permit revisions, ordered revisions, permit renewals and permit transfers, conducting midterm permit reviews, and permit issuance.

Active coal mining on Indian lands presently occurs exclusively in the western United States on Hopi and Navajo lands in the States of Arizona and New Mexico, on the Crow Ceded Area in Montana, and on Ute Mountain Ute lands in New Mexico and Colorado. In addition, a portion of a coal haul road crosses a corner of the Ute Mountain Ute Reservation in northern New Mexico. OSM regulates exclusively on Indian lands in Arizona and New Mexico.

In Montana, OSM and the Montana Department of State Lands (DSL) jointly administer the applicable regulatory requirements for surface coal mining operations located on the Crow Ceded Area pursuant to a 1985 memorandum of understanding (MOU). The MOU was entered into by the Department of the Interior, OSM and the State of Montana as part of a settlement agreement in Montana's challenge to OSM's Indian lands regulations. Specific procedures for the implementation of the permitting provisions of the MOU are set forth in a document entitled "Working Procedures for Coordination of Permitting Activities for the Absaloka Mine" that was jointly prepared and finalized by OSM and Montana DSL in August 1990.

In a letter dated June 1, 1995, the Crow Tribe requested rescission of the MOU between OSM and the State of Montana. OSM responded to the Crow Tribe in its letter of July 20, 1995. That letter indicated that the concerns expressed by the Crow Tribe warranted further consideration and examination, and OSM intended to address this matter in consultation with the Crow Tribe and the State of Montana, with input from the permittee, as appropriate. Any policy or procedural change(s) that result from this OSM consultation with the Crow Tribe and the Montana DSL will be reflected in subsequent revision(s) to this directive.

OSM's field offices and field divisions are responsible for conducting I&E activities on Indian lands mines located within the boundaries of those States that fall within the field

office or division's area of jurisdiction. Inspectors from OSM's Albuquerque, New Mexico Field Office conduct I&E activities on Indian lands in Arizona, New Mexico, and Colorado. On the Crow Ceded Area, Montana DSL has the lead responsibility for conducting inspections and initiating enforcement actions. However, inspectors from OSM's Casper, Wyoming Field Office accompany State inspectors on inspections of coal mining operations on the Crow Ceded Area and retain the authority to take enforcement action should OSM determine that the State has failed to take appropriate action concerning any violations of applicable laws, regulations, orders, approved mining and reclamation plans and permits.

**b. Responsibilities.**

(1) The Assistant Director, Program Support, provides national policy direction and guidance in the development and implementation of agency procedures for ensuring that OSM's Indian lands and trust responsibilities are met in relation to Title IV and Title V programs, projects and activities that involve or may affect Indian lands and trust resources, and that OSM operates within a government-to-government relationship with federally recognized Indian tribes.

(2) The Regional Directors for the Appalachian, Western, and Mid-Continent Regional Coordinating Centers are responsible for ensuring that the applicable agency procedures are implemented by their respective employees in the performance of their Title IV responsibilities for non-program Indian tribes and, as applicable, their Title V permitting activities involving Indian lands and trust resources.

(3) The Field Office Directors (FOD) and Field Division staff are responsible for ensuring that the applicable agency procedures are implemented by field office personnel in the performance of their Title IV responsibilities for grant administration and oversight of approved Indian reclamation programs and their Title V inspection and enforcement activities involving Indian lands and trust resources.

**c. Title IV Procedures.** This section of the directive specifies the applicable regulations and other documents that provide policy and procedural guidance related to OSM's Title IV reclamation responsibilities. OSM's procedures relating to State and Indian reclamation programs are essentially identical, as are the Federal Reclamation Program procedures on non-Indian lands and non-program tribal lands. Documents specific to the Indian reclamation programs are the approved Title IV reclamation plans for the Crow, Hopi and Navajo Tribes. The following regulations and guidance documents listed below are not necessarily specific to Indian reclamation programs or Indian lands but, instead, are generally applicable to Title IV AML reclamation.

- 30 CFR Subchapter R - Abandoned Mine Land Reclamation
- Abandoned Mine Land Final Guidelines (45 FR 14810; March 6, 1980)

- Applicable directives contained in the AML, GMT, and REG sections of OSM's Directives System.

d. Title V Procedures.

(1) Title V Procedures - Permit Application Review and Approval and Inspection and Enforcement. This section of the directive specifies the applicable regulations and other documents that provide policy and procedural guidance for OSM's Title V permitting and inspection and enforcement responsibilities that may affect Indian lands and/or trust resources. Regulatory requirements specific to the Indian lands are found at 30 CFR Subchapter E - Indian Lands Program. The following regulations and guidance documents are generally applicable to OSM's Title V permitting and inspection and enforcement activities and are not necessarily specific to Indian lands.

- 30 CFR Subchapter B - Initial Program Regulations
- 30 CFR Subchapter F - Areas Unsuitable for Mining
- 30 CFR Subchapter G - Surface Coal Mining and Reclamation Operation Permits and Coal Exploration Systems Under Regulatory Programs
- 30 CFR Subchapter J - Bonding and Insurance Requirements for Surface Coal Mining and Reclamation Operations
- 30 CFR Subchapter K - Permanent Program Performance Standards
- Subchapter L - Permanent Program Inspection and Enforcement Procedures
- Subchapter M - Training, Examination, and Certification of Blasters
- Subchapter P - Protection of Employees
- Applicable directives contained in the INE and REG sections of OSM's Directives System.

(2) Consultation and Coordination Procedures for Proposed Permitting Actions. Agency responsibilities and consultation requirements for surface coal mining and reclamation operations on Indian lands are set forth generally at 30 CFR 750.6. However, consultation requirements for proposed permitting actions may vary somewhat depending upon the land ownership status of the lands involved in a particular permitting proposal. For proposed permitting actions involving lands within Federal reservation boundaries and off-reservation tribal trust lands, OSM must consult with the affected Indian tribe and the Bureau of Indian Affairs (BIA), and as applicable, the Bureau of Land Management (BLM) and other appropriate Federal agencies. For proposed permitting actions involving tribal fee lands, OSM must consult with the tribal owner of the mineral



and/or surface estate and may consult with the BIA and BLM and other Federal agencies as appropriate.

OSM must provide the appropriate tribal government offices with copies of proposed permitting actions, submitted by applicants, for their review and comment prior to OSM taking a final action on the proposal. OSM must consider the tribe's comments in reaching its decision on the proposed permitting action. If OSM disagrees with the tribe's comments on a permitting proposal, OSM must provide the tribe with a timely written response clearly explaining the rationale for OSM's position. OSM must also provide the affected tribe with copies of all relevant correspondence relating to the permitting action, as well as copies of the Federal permit, including all revisions, for approved mining operations.

Exceptions to these consultation procedures may occur with respect to certain minor revisions when expedited review of such revisions is necessary due to unforeseen circumstances and the environmental impacts of approving such revisions would be negligible. Such situations might include relocation of topsoil stockpiles, minor realignments of existing roads, or minor modifications to existing office facilities or other structures. In such circumstances, OSM may issue a permitting decision on the proposed revision without prior consultation with the affected Indian tribe or other Federal agencies or may conduct such consultation by telephone in lieu of the normal consultation process.

For allotted lands located outside the boundaries of Federal Indian reservations that are not supervised by an Indian tribe and are thus subject to State regulation in primacy States, OSM is responsible for ensuring that the State RA consults with the appropriate BIA office concerning mining and reclamation proposals involving such lands.

(3) Consultation and Coordination Procedures for I&E Activities.

Agency I&E responsibilities and associated coordination and notification requirements for surface coal mining and reclamation operations on Indian lands are set forth at 30 CFR 750.6 and 750.18. For mining operations that involve Indian lands or trust resources, OSM must notify the affected tribe and, as applicable, BIA and BLM of scheduled mine site inspections and offer them the opportunity to accompany OSM on such inspections. OSM must also provide the affected tribe and, as applicable, BIA and BLM with copies of all inspection reports and enforcement actions. Appropriate tribal officials must also be notified of any hearings or conferences related to civil penalties involving tribal lands and be invited to attend.

For citizen complaints involving Indian lands or trust resources, the OSM field office in receipt of the complaint must provide a copy of the complaint document to the Federal permitting entity and the affected tribe and, as applicable, to the appropriate BIA office, and afford each such recipient an opportunity to comment on the issues raised in the complaint. The field office must ensure that all such copies of the complaint are edited as necessary prior to distribution to conceal the identity of the person submitting the complaint, if

requested by that person, unless disclosure of his or her identity is otherwise permitted pursuant to 30 CFR 842.12(b).

5. **REPORTING REQUIREMENTS.** None.

6. **EFFECT ON OTHER DOCUMENTS.** This directive supersedes OSM Directive REG-18, "Indian Lands Outside the Exterior Boundaries of Reservations" issued on October 16, 1987.

7. **REFERENCES.**

a. Department of the Interior Manual, Part 512, Chapter 2, "Departmental Responsibilities for Indian Trust Resources".

b. Handbook on American Indians and Alaska Natives, Department of the Interior, Office of American Indian Trust, 1995.

c. Presidential Memorandum of April 29, 1994: "Government-to-Government Relations With Native American Tribal Governments" (59 FR 22951; May 4, 1994).

d. Executive Order No. 12875: "Enhancing the Intergovernmental Partnership", (58 FR 580093; October 28, 1993).

e. Advisory Memorandum dated February 24, 1995 from Assistant Secretary for Indian Affairs to all DOI Bureau and Office Heads: "Guidance on the Federal/Tribal Government-to-Government Policy".

8. **EFFECTIVE DATE.** Upon Issuance.

9. **CONTACT.** Assistant Director, Program Support, (202) 208-4264.

10. **KEYWORDS.** Indian lands, trust resources, trust responsibilities, government-to-government.

11. **APPENDICES.** None.